

AUGUST 1990

COMMISSION DECISIONS

08-01-90	Big Horn Calcium Company	WEST 89-377-RM	Pg. 1493
08-01-90	Southern Ohio Coal Company	WEVA 89-124-R	Pg. 1498
08-13-90	Paula Price v. Monterey Coal Company	LAKE 86-45-D	Pg. 1505
08-20-90	Sec. Labor for Michael Price & Joe John Vacha v. Jim Walter Resources	SE 87-128-D	Pg. 1521
08-22-90	Western Fuels-Utah, Inc.	WEST 86-113-R	Pg. 1545
08-23-90	UMWA, Local 1769 v. Utah Power & Light Co.	WEST 87-86-C	Pg. 1548
08-28-90	Pennsylvania Electric Company	PENN 88-227	Pg. 1562
08-29-90	Harry Ramsey v. Industrial Constructors Corp.	WEST 88-246-DM	Pg. 1587

ADMINISTRATIVE LAW JUDGE DECISIONS

08-02-90	Southern Ohio Coal Company	WEVA 90-12	Pg. 1597
08-03-90	Westwood Energy Properties	PENN 88-42-R	Pg. 1625
08-03-90	Southern Ohio Coal Company	WEVA 89-278	Pg. 1627
08-06-90	Wyoming Fuel Company	WEST 90-238-R	Pg. 1604
08-08-90	Crossgates Mining Company, Inc.	KENT 89-209	Pg. 1673
08-08-90	Inferno Coals Incorporated	KENT 90-6	Pg. 1675
08-09-90	John Erasmus Jr. v. Consolidation Coal Co.	WEVA 90-108-D	Pg. 1679
08-10-90	Dravo Basic Materials Co., Inc.	SE 90-86-DM	Pg. 1680
08-16-90	Lang Brothers, Inc.	WEVA 90-48	Pg. 1690
08-21-90	Sec. Labor for Haryy W. Mullen v. Ernst Materials Service	LAKE 90-57-DM	Pg. 1697
08-22-90	UMWA, Local 2176 v. Emery Mining Corporation	WEST 85-72-C	Pg. 1699
08-22-90	UMWA, Local 1769 v. Emery Mining Corporation	WEST 85-74-C	Pg. 1700
08-24-90	Sec. Labor for Willard Gennoy v. Consolidation Coal Company	WEST 90-77-D	Pg. 1701
08-27-90	Utah Power & Light Company	WEST 90-285-R	Pg. 1706
08-28-90	Bellaire Corporation	CENT 89-47	Pg. 1726
08-28-90	Energy Fuels Coal, Inc.	WEST 89-296-R	Pg. 1736
08-28-90	C. W. Mining Company	WEST 90-79	Pg. 1738

ADMINISTRATIVE LAW JUDGE ORDERS

08-14-90	Beth Energy Mines, Inc.	PENN 90-208-R	Pg. 1747
08-20-90	Odell Maggard v. Chaney Creek Coal Corp.	KENT 86-1-D	Pg. 1749

AUGUST 1990

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

Big Horn Calcium Company v. Secretary of Labor, MSHA, Docket No. WEST 89-377-RM and WEST 90-80-M. (Interlocutory Review of several orders, Judge Broderick)

Golden Oak Mining Company v. Secretary of Labor, MSHA, Docket No. KENT 90-185-R. (Judge Broderick, June 29, 1990)

Secretary of Labor, MSHA v. Bob Sherman employed by Blackhawk, Docket No. WEST 90-110-M. (Chief Judge Merlin, Default Decision of July 18, 1990)

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

Joe Weitholter v. Quality Ready Mix, Inc., Docket No. LAKE 90-17-DM. (Judge Melick, July 24, 1990)

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 1, 1990

BIG HORN CALCIUM COMPANY	:	
	:	
v.	:	Docket Nos. WEST 89-377-RM
	:	WEST 90-80-M
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	

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

ORDER

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. (1988) ("Mine Act"). Big Horn Calcium Company ("Big Horn") petitioned for interlocutory review of orders of the administrative law judges assigned to this case. For the reasons set forth below, the petition for interlocutory review, as amended, is granted and this proceeding is remanded for further proceedings consistent with this order.

On review Big Horn asserts that Administrative Law Judge Michael A. Lasher abused his discretion by terminating the evidentiary hearing that was in progress and withdrawing from the case before Big Horn had the opportunity to present its evidence. It also contends that Administrative Law Judge James A. Broderick, the judge assigned to this matter following Judge Lasher's withdrawal, abused his discretion by ruling that all evidence of record developed during the truncated hearing before Judge Lasher would be disregarded and that a de novo hearing would be held in Denver, Colorado.

I.

This proceeding commenced when Big Horn contested citations issued by the Secretary of Labor ("Secretary") at the Granite Canyon Quarry in Laramie County, Wyoming. The case was assigned to Judge Lasher who, in the notice of hearing, directed each party to serve on the other a list of witnesses and exhibits and a precise statement of the issues. The parties exchanged witness and exhibit

lists and filed brief statements of issues. The Secretary listed Thomas Markve and Michael Munoz, inspectors of the Department of Labor's Mine Safety and Health Administration ("MSHA"), as her witnesses. Big Horn listed five individuals as witnesses. Big Horn served interrogatories on the Secretary, but the Secretary did not conduct any discovery.

The evidentiary hearing commenced at 10:30 a.m. on March 21, 1990. Proceeding first, counsel for the Secretary completed his direct examination of Inspector Markve on the first day of the hearing. On the second day of the hearing, counsel for Big Horn was cross-examining this witness when Judge Lasher terminated the hearing. The judge stated that he would be issuing orders to counsel requiring them to further prepare this case for hearing through additional discovery. Tr. 264. Judge Lasher also presented on the record his personal views on a number of subjects not germane to this proceeding. Later in the day on March 22, Judge Lasher issued a written order disqualifying himself from hearing this case.

The case was reassigned to Judge Broderick. After conferring with the parties, Judge Broderick issued a prehearing order setting the case for a de novo hearing in Denver, Colorado, and ruling that the transcript from the previous hearing would not be considered as substantive evidence. (Big Horn had requested that the judge consider the transcript from the previous hearing as part of the substantive record in this case and that the continued hearing be held in Missoula, Montana). The judge also ordered the parties to file more detailed prehearing statements and he allowed additional discovery.

In its petition for interlocutory review, Big Horn maintains that Judge Lasher terminated the hearing in this matter without cause and without allowing Big Horn to present its case or cross-examine the Secretary's witnesses. It argues that in terminating the hearing Judge Lasher arbitrarily denied three out-of-state witnesses, who had appeared in Denver voluntarily at personal expense, the right to testify on behalf of Big Horn. It also asserts that Judge Lasher materially prejudiced Big Horn when he arbitrarily withdrew from the proceeding without issuing a decision on the merits. Further, Big Horn maintains that, after the reassignment to him, Judge Broderick abused his discretion and prejudiced Big Horn by granting the Secretary's request that all evidence presented at the previous hearing be disregarded and a de novo hearing be held. Big Horn asserts that it has no funds with which to subpoena and pay the travel expenses of its witnesses, to appear and defend itself in deposition or at a de novo hearing in Denver, or to pay any penalties assessed by the Secretary. Finally, it states that its witnesses are not available to again return voluntarily to Denver from Montana at personal expense.

Big Horn requests that the Commission issue an order vacating Judge Broderick's orders and staying any further hearing pending review of this matter, awarding attorney's fees to Big Horn pursuant to the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, and vacating the citations that are the subject of this proceeding. In response, the Secretary requests that the petition be denied or, in the alternative, that the Secretary be allowed to conduct discovery into the issue of Big Horn's present operational and financial status. Big Horn filed a response opposing further discovery in this case and supplemented its petition with numerous attachments in an attempt to prove its insolvency. In response, the Secretary repeated her request for discovery into Big Horn's insolvency claims based, in part, on the documents submitted by Big Horn.

II.

The pleadings filed before the Commission on review make clear that a factual dispute exists concerning Big Horn's ability to participate effectively in any further hearing before the administrative law judge. The Secretary requests further discovery so that she can fully and properly respond to Big Horn's claim of insolvency. She maintains that this claim of insolvency and the effect, if any, of such claim on this case should be addressed by the administrative law judge in the first instance. As stated above, Big Horn opposes further discovery but submitted documents not previously entered into the record in support of its claim of insolvency.

The issue of Big Horn's financial status was only sketchily developed before the judge. The resolution of this issue could have a major effect on the need for a hearing and the location of the hearing site. We agree with the Secretary that the administrative law judge is the appropriate adjudicator to resolve this factual dispute. Therefore, pursuant to section 113(d)(2)(C) of the Mine Act, 30 U.S.C. § 823(d)(2)(C), we remand this proceeding to Administrative Law Judge Broderick for further proceedings consistent with this order. Big Horn should be given the opportunity to fully develop in the record its proffer regarding its financial viability. The Secretary should be given the opportunity to respond and, if appropriate, to conduct reasonable discovery on the insolvency issue. Based on the record developed, the parties can then reconsider how they wish to proceed in this case and, if a hearing is necessary, the judge can reconsider the location of the hearing site. The order setting the hearing in Denver, Colorado, is vacated.

The Commission's procedural rule at 29 C.F.R. § 2700.51 provides that the judge "shall give due regard to the convenience and necessity of the parties" in setting a hearing site. We have previously held that an administrative law judge abused his discretion in holding a prehearing conference 900 miles from the office of a small quarry operator. Cut Slate, Inc., 1 FMSHRC 796 (July 1979). The Commission's procedural rule is derived from section 5(b) of the Administrative Procedure Act, 5 U.S.C. § 554(b). The legislative history of this section provides that "the agency's convenience is not to outweigh that of the private parties." Sen. Doc. No. 248, 79th Cong., 2d Sess., 203 (1946). Thus, a careful balancing of interests is required in setting a hearing site and on remand the judge should consider the financial health of Big Horn, the location of its witnesses and the ability to secure their attendance when making this determination.

III.

We agree with Big Horn that Judge Lasher erred in terminating the hearing on March 22 prior to Big Horn's cross-examination of the Secretary's witnesses and prior to the testimony of its own witnesses, including witnesses that it maintains traveled to Denver at their own expense. Nothing in the record suggests reasonable grounds for the judge to have terminated the hearing during Big Horn's cross-examination of Inspector Markve. The stated reason given by the judge was to allow the parties to conduct additional discovery. At the time he terminated the hearing, however, neither party had requested a continuance and an ample opportunity for discovery had been previously provided. Although an administrative law judge is granted broad authority in the conduct

of a hearing, we hold that Judge Lasher abused this authority in abruptly terminating the hearing without good cause.

We disagree, however, with Big Horn's assertion that, following the inappropriate termination of the hearing, Judge Lasher's recusal and the substitution of Judge Broderick was an abuse of discretion that materially prejudiced Big Horn. Section 113(d)(1) of the Mine Act, 30 U.S.C. § 823(d), gives an operator the right to a hearing before an administrative law judge but it does not confer the right to a hearing before a particular judge. See also 29 C.F.R. § 2700.50. An administrative law judge is permitted to withdraw from a case whenever he deems himself disqualified. 30 C.F.R. § 2700.81; 5 U.S.C. § 556(d). If the judge who is to decide the case is not the same judge who conducted the hearing and the proceeding is one in which "the resolution of material conflicting testimony requires a determination of the credibility of witnesses," a party may request a de novo hearing before the substitute judge. United States Steel Corp., 6 FMSHRC 1423, 1429 (June 1984). In this case, however, Big Horn is asking that the proceeding not be heard de novo. Big Horn has set forth no other substantive reason why this case cannot proceed before Judge Broderick.

Judge Broderick ordered a de novo hearing at the request of the Secretary. As discussed above, a de novo hearing may be procedurally necessary in some instances. In this case, however, the Secretary's first witness has not completed his testimony and there has been no showing that resolution of material conflicting testimony will be necessary. Given the posture of this case, we conclude that the judge erred in ordering a de novo hearing. Since Inspector Markve will be returning to testify, the judge will be able to fully evaluate his credibility. Thus, if the hearing on the merits is resumed in this case, it should commence with the cross-examination of Inspector Markve and the record of the hearing held on March 21 & 22, 1990, should be considered by the judge in reaching his decision on the merits.

Certain portions of the transcript of the March 21-22 hearing contain comments of Judge Lasher that are not germane to this proceeding. As a consequence, those portions of the hearing transcript are to be disregarded. Belcher Mine, Inc., 7 FMSHRC 1019, 1030 (July 1985).

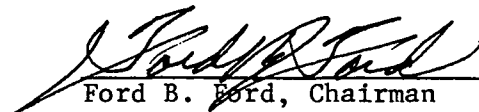
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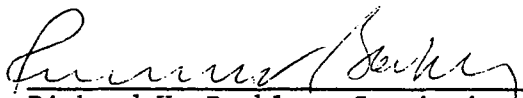
Big Horn also requests attorney's fees, costs and expenses, pursuant to the EAJA, incurred by Big Horn during the March 21-22 hearing. The Commission has promulgated procedures that describe who is eligible for an award of attorney's fees and costs pursuant to the EAJA, and explain how to apply for such awards. 29 CFR Part 2704. Big Horn's request for an award has not been filed in accordance with these requirements. Consequently, its request is denied.

Finally, Big Horn's request that the subject citations be vacated and the associated civil penalties be dismissed is denied. Big Horn is entitled to a fair hearing as set forth in the Mine Act, but it is not entitled to a dismissal of the Secretary's case.

V.

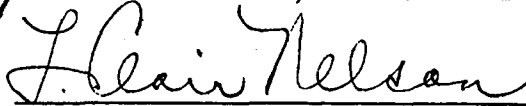
For the foregoing reasons, the order of Judge Broderick setting this proceeding for a de novo hearing in Denver, Colorado, is vacated and this case is remanded to the judge for further proceedings consistent with this order.


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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 1, 1990

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

v.

SOUTHERN OHIO COAL COMPANY

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:
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Docket Nos. WEVA 89-124-R
WEVA 89-204

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

DECISION

BY THE COMMISSION:

The issue in this consolidated contest and civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act"), is whether Southern Ohio Coal Company ("SOCCO") violated 30 C.F.R. § 75.400, the mandatory safety standard prohibiting accumulations of coal dust, loose coal and other combustible materials in active workings and, if so, whether it unwarrantably failed to comply with the standard. ^{1/} For the following reasons, we affirm Commission Administrative Law Judge James A. Broderick's finding of an unwarrantable violation. 11 FMSHRC 2018 (October 1989)(ALJ).

^{1/} 30 C.F.R. § 75.400, which restates section 304(a) of the Mine Act, 30 U.S.C. § 864(a), provides:

Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein.

30 C.F.R. § 75.2(g)(4) defines "active workings" as:

[A]ny place in a coal mine where miners are normally required to work or travel.

On January 30, 1989, Bretzel Allen, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA"), inspected the E-3 longwall section of SOCCO's Martinka No. 1 Mine, an underground coal mine located in Marion County, West Virginia. 2/ Allen was accompanied by MSHA supervisory inspector, Paul Mitchell, and by representatives of the miners and mine management.

After inspecting the longwall face and the longwall shields, Inspector Allen turned his attention to the tailgate entry. There, the inspector observed a "windrow" or ridge of loose coal variously estimated to measure from 58 to 70 feet long, six to eight feet wide, and four feet high. Gov. Exh. 1; Tr. I 24. Approximately 18 feet of this windrow was located in the intersection of the longwall face and the tailgate entry. The other 40 to 52 feet of the loose coal extended up the tailgate entry into the gob area. See Gov. Exh. 7. The accumulated coal had been deposited in the tailgate entry by the shearer as it reached the end of its cut along the longwall face.

Later that day, the MSHA inspectors met with company officials and discussed SOCCO's longwall cleanup plan. 3/ SOCCO's cleanup plan required that five bags of rock dust be spread in the tailgate entry after each cut of the coal by the shearer. Gov. Ex. 4, Item 30. Inspector Allen testified: "We ... discussed how [SOCCO] could reduce the amount of coal spillage into the tailgate entry, and we also recommended that [SOCCO] blanket dust the coal in the tailgate heading." Tr. I 27.

On the following day the inspector returned to the longwall section and observed that a small amount of rock dust had been applied to the ridge of coal in the tailgate entry. The inspector took a sample of the coal to establish its incombustible content. (The sample was later analyzed at an MSHA laboratory and was found to be 20.8% incombustible. Gov. Exh. 3.) Because of the extent of the loose coal and its lack of sufficient rock dust, the inspector believed that SOCCO had violated 30 C.F.R. § 75.400. He also found that the violation was caused by SOCCO's unwarrantable failure to comply with section 75.400 and significantly and substantially contributed to a hazard. The inspector issued to SOCCO a section 104(d)(2) withdrawal order, 30 U.S.C. § 814(d)(2), which states in part:

2/ The longwall section consisted of headgate and tailgate entries and the mining face. The mining face extended between the headgate and tailgate entries for approximately 700 feet. Coal was cut from the face by the longwall shearer. The roof in the mining face was supported by approximately 144 longwall roof support shields. Intake air coursed up the headgate entry, crossed the longwall face and returned down the tailgate entry. 11 FMSHRC 2019, 2021.

3/ 30 C.F.R. § 75.400-2 requires an operator to maintain "[a] program for regular cleanup and removal of accumulations of coal and float coal dusts, loose coal, and other combustibles...." See Utah Power & Light Co., 12 FMSHRC 965 (May 1990).

Loose coal was accumulated 37 inches deep, 7 feet wide for a distance of 18 feet in the tailgate entry of the E-3 longwall section from engineers spad station No. 18478 inby and extending an estimated distance of 40 feet ... into the gob area....

Gov. Exh. 1. 4/

SOCCO contested the validity of the withdrawal order and its associated special findings. SOCCO also challenged the civil penalty proposed by the Secretary for the violation of section 75.400. The contest and civil penalty proceedings were consolidated for hearing.

Before the administrative law judge, SOCCO maintained it had not violated section 75.400. SOCCO noted that section 75.400 prohibits the accumulation of loose coal in "active workings," and that section 75.2(g)(4) defines "active workings," as "any place in a coal mine where miners are normally required to work or travel." SOCCO argued that miners are not normally required to work or travel in the area where the alleged violative accumulation existed. SOCCO also argued that the accumulation did not result from an unwarrantable failure to comply with section 75.400. SOCCO stressed that due to the longwall mining process an accumulation of loose coal in the tailgate entry was inevitable. SOCCO also stressed that the instability of the roof in the intersection of the tailgate and face entries caused by the natural stresses resulting from longwall mining made it extremely dangerous to send miners into the unstable area to remove the coal which would, in any event, soon become part of the gob.

Crediting the inspector's testimony concerning the nature of the accumulation and the analysis of the inspector's incombustible content sample, the judge found that the accumulation consisted largely of combustible loose coal. 11 FMSHRC at 2021, 2022. The judge further held that the evidence established that the cited 18 feet of the accumulation (in the tailgate entry) existed in an area where miners were normally required to travel, making the area "active workings." Finally, because the accumulation in the tailgate entry had been pointed out to SOCCO and was not cleaned up or made inert by January 31, he held the violation resulted from SOCCO's unwarrantable failure to comply with the standard. 11 FMSHRC at 2022-23. 5/

Although SOCCO argues that the judge erred in holding that the accumulation existed in "active workings," we conclude that substantial

4/ The withdrawal order further alleged that SOCCO violated section 75.400 by permitting coal and emulsion oil to accumulate on parts of the longwall roof support shields. The judge found that the Secretary failed to prove this violation. 11 FMSHRC at 2022. The Secretary did not seek review of this finding.

5/ The judge's additional conclusion that the Secretary failed to prove that the violation was of a significant and substantial nature is not at issue on review. 11 FMSHRC at 2022.

evidence supports the judge's finding. Three inspectors testified on behalf of the Secretary: Allen, Mitchell and Ronald Tulanowski. All agreed that the tailgate entry had to be examined regularly. Inspector Allen stated that the area in which the subject part of the accumulation existed "is required to be maintained open for travel for an escapeway off the longwall face" as part of SOCCO's approved roof control plan, and that "[a] fire boss has to travel out into there to make his examinations of his working section at different times." Tr. I 37. When asked how often such travel was required, he responded, "Once a week." Id. Mitchell agreed that the tailgate entry had to be maintained and examined. He testified that "if anything were to occur on [the] longwall face those people have to have some way out." Tr. I 107. He further stated "the entry ... has to be supported in order to make a person safe to travel that area, and it is examined by certified people to see that it is maintained." Tr. I 107. Tulanowski testified that "Roof control law requires that entry to be open for [an] emergency escapeway. It has to be examined weekly." Tr. I 125; see also Tr. I 125-126.

SOCCO acknowledged that fire bosses examine and thus travel the tailgate entry on a weekly basis. SOCCO Br. to ALJ 21; PDR 6. SOCCO also acknowledged Mitchell's testimony that the section foreman regularly examined the area in the tailgate entry adjacent to the last shield (Tr. 119). SOCCO stated "other individuals do check more frequently [than weekly] to determine whether the route from the longwall face down the tailgate entry is passable." SOCCO Br. to ALJ 21. Nevertheless, SOCCO objects that although work or travel normally may have been required in various portions of the tailgate entry, the Secretary did not prove that work or travel was specifically required in the cited portion.

We note that Tulanowski, Ernest Weaver, SOCCO's section foreman, and Pat Zuchowski, SOCCO's general manager of longwalls, stated that miners do not normally work in the area. However, the standard also applies where miners are required to travel. Tr. I 132, Tr. I 175, Tr. II 14. As the inspectors all testified, the tailgate entry must be maintained as an escapeway off of the longwall face. Tr. I 37 Tr. I 107; 30 C.F.R. § 75.215. 6/ Further, as even SOCCO agrees, the entry must be examined. To enter the tailgate entry from the longwall face, a person must pass through the intersection of the face and the tailgate entry, specifically through the area immediately adjacent to the outby end of the accumulation. Such normally required travel establishes the area as "active workings."

In addition, Mitchell testified without dispute that a ventilation curtain was maintained outby the end of the accumulation and that as the

6/ 30 C.F.R. § 75.215 states in part:

For each longwall mining section, the roof control plan shall specify the methods that will be (a) used to maintain a safe travelway out of the section through the tailgate side of the longwall....

face advanced the curtain was moved further outby. He stated, "someone has to go back there to move that." Tr. I 118. It is not an unreasonable inference that miners would therefore normally travel through the intersection to reach the curtain. Compare Cyprus Empire Corp., 12 FMSHRC 911 (May 1990); See Mid-Continent Resources, Inc., 6 FMSHRC 1132, 1138 (May 1989).

Given the unanimous testimony of the inspectors that the tailgate entry area had to be maintained and inspected and the testimony of Mitchell that the outby check curtain had to be moved, we conclude that substantial evidence supports the judge's determination that the area was "active workings" within the purview of section 75.2(g)(4) of the Act where miners were normally required to travel. We agree with the judge that the existence of the accumulation in that area violated section 75.400. 7/

We turn now to the judge's finding that the violation resulted from SOCCO's unwarrantable failure to comply with the standard. In Emery Mining Corp., 9 FMSHRC 1997, 2000-04 (December 1987), and Youghiogheny & Ohio Coal Co., 9 FMSHRC 2007, 2010 (December 1987), we held that "unwarrantable failure means aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act." This conclusion was based on the ordinary meaning of the term "unwarrantable failure," the purpose of unwarrantable failure sanctions in the Mine Act, the Act's legislative history, and judicial precedent. We stated that while negligence is conduct that is "inadvertent," "thoughtless," or "inattentive," conduct constituting an unwarrantable failure is conduct that is "not justifiable" or is "inexcusable". Emery, supra, 9 FMSHRC at 2001.

The judge found that the accumulation in the tailgate entry was brought to SOCCO's attention on January 30, had existed for some time prior thereto, and had not been cleaned up or rendered inert by January 31. The judge concluded that SOCCO's allowing the accumulation

7/ In arguing in support of the judge's conclusion that the area constituted "active workings," the Secretary asserts that 30 C.F.R. § 75.222(g)(1)(ii) requires miners to work or travel throughout the tailgate entry, including the cited area, to install supplemental roof supports. Sec. Br. 8. SOCCO objected to the Secretary's interpretation of the regulation and attached to its reply brief photocopied pages from a mine engineering textbook. SOCCO requested that we take official notice of the materials. SOCCO Reply Br. 8.

The Secretary has moved to strike all reference to the textbook arguing that the material is not a part of the evidentiary record below, was not subject to cross-examination or rebuttal by the Secretary, and cannot be presented for the first time on review. Because we have concluded that substantial evidence supports the judge's finding that SOCCO violated section 75.400 without regard to the Secretary's argument with respect to 30 C.F.R. 75.222(g)(1)(ii) and the materials referenced by SOCCO in rebuttal of that argument, we need not reach the merits of the Secretary's motion to strike.

to continue to exist established its aggravated conduct in connection with the violation. 11 FMSHRC at 2023. We agree.


The presence of the accumulation was brought to SOCCO's attention on January 30. Inspector Allen testified that he was accompanied by David Stout, SOCCO's safety assistant, on that date and that he discussed the accumulation with Stout. Tr. I, 16, 25. Allen, Mitchell and Tulanowski also testified that on January 30, in a subsequent meeting, Allen and other MSHA officials discussed the accumulation with additional management personnel. Tr. I 27, I 103, I 123. Nevertheless, the accumulation continued to exist on January 31 and SOCCO had not, by complying with the provisions of its cleanup plan, lessened the hazard that the accumulation presented. Compare Utah Power & Light Co., Mining Division, supra, 12 FMSHRC at 971-72. Allen testified that by January 31 only a small amount of rock dust had been applied to the accumulation, perhaps one bag. Tr. I 30-31. He described the application as a "very small, minimum amount." Tr. I 30. Safety Committeeman Grimes described it as "very light" and "very little." Tr. I 86-87. The judge credited Allen's and Grimes' testimony. 11 FMSHRC at 2021. A judge's credibility findings and resolutions of disputed testimony should not be overturned lightly, and we find no basis for doing so here. See, e.g., Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 813 (April 1981).

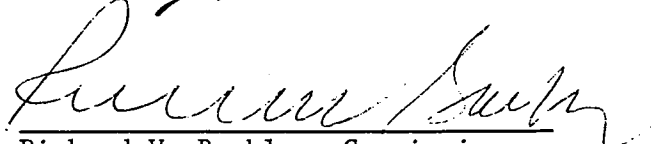
Given the continuing existence of the accumulation on January 31 and the judge's finding regarding SOCCO's noncompliance with its cleanup plan, we conclude that substantial evidence supports the judge's finding that the violation was the result of an unwarrantable failure to comply with the standard. 8/


8/ Responding to SOCCO's assertions regarding the technological inevitability of the accumulation because of the longwall mining process and the hazards of proceeding under unstable roof to remove the accumulation, the Secretary argues that application of rock dust in an amount sufficient to inert the accumulation and render it incombustible would constitute compliance with the cited standard. Sec. Br. 10 n.10. Such an interpretation may be a counterpart to the Secretary's policy on the enforcement of section 75.400 with regard to accumulations of loose coal caused by sloughing ribs. In the case of rib sloughage the Secretary has stated that, because removal of such coal amplifies the hazard of loose ribs, "such loose coal shall not be considered accumulations of combustible material if such material is rendered inert by heavy applications of rock dust." Department of Labor, Mine Safety and Health Administration, Program Policy Manual, Volume V, 52 (1988).


Because of the judge's finding that the accumulations here were not rendered inert, we are not required to rule on the merits of the Secretary's interpretation of section 75.400 as expressed in the referenced footnote. We do note that tension may exist between the interpretation and the standard, which on its face requires that "loose coal and other combustible materials shall be cleaned up and not be permitted to accumulate." See also Black Diamond Coal Mining Co., 7 FMSHRC 1117, 1121 (August 1985). The Secretary may wish to consider

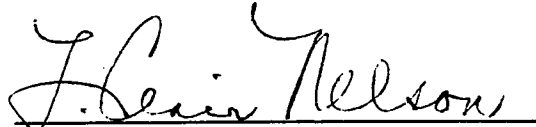
For the foregoing reasons, we affirm the judge's decision.


Ford B. Ford, Chairman


Richard V. Backley, Commissioner


Joyce A. Doyle, Commissioner


James A. Lastowka, Commissioner


L. Clair Nelson, Commissioner

whether the standard comfortably accommodates the longwall mining technology herein at issue.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 13, 1990

PAULA PRICE :
 :
 v. : Docket No. LAKE 86-45-D
 :
 MONTEREY COAL COMPANY :

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

DECISION

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

This discrimination complaint is before the Commission by way of cross-petitions for review of Administrative Law Judge Gary Melick's decision on the merits issued April 12, 1989, 11 FMSHRC 614, and his final disposition on costs and attorney fees issued June 19, 1989, 11 FMSHRC 1099. Monterey Coal Company seeks review of Judge Melick's holding that it violated section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c) (the Mine Act), by suspending Paula Price for four days in retaliation for a statutorily protected work refusal. Price seeks review of the judge's significant reduction in her claimed costs and attorney fees. For the reasons that follow, we reverse the judge's holding that Monterey discriminated against Price in violation of the Mine Act, we dismiss the complaint and we vacate the award of costs and fees.

Paula Price first filed her discrimination complaint with the Secretary of Labor on July 28, 1985 pursuant to section 105(c)(2) of the Mine Act 1/ alleging that Monterey's newly imposed requirement that all

1/ Section 105(c)(2), 30 U.S.C. § 815(c)(2), provides as follows:

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

(Footnote continued)

miners wear integrated metatarsal work boots had been discriminatorily applied to her and others who could not obtain properly fitting footwear. 2/ On August 26, 1985, Price supplemented her complaint by charging that she had not been allowed to work for two days and was thereafter suspended for three days because she "did not have proper boots to wear." 11 FMSHRC 619. By letter of January 7, 1986, MSHA

Fn. 1/ continued

Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate. Such investigation shall commence within 15 days of the Secretary's receipt of the complaint, and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission, with service upon the alleged violator and the miner, applicant for employment, or representative of miners alleging such discrimination or interference and propose an order granting appropriate relief. The Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section) and thereafter shall issue an order, based upon findings of fact, affirming, modifying, or vacating the Secretary's proposed order, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The Commission shall have authority in such proceedings to require a person committing a violation of this subsection to take such affirmative action to abate the violation as the Commission deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest. The complaining miner, applicant, or representative of miners may present additional evidence on his own behalf during any hearing held pursuant to this paragraph.

30 U.S.C. § 815(c).

2/ Integrated metatarsal work boots are boots equipped with a permanent protective shield incorporated into the boot which protects the top of the foot between the ankle and the toes.

informed Price that after its investigation of the matter it had concluded that her complaint of discrimination "ha[d] been satisfied and that no further pursuit of the complaint [was] required." 11 FMSHRC 620. MSHA also informed Price of her right to file a complaint with the Commission on her own behalf pursuant to section 105(c)(3) of the Mine Act, 3/ which she did on January 24, 1986. Id.

Twelve days of hearings on the merits ensued during late 1986 and early 1987. As post-hearing briefing was concluding, the Commission issued its decision in Gilbert v. Sandy Fork Mining Co., 9 FMSHRC 1327 (August 1987), wherein the Commission invalidated Commission

3/ Section 105(c)(3), 30 U.S.C. § 815(c) provides as follows:

Within 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, in writing, the miner, applicant for employment, or representative of miners of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of paragraph (1). The Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section), and thereafter shall issue an order, based upon findings of fact, dismissing or sustaining the complainant's charges and, if the charges are sustained, granting such relief as it deems appropriate, including, but not limited to, an order requiring the rehiring or reinstatement of the miner to his former position with back pay and interest or such remedy as may be appropriate. Such order shall become final 30 days after its issuance. Whenever an order is issued sustaining the complainant's charges under this subsection, a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) as determined by the Commission to have been reasonably incurred by the miner, applicant for employment or representative of miners for, or in connection with, the institution and prosecution of such proceedings shall be assessed against the person committing such violation. Proceedings under this section shall be expedited by the Secretary and the Commission. Any order issued by the Commission under this paragraph shall be subject to judicial review in accordance with section 106. Violations by any person of paragraph (1) shall be subject to the provisions of sections 108 and 110(a).

30 U.S.C. § 815(c)(3).

Procedural Rule 40(b), 29 C.F.R. 2700.40(b), by holding that a section 105(c)(3) complaint could not be filed in the absence of a Secretarial determination that no violation of section 105(c) had occurred. Finding that the Secretary's January 7, 1986, letter to Price was not a determination that no violation had occurred, the judge held that he lacked jurisdiction to continue the proceeding and dismissed the case. 9 FMSHRC 1662 (September 1987).

Price's petition for review of the judge's dismissal order was granted by the Commission on October 13, 1987. Meanwhile, the U.S. Court of Appeals for the District of Columbia Circuit reversed the Commission's retroactive application of its revocation of Rule 40(b) in Gilbert, supra. Gilbert v. FMSHRC, 866 F.2d 1433 (D.C. Cir. 1989). Accordingly, the Commission on February 28, 1989, vacated its direction for review and remanded the case to the judge to complete the record and enter a decision. 11 FMSHRC 183 (February 1989). On remand the judge issued his April 12, 1989, decision on the merits, 11 FMSHRC 614; and his June 19, 1989, disposition of costs and fees, 11 FMSHRC 1099, both presently on review.

Monterey Coal Company operates a large underground coal mine, the Monterey No. 2, in Albers, Illinois at which Paula Price is employed. Sometime prior to early 1985, Monterey conducted studies of foot injuries at its various operations and determined that those injuries could be significantly reduced if miners wore metatarsal protective work boots. The company also determined that greater protection would be provided if the metatarsal shields were integrated into the miners' boots rather than by means of temporary clip-on metatarsal guards which had not passed American National Standards Institute (ANSI) standards for foot protection. 11 FMSHRC 622-23. Monterey began discussing its integrated metatarsal boot policy with the United Mine Workers of America (UMWA) safety and communications committees in February of 1985, and by a series of announcements in April and May of 1985, declared that all miners would be required to report to work with integrated metatarsal boots beginning July 15, 1985. R. Ex. 1.

In response to a suggestion by the UMWA, Monterey agreed to pay for the first pair of boots so long as they were provided by one of two selected vendors (Hy-Test and Iron Age) who provided "shoemobile" services to the mine where boots could be fitted and selected. Miners were permitted to secure conforming boots from any source but would only be eligible for free boots ordered from the two selected vendors. 11 FMSHRC 623; Tr. 883, 1065-1070. Miners were informed that both vendors could make any size as a special order, 11 FMSHRC 623, but that such orders should be placed as soon as possible. Resp. Ex. 1. The vendors were scheduled to visit the mine three times each during the latter half of June. Id.

Anticipating that some miners might have difficulty securing the required shoes by the July 15, 1985, deadline, Monterey advised any such miners to so inform the safety department. A list of those miners was drawn up and provision was made for them to wear temporary clip-on metatarsal guards until the boots on order arrived; the general policy, however, was that miners who reported for work after the deadline without

integrated metatarsal boots would not be allowed to work. 11 FMSHRC 623. Price was unable to secure from the shoe mobile a pair of Hy-Test boots she had selected, so an order was placed and her name was added to the list of miners awaiting boots. Her pair apparently arrived on time, however, and she reported for work in them on July 16, 1985. Id. Price experienced discomfort with the new boots and complained to her foreman, Don Overturf, and to an unidentified clerk in the safety department. She asked that she be allowed to alternate wearing her new (Hy-Test) boots and her old (Red Wing) boots equipped with temporary clip-on guards until the new pair was broken in. The safety clerk told Price he had no authority to grant such an exemption. From July 16 to July 19, 1985, Price described her discomfort as increasing from redness to chafing, to raised and loosened skin across the top of her arch and toes, to blistering. She also complained that the boots caused pains in her heels at work and "charley horses" in her legs when she tried to sleep at home.

On July 19, Price showed her feet to foreman Overturf who reported observing redness but no blisters. In any event, Price left the mine during the shift on July 19 and reported to the nurse's station. 11 FMSHRC 624-626. The nurse's report also showed redness but no blisters. R. Ex. 5, Attach. 2. The following day Price visited a doctor who prepared a note indicating that she had vesicles (small blisters) on her feet and that she should not wear the new boots. 11 FMSHRC 626. Upon returning to work on her next scheduled shift of July 22, 1985, Price presented the note to Ben Chauvin, the mine shift manager, and filed a safety grievance regarding the boot policy. She was given a one-week exemption from the new boot policy and was permitted in the interim to wear her old boots with temporary clip-on guards. 11 FMSHRC 627.

On July 24, 1985, Price filed a second grievance regarding the company's refusal to excuse her absence for part of her July 19, 1985, shift and for refusing to treat her foot problem as a work-related injury. The grievance was settled on July 26, 1985, by the following agreed-upon terms:

The appropriate manufacturing representative shall be contacted regarding this employee's shoes. After such contact is made and a determination given by the manufacturer, the employee shall make arrangement for providing footwear that meets management standards for metatarsal shoes.

It was agreed that Price's boots would be returned to Hy-Test to determine whether they were defective. Id. (Price contended that the boots had "stretched-out." Tr. 657). Price's exemption from the boot policy was extended until such time as the boots were returned or new boots were provided. Hy-Test responded that the boots were not defective but were too big, and sent a replacement pair of a narrower width with the proviso that Price should be sure the new ones fit before she wore them underground. 11 FMSHRC 627.

Price received the replacement pair on August 12, 1985 and wore them at home in an attempt to break them in, but found that she could not "keep them on [her] feet for more than an hour." 11 FMSHRC 617. Shift manager Chauvin became aware on August 15, 1985 that Price had received the replacement pair, and at that point he informed Price that she would no longer be exempt from the policy and that she would have to report to work on August 19, 1985, her next working day, with integrated metatarsal boots. 11 FMSHRC 627. 4/ Price thereupon visited a bootery in an attempt to have the temporary clip-on guards attached permanently to her old Red Wing boots but, according to Price, she was told it could not be done for "liability reasons." On August 19, 1985, Price reported for work wearing her old boots and her own set of temporary clip-on guards. She was refused access to the mine and marked AWOL for the day. 11 FMSHRC 628. Price then secured another doctor's note stating that she required properly fitting boots. She also called Hy-Test to complain that the second pair of boots did not fit and was advised to return them to Monterey's mine warehouse so that a third pair could be provided. On August 20, 1985, after returning the second pair of boots to the warehouse, Price once again reported for work wearing her old boots and temporary clip-ons. Chauvin again denied her access to the mine and marked her AWOL. He also told her that if she failed to appear the following day with integrated metatarsal boots she would be suspended and perhaps discharged. 11 FMSHRC 628-29.

Price made attempts to secure proper boots that day but was told they would have to be specially ordered which would take two weeks. The scenario was repeated at the beginning of the August 21, 1985 shift and when Price and UMWA safety committeeman Burkholder complained to mine superintendent David Lange, he informed her that she was suspended until August 26, 1985, at which time she would have to report to work in boots with integrated metatarsals or risk being discharged. On August 22, 1985, Price met with safety superintendent Gordon Roberts and asked whether she could comply with the boot policy by having temporary clip-on guards attached permanently to her old boots by a cobbler. After conferring with other Monterey officials, Roberts approved this means of compliance and a notice to that effect was posted at the mine. Id. Thereafter Price reported for work on August 26, 1985 in her old boots with the clip-ons permanently attached and was allowed back into the mine. 11 FMSHRC 618, 629.

On August 28, 1985, the UMWA on Price's behalf filed a grievance seeking pay for the four days she was marked AWOL or suspended (August 19, 20, 21 and 22) as well as pay for an "idle day" Price claimed she was entitled to work (August 23) and out-of-pocket expenses connected

4/ The ALJ's decision indicates that Chauvin apparently learned of Price's receipt of the second pair of boots and issued his ultimatum on August 18, 1985. This must be error. August 18, 1985, was a Sunday, a non-working day at the mine. Furthermore, both Price (post-hearing brief at p. 16) and Monterey (brief on review at p. 8, fn 11) agree that the correct date was August 15, 1985.

with the grievance. The grievance was settled by the union for four days' pay in return for the withdrawal of Price's other grievance demands but Price was not present at the time the settlement was entered into. Id. Unsatisfied with the terms of the settlement, Price informed MSHA on December 16, 1985 that while she had been reimbursed four days' pay, she felt she was still entitled to the "idle day" pay and to have all references to the dispute removed from her file. 11 FMSHRC 619.

As described above, the Secretary responded that her complaint "ha[d] been satisfied" and that further pursuit of the complaint was not required. In her subsequent section 105(c)(3) filing with the Commission, Price again requested the "idle day" pay and removal of all references to the dispute from her file. 11 FMSHRC 621. After a preliminary hearing before the ALJ, held July 9, 1986, Price added claims for her "expenses related to the litigation of her complaint" and "a pair of boots that fit." Id.

In his decision on the merits, the judge reduced what he described as Price's "somewhat rambling and ambiguous complaints" to the following basic complaint: that Price "was suspended from work by Monterey because she in essence refused to perform work under a work rule that was unhealthy and unsafe as applied to her." 11 FMSHRC 622. 5/ This distilled complaint provided what the judge termed a "framework" for analyzing the case in terms of work refusal precedents established by the Commission.

Reviewing the evidence the judge determined: that Price's first pair of boots was ill-fitting and caused injuries to her feet; that Price was unsuccessful in breaking in the second pair of boots; that ill-fitting boots would present a hazard of possible infection from abrasions and blisters, or could cause a stumbling hazard or interfere with her safe evacuation of the mine in an emergency; and that Price had made good faith efforts to secure properly fitting boots before and during the period of her suspension. On those bases the judge concluded that Price's continued refusal to comply with Monterey's work rule requiring the wearing of integrated metatarsal boots from August 19 through August 22, 1985, constituted a protected work refusal based on a good faith reasonable belief that it would have been hazardous to comply with the rule. 11 FMSHRC 622, 630.

The judge also found that Price had sufficiently communicated the hazards associated with her wearing ill-fitting metatarsal boots to

5/ The judge made note of other alleged acts of discrimination in Price's post-hearing brief but held they were not properly before him since they had not first been presented to the Secretary under section 105(c)(2). In short, he held that Price had "neither exhausted her administrative remedies nor met a statutory condition precedent." 11 FMSHRC 622, fn. 4. The judge also noted that Price's underlying complaint had not been amended to include the additional allegations nor had Price or her attorney complied with Commission Rule 42(a), 29 C.F.R. 2700.42(a), dealing with the contents of a discrimination complaint. Id.

various Monterey officials, including foreman Overturf and shift manager Chauvin. Lastly, the judge concluded that Monterey's refusal to allow Price to work from August 19 through August 22, 1985, was motivated solely by her refusal to wear integrated metatarsal boots. 11 FMSHRC 630.

Having found protected activity and adverse action motivated solely by that activity, the judge sustained Price's complaint with respect to the loss of four days' work while she was marked AWOL or on suspension. 6/ He also held that Price was entitled to recover her costs associated with pressing her complaint in both the proceeding before him and in the grievance proceeding. Lastly, the judge directed Monterey to delete from its records any references to disciplinary action taken against Price for her refusal to wear integrated metatarsal boots. The judge denied, however, Price's request for a company-paid pair of integrated metatarsal boots since she had waived such an entitlement by requesting to wear her old boots with clip-on guards permanently attached. He also denied her claim for compensation for the "idle day" of August 23, 1985. The judge thereupon directed the parties to submit written statements and responses with respect to the costs to be awarded.

In the supplemental proceeding to determine fees and costs, Price submitted the following claims: \$187.36 incurred in connection with her grievance proceeding; \$4,250.98 in costs of prosecuting her section 105(c)(3) claim; and \$24,107.79 in attorney's fees. Monterey opposed the award of costs or fees on the grounds that they were not authorized under the circumstances of the case and were, in any event, well in excess of "any conceivable fee and expense entitlement." 11 FMSHRC 1099. Monterey argued that Price was foreclosed from recovering costs associated with her labor grievance since that had been settled by the company's payment of the four days' pay in return for the dropping of all other claims. The judge, however, dismissed the challenge on two grounds. First, the costs incurred by Price in processing her grievance were directly related to the development of evidence necessary for the section 105(c)(3) case and were thus, in terms of 105(c)(3), "in connection with the institution and prosecution" of her discrimination complaint before him. Second, Price had not consented to the settlement reached between Monterey and the UMWA acting on her behalf. 11 FMSHRC 1100.

The judge did, however, substantially reduce the claimed court costs and attorney fees on the ground that section 105(c)(3) limits such awards to those costs and expenses "reasonably incurred." Id. To determine the reasonableness of Price's costs and fees, the judge relied on Hensley v. Eckert, 461 U.S. 424 (1983) and Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980). While noting that an appropriate attorney fee may be determined by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate, the judge indicated that the party's partial or limited success may render the product of that multiplication excessive. Thus, "the court necessarily has discretion in making this equitable judgment." 11 FMSHRC 1101. The judge then noted that while Price had alleged 31 protected activities and 14 acts

6/ As noted above, Price had recovered her pay for the four days' work through settlement of her grievance under the labor contract.

of discrimination (some of which he called "facially frivolous"), she prevailed on only one act of discrimination.

The judge also considered the quality of Price's representation as another factor in determining the appropriate fee. Here, he concluded that the inordinate length of trial - 12 days for a case that should have taken 2 days - was chargeable to Price's counsel. He also noted counsel's lack of preparation, focus, and understanding of the law; her frequent and extraordinary delays between questions; and her repeated failure to promptly appear and be ready for trial as bases for significantly reducing the "lodestar" fee. Taking the above matters into consideration, the judge reduced the request for costs and fees to \$4,800 which added together with the costs claimed for the grievance proceeding, resulted in an award of \$4,987.36.

On review, Monterey's first exception to the judge's decision is that he erroneously characterized the dispute over the integrated metatarsal boot policy as a work refusal case. Monterey argues that Price never refused to work; rather, Monterey refused her access to the mine from August 19 to August 22, 1985, because she refused to comply with a company safety rule, i.e., wearing integrated metatarsal boots on the job. Monterey brief pp. 17-18. Viewed from that perspective, the company asserts, it does not matter whether Price was unwilling or unable to comply with the metatarsal boot policy; a mine operator can establish "proactive" company safety rules or requirements and a miner's failure to comply, for whatever reason, should not be deemed protected activity for purposes of the Act.

In the alternative Monterey asserts that even if the case involves a work refusal, Price's claim should be rejected for two reasons: (1) the "hazard" complained of did not justify Price's work refusal, and (2) Price lacked a good faith reasonable belief that a hazard existed. In that regard Monterey first avers that the complained-of hazard was personal to Price and was not under Monterey's control. Monterey further asserts that work refusal rights are intended to be invoked only in the face of a hazard which is "relatively severe and imminent". Monterey contends that the hazard faced by Price on August 19, 1985, was "discomfort from ill-fitting boots that had not yet been broken in" and that the judge's finding of a hazard with respect to the boots is so remote and speculative that it cannot justify a refusal to obey a direct work order. Id. p. 27.

With respect to Price's good faith reasonable belief in the existence of a hazard warranting a work refusal, Monterey asserts that Price could have taken the necessary steps that ultimately brought her into compliance with the work boot policy before the threat of suspension with intent to discharge became a reality. In sum, Monterey takes the position that it was Price's responsibility to secure a pair of boots that complied with the company's integrated metatarsal policy and which fit to her satisfaction; that the company made reasonable efforts to accommodate her by extending her time to comply; and that its imposition of disciplinary measures was justified in order to ensure her compliance.

For her part, Price asserts that she did engage in a protected work refusal based upon her good faith, reasonable belief that her replacement boots were unsafe or unhealthful to wear on August 19, 20 and 21, 1985. Price further argues that once a miner expresses to an operator a good faith reasonable fear of a hazard, the operator has a corresponding obligation to address the perceived danger or provide another method of performing the same work that is safe. Price contends that she continued to reasonably respond to the perceived hazard throughout her suspension while Monterey refused to offer her a reasonable alternative method of performing her job until the work boot dispute could be resolved, i.e., an extension of time for Price to comply until she could: secure a third pair of boots from Hy-Test, have temporary metatarsal guards permanently attached to her old boots, or secure a specially fitted shoe.

In sum, it is Price's contention that the integrated metatarsal boot policy was unhealthful and unsafe as applied to her, since she was unable to secure a pair of boots during July and August of 1985 that would fit her properly and would not cause her discomfort to such an extent that she could not work safely. Given that premise, Price asserts, it was incumbent upon Monterey either to provide Price with a pair of boots that both complied with its policy and did not pose a hazard to her or offer Price an alternative, interim means of compliance until the larger dispute was resolved.

The Commission has long held that a miner seeking to establish a prima facie case of discrimination under section 105(c) of the Mine Act must prove that he or she engaged in protected activity and that the adverse action complained of was motivated in any part by that protected activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co., v. Marshall, 663 F.2d 1211 (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 not motivated by the protected activity. Failing that, the operator may defend affirmatively against the prima facie case by proving that it was also motivated by unprotected activity and would have taken the adverse action in any event for the unprotected activity alone. Pasula, supra; Robinette, supra, (the so-called Pasula-Robinette test). See also Donovan v. Stafford Constr. Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983).

Within this general construct, it is also well-established that in certain circumstances a miner's refusal to work constitutes protected activity. Pasula, supra, Robinette, supra; Miller v. FMSHRC, 687 F.2d 1994 (7th Cir. 1982); Simpson v. FMSHRC, 842 F.2d 453 (D.C. Cir. 1988). The genesis for the recognition of certain work refusals as protected activity is the Senate Report on the 1977 Act, which endorsed a miner's right to refuse "to work in conditions which are believed to be unsafe or unhealthful." S. Rep. No. 81, 95th Cong., 1st Sess. 35 (1977). In order to be protected work refusals must be based upon the miner's "good faith, reasonable belief in a hazardous condition." Robinette, 3 FMSHRC 812; Gilbert v. FMSHRC, supra 866 F.2d at 1439.

The Commission has eschewed the setting of a bright line threshold of severity in determining "how severe a hazard must be in order to trigger a miner's right to refuse work." Pratt v. River Hurricane Coal Co., 5 FMSHRC 1529, 1533 (September 1983). We have instead preferred to resolve that issue on a case by case basis. Id., See also, e.g., Pasula, supra at 2793 and Robinette, supra at 809 fn. 11. Mindful that work refusals are not explicitly addressed in the Mine Act but are derived from its legislative history and our own decisional attempts to implement the overall safety and health goals of the Act, we are initially skeptical as to whether Congress would have envisioned that discomfort arising from a miner's wearing of ill-fitting clothing would constitute a "sufficiently serious danger" (Robinette, 3 FMSHRC at 816) to justify a work refusal.

Mining is not the most comfortable of professions. Many items of basic miner's apparel or gear such as clothing, personal protection equipment and other safety accessories (e.g., cap lamps and batteries, self-rescuers, hard-toed shoes and hard hats) contribute to the general discomfort of laboring in an underground mining environment. It is problematic, however, to compare such discomfort, in either type or degree, to the hazards heretofore at issue in work refusal cases brought before the Commission.

With the foregoing as a preface, our analysis of the record in this case leads us to conclude first that the judge was correct in treating the events of August 19 through August 22, 1985 as a work refusal on Price's part. While it is true, as Monterey argues, that Price actually presented herself for work on those days, but was refused access to the mine for lack of mandated footwear, Price's refusal/failure to comply with the company's metatarsal boot policy constitutes a refusal to comply with a mandatory work rule. We therefore reject Monterey's assertion that the judge erred in treating this matter as a work refusal case and analyzing it in those terms.

We find, however, that the work refusal was not a reasonable one and therefore was not protected by section 105(c) of the Mine Act. Consequently, Monterey did not violate the Act by denying Price access to the mine and suspending her until such time as she came into compliance with the metatarsal boot policy. We reach that conclusion on the ground that the "hazard" posed to Price by the wearing of metatarsal boots was not sufficient to warrant her continued refusal/failure to comply with Monterey's work rule. We further find that whatever "hazard" Price subjectively feared with respect to wearing metatarsal boots was one within her power to overcome as she ultimately did once disciplinary measures were imposed by Monterey. 7/

7/ While substantial evidence supports the judge's finding that the first pair of metatarsal boots did cause Price discomfort and that she was unsuccessful in breaking in the second pair, his findings that the boots would present a stumbling hazard or impede her safe evacuation of the mine in the event of an emergency are highly conjectural and are based on Price's own speculative assertions. We therefore reject these latter findings as they relate to the work refusal at issue.

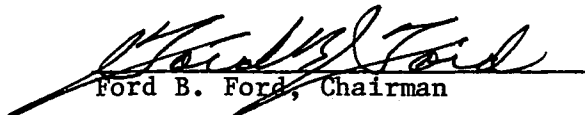
Part of the difficulty in resolving this case is attributable to the complainant's (and to some extent the judge's) tendency to narrow the dispute before us to the two or three days immediately preceeding Monterey's denial of access to Price and her ensuing suspension. In fact, however, disciplinary measures were not taken until a full four months after the metatarsal boot policy was first announced and more than a month after the new policy actually took effect. During that period Price's problems with compliance were accommodated and extensions of time for her to comply were granted in connection with her ongoing grievance concerning the policy. While we do not minimize the discomfort owing to ill-fitting shoes or boots, we are at a loss to determine what more Monterey could have done in these circumstances where the level of comfort associated with the wearing of new boots is a particularly subjective and personal matter.

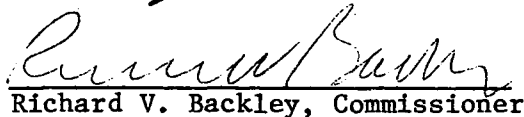
Furthermore, the record clearly indicates that the method by which Price ultimately came into compliance with the policy was available to her prior to August 19, 1985. Price testified that she was aware that another miner experiencing problems with Hy-Test boots, Dorothy Liske, had on July 23, 1985 removed the metatarsals from her new boots and had them permanently attached to her old boots by a cobbler, apparently without incident and with Monterey's knowledge. Tr. 792-794. Price, herself, had on August 17, 1985 sought to have the clip-on metatarsals permanently attached to her old boots at one bootery but was told it could not be done for "liability reasons." 11 FMSHRC 628. Nevertheless, she was able to quickly locate another cobbler who would do the work several days later as soon as she was placed under the threat of suspension with intent to discharge.

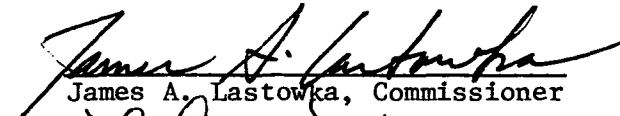
In addition to retrofitting her old boots to achieve compliance, the record indicates that from the outset of the policy Monterey informed the miners that those with particular fitting problems could special order boots from one of the designated vendors. Yet, for reasons unexplained in the record Price had apparently never attempted to place a special order with Hy-Test although by the time of the hearings in this case she had ordered and sent back five pairs of boots to the vendor. Tr. 839. We note in this regard the grievance settlement entered into between Price and Monterey on July 26, 1985 placed the onus of securing footwear that met the metatarsal boot policy squarely on Price.

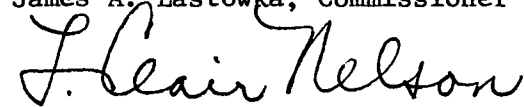
Lastly, it should be borne in mind that the work rule at issue is one specifically designed to enhance Price's safety. We cannot, accordingly, conclude that her refusal to comply with a legitimate work rule adopted to advance the Mine Act's goal of protecting miner safety falls within the realm of conduct intended by Congress to be protected by section 105(c).

We therefore reverse the judge's finding that Monterey discriminated against Price in violation of the Mine Act and dismiss the complaint. In view of our disposition on the merits, we also vacate the judge's award of costs and attorney fees. 8/


Ford B. Ford, Chairman


Richard V. Backley, Commissioner


James A. Lastowka, Commissioner


L. Clair Nelson, Commissioner

8/ Since we are vacating the award of costs and fees, the issue raised in Price's petition with respect to the propriety of the judge's substantial reduction of costs and fees is moot.

Commissioner Doyle, concurring:

In its decision, the majority concludes that Monterey did not discriminate against Price in violation of the Mine Act. It does so after finding that Price was engaged in a work refusal but that the hazard posed was not sufficient to warrant her refusal to comply with Monterey's work rule. Slip op. at 11. I concur in the conclusion that Monterey did not discriminate against Price but do so based on my opinion that Price's conduct was a refusal to comply with a work rule, not a refusal to work.

Monterey Coal Company, after conducting studies of foot injuries at its operations, determined that those injuries could be significantly reduced if miners were required to wear integrated metatarsal-protective work boots. After discussing its plans with the UMWA, Monterey instituted a policy requiring all miners to wear such boots and agreed to pay for the first pair for each miner, who purchased his boots from one of two particular vendors. Price experienced a series of problems with the boots she ordered. As indicated in the majority's decision, Monterey attempted for more than a month to accommodate Price's problem with her boots. Slip op. at 12. Those accommodations did not resolve the problem and Price reported to work on August 19 wearing her old boots with temporary clip-on guards. She was denied access to the mine on that day and again on August 20 and August 21, when she was suspended. 11 FMSHRC 618, 628-29.

A miner's refusal to perform work is protected under section 105(c) of the Mine Act if it is based on a reasonable, good faith belief that the work involves a hazard. Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2789-2796 (October 1980), rev'd on other grounds, sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 807-12 (April 1981). "The case law addressing work refusals contemplates some form of conduct or communication manifesting an actual refusal to work." Perando v. Mettiki Coal Corporation, 10 FMSHRC 491, 494 (April 1988), quoting Secretary on behalf of Sedgmer v. Consolidation Coal Co., 8 FMSHRC 303, 307 (March 1986).

The judge found that Price's refusal to comply with Monterey's work rule requiring integrated metatarsal boots "was a protected work refusal based on a good faith, reasonable belief that it would have been hazardous to comply with." 11 FMSHRC 630. He also found that she had communicated the hazardous nature of wearing ill-fitting integrated metatarsal boots, thus meeting the "communication" requirement. 11 FMSHRC 630.

While the record may support the judge's finding that Price communicated what she saw as the hazardous nature of wearing ill-fitting boots, the record does not show, nor did the judge find, that Price at any time communicated a refusal to work. And while the majority agrees that Price presented herself for work each day but was refused access to the mine, it concludes that Price's refusal to comply with a mandatory work rule equates to a refusal to work. Slip op. at 11. I disagree.

In Perando, 10 FMSHRC 491, the claimant, an underground miner, developed industrial bronchitis and her physician recommended that she be placed in a "position without exposure to coal dust." She agreed to be transferred to a

laboratory position, but then failed to report to work for a substantial period of time. Subsequently, she filed a section 105(c) claim against the operator because he did not retain her higher, underground rate of pay. The administrative law judge concluded that while Perando had never refused to work underground, her "medically substantiated inability to work underground" was the "functional equivalent of a work refusal" and that this "refusal" was protected activity. 8 FMSHRC 1220, 1222.

The Commission unanimously reversed the judge, finding no evidence of a work refusal, and specifically disagreeing with the judge's determination that, while Perando had never refused to work underground in the traditional sense, her medical condition was the functional equivalent of a work refusal. 10 FMSHRC 495. The Commission also found that none of the doctors' reports stated directly or indirectly that Perando was refusing to work. Even viewing the doctor's reports and Perando's actions together, we found no work refusal. Id.

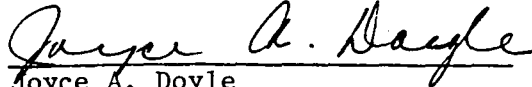
I am unable to distinguish the present case from Perando. Price, like Perando, presented a doctor's note, which diagnosed small blisters and recommended that she not wear her new boots. In addition, Price presented herself for work each day, something more than Perando did. Price's actions alone or taken in conjunction with her doctor's note did not communicate an "actual refusal to work" as required by Sedgmer, 8 FMSHRC 303, or Perando. Accordingly, I would dismiss her complaint on that basis.

The Mine Act gives miners and their representatives the right to play a major role in enforcement of the Mine Act. In order to encourage the exercise of those rights, section 105(c) was enacted in an effort to preclude discrimination motivated by those activities. Also protected is the right to refuse to work in unsafe or unhealthful conditions and the right to refuse to comply with orders that are violative of the Mine Act. 1/ Congress intended that miners not be inhibited in exercising any rights afforded by the Act.

I see nothing in the legislative history, however, to indicate that Congress intended to give miners the right to refuse work on the basis of problems that are totally idiosyncratic to the miner and over which the operator has no control. While a particular miner may hold a good faith, reasonable belief that it is unsafe or unhealthy for him or her to wear shoes that don't fit or a hard hat that provokes a headache, to work underground with industrial bronchitis, to lift timbers with a bad back or while pregnant, or to work at all because of

1/ The Senate Committee stated that section 105(c) "is intended to give miners, their representatives, and applicants, the right to refuse to work in conditions they believe to be unsafe or unhealthful and to refuse to comply if their employers order them to violate a safety and health standard promulgated under the law" (emphasis added). S. Rep. No. 181, 9th Cong., 1st Sess. 36 (1977). The Committee cited with approval Phillips v. IBMA, 500 F.2d 772 and Munsey v. Morton, 507 F.2d 1202. In Phillips the conditions involved excessive coal dust and defective electrical wiring, 500 F.2d at 774-775, while Munsey involved a roof fall and loose roof. 507 F.2d at 1204-1205. See S. Rep. No. 181, 95th Cong., 1st Sess. 36 (1977).

lack of sleep, I do not believe that these are rights protected by the Mine Act or that Congress intended the operator to be charged with discrimination for failing to accommodate them, irrespective of the seriousness of the hazard. On this broader basis, I would also dismiss Price's complaint.


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 20, 1990

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
on behalf of MICHAEL L. PRICE	:	
and JOE JOHN VACHA	:	
	:	
and	:	
	:	
UNITED MINE WORKERS OF AMERICA	:	
	:	
v.	:	Docket No. SE 87-128-D
	:	
JIM WALTER RESOURCES, INC.	:	

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

DECISION

BY: Backley, Doyle and Nelson, Commissioners

This proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act" or "Act"), involves a discrimination complaint brought by the Secretary of Labor against Jim Walter Resources, Inc. ("JWR"). The complaint alleges that complainants Michael L. Price and Joe John Vacha were discharged in violation of section 105(c) of the Mine Act after they failed to provide urine samples required under section II.E. of JWR's Substance Abuse Rehabilitation and Control Program ("Drug Program").

Commission Administrative Law Judge James A. Broderick concluded that section II.E. of the Drug Program, which applies to certain supervisory and hourly employees, "whose duties, whether by job title or by reason of elected office, involve safety," is facially discriminatory because the only hourly employees covered are members of the safety committees at JWR's mines. 10 FMSHRC 896 (July 1988)(ALJ). The judge accordingly determined that the discharges of Price and Vacha pursuant to the Drug Program after they failed to provide urine samples were illegal under section 105(c), 30 U.S.C. § 815(c), and ordered their reinstatement. The judge further found, however, that section II.E. of the Drug Program had not been discriminatorily applied to Price and

Vacha. The judge issued a supplemental decision awarding back pay and expenses and assessing a civil penalty of \$500. 10 FMSHRC 1108 (August 1988)(ALJ). We granted JWR's petition for discretionary review and heard oral argument. For the following reasons, we reverse the judge's determination that the Drug Program is facially discriminatory under section 105(c) of the Mine Act. We also reverse the judge's conclusion that section II.E. was not discriminatorily applied to Price and Vacha, and remand for further findings and analysis as explained below.

I.

Factual Background and Procedural History

JWR operates five underground coal mines, a training facility, and a central shop, all located in Alabama, employing over 2,800 employees, including 2,200 hourly workers represented by the UMWA. Each JWR mine has a local union, all affiliated with District 20 of the UMWA. At all times relevant to this proceeding, the UMWA and JWR were signatories to a collective bargaining agreement governing labor relations in the JWR mines.

The bargaining agreement establishes a Mine Health and Safety Committee at each mine composed of miners "who are qualified by mining experience and training and selected by the local union." The committee is given the right to inspect any portion of a mine and to report any dangerous conditions to management. If the committee believes that an imminent danger exists and recommends that the mine operator remove all employees from the involved area, the operator is required to comply with the recommendation. The judge noted: "Under the Act, the safety committeemen are considered representatives of the miners. They may request MSHA inspections under section 103(g), and normally accompany the MSHA inspector during his physical inspections of the mine." 10 FMSHRC at 902. The safety committeemen are elected by members of the UMWA, and committeemen choose their chairmen and select alternate committee members. Id.

At a meeting held in or around April 1986, JWR representatives and UMWA officials agreed that a significant problem of substance abuse existed among JWR's miners. High discharge, accident and absentee rates were attributed, at least in part, to drug abuse. 10 FMSHRC at 898. The representatives agreed that the problem should be addressed by a joint company-union program. Id. Richard Brooks, JWR's Vice President for Industrial Relations, proposed that the program include education, drug testing, and rehabilitation. The UMWA believed that development of the program should be subject to the collective bargaining process. Id.

Brooks subsequently prepared a proposed draft program, which was submitted to UMWA representatives in July 1986. Brooks received no response to the draft from the UMWA, and JWR distributed copies of its Drug Program to UMWA district and local representatives at a meeting on September 24, 1986. In October 1986, JWR advised UMWA representatives that the Drug Program would take effect on January 1, 1987. By early November 1986, a notice containing a copy of the Drug Program was posted at each mine location and each employee received a copy of the program

with his or her paycheck. 1/

The details of the Drug Program are summarized in the judge's decision. See 10 FMSHRC at 899. At issue is section II.E. of the Drug Program, dealing with random drug testing, which states:

Any employee whose duties, whether by job title or by reason of elected office, involve safety, shall be subject to random testing for substance abuse up to four times per calendar year. Physicals for hoistmen shall also include testing for substance abuse. All provisions of the program shall apply to employees in this category.

The judge accepted Brooks' testimony that, as used in section II.E., the phrase "employee[s] whose duties ... by job title ... involve safety" encompassed safety inspectors, dust and noise control supervisors, and section foremen, all salaried positions. 10 FMSHRC at 899. The only hourly employees covered were union safety committeemen, who came under the phrase "employee[s] whose duties ... by reason of elected office ... involve safety." Id.

At the time the Drug Program was implemented, complainants Michael

1/ On November 5, 1986, the UMWA filed charges with the National Labor Relations Board ("NLRB"), pursuant to the National Labor Relations Act, 29 U.S.C. § 151 et seq. (1982) ("NLRA"), challenging JWR's unilateral implementation of the Drug Program. The NLRB deferred to arbitration proceedings, also initiated by the UMWA, premised on the parties' collective bargaining agreement. JWR and the UMWA subsequently reached a settlement before the arbitrator, the terms of which were set out in an Opinion and Award dated January 27, 1987. Under that opinion, JWR would implement its Drug Program and the arbitrator would retain jurisdiction to resolve any grievances arising under the program.

After the first grievances were filed and acted on, the UMWA filed suit in federal district court to vacate the arbitrator's decision, alleging that the union had not agreed to implementation of the Drug Program. The district court granted summary judgment in JWR's favor, and denied the UMWA's motion for reconsideration. On July 27, 1988, the United States Court of Appeals for the Eleventh Circuit summarily affirmed the district court. (By order of October 12, 1988, we permitted JWR to supplement the record in the present proceeding to include therein a copy of the Eleventh Circuit's unpublished order.)

Meanwhile, the UMWA renewed its unfair labor practice charges before the NLRB. In a letter dated August 31, 1988, the NLRB regional director declined to institute an unfair labor practice complaint based on those charges. (This letter is also included in the supplement to the record referred to above.) The Regional Director noted that the district court and Eleventh Circuit had rejected the UMWA's claim that it had not agreed in settling the arbitration to waive objections to implementation of the Drug Program.

L. Price and Joe John Vacha were employed at JWR's No. 4 Mine, an underground coal mine located near Tuscaloosa, Alabama. 2/ Price had worked for JWR for approximately nine years and had been a union safety committeeman for about eight and one-half years. Vacha had also worked for JWR for nine years, and had been a union safety committeeman for approximately six years. Price was classified as a longwall helper and Vacha as a continuous miner operator although, in recent years, he had actually worked on assembling self-contained rescuers.

Vacha had filed from 75 to 100 safety or health complaints with the Secretary under section 103(g)(1) of the Mine Act, 30 U.S.C. § 813(g)(1), and had participated in 50 to 75 safety grievances. Price had filed approximately 25 section 103(g)(1) complaints annually and had handled approximately 70 safety grievances. Price and Vacha estimated that they spent approximately 50% of their working time on safety committee duties. Both had been involved in disputes with management over safety-related activities and in 1986 Price had been discharged but reinstated following arbitration.

In late February 1987, Brooks decided to begin random testing of the safety-related employees in all the JWR Mines under section II.E. of the Program. He notified the industrial relations supervisors of this decision and directed them to test all employees covered by section II.E. on March 2, 1987. The record reflects, however, that, for various reasons, the urine samples were obtained from affected employees on March 2, 3, 6, and 9, and on April 8, 1987. In the No. 4 Mine, where Price and Vacha worked, sampling was delegated by the Industrial Relations Supervisor, Rayford Kelly, to Wyatt Andrews, a JWR safety inspector, and Bob Hendricks, a JWR associate safety director. (In the other mines, the samples were taken under the direct supervision of the industrial relations supervisors.)

Price and Vacha worked on the day shift -- 7:00 a.m. to 3:00 p.m. At about 8:00 a.m. on March 2, 1987, Price was informed that he would have to submit a urine sample. Vacha was similarly notified at about 11:30 a.m. At the end of their shift, they went to the office of Rayford Kelly. Complainants went into a bathroom with Andrews but were unable to urinate. Water, coffee and soft drinks were made available, but the requested urine samples were not forthcoming. At about 7:00 p.m. (four hours after completion of their shift), Kelly told Price

2/ Neither Price nor Vacha testified at the hearing on the merits in this proceeding. The recitation of facts is based on testimony and other evidence incorporated by the judge in his decision (10 FMSHRC at 897) from earlier proceedings concerning their temporary reinstatement. On July 7, 1987, upon application by the Secretary, the judge ordered that the miners be temporarily reinstated pursuant to section 105(c)(2) of the Mine Act, 30 U.S.C. § 815(c)(2), and Commission Procedural Rule 44, 29 C.F.R. § 2700.44 (1986). We have previously affirmed that order. 9 FMSHRC 1305 (August 1987). JWR appealed the Commission's temporary reinstatement order to the United States Court of Appeals for the Eleventh Circuit, where the matter currently is pending (No. 87-7484, petition for review filed August 7, 1987).

and Vacha that they would be given 30 minutes to provide a sample or they would be disciplined. Price's request that they be permitted to return the next morning to provide the samples was refused. At approximately 7:20 p.m., they were given five more minutes to produce a specimen or be discharged. At 7:30 p.m., they were each given formal five-day suspensions with intent to discharge for insubordinate conduct. The following morning, March 3, 1987, Price and Vacha had drug screening tests at the Emergicare Center (JWR's contract physicians) and at the Longview Hospital, respectively. The test results were negative and were submitted to JWR. 10 FMSHRC 900-01, 909-10. 3/

On March 9, 1987, Price and Vacha filed discrimination complaints with the Secretary pursuant to 30 U.S.C. § 815(c)(2). As noted, the Secretary's application for temporary reinstatement was granted by the judge and affirmed by the Commission. Subsequently, the Secretary filed a section 105(c)(2) complaint on their behalf and the UMWA intervened on behalf of complainants. A hearing on the merits was held before Judge Broderick.

At the hearing, JWR's Brooks testified that section II.E. of the Drug Program covered all JWR supervisors, safety and associate safety inspectors, dust and noise control supervisors, and section and maintenance foremen. Tr. 65-66. Safety committeemen were also included, he stated, because "they have the highest responsibility for safety of anybody in the coal mine." Tr. 67. See also Tr. 76, 77. Brooks estimated that in carrying out safety-related duties, a safety committeeman spent about 50% of his working time engaged in safety inspections, accompanying MSHA inspectors, and preparing "paper work" in the safety office. Tr. 72-75. Brooks had no specific knowledge about drug problems among present committeemen but, because of their safety-related duties, began randomly testing them. Tr. 83. Under section II.E., he explained, JWR supervisory employees had been tested numerous times, "almost every month," and the committeemen once. Tr. 86. As part of the testing commenced on March 2, 1987, urine samples were taken at the No. 4 Mine from four management safety personnel and the owl shift safety committeeman.

In his decision, Judge Broderick reviewed the Drug Program and its implementation, the functions of the safety committee, and industry drug abuse programs. 10 FMSHRC at 898-906. He found initially that Price and Vacha "had physical or psychological difficulties in providing the required samples on March 2, 1987, ... [and] did not refuse to submit the urine samples, but were unable to do so under the circumstances present on the evening of March 2 at the ... mine." 10 FMSHRC at 905-06. He also examined JWR's motivation in adopting the Drug Program. He rejected arguments by the Secretary and the UMWA that section II.E.

3/ Price and Vacha filed grievances over their discharges. On April 13, 1987, the arbitrator issued an opinion sustaining the discharges. See 10 FMSHRC at 901-02. As discussed at some length in Judge Broderick's decision, the judge determined that deference to the arbitrator's findings and conclusions was not appropriate. See 10 FMSHRC at 910-11.

intentionally targeted UMWA safety committeemen out of hostile or discriminatory motivation:

There is no evidence that Section II.E. or any other part of the plan was motivated in any part by hostility to safety committee members. I accept Mr. Brook[s'] testimony that he included safety committee members in section II.E. because he believed that they had such a high degree of responsibility for safety in the mines.

10 FMSHRC at 904.

Notwithstanding the above finding of nondiscriminatory motivation, the judge concluded that an operator's policy or program can itself violate the Mine Act, regardless of the operator's motivation in adopting the program. 9 FMSHRC at 906, citing Local Union 1110, UMWA/Robert Carney v. Consolidation Coal Company, 1 FMSHRC 338 (May 1979). According to the judge, enforcement of such a program against a miner or miners' representative can be prohibited under the Mine Act irrespective of the operator's motive. Id.

The Secretary called as witnesses 17 JWR hourly employees who were committeemen or officials of the UMWA. Judge Broderick summarized this body of testimony as follows:

The evidence establishes that the miners at JWR view mandatory drug testing with varying degrees of hostility: many consider it to be accusatory and believe that it casts suspicion of drug use on persons being tested. They look upon the testing procedures followed by JWR as an invasion of privacy and an affront to their dignity. Further, some of the miners have been exposed to news media reports which cast doubt on the accuracy of the testing procedures. Thus, they expressed fear that they might be erroneously branded as drug users. These suspicions and doubts seem to me to have resulted in part at least from an inadequate education effort on the part of JWR, and from the fact that the program was instituted unilaterally, without the participation of the unions.

The members and potential members of the mine safety committee reacted negatively and hostilely to the provisions of [section] II.E. which they viewed as unfairly singling them out for random testing four times annually. As a result of this reaction, some committee members have resigned; others have considered resigning (only one test has been conducted to date because of the pending litigation), and further testing may cause further resignations. Still others have refused to accept safety committee positions or to run for election to

them.

10 FMSHRC at 907.

The judge then stated:

Based on this review of the evidence, I conclude that one effect of the drug abuse program has been to severely limit the independence and therefore the effectiveness of the committees. This is true without regard to the motivation of JWR in instituting the plan.

10 FMSHRC at 907. After discussing the importance of the safety committees at JWR's mines, the judge concluded that the effect of the Drug Program was to "diminish" the "rights and responsibilities of the miners' representatives" and that, therefore, Section II.E. was "facially in violation of section 105(c) of the Act." 10 FMSHRC at 907-08. He further determined that the discharge of Price and Vacha "because they refused to participate in the program" was, accordingly, in violation of section 105(c) of the Act. 10 FMSHRC at 908.

Based on his determination that section II.E. was facially discriminatory, the judge ordered that complainants be permanently reinstated with back pay and other benefits, that their records be expunged of references to their discharge, and that JWR cease enforcement of section II.E. against safety committee personnel. 10 FMSHRC at 911. In a supplemental remedial decision, the judge awarded specific sums of back pay with interest and expenses and assessed a civil penalty of \$500. 10 FMSHRC at 1109-10.

The judge also proceeded to discuss whether, even if section II.E. is not facially discriminatory, it was discriminatorily applied to Price and Vacha because of their activities as safety committeemen. The judge found that both miners had engaged in protected activity as committeemen. Specifically, he found that Price and Vacha had the reputation of being safety activists, "notorious" for filing safety complaints, and that their numerous safety committee activities were "clearly protected" by the Act. 10 FMSHRC 903, 909.

The judge concluded that the discharge of Price and Vacha was motivated in part because of their protected activity as committeemen and that complainants had established a prima facie case of discrimination. 10 FMSHRC at 909-10. However, he went on to conclude that JWR affirmatively defended by showing that it would have terminated them in any event for the unprotected activity of failing to provide a urine specimen.

We granted JWR's subsequent petition for discretionary review, which essentially raises three assignments of error: (1) the judge erred in holding that JWR's Drug Program violated section 105(c) of the Act, absent proof of any discriminatory motive; (2) the judge erred because he failed to weigh JWR's legitimate safety concerns against the purported adverse effects of the Drug Program on safety committeemen;

and (3) Price and Vacha should not be reinstated because they were not discharged for activities protected by the Mine Act.

In its brief on review, the UMWA replied to the issues raised in JWR's petition for review and, in Part III of its brief, further argued that the judge had erred in concluding that the Drug Program was not discriminatorily applied to Price and Vacha. UMWA Br. 21-27. In response, JWR filed a motion to strike the latter portion of the UMWA's brief as being outside the proper scope of Commission review. Both the UMWA and the Secretary responded in opposition to JWR's motion to strike.

While this proceeding was pending on review, attorneys representing JWR in bankruptcy proceedings (different attorneys from those representing JWR in this proceeding) filed with the Commission a "Notice of Automatic Stay and Notice of Case under Chapter 11 of the United States Bankruptcy Code." This summary notice states that JWR, as a bankruptcy debtor, has filed a petition for reorganization under Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. § 101 et seq. (1982) ("Bankruptcy Code"), in the United States Bankruptcy Court for the Middle District of Florida, Tampa Division, Case No. 89-9715-8Pl. The notice recites a portion of the automatic stay provision of the Bankruptcy Code, 11 U.S.C. § 362, and implies that the stay applies to this discrimination proceeding.

Subsequently, the Commission issued an order directing the parties to file supplemental memoranda "addressing the question of whether the automatic stay provision of 11 U.S.C. § 362(a)(1) applies to this Commission proceeding, with particular reference to the exceptions contained in 11 U.S.C. § 362(b)(4) & (5)." The Secretary, the UMWA, and the attorneys representing JWR in this discrimination proceeding have filed responses, all arguing that this discrimination proceeding is excepted from the automatic stay provision of 11 U.S.C. § 362(a)(1). The attorneys representing JWR in the bankruptcy proceeding did not file a response to the Commission's order.

II.

Disposition of Issues

A. JWR's motion to strike and effect of bankruptcy proceedings

We address first the threshold matters of JWR's motion to strike a portion of the UMWA brief and the effect, if any, of JWR's pending bankruptcy petition on this Commission proceeding. With respect to the motion to strike, under the Mine Act "[a]ny person adversely affected or aggrieved" by a decision of a Commission administrative law judge may file with the Commission a petition for discretionary review of the judge's decision. 30 U.S.C. §§ 823(d)(2)(A)(i)-(iii). See also Commission Procedural Rule 70(a), 29 C.F.R. § 2700.70(a). In general, once such a petition is granted, Commission review is limited to the questions raised by the petition, unless pursuant to the provisions of the Act, the Commission, sua sponte, has directed review of other issues. 30 U.S.C. §§ 823(d)(2)(A)(iii), (B), & (C). See also

Commission Procedural Rules 70(f) & 71, 29 C.F.R. §§ 2700.70(f) & 71. Here, the Secretary and the UMWA obtained below a favorable judgment awarding complainants the remedial relief sought. Therefore, it is not surprising that, as the prevailing parties, they did not file a petition for discretionary review in this matter objecting to those findings and conclusions of the judge that rejected certain of their positions.

After JWR filed its petition for review, the Secretary and UMWA were not compelled to file cross-petitions for review in order to preserve their right to raise on review certain objections to other portions of the judge's decision. Rather, adopting the general federal rule of appeal, we hold that, in such circumstances, the "appellee" may urge in support of the judgment below any matter or issue appearing in the record, even if it involves an objection to some aspect of the judge's reasoning or issue resolution, so long as the appellee does not seek to attack the judgment itself or to enlarge its rights thereunder, in which case it would be obliged to file a cross-petition for discretionary review. See, e.g., Dandridge v. Williams, 397 U.S. 471, 475-76 n.6 (1970); United States v. American Ry. Exp. Co., 265 U.S. 425, 435-36 (1924); Freeman v. B&B Assoc., 790 F.2d 145, 151 (D.C. Cir. 1986). The UMWA's attack in Part III of its brief on the judge's resolution of the issue involving application of the Drug Program to Price and Vacha is based on matters in the record, is not inconsistent with the judgment of discrimination rendered below and does not seek any greater relief than already granted. Accordingly, upon consideration of JWR's motion to strike and the responses thereto, we deny JWR's motion.

Concerning the effect of the bankruptcy proceeding, we concur with the parties that this matter falls within the exceptions to the automatic stay provisions of the Bankruptcy Code. As a preliminary matter, we hold that we possess jurisdiction in this proceeding to determine the effect, if any, of the bankruptcy matter on continuation of this proceeding. See, e.g., Brock v. Morysville Body Wks., Inc., 829 F.2d 383, 385-87 (3rd Cir. 1987); NLRB v. Edward Cooper Painting, Inc., 804 F.2d 934, 938-39 (6th Cir. 1986).

As pertinent here, section 362 of the Bankruptcy Code provides:

Except as provided in subsection (b) of this section, a petition filed under section 301 ... of this title ... operates as a stay, applicable to all entities, of--

(1) the commencement or continuation, including the issuance or employment of process, of judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title; (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title....

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(b) The filing of a petition under section 301 ...
of this title ... does not operate as a stay --

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(4) under subsection (a)(1) of this section, of
the commencement or continuation of an action or
proceeding by a governmental unit to enforce such
governmental unit's police or regulatory power;

(5) under section (a)(2) of this section, of the
enforcement of a judgment, other than a money
judgment, obtained in an action or proceeding by a
governmental unit to enforce such governmental
unit's police or regulatory power....

11 U.S.C. § 362(a) & (b).

The term "governmental unit" is defined in the Bankruptcy Code, in relevant part, as the "United States; ... department, agency, or instrumentality of the United States...." 11 U.S.C. § 101(26). There is no question that the Secretary, Department of Labor, and Mine Safety and Health Administration are all "governmental units" within the meaning of the Bankruptcy Code. Cf. Edward Cooper Painting, 804 F.2d at 942; NLRB v. Evans Plumbing Co., 639 F.2d 291, 293 (5th Cir. 1981)(concluding that NLRB is a "governmental unit").

The present case was brought by the government, through the Secretary, to effectuate and protect the rights secured by section 105(c)(1) of the Mine Act. This is the kind of "police or regulatory" action covered by the exception to the automatic stay. Cf. EEOC v. Rath Packing Co., 787 F.2d 318, 323 (8th Cir. 1986). See also Morysville Body Wks., 829 F.2d at 388; Edward Cooper Painting, 804 F.2d at 942; Secretary on behalf of George W. Heiney & John Chramm v. Leon's Coal Co., 4 FMSHRC 572, 574-75 (April 1982)(ALJ). Accordingly, we conclude that the present proceeding is not subject to the automatic stay provisions of section 362(a)(1).

Section 362(b)(5) also excepts from automatic stay "enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power...." (Emphasis added.) The courts have recognized that adjudicatory bodies presiding over a governmental "police or regulatory" action may enter a money judgment against a respondent-debtor but may not permit collection of that pecuniary judgment in an enforcement action. E.g., Morysville Body Wks., 829 F.2d at 389; Edward Cooper Painting, 804 F.2d at 942-43; Rath Packing, 787 F.2d at 325-27. See also H.R. No. 595, 95th Cong., 1st Sess. 343 (1977), reprinted in 1978 U.S. Code Cong. & Ad. News 5963, 6299. Here, were a finding of JWR's liability ultimately made, judgment could be entered "to fix damages for violation of the law." The enforceability of such a judgment is a matter for other forums.

For the foregoing reasons, we proceed to a disposition of this case.

B. Is section II.E. of JWR's Drug Program Facially Discriminatory?

The general principles applicable to analysis of discrimination issues under the Mine Act are settled. In order to establish a prima facie case of discrimination under section 105(c) of the Act, a complaining miner bears the burden of production and proof in establishing that (1) he engaged in protected activity and (2) the adverse action complained of was motivated in any part by that protected activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (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 not motivated in any part 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, e.g., 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).

This is the first discrimination case before the full Commission that involves issues of workplace substance abuse programs and we begin by placing that subject in perspective under the Mine Act.

Nothing in the Mine Act bars a mine operator from adopting a substance abuse control program. The problem of drug abuse in society and the effects of that problem on the workplace are well documented. As the judge noted:

On September 15, 1986, the President of the United States issued an Executive Order, entitled Drug-Free Federal Workplace, in which he stated that "[D]rug use is having serious adverse effects upon a significant proportion of the national work force and results in billions of dollars of lost productivity each year." The Senate Commerce Committee in Senate Report 100-43, 100th Cong. 1st Sess., to accompany S. 1041 filed April 10, 1987, found that "Drug and alcohol abuse has become an increasing problem in the workplace. Substance abuse leads to impaired memory, lethargy, reduced coordination, and a whole series of changes in heart, brain, and lung functions. These symptoms in

workers have resulted in lost productivity for American businesses of as much as \$100 billion a year, with significant increases in employee accident rates, health care costs, and absenteeism."

10 FMSHRC at 903. Indeed, in the context of the mining occupation, adoption of a reasonable substance abuse program could advance the safety and health goals of the Mine Act. We note also the Secretary's statement that she "is not contending that substance abuse programs are per se unlawful or discriminatory" under the Act and that she "supports the goal of a drug free work place." Sec. Br. 1 & n. 1.

We emphasize, however, that the Commission's jurisdiction to entertain and resolve disputes involving substance abuse programs is limited. As we previously observed: "[T]he Commission does not sit as a super grievance board to judge the industrial merits, fairness, reasonableness, or wisdom of JWR's [Drug Program] apart from the scope and focus appropriate to analysis under section 105(c) of the Mine Act." 9 FMSHRC at 1307. Our limited purpose is to focus simply on whether the Drug Program or enforcement of some component thereof conflicts with rights protected by the Mine Act.

The judge found section II.E. of the Drug Program to be "facially discriminatory" because it "singled out" safety committeemen from JWR's other hourly employees for mandatory drug testing and because of the reaction of safety committeemen and potential safety committeemen to the program, which limited the safety committees' effectiveness. We disagree with the judge that JWR's Drug Program is facially in violation of section 105(c) of the Mine Act.

The Mine Act broadly defines "miner" as "any individual working in a coal or other mine...." 30 U.S.C. § 802(g) (emphasis added). 4/ Section II.E. of the Drug Program applies to a portion of JWR's "miners"; some were salaried or supervisory employees, and some were hourly, nonsupervisory employees -- all are "miners" under the Mine Act. Therefore, the safety committeemen were not the only "miners" subject to mandatory testing under JWR's Drug Program. Stated otherwise, safety committeemen were not "singled out" from all other "miners" at JWR's mines.

The Secretary and the UMWA imply that the inclusion of safety committeemen, alone among JWR's hourly employees, evidences discrimination against them. Not every classification or difference in the treatment of employees, however, amounts to illegal "discrimination," especially where there is sufficient lawful reason for the challenged distinction. We hold that, on this record, JWR advanced adequate and reasonable business justification for including safety committeemen, along with the other employees whose job duties involved

4/ It is to be noted that the safety committeemen at JWR's mines derive their offices, not from the Act or the Secretary's implementing standards and regulations, but wholly from the parties' private contractual agreement.

safety matters, in the pool of miners subject to the drug testing provisions of section II.E. The evidence clearly shows that section II.E. was targeted at miners whose duties have a substantial impact on miner safety. The evidence further reflects, and the judge so found, that JWR genuinely believes that a substance abuse problem existed among its employees, that the effects of any such abuse are most dangerously manifested in job functions involving safety, that section II.E. is designed to address this situation, and that it was adopted for non-discriminatory reasons.

There is no dispute that the safety committeemen spent up to 50% of their time engaged in safety matters. Brooks testified that safety committeemen had "the highest responsibility for safety of anybody in the coal mine." Tr. 67. It may be true that other hourly job classifications also have a substantial impact on miner safety. Indeed, from a general perspective, all miners' work activities affect safety. Given that a mine operator may adopt a substance abuse program, however, section 105(c) cannot be read as compelling mandatory drug testing of all miners because testing is to be a part of the program. Absent a showing of discriminatory motivation, nothing in section 105(c) precludes an operator from proceeding in a gradual, incremental, or limited manner, by first targeting for drug testing certain job classifications that are viewed in good faith as being the most safety sensitive positions. Stated otherwise, an operator is not required by the Mine Act to remedy all aspects of a perceived substance abuse problem or none at all. Cf., e.g., Fisher v. Secretary, 522 F.2d 493, 500, 502 (7th Cir. 1975).

We accept the judge's characterization of the testimony of the safety committeemen as showing that many committeemen opposed and disliked implementation of section II.E. However, a miner's opposition or hostility to an operator's business policy is not determinative of the validity of that policy under section 105(c) of the Mine Act. An adverse action under section 105(c) of the Mine Act is not simply any operator action that a miner does not like. Secretary on behalf of Chester Jenkins v. Hecla-Day Mines Corp., 6 FMSHRC 1842, 1848 n. 2 (August 1984). The personal feelings of opposition and hostility to section II.E. held by safety committeeman, as found by the judge, are insufficient to establish that section II.E. was discriminatory. Again, we note that the burdens imposed by section II.E fell equally on JWR's supervisory staff.

Thus, we find that substantial evidence and applicable legal principles do not support the judge's determination that section II.E. was facially discriminatory. Accordingly, we reverse the judge's finding of a violation of section 105(c) under the theory of facial discrimination.

C. The application of section II.E. of JWR's Drug Program to complainants

The judge concluded that section II.E. of JWR's Drug Program had not been discriminatorily applied to Price and Vacha. The judge's findings that Price and Vacha had engaged in protected activities and

that their termination was motivated, at least in part, by their protected activities are supported by substantial evidence and are consistent with controlling precedent. Accordingly, we affirm the judge's conclusion that Price and Vacha established a prima facie case of discriminatory discharge.

The judge also found that, although the complainants had made out a prima facie case of discriminatory discharge, JWR had defended affirmatively by showing that it would have fired them in any event for the unprotected activity alone of failing to provide the requested urine specimens. 10 FMSHRC at 909-910. As explained above, an operator proves an affirmative defense pursuant to the Pasula-Robinette test if it shows that (1) it was also motivated by the miner's unprotected activities, and (2) would have taken the adverse action in any event for the unprotected activities alone. As we have explained:

[T]he 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 out 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.

Bradley v. Belva Coal Co., 4 FMSHRC 982, 993 (June 1982). As a corollary to these principles, it follows that an operator does not establish a Pasula-Robinette affirmative defense if a work rule or policy that the miner is alleged to have violated, was applied discriminatorily to the miner or in a manner deliberately calculated to render his compliance difficult or impossible. In such cases, the claimed "independent" basis for discipline is actually an extension of the operator's discriminatory conduct. Further, pretext may be found, for example, where the asserted justification is weak, implausible, or out of line with the operator's normal business practices. E.g., Haro, supra, 4 FMSHRC at 1937-38. Ultimately, the operator must show that the justification is credible and would have legitimately moved it to take the adverse action in question. E.g., Haro, 4 FMSHRC at 1938. Here, the judge has entered a number of findings, not fully explained in his analysis of JWR's affirmative defense, that raise these issues.

The judge found that prior to the attempted urine sampling at issue, both Price and Vacha had been subjected to supervisory "joking" concerning their future testing:

Prior to March 2, there was considerable discussion and joking about the program among union employees and management officials. In the subject mine, much of the joking was directed at Price. In

November 1986, Price told Wyatt Andrews, the mine safety inspector and Bob Hendricks, associate safety inspector that he had difficulty urinating in front of others. Hendricks laughed and made a vulgar remark to Price. In later November or early December a urine specimen bottle was exhibited on Wyatt Andrews' desk with a label on it reading "Mike Price UMWA." Andrews laughed when Price saw the bottle. It remained in the safety office for at least two days before Rayford Kelly directed that it be removed. Andrews and another safety inspector had on two occasions jokingly thrust an empty ... cannister and an empty coca cola toward Price and Vacha telling them that they were practice piss cups. Later a styrofoam cup with Price's name and the notation "practice cup" written on it was displayed in the safety office. All these incidents took place prior to March 2, 1987.

10 FMSHRC at 900. The judge also determined that the complainants did not refuse to submit urine specimens on March 2 but had genuine "physical or psychological difficulties" in providing the requested samples. 10 FMSHRC at 904-06. He further noted that Price and Vacha had drug screening tests performed at the Emergicare Center (JWR's contract physicians) and at the Longview Hospital, respectively, the next day and submitted the results, which were negative, to JWR. 10 FMSHRC at 901. The judge stated that Price and Vacha "were unable" to provide urine samples "under the circumstances present on the evening of March 2 at the subject mine." 10 FMSHRC at 906.

At the other JWR mines, the Industrial Relations supervisor oversaw the urine sampling; at the No. 4 Mine, the supervision of urine collection was delegated to Andrews and Hendricks. 10 FMSHRC at 909. Thus, the actual testing of Price and Vacha was carried out by those who had made the earlier jokes, i.e., Andrews and Hendricks. Id.

In some of the mines, those supervising the collection did not go into the bathroom with those giving the samples. No accommodation was offered Price and Vacha when they claimed inability to produce urine specimens, though some accommodation was given others involved in the drug screening program.

10 FMSHRC at 909. Similarly, in its brief on review, the UMWA points to evidence in the record showing that the manner of testing Price and Vacha was different from the testing procedures followed at other mines, that JWR accommodated other miners who experienced difficulty urinating on demand, and that similar discipline was not meted out to those other miners. UMWA Br. 24-25.

We find that the judge did not fully examine and explain, in the context of ruling on JWR's affirmative defense, the impact of the evidence summarized above. If, in fact, Price and Vacha were fired for

failing to comply with discriminatorily applied drug testing procedures or if those procedures were deliberately manipulated to contribute to such failure, a Pasula-Robinette affirmative defense based on those same procedures cannot stand. In other words, a discharge for failure to comply with a discriminatorily implemented work order would not satisfy the affirmative defense requirements of Commission precedent.

Based on the above concerns, we remand this matter to the judge for the narrow purpose of analyzing and explaining the impact of the evidence discussed above on JWR's attempt to establish an affirmative defense. On remand, the judge shall provide all parties with the opportunity to brief the merits of the issues being remanded.

IV.

Conclusion

For the foregoing reasons, we reverse the judge's conclusion that section II.E. of JWR's Drug Program is facially discriminatory in violation of section 105(c) of the Mine Act. With respect to the application of the Drug Program to Price and Vacha, we vacate that portion of the judge's decision in which he concluded that JWR affirmatively defended against the prima facie case of discrimination established by the complainants. We return this case to the judge for further findings and analysis on that subject as explained above. Accordingly, this matter is remanded for further proceedings consistent with this opinion.


Richard V. Backley, Commissioner


Joyce A. Doyle, Commissioner


L. Clair Nelson, Commissioner

Commissioner Lastowka, concurring in part and dissenting in part:

I agree with my colleagues that this matter falls within the exceptions to the automatic stay provisions of the Bankruptcy Code and that the Commission may therefore proceed to a disposition of the proceeding before us. I also concur fully in the conclusion, and the rationale in support thereof, that Section II. E. of JWR's Drug Program is not facially violative of section 105(c) of the Mine Act. I must respectfully dissent, however, from the majority's denial of JWR's motion to strike that part of intervenor UMWA's brief challenging the judge's conclusion that the specific application of JWR's Drug Program to Price and Vacha did not violate section 105(c). As explained below, JWR's motion to strike is well-founded and should be granted. As further explained, I would remand to the administrative law judge for entry of a final, appealable order concerning the specific application of the drug program.

The statutory procedure governing the raising of issues in review proceedings before the Commission is specific and express. Under section 113(d) of the Mine Act "any person adversely affected or aggrieved" by a decision of a Commission administrative law judge may petition the Commission for discretionary review of the judge's decision. 30 U.S.C. § 823(d)(2)(A)(i); 29 C.F.R. § 2700.70(a). If such a petition for discretionary review is granted, the Commission's review authority is limited to the issues raised in the petition. 30 U.S.C. § 823(d)(2)(A)(iii); 29 C.F.R. § 2700.70(f); Chaney Creek Coal Corp. v. FMSHRC, 866 F.2d 1424, 1429 (D.C. Cir. 1989); Secretary v. Phelps-Dodge Corp., 709 F.2d 51 (D.C. Cir. 1983). Additional issues can be considered only if the Commission sua sponte directs such other issues for review within 30 days of the administrative law judge's decision. Chaney Creek; Phelps-Dodge; 30 U.S.C. § 823(d)(2)(B); 29 C.F.R. § 2700.71.

Based on this statutory review scheme, JWR has filed a motion to strike a portion of intervenor UMWA's brief. JWR emphasizes that its petition for discretionary review was the sole petition for review filed, and that its petition challenged only the administrative law judge's conclusion that Section II.E. of JWR's Drug Program is facially discriminatory. JWR further notes that neither the Secretary nor intervenor UMWA petitioned the Commission to review the judge's conclusion that JWR's specific application of the drug program to Price and Vacha did not violate section 105(c). Nor did the Commission sua sponte direct any additional issues for review pursuant to section 113(d)(2)(B). Therefore, according to JWR, that portion of the UMWA's response brief arguing that the judge erred in concluding that the drug program was not discriminatorily applied raises an issue that was not brought before the Commission in accordance with the governing statutory review scheme.

In opposition to JWR's motion to strike, the UMWA and the Secretary make essentially the same arguments. They note that Price and Vacha prevailed on their claim that Section II.E. is facially discriminatory. As a result, they assert that Price and Vacha were awarded the full measure of the relief they sought including reinstatement, back pay, expungement of personnel files and the cessation of enforcement of Section II.E. against safety committeemen. Therefore, the Secretary and the UMWA submit, Price and Vacha were not "adversely affected or aggrieved" by the judge's decision within the meaning of section 113(d), and they lacked standing to appeal the judge's denial of the "as applied"

theory of discrimination.

The Secretary and the UMWA further assert that the UMWA's brief properly challenges the judge's findings and conclusions addressing whether Section II.E. was discriminatorily applied to Price and Vacha. They argue that under settled principles of appellate review a party "may offer in support of his judgment any argument that is supported by the record, whether it was ignored by the court below or flatly rejected." Sec. Response at 5, citing 9 Moore's Federal Practice, § 204.11 [3] at 4-45; UMWA Response at 4-5. They submit that the argument in the UMWA's response brief challenging the judge's "as applied" findings simply offers the Commission an allowable alternative ground for affirmance of the judge's decision in favor of Price and Vacha. My colleagues in the majority embrace this theory, "adopting the general federal rule of appeal." Slip op. at 9.

I disagree. As I read section 113(d) of the Mine Act, JWR's motion to strike must be granted. Were the Commission operating within a more traditional appellate review scheme, I would have little hesitation in proceeding to address the additional issue raised in the UMWA's brief. Under the federal rules of procedure and the case law relied on by the Secretary and the UMWA, the filing of a cross-appeal, or the urging of other error the correction of which offers an additional basis for affirmance, would be appropriate vehicles for expanding the scope of the issues on appeal. The problem, however, is that the Commission's review authority differs substantially from that found in the typical appellate review model. The unique statutory review scheme set forth in section 113(d) of the Mine Act more closely constrains the Commission's review authority. Parties are not free to raise and the Commission is not free to consider issues that have not been directed for review pursuant to section 113(d). 30 U.S.C. § 823(d); Chaney Creek Coal Corp., supra; Phelps-Dodge Corp., supra.

I cannot accept the Secretary's and the UMWA's explanation that they are not seeking to have the Commission resolve an "additional" issue, but are offering only an alternative ground in support of the judge's finding of discrimination. Although the "facially violative" and "as applied" theories were both offered to prove that Price and Vacha had been discriminated against under section 105(c)(1), the material facts and relevant law bearing on these theories of discrimination are quite separate and distinct. In its petition for discretionary review JWR challenged only the judge's findings and conclusions bearing on the "facially violative" theory. To nevertheless proceed to review the correctness of the judge's discussion concerning the "as applied" theory, as tempting as it may be in terms of appellate convenience, is to ignore the constraints of section 113(d). In this regard it is important to note that JWR has identified some of its own disagreements with the judge's discussion concerning the specific application of the drug program to Price and Vacha, but JWR correctly acknowledges that these disagreements were not placed before the Commission through its petition for review. JWR Motion to Strike at 5.

For these reasons I would grant JWR's motion to strike Part III of intervenor UMWA's brief.

In my view, however, granting the motion to strike would not end the Commission's deliberations concerning the procedural consequences of the judge's statement that the specific application of the drug program to Price and Vacha did not violate section 105(c) of the Mine Act. In its motion to strike JWR asserts that Price and Vacha were "adversely affected or aggrieved" within the meaning of section 113(d) by the discussion of the "as applied" theory of discrimination contained in the judge's decision. The implication of JWR's argument is that, because Price and Vacha did not petition for review of the judge's "as applied" discussion, the judge's conclusions in that regard are final and unreviewable. 30 U.S.C. § 823(d)(1).

The Secretary and the UMWA counter by arguing that Price and Vacha were not "adversely affected or aggrieved" because, in prevailing on their "facially violative" theory, they had been awarded all of the relief they had sought. They assert that Price and Vacha were fully satisfied by the judge's award, were not injured thereby, and therefore lacked standing under section 113(d) to obtain review of the judge's decision. Sec. Response at 33-4; UMWA Response at 5-6. I agree.

In the posture of the proceeding before us, the portion of the judge's decision denying Price and Vacha's "as applied" theory of recovery did not constitute a final, adverse disposition against Price and Vacha within the meaning of section 113(d) of the Mine Act. The conclusive, determinative holding by the judge was his conclusion that Price and Vacha had been discriminated against by JWR in violation of section 105(c). It was this holding that formed the basis for his award of remedial relief to Price and Vacha and that caused a party, JWR, to be "adversely affected or aggrieved". In the absence of any appeal of the judge's decision, only JWR, not Price and Vacha, would have been damaged as a result of the judge's decision. The judge's further discussion indicating that he would deny the alternative theory of recovery was not essential to his finding of liability and was unnecessary. Therefore, the judge's comments in this regard did not adversely affect or aggrieve Price and Vacha within the meaning of section 113(d).¹

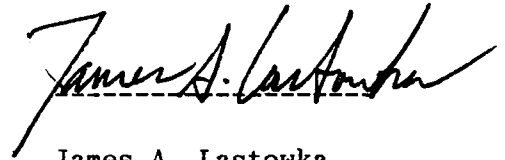
¹ As has been stated:

[T]he general rule is that a party who has obtained full relief in the court below on a particular theory or ground is not entitled to appeal from the judgment to procure relief on other theories or grounds advanced by him below.

Annotation, Right of Winning Party to Appeal from Judgment Granting him Full Relief Sought, 69 A.L.R. 2d 701, 736-37 (1960). See also 4 Am. Jur. 2d Appeal and Error § 185 (1962).

Accordingly, I would remand this proceeding to the administrative law judge for entry of a final dispositional order concerning the "as applied" theory of discrimination advanced by Price and Vacha. I would direct the judge to allow the parties the opportunity to make any additional arguments either in opposition to or in support of the discussion of the "as applied" theory of discrimination set forth in his prior decision. Any party adversely affected or aggrieved by the entry of the judge's final order on remand could then petition the Commission for review of this aspect of his decision.

For these reasons, I concur in part and dissent in part.

A handwritten signature in cursive script, reading "James A. Lastowka", written over a horizontal dashed line.

James A. Lastowka
Commissioner

Chairman Ford, concurring in part and dissenting in part:

I join with my colleagues in reversing the judge's determination that Jim Walter Resources' Drug Program is discriminatory on its face and violative of section 105(c) of the Mine Act, 30 U.S.C. § 815(c). As to the automatic stay provisions of the Bankruptcy Code and the exceptions thereto, I further concur that the instant proceeding falls within the exceptions set forth in section 362(b) of the Code, 11 U.S.C. § 362(b). With respect to the majority's disposition of JWR's motion to strike Part III of the UMWA's reply brief, I am constrained to reluctantly and respectfully dissent in view of the tightly circumscribed scope of Commission review set forth in section 113(d)(2) of the Mine Act, 30 U.S.C. 823(d)(2).

Although general federal appellate procedure may permit an appellee to offer alternative grounds to support an ultimate judgment - even those rejected by the judge below - the Mine Act by its clear terms constricts that option here. Section 113(d)(2) of the Act states that "review shall be limited to the questions raised by the petition" and that "the Commission shall not raise or consider additional issues in such review proceedings" unless it has complied with the procedures and criteria for granting sua sponte review. (Emphasis added). The issue of whether JWR's Drug Program was discriminatorily applied to Price and Vacha was not raised in JWR's petition for discretionary review, nor was it directed for review sua sponte. It arose solely as a component of the UMWA's reply brief filed well outside the 30 day time limit for filing petitions under the Act.

The UMWA and the Secretary argue that they were not "adversely affected or aggrieved by [the] decision" of the judge so that there was no reason for them to file a petition for discretionary review. There is, however, a distinction here between a "judgment", i.e., a favorable outcome for the appellees, and the "decision" itself, and it is the term "decision" to which section 113(d)(2) refers. In this instance the judge's decision is composed of two distinct parts, each involving separate allegations of discriminatory treatment, separate legal theories to support those allegations, and separate modes of analysis to resolve the issues raised. Indeed, one might argue that within the single docket the judge was deciding two discrete cases: one generic case brought in the names of Price and Vacha on behalf of all safety committeemen against the Drug Program as designed (the "facially discriminatory" case), and one brought exclusively by Price and Vacha and involving only their particular relationship to and interaction with JWR and its Drug Program (the "discriminatorily applied" case). In that context it cannot be said that the judge's decision with respect to the latter case was not adverse to Price and Vacha. */

*/ The two matters were even tried somewhat separately. Price and Vacha did not testify at the hearing on the merits. Testimony at that hearing on behalf of the Secretary and the UMWA was predominately provided by safety committee members or potential members who were not disciplined but who testified to the inhibitive effects of the Drug

Appellees also object on practical grounds to the filing of "protective" petitions for discretionary review by prevailing parties, characterizing such a requirement as "meaningless", "cumbersome," and "nonsensical." Given the time and treasure expended in this case, the odds of JWR's appealing the "facially discriminatory" issue so as to place the judge's determination thereon at risk were extremely high. In such circumstances a protective petition for discretionary review would not have been meaningless but would have been prudent. Furthermore, the judge's decision was issued on August 26, 1988 and JWR's petition was filed on September 20, 1988, thus leaving the Secretary, the UMWA, or both five days to file a pro forma petition on the "discriminatorily applied" issue. In any event, the procedural fault at issue lies with the restrictive review scheme devised by Congress and both the Commission and the parties are bound by it.

In summary, Part III of the UMWA's brief raises important issues and compelling arguments. Unfortunately, at this juncture, I find no means by which the Commission can resurrect the "discriminatorily applied" charge when the statute limits our consideration to those issues contained within the four corners of the only petition for discretionary review before us. Chaney Creek Coal Corp. v. FMSHRC, 866 F.2d 1424, 1429 (D.C. Cir. 1989).

Accordingly, I would grant the motion to strike and dismiss the proceeding.


Ford B. Ford, Chairman

Program generally and its impact upon their decisions to continue serving as committeemen or to run for committee office. That testimony went only to the "facially discriminatory" issue. The "discriminatorily applied" issue was tried in the June 29, 1987 hearing on temporary reinstatement wherein Price and Vacha testified to the specific circumstances under which they were subjected to random drug testing under the Drug Program, their history of activism as safety committeemen, and their perceptions of a retaliatory link between the two. Secretary/Price and Vacha v. Jim Walter Resources, Inc., 9 FMSHRC 1305 (August 1987).

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 22, 1990

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket Nos. WEST 86-113-R
	:	WEST 86-114-R
WESTERN FUELS-UTAH, INC.	:	WEST 86-245-(A)

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

ORDER

BY THE COMMISSION:

This consolidated contest and civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("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 v. Western Fuels-Utah, Inc., & FMSHRC, 900 F.2d 318 (1990), rev'g, 11 FMSHRC 278 (March 1989). At issue is whether supervisors who meet the training certification requirements for supervisory personnel under a state program approved by the Department of Labor's Mine Safety and Health Administration ("MSHA") must be given task training prior to performing work for which non-supervisory miners would be required to have task training.

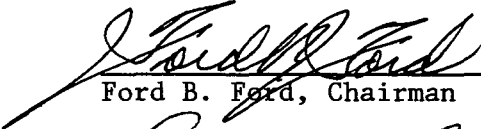
MSHA cited Western Fuels-Utah, Inc. ("Western Fuels") for a violation of section 115(a) of the Mine Act, 30 U.S.C. § 825(a), and 30 C.F.R. § 48.7 for failing to task train one of its section foremen in the operation of a roof-bolting machine prior to his using that machine. Section 115(a)(4) of the Act and section 48.7 of the Secretary of Labor's implementing regulations require task training for "miners"; as relevant, 30 C.F.R. § 48.2(a)(1)(ii) excludes from the definition of "miners" subject to such task training "[s]upervisory personnel subject to MSHA approved State certification requirements." In proceedings before Commission Administrative Law Judge Roy J. Maurer, Western Fuels argued that the foreman in question was exempt from the task training requirements pursuant to the plain language of the exclusion in section 48.2(a)(1)(ii), supra. Accepting the Secretary's construction of the

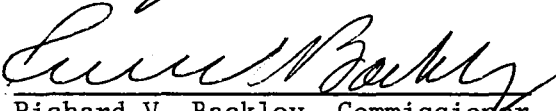
applicable regulations, Judge Maurer concluded that task training of the foreman was required because the supervisory exemption applies only to a supervisor actually and primarily engaged in supervision and not to one engaged in the extraction and production process. The judge concluded that Western Fuels had violated the cited provisions of the Act and regulations and assessed a civil penalty of \$180. 9 FMSHRC 1355 (August 1987)(ALJ). We granted Western Fuels' petition for discretionary review, which was limited to the issue of whether the judge erred in his interpretation of the meaning of the supervisory exemption.

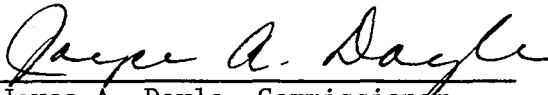
In our prior decision, we disagreed with the judge. We held that the language of section 48.2(a)(1)(ii) "means what it says, that supervisory personnel subject to MSHA approved State certification requirements are exempt from the [relevant] training ... requirements." 11 FMSHRC at 282. We determined: "The exclusion of 'supervisory personnel' from the definition of ['miners' subject to the training requirements in issue] has a plain meaning apparent from any reasonable reading of the regulation. '[S]upervisory personnel' means individuals who are supervisors. Supervisors are persons having authority delegated by an employer to supervise others." 11 FMSHRC at 283. Because it was undisputed that the foreman in question was a mine foreman certified under an MSHA approved State program, it followed that he was exempt from the cited training requirements. In reaching this conclusion, we rejected the Secretary's interpretation of section 48.2(a)(1)(ii), which we found flatly contradicted by the plain and unambiguous language of the regulation. 11 FMSHRC at 284-87.

The Secretary appealed our decision. In a 2-1 opinion, the D.C. Circuit reversed. The Court subscribed to the Secretary's interpretation of the regulation. The Court held that the supervisory exemption applies only to the extent that a supervisor is actually engaged in the act of supervising and does not apply once the person diverts from supervision to actual operation of mining equipment. Western Fuels-Utah, supra, 900 F.2d at 320-23. The Court stressed its belief that its deference to the Secretary's position was required as a matter of law. 900 F.2d at 321, 323. We note the observation of dissenting Circuit Judge Edwards that "[t]he Secretary of Labor ... seeks to overturn the judgment of the Commission because, to put it starkly, the regulation should not be held to mean what it says." 900 F.2d at 323 (Edwards, J., dissenting).

We are obliged to conform to the judgment of the Court in this matter. No other issue remains for disposition in this proceeding. Accordingly, the judge's decision and assessment of civil penalty are reinstated. */


Ford B. Ford, Chairman


Richard V. Backley, Commissioner


Joyce A. Doyle, Commissioner


James A. Lastowka, Commissioner


L. Clair Nelson, Commissioner

*/ The Commission contacted both parties administratively and determined that neither party wished to be further heard on remand.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 23, 1990

UNITED MINE WORKERS OF AMERICA, :
LOCAL UNION 1769, :
DISTRICT 22 :
v. : Docket No. WEST 87-86-C
UTAH POWER AND LIGHT COMPANY, :
MINING DIVISION :

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

DECISION

BY: Backley, Lastowka and Nelson, Commissioners

This compensation proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act"). Commission Administrative Law Judge John J. Morris granted the motion of Utah Power and Light Company ("UP&L") to dismiss this proceeding after a settlement agreement was executed by UP&L and the United Mine Workers of America ("UMWA" or "Union"). 11 FMSHRC 1641 (ALJ) (September 1989). We granted the UMWA's petition for discretionary review. The principal issue presented on review is whether the judge erred in granting UP&L's motion to dismiss. For the reasons that follow, we affirm the judge's decision.

I.

The UMWA sought compensation from UP&L, on behalf of miners belonging to its Local Union 1769, District 22 ("Local Union"), pursuant to the third sentence of section 111 of the Mine Act. 1/ The members of

1/ Section 111 provides in part as follows:

[1] If a coal or other mine or area of such mine is closed by an order issued under section 103, section 104, or section 107 all miners working during the shift when such an order was issued who are idled by such order shall be entitled, regardless of the

the Local Union are employed by UP&L at its Deer Creek Mine located near Price, Utah.

At 12:30 p.m., on November 3, 1986, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") issued an imminent danger withdrawal order at the Deer Creek Mine pursuant to section 107(a) of the Mine Act. 30 U.S.C. § 817(a). The citations alleged violations for insufficient rock dust (30 C.F.R. § 75.403) and an accumulation of combustible materials (30 C.F.R. § 75.400). The inspector determined that the conditions described in the citations constituted an imminent danger. 2/ The affected area covered by the order included "the 3rd South belt entry from #20 crosscut including crosscuts and adjacent 1st Right entry from #34 to 3rd West." However, the entire mine was closed for the remainder of November 3, 1986, and

result of any review of such order, to full compensation by the operator at their regular rates of pay for the period they are idled but for not more than the balance of their shift. [2] If such order is not terminated prior to the next working shift, all miners on that shift who are idled by such order shall be entitled to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than four hours of such shift. [3] If a coal or other mine or area of section 107 of this title for a failure of the operator to comply with any mandatory health or safety standards, all miners who are idled due to such order shall be fully compensated after all interested parties are given an opportunity for a public hearing, which shall be expedited in such cases and after such order is final, by the operator for lost time at their regular rates of pay for such time as the miners are idled by such closing, or for one week, whichever is lesser....

30 U.S.C. § 821. (sentence number added).

2/ The imminent danger order states:

The following conditions which collectively constitute an imminent danger were observed in 3rd South belt entry and 3rd South, 1st right entry: 75.403-The rock dust which was applied in the 1st right entry was not applied in sufficient quantities to render the incombustible content to the required 65 percent from number 34 crosscut inby to ... 3rd West (citation #2928498); 75.400-Combustible material in the form of float coal dust, loose coal, coal fines were observed in numerous locations in 3rd South belt entry, adjacent 1st Right entry and connecting crosscuts. Also paper bags and trash at #20 crosscut, old wood scraps & timber. (citation number 2928499).

for all shifts on November 4, 5, 6, 7 and 10, 1986.

The UMWA's complaint for compensation filed January 29, 1987, requested compensation for each miner who worked the 8:00 a.m. to 4:00 p.m. shift on November 3, 1986, and for each miner scheduled to work the 4:00 p.m. to midnight shift on November 3, 1986, the midnight to 8:00 a.m., 8:00 a.m. to 4:00 p.m., and 4:00 p.m. to midnight shifts on November 4, 5, 6, 7, and 10, 1986. The complaint did not identify any individual miner claimants or the amount of compensation claimed. Rather, the UMWA stated in the complaint that it was incapable of listing every miner affected by the imminent danger order or the exact dollar amount claimed under section 111, and that a prompt effort would be made to obtain this information through discovery procedures.

On February 12, 1987, the UMWA filed interrogatories addressed to UP&L, requesting: (1) the name of each UMWA member employed at the mine who was scheduled to work during the period covered by the complaint (Interrogatory No. 5); (2) the name of each individual who had reported in as unavailable to work and the purported reason for each individual's lack of availability for work (Interrogatory No. 6a); (3) the "hourly or daily rate of pay upon which each individual's most recent paycheck preceding November 3, 1986, was computed" (Interrogatory No. 6b); and (4) the name of each individual paid wages by UP&L for work performed from November 3, 1986 to November 10, 1986, the amount received by each individual, and the specific hours for which compensation was paid to each individual (Interrogatory No. 6c).

On March 25, 1987, UP&L filed answers to the UMWA's interrogatories. In response to Interrogatory No. 5, UP&L provided a list, labeled "Exhibit A," which identified all miners employed at the mine who worked or were scheduled to work during the period for which compensation was sought. In response to Interrogatory 6a, UP&L provided a list, labeled "Exhibit B," which identified miners who were unavailable for work during the period in question. In response to Interrogatories 6b and 6c, UP&L provided "Exhibit C," which was UP&L's payroll record for the period from November 3 to 10, 1986. This list included all wages paid by UP&L to miners for work performed during the period. It also listed the dates worked by each miner, the number of hours worked on each date, and the applicable rate of pay for each miner.

UMWA Legal Assistant Joyce A. Hanula reviewed these exhibits for the purpose of identifying the miner claimants included within the UMWA's complaint. In an affidavit, Hanula states that at least part of her copy of Exhibit A was not legible and that she informed Thomas Means, counsel for UP&L, of this. In her affidavit, Hanula further asserts that Means indicated that he would contact UP&L and attempt to get a clear copy, but that she never received another copy. Hanula also asserts that Means and John Scott, another counsel for UP&L, told her that "Exhibit C" was the best list to use since it had the miners' names and hourly rates of pay. Scott, however, states in his affidavit that he made no representations to the UMWA about Exhibit C other than to say that it could be used to show which miners had already been paid and the miners' rates of pay. Means states that he made no representations as

to how the interrogatory answers should be evaluated by Hanula. The UMWA filed additional interrogatories on April 3, 1987, but did not request any further information concerning the identity of the miners scheduled to work during the period from November 3 to 10, 1986.

On September 28, 1988, Hanula sent Scott a list of miners employed at the mine during November 1986 and their daily rates of pay. She stated that she could not determine from the information obtained through discovery the shift that each of these miners was scheduled to work and requested Scott to provide such information. She stated that "[o]nce I receive this information I will send you the Union's complete list of each individual entitled to compensation and the amount due." On September 29, 1988, Scott returned the list with shift designations beside each miner's name.

A few days later Scott suggested to Hanula that UP&L might offer to settle the case by compensating the miners scheduled to work in the specific area described in the imminent danger order. On October 6, 1988, Hanula sent a letter to Robert Jennings, UMWA Health & Safety Representative in Utah, attaching a list of the names of miners she believed were entitled to compensation. She requested that the Local Union review the list for accuracy. The letter further discussed UP&L's possible offer of settlement. Jennings forwarded this information, including the list of miners, to George Baker, President of the Local Union.

On November 9, 1988, Hanula sent another letter to Jennings attaching a revised list of miners, the miners' daily rate of pay, the number of days each miner was idled, and the amount of compensation that would be claimed by each miner in this compensation proceeding. The letter stated that this information was gathered from UP&L payroll records and that it was imperative that the Local Union contact her regarding any changes or additions. The letter concluded by stating that "[i]f I am not contacted by you or the Local by November 21, 1988, I will assume the list is accurate and forward a copy to the company."

On November 18, 1988, Scott proposed a settlement that would have compensated each idled miner one shift of pay, and would have resulted in a total payment of about \$20,000. This offer was rejected by the Local Union. The UMWA proposed a counteroffer as follows: "That each miner listed on the enclosed attachment be paid the amount indicated under the column entitled 'amount due' prior to December 25, 1988." (emphasis in original.) This counteroffer is contained in a letter dated December 5, 1988, from Hanula to Scott. The letter states that each listed miner would be entitled to one-half the normal amount of pay and that the amount of this settlement would total \$5,961.64 more than UP&L's offer. The attachment listed 148 miners who were entitled to compensation and 34 miners who were not entitled to compensation. At Scott's request, one name was subsequently deleted from the list of miners to be paid and other adjustments were made.

By letter of agreement dated December 8, 1988, from Scott to Hanula, UP&L accepted the UMWA's counteroffer. This letter was signed by Scott for UP&L and approved and signed by Hanula for the UMWA. The

settlement agreement states in numbered paragraph one that "Exhibit A is a list of all claimants in this proceeding" and that "UP&L shall pay to each listed claimant the amount of compensation specified for that claimant." Additionally, the settlement agreement provides that "UP&L shall endeavor to make the payments by December 25, 1988, and in any event shall do so by December 31, 1988." Furthermore, the settlement agreement states that "[p]ayments to the claimants shall terminate any obligations of UP&L, and the UMWA shall, after receiving notice from UP&L that payments have been made, immediately file a motion with the Commission to withdraw its complaint." The list attached to the settlement agreement was identical to the list provided by Hanula with her December 5, 1988 letter, including the agreed-to modifications, and identified those persons who were entitled to receive payment, and the amount to be paid. The agreement also acknowledges that the agreement was entered into for purposes of settlement and that UP&L does not admit that any compensation was due under the Mine Act.

UP&L filed the jointly signed settlement agreement with the judge on December 15, 1988. In an order also dated December 15, 1988, the judge requested the UMWA to move to withdraw its complaint for compensation when it received notice that the miners have been paid.

On December 23, 1988, UP&L paid all the miners listed in Exhibit A of the settlement agreement the sums therein specified, and notified the UMWA that the payments had been completed. In late December 1988, however, Hanula received a call from Baker, president of the Local Union, informing her that there were four miners who were not on the list attached to the settlement agreement, but who were "entitled" to compensation. Scott, when informed of this matter, indicated a willingness to approve payment to these four miners, but no more. Baker also contacted Dave Lauriski, a UP&L manager, who took the same position as Scott. Later in the week, however, Baker determined that 10 more "eligible" miners has not been included in the settlement and approached Lauriski, who then indicated that UP&L would not pay any of the 14 miners.

In a letter dated January 10, 1989, Hanula informed Scott that 14 miners were not compensated and requested that these miners be paid. Hanula stated that these miners were not compensated because she had relied on UP&L's assertedly inaccurate payroll records to compile the list of claimants. Hanula further indicated that as soon as these 14 miners were paid, the complaint would be withdrawn but that if the miners were not paid, the compensation complaint would proceed. In a letter to Hanula dated January 19, 1989, Scott stated that the 14 miners were not entitled to compensation under the terms of the settlement agreement and construed Hanula's request "as an attempt to set aside the settlement agreement and as a breach of terms of that agreement."

UP&L then filed a motion to dismiss the complaint for compensation on February 23, 1989. UP&L argued that the settlement agreement was intended to resolve all issues and to terminate the proceeding in return for payment to the 147 miners listed in the attachment to the agreement, that UP&L had paid all of the miners on the list, and that under the terms of the agreement the UMWA was obligated to withdraw its complaint.

The UMWA took the position that the parties had agreed that all idled miners would be compensated, but that when the agreement was reduced to writing, it did not include 15 miners entitled to payment under the settlement. ^{3/} Alternatively, in the UMWA's view, the omission of the 15 miners was the result of a mutual mistake on the part of both parties. The UMWA argued that reformation of the settlement agreement was necessary to include the 15 individuals along with the appropriate amount to be paid to each, and requested a hearing. The UMWA also argued that if there were a dismissal of the proceeding, such dismissal should affect only the miners who had already received payments under the settlement agreement, leaving the remaining 15 miners free to pursue their section 111 claim or to negotiate a separate settlement.

The judge denied UP&L's motion to dismiss and scheduled the case for hearing. UP&L filed a motion for reconsideration on May 25, 1989. Thereafter, the judge granted UP&L's motion to reconsider his earlier ruling and he dismissed the UMWA's complaint for compensation.

The judge found that this proceeding was settled when Hanula signed the settlement agreement on December 8, 1988. 11 FMSHRC at 1653. After reviewing the record, the judge found that any mistake made in the determination of who should be included in the settlement of the compensation claim was a unilateral mistake on the part of the Local Union or the UMWA and was not a mutual mistake. 11 FMSHRC 1652. The judge found that the UMWA, not UP&L, prepared the list of eligible claimants, that the UMWA had asked the Local Union on two occasions to verify the accuracy of this list, and that the UMWA had submitted the list to UP&L when it made its counteroffer. 11 FMSHRC 1653. In addition, the judge held that there was no mutual mistake as to the number of miners entitled to compensation in this case because the parties were consciously disputing that issue during their negotiations. 11 FMSHRC 1652. The judge found that the parties were making concessions and compromising their positions with respect to whom, if anyone, should receive compensation and how much money each should receive. Id.

Having found no mutual mistake, the judge held that the agreement could not be rescinded. He concluded that unilateral mistake could not form the basis for rescission, and that only mutual mistake would support a rescission. 11 FMSHRC at 1652. The judge also rejected the UMWA's request that he hold a hearing and order that the excluded miners be compensated. Id. He held that if a misrepresentation or mutual mistake had occurred, the remedy was to rescind the settlement agreement, not to reform it. 11 FMSHRC at 1653. Moreover, the judge held that UP&L had already performed its side of the agreement, and that to declare that the excluded miners be paid would impose a new and different settlement agreement on UP&L. Id. The judge further concluded that the miners of the Local Union could not keep the fruits

^{3/} Another miner (unnamed on this record) subsequently came forth claiming that his name was improperly omitted from the settlement agreement. Hanula Affidavit at n.3.

of the settlement agreement and at the same time seek additional compensation. Id.

II.

The Commission's oversight of proposed settlements is, in general, committed to the Commission's sound discretion. See, e.g., Pontiki Coal Corp., 8 FMSHRC 668 (May 1986); Birchfield Mining Co., 11 FMSHRC 1428 (August 1989). We conclude that the judge's finding that a mutual mistake was not established is supported by substantial evidence and that he did not err in concluding that the settlement agreement signed by UP&L and the UMWA on December 8, 1988, was valid and binding, and required dismissal of the UMWA's complaint.

The UMWA maintains that the intent of the settlement agreement was to pay all idled miners 50 cents on the dollar and that if the list was incomplete it was a mutual mistake of both parties. The UMWA argues that "when the parties reduced their agreement to writing they did not include 15 of the miners who ... were entitled to a settlement." UMWA Br. 3. It attributes this omission to a mutual mistake in the compilation of the list of claimants. Id. The UMWA claims that UP&L attorneys directed the UMWA to consult UP&L's payroll records in Exhibit C to UP&L's answer to interrogatories, which it claims is inaccurate, as the best list of eligible miners. UP&L denies that it gave any such direction or that Exhibit C was inaccurate or misleading. The judge did not resolve this particular dispute, but it is not critical to proper resolution of this matter.

Exhibits A and C were submitted by UP&L in response to specific interrogatories posed by the UMWA. In submitting the exhibits, UP&L was providing to the UMWA the specific information that the UMWA requested. Thus, in reviewing the nature of the responses, it is important to keep in mind the specific questions asked. In this context, it is clear that Exhibit A, attached to UP&L's response to interrogatory No. 5, would contain the names of miners not listed on Exhibit C because of the scope of the respective interrogatories. Exhibit A is a list of all miners scheduled to work during the shutdown, while Exhibit C is UP&L's payroll record listing miners who received wages for work during the shutdown. Miners who were paid no wages were not listed on Exhibit C. Although, a portion of Exhibit A was apparently illegible, an answer to an interrogatory that is illegible in whole or in part is non-responsive. Thus, the UMWA could have demanded a complete response to its interrogatories, but it chose to proceed to settlement without ever clarifying the response to Interrogatory No. 5.

Furthermore, the record does not support the UMWA's contention that UP&L took joint responsibility for determining who might be eligible to be included in the settlement. UP&L responded to the UMWA's interrogatories. UP&L then relied on the list prepared by the UMWA and sought only to eliminate miners who had been previously paid. It was the UMWA that made the settlement offer that each miner on the now-

challenged list be paid one-half of his normal wages. The Union did not ask UP&L to verify the completeness of the list. Instead, it appropriately asked its Local Union, twice, to verify the list's accuracy. The obligation was the UMWA's, as representative of the miners, to make sure that the list it was submitting for settlement included all the miners it sought compensation for in the settlement. The fact that a list of miners who were not entitled to compensation was also attached to the settlement agreement does not establish that UP&L intended to pay compensation to miners who were on neither list. Thus, our review of the record leads us to conclude that substantial evidence supports the judge's conclusion that any mistake in preparing the list of eligible miners was not mutual but was unilateral on the part of the UMWA.

Whether UP&L believed that the UMWA's list of miners to be compensated included all of the miners who would have been entitled to compensation had the UMWA prevailed on its theory on the merits is irrelevant. The UMWA agreed to withdraw its complaint if the miners on the list were paid. UP&L was entitled to rely on the list of miners to be paid prepared by the UMWA. The UMWA keyed its settlement offer to the list of miners it had prepared in conjunction with the Local Union. The evidence does not support UMWA's contention that UP&L agreed to pay all miners 50 cents on the dollar. Rather, the evidence shows that UP&L agreed solely to pay all miners set forth on the UMWA's list of miners 50 cents on the dollar. The evidence further shows that UP&L abided by its part of the agreement and promptly discharged its duty by making the payments required thereunder. Only after the payments were made and disbursed to the 147 identified claimants did the UMWA belatedly demand payment for another 15 miners, and refuse to do what it had agreed to do upon payment to the listed miners, i.e., withdraw its complaint.

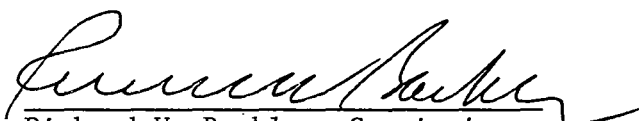
A settlement agreement may be reopened only on the grounds of mutual mistake or fraud. A unilateral mistake is not sufficient to allow the mistaken party to limit or avoid the effect of an otherwise valid settlement agreement. See, Brown v. County of Genesee, 872 F.2d 169, 174-75 (6th Cir. 1989); Mid-South Towing Co. v. Har-Win, Inc., 733 F.2d 386, 392 (5th Cir. 1984); Cheyenne-Arapaho Tribes of Indians v. United States, 671 F.2d 1305, 1311 (Ct. Cl. 1982); Callen v. Pennsylvania R.R., 332 U.S. 625, 630 (1948); Gaines v. Continental Mortgage & Investment Corp., 865 F.2d 375, 378 (D.C. Cir. 1989). Only a unilateral mistake by the UMWA in identifying the miners it believed were entitled to compensation occurred here. Fraud or mutual mistake is not present. Therefore, we agree with the judge that rescission or reformation of the settlement agreement is improper.

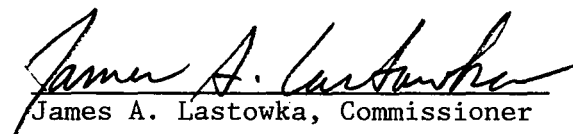
Finally, we agree with the judge that a hearing was not required to resolve this issue. No genuine issue of material fact has been presented because the terms of the settlement are clear from the face of the document itself. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-52 (1985). If the language used by the parties to an agreement is "plain, complete and unambiguous," the intention of the parties must be gathered solely from that language, no matter what the "actual or secret intention of the parties may have been." 17 AM. JUR. 2D Contracts § 245 (1964). Because the language of the settlement agreement between UP&L

and the UMWA is "plain, complete and unambiguous," a hearing to determine the parties' "actual or secret intention" was not necessary.

III.

Accordingly, we conclude that the judge did not err in dismissing the UMWA's complaint for compensation.


Richard V. Backley, Commissioner


James A. Lastowka, Commissioner


L. Clair Nelson, Commissioner

Chairman Ford, dissenting:

This Commission has held that individual miner claimants under section 111 of the Act, 30 U.S.C.821, are deemed to be parties even if their miner's representative is actually prosecuting the compensation claim as a party on their behalf. Loc. Union No. 1881, Dist. 17, UMWA v. Westmoreland Coal Co. and Secretary of Labor, 9 FMSHRC 1195, 1196 (July 1987). Amidst the charges and countercharges exchanged in the affidavits below, there appear to be 15 miners who have as cognizable a claim against UP&L as the 147 miners who were paid as part of the disputed settlement agreement.

Even if one were to assume that section 111 allows the "compromising" of the claims of the 15 miners in exchange for the benefits conferred by settlement upon their 147 fellow workers, the record in this case does not support such a result.

The December 8, 1988 letter from John T. Scott III, counsel for UP&L, to Joyce Hanula, representative for the UMWA, sets forth the terms of the settlement agreement ultimately approved by the judge. Paragraph No. 1 of that agreement states: "Attached as Exhibit A is a list of all claimants in this proceeding. UP&L shall pay to each listed claimant the amount of compensation specified for that claimant." UMWA Ex. H, attached to Hanula Affidavit. "Exhibit A," however, consists of more than just a list of all claimants; it also includes on pp. 8-9 a list of miners identified as "Members of Local Union 1769 Who Are Not Entitled to Compensation." The ineluctible conclusion is that the attachment of both lists to the agreement signified that both the UMWA and UP&L meant to account for all miners at the Deer Creek Mine - those who were entitled to some compensation through the settlement and those who were, for various reasons, not so entitled. 1/

Since the names of the 15 miners do not appear on either list I find more than sufficient grounds for establishing the mutual mistake argued by the UMWA. To be sure, the responsibility for compiling a true and complete list of claimants rested with the UMWA's representative and had her inquiries to the local union for verification of the claimants' list been carefully considered and answered, this matter might not be before us today. By attaching the list of non-claimants to the agreement, however, counsel for UP&L in effect endorsed the UMWA's error

1/ For some unexplained reason the list of those not entitled to compensation was not submitted to the judge with the rest of the settlement agreement. The list was, however, submitted for the record (as part of the December 8, 1988 letter) on UP&L's subsequent motion to dismiss the proceeding. Hanula Affidavit, supra. In his order of dismissal, however, the judge refers only to the seven page list of claimants. 11 FMSHRC 1650.

so as to provide grounds for finding a mutual mistake.

The UMWA urges upon the Commission the "equitable solution" of reforming the settlement agreement to include the 15 miners, or in the alternative dismissing the proceeding involving the 147 miners as settled and allowing a new complaint to proceed with respect to the 15 miners excluded from the settlement agreement. Serious impediments stand in the way of both proposals. With respect to reformation of the settlement agreement, such an action would amount to holding UP&L liable for an estimated \$4200.00 in additional compensation even though the operator insists it is not liable for any compensation in the first place and would, in the absence of the settlement agreement at issue, reserve its option to pursue the entire matter on the merits. As for dismissing the proceeding regarding the 147 miners already paid and allowing a new claim on behalf of the 15 miners to proceed, such an action would amount to reforming the settlement agreement inasmuch as the parties, in particular UP&L, had assumed the settlement to cover all ostensible claims arising from the withdrawal order issued at the Deer Creek mine. Either option would, as the judge indicated, impose "an entirely new and different settlement agreement on UP&L." 11 FMSHRC 1653.

Although the judge found no mutual mistake, I agree with his conclusion that if one had occurred the appropriate remedy would be rescission rather than reformation of the agreement. Shear v. National Rifle Association, 606 F.2d 1251, 1260 (D.C. Cir. 1979). I further note that both parties have offered rescission as an alternative to their principally recommended dispositions of this matter. Brief of UP&L on Review, p. 22; UMWA Reply Brief, below, at pp. 6-7.

In view of my foregoing conclusion that a mutual mistake was made in the course of agreeing to the disputed settlement, I see no reason for a hearing on that issue. I would therefore rescind the settlement agreement, return the parties to the status quo ante, and remand the matter to the judge for whatever additional proceedings may be appropriate.


Ford B. Ford, Chairman

Commissioner Doyle, dissenting:

The majority, after setting forth the opposing views advanced to the administrative law judge by affidavits of UP&L and the UMWA as to the intent of the settlement agreement, concludes that the judge did not err when he found that the settlement argument was valid and binding and required dismissal of the UMWA's complaint. I disagree.

The UMWA asserts that the settlement was intended to compensate all miners scheduled to work during the relevant period, at the rate of fifty cents on the dollar. UP&L asserts that the intent was to compensate only those miners whose names were on the list attached to the settlement agreement. Thus, we have a dispute as to an issue of material fact. Case law is clear that, in such instances, the party challenging the settlement agreement is entitled to a hearing on that issue. "[W]hen opposition to enforcement of the settlement is based not on the merits of the claim but on a challenge to the validity of the agreement itself, the parties must be allowed an evidentiary hearing on disputed issues of the validity and scope of the agreement." Mid-South Towing Co. v. Har-Win, Inc., 733 F.2d 386, 390 (5th Cir. 1984). In that case, the court found that the judge erred when he made a factual finding without holding an evidentiary hearing. Id. at 391.

In Auteria v. Robinson, 419 F.2d 1197 (D.C. Cir. 1969), the court found summary proceedings ill-suited to the resolution of factual issues related to the formation of the contract (a settlement agreement). Id. at 1200. There, as here, the judge appeared to rely on the statements of the attorney representing the party seeking to uphold the settlement agreement, which required rejection of the countervailing version set forth in the appellants' affidavit. Because appellants raised substantial issues of fact as to whether the parties were in mutual accord on the terms of the settlement, and because there was no opportunity for cross-examination or for credibility determinations by the judge, the court determined that appellants were entitled to an evidentiary hearing on the disputed facts. Id. at 1201-1203. Here, the judge made findings of fact in support of his conclusion that the case was settled, in its entirety, at the time the UMWA signed the settlement agreement. 11 FMSHRC 1653. However, his conclusions are both contradictory and unsupported by substantial evidence of record.

The judge found that "[t]he Union proposed instead that everyone receive \$.50 on the dollar" and that "[t]his was agreed to by UP&L." Id. at 1651. (emphasis added.) He then determined that "[u]nfortunately, when the parties reduced their agreement to writing they did not include 14 (or 15) of the miners ... entitled to settlement." Id. at 1651-52. Thus, there was an unqualified finding that both parties intended to compensate all miners and that the settlement agreement did not reflect what both parties intended to be the settlement. The judge then found, however, that "[i]n this case there was no mutual mistake. If a mistake occurred it was unilateral on the part of Local 1769 or the UMWA." Id. at 1652. The judge does not explain on what he based this conclusion but it should be noted that, while UP&L's attorneys argue this position,

neither the affidavit of Mr. Scott nor that of Mr. Means asserts that it was UP&L's intention to compensate only 147 miners rather than all miners working or scheduled to work during the period in issue. There being no other evidence in this record aside from the disputed settlement agreement, except the affidavit of Ms. Hanula to the contrary, I must conclude that there is no evidence in this record to support the judge's finding that any mistake was unilateral. Instead, by virtue of the judge's finding that the parties intended to compensate all miners, it is clear that the settlement agreement does not reflect the parties actual agreement.

The judge also erred when he found that "there can be no mutual mistake as to the number of miners entitled to compensation because on this issue the parties compromised." 11 FMSHRC 1652. In support of this finding, he cited Corbin on Contracts, which states, in relevant part:

[W]here the parties are consciously disputing an issue and agree upon a compromise in order to settle it, they are making no mistake as to the matter at issue and thus settled. There must be a mistake as to matters that were not at issue and were not compromised in order that the settlement may be avoidable on the grounds of mistake.

6 Corbin, Contracts § 1292 (1963).

There is no evidence in the affidavits before the judge that the parties were consciously disputing whether 162 or 147 or any lesser number of miners were entitled to compensation and that the parties had agreed to compromise on 147. Rather, the conscious disputes were over whether the operator was required to compensate any miners, whether only those miners assigned to the section described in the order were entitled to compensation, whether all miners in the entire mine were entitled to compensation, and the amount of compensation, if any, due each miner. If the UMWA had agreed to settle for compensation for only those miners on the idled section, the claim would be considered compromised. When the UMWA agreed to settle for fifty cents on the dollar rather than full compensation, that was a compromise. At no time (at least as evidenced by this record) did the UMWA contemplate settling on behalf of less than all of the miners scheduled to work during the period in issue. Therefore, there was no "compromise" on this issue and the settlement may be voidable on the grounds of mistake. Corbin, supra.

I must disagree with the majority that the inaccuracies in Exhibit C are not critical to the resolution of this case. Slip. op at 7. I believe they are in error when they state that "it is clear that Exhibit A ... would contain the names of miners not listed in Exhibit C because of the scope of the respective interrogatories." Id. In fact, the scope of Interrogatories No. 5 and No. 6 are identical. Interrogatory No. 5 applied to each UMWA member employed at Deer Creek and scheduled to work on the dates in issue. All of the names contained on Exhibit A should have been included on Exhibit C because Interrogatory No. 6 states as follows:

"6. With respect to each of the individuals identified in Interrogatory No. 5, please:

* * *

b. State in dollars and cents the hourly or daily rate of pay upon which each individual's most recent paycheck preceding November 3, 1986, was computed;"

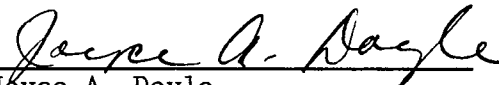
Complainants' First Set of Interrogatories at 2. (emphasis added.)

In response to Interrogatory No. 6(b), UP&L answered "See Exhibit C." Answers to Interrogatories at 4. Thus, contrary to the majority's assertion, UP&L, in effect, represented that all of the names contained on Exhibit A were also contained on Exhibit C. 1/

Irrespective of whether an accord was reached as to whether all miners were to be compensated, it is clear from the UMWA's Complaint for Compensation that a claim was being made on behalf of each and every miner who worked or was scheduled to work during the statutory period. Complaint at 2. The individual miners are the real parties in interest in this action, not the UMWA. The case was settled as to only 147 of the 162 miners who appear to fall within the categories set forth in the complaints. Because the other fifteen miners were not part of the settlement agreement and received no consideration as a result of it, the settlement agreement is void as to them. Therefore, I believe the judge erred in dismissing their action.

Even if one were to assume, for the sake of argument, that the mistake was not mutual but rather that UP&L was aware of the fifteen additional miners and intended to exclude them from the settlement, they would be just that, excluded from the settlement and not bound by it. Thus, the result is the same, i.e., their claims should not have been dismissed.

For the reasons set forth above, I would reverse the judge and remand for an evidentiary hearing and a reanalysis of the law.


Joyce A. Doyle
Commissioner

1/ The affidavits of UP&L's attorneys assert basically that they made no representations as to the lists provided in response to the Interrogatories. However, the Commission's Rule 57 requires that interrogatories be answered under oath, a requirement with which UP&L's attorneys failed to comply.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 28, 1990

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

v.

PENNSYLVANIA ELECTRIC COMPANY

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Docket No. PENN 88-227

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

DECISION

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. (1988) ("Mine Act"), and is before us for a second time on review. The Secretary of Labor alleges that Pennsylvania Electric Company ("Penelec") twice violated 30 C.F.R. § 77.400(c) by failing to guard two head conveyor drives at its Homer City Electric Generating Station ("Generating Station" or "Station"). 1/

The primary question before the Commission in our previous review was whether the cited working conditions were governed by regulations enforced by the Secretary under the Mine Act, as argued by the Secretary, or by regulations enforced by the Secretary under the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 et seq. (1988) ("OSHAct"), as argued by Penelec. A majority of the Commission

1/ 30 C.F.R. § 77.400(c) states:

Guards at conveyor-drive, conveyor-head, and conveyor-tail pulleys shall extend a distance sufficient to prevent a person from reaching behind the guard and becoming caught between the belt and the pulley.

The "head" end of a belt conveyor is the delivery or discharge end. The "head drive" is the device by which mechanical power is transmitted to the head pulley of a belt conveyor. See Bureau of Mines, U.S. Department of the Interior, A Dictionary of Mining, Mineral, and Related Terms 532, 533 (1968).

held that the Secretary properly could decide to make mine safety and health standards applicable to the cited area, but remanded the case to Commission Administrative Law Judge Gary Melick for further proceedings because the record did not clearly indicate whether the Secretary had properly asserted Mine Act jurisdiction. Pennsylvania Electric Co., 11 FMSHRC 1875, 1882 (October 1989)("Penelec"). The Commission stated:

Because of the pervasive ambiguity in the record on the question of whether the Secretary of Labor, through MSHA, has properly exercised her authority to regulate the cited working conditions... we find it appropriate to order further proceedings.

11 FMSHRC at 1885. On remand the judge held that he could not find "any legally cognizable Secretarial impropriety in exercising her authority to regulate [the area in question] within the framework of the Act."
12 FMSHRC 123, 124 (January 1990)(ALJ).

I.

Chairman Ford and Commissioner Doyle would reverse the judge's decision and Commissioners Backley and Nelson would affirm. ^{2/} As a consequence, the Commission is evenly split, a first-time occurrence at the Commission. We conclude that the effect of the split decision is to allow the judge's decision on remand to stand as if affirmed.

Section 113(c) of the Mine Act authorizes the Commission to delegate to "any group of three or more members any or all of the powers of the Commission." 30 U.S.C. § 823(c). The Commission has frequently designated itself as a panel of three members to exercise the powers of the Commission. The Mine Act does not expressly state that disposition of a case (whether affirmance or reversal) shall occur through the majority vote of the Commission or a designated group (panel) of its members. The legislative history provides some indication that case disposition is to be by the traditional judicial process of simple majority vote:

The Commission is authorized to act in panels of three members, with a majority of each panel sufficient to decide a matter. This organization is patterned after that of the National Labor Relations Board and is intended to give the Commission a more flexible administrative organization in order to facilitate the efficient processing of cases before the Commission.

S. Rep. No. 181, 95th Cong., 1st Sess. 47-48 (1977), reprinted in Senate

^{2/} Commissioner Lastowka did not participate in the consideration or disposition of this second review proceeding in this case.

Subcommittee on Labor, Committee on Human Resources, 95th Cong. 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 635-36 (1978) ("Legis. Hist.") (emphasis added). However, neither the Mine Act nor its legislative history addresses the additional subject of the effect of an evenly divided Commission panel.

In the absence of a definitive indication in the statute and its history, it is instructive to turn to general principles of federal adjudication. The United States Supreme Court affirms the decision of the lower court when the justices are evenly divided. In an early case where the justices were divided, Chief Justice Marshall, writing for the Court, held that "the principles of law which have been argued, cannot be settled; but the judgment is affirmed, the court being divided in opinion upon it." Etting v. Bank of the United States, 11 Wheat. 59, 78 (1826). In practice, appellate courts allow the lower court decision to stand when there is an evenly split decision. In a later case, the Court explained:

If the judges are divided, the reversal cannot be had, for no order can be made. The judgment of the court below, therefore, stands in full force.

Durant v. Essex Co., 74 U.S. 107, 112 (1868).

In a somewhat analogous context, courts of appeal have held that evenly split decisions of the Occupational Safety and Health Review Commission ("OSHRC") are reviewable. George Hyman Construction Co. v. OSHRC, 582 F.2d 834 (4th Cir. 1978); Marshall v. Sun Petroleum Products Co., 622 F.2d 1176 (3rd Cir. 1980). These courts determined that because an evenly split OSHRC decision is analogous to an evenly split court decision, the administrative law judge's decision should be allowed to stand. Id. The courts reasoned that the party losing before the administrative law judge is placed in a "jurisdictional limbo" unless the OSHRC order is appealable to the Court of Appeals. Hyman Construction Co., 582 F.2d at 837. In each case, the court determined that the OSHRC decision was a final order for purposes of judicial review and therefore subject to examination "by the next link in the hierarchal chain of review." Marshall, supra, 622 F.2d at 1180.

Several courts of appeals, however, have held the OSHRC errs when it issues a decision with an evenly split vote because "no official action can be taken by the Commission without the affirmative vote of at least two [of its three] members." Shaw Construction, Inc. v. OSHRC, 534 F.2d 1183, 1185 (5th Cir. 1976). See also, Cox Brothers, Inc. v. Secretary of Labor, 574 F.2d 465 (9th Cir. 1978). The court in each case determined that the OSHRC's decision was not a reviewable order within the jurisdiction of the Court. The holding in each of these cases, however, was based in large part on language in the OSHAct that is not contained in the Mine Act. 3/

3/ Section 12(e) of the OSHAct provides that "official action can be taken only on the affirmative vote of at least two members." 29 U.S.C. § 661(f).

A review of the Mine Act and its legislative history reveals no intent to limit judicial review of Commission decisions. The purpose of Congress in authorizing the Commission to act in panels of three or more members was to provide "a more flexible administrative organization in order to facilitate the efficient processing of cases." Legis. Hist. at 636. Adopting the traditional federal judicial model for handling evenly split decisions of this adjudicatory Commission will advance that Congressional objective. Accordingly, all Commissioners participating in this matter hold that this decision is a final order of the Commission subject to judicial review under section 106 of the Mine Act, 30 U.S.C. § 816. Because a majority of the Commission did not vote to reverse the decision of the administrative law judge, his decision stands in full force, as if affirmed. Set forth in section III of this decision, infra, are the Commissioners' separate opinions with respect to the merits of this case.

II.

Penelec also has raised two procedural matters on review. First, Penelec argues that Judge Melick deprived it of the opportunity to resolve ambiguities in the record by denying its motion to consolidate this case with other cases pending before the judge, which also raise jurisdictional issues concerning the Generating Station. The Commission's procedural rule provides that an administrative law judge "may ... order the consolidation of proceedings." 29 C.F.R. § 2700.12. A determination to consolidate lies in the sound discretion of the trial judge. In this instance, the judge decided not to consolidate the present case, involving two citations that had already been tried, decided and appealed to the Commission, with challenges to 23 subsequently issued citations that had not yet been tried. Instead, the judge stayed the hearing on the subsequently issued citations. Given these facts, all Commissioners participating hold that Judge Melick did not abuse his discretion in denying Penelec's motion to consolidate.

Penelec also argues that Judge Melick erred in denying its motion to reopen discovery. Penelec maintains that it was unable to present adequate evidence at the hearing on remand to establish a basis for determining whether the Secretary exercised her jurisdiction appropriately. It contends that the judge denied its motion without good cause. See 29 C.F.R. § 2700.55(a). It states that additional discovery was necessary because "[o]nly with the Commission's October 1989 decision was Penelec on notice that the Secretary might legitimately assert jurisdiction" at the Generating Station. Penelec Br. at 32.

We hold that Judge Melick did not abuse his discretion in denying Penelec's request to take discovery out of time. Penelec waited until December 1, 1989 to request discovery with respect to the issues remanded to the judge on October 10, 1989. Penelec has set forth no explanation why it did not seek to initiate this discovery earlier. Penelec's delay is particularly puzzling because the judge issued the

notice of hearing on October 20, 1989 and a prehearing order on November 8, 1989. Instead of seeking discovery within a reasonable time after the case was remanded, it waited until 12 days before the scheduled hearing to request discovery. We agree with the judge that Penelec's request for discovery was untimely and that it failed to show good cause for extending the time for initiating discovery. Under these facts, all Commissioners participating hold that the judge did not abuse his discretion.

III.

The opinions of the Commissioners on the merits of this case follow.

Commissioners Backley and Nelson, in favor of affirming the decision of the administrative law judge:

A majority of this Commission previously determined that "MSHA possesses statutory authority to regulate working conditions associated with Penelec's preparation of coal, and that therefore the Secretary of Labor could decide to make mine safety standards applicable" to the 5A & 5B head drives at Penelec's Generating Station. Penelec, 11 FMSHRC at 1882. This case was remanded to the administrative law judge because the Commission was "unable to determine with any degree of assurance from the murky record" whether the Secretary had decided to make mine safety standards or OSHA standards applicable to the head drives. Id. The record contained no evidence of enforcement activity by OSHA or MSHA prior to the issuance of the subject citations and no evidence that the Secretary adhered to the procedures set forth in the MSHA-OSHA Interagency Agreement ("Interagency Agreement"), 44 Fed. Reg. 22827 (1979), for resolution of jurisdictional conflicts between the two agencies. Penelec, 11 FMSHRC at 1883. The Commission concluded that "[b]ecause of the pervasive ambiguity of the record on the question of whether the Secretary of Labor, through MSHA, has properly exercised her authority to regulate the cited working conditions at Penelec's Generating Station," the case should be remanded for the taking of further evidence. Penelec, 11 FMSHRC at 1885.

At the hearing on remand, Inspector John Kopsic, the MSHA inspector who issued the head drive guarding citations involved in this case, testified that he regularly inspected the 5A and 5B conveyor belts prior to the issuance of the subject citations. Remand Tr. 118-19, 122, 124-25, 132. He further testified that he has been regularly inspecting this area since 1982 and that he has issued citations for guarding violations at the 5A and 5B head drives. Id. Based on this "newly developed undisputed evidence," the judge found that "MSHA had indeed previously inspected, and issued citations for violations at, the subject 5A and 5B head drives." 12 FMSHRC at 125 n.1. As Penelec presented no evidence to the contrary, the judge's finding in this regard is supported by substantial evidence.

Furthermore, MSHA had previously issued citations at these head drives to Rochester and Pittsburgh Coal Company ("R&P") or its subsidiary (Iselin Preparation Company), the operator of the coal cleaning plant at the Generating Station, and, according to Inspector Kopsic, Penelec was aware of these previous citations because its own employees abated the violations. Remand Tr. 127, 128-32, 150. The inspector further testified that on one occasion he had observed that a Penelec supervisor was present during the abatement of a head drive violation. Remand Tr. 128. Inspector Kopsic stated that he issued the present guarding citations to Penelec because the safety director of R&P's coal cleaning plant informed him that Penelec employees had removed the guards from the head drives and that it was Penelec's responsibility to maintain that area. Remand Tr. 153. Based on this evidence, the judge concluded that Penelec was aware of the previous inspections and violations at the head drives. 12 FMSHRC at 125 n.1. Again, Penelec did not present any evidence on this issue, and substantial evidence supports the judge's finding.

Based on the evidence presented at the remand hearing, it is apparent that the Secretary has consistently applied mine safety and health standards to the 5A and 5B head drives. No evidence was presented that the Secretary has applied occupational safety and health standards to these head drives. Consequently, we conclude that the Secretary has demonstrated that she has properly exercised her authority to regulate the working conditions at the cited area under the Mine Act. In addition, the record makes clear that Penelec had actual or constructive knowledge that citations had been issued in the past for violations of mine safety and health standards at the 5A and 5B head drives. Its employees participated in the abatement of these previous violations. The fact that past citations were issued to R&P is not controlling. An owner and its independent contractor are "operators" under section 3(d) of the Mine Act, 30 U.S.C. § 802(d), and either, in appropriate circumstances, may be held liable for violations of safety standards regardless of fault. See e.g., International Union, UMW v. FMSHRC, 840 F.2d 77 (D.C. Cir. 1988). Thus, the fact that MSHA cited R&P, an independent contractor, rather than Penelec, the owner, for past violations in the disputed area does not, by itself, negate MSHA's enforcement history or Penelec's knowledge of it.

The Interagency Agreement was developed, in part, to "provide a procedure for determining general jurisdictional questions." 44 Fed. Reg. 22827. In the Commission's previous decision, the majority determined that the first clear assertion of MSHA jurisdiction in the record was contained in an April 12, 1988 letter from the MSHA District Manager to Penelec stating that MSHA was expanding its inspection authority at the Generating Station to include all areas directly involved in the coal preparation process. Penelec, 11 FMSHRC at 1883. The record revealed that a copy of this letter was sent to the OSHA Area Office. On the basis of this evidence, the Commission questioned whether the Secretary had properly invoked her jurisdiction through the procedures set forth in the Interagency Agreement.

The evidence produced by the Secretary on remand makes clear that the particular area in question has been inspected by MSHA since at

least 1982 and no evidence was produced to show that OSHA has ever inspected it. As a consequence, the Interagency Agreement has no bearing on this case because no question or conflict between OSHA and MSHA existed. We now know that the Secretary has consistently inspected the head drives under the Mine Act rather than the OSHA Act. As discussed above, Penelec had notice of this fact.

Penelec and Edison Electric Institute ("Edison"), amicus curiae, also question at this stage MSHA's jurisdiction to inspect the head drives. Because the Commission previously determined that such jurisdiction exists, we need not respond to these arguments. 4/ We adopt the holding of the majority in our previous decision that MSHA has jurisdiction over the 5A & 5B head drives.

Accordingly we would affirm the decision of the administrative law judge.



Richard V. Backley, Commissioner



L. Clair Nelson, Commissioner

4/ We note that Penelec's and Edison's additional argument that MSHA cannot preempt OSHA's jurisdiction without first promulgating rules and regulations addressing the working conditions in electric generating facilities was not previously presented to the judge. Except for good cause shown, no assignment of error by a party may rely on any question of fact or law upon which the judge has not been afforded the opportunity to pass. 30 U.S.C. § 823(d)(2)(A)(iii); Union Oil Co., 11 FMSHRC 289, 297 (March 1989). Penelec has not shown any cause why this argument was not made to the judge. In addition, we note that MSHA does have broad safety standards in place governing belts and head drives. Thus, MSHA's standards address the working conditions of the cited area. MSHA is not necessarily required to develop more particularized standards that apply exclusively to those portions of electric generating facilities that are subject to its jurisdiction.

Chairman Ford, in favor of reversing the decision of the administrative law judge:

As a member of the majority in the Commission's prior consideration of this case, 11 FMSHRC 1875, I concurred in the decision to vacate Judge Melick's initial decision and to remand the matter for the taking of additional evidence on the jurisdictional issues giving rise to this dispute. I further concurred in the view that the broadly drawn definitions of "coal or other mine" and "coal mine" in section 3(h) of the Mine Act, 30 U.S.C. § 802(h), did implicate certain facilities at Penelec's Homer City Steam Electric Generating Station, such that the Secretary could assign occupational safety and health enforcement regarding those facilities to the Mine Safety and Health Administration.

The principal question that led me to join my colleagues in the majority was whether the Secretary had indeed assigned such enforcement authority to MSHA. Flowing from that principal question was my concern as to whether the assignment, if executed, was executed with sufficient clarity as to have given Penelec adequate notice that its coal handling activities at the Generating Station would be subject to Mine Act authority before the enforcement actions at issue were taken. The majority had concluded that such questions could not be answered on the basis of the "murky record" before us. 11 FMSHRC 1882. Regrettably, the record developed on remand and now before us on review is in many respects even murkier.

As supplemented by the remand proceeding, the record still exhibits inconsistencies in enforcement policies and practices (some of which the judge characterized as "bizarre"); unanswered questions as to whether there is an overall Departmental plan for accommodating jurisdictional tensions between the Mine Act and the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 et seq., (1982) at coal-fired electric power plants; and a patchwork scheme of inspections that does not adequately address the prior majority's concerns respecting the "whipsaw effects to which an employer can be subjected when important jurisdictional issues appear to be resolved with no assurance that potentially competing agencies have reached a mutual and definitive determination as to their respective roles." 11 FMSHRC 1885.

For those reasons I must part company with my two colleagues who find that "the Secretary through MSHA has properly exercised her authority to regulate the cited working conditions at Penelec's Generating Station." *Id.* It has not been demonstrated that the agencies involved, let alone Penelec, had a clear understanding of the jurisdictional lines of demarcation at the time the citations were issued.

The record, both initially and on remand, establishes the following pertinent chronology:

July 5, 1977 - District Manager Huntley by letter informs William Mason, OSHA operations officer, that contrary to OSHA's position that the Iselin Preparation Plant is under OSHA's jurisdiction, the Deputy Associate Solicitor for Mine Health and Safety (Department of the Interior) has determined that the Iselin Preparation Plant is under the Mining Enforcement and Safety Administration's (MESA's) jurisdiction. (Gov. Ex. 1).

July 28, 1977 - Coal Mine Inspection Supervisor Robert G. Nelson by Memorandum delineates those locations at the Generating Station where Iselin Preparation Co. "has or will have control." (Gov. Ex. 2). They include a "blending bin" subsequently identified at the remand hearing as being the same as bin No. 2 by Inspector Kopsik (Tr. p. 133). No specific reference, however, is made to the 5A and 5B conveyors or to their head drives.

August 25, 1977 - Penelec and MESA meet and reach an oral agreement as to the jurisdictional lines between MESA and OSHA at the Generating Station.

September 6, 1977 - R.C. Herman, Penelec representative at the August 25 meeting, memorializes his understanding of the August 25, 1977 agreement that states in part: "At #2 Bin MESA will have jurisdiction above the top of the bin except for the portions of #5A and #5B conveyors within the structure including the drive units and head pulleys." (Joint Ex. 1). (No record of MESA's understanding of the August 25, 1977 agreement has been produced in this proceeding.)

April 17, 1979 - The MSHA/OSHA Interagency Agreement is published whereby procedures are established for resolving disputes over jurisdiction between the two agencies. 42 F.R. 22827, 22828.

November 29, 1985 - In a Motion to Dismiss filed with the Commission in Utility Fuels, Inc., Docket No. CENT 85-89, Counsel for the Secretary states: "MSHA traditionally has not inspected power plants. Although the Secretary is not able to cite to a particular memorandum incorporating this policy, MSHA and its predecessors have consistently found the production of power to be outside the jurisdiction of the agency. MSHA has taken into account that a portion of the process utilized to produce electric power from coal requires handling and processing coal but has determined that those activities are subsumed in the specialized process utilized to produce electric power, and that the

overall power plant process is more feasibly regulated by OSHA."

January 7, 1988 - MSHA Inspector Kopsic issues the two citations on review alleging violations of 30 C.F.R. § 77.400(c) with regard to guarding at the 5A and 5B head drives at the Generating Station. The citations are issued to Penelec rather than to the Iselin Preparation Plant as had been the custom up to that date.

February 25, 1988 - Mr. Richard E. Orris, manager of safety for Penelec, writes to District Manager Huntley asking for Huntley's position with respect to MSHA's jurisdiction over facilities at the Generating Station including the 5A and 5B conveyors, their head pulleys and their drive units.

April 12, 1988 - District Manager Huntley responds by asserting that the 1977 Mine Act "extends to all areas which contribute to or play a part in the work of preparing coal." (Joint Ex. 3). Attached to the letter is a list of facilities that MSHA "is currently not inspecting but which MSHA has jurisdiction over and will be inspecting" and includes "[b]in No. 2 including motors, plug shoot probe, control buttons, conveyors 5A and 5B and all floors."

April 14, 1988 - District Manager Huntley forwards a copy of the April 12, 1988 letter to Mr. Gary Griess, Area Director of OSHA. (Gov. Ex. 3). (This letter was apparently lost or misdirected within OSHA since a duplicate was sent after the Commission's October 10, 1988 decision and remand and before the judge's December 13, 1989 hearing on remand. Tr. 157-160).

December 30, 1988 - Judge Melick issues his initial decision finding Mine Act jurisdiction over the 5A and 5B head drives.

January 31, 1989 - OSHA issues proposed rule 29 C.F.R. Part 1910 relating to Electric Power Generation, Transmission, and Distribution; Electrical Protective Equipment, wherein the agency states the rule covers work practices at "[f]uel and ash handling and processing installations such as coal conveyors and crushers." 54 F.R. 4974, 5009.

June 28, 1989 - At oral argument in a companion case, Westwood Energy Properties v. Secretary of Labor, MSHA, 11 FMSHRC 2408 (December 1989), counsel for the Secretary indicates that other coal

consuming industries such as steel mills and alumina plants may be subject to Mine Act jurisdiction if they engage in coal processing activities. (Oral Argument Tr. pp. 22-23, 25-26).

October 10, 1989 - The Commission issues its decision and remand in this case.

December 13, 1989 - Judge issues his decision on remand.

If there is a consistent or even discernible pattern of enforcement in the above chronology, I fail to see it. Nor does Inspector Kopsik's testimony on remand serve to resolve or reconcile the discrepancies set forth above. While he testified to having inspected the 5A and 5B conveyors including the head drives and to having issued citations thereon prior to January 7, 1988, his testimony is equivocal as to the locations of the violations. Tr. 123. He had no recollection of the dates when the citations were issued and it appears that the citations, when issued, were issued because Iselin employees were exposed to the alleged hazards cited. Tr. 155. Unfortunately, none of the citations Inspector Kopsik testified to was introduced into evidence so as to document his generalized testimony with respect to the scope of his pre-1988 inspections at the Generating Station. In any event, regardless of what Inspector Kopsik and his immediate supervisors considered to be the scope of Mine Act jurisdiction at the Generating Station, there existed on January 7, 1988 no official Department of Labor policy that assigned coal handling and processing activities undertaken by an electric utility to MSHA's jurisdiction. On the contrary, the last official pronouncement of record prior to January 7, 1988 that addressed such activities was the Secretary's declaration in Utility Fuels, supra, that coal handling and processing at power plants was "more feasibly regulated by OSHA."

Furthermore, there are a number of other anomalies revealed on remand that confound any productive inquiry into the jurisdictional issues placed before the Commission in this case. First, it appears that for several years the jurisdictional lines between MSHA and OSHA were determined by the union affiliation of the employees in the various locations throughout the Generating Station. That rule of thumb seems to have been imposed early on (See attachment to the MESA memorandum of July 28, 1977 identified as Gov. Ex. 2 and Tr. pp. 97-102.) and was only officially rescinded in District Manager Huntley's letter of April 12, 1988 (Joint Ex. 3). Such a distinction assuredly has no foundation in the Mine Act.

Second, for enforcement purposes MSHA considers the Iselin Preparation Company as the mine "operator" and identifies it as such, while the agency considers Penelec an "independent contractor" to Iselin. (Once the January 7, 1988 citations were issued, MSHA required Penelec to obtain a "contractor" identification number. Tr. p. 88). In reality the Iselin Preparation Plant is owned by Penelec but is operated by Iselin, Penelec's independent contractor and a subsidiary of the Rochester and Pittsburgh Coal Company. Thus, the enforcement scheme

employed by MSHA is based upon a characterization that is the complete obverse of the actual contractual relationship obtaining at the Generating Station.

Third, on review the Secretary takes the position that all fuel handling facilities at the Generating Station that handle "run of mine" coal are subject to Mine Act jurisdiction and MSHA enforcement while all facilities handling processed coal are subject to OSHA jurisdiction and enforcement. (Secretary's Brief, p. 21). Yet the schematic "coal flow diagram," introduced in the initial hearing as Exhibit B, clearly indicates that the Huntley letter of April 12, 1988 sought to extend MSHA's jurisdiction over facilities solely dedicated to the handling of processed coal. For example, the bottom of the diagram depicts a route for truck-delivered pre-processed coal that completely bypasses the processing facilities at the Generating Station and delivers the coal directly to generating unit 3 of the power plant. Nevertheless, the schematic identifies this bypass as subject to MSHA's jurisdiction.

In sum, the above evidence of record leads me to conclude that MSHA's authority to regulate the cited conditions at Penelec's Generating Station has not been properly exercised inasmuch as Penelec had insufficient and conflicting notice as to the scope of Mine Act authority up to the time the citations were issued in early January of 1988. Accordingly, on that basis alone I would reverse the judge and vacate the citations.

On a more fundamental level, however, the record thus far adduced calls into question whether dual enforcement by both MSHA and OSHA at the Homer City Generating Station and others similarly situated comports with Congressional intent and achieves the goals of the respective statutes from which the two agencies derive their authority and purpose.

In her brief on review the Secretary acknowledges a contradictory position respecting Mine Act jurisdiction over power plants taken by her predecessor in Utility Fuels, supra, Secretary's brief, p. 12, but does not repudiate it. It could therefore be inferred that jurisdiction over the coal handling facilities at electric generating plants may be decided on an ad hoc, case by case basis. Such an approach, however, gives utilities and other coal consumers little guidance and less notice as to what their compliance responsibilities are to be from one location to another or from one day to another. ^{1/} It would also frustrate any attempts to develop corporate-wide safety programs for utility companies with multiple generating stations - some under OSHA jurisdiction alone, and some under combined MSHA and OSHA jurisdiction.

^{1/} In that connection, I note with interest the settlement agreement approved on August 3, 1990 by the judge in Westwood Energy Properties, supra, a companion case to the instant case, whereby MSHA agrees not to assert jurisdiction over an electric power generating station and its fuel handling facilities located on an abandoned coal mine site even though the fuel, known as culm, contains refuse coal and undergoes processes similar to those at issue here. 12 FMSHRC _____

Such a lack of consistency and uniformity can have negative safety consequences even at a single location such as the Homer City Station. For instance, MSHA electrical standards for surface coal mines and facilities incorporate by reference the provisions of the National Electric Code (NEC). The NEC, however, explicitly exempts electric utility installations from its coverage. National Electric Code, § 90-2(b)(5) (1971). The irony of this contradiction was not lost on the Fourth Circuit Court of Appeals when it held that a utility was not an independent contractor for purposes of the Mine Act: "MSHA would apply to electric utilities a code which by its very terms excludes electric utilities." Old Dominion Power Co. v. Donovan, 772 F.2d 92, 99 (1985). ^{2/}

These specific standard-based conflicts attest to the "whipsaw" effects that concerned the majority in our prior decision. Viewed against the safety and health goals of the two statutes in question, however, these conflicts loom larger than mere inconveniences to those industrial entities subject to dual enforcement: they constitute a potential for confusion that can actually diminish safety as the Fourth Circuit warned. Surely Congress could not have intended such a contrary result.

The Mine Act's jurisdictional map as drawn by Congress is to be found in Section 3, specifically in the definitions of "coal or other mine" and "coal mine." Those definitions are not models of verbal brevity and clarity, but it is generally accepted that the definitions were broadly drawn in order to avoid questions of jurisdiction such as those that arose in the course of the Buffalo Creek disaster wherein the Bureau of Mines, MSHA's predecessor, encountered challenges to its authority to regulate impoundments and retaining dams directly associated with coal mining. See S. Report No. 95-181, 95th Cong., 1st Sess. 14, reprinted in U.S. Code Cong. & Admin. News 1977, 3401, 3414.

^{2/} Amicus Edison Electric Institute (EEI) argues that even if a clear line of demarcation could be drawn between those areas subject to MSHA jurisdiction and those subject to OSHA jurisdiction at a single location, inconsistencies between the respective standards of the two agencies could have adverse consequences for employee safety. For example MSHA standards require a lock out and tagging system while repairs are made on electrical systems while OSHA permits utilities to employ a tagging system only. Compare 30 C.F.R. § 77.501 with 29 C.F.R. § 1926.950(d). Similar differences arise with respect to clearances between mobile equipment and overhead power lines. Compare 30 C.F.R. § 77.807.2 with 29 C.F.R. 1926.950(d) (Table V-1); 952(c)(2). EEI argues that such conflicting compliance requirements would complicate equipment design as well as employee safety work rules and training, and goes on to quote the Fourth Circuit in Dominion, supra: "Requiring electric utility employees suddenly to adhere to conflicting standards depending on their job location can only lead to danger, especially where work around high voltage is involved." 772 F.2d at 99. From a safety standpoint, the arguments of amicus and the conclusions of the Fourth Circuit are most compelling.

The definition of "coal or other mine," set forth in section 3(h)(1) of the Act is divided into three parts: (A) an area of land from which minerals are extracted; (B) private ways and roads appurtenant thereto; and (C) a panoply of facilities and structures associated with the extraction, milling, and preparation of coal and other minerals. Traditionally, the three subparts of section 3(h)(1) have been considered separate and discrete so that an entity falling within any one of the three could generally constitute a "mine" for purposes of the Act. Donovan v. Carolina Stalite Co., 734 F.2d 1547 (D.C. Cir. 1984). Such a reading of the definition has led the Secretary here to argue Mine Act jurisdiction over Penelec's 5A and 5B head drives since they are "equipment" used in "the work of preparing coal" which is in turn defined in section 3(i).

A plausible alternate reading of section 3(h)(1) would hold that subparts (B) and (C) are subordinate to subpart (A), i.e., that the facilities and structures referred to in (C) are those associated with the "area of land" referred to in (A). This alternate reading of section 3(h)(1) is more clearly reflected in the definition of "coal mine," section 3(h)(2), derived verbatim from the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1972).

Close analysis of section 3(h)(2) indicates that the facilities listed therein are all delimited by a geographical referent: the "mine" as that is generally and traditionally understood. Stripped of all extraneous language except that necessary for discussion here, section 3(h)(2) would read as follows:

Coal mine means an area of land and all ...
facilities ... placed upon ... or above the surface
of such land ... used in the work of extracting ...
bituminous coal ... and the work of preparing the
coal ... and includes custom coal preparation
facilities.

Put another way, the definition could be viewed as a pyramid, the delimiting and all-encompassing base of which is "an area of land" and the apex of which is "custom coal preparation facilities."

To date the Commission has not exercised strict adherence to the traditional interpretation of "coal or other mine." If it had, Oliver W. Elam, Jr. Co., 4 FMSHRC 5 (January 1982) would have been decided differently. In Elam the Commission held that a commercial dock loading operation that broke and crushed coal for easier loading was not a "mine" even though, by a strict reading of sections 3(h)(1) and 3(i), it was a "facility" and it engaged in "the work of preparing coal" to the extent that it engaged in "breaking," "crushing" and "loading" coal. Similarly, strict adherence to the alternative interpretation of sections 3(h)(1) and 3(h)(2), proffered above, would result in an overly circumscribed scope of jurisdiction that would limit Mine Act authority to those facilities located on the same parcel of land from which the coal is extracted.

A rational path between the two extremes and one that comports

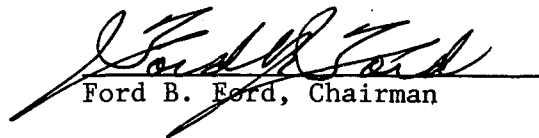
with Congressional intent is that devised by the Commission in Elam: that one looks not only to the facility or activity in question but also "into the nature of the operation performing such activities" Id. p. 7. In other words, as pithily expressed by Commissioner Doyle in her earlier dissent, Congress did not intend MSHA "to follow the coal wherever it might go." 11 FMSHRC 1890.

The "nature" of Penelec's operation is electric power generation. The feedstock for that power generation could be oil, gas, uranium, culm or coal. The fact that coal was the chosen feedstock here does not compel a conclusion that the 5A and 5B head drives constitute a "mine" for purposes of the Act.

At some point one has to look up from the text of the statute and view the jurisdictional question through the lens of common sense and practicality, mindful that Congress intended to regulate a specific and identifiable sector of commerce by passing the Mine Act. I conclude that Penelec's coal handling facilities, including the 5A and 5B head drives, do not fall within that sector nor within the range of facilities meant to be included in sections 3(h)(1) and 3(h)(2).

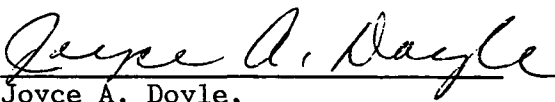
That conclusion is buttressed by the record adduced here. Dual jurisdiction between OSHA and MSHA at Penelec's Generating Station and others similarly situated, with its attendant potential for conflicting compliance requirements, can have negative consequences for safety in contravention of the Congressional purposes at the heart of both the Mine Act and the Occupational Safety and Health Act.

Accordingly, upon careful consideration, I would vacate the citations at issue for lack of jurisdiction and dismiss the proceeding.


Ford B. Ford, Chairman

Commissioner Doyle, in favor of reversing the decision of the administrative law judge:

For the reasons set forth in my dissent, a copy of which is attached, I disagreed with the Commission's earlier determination that "MSHA possesses statutory authorization to regulate working conditions associated with Penelec's preparation of coal ..." 11 FMSHRC 1875, 1882 (October 1989). Nothing in either the administrative law judge's decision on remand or the decision affirming that decision dissuades me from my earlier view that the operations cited by the Secretary are not subject to the jurisdiction of the Mine Act. Accordingly, I would reverse the judge and dismiss the case against Penelec.


Joyce A. Doyle,
Commissioner

Commissioner Doyle, dissenting:

The respondent, Pennsylvania Electric Company ("Penelec"), is the operator of an electric power generating station and has for some years been doing on-site processing of some of the coal used at of its generating station, in order to insure compliance with EPA emission standards, issued in 1977. The coal conveyor cited in this case transports coal received from the Helen and Helvetia Mines between bins on the generating station grounds, most of the coal eventually going to the cleaning plant. Trucked coal is transported on different conveyors with only the run-of-mine portion being diverted to the cleaning plant.

In January 1988, MSHA for the first time inspected the head drives of the 5A and 5B conveyors and sometime thereafter an MSHA district manager advised Penelec that MSHA was also asserting jurisdiction over additional areas of the power plant.

The case before us deals only with alleged violations with respect to the head drives and was submitted on stipulated facts. The administrative law judge found in favor of MSHA and Penelec petitioned for review, asserting that it was not subject to the Mine Act based on:

1. The plain language of the statute and its legislative history;
2. Its work not being that usually performed by an operator of a coal mine;
3. Its being the ultimate consumer of the coal.

The majority of the Commission finds that the processes performed at Penelec's plant "are performed to prepare the coal to meet particular specifications and emission requirements" and are thus "activities ... usually performed 'by custom preparation facilities, undertaken to make coal suitable for a particular use or to meet market specifications.'" Slip op. at 6. The majority also finds Penelec's work to be "the type of work 'usually done by the operator of [a] 'coal mine.'" Slip op. at 7. They discount any exemption for the ultimate consumer of coal and, based on the language of the statute, conclude that the Secretary "properly could decide to make mine safety standards applicable to the disputed area." They are, however, unable to determine from the record whether the Secretary has made such a determination. Slip op. at 8. The majority cites numerous factors both within and outside of the record that show conflicting indications as to which agency in the Department of Labor exercises safety and health authority over operations such as Penelec's. Because of this ambiguity, they remand the matter to the administrative law judge for the taking of further evidence on the jurisdictional question and the entry of a new decision.

I disagree that the head drives of the 5A and 5B conveyors fall within the definition of a "coal mine" as set forth in the Mine Act or that they are subject to that jurisdiction simply because, in some instances, they convey run-of-mine coal to the preparation plant, as opposed to conveying processed coal. I further believe that the case should be decided on the record before us rather than being remanded for the taking of additional evidence.

Section 3(h), 30 U.S.C. §802(h), states:

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

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

The "work of preparing coal" is defined in section 3(i), 30 U.S.C. §802(i), as follows:

[i] "work of preparing the coal" means the breaking, crushing, sizing, cleaning, washing, drying, mixing, storing and loading of bituminous coal, lignite, or anthracite, and such other work of preparing such coal as is usually done by the operator of the coal mine.

A portion of the legislative history pertaining to these sections has been widely quoted in determining Mine Act coverage. That language states that the definition of a mine is to be given the broadest possible interpretation and that doubts should be resolved in favor of inclusion. However, examination of that entire passage of the legislative history indicates a context in which Congress was contemplating regulation of mines in a more traditional sense. The complete passage reads as follows:

Thus, for example, the definition of 'mine' is clarified to include the areas, both underground and on the surface, from which minerals are extracted (except minerals extracted in liquid form underground), and also, all private roads and areas appurtenant thereto. Also included in the definition of 'mine' are lands, excavations, shafts, slopes, and other property including impoundments, retention dams, and tailings ponds. These latter were not specifically enumerated in the definition of mine under the Coal Act. It has always been the Committee's express intention that these facilities be included in the definition of mine and subject to regulation under the Act, and the Committee here expressly enumerates these facilities within the definition of mine in order to clarify its intent. The collapse of an unstable dam at Buffalo Creek, West Virginia, in February of 1972 resulted in a large number of deaths, and untold hardship to downstream residents, and the Committee is greatly concerned that at that time, the scope of the authority of the Bureau of Mines to regulate such structures under the Coal Act was questioned. Finally, the structures on the surface or underground, which are used or are to be used in or resulting from the preparation of the extracted minerals are included in the definition of 'mine'. The Committee notes that there may be a need to resolve jurisdictional conflicts, but it is the Committee's intention that what is considered to be a mine and to be regulated under this Act be given the broadest possibly [sic] interpretation, and it is the intent of this Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act." S. Rep. No. 95-181, 95th Cong., 1st Sess. 14 (1977), reprinted in U.S. Code Cong. & Admin. News 1977, 3401, 3414.

While that language is expansive, it is mine oriented, and it cannot be forgotten that the Act was intended to establish a "single mine safety

and health law, applicable to all mining activity." S. Rep. No. 461, 95th Cong., 1st Sess. 37 (1977) (emphasis added). "The statute is aimed at an industry with an acknowledged history of serious accidents." Marshall v. Stoudt's Ferry Preparation Co., 602 F.2d 589, 594 (3d Cir. 1979). There is no indication of any intention to follow the coal wherever it might go and certainly no indication that Congress intended to regulate other industries such as electric utilities or steel mills as only recently asserted by the Secretary. ^{1/} Indeed, the courts have recognized that it is "clear that every company whose business brings it into contact with minerals is not to be classified as a mine within the meaning of section 3(h)." Donovan v. Carolina Stalite Co., 734 F.2d 1547, 1551 (D.C. Cir. 1984).

I recognize that, in addition to considering Congress' concerns as set forth in the legislative history, deference is generally to be accorded interpretations by the agency charged with enforcing the law. Here, however, the record contains no evidence that, since the Mine Act became effective in 1978, the Secretary has made any previous attempt, either by the issuance of regulations or otherwise, to include electric power plants within the Act's coverage or to put the operators of such facilities on notice of liability under the Mine Act. Nor does the record indicate that the efforts of a district manager to bring Pen-elec's facility within its coverage represents anything more than the district manager's own personal interpretation of the Mine Act.

It should be noted that the Secretary's counsel stated at oral argument that resolution of this case rests solely on the language of the Mine Act itself, which he asserted mandates coverage, and has nothing to do with deference to the Secretary's interpretation of the Mine Act. Tr. 32, Oral Argument, June 28, 1989. It is not surprising that the Secretary eschews deference to her interpretation of this portion of the Mine Act since the Secretary's policy with respect to whether electric utilities come within Mine Act coverage has been exhibited in a variety of ways as follows:

1. Her implied interpretation that coal handling at electric power generating stations does not come within the Mine Act, based on her failure to assert such jurisdiction for approximately ten years after passage of the Mine Act.

^{1/} This position was advanced by the Secretary during oral argument before the Commission in Westwood Energy Properties v. Secretary of Labor, MSHA, PENN 88-42R, Tr. 26, June 28, 1989.

2. Her position as set forth in an earlier Commission case that:

MSHA traditionally has not inspected power plants. Although the Secretary is not able to cite to a particular memorandum incorporating this policy, MSHA and its predecessors have consistently found the production of power to be outside the jurisdiction of the agency.

MSHA has taken into account that a portion of the process utilized to produce electric power from coal requires handling and processing coal but has determined that those activities are subsumed in the specialized process utilized to produce electric power, and that the overall power plant process is more feasibly regulated by OSHA.

Utility Fuels Inc., Docket No. CENT 85-59 (Sec. Motion to Dismiss, November 29, 1985).

3. Her position that coal handling at electric utilities comes within coverage of the Mine Act, as asserted in this case.

4. Her position that coal handling at electric power generating facilities is governed by the OSHA Act, as set forth in regulations recently proposed by OSHA for the operation and maintenance of electrical power generation facilities, which regulations include detailed provisions governing coal handling and processing at those facilities. 54 Fed. Reg. 4974-5024 (1989).

5. Her position that OSHA's proposed rules would apply only to electric generating facilities using already processed coal and that facilities using run-of-mine coal would be subject to Mine Act jurisdiction, as asserted by her counsel at oral argument before the Commission in this case. Tr. 24, 29, 33, Oral Argument, June 28, 1989. 2/

Because her interpretations have been neither longstanding nor consistent, any deference that would ordinarily be due to the Secretary in interpreting the Mine Act is not appropriate to this instance. 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); Sec. v. Beth-Energy Mines, 11 FMSHRC 1445, 1451 (August 1989); Sec. v. Florence Mining Co., 5 FMSHRC 189, 196 (February 1983).

2/ Since some conveyors in Penelec's operation transport coal that meets the emission standards without further processing, those conveyors would, under this theory, presumably remain subject to OSHA jurisdiction rather than MSHA jurisdiction, a position that seems to belie that any consideration was given "to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment," as required by Section 3(h) of the Mine Act, 30 U.S.C. §802(h)(1).

I also view the Commission's holding today as inconsistent with our precedent. The Commission previously found that a commercial dock in which coal was stored, broken and crushed did not fall within the coverage of the Mine Act because the coal preparation was not done to "meet customers' specifications nor to render the coal fit for any particular use." MSHA v. Oliver M. Elam, Jr., Co., 4 FMSHRC 5, 8 (January 7, 1982). After noting that the Commission had concluded in Elam that the Mine Act requires an inquiry "not only into whether the operation performs one or more of the listed work activities [in section 3(i)], but also into the nature of the operation performing such activities," the Commission today avoids an examination of the nature of Penelec's operation and finds that, because the station's coal must meet "particular specifications and emissions requirements," an electric power generating plant is really a coal mine. Slip op. at 6. (emphasis in original).

I am unable to find any basis in either the statute or the legislative history for the distinctions made by either the Secretary (if the conveyor belt moves processed coal, OSHA governs; if it moves run-of-mine coal, Mine Act governs) or the Commission majority (if coal processing is done other than to meet customer specifications, no Mine Act coverage; if coal is processed to meet "particular specifications," Mine Act coverage) nor do I see that these distinctions have anything to do with the Mine Act's overall aim, which is to regulate the safety and health of miners. Rather, I think these artificial distinctions have arisen as a result of various words and phrases of Mine Act definitions having been examined in isolation, with no consideration being given to Congress' overall aim, and with no consideration being given to the Commission's language in Elam, supra, that requires inquiry into "the nature of the operation" as well as examination of the particular operations being performed. 3/ Had Congress wanted to regulate not only mines but electric power generating stations, steel mills and other coal consumers, I think it would surely have given some indication of that intent.

3/ As noted by the United States Court of Appeals for the District of Columbia Circuit, statutes "must be interpreted in light of the spirit in which they were written and the reasons for their enactment." General Serv. Emp. U. Local No. 73 v. N.L.R.B., 578 F.2d 361, 366 (D.C. Cir. 1978). In the same vein, Judge Learned Hand observed that "the duty of ascertaining [the] meaning [of a statute] is difficult at best and one certain way of missing it is by reading it literally..." See Monarch Life Ins. Co. v. Loyal Protective Life Ins. Co., 326 F.2d 841, 845 (2d Cir. 1963).

In determining what constitutes a "coal mine" as defined by the Mine Act, the majority also dismisses out of hand the precedential value of any cases decided under the Black Lung Benefits Act. 30 U.S.C. §901 et seq. (1982). I do not believe those cases can be so lightly dismissed. The majority has determined that these cases lack precedential value because "black lung benefits are financed by a trust, funded by a tax on 'coal sold by producers,'" whereas "the Mine Act's goal is to assure safe and healthful working conditions for the nation's miners." Slip op. at 8, n. 7. "Under the Mine Act 'coal mine' is defined in broad terms to better effectuate the salutary effects of that goal." Slip op. at 8, n. 7. In fact, the definition of "coal mine" set forth in section 3(i) of the Mine Act specifically applies not only to the Mine Act but also to the Black Lung Benefits Act. I find nothing in the Mine Act, the Black Lung Benefits Act or the legislative history that suggests the term is to be construed differently for purposes of determining Mine Act coverage than in determining Black Lung benefits coverage. And while the majority quotes the court in Stroh v. Director, Office of Workers' Compensation Programs, 810 F.2d 61 (3d Cir. 1987) to the effect that the function of a miner seeking black lung benefits should be "integral to the ... preparation of coal, not ancillary to the delivery and commercial use of processed coal" (slip op. at 8, n. 7) as additional evidence of the irrelevance of the Black Lung cases, I view the test developed by the Stroh court and other courts for eligibility for Black Lung benefits as quite relevant in determining when an operation falls within the definition of a "coal mine" as set forth in the Mine Act. 4/ In fact, the United States Court of Appeals for the Third Circuit, in deciding a black lung case, made specific reference to its earlier holding in Marshall v. Stoudt's Ferry Preparation Co., 602 F.2d 589 (3d Cir. 1979), a Mine Act case, as authority for its construction of the terms "coal mine" and the "work of preparing coal." Dowd v. Director, OWCP, 846 F.2d 193, 195 (3d Cir. 1988).

4/ The test set forth is Stroh and earlier cases for determining eligibility for black lung benefits involves a two-prong test, the first being a "situs" test, which requires work in or around a coal mine or coal preparation facility and has required the courts to construe the terms "coal mine," and "work of preparing coal" as defined in section 3 of the Mine Act. The second prong is the "function" test referred to by the majority, which requires that the claimant's job be "integral to the extraction or preparation of coal, not ancillary to the delivery and commercial use of processed coal." It should be noted that, if one agrees with the Secretary and the majority that Penelec's operations include "coal preparation," those of Penelec's employees who work in such preparation would fall within the definition of "miner" set forth in the Black Lung Benefits Act, i.e., "... any individual who works or has worked in or around a ... coal preparation facility in the ... preparation of coal." 30 U.S.C. §902(d)

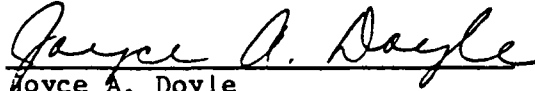
The Secretary also asserts that the Black Lung cases are of no avail to Penelec because they involve "the handling of coal that already had been prepared." Sec. br. at 14. I believe the Secretary misreads those cases. In the cases to which she refers, the courts have made the determination, as part of their construction of the terms "coal mine" and "the work of preparing coal," that once coal has entered the stream of commerce or reached the ultimate consumer, coal preparation has been completed and that, thus, the facilities at which those claimants worked did not fall within the definitions of "coal mine" or "work of preparing coal" set forth in sections 3(h) and 3(i) of the Mine Act. Based on their determination that the term "coal preparation" was much narrower in scope, the claimants were found ineligible for benefits. In Eplion v. Dir., OWCP, 794 F.2d 935 (4th Cir. 1986), cited by the Secretary, the mine operator washed coal for a second time because of dust complaints. Because the washing was "not necessary for processing of the coal into its marketable form," the court declined to extend the definition of a "coal mine" to include that facility. Eplion v. Director, OWCP, supra, at 937. (emphasis added). Likewise, the court in Southard found that the "preparation of coal occurs precedent to its retail distribution and consumption." Southard v. Director, OWCP, 732 F.2d 66, 69 (6th Cir. 1984). Accord Director, OWCP v. Ziegler Coal Co., 853 F.2d 529, 536 (7th Cir. 1988); Johnson v. Weinberger, 389 F. Supp. 1296 (S.D. W.VA. 1974).

Also, as noted by the Secretary, the Third Circuit in Dowd, found the claimant to be a miner, but in so doing stressed that "the claimant's employer ... does not consume the coal, and does not utilize coal to produce a product other than coal." Dowd, supra, at 195. As further noted by the Secretary, the court in Stroh found the claimant to be a miner but also emphasized that the "processing plant to which Stroh delivered was not an ultimate consumer..." Stroh, supra, at 64. Similarly, the Fourth Circuit in Roberts v. Weinberger found the claimant to be a miner, stating that coal is extracted and prepared when it is "in condition for delivery to distributors and consumers." Roberts v. Weinberger, 527 F.2d 600, 602 (4th Cir. 1975). These cases, while not affirmatively holding that coal consumers do not fall within the definition of "coal mine," expressly limit their holdings to facilities that are not coal consumers.

As noted above, I believe that, while the definition of "coal mine" as set forth in the Mine Act is to be broadly interpreted, the interpretation is not without limitations. I am of the opinion that the plain language of the statute does not bring Penelec's operation within coverage of the Mine Act, that the legislative history does not suggest the breadth of coverage asserted by the Secretary and that the

Secretary's interpretation, as set forth in this case, is not entitled to deference. In addition, I am not convinced that ultimate consumers, engaged in the production of a product other than coal, are subject to Mine Act jurisdiction.

For the foregoing reasons, I would reverse the judge and dismiss the case against Penelec.


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Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
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August 29, 1990

HARRY RAMSEY :
 :
 v. : Docket No. WEST 88-246-DM
 :
 INDUSTRIAL CONSTRUCTORS :
 CORPORATION :
 :

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

DECISION

BY THE COMMISSION:

In this discrimination proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act" or Act"), Industrial Constructors Corporation ("ICC"), seeks review of a decision by Commission Administrative Law Judge John J. Morris sustaining a complaint of discrimination brought by Harry Ramsey pursuant to section 105(c)(1) of the Mine Act. 1/ In an Interim Order the judge found that two acts of discrimination by ICC had occurred: the first, when Ramsey was constructively discharged on August 13, 1987, as the result of a safety related complaint, and the second, when ICC subsequently refused to rehire him. 11 FMSHRC 1585 (August 1989)(ALJ). In a final decision ICC was ordered to pay Ramsey back pay, interest, attorney's fees and costs. 11 FMSHRC 1988 (October 1989)(ALJ). The Commission granted ICC's petition for discretionary review. For the reasons that follow, we reverse the judge's decision.

Complainant Ramsey was employed at ICC's Colosseum gold mine, located near San Bernadino, California, from May 1987 until August 1987. With both his prior employer and his own company, Ramsey operated and hired operators of heavy equipment. At ICC, Ramsey initially operated

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

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].

30 U.S.C. § 815(c)(1).

various types of equipment at the mine site and briefly worked as a laborer. Tr. 24-36. In June or early July 1987, Ramsey was assigned as a loader operator to ICC's newly established rock crusher operation, but actually worked as the crusher operator because the individual hired as the crusher operator failed to appear for work. On July 18, 1987, he was reclassified by the foreman, Clifford Morrison, from loader operator to crusher operator with a pay increase. Exh. C-2, Tr. 37-38, 155.

As a crusher operator Ramsey was located in the control tower, an 8'x8' building, 20 feet in height with windows on all sides, affording the operator a view of the working area. Tr. 40-42, Exh. C-3. The duties of the crusher operator were to monitor and insure the continuous flow of material (rock) into and out of the hopper and to shut down the crusher whenever the hopper became blocked up or when a problem with the conveyor belt arose. Tr. 38-40, 44.

Ramsey testified that under normal procedures, when the mechanic or the foreman noticed a buildup of material, they would inform him by hand signal of the problem. Ramsey, under the foreman's or mechanic's instructions, would then alert the three or four workers in the area, first by a horn signal, as a general alert, and then by hand signals, directing them to the specific problem area. When all workers were in view, the machinery was then shut down, and the blockage or spillage could then be safely removed. Tr. 38-40, 44-45. From a designated area the mechanic or foreman would also inform him by hand signals when they wished him to shut off the water spray system, which primarily controlled dust during production and at times was used to increase the moisture content of the material being processed. Tr. 47. It is undisputed that standard operating procedure, shortly before the end of each production shift, was to clean the buildup of mud from the screens by turning off the water sprays while keeping the crusher running, thus allowing the dry material to hit the screens, chipping away the mud. Tr. 55, 160.

On August 12, 1987, Ramsey worked the swing shift, which began about 4:00 p.m. and ended about 2:00 a.m. the next morning. Ramsey testified that about 45 minutes before the end of the shift while in production crushing rock, foreman Morrison gave him a hand signal from the work area to shut off the water sprays. Ramsey initially failed to comply, explaining that this was the first shift since the operation had started that they had "run full production all night"; that production "had been running smooth all night"; that "we had a heck of a stockpile of material out there"; and that he was not anticipating any shut down with 30 to 45 minutes production time still remaining before their normal shut down time. Tr. 45-46.

When Morrison, after a minute or two, "gave me a real strong signal again to shut it off," Ramsey then did as directed. Tr. 44-47, 123-24. According to Ramsey, within a few minutes the dust was such that he "couldn't see the window of the control tower in front of me" and was unable to see any of the employees. He testified that normal procedure was to shut down the machinery automatically if the dust was so thick that you couldn't see at all. Tr. 47-50. After two or three minutes, he shut down the crusher and he stated that about 5 minutes

later the dust had cleared sufficiently so that he could see "a little bit," making out "more or less shadows or whatever the equipment is." Tr. 52. At that point Morrison climbed into the tower and asked why Ramsey had "shut the plant down." Ramsey responded that if he could not see after the water was cut off, he could not operate. According to Ramsey, Morrison replied "I'll tell you when to shut the water on and when to shut it off." Tr. 54, 59, 124-26.

Morrison left the tower and Ramsey restarted the belt for about five minutes, the normal procedure used to clean off the screens before the next shift. Tr. 54-56. Ramsey then met Morrison outside the tower where he again asked if he (Ramsey) had the "latitude" to turn the water on and off when he could not "see the people under me", and received the same reply. Tr. 59-61, 120. The conversation continued and Ramsey repeated a number of times that if he did not have the "latitude" to turn the water off, "I wouldn't work for him under those conditions," because "it is not safe." Tr. 60-61, 120. Ramsey testified he meant not working for Morrison, and that it was not his intention to stop working for ICC. Tr. 61, 116. The judge found, however, that turning in his hard hat and flashlight and saying he "quit" established that he did quit. 11 FMSHRC 1589. At about 10:00 a.m. that same day, Ramsey telephoned mine superintendent Orville Hildebrandt to inform him of the events and was told by Hildebrandt that he would check into it and get back to him. About one week later, during which Ramsey did not work, he was told by Hildebrandt's secretary that there was no work available for him. Tr. 65-69. Ramsey testified that he has continuously but unsuccessfully sought employment based on his work experience, sending out 60-70 resumes or applications. Tr. 81-84. He has worked at other jobs, operating an unsuccessful novelty sales company, managing a mobile home park, and working as a "ranger" at a golf course. Tr. 87-89. On cross-examination Ramsey stated that his understanding with respect to being hired by ICC was that his employment was to be continuous during a three-year project, but that there was no specific agreement on that issue. Tr. 112.

ICC Supervisor Morrison testified that ten or fifteen minutes before the end of the shift on August 13, he signaled Ramsey to turn off the water sprays in order to clean the screens. He had personally insured the safety of all employees by gathering them together with him or in the parts van, and that all could be seen by Ramsey. Tr. 160-61, 178-79. After turning off the water, Ramsey also turned the crusher off. Tr. 160. Morrison also testified that Ramsey had authority to shut down if the employees could not be seen by him. Tr. 160-61. Morrison believed the disagreement with Ramsey was over the authority to shut off the water, not to shut down the crusher. Tr. 162. He stated that outside the tower Ramsey handed him his hard hat and flashlight and said he quit, and that Morrison then said nothing, but walked away. Tr. 162. He stated there was never any dispute that Ramsey had authority to shut down the crusher for safety reasons. Tr. 163. In his opinion, visibility that night never reached a dangerous extent, and he could always see Ramsey in the tower. Tr. 165-66.

Dick Nash, ICC personnel manager, testified that the crusher operations were completed in September 1987, and that Morrison, together

with everyone on the crusher night shift, was terminated on September 25, 1987, and everyone on the day shift, one day later. Tr. 200-03. Mine Superintendent Hildebrandt testified that he decided not to rehire Ramsey because of the August 12 incident and because of an earlier incident in which Ramsey had complained to him and threatened to quit in a disagreement with another supervisor about the correct method of using the bucket on a loader so as to not damage the equipment. Tr. 246-48.

On August 30, 1987, Ramsey filed a complaint of discrimination with the Department of Labor's Mine Safety and Health Administration ("MSHA"), and on June 14, 1988, the Secretary of Labor filed a discrimination complaint on behalf of Ramsey pursuant to 30 U.S.C. § 815(c)(2). On October 20, 1988, counsel for the Secretary moved to dismiss that complaint and to permit Ramsey to file a complaint on his own behalf, pursuant to 30 U.S.C. § 815(c)(3), on the grounds that Ramsey had refused to accept a settlement offer considered reasonable by the Secretary. Following retention of counsel by Ramsey, the judge, on January 23, 1989, granted the Secretary's motion and the matter proceeded to hearing. 2/

In upholding Ramsey's complaint of discrimination, the judge found that Ramsey was engaged in a protected activity when he complained to Morrison about the dusty conditions, which precluded him from seeing the workers in proximity to the crusher, and concluded that "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." 11 FMSHRC at 1595. Quoting extensively from Ramsey's September 15, 1987 statement to MSHA investigators, the judge found a good faith concern for the safety of other miners and a nexus between his complaint and possible injury to others. 11 FMSHRC at 1595-98. As to whether Ramsey communicated his complaint to management, the judge concluded:

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).

Id. at 1598.

Next, the judge found that Ramsey was constructively discharged in that "ICC created or maintained conditions so intolerable that a reasonable miner would have felt compelled to resign," which is the standard of law applied to constructive discharge under Simpson v. FMSHRC, 842 F.2d 453 (D.C. Cir. 1988). Further, the judge rejected

2/ The judge's granting of the Secretary's motion effectively converted the complaint to an action brought pursuant to 30 U.S.C. § 815(c)(3).

ICC's reasons for not rehiring Ramsey and held that he was discriminated against a second time when ICC refused to rehire him. 11 FMSHRC at 1599-1600. Lastly, rejecting ICC's contention that Ramsey along with all other crusher employees would have been terminated on September 27, 1987, the judge awarded back pay with interest from August 13, 1987, to August 31, 1989, when Ramsey declined reinstatement under an agreement between the parties. 11 FMSHRC at 1603.

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

At issue before us here is a work refusal based on an asserted safety hazard to miners other than the complainant himself. In Secretary on behalf of Philip Cameron v. Consolidation Coal Co., 7 FMSHRC 319 (March 1985), aff'd sub nom Consolidation Coal v. FMSHRC, 795 F.2d 364 (4th Cir. 1986), the Commission held that "in certain limited circumstances," the protection of section 105(c) of the Mine Act does attach to a work refusal premised on hazards to others:

Therefore, we hold that a miner who refuses to perform an assigned task because he believes that to do so will endanger another miner is protected under section 105(c) of the Mine Act, if, under all the circumstances, his belief concerning the danger posed to the other miner is reasonable and held in good faith. Bjes v. Consolidation Coal Co., 6 FMSHRC 1411, 1418 (June 1984), citing Secretary on behalf of Robinette v. United Castle Co., 3 FMSHRC at 807-12. We emphasize, however, the need for a direct nexus between performance of the refusing miner's work assignment and the feared resulting injury to another miner. In other words, a miner has the right to refuse to perform his work if such refusal is necessary to prevent his personal participation in the creation of a danger to others. Of course, as with other work refusals, it is necessary that the miner, if possible, "communicate,

or at least attempt to communicate, to some representative of the operator his belief in the ... hazard at issue," Sammons v. Mine Services Co., 6 FMSHRC 1391, 1397-98 (June 1984)(emphasis added), quoting Secretary on behalf of Dunmire and Estle v. Northern Coal Co., supra, 4 FMSHRC at 133, and that the refusal not be based on "a difference of opinion -- not pertaining to safety considerations -- over the proper way to perform the task at hand." Sammons, 6 FMSHRC at 1398.

7 FMSHRC at 324.

Our review of the testimony convinces us that the substantial evidence of record does not support the judge's conclusion that Ramsey was engaged in protected activity on August 13, 1987. As this Commission has consistently recognized, the term "substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." See, e.g., Secretary v. Michael Brunson, 10 FMSHRC 594, 598 (May 1988), Secretary v. Mid-Continent Resources, Inc., 6 FMSHRC 1132, 1137 (May 1984) quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938). We are guided by the settled principle that in reviewing the whole record, an appellate tribunal must also consider anything that "fairly detracts" from the weight of the evidence that may be considered as supporting a challenged finding and must not sustain a finding "merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn ..." Universal Camera Corp. v. NLRB, 340 U.S. 474, 487 (1951).

Ramsey, himself, on direct examination twice testified unequivocally that he initially refused and then reluctantly complied with Morrison's signals to turn off the water sprays solely because he thought production was going so well, that a large amount of material awaited crushing, and that he considered it too early in the shift to cut off the water sprays, which was routinely done shortly before the end of each shift in order to clean the screens. Ramsey also testified that under Morrison's instructions whenever a potential problem or safety hazard arose, Ramsey would alert the employees first by a horn signal, then by hand signals, directing them to an area where they could be observed by him. Tr. 38-40, 44-45. If, despite his testimony, Ramsey's reactions to Morrison's signals were safety related, we find it inconsistent that he did not use the established audio and visual signals to alert the employees and ensure their safety before any dust visibility problem arose.

The testimony of both Ramsey and Morrison at hearing consistently identified the basis of Ramsey's complaint as his "latitude to turn the water on or off." The testimony further establishes that Ramsey's authority to turn off the crusher for safety related concerns was not challenged. Unlike the judge, we place little reliance on Ramsey's September 15, 1987 statement to MSHA investigators quoted extensively in the decision at 1195-97. We view Ramsey's statement as unproved

allegations made in support of his discrimination complaint, and we consequently cannot accord it sufficient weight to overcome his contrary testimony adduced under oath at the hearing subject to the rigors of cross-examination.

In Sammons, supra, this Commission emphasized that in discrimination complaints involving work refusal, the alleged protected activity must not be based on a "difference of opinion -- not pertaining to safety considerations -- over the proper way to perform the task at hand." 6 FMSHRC at 1398. Ramsey's own testimony makes clear that his initial refusal and later reluctance to shut off the water sprays were entirely production oriented. He simply believed it too early in the shift, with production going well and a large stockpile of raw materials yet to be processed, to stop production in order to clean the screens for the oncoming shift. In light of his own testimony, we view Ramsey's subsequent attempts to link his work refusal with safety related concerns to be too little, too late, and inconsistent with the facts. Accordingly, under Cameron, supra, we find that Ramsey's work refusal was not a protected activity under section 105(c) of the Mine Act.

For these same reasons we find that Ramsey failed to communicate to Morrison any true concern with a safety hazard underlying his work refusal. In so concluding, we recognize that as the judge noted, safety complaints are often couched in a heated or argumentative manner, and that a brief, simple communication rather than a detailed statement is sufficient, so long as it describes the nature of the safety hazard to the operator. See e.g., Secretary/UMWA v. Emerald Mines Corp., 8 FMSHRC 1066, 1074, (July 1986), aff'd sub nom. Emerald Mines Co. v. FMSHRC, 829 F.2d 31, (3rd Cir. 1987). In this instance however, there was no communication descriptive of a safety complaint but only a heated disagreement with a supervisor over Ramsey's "latitude" to shut the water on and off and who would make the decision to stop production. See also Conatser v. Red Flame Coal Co., Inc., 11 FMSHRC 12, 17, (January 1989).

We next address the judge's conclusion that Ramsey was constructively discharged. In Simpson, supra, the court adopted the "objective" standard for establishing constructive discharge, holding that constructive discharge occurs whenever "a miner engaged in a protected activity can show that an operator created or maintained conditions so intolerable that a reasonable miner would have felt compelled to resign." 842 F.2d at 461. That standard, the court explained, is the one employed in cases arising under the Civil Rights Act of 1964 and is the same test employed in adjudicating constructive discharge cases under other statutes protecting employees against adverse job actions. 842 F.2d. at 461-62. The cases cited by the court in Simpson agree that a finding of constructive discharge must demonstrate "aggravating factors such as a continuous pattern of discriminatory treatment." Watson v. Nationwide Insurance Co., 823 F.2d 360, 361 (9th Cir. 1987); Clark v. Marsh, 665 F.2d 1168, 1174 (D.C. Cir. 1981). The cases also have consistently emphasized that "a single isolated instance of employment discrimination is insufficient as a matter of law to support a finding of constructive discharge." Watson, supra, 823 F.2d at 361; see also Satterwhite v. Smith, 744 F.2d 1380,

1381, (9th Cir. 1984); Nolan v. Cleland, 686 F.2d 806, 813; (9th Cir. 1982).


In Simpson, the complainant quit his job after the operator had failed repeatedly over a period of several weeks to perform the required pre-shift or on-shift examinations or to test for the presence of black damp, gas, or water in the underground coal mine. The Commission referred to the operator's repeated failures as "blatant violations of the Mine Act," (8 FMSHRC at 1038) a description noted by the court in its finding that Simpson had been constructively discharged. 842 F.2d at 463.

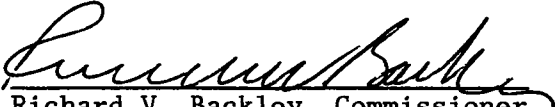
Although the judge stated in his decision that he felt constrained under the Court's holding in Simpson to reach a finding of constructive discharge, we find no parallel between the working conditions involved in Simpson and the conditions of August 13 described by Ramsey in this case. Nor do we see any similarity between the continuous pattern of misconduct on the part of the operator in Simpson and the single incident on which this case rests. In sum, we are persuaded by the testimony of record that Ramsey voluntarily quit his job at the end of the shift and find no evidence to support a finding that a reasonable miner would have felt compelled in this instance to resign because of intolerable conditions created or maintained by operator misconduct as required under Simpson for a finding of constructive discharge.

On review, ICC also challenges the judge's finding that a second act of discrimination occurred when ICC refused to rehire Ramsey after August 13, 1987. If Ramsey's work refusal constituted protected activity under the Mine Act, ICC's refusal to rehire him would be a second unlawful act of discrimination if the evidence demonstrated that the refusal was based on that protected activity. Simpson, 842 F.2d at 454, 464. If Ramsey's work refusal did not constitute protected activity, ICC's refusal to rehire him would be discriminatory only if the evidence established "some nexus to protected activity." 842 F.2d at 464. Rejecting ICC's arguments that Ramsey was not rehired because of two non-safety related disagreements with supervisors, the judge found that the incident of August 13, 1987 involved protected activity and that ICC's refusal to rehire Ramsey was therefore a second act of discrimination.

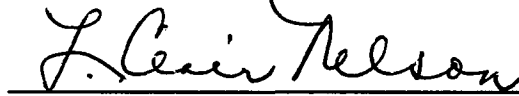
Because we have found that Ramsey's work refusal of August 13 was not a protected activity, a finding of discriminatory conduct in ICC's refusal to rehire him must rest on evidence establishing "some nexus" with other protected activity. Other than the August 13 incident, however, no other protected activity is alleged. As the judge noted at 11 FMSHRC 1593, n. 3, Ramsey's earlier complaint to Hildebrandt alleged that supervisor Brown's instructions as to how the loader should be operated would result in damage to the equipment and was not safety related. Absent any nexus with other protected activity, we find no evidence to support the judge's finding that ICC discriminated against Ramsey for a second time when it refused to rehire him.

Accordingly, we reverse the judge's findings that Ramsey engaged in protected activity and was constructively discharged. We also reverse his finding that ICC's refusal to rehire Ramsey constituted a second act of discrimination. 3/


Ford B. Ford, Chairman


Richard V. Backley, Commissioner


Joyce A. Doyle, Commissioner


L. Clair Nelson, Commissioner

3/ Commissioner Lastowka elected not to participate in this decision.

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

AUG 2 1990

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 90-12
Petitioner	:	A.C. No. 46-03805-03933
v.	:	
	:	Martinka No. 1 Mine
SOUTHERN OHIO COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Mark R. Malecki, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia, for
the Petitioner;
Rebecca J. Zuleski, Esq., FURBEE, AMOS, WEBB &
CRITCHFIELD, Morgantown, West Virginia, 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 a civil penalty assessment in the amount of \$850 for an alleged violation of mandatory safety standard 30 C.F.R. § 77.807-3, as stated in a section 104(d)(2) "S&S" Order No. 2944317, served on the respondent by an MSHA inspector on May 22, 1989. The respondent filed a timely answer contesting the alleged violation and a hearing was held in Morgantown, West Virginia. The parties filed posthearing briefs, and I have considered their arguments in my adjudication of this matter.

Issues

The issues presented in this case are (1) whether the condition or practice cited by the inspector constitutes a violation of the cited mandatory safety standard, (2) whether the

alleged violation was "significant and substantial" (S&S), (3) whether the violation was the result of the respondent's unwarrantable failure to comply with the cited standard, and (4) the appropriate civil penalty to be assessed for the violation, taking into account the statutory civil penalty assessment criteria found in section 110(i) of the Act. Additional issues raised by the parties are disposed of in the course of this decision.

Applicable Statutory and Regulatory Provisions

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

Stipulations

The parties stipulated to the following (Tr. 8-10, exhibits P-1, P-1-A, P-2):

1. The respondent is the owner and operator of the Martinka Mine, and the operations of the mine are subject to the Act.
2. The presiding judge has jurisdiction to hear and decide this matter.
3. MSHA Mine Inspector Spencer Shriver was acting in his official capacity when he issued the contested order, and a true copy of the order was served on the respondent or its agent as required by the Act.
4. A copy of an MSHA's Proposed Assessment Data Sheet (exhibit P-1), which sets forth (a) the number of assessed non-single penalty violations charged for the years 1986 through February, 1989, (b) the number of inspection days per month in said period and (c) the mine and controller tonnage for year 1988, is admitted for the record in this case, and the respondent has no facts to contradict the accuracy of this information.
5. The respondent does not contest the fact that the Martinka Mine has not had a complete inspection free of unwarrantable violations since the issuance of Citation No. 0859286 dated September 1, 1981.
6. A prior violation alleging a violation of section 77.807-3, was issued to the respondent at the Martinka Mine on or about February 2, 1989.

7. A copy of an MSHA computer print-out reflecting the history of prior assessed violations issued at the Martinka No. 1 Mine for the period May 30, 1987 through May 29, 1989, may be admitted as part of the record in this case (Tr. 10, exhibit P-1-a).

8. Assuming the petitioner establishes that a violation of section 77.807-3, occurred in this case, the parties agree that the violation is significant and substantial (S&S) (Tr. 28).

Discussion

This case concerns a section 104(d)(2) "S&S" Order No. 2944317, issued on May 22, 1989, by MSHA Inspector Spencer Shriver, alleging a violation of mandatory safety standard 30 C.F.R. § 77.807-3. The cited condition or practice states as follows:

At about 11:30 a.m., on May 19, 1989, an electrical accident occurred at the North Mains drift substation, while spreading gravel north of the substation fence, an LTL 9000 Ford triaxle truck operated by Robert Radabaugh of Radabaugh Trucking Inc., contacted an energized 34,500-volt powerline with the elevated bed of his truck. None of the truck drivers on this job had received hazard training on maintaining clearance from high voltage lines. There were no plans or prints available at the job site giving the height of the powerline above ground. Also, Citation No. 3106019 was issued by Edwin W. Fetty on February 2, 1989, for failure to maintain 10 feet clearance of 34,500-volt circuit over trucks with elevated beds at the refuse area. This should have caused mine management to take effective action to prevent contact of truck beds with high-voltage lines.

Petitioner's Testimony and Evidence

MSHA Inspector Spencer A. Shriver testified that he is an electrical engineer and holds bachelor's and master's degrees from the West Virginia University. He confirmed that he went to the mine on Friday, May 19, 1989, after his supervisor informed him that a dump truck had contacted a high voltage line, and when he arrived at the mine he met Paul Zanussi, a company safety representative, and he confirmed that an accident had occurred. Mr. Spencer stated that he observed a Ford tri-axle dump truck under the high voltage line, and that several tires had been apparently blown out by the electrical contact with the line. A mechanic for the trucking company was changing the tires to prepare the removal of the truck. Mr. Spencer concluded that a

violation of section 77.807-3, occurred because section 77.807-2, prohibits the operation of equipment within 10 feet of an energized overhead powerline, and if this should occur, section 77.807-3, requires the powerline to be deenergized or other precautions. Since the truck contacted the powerline, resulting in considerable damage to the truck, he concluded that a violation had occurred (Tr. 13-17).

Mr. Shriver spoke with the respondent's project engineer, James Barton, and to the foreman of the general contractor, Mike Powers, who were eye witnesses to the incident. Mr. Barton told him that he had observed three or four trucks "tailgating gravel" through the area in question, and that the last truck through, which was driven by Robert Radabaugh, contacted the overhead neutral line with the truck bed overhang, pulling the two wooden support structures close together, and when the phase conductors dropped down and contacted the truck, a "fairly spectacular short circuit" occurred (Tr. 18).

Mr. Shriver stated that Mr. Powers informed him that he was following the trucks, and was positioned to the left of Mr. Radabaugh's truck watching the flow of gravel out of the truck, and he explained that as the truck's continue travelling and laying down a layer of gravel, the driver has to continue raising the truck bed to keep the gravel flowing out. Mr. Powers was observing the truck in question to make sure that the gravel was not being spread too thick or too thin, and he was also watching for contact with high voltage lines. When Mr. Powers saw that the truck bed had hooked the overhead neutral conductor, he signaled for Mr. Radabaugh to stop, and another driver yelled for him to stop. However, before stopping, Mr. Radabaugh's truck pulled the support structures together, and the conductors dropped down and contacted the truck resulting in a short circuit (Tr. 19).

Mr. Shriver stated that Mr. Radabaugh was taken to the hospital as a precautionary measure, and that he spoke with him 3 days later when he was back at the job site. Mr. Radabaugh confirmed that Mr. Powers was following behind him giving him hand signals, and he also confirmed that he was told not to drive past a wooden footbridge across a gully near the one-pole structure which supported the overhead powerlines. Mr. Radabaugh also stated that when he was near the northeast corner of the substation, he became concerned that he would go over the bank and was standing up in the cab of his truck in order to look out over the engine to see how close he had come to the bank, and that while doing so hooked the neutral conductor which resulted in the short circuit (Tr. 20). Mr. Shriver identified a memorandum which he prepared for the MSHA district manager concerning his accident investigation findings, and a copy of his notes and a sketch of the accident sketch which he prepared (exhibits P-5 through P-7).

Mr. Shriver believed the violation resulted from an unwarrantable failure on the part of the respondent because it did not know how high the voltage line was above the ground, did not know how close the trucks could come to the high voltage line, and did not know how high the truck bed would be when it was fully raised. He confirmed that Mr. Barton had no knowledge of any of this information, and although they found several prints or drawings of the area in the contractor's trailer, they did not show how high the voltage line was above the ground. Mr. Shriver believed that the respondent was negligent for not having this information. He also confirmed that another MSHA electrical inspector (Fetty) had previously issued a citation at the site on February 2, 1989, because a truck was under the same voltage line, within 10 feet of the line, and that this should have caused the respondent to take steps to insure that no vehicles are within 10 feet of the line (Tr. 29).

Mr. Shriver stated that when he previously worked for a power company, any time vehicles were in the area of high voltage lines, he knew the height of the truck and the lines, and that if there were any questions about this, someone would be assigned to stop a vehicle before it got too close to a line, or barricades or flagged and roped barrels would be put up to warn a driver (Tr. 30).

Mr. Shriver stated that Mr. Barton did not inform him how long he had been present at the site, or whether it was his first visit there. Mr. Shriver confirmed that when he spoke with Mr. Radabaugh and his brother, they informed him that they had not received any hazard training with respect to overhead lines. However, the following Monday after the accident, a company official gave all of the truck drivers hazard training concerning overhead powerlines (Tr. 31).

On cross-examination, Mr. Shriver stated that with respect to the "other precautions shall be taken" language found in section 77.807-3, and assuming that one knew that a truck would come within 10 feet of an energized powerline, he would expect a barricade with a rope or flags to be installed so that a truck could not pass through the area, or as a minimum precaution, someone should be stationed in the area so that he could stop the truck. Any such precautions would have to be as effective as deenergizing the powerline (Tr. 32).

Mr. Shriver confirmed that his notes reflect that Mr. Powers told him that he had instructed Mr. Radabaugh not to go past a wooden footbridge near the last pole of the high voltage circuit, which would have kept the truck bed about 15 feet from the power conductors, and that Mr. Radabaugh admitted that he had received this instruction (Tr. 34). Mr. Shriver also confirmed that

Mr. Powers told Mr. Radabaugh not to go beyond the wooden foot-bridge so that he would not contact the powerline, and if Mr. Radabaugh had not gone beyond that location, he would not have contacted the power conductors (Tr. 36).

Mr. Shriver confirmed that he issued the contested section 104(d)(2) order to the respondent, and also issued section 104(d) citations to Radabaugh Trucking and the contractor (Coal Fuel Services), and that they were all essentially identical (Tr. 37). He also confirmed that he was not familiar with MSHA's hazard training policies, and that he included the lack of training as part of his order because Mr. Radabaugh contacted the powerline and told him that he had not been trained. Although Mr. Shriver issued no citation for failing to hazard train Mr. Radabaugh, he considered the lack of training as part of his unwarrantable failure finding because he believed the driver needed training because he contacted the powerline (Tr. 41).

Mr. Shriver confirmed that he issued a section 107(a) imminent danger order to the contractor, Coal Field Services, and that he did indicate to respondent's personnel on the day of the accident that he did not believe that the respondent was negligent. He concluded that the respondent was negligent on the Monday following the accident after again speaking with Mr. Powers, Mr. Barton, and Mr. Radabaugh, and with his supervisor and MSHA's chief of engineering services (Tr. 44).

Mr. Shriver confirmed that the prior citation issued by Inspector Fetty was one of the factors on which he based his unwarrantable failure finding, and that the other factor was the fact that Mr. Barton, the respondent's project engineer, was watching Mr. Radabaugh bring gravel under the high voltage line (Tr. 44). Mr. Shriver acknowledged that Mr. Fetty's prior citation concerned one of the respondent's trucks operating in the mine refuse area, and he assumed that the driver was employed by the respondent and under the control of one of its supervisors. He believed that both situations were "similar enough" because once the respondent was on notice of the danger of a truck getting into a powerline it should have been alerted by the prior citation and taken effective steps to preclude this from happening again (Tr. 45).

Mr. Shriver acknowledged that he was aware of the fact that the general contractor's employee, Michael Powers, was directly supervising the hauling and dumping of gravel, and that Radabaugh Trucking was the subcontractor hired directly by the general contractor (Tr. 46). Mr. Shriver confirmed that Mr. Radabaugh told him that he had been involved in a prior incident of contacting a high tension line with his truck, and that he knew he should not leave his truck when such contact is made (Tr. 47).

Mr. Shriver defined an unwarrantable failure as follows: "it is aggravated negligence or conduct on the part of the operator. I think the question of repeat violations enters into it and knowing that something occurred and failing to take some effective action to stop an accident" (Tr. 48).

In response to further questions, Mr. Shriver stated that the powerline in question was approximately 27 feet 4 inches above the ground, and that the height of the truck bed when fully raised was 24-1/2 feet. The neutral wire was 4 to 5 feet under the other wires, and the overhang of the front of the truck bed hooked the neutral wire. The neutral wire is not considered a high voltage wire because it is basically at ground potential and carries no voltage. However, the bed of the truck, when it is fully raised, would contact the neutral wire, and if it did, it would be within 10 feet of the high voltage line. If the truck bed had not been raised, it would not have contacted the neutral wire, and other trucks had already passed under the wires (Tr. 53-54).

Mr. Shriver confirmed that the instructions to Mr. Radabaugh not to go beyond the footbridge were given so that he would not be within 10 feet of the powerline. He had no reason to believe that the instructions were not given, and Mr. Radabaugh admitted that he was so instructed (Tr. 56). With regard to Mr. Fetty's prior citation, Mr. Shriver confirmed that it did not involve any truck contact with a powerline, and that the trucks were simply within 10 feet of a high voltage line (Tr. 56). A copy of this prior citation, (exhibit P-8), reflects that the cited trucks were parked in a raised position directly under energized high voltage transmission lines near the refuse bin, and the citation is a section 104(a) "S&S" citation, with a moderate negligence finding (Tr. 58).

Mr. Shriver confirmed that the height of the high voltage line itself was in compliance with the required standard, and if a truck had driven under it without the bed raised, there would be no chance of contact with the wire, and it would be in compliance. However, in the instant case, the truck, with its bed raised, contacted the neutral wire and pulled it down, causing the two poles supporting the high voltage lines to come together in "a looped position," and they contacted the truck. If the raised truck bed had pulled down only the neutral wire, without causing the tires to blow out, a citation would still have issued because the truck bed which hooked the neutral line would have been within 5 feet of the energized powerline, and the standard requires that equipment not be within 10 feet of such a powerline (Tr. 60-61).

Respondent's Testimony and Evidence

Michael L. Powers testified that he is employed by Coal Field Services, and that he was the field work supervisor at the site at the time of the accident. He confirmed that Coal Field was the general contractor of the project, under contract with the respondent. He stated that all contractor employees working on the project were hazard trained on the first day they were on the job, and he identified copies of the "hazard training slips" for the employees (Tr. 76; exhibits R-1-B, C, and D). He confirmed that Coal Field hired Radabaugh Trucking to haul and dump gravel at the site, and also hired C. W. Stickley to do the actual grading work. He was in direct control, and supervised the work of Radabaugh Trucking. Mr. Barton came to the site to make sure that the work was being done in conformance with the contract specifications, and he occasionally came to the site three or four times a day. The truckers employed by Radabaugh did not leave their vehicles at any time while at the site, and the respondent advised Mr. Powers that they were not required to be hazard trained because they only came to the site to dump gravel and would leave (Tr. 76-78).

Mr. Powers stated that he was serving as the truck spotter, and that he instructed the drivers where they were to dump their gravel loads each time they came to the site. He told them to watch for any powerlines, and remained behind the trucks and used hand signals to show them where to dump and how much to dump (Tr. 78-79). He estimated that the powerlines were located approximately 10 to 15 feet past the end of the foot bridge, and he described how the incident occurred (Tr. 80-83). He specifically told Mr. Radabaugh not to go past the footbridge, and that one of the other drivers called Mr. Radabaugh by radio and told him that he was getting too close to the powerlines. Mr. Powers stated that he was using hand signals in an attempt to stop Mr. Radabaugh from moving further, but instead of stopping, he continued to move his truck forward, and as he did, the truck bed hooked the neutral line, bringing the poles together. Mr. Radabaugh told him that he knew better than to attempt to jump from the truck after it contacted the wires because he had previously contacted some powerlines with his truck "on a highway somewhere around Fairmont" (Tr. 85).

Mr. Powers confirmed that Coal Field Services has its own MSHA I.D. number, and it was his understanding that MSHA policy does not require hazard training for pickup and delivery drivers, and that only those drivers who were at the site and out of their trucks were required to be trained (Tr. 86). He stated that Mr. Barton had visited the site on two occasions on the morning of the accident "to check to see how things were going," and came out again before lunch to ask him to have dinner with him (Tr. 87).

On cross-examination, Mr. Powers stated that prior to the accident, Mr. Barton came to the site four or five times a day to check the progress of the work and to see if the contract was being followed. They discussed safety practices on quite a few occasions, and Coal Field Services conducted its own safety meetings when it had people at the site (Tr. 89, 91). Mr. Powers explained the procedures for dumping and spreading the gravel at the time of the accident, and he confirmed that when he was preparing to start the project he did not gather any data as to how high the voltage lines were from the ground (Tr. 92-95). He confirmed that the first three or four trucks which preceded Mr. Radabaugh backed under the powerlines, and as they started forward, they opened their truck gates, and raised their truck beds as they traveled away from the lines. None of the other trucks contacted the neutral powerline and there was ample room to clear the lines over the neutral line (Tr. 98).

Mr. Powers confirmed that he told Mr. Radabaugh not to go beyond the footbridge because of the powerlines, and because of other transformer lines in the area. He stated that he carefully maneuvered Mr. Radabaugh away from the transformers, started him in the other direction toward the footbridge, but told him not to go past the footbridge where it was necessary for him to back up because there was no room to turn around. He stated that Mr. Radabaugh told him that he went beyond the footbridge because he was distracted by the other driver who was yelling at him and that he lost contact with him while he was signalling him to stop and had his head out of the window trying to determine the location of the powerline (Tr. 99).

Mr. Powers stated that he had prior experience working around overhead powerlines. He confirmed that he knew how high the lines were above the truck beds, and how much the beds could be raised to stay away from them and stay outside of the 10 foot minimum distance required by the standard, but he did not know the distance between the neutral line and the other lines. He knew by "instinct" that the trucks would clear the wires by backing in and using the reverse spreading procedure, and he confirmed that he did not discuss the powerlines with Mr. Barton before the accident while he was at the site (Tr. 102). He confirmed that Coal Field did not employ any of the truckers hauling gravel (Tr. 105).

Robert W. Radabaugh testified that he is employed by Radabaugh Trucking, and that it is owned by his parents. He confirmed that he was operating the truck when it contacted the high voltage lines on May 19, 1989, and that he was hauling limestone that day for C. W. Stickley, a subcontractor of Coal Field Services. Mr. Powers was instructing him where to dump his load on that day, and was serving as his truck "spotter." Mr. Radabaugh stated that he backed into the area where he started to dump his load, and that Mr. Powers instructed him "to

go toward the bridge and spread it as far as it would go" (Tr. 114). He did not recall that Mr. Powers told him not to go beyond the footbridge, but that he did tell him "to be careful, there are wires everywhere" when he made his first trip to the job site that morning (Tr. 114). He denied that Mr. Powers was giving him hand signals or directing him where to dump the gravel, and that Mr. Powers was behind his truck when he began spreading gravel.

Mr. Radabaugh stated that Mr. Powers backed him into the area where he started to dump his gravel load, and told him "to go on." Since he was spreading gravel to a depth of 4 to 6 inches, Mr. Radabaugh believed that he would have traveled approximately 120 to 180 feet, and that during this time, it would have been impossible for him to see Mr. Powers in his mirror when he first started to move out of the area where he had backed in. At the same instant that he felt the neutral line catch his truck, he heard another driver calling him over the radio telling him that he was into the power wires (Tr. 116).

Mr. Radabaugh denied that he had directly contacted a power-line with his truck on a prior occasion, and stated that he has had "experience with wires before" while spreading asphalt, and that he was "in the machine, and the power arced from the wire to my bed." The individual who was on the machine was shocked and his feet were burned, and after seeing the arc, Mr. Radabaugh drove his truck out and dumped the asphalt, and "saved the man's life" (Tr. 117). Mr. Radabaugh confirmed that he was driving the truck when this incident occurred.

On cross-examination, Mr. Radabaugh stated that he had made a prior trip to the site during the morning spreading gravel on a parking lot, and that Mr. Powers was directing him where to start and where to go to spread his loads, and that he asked Mr. Powers to give him signals if he were spreading the gravel to thick or too thin (Tr. 120). He stated that when he "felt" that he was in the neutral wire at the time the other driver alerted him, "the first thing I did was to make a quick look to see if the wire was big enough that I could break it" and that he had no indication at that time that there was power in the wire or that it had arced. When he saw that he would not break the wire, he looked to both sides and put the truck in reverse, and when he looked into his mirror, he saw Mr. Powers running up behind him motioning for him to stop, and that he did. Mr. Radabaugh denied that he was aware of the powerlines before starting to move forward, and the last instructions that he heard from Mr. Powers was "to go toward the bridge as far as the gravel will go" (Tr. 121). He confirmed that he was standing up on his truck watching to see if the truck would empty by the time he got to the downgrade or bank (Tr. 123).

Mr. Radabaugh confirmed that he appealed the citation served on Radabaugh Trucking because he disagreed with the assertion that he had acknowledged that Mr. Powers told him not to go beyond the footbridge, but that his father decided to pay the civil penalty assessment because "it was not worth missing another day's work." Mr. Radabaugh denied that he ever told Inspector Shriver that he received instructions not to pass the bridge, and he stated that he had not received any such instruction (Tr. 128).

Mr. Powers was recalled by the respondent in rebuttal, and he stated that he accompanied the Radabaugh Trucking drivers with each load and gave them directions and hand signals once they started to spread their load, and that they were under his control at all times. The only trucks that he did not stay close to were those which were in an open area where "there was nothing they could get into," and he let them know when their trucks were empty. He reiterated that he stayed to the rear and left of Mr. Radabaugh at all times, and that he could see his face in the truck mirror while he was watching him. Mr. Powers further explained Mr. Radabaugh's movements, and he confirmed that Mr. Radabaugh acknowledged that he was told where to stop during the interview with Inspector Shriver and a state inspector, and in the presence of Mr. Barton (Tr. 133-141).

James Barton, testified that he was employed by American Electric Power, as a civil engineer in its design and construction group, and that he holds a B.S. degree in mining engineering and has served as a mining engineer and as a strip and surface foreman in West Virginia and Ohio. He stated that his duties as the project engineer for the work being performed for the respondent on May 19, 1989, entailed assuring that the contract specifications for the quality of the work being performed were being followed, and that he was there that day to oversee the remainder of the surfacing project. He confirmed that Coal Field Services was hired as the general contractor for the work, and that the work was being supervised by Coal Field's employees, and he identified the contract provision in this regard (Tr. 143-147; exhibit R-1-(f)). The contract called for Coal Field to insure that the work was completed in a safe manner, including the work of subcontractors, and that Coal Field was responsible for enforcing all applicable safety laws (Tr. 148-149).

Mr. Barton stated that he maintained no control over the procedures or manner in which the gravel was being hauled, dumped, or spread by Radabaugh Trucking, and that Radabaugh Trucking was not hired by the respondent to do the work (Tr. 149). He confirmed that he observed three to five gravel trucks on the morning of the accident in order to insure whether the proper amount of gravel was being spread, and that the trucks were under the control of Mr. Powers by means of hand and verbal

communication. He stated that he did not see Mr. Powers directing Mr. Radabaugh's truck and was paying no particular attention to it because he was in another area. He did not see Mr. Radabaugh's truck contact the powerline, but when it did, he turned and saw that his truck had contacted the wires, and heard the "electrical shorting sound" (Tr. 149-152).

Mr. Barton stated that he spoke with Inspector Shriver regarding the incident on May 19, 1989, but he could not recall whether the inspector informed him that the respondent would be held liable or negligent for the incident. He confirmed that he was not concerned about the manner in which the work was being done because it appeared that the dumping and spreading of the gravel was being controlled by Mr. Powers, and the drivers were complying with his hand signals (Tr. 154). He confirmed that in the event he observed any drivers engaging in any unsafe acts he had the authority to put a stop to it (Tr. 155).

On cross-examination, Mr. Barton confirmed that the respondent is a subsidiary of American Electric Power, and that he was present at the mine site for approximately a week. During that week, he observed and saw to it that safety standards were met, but he did not meet with any contractor employee to discuss any measures to be taken to insure that the gravel would be spread in a safe manner. He confirmed that he went to the site on the morning of the incident to see how the job was progressing and to have lunch with Mr. Powers. He confirmed that he was concerned that elevated trucks would be used around high powerlines, but trusted the contractor because the work was being done in a very controlled manner. He did not provide the contractor with any data concerning the height of the powerlines, and this data was not available to him even though he was the direct contact representative between the respondent and the contractor (Tr. 158-159).

Mr. Barton stated that since the trucks were under the control of each driver, he would expect the driver to visually look out for the powerlines. He believed that the accident resulted from a failure in communications, and that short of being the direct supervisor over the job, he could not be there at all times. In hindsight, he agreed that if he knew that the trucks could not clear the powerlines, the gravel may have been spread in a different manner, and he further agreed that the contractor should alert the drivers to stay clear of the lines (Tr. 161).

Larry G. Massey testified that he was employed by the respondent as the mine staff electrical engineer. He confirmed that he investigated the incident in question and spoke with Mr. Radabaugh. He stated that Mr. Radabaugh told him that he had contacted the power wires and did not leave his truck after making contact because "he had got into high voltage lines before

at another time" (Tr. 163). Mr. Massey confirmed that he spoke with Inspector Shriver on the day of the incident, and that at no time did Mr. Shriver indicate that the respondent would be held liable for the incident. When he again spoke with Mr. Shriver on the Monday following the incident, Mr. Shriver informed him that he issued the unwarrantable failure order to the respondent because the incident occurred on mine property and it was the total responsibility of the respondent. Mr. Shriver also informed him that the incident was similar to a prior violation issued by Inspector Fetty (Tr. 164).

Paul S. Zanussi, testified that he was employed in the respondent's safety department as an accident prevention officer, and that he became aware of the incident when he received a telephone call from the superintendent of engineering. He confirmed that he investigated the incident, and he described what he observed when he arrived at the scene shortly after the incident. He confirmed that the footbridge in question was not located directly under the overhead powerlines, and he estimated that it was located approximately 10 feet away (Tr. 166-168).

Mr. Zanussi confirmed that the inspector did not issue any order to the respondent on the day of the incident, but that the contractor received an order that day, and that the inspector told Mr. Zuleski, the respondent's mine safety and health manager, that he decided to issue an order to the contractor (Tr. 169-170). Mr. Zanussi stated that it was his understanding that the contractor was taking responsible precautions and had a spotter watching the truck and that the drivers knew of the dangers and their responsibilities (Tr. 175). Mr. Zanussi confirmed that no one from the mine safety department was assigned to be at the job site to insure that the work was being done safely, and that he received no instructions to visit the site (Tr. 177).

Inspector Shriver was called in rebuttal by the petitioner, and he stated that on the basis of his diagram of the accident scene, and Mr. Zanussi's testimony that the footbridge was 10 feet in front of the neutral overhead wire, if Mr. Radabaugh had stopped his truck at the point where he looked out of the window of his truck, he would have been within 10 feet of the phase conductor. If Mr. Radabaugh had stopped his truck "as he was driving, right by the bridge," Mr. Shriver still believed that his elevated truck bed would be within 10 feet of the wire (Tr. 179).

On cross-examination, Mr. Shriver stated that he was aware of no MSHA regulations requiring that plans or prints be made available on the job site in question in this case. He confirmed that his inspection notes confirm that Mr. Powers told him that he instructed Mr. Radabaugh not to go past the footbridge (Tr. 183). He again confirmed that he issued "unwarrantable failure

type papers" to Radabaugh Trucking, Coal Field Services, and the respondent (Tr. 185). He explained his reasons for doing so as follows at (Tr. 186-188):

Q. How was the driver here, Mr. Radabaugh, guilty of aggravated conduct?

A. According to statements made to me by other parties, he had been told not to go past the bridge, and on Monday he conceded he had gone past it. You know, I don't know whether I caught him cold, or what, but he had just dismounted from the truck and --

Q. And he confirmed that he had been told?

A. Right. He later said at a conference on the citation that he had not really said that.

Q. The contractor here, how was the contractor guilty of aggravated conduct?

A. The general contractor, while having the people, the trucks, travel under high voltage lines, he did not put up an effective barrier to prevent him from going past it.

Q. So, if the contractor didn't prevent the driver from doing it, and if the driver himself did it knowing or flaunting the instruction not to do it, and both of that is aggravated conduct, how does Martinka come on the receiving end of aggravated conduct also?

A. Well, again, Mr. Barton, the project engineer, on Friday -- and I believe again on Monday, I talked to him on Monday -- stated that he had watched these trucks go through there and he had watched this particular truck go through, and he had made no effort to ensure that it was low enough to get under, or the power lines were high enough for them to get under, without trouble.

The second thing was that he as the project engineer did not have any knowledge of how high the line was and therefore from my standing there, looking at it, it was very difficult for me to tell how high the line was.

I would hesitate to tell a truck driver that he could drive that through there with his bed down. It is highly misleading when you look up if you don't actually know how high the line is. It is very risky

to go under it. And also, he had no knowledge of how high the truck beds were.

The third was Mr. Fetty's citation on a similar violation for having the refuse trucks under this same circuit; not the same identical line.

Findings and Conclusions

Fact of Violation

The respondent is charged with a violation of mandatory safety standard 30 C.F.R. § 77.807-3, which provides as follows:

When any part of any equipment operated on the surface of any coal mine is required to pass under or by any energized high-voltage powerline and the clearance between such equipment and powerline is less than that specified in section 77.807-2 for booms and masts, such powerlines shall be deenergized or other precautions shall be taken. (emphasis added).

The respondent does not dispute the fact that the raised bed of the truck which was operated by Mr. Radabaugh on its mine property did in fact come within 10 feet of an energized powerline. Indeed, the truck bed contacted the wire, causing an electrical short circuit and arcing, and the contact damaged the truck tires. The inspector concluded that a violation of section 77.807-3, occurred because the raised truck bed contacted the overhead energized powerline causing considerable damage to the truck. Since the clearance between the raised truck bed and the powerline was less than the 10 foot clearance mandated by section 77.807-2, and since the powerline was not deenergized and no other precautions to avoid contact were taken, as required by section 77.807-3, the inspector found a violation of that standard.

Section 77.807-3, requires that certain clearance distances be maintained when any part of any equipment operated on the surface of any coal mine is required to pass under or by any energized high voltage powerline. Section 77.807-2, which is incorporated by reference as part of section 77.807-3, requires a 10 foot clearance or separation between the booms and masts of equipment and an energized overhead powerline. I conclude and find that the cited truck in question was a piece of "equipment" within the meaning of sections 77.807-2, and 77-807-3. I further conclude and find that the device used to raise the truck bed was a "boom or mast" within the meaning of section 77-807-2, and that the raised truck bed which contacted the powerwire was "part" of the truck, and within the meaning of section 77.807-3.

Although the parties have not directly raised the issue as to whether or not the truck was required to pass under the overhead energized powerline, the respondent takes the position that the truck driver was specifically instructed not to go beyond the area of a footbridge in the proximity of the powerlines. The evidence establishes that Mr. Powers, the individual who was serving as a truck spotter, and who was directing the traffic flow and the dumping and spreading of the gravel, was aware of the powerlines and had instructed the drivers to watch out for them. Mr. Powers relied on his visual observation of the powerline and his "instinct" that the trucks would clear the power wires by backing under the wires and using a "reverse spreading procedure." As a result of the traffic pattern utilized to dump and spread the gravel under the control of Mr. Powers, three or four trucks which proceeded Mr. Radabaugh's truck backed under the power wires, and Mr. Powers instructed them to begin raising their truck beds as they traveled away from the wires. Mr. Radabaugh testified that following Mr. Powers' instructions, he backed his truck up, and as he proceeded in a forward direction to spread his gravel load, he contacted the wire after traveling approximately 120 to 180 feet. Under all of these circumstances, I conclude and find that in the process of spreading the gravel, all of the aforementioned trucks, including Mr. Radabaugh's, were required to pass under or by energized overhead power wires.

The respondent's defense to the violation focuses on the unwarrantable failure finding made by the inspector, the respondent's alleged negligence for the violation, and whether or not a production operator, such as the respondent, may properly be cited for a violation attributable to an independent contractor. The respondent takes the position that it should not be held liable for the violation of its independent contractor because it did not contribute to the violation, or let it exist, none of its miners were exposed to any hazard, and it retained no control or supervision over the contractor's work or the alleged violative condition. In support of its arguments, the respondent cites the Commission's decision in Cathedral Bluffs Shale Oil Company, 6 FMSHRC 1871 (August 1984), and a court decision in Brock v. Cathedral Bluffs Shale Oil Company, 796 F.2d 553 (D.C. Cir. 1986). The respondent maintains that the facts and evidence presented in this case do not support MSHA's position that it was properly cited pursuant to the Act, as well as MSHA's independent contractor regulations and policies.

In the Cathedral Bluffs Shale Oil Company case, the Commission affirmed a Judge's decision vacating a citation issued to a production operator on the ground that MSHA improperly applied its newly promulgated and adopted independent contractor enforcement policy. The Commission found no credible evidence in that case to support any conclusion that the production operator's employees were exposed to any hazard as a result of the

violation, or that the operator exercised sufficient control over the work activities of its independent contractor so as to establish a link or nexus with the contractor's violation. MSHA appealed the decision, Brock v. Cathedral Bluffs Shale Oil Company, and the Court reversed the Commission's decision, and held that the Commission improperly regarded MSHA's general independent contractor enforcement policy as a regulation which MSHA was required strictly to observe. The Court clearly recognized that MSHA retained broad discretion to cite a mine operator, as well as contractors, for violations, and stated that "the statement here in question pertains to an agency's exercise of its enforcement discretion - an area in which the courts have traditionally been most reluctant to interfere," 796 F.2d 538, and the cases cited therein. The court further stated as follows at 796 F.2d 538:

* * * * *

[W]e see no basis for overturning the Secretary's judgment that his independent contractor enforcement guidelines do not constitute a binding, substantive regulation. The language of the guidelines is replete with indications that the Secretary retained his discretion to cite production-operators as he saw fit. The statement characterizes itself as merely a "general policy" to "be used by inspectors as guidance in making individual enforcement decisions." At its very outset it warns production-operators that nothing it contains should be regarded as altering their basic compliance responsibilities:

Production-operators are subject to all provisions of the Act, standards and regulations which are applicable to their mining operation. This overall compliance responsibility of production-operators includes assuring compliance with the standards and regulations which apply to work being performed by independent contractors at the mine. As a result, independent contractors and production-operators both are responsible for compliance with the provisions of the Act, standards and regulations applicable to the work being performed by independent contractors. (Emphasis added).

It seems clear to me that production operators are jointly and severally liable for violations involving independent contractors at their mines. Cyprus Industrial Minerals Co. v. FMSHRC, 664 F.2d 1116 (9th Cir. 1981). It is also clear that a mine owner-operator is liable for the independent contractor's safety violations without regard to the owner's fault. See:

Consolidation Coal Company, 10 FMSHRC 745, 749 (June 1988), and the decisions cited therein by Judge Weisberger. The Commission affirmed Judge Weisberger's findings that MSHA's discretion was not abused in citing both the production operator and its contractor, and took note of the Court's decision in Brock v. Cathedral Bluffs Shale Oil Co., supra, with respect to MSHA's wide enforcement discretion, 11 FMSHRC 1439, 1443 (August 1989).

There is no evidence in this case that any employee of the respondent was exposed to the hazard presented by the violation. The work was being conducted and directly supervised by the contractor's supervisor, Michael Powers, pursuant to a contractor with the respondent. The respondent points out it did not hire the contractor and sub-contractor employees performing the work, and only "monitored the contractor's work performance." Mr. Barton testified that pursuant to the contract, the contractor was responsible for the safe completion of the work as well as the enforcement of all applicable safety laws. Although not specifically raised by the respondent as an issue, I reject any notion that a production operator may contract away or delegate its statutory duty to prevent safety hazards or violations which may occur on its property or its strict liability as established by the Act.

MSHA takes the position that as an owner-operator, the respondent is charged with the responsibility of assuring contractor compliance with the safety requirements of the Act and its safety regulations, and that the respondent may be cited for the acts and omissions of its contractor. MSHA relies on its independent contractor enforcement policy guidelines which state that it is appropriate to cite the owner-operator as well as the contractor when the ". . . production-operator has contributed by either an act or an omission to the occurrence of a violation in the course of an independent contractor's work or . . . when the production operator has either contributed to the continued existence of a violation committed by an independent contractor. . .".

MSHA maintains that the respondent contributed to the violation by failing to provide wire height information to its contractor, by failing to meet with the contractor to systematically enforce the safety provisions of its contract with the contractor, and by wrongly advising the contractor that it did not have to train its drivers. With regard to Mr. Barton's role in connection with the violation, MSHA points out that the work area in question was an electrical substation and that a high voltage line accident was clearly the most likely and foreseeable hazard faced by the drivers. Since Mr. Barton was an employee of American Electric Power, and was a trained and experienced civil and mining engineer, MSHA believes that he should be held to a higher standard of prudence and care than a regular mine supervisor or a lay person.

MSHA further argues that Mr. Barton had the responsibility of overseeing the contract performance of the contractor retained by the respondent, and that the contract required the work to be performed in a safe manner under competent supervision. MSHA asserts that Mr. Barton apparently did nothing to assure contractor compliance with this contract provision, did not meet with the contractor regarding safety measures to be taken, and did not ascertain whether the contractor had familiarity with wire heights or truck bed heights, or whether it was familiar with the hazard inherent in the job. MSHA points out that Mr. Barton apparently never advised Mr. Powers that he was contractually responsible for the safety of the project, and that Mr. Powers testified that he was not familiar with its safety provisions.

Finally, MSHA suggests that the respondent must bear derivative liability for the acts or omission of Mr. Powers. Since the contractor was apparently delegated the sole responsibility for safety considerations pursuant to the contract, MSHA concludes that the contractor became the respondent's agent as that term is used in section 3(e) of the Act and stands in the shoes of its' directly employed supervisory agents, and is accountable for the acts or omissions of Mr. Powers.

In the instant case, the inspector cited and found three separate entities who he believed were responsible for the violation in question. In addition to the respondent, he also issued section 104(d) citations to the respondent's general contractor (Coal Fuel Services), and the contractor's sub-contractor (Radabaugh Trucking Company). The inspector explained his reasons for citing all three of these parties. His reasons for citing the respondent are summarized as follows:

- The violation occurred on the respondent's mine property.
- The respondent's project engineer, James Barton, was at the work site and observed the trucks (including Mr. Radabaugh's truck) spreading gravel under the powerlines, and made no effort to ascertain the clearance distances between the trucks and the power wires.
- The respondent's electrical prints, which were available at the site, did not reflect the height of the power wires above the ground, and Mr. Barton did not know the height of the power wires, how close the trucks would drive to the power wires, and did not know the height of the truck bed when it was in a fully raised position.

- The respondent was previously cited for a violation of section 77.807-3, on February 2, 1989, for failing to maintain a 10-foot clearance between its trucks which were parked under energized high-voltage lines which was part of the "electrical circuit" involved in the instant matter. The inspector believed that this prior citation should have alerted the respondent to be aware of the potential hazard and take appropriate action.
- The lack of training for the truck driver (Radabaugh) whose truck contacted the overhead power wires in this case

Mr. Barton confirmed that he was present at the work site for approximately a week during the course of the work being performed by the contractor. Contrary to the respondent's assertions that "there is no testimonial evidence establishing the duration of the visits nor what specifically was observed" (pgs. 9-10, posthearing brief), Mr. Barton testified that one of the reasons for his visits during the week was to see to it that safety standards were met, and he confirmed that he was at the site on the morning of the accident and observed three or four trucks spreading gravel under the direction of Mr. Powers. Although Mr. Barton denied that he observed Mr. Powers directing Mr. Radabaugh's truck, and stated that he did see the truck contact the power wire because he was in "another area," he was apparently close to the scene of the accident because at the moment of contact, he turned and saw the truck and heard the "electrical shorting sound." Mr. Powers testified that prior to the accident Mr. Barton came to the site four or five times a day to check the progress of the work, and that he had visited the site on two occasions on the morning of the accident to "see how things were going" and returned again that day to ask him to have lunch or dinner with him.

Although Mr. Powers testified that he and Mr. Barton discussed "safety practices" during Mr. Barton's visits to the work site, he admitted that they did not discuss the powerlines during any of Mr. Barton's visits prior to the accident. Mr. Barton testified that during the week of his visits to the work site to observe whether all safety standards were met, he did not meet with any contractor personnel to discuss measures for insuring that the gravel was spread in a safe manner, and although he had observed the trucks coming and going, and spreading the gravel, he was not concerned about the methods being used because he believed that Mr. Powers had matters under control.

Mr. Barton confirmed that he was concerned that elevated trucks were being used around high powerlines, and Mr. Powers was apparently also concerned because he testified that he instructed

the drivers to "watch out" for the overhead wires. Notwithstanding these concerns, Mr. Barton and Mr. Powers never discussed the hazards of trucks operating at the electrical substation area where the presence of overhead energized powerlines was readily obvious and apparent. Further, even though electrical prints and drawings were subsequently found by the inspector and Mr. Barton in a contractor's trailer, they did not include any information with respect to the height of the powerlines above the ground. Although he was acting as the respondent's direct contact representative with the contractor, Mr. Barton was ignorant of the height of the powerlines, and he apparently made no effort to obtain this information and communicate it to the contractor.

Mr. Barton expected each truck driver to visually look out for the overhead power wires, and Mr. Powers relied on his "instinct" and the "reverse spreading" procedure as a means of preventing a truck from contracting a wire. I conclude and find that the failure by Mr. Barton and Mr. Powers to make any meaningful determination as to the safe working parameters for the trucks which were working in a rather confined electrical substation area around overhead powerlines, or to specifically determine the height of the overhead power wires, prior to the beginning of the work in question, and to discuss and exchange such information with each other, constituted omissions on their part which contributed to the violation.

Respondent's safety representative, Paul Zanussi, testified that he was never instructed to be at the site, and that no one from the safety department was assigned to be present to insure that the work was done in a safe manner. While there is no evidence that Mr. Barton was aware of the previous citation issued some 3 months earlier for a violation of the same standard cited in this case, I believe that one may reasonably conclude that the safety department was aware of it. Although the presence of a safety representative may not be required on a daily basis at the site where a contractor is performing work, given the fact that Mr. Barton was concerned about the trucks working around overhead powerlines, and the fact that the respondent had recently been charged with a similar violation, I believe that it is not unreasonable to expect at least some communication between the respondent's safety and engineering departments and the contractor to insure that the work was being done in a safe manner and that truckers were not exposed to potential hazards. As noted earlier, the respondent may not absolve itself of all of its statutory safety responsibilities by simply "contracting them out" to a contractor.

Although Mr. Barton took the position that the contractor was responsible for insuring that the work was performed in a safe manner, and was responsible for enforcing all applicable safety laws, he conceded that he had the authority to act or intervene if he observed any drivers engaging in any unsafe acts.

He also conceded that part of his responsibilities during his site visits was to insure that all safety standards were met, and in "hindsight," he agreed that if he knew that the trucks could not clear the powerlines, the gravel would have been spread in a different manner. It seems to me that if Mr. Barton had the authority in "hindsight" to dictate the manner in which the gravel was spread if he believed that the spreading methods used exposed the truck drivers to a hazard of contacting the overhead powerlines, he also had that authority prior to the time of the accident. Under all of these circumstances, the respondent's suggestion that it had no safety responsibility for the work being performed by the contractor, and that Mr. Barton's presence at the work site was for the limited or sole purpose of insuring contract compliance with only the job specifications is rejected.

I conclude and find that Mr. Barton had an obligation and duty, which were inherent in his position as the project engineer on the job, to insure that the contractor work being performed in and around the electrical substation area which was located on the respondent's property, an area which was rather confined, and where energized overhead powerlines and other electrical equipment were located, was done in a safe manner. I conclude and find that Mr. Barton's failure in this regard constituted omissions which contributed to the violation.

In view of the foregoing findings and conclusions, I conclude and find that MSHA has established a violation by a preponderance of the credible and probative evidence adduced in this case. I also conclude and find that the respondent was properly cited in this case, that the inspector's reasons for citing the respondent were reasonable and proper in the circumstances and were in compliance with MSHA's independent contractor policies and guidelines, and that the inspector did not act arbitrarily by citing the respondent as well as the contractor and its subcontractor. Accordingly, the contested violation IS AFFIRMED.

Significant and Substantial Violation

The parties stipulated that in the event the violation is affirmed, it was indeed a significant and substantial violation. Accordingly, the inspector's finding in this regard IS AFFIRMED.

Unwarrantable Failure Violation

The governing definition of unwarrantable failure was explained in Zeigler Coal Company, 7 IBMA 280 (1977), decided under the 1969 Act, and it held in pertinent part as follows at 295-96:

In light of the foregoing, we hold that an inspector should find that a violation of any mandatory standard was caused by an unwarrantable failure to

comply with such standard if he determines that the operator involved has failed to abate the conditions or practices constituting such violation, conditions or practices the operator knew or should have known existed or which it failed to abate because of a lack of due diligence, or because of indifference or lack of reasonable care.

In several recent decisions concerning the interpretation and application of the term "unwarrantable failure," the Commission further refined and explained this term, and concluded that it means "aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act." Energy Mining Corporation, 9 FMSHRC 1997 (December 1987); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987); Secretary of Labor v. Rushton Mining Company, 10 FMSHRC 249 (March 1988). Referring to its prior holding in the Emery Mining case, the Commission stated as follows in Youghiogheny & Ohio, at 9 FMSHRC 2010:

We stated that whereas negligence is conduct that is "inadvertent," "thoughtless" or "inattentive," unwarrantable conduct is conduct that is described as "not justifiable" or "inexcusable." Only by construing unwarrantable failure by a mine operator as aggravated conduct constituting more than ordinary negligence, do unwarrantable failure sanctions assume their intended distinct place in the Act's enforcement scheme.

In Emery Mining, the Commission explained the meaning of the phrase "unwarrantable failure" as follows at 9 FMSHRC 2001:

We first determine the ordinary meaning of the phrase "unwarrantable failure." "Unwarrantable" is defined as "not justifiable" or "inexcusable." "Failure" is defined as "neglect of an assigned, expected, or appropriate action." Webster's Third New International Dictionary (Unabridged) 2514, 814 (1971) ("Webster's"). Comparatively, negligence is the failure to use such care as a reasonably prudent and careful person would use and is characterized by "inadvertence," "thoughtlessness," and "inattention." Black's Law Dictionary 930-31 (5th ed. 1979). Conduct that is not justifiable and inexcusable is the result of more than inadvertence, thoughtlessness, or inattention. * * *

In my view, the direct and proximate cause of the accident was the result of the truck driver's failure to adhere to the instruction by Mr. Powers not to drive beyond the footbridge. Although Mr. Radabaugh denied that he was so instructed, I find the testimony of Mr. Powers to be more credible. In addition,

the inspector had no reason to believe that the instructions were not given. Indeed, he testified that Mr. Radabaugh admitted that he was so instructed, and the inspector's notes made at the time of the incident reflect that Mr. Powers informed him that he had instructed Mr. Radabaugh not to go beyond the footbridge and that Mr. Radabaugh admitted that this was in fact the case. The inspector also confirmed that the reason Mr. Powers instructed Mr. Radabaugh not to go beyond the footbridge was in order to avoid contact with the powerwire, and if Mr. Radabaugh had complied with the instruction he would not have contacted the wire. Under the circumstances, I do not believe Mr. Radabaugh's testimony that he was not instructed not to proceed beyond the footbridge.

The evidence establishes that the incident in question was not the first time Mr. Radabaugh had contacted an energized power wire with his truck. Although Mr. Radabaugh denied that he saw the power wire as he proceeded away from the area where he had dumped gravel while under Mr. Powers' direction, he testified that when his truck initially made contact with the neutral wire, another driver alerted him to this fact. Although the neutral wire did not arc, and there was no indication that the wire had any power on it, rather than stopping his truck at that point, Mr. Radabaugh looked at the wire to determine whether he could break it, and when he determined that he could not break it, he put his truck in reverse, and as he backed up he saw Mr. Powers through his rear view mirror running toward him and motioning him to stop. Although Mr. Radabaugh stopped, the neutral wire which he initially caught with his truck bed brought the power line support poles together causing the neutral wire to contact the energized power wire and the truck. In my view, if Mr. Radabaugh had simply stopped his truck and not attempted to break the wire with his truck by moving it further, the accident may have been avoided.

Inspector Shriver confirmed that in addition to the respondent, he also charged the contractor and its sub-contractor with unwarrantable failure violations in connection with the accident in question. He believed that the respondent was guilty of aggravated conduct because Mr. Barton informed him that he had observed the trucks, and in particular, Mr. Radabaugh's truck, travelling under the powerlines while spreading gravel, Mr. Barton's lack of knowledge of the height of the overhead wires or the height of the raised truck beds, and the prior citation issued by another inspector for parking trucks with their raised beds under the same overhead power circuit. He also considered Mr. Radabaugh's admission that he had received no training with respect to overhead powerlines.

Although the evidence establishes that Mr. Barton observed the gravel trucks operating in the area of the overhead powerlines on the day of the accident, Mr. Barton testified that he

did not observe Mr. Powers directing Mr. Radabaugh's truck and paid no particular attention to it because he was in another area. Mr. Powers testified that three or four trucks preceded Mr. Radabaugh and backed under the wires. Mr. Shriver's notes reflect that Mr. Barton told him that he had observed three or four loads of gravel spread in the area north of the substation fence, and this information was incorporated in an accident memorandum submitted by Mr. Shriver to MSHA's district manager on June 1, 1989. Although Mr. Radabaugh was spreading gravel at the area noted in the notes and memorandum, the information contained in these documents do not reflect that Mr. Barton specifically observed Mr. Radabaugh's truck. They simply reflect that Mr. Barton "watched three loads of gravel spread north of the substation fence" (exhibits P-5 and P-6). Mr. Radabaugh confirmed that he had made an earlier trip to the site spreading gravel on a parking lot.

While it is true that Mr. Barton conceded that the trucks operating and spreading gravel in the area of the powerlines cause him some concern, his credible testimony reflects that he relied on the fact that Mr. Powers was serving as the truck spotter directing and supervising the spreading of the materials, and that he trusted Mr. Powers judgment that the work was being done in a safe manner. Mr. Powers had previous experience working around powerlines, and he cautioned each driver as they arrived at the site to be aware of the lines. Although I have concluded that Mr. Barton had a duty to communicate with the contractor in order to insure the availability of information regarding the height of the powerlines and the height of the raised truck beds, in the circumstances then presented, including the fact that Mr. Radabaugh disregarded a direct order by Mr. Powers not to go beyond the footbridge, I cannot conclude that Mr. Barton could have reasonably anticipated that Mr. Radabaugh would not follow instructions and place himself in a position to contact the powerlines. Under all of these circumstances, I conclude and find that Mr. Barton's failure to act when he initially observed the truck was the result of inattention rather than aggravated conduct.

With regard to the prior citation issued by Inspector Fetty, I am not persuaded that this singular violation supports, or contributes to, a finding of aggravated conduct. The prior citation concerned a different factual situation, and I find no evidence that Mr. Barton was aware of it.

With respect to Mr. Radabaugh's lack of training, I take note of the fact that the inspector did not issue any violations for lack of training, and I find no probative evidence that the respondent was required to train Mr. Radabaugh. The un rebutted testimony of Mr. Powers establishes that the contractor hazard trained its employees, and I assume that Radabaugh Trucking Company, who was also a contractor, had some responsibility for

training its own drivers. Although it may be true that the respondent advised Mr. Powers that the truckers employed by Radabaugh Trucking were not required to be trained, there is no evidence that Mr. Barton gave this advice, and even if he did, I am not convinced that the basis for this opinion was incorrect. Mr. Powers confirmed that the truckers did not leave their vehicles at any time while at the work site, and it was his understanding that MSHA's training policy did not require hazard training for pickup and delivery drivers who remain in their vehicles. The policy referred to by Mr. Powers, exhibit R-1, supports this conclusion, and I find no evidentiary basis for concluding that the advice given to the contractor by the respondent was other than a reasonable and good faith opinion based on the work being performed by contractor truckers.

I take particular note of the fact that Mr. Shriver admitted that he was not familiar with MSHA's training policy and that he abated and terminated the violation after the respondent stated that it would provide hazard training for contractor truckers, and that it "will ensure that contractors provide this hazard training to trucking subcontractors." Thus, it would appear that the inspector put the onus on the contractor to train its own subcontractors. Under all of these circumstances, I cannot conclude that Mr. Radabaugh's lack of training supports, or contributes to, a finding of aggravated conduct by the respondent.

In view of the foregoing findings and conclusions, I conclude and find that the violation was a result of the respondent's inattention and failure to exercise reasonable care rather than aggravated conduct. Accordingly, the inspector's unwarrantable failure finding IS VACATED, and the order IS MODIFIED to a section 104(a) citation with significant and substantial (S&S) findings, and as modified, the citation IS AFFIRMED.

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

I conclude and find that the respondent is a large mine operator and that the civil penalty assessment for the violation in question will not adversely affect the respondent's ability to continue in business.

History of Prior Violations

The respondent's history of prior violations, as reflected by an MSHA computer print-out, (exhibit P-1-a), shows that for the period May 30, 1987 through May 29, 1989, the respondent paid \$251,308 for 1,047 violations issued at the Martinka No. 1 Mine. One-thousand and fourteen (1,014), were for violations found to be significant and substantial (S&S). No prior violations of section 75.807-3, are noted. MSHA has not argued or suggested

that the respondent's compliance record warrants any additional increases to its proposed civil penalty assessments, and I assume that it considered the respondent's history of compliance when the assessments were initially made. However, I have considered this compliance history in the penalty assessment which I have made for the violation which has been affirmed.

Good Faith Compliance

The record reflects that the respondent timely abated the violation by providing hazard training to contractors, and insuring that the contractors will provide hazard training to its subcontractors. I conclude and find that the respondent timely abated the violation in good faith.

Negligence

Although the record reflects that the height of the powerlines were otherwise in compliance with MSHA's regulations, I conclude and find that the failure by Mr. Barton or the respondent to make any determination as to the height of the raised truck beds operating in the area of the powerlines, or to otherwise discuss the matter with the contractor, or to communicate this information to the contractor in advance of the start of the project, constitutes a lack of reasonable care amounting to ordinary negligence.

Gravity

As noted earlier, the respondent stipulated that the violation was significant and substantial. The truck contact with the energized powerline caused considerable damage to the truck, and Mr. Radabaugh was fortunate that he was not seriously injured or killed. I conclude and find that the violation was serious.

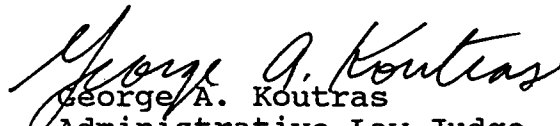
Civil Penalty Assessment

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that a civil penalty assessment of \$500 is reasonable and appropriate for a violation of mandatory safety standard 30 C.F.R. § 77.807-3, as noted in the modified section 104(a) "S&S" Citation No. 2944317, May 22, 1989.

ORDER

The respondent IS ORDERED to pay a civil penalty assessment in the amount of \$500 for the violation in question, and payment

is to be made to MSHA within thirty (30) days of the date of this decision and order. Upon receipt of payment, this matter is dismissed.


George A. Koutras
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

2 SKYLINE, 10th FLOOR

5203 LEESBURG PIKE

FALLS CHURCH, VIRGINIA 22041

AUG 3 1990

WESTWOOD ENERGY PROPERTIES,	:	CONTEST PROCEEDINGS
Contestant	:	
v.	:	Docket Nos. PENN 88-42-R
	:	PENN 88-43-R
SECRETARY OF LABOR,	:	and
MINE SAFETY AND HEALTH	:	PENN 88-73-R
ADMINISTRATION (MSHA),	:	thru PENN 88-89-R
Respondent	:	
	:	Refuse Culm Bank
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 88-148
Petitioner	:	A.C. No. 36-07888-03501
v.	:	
	:	Refuse Culm Bank
WESTWOOD ENERGY PROPERTIES,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT ORDER OF DISMISSAL

Before: Judge Broderick

By Decision issued December 20, 1989, the Commission remanded these cases to me to determine whether the Secretary properly exercised her authority to regulate the cited working conditions at the subject facility. By order issued January 22, 1990, I granted Westwood's motion to reopen discovery and I extended the time for prehearing submissions. Extensive discovery including interrogatories, production of documents and a deposition was conducted between January and March 1990.

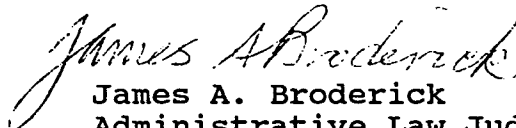
On August 1, 1990, the Secretary filed a motion to approve a settlement between the parties and to dismiss these proceedings. The settlement agreement provides that Westwood will withdraw its contest proceedings and pay the \$900 in civil penalties assessed in my decision of January 26, 1989. It further provides that MSHA will not assert jurisdiction over Westwood's facility in the future, so long as Westwood does not materially change the manner in which it processes culm as described in the Commission decision. If MSHA determines that a material change has occurred and decides to reassert its jurisdiction, it will so notify Westwood. Westwood does not admit MSHA's jurisdiction over any portion of the Westwood facility and its withdrawal of the

notices of contest is without prejudice to its right to contest any future assertion of jurisdiction by MSHA.

I have considered the motion in the light of the Commission Decision of December 20, 1989, and in the light of the provisions of section 110(i) of the Act and conclude that it should be approved.

Accordingly, the settlement agreement is **APPROVED**, and Westwood is **ORDERED TO PAY** the sum of \$900 within 30 days of the date of this order.

IT IS FURTHER ORDERED that subject to the payment of the above penalty the captioned contest and civil penalty proceedings are **DISMISSED**.


James A. Broderick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

2 SKYLINE, 10th FLOOR

5203 LEESBURG PIKE

FALLS CHURCH, VIRGINIA 22041

AUG 3 1990

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 89-278
Petitioner	:	A.C. No. 46-03805-03939
v.	:	
	:	Martinka No. 1 Mine
SOUTHERN OHIO COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Mark R. Malecki, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia, for
the Petitioner;
Rebecca J. Zuleski, Esq., FURBEE, AMOS, WEBB &
CRITCHFIELD, Morgantown, West Virginia, 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 penalty assessments for five alleged violations of certain mandatory safety standards found in Parts 75 and 77, Title 30, Code of Federal Regulations. The respondent filed a timely answer contesting the alleged violations and a hearing was held in Morgantown, West Virginia. Two of the alleged violations were settled by the parties, one was dismissed by the petitioner, and testimony and evidence was taken with respect to two alleged violations. The parties filed posthearing briefs, and I have considered their arguments in the course of my adjudication of this matter.

Issues

The issues presented in this case are (1) whether the conditions or practices cited by the inspector constitute violations of the cited mandatory safety standards, (2) whether two of

the alleged violations were "significant and substantial" (S&S), (3) whether the violations were the result of the respondent's unwarrantable failure to comply with the cited standards, and (4) the appropriate civil penalties to be assessed for the violations, taking into account the statutory civil penalty assessment criteria found in section 110(i) of the Act. Additional issues raised by the parties are disposed of in the course of this decision.

Applicable Statutory and Regulatory Provisions

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

Stipulations

The parties stipulated to the following (Tr. 7-11; exhibit P-1):

1. The respondent is the owner and operator of the Martinka Mine, and the operations of the mine are subject to the Act.
2. The presiding judge has jurisdiction to hear and decide this matter.
3. A copy of an MSHA's Proposed Assessment Data Sheet (exhibit P-2) which sets forth (a) the number of assessed non-single penalty violations charged for the years 1986 through February, 1989, (b) the number of inspection days per month in said period and (c) the mine and controller tonnage for year 1988, is admitted for the record in this case, and the respondent has no facts to contradict the accuracy of this information.
4. A copy of an MSHA computer print-out reflects the history of prior assessed violations issued at the Martinka No. 1 Mine for the period April 26, 1987 through April 25, 1989 (exhibit P-3).
5. The MSHA inspectors who issued the contested orders were acting in their official capacity when the orders were issued, and true copies were served on the respondent or its agent as required by the Act.

6. The respondent knows of no evidence to contradict the petitioner's assertion that the Martinka No. 1 Mine has not had a complete inspection free of unwarrantable failure violation since the issuance of Citation No. 0859286 dated September 1, 1981.

Discussion

The parties settled three of the contested orders in this case. The remaining two orders are as follows:

Section 104(d)(2) Order No. 3117868, May 23, 1989, cites an alleged violation of 30 C.F.R. § 77.404(a), and the cited condition or practice states as follows:

Based on a complaint investigation a D-7 caterpillar dozer company number 29423 had been operated from 5-15-89 to 5-19-89 with two broken cat pads, which are part of a walkway platform on which the machine operators walk to mount and dismount the machine. This condition had been known by the foreman in charge, Jim Richards, and had been recorded in the machine operator's daily examiners record book on 5-16-89.

Section 104(d)(2) Order No. 2944318, May 24, 1989, cites an alleged violation of 30 C.F.R. § 75.1704, and the cited condition or practice states as follows:

On B11 longwall, the intake escapeway is not maintained to insure passage of any person, including disabled persons. In the crosscut just inby station 22031, between the track and intake entries, there were the following obstructions:

- (1) Ten 5-gallon cans of hydraulic oil, two deep
- (2) 20 pieces of belt structure
- (3) 20 belt rollers
- (4) Mandoor from stopping
- (5) Two wooden pallets
- (6) A 3' x 4' x 4' wooden crate full of pan line chain
- (7) Four 3/4" x 2' x 4' steel plates
- (8) A scoop Tire

In the crosscut from the belt to the track, there was about 30 feet of water and mud 12 inches deep. One block outby in escapeway (outby station 22032) there was a water hole 40 feet long rib to rib, 12 inches deep, with a 2 foot drop off to water. The foreman stated that this crosscut was entrance to intake escapeway entry, and there was a green arrow escapeway

sign hanging in track entry, pointing into this crosscut.

Citation No. 2944303 was issued on 5-1-89 for obstructed intake escapeway on D-4 longwall. This should have caused operator to take effective action to prevent obstructed intake escapeways.

Petitioner's Testimony and Evidence (Order No. 3117868)

MSHA Inspector Bretzel Allen confirmed that he conducted a surface inspection of the mine on May 23, 1989, after receiving a section 103(g) complaint from a representative of the miners. The complaint concerned a D-7 bulldozer with broken cat pads being operated in the refuse dump area. He confirmed that the broken pads had been replaced prior to his inspection, but that he determined that they were previously missing through his discussion with the equipment operators, foreman Jim Richards, and the respondent's accident prevention officer, Wesley Dobbs. Mr. Allen identified exhibit P-4-E, as a copy of an equipment record book which reflects that the broken pads had been reported by the machine operator, and he stated that Mr. Richards confirmed that this had been done (Tr. 12-16).

Mr. Allen stated that he was informed that new replacement cat pads were ordered and received on May 17 or 18, 1989, and were installed on the dozer on May 19. The complaint was made because the dozer had not been taken out of service and was continuously used from May 15 to May 19. He confirmed that the primary purpose of the cat pads is to provide traction for tramming the dozer, and they are also used as a travelway for the machine operator to access and exit the cab of the machine. The operator walks along the pads to reach the left door of the cab which is normally used to get in and out of the machine. He confirmed that he has observed dozer operators enter and exit a dozer, and they always use the left track as a walkway (Tr. 16-19).

Mr. Allen stated that the pads normally break off at the location of the mounting bolts, and this leaves an opening 9-1/4 inches wide by 12 inches long. He believed that a missing pad would pose an injury hazard because the dozer tracks are slippery, and the operator normally takes short steps while walking across the cleats and he needs to hold onto a handrail or some part of the machine to get on off. The dozer in question can be expected to be used at night, and visibility of the tracks is poor because the dozer operates in a muddy and wet area and someone may not notice any missing pads because they may be covered or "caked" with mud. He believed that a slip or fall off the machine would result in "lacerations, strains, sprains, fractures, different things" (Tr. 23). He confirmed that dozer

operator Bill Bice lost 3 days of work when he slipped on a broken cat pad and received a back injury.

Mr. Allen stated that he based his unwarrantable failure finding on the fact that the respondent knew the pads were broken because the condition had been reported and recorded in the record book. Although replacement parts were ordered, the respondent continued to use the dozer with the broken pads instead of removing it from service until it could be repaired, and this did not comply with section 77.404(a). Mine management gave him no reason for not installing the cat pads on May 17 or 18, and replacement could have been achieved by removing and replacing four bolts. He confirmed that management was aware of Mr. Bice's injury because it promptly reported the incident to MSHA (Tr. 24).

On cross-examination, Mr. Allen stated that the operator's controls on the right side of the cab would hinder his exit from that door and that the manufacturer put two exit doors on the machine "in case of an emergency." He confirmed that a missing pad would leave an opening 9-1/2 wide by 12 inches long by measuring a pad which was on the machine. He also confirmed that the accident report concerning Mr. Bice reflects that he lost 1 day of work, and that weekends are not counted as workdays (Tr. 26).

Mr. Allen confirmed that he cited a violation of 77.404(a), because he believed that the two half-broken cat pads on the cited dozer rendered the machine unsafe to operate, and that the respondent should have immediately removed it from service once it knew the pads were broken (Tr. 26). He stated that the cat pad on the cited dozer is approximately 36 inches wide, from left to right, and that after counting the number of pads on a print of a D-7 dozer, he determined that there are 72 pads on the machine. He agreed that there could be a minimum of 77 pads on a dozer, but did not believe that the cited dozer had more than 77, but he did not count them (Tr. 29).

Mr. Allen confirmed that he has operated a D-7 dozer and he described the enclosed glass operating cab. He stated that the dozer is normally mounted from the back, and that the terrain where the machine is operated has some effect on whether or not the pads break. He believed that a dozer operator would not necessarily look for any broken pads, and he has not observed any employee exit from the cab onto the track and jump off the machine (Tr. 33). If an operator observed a broken pad, he could move the machine so that the broken pad is contacting the ground prior to dismounting, or he could use the other door. He confirmed that each operator is responsible "to a certain extent" for his own safety when he is mounting and dismounting the machine (Tr. 34).

Mr. Allen defined "unwarrantable failure" as "an unsafe condition or practice that the operator knew about or should have known about" (Tr. 35). He determined that the violation was an unwarrantable failure because Mr. Richards, the foreman in charge, knew about the condition of the dozer for a week, and that the surface superintendent, Richard Haught, also knew about the condition. Mr. Allen confirmed that he did not see or measure the broken pads because they had already been replaced at the time the order was issued (Tr. 36).

Mr. Allen stated that unless the dozer has been parked or cleaned up, it is normally slick because it operates in wet materials, and that a certain portion of the mud which adheres to the tracks is discharged because the machine is designed to do this (Tr. 48). He confirmed that getting on and off a dozer is hazardous and that an operator should be cautious and use "the grab bars" on the machine (Tr. 53).

Delbert Barnett, testified that he has been employed by the respondent as a mobile equipment operator for approximately 7 years. He operates a dozer at the coal refuse area where "it is the type of refuse which is real mucky" and black in color. He was aware of the injury to Mr. Bice when he fell through a pad on a dozer, and he confirmed that in 1989, there were problems with broken bolts on the pads. Complaints were made to management, but no action was taken until Mr. Bice was injured, and management then began repairing the pads. The safety department met with the operators and instructed them that no one was to operate dozers if a pad was broken off, and he was never required to operate a dozer with broken pads. However, the operators were required to operate the dozers when it was known that they were loose. He acknowledged that it was difficult to detect a loose pad unless one actually stepped on it, and when a loose pad was discovered, the foreman was notified, and he was supposed to contact a mechanic to fix it (Tr. 59-62).

Mr. Barnett identified exhibit P-4-E, as copies of equipment operator's checklists which he has filled out and left to be picked up by management. He identified a May 16, 1989, checklist which he filled out and it notes that "two pads broke, left side," and confirmed that he gave it to foreman Jim Richards, but that Mr. Richards took no action to repair the machine that day (Tr. 63). Mr. Barnett also confirmed that he made a notation on the form that the "pads was broke off the tracks" and that he "almost fell through the broken pads," and he further explained this incident (Tr. 64-67). He believed that missing cat pads pose a risk to him because when he is working on slopes or benches he should not have to worry about "stepping and falling through something" (Tr. 67). He stated that it is much easier to walk if there are no missing pads, and that at times, the tracks are so muddy that he cannot see the pads and that its "real

slippery" and "that is why we have so many hand bars on it to hold yourself as you're getting up on the machine" (Tr. 68).

Mr. Barnett stated that the cited dozer was operated "around the clock," and that he has operated it in the dark once or twice in the past year, and the only lighting was on the front and back of the machine. There are times when he cannot exit from the right side of the machine, and he uses the left side track for checking the machine oil, transmission, and water level at the start of the shift, and his gauges during the shift (Tr. 70). He uses the right exit of the machine more than the left because a parking brake on the left side is "a hassle" (Tr. 72).

Mr. Barnett explained that the problems with the pads began when the respondent decided to weld the mounting bolts to keep them from breaking and to save time replacing the bolts. However, the pads were crystallized when they were welded by a contractor, and most of them have been replaced to their original factory condition (Tr. 73).

On cross-examination, Mr. Barnett stated that he has always reported broken pads to management, and that his reports are left on a desk to be picked up by the foreman. He stated that he can observe the pads as they move around when the machine is operating, and can see any broken pads once the machine is moving (Tr. 74-80). He confirmed that the machine oil and water must be checked from the left side, and that the fuel is checked from the right side (Tr. 81). He confirmed that he can use the right side to exit the machine, or sometimes can move the machine forward to avoid broken pads, if he is aware of them (Tr. 83-84). He denied that he has ever jumped off a machine, and he has never observed anyone do so (Tr. 85).

Mr. Barnett confirmed that Mr. Dobbs, who is with the respondent's safety department, has instructed the dozer operators not to operate any dozers with broken pads, but that Mr. Dobbs told them this after the violation in this case was issued, and not before (Tr. 86). He also believed that the safety department stated that dozers with broken pads would be withdrawn after Mr. Bice was injured, but before Inspector Allen came to the mine (Tr. 86).

In response to further questions, Mr. Barnett stated that he had observed the broken pads which he had reported on the May 16, 1989, checklist during the shift, but that the respondent took the position that broken pads were not against the law and that "it wasn't no safety issue for us to run the machinery" with broken pads. He stated that "the company told us that we had to run them with broken pads," and that after Mr. Bice was injured, "they started shutting the machine down and fixing the pads" (Tr. 89). He could not recall why he did not report any broken pads on his checklist report dated May 17, 1989, and was not sure if

they had been repaired by that time (Tr. 90). He considered a dozer with broken pads to be unsafe when he had to use them as a walkway, checking his machine, or dismounting (Tr. 94). He confirmed that he would leave the machine from the right or left side, depending on where it would be parked, and whether there were any obstructions present (Tr. 95).

Dave Kincell confirmed that he has been employed by the respondent as a dozer operator for 7 years, and that he operates a dozer in the refuse area. He was aware that Mr. Bice hurt his tail bone a couple of times when he slipped off a dozer (Tr. 98). He was also aware of pad problems in the spring of 1989, when the pads were coming loose and the respondent decided to have them welded (Tr. 99). He confirmed that mine management instructed the dozer operators not to operate any dozer with a broken pad, and he believed that this statement was made after Mr. Bice was injured and before Inspector Allen issued the violation in this case (Tr. 100).

Mr. Kincell believed that missing cat pads pose a risk to him as the dozer operator, particularly before daylight during the winter when he cannot see any broken pad on the machine walkway. He stated that he can see one-third of the pad from his operator's cab, and that the pads are hard to walk on when they are wet and slippery, even if none of them are missing or loose (Tr. 101). At times, the mud is packed on the pads and "you wouldn't know it was there until you stepped on it or the mud fell out of it" (Tr. 101). He did not believe it was practical for him to remember if a pad is missing and act accordingly, because he is concentrating on operating his machine and not the pads (Tr. 103).

Mr. Kincell confirmed that the oil on a D-7 dozer is checked from the left side, and that he has worked as a mechanic and has repaired the pads. He believed that anyone can change the pads with the proper tools, and if the bolts were not required to be burned off, a pad can be replaced in 20 minutes, or in 35 to 45 minutes if the bolts had to be burned off. Such repairs are made by mine employees or contractors at the mine (Tr. 105).

On cross-examination, Mr. Kincell confirmed that Mr. Richards, Mr. Dobbs, and others told the dozer operators that they were not to operate the dozers with broken or chipped pads, and that this was said during a safety meeting the morning following Mr. Bice's injury. He stated that "they said if you get on your machine and you checked it out and it had a broken cat pad, notify them and they will find you something else to do until it was fixed, or it wouldn't run like that" (Tr. 108). He acknowledged that he can exit from the right side of the dozer, but that he cannot see the front and sides of the dozer tracks from the cab because the view is obstructed by a hydraulic tank and fender (Tr. 108-110). Mr. Kincell confirmed that he is more

careful in mounting and dismounting a dozer when operating under wet and slippery conditions (Tr. 111).

Mr. Kincell confirmed that he fills out an operator's checklist on a daily basis, and has reported broken dozer pads "quite a few times" (Tr. 113). He stated that he has operated a dozer knowing that the pad is broken if he knew that management would repair or replace it within "the next hour or so," but has refused to operate a machine when he knew that there were no replacement pads available, or he had to operate the machine on a slope (Tr. 113, 122-123). He conceded that he is responsible to watch out when climbing on a dozer or using the walkway (Tr. 114).

Bill Bice testified that he has been employed by the respondent as a mobile equipment operator for 10 years and operates a D-7 dozer. He confirmed that he was injured on March 2, 1989, when he stopped the dozer to obtain some oil and while leaving the machine he stepped into a hole created from a partially broken track pad, and strained his back when his foot went through the hole (Tr. 129; exhibit P-4-D). He confirmed that he had previously slipped on a track pad and broke his tail bone 3 to 4 years ago. There was nothing wrong with the pad, but it was slippery and his feet went out and he fell (Tr. 131).

Mr. Bice stated that management called him at home when he was injured on March 2, 1989, and informed him that dozers were not going to be operated with broken pads, and the following week or so, this was confirmed by the safety department during a safety meeting with equipment operators (Tr. 132). He confirmed that the cited dozer which prompted Inspector Allen's inspection had a broken pad, and he considered a broken pad to be a risk or hazard to him (Tr. 133-134).

Mr. Bice stated that it is not always easy to see whether a pad is broken because of poor ground conditions or lighting, and that it is easier to leave the machine from the right side because of the brake which is located on the left side. He confirmed that he has exited the machine from both sides, but that it is normally easier for him to leave by the right door, but there are times when he leaves from the left door depending on the circumstances presented (Tr. 136).

On cross-examination, Mr. Bice confirmed that if he were aware of a broken pad and "was thinking about it" he could move the machine forward before leaving, or use the opposite door to exit. He confirmed that Mr. Richards assigned him to operate the dozer which was cited by Inspector Allen, but he was not sure of the date. He confirmed that he observed the broken pads, but that he did not make the safety complaint because he did not know the pads were broken until a day after the complaint was made when he came to work. He believed that half of the pad was

broken off, and stated that there is a fender over half of the pad along the cab of the dozer, and that he would step on the fender and onto the track and would normally walk to the back of the machine to dismount (Tr. 139).

Mr. Bice confirmed that prior to the violation in question he operated a dozer with broken pads, and that this condition does not render the machine inoperable and it would still have traction. He could not recall whether he has ever jumped off a dozer, but has observed other operators jumping off. He agreed that a dozer operator is responsible for being careful while mounting and dismounting a dozer, and that his usual practice is to use the grab bars on the back of the machine (Tr. 141). He did not believe that he was instructed not to use the cited dozer after the order was issued, but he was not sure (Tr. 141).

Respondent's Testimony and Evidence

Frederick L. Ware, Field Service Mechanic, Beckwith Machinery Company, was called as a witness out of turn by the respondent at the conclusion of the hearing of May 1, 1990, in another docket involving these same parties. He testified that he is a journeyman and master mechanic with 23 years of experience, and he has worked on and operated D-7 dozers. He recalled working on a D-7 dozer with broken pads at the mine between May 19 and 23, 1989, and he identified a copy of a work order dated May 19, 1989, (exhibit R-2-1). The order reflects that he replaced three broken pads, and he believed that they were broken on the inside of the rail, but he was not sure (Tr. 197). He confirmed that the upper portion of the D-7 dozer tracks is utilized as a walkway for the operator to mount and dismount and it is the only way one can get on the machine. The operator usually mounts the machine from the front because there are fenders on the back end and the handrails are on the front. He identified exhibit R-2-C as a photograph of the dozer.

Mr. Ware stated that it would be difficult for the dozer operator to see a broken pad on that portion of the track which is on the ground, but that he could see the portion of the track which is not hidden by the ground. He confirmed that the operator can see the front portion of the tracks from inside the cab, but not that portion directly under him (Tr. 199). He confirmed that the pads are properly attached to the D-7 dozer by bolts, and that the respondent welded the bolts so that they do not vibrate as an added safety feature or precaution. He stated that there are 38 pads on each side of the dozer, and that this is a standard track. Some dozers have extended roller frames which can accommodate two more pads on each side (Tr. 200).

In response to a question as to whether or not two half-broken pads would render the D-7 dozer unsafe to operate "in

any way as far as traction" is concerned, Mr. Ware responded as follows (Tr. 201-202):

Q. Mr. Ware, in your opinion, would two half-broken cat pads, would that render this piece of equipment unsafe and unable to safely operate in any way as far as traction?

A. We're talking about the operation of the machine?

Q. That is correct.

A. No, it wouldn't.

Q. There is no way this would render this piece of equipment unsafe?

A. No. There is nowhere it states in any of our books a broken pad is a reason for not operating a machine, as far as operation of the machine is concerned.

Q. And two half-broken cat pads would not render the tracks loose, or you would not lose (sic) traction in any way?

A. No.

On cross-examination, Mr. Ware confirmed that "anybody can bolt on a track pad," and that the pads were welded on the dozers to prevent the bolts from loosening. He did not believe that the heat generated by the welding process affected the pads in any way, but that some pads which were welded "underneath on a pad to the link" caused a break problem. He could not recall whether the pads that he repaired had this problem (Tr. 204). He confirmed that "there are different things on different sides you have to look at on this machine at times." He stated that "I think the right track is to refuel. Maybe to check the oil from the right side. I don't know" (Tr. 204). He believed that a broken pad would be visible to the operator during the daytime, but not at night (Tr. 205).

In response to further questions, Mr. Ware stated that depending on the terrain, it is not unusual for D-7 dozer pads to break occasionally, and that the track pads are 32 inches extra wide and have a tendency to break on the outside regardless of who makes them or how they are installed (Tr. 205). The primary function of the pads is to provide traction (Tr. 206).

Delbert Linville, respondent's refuse supervisor, testified that he is a master electrician and has mine foreman's papers. He explained the terrain at the refuse pile and confirmed that it consists of coal waste which is always wet and very slippery. In

his opinion, two half-broken pads on a D-7 dozer would not render it unsafe to operate, and such a condition would not affect the tracks, and the loss of traction would be minimal (Tr. 146). He believed "that a man getting on or off the machine should pay particular attention to how he is stepping and where he is stepping" (Tr. 148).

Mr. Linville stated that in his 27 years of experience he was unaware of any serious injuries involving broken pads on a dozer, and was not aware of any orders ever being issued by MSHA for such a condition, or for half-broken pads or any other reason (Tr. 150-151). He stated that the major purpose of the pads is to provide traction for the machine, and that they are not designed for a walkway (Tr. 151). He confirmed that night lighting at the refuse pile is provided by a portable light plant, and there are six to eight lights on each dozer, and although the lighting on the machine may not be adequate when an operator initially mounts it, once he turns the machine lights on, "he can see fine" (Tr. 152).

On cross-examination, Mr. Linville confirmed that although the pads are primarily used for traction, the only way for an operator to reach the cab would be to "step on one to get up there." He stated that it might take 4 days to repair pads if they were not in stock, but he indicated that they are stocked and that the supplier is located 15 to 18 miles from the mine (Tr. 156). He confirmed that he was not the foreman when the order was issued, and that he never had two broken pads on a dozer and let it go for 4 days without repairing it (Tr. 156). He confirmed that a dozer operator may have to use both tracks to perform certain maintenance services (Tr. 157).

Mr. Linville considered broken pads to be a normal wear and tear item, and stated that "in due time we would replace them, in a timely manner. If we didn't have them in stock, then we had to buy it or order it, and then replace it" (Tr. 159). He confirmed that in the past he would not have shut a machine down for broken pads. He was not aware of any inspector citing a machine when he observed a broken pad, nor was he aware of any inspector inspecting the pads on a dozer and say anything about them (Tr. 159). He did not consider the machine with a broken pad that Mr. Bice stepped through to be in an unsafe condition because he believed that Mr. Bice should "try to get off as easy as he can, as safe as he can," and that he should have been looking and able to see the broken pad (Tr. 160).

Petitioner's Testimony and Evidence (Order No. 2944318)

MSHA Inspector Spencer Shriver confirmed that he conducted an inspection on May 24, 1989, in the company of Mr. Dobbs and miner's representative Pat Grimes. Referring to a sketch of the cited area, he described the parts, supplies, and other materials

which he observed in a crosscut on the intake escapeway, including water and muddy holes approximately 1 foot deep. The water holes were not bridged or being pumped, and he concluded that all of the accumulated materials, including the holes, obstructed the escapeway and constituted a violation of section 75.1704.

The inspector believed that the cited standard requires that an escapeway be maintained in such a condition so as to allow travel by miners, including disabled persons who may be carried out on stretchers. He stated that he had to climb over the materials in the crosscut, and he believed that in an emergency, injured or disabled miners, as well as miners assisting those who may be injured, would be exposed to a danger of falling while attempting to travel through the obstructed area. He also believed that the slippery and muddy waterholes obstructed the escapeway, and presented a slip and fall hazard, including drowning. Miners would also have difficulty reaching some of the self rescuers stored in the area because they would have to climb over the accumulated parts and materials (Tr. 169-175).

Mr. Shriver stated that if an emergency were to occur, and miners had to use the obstructed escapeway, particularly while carrying out any injured miners, it would be reasonably likely that an injury would occur. In the event of a longwall dust ignition, a fire on a track locomotive, or a major disaster, smoke would course through the area and would affect visibility. If an injured miner attempting to travel the escapeway where the water holes were located was unaware of the holes, he could slip and fall and conceivably be drowned or knocked unconscious out (Tr. 177-178).

Mr. Shriver stated that longwall foreman Larry Morgan admitted that he knew that the escapeway was impeded and informed him that the midnight crew had knocked down the stopping in the crosscut to prepare the changing of the escapeway. He stated that Mr. Morgan explained that the respondent's policy is to initially clear any existing obstructions, then knock down the stopping, and hang check curtains. Mr. Shriver also determined that a supply scoop had difficulty travelling over a 2-foot dropoff at one of the water holes, and that a chain had been used over a 3-day period to pull the scoop over the hole. He concluded that the supplies and materials in the crosscut had been there since approximately 8:00 a.m. on the day of his inspection, and that the water hole had been there for 2 or 3 days. He concluded that "it had been there a relatively long time, and I consider it to be a serious violation" (Tr. 179-181).

Mr. Shriver stated that he had previously visited the longwall area on a "prestart" inspection and informed the respondent of the hole which had a 3-foot "stepup" and that a ladder or steps should be installed. When he returned on May 1, 1989, two bags of rock dust were in the hole but they were broken and "of

no consequence," and he cited the condition. He informed the respondent of a possible problem with the escapeway and that additional attention should be given to it so that it did not become unpassable. He further stated that Mr. Morgan admitted that he was aware of the situation "but just hadn't really got around to having it cleaned up." Under all of these circumstances, Mr. Shriver concluded that the violation was an unwarrantable failure (Tr. 182).

Mr. Shriver confirmed that some of the bricks and blocks from the stopping which had been knocked out by the midnight shift had been removed, and that three curtains had been hung. He observed no work being performed to remove the accumulated materials, and the longwall was in operation. Mr. Shriver believed that the material was being "warehoused" back in the crosscut when the stopping was still intact, and he confirmed that at that time, that location was not a designated escapeway and the material did not have to be cleaned up. Once the stopping was knocked out to reroute the escapeway, it became an escapeway "at that precise moment," and it was required to be free of debris (Tr. 186).

Mr. Shriver also believed that the waterhole in the intake escapeway entry constituted "unwarrantable conduct" because he was informed that it had been there for several shifts and that men were seen pulling a scoop out of the hole for 2 or 3 days using a chain over the top of some roof bolts. He observed the rusted and broken bolts, and concluded that the water hole had been there for several shifts. During this time, the hole was in the escapeway, and the escapeway was being re-routed to the area where the stopping had been knocked out. Since the escapeway had to be walked weekly, and since the scoop was there, and it required an electrical inspection, he concluded that mine management should have known that the hole was there (Tr. 192).

On cross-examination, Mr. Shriver confirmed that his initial gravity finding that it was reasonably likely that a fatality would occur, was subsequently modified to "permanently disabling" during an MSHA conference that he normally does not attend (Tr. 196). He also confirmed that there are several miles of escapeways on the section, and that self rescue devices are stored all along the working faces and it would not be necessary to use the ones near the obstructed escapeway in question (Tr. 196).

Mr. Shriver confirmed that when he encountered the three miners in the dinner hole who advised him about the water holes, they told him that they were informed by their supervisor to clean up the escapeway once the ventilation was moved up (Tr. 198). He also confirmed that there are other available escapeways out of the section other than the one that was being re-routed (Tr. 200). He agreed that there are no regulations establishing any time limits for a section supervisor to move the

ventilation or clean up an escapeway once he arrives on the section (Tr. 201).

Mr. Shriver confirmed that there was a pump located in the track entry, and a 2-inch line was installed over the water hole. However, the pump was not working, and he was told that it was inoperative since at least the morning of his inspection. He concluded that the area was a "natural sump area" and that the water drained to the area of the hole (Tr. 204).

Mr. Shriver stated that the partially obstructed escapeway constituted a significant and substantial violation, because the presence of the "three different sets of obstructions" which he found could reasonably likely result in injuries and that if a person "was disabled himself or assisting a disabled person, there could be further injury to his injury" (Tr. 204). He confirmed that he climbed over the accumulated material "with some care and great difficulty," and although there was a walkway present, the area was still obstructed with materials. He agreed that there were three escapeways on the section, namely, at the intake, track, and belt, and that the other escapeways can be used in an emergency (Tr. 205). He also agreed that self rescuers are available along the face where the longwall operator and shield men would be working (Tr. 206). With regard to four visitors who were on the section, Mr. Shriver confirmed that they were required to be hazard trained by the respondent, and he was informed that they had all been trained (Tr. 208).

With regard to his prior citation at the 3-foot "stepup" location, Mr. Shriver stated that he discussed it with the respondent during his April pre-start inspection, and when he returned on May 1, rock dust bags had been thrown in the hole for someone to step on, and some effort had to be made to address the problem. He confirmed that he advised the assistant longwall coordinator at that time that "you best be getting a grip on this escapeway situation" (Tr. 222).

Patrick Grimes testified that he is employed by the respondent as a mechanic and serves on the union mine safety committee. He confirmed that he accompanied the inspector on May 24, 1989, and the parties agreed that his testimony concerning the conditions cited by the inspector would be the same as the inspector (Tr. 228). Mr. Grimes confirmed that the stopping had been knocked down on the previous shift and that the miners in the dinner hole confirmed that they were assigned to clean up the accumulations and were not busy doing other work (Tr. 229). Mr. Grimes stated that foreman Larry Morgan informed them that he was aware of the water, that a water pump was present in that area, but Mr. Grimes did not know whether Mr. Morgan knew that the pump was not operating. Mr. Grimes stated that the escapeway had been used to bring supplies to the section and that a scoop had been pulled through the hole (Tr. 231).

On cross-examination, Mr. Grimes stated that the mine pumps millions of gallons of water a day, and that the water hole was approximately a foot deep. Mr. Morgan informed him that the water was being pumped from the hole, that the stopping had been knocked out on the midnight shift, and that the ventilation had been moved up, but nothing had been done to clean up the accumulated materials (Tr. 234).

Respondent's Testimony and Evidence

Larry Morgan, section supervisor, testified that he was the supervisor on the longwall section on May 24, 1989, when the inspector issued the order. He confirmed that the shift began for him at 9:30 a.m., and that he instructed his crew to move the ventilation and help clear the walkways. Referring to a mine map, exhibit R-5-A, Mr. Morgan identified the location of the alleged obstructed escapeway, and he stated that once the stopping was knocked out, he could observe the escapeway, and he confirmed that it was partially obstructed. He stated that there was a 30-inch walkway through the area, that "you could walk through it," and there were no blocks in the walkway (Tr. 247). He first learned that the escapeway was partially obstructed "after we knocked the stopping out for the ventilation move" (Tr. 247). Although he believed that establishing ventilation and cleaning up walkways are both important, he would first establish the ventilation to keep any gas off the face and then address the walkways (Tr. 248).

Mr. Morgan confirmed that he observed the cited water and mud condition one block outby when it was brought to his attention by the inspector. He stated that the location of the hole was in a low part of the heading, and the water drains into the hole. A pump was installed to pump off the water, and a scoop had traveled over the area. The pump was pumping when the inspector came to the area, but it was not pumping efficiently (Tr. 250). He could not recall whether the inspector asked him whether the pump was effectively draining off the water, and when he informed the inspector that he had instructed his crew to clear the walkway, the inspector said "that's how it was whenever he come in and that's the way it's going to be" (Tr. 251).

Mr. Morgan did not believe that any miner was exposed to a hazard at the time of the inspection, and he received no complaints from any miners regarding the alleged hazardous condition of the escapeway or the water. When he learned that the pump was not working, he requested that a pumper be sent to the section to check it, and prior to this time the pump was adequately pumping the water. He described the hole as "slope like" and "a low place," and that it was not a hole that anyone could fall into (Tr. 252).

On cross-examination, Mr. Morgan stated that other than a notation as to when he arrived on the section, he had no other notes concerning the cited conditions. He confirmed that he did not fire boss the water hole, noticed that there was a pump on the section, and knew that the hole existed, but did not know when he first became aware of it or how long the pump had been there (Tr. 254). He was aware that a scoop was used to bring materials to the section up the escapeway, but was not aware that any vehicles got stuck in the hole (Tr. 255).

Mr. Morgan stated that the walkway was off to the left side, and he disagreed with the testimony of the inspector and Mr. Grimes that they had to actually walk over the accumulated materials. He confirmed that he made no notes or drawings and that his testimony is based on his recollection. He denied that he had to step over anything when he walked the area, and he believed that anyone who was disabled in an emergency could safely pass through the area. He confirmed that he did not observe the materials when he fire bossed at 8:50 a.m., because the stopping was still in place at that time and the materials were on the other side of the stopping (Tr. 257-258).

In response to further questions, Mr. Morgan stated that there are four escapeways on the section, and he identified them as the main, track, belt, and return escapeways, and that "the others" were not obstructed and the men could have gone out the other three escapeways (Tr. 263). After the stopping was knocked out, the materials behind it had to be moved with a scoop, and if they were to remove the materials before knocking out the stopping, the materials would have to be carried out by hand because the scoop could not get around to the area. He was aware of back injuries resulting from people carrying heavy materials in the mine (Tr. 264).

Mr. Morgan admitted that a scoop could have reached the area where the materials behind the stopping were located, and that any handling of the materials by hand would be limited to moving them out of the way so that they could be loaded on the scoop and moved to another location, and that the materials would not be hand-carried out of the section (Tr. 264-267). He was not aware that all of the accumulated materials cited by the inspector were behind the stopping until it was knocked down. When asked whether he was surprised that the materials were there, he stated that "I didn't realize there was that much there" and was not aware of "all of it" (Tr. 269). He stated that while there was a clear walkway to the left side of the area, the walkway had not been established as such, and that he was in the process of doing this when the inspector arrived. He conceded that none of the material had been removed before the inspector saw them (Tr. 269-270).

Mr. Morgan stated that he instructed his crew to clean up the materials during the first part of the shift after the stopping was knocked out, and that "whenever we move up, we just automatically knock out stoppings" (Tr. 273). He assumed that the materials were moved to the location in question with a scoop "and then hope to get them out of the mine" (Tr. 273). He stated that the inspector was mistaken when he testified that he (Morgan) told him that the stopping in the crosscut between the track entry and the intake escapeway was the one that was knocked out by the night shift, and that the stopping knocked out by the night shift was the belt stopping (Tr. 274).

Inspector Shriver was recalled, and he testified that it was his understanding through his conversation with Mr. Morgan that the stopping between the track and the intake entry had been taken down by the night shift, and that during this conversation, he, Mr. Grimes, Mr. Dobbs, and Mr. Morgan were all looking into the area where the accumulated materials were located, and that this occurred at approximately 11:45 a.m. Mr. Morgan told him that the night crew had knocked the stopping down, and that he had assigned men to clean it up (Tr. 281).

When asked whether there could have some confusion over which stopping was taken down by the night shift, Mr. Shriver stated as follows (Tr. 286):

THE WITNESS: Well, both stoppings were done, and the one that we were discussion had the accumulation of parts and junk behind it, and we were all standing there looking at it, and Mr. Morgan --

JUDGE KOUTRAS: Well, it becomes critical because if it was knocked out the midnight shift, there may have been an hour or two interval in there where -- you obviously believed it was done at midnight. You felt that between that time and the start of the day shift they should have had it cleaned up.

THE WITNESS: That's right.

JUDGE KOUTRAS: If it was knocked down shortly before you got there, then certainly they didn't have enough time to clean it up. Do you follow?

THE WITNESS: Yes.

On cross-examination, Mr. Shriver confirmed that he did not specifically ask Mr. Morgan which stopping was knocked down by the night shift because "we were standing there looking at this area" (Tr. 286). He also confirmed that Mr. Morgan did not ask him why he was issuing the order or indicate to him that he had just knocked the stopping down, and that Mr. Morgan stated "the

stopping was knocked down by the midnight and we hung the ventilation curtains" (Tr. 288). Mr. Shriver stated that he did not ask the men on Mr. Morgan's shift who informed him that they were assigned to clean the area whether or not they had knocked down the stopping (Tr. 289). He also did not ask Mr. Morgan whether they had just knocked the stopping down (Tr. 290).

Wesley Dobbs testified that he is employed in the respondent's safety department as an accident prevention officer, and he confirmed that he arrived on the section at approximately 11:00 a.m. on the day of the inspection and was with the inspector and Mr. Grimes. After confirming that they were on the intake escapeway, the inspector told him that "there could be a problem" and Mr. Dobbs left to get Mr. Morgan. When they returned, the inspector informed Mr. Dobbs that he was issuing a section 104(d)(2) order for obstruction of the walkway to the intake, and at that point Mr. Morgan informed the inspector that he had removed the intake stopping and had installed a check curtain (Tr. 298). Mr. Dobbs identified the two stoppings in question, and stated that Mr. Morgan informed the inspector that he had removed the stopping between the intake and track entry, and Mr. Dobbs surmised that the midnight shift had removed the belt and track stopping (Tr. 299-300).

Mr. Dobbs stated that there is a priority for removing stoppings, and that the belt and track stopping has to be removed first so as to avoid warm air and dust in the loading area (Tr. 301-302). If he were advancing the face, he would remove that stopping first, but he could not recall the inspector asking Mr. Morgan which stopping he removed. The inspector informed him (Dobbs) that he was issuing the order because of the obstructions on the walkway and that people could not pass through (Tr. 303). Mr. Dobbs observed the cited conditions, and he stated that the materials were on the right side and that there was a 30-inch opening on the left side which he measured with a tape, and that the area was only partially obstructed. He believed that a miner could walk through the opening and that the inspector himself walked through it and he is a "large man" (Tr. 305).

Mr. Dobbs confirmed that he observed the water in the intake escapeway and he described the location as a "low place in the entry." He also observed an area along the left rib where it appeared that "the scoop had been trying to push some dirt, or something, so that the dirt was up on the left rib where persons, that you could see, had been walking on that dirt going up the intake" (Tr. 306). The water was draining to the low spot, and a pump was functioning and pumping water, but because of a problem with the bearings, it was "not pumping as it should be" (Tr. 306).

On cross-examination, Mr. Dobbs stated that when he discussed the order with the inspector after it was issued, he did

not give the inspector the impression that the stopping had been knocked out on Mr. Morgan's shift. He recalled that Mr. Morgan gave that impression to the inspector, but that he (Dobbs) had no underground notes to confirm this, and that the only notation he made underground was in reference to the walkway opening that he had measured (Tr. 311-312).

Mr. Morgan was recalled, and he confirmed that during a ventilation move, the belt and track stopping would be removed first to keep the face ventilated and to avoid gas on the face (Tr. 315). He confirmed that when he was discussing the matter with the inspector, they were standing in the track entry near the location where the accumulated materials were observed (Tr. 316).

Inspector Shriver was recalled, and he stated that he did not see Mr. Dobbs make any measurements of the walkway area in question. He did not observe Mr. Morgan and Mr. Dobbs walk through the area unimpeded, but did not know whether they may have done so out of his presence (Tr. 317). He agreed that it was quite possible that Mr. Dobbs and Mr. Morgan had one stopping in mind, and that he had another one in mind at the time of their discussion underground (Tr. 320). He also agreed that the belt and track stopping should have come down first, and assuming that it was taken down by the night shift, he would be looking at the other stopping when he arrived on the section, but that Mr. Morgan did not tell him that his shift had removed any stopping (Tr. 321).

Findings and Conclusions

Fact of Violation - Order No. 3117868, 30 C.F.R. § 77.404(a)

The respondent is charged with a violation of mandatory safety standard 30 C.F.R. § 77.404(a), for operating a dozer with two broken "cat" or track pads. The cited standard provides as follows: "(a) Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately."

The issue presented here is whether or not the evidence establishes that the broken dozer pads in question placed the machine in an unsafe condition while it was being operated. If it is found that the dozer was in an unsafe condition, section 77.404(a), would require it to be removed from service immediately. In defense of the violation, the respondent relies on the testimony of its two witnesses who were of the opinion that the primary purpose of the pads is to provide traction for the dozer, and that operating it with two partially broken pads is not unsafe.

The respondent's characterization of Mr. Ware and Mr. Linville as "expert witnesses" is inaccurate. I have reviewed the transcript and find that these witnesses were not offered or accepted as "experts." The record reflects that Mr. Ware has 23 years of experience as a journeyman and master mechanic, and he has serviced and operated D-7 dozers. However, I take note of the fact that when he was describing the servicing aspects of the machine, he "thought" that the right track was used to refuel the machine, and that "maybe" it was used for checking the oil, but did not know. If he were an "expert," one would reasonably expect him to know with more certainty the locations where this work would be performed.

With regard to Mr. Linville, he is a certified electrician with 27 years of experience "working with or around heavy equipment." He confirmed that he was not the foreman when the citation was issued, and I find nothing in his testimony to indicate that he has ever personally operated a D-7 dozer or personally performed any maintenance work on one. Under the circumstances, I have not considered Mr. Ware or Mr. Linville as experts, and cannot conclude that their testimony is entitled to any greater weight than the other witnesses who testified in this case.

In response to a question as to whether he believed that the operation of a dozer with two half-broken pads would render the machine unsafe to operate, Mr. Ware responded "no." However, he went on to explain his answer, and stated that there was nothing in his "books" (I assume he was referring to some kind of an operation manual), to suggest that a broken pad is a reason for not operating the machine. He further qualified his answer when he stated "as far as operation of the machine is concerned," broken pads would not loosen the tracks or affect their traction. The thrust of Mr. Ware's testimony focuses primarily on the operation of the machine, rather than the safety implications of broken pads.

Mr. Linville was of the opinion that dozer tracks are not designed to be utilized as a "walkway," and that their primary purpose is to provide traction. He believed that two half-broken pads would result in a minimal loss of traction, and would not render the machine unsafe to operate. Mr. Linville's view of the safety hazards concerning a dozer which is operated with broken pads, and his opinion that operating a machine in that condition is not unsafe, may be summarized by his statements that a dozer operator should watch where he is stepping, and that Mr. Bice's injury, which occurred when he stepped through a hole created by broken track pads, could have been avoided if he were looking where he was walking.

Mr. Ware agreed that the "upper portion of the track" on a D-7 dozer is utilized as a walkway for the operator to mount and dismount the machine, and stated that the use of the tracks "is

about the only way you can get in" the machine. He also conceded that a broken pad would not be visible at night. Although he stated that an operator "usually" mounts the machine from the front, the machine operators who testified credibly in this case indicated that they would mount and dismount the machine from either side, depending on the prevailing conditions, and used the tracks to reach the operator's compartment or to perform preshift and onshift servicing such as refueling or oiling, or to check the transmission or water levels.

Mr. Linville conceded that the only way a dozer operator can reach the operating cab of the machine is to step up and on the tracks, and that the machine lighting may not be adequate for an operator operating the machine at night when he initially mounts the machine, and before he has an opportunity to turn on the lights.

I conclude and find that the dozer tracks, including the pads, are an integral and functional part of the machine, and that the tracks and pads were used by the operators to facilitate the mounting and dismounting of the machine, as well as for servicing the machine as required. Even though the tracks and pads may have been designed to provide machine traction, their regular and normal use by the operators in the manner described may not be divorced from the safety requirements found in section 77.404(a).

The respondent's assertions that the inspector did not view the cited conditions, was not an expert, and should have cited another standard if he believed that the broken pads presented a stumbling or tripping hazard are not persuasive. The issue is whether or not the broken pads rendered the machine unsafe within the meaning of section 77.404(a), and whether there is a preponderance of credible and probative evidence to support a violation.

Dozer operator Barnett, who had recorded the cited broken pads on his operator's checklist, testified and noted that he "almost fell through the broken pads," and he believed that missing pads pose a risk to his safety because he wanted to concentrate on the operation of his machine when he is working on the slope and bench areas, and did not wish to be distracted by worrying about any broken pads. He testified that he used the dozer tracks to service the machine, and that he mounted and dismounted the machine from both sides.

Dozer operator Kincell believed that missing or broken pads posed a risk to him, particularly during the winter season before daylight when he cannot see any broken pads on the track walkway. He also testified that the tracks are inherently dangerous when they are wet and slippery, and that when the mud from the refuse area where he operates his machine adheres to the tracks, he

would be unaware of a broken pad unless he stepped on it or the mud fell out of it. He also believed that it is impractical to expect him to recall whether a pad is broken, particularly when he is concentrating on operating the machine. Mr. Kincell confirmed that he has worked as a mechanic and has repaired dozer pads.

Dozer operator Bice testified that he strained his back when he stopped his machine to oil it and stepped into a hole created from a partially broken pad while he was attempting to leave the machine. Mr. Bice confirmed that 3 or 4 years earlier, he slipped on a slippery track pad which was otherwise in good condition, and broke his tail bone. He believed that a broken pad posed a risk or hazard to him, and that it is always not easy to see a broken pad because of the ground conditions and poor lighting. He also confirmed that he used the tracks on both sides of the machine as a means of exiting the machine depending on the circumstances presented.

Having viewed the equipment operators in the course of their testimony, I find them to be credible witnesses. After consideration of all of the testimony presented in this case, I conclude and find that the testimony of the equipment operators who operated the D-7 dozers clearly establishes that the broken pads on the cited dozer rendered it unsafe to operate, and that the respondent's failure to immediately remove it from service when the condition was discovered and reported constitutes a violation of section 77.404(a). Further, the fact that no other inspector had previously cited broken pads as a violation did not estop the inspector in this case from making such a finding. See: King Knob Coal Company, Inc., 3 FMSHRC 1417, 1422 (June 1980); Midwest Minerals Coal Company, Inc. 3 FMSHRC 1417 (January 1981); Missouri Gravel Co., 3 FMSHRC 1465 (June 1981); Servtex Materials Company, 5 FMSHRC 1359 (July 1983); Emery Mining Corporation v. Secretary of Labor, 3 MSHC 1585, the Tenth Circuit's Affirmance of the Commission's decision at 5 FMSHRC 1400 (August 1983).

In view of the foregoing findings and conclusions, I conclude and find that the petitioner has established a violation by a preponderance of the evidence. Accordingly, the violation issued by the inspector IS AFFIRMED.

Fact of Violation - Order No. 2944318, 30 C.F.R. § 75.1704

The respondent is charged with a violation of mandatory safety standard 30 C.F.R. § 75.1704, for failing to maintain the cited intake escapeway free of obstructions so as to insure passage of miners or disabled miners. The cited standard provides in relevant part as follows:

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. * * * (emphasis added).

In support of the violation, MSHA takes the position that the inspector's testimony, as corroborated by the detailed notes which he made at the time of his inspection, establishes that the intake escapeway was obstructed by the materials which he observed and inventoried in the escapeway crosscut, as well as the deep waterhole and ledge which he found in the intake entry one crosscut outby the location of the materials. Notwithstanding the respondent's testimony which contradicts the inspector's belief that the accumulated materials in the escapeway crosscut obstructed and impeded travel through the area, MSHA believes that the inspector's fully documented account of the conditions should be credited over the respondent's undocumented account of the conditions.

With regard to the waterhole, MSHA asserts that the fact that a scoop was undeniably stuck in the waterhole and had to be winched out would tend to support the inspector's conclusion that the waterhole was large enough and deep enough to prevent travel by a crawling or limping miner using the escapeway in an emergency. MSHA maintains that the intake escapeway is designated to be the most assuredly safe means of escape since the other entries (track, or belt) have equipment that may be the source of smoke or fire. Citing two decisions by Commission Judges affirming violations of section 75.1704, MSHA concludes that standing water of the depths found in the present case constitutes hazardous conditions. See: Consolidation Coal Company, 3 FMSHRC 405 (February 1981), and Mid-Continent Resources, Inc., 11 FMSHRC 2456, 2499 (December 1989).

In support of its case, the respondent argues that the requirements of sections 75.1704 and 75.1704-1(a), are not mandatory, and it cites the Commission's decision in Utah Power and Light Company, 11 FMSHRC 1926 (October 1989), in support of this conclusion. I have reviewed this decision, and for the reasons which follow, I find that it is distinguishable from the instant case and that the respondent's reliance on that decision is misplaced.

In the Utah Power and Light Company case, the operator was initially cited for a violation of section 75.1704-1, and the citation was subsequently modified to allege a violation of section 75.1704. The operator was cited with a failure to meet

the criteria by which MSHA was to be guided in approving escapeways (5 foot height requirements). Apart from the alleged failure by the operator to comply with the criteria, the parties stipulated that the cited portion of the escapeway was fully passable by all persons, including disabled persons. On the basis of these stipulations, Judge Morris vacated the citation on the ground that the criteria relied on by the inspector in support of the violation were not mandatory requirements, and that the proper test for determining the adequacy of escapeways pursuant to section 75.1704, is whether they are maintained to insure passage at all times of any person, including disabled persons.

The Commission affirmed Judge Morris' decision, and agreed with his findings that section 75.1704-1(a) does not impose a mandatory duty on a mine operator to either maintain escapeways in accordance with the subject criteria or to seek prior approval from MSHA for non-conformance with the criteria. However, the Commission, at 11 FMSHRC 1930, stated that the relevant language found in section 75.1704, was plain and unambiguous and established a general functional test of "passability" as enunciated by Judge Morris.

I take note of the fact that the Commission affirmed Judge Morris' decision in a companion Utah Power and Light Company case upholding a violation of section 75.1704, on the basis of evidence establishing that an escapeway was obstructed with loose coal and a 6-inch water line which was angled across the escapeway, resulting in tripping, slipping, and falling hazards. In his decision at 10 FMSHRC 71, 78 (January 1988), Judge Morris observed that "In an emergency, men traveling the route will need the best possible avenue of escape, and their lives may depend on how well the escapeway is marked and maintained." In his decision in Mid-Continent Resources, Inc., supra, at 11 FMSHRC 2499, Judge Morris rejected the operator's contention that miners, or miners carrying a stretcher, could pass through a 3-foot walkway on the "up-dip" side of a water hole obstructing an escapeway without coming into contact with the hole, and he stated as follows: "I reject the operator's views; escapeways can often be filled with smoke and involve confused miners. And what of a mine crawling the escapeway. Is he to somehow find a three-foot walkway on the up-dip side?"

In the instant case, the respondent is not charged with a violation of the escapeway criteria rejected by the Commission in the Utah Power and Light Company case, and the inspector did not rely on that section or the escapeway height criteria when he issued the violation. Accordingly, the respondent's reliance on that decision is rejected. I take note of my prior decision in Southern Ohio Coal Company, 11 FMSHRC 1705, 1728 (September 1989), affirming a violation of section 75.1704, which was issued at the Martinka No. 1 Mine. In that case, I concluded that

section 75.1704, contains two basic requirements, namely, (1) that an escapeway be maintained to insure passage of miners at all times, and (2) that escapeways be maintained in a safe condition. I reaffirm and adopt those conclusions as the parameters under which the application of this standard should be considered in this case. See also: Peggs Run Coal Company, 1 MSHC 1342, 1346 (1975), affirming a Judge's decision that an operator failed to comply with the standard where water and roof conditions posed difficulties and risks to disabled miners; U.S. Steel Company, 6 FMSHRC 310, 313-314 (February 1984), holding that it is imperative that escapeways be maintained in a manner that they may be available and usable to escape from hazardous conditions; and Consolidation Coal Company, 2 FMSHRC 1809 (July 1980), holding that section 75.1704 imposes an absolute duty on a mine operator to assure that escapeways are maintained in a safe condition.

In further support of its case, the respondent relies on the testimony of Mr. Morgan and Mr. Dobbs who indicated that the accumulated materials were only partially obstructing the escapeway, and that there was a clear 30-inch walkway at the left rib which was readily passable. With regard to the water hole in question, the respondent does not dispute the existence of the water or the hole and concedes that the water accumulation was present at the first outby crosscut. However, it maintains that the water was a natural condition located in a low area of the mine where water accumulated, and that it was being pumped out. Respondent also points out that a considerable amount of water is pumped from the mine and that the inspector did not dispute this fact.

Section Foreman Morgan did not dispute the existence of the conditions. However, he testified that there was a 30-inch walkway through the left side of crosscut area which would allow someone to walk through, and he observed that nothing was blocking the walkway. He conceded that the walkway had not been established as such, claimed that he was in the process of establishing the walkway when the inspector arrived on the section, but conceded that none of the materials had been removed before the inspector observed them.

Mr. Morgan disputed the testimony of the inspector and Mr. Grimes that they had to step over the accumulated materials, and denied that he had to step over any of the materials when he walked the area. In his opinion, a disabled miner could safely pass through the area in an emergency. He confirmed that he did not observe the accumulated materials when he initially fire-bossed the section because they were located behind the stopping which was still intact, but conceded that the escapeway was partially obstructed, and that he observed this condition after the stopping was knocked down. He further confirmed that after knocking down a stopping, his first priority would be to

establish the ventilation, and he would next attend to and clean up any walkway accumulations.

Mr. Morgan confirmed that he made no notes or sketches at the time of the inspection and that his testimony was based on his "recollection." When asked if he was surprised about the existence of the materials behind the stopping before it was knocked down, Mr. Morgan responded "I didn't realize there was so much there." Although he indicated that he had instructed his crew to clean up the materials during the first part of the shift when the stopping was knocked down, the respondent called no crew members to testify about any cleaning up of the materials.

Mr. Dobbs testified that the materials accumulated behind the intake escapeway stopping were on the right side as one looked into the area from the entry, and that he measured a 30-inch opening or walkway on the left side. He characterized the area as "partially obstructed," and stated that the inspector walked through the opening. Mr. Dobbs also observed the water in the intake escapeway, and he described it as a "low place in the entry" where the water was draining to the low spot, and although he believed that a pump in that area was functioning, he conceded that it was "not pumping as it should be." He also described an area along the left rib where he believed that a scoop had attempted to push some dirt, and that people had walked on the dirt going up the intake. Mr. Dobbs confirmed that with the exception of a notation which he made with respect to his measurement of the 30-inch "walkway," he made no other notes at the time of the inspection.

The testimony of Inspector Shriver is documented by his detailed notes and sketches made at the time of his inspection, and the information recorded by the inspector with respect to the accumulated materials and the accumulated water and water hole were detailed in the order which he issued. The inspector's comprehensive testimony detailing these conditions was corroborated by one of the respondent's employee's (Patrick Grimes), a member of the mine safety committee who accompanied the inspector during the inspection.

Although Inspector Shriver confirmed that there was a walkway present in the area where the accumulated materials were discovered, he stated that the area was still obstructed with the materials and that he had to climb over them with care and difficulty. He did not observe Mr. Morgan measure the walkway opening, nor did he observe Mr. Morgan or Mr. Dobbs walking freely through the opening, and I take note of the fact that Mr. Morgan conceded that the so-called "walkway" had not been established as such and that none of the materials had been removed before the inspector observed them. I find both Mr. Grimes and Inspector Shriver to be credible witnesses, and their testimony is corroborated by the detailed notes made by the inspector at the time of

the inspection. I credit their testimony over the testimony of Mr. Dobbs and Mr. Morgan, and reject their contention that the walkway presented a clear and unobstructed passageway through the accumulated materials.

I further find the inspector's testimony regarding the existence of 30 foot area of water and mud 12 inches deep, and a water hole approximately 40 feet long, rib-to-rib, 12 inches deep and with a drop-off of approximately 2 feet, to be credible, and I reject Mr. Dobbs' suggestion that there was a clear passageway along the rib to allow clear passage of people at this location. I accept as credible the inspector's belief that the intake escapeway area which was obstructed by the accumulated materials, and the areas obstructed by the slippery and muddy waterholes or areas, presented potential hazards to any injured or disabled miners, including miners assisting them, in the event they had to use the escapeway in an emergency situation.

Section 75.1704, requires that an intake escapeway be maintained to insure passage at all times, and that it be maintained in a safe condition and properly marked. Although the escapeway was properly marked and designated, I conclude and find that it was not maintained in a safe condition, nor was it maintained to insure passage at all times by those miners who may have had a need to use it in an emergency to escape from the mine. Although there were other available escapeways, the cited intake escapeway in question was not maintained as required by section 75.1704. Accordingly, I conclude and find that MSHA has established a violation by a preponderance of the credible and probative evidence adduced in this case, and the contested violation IS AFFIRMED.

Significant and Substantial Violations

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. § 814(d)(1). A violation is properly designated significant and substantial "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

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

In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must

prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety-contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

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

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

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, Secretary of Labor v. Texasgulf, Inc., 10 FMSHRC 498 (April 1988); Youghiogeny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987).

Order No. 3117868 - 30 C.F.R. § 77.404(a)

I have concluded and found that the broken dozer pads cited by the inspector rendered the cited dozer in an unsafe condition while it was operated in that condition. Inspector Allen testified credibly that the inability of an operator to see a broken pad because of poor visibility, or because of the presence of caked mud, would likely result in a slip or fall off the machine, and that should this occur, it would result in injuries such as lacerations, strains, sprains, or fractures. He also believed that such occurrences were likely in view of the fact that the dozer operates in the refuse area of the mine which is muddy and wet, and that even in cases where the pads are not broken, the tracks are slippery as a result of operating under such conditions.

The evidence establishes that dozer operator Bice suffered a strained back when he stepped through a hole created by a partially broken pad while leaving the machine. Dozer operator Barnett testified that he nearly fell through a broken pad, and both he and the other equipment operators testified credibly that

a broken pad exposed them to hazards. Under the circumstances, I conclude and find that the partially broken pads in question constituted a condition which would reasonably likely contribute to an injury, and that it was reasonably likely that the injury would be one of a reasonably serious nature. Accordingly, the inspector's significant and substantial (S&S) finding IS AFFIRMED.

Order No. 2944318 - 30 C.F.R. § 75.1704

Inspector Shriver testified credibly that the cited obstructed escapeway areas in question exposed miners, as well as disabled miners, to tripping, falling, or slipping hazards while attempting to travel the obstructed escapeway, and that miners would have difficulty reaching some of the self rescuers stored in the area because they would have to climb over some of the accumulated materials to reach them. He believed that any miners using the obstructed escapeway in an emergency, particularly while carrying out any disabled miners on stretchers, would reasonably likely suffer injuries. In the event of a mine disaster, their visibility would be affected if any smoke coursed through the escapeway while they were attempting an escape, and they could be unaware of the existence of the water and water hole and have difficulty in traveling through those areas and could conceivably be drowned or rendered unconscious if they were to fall or slip in these areas.

Although it may be true that other escapeways were provided, and they were equipped with self rescuers, and that the mine visitors in question had received training, the fact remains that the cited intake escapeway was not maintained in a safe condition, and was not maintained free of obstructions so as to permit safe travel at all times. Under the circumstances, I conclude and find that the evidence establishes that the violation was significant and substantial, and the inspector's finding in this regard IS AFFIRMED.

The Unwarrantable Failure Issue

The governing definition of unwarrantable failure was explained in Zeigler Coal Company, 7 IBMA 280 (1977), decided under the 1969 Act, and it held in pertinent part as follows at 295-96:

In light of the foregoing, we hold that an inspector should find that a violation of any mandatory standard was caused by an unwarrantable failure to comply with such standard if he determines that the operator involved has failed to abate the conditions or practices constituting such violation, conditions or practices the operator knew or should have known existed or which it failed to abate because of a lack

of due diligence, or because of indifference or lack of reasonable care.

In several recent decisions concerning the interpretation and application of the term "unwarrantable failure," the Commission further refined and explained this term, and concluded that it means "aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act." Energy Mining Corporation, 9 FMSHRC 1997 (December 1987); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987); Secretary of Labor v. Rushton Mining Company, 10 FMSHRC 249 (March 1988). Referring to its prior holding in the Emery Mining case, the Commission stated as follows in Youghiogheny & Ohio, at 9 FMSHRC 2010:

We stated that whereas negligence is conduct that is "inadvertent," "thoughtless" or "inattentive," unwarrantable conduct is conduct that is described as "not justifiable" or "inexcusable." Only by construing unwarrantable failure by a mine operator as aggravated conduct constituting more than ordinary negligence, do unwarrantable failure sanctions assume their intended distinct place in the Act's enforcement scheme.

In Emery Mining, the Commission explained the meaning of the phrase "unwarrantable failure" as follows at 9 FMSHRC 2001:

We first determine the ordinary meaning of the phrase "unwarrantable failure." "Unwarrantable" is defined as "not justifiable" or "inexcusable." "Failure" is defined as "neglect of an assigned, expected, or appropriate action." Webster's Third New International Dictionary (Unabridged) 2514, 814 (1971) ("Webster's"). Comparatively, negligence is the failure to use such care as a reasonably prudent and careful person would use and is characterized by "inadvertence," "thoughtlessness," and "inattention." Black's Law Dictionary 930-31 (5th ed. 1979). Conduct that is not justifiable and inexcusable is the result of more than inadvertence, thoughtlessness, or inattention. * * *

Order No. 3117868 - 30 C.F.R. § 77.404(a)

Inspector Allen confirmed that he based his unwarrantable failure finding in this case on the fact that the cited broken pads condition was known to foreman Richards and superintendent Haught, and that the dozer was permitted to continue to operate and was not taken out of service. The evidence made available to the inspector at the time of his inspection reflects that the broken pads were reported by the dozer operator on May 16, 1989, and that Mr. Richards acknowledged that this was the case. New

replacement pads were ordered and received on May 17 or 18, but were not installed on the dozer until May 19, 1989. The inspector confirmed that mine management gave him no reason for not installing the pads when they were received, and he believed that the pads could have been readily installed by removing and replacing four bolts.

Mr. Richards and Mr. Haught did not testify in this case. Mr. Ware identified a copy of a work order dated May 19, 1989, which reflects that he replaced three broken pads on the dozer, and he testified that he performed the work between May 19 and 23, 1989. Mr. Linville, who was not the foreman at the time the order was issued, considered broken pads to be normal "wear and tear" items, and although he contended that broken pads would be replaced "in due time," he confirmed that in the past he would not shutdown a machine because of broken pads.

Dozer operator Barnett testified credibly that he reported the broken pads condition on May 16, 1989, when he filled out an operator's checklist, and gave this information to Mr. Richards. Even though Mr. Barnett made a notation on the form that he "almost fell through the broken pads," Mr. Richards apparently took no action to repair the machine that day or to take it out of service. As a matter of fact, a "safety contact" made by Mr. Richards with an employee on May 19, 1989, reflects that Mr. Richards was aware of the two broken pads on the cited machine as of that date, and he simply cautioned the employee to insure that the pads were down when he stopped his machine, and instructed him to leave the machine from the right side (exhibit R-2-J). Mr. Richards' failure to take the machine out of service or to timely repair the pads corroborates Mr. Barnett's un rebutted testimony that prior to Mr. Bice's injury, the respondent permitted or instructed the equipment operators to operate the dozers with broken pads.

After careful consideration of all of the testimony and evidence in this case, I conclude and find that the inspector's high negligence and unwarrantable failure findings were justified. I find nothing of record to mitigate the respondent's failure to timely repair the dozer or take it out of service when the condition was first reported to mine management. The respondent knew of Mr. Bice's injury some 2 or 3-months earlier, and its accident prevention officer Dobbs filed an accident report which specifically points out that Mr. Bice strained his back when he stepped into a hole "created from a partially broken track pad" (exhibit P-4-D). Mr. Barnett's report of May 16, 1989, to Mr. Richards informed him that the cited dozer had two broken pads, and the report contained a notation by Mr. Barnett that he "almost fell through broken pads" (exhibit P-4-E). Rather than taking immediate or more timely action to correct an obviously hazardous condition which it was clearly aware of, mine

management not only permitted the equipment to continue to operate with broken pads, a condition which was the proximate cause of Mr. Bice's injury and Mr. Barnett's "near miss," it expected the operators to continue operating the equipment in that condition. Under all of these circumstances, I conclude and find that mine management's failure to act was unjustified and inexcusable, and constitutes aggravated conduct. The inspector's unwarrantable failure finding is therefore AFFIRMED.

Order No. 2944318 - 30 C.F.R. § 75.1704

Inspector Shriver's unwarrantable failure finding was based on his belief that the water hole had existed for 2 or 3 days. He observed evidence that a scoop had difficulty traveling through the hole, and he was informed that a chain was used to pull the scoop through the area for 2 or 3 days. Although he believed that the hole had been present for "several shifts," there is no evidence that he reviewed any of the shift or pre-shift reports to determine whether the condition had been reported. He confirmed that section foreman Morgan appeared surprised at the existence of the hole. The evidence establishes that the hole was located at a low spot where water naturally drained, that the mine released a great deal of water, and that a pump had been installed in the area as a means of controlling and pumping the water. Although the pump may not have operating at peak efficiency, I cannot conclude that the respondent ignored this condition, and the existence of the pump establishes that some effort was being made to address the problem.

With regard to the 3 foot "stepup" location, Mr. Shriver indicated that he had previously visited the area during a "prestart" inspection, and next returned on May 1, 1989, when he found that the respondent had placed some rock dust bags in the area to provide a means of crossing the "stepup." He issued a citation after determining that the bags were "of no consequence," and informed the respondent of a "possible problem" and that additional attention should be given to the escapeway. The inspector conceded that the respondent had made some effort to address this problem.

With respect to the accumulated materials which were in the crosscut area where the escapeway was being rerouted, the testimony is in dispute as to whether or not the stopping at that location had been knocked down by the previous night shift or during foreman Morgan's day shift. The inspector believed that the stopping which concealed the accumulated materials had been taken down by the night shift, and although his notes do not specifically identify the stopping, he believed it was the stopping between the track entry and intake entry. Foreman Morgan testified that the belt stopping had been knocked down by the night shift, and that his day shift knocked down the stopping which concealed the materials. If the stopping had been knocked

down by the night shift, the inspector believed that there was enough time to clean up the materials during the 2 or 3 hour interval between shifts. If the stopping were knocked down during Mr. Morgan's shift, the inspector conceded that there was insufficient time to clean up the accumulated materials.

The inspector confirmed that he did not ask Mr. Morgan whether the stopping which had concealed the accumulated materials had just been knocked down on his shift, and he made no inquiries of the miners on the shift as to whether or not they had knocked the stopping down on their shift. The inspector conceded that it was quite possible that Mr. Morgan and Mr. Dobbs had one stopping in mind, and that he had another one in mind at the time of their discussions underground, and he agreed that the belt and track stopping should have been knocked down first. Assuming that this were the case, he further agreed that he would have been looking at the other stopping, which Mr. Morgan claimed was the stopping which concealed the materials, when he arrived on the section.

The inspector confirmed that there is no time limitation with respect to the removal or clean up of accumulated materials, and given the fact that the escapeway was being rerouted, the uncertainty as to whether the stopping was knocked down during the night shift or day shift, and the fact that the respondent was establishing the ventilation on the section, I cannot conclude that the respondent was dilatory in removing the accumulated materials, or that it was aware of the materials over any inordinate period of time. Coupled with the fact that the respondent was making an effort to address the other conditions which obstructed the escapeway, I cannot conclude that the violation was the result of any aggravated conduct on the part of the respondent. To the contrary, I conclude and find that the violation resulted from mine management's inattention and failure to exercise reasonable care. Under the circumstances, the inspector's unwarrantable failure finding IS VACATED, and the order IS MODIFIED to a section 104(a) citation with significant and substantial (S&S) findings, and as modified, the citation IS AFFIRMED.

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

I conclude and find that the respondent is a large mine operator and that the civil penalty assessments for the violations in question will not adversely affect the respondent's ability to continue in business.

History of Prior Violations

The respondent's history of prior violations, as reflected by an MSHA computer print-out, (exhibit P-3), shows that for the

period April 26, 1987 through April 25, 1989, the respondent paid \$251,000 for 1,047 violations issued at the Martinka No. 1 Mine. One-thousand and sixteen (1,016), were for violations found to be significant and substantial (S&S), and twenty-five (25) were for violations of section 75.1704. No prior violations of section 77.404(a), are noted. MSHA has not argued or suggested that the respondent's compliance record warrants any additional increases to its proposed civil penalty assessments, and I assume that it considered the respondent's history of compliance when the assessments were initially made. In any event, I have considered this compliance history in the assessments which I have made for the violations which have been affirmed.

Good Faith Compliance

The record reflects that the escapeway violation was abated within 2 or 3 hours of the issuance of the order on March 24, 1989, by the removal of the accumulated materials and the building of bridges over the water accumulations. With regard to the broken dozer pads violation, the record reflects that the condition had been corrected at the time the violation was issued. I conclude and find that both violations were timely abated by the respondent in good faith and I have taken this into consideration.

Negligence

On the basis of my unwarrantable failure finding with respect to the broken dozer pads violation, which are incorporated by reference, I conclude and find that the violation resulted from a high degree of negligence on the part of the respondent. With respect to the escapeway violation, I conclude and find that the violation resulted from the respondent's failure to exercise reasonable care, and that this constitutes ordinary negligence.

Gravity

In view of my "S&S" findings and conclusions, which are incorporated by reference, I conclude and find that both of the contested violations were serious.

Civil Penalty Assessments

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that the proposed civil penalty assessment of \$1,000, is reasonable and appropriate for a violation of mandatory safety standard 77.404(a), as stated in section 104(d)(2) Order No. 3117868, May 23, 1989. I further conclude and find that a civil penalty assessment of \$675 is reasonable

and appropriate for a violation of mandatory safety standard 75.1704, as stated in the modified section 104(a) Citation No. 2944318, May 24, 1989.

Settled Violations

The parties settled three of the contested section 104(d)(2) orders in this case (Nos. 3112683, 3112684, 3118284). MSHA filed a posthearing motion pursuant to Commission Rule 30, 29 C.F.R. § 2700.30, seeking approval of the proposed settlement. Order No. 3118284 was modified to a section 104(a) citation, and the proposed civil penalty assessment was reduced from \$1,000 to \$395. With regard to Order No. 3112684, MSHA confirmed that the respondent has agreed to accept the findings of the inspector and has agreed to pay the full amount of the proposed civil penalty assessment of \$950 for the violation in question. With respect to Order No. 3112683, MSHA has agreed to vacate the order.

MSHA submitted a discussion and disclosure as to the facts and circumstances surround the issuance of the orders in question, and a reasonable justification for the settlement disposition of the violations. MSHA also submitted information pertaining to the six statutory civil penalty criteria found in section 110(i) of the Act, and it believes that the resulting cumulative civil penalty assessment of \$1,345 for the two orders which have been settled is fair and reasonable and will effectuate the purposes of the Act.


After careful review and consideration of the pleadings, and the submissions in support of the motion to approve the settlement disposition of these orders, I conclude and find that it is reasonable and in the public interest. Accordingly, the motion is granted, and the settlement IS APPROVED.

ORDER

The respondent IS ORDERED to pay the following civil penalty assessments for the aforementioned violations which have been affirmed and/or settled in this proceeding:

<u>Citation/Order No.</u>	<u>Date</u>	<u>30 C.F.R. Section</u>	<u>Assessment</u>
3118284	05/15/89	75.220	\$ 395
3117868	05/23/89	77.404(a)	\$1,000
2944318	05/24/89	75.1704	\$ 675
3112683	05/30/89	75.1403	Vacated
3112684	05/30/89	75.303	\$ 950

Payment of the aforementioned civil penalties shall be made to MSHA within thirty (30) days of the date of this decision and order, and upon receipt of payment, this proceeding is dismissed.


George A. Koutras
Administrative Law Judge

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/fb

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

AUG 6 1990

WYOMING FUEL COMPANY,	:	CONTEST PROCEEDINGS
Contestant	:	
v.	:	Docket No. WEST 90-238-R
	:	Order No. 3077023; 6/12/90
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Golden Eagle Mine
ADMINISTRATION (MSHA),	:	Mine ID 05-02820
Respondent	:	

DECISION

Appearances: Lawrence J. Corte, Esq., Lakewood, Colorado, for
Lakewood, Colorado, for the Contestant;
Robert J. Murphy, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for the Respondent.

Before: Judge Morris

This case is before me pursuant to section 105(d) of the
Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et
seq., (the "Act"), to challenge an order issued under section
107(a) of the Act to Wyoming Fuel Company ("WFC").

After notice to the parties an expedited hearing on the
merits was held in Denver, Colorado, on June 26, 1990.

The parties filed post-trial briefs.

Procedural Issues

The judge believes certain procedural issues should be
initially considered.

WFC moved for an expedited hearing. The Secretary opposed
the motion in this case as she did in other unrelated cases
involving the same parties (WEST 90-112-R, WEST 90-113-R,
WEST 90-114-R, WEST 90-115-R and WEST 90-116-R).

The issue is again raised in this decision and the
Commission is invited to consider the issue anew.

To support of its motion for expedition, WFC relies on the statutory requirements set forth at section 107(a) of the Act. The cited section provides as follows:

(e) Relief from orders; hearing; order; expedited proceeding.

(1) Any operator notified of an order under this section or any representative of miners notified of issuance, modification, or termination of such an order may apply to the Commission within 30 days of such notification for reinstatement, modification or vacation of such order. The Commission shall forthwith afford an opportunity for a hearing ... and thereafter shall issue an order, based on findings of fact, vacating, affirming, modifying, or terminating the Secretary's order. The Commission and the courts may not grant temporary relief from the issuance of any order under subsection (a).

(2) The Commission shall take whatever action is necessary to expedite proceedings under this subsection. (§ 107(e), (1) and (2), Emphasis added).

In opposition to the motion the Secretary states the section 107(a) order in this case and other cases were modified to permit mining activity. The Secretary also contends that if all orders issued under section 107 were expedited on request, there would no longer be any capability for expeditious hearings.

The Secretary further asserts the Congressional intent of section 107(a) is to assist operator's where an emergency situation exists. In short, the Secretary argues Congress intended to allow an expedited hearing only in the case of an active closure order, where the mine is not being allowed to produce and it suffering a great hardship as a result of an MSHA order.

It is also urged that the matter of whether a hearing should be expedited rests with the sound discretion of the presiding judge.

The Secretary also contends the Commission Rules are so structured that expedited hearings are allowed only in emergency situations.

Discussion

It is a basic rule of construction that where the language is clear the statute must be enforced as it is written unless it can be established that Congress clearly intended the words to have a different meaning. Chevron, USA v. NRDC, 467 U.S. 837, 842-43, 104 S.Ct. 2778 (1984); United States Lines v. Baldrige, 677 F.2d 940, 944 (D.C. Cir. 1982); Phelps Dodge Corp. v. FMSHRC, 681 F.2d 1189, 9th Cir. (1982); Freeman United Coal Mining Co., 6 FMSHRC 1577, 1578 (1984).

The statutory requirement, stripped of surplus language, is that "any operator ... notified of an order, etc., may apply within 30 days ... for a vacation of such order, etc." In such a situation, "the Commission shall expedite proceedings."

It is uncontroverted here that an order was issued under the authority of section 107(a) of the Act. Further, the contest was filed within 30 days.

The foregoing uncontroverted facts require that this case be expedited. I agree with the Secretary that Congress may have intended an expedited hearing only in the event of an active closure order. However, the wording of section 107 does not disclose such an intent.

Further, the structure of the Commission's Rules do not support the Secretary. Commission Rule 52, 29 C.F.R. § 2700.52, provides as follows:

§ 2700.52 Expedition of proceedings

(a) Motions. A motion of a party to expedite proceedings may be made orally, with concurrent notice to all parties, or served and filed by telegram. Oral motions shall be confirmed in writing within 24 hours.

(b) Timing of hearing. If the motion is granted, a hearing on the merits of the case shall not be scheduled with less than four days notice, unless all parties consent to an earlier hearing.

A fair reading of the statute and the Commission rules indicate that expeditious hearings involving section 107(a) orders are generally not left to the discretion of the presiding judge; further, expedited hearings are not necessarily restricted to "emergency" situations.

I agree the failure to read "emergency situation" into the Act and Rule 52 could render the expedited hearing process meaningless. However, the writer has never found the expedited hearing process to be burdensome, nor have any litigants attempted to "overload" the Commission with requests for expeditious proceedings. If this were to become a problem interfering with the Commission's duties of adjudicating disputes under the Mine Act, and Commission would no doubt amend Rule 52. In such circumstances the appellate courts would accord great deference to the Commission's interpretation of its own rules. Lucas Coal Company v. Interior Board of Mine Operations Appeal, 522 F.2d 581 (1975).

In sum, under the Mine Act, contestant is entitled to an expedited hearing when a section 107(a) order is involved.

If the order here had been issued under section 104(d) of the Act there would be a totally different result.¹ Under section 105(B)(2), [30 U.S.C. § 815(b)(B)(2)], the Commission may grant temporary relief from a section 104(d) order only under very restrictive conditions. These are:

(A) a hearing [before MSHA] has been held in which all parties were given an opportunity to be heard;

(B) the applicant shows that there is substantial likelihood that the findings of the Commission will be favorable to the applicant; and

(C) such relief will not adversely affect the health and safety of miners.

No temporary relief shall be granted in the case of a citation issued under subsection (a) of (f) of section 104. The Commission shall provide a procedure for expedited consideration of applications for temporary relief under this paragraph.

In sum, I reaffirm my previous order granting WFC an expedited hearing.

Stipulation

At the commencement of the hearing the parties stipulated as follows:

¹ See Order in Medicine Bow Coal Co., WEST 90-117-R, March 13, 1990.

1. The Golden Eagle Mine is owned by Wyoming Fuel Company and the mine is subject to the Act.
2. In 1989, the mine produced 900,000 tons of coal.
3. The Commission and Administrative Law Judge have jurisdiction over this matter.
4. The imminent danger orders involved in this case were properly served on the operator and can be received in evidence.

Summary of the Case

The evidence concerning the underlying facts is uncontroverted. The conflict arises from the conclusions to be drawn from such facts.

Donald L. Jordan and Steve Salazar, both experienced in mining, testified in the case.

On June 12, 1990, MSHA Inspector Jordan was involved in a saturation inspection at the Golden Eagle Mine. The operation of this gassy mine involves a continuous miner development combined with a retreating longwall.

At approximately 7:50 a.m., Inspector Jordan, Messers. Salazar, the general mine foreman, and Ralph Sandoval,² a union escort, went to the northwest No. 1 tailgate section.

As the group started into the section they were told not to enter the area. Section Foreman Kretoski had notified all personnel to stay out; he had also posted the neck of the unit. The miners were being withdrawn because a methane concentration in excess of 1.5 percent had been detected. Mr. Salazar reaffirmed the order of withdrawal. Further, section mechanic Ben Chavez was on his way to deenergize the power.

Messers. Jordan and Salazar then went to the No. 1 return and took air samples. They agreed the methane concentration in the area exceeded 1.5 percent. In fact, the concentration was 1.7 percent. (Tr. 20, 22, 66) They continued on to the No. 4 return. The methane concentrations fluctuated from .9 to 1 percent. The belt entry concentration was two-tenths of one percent. Inspector Jordan and Mr. Salazar then drove to the face area. They found that a curtain in the No. 2 entry was choking off most of the air.

The methane concentrations at the face ranged between 0.3, 0.5 and 0.8 percent. Mr. Salazar indicated it would probably

² This area is circled on the mine map, Exhibit C2.

take the rest of the day shift for the concentration to go below one percent.

After returning from the face the two men walked the entry, a distance of about 1400 feet. In that distance they found the methane concentration varied from 1.4 to 1.7 percent. (Tr. 86-89)

Inspector Jordan stated he would have to write a section 107(a) Order so he would be in control of the situation. When the order was written WFC had already withdrawn the personnel and deenergized the power. (Tr. 69) Mr. Salazar did not believe an imminent danger existed. (Tr. 71-84)

At 2:00 p.m., the concentration was 1.3 percent. Inspector Jordan modified his order and he authorized production to resume if the concentration went below one percent. At 4:30 p.m., mining resumed when the concentration dropped between 0.8 to 0.9 percent.

The graveyard shift mined until 4:00 a.m. At that time the methane escalated to 1.4 percent. Mr. Salazar informed the crew not to let it reach 1.5 percent; the crew was withdrawn.

On the 19th, MSHA Inspector Mel Shively wrote a section 104(a) citation when he found the methane concentration was still holding at 1.2 percent. On June 21st at approximately 4:30 p.m., Inspector Jordan abated his prior section 107(a) order.

When the order was originally written management was complying with 30 C.F.R. § 75.309(b).

In Mr. Salazar's opinion, Inspector Jordan issued the section 107(a) order as a control device. Inspector Jordan believed he was complying with his obligations under the Mine Act when he issued the order.

Discussion

This case involves the construction of relevant portions of the Act.

Section 107(a), under which the order here was issued, provides for procedures to counteract dangerous conditions. The section, in part, provides as follows:

Procedures to Counteract Dangerous Conditions

Sec. 107. (a) If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such

representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section 104(c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist. The issuance of an order under this subsection shall not preclude the issuance of a citation under section 104 or the proposing of a penalty under section 110.

On the facts presented here, it would appear that no condition of imminent danger existed within the ordinary meaning of section 107(a). The methane concentration had not reached an explosive range. In addition, the inspector and the mine superintendent walked in by No. 1 entry for 1400 feet. The methane concentrations in the walk remained constant at 1.4 percent to 1.7 percent. However, the fact that the two men walked the entry indicates they both believed no condition of imminent danger existed.

Congress has legislated many facets of mining. One such mandate is set forth in 30 U.S.C. § 863(h)(2) which provides:

(2) If, when tested, a split of air returning from any working section contains 1.5 volume per centum or more of methane, all persons except those persons referred to in section 814(d) of this title, shall be withdrawn from the area of the mine endangered thereby to a safe area and all electric power shall be cut off from the endangered area of the mine, until the air in such split shall contain less than 1.0 volume per centum of methane. [Emphasis added]

The above statutory provision has also been codified in the Secretary in regulations at 30 C.F.R. § 75.309(b).

Whether the described methane concentrations are held to be a "per se imminent danger" (as ruled by Judge Joseph B. Kennedy)³ or a Congressionally mandated imminent danger is not critical to a resolution of the issues.

The meaning of the foregoing statutory provisions is amplified by the legislative history of the 1969 Act. In reviewing Section 204(i)(2) the Senate Committee stated as follows:

³ Consolidation Coal Company v. Secretary of Labor, 4 FMSHRC 1960 (1982).

This section requires that men be withdrawn by the operator or inspector, if he is present, and power shut off from a portion of a mine endangered by a split of air returning from active underground workings containing 1.5 percent of methane.

The presence of 1.5 percent of methane in the air current returning from active underground working places indicates that considerably larger amounts of methane may be accumulating in the air at places in the mine through which the current of air in such split has passed. Safety requires that employees be withdrawn from the portion of the mine which is endangered by the possibility of an explosion of any such accumulation of methane, and that all electric power be cut off from such portion of the mine, until the cause of the high percentage of methane in such returning air is ascertained and the quantity of methane in such returning air is reduced to no more than 1.0 percent.

Legislative History of the Federal Coal Mine Health and Safety Act of 1969, at 185. To like effect see also, CF&I Steel Corporation, 3 FMSHRC 2819, 2823 (1981) (Boltz, J.).

WFC's initial argument is that the presence of 1.7 percent methane does not trigger a section 107(a) order because there can be no per se imminent dangers under the Act. In support of its position WFC relies on the frequently stated tests of imminent danger. Old Ben Coal Corp. v. Interior Board of Mine Operations Appeals, 523 F.2d 25, 32 (7th Cir. 1975) (quoting Freeman Coal Mining Corp., 2 IBMA 197, 212 (1973), aff'd sub nom. Freeman Coal Mining Co. v. Interior Board of Mine Operations Appeals, 504 F.2d 741, 743 (7th Cir. 1974)). Rochester & Pittsburgh Coal Co., 11 FMSHRC 2159, 2164 (1989).

WFC's argument should be addressed to the Congress, not to the Commission. The statute, as stated above, clearly defines a 1.5 percent concentration methane to be an area of the mine that is endangered. It requires withdrawal of all miners from such an area.

In sum, I agree with Inspector Jordan's view that:

. . . when I encounter 1.5% methane regardless of the situation, if I am in fact present, that I am obligated to issue an imminent danger [order] until the imminent danger has in fact been removed (Tr. 37).

The cases relied on by WFC address the issue of "imminent danger." However, more critically, these cases do not involve methane concentrations exceeding 1.5 percent.

The case of Mid-Continent, 1 IBMA 250, also cited by WFC, supports the Secretary and not WFC. In the cited case, the Board stated that "neither the Act nor the Regulations provide that a mere presence of methane gas in excess of 1.0 volume per centum is, per se, a violation." 1 IBMA at 253. However, as noted, Congress has mandated that 1.5 percent methane requires remedial action by the operator as well as the inspector, if he is present.

Based on Mid-Continent, WFC further suggests a method of enforcing § 75.309 without the need of resorting to a section 107(a) order.

MSHA can consider WFC's proposal, but this case is not a rule-making proceeding, but a contest concerning the validity of the order issued by the Secretary's representative.

WFC also argues that the Secretary's per se imminent danger rule cannot be reconciled with pending changes proposed in her regulations. ⁴

WFC states that, in her proposed changes to the regulations, the Secretary does not require miners to be withdrawn until the methane concentration attains 2.0 percent. 54 Fed. Reg. at 2415.

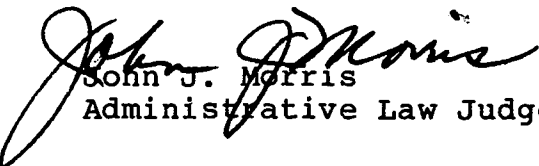
I agree. It appears the Secretary's proposed regulations, not yet enacted, clarify, reorganize, and update existing ventilation standards promulgated more than 15 years ago. The proposal also recognizes new technology available in mines.

The Secretary has broad rule-making powers. However, this case is necessarily determined on existing requirements and not on the proposed changes. The changes, which are in the proposal state, may never be adopted.

For the foregoing reasons, I conclude that Inspector Jordan properly issued Order 3077023. Accordingly, I enter the following:

ORDER

The contest of Order No. 3077023 is DISMISSED.


John J. Morris
Administrative Law Judge

⁴ 54 Federal Register 2383, 2415 (1988).

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

AUG 8 1990

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 89-209
Petitioner	:	A. C. No. 15-13541-03556
v.	:	
	:	Docket No. KENT 89-235
CROSSGATES MINING COMPANY,	:	A. C. No. 15-13541-03557
INCORPORATED,	:	
Respondent	:	Docket No. KENT 89-236
	:	A. C. No. 15-13541-03558
	:	
	:	Docket No. KENT 90-66
	:	A. C. No. 15-13541-03560
	:	
	:	No. 1 Mine
	:	

DECISION

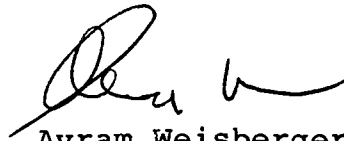
Appearances: Mary Sue Taylor, Esq., Office of the Solicitor,
U. S. Department of Labor, Nashville, Tennessee,
for the Secretary;
Mr. Dale A. Anderson, Vice President Administration,
Crossgates Mining Company, Incorporated, Ashland,
Kentucky, for the Respondent.

Before: Judge Weisberger

These cases are before me upon petitions for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). Petitioner had filed a joint motion, with regard to Docket Nos. KENT 89-209, 89-335, and 89-236, to approve a settlement agreement and to dismiss these cases. A reduction in penalty from \$5,924 to \$2,962 is proposed. Initially, the Motion was not granted, and a hearing was scheduled to allow the Parties to present evidence to support the settlement. At the hearing, Petitioner made a Motion, agreed to by Respondent, to approve a settlement of Docket No. KENT 90-60, proposing a reduction in penalty from \$1,362 to \$681.

I have considered the representations and documentation submitted in these cases, especially the documentation and testimony presented at the hearing, on July 24, 1990, with regard to Respondent's financial condition. I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is GRANTED, and it is ORDERED that Respondent pay a penalty of \$3,643 within 30 days of this order.



Avram Weisberger
Administrative Law Judge

Distribution:

Mary Sue Taylor, Esq., Office of the Solicitor, U. S. Department of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 37215 (Certified Mail)

Mr. Dale A. Anderson, Vice President Administration, Grossgates Mining Company, Incorporated, P. O. Box 989, Ashland, KY 41105-0989 (Certified Mail)

dcp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

AUG 8 1990

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 90-6
Petitioner	:	A.C. No. 15-11529-03524
v.	:	
	:	H-8 Mine
INFERNO COALS INCORPORATED,	:	
Respondent	:	

DECISION

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville, Tennessee,
for Petitioner;
Charles J. Baird, Esq., Baird and Baird, P.S.C.,
Pikeville, Kentucky 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," charging Inferno Coals Incorporated (Inferno) with 20 violations of mandatory standards and proposing civil penalties of \$2,829 for the alleged violations. The general issue before me is whether Inferno violated the cited regulatory standards and, if so, the appropriate civil penalty to be assessed in accordance with Section 110(i) of the Act.

Respondent failed to appear at the scheduled hearings but filed pleadings captioned "Motion to Withdraw Notice of Contest" with respect to 19 of the 20 citations at bar. At the hearings Petitioner presented testimony and documentation adequate to support its proposed penalties for these 19 violations within the framework set forth in Section 110(i) of the Act. Respondent's "Motion to Withdraw Notice of Contest" is deemed to be a motion for approval of settlement and in light of the evidence presented it is granted. An order will therefore be incorporated as part of this decision directing that Respondent pay the penalties proposed for the subject 19 violations.

Respondent also filed a "Joint Stipulation of Facts" regarding the remaining citation, No. 2784600. As amended at hearing the proposed stipulations were accepted by the Secretary. At hearings the Secretary also presented testimonial and documentary evidence in support of her claim that a factual basis existed to sustain the allegations in Citation No. 2784600 and that a violation did in fact occur. See Co-op Mining Co., 2 FMSHRC 3475 (1980). The Secretary also produced evidence in support of her proposed penalty of \$600 for that violation.

According to supervisory MSHA Inspector John South, Inferno was previously cited on January 5, 1989, for a violation of the same mandatory standard cited at bar (i.e. 30 C.F.R. § 48.10) after Inferno had failed to pay 14 miners for the required safety training (See Exhibit G-22). During his investigation of events leading to that citation Inspector South was told by one of Inferno's owners, James Salyers, that in his 11 years in the coal mining business he had never paid any of his employees for the MSHA required safety training. However, according to Inspector South, Mine Superintendent Jackie Bartley told him that he (Bartley) had been aware of the necessity to pay miners for such safety training and had previously told Salyers of this requirement.

According to Inspector South, Inferno abated the January 5 citation by compensating the 14 miners for their lost pay, but thereafter withheld from the "bonus pay" of 9 of these 14 miners plus 5 additional miners who had attended annual refresher training on subsequent dates, amounts equal to the compensation they were paid for the training. Accordingly on July 28, 1989, Citation No. 2784600 was issued by Inspector South. That Citation reads as follows:

Harry Mullins, Michael Fleming, Ronald Ratliff, Ronald England, James E. Charles, Russell Ratliff, John H. Allen, Donald Saunders, and Bennett Justice attended Annual Refresher Training on December 3, 1988, and received compensation for the subject training hours.

Larry Coleman, Frank J. Stanley, Alfred Adkins and Randy Hill attended Annual Refresher Training on December 17, 1988, and received compensation for the subject training hours.

James Billiter attended Annual Refresher training on December 31, 1988, and received compensation for the subject training hours.

The compensation received for the subject training was withheld in the same amount from the above listed employee's bonus pay received by the subject employees on June 30, 1989.

The cited standard, 30 C.F.R. § 48.10, provides as follows:

(a) training shall be conducted during normal working hours; miners attending such training shall receive the rate of pay as provided in Section 48.2(d) (definition of normal working hours of this sub-part A).

(b) if such training shall be given at a location other than the normal place of work, miners shall be compensated for the additional cost, such as mileage, meals and lodging, they may incur in attending such training sessions.

Inferno apparently argues that because the issuance of a "bonus" to miners was voluntary on its part and above and beyond any required payment to its employees, it had the right to withhold payment of this "bonus" to those miners taking the MSHA mandated annual refresher training in the precise amount of the compensation paid to the miners attending such training. However, since it is not disputed that the subject miners would have received the full "bonus" but for their attendance at the legally mandated annual refresher training it is clear that Inferno violated the standard at 30 C.F.R. § 48.10 as alleged.

Since Inferno management clearly knew, following its initial abatement of the January 5, 1989, citation, of the regulatory requirement to compensate miners for their required safety training, its subsequent attempt to recoup that compensation from those miners through a transparent accounting subterfuge, Inferno is chargeable with an intentional violation--or, within the framework of the criteria under section 110(i), the highest negligence. In addition, since Inferno continued to refuse to compensate the subject miners on the basis of this transparent subterfuge until a section 104(b) "failure to abate" withdrawal order was issued, it clearly did not abate the violation in good faith. The violation was also serious in that the repeated failure to compensate miners for their required safety training would clearly tend to discourage participation in that important training.

Under the circumstances, and considering all the criteria under Section 110(i) of the Act, I find that a civil penalty of

\$600 is indeed appropriate for the violation charged in Citation No. 2784600.

ORDER

Inferno Coals Incorporated is hereby directed to pay the proposed civil penalties of \$2,829 in full within 30 days of the date of this decision.



Gary Melick
Administrative Law Judge

Distribution:

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Charles J. Baird, Esq., Baird and Baird, P.S.C., Inferno Coal
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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 9 1990

JOHN ERAZMUS, JR.,	:	DISCRIMINATION PROCEEDING
Complainant	:	
v.	:	Docket No. WEVA 90-108-D
	:	MORG-CD 90-04
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	Ireland Mine
JOHN WEIGAND, JR.,	:	DISCRIMINATION PROCEEDING
Complainant	:	
v.	:	Docket No. WEVA 90-109-D
	:	MORG-CD 90-05
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	Ireland Mine

ORDER LIFTING STAYS AND DISMISSING PROCEEDINGS

Before: Judge Melick

Complainants request approval to withdraw their complaints in the captioned cases for the reason that an arbitrator has awarded them appropriate remedies for the discrimination alleged in these cases. Under the circumstances herein, the request is granted. 29 C.F.R § 2700.11. The Stay Orders previously issued are accordingly now lifted and these cases are therefore dismissed.


Gary Melick
Administrative Law Judge

Distribution:

Walter J. Scheller, III, Esq., Consolidation Coal Company,
1800 Washington Road, Pittsburgh, PA 15241 (Certified Mail)

Mr. Thomas M. Myers, District Six, UMWA, 56000 Dilles Bottom,
Shadyside, OH 43947 (Certified Mail)

Mr. David Hudson, Superintendent, Consolidation Coal Company,
P.O. Box 587, Moundsville, WV 26041 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

AUG 10 1990

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 90-86-DM
Petitioner	:	MD 90-03
v.	:	
	:	Selma Mine
DRAVO BASIC MATERIALS CO.,	:	
INCORPORATED,	:	
Respondent	:	
and	:	
	:	
R & S MATERIALS, INC.,	:	
Respondent	:	

DECISION

Appearances: William Lawson, Esq., U.S. Department of Labor
Office of the Solicitor, Birmingham, AL, for the
Secretary;

R. Henry Moore, Esq., Buchanan Ingersoll, P.C.,
Pittsburgh, PA, for Dravo Basic Materials, Co.,
Inc.,

Harold Bowron, Jr., Esq., Balch & Bingham,
Birmingham, AL, for R & S Materials, Inc.

Before: Judge Fauver

The Secretary of Labor brought this proceeding on behalf of Alonzo Walker under § 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., contending that he was discharged in violation of that section.

The original complaint was against Dravo Basic Materials Co., Inc., as was an application for temporary reinstatement, which was granted pending a hearing and decision on the merits of the complaint.

The case was set for hearing on the merits on May 22, 1990.

On May 14, 1990, the Secretary moved to amend the complaint to add R & S Materials, Inc., as a respondent and to assess a civil penalty for a violation of § 105(c) of the Act.

On May 21, 1990, Dravo filed an answer to the amended complaint in the event the motion to amend were granted, and R & S filed a motion to strike the motion to amend the complaint, also with an answer to the amended complaint in the event the motion to amend were granted.

On the same date, the judge held a telephone conference with the attorneys for the Secretary, for Dravo, and for R & S. The judge advised the parties that he would hear oral arguments the following morning on the Secretary's motion to amend the complaint and that, if the motion were granted, R & S would be entitled to a continuance to prepare for a hearing on the merits. R & S stated that it was desirous of proceeding with the hearing on the merits, scheduled for the following day, if its motion to strike the motion to amend the complaint were denied.

On May 22, 1990, after oral arguments, the motion to amend the complaint was granted. The amended complaint and Respondents' answers thereto were deemed to be filed on the dates they were previously received by the judge's office. In light of R & S's desire to proceed to hearing on the merits that day, and its waiver of procedural and due process objections, a hearing on the merits was held on May 22 and 23, 1990.

This decision is limited to the issue whether Walker was discharged in violation of § 105(c) of the Act, reserving for a supplemental decision issues of successor in interest, damages, a civil penalty and other relief.

Having considered the hearing evidence and the record as a whole, I find that a preponderance of the substantial, reliable, and probative evidence establishes the following Finding of Fact and further findings in the Discussion below:

FINDINGS OF FACT

1. R & S Materials, Inc., operated an open pit sand and gravel mine, known as the Selma Mine, until January 12, 1990, when the mine was acquired from R & S by Dravo Basic Materials Co., Inc., 1/

1/ Further findings of fact concerning the issue of Dravo's responsibility as a successor in interest are deferred pending further proceedings.

2. At the beginning of the day on January 10, 1990, Alonzo Walker reported to work at the Selma Mine where he was employed as a dragline operator. To get to the dragline, Walker rode a motor grader driven by Jimmy Callen.

3. During the trip to the dragline, Callen asked Walker if he ever had problems of dizziness or shortness of breath while operating the backhoe, indicating that he had such ailments the day before. Walker replied that he did not have such problems with the backhoe but that he had not operated the machine for some time, approximately four or five months.^{2/} Callen, the regular motor grader operator, operated the backhoe a half shift the day before and at that time experienced difficulty in breathing and a burning sensation in his nose. He had not expressed such complaints previously on the backhoe or any other machine.

4. In the morning on January 10, Walker operated the dragline. Callen again was temporarily assigned to operate the backhoe, because the regular operator, Randy Hamilton, had not arrived at the mine. Callen again experienced difficulty in breathing and a burning sensation in his nose while operating the backhoe. The door to the backhoe was closed, so he opened it to get more air in the cab. This did not help.

5. During the morning, an MSHA mine inspector came to Callen's worksite as part of a mine inspection. He briefly looked at the backhoe, but did not inspect it for noxious fumes. He was not aware of Callen's complaints.

6. Callen operated the backhoe until lunch time, when he was relieved for lunch by Randy Hamilton, his supervisor. ^{3/} Callen told Hamilton that he was having trouble breathing and a burning sensation in his nose. Hamilton understood Callen's complaint to mean that his condition was a result of operating

^{2/} All employees would occasionally operate other equipment, on an as-needed basis.

^{3/} Randy Hamilton was a working foreman who regularly operated the backhoe. In the absence of the Mine Superintendent, Hamilton was in charge of the mine.

the backhoe (Tr. 248). 4/ Hamilton replied to Callen's complaint by saying that when the weather was hot and dusty he had similar symptoms while operating the backhoe. Hamilton did not offer to inspect the backhoe or have it tested for noxious fumes.

7. When Callen was relieved for lunch he went to the hopper area (where some of the employees generally met to eat lunch) to try to rest and to catch his breath. Walker was there and Callen again complained to him about his physical ailments while operating the backhoe. Walker advised Callen to go to the Mine Superintendent, Roger Campbell, and tell him about the beliefs he had concerning the backhoe.

8. Callen went to the office, and told Campbell that he could hardly breathe, that he had a burning sensation in his nose, that he needed to see a doctor, and that he believed "something was on [wrong with] the backhoe" (Tr. 116, 186, 369; Ex. C-9). Campbell immediately sent Callen to a hospital on workmen's compensation.

9. When Callen did not return to the backhoe after lunch, Hamilton went to the office and asked Roger Campbell what had happened to him. Campbell told Hamilton that Callen had been taken to the hospital. Both Campbell and Hamilton knew that Callen was taken to the hospital because he had breathing difficulties and a burning nose sensation while operating the backhoe.

10. After his own lunch period, Hamilton noticed the dragline was not operating and decided to assign Alonzo Walker to operate the backhoe the rest of the shift. Walker was in the hopper area where he, Robert Baldwin and Leon Kent had just eaten lunch.

4/ At the previous hearing on the application for temporary reinstatement, Hamilton had testified that Callen asked him whether he had shortness of breath or a burning sensation in the nose while operating the backhoe. Transcript in Docket No. SE 90-63-DM, page 59. At the hearing on the merits, he first testified that Callen did not associate his symptoms with operating the backhoe (Tr. 246), but when confronted with his earlier testimony, Hamilton acknowledged that he understood Callen's complaints to be directed at the backhoe. "I figured it was about the backhoe since he was on it and everything." Tr. 248.

11. Hamilton went to the hopper area and told Walker that he wanted him to operate the backhoe. Walker asked him where Jimmy Callen was. Hamilton said he had gone to the hospital. Walker replied that he "would rather have somebody check it out because Jimmy was complaining about it" (Tr. 29-30). Hamilton replied that there was "nothing wrong with it," and Walker replied "I'd rather have a mechanic to check it out" (Tr. 30). Hamilton started walking toward his truck, and told Walker to either operate the backhoe or go to the house (meaning he would be fired). Walker then asked Hamilton where Superintendent Campbell was. Hamilton did not respond. Walker caught a ride on a dump truck down to the dragline, to operate that machine.

12. Hamilton left the hopper area, looking for Campbell. He found him and told him Walker refused to run the backhoe. Campbell, with Hamilton, proceeded to the dragline to talk to Walker. At the dragline Campbell asked Walker why he did not operate the backhoe and Walker said there was a problem with the backhoe, that "Jimmy Callen got sick on the backhoe" (Tr. 32) and he wanted to have it checked out. Campbell said there was nothing wrong with it and to either run it or look for another job. Walker did not run the backhoe, and understood he was fired. He went to the office, where Campbell gave him a termination slip that stated the following reason for his discharge: "Asked to run backhoe and refused." Ex. C-2. When Walker read the form he said there were two other men who could run the backhoe and asked Campbell, "if there ain't nothing wrong with it [the backhoe], how come they couldn't run it?" Tr. 35. Campbell then instructed his secretary to type the following additional language on the slip: "Dragline operator. Alonzo Walker stated that there were four other men capable of running backhoe." Tr. 35; Ex. C-2. Walker, however, had not stated four other men were capable of running the backhoe. Also, he had asked Campbell to put his safety complaint about the backhoe on the personnel form but Campbell did not do so.

13. R & S Materials, Inc.'s Safety Manual, handed to each employee, stated in Rule No. 3(b):

It shall be the duty of every employee to promptly report to his supervisor any hazardous condition or practice that may cause injury or property damage.

14. Callen stayed in the hospital about a week. His medical problem was apparently a lung disorder, which was treated. He returned to work and was operating the backhoe and other equipment without difficulty at the time of the hearing.

15. At the request of Mine Superintendent Campbell, MSHA tested the backhoe for noxious fumes on January 12. The tests were negative.

DISCUSSION WITH FURTHER FINDINGS

The central issue is whether Walker was unlawfully discharged for engaging in a protected refusal to work under § 105(c)(1) of the Act. 5/

A miner may refuse to work under that section if he has a good faith, reasonable belief that a hazardous condition exists. Northern Coal Company, 4 FMSHRC 126, 128 (1982). The "belief must be reasonable, and . . . miners may rely on such indications of conditions as seemingly trustworthy reports from others and earlier conditions in the mine." Id. at 136.

Where practical, a miner refusing work should communicate to a representative of the operator his belief that a hazardous condition exists. "Simple, brief communication will suffice, and the 'communication' can involve speech, action, gesture, or tying in with others' comments." The purpose of the rule "is promoting safety and [the Commission] will evaluate communication issues in a common sense, not legalize, manner." Id. at 133, 134.

5/ Section 105(c)(1) provides:

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

To determine "reasonableness" of a work refusal, the miner's safety concern must be viewed from the miner's perceptive at the time of the work refusal, and the miner need not objectively prove that an actual hazard existed. Union Carbide Corp., 5 FMSHRC 993, 997-98 (1983); River Hurricane Coal Co., 5 FMSHRC 1529, 1533-34 (1983); Haro v. Magna Cooper Co., 4 FMSHRC 1935, 1944 (1982). "Good faith belief simply means honest belief that a hazard exists." United Castle Coal Company, 3 FMSHRC 803, 810 (1981).

Generally, in order to establish a prima facie case of discrimination under § 105(c) a complaining miner bears the burden of proving that (1) he or she engaged in protected activity and (2) the adverse action complained of was motivated in any part by that activity. 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); Hecla-Day Mines Corporation, 6 FMSHRC 1842 (1984); Phelps Dodge Corp., 3 FMSHRC 2508, 2510-2511 (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 it was also motivated by the miner's unprotected activities and would have taken the adverse action on those grounds alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Company, supra. The ultimate burden of persuasion does not shift from the complainant. United Castle Coal Company, supra. See also Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983); and NLRB v. Transportation Management Corporation, 462 U.S. 393 (1983) (where the Supreme Court approved the NLRB's virtually identical analysis for discrimination cases arising under the National Labor Relations Act).

Applying these principles, I find that Walker had a good faith, reasonable belief that operating the backhoe presented a hazard and he communicated that belief to his supervisors by his refusal to operate the machine until his employer had it checked out for hazardous conditions.

The supervisors and Walker were all aware that Callen had complained of dizziness, breathing problems, and a burning sensation in his nose while operating the backhoe, and that he was sent to the hospital because of this condition.

It was reasonable for Walker to believe that the backhoe presented a hazard and may have been leaking fumes or had other

defects that caused Callen's condition. Walker was protected by § 105(c) of the Act in requesting that the machine be checked for hazards before he would operate it. Walker was not a mechanic and did not have the training, skills, or equipment to test the machine for noxious fumes, emissions, or other hazards that may have caused Callen's symptoms. He was not trained or qualified to judge whether Callen's condition was due to defects of the backhoe or to independent health causes such as a heart attack or a lung disease. He was therefore not obligated to examine the backhoe to determine whether it was safe. Nor was he required to operate it and "wait and see" if he would become sick and require hospitalization. It was not reasonable for his supervisors to order him to run the machine without adequate tests to ensure his safety.

The hospital physician who examined Callen suggested that the equipment and work area be checked for possible noxious fumes or chemicals that could cause Callen's condition. When the Mine Superintendent checked the equipment and work area, he saw nothing wrong but still could not determine whether or not odorless noxious fumes were escaping from the equipment. He therefore requested MSHA to bring in an expert with the proper technical skill and equipment to test for noxious fumes.

The fact that such tests proved negative does not alter the reasonableness and good faith of Walker's work refusal. As stated, a good faith belief "simply means honest belief that a hazard exists." United Castle Coal Co., supra, 3 FMSHRC 803, 810 (1981). It does not require objective proof that a hazard actually existed.

Hamilton testified that Walker did not ask him to check out the backhoe, but merely stated he "runs the dragline, not the backhoe" (Tr. 24). I do not find this testimony to be credible. Other witnesses corroborated Walker's testimony that he asked Hamilton to check out the backhoe. On balance, I credit Walker's testimony as to what he stated to Hamilton. Respondent contends that noise at the hopper may have drowned out Walker's responses to Hamilton, and that Walker had a duty to make any safety complaint clearly heard and understood by his supervisor. I find the noise factor to be a non-issue in this case. Hamilton said he had no difficulty hearing the words of Walker. Walker had no difficulty hearing Hamilton. The difference between them is their testimony of what was said, and I find Walker's testimony to be more credible and convincing than Hamilton's.

Campbell testified that when Callen complained to him about difficulty in breathing and a burning sensation in his nose Campbell did not know that Callen was complaining about the backhoe. I do not find this testimony to be credible.

Campbell's secretary, Annette York, testified that she was present when Callen came in and complained to Campbell about the ailments he was suffering from operating the backhoe. Tr. 368, 369. Campbell's testimony is also refuted by MSHA Inspector Kelly, who testified that on January 12 he interviewed Campbell and Campbell stated that Callen had told him he had trouble breathing and a burning sensation in his nose while operating the backhoe and had tried operating the backhoe with the door open but that did not help. Tr. 186, 187; Ex. C-9, p.3. Finally, Campbell's testimony is refuted by Callen himself, who testified that he told Campbell that he believed there was "something on [wrong with] the backhoe" (Tr. 116).

Campbell also testified that Walker flatly refused to operate the backhoe, with no explanation. Tr. 459-461. I do not find this testimony to be credible and reasonable. When Campbell approached Walker at the dragline, this was Walker's last chance to plead his case for refusing to operate the backhoe. He had asked Hamilton where Campbell was, indicating his desire to discuss the situation with him. I credit Walker's account of his statements to Campbell, both at the dragline and in Campbell's office.

On balance, I find that a preponderance of the reliable evidence proves that Walker's work refusal was protected by § 105(c) of the Act. His discharge was therefore a violation of that section.

CONCLUSIONS OF LAW

1. The judge has jurisdiction in this proceeding.
2. The discharge of Alonzo Walker on January 10, 1990, by R & S Materials, Inc., violated § 105(c)(1) of the Act.

ORDER

1. This decision shall not become a final disposition of this matter until a supplemental decision and final order are issued.
2. The parties shall have until September 5, 1990, to submit proposed findings and conclusions, with supporting arguments, concerning:
 - (a) Issues of liability of Respondent Dravo Basic Materials, Co., Inc., as a successor in interest.
 - (b) Civil penalty or penalties to be assessed under § 110(i) of the Act.

(c) Relief to be accorded to Alonzo Walker.

(d) Any other matters the parties believe should be addressed to reach a final disposition of this proceeding.

3. If necessary, a supplemental evidentiary hearing will be held on factual issues raised in the parties' proposals on damages.

4. The previous order of temporary reinstatement shall remain in force pending a final decision.


William Fauver
Administrative Law Judge

Distribution:

William Lawson, Esq., U.S. Department of Labor, Office of the Solicitor, Suite 201, 2015 2nd Avenue, North, Birmingham, AL 35203 (Certified Mail)

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iz

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 1990

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 90-48
Petitioner	:	A.C. No. 46-01968-03502
v.	:	
	:	Docket No. WEVA 90-58
LANG BROTHERS, INC.,	:	A.C. No. 46-01968-03503
Respondent	:	
	:	Blacksville No. 2 Mine

DECISION

Appearances: Wanda M. Johnson, Esq., Office of the Solicitor,
U.S. Department of Labor, for the Secretary of
Labor (Secretary); Gregory A. Morgan, Esq.,
Young, Morgan and Cann, Clarksburg, West Virginia,
for Lang Brothers, Inc. (Lang Brothers).

Before: Judge Broderick

STATEMENT OF THE CASE

In March and December 1989, Inspector George H. Phillips of the Mine Safety and Health Administration reviewed the registers kept by Consolidation Coal Company (Consol) of the contractors working at Consol's Blacksville No. 2 Mine. Lang Brothers was included on the register, having been engaged in cleaning out and plugging gas wells which penetrated the coal seam within the subject mine. The inspector conducted spot inspections of Lang Brothers operation including its drilling equipment and issued a number of citations for violations of mandatory safety standards promulgated under the Mine Act. The Secretary seeks civil penalties for these alleged violations. On motion of the Secretary, the two dockets were consolidated for the purposes of hearing and decision. Pursuant to Notice, the consolidated case was called for hearing in Morgantown, West Virginia, on May 30, 1989. George H. Phillips and Lloyd Alvarez testified on behalf of the Secretary; Glenn Andrew Lang and Calvin Lofton testified on behalf of Lang Brothers. Both parties have filed post-hearing briefs. I have considered the entire record and the contentions of the parties and make the following decision.

FINDINGS OF FACT

1. Lang Brothers is a heavy construction company, a major part of whose business involves drilling new gas wells and repairing existing wells for gas companies (approximately 50 percent of its work), and cleaning out and plugging abandoned wells for coal mine operators (the other 50 percent).

2. Lang Brothers has had "blanket contracts" with Consolidation Coal Company (Consol), each covering a calendar year wherein Lang Brothers agrees to clean and plug gas wells for Consol pursuant to "purchase orders" for each well to be plugged. Such a blanket contract existed for the calendar year 1989. Lang has plugged wells at different Consol mines since about 1980. It has also done the same work for about five other coal operators.

3. Consol owns and operates an underground coal mine whose portal is in Monongalia County, West Virginia, and which extends underground in the states of West Virginia and Pennsylvania, called the Blacksville No. 2 Mine.

4. Effective August 19, 1980, the Mine Safety and Health Administration (MSHA) issued an order granting Consol's petition for modification of the requirements of 30 C.F.R. § 75.1700 requiring it to establish and maintain barriers around oil and gas wells in the Blacksville No. 2 Mine. In lieu of establishing and maintaining such barriers, Consol was permitted to clean the wellbore and to seal the coalbed from the surrounding strata at the affected wells by plugging the wells from below the coalbed to the surface.

5. In March of 1989, pursuant to a purchase order from Consol and instructions from Consol's engineer, Lang Brothers reopened, cleaned out and plugged well No. B2-233 located in Pennsylvania. Consol had received a permit from the state of Pennsylvania¹ for this work. Lang then brought its equipment to the site, including a drill rig, a water pump and water tanks, and a bulldozer.

6. With this equipment, Lang cleaned out the existing well and plugged it with cement. The well penetrates and extends below the coal seam. Well No. B2-233 extended more than 1370 feet below the surface. The coal seam was from 674 feet to 682 feet below the surface.

¹ There is some confusion in the record as to whether the well was located in Pennsylvania or West Virginia, since Respondent's Exhibit 4 is an affidavit of plugging and filling a gas well on a West Virginia form. The date of this form however, is March 1990. The record seems to show that both wells involved in this case opened on Pennsylvania land.

7. The land on which the equipment was positioned to clean and plug the wells was apparently not owned by Consol. Consol and Lang had to obtain the landowners' permission to enter and perform the necessary work. The land of course was above the coal mine being operated by Consol.

8. On March 20, 1989, Federal mine inspector George Phillips went to the Blacksville No. 2 Mine office and asked to see the contractor's register. Lang Brothers name appeared on the register, and Inspector Phillips proceeded to the area in which they were engaged in cleaning and plugging gas well No. B2-233. He issued a citation charging a violation of 30 C.F.R. § 77.1710(i) because the bulldozer was provided with rollover protection but did not have seat belts.

9. In December 1989, pursuant to another purchase order from Consol and instructions from Consol's engineer, Lang reopened, cleaned out and plugged well No. B2-278. Consol had applied for and received a permit from the state of Pennsylvania for this work. Thereafter Lang brought its equipment to the site and commenced the operation.

10. Well No. B2-278 extended more than 3000 feet below the surface. The coal seam was from 802 feet to 808 feet below the surface.

11. On December 4 and December 12, 1989, Inspector Phillips in the course of inspections of Lang's operation at well B2-278, issued five citations, two alleging violations of 30 C.F.R. § 77.404(a) because of a defective cylinder pressure gauge and inoperative rear lights on a bulldozer, one alleging a violation of 30 C.F.R. § 77.503 because of damaged insulation on a welder cable, one alleging a violation of 30 C.F.R. § 77.1110 because of a defective fire extinguisher at the oil storage station, and one alleging a violation of 30 C.F.R. § 77.410 because of a defective backup alarm on a bulldozer.

12. On May 1, 1989, coal mine inspector Lloyd Alvarez inspected the plugging operations at well B2-233, and on January 16, 1990, he inspected the plugging operations at well No. B2-278.

13. At the time well B2-278 was cleaned and plugged, Consol was cutting through the coal seam about 300 feet from the well. The record does not indicate how far the coal mining operation was from well B2-233 at the time it was cleaned and plugged.

14. Lang concedes that the plugging operation itself is subject to MSHA inspection. Lang has an MSHA I.D. number as an independent contractor.

15. Lang concedes that if it is subject to the Mine Act, the conditions and practices cited in the citations involved here were present or occurred, and constituted violations of the Mine Act as alleged.

ISSUE

1. Whether Lang's operations in cleaning and plugging gas wells under contract with an underground coal mine operator are subject to the provisions of the Mine Act?

STATUTORY PROVISIONS

Section 3(d) of the Act provides:

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

Section 3(h) of the Act provides:

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

(2) For purposes of titles II, III, and IV, 'coal mine' means an area of land and all structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations, and other property, real or personal, placed upon, under, or above the surface of such land by any person, used in, or to be used in, or resulting from, the work of extracting in such area bituminous coal, lignite, or anthracite from its

natural deposits in the earth by any means or method, and the work of preparing the coal so extracted, and includes custom coal preparation facilities;

Section 4 of the Act provides:

SEC. 4. Each coal other mine, the produce 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.

CONCLUSIONS OF LAW

In the Otis Elevator cases (11 FMSHRC 1896, "OTIS I"; 11 FMSHRC 1918, "OTIS II" (1989), appeals docketed Nos. 89-1712 and 89-1713 (D.C. Cir. Nov. 20, (1989)) the Commission held that Otis Elevator Company which examined and maintained elevator equipment at an underground coal mine under contract with the coal mine operator, was an independent contractor performing services at a mine and thus was subject to the Mine Act.

The Commission found Otis subject to the Mine Act because (1) its activities were an integral and important part of the coal extraction process; (2) Otis' employees worked at the mine site and were exposed to many of the same hazards as the employees of the mine operator; (3) Otis had a continuous presence at the mine site.

The activities of Lang Brothers, in cleaning and plugging the gas wells for Consol, constitute an integral and important part of Consol's extraction process. Consol was obliged to clean and plug the wells in accordance with the modification petition in order to mine through the area where the well penetrated the coal seam. If Consol did the work itself, there could be no doubt that the work was part of the mining process. There should be no different conclusion because it contracted out the work. Lang admits that the plugging operation itself is subject to MSHA inspection. But the cleaning and plugging constitute a single process, and both are necessary to Consol's mining activity.

Lang's operations were not at the mine site per se, but were performed on land above the mine and involved an operation which penetrated the coal seam.

The two projects involved in these proceedings were of relatively short duration. Lang did not have a "continuing presence" at the subject mine, but approximately 50 percent of its work involved cleaning and plugging gas wells for coal mine operators. It could therefore be said therefore to have a continuing presence in coal mine related work.

Section 3(d) of the Act defines operator to include "any independent contractor performing services or construction at such mine." But as the Commission stated in OTIS I, not all independent contractors are operators. "[T]here may be a point, at least, at which an independent contractor's contact with a mine is so infrequent or de minimis that it would be difficult to conclude that services were being performed." National Indus. Sand Ass'n v. Marshall, 601 F.2d 689, 701 (3rd Cir. 1979).

In the case of Old Dominion Power Co. v. Donovan, 772 F.2d 92 (4th Cir. 1985), relied upon by Lang, the Court held that a public utility which monitored an electric substation at a mine site, was not an operator under the Act, since it did not have a continuing presence at the mine. The relationship of Lang's activities involved here to the coal mining process is much more direct than the power company's activities in Old Dominion. About 50 percent of Lang's work is for coal mines as contrasted to the extremely small percentage of the power company's work. Although Lang's employees were not in the mine itself, they operated heavy equipment which penetrated the mine atmosphere and directly and substantially affected the extraction process. Most importantly, their work was directly related to the safety of the miners, since improper plugging of a gas well could cause methane leaking into the mine as the extraction of the coal progressed and could result in an underground ignition or explosion. I conclude that Lang's contact with the mine was neither "infrequent or de minimis".

Therefore, I conclude that Lang, by virtue of the services it provided Consol and the importance of those services to Consol's coal mining operation, falls within the definition of operator in the Mine Act and is, therefore, subject to its jurisdiction.

ORDER

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

1. Citations 3100560 issued March 3, 1989, and 3311069, 3311070, 3311071, issued December 4, 1989, and 3311624 and 3311625 issued December 12, 1989, are **AFFIRMED**;

2. Respondent shall within 30 days of the date of this decision pay the following civil penalties for the violations found to have occurred.

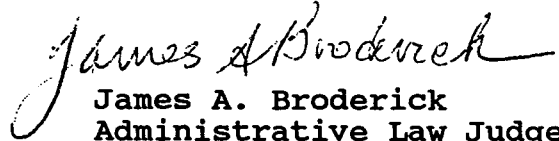
CITATION

PENALTY

3100560	\$ 39.00
3311069	39.00
3311070	39.00

3311071
3311624
3311625

39.00
39.00
39.00
\$234.00


James A. Broderick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

AUG 21 1990

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 90-57-DM
ON BEHALF OF	:	MSHA Case No. MD 89-65
HARRY W. MULLEN,	:	
Complainant	:	Sand and Gravel Plant
v.	:	
	:	
ERNST MATERIALS SERVICE,	:	
Respondent	:	

ORDER OF DISMISSAL

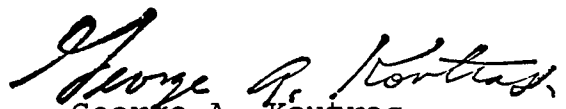
Before: Judge Koutras

Statement of the Case

On June 12, 1990, I issued an order granting the Secretary's motion for a continuance of the hearing scheduled for June 26, 1990, in Cincinnati, Ohio, and for a stay of the proceeding in order to afford the Secretary time to conduct an additional investigation. The Secretary has now filed a Motion to Dismiss this matter on the ground that further investigation revealed that the respondent corporation is no longer in business and the owner of the former respondent corporation died on June 22, 1990. The Secretary states that an analysis of successor liability was conducted under the standard enunciated in Munsey v. Smitty Baker Coal Company, et al., 2 FMSHRC 3463 and its progeny, and that the results of the analysis show that no successor corporation exists that could reasonably be impleaded by the Secretary.

ORDER

In view of the foregoing circumstances, the previously issued stay order IS LIFTED, and for good cause shown, the Secretary's motion IS GRANTED, and this matter IS DISMISSED.


George A. Koutras
Administrative Law Judge

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

AUG 22 1990

LOCAL UNION 2176, DISTRICT 22 : COMPENSATION PROCEEDING
UNITED MINE WORKERS OF :
AMERICA (UMWA), : Docket No. WEST 85-72-C
Complainant :
v. : Wilberg Mine
EMERY MINING CORPORATION, :
Respondent :

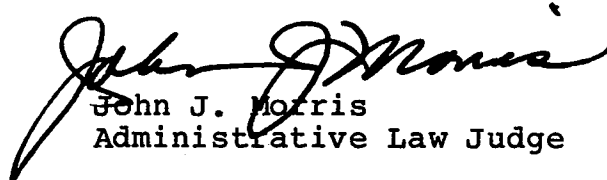
ORDER OF DISMISSAL

Before: John J. Morris

The parties have reached an amicable settlement in the above case.

Accordingly, the following order is appropriate:

1. The settlement agreement is approved.
2. The order of August 28, 1987, staying the hearing herein is dissolved.
3. The hearing scheduled for October 10, 1990, in Price, Utah is cancelled.
4. The case is dismissed.


John J. Morris
Administrative Law Judge

Distribution:

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

AUG 22 1990

LOCAL UNION 1769, DISTRICT 22	:	COMPENSATION PROCEEDING
UNITED MINE WORKERS OF	:	
AMERICA (UMWA),	:	Docket No. WEST 85-74-C
Complainant	:	
	:	Wilberg Mine
v.	:	
	:	
EMERY MINING CORPORATION,	:	
Respondent	:	

ORDER OF DISMISSAL

Before: Judge Morris

The parties have reached an amicable settlement in the above case.

Accordingly, the following order is appropriate:

1. The settlement agreement is approved.
2. The order of August 28, 1987, staying the hearing herein is dissolved.
3. The hearing scheduled for October 10, 1990, in Price, Utah is cancelled.
4. The case is dismissed.


John J. Morris
Administrative Law Judge

Distribution:

Mary Lu Jordan, Esq., Michael Dinnerstein, Esq., United Mine Workers of America, 900 15th Street, N.W., Washington, D.C. 20005
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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 24 1990

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 90-77-D
on behalf of, ex rel,	:	MORG CD 90-01
WILLARD GENNOY,	:	
Complainant	:	Arkwright No. 1 Mine
v.	:	
	:	
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Broderick

On August 17, 1990, the Secretary filed a motion to approve settlement in the above proceeding. Pursuant to the settlement agreement, I make the following findings and order:

1. Willard Gennoy was engaged in protected activity on August 24, 1989, when he complained to a Consol management official about allegedly unsafe conditions and equipment on surface areas of the Arkwright No. 1 Mine.

2. Consol illegally discriminated against Willard Gennoy in violation of section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(1), by attempting to discharge him for his protected activity.

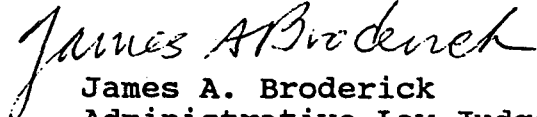
3. Consol is ORDERED to execute and post a copy of the Notice to Miners, attached hereto, at the Arkwright No. 1 Mine for a period of not less than 30 days.

4. Consol is ORDERED to expunge any reference to the events of the morning of August 24, 1989, and the attempted discharge of Willard Gennoy from all records maintained by Consol which are searchable by the Complainant's name, including but not limited to, the personnel records of Consol.

5. Consol is ORDERED to pay back wages to Willard Gennoy of \$2737.61 within 30 days of the date of this order. Consol is authorized to withhold from this sum such moneys as are authorized or required by law or contract to be withheld. Consol shall provide Willard Gennoy with a written statement itemizing such withholding at the time of payment.

6. Consol is ORDERED to pay Willard Gennoy case related expenses of \$228 within 30 days of the date of this order.

7. Consol is ORDERED TO PAY the Secretary a civil penalty of \$100 within 30 days of the date of this order.


James A. Broderick
Administrative Law Judge

Distribution:

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Walter J. Scheller, Esq., Consolidation Coal Company, Legal Department, 1800 Washington Road, Pittsburgh, PA 15241 (Certified Mail)

Willard E. Gennoy, Route 2, Box 306, Morgantown, WV 26505
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Steven P. McGowan, Esq., Steptoe & Johnson, P.O. Box 1588, Charleston, WV 25326 (Certified Mail)

slk

NOTICE TO MINERS

This notice is provided to convey Consolidation Coal Company's awareness of the anti-discrimination provisions of Section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq. and to insure all employees of Consolidation Coal Company that the safety of employees is management's foremost concern.

Consolidation Coal Company, the Secretary of Labor, and Willard Gennoy have reached a settlement in an action filed by the Secretary on behalf of Willard Gennoy under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. in the case of Secretary of Labor, Mine Safety and Health Administration (MSHA), on behalf of Willard Gennoy v. Consolidation Coal Company, Docket No. WEVA 90-77-D. The Secretary filed that action after receiving a complaint from Willard Gennoy that Consol attempted to discharge him after Willard Gennoy complained about unsafe conditions and equipment to a management official.

Management recognizes that the identification of problems affecting safety are essential and are protected under the Mine Act. Section 105(c)(1) of the Federal Mine Safety and Health Act of 1977 provides in its entirety:

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 of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners, or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise of such miner, representative of miners, or applicant for employment of any statutory right afforded by this Act.
(emphasis added)

Consolidation Coal Company acknowledges that this provision of the Mine Act prohibits Consol from discriminating against a miner because that miner reports an alleged danger or safety or health violation to management, the mine safety committee, the State of West Virginia, or the Mine Safety and Health Administration. Moreover, all miners, mine safety committeemen, and foremen are afforded this protection against discrimination.

Consolidation Coal Company acknowledges that the Mine Act prohibits Consol from treating a miner who complains about an alleged danger or safety or health violation differently than other miners.

Consolidation Coal Company encourages miners to report any condition or practice believed to be unsafe or a violation of a mandatory safety or health standard to management. It is not now nor has it ever been Consolidation Coal Company's policy or practice to discriminate or otherwise interfere with miners exercising their rights under Section 105(c)(1) of the Mine Act.

With continued cooperation between employees and management,

it is our belief that we can maintain a safe and productive work environment.

Sincerely,

James Simpson
Superintendent

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

AUG 27 1990

UTAH POWER AND LIGHT COMPANY, : CONTEST PROCEEDING
MINING DIVISION, :
Contestant : Docket No. WEST 90-285-R
: Order No. 3583332; 7/12/90
v. :
: Cottonwood Mine
SECRETARY OF LABOR, : Mine ID 42-01944
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), :
Respondent :

DECISION

Appearances: Susan E. Chetlin, Esq., Crowell & Moring,
Washington, D.C.,
for Contestant;

James B. Crawford, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia,
for Respondent;

Robert Jennings, International Representative,
UMWA, District 22, Price, Utah,
for Intervenor.

Before: Judge Lasher

This matter came on for expedited hearing on July 19 and 20, 1990, to review a so-called "Imminent Danger" Withdrawal Order issued pursuant to Section 107(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (herein Mine Act). The Applicant (Contestant) Utah Power & Light Company, Mining Division (herein UPL) and the Secretary of Labor, MSHA (herein MSHA) were represented by Counsel. United Mine Workers of America (herein UMWA), the representative of miners, was represented by its International Representative, Mr. Robert Jennings. The parties submitted closing arguments (and precedent references) in lieu of post-hearing briefs.

The subject Withdrawal Order, No. 3583332, was issued on July 12, 1990, at Contestant's Cottonwood Mine by MSHA Inspector Jerry O.D. Lemon. It had the effect of removing from service UPL's only two EIMCO (Diesel) #915 scoops (herein 915). The Order, consisting of four pages with diagrams, and two subsequent one-page modifications, alleges that the dangerous condition results from "blind spots" and the restricted field of vision available to the 915 operator. The basis for the issuance of the

order was more fully developed in the exhibits and testimony of six witnesses presented by MSHA. UPL also called six witnesses and introduced exhibits in support of its positions.

Issues

The withdrawal order does not contain any charge of violation of safety or health standards. MSHA's allegation that an imminent danger existed is based on its investigation of the circumstances, including measurements of visibility problems and "blind spots," interviews, and findings as to prior accidents involving the subject equipment (See T.19-21).

UPL contends that the enforcement action taken by MSHA was inconsistent with the existence of an imminent danger, including arguments that (1) the mine was subject to some 20 prior inspections while the 915s were in use (since about 1985) without their being cited, (2) that a prior 103(g) inspection conducted by Inspector Fred R. Marietti on May 21 and 22, 1990, did not result in any enforcement action or in a finding of imminent danger, (3) that Inspector Lemon delayed for approximately two hours his issuance of the withdrawal order (citing the decision of ALJ James Laurenson in Sharp Mountain Coal Company, et al., 3 FMSHRC 115 (January 1981), and (4) that the 915s are still permitted use in other mines.

UPL also contends that the 915s have been in use over five years in its Cottonwood Coal Mine without the occurrence of any "lost-time" injuries (T. 23), that there was no emergency, and that use of the 915s was not "likely to lead to death or serious injury." (T. 23-26).

The Order

Withdrawal Order No. 3583332 was issued on July 12, 1990, at approximately 2 p.m. by Inspector Lemon. It provides, inter alia:

Safe operation of the EIMCO 915 diesel scoop, Serial No. 01147 could not be done in that an inspection was done by the writer on 7/12/90 and it was determined that serious visability [sic] problems existed on the model 915-1147 in that; the view opening from the top of the operators cab over the steering wheel was 2" to 2 3/4" wide and with a miner--that was 5'9" tall was placed 4' outby or from the side of the machine and moved inby and outby, it was determined that an approximate blind spot of 23' 10" existed on opposite the operators side of the

machine. This blind spot imposes a serious blind spot to any coal miner walking on this side of the machine. See the below diagram which is not to scale:

[Refer to diagram on Ex. G-1]

There is no termination time set as this is an order.

It is important to note that the EIMCO 915, SIN-04117 was also taken underground to the 1st South Main Intake haulage road and the following results were found; with a Isuzu pickup parked in the center of the entry, lined up with this EIMCO-915--with the bucket on the EIMCO in the half-roll position (up)--, the operator can see only the top of the cab of the truck. Front of the truck right at the bucket--of the EIMCO. To see the headlights of this truck other truck had to be moved 164 feet outby the EIMCO on a fairly flat roadway. These headlights are at about 31" height.

Results of in mine Rear View:

[Refer to diagram on Ex. G-1]

Results of turning EIMCO (away from operators sight): The operator in this case could not see the Isuzu pick-up at a 269-foot distance. He could only see the glare of the lights on the mine roof. There was a 5% grade approximately drop from the corner turn point to the Isuzu pick-up.

[Refer to diagram on Ex. G-1]

At 6" from the bucket of scoop, operator of the scoop can barly [sic] see the top of the Isuzu for a considerable distance. The entry at this location was about 19 feet wide by 8 feet height. This diesel scoop is approximately 76" height from the ground to the top of the canopy. From the entry floor to the tope of the highest point on a surge tank cover plate it was 65". This machine is 8' 1". The operators compartment on the machine is flush with the right-hand side of this machine. In the writers view--the visability [sic] on this machine is terrible from the operators compartment. There has been one reported serious accident--with this scoop and an Isuzu pick-up truck driving into each other. Neither operator seen each other until it was too late.

[Refer to diagram on Ex. G-1)

To summarize these two diagrams, diagram A which is to the radiator and end of the machine. [A] 5' 9" man was placed 4' from the side of the machine and he could not be seen from the belt up, until a point 72 1/2' distance. The boot level of the miner could not be seen for a distance of 92 1/4 feet (This would be 90% to 100% of the miner view.

In Diagram B, looking over the bucket of this machine--the same man was placed 4' from the right-hand side of this machine and this man--from the belt up could not be seen for a distance of 130 feet (50% observation of this man) and from his boots up to his head could be seen at about 199' from the operators eye area. These tests were run on the surface.

There is no part and section of 30 C.F.R. that relates to this visability [sic] problem observed here, so this is a 107-a order with no violation of Part 30 CFR.

A regular operator was placed in the operators cab prior to making these tests and all distances were based on his sight (Terral Hardy).

The first modification of the Order was issued by Inspector Lemon on July 16, 1990, stating: "107(a) Order dated July 12, 1990, is hereby modified to also show that following the interviews of five Diesel EIMCO 915's operators, it was found that far more than one accident had occurred over a five-year period. At least 15 accidents were substantiated through the interviews. Ed Taylor, operator, five accidents; Scott Oliver, operator, two accidents; Robert Phelps, operator, one accident; Steve Miner, operator, three accidents; James Ledger, operator, three accidents. All these operators talked to, stated that a real visability problem exists opposite the operator's side of these two EIMCO 915s on this property. Also, that serious blind spots exist when making a turn away from the operator's sight, into crosscuts or around entries. These interviews were conducted on July 13, 1990."

The second modification was issued by Inspector Lemon on July 18, 1990, indicating: "107-a Order No. 3583332 dated July 12, 1990, is hereby modified to show continuations sheet No. 2 modified on the lower diagram, under Results of Turning EIMCO (away from operator sight). This diagram of the EIMCO scoop is modified to show the bucket on the other end of the

EIMCO 915. Also in the body of the condition under this diagram, the first sentence is modified to read; at 6" from the Radiator end of this scoop, the operator of the EIMCO can barely see the top of the Isuzu pick-up truck."

Inspector Lemon was sent to the mine by his superiors on July 12, 1990, to take a "second look" or make a "follow-up" following an earlier MSHA investigation into a complaint filed under section 103(g) of the Mine Act with special emphasis on the visibility problems of the 915s (T. 29, 62, 74).

The Section 103(g) Complaint 1/

In a letter to Randy Tatton, UPL's Safety Director, Steven L. Thornton, President, UMWA, Local 2176, District 22, complaints by 915 (927) diesel haulage operators in a May 10, 1990, union meeting relating to "Isuzu trucks" and visibility problems were reported (Ex. A-6).

1/ Section 103(g) of the Mine Act provides:

"(g)(1) Whenever a representative of the miners or a miner in the case of a coal or other mine where there is no such representative has reasonable grounds to believe that a violation of this Act or a mandatory health or safety standard exists, or an imminent danger exists, such miner or representative shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing, signed by the representative of the miners or by the miner, and a copy shall be provided the operator or his agent no later than at the time of inspection, except that the operator or his agent shall be notified forthwith if the complaint indicates that an imminent danger exists. The name of the person giving such notice and the names of individual miners referred to therein shall not appear in such copy or notification. Upon receipt of such notification, a special inspection shall be made as soon as possible to determine of such violation or danger exists in accordance with the provision of this title. If the Secretary determines that a violation of danger does not exist, he shall notify the miner or representative of the miners in writing of such determination.

By letter of May 16, Mr. Tatton and Earl Snow, General Mine Foreman, responded to the Thornton letter and listed some 12 measures being taken to resolve the problems. (Ex. A-5).

Based on an unsigned complaint dated May 21, 1990 (Ex. A-7, p. 1), MSHA Inspector Fred R. Marietti, (on the same date) conducted an investigation of the complaint and on May 22, 1990, issued a two-page report based thereon (also Ex. A-7, pp. 2 and 3). This report states.

"This is the result of a 103(g) inspection conducted on 05/21-22/90. The EIMCO 915 scoop was looked at and the operators of the scoops interviewed. Changes in lighting, moving of lights, removal of metal or lowering has been conducted on the machine to increase the operators visibility. The operators feel they are in control of their machine. Because the machine is so large and the mine environment restricts the machine's mobility, it is apparent that they have to be operated with some precautions. This also includes precautions of other equipment being operated by its operator. Traffic rules have to be established and followed to avoid accidents. In regard to the 300

1/ (Footnote continued)

(2) Prior to or during any inspection of a coal or other mine, any representative of miners or a miner in the case of a coal or other mine where there is no such representative, may notify the Secretary or any representative of the Secretary responsible for conducting the inspection, in writing, of any violation of this Act or of any imminent danger which he has reason to believe exists in such mine. The Secretary shall, by regulation, establish procedures for informal review of any refusal by a representative of the Secretary to issue a citation with respect to any such alleged violation or order with respect to such danger and shall furnish the representative of miners or miner requesting such review a written statement of the reasons for the Secretary's final disposition of the case."

feet mentioned in the 103(g) complaint, ^{2/} there are many areas where that would be impossible due to dips, bends, and other conditions common to the mine environment. Depending on the size of the equipment, lower as an Isuzu pick-up, it may not be able to be seen immediately alongside or within 25 to 50 feet in front or behind on the side opposite the operator's compartment. A person standing is more easily seen with his light and reflective tape and this mine requires reflective vests also. Operators of Isuzus and other equipment were interviewed also. It appears that the general consensus of the persons interviewed was that traffic rules and consideration with safe driving methods need to be followed. On May 16, a meeting was held between management and representatives of the miners. A copy of the outcome with problems needing to be addressed is enclosed as a part of this investigation. At the time of this investigation, the problems addressed have been implemented or are being worked on. There were no violations, safeguards, or orders issued."

According to Inspector Lemon, he had no knowledge why Inspector Marietti did not issue a withdrawal order, but he assumed that "he didn't go through the tests and examinations we went through." (T. 60). This impression was borne out in the record (T. 168-172, 176-179, 201).

General Findings

At the times material herein, UPL utilized two 915s at its Cottonwood underground coal mine and has done so since approximately 1985 (T.152).

^{2/} The complaint alleges: "The EIMCO 915 loaders at our mine have a visibility problem of which the operators cannot see the travelway or incoming traffic 300' out. (This was brought up by an operator at a meeting with management.) We feel this to be an imminent danger to personnel traveling the roadways. Also, we have experienced several accidents involving this equipment." (Ex. A-7).

The 915 is 30 feet long by 8 feet wide by 5 feet high (T.55, 149). ^{3/} It weighs approximately 20 tons (T. 85, 149) and runs between five and seven mph (T. 67, 242). The 915 is more suitable for metal/non metal mines since they generally have a higher seam than coal mines (T. 144-146).

Eighty to 90 percent of the time, the two 915s are engaged in taking supplies from outside the mine to the sections and the rest of the time they are engaged in "gobbing" - a process of cleaning up loose coal on an active section, or "even outby in crosscuts or roadways." The 915s travel "the most traveled roadways into the mine" and "travel all the main intakes in." Inspector Lemon testified the 915s would meet all traffic "coming in the opposite direction" and would meet "occasional miners walking along intakes, miners coming from other entries, belt entries, what have you, through the doors through these intakes." (T. 54-55, 120, 149, 150). The two 915s are operated on all three eight-hour shifts at the mine (T. 96).

One miner, Jeffery A. Ricchetti, a mechanic, described the operational effect of the 915s as follows:

"Well, one, I've seen these operators visually, because they can't see out of the machine, they've hooked onto pieces of equipment in my sections, drug 'em down the entries, they've run into our material cars, tore the supplies off the material cars, they've ran into 7200 cables with these machines, live 7200 cables with these machines, basically because they can't see out of these machines. And they are big and large, and they take up the entry, and they kind of scare you when you go around them." (T. 84).

Ricchetti also described the mine as being full of inter-sections, turns, dips and rolls (T. 91, 94) and indicated that it was difficult from an Isuzu pick-up to see another pickup at 100 or 200 yards (T. 91).

^{3/} By comparison, an Isuzu pick-up weighs 3000 pounds (T. 85). There were approximately 25-27 Isuzus operating at the mine (T. 286-287, 359, 378). At the time of the Order's issuance, not all of the Isuzu pick-ups had been equipped with strobe lights. (See Ex. A-5; T. 288, 359).

The adverse effect on visibility of the vagaries, "ups and downs" and bends in the mine was conceded or confirmed by numerous other witnesses (T. 100-104, 113-114, 116, 187-188, 190, 197-198, 203-206, 265, 288, 290, 293, 301-305). The existence of "blind spots" due to dips was also confirmed (T. 265, 297). Relying on the reflections from the lights of other vehicles does not always prevent the 915 operator from striking the other vehicle (T. 295-296, 312-313). It would be "possible" not to see a miner on foot due to "blind spots" (T. 297-299).

Upon his arrival at the mine on July 12, Inspector Lemon had one of the two 915s brought to the surface (this was the "better" of the two machines, T. 61) where he conducted visibility tests. A "four-foot blind spot" was found by placing a 5'9" man four feet from the machine (T. 30, 31, 32, Ex. G-3). For a distance of 14 feet 8 inches parallel to the machine, the 915 operator could see no portion of the man's head (T. 33, T. 140-144). Then for a space of six inches, the man could be seen; then, however, another blind spot occurred from the end of the six-inch point, described by the Inspector as follows:

A. Then at roughly an approximate point six inches inby this 14 foot 8 inch point this man again went into another blind spot and we advanced him out to nine foot two inches.

Q. Is that indicated here in Exhibit 3?

A. Yes, it is.

Q. And in that area this man who was walking parallel four feet from the piece of equipment could not be seen?

A. Yes, sir. So from this examination we surmised that we had a serious blind spot off the operator's side of this machine, and being very concerned with this, because this type of machine in a coal mine, there are people walking alongside of these machines." (T. 34).

The record reveals numerous situations where the 915 has very limited or partial visibility (Ex. G-3, G-5, G-6; T. 34, 47, 49, 77, 97, 142, 193, 197-198, 277, 278, 281, 295, 300).

On July 12 after the surface tests, the 915 was taken underground into the First South intake roadway where the approximate mine height was 8 feet and the width was 20 feet (T. 35).

From first talking to two operators (Terral Hardy and Edmond Taylor), Inspector Lemon determined there was a visibility problem on the side opposite the operator, and in making turns into crosscuts and entries (T. 36, 45, 47). With respect to the 915's visibility problem relating to the modified Isuzu pick-ups used in the mine, Inspector Lemon testified:

"That means that I was standing right next to the operator myself, although he was in--his visibility was was probably just a little less than mine. I could see roughly that much of the cab, and that's what he could see, about an inch of the cab, about an inch and a half of the cab. And after the six-inch outby, the six inches the truck faded out of view, and up to a distance of 269 feet you couldn't see any part of the truck, nor could you see any part of the headlights. All you could see is the light off the truck, the glare off the mine roof." (T. 39). (Emphasis added).

XXX

XXX

XXX

THE WITNESS: No, you cannot see the headlights. You can see the light glare against the mine roof.

THE COURT: Okay, you can see the top of the truck?

THE WITNESS: No, you can't.

THE COURT: Okay. Are you saying at 269 feet away, you can't see any part of the truck?

THE WITNESS: Yes, that's what I'm saying.

THE COURT: Oh, okay. So on EXHIBIT 5 you indicated 269 feet the Eimco operator cannot see the headlights of the truck?

THE WITNESS: That's right, sir.

THE COURT: Okay, you're saying now he couldn't see the top of the truck either?

THE WITNESS: No, all he could see was the light reflections off of the line roof from a blue strobe light." (T. 41). (Emphasis added).

Inspector Lemon gave this description of the view an operator has through the cab of the 915:

- A. This gives a true indication of the view, it gives a true indication of the real problem we have, a basic problem of tunnel vision. When you're setting in this cab, your head is against this cab, and you're looking at a space of two to two and three-quarter inches over to five and three-quarter on the far left side of that and this machine, if you keep in mind, is approximately eight feet one inches wide. It's just like looking down a tube." (T. 52). See also Exhibit G-4.

The Inspector explained his decision to issue an imminent danger Order in this manner:

"I concluded it was very dangerous with the blind spots that we have. I feel it's a very serious blind spot opposite the operator's side of the machine, and I feel also that it's a very dangerous situation exists with visibility on turns, and that's why I issued the order. That's my feeling, that we have a serious situation here." (T. 77).

Respondent MSHA established that there has been a significant number of accidents involving the 915 over the 5-5½ year period it had been in use at the Cottonwood Mine. Thus, Inspector Lemon's investigation revealed there had been approximately 15 accidents over the period (T. 50, 58, 73).

Several of these accidents had the potential of causing serious injuries (T. 50, 73, 100-102, 158, 195, 281, 301).

In one of the accidents, involving an Isuzu pickup driven by Larry Hunsaker, an electrician mechanic, and Robert Phelps, who was operating a 915, the Isuzu pickup was "totaled" (T. 102, 111). Hunsaker narrowly escaped serious injury (T. 100, 101-102, 111, 112). Although the two vehicles were approaching each other "head on," neither driver saw the other (T. 107-108, 113-114, 116). While Hunsaker received "corrective action" from UPL for "going too fast," the record nevertheless indicates the essential cause of this and other accidents as the visibility problem of the 915 driver (T. 47-49, 65, 89-90, 91, 113, 114, 116, 118, 134, 159-160, 193, 194, 197, 203-206, 277, 278, 291).

Another 915 accident resulted in the filing of a safety grievance in April 1990 (T. 158), following which special meetings were held between UPL, UMWA, and the 915 operators.

After these meetings UPL installed work changes and equipment changes prior to the July 12, 1990 Withdrawal Order (Exs. A-1, A-5, A-6; T. 160). Some of these changes announced by UPL in a May 16, 1990 memo (Ex. A-5) were to encourage Isuzu travel in certain areas, counseling an apparently aberrant Isuzu operator, training in traffic policies, upgrading lighting (high intensity blue strobe light) for parked Isuzus, training Isuzu operators to get into a safe location at least 300 feet away from oncoming large equipment, eliminating a severe dip, upgrading lighting systems on the 915s, and lowering the 915s fenders to improve visibility (T. 160-168, 172, 191, 216, 229). Nevertheless, these changes, presumably in effect on July 12, 1990, did not change the testing and measuring results (Exs. G-2, 3, 4 and 5) obtained by Inspector Lemon, nor the opinions of various credible witnesses adduced at the hearing as to the visibility problem. Further the upgraded lighting was not placed on other equipment (T. 163, 216-217), nor were the strobe lights installed on all Isuzu pickups (T. 288, 378-379).

MSHA also established that there was considerable exposure to miners traveling on foot in the mine by the blind spots and visibility limitations of the 915 (T. 94-95, 110, 142-143, 256, 266-273, 290, 292, 297-299, 389).

Contestant's Positions

Contestant established through its Chief Safety Engineer, Randy B. Tatton, that the most serious disabling injuries at the mine were back injuries and that use of the 915, which has the capability of delivering material in close proximity to the work site, would decrease such injuries by decreasing the amount of material actually handled by miners (T. 150).

915 operators are task-trained on the machines and on several occasions special training sessions have been held to discuss new work rules, and such things as use of lights and rights-of-way rules (T. 152-154, 155).

No "occupational injuries," i.e. lost-time injuries, have occurred at the Cottonwood mine as a result of the operation of the 915s (T. 156). While the accident involving Phelps-Hunsaker involved an injury to Hunsaker, such required only first-aid and was not classified as an occupational injury calling for reporting to MSHA (T. 157).

Mr. Tatton testified that following the installation of new work rules on or about May 23, 1990, there have been no collisions involving the 915 (T. 171, 174-175).

Mr. Tatton described in some detail what he considered Inspector Lemon's indecision after conducting his measurements and before the withdrawal order was issued (T. 180-184). Among other things, Mr. Tatton indicated that on July 12 the inspection party returned to the surface and arrived at his office about 12:15 p.m.; that he asked Inspector Lemon what he was "going to do with the machine," and that the Inspector said he had to look at his information before making a decision. Mr. Tatton said it was not until 1:30 p.m. to 1:45 p.m. before the company was asked to take the machines out of service (T. 180-182).

Mr. Tatton gave the opinion that the use of the 915 at the Cottonwood mine did not constitute an imminent danger and explained:

"To me an imminent danger means that if that machine turned around and went back in that mine, it would probably kill somebody; and I knew for a fact we'd operated two machines for five years and never even had an occupational injury." (T. 184).

The 915 operator Edmond Taylor indicated that at 2 p.m. on July 12, 1990, he was asked by one Dixon Peacock to tag his 915 out of service (T. 228). Mr. Taylor's opinion was that the 915's visibility problem did not create an imminent danger (T. 228, 248).

Dale Fillmore, area manager for Eimco/Jarvis/Clark, the maker of the 915, testified that he is in charge of sales and service of his company's products for his area; that the 915 has been produced for 15 years; that some 20-25 other "mines" use the 915; that "several" of such mines have similar seam heights to the Cottonwood mine; that it was his opinion that use of the 915 at the Cottonwood was not reasonably likely to lead to death or serious injury; that the safety of the 915 has to be related to the professionalism of the operator and such things as work rules.

Dave D. Lauriski, director of health, safety and training for UPL testified that at 12:30 p.m. on July 12, 1990, he called the mine and spoke with Mr. Tatton (T. 345-346) who told him that "there was a concern that there was going to be some enforcement

action taken against the equipment." 4/ Mr. Lauriski then went to the mine and discussed the matter with Inspector Lemon, who was undecided whether to cite a violation or issue an imminent danger order (T. 346, 349). Lauriski suggested that a meeting with Inspector Lemon's supervisors in Price, Utah might be in order in lieu of enforcement action being taken (T. 349). According to Mr. Lauriski, it was at this point that Inspector Lemon suggested that UPL voluntarily take the 915s out of service. Inspector Lemon's supervisor was called and reportedly he, in effect, said that the enforcement decision was Inspector Lemon's to make and that such a meeting as that suggested by Lauriski would be "meaningless." (T. 349-350). Inspector Lemon then issued the withdrawal order.

Mr. Lauriski did not believe that the "visibility restrictions" on the 915 created "a reasonable likelihood of serious injury or death." (T. 351). He also said that taking the 915s out of service increases the "manhandling" of materials by individual miners, would slow down supplying the mine with needed materials for retreat mining, etc., and would increase the risk of injury to miners because of the types of manual labor that might have to be performed. He also was concerned that mine housekeeping and trash removal would deteriorate (T. 352-353, 356). He also indicated that on July 12, 1990, only approximately three-fourths of the 26-27 Isuzu pickups were equipped with strobe lights for use when parked (T. 359, 378-379).

As noted above, contestant UPL introduced evidence that, to make the 915's operation safer, it installed work changes and equipment changes prior to the July 12, 1990 Withdrawal Order (Exs. A-1, A-5, A-6; T. 160-167, 172).

Nevertheless, these changes presumably in effect on July 12, 1990, did not change the testing and measuring results obtained by Inspector Lemon, nor the opinions of various credible witnesses adduced at the hearing as to the visibility problem. Further, the upgraded lighting was not placed on other equipment (T. 163, 216-217), nor were the strobe lights installed on all Isuzu pickups (T. 288, 378-379).

4/ 12:30 p.m. would have been shortly after the inspection party returned to the surface. This particular testimony also supports Inspector Lemon's position that he was going to do something about the 915s. (See also T. 363).

UPL also established that it had certain "Rules of the Road" in effect on July 12, 1990, one of which, pertaining to right-of-way, provided that smaller vehicles must give way to larger vehicles (T. 70-71). The record indicates that the 915 is the largest such equipment in the mine (T. 89). Here again, though, there is the evidence that, while the Isuzu pickups were required by this rule to get out of the way of the oncoming 915s, there are occasions, such as when going around a turn, when this is impossible (T. 90-91, 190, 193, 197-198, 276-279).

Other significant (and preponderant) evidence shows (1) because of dips and turns, the 915 operator's visibility is further limited (T. 127, 131, 159, 191, 197-198, 235, 238, 265); (2) the rules are not always followed (T. 127, 131, 159, 191, 197-198, 203, 206, 238-240, 244-246, 276, 277, 278, 281-284); and (3) conditions are not always "normal" (T. 97, 193, 197, 238-240, 244-246, 276, 277, 278, 281-284). Individual miners do not wear their reflective tape in the same place (T. 284).

UPL makes the argument that there were 5 to 5½ years of inspections at the Cottonwood mine while the 915 loader was in service without a withdrawal order being issued on the 915. To the extent that such contention goes beyond the raising of a possible basis for inferring that the 915 has no dangerous visibility problem and raises the defense of estoppel, such is rejected. See Secretary of Labor v. King Knob Coal Company, Inc., 3 FMSHRC 1417 (1981). Further, there is no showing that the specific limits of visibility were ever previously determined as they were in the tests and measurements of Inspector Lemon, and as I have noted elsewhere herein the determination of Inspector Marietti apparently was not anywhere as thorough as that of Inspector Lemon.

Contestant UPL was also concerned with and presented evidence with respect to its economic hardship and cost factors which would attend the loss of use of the 915s. Such evidence, however, is not found to be directly or indirectly relevant to the decisive issue in this case: whether an imminent danger existed.

Discussion and Conclusions

The question in this matter is whether or not the blind spots and visibility limitations on the operators of the 915s constitute an imminent danger.

The meaning of "imminent danger" has undergone transformation since the general concept of it first appeared in mine safety law in 1952. ^{5/} See Freeman Coal Mine Company v IBMA, (7th Cir. 1974). In that case the Court, speaking in reference to the 1969 Federal Coal Mine and Safety Act, quoted from the legislative history, to wit:

The definition of an "imminent danger" is broadened from that in the 1952 act in recognition of the need to be concerned with any condition or practice, naturally or otherwise caused, which may lead to sudden death or injury before the danger can be abated. It is not limited to just disastrous type accidents, as in the past, but all accidents which could be fatal or non-fatal to one or more persons before abatement of the condition or practice can be achieved.
115 Cong. Rec. 39985 (1969). (Emphasis added.)

The Federal Mine Safety and Health Review Commission in the last year retained the view of the U.S. Appellate Courts in its decision in Rochester & Pittsburgh Coal Company v. Secretary of Labor, 11 FMSHRC 2159 (November 1989), wherein it set forth the following useful formula for analysis of "imminent danger" questions:

In analyzing this definition, the U.S. Courts of Appeals have eschewed a narrow construction and have refused to limit the concept of imminent danger to hazards that pose an immediate danger. See e.g., Freeman Coal Mining Co. v. Interior Bd. of Mine Op. App., 504 F.2d 741 (7th Cir. 1974). Also, the Fourth Circuit has rejected the notion that a danger is imminent only if there is a reasonable likelihood that it will result in an injury before it can be abated. Eastern Associated Coal Corp. v. Interior Bd. of Mine Op. App., 491 F.2d 277, 278 (4th Cir. 1974). The

^{5/} The Mine Act defines an imminent danger as "the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." Section 3(j) of the Mine Act; 30 U.S.C. 802(j). This definition was not changed from the definition contained in the Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976) (amended 1977) (the "Coal Act").

court adopted the position of the Secretary that "an imminent danger exists when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated. 491 F.2d at 278 (emphasis in original). The Seventh Circuit adopted this reasoning in Old Ben Coal Corp. v. Interior Bd. of Mine Op. App., 523 F.2d 25, 33 (7th Cir. 1975.)"

These principles seem to put to rest any argument--if such is indeed actually made--by UPL that an "emergency" extant in the mine is a prerequisite to the existence of an imminent danger determination. In Rochester & Pittsburgh, supra, the Commission also seemed to emphasize that the analytical focus is on the "Potential of the risk to cause serious physical harm at any time" (emphasis added). Inspector Lemon testified in this connection that:

"In my mind, I feel that reasonably, at any time, someone could be seriously hurt or killed, if I let this condition go before it could have been abated."
(T. 56).

The Inspector 6/ elaborated on this judgment as follows:

- A. Okay, I'm very concerned with off the operator's side, if they're hitting these pickups and they don't actually know where the pickup is, I'm very concerned with where the person that got out of the pickup is, whether he's walking around. If they couldn't see the pickup, they're not going to see the operator that's between the line of pickup.
- Q. What kind of hazard would there be?
- A. This would be an imminent danger, if he was pinned between that and the machine, you'd kill him outright or crush him to where he'd be seriously hurt.

6/ Inspector Lemon was a particularly persuasive witness, his testimony reflecting the thoroughness of his testing and investigation, his candid responses on cross-examination, and sincerity of conviction.

Q. What if he was inside the truck, how would you compare?

A. If he was inside the truck, he could also be killed, if the machine hit that pickup in the door side of the operator, it could be fatal. That's all in relation to the speed that the machine is traveling, but that's a very, very possible likelihood. (T. 56-57)

UPL's claim that the 915 was really no different in visibility limitation to other pieces of equipment (T. 133-136, 184-185, 188-189, 203-206) was in the form of generally stated opinion evidence, unsupported by measurements taken on such other equipment or accident statistics (T. 198). Nor was such other equipment shown to be similar to the 915 (T. 136-137). Such is not considered to overcome the more detailed and convincing proof submitted by MSHA in support of its conclusion that the 915's blind spots visibility problem created an imminent danger (T. 190, 193, 197, 203-206, 297, 299).

Although UPL in one of its major arguments takes the position that the Inspector's "delay" in issuing the Withdrawal Order demonstrates an inconsistency with the "emergency" or urgency it alleges is necessary to justify an imminent danger order, Inspector Lemon satisfactorily explained his actions as follows:

A. Well, at this time I asked the safety man, Randy Tatton, and a few other management people around there, I needed some time to go outside to look at all the data we had got together, and compiled all this stuff, and I told him I felt we had a serious problem here with visibility. And I asked him at this time if he would pull his machines out of service until I could get all this stuff together. And so Randy said yes, this would be possible.

He took his machines out of service. They took them outside and they put company tags on them and they put them in the--it's a little house where they store rock dust, right adjacent to their surface shop area.

Q. So you did that immediately after you made your observations of the situation?

A. Yes.

Q. You didn't wait two hours?

- A. No, and we did that immediately. Randy took them out of service immediately, and then we got outside and we talked about the problems. I was having a real problem finding a section in 30 CFR to attach to the imminent danger order, and I couldn't find one because there is not one. So I, in fact, issued the order, and then we went down and put the tags on the machine. And some of the safety department, maybe one of the mine managers, went on down to the Price office to meet with one of the supervisors, and they asked me to go down with them, and I said I'd be down shortly, as soon as I finished looking at the Eimco and took some measurements. And I took some measurements and looked at it. (T. 45, 46).

Inspector Lemon, when called as a rebuttal witness, reiterated his testimony that while the inspection party was still underground he asked Mr. Tatton (in the presence of the union representative and an MSHA "technical support man") to voluntarily remove the 915s from service (T. 381).

Based on the Inspector's explanation for the short delay in issuing the withdrawal order, and the fact that for at least part of this period UPL actually, albeit voluntarily, removed the 915s from active service, I attribute no misunderstanding or doubt on the Inspector's part as to the necessity of or justification for issuing the Order. 7/

UPL's "delay in issuance" argument can be equated to an "Instant Recognition" test, that is, if the situation is not so patent or obviously an "emergency," that it immediately dawns on the "reasonable man" inspector observing such and causes him to act instantaneously, then the condition or practice cannot be an

7/ One member of UPL's management, Garth Neilsen, Longwall Superintendent, verified that the Inspector was concerned about getting the 915s out of service and that his "indecision" was about how to do it:

To me he seemed undecided. I do feel he felt there was a definite safety problem there, as far as visibility, but he felt--I felt that he felt he was undecided on how to handle that, as far as which way to get the machine out of service. (T. 211) (Emphasis added).

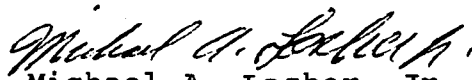
imminent danger. Such a test undoubtedly would cover some imminent danger situations, but not necessarily all. Applying such a test might frequently shift the litigation from a trial of the true issue to a trial of such things as the Inspector's I.Q., his fatigue, or his high-level expertise on a specific safety subject. Again, the effect would be that if the inspector cannot literally "hip-shoot" a particular decision, the withdrawal order should not stand. Such a squeezing of the decision time-frame would infringe on the principle that mine inspectors must have "the necessary authority for the taking of action to remove miners from risk." Rochester & Pittsburgh Coal Co., supra. In the instant matter, the inspector had measurements, tests, information, a number of laws, enforcement options and fairness to the mine operator as factors to weigh. Any one of such factors in a given set of circumstances might justify a longer period of deliberation than that involved here. Forcing a hasty decision may not always be consistent with either sound mine safety enforcement or justice.

I find no basis for concluding that Inspector Lemon abused his discretion or authority in the issuance of an imminent danger withdrawal order in this matter.

It is concluded that the conditions observed by the Inspector and described in the record could reasonably have been expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed, and that the use of the 915s with the severe visibility limitations described herein above created a significant potential of causing serious physical harm at any time.

ORDER

Based on the foregoing findings and conclusions, UPL's application for review seeking vacation of Withdrawal Order No. 3583332 is DENIED and the Order is AFFIRMED.


Michael A. Lasher, Jr.
Administrative Law Judge

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

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

AUG 28 1990

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 89-47
Petitioner	:	A.C. No. 32-00044-03511
	:	
v.	:	Indian Head Mine
	:	
BELLAIRE CORPORATION,	:	
Respondent	:	

DECISION

Before: Judge Cetti

This case is before me upon a petition of 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". The Secretary of Labor on behalf of the Mine Safety and Health Administration (MSHA), charges the Respondent, Bellaire Corporation (Bellaire), as operator of the Indian Head Mine with the violation of 30 C.F.R. § 77.1605(k) and 30 C.F.R. § 77.1103(a).

Respondent filed a timely answer contesting the violations. With respect to Citation No. 2930426, Respondent denies Petitioner's allegation that a violation occurred and contests the citation on the grounds that the safety cans referred to in the citation were "identified" within the meaning of 30 C.F.R. § 77.1103(a), and on the grounds that the citation constitutes an unlawful retroactive application by Petitioner of a change in policy with respect to the interpretation of 30 C.F.R. § 77.1103(a).

With respect to Citation No. 2930427, Respondent denies Petitioner's allegation that a violation occurred and contests the Citation on the grounds that it constitutes an unlawful retroactive application by Petitioner of a change in policy with respect to the interpretation of 30 C.F.R. § 77.1605(k).

Citation No. 2934026 alleging a significant and substantial violation of 30 C.F.R. § 77.1103(a) and Citation No. 2930427, were issued by federal mine Inspector Sass based on his AAA inspection of Bellaire's Indian Head Mine. Petitioner filed a proposal for penalty in the sum of \$363 for Citation Nos. 2930426 and 2930427.

Citation No. 2930427 - VACATED

On August 7, 1989, petitioner filed a motion for leave to vacate Citation No. 2930427 and withdraw its related \$206 proposed penalty based upon its determination that the citation was issued in error. The motion is GRANTED. Citation No. 2930427 and its related proposed penalty are vacated.

Citation No. 2930426

The remaining Citation No. 2930426, by agreement of the parties, is now submitted for decision without hearing on stipulated facts, affidavits, exhibits, and supporting briefs. The primary issue is whether the five-gallon cans containing a flammable liquid (gasoline) referred to in Citation No. 2930426 were "properly identified" as that term is used in 30 C.F.R. § 77.1103(a).

Stipulations of Facts not in Dispute

1. Bellaire Corporation ("Bellaire") is engaged in mining and selling of lignite in the United States and its mining operations affect interstate commerce.

2. Bellaire is the owner and operator of Indian Head Mine, MSHA I.D. No. 32-00044-03511.

3. Bellaire is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., ("the Act").

4. The Administrative Law Judge has jurisdiction in this matter.

5. Citation No. 2930426 (the "Citation"), a true and correct copy of which is in evidence as Exhibit 1, was properly served by a duly authorized representative of the Secretary upon an agent of Bellaire on the date and place stated therein and is admitted into evidence for the purpose of establishing its issuance and not for the truthfulness or relevancy of any statements asserted therein.

6. The proposed penalty will not affect Bellaire's ability to continue business.

7. Bellaire demonstrated good faith in abating the violation.

8. Bellaire is a large mine operator with approximately 1,100,000 tons of production in 1988.

9. Bellaire has never had any accidents or injuries involving color coded safety cans used to store flammable liquids.

10. September 12, 1988, was the first time that Richard Sass, who issued the Citation, inspected the Indian Head Mine.

11. The safety cans described in the Citation (the "Safety Cans") were all of the five-gallon size, were approximately 12 in number and were all colored red. One of the Safety Cans was labeled "Kerosene" and was empty. All of the other Safety Cans were empty or contained gasoline. All of the Safety Cans complied with Bellaire's Policy on Uniform Color Coding of Safety Cans.

12. All of the Safety Cans were located in the "fuel farm" area at the Indian Head Mine. The fuel farm is approximately 45 ft. x 105 ft. in size; contains gasoline, diesel fuel and oil storage tanks, as well as gasoline and diesel fuel pumps; and is surrounded by a dike approximately two feet high which cannot be crossed by vehicles, as required by state law. A true and correct drawing depicting the fuel farm area at the time of the Citation was issued is attached hereto as Exhibit 2. All of the Safety Cans were inside the dike surrounding the fuel farm and were located within twenty (20) feet of the gas pump. "NO SMOKING", "FLAMMABLE" and "KEEP OPEN FLAMES AWAY" signs were posted at the fuel farm when the Citation was issued. No ignition sources were present.

13. The flammable liquids in the Safety Cans were stored in accordance with all applicable standards of the National Fire Protection Association.

14. There are no factual issues in dispute. The only legal issue in dispute is whether the use of color coding to identify safety cans containing flammable liquids violates 30 C.F.R. § 77.1103(a).

15. No hearing is necessary in order for the Administrative Law Judge to decide the legal issue presented by this case.

16. If the Administrative Law Judge finds in favor of Petitioner on the alleged violation of 30 C.F.R. § 77.1103(a), Respondent agrees that the violation would be significant and substantial and that the amount of penalty, as proposed by the Secretary of Labor, would be appropriate.

17. The certified copy of the MSHA Assessed Violations History (Joint Ex. J-1) accurately reflects the history of Bellaire Corporation's Indian Head mine for the two years prior to the date of Citation No. 2930426.

18. The safety cans cited in Citation No. 2930426 were not labeled in writing or lettering of any kind which named the contents of the cans.

19. The safety can labeled "kerosene," which is referred to in Stipulation No. 11, was properly identified and is not covered by Citation No. 2930426.

The Record

The record before me, in addition to the stipulated facts set forth above, includes (1) Bellaire's Policy on Uniform Color Coding of Safety Cans (Ex. 1); (2) a diagram of the fuel farm at the Indian Head Mine (Ex. 2); (3) the affidavit of Inspector Richard Sass (the "Sass Affid.") filed by Petitioner, (4) the affidavit of Robert L. Benson, general superintendent of the Indian Head Mine, the "Benson Affid." filed by the Respondent, and; (5) the printout of the Respondent's prior history of violations at the Indian Head Mine during the two years prior to the issuance of Citation No. 2930426 (Ex. J).

DISCUSSION

30 C.F.R. § 77.1103(a) provides:

Flammable liquids shall be stored in accordance with the standards of the National Fire Protection Association. Small quantities of flammable liquids drawn from storage shall be kept in properly identified safety cans. (Emphasis added).

Citation No. 2930426 describes the alleged violation as follows:

Safety cans, containing a flammable liquid (gasoline), were observed [sic] by the fueling area that were not properly identified with a label [sic] to show the contents of the cans. This condition creates a hazard of an explosion or fire. (Emphasis added).

On page 1 of her "Memorandum Brief in Support of Proposal for Penalty, Petitioner states that the sole issue for decision is whether the red safety cans containing gasoline observed at the mine's fuel farm were properly "labeled." That is not the issue. The issue is whether the cans containing gasoline were properly "identified." The cited safety standard expressly requires only "proper identification," not "proper labeling."

The parties now stipulate that there are no factual issues in dispute and that the only legal issue in dispute is whether the use of color coding to identify safety cans containing flammable liquids violates 30 C.F.R. § 77.1103(a). ^{1/}

The key term in the cited regulation is "properly identified." Respondent contends that the regulation permits the use of color coding to identify safety cans containing flammable liquids. The Petitioner, on the other hand, contends that labeling is the only proper means of identification. ^{2/} The term "properly identified" is not defined in the regulations at Title 30 of the Code of Federal Regulations, and neither party has cited any cases on point.

^{1/} The parties have stipulated that the safety cans cited were in accordance with all applicable standards of the National Fire Protection Association. (Stip.#13).

^{2/} The Secretary has not published or distributed to mine operators any document which interpret 30 C.F.R. § 77.1103(a) to require the use of labeling, and prior to the issuance of Citation No. 2930426, the Secretary never advised Respondent that color coding was unacceptable. [Benson Affid. ¶ 3.B. and 3.C.]

In his Affidavit, Inspector Sass states that it has always been MSHA's policy to require labeling under 30 C.F.R. § 7.1103(a), but it clearly appears no such written policy exists. Furthermore, the fact that Respondent utilized its color coding system for almost six and one-half years without being cited and was inspected by MSHA many times during this period tends to demonstrate that no such policy existed at least in MSHA's District 9.

It is well established that in construing a statute or regulation, one must first look to the plain language of the provision. Secretary of Labor v. Freeman United Coal Mining Company, 6 FMSHRC 1577, 1578 (1984); Secretary of Labor v. Puerto Rican Cement Company, Inc., 4 FMSHRC 997, 998 (1982).

The relevant meaning of "identify" is, "to establish the identity of." Webster's Ninth New Collegiate Dictionary (1986) p. 597. It is generally accepted that identity can be established through means other than labeling.

If the Secretary had meant to require labeling in 30 C.F.R. § 77.1103(a), she could have easily done so as she did in 30 C.F.R. § 57.4402. That regulation deals with storage of flammable liquids in underground metal and nonmetal mines and provides:

Safety cans. Small quantities of flammable liquids drawn from storage shall be kept in safety cans labeled to indicate the contents.

The fact that both regulations deal with the same subject matter (storage of flammable liquids) and that the Secretary expressly required labeling in one instance but not in the other is a clear indication that the Secretary did not intend to require labeling in 30 C.F.R. § 77.1103(a). ^{3/}

Even if the Secretary did intend to require labeling under 30 C.F.R. § 77.1103(a), she did not adequately express her intent, and as the Court in Phelps Dodge Corp. v. Federal Mine Safety and Health Review Commission, 681 F.2d 1189, 1193 (9th Cir. 1982) observed:

If a violation of a regulation subjects private parties to criminal or civil sanctions, a regulation cannot be construed to mean what an agency intended but did not adequately express.

^{3/} Significantly, in 30 C.F.R. § 56.20012, the Secretary also expressly required labeling of toxic materials. That regulation provides:

Labeling of toxic materials: Toxic materials used in conjunction with or discarded from mining and milling of a product shall be plainly marked or labeled so as to positively identify the nature of the hazard and the protective action required.

I concluded that the proper construction of 30 C.F.R. § 77.1103(a) is that an operator may use any reasonable means of establishing for its employees the identity of flammable liquids stored in safety cans.

The Secretary already has recognized that color coding is a proper means of identification. In 30 C.F.R. § 77.1710-1 and 30 C.F.R. § 75.1720-1 the Secretary has required the use of distinctively colored hard hats to identify new miners.^{4/} Thus, I am hard pressed to give credence to the Secretary's assertion that color coding is not a proper means of identification. Her argument is not persuasive.

It has not been demonstrated that Respondent's color coding system failed to establish for employees at the Indian Head Mine the identity of flammable liquids stored in safety cans. Respondent issued a written policy covering its color coding system. The policy was posted at ten locations at Respondent's mine. All employees were instructed on the policy when it was implemented, and all new employees are instructed on the policy as part of their initial training and orientation. In addition, "FLAMMABLE," "NO SMOKING" and "KEEP OPEN FLAMES AWAY" signs were posted in the fuel farm area at the mine where the safety cans in issue were located. Respondent has not had any accidents involving safety cans used to store flammable liquids since implementing its color coding policy on April 16, 1982. It appears from the record that Respondent's color coding policy works.

The Secretary argues that the safety cans in issue were not properly identified, because the identity of the contents

^{4/} 30 C.F.R. § 77.1710-1 provides:

Hard hats or hard caps distinctively different in color from those worn by experienced miners shall be worn at all times by each newly employed, inexperienced miner when working in or around a mine or plant for at least one year from the date of his initial employment as a miner or until he has been qualified or certified as a miner by the State in which he is employed.

was not "readily apparent" to visitors like Mr. Sass who were not familiar with the Respondent's color coding system. ^{5/} This argument necessarily assumes that federal mine inspectors and other visitors lack common sense and, if left unattended, will without permission experiment or tamper with things at a coal mine. This argument is not persuasive and, if applied to the entire mining operation, would lead to a host of absurd results. The purpose of the Federal Mine Safety and Health Act, as set forth in Congressional findings and declaration of purpose, 30 U.S.C. § 801, is to protect miners, which Respondent's color coding system with its training and posting requirements certainly does. The argument that the identity of the contents of the safety cans was not readily apparent to Mr. Sass is not persuasive and certainly is not dispositive of the issue.

If the Secretary truly believes that the identification required by 30 C.F.R. § 77.1103(a) should be done specifically by labeling and no other method, she should so modify the regulation in accordance with Section 101(a) of the Mine Act, which requires all rules concerning mandatory health or safety standards to be promulgated in accordance with section 553 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 553. Further, section 101(a)(2) of the Act, 30 U.S.C. § 811(a)(2), requires the Secretary to publish in the Federal Register any "proposed rule promulgating, modifying, or revoking a mandatory health or safety standard" and to permit public comment on the proposed regulation (emphasis added).

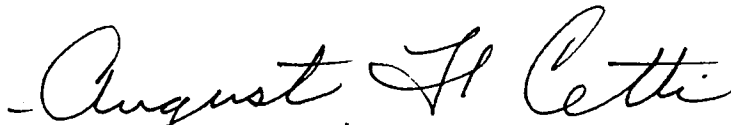
Based upon the foregoing findings of fact and conclusions of law, I enter the following:

ORDER

1. Citation No. 2950426 is vacated and its related proposed penalty is set aside.

^{5/} Mr. Sass had never inspected the Indian Head Mine prior to the date he wrote Citation No. 2930426. (Stip. #10).

2. In accordance with Petitioner's motion Citation No. 2930427 is vacated and its related proposed penalty set aside.


August F. Cetti
Administrative Law Judge

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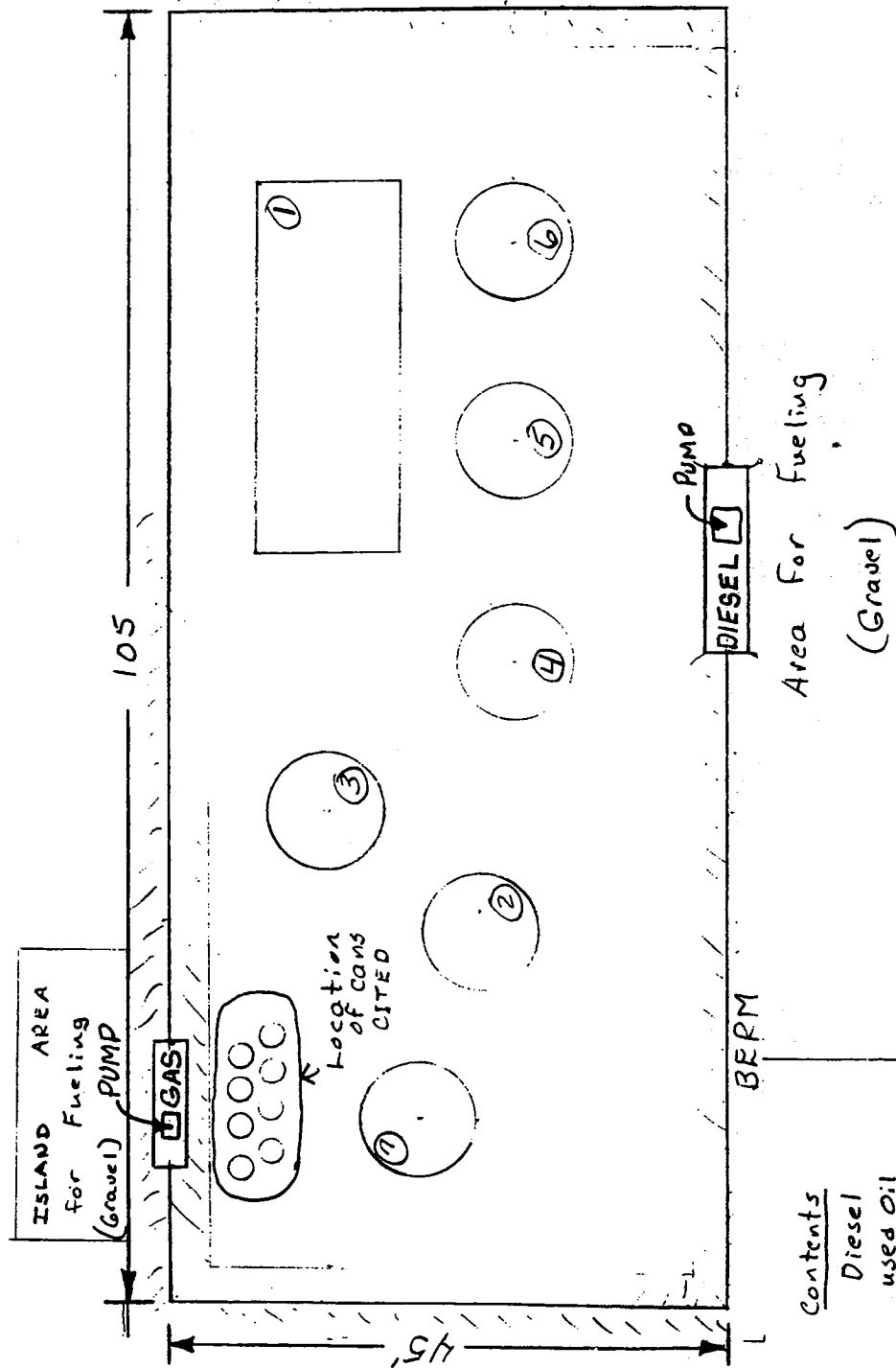
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Mr. Wayne Stevens, IMWA, Route One, Box 180, Hazen, ND 58545 (Certified Mail)

/ek

Indian Head Fuel Farm



Tank #	Contents
1	Diesel
2	used Oil
3	used Oil
4	Diesel
5	Diesel
6	Diesel
7	Gasoline

Scale - 1" = 15'

EXR-*mk*

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

THE FEDERAL BUILDING

ROOM 280, 1244 SPEER BOULEVARD

DENVER, CO 80204

AUG 28 1990

ENERGY FUELS COAL, INC., : CONTEST PROCEEDING
Contestant :
 : Docket No. WEST 89-296-R
v. : Citation No. 3077175; 5/11/89
 :
SECRETARY OF LABOR, : Docket No. WEST 89-288-R
MINE SAFETY AND HEALTH : Citation No. 3077183; 5/11/89
ADMINISTRATION (MSHA), :
Respondent : Southfield Mine
 : Mine I.D. 05-03455
 :
 :
SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) : Docket No. WEST 89-449-A
Petitioner : A.C. No. 05-03455-03569
 :
v. : Southfield Mine
 :
 :
ENERGY FUELS COAL, INC., :
Respondent :

DECISION APPROVING SETTLEMENT

Appearances: Phillip D. Barber, Esq., Welborn, Dufford, Brown &
Tooley, Denver, Colorado,
for Contestant/Respondent;
Margaret A. Miller, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Petitioner/Respondent.

Before: Judge Lasher

The parties, through the Secretary of Labor, have submitted a motion to approve their settlement which resolves the two citations remaining in Penalty Docket WEST 89-449-A. Pursuant to the settlement reached, Respondent agrees to pay in full the \$79 penalty originally assessed for Citation No. 3077183. As to Citation No. 307715, the parties agree that the violation described therein is not "significant and substantial" and that the penalty therefor should thus be reduced from the original \$98 to \$50. Based on approval of this agreement, Respondent withdraws its contests in the two captioned contest proceedings. The settlement is reasonable and part of an overall settlement of many dockets reached by these parties. Accordingly, it is APPROVED.

Order

1. Citation No. 3077175 is MODIFIED to delete the "significant and substantial" designation thereon and is otherwise APPROVED.
2. Contestant/Respondent Energy Fuels shall pay to the Secretary of Labor the total sum of \$129 as and for the civil penalties agreed on and here assessed within 30 days from the date hereof.
3. Contest Docket Nos. WEST 90-288-R and WEST 89-296-R are DISMISSED.

Michael A. Lasher Jr.

Michael A. Lasher, Jr.
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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5203 LEESBURG PIKE
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AUG 28 1990

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 90-79
Petitioner	:	A.C. No. 42-01697-03609
v.	:	
	:	Docket No. WEST 90-94
C. W. MINING COMPANY,	:	A.C. 42-01697-03610
Respondent	:	
	:	Bear Canyon No. 1 Mine

DECISION

Appearances: Robert J. Murphy, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado, for
the Secretary of Labor (Secretary);
Carl E. Kingston, Esq., Salt Lake City, Utah,
for C.W. Mining Company (C.W.)

Before: Judge Broderick

STATEMENT OF THE CASE

The Secretary seeks civil penalties for eight alleged violations of mandatory health and safety standards promulgated pursuant to the provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the Act). Both parties engaged in pretrial discovery. Pursuant to notice, the cases were called for hearing on the merits on July 17, 1990, in Salt Lake City, Utah. On the record, I ordered the cases **CONSOLIDATED** for the purposes of hearing and decision. Counsel for the Secretary stated that citation 3411629 would be vacated and that the parties had agreed to a settlement with respect to citations 3077726 and 3412009. I indicated on the record that I would affirm the vacation of the citation mentioned above and would approve the proposed settlement of the other two violations. Donald E. Gibson and Terrance Dinkel testified on behalf of the Secretary. Kenny Defa, Nathan Atwood, Gaylen Atwood and Cyril Jackson testified on behalf of C.W. At the close of the hearing, counsel for both parties waived their rights to file post-hearing briefs, and each argued his case of the record. I have considered the entire record and the contentions of the parties and make the following decision.

FINDINGS OF FACT

1. At all times pertinent hereto, C.W. was the owner and operator of an underground coal mine in Emery County, Utah, known as the Bear Canyon No. 1 Mine.

2. C.W. produced 211,438 tons of coal during the first nine months of 1989. It is a medium sized operator.

3. During the period from July 5, 1987 to July 4, 1989, C.W. had 242 paid violations; during the period October 24, 1987 to October 23, 1989, it had 213 paid violations. Of these one was a violation of 30 C.F.R. § 75.524, four were violations of 30 C.F.R. § 75.313, 17 were violations of 30 C.F.R. § 75.503 and 27 were violations of 30 C.F.R. § 75.400. I find that this history is not such that penalties otherwise appropriate should be increased because of it.

INNER ARCING OF SHUTTLE CARS

4. On August 23, 1989, Federal Coal Mine Inspector Donald E. Gibson inspected the subject mine because MSHA had received a section 103(g) complaint that "arcing" existed when shuttle cars touched the continuous miner.

5. When Inspector Gibson reached the section, the continuous miner was outby the power center where repairs were being performed. For that reason, he conducted his tests between two shuttle cars, number 20 and number 21. The shift was an idle shift and the cars were parked. He tested with a Hubble-Ensign amp meter, clamping a lead to each car, the cars being between 12 and 24 inches apart. He asked the operator of car No. 20 to set the parking brake and start the tram lever. This resulted in a reading of 1.5 amps on the meter. Using the same procedures on car No. 21, he found a reading of 1.2 amps. He verified these readings using a "lock-on" amp meter. The same results were found. Respondent's witnesses testified that the inspector did not use the Hubble-Ensign amp meter but only used the lock-on amp probe, which did not have an ohm resistor. I have no reason to disbelieve the testimony of Inspector Gibson, and therefore on this question, I accept it as factual.

6. The two shuttle cars involved here were the only cars normally used on the section. They operated on separate roadways, one tramping toward the miner to obtain a load of coal, the other hauling a load of coal from the miner to the feeder breaker and beltline. In the normal mining cycle, the two shuttle cars do not contact each other. On one occasion in 1987 or 1988 when a new mine was being started, the two shuttle cars were operated "piggy-back"--one car was loaded from the miner and then transferred the load to the other car. This occurred because the miner was a great distance from the feeder breaker.

It has not been repeated. Although the shuttle cars do not contact each other, each car regularly contacts the continuous miner in the normal mining cycle.

7. No methane has ever been detected in the mine by a hand held methane detector. Bottle samples taken April 6, 1988 showed .04% methane. Samples taken February 22, 1989, showed .01 % methane. The former would result in 24,000 CFM methane in a 24 hour period, the latter in 1500 CFM methane in a 24 hour period.

8. On August 23, 1989, Inspector Gibson issued two citations alleging violations of 30 C.F.R. § 75.524 because the current between the frames of the No. 20 and No. 21 Joy shuttle cars exceeded one ampere. (One citation was issued for each shuttle car.) The inspector also issued a withdrawal order under section 107(a) of the Act alleging that the conditions of the two shuttle cars constituted an imminent danger. The withdrawal order itself was not contested.

9. The withdrawal order was terminated on August 23, 1989, when the shuttle cars were deenergized and removed from the section. The citations were terminated on August 24, 1989, when "the inner arcing on [each] machine was repaired."

METHANE MONITOR

10. At about 4:30 a.m., on November 16, 1989, a piece of rib coal struck the methane monitor on the continuous mining machine and knocked out the power to the miner. The miner operator (also the section foreman on the graveyard shift) bypassed the power to eliminate the monitor in order to back the miner out to a safer place. It was then about 5:30 a.m., and the section foreman performed his preshift examination and called the results outside. The miner was not tagged or locked out.

11. The preshift examination book did not note that the methane monitor was inoperative or that miner was removed from service.

12. Inspector Gibson arrived at the mine shortly after 5:30 a.m., on November 16, 1989, conferred with Kenneth Defa, C.W.'s Superintendent, and went underground a little before 7:00 a.m. to perform an electrical spot inspection.

13. When the inspection party arrived on the section, the continuous miner was energized and miners were servicing and washing it. It was located about two crosscuts in by the feeder breaker. It had not been used to cut coal since it was moved back at about 5:30 a.m.

14. Inspector Gibson checked the methane monitor and found that it was not operating. He issued a citation for a violation

of 30 C.F.R. § 75.313. He cited the violation as significant and substantial. No methane was detected at the time. The Inspector believed that the condition created a hazard of an ignition or explosion should the miner strike a pocket of methane and fail to shut down.

15. After the citation was issued, Superintendent Defa asked Inspector Gibson for permission to continue to use the miner until the methane monitor could be replaced. Gibson told him he could not give such permission. Defa denied that he made such a request, but I accept Gibson's testimony that he did.

16. A new methane monitor was installed and the citation was terminated on November 17, 1989.

PERMISSIBILITY

17. The same continuous miner had a loose headlight and an opening in excess of .005 inch between the cover lid and the main circuit breaker compartment.

18. Inspector Gibson issued a citation on November 16, 1989, for a violation of 30 C.F.R. § 75.503. He cited the violation as significant and substantial.

19. The hazard posed by this condition was the possibility of internal arcing within the control box which could escape to the outside and cause an ignition. The miner was not cutting coal, but was energized.

20. The conditions were corrected by securely fastening the headlight to the frame of the machine and closing the opening in the cover lid of the main circuit breaker compartment. The citation was terminated November 17, 1989.

ACCUMULATIONS ON BOBCAT

21. On November 17, 1989, there were accumulations of coal fines, pieces of coal and oil on the housing of a diesel bobcat being operated on the West bleeder working section of the subject mine. The oil and oil mixed with coal were on the top and both sides of the motor. Coal and coal fines were on the bottom of the motor.

22. Inspector Gibson issued a citation for the above accumulations alleging a violation of 30 C.F.R. § 75.400. He designated the violation as significant and substantial because he believed they posed a fire hazard. He did not measure the accumulations.

23. The bobcat had been cleaned about 10 hours prior to the issuance of the citation. It was scheduled to be cleaned again

on the following shift in accordance with the company cleanup program.

24. The bobcat was cleaned, the accumulations removed, and the citation terminated in about 15 minutes.

REGULATIONS

30 C.F.R. § 75.524 provides as follows:

§ 75.524 Electric face equipment; electric equipment used in return air outby the last open crosscut; maximum level of alternating or direct electric current between frames of equipment.

The maximum level of alternating or direct electric current that exists between the frames of any two units of electric face equipment that come in contact with each other in the working places of a coal mine, or between the frames of any two units of electric equipment that come in contact with each other in return air outby the last open crosscut, shall not exceed one ampere as determined from the voltage measured across a 0.1 ohm resistor connected between the frames of such equipment.

30 C.F.R. § 75.313 provides as follows:

§ 75.313 Methane monitor.

[Statutory Provisions]

The Secretary or his authorized representative shall require, as an additional device for detecting concentrations of methane, that a methane monitor, approved as reliable by the Secretary after March 30, 1970, be installed, when available, on any electric face cutting equipment, continuous miner, longwall face equipment, and loading machine, except that no monitor shall be required to be installed on any such equipment prior to the date on which such equipment is required to be permissible under §§ 75.500, 75.501, and 75.504. When installed on any such equipment, such monitor shall be kept operative and properly maintained and frequently tested as prescribed by the Secretary. The sensing device of such monitor shall be installed as close to the working face as practicable. Such monitor shall be set to deenergize automatically such equipment when such monitor is not operating properly and to give a warning automatically when the concentration of methane reaches a maximum percentage determined by an authorized representative of the Secretary which shall

not be more than 1.0 volume per centum of methane. An authorized representative of the Secretary shall require such monitor to deenergize automatically equipment on which it is installed when the concentration of methane reaches a maximum percentage determined by such representative which shall not be more than 2.0 volume per centum of methane.

30 C.F.R. § 75.503 provides as follows:

§ 75.503 Permissible electric face equipment; maintenance.

[Statutory Provisions]

The operator of each coal mine shall maintain in permissible condition all electric face equipment required by §§ 75.500, 75.501, 75.504 to be permissible which is taken into or used in by the last open crosscut of any such mine.

30 C.F.R. § 75.400 provides as follows:

§ 75.400 Accumulation of combustible materials.

[Statutory Provisions]

Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein.

ISSUES

1. Whether the evidence establishes that the level of electric current existing between the frames of two units of electric face equipment that come in contact with each other in the working places of the coal mine exceeded one ampere?
2. Whether the methane monitor on the continuous monitor was kept operative and properly maintained?
3. Whether the continuous miner was maintained in a permissible condition?
4. Whether coal dust and other combustible materials were permitted to accumulate on the diesel bobcat?
5. Whether, if violations are established, they were significant and substantial?

CONCLUSIONS OF LAW

C.W. is subject to the provisions of the Act in the operation of the Bear Canyon No. 1 Mine. I have jurisdiction over the parties and subject matter of this proceeding. C.W. is a medium sized operator and has an average history of prior violations. All the violations involved in this proceeding were abated promptly in good faith.

I. INNER ARCING OF SHUTTLE CARS

30 C.F.R. § 75.524 provides that the maximum level of electric current existing between the frames of any two units of electric face equipment that come in contact with each other in the working places or in return air outby the last open crosscut shall not exceed one ampere. The inspector tested two shuttle cars and found the current to exceed one ampere in each car. The evidence, however, does not establish that these shuttle cars come in contact with each other, either in the working places, or in return air outby the last open crosscut. Each shuttle car regularly comes in contact with the continuous miner, and the inspector speculated that arcing would occur between each car and the miner, but he did not test them. I conclude that the Secretary has not carried her burden of proving the two violations charged in citations 3411949 and 3411950.

II. METHANE MONITOR

The methane monitor on the continuous miner was admittedly inoperative. The miner had been pulled back from the face because the monitor had been damaged. The question is whether it was withdrawn from service. It was not deenergized when Inspector Gibson observed it. The methane monitor problem had not been noted in the preshift book (though the condition had been orally reported by the graveyard shift foreman). The miner was not tagged or locked out. Most significantly, C.W.'s superintendent asked the inspector for permission to continue to use the miner. Therefore, I conclude that the methane monitor on the continuous miner was not kept operative or properly maintained. I reject C.W.'s contention that the methane monitor violation is a permissibility violation, and must be included as part of the citation alleging other permissibility violations.

The failure to remove a continuous miner from service when its methane monitor is inoperative is a very serious violation. Such a violation is likely to result in serious injury. This is true even though methane has not been detected by a methane detector in this mine. As Inspector Gibson stated, methane is liberated in the cutting of coal, and even a small amount of methane can cause an ignition. It was properly cited as significant and substantial. Cf. Mathies Coal Company, 6 FMSHRC 1 (1984).

III. PERMISSIBILITY

C.W. does not seriously contest the alleged permissibility violations but argues that they were minimal. The headlight was loose; there was an opening in the main circuit breaker compartment of the miner. I conclude that a violation of the permissibility standard was established. The Secretary has failed to establish that the violation was significant and substantial. There is no evidence that it would be reasonably likely to result in injury.

IV. ACCUMULATIONS ON BOBCAT

C.W. argues that the accumulations on the bobcat constituted simply a film and that C.W. follows a regular cleanup program. Inspector Gibson testified that motor oil had leaked from the valve cover pan down on the sides of the motor. He testified that coal fines and loose coal were caked on the sides of the motor. I conclude that C.W. permitted coal dust, loose coal and other combustible material to accumulate on the bobcat. The fact that it was following a cleanup plan does not defeat a citation for accumulations of combustible materials. Utah Power & Light Co., 12 FMSHRC 965 (1990). The bobcat motor was hot to the touch. The accumulations were reasonably likely to ignite. The bobcat was parked behind the feeder breaker. Should a fire break out, it would cause smoke or flame to go inby toward the face. The violation was significant and substantial.

ORDER

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

1. Citation 3411629 is **VACATED**.
2. Citations 3411949 and 3411950 are **VACATED**.
3. Citations 3077726 and 3412009 are **AFFIRMED**.
4. Citations 3412281 and 3412288 are **AFFIRMED** including the designation of the violations as significant and substantial.
5. Citation 3412282 is modified to eliminate the designation of significant and substantial and, as modified, is **AFFIRMED**.
6. C.W. Mining shall within 30 days of the date of this decision pay the following civil penalties for the violations found herein:

CITATION

30 C.F.R.

PENALTY

3077726	48.9(a)	\$ 250.00
3412009	75.400	178.00
3412281	75.313	400.00
3412282	75.503	50.00
3412288	75.400	<u>300.00</u>
		\$1178.00

James A. Broderick
 James A. Broderick
 Administrative Law Judge

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041
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August 14, 1990

BETH ENERGY MINES, INC.,	:	CONTEST PROCEEDING
Contestant	:	
v.	:	Docket No. PENN 90-208-R
	:	Citation No. 3099484; 6/20/90
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Mine No. 84
ADMINISTRATION (MSHA),	:	Mine ID No. 36-00958
Respondent	:	

ORDER DENYING MOTION FOR CONTINUANCE


This proceeding concerns a Notice of Contest filed by the contestant pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, challenging a section 104(a) "S&S" Citation No. 3099484, charging it with an alleged violation of mandatory safety standard 30 C.F.R. § 75.511. The contestant has initiated discovery pursuant to Commission Rules 55 and 57, 29 C.F.R. § 2700.55 and 2700.57, and has filed interrogatories and requests for production of documents on the respondent.

The respondent has filed an answer and a motion for a continuance pending the filing of its companion civil penalty assessment proceeding. By letter dated July 31, 1990, and received on August 2, 1990, the contestant objects to any continuance of the matter. In support of its objection, the contestant states that while it has not requested an expedited hearing, it believes that "the matter should move forward in the normal course without delay" because the issue presented by its contest (the necessary qualifications for a miner to uncouple deenergized high voltage cable) arises with some frequency and that a delay in resolving this issue would be inappropriate. The respondent has not responded to the contestant's objections for a continuance.

ORDER

The respondent's motion for a continuance IS DENIED, and the matter will be scheduled for a hearing on the merits in the near future. However, in view of the presiding judge's current trial docket, a hearing is not likely to be scheduled until sometime after January, 1991. Under the circumstances, the respondent

should have ample time to file its civil penalty proceeding and file a request for a consolidation of the cases. In the meantime, the respondent IS ORDERED to timely respond to the contestant's discovery requests.


George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

AUG 20 1990

ODELL MAGGARD,	:	DISCRIMINATION PROCEEDING
Complainant	:	
v.	:	Docket No. KENT 86-1-D
	:	MSHA Case No. BARB CD 85-48
CHANEY CREEK COAL CORPORATION,	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. KENT 86-51-D
Complainant	:	MSHA Case No. BARB DC 85-48
v.	:	
	:	Dollar Branch Mine
DOLLAR BRANCH COAL CORPORATION:	:	
and	:	
CHANEY CREEK COAL CORPORATION,	:	
Respondents	:	

DECISION AND ORDER

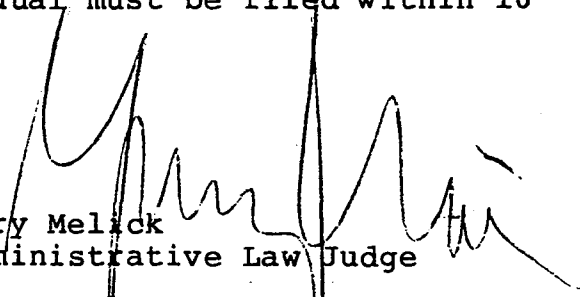
Appearances: Tony Oppegard, Esq., Appalachian Research & Defense Fund of Kentucky, Hazard, Kentucky for Complainant Maggard;
Joseph B. Luckett, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee for the Secretary of Labor;
No Appearance on behalf of Respondents.

Before: Judge Melick

These cases are before me following the Commission remand order dated March 27, 1990, and as supplemented on June 5, 1990. Hearings on remand were held on August 9, 1990, at which no representative of Respondents appeared. Accordingly they are deemed to have waived their rights to a hearing on the remand issues and to their right to objections thereat.

Complainant Maggard seeks additional attorney fees and expenses totalling \$56,957.55 for work performed during appellate proceedings and recalculated interest of \$4,246.84. The unopposed petitions are legally and factually supported and are accordingly granted.

This is not a final decision and will not become final until completion of discovery and determination by Complainant Maggard of whether or not he will file a motion to join Mr. John Chaney in these proceedings under an alter ego theory of liability. Discovery on this issue must be completed on or before October 12, 1990, and any motion to join John Chaney as an individual must be filed within 10 days thereafter.



Gary Melick
Administrative Law Judge

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