

AUGUST 1992

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AUGUST 1992

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

Ronny Boswell v. National Cement Company, Docket No. SE 90-112-DM.  
(Judge Maurer, July 1, 1992)

Secretary of Labor, MSHA v. Magma Copper Company, Docket No. WEST 92-98-M.  
(Default Decision of Chief Judge Merlin, July 15, 1992 - not published)

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

Richard Allen Plaster v. Falcon Coal Company, Docket No. VA 91-449-D.  
(Judge Maurer, June 29, 1992)





## COMMISSION DECISIONS



# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 4, 1992

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket Nos. KENT 90-356
	:	KENT 90-399
v.	:	KENT 90-400
	:	KENT 90-401
LJ'S COAL CORPORATION	:	
	:	
	:	

BEFORE: Ford, Chairman; Backley, Doyle, Holen 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) (the "Mine Act" or "Act") and concerns whether two citations issued by the Secretary of Labor ("Secretary") to LJ's Coal Corporation ("LJ's") for violations of 30 C.F.R. §§ 75.220 and 50.10 were properly characterized as being of a significant and substantial ("S&S") nature.<sup>1</sup> Commission Administrative Law Judge Avram Weisberger concluded that the evidence was insufficient to establish that the violation of 30 C.F.R. § 75.220, a roof control standard, was S&S. 13 FMSHRC 1277, 1286 (August 1991) (ALJ). With respect to the violation of 30 C.F.R. § 50.10, an accident reporting standard, the judge made no findings as to whether the violation was of an S&S nature. 13 FMSHRC at 1280.

The Commission granted the Secretary's petition for discretionary review challenging the judge's S&S determinations. For the following reasons, we reverse the judge's determination that the violation of 30 C.F.R. § 75.220 was

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<sup>1</sup> The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which, in pertinent part, distinguishes as more serious in nature any violation that "could significantly and substantially contribute to the cause and effect of a ... mine safety or health hazard...."

not S&S and remand to the judge for a determination of whether the violation of 30 C.F.R. § 50.10 was S&S.

I.

Factual Background and Procedural History

A. Violation of section 75.220

The facts regarding the violation of the approved roof control plan are undisputed. LJ's was engaged in retreat mining and extracting a series of four, forty foot square pillars of coal in the 001 Section of its No. 3 Mine. 13 FMSHRC 1284. In this section, five entries lead to the last open crosscut, where pillar extraction was being performed. LJ's used Entries 2 and 4 to gain access to the pillars on both sides of those entries at the intersection of the last open crosscut. Entries 1 and 5 were full of debris. 13 FMSHRC 1285-86.

The procedure for recovering coal from pillars, as detailed in LJ's approved roof control plan, is a sequential process integrating the installation of roof support with a series of cuts from the center of each pillar. Tr. 281, 300-312. The plan divides the center portion of each pillar into sections, each representing a ten foot by twenty foot cut made to extract coal. Tr. 301. The outside edges, or splits, measuring ten feet by forty feet, are left as support during the recovery process.

LJ's roof control plan provides that posts are to be installed on four foot centers and are to be in place before mining is started on any pillar. After each cut, posts must be installed before the mining of the next cut. The plan further provides that pillars may be mined from either side or from outby; however, all pillars must be mined from the same direction, limiting access through each entry to one pillar.<sup>2</sup> Tr. 280, 300-312.

During an inspection of LJ's ongoing operations, MSHA Inspector Robert W. Rhea noticed that the pillar extraction under way departed from the roof control plan in that entries were being used to gain access to two pillars. Broad sections of the last open crosscut were left largely unsupported. Tr. 322-323. Specifically, Inspector Rhea testified that Entries 2 and 4 were being used to gain access to pillars III and IV, and I and II, respectively. Accordingly, he issued an order pursuant to section 104(d)(2) of the Mine Act,,

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<sup>2</sup> This provision means that when making the cuts, all of the pillars must be approached either from the entries located to the right of the pillars or from entries located to the left of the pillars. The operator cannot approach two pillars from the same entry because the roof support posts must be evenly spaced across the last open crosscut in front of the pillars.

30 U.S.C. § 104(d)(2) (1988), which he designated S&S, for violation of LJ's approved roof control plan. That order<sup>3</sup> provided:

The Approved Roof Control plan (pillar plan) was not being followed in the 001 section in that the No. 1 & 2 pillar block and the No. 4 & 5 pillar blocks were being mined from one roadway.

The approved plan stipulates in sketch #8 page #13 that one pillar split shall be mined from one roadway only.

Following an evidentiary hearing, Judge Weisberger found that placement of the breaker timbers, or supports, did not provide maximum support at the intersections of the last open crosscut and Entries 2 and 4. The judge found that the alternatively placed timbers provided support at the intersection of the last open crosscut and Entry 5 and additional support at the intersection of the last open crosscut and Entry 3. Based on these facts, the judge found "the evidence insufficient to establish that the violation was significant and substantial." 13 FMSHRC at 1286.

On review, the Secretary argues that the uncontroverted testimony amply demonstrates the dangers inherent in failing to place the timbers in the proper locations during pillar extraction. The Secretary argues further that the evidence shows serious roof control problems in that section of the mine because of hill seams and draw rock. Moreover, the Secretary contends, the evidence is uncontroverted that the cited practices would create severe stresses on the roof strata at the unsupported intersections exposing miners to the dangers of a roof fall. The Secretary notes that Inspector Rhea described the conditions as "deadly dangerous."

LJ's did not file a brief before the Commission. At trial, LJ's presented no witnesses and waived its right to file briefs with the judge.

B. Violation of section 50.10

During an earlier inspection of LJ's mining operations on March 8, 1990, an MSHA inspector noted a large cavity in a section of roof in the No. 3 entry. Mine personnel indicated that the cavity was the result of an unplanned roof fall that had trapped a roof bolting machine. A citation then was issued to LJ's for failing to report this accident as required by 30 C.F.R. § 50.10. The citation was designated as S&S. 13 FMSHRC at 1279.

Judge Weisberger found that an unplanned roof fall had, in fact, occurred. Moreover, because the fall buried a roof-bolting machine, the judge concluded that it took place in an active work area and impeded passage of miners. Based on these facts, the judge affirmed the violation of 30 C.F.R.

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<sup>3</sup> The order mistakenly refers to the entry between pillars 4 and 5. There is no evidence that a pillar 5 exists. The testimony, however, makes clear that the intended reference is to pillars 3 and 4.

§ 50.10 for failure to report the accident. Although the judge noted testimony clearly indicating the hazardous conditions associated with retrieving the buried roof-bolter, the judge found no evidence with regard to the gravity of the cited violation, i.e., "failure to report" the roof fall. (Emphasis in the original.) The judge's decision did not address the Secretary's contention that the violation was of an S&S nature. 13 FMSHRC at 1280.

On review, the Secretary argues that the uncontroverted testimony amply demonstrates the dangers inherent in failing to report the unplanned roof fall. According to the Secretary, if the accident had been reported, the area would have been secured pursuant to section 103(k) and steps, such as installation of various support mechanisms, taken to insure the safe recovery of the buried machinery. The Secretary argues that the inspector's testimony shows that serious injury was reasonably likely to occur because of the massive nature of the fall and the operator's failure to install additional support during the recovery phase. Finally, the Secretary notes that the judge's failure to consider this testimony does not satisfy Commission procedural requirements that the judge set forth findings of fact and conclusions of law.

## II.

### Disposition of Issues

#### A. Violation of section 75.220

The judge determined that the violation by the operator of its approved roof control plan was not S&S because there was no evidence that the timbers were improperly installed or that the alternative supports placed in the last open crosscut were of a lesser quantity or quality. 13 FMSHRC 1286. The judge found that those alternative supports provided some measure of support for Entries 3 and 5. Id. Based on these findings, the judge found that the violation was not properly characterized as S&S. We disagree.

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

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

6 FMSHRC at 3-4. See also Austin Power Co. v. Secretary, 861 F.2d 99, 104-05 (5th Cir. 1988), aff'g 9 FMSHRC 2015, 2021 (December 1987) (approving Mathies criteria).

With respect to the first element, the judge found a violation of the approved roof control plan. 13 FMSHRC 1285. With respect to the second element, inasmuch as the judge accepted the inspector's conclusion that the failure to provide maximum roof support can lead to a roof fall, the record contains evidence that a measure of danger to safety resulted from the violation. 13 FMSHRC 1286. The fourth element is also satisfied: a reasonable likelihood exists that an injury resulting from a roof fall would be of a reasonably serious nature. Tr. 336-337.

The judge's analysis of the third element of the Mathies test does not address the entries in question. His determination that the alternatively placed timbers provided additional support concerned the intersection of the last open crosscut and Entries 3 and 5. Id. The violation that was cited and was alleged to be S&S was the operator's failure to provide the required roof support in the intersection of the last open crosscut and Entries 2 and 4, not Entries 3 and 5. Consequently, the judge's determination that the violation was not of an S&S character fails to address the specific entries that were cited by the Secretary.

Moreover, the judge recounted the inspector's testimony that "lack of support in an intersection results in a weakened roof, and a greater danger of roof fall in the intersection," but, nonetheless, incorrectly concluded that the Secretary failed to present sufficient evidence to show that the violation was S&S. 13 FMSHRC 1286. This conclusion is not based on substantial evidence.

The record evidence demonstrates a reasonable likelihood that the hazard, lack of properly placed roof supports, would result in an injury. As noted by the judge, Inspector Rhea testified that the lack of support at the cited intersections increases the likelihood of roof failure. Tr. 326-327. The Inspector also testified in detail to the unstable geological conditions in that area of the mine and that certain conditions known as hill seams and draw rock existed. Tr. 331-336. Finally, Inspector Rhea noted the history of roof falls and unstable roof in that section of the mine, further indicating the likelihood of a roof fall and concomitant injury without the proper support required by the approved roof control plan. Tr. 341-345.

According to Inspector Rhea, not only were the roof conditions themselves dangerous, but hazards due to those particular geological conditions were further aggravated by the failure to provide support at locations designated in the plan. Inspector Rhea testified further that the lack of support added significantly greater stress on the unsupported roof in locations where miners were actively engaged in pillar extraction. Tr. 336-338. The operator offered no evidence to rebut this testimony nor was contradictory testimony elicited on cross examination. Moreover, the judge did not suggest a lack of credibility on the inspector's part. While the judge apparently concluded that, because the misplaced timbers provided additional support in Entries 3 and 5, they were an acceptable substitute for the missing

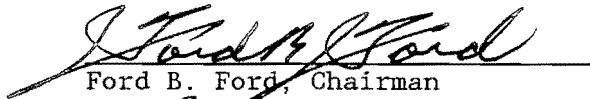
supports, there is no evidence in the record to support this conclusion. We find no other evidence in the record to support the judge's conclusion that the violation was not S&S. Rather, the uncontroverted evidence establishes a reasonable likelihood that the failure to place roof support beams in their proper positions, according to the approved roof control plan, would result in an injury of a reasonably serious nature to miners conducting pillar recovery in Entries 2 and 4. Accordingly, we reverse the judge's conclusion that the violation was not S&S.

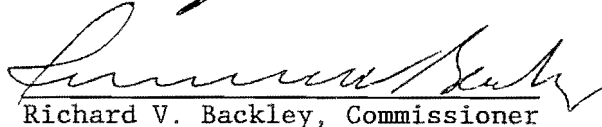
B. Violation of section 50.10

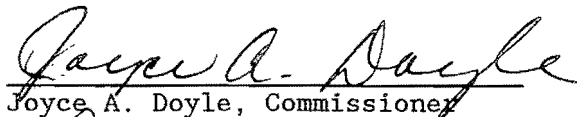
The citation issued by the Secretary to LJ's for violation of section 50.10 was designated as being of an S&S nature. Although the judge affirmed the violation, he erred in failing to set forth findings of fact and conclusions of law, and supporting reasons or bases analyzing whether the violation was of an S&S nature under the four elements of the Mathies test. See 29 C.F.R. § 2700.65(a). See also Anaconda Co., 3 FMSHRC 299, 299-300 (February 1981) and Youghiogheny & Ohio Coal Co., 7 FMSHRC 1335, 1336 (September 1985).

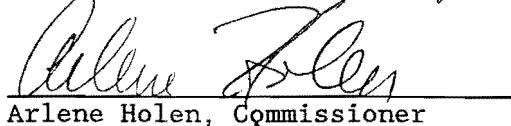
III.  
Conclusion

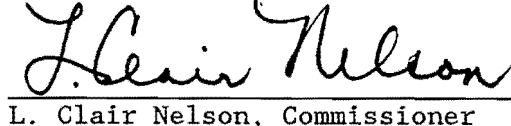
For the reasons discussed above, we reverse the judge's finding and hold that the failure to follow the approved roof control plan in violation of 30 C.F.R. § 75.220 was S&S. We remand to the judge for the limited purpose of determining whether the failure to report an unplanned roof fall in violation of 30 C.F.R. § 50.10, was S&S. In this regard, the judge shall analyze each element of the Mathies test and set forth findings of fact and conclusions of law, and the reasons or bases supporting his determinations.

  
Ford B. Ford, Chairman

  
Richard V. Backley, Commissioner

  
Joyce A. Doyle, Commissioner

  
Arlene Holen, Commissioner

  
L. Clair Nelson, Commissioner



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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 4, 1992

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

v.

BETHENERGY MINES, INC., et al.

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Docket Nos. PENN 88-149-R, etc.

BEFORE: Backley, Doyle, Holen and Nelson, Commissioners

## DECISION

BY: Backley, Holen and Nelson, Commissioners

This consolidated proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act" or "Act"), presents the issues of whether BethEnergy Mines, Inc. ("BethEnergy") violated 30 C.F.R. § 75.303(a); whether that violation was of a significant and substantial nature ("S&S") and caused by BethEnergy's unwarrantable failure to comply with the standard; and whether civil penalties should be assessed, pursuant to section 110(c) of the Mine Act, against each of three BethEnergy supervisory personnel for being knowingly involved in the violative conduct.<sup>1</sup>

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<sup>1</sup> 30 C.F.R. § 75.303(a), which repeats § 303(d)(1) of the Mine Act, 30 U.S.C. § 863(d)(1), provides in pertinent part:

Within 3 hours immediately preceding the beginning of any shift, and before any miner in such shift enters the active workings of a coal mine, certified persons designated by the operator of the mine shall examine such workings.... If such mine examiner finds a condition which constitutes a violation of a mandatory health or safety standard or any condition which is hazardous to persons who may enter or be in such area, he shall indicate such hazardous place by posting a "danger" sign conspicuously at all points which persons entering such hazardous place would be required to pass, and

Commission Administrative Law Judge Gary Melick concluded that BethEnergy violated section 75.303(a), that the violation was S&S and caused by BethEnergy's unwarrantable failure, and that civil penalties should be assessed pursuant to section 110(c) of the Act against the supervisory personnel. 12 FMSHRC 403 (March 1990) (ALJ). The Commission granted BethEnergy's petition for discretionary review, which challenges each of the judge's findings. For the reasons that follow, we affirm the judge's conclusions, with the exception of his determination that BethEnergy's violation was S&S, which we reverse.

I.

Factual Background and Procedural History

BethEnergy operates the Eighty-Four Complex, an underground coal mine located in Eighty-Four, Pennsylvania. During the 12:01 a.m. shift on Saturday, January 30, 1988, five supplemental support "I" beams were installed in the 4-butt empty track near the No. 80 stopping in the Livingston Portal area of the mine; the work had been ordered by James Nuccetelli, the chief construction foreman at the Eighty-Four Complex. Tr. 53, 228. The roof in that area sagged, bowed, and in the past had had three to four breakthroughs. Tr. 55, 129. The five beams were installed against the roof over a distance

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shall notify the operator of the mine. No person, other than an authorized representative of the Secretary or a State mine inspector or persons authorized by the operator to enter such place for the purpose of eliminating the hazardous condition therein, shall enter such place while such sign is so posted.

(Emphasis added.)

Section 110(c) of the Act provides:

Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this [Act] or any order incorporated in a final decision issued under this [Act], except an order incorporated in a decision issued under subsection (a) of this section or section [105(c)], any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d) [of section 110].

30 U.S.C. § 820(c).

of approximately 20 feet, and were spaced approximately 46 inches apart. The beams were scheduled to be "saddled" during the daylight shift on Sunday, January 31, 1988. Tr. 229. (Saddling, or "strapping," a beam is a method of securing the beam by strapping it with a metal cable bolted to the roof for the purpose of keeping the beam from falling if a post or "leg" supporting the beam is dislodged. Tr. 54, 57.) The roof in the area was supported by 6-foot bolts in addition to the beams, and was super-bolted with 12-foot resin bolts. Tr. 67-68, 129, 235.

During the daylight shift on January 30, 1988, Donald Rados, then acting as a fireboss for BethEnergy, examined the area in which the unsaddled beams were located. Mr. Rados called the dispatcher and told him not to bring empty cars into that area. Rados then placed two boards across the empty track, attached a danger sign to them, and placed a second danger sign on the trolley switch. In the mine examiner's book, he also entered the condition of the unsaddled beams as a danger. Tr. 135; G. Exh. 3.

On the 12:01 a.m. shift of January 31, 1988, Sam Kubovcik, then acting as a shift foreman for BethEnergy, contacted Mr. Nuccetelli at his home to inform him that independent contractors had arrived at the mine to splice a conveyor belt in the 4-butt area but could not do so because coal was on the belt. Nuccetelli, aware that the area had been dangered off because of the unsaddled beams, testified that he told Mr. Kubovcik to instruct John Ronto, who acted as a construction foreman on the 12:01 a.m. shift on January 31, 1988, to check the safety of the area in which the unsaddled beams were located. Tr. 230. Nuccetelli testified that he told Kubovcik that if the area was safe, Mr. Ronto was to bring empty cars into the area to unload the coal from the belt. Id.<sup>2</sup> Kubovcik testified that Nuccetelli told him that the area was dangered off because the beams were unsaddled. Tr. 283.

Kubovcik gave Nuccetelli's instructions to Ronto. Tr. 284. Ronto testified that Kubovcik told him that the area was dangered off because the beams were unsaddled. Tr. 347-48. Kubovcik testified that he did not tell Ronto whether the danger signs should be rehung. Tr. 285. Ronto then assigned two miners, Messrs. Naddeo and Malie, to gather 20 empty cars and a motor. Ronto testified that he cautioned the motormen about the unstrapped beams. Tr. 316. While the cars were being gathered, Ronto went into the dangered off area and examined the roof and the unsaddled beams at the No. 80 stopping area. He hit the posts supporting the beams to make sure that they were solid, checked the clearance between the track and the legs, and observed that the track was dry. Tr. 320. Ronto testified that when the miners came back from gathering the empty cars, he cautioned them again about the condition of the unsaddled beams. Tr. 319.

Ronto later received a call from Naddeo and Malie when they reached the area with the empty cars, confirming that the area was dangered-off and that a Fletcher drill, which was parked at the mouth of the empty track, was in the

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<sup>2</sup> Ronto testified that he could not recall whether he had been told to examine the area but assumed that he had. Tr. 348.

way. Ronto told Naddeo and Malie that "everything was okay." Tr. 322. The miners then moved the Fletcher drill, removed the danger signs, and moved the empty cars into the area. Tr. 325-27, 343. The empty cars were left at the dump beside the belt to be filled with coal, and the motor was brought back under the unsaddled beams. Tr. 326-28. When Ronto rejoined the miners, they were in the process of putting the Fletcher drill back on the track. He told them to put everything back the way they had found it. Tr. 328. They rehung the danger signs. Tr. 329-30, 343.

At approximately 6:00 a.m. on January 31, 1988, while conducting a pre-shift examination, Rados noticed that the beams still were unsaddled and that empty cars had been brought into the area. He called the dispatcher, who told him that Ronto had directed Naddeo to bring the empty cars on to the track. Tr. 137. The beams were saddled later during that shift, as originally scheduled. Tr. 45-46, 164, 229. After the beams were saddled, the danger notation was removed from the books. Tr. 163-64.

Fred Imer, a member of the mine's safety committee, filed a written request with the Department of Labor's Mine Safety and Health Administration ("MSHA"), pursuant to section 103(g)(1) of the Mine Act, 30 U.S.C. § 813(g)(1), asking for an investigation of the incident in which the dangered-off area had been entered for a reason other than to remedy the hazardous condition. Upon receipt of the request on February 4, 1988, MSHA Inspector Alvin Shade went to the Livingston Portal and interviewed several people regarding the incident.

Inspector Shade testified that Nuccetelli told him that he gave the order to remove the danger signs. Tr. 44.<sup>3</sup> Shade also stated that Ronto told him that he had been told to take down the danger signs, push 20 cars up to the dump, bring the motor back, and rehang the danger signs. Tr. 48. Shade testified that Naddeo informed him that his job was to take the cars to the dump, unhook them, and bring the motor back out, but that he was not informed of the condition of the unstrapped beams. Tr. 51. (As noted above, Ronto testified that he had informed Naddeo and Malie of the hazardous condition on at least two occasions. Tr. 316-17, 319.) Naddeo told Shade that he was the person who took down the danger signs. Tr. 80. Shade concluded from his interview that Ronto had instructed Naddeo to rehang the danger signs. Tr. 81, 96.<sup>4</sup>

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<sup>3</sup> Nuccetelli testified at the hearing that he did not discuss with shift foreman Kubovcik what action to take with respect to the danger signs. Tr. 237.

<sup>4</sup> Shade also testified that Ronto told him that he had been directed from the surface to rehang the danger signs, and that Kubovcik relayed the order. Tr. 97-98. Kubovcik testified that he did not discuss with either Nuccetelli or Ronto whether the danger signs should be rehung. Tr. 285.

Based upon his investigative findings, Inspector Shade issued an order to BethEnergy, pursuant to section 104(d)(2) of the Mine Act, 30 U.S.C. § 814 (d)(2), alleging a violation of section 75.303:

Representative of the operator (foreman) had a miner remove a danger-board and go inby at No. 79 to 80 cross-cut 4 butt track-haulage, to bring 20 empty cars under "I" beams that were not strap[p]ed or saddled. Then proceed to come back through area second time with motor, and rehung the danger board.

G. Exh. 1.<sup>5</sup>

Inspector Shade testified that the danger present in the area was the unstrapped beams and that the rehunging of the danger signs was an acknowledgment that a hazard still existed. Tr. 96, 109. Shade also found the alleged violation to be S&S and caused by BethEnergy's unwarrantable failure to comply. G. Exh. 1; Tr. 51, 61-62. He testified that the unabated condition could cause a serious accident before it could be corrected. Tr. 51. Shade described BethEnergy as being highly negligent because he believed that its management knew that the beams had to be secured. Tr. 58. He did not believe that such conduct rose to the level of "reckless disregard" because Ronto had made an examination of the area before he authorized a miner to enter it. Id.

After the order was issued, MSHA special investigator John Savine was assigned to conduct an investigation to determine if any individual liability for a knowing violation existed under section 110(c) of the Act. Savine interviewed Inspector Shade and other witnesses, including Nuccetelli, Kubovcik, and Ronto. Nuccetelli told Inspector Savine that he had told Kubovcik to direct Ronto to take 20 empty cars to the 4-butt dump so that the belt could be unloaded and then spliced. Tr. 177-78. Kubovcik generally confirmed Nuccetelli's account of the facts. Tr. 178. Ronto told Savine that Kubovcik had instructed him to get the 20 empty cars. Tr. 178. Savine testified that Ronto told him that he had not been instructed to make an examination of the area, but that he did so before the cars were brought through the area. Tr. 178-79. According to Savine, Ronto also told him that he had cautioned Naddeo and Malie about a hazard along the track and had instructed the men to go through the area because Kubovcik told him to do so. Tr. 178-79, 182-83. Finally, Naddeo told Savine that he and Malie rehung the danger signs. Tr. 182.

Following the conclusion of Savine's investigation, the Secretary proposed the assessment of individual civil penalties in the amounts of \$500,

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<sup>5</sup> At the hearing, the judge modified the section 104(d)(2) order to a citation issued pursuant to section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), because he determined that the Secretary had failed to prove that there had been no intervening clean inspection. 12 FMSHRC at 406 n.2; Tr. 199. The Secretary does not challenge this finding on review.

\$450, and \$400 against Nuccetelli, Kubovcik, and Ronto, respectively. The entire matter proceeded to an evidentiary hearing before Judge Melick.

In his decision, the judge determined that the fact of violation would turn on whether, at the time of the removal of the danger signs and entry into the previously dangered-off area, there still existed either a violation of a mandatory standard or a hazard, within the meaning of section 75.303(a). 12 FMSHRC at 410. He concluded that both conditions obtained at the time of entry. 12 FMSHRC at 410-11. The judge found that BethEnergy had violated a provision of its roof control plan and, thus, a mandatory safety standard, because the roof control plan unambiguously required strapping at the time that the beams were installed. *Id.* Crediting the testimony of mine examiner Rados, as corroborated by Inspector Shade, the judge also concluded that a significant hazard involving the unstrapped beams continued to exist at the time that the danger signs were removed. 12 FMSHRC at 411.

The judge concluded that BethEnergy's violation of section 75.303(a) was S&S, finding that a discrete hazard in the form of falling beams was contributed to by the violation, that it was reasonably likely that any hazard contributed to would have resulted in an injury, and that it was reasonably likely that any resulting injury would be reasonably serious or fatal. 12 FMSHRC at 411. The judge also found that the violation was caused by BethEnergy's unwarrantable failure, and assessed a civil penalty of \$1,000 for the violation. 12 FMSHRC at 412-13. Finally, the judge determined that Nuccetelli, Kubovcik and Ronto each knowingly authorized, ordered, or carried out the violation of section 75.303(a) and, accordingly, were individually liable under section 110(c) of the Act. *Id.* The judge then assessed civil penalties in the amount of \$400 each against Nuccetelli, Kubovcik and Ronto. 12 FMSHRC at 413. The Commission granted BethEnergy's petition for discretionary review and heard oral argument in this matter.

## II.

### Disposition of Issues

#### A. Violation of section 75.303(a)

We agree with the judge's conclusion that BethEnergy violated section 75.303(a). BethEnergy argues that the judge erred in finding that a violative and hazardous condition existed in the area at the time that its foremen authorized entry into the area. BethEnergy argues that a hazard within the meaning of section 75.303(a) did not exist in the area because the standard requires dangering off an area only when a hazard amounting to an imminent danger exists.<sup>6</sup> Alternatively, BethEnergy argues that even if the standard

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<sup>6</sup> Relying on the testimony of John Gallick, BethEnergy's safety director, BethEnergy argues that it is accepted practice within the industry that only hazards rising to the level of imminent dangers need be dangered-off. Regardless of the accuracy of this characterization of alleged industry practice, parties are not privileged to override or nullify the plain requirements of statutory language. See generally Secretary of Labor on behalf of David Pasula v.

requires dangering off an area for the presence of a hazard amounting to less than an imminent danger, the hazard must be reasonably likely to occur. BethEnergy contends that no violation occurred because it was not reasonably likely that a leg supporting a beam would be dislodged, causing a beam to fall on a miner. BE Br. at 20. We find no legal support for the interpretation of section 75.303(a) advanced by BethEnergy.

In relevant part, section 75.303(a) provides that a danger sign is to be posted in an area of active working if there exists a "condition which is hazardous to persons who may enter or be in such area...." Our analysis of this mandatory standard, which repeats the language of section 303(d)(1) of the Mine Act, 30 U.S.C. § 863(d)(1), and its predecessor, section 303(d)(1) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976)(amended 1977)("1969 Coal Act"), begins with the fundamental canon of statutory construction that "the primary dispositive source of information [about statutory meaning] is the wording of the statute itself." Association of Bituminous Contractors v. Andrus, 581 F.2d 853, 861 (D.C. Cir. 1978). See also Consolidated Coal Co., 11 FMSHRC 1609, 1613 (September 1989).

There is no indication in the statutory text or in the legislative history that Congress intended that the "hazardous condition" referred to in section 303(d)(1) must amount to an imminent danger, or must rise to some specific level of risk before dangering off is required.<sup>7</sup> The House Report on the bill that became the 1969 Coal Act, explaining section 303(d)(1) of the Coal Act, stated:

Paragraph (1) of subsection (d) contains detailed requirements for preshift examinations which must be made within 3 hours before a coal-producing shift. When hazards are encountered the examiner shall report the conditions found to a person on the surface and record the results of such examination in a manner prescribed in this section. A "Danger" sign is posted in all places where persons would observe the sign and such persons are not to enter the area except to correct the dangerous condition.

H. Rep. No. 563, 91st Cong., 1st Sess. 44 (1969), reprinted in Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Congress,

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Consolidation Coal Co., 2 FMSHRC 2786, 2794 (October 1980), rev'd on other grounds, 663 F.2d 1211 (3d Cir. 1981) (contractual provision limiting the conditions in which a miner could refuse to work did not override the provisions of the Mine Act governing the scope of a miner's work refusal).

<sup>7</sup> The Secretary is empowered to issue withdrawal orders in the face of imminent dangers in mines, 30 U.S.C. § 817, and the term is defined in the Mine Act as "the existence of any condition or practice in a ... mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated...." 30 U.S.C. § 802(j).



1st Sess., Part I Legislative History of the Federal Coal Mine Health and Safety Act of 1969, at 1074 (1975) ("1969 Legis. Hist.") (emphasis added). See also S. Rep. No. 411, 91st Cong., 1st Sess. 57, reprinted in 1969 Legis. Hist. at 183.

The general meaning of the statutory text and the parallel regulation is plain: If a "hazardous" condition is encountered in active workings by the preshift examiner, the affected area must be dangered off. The statute does not use the phraseology of "imminent danger." We discern no indication in the statute that Congress intended to convey anything other than the ordinary meaning of the phrase "condition which is hazardous." The Commission similarly adopted such ordinary meaning in National Gypsum Co., 3 FMSHRC 822, 827 & n.7 (April 1981). Such a construction based on plain meaning enhances miner safety in that it requires the dangering off of an area upon a finding that a hazard, although not necessarily an imminent danger, exists. Thereafter, miners must heed the warning of that danger sign unless they enter the area to remedy the hazardous condition. The sanctity of danger signs has long been recognized in the mining industry and constitutes a fundamental tool of protecting miner safety. We reject any construction of the standard that diminishes that protection as contrary to the primary purposes of the Mine Act.

If such a hazardous condition or place has been dangered off as a result of a preshift examination, section 75.303(a) makes clear that no person shall enter such place while the danger sign is posted except authorized persons "for the purpose of eliminating the hazardous conditions." Substantial evidence supports the judge's finding that BethEnergy violated section 75.303(a) because its foreman authorized miners to enter a dangered off area for a reason other than eliminating the hazardous condition while the condition continued to exist in that area.

Although the record contains some conflicting testimony regarding the nature of the hazard in question, the judge made a credibility finding in favor of the testimony of Rados and Shade to the effect that a hazard existed. We emphasize that, in general, credibility determinations are within the discretion of the presiding official who heard the witnesses' testimony and observed their demeanor. See, e.g., Griessenauer v. Department of Energy, 754 F.2d 361, 364 (Fed. Cir. 1985); Brown v. U.S. Postal Service, 860 F.2d 884, 887 (9th Cir. 1988). If the judge's findings are supported by substantial evidence, that is, "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," the Commission is bound to uphold them, rather than substitute its own view even if such a competing view finds some support in the record. Donovan v. Phelps Dodge Corp., 709 F.2d 86, 92 (D.C. Cir. 1983).

Was there a continuing hazard in the dangered-off area when the miners entered it on January 30? Mine examiner Rados testified that derailments occurred in the cited area involving dislodgements of the legs supporting the beams "twice a month, once a month, sometimes more often. It might be one or two months before one wreck, ... [and then] a couple [of wrecks would occur] in a week"; and that he himself had recorded such dislodged posts as a danger in fireboss books "a number of times." Tr. 130-31. Nuccetelli testified that

he was unaware of any history of derailments in the area, but that he was not the only person who reviewed the derailment sheets and that mine foremen also reviewed them. Tr. 242. Alfred Paterini, a mine examiner for BethEnergy at the 84 Complex (and a nonparty to the action), testified that he had been aware of derailments occurring in the cited area and had been sent into the area on a few occasions to reset the legs. Tr. 432. Paterini testified that if a leg were dislodged, an unsaddled beam could fall on the persons travelling below or could fall on the trolley wire, causing short-circuiting or a fire. Tr. 430.

Inspector Shade stated that if legs supporting unsaddled beams were dislodged, the beams could fall and strike any person below them, or a roof fall could result because the roof bowed and sagged. Tr. 54-55. Shade also testified that a motorman pushing twenty cars through the area would be unable to observe all of the cars and that pushing cars makes a derailment more likely. Tr. 97, 108. Derailment can occur when pushing cars regardless of whether there is adequate clearance. Tr. 108. Shade believed that when the danger signs were removed, a hazard continued to exist because the beams were not strapped. Tr. 109.

As noted by the judge, even supervisors involved in the section 110(c) aspect of this proceeding conceded, to one degree or another, that a caution to people was warranted by the condition. 12 FMSHRC at 411. Nuccetelli testified that he believed the unsaddled beams warranted a warning to people going through the cited area. Tr. 255. Ronto also conceded generally that, although he did not consider the unsaddled beams a large danger, the danger signs were rehung because of a concern for people going through the area with a motorized vehicle. Tr. 343-44. Such evidence demonstrates that BethEnergy realized that the unsaddled beams presented a hazardous condition.

BethEnergy also argues, in defense to special findings and allegations that its supervisors violated section 110(c), that its supervisors possessed the authority to override a preshift examiner's decision to danger-off an area. Although such a defense could have possible implications with respect to liability issues under section 75.303(a), we find the defense inapposite in this case because no actions were taken by BethEnergy supervisory personnel consistent with the operator's internal procedures for overriding a preshift examiner's action. See Oral Arg. Tr. 8-9. We, therefore, leave to another case analysis of the effect and implications under section 75.303(a) of an operator's decision to override the dangering off of an area by a mine examiner.

Accordingly, we affirm the judge's findings that a dangered-off hazard continued to exist in the affected area on January 31, 1988. There is no dispute that BethEnergy miners entered that area on that date for purposes other than elimination of the hazard. Under the circumstances, BethEnergy violated section 75.303(a).

The judge determined that the standard was violated in addition because a violation of BethEnergy's roof control plan existed in the dangered-off area when the miners entered it for purposes other than elimination of the hazard. As a threshold objection, BethEnergy maintains that a proper reading of the

standard requires prohibition of access to a dangered-off area only when a hazard exists in the area. We disagree. Given the wording of the cited standard, analysis of whether a violative condition existed is relevant, even though a separate citation for a violation was not issued. The judge reasoned that the roof control plan clearly required that the beams be installed with appropriate support and that, in this case, failure to saddle the beams constituted a hazardous violation of the roof control plan. Since the alleged violation in this case involved a hazard, as discussed above, we need not reach any hypothetical issue of whether a dangered-off area containing only a "technical" or "non-hazardous" violation requires prohibition of access under the standard.

BethEnergy argues that its roof control plan did not require simultaneous installation of support when the beams were emplaced but, rather, allowed a reasonable time for such installation of support. If the language of a document is plain and unambiguous, the intent expressed and indicated in that language controls, rather than whatever may be claimed to be the actual intention of the parties. See, e.g., 17A Am Jur. 2d Contracts § 352 (1991). The provision in the roof control plan requiring that "beams shall be installed with some means of support" unambiguously requires that a means of support must be provided at the same time that the beams are installed. We find this to be the most natural reading of the term "with" in this language. We discern nothing in the language at issue implying a "reasonable time" rule, as contended by the operator. Even assuming facial ambiguity in this language, substantial evidence supports the judge's findings that the operator's actual practices and understanding were consistent with contemporaneous installation of strapping support when the beams were put in place.

Therefore, we agree with the judge that BethEnergy's failure to saddle the beams when they were installed constituted a hazard as well as a violation of its roof control plan. Because a hazardous violation of a mandatory standard existed at the time that the area was entered for a reason other than eliminating the condition, section 75.303(a) was thereby violated.

B. Special finding issues

1. Significant and substantial

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

In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation; (3) a reasonable likelihood that the hazard

contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

See also Austin Power Co. v. Secretary, 861 F.2d 99, 104-05 (5th Cir. 1988), aff'g 9 FMSHRC 2015, 2021 (December 1987)(approving Mathies criteria).

With respect to the first and second elements, we have concluded that the judge properly found that BethEnergy violated section 75.303(a) and that the unsaddled beams presented a discrete safety hazard -- the danger of an unstrapped beam being dislodged and falling. The fourth element is undisputed given BethEnergy's statement in its brief that "Respondents would concede that if a beam were dislodged and fell upon a miner a serious injury could occur." BE Br. at 20.

With respect to the third element, we conclude that substantial evidence does not support the judge's finding that there was a reasonable likelihood that the hazard contributed to would result in an injury. We note preliminarily that the judge did not provide specific findings or credibility determinations on this issue.

The key question here is the likelihood of a derailment causing dislodgement of a leg, the falling of an unstrapped beam, and a resultant injury. Although the record contains evidence that derailments had occurred in this area in the past, the record also contains unrebutted evidence of diminished likelihood of derailment under the existing circumstances. Derailment is less likely to occur in areas where there are no switches, at slower speeds, and on straight track. Tr. 77-79. There were no switches in the area in question, Naddeo pushed the cars slowly, and the track was straight. Tr. 77-79, 238, 327.

More importantly, the evidence also fails to establish that, in the event of a derailment, a chain of events would occur that would be reasonably likely to result in an injury. Exposure to the hazard of a falling beam would occur only when a miner is very close to, or in the immediate area of, the falling beam. Tr. 75-76. While cars in the front are more likely to derail, a motorman would be positioned in the back. Tr. 79, 405. Gallick testified that although his experience was mainly with his own mine, there were probably tens of thousands of unsaddled beams in use in Western Pennsylvania underground mines over the course of 20 years. Tr. 402-04. He knew of only one accident, however, in which an operator was trapped in a cab by a fallen unsaddled beam, and no injuries occurred as a result of that accident. Id. Ronald Bizick, a mine inspector for BethEnergy, also testified that, in his eight years of experience at BethEnergy, he was unaware of any incidents in which a miner was injured from a beam falling along a haulage track. Tr. 355. This undisputed evidence describes a considerable base of experience with no injury-causing events. We find that the evidence fails to establish a reasonable likelihood that the hazard contributed to here would result in an injury.

The Secretary additionally argues that the strapping of beams is intended to provide its safety function of preventing a beam from falling

"only in the event that a support post has been dislodged." S. Br. at 20. The Secretary maintains that because the requirement of strapping presumes the occurrence of a beam being dislodged, the third Mathies element must be evaluated within the context of a presumption of a post having been dislodged. Id. The Secretary contends that, therefore, the likelihood of a beam being dislodged is not at issue. Id. The Secretary, however, did not raise this new theory before the judge. Under the Mine Act and the Commission's procedural rules, "[e]xcept for good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the administrative law judge ha[s] not been afforded an opportunity to pass." Section 113(d)(A)(iii) of the Mine Act, 30 U.S.C. § 823(d)(2)(A)(iii); see also 29 C.F.R. § 2700.70(d). The Secretary has not attempted to show good cause for not first presenting this issue to the judge. We, therefore, leave resolution of the Secretary's assumption approach to another case in which it is first properly raised before the judge.

## 2. Unwarrantable failure

The Commission has determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. Emery Mining Corporation, 9 FMSHRC 1997, 2004 (December 1987); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007, 2010 (December 1987). This determination was derived, in part from the plain meaning of "unwarrantable" ("not justifiable" or "inexcusable"), "failure" ("neglect of an assigned, expected or appropriate action"), and "negligence" ("the failure to use such care as a reasonably prudent and careful person would use, characterized by "inadvertence," "thoughtlessness," and "inattention"). Emery, 9 FMSHRC at 2001.

The judge determined that BethEnergy's conduct amounted to aggravated conduct because the operator's agents authorized the removal of the danger signs and allowed employees to enter the area, while knowing facts that demonstrated that a hazard and a violation of the roof control plan existed in the area. 12 FMSHRC at 412.

We reject BethEnergy's initial argument that its alleged violation was not the result of its unwarrantable failure because such a special finding cannot be based upon an "after-the-fact investigation" such as occurred here. BE Br. at 30-31. The Commission has held that an unwarrantable failure charge may be based upon investigative findings made after the occurrence of the violation. Emerald Mines Co., 9 FMSHRC 1590 (September 1987), aff'd, Emerald Mines Co. v. FMSHRC, 863 F.2d 51, 59 (D.C. Cir. 1988). See also Nacco Mining Co., 9 FMSHRC 1541 (September 1987).

We agree with the judge that BethEnergy's conduct is properly characterized as aggravated because the evidence shows that BethEnergy's supervisors knew that: (1) the area had been danger off because the beams were unsaddled (Tr. 283, 347-48); (2) the decision to danger off the area had not been overridden in accordance with BethEnergy's own policies by permanently removing the danger sign and making an entry in the fireboss books that the decision to danger off had been overridden (Tr. 141-42, 292-93, 352); and, (3) the unsaddled beams presented a danger when a motorized vehicle was brought through the area (Tr. 268, 290-91, 343-44). BethEnergy's supervisors

authorized miners to enter the area, not for the purpose of saddling beams, but for the purpose of bringing a motorized vehicle through the area.

The fact that Ronto examined the area before the cars were brought through it does not reduce BethEnergy's conduct to "moderate negligence," as argued by the operator (BE Br. at 34-35). The examination did not eliminate the risk posed by the unsaddled beams but rather served to measure the risk presented.<sup>8</sup> Such deliberate conduct is appropriately characterized as a knowing neglect of the actions required by section 75.303(a).

We find unpersuasive BethEnergy's argument that Ronto was authorized to override the danger sign and that he rehung the danger sign only to put the area "back the way it was." BE Br. at 33. Even if such a defense were valid, there is no indication in the record that Ronto took the steps necessary to override the danger designation. In instances in which a mine examiner believed that an area was unnecessarily dangered off, BethEnergy's policy allowed the examiner to remove the danger signs and make a notation in the fireboss books that he was overriding the decision to danger off the area. Tr. 164-65, 264, 352, 398. Ronto did not require that the danger signs be permanently removed; on the contrary, he authorized miners to rehang the signs. Tr. 328, 338-39. Ronto admitted that he authorized the rehang of the signs because he believed that the area continued to warrant cautioning miners. Tr. 343-44. Furthermore, none of BethEnergy's supervisors, including Ronto, overrode the danger notation in the fireboss books. Tr. 292-93, 352.

The conduct described above was deliberate and aggravated and, accordingly, unwarrantable. BethEnergy has presented no viable defense to negate such characterization of its conduct. We therefore affirm the judge's finding that BethEnergy's violation of section 75.303(a) was caused by its unwarrantable failure to comply with the standard.

#### C. Section 110(c) issues

The judge found that the conduct of Nuccetelli, Kubovcik and Ronto in causing entry into the area while each knew of facts demonstrating that a hazardous and violative condition continued to exist in the area, not only established that BethEnergy's conduct was unwarrantable but also that it was "so aggravated that it constituted violations of section 110(c) of the Act." 12 FMSHRC at 412. The judge based this conclusion upon the findings that when the three individuals issued various orders resulting in entry to the area, they were aware of the requirements of BethEnergy's roof control plan, that the cited beams were without support, and that the area had been legally dangered off by a qualified mine examiner. 12 FMSHRC at 412-13.

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<sup>8</sup> The evidence was disputed as to whether Ronto was instructed to examine the area before it could be entered. Inspectors Shade and Savine testified that Ronto told them that he had not been instructed to examine the area for safety. Tr. 50, 178. At the hearing, Ronto testified, "In my recollection, I don't recall Sam [Kubovcik] saying anything to me about examining the area, but with his experience, I would assume that he probably did tell me this." Tr. 348.

A corporate agent "who knowingly authorized, ordered, or carried out ... [a] violation" committed by a corporate operator may be subject to individual liability under section 110(c) of the Mine Act. The proper legal inquiry for purposes of determining liability under section 110(c) of the Act is whether the corporate agent "knew or had reason to know" of a violative condition. Secretary v. Roy Glenn, 6 FMSHRC 1583, 1586 (July 1984), citing Kenny Richardson, 3 FMSHRC 8, 16 (January 1981).<sup>9</sup> In Kenny Richardson, the Commission stated:

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

3 FMSHRC at 16. In order to establish section 110(c) liability, the Secretary must prove only that the individuals knowingly acted not that the individuals knowingly violated the law. Cf., e.g., United States v. International Minerals & Chemical Corp., 402 U.S. 558, 563 (1971).

The three individuals preliminarily argue that the foregoing standard of liability under section 110(c) should be replaced by a standard requiring, at the minimum, either actual knowledge, or a conscious disregard, of the requirements of a mandatory standard. They claim that the Commission's present section 110(c) standard requires the Secretary to establish the presence of only ordinary negligence. We reject these arguments. We reaffirm the Commission's previous holding that a "knowing" violation under section 110(c) involves aggravated conduct, not ordinary negligence. See Emery, 9 FMSHRC at 2003-04. In Kenny Richardson, the Commission expressly rejected the contention that section 110(c) liability is premised, at the minimum, on a showing of "willful" conduct (3 FMSHRC at 15), and we reaffirm that holding today. Further, we reject the three individuals' threshold argument that section 110(c) of the Mine Act violates constitutional equal protection because it applies only to agents of corporate operators. They have presented no new arguments persuading us to depart from established precedent to the contrary. See, Richardson v. Secretary of Labor, 689 F.2d 632 (6th Cir. 1982), aff'g Kenny Richardson, 3 FMSHRC 8, 18-21 (January 1981).<sup>10</sup> With respect to the merits of the section 110(c) issues, we find substantial evidence demonstrates that the deliberate conduct of each individual amounted to knowingly authorizing or ordering actions that violated section 75.303. We now address the three individuals' liability separately.

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<sup>9</sup> Commissioner Holen concludes that the three individuals acted "knowingly" within the meaning of section 110(c) of the Act. She reaches this result without reliance upon Kenny Richardson. She believes that under Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984), the plain meaning of the statute is not properly subject to reinterpretation.

<sup>10</sup> While it is clear to us that section 110(c) applies only to agents of corporate operators, we also believe that other subsections of section 110 may be applied to the agents of non-corporate operators as well.

1. Nuccetelli

Nuccetelli argues that he is not liable under section 110(c) because he was not aware that the dangered-off condition presented a hazard (or a violation of a mandatory standard) and that, in any event, he had the authority to override Rados' decision to danger off the area. BE Br. at 50-51. Consistent with BethEnergy's general position (supra) that an area should not be dangered off for only a violation of a mandatory standard but, rather, that a hazardous condition must also exist, Nuccetelli maintains that even if he believed that a violation of the roof plan existed, it cannot be inferred that he had constructive knowledge that such a violation involved a hazard requiring dangering off the area. BE Br. at 51-52.

Substantial evidence supports the judge's determination that Nuccetelli is liable under section 110(c). Nuccetelli knew that the area had been dangered off because the beams in the area were unsaddled and that the area would be entered for a reason other than for saddling the beams. Tr. 230, 237. He testified that he told Kubovcik to instruct Ronto to check the safety of the area and to bring the empty cars into the area, if it was safe. Tr. 237. More importantly, he also believed that the condition of the area warranted warning the miners of the unsaddled beams before they travelled through the area. Tr. 255, 268. He testified that he was "concerned [that miners] should go through [the area] with caution because the beams were not saddled." Tr. 253. Nuccetelli also testified that he told Kubovcik to tell Ronto to warn the motorman about the condition before he brought the vehicles through the area. Tr. 237, 257. In addition, Kubovcik testified that Nuccetelli told him that "there was a danger [in] the beams not being saddled." Tr. 291. This evidence is sufficient to show that Nuccetelli was aware that a hazard existed in the area.

We are unpersuaded by Nuccetelli's reliance on the Pennsylvania Bituminous Coal Mine Act, which allegedly gave him the authority to override the danger signs and thus determine that access to the area need not be prohibited. Even assuming that such a defense exists for Mine Act purposes, Nuccetelli did not take actions to indicate that he was overriding Rados' decision to danger off the area. Nuccetelli did not remove the danger entry from the fireboss books or instruct others to do so. Tr. 264. In addition, Nuccetelli testified that he did not tell Kubovcik what actions should be taken with respect to the danger signs. Tr. 237.

2. Kubovcik

Kubovcik argues that the judge's finding that he is liable under section 110(c) of the Act is not supported by substantial evidence because he had no reason to believe that the unstrapped beams presented any particular hazard and, further, that he acted only as a conduit for Nuccetelli's instructions. BE Br. at 53.

Substantial evidence supports the judge's finding that Kubovcik knowingly ordered or authorized the violation of section 75.303(a). Kubovcik knew that the area had been dangered off because the beams were unsaddled, and that the area was to be entered for a reason other than to saddle the beams.



Tr. 281, 283, 291. Kubovcik testified that he passed along Nuccetelli's instructions to Ronto to examine the area, and to bring the cars into the area if it was safe. Tr. 284. Ronto testified that Kubovcik also told him that the area was dangered off because the beams were unsaddled. Tr. 347-48. The evidence also reveals that Kubovcik knew of such facts that indicated that a hazardous condition existed in the area. As noted above, Kubovcik testified that Nuccetelli told him that there was a danger presented by the unsaddled beams. Tr. 283, 291. Kubovcik, after agreeing that the purpose of saddling beams was to prevent a beam from falling in the event that a car derailed and hit a leg supporting a beam, also acknowledged that there are many causes of derailment other than those related to the condition of the track and the amount of clearance. Tr. 295-97. Ronto further testified that Kubovcik told him to caution the motorman about the unsaddled beams before he brought the vehicles through the area. Tr. 315.

In addition, Kubovcik, like Nuccetelli, did not override Rados' decision to danger off the area in accordance with BethEnergy's policies. After observing that the danger demarcation had not been removed from the fireboss books after the area had been entered, Kubovcik did not remove that danger demarcation nor did he ensure that the danger signs were not rehung. Tr. 308-09. Inspector Shade testified that Ronto told him that he had rehung the danger signs because he was told to do so from the surface, and that Kubovcik had relayed the order. Tr. 97-98. (Kubovcik testified that he did not discuss with Ronto what action should be taken with the danger signs. Tr. 285.)

### 3. Ronto

Substantial evidence supports the judge's finding that Ronto is liable under section 110(c) of the Act. Like Nuccetelli and Kubovcik, Ronto knew that the area had been dangered off because the beams were unsaddled and that the area was entered for a reason other than for saddling beams. Tr. 315, 347-48. Although Ronto had been informed by Kubovcik that the area had been dangered off because of the unsaddled beams, he authorized entry with a motorized vehicle. Tr. 322, 347-48. Ronto expressly indicated that he knew of facts that amounted to the existence of a hazardous condition, as defined herein, in the area.

Q: When you replaced them [the danger signs] later, what hazard were you concerned with?

A: Not really a large hazard. I was concerned that I wanted other people to be aware of the 80 stopping area.

Tr. 343. Although Ronto did not consider the danger posed by the unsaddled beams to be large, he acknowledged that he rehung the danger signs as a caution because he was concerned about the possibility of vehicles coming through the area without the vehicle operators being warned that some beams in the area were unsaddled. Tr. 343-45. Inspector Savine testified that Ronto "did caution the two motormen ... about a hazard along the track. I think he said he directly said it involved the beams not being strapped." Tr. 179.

Ronto testified that he cautioned the motormen about the condition of the beams on two occasions. Tr. 316, 319.

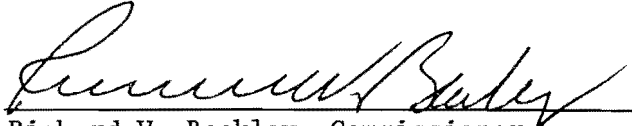
Ronto also failed to take actions that would indicate that he was overriding the decision to danger off the area. He did not remove the danger demarcation from the books or permanently remove the dangers signs. Tr. 343, 352. Ronto authorized the danger signs to be rehung. Tr. 328. Although Ronto testified that he did so just because he was putting the area back the way it was, Inspector Shade testified that Ronto told him that he did so because he was ordered to do so by Kubovcik. Tr. 97-98. Inspector Shade testified that Ronto told him that "he was told to take the danger board down, push 20 cars up to the dump. Then he was supposed to bring the motor back and hang the danger board." Tr. 48.

Thus, substantial evidence supports the judge's findings that Nuccetelli, Kubovcik and Ronto are each liable under section 110(c) of the Mine Act for a knowing violation of section 75.303(a). Each knew that the area had been dangered off because the beams were unsaddled and that the area would be entered for a reason other than saddling the beams. Substantial evidence also demonstrates that each knew of facts showing that the unsaddled beams presented a hazard. Because the individuals in this case knowingly authorized or ordered the violation, we uphold the judge's findings of individual liability. Accordingly, we conclude that the judge properly found the three individuals liable under section 110(c).

III.

Conclusion

For the reasons set forth above, we affirm the judge's determinations that BethEnergy violated section 75.303(a); that the violation was caused by its unwarrantable failure; and that Nuccetelli, Kubovcik, and Ronto are each liable under section 110(c) of the Mine Act for being "knowingly" involved in the violative conduct. We reverse the judge's finding that BethEnergy's violation of section 75.303(a) was S&S.<sup>11</sup>

  
Richard V. Backley, Commissioner

  
Arlene Holen, Commissioner

  
L. Clair Nelson, Commissioner

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<sup>11</sup> Chairman Ford did not participate in the consideration or disposition of this matter.

Commissioner Doyle, concurring in part and dissenting in part:

In this case, BethEnergy Mines, Inc, ("BethEnergy") was charged with a violation of 30 C. F. R. § 75.303, which requires the posting of a danger board when a hazard or a violation is found and prohibits miners from passing beyond that danger board. The order reads as follows:

Representative of the operator (foreman) had a miner remove a danger-board and go inby at No. 79 to 80 cross-cut 4 butt track-haulage, to bring in 20 empty cars under "I" Beams that were not strap[p]ed or saddled. Then proceed to come back through area second time with motor, and rehung the danger-board....

Gov. Exh. 1.

After noting the Secretary's concession that a qualified mine examiner was authorized to remove the danger board if he found no violation or hazard, the administrative law judge upheld the violation, finding that the examiner's actions were unlawful based on the judge's determination that, at the time the "dangered off" area was entered, there existed both a violation of a mandatory standard, i.e., a provision of BethEnergy's roof control plan, and a hazard of a significant nature.<sup>1</sup> 12 FMSHRC at 406, 411.

Based on his reading of the roof control plan as "clear and unambiguous" to the effect that the beams must be saddled contemporaneously with their installation,<sup>2</sup> the judge found that it could reasonably be inferred that Messrs. Nuccetelli, Kubovcik and Ronto "knowingly authorized and ordered the violation." 12 FMSHRC at 413.

I agree with the majority that substantial evidence supports the judge's determination that BethEnergy violated section 75.303(a) and also with their determination that the violation was not significant and substantial. I respectfully dissent, however, from that part of the decision wherein the majority finds section 110(c) liability on the part of respondents Nuccetelli, Kubovcik, and Ronto. I do so because I am of the opinion that:

1. Section 110, as interpreted and enforced by the Secretary of Labor (the "Secretary") to assert individual liability only against corporate employees is unconstitutional;

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<sup>1</sup> The inspector testified that he based his order on the existence of a hazard, primarily because of Mr. Ronto's rehunging of the danger board, rather than on the existence of a roof control plan violation. Tr. at 49-50, 96. He further testified, under extensive cross-examination by the judge, that MSHA did not require an operator to danger off an area where a violation existed, if the condition did not present a hazard. Tr. 90-95.

<sup>2</sup> Saddling does not, by itself, provide roof support. Tr. 57, 99, 233.

2. Assuming section 110 to be constitutional, the language of section 110(c) is clear on its face, and thus not subject to further interpretation by the Commission or by the Secretary;

3. The case should be remanded to the judge for reevaluation of the evidence against each of them individually as to whether each knowingly authorized or ordered a violation of section 75.303.

Because the judge based his finding of unwarrantable failure by BethEnergy on a flawed analysis of the behavior of Nuccetelli, Kubovcik, and Ronto, I would also remand that issue for further analysis.<sup>3</sup>

1. Constitutionality

According to the Secretary, she is empowered to charge individuals under section 110 only if they are employees of corporate operators. Her enforcement actions have conformed to that interpretation. Tr. Oral Arg. at 53-54. This interpretation by the Secretary applies to section 110(d) as well as to section 110(c). Id.

I am of the opinion that, in enacting section 110(c), Congress intended to make clear that corporate employees could also be held individually liable for violations. I do not believe that the purpose of section 110(c) was to impose liability under sections 110(c) and (d) on corporate employees alone. The Secretary's interpretation and discriminatory enforcement of section 110 to assert individual liability only against corporate employees not only frustrates congressional intent but deprives corporate employees of their constitutional rights to equal protection.

Section 110(c) of the Mine Act provides:

Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this Act...any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d). (emphasis added).

30 U.S.C. § 820(c). Section 110(d) provides as follows:

Any operator who willfully violates a mandatory health or safety standard, or knowingly violates or fails or refuses to comply with any order issued under sections 104 and 107, ... shall, upon conviction, be punished

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<sup>3</sup> The judge could find unwarrantable failure on BethEnergy's part based on the collective behavior of Nuccetelli, Kubovcik, and Ronto, even if he found none of them liable individually under section 110(c).

by a fine of not more than \$25,000, or by imprisonment for not more than one year, or by both,.... (emphasis added).

30 U.S.C. § 820(d). Section 110(d) contains no language restricting its applicability to corporate employees and the definition of operator (those subject to liability under 110(d)) set forth in section 3(d) includes any "other person who operates, controls, or supervises a coal or other mine...." 30 U.S.C. § 802(d). The imprisonment penalty in section 110(d) can apply only to individuals, and makes clear that Congress did contemplate individuals being prosecuted under section 110(d). The Secretary's position, however, is that she cannot charge an individual, personally, under 110(d) unless he is a corporate employee. Tr. Oral Arg. at 53, 54.

Section 110(c) provides that a corporate employee can be subjected to the same penalties, fines, and imprisonment as a person charged under 110 (d). If the Secretary is correct that corporate employees alone are subject to prosecution under subsection 110(d) as well, it follows that section 110(c) means simply that a corporate employee can be penalized to the same extent under 110(c) for a "knowing" violation as he can be under section 110(d) for a "willful" violation.

The Secretary attempts to distinguish, for section 110 purposes, the terms "knowingly" and "willfully" from each other and from ordinary negligence.<sup>4</sup> However, under the Secretary's interpretation that corporate employees alone are individually liable under sections 110(c) and (d), the difference between "knowingly" and "willfully" is moot and section 110(c) serves little purpose beyond making a corporate employee liable for the same penalties and imprisonment for a "knowing" violation under subsection 110(c) as he is for a "willful" violation under subsection (d).

The provisions of both sections 110(c) and 110(d) of the Mine Act were part of the Federal Coal Mine Health and Safety Act of 1969 (the "Coal Act").<sup>5</sup> The section that is now section 110(d) was section 109(b) of the Coal Act while the section that is now section 110(c) followed it as section 109(c) of the Coal Act. Thus, under the Coal Act, the penalties for both ordinary and willful violations by an "operator" (defined then, as now, to include a person who supervises a mine) were set forth in sections (a) and (b) respectively, followed by the section providing that, whenever the violator was a corporate operator, its directors, officers and agents who knowingly authorized, ordered, or carried out such a violation were liable for the same penalties that could be imposed upon a "person" under the two previous

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<sup>4</sup> The Secretary interprets these terms to the effect that negligence means "[m]aybe you should have known," "knowingly" means "[you] knew or should have known" or "you definitely should have known" and "willfully" means something more. Tr. Oral Arg. at 47, 48, 50.

<sup>5</sup> Under the predecessor Federal Coal Mine Safety Act Amendments of 1952, individual liability was limited to agents causing miners to work in the face of withdrawal orders. Pub.L. No.82-552, ch.877, 66 Stat. 692 (1952).

sections. Section (b) became section (d), without explanation, when the Mine Act was enacted.

It thus appears to me that, in enacting the provision on corporate agent liability under the Coal Act, Congress, rather than intending to limit individual liability to corporate employees, had in mind only to make clear that corporate employees were subject to the same penalties personally as were other managers and supervisors and were not to be shielded from liability because of the corporate veil.<sup>6</sup> I believe that the Secretary's discriminatory enforcement activities not only fail to further this intent but violate corporate employees' guarantee of equal protection.

## 2. Statutory Language

Even if one assumes that section 110(c) is not enforced by the Secretary in an unconstitutional manner, the majority errs in defining the test for individual liability under section 110(c). The Secretary argues that actual or constructive knowledge that "[the corporate agent's] action was in violation of a mandatory standard" is the appropriate test. Sec. Br at 26-29. The majority, citing Kenny Richardson, 3 FMSHRC at 16, first emphasizes that, in order to establish individual liability, the Secretary must prove that the corporate agent "knew or had reason to know of a violative condition." Slip op. at 14.<sup>7</sup> They then correct themselves and assert that the Secretary must prove "at the least only that the individuals knowingly acted not that [they] knowingly violated the law." Id. Finally, they analyze each individual's liability based on his awareness of a hazardous condition. Slip op. at 15-17.

The majority is correct in saying that the Secretary must prove only that the individual knowingly acted, i.e. in this case that he knowingly authorized or ordered entry inby a posted danger board, not that he knowingly violated the law. See United States v. Int'l Minerals & Chem. Corp., 402 U.S. 558, 563 (1971). I disagree, however, with their analysis to the extent that they rely on Kenny Richardson to interpret "knowingly" to mean "knew or had reason to know of a violative condition" and to the extent that their

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<sup>6</sup> The Court in Richardson v. Secretary of Labor, 689F.2d 632 (6th Cir.1982) aff'g Secretary v. Kenny Richardson, 3 FMSHRC 8 (January 1981), while finding the section constitutional as written, appears to have recognized that sole proprietors and partners were personally liable as "operators." 689 F.2d 632, 633. The court notes that congressional intent was to also hold corporate decision-makers liable (Id. at 633) and that this was a decision by Congress "to hold an additional group of decision-makers personally liable..." (emphasis added) 689 F.2d at 634. Kenny Richardson did not deal with the issue of the Secretary's discriminatory application of section 110(c). See also H. R. Rep. No. 563, 91st Cong., 1st Sess., reprinted in 1969 U.S. Code Cong. & Ad. News 2503, 2513-14.

<sup>7</sup> Under this test, the individual respondents would be liable for section 110(c) violations based on their knowledge that a danger board had been passed in violation of the regulation, irrespective of whether they had authorized, ordered or carried out the violation.

reasoning avoids recognition of the clear statutory language "authorized, ordered, or carried out such a violation...." Because I am of the opinion that Kenny Richardson was effectively overruled by Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, (1984). I would, in concurrence with Commissioner Holen, decide this case without reliance on Kenny Richardson.

The Secretary and the Commission "must give effect to the unambiguously expressed intent of Congress" and only when "the statute is silent or ambiguous with respect to the specific issue" is it subject to interpretation. Chevron, 467 U.S. at 843. Contrary to the Secretary's suggestion (Sec. Br. at 27, n. 8), the words "knowingly authorized, ordered or carried out such violation, failure or refusal..." are not ambiguous. Thus, under Chevron, which the Secretary agrees applies (Id.), these words must be given their plain meaning and are not subject to further interpretation by the Commission or the Secretary.

The court in United States v. Jones, 735 F.2d 785 (4th Cir. 1984), quoting E. Devitt & C. Blackmar, Federal Jury Practice and Instructions, section 14.04 (3d ed. 1977), states that:

A well-accepted definition of "knowingly" is "[a]n act...done voluntarily and intentionally, and not because of mistake or accident or other innocent reason."

735 F. 2d at 789.<sup>8</sup> The dictionary similarly defines "knowingly" as "with awareness, deliberateness, or intention." Webster's Third New Int'l. Dictionary (Unabridged), 1252 (1986).

Because the word "knowingly" is unambiguous, I believe that, consistent with the Supreme Court's holding in Chevron, it must be given its plain meaning and cannot be interpreted by the Secretary or the Commission to mean "knew or had reason to know."

Based on the statute's clear language, it appears that Congress intended to penalize, through section 110(c), those corporate agents who voluntarily and intentionally authorized, ordered or carried out the activity giving rise to a violation, not someone who knew or had reason to know of a violative condition. Therefore, I believe that the majority errs in determining the liability of Nuccetelli, Kubovcik, and Ronto based on their knowledge of a violative condition.

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<sup>8</sup> The Jones court quoting United States v. Illinois Cent. R.R., 303 U.S.239 (1938) described "willful conduct" as "that which is 'intentional, or knowing, or voluntary, as distinguished from accidental' and [characterizes] 'conduct marked by careless disregard'..." 735 F. 2d at 789.



### 3. Section 110(c) Liability

The judge found Nuccetelli, Kubovcik, and Ronto guilty of section 110(c) violations based on his determination that "when they issued orders ... they were fully aware of the requirements of the Roof Control Plan including the requirement that 'beams shall be installed with some means of support.'" 12 FMSHRC at 413. Because he found the language of the roof control plan to be clear and unambiguous, he "inferred that, they 'knowingly authorized [and] ordered' the violation..." Id.<sup>9</sup>

I believe that the judge erred in concluding that the individuals were liable for section 110(c) violations based on their collective acts and inferred knowledge of the requirements of the roof control plan, rather than by weighing individually the actions of Nuccetelli, Kubovcik and Ronto as to the violation actually charged by the Secretary, i.e., knowingly authorizing and ordering travel in by the danger board. I believe he also erred in failing to consider the testimony of the inspector that endangering off is required only for a hazard and not for non-hazardous violations and the Secretary's concession that a reexamination is permissible in lieu of corrective action. 12 FMSHRC at 406, Tr. Oral Arg. at 36, Tr. 49-50, 90-95. Further, he erred in permitting the inspector to testify as to the state of Ronto's mind while rehanging the danger board and also in holding Nuccetelli and Kubovcik responsible for that perceived state of mind. Accordingly, I would have remanded the section 110(c) cases to the judge for further individual analysis

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<sup>9</sup> Even under Kenny Richardson, such a conclusion is not warranted. The respondents do not deny that they were aware the roof control plan required the beams to be strapped. Each claims that he did not understand that the beams had to be strapped concurrently with their installation. In determining their knowledge of the roof control plan, more would be required than the judge finding that to him, as a trained and experienced lawyer and judge, the language was unambiguous. That such is the case is clearly evidenced by the inspector's testimony as to the actual meaning of the standard in issue. Although 30 C.F.R. § 75.303 states that whenever a "mine examiner finds a condition which constitutes a violation of a mandatory health or safety standard or [a hazardous condition], he shall [post] a 'danger' sign..." Inspector Shade testified repeatedly, including under extensive questioning from the judge, that the operator was not required to post a danger board merely because a violation of a mandatory standard was found, but only when an actual hazard existed. Tr. 90-95. Obviously, the apparent clarity of language does not determine each individual's actual knowledge or understanding of it. The judge would be required to look at each individual's knowledge and understanding of the plan in the context in which he viewed it, which may have included his own reading of the plan as well as information received from superiors as to the plan's requirements and previous enforcement of the provision by MESA and MSHA at both BethEnergy's mines and at other facilities.

of whether each individual knowingly authorized or ordered a violation, taking into consideration the evidence set forth below.

As to Mr. Nuccetelli, the record shows that he was aware of the unsaddled beams prior to the time that they were noted in the examination book by Mr. Rados but he did not believe that they constituted a danger. When called about the matter at home, Nuccetelli gave instructions that the area be reexamined to assure that it was still safe and, only if it continued to be safe, was it to be entered. There is no evidence that Nuccetelli was consulted further.

As to Kubovcik, it would appear that, even though he was the section foreman at the time, he had no decision making role at all in the incident. He called Nuccetelli for instructions, and was told to have Ronto reexamine the area. He delivered the message.

As to Ronto, he was asked only for his understanding of the requirements of the roof control plan as to immediate strapping and he answered that the strapping had to be done within a reasonable time. TR. 345. There is no evidence as to how Mr. Ronto, a construction foreman, had reached this understanding, or even of whether he had been given access to the roof control plan or had based his understanding of it on information received from his superiors.

Contrary to the majority's opinion, the Secretary concedes that the operator was within his rights in reexamining the area and removing the danger board if a hazard did not exist. 12 FMSHRC at 406, Tr. Oral Arg. at 36, Tr. 49-50, 90-95. However, the inspector does a little mind reading and is allowed to testify that Ronto must have believed that a hazard existed because he rehung the danger board. Perhaps Nuccetelli erred when he did not make his instructions specific on this point, i.e., if the area is safe, take down the danger board, remove the item from the examination book, and only then enter the area. Certainly this would have been a more precise and more orderly way to proceed, but I do not believe that Nuccetelli's failure to give such complete instructions raises his conduct to the level of aggravated conduct.<sup>10</sup> Nor do I believe that the implications of Mr. Ronto's decision to rehang the danger board can be attributed to Mr. Nuccetelli or to Mr. Kubovcik.

According to the test set forth in United States v. Int'l Minerals & Chem. Corp., 402 U.S. 558, 563 (1971), which the majority cited but did not apply, the judge should have inquired whether Nuccetelli, Kubovcik, or Ronto, individually, voluntarily and intentionally authorized or ordered miners to pass a danger board under violative conditions. This he did not do. Therefore, I would remand the section 110(c) cases to the judge for reevaluation under this test.

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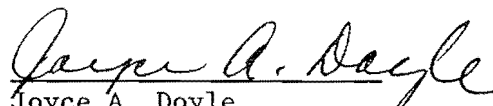
<sup>10</sup> The Secretary herself asserts that a § 110(c) violation "does not occur upon the mere negligence of a corporate agent." Sec. Br at 28.

### Unwarrantable Failure

Because the judge based his finding of unwarrantable failure on this flawed analysis and application of section 110(c), I would also remand the unwarrantable failure issue to the judge for reevaluation. I would not have considered as substantial evidence, as does the majority, BethEnergy's entrance into the area to conduct a reexamination rather than to eliminate the hazard or Ronto's failure to complete the steps to "formally" override the danger board by removing the condition from the fireboss book. Slip op. at. 16. In the first instance, the Secretary acknowledges BethEnergy's right to reinspect and override the danger board. 12 FMSHRC at 406, Tr.73-74, 90, See Tr. Oral Arg. at 36. The failure of Ronto to remove the condition from the fireboss book and his decision to "put things back the way they were" after actually examining the area and determining that the unsaddled beams did not present a hazard, does not rise to the level of aggravated conduct.

### Conclusion

I join the majority in affirming the finding of violation and in its determination that it was not significant and substantial. For the foregoing reasons, however, I would remand to the judge for further analysis of both the unwarrantable failure and section 110(c) issues.

  
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 6, 1992

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

v.

PEABODY COAL COMPANY

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Docket No. LAKE 91-11

BEFORE: Ford, Chairman; Backley, Doyle, Holen, 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" or "Act"). The sole issue is whether Commission Administrative Law Judge Gary Melick erred in finding that a violation of 30 C.F.R. § 75.400 by Peabody Coal Company ("Peabody") resulted from its unwarrantable failure to comply with the standard.<sup>1</sup> For the reasons set forth below, we affirm the judge's determination of unwarrantable failure.

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<sup>1</sup> 30 C.F.R. § 75.400, which repeats the statutory language of 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.

The unwarrantable failure terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which, in pertinent part, distinguishes those violations of mandatory health or safety standards "caused by an unwarrantable failure of [an] operator to comply with such mandatory health or safety standards...."

I.  
Factual and Procedural Background

Peabody operates the Peabody No. 10 Mine, an underground coal mine in Christian County, Illinois. On May 18, 1990, Edward Banovic, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA"), conducted a regular inspection of the mine. He reviewed the preshift examination books and discovered that repeated problems were recorded concerning the transfer point between the conveyor belts in the second north and seventh west areas of the mine.<sup>2</sup> At approximately 9:00 a.m., Inspector Banovic, accompanied by Robert Stevens, a United Mine Workers of America ("UMWA") safety representative, travelled to the transfer point in order to inspect it. When they arrived, power to the belts had been turned off due to unrelated problems in another area of the mine.<sup>3</sup>

Inspector Banovic discovered coal dust and loose coal in five different locations within approximately 100 feet of the transfer point. Two of the piles were comprised of coal and measured approximately 15 feet in length and 30 inches in height. Inspector Banovic testified that, if the belt had been running, the belt line would have rubbed against the coal. A third pile, approximately 24 inches high and four feet wide, was comprised of charred, discolored, pulverized coal dust packed around the second north drive roller. According to the inspector, the drive roller is approximately 30 inches in diameter, and as it turned, it would compress the coal dust. The inspector also observed two piles of fine coal dust that measured 30 inches in height, four feet in width and four feet in length between the drive roller and the transfer point.

Inspector Banovic testified that "the two long locations of coal were at a transfer point where coal could spill steadily as the shift was being conducted." Tr. 75. He believed that the coal dust packed around the drive roller had been present in that location for at least five days. Tr. 75-76. He explained that coal accumulates slowly in such a location, and that it would take "a reasonable period of time" for it to accumulate to the extent that he observed. Tr. 75. He also stated that its discoloration indicated that it had been present for "a considerable amount of time while the rollers were turning." Tr. 99. In addition, Inspector Banovic testified that the "two large piles" were fresh, and that he believed they had been deposited within 24 hours of his arrival. Tr. 75.

After examining the area, Inspector Banovic then travelled to the surface and further examined the mine examiners' books in order to document

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<sup>2</sup> Under 30 C.F.R. § 75.303(a), certified persons designated by the operator of the mine are required to examine active workings of a mine for hazardous conditions and record the results of that examination.

<sup>3</sup> The second north belt dumps onto the seventh sub-main west belt, which dumps onto the main south belts. The belts are synchronized, so that the inoperability of the main-south belt prevented the belts in question from running.

the instances in which such accumulations had previously been reported. He noted that a spillage had been reported in the entry for the 8:00 a.m. shift that morning. He also found examiners' notations indicating that the cited areas had needed to be cleaned at the start of seven of the eight previous shifts.

Based upon his observations, Inspector Banovic issued an order, pursuant to section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), alleging a significant and substantial ("S&S") violation of section 75.400.<sup>4</sup> Inspector Banovic stated that the violation occurred as a result of Peabody's unwarrantable failure because similar problems regarding the cited area had been entered repeatedly in the preshift examination books, Peabody had repeatedly violated the standard, MSHA officials had discussed with Peabody officials those repeated violations of section 75.400, and because management neglected to properly repair the belt drive. Tr. 85. The order was terminated after five miners worked for four hours removing the accumulations.

Following an evidentiary hearing, the judge found that Peabody violated section 75.400, and that the violation was S&S, and caused by Peabody's unwarrantable failure to comply. Peabody Coal Co., 13 FMSHRC 835 (May 1991) (ALJ). In reaching his unwarrantable failure finding, the judge relied upon Inspector Banovic's testimony that the cited area and condition had been reported several times in the preshift examination book and that, although the condition had been so recorded the morning of the inspection, the condition was not being abated at the time the inspector examined it. 13 FMSHRC at 839. In addition, the judge noted MSHA supervisory Inspector Lonnie Conner's testimony that MSHA had met with Peabody in March, June, and November 1989, to discuss Peabody's repeated violations of section 75.400, but that there had been no decrease in the number of violations since those discussions. 13 FMSHRC at 840.

The judge discredited the testimony of William Raetz, superintendent of the mine, that the single miner who had been assigned to clean the cited area as well as other areas, would have completed that task by the end of the shift. 13 FMSHRC at 840. The judge relied upon the uncontroverted testimony that it took five miners four hours to abate the violative condition. Id. The judge then noted Mr. Raetz's testimony that, after a meeting with MSHA, Raetz gave supervisory personnel instructions to correct the recurring accumulation problems. 13 FMSHRC at 840. The judge also stated that, although Raetz indicated that Peabody maintains records of disciplinary action taken for failure to comply with regulations, Raetz did not know whether any disciplinary action had been taken due to a failure to correct violations of section 75.400. 13 FMSHRC at 840-41. The judge indicated that, regardless of any disciplinary actions taken to ensure compliance with the standard, Peabody had been cited 17 times between October 30, 1989, and May 10, 1990, for violations of section 75.400. Citing Youghioghney & Ohio Coal Co., 9 FMSHRC

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<sup>4</sup> The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which, in pertinent part, distinguishes as more serious in nature any violation that "could significantly and substantially contribute to the cause and effect of a ... mine safety or health hazard...."

2007 (December 1987) ("Y&O") and Emery Mining Corp., 9 FMSHRC 1997 (December 1987), the judge concluded that "[t]his evidence is relevant in showing a pattern of lack of due diligence, indifference or lack of reasonable care and supports the finding that the violation herein was the result of gross negligence and aggravated acts and/or omissions constituting 'unwarrantable failure.'" 13 FMSHRC at 841. Accordingly, the judge assessed the penalty proposed by the Secretary in the amount of \$1,400. Id. The Commission subsequently granted Peabody's petition for discretionary review, in which Peabody contests only the judge's unwarrantable failure finding.

## II.

### Disposition of issues

We conclude that substantial evidence supports the judge's finding that Peabody's violation of section 75.400 was caused by its unwarrantable failure to comply with the standard. In Emery, the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. This determination was derived, in part, from the plain meaning of "unwarrantable" ("not justifiable" or "inexcusable"), "failure" ("neglect of an assigned, expected or appropriate action"), and "negligence" ("the failure to use such care as a reasonably prudent and careful person would use, characterized by "inadvertence," "thoughtlessness," and "inattention"). 9 FMSHRC at 2001. This determination was also based on the purpose of unwarrantable failure sanctions in the Mine Act, the Act's legislative history, and judicial precedent. Id.

The Commission has previously recognized as relevant to unwarrantable failure determinations such factors as the extent of a violative condition, or the length of time that it has existed, whether an operator has been placed on notice that greater efforts are necessary for compliance, and the operator's efforts in abating the violative condition. See, e.g., Quinland Coals, 10 FMSHRC 705, 708-09 (June 1988); Y&O, 9 FMSHRC at 2011; Utah Power & Light Co., 11 FMSHRC 1926, 1933 (October 1989) ("UP&L"). We conclude that the judge considered such factors demonstrating aggravated conduct and that substantial evidence supports his decision.

The record reveals that the five accumulations of loose coal and coal dust were extensive. Peabody argues that the cited accumulations must have accumulated after the preshift examination, between 9:00 p.m. and midnight on May 17, 1990. P. Br. at 8-9.<sup>5</sup> The judge, however, credited Inspector

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<sup>5</sup> Peabody focuses upon the fact that Janette Molancus, a belt shoveler for Peabody, told Inspector Banovic that the area under the belt had been cleaned on May 17, at 4:00 p.m. Peabody notes that, although the cited accumulations had been recorded as part of the preshift examination for the 8:00 a.m. to 4:00 p.m. shift on May 18, (the shift during which the inspection occurred), no accumulations had been recorded as a result of the preshift examination for the preceding shift (midnight to 8:00 a.m. on that day). Tr. 89. Peabody speculates that the accumulations must have occurred sometime after that preshift examination. Because a preshift examination is performed within the three hours prior to the beginning of a shift, and because coal is not produced during night

Banovic's testimony that the accumulations around the drive roller had existed for up to one week. 13 FMSHRC at 839.

Inspector Banovic testified that, although some of the accumulations might have been freshly deposited, he determined that the coal dust packed around the second north drive roller had existed in the area for a period of time between five days and one week, given its packed, discolored and charred appearance. Tr. 75-76, 99. The inspector suggested that the reason the coal packed around the drive roller had not been reported was because the preshift examiner might not have looked "underneath that belt drive as he walked by the area." Tr. 90. In addition, Inspector Banovic testified that Ms. Molancus told him that the area under the seventh west belt had been cleaned on May 17, not that the head roller or drive roller had been cleaned. Tr. 87.

The evidence that the coal packed around the drive roller was charred and discolored, and that coal accumulates slowly in such a location, was undisputed. Furthermore, the fact that the presence of that coal dust was not recorded does not necessarily establish that the area was clean during the shift immediately prior to the inspection. Such a fact may only indicate that the examiner failed either to see or to record an accumulation, as Inspector Banovic posited, and does not bar an unwarrantable failure finding. See generally Eastern Associated Coal Corp., 13 FMSHRC 178, 187 (February 1991).

In concluding that Peabody's conduct amounted to an unwarrantable failure, the judge considered Inspector Banovic's testimony that accumulation problems in the cited area had been reported several times in the preshift examination books. 13 FMSHRC at 839. Inspector Banovic testified that entries for seven of the eight preshift examinations prior to the inspection noted problems with accumulations or spilling in the cited area. Tr. 80-81. For example, the entry for the midnight shift on May 17 specified that an area of the second north belt "still spills A LOT." P-Exh. 7 (emphasis in original). Such evidence is relevant in demonstrating that Peabody had prior notice that a problem with coal and coal dust accumulations existed in the cited area, and that greater efforts were necessary to assure compliance with section 75.400. Peabody's failure to rectify the acknowledged spilling problem at the cited location was properly considered by the judge when determining whether Peabody's violation was caused by its unwarrantable failure. See, e.g., Y&O, 9 FMSHRC at 2011; Quinland, supra, 10 FMSHRC at 709; Eastern, supra, 13 FMSHRC at 187; Drummond Co., Inc., 13 FMSHRC 1362, 1368 (September 1991).

The judge also properly considered Inspector Banovic's testimony that, at the time of the inspection, no one was engaged in attempting to remove the accumulations. 13 FMSHRC at 839. Peabody argues that this fact does not establish that Peabody engaged in aggravated conduct because a belt shoveler had been assigned to clean the cited area, but was cleaning another area first. P. Br. at 7-9. Peabody also focuses upon Raetz's testimony that, under its policies, a foreman has until the end of a shift to rectify a

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shifts, Peabody concludes that the accumulations occurred sometime between 9:00 p.m. and midnight on May 17. P. Br. at 8-9.



problem of which he had been made aware earlier in that shift. The judge found that Peabody's conduct was "particularly aggravated" because it assigned only one person to work less than one shift to correct the condition. 13 FMSHRC at 840. The judge noted that undisputed evidence established that it eventually took four hours for five miners to clean up the accumulations. Id. The judge held that "[t]his evidence clearly supports a finding that under all the circumstances the operator knew or should have known of these loose coal and coal dust deposits and failed to abate the violative conditions because of lack of due diligence, indifference or lack of reasonable care." Id.

In contrast, in UP&L, supra, 11 FMSHRC at 1933, the Commission affirmed the judge's finding that the operator's violation of section 75.400 was not caused by its unwarrantable failure to comply with the standard. In that case, the Commission relied, in part, upon the fact that before and during the inspection, miners were present shoveling the coal accumulations and attempting to abate the condition. The record contains no evidence that Peabody gave similar priority to the abatement of the cited accumulations. Although Peabody was aware that the cited area required close scrutiny, given the fact that seven of the eight past preshift examination reports revealed accumulation problems, Peabody assigned only one miner to clean the area and she had also been given other responsibilities. The judge found that such an effort was not sufficient to effectively deal with the cited accumulations. This finding supports the judge's determination that Peabody engaged in aggravated conduct. See Drummond, supra, 13 FMSHRC at 1369.

Peabody argues that the judge improperly relied on its past violations of section 75.400 in determining whether the cited conduct was unwarrantable. P. Br. at 2. Peabody contends that Commission precedent reveals that only past violations involving the same regulation, and occurring in the same area within a "continuing time frame" may properly be considered when determining whether a violation is unwarrantable. P. Br. at 4. The judge considered the fact that Peabody had been cited 17 times over the preceding six and a half months for violations of section 75.400. While the judge considered that history as relevant and supportive of an unwarrantable failure finding, it is clear that the judge primarily relied upon his findings that the accumulations had been noted in approximately seven of the preceding preshift reports, and that the conditions were obvious and extensive requiring significant abatement efforts. 13 FMSHRC at 841. Moreover, the Commission has not limited, in the manner asserted by Peabody, the circumstances under which past violations may be considered by a judge in determining whether an operator's conduct demonstrated aggravated conduct.

Peabody contends that section 104(d) orders cannot be based on an operator's prior violations because such a "pattern of violations" should give rise only to sanctions under section 104(e) of the Act. P. Br. at 6. We reject Peabody's argument. The record demonstrates that the inspector issued the section 104(d) order because of Peabody's unwarrantable failure to comply with the standard rather than merely because it had violated the same standard on a number of occasions in the past. Moreover, the inspector acted properly, in determining whether Peabody engaged in aggravated conduct, in considering whether Peabody had been put on notice, as a result of previous MSHA

enforcement actions, that coal accumulations around belts had created a problem that required more attention.

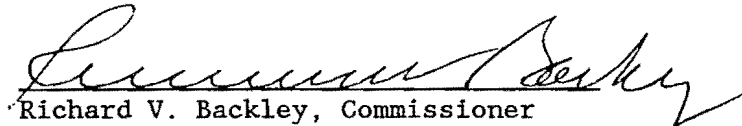
Similarly, we disagree with Peabody's argument that the judge improperly took Peabody's past violations into account twice when assessing a civil penalty: once when considering the history of violations component of section 110(i), and again when considering section 110(i)'s negligence component. P. Br. at 5. Although the judge may have considered the same factual circumstances for two of the criteria under section 110(i), this was not improper or duplicative because the purposes of such consideration are different. As discussed above, a history of similar violations at a mine may put an operator on notice that it has a recurring safety problem in need of correction and thus, this history may be relevant in determining the degree of the operator's negligence. Nonetheless, section 110(i) requires the judge to consider the operator's general history of previous violations as a separate component when assessing a civil penalty. Past violations of all safety and health standards are considered for this component.

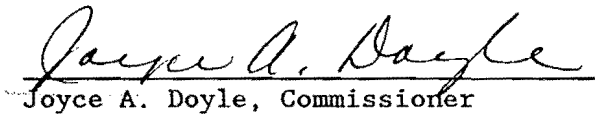
In sum, the evidence reveals that the coal accumulations were extensive, and that at least one had existed for a period of time possibly as long as a week. In addition, the record discloses that, although Peabody had heightened awareness that the cited area had accumulation problems and that greater efforts were required to assure compliance with section 75.400, Peabody did not take adequate measures to remedy the spilling problems. Taken as a whole, the record provides substantial evidence supporting the judge's conclusion that Peabody's violation of section 75.400 was caused by its unwarrantable failure.

III.  
Conclusion

For the reasons set forth above, we affirm the judge's finding that Peabody's violation of section 75.400 was caused by its unwarrantable failure to comply with the standard.

  
Ford B. Ford, Chairman

  
Richard V. Backley, Commissioner

  
Joyce A. Doyle, Commissioner

  
Arlene Holen, Commissioner

  
L. Clair Nelson, Commissioner

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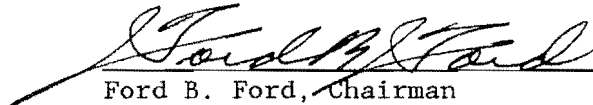
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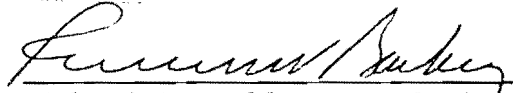


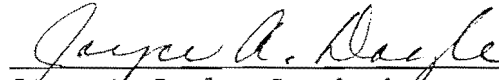
Under the Commission's rules of procedure, the party against whom a penalty is sought must file an answer with the Commission within 30 days after service of the penalty proposal. 29 C.F.R. § 2700.5(b) & .28. When no answer to the penalty proposal was filed with the Commission, the judge, on April 9, 1992, issued an order directing Magma to file an answer within 30 days or show good cause for its failure to do so. When Magma failed to respond to the show cause order, the judge issued an order of default on July 15, 1992.

It appears that Magma may have confused the roles of the Commission and the Department of Labor in this adjudicatory proceeding. On the basis of the present record, we are unable to evaluate the merits of Magma's position. In the interest of justice, we will permit Magma to present its position to the judge, who shall determine whether final relief from the default order is warranted. See, e.g., Kelley Trucking Co., 8 FMSHRC 1867 (December 1986).

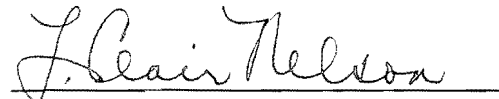
Accordingly, we vacate the judge's default order and remand this matter for further proceedings.

  
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Joyce A. Doyle, Commissioner

  
Arlene Holen, Commissioner

  
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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 25, 1992

FRANCIS A. MARIN

v.

ASARCO, INC.

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:  
:  
:  
:

Docket No. WEST 91-161-DM

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

## DECISION

BY THE COMMISSION:

This is a discrimination proceeding brought under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act" or "Act") by complainant Francis Marin against Asarco, Inc. ("Asarco"). At issue is whether the Commission and its administrative law judges may impose sanctions against private parties in litigation arising under the Mine Act, under Commission Procedural Rule 1(b), 29 C.F.R. § 2700.1(b), and Federal Rules of Civil Procedure ("Fed. R. Civ. P.") 11 and 37(b)(2). Commission Administrative Law Judge John J. Morris denied Asarco's motion for sanctions in which Asarco alleged that Ms. Marin filed a frivolous lawsuit and abused the discovery process. 13 FMSHRC 1113 (1989)(ALJ). The Commission granted Asarco's petition for discretionary review, challenging the judge's rulings. For the reasons that follow, we affirm the judge's decision.

### I.

#### Factual and Procedural Background

Marin was a haulage truck driver for Asarco's Ray Unit in Hayden, Arizona, and as of May 1990, had worked in the mining industry for sixteen years.<sup>1</sup> Asarco terminated Marin on April 25, 1990. On May 14, 1990, Marin filed a discrimination complaint against Asarco with MSHA, pursuant to section 105(c) of the Mine Act, 30 U.S.C. § 815(c). At the same time, she also filed sex discrimination charges with the federal Equal Employment Opportunity Commission and the Arizona Civil Rights Division. Marin subsequently brought a complaint in state court charging Asarco with sexual discrimination and harassment.

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<sup>1</sup> There was no hearing in this matter; the background information set forth herein is taken from pleadings and briefs filed by the parties. No affidavits support the factual assertions made by either party.

Marin's MSHA complaint alleged that Asarco committed a "violation of safety operations and discrimination on the basis of her sex." Her allegations involve driving unsafe trucks. Asarco denied Marin's allegations of safety violations.

By letter dated December 3, 1990, MSHA informed Marin that it had determined that no violation of section 105(c) had occurred. On December 15, 1990, Marin, proceeding pro se, filed a request with the Commission for a hearing on her complaint under section 105(c)(3) of the Mine Act, 30 U.S.C. § 815(c)(3). The matter was assigned to Judge Morris.

On April 26, 1991, attorney Mary Judge Ryan of the law firm of Strompoly & Stroud notified the Commission that her firm was representing Marin. Counsel for Asarco, Henry Chajet, asserts that he did not learn of Ms. Ryan's representation until receipt of Notice by Judge Morris dated May 14, 1991, which listed Ryan's firm on the distribution list. Mr. Chajet scheduled a deposition of Marin for May 29, 1991, by mailing a notice of deposition to Marin, personally, on May 16. On May 22, Chajet also served that notice on Marin's counsel by Federal Express. The notice arrived at her office on May 23. On May 27, two days before the scheduled deposition, Marin was personally served with a subpoena to appear at the deposition. There is no indication that, prior to scheduling the deposition, counsel for Asarco attempted contact with Ms. Ryan to arrange a mutually agreeable time or even to alert her to the deposition.

Counsel for Marin states in her brief that she attempted to contact Chajet on Friday, May 24, to reschedule the deposition. When she called Chajet's office, Ryan learned that he had left Washington and was travelling to Arizona on other business. Ryan then informed Chajet's colleague that Marin would appear at the deposition as scheduled, and sent a confirmation letter. The following days, May 25, 26, 27, were Memorial Day Weekend. On Tuesday, May 28, Ryan and Marin met to prepare for the next day's scheduled deposition. Upon advice of counsel, Marin decided at that time to withdraw the section 105(c)(3) proceeding and pursue her claims solely in state court.

Marin and Ryan appeared at the deposition on May 29. There, Ryan announced on the record that Marin was withdrawing from the Commission proceeding, and requested that the deposition be postponed until the motion to withdraw was decided. She also instructed Marin not to answer any questions. Chajet protested, and Ryan telephoned Judge Morris but was unable to reach him. She advised Judge Morris' clerk by telephone that Marin was willing to move for withdrawal, which would make the deposition unnecessary.

On May 31, Marin filed a formal motion to withdraw from the Commission proceeding. Asarco opposed the motion, and filed its motion for sanctions and a motion to dismiss with prejudice.

The administrative law judge granted Marin's motion to withdraw and denied Asarco's motions for sanctions and dismissal with prejudice. 13 FMSHRC at 1115. After recounting the facts leading up to the dismissal, Judge Morris concluded that "the Commission lacks jurisdiction to impose sanctions." 13 FMSHRC at 1115. He relied on the Commission's decision in



II.

Disposition of Issues

A. Applicability of Rule 11 Sanctions

The first issue presented is whether the Commission may impose sanctions against a private litigant under Fed. R. Civ. P. 11 ("Rule 11"), which provides sanctions for the filing of frivolous pleadings.<sup>2</sup> The Commission's Procedural Rules, 29 C.F.R. Part 2700, do not provide for monetary sanctions. Commission Procedural Rule 1(b) provides:

On any procedural question not regulated by the Act, these Procedural Rules, or the Administrative Procedure Act (particularly 5 U.S.C. 554 and 556), the Commission or any Judge shall be guided so far as practicable by any pertinent provisions of the Federal Rules of Civil Procedure as appropriate.

29 C.F.R. § 2700.1 (emphasis added). Asarco essentially requests the

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<sup>2</sup> Rule 11, entitled "Signing of Pleadings, Motions, and Other Papers; Sanctions," provides in pertinent part:

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address.... The signature of an attorney or party constitutes a certificate by the signer that the signer had read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.... If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Commission to impose Rule 11 sanctions against Marin on the basis of Commission Procedural Rule 1(b). We conclude that Rule 11 sanctions are unavailable in Commission proceedings as a general matter and, in any event, that they would not be warranted on the facts of this case.

Both parties rely on Rushton to support their opposing positions on Rule 11. In Rushton, the Commission determined that the monetary sanctions provision of Rule 11 could not be imposed against the Secretary of Labor in Mine Act proceedings. 11 FMSHRC at 759-60. Asarco contends that Rushton is limited to Rule 11 motions brought against the Secretary. Although Rushton dealt specifically with the subject of sanctions against the Secretary, the Commission also stated broadly:

The essential question presented is whether the monetary sanctions provision of Fed. R. Civ. P. 11 applies to Commission proceedings. In accord with the judge, we conclude that it does not.

11 FMSHRC at 763.

Moreover, a number of the principles underlying Rushton apply equally to cases involving private litigants. In Rushton, the Commission emphasized that the Mine Act is silent on the subject of monetary sanctions against the government and that "the absence of specific statutory authorization for an asserted form of relief under the Mine Act 'dictates cautious review....'" 11 FMSHRC at 764, citing Council of So. Mtn. v. Martin County Coal Corp., 6 FMSHRC 206, 209 (February 1984), aff'd, 751 F.2d 1418 (D.C. Cir. 1985); Kaiser Coal. Corp., 10 FMSHRC 1165, 1169-70 (September 1988)). The Commission also noted in Rushton that it has strictly interpreted monetary award provisions in analogous Mine Act contexts. Id. For example, in Loc. U. 2274, UMWA v. Clinchfield Coal Co., 10 FMSHRC 1493, 1498-99 (November 1988), aff'd sub nom. Clinchfield Coal v. FMSHRC, 895 F.2d 773 (D.C. Cir. 1990), the Commission followed the 'American Rule' that "attorney's fees are not available to prevailing litigants ..., except where the [Mine] Act specifically authorizes such fees." There, the Commission refused to award attorney's fees in compensation proceedings where the Act failed to so provide. See also Odell Maggard v. Chaney Creek Coal Corp., etc., 9 FMSHRC 1314, 1322-23 (August 1987), aff'd in part, rev'd in part on other grounds, 866 F.2d 1424 (D.C. Cir. 1989). Likewise, the Mine Act is silent on the subject of monetary sanctions against private litigants for engaging in frivolous litigation, the subject of Rule 11.

Additionally, as explained in Rushton, Commission Procedural Rule 1(b) "does not dictate that any particular Federal Rule of Civil Procedure be reflexively applied in Commission proceedings on procedural questions not regulated by the Mine Act." 11 FMSHRC at 765. This is because "[t]he Commission, of course, is not a federal court. The Commission is an agency created under the Mine Act with certain defined and limited administrative and adjudicative powers. (Citations omitted)." 11 FMSHRC at 764. The Commission is not bound by the Federal Rules of Civil Procedure, and only looks to those rules insofar as is administratively "practicable" and "appropriate."

We reject Asarco's urging to apply Rule 11 under the authority of Commission Procedural Rule 1(b). We perceive no statutory warrant in the Mine Act for the imposition of monetary sanctions for frivolous pleading in Mine Act proceedings. We conclude that the Commission is without authority to impose monetary sanctions for frivolous claims filed against private parties under the Mine Act.

In any event, on the facts of this case, Rule 11 sanctions would not be warranted. Marin filed this case as a pro se complainant. In general, courts take into account the "special circumstances of litigants who are untutored in the law." Maduakolam v. Columbia University, 866 F.2d 53, 56 (2d Cir. 1989); see also Haines v. Kerner, 404 U.S. 519, 520 (1972) (pro se complainant's pleadings held to less stringent standards than pleadings drafted by attorneys); cf. Schulte v. Lizza Industries, Inc., 6 FMSHRC 8, 12-13 (January 1984) (pro se miner's late filing may be excused in justifiable circumstances). Approximately one month after Marin retained an attorney, she moved to withdraw her section 105(c) complaint, deciding instead to bring all of her claims in state court.

Asarco asserts that the following events demonstrate that the complaint is frivolous: (1) Marin discontinued her original complaint for "lack of protected activity;"<sup>3</sup> (2) the MSHA investigator found no violation of section 105(c); and, (3) counsel's ultimate decision to withdraw the complaint. None of these events demonstrate frivolity. Marin's decision to discontinue the MSHA investigation and then reinstitute it does not indicate that her suit was groundless. In her complaint to MSHA dated May 14, 1990, Marin alleged that Asarco committed a "violation of safety regulations and discrimination on the basis of her sex." Her allegations concern driving unsafe trucks. Additionally, an MSHA determination of no violation is not binding on the Commission. See 30 U.S.C. § 815(c)(3). Section 105(c)(3) of the Act expressly provides that a complainant has the right to file an action with the Commission if the Secretary determines that there was no violation. Similarly, Marin's motion to withdraw was without prejudice and, thus, was not an admission that her claim lacked merit.

The principal Rule 11 cases on which Asarco relies are inapposite. These cases involve egregious behavior, which is not present here. For instance, in Dean v. ARA Environmental Services, Inc., 124 F.R.D. 224, 227 (N.D. Ga. 1988), the sanctioned party continued to file suits against the same parties based on the same facts, even after 28 suits based on those facts had been dismissed. In Foster v. Michelin Tire Corp., 108 F.R.D. 412, 415 (D. Ill. 1985), a plaintiff's attorney was sanctioned for filing a suit when, more than two years after the underlying incident and after eight months of litigation, he summarized the facts supporting the suit as "none."

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<sup>3</sup> Marin withdrew her original complaint in June, 1990. She reinstated her complaint on September 4, 1990, stating: "Since then I have reconsidered and now I believe my termination was because I refused to drive a truck with a blown up turbo charger."

We find absent from the record any evidence of deliberate abuse or harassment by Marin or her counsel. Asarco asserts that Ryan's confirmation letter of May 24, 1991, reflects a deliberate intention to mislead Chajet into believing that the deposition would proceed and justifies Rule 11 sanctions. We do not perceive deception. Ryan asserts that she telephoned Chajet and attempted to postpone the deposition on May 24, the day after she received the notice. She spoke with another attorney at Chajet's firm and learned that Chajet had already left Washington for Arizona on other business. They agreed that the deposition should go ahead as scheduled, and Ryan sent a confirmation letter. Chajet could not have been misled by the letter prior to the deposition because he had already traveled to Arizona on other business.

These facts suggest to us that what occurred resulted from a lack of communication in the context of a tight schedule unilaterally imposed upon Marin. Chajet did not consult Ryan with regard to scheduling the deposition. Ryan received notice of the deposition on May 23, only six days before the designated date, and the Memorial Day Weekend accounted for three of those six days. As of May 24, Chajet was already unavailable. Given the short time period involved, and the lack of evidence that Chajet's office offered information as to how he could be reached, we see no basis to criticize Ryan's actions. After consulting with her client the day after Memorial Day, Ryan decided to dismiss the Mine Act complaint. We would be hard pressed on this record to regard her dismissal motion as an abusive pleading causing harm to Asarco. Cf. Robert K. Roland v. Secretary, 7 FMSHRC 630, 635-36 (May 1985). In short, we do not find any evidence of abusive behavior by Marin or her counsel meriting imposition of Rule 11 sanctions.

B. Applicability of Rule 37(b)(2) Sanctions

The second issue presented is whether the Commission may impose sanctions against Marin under Fed. R. Civ. P. 37(b)(2) ("Rule 37(b)(2)"),

which provides, in relevant part, monetary sanctions for discovery abuse.<sup>4</sup> Apart from whether the Mine Act provides for the imposition of discovery abuse sanctions, we conclude that Rule 37(b)(2), by its express terms, does not apply to the proceeding before us.

Rule 37(b)(2) applies when an order compelling discovery has been issued upon motion and a party, in defiance or violation of such an order, fails to provide or communicate the discoverable material. E.g., Salahuddin v. Harris, 782 F.2d 1127, 1131 (2d Cir. 1986); Fox v. Studebaker Worthington, Inc., 516 F.2d 989, 994 (8th Cir. 1975). Here, Marin was not being deposed pursuant to such an order but, rather, appeared pursuant to a subpoena. Thus, invocation of Rule 37(b)(2) is inappropriate.

Even if this matter were viewed as a subpoena compliance dispute under the Mine Act, Rule 37(b)(2) would not apply. As Rule 1(b) indicates, the Commission consults the Federal Rules for guidance only when the Mine Act and Commission Procedural Rules do not otherwise provide for appropriate procedure in a given area. The Mine Act and Commission Procedural Rules explicitly provide for subpoena enforcement. Pursuant to the Act and the Commission's rules, federal district courts have the power to enforce a subpoena and impose sanctions for failure to comply with the subpoena. 30 U.S.C. § 823(e); 29 C.F.R. § 2700.58. Asarco's enforcement remedy, if any, was to request the judge or Commission to apply for subpoena enforcement in the appropriate district court. Asarco's reliance on Commission Procedural Rule 1(b) is misplaced.

Furthermore, if Rule 37(b)(2) were applicable to the facts of this case, monetary sanctions would not be warranted. Commission Procedural Rule 56(b) contemplates that the parties will attempt to agree on deposition schedules. 29 C.F.R. § 2700.56(b). As noted above, Chajet sent the notice of deposition to Marin's counsel shortly before the scheduled date and had

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<sup>4</sup> Rule 37(b)(2) falls under the general heading "Failure to Comply with Order" and is entitled "Sanctions by Court in Which Action is Pending." It provides in pertinent part:

If a party ... fails to obey an order to provide or permit discovery, ... the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

\* \* \* \*

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

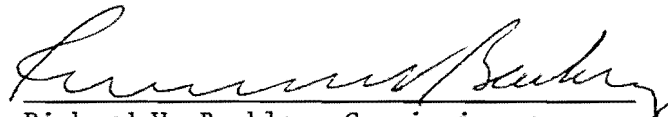
not consulted her as to an acceptable date. Ryan telephoned Chajet the day after receipt of the notice to attempt to postpone the deposition and found that he was already en route to Arizona. Ryan agreed to go ahead with the deposition and, during the course of preparation, decided to withdraw the Mine Act complaint. She announced her intention at the deposition and attempted to reach Judge Morris by telephone at that time to move to withdraw the complaint. The facts of this case do not disclose discovery abuse by a recalcitrant party.

III.

Conclusion

For the reasons set forth above, we affirm the judge's decision.

  
Ford B. Ford, Chairman

  
Richard V. Backley, Commissioner

  
Joyce A. Doyle, Commissioner

  
Arlene Holen, Commissioner

  
L. Clair Nelson, Commissioner

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 26, 1992

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

v.

LJ'S CORPORATION

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:  
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:  
:  
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:  
:

Docket No. VA 90-47

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

## DECISION

BY THE COMMISSION:

At issue in this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) (the "Mine Act"), is whether LJ's Coal Corporation ("LJ") violated 30 C.F.R. § 49.6(b) because of the alleged failure of its independent contractor, Mine Technology Rescue Station ("MT"), to test mine rescue apparatus at intervals not exceeding 30 days.<sup>1</sup> Commission Administrative Law Judge Avram Weisberger concluded that LJ did not violate section 49.6(b). 13 FMSHRC 1491 (September 1991) (ALJ). The Commission granted the Petition of the Secretary of Labor ("Secretary") for Discretionary Review. For the reasons set forth below, we reverse the judge's decision.

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<sup>1</sup> Section 49.6(b) provides:

Mine rescue apparatus and equipment shall be maintained in a manner that will ensure readiness for immediate use. A person trained in the use and care of breathing apparatus shall inspect and test the apparatus at intervals not exceeding 30 days and shall certify by signature and date that the inspections and tests were done. When the inspection indicates that a corrective action is necessary, the corrective action shall be made and the person shall record the corrective action taken. The certification and the record of corrective action shall be maintained at the mine rescue station for a period of one year and made available on request to an authorized representative of the Secretary.



## I.

### Factual Background and Procedural History

LJ's No. 1 Mine, an underground coal mine, is in Lee County, Virginia. LJ contracted with MT to provide it with a mine rescue station and related services. On April 11, 1990, Mine Safety and Health Administration ("MSHA") Inspector Fred Buck examined MT's records of the mine rescue apparatus made available to LJ pursuant to MT's contract with LJ. Buck found that inspection and testing of the mine rescue apparatus had not been done within the 30-day period prescribed under section 49.6(b). On April 16, 1990, Buck issued a citation to LJ pursuant to section 104(a) of the Mine Act, 30 U.S.C. § 814(a), alleging a violation of section 49.6(b). The citation states:

During an inspection of the Mine Technology Mine Rescue Station the following violation was observed[:] The mine rescue apparatus was not being tested within the 30 day interval. The records showed the 30 days was exceeded by as much as 4 days.

At the hearing, Inspector Buck testified that, according to MT's records, the required inspection and testing under section 49.6(b) had not been done within 30 days. LJ presented no evidence. In his decision, Judge Weisberger found that, at best, the evidence established that MT's records did not contain an entry listing an inspection of the mine rescue apparatus within the relevant 30-day period. Judge Weisberger concluded that this evidence, by itself, was insufficient to establish that, in fact, the apparatus had not been tested within a 30-day interval. As a result, Judge Weisberger dismissed the citation. 13 FMSHRC at 1492.

## II.

### Disposition of Issues

On review, the Secretary argues that the judge erred in finding that LJ did not violate section 49.6(b). The Secretary asserts that she established a prima facie case, having shown that MT's records indicated that more than 30 days had elapsed between inspections. The Secretary argues that, after establishing a prima facie case, the operator must provide evidence that the required inspection was actually conducted.

Section 49.6 provides, in pertinent part, that a person trained in the use and care of breathing apparatus shall inspect and test the mine rescue apparatus at intervals not exceeding 30 days and shall certify by signature and date that the inspections and tests were done. The regulation also provides that a record of the certification shall be maintained at the mine rescue station for a period of one year and made available on request to an authorized representative of the Secretary.

The Secretary requires certification of inspections by operators in order to allow MSHA inspectors, upon review of the records, to determine

whether inspection and testing has been conducted as prescribed in the mandatory safety standard. PDR at 4; S. Br. at 4. If the Secretary were unable to establish a violation by relying on the operator's own records to indicate that the inspection had not been conducted, her only recourse would be to monitor constantly each operator's inspection and testing activities. The Secretary maintains that such a procedure would be unworkable. PDR at 5. We agree.

Clearly, the purpose of the required recordkeeping is to allow the Secretary, simply by examining the records, to determine whether the operator has conducted the inspection and testing. We agree with the Secretary that the absence of certification of inspection and testing of the mine rescue apparatus, within the 30-day period required by the regulation, is sufficient to establish a prima facie case of a violation. We recognize that the operator may have inspected and tested the mine rescue apparatus, as required, but, for some reason, failed to record such inspection and testing. If such be the case, the operator could come forward with evidence that the inspection and testing were, in fact, performed as required. Since the operator is in the best position to know whether the inspection and testing has been done, we hold that, upon a showing by the Secretary that the operator's records indicate the required certification was not made, the violation is established unless the operator can show that such inspection actually occurred within the relevant time period. Cf. Southern Ohio Coal Company, 14 FMSHRC 1, 13 (January 1992); Mid-Continent Resources, 11 FMSHRC 505, 509 (April 1989).

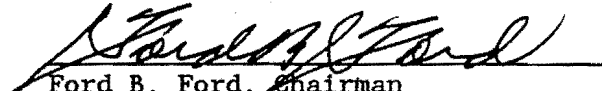
Inspector Buck testified that the records required to be kept under section 49.6 indicated that the mine rescue breathing apparatus had not been inspected and tested during the 30-day interval. Tr. 11-12. LJ did not call any witnesses or offer other evidence to show that the required inspection and testing had actually been conducted. See Tr. 24-25. LJ's counsel argued only that there was no evidence that the equipment had not, in fact, been tested. We conclude that the Secretary established a violation.


Accordingly, we reverse the judge's finding that LJ did not violate section 49.6(b). The citation indicated that the violation was not of a significant and substantial nature and that it resulted from low negligence. See Tr. 24. Thus, we assess the \$20 civil penalty proposed by the Secretary.


III.

Conclusion

For the reasons set forth above, we reverse the judge's decision. We conclude that LJ violated section 49.6(b), reinstate the section 104(a) citation, grant the Secretary's petition for civil penalty, and assess a civil penalty of \$20 proposed by the Secretary.

  
Ford B. Ford, Chairman

  
Richard V. Backley, Commissioner

  
Joyce A. Doyle, Commissioner

  
Arlene Holen, Commissioner

  
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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 28, 1992

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket Nos. WEST 90-112-R
ADMINISTRATION (MSHA)	:	WEST 90-113-R
	:	WEST 90-114-R
v.	:	WEST 90-115-R
	:	WEST 90-116-R
WYOMING FUEL COMPANY	:	

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

## DECISION

BY THE COMMISSION:

These five contest proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)(the "Mine Act" or "Act"), and involve three citations, issued to Wyoming Fuel Company ("WFC") by the Department of Labor's Mine Safety and Health Administration ("MSHA") pursuant to section 104(a) of the Mine Act, 30 U.S.C. § 814(a), and two imminent danger orders, issued pursuant to section 107(a) of the Mine Act, 30 U.S.C. § 817(a).

Following an expedited evidentiary hearing, Commission Administrative Law Judge John J. Morris reaffirmed his pretrial grant of WFC's motion for an expedited hearing. 12 FMSHRC 2003, 2008-11 (October 1990)(ALJ). The judge vacated the two citations that alleged violations of 30 C.F.R. § 75.329-1(a), on the basis that the cited standard, by its terms, did not apply to the mine in question.<sup>1</sup> In reaching this conclusion, he disallowed modification by MSHA of the citations, subsequent to their termination, to allege violations of 30 C.F.R. § 75.316, on the grounds that terminated citations may not be modified.<sup>2</sup> 12 FMSHRC at 2012. The judge also vacated the two imminent danger orders, based on his finding that the inspectors' actions belied their stated opinions that imminent dangers existed in the mine. 12 FMSHRC at 2050-51, 2058. He vacated the third citation (No. 3241333) as well, which alleged that WFC was working contrary to the terms of an imminent danger withdrawal order, based on the fact that he had found that imminent danger order invalid. 12 FMSHRC at 2058.

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<sup>1</sup> Section 75.329-1(a) provides in pertinent part that, "[a]ll areas of a coal mine from which the pillars have been wholly or partially extracted and abandoned areas shall be ventilated or sealed by December 30, 1970...."

<sup>2</sup> Section 75.316 provides in part that a "ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator...."

For the reasons that follow, we affirm in result the judge's vacation of Citation No. 3241333. We reverse the judge's determinations that he was without discretion to determine whether WFC's motion for an expedited hearing should be granted, and that terminated citations may not be modified by the Secretary. We vacate the judge's decision as to the imminent danger orders, and remand for further proceedings.

I.

Factual Background and Procedural History

WFC operates the Golden Eagle Mine, an underground coal mine located in Colorado. In a 24-hour period, the mine liberates over five million cubic feet of methane.

A. The Second South Section

WFC had not mined the Second South area since 1985 because of floor heave and ventilation problems. In late 1989, WFC decided to seal the area because it determined that it could no longer be examined safely. In January 1990, WFC blocked all six of the entries with Kennedy stoppings.<sup>3</sup>

On February 12, 1990, MSHA Inspector Donald Jordan, accompanied by Mark Bayes, an assistant mine foreman for WFC, examined the Second South area, and noticed the Kennedy stoppings erected across all six entries. Inspector Jordan took methane readings outside each of the six stoppings, using a hand-held methane detector, and obtained readings ranging from .6 to 1.5% methane. Tr. 45-46, 48. Shortly thereafter, he used an aspirator pump to withdraw samples from behind the stopping in the No. 1 entry, and obtained a methane reading in excess of 9%. Tr. 53-54, 62.

After consulting with his subdistrict manager, Joe Paplovich, Inspector Jordan orally issued an imminent danger withdrawal order. Inspector Jordan had determined that an imminent danger existed because he believed that there were ignition sources behind the stoppings. Tr. 65, 110-11. He knew of six roof falls that had occurred in the Second South area. Tr. 65, 109-10. He was of the opinion that a roof fall behind the stoppings could create an incentive spark if steel struck steel, and, due to the presence of methane, could result in an explosion. Tr. 66, 97, 111.

After Inspector Jordan left Second South, he and other MSHA personnel held a conference with WFC management to discuss abatement methods. It was agreed that WFC would erect permanent seals in the area, and a detailed abatement plan was developed for construction of the seals. The plan required, in part, that certified personnel be present to monitor gas levels, that methane levels be maintained below 1%, and that non-sparking tools be used. Tr. 223.

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<sup>3</sup> A Kennedy stopping is comprised of a series of telescopic metal panels and is used to direct air courses. Tr. 42.

After the meeting, Inspector Jordan went back to the mine and issued a written imminent danger order covering the entire mine, and a section 104(a) citation alleging a significant and substantial ("S&S") violation of section 75.329-1(a).<sup>4</sup> Inspector Jordan believed that the abandoned area in the Second South section had been neither ventilated nor sealed as required by section 75.329-1(a). Tr. 72. He subsequently modified the Second South imminent danger order to allow construction of the permanent seals under the controlled conditions of the abatement plan. The modification provided that "[n]o other work will be done until the order is terminated." Order No. 2930784-01.

In carrying out the approved abatement plan, WFC employees worked within two to three feet of the Kennedy stoppings while constructing the permanent seals. Tr. 462. On February 17, the seals were completed after approximately 113 miners had worked five days. Tr. 404-05, 462, 893. The citation was then terminated. Tr. 70.

On that same day, the Second South imminent danger order was again modified to "prohibit any other work until the atmosphere behind the seals has passed either above or below the explosive range for methane and oxygen gas combinations." Order No. 2930784-02. The modification provided that "[o]nly those persons necessary to monitor the gases and safeguard the mine are to be allowed underground." *Id.* The order was again modified later that day to allow resumption of production and to require WFC to monitor methane levels behind the seals for 72 hours. Order No. 2930784-03; Tr. 201. On February 28, after it was determined that methane levels were beyond the explosive range, MSHA terminated the Second South imminent danger order. Tr. 114, 202-03, 564, 896.

#### B. The First Right Section

In December 1988, WFC had decided to seal the First Right section because it was unable to maintain a methane level below 2%, and water was flooding into the area. Tr. 347-48, 354, 357-58. In February 1989, WFC erected Kennedy stoppings in all three entries of the section. Construction of the permanent seals began on February 14, 1990, the day after issuance of the Second South imminent danger order. Tr. 349, 363, 478-79.

On February 16, while the Second South abatement work was going on, MSHA Inspector Anthony Duran, accompanied by Frank Perko, the safety supervisor for the mine, travelled to the First Right Section and observed six miners and a foreman erecting permanent seals. Tr. 141-43, 500. Inspector Duran obtained methane readings ranging from 2% to 5% in front of the stoppings, and up to 8% near a small hole in one of the stoppings. Tr. 144-46, 149.

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<sup>4</sup> The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which, in pertinent part, distinguishes as more serious in nature any violation that "could significantly and substantially contribute to the cause and effect of a ... mine safety or health hazard...."

Inspector Duran issued a section 107(a) imminent danger order. He believed "there was a possibility of an imminent danger behind [the] Kennedys," because there was an unknown mixture of methane behind the stoppings and a spark from a roof fall or from the tools being used to construct the seals could cause an ignition. Tr. 151-53, 159, 198. Inspector Duran also issued Citation No. 3241333 alleging WFC was working contrary to the terms of the earlier imminent danger order. Tr. 155. That citation, as issued, described MSHA's enforcement action to be under both sections 104(a) and 107(a), but no section of the Mine Act or regulations was set forth as having been violated. Inspector Duran also issued a second citation, No. 3241332, alleging a violation of section 75.329-1(a) in the First Right area. The mine was evacuated, and MSHA and WFC officials met to establish a plan for completion of the permanent seals in that area. Tr. 199. On February 17, after the conditions had been abated, the imminent danger order and citation were terminated.

On March 6, subsequent to the termination of the two citations alleging violations of section 75.329-1(a) and one week prior to the evidentiary hearing, the Secretary served WFC with modifications of the citations. The modifications changed the standard allegedly violated from 30 C.F.R. § 75.329-1(a) to 30 C.F.R. § 75.316, and stated that the areas were not "properly sealed and the stopping[s] in use as seals were not constructed as explosion proof seals as required by the approved ventilation ... plan." Exhs. S-1, S-2.

### C. Hearing and Judge's Decision

At the evidentiary hearing, WFC objected to the modifications of the citations on the grounds that citations cannot be modified after termination. Tr. 9-10. The Secretary contended that she may modify a citation at any time and that, in any event, the proof at trial would be the same for either the modified or the unmodified versions of the citations. Tr. 12-13, 16-17. The judge sustained WFC's objection, and the Secretary proceeded at the hearing on the original citations. Tr. 14, 23.

In his decision, the judge confirmed his earlier ruling that WFC was entitled to an expedited hearing on the imminent danger orders because section 107 of the Act and Commission Procedural Rule 52, 29 C.F.R. § 2700.52, demonstrated to him that expedited hearings on such orders are not restricted to emergency situations and are not left to the discretion of the presiding judge. 12 FMSHRC at 2008-11. Citing Clinchfield Coal Company v. FMSHRC, 895 F.2d 773, 776 (D.C. Cir. 1990), and Emery Mining Corp./Utah Power & Light Co., 10 FMSHRC 1337 (March 1989)(ALJ), the judge reaffirmed his bench ruling and held that the two citations could not be modified to allege violations of section 75.316 because the citations had been terminated at the time of attempted modification. 12 FMSHRC at 2012.

The judge vacated both imminent danger orders after determining that the inspectors' belief in the existence of "an impending accident or disaster must be measured in light of their actions." 12 FMSHRC at 2050. The judge concluded that "MSHA's undisputed actions ... necessarily cause me to conclude that MSHA did not believe 'an impending accident ... [was] likely to occur at

any moment.'" Id. (citations omitted). The judge based this conclusion upon the fact that MSHA had permitted 113 miners to construct seals in close proximity to the stoppings and MSHA had not required the atmosphere behind the stoppings to be stabilized through the addition of inert gas before miners were permitted to enter the area. 12 FMSHRC at 2051, 2057-58.

The judge also vacated the two citations alleging violations of section 75.329-1(a) because he found that the standard's application is limited to areas in mines that were pillared or abandoned prior to December 30, 1970, and that "the Secretary [could] not show [that] the [Golden Eagle] mine was in existence before 1970." 12 FMSHRC at 2057.

Finally, the judge dismissed Citation No. 3241333, reasoning that, although "credible evidence establishes the operator was 'working on an order,'" the citation must be vacated because the underlying order was invalid. 12 FMSHRC at 2058. Accordingly, the judge sustained WFC's five contests. 12 FMSHRC at 2058.

The Commission subsequently granted the Secretary's petition for discretionary review, in which she challenges the judge's decision to grant WFC's motion for an expedited hearing, the judge's determination that citations cannot be modified following their termination, and the judge's vacation of the imminent danger orders and Citation No. 3241333.

## II.

### Disposition of Issues

#### A. Expedited hearing

The Secretary argues that the judge erred in granting WFC's motion for an expedited hearing because section 107(e) does not mandate an expedited hearing but, instead, allows the Commission to decide what action may be appropriate. She maintains that, here, there was no reason to expedite WFC's contests in view of the fact that the imminent dangers orders had been terminated. The Secretary contends that requiring motions for expedited hearings to be granted "automatically" would result in burdening Commission judges and straining the Secretary's limited resources.

We begin by examining the plain meaning of section 107(e), 30 U.S.C. § 817(e). As the Commission has often recognized, the "primary dispositive source of information [about the meaning of statutory terms] is the wording of the statute itself." Consolidation Coal Co., 11 FMSHRC 1609, 1613 (September 1989)(citations omitted). Additionally, effect must be given, if possible, to every word in a statute. United States v. Menasche, 348 U.S. 528, 538-39 (1955). Section 107(e)(1) of the Mine Act provides in pertinent part that:

Any operator notified of an order under this section or any representative of miners notified of the 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....

30 U.S.C. § 817(e)(1)(emphasis added). Section 107(e)(2), 30 U.S.C. § 817(e)(2), provides that the "Commission shall take whatever action is necessary to expedite proceedings under this subsection." This language does not mandate that such hearings must be scheduled "immediately" in all circumstances, or that the Commission must automatically grant a party's motion for expedition on the terms sought.

The key words in this statutory language are "forthwith" and "expedite." Webster's Third New International Dictionary, Unabridged 895 (1971) ("Webster's"), defines "forthwith" as "with dispatch; without delay; within a reasonable time; immediately; immediately after some preceding event." Black's Law Dictionary 588 (5th ed., 1979) ("Black's"), defines "forthwith," in part, as "[i]mmediately; without delay; directly; within a reasonable time under the circumstances of the case; promptly and with reasonable dispatch...." Webster's defines "expedite," as "to carry through with dispatch; execute promptly; to accelerate the process...." Webster's at 799. Black's definition of "expedite" is substantially the same. Black's at 518.

We conclude that sections 107(e)(1) & (2) require the Commission to provide an opportunity for a hearing on an imminent danger order with dispatch and without undue delay but, nevertheless, within a period of time reasonable under the circumstances of each case. The terminology requires promptness, but does not require immediacy under all circumstances. Accordingly, we hold that informed discretion remains with Commission judges in scheduling hearings on imminent danger orders to consider factors that may affect the period of time reasonable under the circumstances of each case. For instance, the judge may consider such factors as whether an imminent danger order is still in effect and the time necessary for a party to prepare adequately for a hearing in light of the complexity of the case.

In the present case, the Secretary opposed WFC's motion to expedite on the grounds that the closure order was no longer in effect and that the Secretary's management of the case was adversely affected because she was forced to go to trial with outstanding discovery requests. S. Br. at 19, 23. The judge did not expressly consider these factors when ruling on WFC's motion. The judge focused only upon whether section 107(e) deprived him of all discretion in granting motions to expedite hearings on imminent dangers and determined that it did. For the reasons discussed above, we reverse that determination. However, because the hearing has already been held, and because the question of whether the hearing should have been expedited under the circumstances is now moot, further consideration of the issue by the judge is unnecessary.

#### B. Modification of terminated citations

The Secretary submits that the judge erred in denying her modifications to allege violations of section 75.316 rather than section 75.329-1(a). We hold that, absent legal prejudice to WFC, the Secretary's modifications of the citations were permissible.

WFC's essential argument on review is that the citations had been terminated prior to the attempted modifications and, thus, because they were no longer in effect within the meaning of section 104(h) of the Mine Act, 30 U.S.C. § 814(h), they could not be modified. Section 104(h) provides that "[a]ny citation or order issued under this section shall remain in effect until modified, terminated or vacated by the Secretary or his authorized representative, or modified, terminated or vacated by the Commission or the courts pursuant to section 105 or 106." The judge agreed with WFC's position, citing his earlier decision in Emery Mining, supra, 10 FMSHRC at 1347, in which he held that "once a citation or order is no longer in effect because it was terminated it cannot be modified." 12 FMSHRC at 2012. We disagree.

The Act does not define "termination," nor does the legislative history explain the meaning or consequences of terminating a citation or withdrawal order. However, termination of citations and orders is a common administrative function of the Secretary. She states that termination of a citation is merely an administrative action used to indicate to an operator that it has successfully abated a violative condition and that the operator is no longer subject to a potential withdrawal order under section 104(b), 30 U.S.C. § 814(b), for "failure to abate" the alleged violation. According to the Secretary, termination of a citation means that the cited condition no longer exists, since abatement has been accomplished, not that the citation itself no longer exists for other legal purposes. The Secretary's policy manual for the guidance of MSHA inspectors reflects the Secretary's longstanding position in this regard. I Coal Mine Inspection Manual: Procedure, Orders, Citations and Inspection Reports § B, MSHA form 7000-3 (1982). See Mettiki Coal Co., 13 FMSHRC 760, 766-67 & n.6 (May 1991) (MSHA's manuals may serve as accurate guides to MSHA policies and practices).

WFC does not dispute the Secretary's contention that, at the least, termination of a citation informs the operator that abatement of the violative condition has been completed, and that the operator is not subject to a section 104(b) withdrawal order involving that citation. Moreover, in Loc. U. 1810 UMWA v. Nacco Mining Company, 11 FMSHRC 1231 (July 1989), the Commission concluded that termination occurs when the Secretary determines that a violative condition has been abated and, therefore, signals that the violative condition no longer exists. 11 FMSHRC at 1236.

Although it is not readily apparent from the language of section 104(h) what legal actions may or may not be taken with respect to a citation or order following its termination, it is obvious that a citation or order, even though terminated, remains in effect for purposes of subsequent contest and civil penalty proceedings. The citations in question, for example, have been contested by WFC, even though they have been terminated. Also, a terminated citation remains subject to vacation by the Secretary, the Commission, or a court. See section 104(h). Indeed, WFC's contests of the citations seek their vacation by the Commission, and the Secretary's authority to vacate these citations, even though they have been terminated, is not disputed.

Addressing a similar problem in Nacco, supra, the Commission explained:

Thus, the language of section 104(h) that states that a citation or order issued under section 104 "shall remain in effect until modified" does not necessarily mean that the original citation or order ceases to have any effect following modification.... Rather, the original citation or order remains in effect, as modified.

11 FMSHRC at 1236.

Accordingly, we conclude that termination does not divest the Secretary of jurisdiction over the citation or order or set in stone the initial citation or order as written. We reiterate the Commission's view set forth in Nacco that termination of a citation is meant only to convey that a violative condition has been abated and to inform the operator that it will not be subject to a section 104(b) "failure to abate" withdrawal order involving that citation. Consequently, in appropriate circumstances, the Secretary may modify a terminated citation or order. Consistent with the Secretary's basic position herein, however, we emphasize that the Secretary may not modify a terminated citation to direct further abatement -- for the foundation of our holding is that termination does no more and no less than signal that abatement has been successfully completed.<sup>5</sup>

The remaining issues are the scope of the Secretary's modification authority and whether the modifications in the present case are permissible. Section 104(a) citations are essentially "complaints" by the Secretary alleging violations of mandatory standards. The Secretary's attempted modifications, alleging, based on the same facts, that a different standard has been violated, are essentially proposed "amendments" to the initial complaints, i.e., citations. The Commission has previously analogized the modification of a citation to an amendment of pleadings under Fed. R. Civ. P. 15(a).<sup>6</sup> Cyprus Empire Corp., 12 FMSHRC 911, 916 (May 1990). In Cyprus Empire, where the operator conceded that it was not prejudiced thereby, the Commission affirmed the trial judge's modification of a terminated citation to allege violation of a different standard. Id.

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<sup>5</sup> The reliance by WFC and the judge upon an observation in the D.C. Circuit's decision in Clinchfield, 895 F.2d at 776, is misplaced. In that case, involving the Mine Act's compensation provisions, 30 U.S.C. § 821, the Court noted in passing that "the power to modify evidently ceases after an order has been terminated." This statement was dictum, conditionally phrased, and not further explained.

<sup>6</sup> The Commission's Procedural Rules, 29 C.F.R. Part 2700, provide that on questions of procedure not regulated by the Act, the Commission's rules, or the Admin. Procedure Act, 5 U.S.C. § 551 et seq. (1988), the Commission may apply the Fed. R. Civ. P., insofar as "practicable" and "appropriate." 29 C.F.R. § 2700.1(b).

In Federal civil proceedings, leave for amendment "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). The weight of authority under Rule 15(a) is that amendments are to be liberally granted unless the moving party has been guilty of bad faith, has acted for the purpose of delay, or where the trial of the issue will be unduly delayed. See 3 J. Moore, R. Freer, Moore's Federal Practice, Par. 15.08[2], 15-47 to 15-49 (2d ed. 1991)("Moore's"). And, as explained in Cyprus Empire, legally recognizable prejudice to the operator would bar otherwise permissible modification.

Here, there has been no assertion that the Secretary has been guilty of bad faith or undue delay. Rather, in response to the Secretary's petition for review of the judge's ruling on modification, WFC argued that it would be prejudiced by modification of the citations.

Accordingly, we reverse the judge's finding that a citation cannot be modified after it has been terminated, and remand this matter for consideration of whether WFC would suffer legally recognizable prejudice if Citation Nos. 2930785 and 3241332 were modified as proposed by the Secretary. The judge may seek guidance, insofar as "practicable" and "appropriate," in Fed. R. Civ. P. 15 and case law thereunder. If the judge finds prejudice, the citations shall remain unmodified and his holding vacating them, on the basis of the inapplicability of section 75.329-1, shall stand. If the judge does not find legally recognizable prejudice, the citations shall be modified to allege violations of section 75.316, and the judge shall conduct such further proceedings as he deems necessary.

#### C. Validity of imminent danger orders

Section 3(j) of 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...." 30 U.S.C. § 802(j). In Rochester & Pittsburgh Coal Co., 11 FMSHRC 2159 (November 1989)("R&P"), the Commission reviewed the precedent analyzing this definition and noted that "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." 11 FMSHRC at 2163 (citations omitted). It noted further that the courts have held 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." Id., quoting Eastern Associated Coal Corp. v. Interior Bd. of Mine Op. App., 491 F.2d 277, 278 (4th Cir. 1974).

In Utah Power & Light Co., 13 FMSHRC 1617, 1621 (October 1991), the Commission held that there must be some degree of imminence to support a section 107(a) order and noted that the word "imminent" is defined as "ready to take place: near at hand: impending ...: hanging threateningly over one's head: menacingly near." 13 FMSHRC at 1621 (citation omitted). The Commission determined that the legislative history of the imminent danger provision supported a conclusion that "the hazard to be protected against by the withdrawal order must be impending so as to require the immediate withdrawal

of miners." Id. Finally, the Commission stated that the inspector must determine whether an imminent danger exists without considering the "percentage of probability that an accident will happen." Id., quoting S. Rep. No. 181, 95th Cong., 1st Sess. 38 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 626 (1978) ("Mine Act Legis. Hist.").

In both R&P and UP&L, the Commission concluded that an inspector must be accorded considerable discretion in determining whether an imminent danger exists because an inspector must act with dispatch to eliminate conditions that create an imminent danger. R&P, 11 FMSHRC at 2164; UP&L, 13 FMSHRC at 1627. As the U.S. Court of Appeals for the Seventh Circuit recognized:

Clearly, the inspector is in a precarious position. He is entrusted with the safety of miners' lives, and he must ensure that the statute is enforced for the protection of these lives. His total concern is the safety of life and limb.... We must support the findings and the decisions of the inspector unless there is evidence that he has abused his discretion or authority.

Old Ben Coal Corp. v. Interior Bd. of Mine Op. App., 523 F.2d 25, 31 (7th Cir. 1975)(emphasis added).

The judge did not apply the appropriate analysis in his imminent danger determination. He recited the extensive evidence, but did not weigh it in order to determine whether a preponderance of the evidence showed that the conditions or practices, as observed by the inspectors, could reasonably be expected to cause death or serious physical harm, before the conditions or practices could be eliminated. The judge apparently did not consider R&P or Old Ben (UP&L had not yet been decided), nor did he determine whether the inspectors abused their discretion in issuing the orders.

Instead, the judge found that the imminent danger orders were invalid solely because the inspectors' actions in permitting 113 miners to construct permanent seals in close proximity to the Kennedy stoppings, and not requiring that the atmosphere in the First Right section be stabilized through the insertion of inert gas, demonstrated that MSHA did not believe that "an impending accident ... [was] likely to occur at any moment." 12 FMSHRC at 2050 (citations omitted). The judge relied upon the decision of the Board of Mine Operations Appeals in Freeman Coal Mining Corp., 2 IMBA 197, 212 (1973). The judge cited Freeman to stand for the propositions that "the test of imminence is objective and ... the inspector's subjective opinion is not necessarily to be taken at face value," and that the "inspector[s'] belief of the existence of an impending accident or disaster must be measured in light of their actions." 12 FMSHRC at 2048, 2050.

Although the inspectors' actions are relevant to a consideration of whether imminent dangers existed in the two areas, their actions must be viewed within the context of the specific conditions extant. Section 107(a)

requires elimination of the conditions giving rise to the imminent danger withdrawal order. Actions to achieve such elimination must be suitable to the specific conditions presented, and the method of abatement is left to the informed discretion of the designated representatives of the Secretary. Some imminently dangerous conditions may require abatement that poses a degree of unavoidable risk to miners. The fact that such actions are necessary to abate a condition, however, does not mean that the condition does not pose an imminent danger.

Because the judge failed to apply the appropriate analysis as to imminent danger and to weigh the evidence accordingly, we vacate his decision as to the imminent danger orders, and remand for further consideration consistent with this decision. In applying the Commission's imminent danger test, the appropriate focus is on whether the inspector abused his discretion when he issued the imminent danger order. The judge should set forth necessary factual findings, credibility determinations and conclusions of law. The judge should make factual findings as to whether the inspector made a reasonable investigation of the facts, under the circumstances, and whether the facts known to him, or reasonably available to him, supported issuance of the imminent danger order. In so doing, the judge should take into consideration the conditions observed by the inspectors in each of the two areas. We note that much of the evidence is contradictory and requires resolution by the judge.

D. Validity of Citation No. 3241333

Although the judge found that the "credible evidence establishes the operator was working on an order," he vacated Citation No. 3241333 because he found that the underlying imminent danger order was invalid. 12 FMSHRC at 2058. The Secretary argues that the judge erred in vacating the citation because the fact that an imminent danger order may later be found invalid does not excuse noncompliance with that order. She maintains that an operator cannot "pick and choose" which imminent danger order merits its compliance, on the chance that it might prevail when contesting the validity of the order.

We share the Secretary's concern that miner safety may be compromised if the validity of an underlying imminent danger order were a prerequisite to upholding a citation alleging noncompliance with that order. The legislative history of section 107 makes clear that the removal of miners from the perceived imminent danger is the paramount concern; disputes over whether the miners should, in fact, have been removed are resolved only afterward. For instance, the Senate Report for the Federal Coal Mine Health and Safety Act of 1969 (the "Coal Act") states that "the miners must be removed from the danger forthwith when the danger is discovered without waiting for any formal proceedings or notice.... After the miners are free of danger, then the operator can expeditiously appeal the action of the inspector." S. Rep. No. 411, 91st Cong., 1st Sess. 89 (1969), reprinted in Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess. Part 1 Legislative History of the Federal Coal Mine Health and Safety Act of 1969 at 215 (1975) ("Coal Act Legis. Hist.").

In a similar vein, under section 107(e)(1) of the Mine Act, 30 U.S.C. § 817(e)(1), the Act's provisions for temporary relief (30 U.S.C. §815(b)(2)) do not apply to imminent danger orders. The Senate Report for the Mine Act explains this limitation as follow:

It is the Committee's view that the authority under this section is essential to the protection of miners and should be construed expansively by inspectors and the Commission.... The Committee intends that the Act give the necessary authority for the taking of action to remove miners from risk. The Committee points out that, although imminent danger closure orders are subject to review by the Commission (as are all closure orders), Section 108(e) [107(e)] provides that no temporary relief may be granted from the issuance of such an order. This limitation on the review authority of the Commission in this respect does not suggest a limitation on the inspector's authority to issue such orders, but rather is consistent with the importance of the imminent danger order as a means of protecting miners.

Mine Act Legis. Hist. at 626 (emphasis added).

WFC contends that the Mine Act recognizes that an operator need not comply with an imminent danger order with which it disagrees and that sections 108, 110 and 111, 30 U.S.C. §§ 818, 820, 821, provide a remedy for such noncompliance. While we agree with WFC that the Mine Act contains sanctions for operator noncompliance with an imminent danger order, we find no indication in the Mine Act that such noncompliance is legally permissible or that the validity of an imminent danger order is a prerequisite to finding failure to comply with that order. Accordingly, we hold that the judge erred in finding that the validity of Citation No. 3241333 was dependent upon the validity of the Second South imminent danger order. Nevertheless, for the following reasons, we affirm in result the judge's vacation of the citation.

The Secretary asserts that WFC violated section 109(c) of the Mine Act, 30 U.S.C. § 819(c), by working contrary to the terms of an imminent danger order. S. Br. at 5, 14-15; Tr. 25. However, citation No. 3241333 does not, in fact, charge WFC with a violation of section 109(c). The citation was modified by Modification No. 3241333-01 to allege a violation of section 109(c). The citation was subsequently modified by Modification No. 3241333-02 to strike section 109(c) as the section of the Mine Act violated, and to substitute in its place section 107(a). Neither modification is part of the official record. While WFC attached Modification Nos. 3241333-01 and 3241333-02 to its post-hearing brief, the Secretary moved to strike the modifications from the official record because they had not been introduced into evidence and she had not had the opportunity to cross-examine as to them. Neither party has sought review of the judge's decision granting the Secretary's motion.

We find the Secretary's actions here to be confusing and inconsistent. The Secretary first modified the original citation to allege a violation of section 109(c), and later to allege a violation of section 107(a). The Secretary then successfully moved to strike those modifications from the record. On review, the Secretary is attempting to proceed on the first modification, alleging a violation of section 109(c). In an enforcement action, the Secretary "bears the burden of proving any alleged violation." Jim Walter Resources, Inc., 9 FMSHRC 903, 907 (May 1987). If the Commission were to affirm the citation as first modified, it would be in the untenable position of affirming a citation that is not part of the official record and one subsequently modified to allege a different violation. Under section 113(d)(2)(C) of the Mine Act, 30 U.S.C. § 823(d)(2)(C), the Commission may consider only those matters that are part of the record. Accordingly, we affirm the judge's vacation of the citation.

### III.

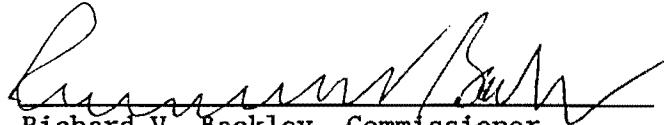
#### Conclusion

For the reasons set out above, we affirm in result the judge's vacation of Citation No. 3241333. We reverse the judge's conclusions that he was without discretion to determine whether WFC's motion for an expedited hearing should be granted and that the terminated citations cannot be modified. We remand for consideration of whether WFC suffered prejudice as a result of the modifications. Finally, we vacate the judge's decision vacating the imminent danger orders, and remand for reconsideration consistent with the principles set forth in this decision.



Accordingly, the judge's decision is affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion.

  
Ford, B. Ford, Chairman

  
Richard V. Backley, Commissioner

  
Joyce A. Doyle, Commissioner

  
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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 28, 1992

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

v.

TEN-A-COAL COMPANY

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Docket No. WEVA 89-274

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

## DECISION

BY THE COMMISSION:

This civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act" or "Act"), raises the issue of whether the Secretary of Labor may modify a terminated section 104(a) citation to a section 104(d)(1) order. Commission Administrative Law Judge Roy Maurer concluded that the citation could not be modified once it had been terminated. 12 FMSHRC 987 (May 1990)(ALJ). Consistent with our opinion in Wyoming Fuel Corp., 14 FMSHRC \_\_\_\_, No. WEST 90-112-R, et al. (August 1992), we reverse and remand this matter for further proceedings.

### I.

#### Factual and Procedural Background

The facts are essentially undisputed. Ten-A-Coal Company ("Ten-A") operates the Ward Mine, a surface coal mine located in Barbour, West Virginia. On May 3, 1989, James Young, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA"), conducted an inspection.

Inspector Young noticed that the highwall, over 60 feet high, was not scaled back. Part of the highwall had collapsed. A five-foot barrier was left between the bench and the wall. The bench was generally seven to eight feet wide and 10 feet at its widest point. The high wall lacked any bench for over 40 feet. Loose clay and rocks were slipping from the highwall into the pit.

Inspector Young issued Citation No. 2944253, pursuant to section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1). It alleged a violation of 30 C.F.R. § 77.1000 in that Ten-A had not complied with its established ground

control plan, which required the highwall to be scaled back and a bench of 20 feet in width to be present along the highwall above the working pit. Young found the violation to be of a "significant and substantial" ("S&S") nature and Ten-A's negligence to be high. Young terminated the section 104(d)(1) citation 15 minutes after its issuance, after loose material had been removed from the highwall.

Inspector Young had also issued Citation No. 2944252, pursuant to section 104(a) of the Act, 30 U.S.C. § 814(a), alleging a violation of 30 C.F.R. § 77.1004(b), for Ten-A's failure to correct or post the unsafe ground condition observed in the highwall. Young found the violation to be S&S and Ten-A's negligence to be moderate. He terminated the section 104(a) citation three hours after its issuance, having observed that the needed work on the highwall was being performed and in belief that an examination would be conducted before work in the pit resumed.

Before leaving, Inspector Young told Frank Cunningham, co-owner of Ten-A, that he should consider the cited matters still under investigation because he wanted to discuss his findings with his supervisor. Young subsequently had that discussion with his supervisor. They determined that the conditions underlying the violation met the criteria for unwarrantable failure and that the operator's negligence was high. The next day, Inspector Young modified the previously terminated section 104(a) citation to a section 104(d)(1) order and modified the negligence finding from moderate to high.

At the hearing, the judge, sua sponte, raised the issue of the appropriateness of modifying the section 104(a) citation, since it had been abated and terminated. Tr. 51, 53-54, 55. The judge expressed his opinion that a terminated citation could not be modified, but reserved judgment to allow the Secretary an opportunity to justify her position to the contrary. Tr. 55.

In his decision, the judge concluded that Inspector Young's attempted modification of section 104(a) Citation No. 2944252 to a section 104(d)(1) order could not stand. 12 FMSHRC at 988. The judge stated that once a citation is no longer in effect because it has been terminated, the inspector no longer has the authority to modify it. Id. The judge affirmed the citation as originally written, finding Ten-A's violation of section 77.1004(b) to be S&S. He assessed a civil penalty of \$200 for the violation. 12 FMSHRC at 992.<sup>1</sup>

Ten-A did not seek review of the judge's determinations. The Commission granted the Secretary's petition for discretionary review, which challenges only the judge's conclusion that the modification of the inspector's section 104(a) citation to a section 104(d) order was impermissible.

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<sup>1</sup> The judge also affirmed Citation No. 2944253 as a section 104(d)(1) citation finding Ten-A's violation of section 77.1000 to be both S&S and the result of its unwarrantable failure to comply with the standard. 12 FMSHRC 989-92. He assessed a civil penalty of \$400 for the violation. 12 FMSHRC at 992.

## II.

### Disposition of Issues

In our companion decision issued this date in Wyoming Fuel, we held that, absent legal prejudice to the operator, the Secretary's modifications of section 104 citations, terminated pursuant to section 104(h) of the Act, 30 U.S.C. § 814(h), were permissible. Wyoming Fuel, 14 FMSHRC at \_\_\_\_, slip op. at 6-9. We concluded that termination of a section 104 citation or order is an administrative action of the Secretary which is meant to convey that a violative condition has been abated and to inform the operator that it will not be subject to a withdrawal order pursuant to section 104(b), 30 U.S.C. § 814(b), for failure to abate. 14 FMSHRC at \_\_\_\_, slip op. at 8. We emphasized that termination does no more and no less than signal that abatement has been successfully completed, and that a citation or order, even though terminated, remains in effect for other purposes, such as subsequent contest and civil penalty litigation and vacation. 14 FMSHRC at \_\_\_\_, slip op. at 7-8. Accordingly, we approved the Secretary's administrative authority to modify terminated section 104 citations and withdrawal orders in appropriate circumstances. 14 FMSHRC at \_\_\_\_, slip op. at 8.

We noted, however, that this administrative power is not without limits. We indicated that the Secretary could not use the modification process to direct further abatement. 14 FMSHRC at \_\_\_\_, slip op. at 8. We further likened the Secretary's modification of a terminated citation or order to amendment of a pleading pursuant to Fed. R. Civ. P. 15(a). Id. We concluded that a modification should be permitted unless the operator would be legally prejudiced by the modification. 14 FMSHRC at \_\_\_\_, slip op. at 9.

In Wyoming Fuel, the Secretary sought to modify section 104(a) citations to allege violation of a different standard from the one originally cited. In the present proceeding, the Secretary seeks to modify a section 104(a) citation to a section 104(d)(1) order, alleging that the cited violation resulted from the operator's unwarrantable failure and from high, rather than moderate, negligence. Absent prejudice to the operator, we find this a permissible form of modification. Cf. Consolidation Coal Co., 4 FMSHRC 1791, 1793-97 (October 1982) (approving modification of vacated section 104(d) withdrawal orders to section 104 citations).

Here, the Secretary's modification of the section 104(a) citation to a section 104(d)(1) order did not affect Ten-A's abatement of the citation. The modification was made about 24 hours after termination of the original citation. Inspector Young informed Ten-A that it should consider the matter still under investigation after he terminated the original citation and while he was still at the mine, because he wanted to discuss his findings with his supervisor. This action was demonstrative of good faith on the Secretary's part, and put Ten-A on notice that further Secretarial action concerning the alleged violation might occur. Ten-A has made no claim in this matter that it was legally prejudiced by the modification or that it was compromised in its ability to present a defense. (Indeed, it was the judge, not the operator, who raised the matter at hearing.) Under these circumstances, we perceive no legally recognizable prejudice to Ten-A. We therefore reverse the judge's

determination that the terminated section 104(a) citation could not be modified, and recognize the modification of the citation to a section 104(d)(1) order.

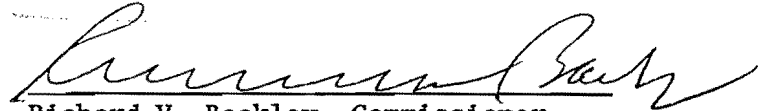
III.

Conclusion

Based on the foregoing conclusions, we remand this matter to the judge. The judge shall determine whether the issuance of a section 104(d)(1) order for Ten-A's violation of section 77.1004(b) was substantively appropriate and, if so, reconsider his assessment of the civil penalty.

Accordingly, we reverse the judge's conclusion as to the permissibility of the modification, approve the modification procedurally, and remand for further proceedings consistent with this decision.

  
Ford B. Ford, Chairman

  
Richard V. Backley, Commissioner

  
Joyce A. Doyle, Commissioner

  
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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 28, 1992

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

v.

SHAMROCK COAL COMPANY, INC.

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Docket No. KENT 90-60

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

## DECISION

BY THE COMMISSION:

This civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) (the "Mine Act" or "Act"), involves a dispute between the Secretary of Labor and Shamrock Coal Company, Inc. ("Shamrock") regarding whether Shamrock's violation of 30 C.F.R. § 75.1101-23 may properly be characterized as being of a significant and substantial ("S&S") nature.<sup>1</sup> Commission Administrative Law Judge Avram Weisberger concluded that the violation was not S&S because he did not find that the hazard contributed to by the violation was reasonably likely to occur. 12 FMSHRC 1944 (October 1990) (ALJ). The Commission granted the Secretary's petition for discretionary review challenging the judge's S&S determinations. On review, the Secretary's challenge is based entirely on the theory that the S&S nature of the violation should be examined in the context of the presumed occurrence of an emergency. Because the Secretary failed to raise this theory before the judge, we are unable to consider it on review, given the review strictures of the Act. Under these circumstances, we affirm

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<sup>1</sup> Section 75.1101-23 provides in pertinent part:

- (a) Each operator of an underground coal mine shall adopt a program for the instruction of all miners in the location and use of fire fighting equipment....

Shamrock was cited for failure to comply with the terms of the program required by section 75.1101-23. S. Br. at 2-3 n.1; Sh. Br. at 1.

The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious in nature any violation that "could significantly and substantially contribute to the cause and effect of a ... mine safety or health hazard...."

the judge's decision.<sup>2</sup>

I.

Factual Background and Procedural History

On September 20, 1989, John Linder, an inspector for the Department of Labor's Mine Safety and Health Administration ("MSHA"), issued Citation No. 3205519 to Shamrock pursuant to section 104(a) of the Mine Act, 30 U.S.C. 814(a), alleging an S&S violation of section 75.1101-23. The citation provides:

The operators approved fire fighting and evacuation plan which requires that the self contained self rescuers (SCSR's) for non-section workers will be allowed 10 minutes away from the SCSRs ... [w]as not being complied with in that four persons was cleaning belt conveyor for 006 section and they were 3,600 feet inby the mine portal. The mining heigh[t] was 52 to 64 inches in this area and only one self contain[ed] self rescuer was provided within 600 feet of the four person's.

At the evidentiary hearing, Shamrock contested only whether the violation of section 75.1101-23 was S&S. Sh. Br. at 2. The judge found that Shamrock had violated section 75.1101-23 but that the violation was not S&S. The judge summarized Inspector Linder's testimony that the SCSRs provide oxygen for one hour and would enable a miner to breathe in the event of an explosion or liberation of methane. 12 FMSHRC at 1946. He noted that the miners observed by the inspector were wearing "filter type rescuers" that did not produce oxygen and could not be used for some poisonous gases. Id. After further review of the evidence, he found:

Thus, although there was some hazard to the miners in the section in question, as a result of not having been provided with rescuers that could supply oxygen in the event of a fire or an explosion, the evidence fails to establish that there was any "reasonable likelihood" that the hazard contributed to would result in an injury-producing event. (U.S. Steel Mining Co., supra.) Accordingly, I conclude that it has not been established that the violation herein was significant and substantial.

12 FMSHRC at 1946-47.

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<sup>2</sup> This decision is one of three issued on this date involving the Secretary's attempt to raise this new theory on review without having first presented it to the judges below. The two other decisions issued today are: Beech Fork Processing, Inc., 14 FMSHRC \_\_\_\_, Docket No. KENT 90-398 (August 1992); and Shamrock Coal Co., 14 FMSHRC \_\_\_\_, Docket Nos. KENT 90-137 and KENT 90-142 (August 1992).

On review, the Secretary argues that the judge's finding that Shamrock's failure to provide SCSRs was not S&S is erroneous because the judge failed to analyze the S&S nature of the violation in the context of an emergency. S. Br. at 5. The Secretary maintains that, when considering the S&S nature of a violation involving a safety standard that is designed to take effect only in an emergency situation, the occurrence of such an emergency should be presumed. S. Br. at 6-7. The Secretary argues that the relevant question under the Commission's test in Mathies Coal Co., 6 FMSHRC 1 (January 1984), therefore, is not whether a fire is reasonably likely to occur but, instead, "given the presence of a fire or explosion, whether the failure to have a sufficient number of SCSRs within the specified distance from miners working underground is reasonably likely to result in serious injuries or deaths that would not otherwise occur if such SCSRs had been provided as required." S. Br. at 7.<sup>3</sup> The Secretary does not argue in the alternative that the judge's determination that an ignition was not reasonably likely to occur is without substantial evidence. Thus, the Secretary's case on review hinges entirely on the proposition that an emergency event should be presumed for purposes of the S&S analysis.

## II.

### Disposition of Issues

As in our companion decisions issued this date in Beech Fork Processing, Inc., 14 FMSHRC \_\_\_\_, Docket No. KENT 90-398 ("Beech Fork") and Shamrock Coal Co., 14 FMSHRC \_\_\_\_, Docket Nos. KENT 90-137 and KENT 90-142, the Secretary

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<sup>3</sup> A violation is properly designated as S&S "if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum, 3 FMSHRC 822, 825 (April 1981). In Mathies, the Commission explained:

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

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

6 FMSHRC at 3-4. See also Austin Power Co. v. Secretary, 861 F.2d 99, 104-05 (5th Cir. 1988), aff'g 9 FMSHRC 2015, 2021 (December 1987) (approving Mathies criteria). The Commission has held 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., Inc., 6 FMSHRC 1834, 1836 (August 1984).



presents a new theory in this case, i.e., that the S&S nature of violations involving safety standards that provide protection only in the event of an emergency should be examined in the context of the presumed occurrence of that emergency. The Secretary, however, failed to present this theory below for consideration by the judge and, therefore, has not preserved it for the Commission's review.

Explicit limits to Commission review are provided in section 113(d) of the Mine Act, 30 U.S.C. § 823(d). Section 113(d)(2)(A)(iii) of the Act, 30 U.S.C. § 823(d)(2)(A)(iii), provides, in pertinent part, that "[e]xcept for good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the administrative law judge had not been afforded an opportunity to pass." See also Commission Procedural Rule 70(d), 29 C.F.R. § 2700.70(d). The key Senate Report on the bill that was enacted as the Mine Act explains this provision as follows:

The Committee believes that the provision of section 114(d)(2) [section 113(d)(2)] that matters not raised before an Administrative Law Judge may not be raised before the Commission (except for good cause shown) and the provision of section 107(a) [section 106(a)] that objections not raised before the Commission cannot be raised before a reviewing court are consistent with sound procedure and do not deny essential due process. The Committee notes that fairness is also protected by provisions which would permit remanding of cases for further factfinding where warranted. It is the Committee's intention that the Commission and Administrative Law Judges permit parties every reasonable opportunity to adequately develop the record within these constraints and consistent with its duty to resolve matters under dispute in an expeditious manner.

S. Rep. No. 181, 95th Cong., 1st Sess. 38 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 at 637 (1978).

The explicit statutory limitation on the scope of Commission review set forth in section 113(d)(2) may be raised as an issue by an objecting party, or sua sponte, by the Commission itself, at any appropriate time during the Commission review process. See Midwest Minerals, Inc., 12 FMSHRC 1375, 1378 (July 1990); Ozark-Mahoning Co., 12 FMSHRC 376, 379 (March 1992); Union Oil of California, 11 FMSHRC 289, 301 (March 1989) ("Unocal"). This limitation on review is an important feature of the administrative trial and appeal structure established by the Act.

Here, the Secretary presented testimony at trial as to the existence of factors that would cause an ignition to be reasonably likely to occur, in an attempt to demonstrate that it was reasonably likely that injuries would occur as a result of the violation. See, e.g., Tr. 21-24. In other words, the

Secretary proceeded along established Mathies lines. N.3 supra. Neither party filed a post-hearing brief. The Secretary's theory on review that the occurrence of a fire or explosion should be presumed is a departure from her trial position. Thus, on review, the Secretary relies on a theory upon which the judge "had not been afforded an opportunity to pass." Nor has the Secretary demonstrated any cause for her failure to present her theory to the judge.

As we observed in Beech Fork, supra, the "Commission's practice has been to resolve these 'opportunity to pass' questions on a case-by-case basis." 14 FMSHRC at \_\_\_, slip op. at 5 (citations omitted). We noted that "a matter must have been presented below in such a manner as to obtain a ruling in order to be considered on review." Id. (citation omitted). In addition, we stated that the "matter must be raised with 'sufficient specificity and clarity [so] that the [judge] is aware that [he] must decide the issue.'" 14 FMSHRC at \_\_\_, slip op. at 5-6, quoting Wallace v. Dept. of the Air Force, 879 F.2d 829, 832 (Fed. Cir. 1989). We recognized that "a matter urged on review may have been implicitly raised below or is so intertwined with something tried before the judge that it may properly be considered on appeal." 14 FMSHRC at \_\_\_, slip op. at 6 (citation omitted). Here, however, none of the foregoing criteria is satisfied. The Secretary argued below only the theory that factors existed making a fire reasonably likely to occur. Thus, the judge was most likely unaware of the Secretary's theory that the S&S nature of the violation should be evaluated in the context of the presumed occurrence of an emergency.

In Beech Fork, we recognized that the Mine Act "establishes an orderly, two-tiered litigation system consisting of trial before a Commission judge and appellate review by the Commission." Id. We explained that the "rationale for requiring lower tribunals to first pass upon questions is that subsequent review is not hindered by the lack of necessary factual findings and the lack of application of the lower court's expertise or discretion." Id. (citations omitted). The Secretary's actions here conflict with this basic principle, that parties in Mine Act cases must first present their evidence and advance their legal theories before the judge, and not for the first time on appeal.

In addition, in Beech Fork we noted that the essence of Mathies analysis is a careful examination surrounding a specific violation, and that use of the presumption advanced by the Secretary would represent a departure from that analysis. Id. As in Beech Fork, we conclude that it "is incumbent upon the Secretary to develop a trial record demonstrating why the presumption that she wishes the Commission to accept is legally supportable." Id.


In sum, in the instant proceeding, the Secretary has asserted on review a theory upon which the judge was not afforded an opportunity to pass. She also has asserted no reason for her failure to present this theory to the judge. The language of section 113 of the Mine Act and Commission precedent bar us from considering the Secretary's theory in this case. See, e.g., Ozark-Mahoning, 12 FMSHRC at 379; Unocal, 11 FMSHRC at 297-98, 300-301. Because the Secretary did not proceed on alternative grounds, no other basis for review is presented. Accordingly, we affirm the judge's decision.

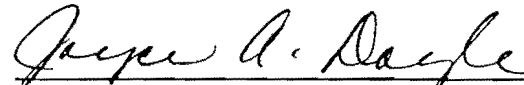
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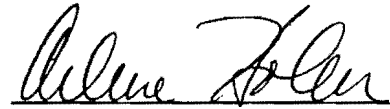
Conclusion

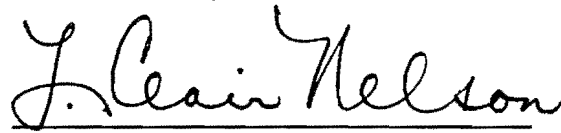
For the reasons set forth above, we affirm the judge's decision that Shamrock's violation of section 75.1101-23 was not S&S.

  
Ford B. Ford, Chairman

  
Richard V. Backley, Commissioner

  
Joyce A. Doyle, Commissioner

  
Arlene Holen, Commissioner

  
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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 28, 1992

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

v.

SHAMROCK COAL COMPANY, INC.

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:  
:  
:  
:  
:  
:

Docket Nos. KENT 90-137  
KENT 90-142

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

## DECISION

BY THE COMMISSION:

These civil penalty proceedings, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) (the "Mine Act" or "Act"), involve a dispute between the Secretary of Labor and Shamrock Coal Company, Inc. ("Shamrock") regarding whether Shamrock's violations of 30 C.F.R. §§ 75.403, 75.1101-1(a), and 75.1101-10 may properly be characterized as being of a significant and substantial ("S&S") nature.<sup>1</sup>

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<sup>1</sup> 30 C.F.R. § 75.403, entitled "Maintenance of incombustible content of rock dust," provides in pertinent part:

Where rock dust is required to be applied, it shall be distributed upon the top, floor, and sides of all underground areas of a coal mine and maintained in such quantities that the incombustible content of the combined coal dust, rock dust, and other dust shall be not less than 65 per centum, but the incombustible content in the return aircourses shall be no less than 80 per centum....

30 C.F.R. § 75.1101-1 is entitled "Deluge-type water spray systems," and section 75.1101-1(a) provides:

Deluge-type spray systems shall consist of open nozzles attached to branch lines. The branch lines

(continued...)

Commission Administrative Law Judge Avram Weisberger concluded that the violations were not S&S because he did not find that the hazards contributed to by the violations were reasonably likely to occur. 12 FMSHRC 2098 (October 1990)(ALJ). The Commission granted the Secretary's petition for discretionary review, in which she challenges the judge's findings by arguing, with respect to the violation of section 75.403, that the judge misapplied the Commission's test formulated in Mathies Coal Co., 6 FMSHRC 1 (January 1984). With respect to Shamrock's violations of sections 75.1101-1(a) and 75.1101-10, the Secretary's challenge is based entirely on the theory that the S&S nature of the violations should be examined in the context of the presumed occurrence of an emergency. For the reasons discussed below, we affirm the judge's decision.<sup>2</sup>

I.

Factual Background and Procedural History

Shamrock operates the Shamrock No. 18 Series Mine, an underground coal mine located in Leslie County, Kentucky. On January 10, 1990, MSHA Inspector James Delp issued three citations to Shamrock pursuant to section 104(a) of the Mine Act. Citation No. 3206452 alleges an S&S violation of section 75.403, and states, in pertinent part:

Rockdust applications in the outby area of 006 section are not adequate in that ... the results of a survey collected, during the period from 11-29 thru 11-30-

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<sup>1</sup>(...continued)

shall be connected to a waterline through a control valve operated by a fire sensor. Actuation of the control valve shall cause water to flow into the branch lines and discharge from the nozzles.

30 C.F.R. § 75.1101-10 is entitled "Water sprinkler systems; fire warning devices at belt drives," and provides:

Each water sprinkler system shall be equipped with a device designed to stop the belt drive in the event of a rise in temperature and each such warning device shall be capable of giving both an audible and visual warning when a fire occurs.

The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious in nature any violation that "could significantly and substantially contribute to the cause and effect of a ... mine safety or health hazard...."

<sup>2</sup> This decision regarding the Secretary's new theory is one of three issued this date. The two other decisions issued today are: Beech Fork Processing, Inc., 14 FMSHRC \_\_\_\_\_, Docket No. KENT 90-398 (August 1992); and Shamrock Coal Co., Inc., 14 FMSHRC \_\_\_\_\_, Docket No. KENT 90-60 (August 1992).

1989, in such area showed that 31 of 38 samples collected had an incombustible content of from 56 to 79.2 percent, in the return air courses (80% required)....

The citation was later modified to include the results of samples collected in intake air courses of the 006 section of the mine showing that one of the 54 samples had an incombustible content of 60.4%, while 65% was required. Citation No. 3206452-01.

Citation No. 3206323 alleges an S&S violation of section 75.1101-10 and states:

The requirement that, each deluge water system shall be equipped with a device designed to stop the belt drive in the event of a rise in temperature and such warning device shall be capable of giving both a audible and visual warning when a fire occurs, is not being complied with at the No. 6 headdrive unit, serving the 005 working section, in that; when tested, the belt conveyor did not stop and no visual or audible warning was given.

Citation No. 3206454 alleges an S&S violation of section 75.1101-1(a) and states:

The Deluge-type water spray system provided for the 009 section headdrive unit was inoperative in that; the waterline was not connected to the water supply.

At the evidentiary hearing, Shamrock did not contest the fact that it violated section 75.1101-1(a), but did contest the fact of violation of sections 75.403 and 75.1101-10. Tr. 50-51. The judge concluded that Shamrock had violated section 75.403 because Shamrock had not rebutted laboratory analyses indicating that required incombustible contents were not maintained in the return and intake air courses in the 006 section. 12 FMSHRC at 2099. The judge then determined Shamrock's violation of section 75.403 was not S&S because the evidence failed to show that an ignition was reasonably likely to occur. Id. The judge noted that the equipment in the area was not in a deficient condition, "which would have rendered it reasonably likely for a spark to have occurred," and that the mine does not liberate a large quantity of methane. Id. The judge concluded that, although the violation "could have contributed to the hazard of the propagation of an explosion ... the evidence fails to establish that there was any reasonable likelihood of an ignition." Id. The judge then found that the violation was of a moderately high degree of gravity but that the operator acted with a low degree of negligence, and assessed a civil penalty of \$300, rather than the penalty of \$434 proposed by the Secretary. 12 FMSHRC at 2100.

The judge found that Shamrock had violated section 75.1101-1(a) but that the violation was not S&S, because the evidence did not reveal that the hazard of an ignition was reasonably likely to occur. He stated:

[Inspector Delp] indicated that there were various materials which could potentially burn, such as several gallons of oil in metal containers, and various timbers and wooden cribs. However, he did not indicate the distance of these materials to the head drive, and it is noted that the oil was contained in metal containers. Also, although he indicated that the area is known as one that accumulates float coal dust, and that the belt was in operation and carrying coal, he was unable to say whether he observed coal dust on the belt, and did not specifically indicate that there was any coal dust around the head drive. Further, although he noted that there was a potential of fire due to friction of rollers and various components, as well as sparks from various electrical equipment at the head drive, there was no evidence adduced as to a specific condition of the various equipment which would make the hazard of an ignition reasonably likely to have occurred. I thus conclude that it has not been established that the violation herein was significant and substantial. (See, Mathies, supra).

Id.

The judge also found that Shamrock had violated section 75.1101-10 based on Inspector Delp's testimony concerning the inoperative condition of the sprinkler system on the belt drive, which was unrebutted. 12 FMSHRC at 2103. The judge determined that this violation also was not S&S:

Delp indicated that the hazards of a fire are the same as those he described in his testimony with regard to Citation No. 3206454, which involved the deluge system. Also, on the same date, concerning the same belt, he issued Citation No. 3206321 alleging that there were no fire hose outlets for a distance of approximately 900 feet along the belt. In addition, he issued Citation No. 3206322 alleging that there was coal dust a quarter inch to 20 inches in depth, along the side and under the belt conveyor for a distance of approximately 900 feet. However, Delp did not describe the presence of any specific condition which would make the event of ignition reasonably likely to occur. Accordingly, I find that it has not been established that the violation herein was significant and substantial.

Id.

With respect to the judge's finding that Shamrock's violation of section 75.403 was not S&S, the Secretary argues on review that the judge misapplied the Commission's S&S test formulated in Mathies, supra. She maintains that

the judge failed to apply the third element of the test, regarding the reasonable likelihood that the hazard contributed to would result in an injury, in terms of normal mining practices. S. Br. at 7-8. The Secretary asserts that the judge essentially would require electrical equipment to actually be producing sparks before finding the violation to be S&S and that he improperly equated conditions that present an imminent danger with those that are S&S. S. Br. at 8-9. The Secretary emphasizes that an S&S violation is less than an imminent danger, and that the Commission "has consistently determined that S&S findings are not dependent on a high probability of occurrence or on the present existence of all factors necessary for an injury causing event." S. Br. at 9.

With respect to the violations of sections 75.1101-1(a) and 75.1101-10, the Secretary argues that the "judge's failure to analyze the significant and substantial nature of Shamrock's violations of ... sections 75.1101-1(a) and 75.1101-10 in the context of an emergency was erroneous." S. Br. at 12. The Secretary maintains that, when considering the S&S nature of a violation involving a safety standard that is designed to take effect only in an emergency situation, such an emergency should be presumed. S. Br. at 12-14. The Secretary argues that the relevant question regarding whether Shamrock's violation of section 75.1101-1(a) is S&S under the Commission's test in Mathies, therefore, is not whether a fire or explosion is reasonably likely to occur but, instead, is "given the presence of a fire at the belt head drive, whether the failure to have a deluge water spray system is reasonably likely to result in serious injuries or deaths that would not otherwise occur if such system was properly functioning as required by the standard." S. Br. at 14. Similarly, with respect to section 75.1101-10, the Secretary argues that the relevant question is "given the presence of a fire, whether the failure to stop the coal-conveying belt and the failure to visually and audibly warn miners of the fire, are reasonably likely to cause serious injuries or deaths that would not otherwise occur if such alarms had been given and the belt stopped as required." S. Br. at 15-16. The Secretary does not argue in the alternative that the judge's determinations that a fire or ignition was not reasonably likely to occur is without substantial evidence.

## II.

### Disposition of Issues

#### A. Violation of section 75.403

We conclude that substantial evidence supports the judge's finding that Shamrock's violation of section 75.403 was not S&S. A violation is properly designated as being S&S "if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or an illness of a reasonably serious nature." Cement Division, National Gypsum, 3 FMSHRC 822, 825 (April 1981). In Mathies, the Commission explained:

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



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

6 FMSHRC at 3-4. See also Austin Power Co. v. Secretary, 861 F.2d 99, 104-05 (5th Cir. 1988), aff'g 9 FMSHRC 2015, 2021 (December 1987) (approving Mathies criteria). The Commission has held 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., Inc., 6 FMSHRC 1834, 1836 (August 1984).

Here, there is no dispute as to the fact of violation or that the discrete safety hazard contributed to by the violation is the hazard of ignition or explosion. The issue on review is the third element, whether there was a "reasonable likelihood that the hazard contributed to will result in an injury."

We reject the Secretary's contention that the judge improperly equated the reasonable likelihood element with the presence of an "imminent danger." As in Eastern Associated Coal Corp., 13 FMSHRC 178 (February 1991), we do not find any indication in the judge's decision that he misapplied the Mathies test by requiring that the injurious event be imminent. The judge did not expressly require that the injurious event be imminent but, rather, properly stated that it must be reasonably likely to occur. 12 FMSHRC at 2099. Nor did the judge rely solely on the fact that the equipment was permissible at the time of the inspection. Rather, the judge found that an ignition was not reasonably likely to occur because the mine did not liberate a large quantity of methane. Id. The Commission has previously recognized that, when examining whether an explosion or ignition is reasonably likely to occur, it is appropriate to consider whether a "confluence of factors" exists that could result in an ignition or explosion. Texasgulf, Inc., 10 FMSHRC 498, 501 (April 1988). The judge properly followed Commission precedent by reviewing the evidence regarding such a confluence of factors.

Substantial evidence supports the judge's conclusion that the record lacks evidence establishing that an ignition was reasonably likely to occur. Inspector Delp testified that section 75.403 is directed at "hold[ing] down the combustible material" by requiring that limestone dust be applied to highly flammable and explosive coal dust. Tr. 22-23. He stated that if the incombustible content is not maintained at the appropriate level, a mine "could have the possibility of [a] dust ignition." Tr. 23. Inspector Delp explained that if "by chance methane or some other source of ignition were to take place in the face area or anywhere in the return, if you had enough concussion or pressure to raise the float dust into suspension in the air, where the particles would ignite, then you would have what is known as a dust explosion." Tr. 24.

Inspector Delp also testified that when the samples were taken, 12 men working in the face of the section were operating a continuous mining machine, two shuttle cars, two roof bolting machines and a scoop, and that if such equipment malfunctioned, it could be a source of sparks. Tr. 24. Although Inspector Delp testified that there was electrical equipment in use at the face, and that such equipment could be a source of sparks if the equipment malfunctioned, the record does not reveal that such equipment was impermissible. Tr. 24, 29. In addition, the record does not reveal that the mine had experienced methane ignitions in the past, or that it liberated excessive quantities of methane. Inspector Delp testified that the mine liberated "some" methane, although "not a great amount," and that he had measured 16,000 cubic feet of methane in a 24-hour period. Tr. 26, 32. There is no evidence in the record of the amount or extent of coal dust or loose coal present, other than that there was "always the amount of coal dust, loose coal" at the face, that would be a by-product of mining. Tr. 25.

The judge's finding that Shamrock's violation was not S&S is also supported by the lack of specific evidence to establish the fourth Mathies factor, that is, that the injuries sustained would be of a reasonably serious nature. Inspector Delp testified that, if an ignition occurred, miners other than those at the face could possibly be affected, but he did not specify in what manner. Tr. 26.

This lack of specificity results in a vague and general record more suited to speculation than in clear evidence of the S&S nature of the violation sufficient to overturn the judge's finding that it was not. Cf. Utah Power & Light Co., 12 FMSHRC 965, 971 (May 1990). We do not suggest that the Secretary could not have proven the S&S nature of the violation in this case. Rather, we conclude only that she did not do so here. Thus, we conclude that substantial evidence supports the judge's conclusion that Shamrock's violation of section 75.403 was not S&S.

B. Violations of sections 75.1101-1(a) and 75.1101-10

As in our companion decisions issued this date in Beech Fork Processing, Inc., 14 FMSHRC \_\_\_\_, Docket No. KENT 90-398 ("Beech Fork"), and Shamrock Coal Co., 14 FMSHRC \_\_\_\_, Docket No. KENT 90-60, the Secretary presents a new theory in this case, i.e., that the S&S nature of violations involving safety standards that provide protection only in the event of an emergency should be examined in the context of the presumed occurrence of that emergency. The Secretary, however, failed to present this theory below for consideration by the judge and, therefore, has not preserved it for the Commission's review.

Explicit limits to Commission review are provided in section 113(d) of the Mine Act, 30 U.S.C. § 823(d). Section 113(d)(2)(A)(iii) of the Act, 30 U.S.C. § 823(d)(2)(A)(iii), provides, in pertinent part, that "[e]xcept for good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the administrative law judge had not been afforded an opportunity to pass." See also Commission Procedural Rule 70(d), 29 C.F.R. § 2700.70(d). The key Senate Report on the bill that was enacted as the Mine Act explains this provision as follows:

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The explicit statutory limitation on the scope of Commission review set forth in section 113(d)(2) may be raised as an issue by an objecting party or, sua sponte, by the Commission itself, at any appropriate time during the Commission review process. See Midwest Minerals, Inc., 12 FMSHRC 1375, 1378 (July 1990); Ozark-Mahoning Co., 12 FMSHRC 376, 379 (March 1992); Union Oil of California, 11 FMSHRC 289, 301 (March 1989) ("Unocal"). This limitation on review is an important feature of the administrative trial and appeal structure established by the Act.

Here, the Secretary presented testimony at trial as to the existence of factors that would cause an ignition or fire to be reasonably likely to occur, in an attempt to demonstrate that it was reasonably likely that injuries would occur as a result of the violations. See, e.g., Tr. 56, 58-59, 127-29. In other words, the Secretary proceeded along established Mathies lines. N.3 supra. Neither party filed a post-hearing brief. The Secretary's theory on review that the occurrence of a fire or ignition should be presumed is a departure from her trial position. Thus, on review, the Secretary relies on a theory upon which the judge "had not been afforded an opportunity to pass." Nor has the Secretary demonstrated any cause for her failure to present her theory to the judge.

As we observed in Beech Fork, supra, the "Commission's practice has been to resolve these 'opportunity to pass' questions on a case-by-case basis." 14 FMSHRC at \_\_\_, slip op. at 5 (citations omitted). We noted that "a matter must have been presented below in such a manner as to obtain a ruling in order to be considered on review." Id. (citation omitted). In addition, we stated that the "matter must be raised with 'sufficient specificity and clarity [so] that the [judge] is aware that [he] must decide the issue.'" 14 FMSHRC at \_\_\_, slip op. at 5-6, quoting Wallace v. Dept. of the Air Force, 879 F.2d 829, 832

(Fed. Cir. 1989). We recognized that "a matter urged on review may have been implicitly raised below or is so intertwined with something tried before the judge that it may properly be considered on appeal." 14 FMSHRC at \_\_\_\_, slip op. at 6 (citation omitted). Here, however, none of the foregoing criteria is satisfied. The Secretary argued below only the theory that factors existed making a fire reasonably likely to occur. Thus, the judge was most likely unaware of the Secretary's theory that the S&S nature of the violations should be evaluated in the context of the presumed occurrence of an emergency.

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In addition, in Beech Fork we noted that the essence of Mathies analysis is a careful examination surrounding a specific violation, and that use of the presumption advanced by the Secretary would represent a departure from that analysis. Id. As in Beech Fork, we conclude that it "is incumbent upon the Secretary to develop a trial record demonstrating why the presumption that she wishes the Commission to accept is legally supportable." Id.

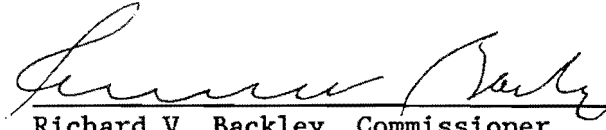
In sum, in the instant proceeding, the Secretary has asserted on review a theory as to Shamrock's violations of sections 75.1101-1(a) and 75.1101-10, upon which the judge was not afforded an opportunity to pass. She also has asserted no reason for her failure to present this theory to the judge. The language of section 113 of the Mine Act and Commission precedent bar us from considering the Secretary's theory in this case. See, e.g., Ozark-Mahoning, 12 FMSHRC at 379; Unocal, 11 FMSHRC at 297-98, 300-301. Because the Secretary did not proceed on alternative grounds with respect to Shamrock's violations of sections 75.1101-1(a) and 75.1101-10, no other basis for review is presented. Accordingly, we affirm the judge's decision that Shamrock's violations of sections 75.1101-1(a) and 75.1101-10 were not S&S.

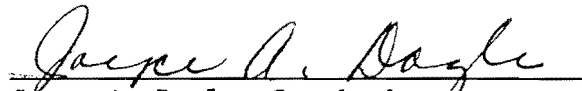
III.

Conclusion

For the reasons set forth above, we affirm the judge's decision that Shamrock's violations of sections 75.403, 75.1101-1(a) and 75.1101-10 were not S&S.

  
Ford B. Ford, Chairman

  
Richard V. Backley, Commissioner

  
Joyce A. Doyle, Commissioner

  
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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 28, 1992

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

v.

BEECH FORK PROCESSING, INC.

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Docket No. KENT 90-398

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

## DECISION

BY THE COMMISSION:

This civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) (the "Mine Act" or "Act"), involves a dispute between the Secretary of Labor and Beech Fork Processing, Inc. ("Beech Fork") regarding whether Beech Fork's two violations of 30 C.F.R. § 75.1100-3 may properly be characterized as being of a significant and substantial ("S&S") nature.<sup>1</sup> Commission Administrative Law Judge James A. Broderick concluded that the violations were not S&S because he did not find that the hazards contributed to by the violations were reasonably likely to occur. 13 FMSHRC 576 (April 1991) (ALJ). The Commission granted the Secretary's petition for discretionary review challenging the judge's S&S determinations. On review, the Secretary's challenge is based entirely on the theory that the S&S nature of the violations should be examined in the context of the presumed occurrence of an emergency. Because the Secretary failed to raise this theory before the judge, we are unable to consider it on review,

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<sup>1</sup> 30 C.F.R. § 75.1100-3, entitled "Condition and examination of firefighting equipment," provides:

All firefighting equipment shall be maintained in a usable and operative condition. Chemical extinguishers shall be examined every 6 months and the date of the examination shall be written on a permanent tag attached to the extinguisher.

The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which, in pertinent part, distinguishes as more serious in nature any violation that "could significantly and substantially contribute to the cause and effect of a ... mine safety or health hazard...."

given the review strictures of the Act. Under these circumstances, we affirm the judge's decision.<sup>2</sup>

I.

Factual Background and Procedural History

On April 12, 1990, Kellis Fields, an inspector for the Department of Labor's Mine Safety and Health Administration ("MSHA"), issued a citation to Shamrock pursuant to section 104(a) of the Act, 30 U.S.C. § 814(a), alleging an S&S violation of section 75.1100-3. The citation states:

The deluge type fire suppression system installed for fire fighting purposes was not being maintained in a usable or operative condition. When tested water would not flow through the branch lines. For the 1-A belt conveyor drive.

On April 16, 1990, Inspector Fields issued a second section 104(a) citation to Shamrock alleging another S&S violation of section 75.1100-3. The citation states:

The dry chemical type fire suppression system installed for fire fighting equipment on the No. 2 10 shuttle car on the 002-0 section was not being maintained in a useable and operative condition. The branch line going to the tank was broken off leaving the system open if either ... was activated.

Following an evidentiary hearing, Judge Broderick concluded that Shamrock had violated section 75.1100-3, as alleged in the first citation, because the deluge fire suppression system on the belt line was not maintained in a usable and operative condition as required by the standard. However, the judge rejected the Secretary's allegations that the violation was S&S. The judge found:

The hazard to which this violation contributes is fire and smoke which could travel in by from the belt conveyor to the section. A fire could result from stuck rollers, friction, or coal spillage including float coal dust. The inspector testified that these are common occurrences in coal mines. However, there is no evidence of any such conditions in the area of the cited violation. The evidence does not establish

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<sup>2</sup> Our decision in this matter is one of three issued on this date involving the Secretary's attempt to raise this new theory on review without having first presented it to the judges below. The two other decisions issued today are: Shamrock Coal Co., Inc., 14 FMSHRC \_\_\_\_, Docket No. KENT 90-60 (August 1992), and Shamrock Coal Co., Inc., 14 FMSHRC \_\_\_\_, Docket Nos. KENT 90-137 and KENT 90-142 (August 1992).

that the hazard contributed to is reasonably likely to result in serious injury. The citation was not properly designated as significant and substantial.

13 FMSHRC at 578.

The judge also concluded that Shamrock violated section 75.1100-3, as alleged in the second citation, because the dry chemical type fire suppression system on the cited shuttle car was inoperative. 13 FMSHRC at 579. He again rejected the Secretary's S&S allegations, finding:

The traction motor on the shuttle car has electrical components and the cable going back to the power center carries 440 volt ac power. If the traction motor shorted out and ignited accumulations of oil, grease, or coal dust, or a cut in cable caused a spark, a fire could result, which could cause smoke inhalation injuries to miners on the section. However, there is no evidence of any oil, grease or coal dust, and no evidence of any electrical problems or defects in the motor or cable. Therefore, the evidence fails to show that the hazard contributed to was reasonably likely to result in injuries to miners. The citation was not properly designated as significant and substantial.

13 FMSHRC at 579.

Beech Fork did not seek review of the judge's determination that it violated the standard. The Secretary seeks review of the judge's S&S finding. She argues that the judge erred in finding that the violations were not S&S based on his determination that a fire was not reasonably likely to occur under the circumstances surrounding the violations. S. Br. at 5-6. The Secretary maintains that, when considering the S&S nature of a violation involving a safety standard that is designed to take effect only in an emergency situation, the occurrence of such an emergency should be presumed. S. Br. at 3-4. The Secretary argues that the relevant question under the Commission's test in Mathies Coal Co., 6 FMSHRC 1 (January 1984), therefore, is not whether a fire is reasonably likely to occur but is, instead, "given the presence of a fire at the belt head drive or on the shuttle car, whether the failure to have operative firefighting equipment is reasonably likely to result in serious injuries or deaths that would not otherwise occur if such equipment was properly functioning as required by the standard." S. Br. at 5-6.<sup>3</sup> The Secretary does not argue in the alternative that the judge's

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<sup>3</sup> A violation is properly designated as S&S "if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum, 3 FMSHRC 822, 825 (April 1981). In Mathies, the Commission explained:



determination that a fire was not reasonably likely to occur is without substantial evidence. Thus, the Secretary's case on review hinges entirely on the proposition that an emergency event should be presumed for purposes of the S&S analysis.<sup>4</sup>

## II.

### Disposition of Issues

The Secretary presents a new theory in this case, i.e., that the S&S nature of violations involving safety standards that provide protection only in the event of an emergency should be examined in the context of the presumed occurrence of that emergency. The Secretary, however, failed to present this theory below for consideration by the judge and, therefore, has not preserved it for the Commission's review.

Explicit limits to Commission review are provided in section 113(d) of the Mine Act, 30 U.S.C. § 823(d). Section 113(d)(2)(A)(iii) of the Act, 30 U.S.C. § 823(d)(2)(A)(iii), provides, in pertinent part, that "[e]xcept for good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the administrative law judge had not been afforded an opportunity to pass." See also Commission Procedural Rule 70(d), 29 C.F.R. § 2700.70(d). The key Senate Report on the bill that was enacted as the Mine Act explains this provision as follows:

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

6 FMSHRC at 3-4. See also Austin Power Co. v. Secretary, 861 F.2d 99, 104-05 (5th Cir. 1988), aff'g 9 FMSHRC 2015, 2021 (December 1987) (approving Mathies criteria). The Commission has held 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., Inc., 6 FMSHRC 1834, 1836 (August 1984).

<sup>4</sup> Beech Fork did not file a response brief before the Commission, and proceeded pro se at the evidentiary hearing.

The Committee believes that the provision of section 114(d)(2) [section 113(d)(2)] that matters not raised before an Administrative Law Judge may not be raised before the Commission (except for good cause shown) and the provision of section 107(a) [section 106(a)] that objections not raised before the Commission cannot be raised before a reviewing court are consistent with sound procedure and do not deny essential due process. The Committee notes that fairness is also protected by provisions which would permit remanding of cases for further factfinding where warranted. It is the Committee's intention that the Commission and Administrative Law Judges permit parties every reasonable opportunity to adequately develop the record within these constraints and consistent with its duty to resolve matters under dispute in an expeditious manner.

S. Rep. No. 181, 95th Cong., 1st Sess. 38 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 at 637 (1978).

The explicit statutory limitation on the scope of Commission review set forth in section 113(d)(2) may be raised as an issue by an objecting party or, sua sponte, by the Commission itself, at any appropriate time during the Commission review process. See Midwest Minerals, Inc., 12 FMSHRC 1375, 1378 (July 1990); Ozark-Mahoning Co., 12 FMSHRC 376, 379 (March 1992); Union Oil of California, 11 FMSHRC 289, 301 (March 1989) ("Unocal"). This limitation on review is an important feature of the administrative trial and appeal structure established by the Act.

Here, the Secretary presented testimony at trial as to the existence of factors that would cause an ignition to be reasonably likely to occur, in an attempt to demonstrate that it was reasonably likely that injuries would occur as a result of the violations. See, e.g., Tr. 26-27, 30-31, 49-52. In other words, the Secretary proceeded along established Mathies lines. N.3 supra. Neither party filed a post-hearing brief. The Secretary's theory on review that the occurrence of a fire should be presumed is a departure from her trial position. Thus, on review, the Secretary relies on a theory upon which the judge "had not been afforded an opportunity to pass." Nor has the Secretary demonstrated any cause for her failure to present her theory to the judge.

The Commission's practice has been to resolve these "opportunity to pass" questions on a case-by-case basis. See, e.g., Ozark-Mahoning, supra, 12 FMSHRC at 379; Unocal, supra, 11 FMSHRC at 297-98, 300-01; Richard Bjes v. Consolidation Coal Co., 6 FMSHRC 1411, 1417 (June 1984). The Commission has not viewed this limitation as a procedural straitjacket. However, in general, a matter must have been presented below in such a manner as to obtain a ruling in order to be considered on review. See generally 4 C.J.S. Appeal & Error § 243 (1957). The matter must be raised with "sufficient specificity and clarity [so] that the [judge] is aware that [he] must decide the issue."

Wallace v. Dept. of the Air Force, 879 F.2d 829, 832 (Fed. Cir. 1989). The Commission also has recognized that a matter urged on review may have been implicitly raised below or is so intertwined with something tried before the judge that it may properly be considered on appeal. See, e.g., Freeman United Coal Mining Co., 6 FMSHRC 1577, 1580 (July 1984). Here, however, none of the foregoing criteria is satisfied. The Secretary argued below only the theory that factors existed making a fire reasonably likely to occur. Thus, the judge was most likely unaware of the Secretary's theory that the S&S nature of the violations should be evaluated in the context of the presumed occurrence of an emergency.

The Mine Act establishes an orderly, two-tiered litigation system consisting of trial before a Commission judge and appellate review by the Commission. This system provides for the creation of the factual record before the trier of fact. The rationale for requiring lower tribunals to first pass upon questions is that subsequent review is not hindered by the lack of necessary factual findings and the lack of application of the lower court's expertise or discretion. See, e.g., Railroad Yardmasters of America v. Horns, 721 F.2d 1332, 1338 (D.C. Cir. 1983); Terkildsen v. Waters, 481 F.2d 201, 204-05 (2d Cir. 1973). The Secretary's actions here conflict with this basic principle, that parties in Mine Act cases must first present their evidence and advance their legal theories before the judge, and not for the first time on appeal. Unocal, 11 FMSHRC at 301. The U.S. Court of Appeals for the D.C. Circuit has recognized the general rule that litigation theories not pursued in a lower court will not be heard on appeal. See, e.g., Short v. UMWA, 728 F.2d 528, 532 (D.C. Cir. 1984); Kassman v. American University, 546 F.2d 1029, 1032 (D.C. Cir. 1976).

The Commission's National Gypsum decision was issued in 1981. In its Mathies decision issued in 1984, the Commission set forth the requirements for establishing the S&S nature of a violation under National Gypsum. 6 FMSHRC at 3-4. The essence of Mathies analysis is a careful examination of the evidence surrounding a specific violation; use of the presumption advanced by the Secretary would represent a departure from that analysis. It is incumbent upon the Secretary to develop a trial record demonstrating why the presumption that she wishes the Commission to accept is legally supportable. Cf. Unocal, 11 FMSHRC at 297 & n.6.

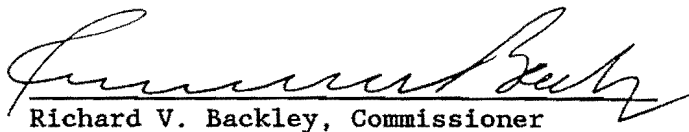
In sum, the Secretary has asserted on review a theory upon which the judge was not afforded an opportunity to pass. She also has asserted no reason for her failure to present this theory to the judge. The language of section 113 of the Mine Act and Commission precedent bar us from considering the Secretary's theory in this case. See, e.g., Ozark-Mahoning, 12 FMSHRC at 379; Unocal, 11 FMSHRC at 297-98, 300-301. Because the Secretary did not proceed on alternative grounds, no other basis for review is presented. Accordingly, we affirm the judge's decision.


III.

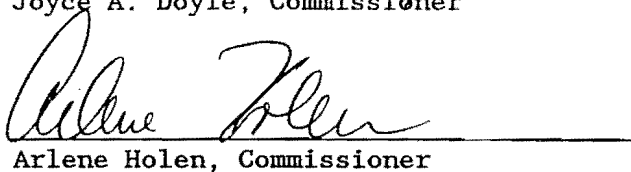
Conclusion

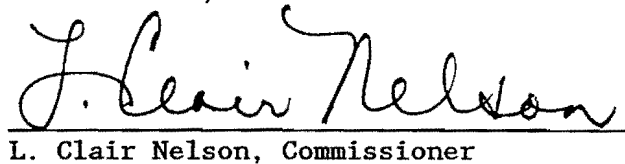
For the reasons set forth above, we affirm the judge's decision that Beech Fork's violations of section 75.1101-3 were not S&S.

  
Ford B. Ford, Chairman

  
Richard V. Backley, Commissioner

  
Joyce A. Doyle, Commissioner

  
Arlene Holen, Commissioner

  
L. Clair Nelson, Commissioner

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 28, 1992

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

v.

ASARCO, INC.

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Docket Nos. SE 88-82-RM  
SE 88-83-RM  
SE 89-67-M

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

## DECISION

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"), concerns a discovery dispute between the Secretary of Labor and Asarco, Inc. ("Asarco") and is before the Commission for a second time. Commission Administrative Law Judge Avram Weisberger issued an Order on Remand on May 20, 1991, in response to the Commission's prior decision in this proceeding. Asarco Inc., 13 FMSHRC 1199 (May 1991)(ALJ). The judge's order required the Secretary to produce a number of specific documents notwithstanding her claims of privilege as to those documents and upheld the Secretary's privilege claims as to other documents. The Secretary filed a Petition for Interlocutory Review of that part of the judge's order on remand requiring her to produce all or part of five documents that she asserts are protected by the informant's privilege. The Commission granted the Secretary's petition. For the reasons that follow, we reverse the judge's order in part and affirm it in part.

I.

### Factual and Procedural Background

Asarco operates the Immel Mine, an underground zinc mine in Knox County, Tennessee. A fatal accident occurred at the mine on July 15, 1988, when an electrician contacted an energized 4,160-volt terminal located inside a transfer switch cabinet. An inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") issued two citations charging violations of 30 C.F.R. §§ 57.12017 & 57.12019. The citations allege that the top terminals in the cabinet were not deenergized and that suitable clearance

was not provided while the electrician was cleaning the terminals and insulators.

The discovery dispute began when the Secretary refused to produce, on the basis of the informant's privilege, the attorney-client privilege and the work product rule, all of the documents Asarco sought in its request for production of documents. After an in camera examination of the documents, Judge Weisberger held that certain of these documents were not subject to the privileges asserted by the Secretary and ordered the Secretary to produce them. Unpublished Order of September 22, 1989. When the Secretary refused to comply with his order compelling production, the judge dismissed the civil penalty proceeding against Asarco. 11 FMSHRC 2351 (November 1989)(ALJ). The Secretary filed a Petition for Discretionary Review, which the Commission granted. On review, the Commission vacated the judge's order dismissing the civil penalty proceeding, and also vacated that portion of his order of September 22, 1989, which had directed the Secretary to produce the disputed documents. Asarco, Inc. 12 FMSHRC 2548 (December 1990)("Asarco I"). The Commission remanded this matter to the judge for further proceedings consistent with its decision and its prior decision in Bright Coal Co., 6 FMSHRC 2520 (November 1984).

Both the Secretary and Asarco filed briefs before the judge on remand. In his Order on Remand, the judge held that some of the disputed documents were privileged and not subject to discovery. He also determined that some of the disputed documents were not protected by the informant's privilege and ordered the Secretary to produce them. The Secretary filed a Petition for Interlocutory Review of that portion of the judge's order requiring the Secretary to produce five documents that she maintains are protected by the informant's privilege. Asarco filed a statement in opposition to the Secretary's Petition and a Motion for Sanctions, including dismissal, against the Secretary for her continuing refusal to comply with the judge's discovery orders. The Commission granted the Secretary's Petition for Interlocutory Review.

In its brief on review, Asarco replied to the issues raised by the Secretary and, in Part II of its brief, further argued that the judge erred in upholding the Secretary's claim that portions of one document are protected from disclosure by the attorney-client privilege and the work product rule. Asarco Br. 12-15. In response, the Secretary filed a motion to strike the latter portion of Asarco's brief as being outside the proper scope of Commission review. Asarco responded in opposition to the Secretary's motion to strike.

The five documents that are the subject of the Secretary's present appeal and the judge's ruling with respect to each document are as follows:

A. Exhibit B. MSHA Form No. 4000-60 Special Assessment Review

This document is an internal MSHA special assessment form used when the Secretary proposes a civil penalty under 30 C.F.R. § 100.5. The Secretary seeks to withhold from Asarco, on the basis of the informant's privilege, only

numbered paragraph one on page two. The disputed paragraph summarizes the statement of an individual but does not identify the individual by name.

The judge held that the Secretary bears the burden of proving facts necessary to support the existence of the privilege. 13 FMSHRC at 1200. He determined that the Secretary did not offer any evidence to show that the identity of an informant would be revealed by the production of the document. Id. The judge found as follows:

The statement does not indicate whether the person who made it is a present or former employee of Respondent, or whether the individual is an independent contractor. Petitioner has not alleged, nor does the record contain any indication of the number of persons in the job category of the person who made the statement at issue. Nor is there any indication of the number of persons who performed the same task. Hence, I conclude that it has not been established that the informer's identity would be revealed by allowing discovery of the statement at issue. Hence, the Secretary shall divulge paragraph 1 on page 2 of Exhibit B.

Id.

B. Exhibits E, F & G, Detailed Statements of Miners

These three documents are the transcribed notes, in question-and-answer format, of an MSHA Special Investigator's interviews of three individuals. The Secretary seeks to withhold all of these documents.

The judge first held that the three statements are "subject to a qualified privilege." 13 FMSHRC at 1201-02. The judge then found that "the material consisting of a transcription of [the employees'] detailed extensive statements, is unique, closely related in time to the instance in issue, and within the sole control of the Secretary." 13 FMSHRC at 1202 (emphasis in original). He determined that Asarco "does not have another avenue available to obtain the transcriptions of the detailed statements" and that "these statements would enable Asarco to use the material to refresh the recollection of a witness or to attempt to impeach the credibility of a witness by way of prior inconsistent statement." Id.

The judge further held that the documents "are essential to a fair determination of the issues." Id. The judge found that the documents "contain statements that have a critical bearing on the issues raised by the citations at issue and possible defenses." 13 FMSHRC at 1203. On that basis, the judge concluded that "Asarco has a high degree of need to discover these exhibits" and that "Asarco's need ... outweighs the Secretary's need to maintain the informer's privilege." Id.

C. Exhibit K. Notes of MSHA's Special Investigator

This document consists of Special Investigator Everett's detailed notes of his investigation of this accident. A large part of this document was previously produced by the Secretary. Only two portions of this document are in dispute in this appeal. First, the Secretary seeks to withhold the first six words of the seventh line of the paragraph on the middle of page 12 and the quoted phrase at the end of the paragraph.<sup>1</sup> Second, the Secretary seeks to withhold the list of questions on page 23, and the responses on page 24 and the first two lines on page 25.

The judge held that the informant's privilege applied to most of the middle paragraph on page 12 of this document, but held that:

the first six words of the seventh line of that paragraph, as well as the quoted phrase at the end of this paragraph contain information that might lead to a possible defense, without identifying the source of the information. It is difficult to see how Asarco could obtain this information without discovery. Hence, applying the factors enunciated in Bright, discovery of this deleted material is to be allowed..."

13 FMSHRC at 1205.

With respect to the questions and answers on pages 23 through 25, the judge held that in order for Asarco to obtain the specific statements contained in this material "it would need not only the identity of the informer, but also the specific questions asked." Id. He concluded that because this material is relevant to this proceeding and is in the sole custody of the Secretary, it is subject to discovery under the Bright test.

II.

Disposition of Issues

A. Secretary's Motion to Strike Portion of Asarco's Brief

Section 113(d)(2)(A)(iii) of the Mine Act provides that Commission review is limited to the questions raised in the petition for discretionary review. This principle is also applicable to interlocutory review proceedings conducted pursuant to Commission Procedural Rule 74, 29 C.F.R. § 2700.74. Commission Procedural Rule 74(d) provides that, if a petition for interlocutory review is granted, "the scope of review shall be confined to review of the ruling or order of the judge on the issue stated in the Commission's order granting review, and shall not extend to other issues." The Secretary's

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<sup>1</sup> Before the judge, the Secretary sought to withhold the entire paragraph. The judge held that Asarco was not entitled to discover the remainder of the paragraph.



petition for interlocutory review, which the Commission granted, did not seek review of the judge's attorney-client privilege or work product rulings. In the present case, the judge's discovery rulings are separate and distinct. Asarco could have filed a petition for interlocutory review of the judge's other rulings, in response to the Secretary's motion to strike, at any time. Since Asarco's brief raises issues concerning the judge's other rulings, which are outside the scope of the present interlocutory review, the Secretary's motion to strike Part II of Asarco's brief is granted.

#### B. Informant's Privilege

The principal issue in this case is whether the judge's Order on Remand complies with the Commission's decision in Asarco I. The Commission must determine whether the judge abused his discretion in requiring the Secretary to disclose to Asarco all or specific parts of five documents because the informant's privilege does not apply or because the privilege must yield since Asarco's need for the document is greater than the Secretary's need to maintain the privilege.

Discovery before the Commission is regulated by Commission Procedural Rule 55, 29 C.F.R. § 2700.55. The scope of discovery is specified in subsection (c):

Parties may obtain discovery of any relevant matter, not privileged, that is admissible evidence or appears reasonably calculated to lead to the discovery of admissible evidence.

The Secretary alleges that each of the disputed passages is protected by the informant's privilege. Commission Procedural Rule 59, 29 C.F.R. § 2700.59, provides, in pertinent part:

A Judge shall not, except in extraordinary circumstances, disclose or order a person to disclose to an operator or his agent the name of an informant who is a miner.

In Bright and Asarco I, we stressed the importance of the informant's privilege and set forth the specific procedures to be followed if the Secretary asserts that privilege. Bright, 6 FMSHRC at 2526; Asarco I, 12 FMSHRC at 2553-54. We also held that it is the name of the informant, not the contents of the statement, that is protected, unless disclosure of the contents would tend to reveal the identity of the informant. Asarco I, 12 FMSHRC at 2554, citing Roviaro v. United States, 353 U.S. 53, 60 (1957).

In reviewing a judge's discovery rulings, the Commission "cannot merely substitute its judgment for that of the administrative law judge." Asarco I, 12 FMSHRC at 2555. Rather, the Commission is required "to determine whether the judge correctly interpreted the law or abused his discretion and whether substantial evidence supports his factual findings." Id. The Commission recently reaffirmed that a judge is granted wide discretion in discovery matters and that his findings will not be disturbed "unless a clear abuse of

discretion is demonstrated." In Re: Contests of Respirable Dust Sample Alteration Citations, 14 FMSHRC 987, 1005 (June 1992) ("Dust Sample Case"). The Commission further emphasized:

[W]hen analyzing the manner, content, and effect of a judge's discovery rulings, the judge, by rule, is authorized to exercise wide discretion in discovery matters, and the Commission by precedent is disinclined to substitute its judgment for that of the judge unless error or abuse of discretion has occurred.

Dust Sample Case, 14 FMSHRC at 1004. The Commission noted, with approval, that in Federal practice, unless there is a "manifest abuse of discretion" on the part of a judge, discovery orders are not ordinarily subject to interlocutory appellate review, and that, if review is ordered, the judge's orders will not generally be overturned "unless, in the totality of the circumstances, [the] rulings are seen to be a gross abuse of discretion resulting in fundamental unfairness in the trial of the case." Id., quoting Xerox Corp v. SCM Corp., 534 F.2d 1031, 1032 (2nd Cir. 1976), and Voegeli v. Lewis, 568 F.2d 89, 96 (8th Cir. 1976).

With these guiding principles in mind, we now address the documents in dispute.

1. Exhibit B - Special Assessment Review

In Asarco I, the Commission held that an informant's statement is protected by the privilege if disclosure would tend to reveal his identity, and that whether the informant is identified by name cannot be the sole basis for making that determination. 12 FMSHRC at 2554. The Commission concluded that the judge erred in his previous order because he failed to determine whether release of the document, including the disputed paragraph, would tend to reveal the identity of an informant. Id. The Commission vacated the judge's order and remanded for further consideration. The Commission stated, in relevant part, that the "judge should determine whether release of the statement ... would tend to reveal the informant's identity taking into consideration the factual context of this case." Id.

On remand, the judge determined that the Secretary failed to establish that release of the document would tend to reveal the identity of an informant. 13 FMSHRC at 1200. The Secretary argues that the judge erred in his analysis because he failed to recognize that the "words in question describe the individual informer" and "the universe of persons fitting that description is relatively small." Sec. Br. 10. She bases her argument on the consideration that, in her opinion, "it is not seriously contested by Asarco that the universe of persons with potentially relevant information in this case is other than small in number and known to Asarco." Sec. Br. 10 n.5. In the alternative, she asks the Commission to remand the case to the judge so that she can "establish with specific evidence the size of the universe of individuals with potential knowledge of facts in this case." Id.

The Secretary bears the burden of proving facts necessary to support the existence of the informant's privilege. Bright, 6 FMSHRC at 2523. In the present case the Secretary asserts in her brief that the "universe of persons with potentially relevant information about this case" is small in number and known to Asarco. Sec. Br. 10 n.5. Before the judge on remand, she argued that it would be "impossible for the Secretary to argue the specific facts of each of these statements to show in the factual context of this case their revelation would identify the speaker." Sec. Br. on Remand 6. The Secretary asked the judge to consider the statement contained in the exhibit "in light of the limited universe of employees who would necessarily possess the information which the statement reveals." Id. The Secretary did not seek to present any facts to the judge to establish her claim.

The judge reviewed the document in camera. Following the Commission's instructions in Asarco I, he determined that release of the statement attributed to an unidentified informant would not tend to reveal the informant's identity. He found that, in meeting her burden of proof, the Secretary did not "proffer any evidence" but "merely asserted" in her brief that the identity of the informant could be provided by the content and context of the statement because of the small universe of persons with knowledge about the relevant events. 13 FMSHRC at 1200. He found that the Secretary did not establish, and the record did not contain, any indication of the number of persons in the job category of the informant or the number of persons who performed the same task. Id. He determined that the Secretary failed to meet her evidentiary burden of establishing that the informant's identity would tend to be revealed by the disclosure of the statement. Id.

Because the Secretary bears the burden of proving facts necessary to support the existence of the informant's privilege, it is not enough for the Secretary merely to argue that the case involves a small universe of persons with knowledge of the relevant events. It is the judge, not the Secretary, who must determine whether the privilege obtains with respect to a particular document or group of documents and he must be provided with evidence sufficient to make such a determination. In this case, the judge was required to determine whether the statement, which did not contain the name of an informant, would tend to reveal the identity of the informant. Such an analysis may not be possible unless the party invoking the privilege provides the judge with facts that explain how disclosure of the subject material would tend to reveal that informant's identity. In general, a "bald assertion of privilege is insufficient ... since a trial court must be provided with sufficient information so as to rule on the privilege claim." 4 J. Moore, J. Lucas & G. Grotheer, Moore's Federal Practice ¶ 26.60[1] (2d ed. 1991). Thus, the Secretary had the burden of showing how or why the disclosure of the disputed text would tend to reveal the identity of the informant.

The Secretary did not present to the judge, either in open court or in camera, any evidence to support the claimed privilege. Moreover, on remand to the judge, the Secretary again failed to support her argument with any evidence. From our examination of the record, it is not readily apparent that the person to whom the statement is attributed would tend to be revealed by the contents of the document or the context of the disputed text. Therefore, given the discretion granted to trial judges in discovery matters, we conclude

that the Secretary has not demonstrated that the judge committed "a clear abuse of discretion" with respect to this exhibit. Dust Sample Case, 14 FMSHRC 1005. We therefore affirm his order requiring the Secretary to disclose the disputed language in Exhibit B.

We fully appreciate why the Secretary must exercise care not to identify an informant inadvertently in presenting facts to prove the applicability of the privilege in a small universe setting. The Secretary's burden of proving that a document would tend to reveal an informant's identity, however, is not necessarily high. For example, an affidavit from an MSHA investigator or anyone else with knowledge of the facts, setting forth how or why disclosure of statements of informants would tend to reveal the identity of an informant, may be sufficient. If the Secretary believes that she must disclose specific facts to meet her burden in a given case and that such facts might tend to reveal an informant's identity, she can submit an affidavit for the judge's in camera review.

## 2. Exhibits E, F & G - Detailed Statements of Miners

In Asarco I, the Commission concluded that the judge failed to consider whether the information in these documents could be obtained by Asarco through depositions or by other means. 12 FMSHRC at 2556. The Commission also concluded that the judge failed to set forth the basis for his conclusion that Asarco's need for the information was essential to a fair determination of the issues and that its need outweighed the Secretary's need to maintain the privilege. Id. The Commission vacated the judge's order and remanded for further consideration. The Commission also stated that the judge should "weigh the factors set forth in Bright and clearly articulate the basis for his conclusion." 12 FMSHRC at 2557.

On remand, the judge reasoned that "[a]lthough the individuals whose statements are the subject of Exhibits E, F, and G, are employees of Asarco, and presumably under its control, ... the material consisting of a transcription of their detailed extensive statements, is unique, closely related in time to the instance at issue, and within the sole control of the Secretary." 13 FMSHRC at 1202 (emphasis in original). He held that because Asarco does not have any other means of obtaining "the transcripts of the detailed statements" at issue, the material would enable Asarco to more effectively examine witnesses at the hearing. Id. The judge concluded that Asarco's need for the documents outweighed the Secretary's need to maintain the informant's privilege. 13 FMSHRC at 1203.

The Secretary maintains that the judge's conclusion that Asarco is entitled to the documents because it would not be able to duplicate the precise contents of the documents on its own is "legally insupportable and would, if accepted, effectively eviscerate the informer's privilege." Sec. Br. 11-12. The Secretary emphasizes that the judge failed to comply with the Commission's instruction to consider whether Asarco could obtain "substantially similar information from other sources." Sec. Br. 12. The Secretary maintains that Asarco could get essentially the same information by deposing those miners who may have knowledge of the relevant events.

Sec. Br. 13. Finally, the Secretary argues that the judge failed to appreciate that, pursuant to Commission Procedural Rule 59, the judge may compel the Secretary to disclose, two days prior to hearing, the names of all persons the Secretary expects to call as witnesses and that he may also order the Secretary to produce the statement of any informant who is actually called as a witness. Sec. Br. 12.

We hold that the judge incorrectly interpreted the law and abused his discretion. First, the judge erred in basing his order on the fact that the Secretary was in sole control of the requested material -- the documents themselves -- rather than the information contained in the documents. In its remand, the Commission directed the judge to consider "whether Asarco could obtain substantially similar information from other sources." 12 FMSHRC at 2556. The judge based his decision on a finding that the documents themselves are unique and within the sole control of the Secretary. The issue, however, is whether Asarco can get substantially the same information by deposing those miners who have knowledge of the accident. See Bright, 6 FMSHRC at 2526. The judge did not enter any findings with respect to this issue except that Asarco "might, by way of deposition, have access to information within the knowledge of these persons." 13 FMSHRC at 1202. By focusing on the fact that the documents are "unique," the judge erred as a matter of law. While we agree with Asarco that the Commission cannot merely substitute its judgment for that of the judge, Asarco has access to the same individuals with knowledge of the accident as the Secretary's investigators and can question them in the same manner, under subpoena, if necessary.

Second, as the Secretary pointed out, the judge failed to recognize that Asarco will be able to obtain the names of the Secretary's witnesses two days before the trial and that any statement of a miner who is called as a witness may be obtained for the purpose of refreshing his recollection or impeaching his credibility at the trial. In Asarco I, the Commission noted that "this case concerns Asarco's requests for documents during the discovery phase of this proceeding" rather than Asarco's right to documents, otherwise protected by the informant's privilege, relating to the testimony of a witness at the time of trial. 12 FMSHRC at 2561 n.3 (emphasis in original). As set forth in Asarco I, however, Asarco's right to these documents at the time of trial is a separate and procedurally distinct issue from the discovery issue presented here. See, e.g., Brennan v Engineered Products, Inc., 506 F.2d 299, 302-03 (8th Cir. 1974). The judge erred in concluding that Asarco's need for the documents is greater than the Secretary's need to maintain the privilege, based on his conclusion that Asarco may need them in examining witnesses at the hearing. Asarco's need for the documents at the hearing should be resolved by the judge at that stage of these proceedings.

Third, in analyzing whether these documents are essential to a fair determination of the issues, the judge determined that the exhibits "contain statements that have a crucial bearing on" the issues in the case. 13 FMSHRC at 1203. Because substantially the same information is available to Asarco by other means, as discussed above, disclosure of these documents is not essential to a fair determination of the issues. In contrast, the operators in the Dust Sample Case demonstrated a compelling need for scientific studies

that were within the scope of the deliberative process privilege, because, in part, those studies may play a unique and significant role in that case. 14 FMSHRC at 994-95. The Secretary was in sole control of those studies, and the operators could not obtain substantially the same information by deposing the appropriate individuals.

The judge's failure to comply with the balancing test set forth in Bright and Asarco I constitutes a clear abuse of discretion in contravention of Commission Procedural Rule 59. For the foregoing reasons, the judge's order with respect to these exhibits is reversed.

### 3. Exhibit K - Special Investigator's Notes

Because the judge failed to rule on the informant's privilege issues in his prior order, the Commission remanded "this issue to the judge for his reconsideration in accordance with [Asarco I] and Bright." 12 FMSHRC at 2557.

#### a. Material on page 12

The disputed paragraph on page 12 is the special investigator's description of a conversation that he had with an individual during his investigation of the accident. On remand, the judge determined that much of the paragraph should be withheld from Asarco, but he held that two passages of this paragraph did not identify the source of the information and that Asarco could not otherwise obtain this information. 13 FMSHRC at 1205. Thus, the judge determined that the informant's privilege does not apply to the disputed passages within this paragraph because they do not identify the source of the statements. Although he did not state so expressly, the judge determined that the Secretary failed to meet her burden of showing that the release of the passages would tend to reveal the identity of a miner informant. The judge's analysis is somewhat confusing, however, because he also performed a Bright balancing test, which is applicable only when the judge has determined that the material is subject to a qualified privilege.

The Secretary contends that release of the phrases in question "would almost certainly" reveal an informant's identity, given "the small universe of those individuals who might have relevant information." Sec. Br. 14. In addition, she argues that the judge erred in concluding that the privilege should yield because Asarco would not be able to "obtain this information without discovery." Id., quoting 13 FMSHRC at 1205. She contends that the judge's holding demonstrates that he failed to comply with Asarco I's direction to evaluate whether Asarco had "other avenues available from which to obtain the substantial equivalent of the requested material." Id., quoting 12 FMSHRC at 2555. She also maintains that the judge's holding suggests he believed that, with appropriate discovery, Asarco could effectively obtain this material.

As with exhibit B, discussed above, the Secretary has asserted without any proof that release of the passages would reveal the informant's identity because of the small universe of individuals who might have relevant information. It is not readily apparent to us that the specific language of the disputed passages would tend to reveal the identity of an informant. It

is also not apparent that Asarco could determine the source of the statements by examining other parts of Exhibit K, previously supplied by the Secretary. As stated above, a bald assertion of privilege is inadequate because the trial court must be provided with sufficient facts to rule on the claim of privilege. For the same reasons set forth with respect to Exhibit B, we affirm the judge's holding.

The Secretary has failed to show that the judge's order is a clear abuse of discretion. The Secretary had two opportunities in this proceeding to provide evidence to the judge in support of her argument that, because the universe of persons with knowledge of the facts in this case is small, disclosure of the statement of an unnamed informant would tend to reveal the identity of an informant. As stated above, this evidentiary burden is not high. An affidavit from an MSHA investigator or anyone else with knowledge of the facts would generally be sufficient and the Secretary may request that the judge review such evidence in camera. A separate affidavit would generally not be required for each document, unless the facts giving rise to the assertion of the privilege differ significantly.

Finally, we note that the Secretary argued before the judge that the entire paragraph containing these passages should be protected by the privilege. The judge protected from disclosure those portions of the paragraph that contain the name of the informant and allowed discovery of two passages that do not contain the informant's name. Notwithstanding our affirmance, we underscore that better judicial practice dictates that a judge, before ruling against the Secretary's assertion of privilege, should generally consider providing the Secretary an opportunity to supplement the record with such evidence as she deems appropriate. This practice is particularly advisable before a judge orders discovery of disputed material after deleting information that identifies an informant. The judge's failure to provide the Secretary with an additional opportunity to present such evidence in this case is not a clear abuse of discretion because, as stated above, the Secretary had an additional opportunity after remand to provide evidence to support her claim of privilege on the basis of the small universe argument, and failed to do so.

b. Material on pages 23-25

This material consists of a list of questions asked of an informant, who is identified by name, and the answers. The judge determined that the specific questions asked, as well as the answers supplied, are in the sole custody of the Secretary. 13 FMSHRC at 1205. He held that "inasmuch as the information relates to the circumstances surrounding [one of the citations], the information would be relevant in resolving the issues and might lead to a possible defense." 13 FMSHRC 1205-06. He concluded that under the Bright balancing test the material is subject to discovery. 13 FMSHRC at 1206.

The Secretary argues that the judge's analysis is legally insupportable because it is based on the premise that Asarco is entitled to know what questions to ask the informant in order to elicit the same responses. She maintains that an in camera examination of the disputed material by the Commission will reveal that the "information contained in it would be readily

reproducible by even the most pedestrian questioning of the individual by a competent legal representative...." Sec. Br. 16. The Secretary states that Asarco could obtain substantially similar information from other sources and that Asarco has not met its burden of proving facts necessary to show that release of the material is essential to a fair determination of the issues. Id.

Because the material does reveal the identity of an informant, the judge was required to determine whether Asarco's need for the information was greater than the Secretary's need to maintain the privilege. Asarco had the burden of showing a critical need for this information. The judge's holding with respect to this material is similar to his holding for Exhibits E, F and G, described above, that, because the Secretary is in sole possession of the documents themselves, Asarco has no other way to obtain the information contained therein. For the reasons set forth above with respect to Exhibits E through G, we conclude that the judge erred and abused his discretion. The Secretary is not in sole control of this information. Because Asarco could obtain similar information from other sources, the disclosure of these passages is not essential to a fair determination of the issues.

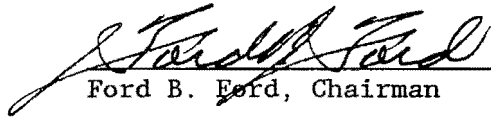
The judge's failure to comply with the balancing test set forth in Bright and Asarco I constitutes a clear abuse of discretion in contravention of Commission Procedural Rule 59. For the foregoing reasons, the judge's order with respect to the questions and answers on pages 23 through 25 is reversed.

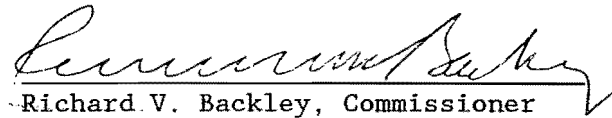


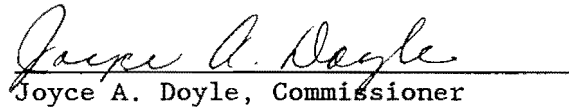
III.

Conclusion

For the reasons set forth above, we affirm that portion of the judge's Order on Remand that required the Secretary to disclose to Asarco numbered paragraph one on page two of Exhibit B and two phrases on page 12 of Exhibit K. We reverse that portion of the judge's Order on Remand that required the Secretary to disclose Exhibits E, F, and G and the questions and answers on pages 23 through 25 of Exhibit K.<sup>2</sup> We hereby dissolve our order of July 24, 1991, staying this proceeding.

  
Ford B. Ford, Chairman

  
Richard V. Backley, Commissioner

  
Joyce A. Doyle, Commissioner

  
Arlene Holen, Commissioner

  
L. Clair Nelson, Commissioner

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<sup>2</sup> Asarco's motion for sanctions against the Secretary for filing the Petition for Interlocutory Review in the proceeding is hereby denied.

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## ADMINISTRATIVE LAW JUDGE DECISIONS



# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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AUG 3 1992

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 91-228-M
Petitioner	:	A.C. No. 25-00772-05507
v.	:	
	:	Mowitz Mine
OVERLAND SAND & GRAVEL	:	
COMPANY,	:	Docket No. CENT 92-3-M
Respondent	:	A.C. No. 25-01057-05504
	:	
	:	McCool Portable Mine

## DECISION

Appearances: Tamera Leonard, Esq., Office of the Solicitor,  
U. S. Department of Labor, Denver Colorado, for  
Petitioner;  
Tobin N. Anderson, Stromsburg, Nebraska, for  
Respondent.

Before: Judge Barbour

These cases are before me upon petitions for assessment of a civil penalty filed by the Secretary of Labor ("Secretary") pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977 (the "Mine Act"). 30 U.S.C. §§ 815 and 820. The petitions allege violations of various mandatory safety standards for surface metal and non-metal mines found in Part 56 of Volume 30 of the Code of Federal Regulations. Overland Sand & Gravel Company ("Overland") timely answered, and the matters were consolidated for hearing. The cases were tried on March 31, 1992, in Lincoln Nebraska.

At the hearing, the parties proposed that I approve the settlement of one of the citations at issue in Docket No. CENT 92-228-M (section 104(a) citation no. 3635911). The citation was issued for a violation of 30 C.F. R. § 56.9100(a), a mandatory safety standard requiring establishment and compliance with rules governing speed, right of way, direction of movement and use of headlights at surface metal and non-metal mines. The citation states that there where no uniform traffic rules established for entering and leaving the mine's stockpile and plant area, that two gates were used both for entrance and exit from the mine and that there should have been one entrance and one exit only.

The inspector indicated the violation was not a significant and substantial contribution to a mine safety hazard (an "S&S" violation), that an injury was unlikely to occur as a result of the violation and that Overland exhibited moderate negligence in allowing the violation to exist. A \$20 penalty was proposed for the violation by the Mine Safety and Health Administration ("MSHA") which Overland has now agreed to pay.

The Secretary's counsel believes the \$20 penalty is appropriate for the violation. In light of the facts as stated, as well as the relevant statutory penalty criteria, I agree. I will incorporate the terms of the settlement into my order at the end of this Decision.

#### STIPULATIONS AND AGREEMENTS

There remained for trial three alleged violations in Docket No. CENT 91-228-M and two alleged violations in Docket No. CENT 92-3-M. At the hearing the parties entered into the following stipulations:

1. Overland . . . is engaged in the mining and selling of sand and gravel in the United States, and its mining operations affect interstate commerce.
2. Overland . . . is the owner and operator of Mowitz Mine . . . and McCool Portable Mine.
3. Overland . . . is subject to the jurisdiction of the [Mine Act].
4. The Administrative Law Judge has jurisdiction in this matter.
5. The subject citations were properly served by a duly authorized representative of the Secretary upon an agent of [Overland] on the dates and places stated therein, and may be admitted into evidence for the purpose of establishing their issuance, and not for the truthfulness or relevancy of any statements asserted therein.
6. The exhibits . . . offered by [Overland] and the Secretary are stipulated to be authentic but no stipulation is made as to their relevance or the truth of the matters asserted therein.
7. The proposed penalt[ies] will not affect [Overland's] ability to continue business.
8. [Overland] demonstrated good faith in abating the violations.

9. Overland . . . is a small mine operator with 15,229 tons of production or hours worked per year.

10. The certified copies of the MSHA Assessed Violations History accurately reflect the history of these mines for the two years prior to the date of the citations.

#### DISCUSSION

The alleged violations in this case arose out of general health and safety inspections conducted at Overland's Mowitz Mine and McCool Portable Mine by MSHA Inspector James Enderby on April 10, 1991, and July 2, 1991, respectively. The Mowitz Mine is an open pit sand and gravel dredging operation and is located in Hamilton County, Nebraska. The McCool Portable Mine is also an open pit sand & gravel dredging operation. The McCool Mine operates intermittently about 9 months of the year. It is located in York County, Nebraska. Enderby was familiar with both operations, having begun inspecting the Mowitz Mine in October 1990 and the McCool Mine in October 1989.

At the hearing, the Secretary called Enderby as her primary witness. Overland's Vice President, Tobin Anderson, presented Overland's case through cross examination of Enderby, as well as through Anderson's own sworn testimony.

#### DOCKET NO. CENT 92-228-M

Three violations are alleged. Section 104(a) citation no. 3635908 was issued for a violation of 56.14107(a) because a pinch point between the roller screen and the trunnion rollers on the crusher was not guarded. Section 104(a) citation no. 3635910 was issued for a violation of section 56.14107(a) because pinch points on the front of the dredge's main diesel engine were not guarded. Section 104(a) citation no. 5635905 was issued for a violation of section 56.11002 because the wire rail around the outer edge of the dredge was not properly maintained.

Overland argues that it did not violate section 56.14107(a) with regard to guarding the crusher rollers. Overland admits the second guarding violation, and it admits the violation of failing to maintain the wire handrail around the edge of the dredge, but argues that, contrary to the inspector's findings, neither of these admitted violations was S&S.

Mine Act			
<u>Section</u>	<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R.</u>
Section 104(a)	3635908	4/10/92	56.14107(a)

The citation states:

The pinch point between the roll screen and the south trunnion roller was not guarded to prevent a person becoming entangled in the pinch point. The pinch point was located adjacent to the walkway on the south/side of the roll screen. Persons are not permitted on the roll screen walkways when the screen is in operation.

The inspector testified that during his inspection of the plant area of the mine he observed an unguarded pinch point on the south/side of the roll screen mechanism that is used for screening gravel. The roll screen consists of a steel drum, approximately 8 feet in diameter, and 10 to 12 feet in length. There are screens on the roll. The drum turns in a clockwise direction. The inspector described the mechanism that drives the drum and how the roll screen functions. He stated that the roll screen has "four support rollers underneath it, one side being the drive and the other side being the support rollers, just to keep it so it will stay in one position." Tr.23 The trunnion rollers are hard rubber rollers mounted on the lower parts of the framework of the platform. They hold the drum up off the walkways and off the platform so it can turn, allowing the gravel to go through the screens that are on the roll. The roll screen is surrounded on three sides by a deck or platform. The platform is approximately 12 feet above the plant floor. A stairway provides access to the platform.

The inspector explained that an unguarded pinch point existed between the drum and the drive roller and that this pinch point was located approximated 12 inches above the walkway and 12 inches from the side of the walkway. Although, there was no guard immediately adjacent to the pinch point, the inspector further explained that at the bottom of the stairway leading to the platform, a 3/8 inch chain was stretched from one handrail of the stairway to the other side of the stairway. The chain was welded to the handrails and was locked with a padlock.

The inspector feared that a miner who slipped or fell on the walkway would reach out while trying to steady himself or herself and would come in contact with the pinch point. If so, he believed, fingers or hands would be crushed beyond repair and/or arms would be broken. He estimated the drum to weigh 2,000 pounds. Because there was nothing to prevent a person from stepping over or ducking under the chain and proceeding up the stairs to the platform, and because the person might then slip or fall and be caught in the pinch point, the inspector issued to Overland the citation for a violation of section 56.14107(a).



### The Violation

Section 56.14107(a) states:

(a) Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, taxi, and takeup pulleys, flywheels, coupling, shafts, fan blades, and similar moving parts that can cause injury.

Overland does not dispute the fact that the pinch point was unguarded but rather argues that access to the pinch point was effectively restricted by the padlocked chain across the stairway, that there was no reason for anyone to gain access except for purposes that require the screen roll to be de-energized and rendered inoperable and that were a person nonetheless on the platform the person would be seen prior to re-energizing the roll screen.

The Secretary responds that the chain was not an adequate guard as contemplated by the regulation because it did not prevent anyone from gaining access to the roll screen platform. A person could step over or duck under the chain, and any employee who had a key to the padlock could also gain access to the platform.

I conclude that the Secretary has established the violation. The guarding standard for metal and non-metal mines is not comparable to the guarding standards for coal mines, 30 C.F.R. § 75.1722 and 30 C.F.R. § 77.400, which state that "Gears, sprockets, chains and similar exposed moving machine parts, which may be contacted by persons and which may cause injury to persons shall be guarded." Rather, section 56.14107(a) states that moving machine part that can cause injury "shall be guarded to protect persons from contact." As Commission Administrative Law Judge George Koutras, has aptly noted, "the....language found in [section] 56.14107(a) specifically and unequivocally requires guarding for any of the enumerated moving machine parts, as well as any similar moving parts that can cause injury if contacted. The obvious intent of the standard is to prevent contact with a moving part." Highland County Board of Commissioners, 14 FMSHRC 270,291 (February 1992) (ALJ Koutras).

Overland does not dispute the fact that the cited moving machine parts were unguarded, nor has it asserted that the equipment was not the kind covered by the standard. I therefore find that the cited roll screen and trunnion roller were moving machine parts within the meaning of section 56.14107(a) and that contact by anyone with the pinch point can cause an injury.

The presence of the locked chain across the entrance to the stairs accessing the platform mitigates the gravity of the violation but does not excuse it. I note in this regard MSHA's official published policy that "the use of chains to rail off walkways and travelways over moving machine parts, with or without the posting of warning signs in lieu of guards, is not in compliance with this standard". Department of Labor, the Mine, Safety and Health Administration, Program Policy Manual, Vol.V at 55a (6/18/91).

### Gravity and Negligence

In assessing the gravity of the violation, both the potential hazard to the safety of miners and the probability of such hazard occurring must be analyzed. There is no doubt that the potential hazard was grave. Severe injury to fingers, hands, or arms reasonably could be expected should a miner slip and fall into the pinch point or reach into it in order to break a fall.

However, such a accident was decidedly less than likely given the fact that access to the platform was restricted by the locked chain and given the fact that, as the inspector himself testified, a miner would not normally be in the area of the pinch point when the roll screen was operating. The inspector candidly explained that the only time access is required to the platform is when screening material needs to be replaced and that this must be done while the drum is not moving. Further, it is not disputed that a miner in the vicinity of the pinch point would be observed before the roll screen was re-energized and started. In addition, the inspector termed the possibility of a non-miner having access to the platform while the drum was operating as "very remote." Tr. 28,40.

I conclude that although the potential injuries resulting from the violation are grave, the likelihood of them occurring is so remote as to make this a non-serious violation.

Because the lack of a guard was readily apparent Overland knew or should have known of the violation, and I also conclude that Overland negligently violated the standard.

<u>Mine Act</u> <u>Section</u>	<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R.</u>
Section 104(a)	3635910	4/10/91	56.11002

After inspecting the roll screen, the inspector proceeded to the dredge area of the mine. The dredge itself is located in the pit on an island-like platform that floats on pontoons. The dredge is reached by rowboat. The water is 30 to 40 feet deep at the dredge.

The inspector testified that upon climbing onto the dredge platform from the rowboat, he noticed that the wire rope hand rail that completely surrounds the platform was slack. The wire, which the inspector described as being either 5/16 inch or 1/4 inch in size, passes through metal loops at the top of steel posts. There is one post every six to eight feet around the outer perimeter of the dredge deck, and the posts are bolted or screwed to the deck. The wire rope completely circles the outer edge of the dredge platform and is of one piece. It is clamped together at its ends.

The inspector testified that the rope could be pushed out over the water one arm's length, or about 30 inches. The inspector believed that if a person fell against the wire rope, the slackness of the rope would allow the person to go over the rope and into the water. The inspector cited Overland for a violation of section 56.11002. The citation states in part:

The handrail and mid-rail around the outer edges of the dredge walkways and travelways was not being properly maintained in that it was not kept tight.

He further found that the violation was S&S.

#### The Violation

30 C.F.R. § 56.11002, requires that when handrails are provided at specified locations they shall be "maintained in good condition." Overland does not dispute that it violated the cited standard. Rather, it asserts that the violation was not S&S.

#### S&S

A S&S violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significant and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). A violation is properly designated S&S "if, based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonable 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--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 reasonable serious nature.

In United States Steel Mining Co., Inc., 7 FMSHRC 1125, 1129 (August 1985), 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 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 Co., Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

In United States Steel Mining Co., Inc., 7 FMSHRC 327, (March 1985), the Commission reaffirmed its previous holding in U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984) that it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial, and that a determination of the significant and substantial nature of a violation must be made in the context of continued normal mining operations, including the question of whether, if left uncorrected, the cited condition would reasonably likely result in an accident or injury.

The inspector testified that during the course of normal mining operations, one person, the dredge operator, was usually on the dredge and that the dredge operator would leave the dredge control shack up to 3 or 4 times a day to start, to grease, or otherwise to service the dredge engine. The inspector feared that a person on the deck could slip on oil, or, if there were a frost, on ice, or could trip on equipment lying on the deck, such as hydraulic hoses and pipelines, and could fall over the loose wire rope and into the water. Due to the heavy clothing that is usually worn by the dredge operator, such a fall could lead to a drowning or an injury. The inspector also feared that the dredge operator could slip upon getting out of the rowboat and climbing up onto the dredge deck and, because of the slack wire rope, fall into the water.

He believed that such an accident was made more likely by the fact that the dredge operator arrived at the dredge in the morning when frost was more likely to be on the deck. Although, life jackets are required to be worn in the boat and on the dredge deck, they are not worn in the control shack, and the

inspector believed a mine employee would forget to put on a jacket when coming out of the shack. Also, he feared that employees of Overland who were sent to the dredge for repair and maintenance work would not always wear life jackets. (He testified that repair and maintenance workers usually numbered between one and four people and on the average were sent to the dredge one day a week.) Finally, although the inspector agreed that two or three employees working at the pit could see the dredge from their work stations, he stated that an employee who had fallen into the water could go unnoticed.

In assessing the S&S nature of the violation, it is certain that the first element of the Mathies test has been established. Overland agrees that the cited standard has been violated. The second element of the test, likewise, has been established. The inspector's testimony makes clear that there was a daily need for at least one employee to climb from the rowboat to the deck and that there was a possible slipping or tripping hazard once on the deck. The third element requires a reasonable likelihood that the hazard contributed to will result in an injury. I conclude that the condition of the wire rope contributed to the danger of an employee falling off the deck and into the water and that the evidence establishes it was reasonably likely that such a fall would result in an injury. Even if, as seems probable, the employee was wearing a life jacket, and was ultimately "fished out", the employee could be injured by striking the edge of the deck while going "over board", or could be injured while trying to climb back onto the deck. Obviously, it is reasonably likely that the resulting injury, whether a drowning or bodily injury from the fall, would be of a reasonably serious nature.

The Secretary argues that she is not required to establish that the feared injury causing event is more likely than not to occur, and I agree. Rather, as I understand the Mathies test, the Secretary must prove that the feared event is reasonably likely. Since, in my opinion, she has done so here, the S&S finding is affirmed.

#### Gravity and Negligence

Given the potential injuries that could have resulted from the violation and the probability of the hazard occurring, I conclude that the violation was serious.

In addition, the slack rope was readily detectable and should have been known to the operator. Hence, Overland was negligent in allowing the violation to exist.

Mine Act Section	Citation No.	Date	30 C.F.R.
Section 104(a)	3635910	4/10/91	56.14107(a)

Continuing his inspection of the dredge, the inspector found that the pinch point of the V-belt drive and the alternator pulley on the front of the dredge's main diesel engine was accessible and unguarded. He cited Overland for a violation of the guarding standard, section 56.14107(a), and he found that the violation was S&S.

The inspector testified that the unguarded pinch point was on the right front side of the engine, 36 to 40 inches above the dredge floor and twelve to fourteen inches from a stairway providing access to the control shack. The inspector stated the stairway is one of the main stairways to and from the control shack and that it is normally used two or three times a day by the dredge operator during the course of the day. (The inspector stated that he had seen the dredge operator use the stairs two or three times during the inspection.) He further stated that the stairway is part of the most direct route from the control shack both to the main diesel engine and to the place where oil is stored on the dredge. The inspector feared that a person could fall or trip and extend a hand into the pinch point, which accident could result in the full or partial amputation of a finger or fingers. He noted that the walkway past the pinch point could be slippery from spilled oil or frost (work starts on the dredge at 7:00 a.m.) and, in fact, he stated that he had observed some spilled oil when he cited the violation. While the stairway has a handrail and a mid-rail, these are on the side opposite the pinch point. The inspector also stated, and Overland agreed, that the guard on the pinch point had been removed during a recent overhaul of the diesel engine and that it had not been replaced.

Overland's representative testified that the stairs in question are designed to provide access to the main diesel engine for servicing and that under normal circumstances the engine was shut off while it is being serviced. However, he acknowledged that at least once a day the dredge operator walks past the unguarded pinch point while the engine is turning and that it is possible the dredge operator might have to walk by more frequently if other engines on the dredge malfunctioned.

#### The Violation

Overland concedes the violation.

#### S&S

As with the prior violation, the first two elements of the Mathies test have been established. Overland admitted the

required guard was not in place, and the testified offered by both parties is in agreement that the stairway provided access to the pinch point and that the stairway was normally used. The lack of a guard on the pinch point created a safety hazard to anyone using the stairway and passing the unguarded pinch point. The question is whether the third and fourth elements of the Mathies test were also established by the Secretary?

The hazard contributed to by the violation is the danger of a person having fingers or a hand caught in the pinch point. The testimony establishes that at least once a day miners pass close to the pinch point while the engine is running and, indeed, Overland's representative does not dispute the testimony of the inspector that on the day of the inspection the dredge operator used the stairs adjacent to the pinch point 2 or 3 times. The fact that the feared injury was reasonably likely to occur was heightened by the fact that there was an open space between the edge of the stairs and the pinch point. Moreover, Overland did not refute the inspector's belief that oil and early morning frost could make the stairs slippery and that the inspector noted some spilled oil on the day of the inspection. Given the presence of at least one miner adjacent to the pinch point, and given the presence of causes for slipping and falling, I conclude that there was a reasonable likelihood the hazard contributed to would result in a reasonably serious injury in that a miner's fingers or hand could be caught in the pinch point, with the resulting loss or severe damage of such parts, and I find that the violation was S&S.

#### Gravity and Negligence

Further, given the potential hazard to miners and the probability of the hazard occurring, I conclude that the violation was serious.

In addition, the violation was visually obvious, Overland should have known of its existence and was negligent in allowing the violation to exist.

#### DOCKET NO. CENT 92-3-M

Two violations are alleged to have occurred at the McCool Portable Mine. One section 104(a) citation was issued when the inspector found that a wooden walkway leading to a floating pump platform lacked handrails in violation of 30 C.F.R. § 56.11012, and a second section 104(a) citation was issued for an alleged guarding violation on the main diesel motor of the dredge. The inspector further found that both were S&S violations.

Overland concedes the violations but challenges the S&S designations.

<u>Mine Act</u> <u>Section</u>	<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R.</u>
Section 104(a)	3907149	7/2/91	56.11012

The inspector testified that he observed a wooden walkway that lacked handrails. The walkway was approximately 12 inches wide, 2 inches thick and 14 feet long. It extended from the shore of the pit to a floating platform, on which was located a fresh water pump. The first 2 to 3 feet of the walkway rested on the sand and gravel at the edge of the pit. The rest of the walkway extend over the water to the platform. Although, there was a handrail around the platform, there was no handrail on either side of the walkway. The inspector testified that the water under the walkway gradually increased in depth until it measured 2 to 3 feet at the platform. The inspector described the board as being "slightly warped" and as not being secured to the platform. Tr. 141

The inspector testified that during the Spring and Fall one miner uses the walkway daily to access the platform in order to prime and drain the pump. During the summer, daily visits are not required -- there being no chance the water in the pump will freeze -- and the walkway is used approximately one time a week by a miner who checks the pump.

The inspector stated that the board could be slippery from frost or rain and that he feared without handrails a miner trying to cross to the pump platform could slip or loose his or her balance and fall, that the miner could come down on the board and have a resulting injury to his or her back, or a miner could hit his or her head on the board, be knocked unconscious and drown. However, he agreed that drowning was but a very remote possibility. In his opinion a back injury was more likely.

#### The Violation

Overland agrees that it violated the cited standard.

#### S&S

Overland argues, I believe correctly in this instance, that the testimony does not establish the S&S nature of the violation. While the first two elements of the Mathies test have been met in that there is a violation of section 56.11012 which resulted in a measure of danger to safety, the evidence falls short of establishing a reasonable likelihood that the hazard contributed to will result in an injury. The inspector's testimony makes clear that if a miner slips or looses his or her balance, the miner will simply step in the water and get his or her feet and



legs wet; or the miner will fall to one side and the water will cushion the fall -- as the inspector stated, the miner will "just fall in the water and go splash." Tr. 148 Should this happen, the inspector agreed that the miner would most likely have no difficulty standing and walking out of the water. Further, even if the miner hit the board on the way down, which appears unlikely given the relative narrowness of the board (12 inches), the inspector stated that the flexibility of the board would in most cases cause the person to simply bounce back up. In short, I conclude that the chance of actual injury to a miner is so remote as to exclude a reasonable likelihood that the hazard contributed to will result in an injury. Therefore, I find that this is not a S&S violation.

### Gravity and Negligence

The lack of any reasonable likelihood of injury in my opinion renders the violation non-serious, and I so find.

The lack of handrails was visually obvious and due to Overland's negligence.

<u>Mine Act</u>	<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R.</u>
<u>Section</u>			
Section 104(a)	3907149	7/2/91	56.14107(a)

Continuing the inspection the inspector found that a guard was missing at the pinch points of the fan belts and pulleys on the portable dredge's main diesel engine. The inspector was most concerned with the belt at the side of the engine that went to the alternator. The pulley and pinch point were adjacent to a walkway and the pinch point was approximately 48 inches above the floor level. The inspector believed that a miner could purposefully reach into the belt and pulley area and become entangled in the pinch point. The inspector also believed that a miner could inadvertently slip or trip, that the miner's clothing could become entangled in the pulley and that the miner could be drawn into the pinch point.

The pinch point was adjacent to a walkway normally traveled one time a day by a person doing visual equipment checks. Further, on the day of the inspection, the inspector observed one person cleaning an hydraulic fluid spill in the immediate vicinity of the pinch point. The inspector, therefore, cited Overland for a violation of the guarding standard, 56.14107(a), and found that the violation was S&S.

### The Violation

Overland concedes that the violation existed.

### S&S

Overland challenges the inspector's S&S finding. The first two elements of the Mathies test are established in that the violation of section 56.14107(a) is admitted, and it is apparent the violation contributed to the hazard of a miner being injured by becoming entangled in the pinch point. The next question is whether there was a reasonable likelihood the feared injury would actually occur. Obviously, for there to be a reasonable likelihood of injury there must be a miner in the vicinity of the unguarded pinch during normal mining operations. The inspector's testimony that normally a miner would traverse the walkway adjacent to pinch point one time a day was not refuted, nor was his assertion that on the day the violation was cited a person was in the area, at times was within 12 inches of the pinch point, cleaning up an hydraulic oil spill. Further, the inspector's statement that the walkway was uneven due to the presence of hydraulic hoses and water lines was not challenged, and this material, along with the presence of the hydraulic fluid, obviously increased the possibility that a miner would slip or fall and come in contact with the pinch point.

I conclude that in the context of continued normal mining operations the presence of the hydraulic fluid and the presence of the hoses and water lines made it reasonably likely that a miner would slip or fall, would become entangled in the pinch point, and, as a result, would be injured. Further, as the inspector explained, the resulting injuries could include cuts, bruises, scrapes and strained muscles, all injuries that are of a reasonably serious nature. Therefore, I find that the Secretary has established the S&S nature of this violation.

### Gravity and Negligence

Because of the nature of the potential injuries resulting from the violation and the possibility that they would occur, I conclude that the violation was serious.

Because the lack of a guard was visually obvious, Overland should have known the guard was missing and I find that Overland was negligent in allowing the violation to exist.

### Other Civil Penalty Criteria

The parties stipulated that Overland is a small operator, that assessment of the proposed penalties would not effect Overland's ability to continue in business, and that Overland demonstrated good faith in abating the violations. The parties also stipulated that copies of MSHA's assessed violations history accurately reflect the history of previous violations at Overland's mines for the two years prior to the date of the citations. I accept these stipulations.

Regarding Overland's history of previous violations, I note that in the two years prior to the subject inspection of the Mowitz Mine, a total of six violations occurring at the mine were assessed, one of which was a violation of section 56.14107(a) and one of which was a violation of section 56.11012. Exh. P2. No violations were assessed at the McCool Portable Mine in the two years prior to July 1, 1991. Id. This is a commendably low history of previous violations.

It is so worth noting that Overland's attitude toward compliance was described by the inspector as reflecting a "very good record." Tr. 184 The inspector stated that Overland effectuated compliance "almost immediately." Id. In my opinion, the company's low history of previous violations and its willingness to abate with expedition those violations for which it was cited, are indicative of a laudable attitude toward compliance, an attitude that warrants encouragement. Effectuation of the goals and purposes of the Mine Act is made possible when violations of the Act and its standards are kept to a minimum and when unsafe conditions are swiftly eliminated. In consideration of these factors the penalties assessed will be reduced by approximately 10%, and I do so with the hope and expectation that Overland will continue its efforts to maximize compliance with the Act.

#### Civil Penalty Assessment

On the basis of the foregoing, I conclude and find that the following civil penalties are appropriate for the violations that have been affirmed:

##### Docket No. CENT 91-228-M Mowitz Mine


<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Amount Assessed</u>
3635908	4/10/91	56.14107(a)	\$18.00
3635909	4/10/91	56.11002	\$71.00
3635910	4/10/91	56.14107(a)	\$57.00

##### Docket No. CENT 92-3-M McCool Portable Mine

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Amount Assessed</u>
3907148	7/2/91	56.11012	\$18.00
3907149	7/2/91	56.1407(a)	\$35.00

ORDER

ACCORDINGLY, Overland is ordered to pay civil penalties totaling \$199 for the assessed violations. Overland is also ordered to pay a civil penalty of \$20 for section 104(a) citation no. 3635911 (Docket No. CENT 91-228-M) as agreed to in the approved settlement. In addition, section 104(a) citation no. 3907149 (Docket No. CENT 92-3-M) is modified to delete the S&S finding. Overland shall pay the assessed civil penalties and the civil penalty specification of the approved settlement within thirty (30) days of the date of this Decision and, upon receipt of payment, these matters are DISMISSED.

  
David F. Barbour  
Administrative Law Judge  
(703) 756-5232

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

AJD 3 1992

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 91-2094
Petitioner	:	A. C. No. 46-01436-03861-A
v.	:	
	:	Shoemaker Mine
JOHN FUGURSKI,	:	
Employed by	:	
CONSOLIDATION COAL COMPANY	:	
Respondent	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 91-2095
Petitioner	:	A. C. No. 46-01436-03663-A
v.	:	
	:	Shoemaker Mine
ERNIE KAPISKOSKY,	:	
Employed by	:	
CONSOLIDATION COAL COMPANY	:	
Respondent	:	

## DECISION

Appearances: Tana M. Adde, Esq., U.S. Department of Labor,  
Office of the Solicitor, 4th Floor, Arlington,  
Virginia for Petitioner;  
David J. Hardy, Esq., Jackson & Kelly,  
Charleston, West Virginia for Respondent

Before: Judge Weisberger

These cases which have been consolidated for purposes of hearing, are before me based on petitions for assessment of civil penalty filed by the Secretary of Labor (Petitioner) seeking civil penalty pursuant to section 110(c) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. § 820(c). Pursuant to notice the cases were scheduled for April 7 and 8, 1992 in Pittsburgh, Pennsylvania. Subsequently, Respondents presented a request in a telephone conference call with Petitioner and the undersigned, to have the cases heard instead in Steubenville, Ohio. Petitioner did not object to this request and the cases were rescheduled and subsequently heard in Steubenville, Ohio on the dates previously assigned. Subsequent to the hearing, the parties each filed proposed findings of fact

and a brief on July 14, 1992. Respondents filed a reply brief on July 28, 1992, Petitioner did not file any reply brief.

## Findings of Fact and Discussion

### I. Introduction

Sometime prior to 1971 when the entry in question was originally developed, the roof was supported by bolts. Additional bolts were also installed. In 1977, a false roof was installed below the original roof. The false roof consisted of 12 foot wooden boards bolted between horizontal I-beams that were placed 4 feet apart and perpendicular to the ribs of the entry. The I-beams, 12 feet long, 6 inches wide, and 6 inches high, were supported by vertical steel legs that were approximately 6 feet in height. Square pad plates approximately 6 feet by 6 inches by 6 inches wide were welded to the tops of the vertical beams and were bolted to the horizontal beams. Subsequent to the installation of the horizontal I-beams, wooden material, 2 inches thick, approximately 5 feet high and 4 feet wide was placed between the vertical legs. At a later date, straps were placed in the middle of the horizontal beams to support them.

During the day shift on March 19, 1990, a line of coal cars travelling on tracks in the entry in question derailed, dislodging some of the vertical steel legs. The next day, during the afternoon shift, when the area was examined by MSHA inspector Donald Moffitt, Jr., he issued a Section 104(d)(2) Order alleging a violation of 30 C.F.R. § 75.202(a) in that 13 steel legs were dislodged, and no action was taken to support the area until 4:00 p.m., on the next shift. Subsequently, Petitioner filed petitions pursuant to Section 110(c) of the Act alleging in essence that Respondents knowingly violated Section 75.202(a) supra.

### II. Violation of Section 75.202(a) supra

Section 75.202(a) provides as follows: "The roof, face and ribs of areas where persons work or travel shall be supported or, otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts."

The area in question denominated as "Leo's turn" commences immediately inby a steel arch covering the intersection of the entry in question and an adjoining entry, and continues inby approximately 550 feet. According to Moffitt, when he examined the area on March 20, he looked up in the gap between the arch and the first horizontal beam immediately inby the arch, and saw that one roof bolt was 3 feet below the roof, and two other bolts were 1/2 to 2 feet below the roof. He also observed that material around the bolts had deteriorated, and that there were stones and coal on the horizontal beams. Moffitt indicated that

he was able to see only 1 to 2 feet inby the arch and only 2 feet along the length of the beam, and that he could not make an adequate examination of the roof bolting system by looking over the first I-beam outby, because the beams were "uptight against the mine roof" (Tr.94).

In addition, Moffitt testified that he climbed up the rib on the clearance side of the entry, at a point approximately 12 feet further inby. He said that he saw 2 bolts that were dislodged, and that there was deteriorated material around the bolts. He said that he could not see more than a foot and a half, looking diagonally across the entry. At another point 10 to 12 feet inby on the clearance side, he saw 2 bolts dislodged and some material on the beams. He indicated that he could only see 2 bolts because the beams were "uptight against the roof", and there was material on the beams (Tr.104).

In essence, according to Moffitt, since he observed that some roof bolts were not providing support, and that it was impossible to examine the entire original roof in the area, he concluded that the system of horizontal I-beams and vertical support legs were providing the main support for the roof. Hence, according to Moffitt, if some vertical legs were dislodged, then the roof was unsupported.

Robert E. Merrifield an MSHA inspector/roof control specialist opined that the vertical legs create a barrier between the tracks and the ribs, in order to protect the tracks from sloughage off the ribs, but that their primary function is to support the roof. He explained that, given the fact that roof bolts were loose, and that it was impossible to examine and inspect the integrity of the roof, he concluded that the roof was not adequately supported.

Howard Snyder a union safety-man who accompanied Moffitt corroborated the latter's testimony with regard to the observation of bolts that were not firmly in place. None of the Respondents' witnesses contradicted the testimony of Moffitt and Snyder with regard to the existence of bolts that were not providing support.<sup>1</sup>

Thomas W. Duffy, a safety inspector employed by Consolidation Coal Company ("Consol"), has worked for 25 years at the subject mine. He testified that he had observed the entry in question when it was originally developed, and saw that it was

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<sup>1</sup>Respondents' witnesses testified they did not observe any indicia of bad roof on April 19 and 20. I do not find this testimony sufficient to contradict or impeach the testimony of Moffitt and Snyder with regard to the condition of the bolts actually observed by them.

bolted with extra bolts. He indicated that when he observed the entry area in question on March 20, 2 or 3 bolts were dislodged in the center of the roof. However he indicated that, looking outby approximately five feet, inby 20 feet, and from the wire side to the clearance side, he did not see any indication of unsupported roof. In connection, due to the expertise of Merrifield, I place considerable weight on his testimony that, generally, bolts are placed in patterns, and that even though only one bolt is not in place, destabilization of the roof could result. Hence, based on the testimony of Snyder, Moffitt and Merrifield, I find that, in the area in question, at least 6 bolts were not in place firmly against the roof, and were not providing support.

Ernie Kapiskosky, one of Consol's shift foremen testified that he had installed the steel sets that are in issue, and that their purpose was to keep the air in the mine from the roof in order to prevent it from deteriorating, and also to keep sloughage from the roof off the track. In the same fashion, Mike Yarish, a section foreman, testified that foremen who supervised the installation of the steel sets had told him that the false roof was installed to keep sloughage from coming down, and to keep air velocity off the top off the roof.

Taking into account the width of the horizontal I-Beams, their placement four feet apart, their being supported by vertical steel beams with a supporting surface approximately 6 inches by 6 inches, and their being placed tight against the surface of the roof, I find credible the testimony of Moffitt and Merrifield, that, in essence, the steel sets provided some measure of support to the roof. Even though the horizontal I-beams were supported by straps, there is no evidence that the straps themselves provide roof support. Hence, when some vertical steel beams were dislodged and not replaced, some degree of roof support was lacking. Accordingly I find that Section 202(a) supra, was violated.

III. Whether the violation of Section 75.202(a) supra was knowingly authorized, ordered or carried out.

Sometime during the day shift on March 19, 1990, coal cars driven by Everette Auten derailed, and knocked out some of the vertical steel legs along the wire side of the entry at Leo's turn. Neither Auten nor Charles Whitlatch, another motorman, counted the number of legs that were knocked out.

Howard Snyder, a track timberman, and member of the union safety committee, indicated that when he went to the area in question on March 19, at approximately 4:30 p.m., he observed that there were 12 horizontal I-beams without any legs under them, and that there were 3 to 5 legs that were dislodged and leaning against the rib. Although Whitlatch and Auten did not



count the number of legs that were knocked out, they each indicated that there were "probably" five legs dislodged.

Richard L. Schrickel, a foreman who was present on March 19, testified that 4 to 6 legs were dislodged and in the ditch, and that he subsequently removed them after the violation was abated. The testimony of John P. Figurski an assistant superintendent who also was present was to the same effect. Ernie Kapiskosky, the shift foreman, observed on the day of the derailment that five legs were out, and one was not strapped which he then jacked.

I thus find that, on the basis of the weight of the testimony, that at least five steel legs were knocked out by the derailment on March 19, 1990.

a. Respondents Conduct

After Kapiskosky was advised of the derailment and went to Leo's turn, he examined the area in question for "immediate" movement in the roof occasioned by the derailment, and looked at beams, straps, bolts, and lag boards. He also looked to see if any dust had been "jarred" (Tr.104). He did not see any indicia of movement. Kapiskosky testified that he pulled himself up to the false roof on the wire side at shoulder level with the planks, and observed that bolts were intact and that in general the roof looked "sufficiently supported". (Tr. 104). At another point 6 to 8 feet further outby on the wire side he again pulled himself up to the false roof, and observed up that the bolts were intact, and that the beams were flush up against the roof. After the area was cleaned and the legs that were dislodged were removed, he authorized resumption of the travel and transportation through the area.

John Figurski testified that he also inspected most of the beams and there was nothing to indicate the existence of a bad roof. He said that bad roof is evidenced by twists in the beams which indicate weight has been placed upon them. In addition, Figurski said that if the roof is bad, boards will separate and crack, and bolts will drop out or be sucked up the straps holding the beams. However, he did not see such evidence of bad roof, and he concluded that the roof was supported.<sup>2</sup> He agreed with Kapiskosky's judgment that travel could be resumed in the area.

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<sup>2</sup> Testimony to the same effect was provided by Schrickel and Yarish Shrickel, who also was present on March 19, opined that the roof was properly supported as there was no movement of the boards, or movement or bowing of the beams. According to Yarish when he arrived at Leo's turn on March 19 after 4:00 p.m., the boards between the beams "did not take any weight", as the bolts "didn't stuck up through the boards". (Tr. 248) (sic).

b. Petitioner's case

Merrifield opined that if only 5 legs had been knocked out, the entire area at Leo's turn, rib-to-rib, and extending 48 feet from arch to arch should have been examined as "...all these things are more or less tied into one another. When you disturb 1 or 2 or 5 or 15 or how many there is, it has adverse effects on the other ones or it could have" (Tr.305). (sic) He further stated, in essence, that a conclusion that Leo's turn was properly supported can not be based on an examination limited to the area directly above where the steel legs had been dislodged.

Both Moffitt and Snyder testified that on March 20, they walked the entire area covering a distance of approximately 48 feet inby the arch at Leo's turn, and that the only places where it was possible to see above the false roof were at the three areas testified to by Moffitt. In this connection, Moffitt testified that he spent approximately 2 to 2 1/2 hours examining the entire area. Also, Moffitt was asked how hard it was to see over the top at the first I-beam outby the arch where he had observed 3 bolts not in place, and he answered as follows: "I thought it was fairly easy to look for" (Tr.81). Also, Moffitt and Snyder testified that it would have been impossible to have climbed up to look at the false roof on the wire side as testified to by Kapiskosky, because the beams were flush up against the roof and there was no room. I do not find this testimony to be of sufficient weight to impeach the testimony of Kapiskosky who, based upon his demeanor, I find credible with regard to what he actually did. In this connection I note that none of the Petitioners' witnesses attempted to climb up to shoulder level with the planks on the wire side as did Kapiskosky.

According, to Synder, Joe Fahay, a motorman, had complained to him about motors rubbing against the vertical steel legs that had been dislodged. Synder also said that on March 19, Whitlatch and Auten had come to him and told him of their concern about the roof falling subsequent to the derailment which had dislodged some legs. However, the record does not establish that either of these two had complained to either Figurski or Kapiskosky with regard to any hazardous roof condition. In their testimony Auten and Whitlach each expressed concern that the roof could possibly have fallen after the derailment, but did not indicate any facts which formed the basis for their conclusions.

According to Snyder, on March 19, shortly before the commencement of the evening shift he informed Yarish that the violation should be corrected "before they run" and Yarish said "yeah, I know we do." (Tr.246) Snyder stated that Yarish called the shift foreman and told him that the legs were dislodged, and that some beams needed either jacks or posts to be set under them. He also stated that he told Yarish that the straps holding

the I-beams were more than 6 feet from the rib, and Yarish agreed that additional support was needed.

Yarish indicated that he could not recall the conversation with Snyder, and that on his shift he installed 13 wooden post. When asked why he installed 13 posts, Yarish stated installed them to replace the legs that were dislodged, and that "I know that if I didn't put them legs back in that they would've been put in before" (Tr. 258) (sic). Yarish said he "felt comfortable with the posts being there" (Tr.260). I find that Snyder's version more credible based upon my observations of both of these witnesses.

c. Case Law

In Kenny Richardson, 3 FMSHRC 8 (1981), aff'd 689 F.2d 632 (6th Cir. 1982) cert. den. 461 U.S. 928 (1984), the Commission reviewed the legislative history of the term "knowingly" as used in Section 109(c) of the Federal Coal Mine Health and Safety Act of 1969, (the 1969 Act), whose exact language was continued in Section 110(c) of the 1977 Act and held that the term means "knowing or having reason to know", (Kenny Richardson, supra, at 16) Specifically, the Commission stated as follows: "If a person in a position to protect employees safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition, he has acted knowingly and in a manner of contrary to the remedial nature of the statute." Kenny Richardson, supra at 16.

In Roy Glenn, 6 FMSHRC 1583 (July 1984), the Commission applied its holding in Kenny Richardson supra to a factual situation where the violation of a mandatory standard did not exist at the time of the alleged failure of the corporate agent to act. The Commission stated as follows:

We hold that a corporate agent in a position to protect employee safety and health has acted "knowingly" in violation of section 110(c) when, based upon facts available to him, he either knew or had reason to know that a violative condition or conduct would occur, but he failed to take appropriate preventative steps. To knowingly ignore that work will be performed in violation of an applicable standard would be to reward a see-no-evil approach to mine safety, contrary to the strictures of the Mine Act. (6 FMSHRC supra at 1586).

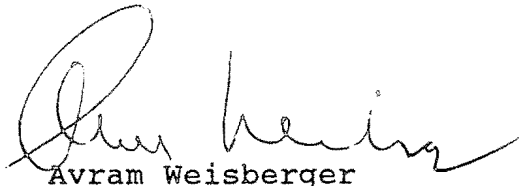
Further, the Commission in Roy Glenn, supra at 1587, provided the following interpretation of its concerns and principles it had set forth in Kenny Richardson, supra:

\*\*\*[t]he Commission held in Kenny Richardson that a supervisor's blind acquiescence in unsafe working conditions would not be tolerated. Onsite supervisors were put on notice by our decision that they could not close their eyes to violations because of self-induced ignorance. (Emphasis added.)

Based on the language of the Commission in Kenny Richardson, supra, and Roy Glenn, supra, set forth above, wherein the Commission described the type of conduct that falls within the scope of the term "knowingly" in the context of Section 110(c) supra, I conclude that a violation of Section 110(c), supra occurs where one ignores an unsafe condition or ignores information that gives him reason to know of the existence of a violative condition. Applying these principles to the case at bar, I find that neither Respondents "knowingly" violated Section 75.202(a) supra. Figurski and Kapiskosky, testified that they examined the roof in the area, and did not observe any of the indicia indicative of a bad roof. Neither did Shrickel and Yarish who were also in the area on March 19. None of Petitioner's witnesses specifically contradicted or impeached this testimony with regard to the non-existence of the various factors testified to by Respondents' witnesses as being indicative of a bad roof. Also, since none of Petitioner's witnesses actually climbed or attempted to climb on the rib of the wire side to get a view of the roof above the false roof, I accept Kapiskosky's testimony that when he did climb in these areas the roof observed by him was well supported. For these reasons I find that neither Respondents ignored any information that gave them reason to know the existence of a violative condition. I conclude that it has not been established that Respondents knowingly violated Section 75.202(a).

ORDER

It is hereby ORDERED that this case be dismissed.



Avram Weisberger  
Administrative Law Judge  
(703) 756-6215

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 10 1992

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
ON BEHALF OF WAYNE KIZZIAH	:	Docket No. SE 92-350-D
AND ROGER KIZZIAH,	:	
Applicant	:	
v.	:	BARB CD 92-12
	:	BARB CD 92-13
C & H MINING COMPANY, INC.,	:	
Respondent	:	

## DECISION

Appearances: William Lawson, Esq., Office of the Solicitor,  
U.S. Department of Labor, Birmingham, Alabama,  
for the Applicant;  
James J. Jenkins, Esq., K. Scott Stapp, Esq.,  
Phelps, Owens, Jenkins, Gibson and Fowler,  
Tuscaloosa, Alabama, for the Respondent.

Before: Judge Melick

This case is before me upon the request for hearing filed by C & H Mining Company, Inc. (C & H) under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," and under Commission Rule 44(b), 29 C.F.R. § 2700.44(b), to contest the Secretary of Labor's application for temporary reinstatement on behalf of miners Wayne Kizziah and Roger Kizziah.<sup>1</sup>

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<sup>1</sup> The substantive statutory foundation for the discrimination complaint is set forth in section 105(c)(1) of the Act. That sections provides as follows:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicants 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 miners at the coal or other mine of an alleged danger or safety or health

These proceedings are governed by Commission Rule 44(c), 29 C.F.R. § 2700.44(c). That rule provides as follows:

The scope of a hearing on an application for temporary reinstatement is limited to a determination by the Judge as to whether the miner's complaint is frivolously brought. The burden of proof shall be upon the Secretary to establish that the complaint is not frivolously brought. In support of his application for temporary reinstatement the Secretary may limit his presentation to the testimony of the complainant. The respondent shall have an opportunity to cross-examine any witnesses called by the Secretary and may present testimony and documentary evidence in support of its position that the complaint is frivolously brought.

This scheme of procedural protections, including the statutory standard of proof provided by section 105(c)(2) of the Act, to an employer in temporary reinstatement proceedings far exceeds the minimum requirements of due process as articulated by the Supreme Court in Brock v. Roadway Express, Inc., 481 U.S. 252 (1987). See JWR v. FMSHRC, 920 F.2d 738 (11th Cir. 1990).

The standard of review in these proceedings is therefore entirely different from that applicable to a trial on the merits of the complaint. As stated by the court in JWR, supra. at pg. 747.

The legislative history of the Act defines the 'not frivolously brought standard' as indicating whether a miner's 'complaint appears to have merit' - an interpretation that is strikingly similar to a reasonable cause standard. [Citation omitted]. In a similar context involving the

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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.

propriety of agency actions seeking temporary relief, the former 5th Circuit construed the 'reasonable cause to believe' standard as meaning whether an agency's 'theories of law and fact are not insubstantial or frivolous.' See Boire v. Pilot Freight Carriers, Inc., 515 F.2d 1185, 1189 (5th Cir 1975) cert denied, 426 U.S. 934, 96 S. Ct. 2646, 49 L.Ed 2d 385 (1976).

The evidence in this case shows that Wayne Kizziah and his brother Roger Kizziah had been employed by Respondent as truck drivers at its mine in Tuscaloosa County, Alabama. On September 24, 1991, William Dykes, a special investigator of the Mine Safety and Health Administration (MSHA), interviewed Wayne Kizziah during the course of an investigation into a discrimination complaint filed by Roger Lowery, a former employee of Respondent. During the course of this interview the fact that Wayne Kizziah had not received "task training" for the operation of end loaders was discussed. It is not disputed that before this time truck drivers at the C & H mine frequently operated the end-loaders on Sundays to load their own trucks.

Subsequently, MSHA Inspector Lonny Foster appeared at the C & H mine site and questioned Respondent's foreman David Walker regarding the operation of end-loaders on Sundays by truck drivers not having the necessary "task training." Foster was told by company officials that they no longer loaded trucks on Sundays. They also told him they had an idea who reported on them. Inspector Foster informed C & H officials that it would be subject to a citation if the truck drivers operated the end-loaders without first receiving task training.

It is undisputed that sometime after Special Investigator Dykes' interview with Wayne Kizziah, Herbert Hall, Jr., one of the company officials, stated to Roger Kizziah in the presence of Wayne and another driver, Jerry Leonard, that there would be no more Sunday loading and "[i]f they wanted to know why they wasn't going to get to load on Sunday anymore to ask [Wayne]." Hall then purportedly stated that he did not have time for training classes. Sunday work was indeed thereafter eliminated for all of the truck drivers. It is further undisputed that Respondent reduced the pay of Wayne and Roger Kizziah effective December 8, 1991, to an hourly rate of \$5.00. Before this reduction in pay the Kizziahs had been compensated on 22 percent of the value of each load of coal they hauled plus \$9.00 per hour for servicing the trucks and stockpiling coal. The remaining



truck drivers continued to be compensated under the latter plan and did not suffer the Kizziahs' reduction in pay. Indeed, the evidence shows that prior to the reduction the Kizziahs had gross earnings generally about \$600 per week whereas during the first week of the pay cut, which included some overtime at the rate of \$7.50 per hour, Wayne Kizziah grossed only \$276.88 and Roger grossed only \$295.63.

The evidence further shows that on December 17, 1991, the Kizziahs were given only one load to haul and sent home whereas most of the other drivers were given additional loads. On the next day, December 18, the Kizziahs reported to work at 6:30 a.m., and at that time learned that other truck drivers had already reported at 3:30 a.m. thereby providing longer work hours than the Kizziahs. The Kizziahs, in their own words, then "quit." According to Wayne Kizziah he quit because he "couldn't make it" under the lower pay scale. He testified subsequently that there were three reasons for his quitting, (1) the "humiliation in it" (presumably because he was not asked to begin work at 3:30 a.m. on December 18 as opposed to the regular startup time of 6:30 a.m.); (2) "the way they was taking us down" and (3) because he wanted a better job and to collect unemployment. Roger Kizziah testified that he quit with his brother on the morning of the 18th when he learned that other drivers had loaded-out earlier that morning. He explained that he would not work for a man who would treat him "worse than a dog."

The Secretary maintains that the Kizziahs' resignations constituted constructive discharges under the circumstances of the case. A constructive discharge occurs whenever a miner engaged in protected activity can show that an operator created or maintained conditions so intolerable that a reasonable miner would have felt compelled to resign. Simpson v. FMSHRC, 842 F.2d 453 (D.C. Cir. 1988) at 461-463. Whether or not a reduction in pay suffered by the Kizziahs in this case would be sufficient to predicate a finding of constructive discharge is another issue that must be finally resolved at another time. The standard of review in this proceeding is however whether the Secretary's legal theories, as well as her facts, are not frivolous. See JWR, supra, at page 747. The Secretary's legal theory on the question of constructive discharge, while it may not be sustained at a trial on the merits, is certainly an arguable position and cannot be deemed to be frivolous.

With respect to the application on behalf of Roger Kizziah, I note that the Secretary changed her theory of the alleged discrimination in closing argument having failed to produce any evidence at hearing that would support the initial complaint. In her closing arguments the Secretary maintained that the alleged discriminatory treatment sustained by Roger Kizziah was the result of retaliation by the Respondent against his brother's protected activity.

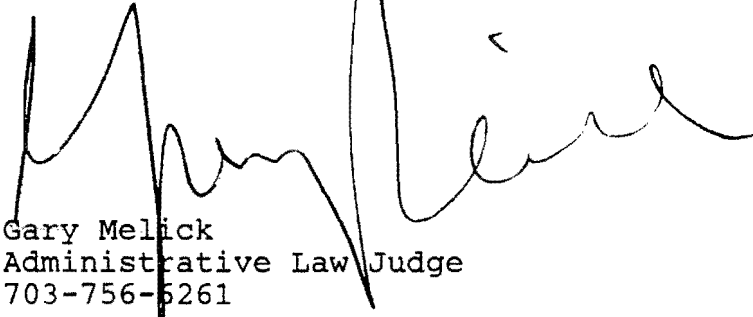
Miners may suffer discrimination under the Act where the mine operator has based its retaliatory action upon only suspicion that the complainant had engaged in protected activity whether or not he actually engaged in that activity. See Elias Moses v. Whitley Development Corp., 4 FMSHRC 1475 (1982). See also Anderson v. Consolidation Coal Co., 9 FMSHRC 413 (1987). In addition there is decisional support for the proposition that a miner is protected under section 105(c) from retaliation based on the protected activities of a relative. See Mackey and Clegg v. Consolidation Coal Co., 7 FMSHRC 977 (1985). Thus there is support for the legal theory that Roger Kizziah suffered discriminatory treatment because of suspicions or actual knowledge of protected activity by his brother Wayne. It cannot therefore be said that the Secretary's legal theory herein is frivolous.

Respondent's evidence at hearing is essentially in the nature of evidence appropriate at a trial on the merits of the discrimination complaints to either rebut a prima facie case of discrimination to show that the adverse action was not motivated in any part by protected activity and/or as an affirmative defense in an effort to prove that the operator was also motivated by the miners' unprotected activity and that it would have taken the adverse action in any event for the unprotected activity alone. See Secretary on behalf of Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (1980), reversed on other grounds sub nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary on behalf of Robbinette v. United Castle Coal Company, 3 FMSHRC 817-818 (1981), Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983).

Under the circumstances however the Secretary has indeed sustained her burden of proving that the complaints of discrimination by Roger and Wayne Kizziah herein were not frivolously brought and the applications must therefore be sustained.

ORDER

C & H Mining Company, Inc. is hereby directed to immediately reinstate Wayne Kizziah and Roger Kizziah to their former positions as truck drivers at the same rate of pay and the same hours as other drivers with equivalent experience. In light of the significant legal issues and the defenses presented at hearing the Secretary is urged to seek prompt disposition of the merits of the complaints herein. It is noted that complaints have already been pending for over seven months. Failure by the Secretary to take such prompt action may result in termination of this order.



Gary Mellick  
Administrative Law Judge  
703-756-5261

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 11 1992

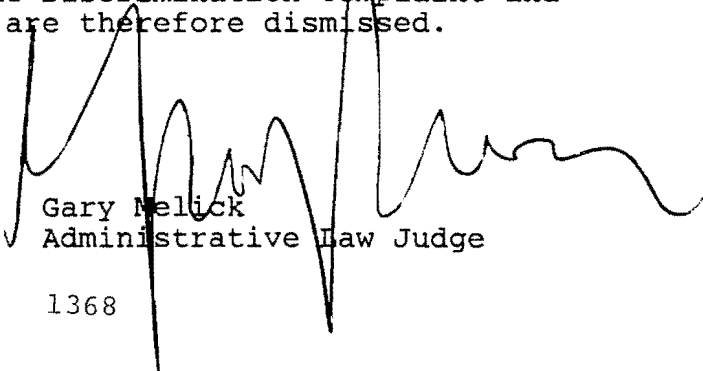
SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA) on	:	
behalf of EARL SHACKLEFORD,	:	Docket No. KENT 91-457-D
Complainant	:	MSHA Case No. BARB-CD-90-37
	:	
EARL SHACKLEFORD,	:	
Intervenor	:	
v.	:	
	:	
NEW HOPE COMPANY OF KENTUCKY,	:	
INC., L & R CONTRACTORS,	:	
INC. AND REECE LEMAR,	:	
Respondent	:	

**ORDER OF DISMISSAL**

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor,  
U.S. Department of Labor, Nashville, Tennessee,  
for the Complainant;  
Tony Oppegard, Esq., Mine Safety Project of  
the Appalachian Research and Defense Fund of  
Kentucky, Inc., for Intervenor;  
Robert A. Thomas, Esq., Harlan, Kentucky,  
for Respondents L & R Contractors, Inc.  
and Reece Lemar;  
Henry S. Johnson, Esq., for Respondent  
New Hope Company of Kentucky, Inc.

Before: Judge Melick

The Complainant, Secretary of Labor, and the Intervenor, Earl Shackleford, request approval to withdraw the Complaint and Petition for Civil Penalty in the captioned case based upon a settlement agreement reached at hearings and set forth in the Appendix hereto. The Respondents are hereby ordered to comply with the terms of said agreement and, under the circumstances herein, permission to withdraw is granted. 29 C.F.R. § 2700.11. This case, including both the Discrimination Complaint and Petition for Civil Penalty, are therefore dismissed.

  
Gary Melick  
Administrative Law Judge

Distribution:

Thomas S. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, Tennessee 37215 (Certified Mail)

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Henry S. Johnson, Esq., P.O. Box 1679, Harlan, KY 40831 (Certified Mail)

Robert A. Thomas, Esq., P.O. Box 932, Harlan, KY 40831 (Certified Mail)

/lh

## APPENDIX

MR. GROOMS: (Counsel for the Secretary)

\* \* \*

The respondents, New Hope of Kentucky Company, Incorporated, L & R Contractors, and Reece Lemar agreed to be liable jointly and severally and to pay the miner Earl Shackelford, Jr., \$20,000 in damages to be paid in 40 weekly installments of \$500 per week. This payment will be by check to be sent certified mail -- certified mail return receipt to Mr. Shackelford at the following address: It's H.C. 65, Box 203 Wallings, W-a-l-l-i-n-s Creek, Kentucky 40873. The first \$500 payment in damages will commence on Friday, July 24th, 1992.

Upon the commencement of this payment, the prior payments that were being made under the settlement which was entered into by the parties and approved by the Court on June the 5th, 1992, will be terminated as of that date and economic reinstatement will no longer apply. Those payments will not be deducted from the \$20,000 in damages that the parties have settled upon. The settlement includes an acceleration clause; that is, your Honor, that if any one of the \$500 payments is not made on the successive 40 Fridays, that upon this failure and written notification to the respondents that the respondents will have 5 days from the receipt of such notice to cure that failure to pay. Otherwise, the full amount of the balance due of that date will become immediately due and payable. The notice of failure to pay according to the terms of this agreement will be sent to Mrs. R-o-b-b-i-n-s, the first name I-n-a, at P.O. Drawer 1597, Harlan, Kentucky 40831.

Mr. Shackelford -- another term of the settlement is that Mr. Shackelford agrees to waive personal reinstatement and Mr. Shackelford agrees not to file or pursue any civil action including but not limited to an act for wrongful discharge or an action for unemployment compensation benefits against the respondents. The government agrees to withdraw its proposal for civil money penalty and subject to the Court's discretion.

\* \* \*

MR. GROOMS: I apologize, your Honor. This is a little bit unusual, I suppose. I think your Honor is correct. I think that if we get an order directing

compliance with the terms of the settlement and your approval, then it actually can be dismissed. And we can take that order if necessary so that would not be necessary for it to be held open.

THE COURT: All right.

MR. GROOMS: Is that all right?

THE COURT: That will be fine.

MR. GROOMS: I know this is somewhat unusual, your Honor. I guess that's why we have a little bit of confusion on that.

THE COURT: All right. Then I will go ahead upon conclusion of this proceeding to issue an Order of Dismissal.

MR. GROOMS: Okay. I have other terms, your Honor. I haven't finished.

THE COURT: Yes, I understand. Go ahead.

MR. GROOMS: I don't remember if I mentioned Mr. Shackelford agrees to waive personal reinstatement. The parties agreed that this settlement agreement does not constitute admission of liability by the respondents in this proceeding. Department of Labor also agrees to submit citation civil -- I mean to submit Citation No. 3831121 and No. 3831122 issued to New Hope Company of Kentucky, May 8, 1982, for regular assessment Code of Federal Regulations, Part 100, that it will not be subject to special assessment. That is, as I said, the order out of a -- they were issued in an attempt to institute reinstatement to Mr. Shackelford under temporary reinstatement order on that day. I would ask that the attorneys respond, satisfied as correct statement of that, your Honor. If not --

MR. JOHNSON: Yes, it is.

MR. THOMAS: I believe the payments are going to be styled as damages.

MR. GROOMS: Right. I didn't mention that.

MR. OPPEGARD: Mr. Shackelford agrees with the terms.

...

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

THE FEDERAL BUILDING

ROOM 280, 1244 SPEER BOULEVARD

DENVER, CO 80204

AUG 12 1992

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 92-52-M
Petitioner	:	A.C. No. 14-01518-05503
	:	
v.	:	
	:	Portable Plant No. 3
WALKER STONE COMPANY, INC.,	:	
Respondent	:	

DECISION

Appearances: Tandra Leonard, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;  
David S. Walker, pro se, Chapman, Kansas, for Respondent.

Before: Judge Cetti

This case is before me upon a petition for assessment of civil penalties 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, the operator of the mine, Portable Plant No. 3, with four violations of mandatory regulatory standard found in 30 C.F.R.

The operator filed a timely answer contesting the alleged violations, the serious and substantial (S&S) characterization of three citations and the appropriateness of the proposed penalties.

Pursuant to notice, a hearing on the merits was held before me at Topeka, Kansas, on June 17, 1992. Testimony was taken from Federal Mine Inspector Richard Laufenberg who made the inspection on October 22, 1991 and from David Walker, President of Walker Stone Company. At the conclusion of the hearing, the parties submitted the matter waiving their right to file post-hearing briefs.



### Stipulations

At the hearing, the parties entered into the record the following stipulations which I accept as established fact.

1. Walker Stone Company Incorporated is engaged in mining and selling of stone in the United States, and its mining operations affect interstate commerce.

2. Walker Stone Company Incorporated is the owner and operator of Portable Plant No. 3 Mine, MSHA I.D. No. 14-01518.

3. Walker Stone Company Incorporated 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. The subject citation as modified was properly served by a duly authorized representative of the Secretary upon an agent of respondent on the date and place stated therein, and may be admitted into evidence for the purpose of establishing its issuance, and not for the truthfulness or relevancy of any statements asserted therein.

6. The exhibits to be offered by Respondent and the Secretary are stipulated to be authentic but no stipulation is made as to their relevance or the truth of the matters asserted therein.

7. The proposed penalty will not affect Respondent's ability to continue business.

8. The operator demonstrated good faith in abating the violation.

9. Walker Stone Company Incorporated is a small mine operator with 67,187 hours worked per year as reflected in the records for 1990.

10. The certified copy of the MSHA Assessed Violations History accurately reflects the history of this mine for the two years prior to the date of the citation.

11. The conditions cited in Citation No. 3629902 constitute a violation of 30 C.F.R. § 56.14112(a)(1).

12. The conditions cited in Citation No. 3629903 constitute a violation of 30 C.F.R. § 56.14112(a)(1).

13. The conditions cited in Citation No. 3629904 constitute a violation of 30 C.F.R. § 56.14112(a)(1).

Citation No. 3629901

This citation, as amended, charges the operator with a 104(a) non S&S violation of 30 C.F.R. § 56.6101.

The citation charges as follows:

The magazine area was not kept free of dry grass and brush. Dry vegetation was observed at a distance of less than 25 feet. The magazines were used to store explosive material.

A grass fire in the area could result in an unplanned detonation of the explosive material stored in the magazines.

The cited safety standard 30 C.F.R. § 57.6101 reads as follows:

§ 57.6101 Areas around explosive material storage facilities.

(a) Areas surrounding storage facilities for explosive material shall be clear of rubbish, brush, dry grass, and trees for 25 feet in all directions, except that live trees 10 feet or taller need not be removed.

The essential facts are not in dispute. Inspector Richard Laufenberg testified that there was dry vegetation within 25 feet of each of two magazines used to store explosive material. One was used to store detonators and the other to store explosives. There was vegetation knee high to waist high within 25 feet to the north and west of the detonator magazine. It covered 30 - 40% of that area. There was also dry grass within 25 feet to the north and east of the other explosive magazine, covering 90% of that area. On the other hand the area in front leading up to the door of each magazine was clear of all vegetation. To abate the citation a front end loader was used to scrape clear the area around the magazines.

There was no contrary evidence. The operator simply argued that the magazines were in a somewhat isolated area and that there was no hazard of either magazine exploding. The operator also stated he was relying upon photographs taken at the time of inspection by the inspector to prove there was no hazard. At the hearing it was established that the photographs were lost and thus unavailable to either party.

The undisputed testimony of the mine inspector clearly established the alleged 104(a) non S&S violation of 30 C.F.R. §57.6101. There was dry vegetation within 25 feet of both the detonator and explosive magazine.

I have considered the statutory penalty criteria set forth in Section 110(i) of the Act and find that MSHA's proposed \$20 penalty is fully supported by the record. It is a modest but appropriate civil penalty in view of the testimony of the mine inspector who found that under all the circumstances and facts involved in this violation, it was not a significant and substantial violation.

Citation No. 3629902

Citation No. 3629902 charges the operator with 104(a) S&S violation of 30 C.F.R. § 56.14112.

The citation charges as follows:

The guard for the tail pulley on the Pioneer conveyor belt was constructed in a manner that would not withstand the vibration, shock, and wear to which it was subjected during normal operations. The guard was constructed of old conveyor belting and hung on hooks mounted to the frame of the conveyor. Bent hooks and an accumulation of limestone dust on the belt guard, had eventually caused the guard to fall off the tail pulley section of the conveyor. A well designed guard is necessary to prevent someone from being caught by and entangled in the moving parts.

The cited safety standard 30 C.F.R. § 56.14112(a)(1) reads as follows:

§ 56.14112 Construction and maintenance of guards.

(a) Guards shall be constructed and maintained to -

(1) Withstand the vibration, shock, and wear to which they will be subjected during normal operations . . . .

The essential facts are undisputed. Inspector Laufenberg testified the citation quoted above accurately describes the violative condition he observed at the time of his October 22, 1991 inspection. The operator stipulated that "the conditions cited in Citation No. 3629902 constitute a violation of 30 C.F.R. Section 56.14112(a)(1)." (Stipulation No. 11). The primary issue remaining is whether or not the violation was significant and substantial. Since this is the primary issue in the remaining two citations (Citation Nos. 3629903 and 3629904) this issue in all three cases alleging an S&S violation of the same standard will be discussed below under the heading entitled "Significant and Substantial Violations" after setting forth the violative conditions charged and established in these two remaining citations.

Citation No. 3629903

This citation charges a 104(a) S&S violation of 30 C.F.R. § 56.14112. The citation reads as follows:

The guard for the tail pulley on the #2 conveyor belt was constructed in a manner that would not withstand the vibration, shock, and wear to which it was subjected during normal operations. The guard was constructed of old conveyor belting and hung on hooks mounted to the frame of the conveyor. Bent hooks and an accumulation of limestone dust on the belt guard, had eventually caused the guard to fall off the tail pulley section of the conveyor. A well designed guard is necessary to prevent someone from contacting the moving machine parts. The tail pulley was located approximately four (4) foot above ground.

The cited safety standard reads as follows:

§ 56.14112 Construction and maintenance of guards.

(a) Guards shall be constructed and maintained to -

(1) Withstand the vibration, shock, and wear to which they will be subjected during normal operation ... .

The essential facts are undisputed. The credible testimony of Inspector Laufenberg established the violative conditions alleged in the citation. The inspector testified the citation accurately describes the condition he observed at the time of his inspection.

In addition, the operator stipulated that the conditions cited in Citation No. 3629903 constitute a violation of 30 C.F.R. § 56.14112(a)(1). (Stipulation No. 12).

The S&S issue involved in this citation will be discussed under the heading "Significant and Substantial Violations" since this is also the primary issue in two other citations charging violations of the same safety standard.

#### Citation No. 3629904

This citation charges the operator with a 104(a) S&S violation of 30 C.F.R. § 56.14112.

The citation reads as follows:

The guard for the tail pulley on the 65 foot Universal stacking conveyor belt was constructed in a manner that would not withstand the vibration, shock, and wear to which it was subjected during normal operations. The guard was constructed of old conveyor belting and hung on hooks mounted to the frame of the conveyor. Bent hooks and an accumulation of limestone dust on the belt guard had eventually caused the guard to fall off the tail pulley section of the conveyor. A well designed guard is necessary to prevent someone from contacting the moving machine parts. The tail pulley was located approximately three (3) foot above ground.

The cited safety standard 30 C.F.R. § 56.14112(a)(1) reads as follows:

§ 56.14112 Construction and maintenance of guards.

(a) Guards shall be constructed and maintained to -

(1) Withstand the vibration, shock, and wear to which they will be subjected during normal operation ... .

The essential facts are undisputed. Inspector Laufenberg testified the citation quoted above, accurately describes the violative condition he observed at the time of his October 22, 1991 inspection. There was no contrary evidence.

The operator also stipulated that "The conditions cited in Citation No. 3629904 constitute a violation of 30 C.F.R. § 56.14112(a)(1)." (Stipulation No. 13).

The S&S issue involved in this citation will be discussed under the heading "Significant and Substantial Violations" since this is also the primary issue in the other two citations charging violations of the same safety standard.

#### 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, (August 1985) 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).

Whether any particular violation is significant and substantial must be based on the particular facts surrounding the violation. Secretary of Labor v. Texasgulf, Inc., 10 FMSHRC 498, 501 (April 1988).

The reasonable likelihood that the hazard contributed to will result in an event in which there is a serious injury must be evaluated in terms of continued normal mining operations. U.S. Steel Mining Co., 6 FMSHRC 1573 (July 1984); Monterey Coal Co., 7 FMSHRC 996 (1985). Thus the time frame for determining if a reasonable likelihood exists includes not only the time that a violative condition existed but also the time it would have existed if normal mining operations had continued. Rushton Mining Co., 11 FMSHRC 1432 (1989); Halfway, Inc., 8 FMSHRC 8, 12 (1986); U.S. Steel Mining Co., 7 FMSHRC 1125, 1130 (August 1985).

The Secretary is not required to present evidence that the hazard actually will occur. In Youghiogheny & Ohio Coal Co., 9 FMSHRC 673 (April 1987), the Commission held that:

In order to establish the significant and substantial nature of the violation, the Secretary need not prove that the hazard contributed to actually will result in an injury causing event. The Commission has consistently held that proof that the injury-causing event is reasonably likely to occur is what is required.

See also Eagle Nest, Incorporated, Docket No. WEVA 91-293-R (July 28, 1992).

Citation Nos. 3629902, 3129903 and 3629904 each allege a significant and substantial violation of 30 C.F.R. § 56.14112(a)(1). These citations involve three (3) different tail pulley guards. Each tail pulley was 18 to 24 inches in diameter and the conveyor belts were 30 to 32 inches wide. The tail pulley guards were constructed of conveyor belting hung on hooks. Due to poor construction and maintenance, a substantial portion of each tail pulley guard had fallen off leaving employees exposed to the hazard of contact with the pinch point between the pulley and the moving conveyor belt.

Each belt and pulley was moving at a speed of approximately 100 RPM. The pinch points between the belt and pulley were located 2 to 4 feet above ground level and were easily accessible to employees. I credit the testimony of Inspector Laufenberg that there was spillage from the belt which could cause an employee to trip and fall into the belt and also that an employee could be drawn into the pinch point by his clothes being caught in the pinch point. There was no stop cord near the conveyor belts. Evaluated in terms of continued normal mining operations, the hazard contributed to would reasonably likely result in serious injury.

The most probable injury would be the loss of an arm. The operator was clearly negligent in his failure to comply with the cited safety standard. The record fully supports the inspector's evaluation of the operator's negligence as moderate. I find the gravity of the violation was indeed serious. The operator abated all violations in good faith. He is a small operator.

Upon evaluation of all the evidence, I concur with Inspector Laufenberg's finding that each of the three violations involving tail pulley guards was a significant and substantial violation. The credible testimony of Inspector Laufenberg established that in each case there was a violation of a mandatory safety

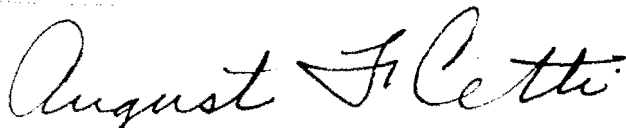


standard; that a discrete safety hazard existed and that there was a reasonable likelihood, evaluated in terms of continued normal mining operation, that the hazard contributed to would result in serious injury.

Accordingly, it is found each of the violations of 30 C.F.R. § 56.1412(a)(1) is a significant and substantial violation and considering the statutory criteria in Section 110(i) of the Act, the full amount of MSHA's proposed penalty is assessed for each violation.

ORDER

Each of the citations is **AFFIRMED**. Walker Stone Company **IS DIRECTED TO PAY** civil penalties in the sum of \$224 to the Secretary of Labor within 30 days of the date of this decision. Upon receipt of payment, this case is **DISMISSED**.



August F. Cetti  
Administrative Law Judge

Distribution: Certified Mail

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David S. Walker, President, WALKER STONE COMPANY, INC., Box 563, Chapman, KS 67431

sh

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

AUG 12 1992

IN RE: CONTESTS OF RESPIRABLE	)	Master Docket No. 91-1
DUST SAMPLE ALTERATION	)	
CITATIONS	)	
	)	
BIG BOTTOM COAL CO., INC.,	)	CONTEST PROCEEDINGS
Contestant	)	
v.	)	Docket Nos. KENT 91-501-R
	)	and KENT 91-502-R
SECRETARY OF LABOR,	)	
MINE SAFETY AND HEALTH	)	Citation Nos. 9858986
ADMINISTRATION (MSHA),	)	and 9858987
Respondent	)	Issued April 4, 1991
	)	
	)	No. 1 Mine
	)	Mine ID 15-12610
	)	
SECRETARY OF LABOR,	)	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	)	
ADMINISTRATION (MSHA),	)	Docket No. KENT 91-1134
Petitioner	)	A.C. No. 15-12618-03575D
.v	)	
	)	No. 1 Mine a/k/a Big Bottom
BIG BOTTOM COAL CO., INC.,	)	
a/k/a RAWL SALES AND	)	
PROCESSING COMPANY,	)	
Respondent	)	
	)	
BIG BOTTOM COAL CO., INC.,	)	CONTEST PROCEEDINGS
Contestant	)	
v.	)	Docket Nos. KENT 91-1017-R
	)	and KENT 91-1018-R
SECRETARY OF LABOR,	)	
MINE SAFETY AND HEALTH	)	Citation Nos. 9862923
ADMINISTRATION (MSHA),	)	and 9862924
Respondent	)	Issued June 7, 1991
	)	
	)	No. 1 Mine
	)	Mine ID 15-12618
	)	

SECRETARY OF LABOR,	)	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	)	
ADMINISTRATION (MSHA),	)	Docket No. KENT 92-126
Petitioner	)	A.C. No. 15-12618-03579D
.v	)	
BIG BOTTOM COAL CO., INC.,	)	No. 1 Mine a/k/a Big Bottom
a/k/a RAWL SALES AND	)	
PROCESSING COMPANY,	)	
Respondent	)	
<hr/>		
TALL TIMBER COAL CO., INC.,	)	CONTEST PROCEEDING
Contestant	)	
v.	)	Docket No., KENT 91-668-R
SECRETARY OF LABOR,	)	Citation No. 9859055; 4/4/91
MINE SAFETY AND HEALTH	)	
ADMINISTRATION (MSHA),	)	Mine No. 1
Respondent	)	Mine ID 15-13720
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SECRETARY OF LABOR,	)	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	)	
ADMINISTRATION (MSHA),	)	Docket No. 91-1135
Petitioner	)	A.C. No. 15-13720-03573D
v.	)	
RAWL SALES AND PROCESSING CO.,	)	Tall Timber a/k/a No. 1 Mine
a/k/a TALL TIMBER COAL CO.,	)	
Respondent	)	
<hr/>		
MARTIN COUNTY COAL CORPORATION,	)	CONTEST PROCEEDINGS
Contestant	)	
v.	)	Docket Nos. KENT 91-482-R
SECRETARY OF LABOR,	)	through KENT 91-484-R
MINE SAFETY AND HEALTH	)	
ADMINISTRATION (MSHA),	)	Citation Nos. 9859067
Respondent	)	through 9859069
	)	Issued April 4, 1991
	)	
	)	Black Bear Mine
	)	Mine ID 15-13946
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SECRETARY OF LABOR,	)	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	)	
ADMINISTRATION (MSHA),	)	Docket No. KENT 91-1095
Petitioner	)	A.C. No. 15-13946-03534D
v.	)	
MARTIN COUNTY COAL CORPORATION,	)	Black Bear Mine
Respondent	)	

MARTIN COUNTY COAL CORPORATION,  
Contestant

v.

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

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

v.

MARTIN COUNTY COAL CORPORATION,  
Respondent

MARTIN COUNTY COAL CORPORATION,  
Contestant

v.

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

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

v.

MARTIN COUNTY COAL CORPORATION,  
Respondent

MARTIN COUNTY COAL CORPORATION,  
Contestant

v.

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

CONTEST PROCEEDING

Docket Nos. KENT 91-485-R  
Citation No. 9859295; 4/4/91

Wildcat No. 3 Mine  
Mine ID 15-15940

CIVIL PENALTY PROCEEDING

Docket No. KENT 91-1097  
A.C. No. 15-15940-03507D

Wildcat No. 3 Mine

CONTEST PROCEEDINGS

Docket Nos. KENT 91-493-R  
and KENT 91-494-R

Citation Nos. 9858712  
and 9858713  
Issued April 4, 1991

Preparation Plant Mine  
Mine ID 15-05106

CIVIL PENALTY PROCEEDING

Docket No. KENT 91-1094  
A.C. No. 15-05106-03525D

Preparation Plant Mine

CONTEST PROCEEDINGS

Docket Nos. KENT 91-488-R  
through KENT 91-492-R

Citation Nos. 9859602  
through 9859606  
Issued April 4, 1991

	)	Bobcat No. 2 Mine
	)	Mine ID 15-16652
	)	
SECRETARY OF LABOR,	)	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	)	
ADMINISTRATION (MSHA),	)	Docket No. KENT 91-1099
Petitioner	)	A.C. No. 15-16652-03502D
v.	)	
	)	Bobcat No. 3 Mine
MARTIN COUNTY COAL CORPORATION,	)	
Respondent	)	
	)	
MARTIN COUNTY COAL CORPORATION,	)	CONTEST PROCEEDINGS
Contestant	)	
v.	)	Docket Nos. KENT 91-486-R
	)	and KENT 91-487-R
SECRETARY OF LABOR,	)	
MINE SAFETY AND HEALTH	)	Citation Nos. 9859559
ADMINISTRATION (MSHA),	)	and 9859560
Respondent	)	Issued April 4, 1991
	)	
	)	Red Fox No. 3 Mine
	)	Mine ID 15-16574
	)	
SECRETARY OF LABOR,	)	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	)	
ADMINISTRATION (MSHA),	)	Docket No. KENT 91-1098
Petitioner	)	A.C. No. 15-16574-03505D
v.	)	
	)	Red Fox No. 3 Mine
MARTIN COUNTY COAL CORPORATION,	)	
Respondent	)	
	)	
MARTIN COUNTY COAL CORPORATION,	)	CONTEST PROCEEDINGS
Contestant	)	
v.	)	Docket Nos. KENT 91-472-R
	)	through KENT 91-481-R
SECRETARY OF LABOR,	)	
MINE SAFETY AND HEALTH	)	Citation Nos. 9859213
ADMINISTRATION (MSHA),	)	through 9859222
Respondent	)	Issued April 4, 1991
	)	
	)	Black Diamond Mine
	)	Mine ID 15-15623
	)	
SECRETARY OF LABOR,	)	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	)	
ADMINISTRATION (MSHA),	)	Docket No. KENT 91-1096
Petitioner	)	A.C. No. 15-15623-03508D
v.	)	

MARTIN COUNTY COAL CORPORATION, Respondent	)	Black Diamond Mine
	)	
MARTIN COUNTY COAL CORPORATION, Contestant	)	CONTEST PROCEEDINGS
v.	)	Docket Nos. KENT 91-495-R
	)	through KENT 91-500-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	)	Citation Nos. 9858669
	)	through 9858674
	)	Issued April 4, 1991
	)	No. 1-C Mine
	)	Mine ID 15-03752
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	)	CIVIL PENALTY PROCEEDING
v.	)	Docket No. KENT 91-1093
	)	A.C. No. 15-03752-03557D
	)	No. 1-C Mine
MARTIN COUNTY COAL CORPORATION, Respondent	)	
	)	
MARTIN COUNTY COAL CORPORATION, Contestant	)	CONTEST PROCEEDING
v.	)	Docket Nos. KENT 91-1019-R
	)	Citation No. 9862930; 6/7/91
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	)	Red Fox No. 4 Mine
	)	Mine ID 15-16691
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	)	CIVIL PENALTY PROCEEDING
v.	)	Docket No. KENT 92-127
	)	A.C. No. 15-16691-03503D
	)	Red Fox No. 4 Mine
MARTIN COUNTY COAL CORPORATION, Respondent	)	

**DECISION APPROVING SETTLEMENT**  
**ORDER OF DISMISSAL**

Before: Judge Broderick

On July 29, 1992, the Secretary filed a Motion to Approve Settlement between the parties in the above cases. The cases

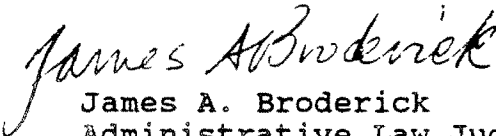
include 35 citations variously assessed at \$1100, \$1200, \$1300 and \$1400 for alleged violations of 30 C.F.R. § 70.209(b). The Secretary continues to assert that the violations resulted from a deliberate act and has offered evidence to support this assertion. The operators continue to assert that they did not tamper with or alter any of their dust filter media, and have offered evidence to show that dust dislodgement on samples may result from accidental causes. In order to resolve these matters the parties have agreed to propose this settlement. The penalties originally assessed totalled \$46,100. The parties agree to a settlement reducing the total penalties to \$39,185, a 15 percent reduction in the penalty for each alleged violation.

The operators represent that they have made good faith efforts to investigate and address conditions in their dust sampling programs which may cause or contribute to dust dislodgement from samples. The operators further have submitted a written program attesting to their commitment to the integrity of their respirable dust programs.

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

Accordingly, the settlement motion is APPROVED. The operators are ORDERED to pay within 30 days of the date of this decision the sum of \$39,185. for the violations charged in these proceedings.

IT IS FURTHER ORDERED that the above contest proceedings are DISMISSED.

  
James A. Broderick  
Administrative Law Judge

Distribution:

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/fb

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 14, 1992

COSTAIN COAL INC.,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. KENT 92-868-R
v.	:	Citation No. 3805836; 2/25/92
	:	
	:	Millers Creek Mine No. 1
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Mine ID 15-16855
ADMINISTRATION (MSHA),	:	
Respondent	:	

## ORDER OF DISMISSAL

Before: Judge Merlin

On May 11, 1992, the Commission received the operator's notice of contest of Citation No. 3805836 which was dated May 8, 1992. The contest was assigned the above docket number.<sup>1</sup> Notice is completed upon mailing, therefore, the case is accepted as filed on May 8, 1992. J. P. Burroughs, 3 FMSHRC 854 (1981). On June 15, 1992, the Solicitor filed a motion to dismiss the operator's notice of contest. On June 22, 1992, the operator filed a response to the motion to dismiss.

Section 105(d) of the Mine Act, 30 U.S.C. § 815(d), provides in relevant part:

If, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends to contest the issuance or modification of an order issued under section 104, or citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b) of this section, or the reasonableness of the length of abatement time fixed in a citation or modification thereof issued under section 104 \* \* \* the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing \* \* \* .

---

<sup>1</sup> The operator did not attach a copy of the citation to its contest as required by Commission rule 20(c). 29 C.F.R. § 2700.20(c). The Commission's Docket Office contacted the operator on May 14, 1992, and requested that a copy of the citation be sent, but no copy was received. Upon request the Solicitor on August 3, 1992 faxed a copy of the citation to the Commission.



In her motion to dismiss, the Solicitor represents that the citation was issued on February 25, 1992 and was conferenced on April 4, 1992 and that the notice of contest was filed on May 8, 1992. The Solicitor therefore, calculates that the notice was filed 72 days after the citation was issued. Relying upon section 105(d) of the Act, Commission rules and decisions, the Solicitor asserts that a notice of contest must be filed within 30 days of receipt of the citation. Therefore, the Solicitor argues that this contest should have been filed by March 26, 1992, and that since it was not filed until May 8, it must be dismissed as untimely.

The operator in opposing the motion to dismiss represents that the conference was held on April 6, 1992, not April 4. The operator alleges it was then advised "by MSHA personnel" at the conclusion of the conference that if it wished to pursue its action, the operator had 30 days to file a notice of contest. The operator states that it contested the citation within 30 days after the conference was held by mailing its notice on May 5, 1992. Finally, the operator claims that it requested the conference within 6 days after the citation was issued and that if MSHA had granted the conference within the 15 days set out in its guidelines, the operator would have been able to contest the citation within the statutory thirty days.

The operator's position is without merit. Its contention that the notice was mailed on May 5 must be rejected since the notice itself which is in the form of a letter, is dated May 8. Moreover, the date of the conference is not controlling. As the statute unequivocally provides, the 30 day filing period runs from the date the citation was issued. Therefore, this contest was filed 42 days late.

A long line of decisions going back to the Interior Board of Mine Operation Appeals has held that cases contesting the issuance of a citation must be brought within the statutory prescribed 30 days or be dismissed. Freeman Coal Mining Corporation, 1 MSHC 1001 (1970); Consolidation Coal Co., 1 MSHC 1029 (1972); Island Creek Coal Co. v. Mine Workers, 1 MSHC 2143 (1979); aff'd by the Commission, 1 FMSHRC 989 (August 1979); Amax Chemical Corp., 4 FMSHRC 1161 (June 1982); Rivco Dredging Corp., 10 FMSHRC 889 (July 1988); Prestige Coal Company, 13 FMSHRC 93 (January 1991); See Also, Peabody Coal Co., 11 FMSHRC 2068 (October 1989); Big Horn Calcium Company, 12 FMSHRC 463 (March 1990); Energy Fuels Mining Company, 12 FMSHRC 1484 (July 1990); Wallace Brothers, 14 FMSHRC 586 (April 1992). The time limitation for contesting the issuance of citations must therefore, be viewed as jurisdictional.

The notice in this case was filed more than 70 days after the citation was issued. I have held previously that the Mine Act and applicable regulations afford no basis to excuse tardi-

ness because the operator believed it could pursue other avenues of relief with MSHA before coming to this separate and independent Commission to challenge a citation. Prestige Coal Company, supra, at 95. Furthermore, the operator's assertion that certain MSHA personnel advised that the operator could contest the citation within 30 days from the conference, even if true, is of no effect. The provisions of the law are clear and the Secretary would not be estopped even assuming such misinformation had been given. Emery Mining Corp. v. Secretary of Labor, 744 F.2d 1411 (10th Cir. 1984); U. S. Steel Mining Co., Inc., 6 FMSHRC 2305 (Oct. 1984); King Knob Coal Co., Inc., 3 FMSHRC 1417 (June 1981); See Also, Skelton Incorporated, 13 FMSHRC 294 (Feb. 1991); and Featherlite Building Products, 12 FMSHRC 2580 (Dec. 1990).

Although the foregoing is dispositive, it is noted that the operator has filed a timely notice of contest of the penalty assessment for Citation No. 3805836 in Docket No. KENT 92-723. Commission rules provide that an operator's failure to file a notice of contest of a citation or order does not preclude the operator from challenging the citation in a penalty proceeding. 29 C.F.R. § 2700.22. Therefore, the operator has the opportunity in KENT 92-723 to contest this citation.

In light of the foregoing, it is ORDERED that this case be DISMISSED.



Paul Merlin  
Chief 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 14 1992

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 92-279-D
on behalf of	:	
DONALD L. GREGORY,	:	Black Thunder Mine
Complainant	:	
	:	
v.	:	
	:	
THUNDER BASIN COAL COMPANY,	:	
Respondent	:	
	:	
	:	
SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 92-280-D
on behalf of	:	
LOY D. PETERS,	:	Black Thunder Mine
Complainant	:	
	:	
v.	:	
	:	
THUNDER BASIN COAL COMPANY,	:	
Respondent	:	

DECISION AND ORDER DISMISSING PROCEEDING  
and  
CANCELING HEARING

Before: Judge Lasher

I have previously entered two separate Orders requiring a response to discovery. Orders were dated July 8, 1992, and July 22, 1992. On or about August 5, 1992, the Secretary of Labor filed a Notice Regarding Discovery in which she indicated the discovery would not be responded to by Mr. Gregory. See Stipulation of the parties dated August 7, 1992, indicating that the positions taken as to Mr. Gregory are the same positions taken as to Mr. Peters.

The Commission has held that "[s]hould the Secretary resist the Judge's order to disclose [a matter in discovery], dismissal of the proceeding is the appropriate sanction with further review available, in accordance with section 113(d)(2) of the Mine Act."

Secretary of Labor on Behalf of Logan v. Bright Coal Company, Inc., 6 FMSHRC, Dec. 2520, 2526 (November 1984). The Commission recently reaffirmed this procedure in Secretary of Labor v. ASARCO, Inc., 12 FMSHRC, Dec. 2548, 2560 (December 1990). Thus, dismissal is appropriate here. <sup>1</sup>

It is noted that there were Notices of Taking Deposition of Complainants filed in this action on May 18, 1992. These Notices specifically requested that each Complainant bring with him all "written statements given to any governmental agency or any other person or entity, tape recordings, or any other documents of any type, which in any way relate to [Complainant's] allegations in this action." In conjunction with that deposition, counsel for Respondent notes to the Judge that, as agreed by the parties, there was no need to subpoena Complainants pursuant to the conduct of the deposition. Any statements that were given are either in the possession of Complainants or can be obtained by them and thus production can and must be ordered. 8 Wright & Miller, Federal Practice and Procedure, § 2210 p. 621. This situation was glossed over in the Secretary's "Notice Regarding Discovery."

The requested information is plainly relevant. The discovery request is not, as alleged, addressed to union organizing activities, but rather is addressed to statements made regarding the nature and scope of alleged mistreatment of the two Complainants by Thunder Basin. The orders granting discovery contained protective language. Even assuming, for the sake of argument, that there are no conflicts between the statements sought in the discovery request, and statements given to MSHA, that cannot be a basis for denying the discovery. For example, variations between statements in the form of omissions or additions between the two statements may give rise to questions, even assuming that, literally speaking, there are no "conflicts" as such. In view of the information already contained in the Commission files, I find the Secretary's assertion of informer's privilege a transparency.

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<sup>1</sup> The Secretary's motion for Certification for Interlocutory Review, under Authority of Commission Procedural Rule 74 is rendered moot by dismissal of this proceeding on this ground. This issue can be resolved on appeal. Bright Coal Company, supra.

ORDER

1. For the reasons indicated, these two proceedings are **DISMISSED**.

2. The hearing scheduled to commence in Casper, Wyoming, on August 25, 1992, is **CANCELED**.

*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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FALLS CHURCH, VIRGINIA 22041

17 1992

ROCHESTER & PITTSBURGH COAL	:	CONTEST PROCEEDINGS
COMPANY,	:	
Contestant	:	Docket No. PENN 92-70-R
v.	:	Citation No. 3705517;
	:	10/11/91
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. PENN 92-71-R
ADMINISTRATION (MSHA),	:	Citation No. 3705518;
Respondent	:	10/11/91
	:	
	:	Docket No. PENN 92-100-R
	:	Citation No. 3705241;
	:	10/23/91
	:	
	:	Greenwich Collieries No. 2
	:	Mine
	:	
	:	Mine ID 36-02404

## DECISION

Appearances: Joseph A. Yuhas, Esq., Pennsylvania Mines Corporation, Ebensburg, Pennsylvania, for Contestant;  
Edward H. Fitch, Esq., Office of the Solicitor, U. S. Department of Labor, Arlington, Virginia, for Respondent.

Before: Judge Maurer

These proceedings concern Notices of Contest filed by the contestant (R&P) against the respondent (MSHA) challenging the validity of "S&S" Citation Nos. 3705517, 3705518, and 3705241, all issued pursuant to section 104(a) of the Federal Mine Safety and Health Act of 1977. The citations all charge R&P with an alleged violation of the mandatory standard found at 30 C.F.R. § 75.311. The respondent filed a timely answer asserting that the citations were properly issued and in due course a hearing was held on March 17, 1992, in Indiana, Pennsylvania. The parties filed posthearing briefs, and I have considered their respective arguments in the course of my adjudication of this matter. I have also considered the oral arguments made during the course of the hearing.

### STIPULATIONS

The parties stipulated to the following:

1. Greenwich Collieries is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.
2. The Administrative Law Judge has jurisdiction over these proceedings.
3. The subject citations were properly served by a duly authorized representative of the Secretary of Labor upon an agent of the respondent at the dates, times, and places stated therein, and may be admitted into evidence for the purpose of establishing their issuance, and not for the truthfulness or relevancy of any statements asserted therein.
4. The respondent demonstrated good faith in the abatement of the citations.
5. The assessment of a civil penalty in this proceeding will not affect respondent's ability to continue in business.
6. The parties stipulate to the authenticity of their exhibits, but not to their relevance, nor to the truth of the matters asserted therein.
7. An inlet evaluation point ("IE") is a point where air enters an abandoned area. (Tr. 19).
8. Citation No. 3705517 was issued on October 11, 1991, charging a violation of section 75.311.
9. Citation No. 3705517 states correctly that air was passing by openings to abandoned areas, IE's 39 and 45 within the meaning of section 75.311.
10. The air passing by IE's 39 and 45 was coursed to ventilate the 1 Butt section of the mine.
11. An examination of this air passing by IE's 39 and 45 was not made during a preshift examination at the point where the air passed by the opening to the abandoned area nor was an examination conducted immediately inby this point.
12. The distances from IE's 39 and 45 to the faces of the 1 Butt section are approximately 1,500 feet and 3,000 feet, respectively. (Jt. Exh. 1).
13. The air at IE 45 was traveling in its proper direction, into the gob, on October 11, when checked by the inspector. (Tr. 19, 36).

14. The air at IE 45 contained no methane on October 11, when checked by the inspector. (Tr. 36).

15. The inspector did not travel to IE 39 on October 11. (Tr. 36).

16. The inspector did not travel to the faces of 1 Butt section on October 11. (Tr. 37).

17. The air at IE 45 was traveling into the gob at a velocity of over 400 feet per minute. (Tr. 36).

18. Citation No. 3705518 issued on October 11, 1991, charges a violation of section 75.311.

19. Citation No. 3705518 correctly states that air was passing by an opening to an abandoned area, IE 38.

20. The air passing by IE 38 was ventilating the M11X-01 section of the mine.

21. An examination of the air passing by IE 38 was not made during a preshift examination at the point where the air passed by IE 38 nor was an examination conducted immediately inby this point.

22. The inspector did not travel to IE 38 on October 11. (Tr. 44).

23. The inspector issued Citation No. 3705518 based on his inspection of mine maps. (Tr. 45).

24. The inspector did not travel to the M11X-01 section on October 11. (Tr. 45).

25. Citation No. 3705241 was issued on October 23, 1991 and charges a violation of section 75.311.

26. Citation No. 3705241 differs from Citation Nos. 3705517 and 3705518 in that the air passing by the IE's in 3705517 and 3705518 is directly adjacent to the IE's whereas at IE's 20, 20A, and 15 cited in No. 3705241 the air traveling to the M11X-02 section is a minimum of 90 feet from the nearest IE. The air does pass directly adjacent to IE's 43(a), (b), and (c). (Tr. 48).

27. The air traveling to IE's 20, 20A, and 15 splits from the air traveling to the M11X-02 section approximately 90 feet from those IE points. The Secretary requires an examination immediately inby the split point. (Tr. 49).



28. After the air traveling to IE's 20, 20A, and 15 splits from the air traveling to the M11X-02 section, it travels through the inlet evaluation points, through the gob and does not ventilate the M11X-02 section. (Tr. 49, 74).

29. The air ventilating the M11X-02 section was not examined for methane during a preshift examination prior to it entering the mouth of the M11X-02 section.

30. The inspector did not examine the areas of the mine cited in Citation No. 3705241 on October 23, 1991. (Tr. 32).

#### DISCUSSION

On October 11, 1991, MSHA Inspector Nevin J. Davis issued section 104(a) Citation No. 3705517, citing a violation of 30 C.F.R. § 75.311<sup>1</sup> and charging as follows:

Preshift type examinations for methane content levels are not being conducted for the areas of the bleeder inlet evaluation point numbers 45 and 39; previously approved for the old 1 Butt abandoned gob area. Intake air current is being coursed, at this time, directly past these bleeder point openings and then flowing onto and ventilating the active 1 Butt (051) working section. Twenty-one citations have been issued at this mine under Part/Section 75.300 series from 7/1/91 to 9/30/91.

Also on October 11, 1991, Inspector Davis issued Citation No. 3705518, citing the identical section and charging as follows:

Preshift type examinations for methane content levels are not being conducted for the areas of the bleeder inlet evaluation point number 38; previously approved for the old M11X abandoned gob area. Intake air current is being coursed, at this time, directly past this bleeder point opening and then flowing into and ventilating the active M11X (013) working section. Twenty-one citations have been issued at this mine under Part/Section 75.300 series from 7/1/91 to 9/30/91.

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<sup>1</sup> 30 C.F.R. § 75.311 provides in pertinent part that: Air which has passed by an opening of any abandoned area shall not be used to ventilate any working place in the coal mine if such air contains 0.25 volume per centum or more methane. Examinations of such air shall be made during the preshift examination required by section 75.303.

On October 23, 1991, Inspector Davis issued Citation No. 3705241, again citing the same section and charging as follows:

Preshift type examinations for methane content levels are not being conducted for the areas of the bleeder inlet evaluation point numbers, previously approved for the M-11 to M-9 gob area, bleeder numbers 20-20A-15, M-11X to M-9 gob area. Bleeder number 43A-43B and 43C, M11X-1 gob area with bleeder number 34. Intake air current flow is now being coursed past these inlet points and into the active M11X-2 (009) working section. Twenty-one citations have been issued at this mine under Part/Section 75.300 series from 7/1/91 to 9/30/91.

Basically, it appears to me that the operator was not examining air which was passing by various openings to abandoned areas at or immediately inby those points or at least before that air mixed with other intake air flowing to the working place and downstream that air was being used to ventilate working places<sup>2</sup> in the mine. The cited mandatory standard requires examination of such air during the preshift examination.

The operator's basic substantive disagreement is that they believe that so long as a methane check is made of that totality of intake air before it ventilates the working faces, then the purpose and intent of the ventilation regulations have been served and they are in compliance. Counsel at hearing noted the anomalous situation that arises where if you had air passing by an inlet evaluation point (IE) that contained .3 percent methane that went to the face, you would be in violation of section 75.311, but you could have air that contained .2 percent methane as it passed that point which later picked up more methane inby that point and contained .9 percent methane by the time it got to the face. The latter situation, even though a greater concentration of methane gas reaches the working face, is permissible. There is no violation in that situation.

Contestant also argues that section 75.311 does not apply to sections which are not producing coal. But I find no such requirement in the specific language of 30 C.F.R. § 75.311 and therefore the failure to prove that the relevant working places alluded to in the citations at bar were actually producing coal at the time is irrelevant.

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<sup>2</sup> 30 C.F.R. § 75.2(g)(2) defines working place as the area of a coal mine inby the last open crosscut.

Another issue raised by the operator is the admitted fact that they were led to believe by MSHA personnel that these examinations for methane at or immediately past the IE points would not be required if a velocity of 400 feet per minute of air was maintained traveling into the IE points. It is undisputed that this interpretation came from the MSHA District Office at Pittsburgh and was conveyed to the operator. However, it is also undisputed that these personnel had no actual authority to waive regulatory requirements or substitute alternative criteria in their place. Absent a granted petition for modification under section 101(c) of the Mine Act, MSHA personnel do not have authority to waive compliance with a mandatory standard for any reason. On the other hand, the contestant is charged with knowledge of the regulations and is required to comply with all mandatory health and safety standards at all times.

The Secretary is willing to concede only that to the extent the contestant relied on MSHA personnel for the opinion that compliance with 30 C.F.R. § 75.311 was not necessary if they maintained an air velocity of 400 feet per minute in the intake entry adjacent to the openings into the abandoned areas involved, the negligence factor should be lower than might otherwise be expected, at least for the two citations issued on October 11, 1991.

I concur with the Secretary on this point. The Mine Act requires that a citation be issued and a penalty assessed when a violation is found to have occurred. Relying on well-settled precedent, the Commission has rejected the doctrine of equitable estoppel against the Secretary in Secretary v. King Knob Coal Co., Inc., 3 FMSHRC 1417, 1421-22 (June 1981). Therein the Commission held that approving an estoppel defense would be inconsistent with the liability without fault structure of the Mine Act since such a defense is in reality a claim that although a violation occurred, the operator was not to blame for it.

The Supreme Court long ago held that equitable estoppel does not lie against the federal government generally. Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 383-386 (1947).

I believe this case ultimately turns on the legal argument concerning the weight or deference to be given the Secretary's interpretation of her own regulations.

The Secretary argues that 30 C.F.R. § 75.311 requires that air which passes by openings into abandoned areas must be checked for methane during the preshift examinations at a point prior to that air mixing with other air in the same intake air course.

Her reasoning is that in order to examine the air which has passed by any particular opening of any abandoned area, it is necessary to examine that air prior to its mixing with any other

air from adjacent entries in the same air course. This requirement is also consistent with 30 C.F.R. § 75.312<sup>3</sup> which prohibits the use of any air which has passed through an abandoned area to ventilate any working place in the mine. The existence of methane above .25 percent in the intake air just inby an opening of any abandoned area would be an indication that there may well be a ventilation problem where gases are migrating out of the gobs into the intakes. Therefore, I view section 75.311's purpose as being a mandatory gas check to assure that a violation of section 75.312 does not occur. It is a consistent scheme of regulation.

It is also well-settled that an agency's interpretation of its own regulation is "of controlling weight unless it is plainly erroneous or inconsistent with the regulation." Bowles v. Seminole Rock Co., 325 U.S. 410, 414 (1945). A regulation must also be interpreted so as to harmonize with and further rather than conflict with the objective of the statute it implements. Emery Mining Corp. v. Secretary of Labor, 744 F.2d 1411 (10th Cir. 1984).

In this case, I find the Secretary's interpretation of the mandatory standard at issue to be reasonable and harmonious with the objectives of the Mine Act. I also find it to be consistent with the scheme of ventilation regulation in general. Accordingly, I find it to be the preferred interpretation.

Given that the Secretary's interpretation is correct, contestant next raises the issue of whether they had adequate notice that examinations for methane were required at or immediately past the IE points.

The Commission addressed the issue of notice in Lanham Coal Company, Inc., 13 FMSHRC 1341, 1343-44 (September 1991). The Commission found:

When faced with a challenge that a safety standard failed to provide adequate notice of prohibited or required conduct, the Commission has applied an objective standard, i.e., the reasonably prudent person test. The Commission recently summarized this test as "whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard." Ideal Cement Co., 12 FMSHRC 2409, 2416 (November 1990). "In order to

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<sup>3</sup> 30 C.F.R. § 75.312 provides in pertinent part that: Air that has passed through an abandoned area or an area which is inaccessible or unsafe for inspection shall not be used to ventilate any working place in any mine.

afford adequate notice and pass constitutional muster, a mandatory safety standard cannot be 'so incomplete, vague, indefinite or uncertain that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application.'" Id., quoting Alabama By-Products Corp., 4 FMSHRC at 2129 (citations omitted).

In my opinion, a reasonably prudent person familiar with the mining industry and the purpose of the regulation at bar would have recognized that for this regulation to have any meaning at all, that air passing by the IE points had to be checked for methane before it mixed with any other air. The standard specifically mentions air that has passed by an opening of any abandoned area. The obvious purpose of the standard is to check for methane gas coming into the intake air from the gob. Implicitly therefore, it requires the air to be checked right there or just past that point if any meaningful information is to be gained from the examination.

Contestant has raised several points, but does not dispute the essential fact that it was not making preshift examinations of this particular air at or immediately inby the cited openings [or reasonable extensions of those openings as cited in Citation No. 3705241]. I accept as "reasonable" the inspector's explanation of why he extended the openings of the actual IE points at 15, 20, and 20A the approximately 90 feet to a point where they would open to the intake air. The air traveling to IE's 15, 20, and 20A splits from the air traveling to the M11X-02 section approximately 90 feet from those IE points, and the Secretary interprets section 75.311 as requiring an examination for methane immediately inby the split point. I find this to be a reasonable interpretation and also entitled to deference. See, e.g., Bowles, supra.

Accordingly, I find the violations alleged in Citation Nos. 3705517, 3705518, and 3705241 to be proven as charged.

Turning now to the issue of "significant and substantial," 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 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 (August 1985), the Commission stated further as follows:

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

I do not believe that the Secretary has shown that there was a reasonable likelihood of a hazard given the particular facts surrounding the violations contested herein.

The inspector's rationale for designating the citations as S&S was that methane could come out of the gob, come into contact with an ignition source and cause an explosion. While that may well be adequate grounds for an S&S finding in the abstract, there are no facts proven in this particular record to support such a finding. In fact, the reporting inspector himself appears to distance himself from his own purported finding at Tr. 47:

Q. So, what you're saying is then you based your S and S findings on arrows on the map and a remote possibility that air could come out of the gob, contaminate this air ventilating the faces, not be detected by the person preshifting the faces and cause an explosion at the face?

A. Yes.


Q. Would you consider that a reasonable likelihood of occurring?

A. No, I wouldn't.

The fact of the matter is that there is no evidence whatsoever in this record that any ignition sources were present in by or that any undetected methane was coming out of the abandoned areas. To the contrary, where the inspector did in fact check, the IE points were all working properly and no methane was detected. Accordingly, I am going to delete the special findings pertaining to S&S from the three citations at bar, which will be otherwise affirmed.

ORDER

Citation Nos. 3705517, 3705518, and 3705241 ARE AFFIRMED as non S&S violations of 30 C.F.R. § 75.311.

  
Roy J. Maurer  
Administrative Law Judge

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. LAKE 90-53  
Petitioner : A. C. No. 33-01173-03825  
v. :  
SOUTHERN OHIO COAL COMPANY, : Meigs No. 2 Mine  
Respondent :

## DECISION ON REMAND

Before: Judge Broderick

This is a civil penalty proceeding in which the Secretary seeks a penalty for an alleged violation of a safeguard notice issued under section 314(b) of the Mine Act. In a decision issued January 9, 1991, I upheld the safeguard notice and the related citation and assessed a penalty of \$150 for the violation.

On May 21, 1992, the Commission remanded this case for findings and conclusions as to whether the Secretary proved that the safeguard notice was based on the judgment of the inspector as to the specific conditions in the Meigs No. 2 Mine, and on the inspector's determination that a transportation hazard existed that was to be remedied by the action prescribed in the safeguard. I was directed to determine whether the safeguard notice identified the hazard at which it was directed and the conduct required to remedy the hazard. If I find the safeguard valid, I am further directed to reevaluate whether SOCCO violated it. 14 FMSHRC 748 (1992).

Pursuant to a notice which I issued June 6, 1992, both parties have filed briefs directed to the issues identified in the Commission's remand. Both parties stated that further evidence was not needed. I am issuing this decision based on the record made at the hearing in Columbus, Ohio, September 26, 1990. I have considered the entire record and the contentions of the parties in making this decision.



## FINDINGS OF FACT

1. On March 31, 1989, Federal Mine Inspector Patrick McMahon discovered a rubber-tired scoop being operated along a supply track with only 6 inches of side clearance. The scoop picked up supplies from supply cars on the track and carried them to the face area.

2. The inspector observed that the scoop was "bumping [the] supply cars" as it proceeded up the entry. (Tr. 31).

3. Similar "incidents" in the past in the subject mine resulted in inspector discussions at the MSHA office and the conclusion that "something needed to be done to prevent this from happening." (Tr. 32). In one of these incidents, a scoop had knocked a supply car loose and caused it to run off the track. McMahon's knowledge of that incident was based on a statement of another inspector who heard it from someone else.

4. The inspector was first of all concerned about the safety of the scoop operator: with limited clearance, pieces of rib coal could be knocked loose and come through the screened canopy of the operator's cab and cause serious injury.

5. He was further concerned because the track entry is a walkway, and pedestrians could be imperiled by the scoop, travelling with insufficient side clearance.

6. The scoop operated at a very slow speed and only for a short time on each shift. Much of the time it was parked in the track entry next to the supply cars. The distance from the supply cars to the end of the track was from 300 to 500 feet.

7. The track entry is 20 feet wide. The scoops vary in width from 8 feet 10 inches to more than 10 feet. The supply cars also vary in width. Some are much wider than others.

8. On March 31, 1989, Inspector McMahon issued a notice to provide safeguards because there were only 6 inches of side clearance for the scoop operating along the supply track. The notice described the condition or practice as follows:

Only 6 inches of side clearance was provided for the company No. 5062 rubber-tired scoop car being operated along the 3L2SW (014-0 mmu) supply track where supplies were being loaded into the scoop bucket. This is a Notice to Provide Safeguards requiring that a total of at least 36 inches of unobstructed side clearance (both sides combined) be provided for all rubber-tired haulage equipment where such equipment is used.

9. On January 5, 1990, while conducting a regular inspection at the subject mine, Inspector McMahon observed a scoop parked in a track entry between the coal rib and the supply cars. The scoop operator was loading supplies. The inspector measured the distance between the scoop operator's compartment and the coal rib which he found to be 24 inches. He measured the distance from the other side of the scoop to the supply car which he found to be 4 inches.

10. The rib line was uneven, and the bottom was muddy and rutted from vehicles operating in the area. There was a downhill slope toward the face area.

11. Inspector McMahon issued a 104(a) citation alleging a violation of the safeguard notice because only 28 inches of continuous clearance was provided for the scoop being operated along the supply track.

### ISSUES

1. Whether the safeguard notice was based on the inspector's judgment as to specific conditions at the subject mine?

2. Whether the safeguard notice was based on the inspector's determination that a transportation hazard existed that was to be remedied by the safeguard?

3. Did the safeguard notice identify the hazard at which it was directed and the conduct required to remedy it?

4. If the safeguard was validly issued, did SOCCO violate it as charged in the citation?

### CONCLUSIONS OF LAW

1. Findings of Fact No. 2 and 3 clearly establish that the safeguard notice was based on the inspector's judgment as to specific conditions at the subject mine. SOCCO's position is that there were no conditions at the mine justifying the safeguard. But in fact the inspector and his fellow MSHA inspectors were concerned about prior incidents of contacts between scoops and supply cars. The inspector observed the scoop bumping the supply cars as it travelled up the track entry.

2. The safeguard notice was based on the inspector's determination that a hazard existed: Findings of Fact 3 and 4 describe the hazards he believed resulted from inadequate clearance and were to be remedied by the safeguard mandating increased clearance. SOCCO argues that the safeguard restricted the use of scoops in carrying heavy supplies to the face, and that if scoops could not be used, the supplies would have to be

carried by hand. This, SOCCO argues, would create additional and more serious injuries to miners. This argument was considered in my original decision. I concluded that the safeguard addresses and attempts to minimize hazards to the scoop operators and to miners using the track entry as a walkway to the face. The fact that alternative means of transporting materials might pose other hazards does not preclude the inspector from issuing a safeguard notice addressed to actual hazards which be observed.

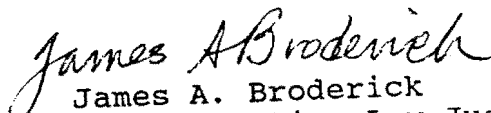
3. The safeguard notice did not specifically identify the hazard at which it was directed. It did identify the conduct required to remedy what the inspector determined was a hazard, namely the requirement of a total of 36 inches of side clearance. The Commission remand decision and its decisions in SOCCO I, 7 FMSHRC 493 (1985); Southern Ohio Coal Company, 14 FMSHRC 1 (1992) and Beth Energy Mines, Inc., 14 FMSHRC 17 (1992) require that a safeguard notice "identify with specificity the nature of the hazard at which it [was] directed. . . ." The safeguard notice was issued, according to Inspector McMahon's testimony to minimize hazards to scoop operators and pedestrians resulting from insufficient side clearance. The hazards to the scoop operator were potential injuries from striking the rib or the supply cars or in being struck by rib coal coming through the canopy. Hazards to pedestrians include being struck by a scoop or by a dislodged supply car. However, none of these hazards was specifically identified in the safeguard notice. For this reason, the safeguard notice is invalid.

4. Although the citation for which a penalty is sought herein accurately charges that SOCCO was in violation of the requirement of the safeguard notice, because the safeguard notice is invalid, the citation which is based on the safeguard is also invalid.

#### ORDER

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

1. Safeguard Notice 3124669 issued March 31, 1989, is **VACATED**.
2. Citation 3323861 issued January 5, 1990, is **VACATED**.
3. The penalty proposal and this proceeding **ARE DISMISSED**.

  
James A. Broderick  
Administrative Law Judge

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 91-596
Petitioner	:	A.C. No. 44-00649-03537
v.	:	
	:	Coronet Jewell Prep Plant #2
JEWELL SMOKELESS COAL	:	
CORPORATION,	:	
Respondent	:	

## DECISION

Appearances: Caryl L. Casden, Esq., Office of the Solicitor,  
U.S. Department of Labor, Arlington, Virginia, for  
the Petitioner;  
Joseph W. Bowman, Esq., Street, Street, Scott &  
Bowman, Grundy, 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). Petitioner seeks a civil penalty assessment in the amount of \$50 for an alleged violation of mandatory reporting standard 30 C.F.R. § 50.20(a). The respondent filed a timely answer contesting the alleged violation, and a hearing was held in Grundy, Virginia. The parties filed posthearing arguments, and I have considered them in my adjudication of this matter.

## Issues

The issues presented in this proceeding are (1) whether the respondent has violated the cited standard as alleged in the proposal for assessment of civil penalty, and (2) the appropriate civil penalty that should be assessed for the violation based upon the civil penalty assessment criteria found in section 110(i) of the Act. Additional issues raised by the parties are identified and 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. 30 C.F.R. § 50.20(a).
4. Commission Rules, 29 C.F.R. § 2700.1 et seq.

### Stipulations

The parties stipulated to the following (Tr. 5):

1. The respondent is the owner and operator of the Coronet Jewell Preparation Plant #2, and is subject to the jurisdiction of the Act.
2. The Commission has jurisdiction in this matter and the presiding judge has jurisdiction to hear and decide this case.
3. A copy of the contested citation was duly served on the respondent or its agent.
4. The payment of the proposed civil penalty assessment will not adversely affect the respondent's ability to continue in business.

### Discussion

The contested section 104(a) non "S&S" Citation No. 3509275, March 20, 1991, cites an alleged violation of mandatory reporting regulation 30 C.F.R. § 50.20(a), and the cited condition or practice states as follows:

The operator did not report to MSHA on Form 7000-1 an occupational illness within ten working days after being notified of the illness. The operator was notified in September 1986 and did not report it until 9-6-88. This citation was issued as the result of a Part 50 audit.

### Petitioner's Testimony and Evidence

MSHA Surface Mine Inspector James R. Smith testified that he has inspected the respondent's mining operations for several years, including the No. 2 Preparation plant. He confirmed that he conducted an "audit type of inspection" of the respondent's accident, medical, and compensation reports in March 1991.

Safety Director Gerald Kendrick made the records available, and Mr. Smith found a copy of an accident report Form 7000-1, pertaining to mine employee Woodrow Stacy which reflected that the company had been notified of an accident on November 11, 1985, and that Mr. Kendrick did not report it to MSHA until September 6, 1988. (Exhibit P-1; Tr. 11-18).

Mr. Smith confirmed that he issued the contested citation in question (Exhibit P-3), citing a violation of section 50.20(a), because Mr. Stacy's pneumoconiosis condition was diagnosed on November 2, 1985, and it was not reported to MSHA until the form was submitted on September 6, 1988. The regulation required it to be reported within 10 days of the diagnosis. Mr. Smith stated that he discussed the matter with Mr. Kendrick, and that Mr. Kendrick acknowledged that he was aware of the need to report the matter in 1986 but that company management told him to wait until the case went to court and was settled. Mr. Smith confirmed that he based his "high negligence" finding on the fact that 2 years had past from the time the company was first notified and the time it was reported to MSHA (Tr. 19-22).

On cross-examination, Mr. Smith confirmed that he received instructions on Part 50 audits from his supervisor Larry Worrell "several years ago", and that he was also instructed "on all parts of Part 50" (Tr. 23). Mr. Smith confirmed that he first saw the form submitted by Mr. Kendrick during the audit, and he had no doubt that it was submitted on September 6, 1988. Based on his construction of the regulation, the report should have been submitted within 10 days of November 2, 1985. Mr. Smith confirmed that the citation he issued states that the respondent failed to report Mr. Stacy's alleged black lung condition within ten days of being notified of the illness, and he believed that the cited regulation uses that term. He further confirmed that he interpreted the November 2, 1985, notification date to be the date of diagnosis of the illness (Tr. 24-28).

MSHA Supervisory Mine Inspector Larry J. Worrell testified that a mine operator must retain accident and illness reporting records for a 5-year period, and he explained the purpose of an audit of these records and the procedures followed in conducting an audit (Tr. 31-37). He confirmed that he was present for part of the time during Mr. Smith's audit for the purpose of monitoring his inspection, and he reviewed some of the report forms to insure that Mr. Smith was making the correct decision with respect to the reporting requirements. Mr. Worrell stated that Mr. Smith showed him the report form submitted by Mr. Kendrick and he concurred in Mr. Smith's decision to issue a citation (Tr. 40).

Based on his review of the report form in question, Mr. Worrell agreed with Mr. Smith's finding of a violation of section 50.20(a). Mr. Worrell explained that the form reflects

that the respondent was notified on November 2, 1985, that a diagnosis of black lung was delivered to the company on that date, and it was not reported until September 6, 1988, more than the 10 working days required by the regulation (Tr. 41). Mr. Worrell agreed with Mr. Smith's high negligence finding and he believed that the respondent knew or should have known about the reporting requirement and there were no mitigating circumstances (Tr. 43).

Mr. Worrell stated that based on his interpretation of the regulation, the time frame within which a mine operator must report an illness such as black lung begins to run on the day the employee notifies the operator that he has been diagnosed as having black lung. He explained further as follows at (Tr. 44-45):

Q. And why do you interpret it that way?

A. Well, you can't hold a company responsible---. A guy . . . a person can make a...go to a doctor and have a x-ray and become diagnosed, he may not let the company know for two (2) months, or three (3) months, or whatever. So they're really not, in my opinion required to report until they become aware of this condition. Now after they become aware of this condition, then that's when they have to meet the ten (10) day reporting requirements.

On cross-examination, Mr. Worrell confirmed that regulatory section 50.20 does not contain the term "notification", and simply states that an illness must be reported within 10 working days of the diagnosis (Tr. 48). He confirmed that the only circumstances he was aware of to support the high negligence finding was the "accident" date of November 2, 1985, the fact that it was not reported until approximately 2 years later, and that the respondent knew or should have known about the reporting requirement found in section 50.20(a) (Tr. 50).

In response to several hypothetical questions concerning multiple x-rays and x-ray interpretations, Mr. Worrell stated that a mine operator is obliged to file a report with MSHA "when the company was notified... the first notified, the first diagnosis of pneumoconiosis...." or "whenever the company is notified in however manner they want to be ..they are notified, when it comes that they have a diagnosis of pneumoconiosis, they are required to report it" (Tr. 54, 56). He confirmed that he had no knowledge that the respondent ever received a diagnosis of pneumoconiosis and stated that "I'm going with this 7000-1 that was submitted to our office" (Tr. 56).

In response to further questions, Mr. Worrell stated that most mine operators will state on the MSHA form that an employee

"alleges" an injury or illness until the claim is either settled or a compensation award is made. He agreed that section 50.20(a) does not require an operator to submit a report within 10 days of notification of an illness or injury, and that the regulation only uses the term "diagnosis". He confirmed that he did not know whether or not Mr. Stacy presented the respondent with any x-rays or any diagnosis of his alleged black lung condition.

Mr. Worrell believed that Inspector Smith interpreted Mr. Stacy's allegation that he had black lung to be a diagnosis. Mr. Worrell identified a copy of a report which was sent to the Virginia Industrial Commission and which was in the mine file reviewed by Mr. Smith during his audit (Exhibit P-4). Mr. Worrell stated that he was with Mr. Smith when he reviewed the file and that the respondent made a copy of the report for him. Mr. Worrell explained that this form is filed by the company with the state compensation commission and that it was in the company file with the MSHA 7000-1 form (Tr. 62-63). The report reflects that it was submitted on February 23, 1987, and it states that Mr. Stacy alleged that he contacted pneumoconiosis (Tr. 64).

#### Respondent's Testimony and Evidence

Michael G. Prater testified that he is employed by the respondent and serves as the manager of workers' compensation, compliance and assessment officer, and personnel officer. He confirmed that he was aware of Mr. Stacy's compensation claim filed against the respondent alleging that he had received a diagnosis of an occupational disease (Tr. 82). He confirmed that he received a copy of a hearing application (Exhibit P-5) filed by Mr. Stacy with the Industrial Commission of Virginia in connection with his black lung claim. The document was mailed on April 25, 1986. He obtained the November 2, 1985, date from that document and used it when he filed reports with MSHA and the state agency (Exhibits P-1 and P-4; 83-84).

Mr. Prater confirmed that the letter he received from the Virginia Industrial Commission, dated April 25, 1986, was the first notice he received that Mr. Stacy was alleging that he had received a diagnosis of an occupational lung disease (Tr. 85). Mr. Prater stated that he never received the x-ray film upon which Mr. Stacy's claim was based, but he did receive copies of two interpretation reports from two doctors which were included with the copy of the hearing application and letter received from the Virginia Industrial Commission (Exhibits P-5 through P-7; Tr. 86-87). Mr. Prater further confirmed that he requested Mr. Stacy's chest x-ray from his attorney, but was advised that the film had been lost and he was never able to obtain it (Tr. 88).



Mr. Prater stated that he received another x-ray film of Mr. Stacy in September, 1986, and he identified a copy of the radiology report dated September 30, 1986, interpreting that film (Exhibit R-1; Tr. 90). He confirmed that he had requested the doctor to read the x-ray and give him a report. He further confirmed that 10 additional doctors were asked to review the film and to give the respondent their reports, and he produced copies of those reports from his files (Exhibit R-3; Tr. 92-93). Mr. Prater stated that Mr. Stacy's claim was scheduled for a hearing on August 31, 1988, before the Virginia Industrial Commission, but a settlement was reached with Mr. Stacy on August 31, 1988, and it was ultimately approved by the Commission on September 19, 1988 (Exhibit P-8; Tr. 94-95).

Mr. Prater stated that after Mr. Stacy's claim was settled, he sent a Form 7000-1 and the state "First Report of Accident" form to safety director Gerald Kendrick and told him that since Mr. Stacy's claim had been settled a report needed to be filed with MSHA (Exhibits P-1, P-4, Tr. 96). Mr. Prater confirmed that he always handled the reporting of alleged diagnoses of occupational illnesses to MSHA in this same way in the past, and he explained his usual practice in this regard (Tr. 96-98). He stated that the respondent has never considered a disease or illness to be reportable to MSHA until such time that a decision is received from the Industrial Commission of Virginia, and this is what was done in Mr. Stacy's case (Tr. 99).

Mr. Prater stated that he receives approximately twenty to forty state occupational disease claims a year. He confirmed that there were 20 interpretations or readings made of the x-ray film actually received in Mr. Stacy's case, and three of them were lost (Tr. 100).

On cross-examination, Mr. Prater confirmed that respondent's practice has been to wait for the state disposition of a compensation claim before reporting an occupational incident to MSHA (Tr. 100). He further explained his position as follows at (Tr. 101-102):

Q. And you have a background in health?

A. Yes, ma'am.

Q. In your opinion, do you think that a judicial decision or settlement agreement could ever be considered a diagnosis?

A. Well, I think that a judicial...well, considering the difference in opinion as to black lung diagnosis, I think it's as good as any.

Q. You think that you could call a judicial decision or settlement a diagnosis?

A. I could say that the judge that...that rules on these claims has an understanding and has a knowledge of black lung as good as anybody and he could take before him readings, x-ray readings, from so called, or whatever, B-readers, and he could make a determination as to where the preponderance of that evidence lies, and that's exactly what we rely on.

Q. Are you saying that you think a judge can make a diagnosis?

A. I . . . I . . . they do in the State of Virginia. I mean, not a diagnosis, but they make a decision as to whether or not a man has black lung.

Q. So the judge is not making a diagnosis, is he?

A. No. No, he's not.

Mr. Prater conceded that regulatory section 50.20, refers to a diagnosis of occupational injury or illness and does not refer to any judicial decisions or settlements (Tr. 102). He also confirmed that the regulation does not further define the term "diagnosis" (Tr. 103). He believed that he was following the correct procedure in this case, and he stated that "the way we interpreted it to mean was when you got a decisive decision as to whether or not a man had a disease or diagnosis was when we reported it" (Tr. 104). Mr. Prater confirmed that as of the latter part of April, 1986, he was aware of Mr. Stacy's state application for a hearing and the x-ray interpretations made by two doctors (Tr. 110).

Gerald E. Kendrick, respondent's coordinator of health and safety, stated that one of his responsibilities is to file MSHA report Form 7000-1. He stated that he prepared the MSHA Form 7000-1 (Exhibit P-1), from the information provided on the state First Report of Accident (Exhibit P-4). He confirmed that these forms were sent to him by Mr. Prater, with a note attached, on August 31, 1988, and that prior to this time he was not aware of any allegation or diagnosis that Mr. Stacy had an occupational lung disease (Tr. 115-116).

Mr. Kendrick stated that he gave Mr. Stacy's file to Inspector Smith during the audit in question and he explained his discussion with Mr. Smith as follows at (Tr. 117-118):

A. With this, he asked me if I was aware of what the regulations required, that pneumoconiosis be reported, claims . . . not claims, but people with pneumoconiosis be

reported, and I told him that I did. And if in fact that this gentlemen had pneumoconiosis in 1986, then it probably should have been reported. So then I said, "But in the meantime, Gary Prater handles all the compensation claims and I'll let him come down and explain that to you." So Gary came to our office and explained the compensation case with him and Mr. Worrell.

Q. Okay. Let me ask you . . . there's been . . . did you ever indicate to Mr. Smith that you . . . uh . . . were aware, or that it was your interpretation of that regulation that you had to report this injury . . . or this within ten (10) days of learning of the man's claim, or within ten (10) days of the diagnosis, but that you had been instructed to do otherwise by management?

A. That's a good question. I don't remember specifically what was said. I don't recall . . . I don't recall discussing that with him, no. The only thing I do recall is that we were talking about this black lung claim and . . . uh . . . I what I referred to him was that I thought that all confirmed black lung cases should be reported. And in those cases, when they were confirmed was when Gary and them took them to court, or settled them, or whatever the case may be with the Commission.

On cross-examination, Mr. Kendrick stated that his purported statement to Inspector Smith that he was aware of the need to report Mr. Stacy's alleged black lung condition in 1986 was taken out of context. Mr. Kendrick explained that "I did make a statement that I was aware that black lung case are to be reported . . . confirmed. That was my understanding with what the regulations say, or aware of compensation had been made" (Tr. 119). He stated that he would not have known about Mr. Stacy's conditions in 1986 because he did not receive the report from Mr. Prater until 1988, which was the first time he saw a report on a black lung case. He believed that the "date of injury" date of November 2, 1985, shown on the report form, was inappropriate, and that the date on which an illness or injury is totally confirmed should be used because "about any doctor in this county will, and in most cases have diagnosed people with black lung and they never had it" (Tr. 121). Mr. Kendrick agreed that the November 2, 1985, x-ray report would be the date of diagnosis (Tr. 121).

#### Petitioner's Arguments

Petitioner states that in the course of an audit conducted on March 20, 1991, MSHA Inspector Smith and his supervisor, Inspector Worrell, met with the respondent's safety coordinator Kendrick who provided them with the necessary mine reporting files. The inspectors began checking the respondent's records

against MSHA's records, to confirm that it had reported all reportable injuries and illnesses of which the respondent was aware during the audit period. While examining these records, Inspector Smith discovered an MSHA 7000-1 report form that had been completed by Mr. Kendrick (Exhibit P-1). The subject of this form was mine employee Woodrow Stacy who had filed a state workers compensation claim for pneumoconiosis. The form caught the inspector's attention because the "date of accident" (illness) indicated was November 2, 1985, the date of the first x-ray report that stated that Mr. Stacy had pneumoconiosis, and Mr. Kendrick had not completed the form until nearly three years later, on September 6, 1988. The inspector was aware that section 50.20(a), required the form to be filed with MSHA within 10 working days after an operator has been notified that an occupational illness has been diagnosed. MSHA points out that although section 50.20(a) appears to require reporting within 10 days of a diagnosis, the inspectors testified that MSHA requires that an operator report an occupational illness within 10 days of becoming aware of such a diagnosis, and that Inspector Worrell testified that it would be unreasonable to attempt to hold an operator liable for not reporting a diagnosis of which it is unaware.

The petitioner asserts that Mr. Kendrick confirmed that the required report form had not been filed with MSHA within ten days after the company became aware of Mr. Stacy's diagnosis, and that it was the company's practice to wait until an employee had filed a state worker's compensation claim for pneumoconiosis, and the company either had lost or settled the case, before the company would file a report with MSHA. In addition, petitioner points out that the inspectors also found in the company's files a note attached to an Industrial Commission report regarding Mr. Stacy from Mr. Prater to Mr. Kendrick directing him to "please file accident report on this O.D. claim as it was settled on 8/31/88" (Exhibit P-4). Petitioner concludes that this confirmed for the inspectors the company's practice to wait more than 10 days after being notified of an occupational disease diagnosis before filing a report with MSHA. Under all of these circumstances, the inspectors concluded that a violation of section 50.20 had occurred, and although they did not know the exact date on which the respondent had been notified of the diagnosis, it was obvious to the inspectors that more than 10 days had elapsed between the date on which the company was notified of the diagnosis, and the date on which it filled out the form.

The petitioner cites the hearing testimony of the respondent's worker's compensation specialist Prater verifying that the respondent was aware, well before September 6, 1988, that a doctor had determined that Mr. Stacy had pneumoconiosis, Petitioner states that Mr. Prater confirmed that the respondent received a letter dated April 25, 1986, from the Virginia Industrial Commission notifying the respondent that Mr. Stacy had

filed a claim for worker's compensation and had requested a hearing, and that included with the letter were two x-ray reading reports from two doctors (Ermaz and Fisher), of Mr. Stacy's x-ray film. The reading by Dr. Ermaz was of the film dated November 2, 1985, and the reading by Dr. Fisher was a March 13, 1986, rereading of the November 2, 1985, film. In both instances, the doctor's reported that Mr. Stacy had pneumoconiosis. Under these circumstances, the petitioner concludes that there is no question that the respondent was notified in April 1986, that Mr. Stacy had pneumoconiosis.

The petitioner asserts that after proceeding to defend against Mr. Stacy's compensation claim, a settlement was reached on August 31, 1988, (Exhibit P-8), and Mr. Prater instructed Mr. Kendrick to report the diagnosis of pneumoconiosis to MSHA. Mr. Prater filled out the form on September 6, 1988, and filled in the date of November 2, 1985, in the space provided as the "date of accident", which is the date of the first x-ray report concluding that Mr. Stacy had pneumoconiosis.

The petitioner points out that section 50.20 provides that if an occupational illness is diagnosed as one of those listed in section 50.20-6(b)(7), it must be reported to MSHA. Since pneumoconiosis is listed as an occupational disease, it must be reported. The petitioner argues that the definition of "occupational illness" found in section 50.2(f), does not help the respondent's case. "Occupational illness" is defined as "an illness or disease of a miner which may have resulted from work at a mine or for which an award of compensation is made". The petitioner concludes that it is clear that whenever either of these factors occurs--an employee has an illness which may have resulted from work at a mine, or, an award of compensation is made--an operator must report the existence of a diagnosis to MSHA. The petitioner points out that if the regulations had defined occupational illness as "an illness or disease of a miner which may have resulted from work at a mine and for which an award of compensation is made", then the respondent would be justified in waiting for the outcome of a state claim before reporting. However, on the facts of this case, once the respondent was aware that Mr. Stacy had been diagnosed with pneumoconiosis, a disease that clearly may have arisen from work in a mine, it did not have the option of waiting for several years for Mr. Stacy's compensation claim to be resolved before reporting to MSHA.

Citing a dictionary definition of the term "diagnosis", the petitioner maintains that there is no doubt that each of the x-ray reports that the respondent received in April 1986, constitutes a diagnosis of pneumoconiosis. The petitioner points out that a diagnosis is not necessarily a declaration that has been proven definitively, but rather, a diagnosis is a statement made in the process of determining the nature of a disorder.

Petitioner concludes that the possibility that another doctor subsequently could conclude that a patient does not in fact have pneumoconiosis does not negate the fact that an earlier statement concluding that the patient does have the disease is a diagnosis. In any event, petitioner points out that the respondent's witnesses have not denied that the x-ray reports received in April 1986 are diagnoses of pneumoconiosis, and that Mr. Prater made it clear in his request for a civil penalty conference that he views the two x-ray reports as diagnoses of pneumoconiosis, and stated that "Jewell Smokeless does not feel that this citation is justified because a diagnosis of an illness without an award of compensation from the Industrial Commission, is not proof of illness." (Exhibit P-10). Petitioner concludes that it appears that the respondent does not dispute that the x-ray reports are diagnoses of pneumoconiosis; but rather, the respondent does not feel that it should be required to report a diagnosis.

The petitioner maintains that section 50.20(a) specifically provides that operators must report each occupational illness that is diagnosed, and that there is no regulatory basis for the respondent's practice of waiting for the outcome of a state worker's compensation case before deciding whether or not to report such an illness to MSHA. The petitioner points out that Mr. Prather testified that he is aware that a judge does not make a diagnosis, and that the regulations say nothing about reporting to MSHA each time that a state worker's compensation board decides that a claimant is entitled to an award of compensation, or each time that a company decides to settle a case with an employee.

Finally, the petitioner maintains that the respondent's stated reporting practice fails to advance MSHA's interest in collecting full and current information on the occurrence of pneumoconiosis. In response to the respondent's argument that it should be presented with more proof of pneumoconiosis before it should be required to file a report with MSHA, the petitioner points out that the respondent delayed reporting until after Mr. Stacy obtained a worker's compensation settlement, which is not a definitive statement that an employee has an occupational disease, and thus delayed reporting a diagnosis of pneumoconiosis for approximately 2 years, in violation of the regulations, for no valid reason. In response to Mr. Prater's testimony that the respondent would not report a diagnosis of pneumoconiosis unless an employee had filed a state claim, the petitioner points out that in practice, not every miner who obtains an X-ray reading diagnosing pneumoconiosis files a claim for compensation. Under the circumstances, the respondent's reporting method, if allowed to continue, would result in underreporting of pneumoconiosis.

### Respondent's Arguments

In support of its case, the respondent states that this proceeding began when Woodrow Stacy, one of its employees, alleged that he had been given a diagnosis of an occupational lung disease on November 2, 1985, and in April of 1986, filed a claim with the Industrial Commission of Virginia alleging occupational lung disease. The chest X-ray upon which Mr. Stacy's alleged diagnosis was based was lost, and Mr. Stacy allegedly had another chest X-ray made on September 12, 1986, which was initially read as showing no evidence of an occupational lung disease (R-1). The September 12, 1986, chest X-ray was interpreted by numerous physicians, most of whom were of the opinion that the X-ray showed no evidence of an occupational lung disease (R-3). Nevertheless, the respondent settled the claim in which Mr. Stacy was alleging that he had contracted an occupational lung disease in order to avoid further litigation, and following that settlement reported to MSHA on September 6, 1988, the fact that Mr. Stacy had alleged that he had contracted coal worker's pneumoconiosis. Two and one-half years later, while performing an audit, Inspector Smith found a copy of the Form 7000-1 in the respondent's mine records and issued the contested violation on the ground that the respondent had failed to report an occupational illness within 10 working days after being notified of the illness.

The respondent asserts that according to its interpretation of the reporting requirements of sections 50.20 and 50.20-6, in a situation where an employee has filed a claim for monetary benefits under the Worker's Compensation Act based on an allegation of a diagnosis of an occupational lung disease, its obligation and past practice has been to report the claim to MSHA after it is either settled by the claimant and the operator or the State Industrial Commission finds that the evidence supports the claim of an occupational disease. Consistent with this interpretation, the respondent maintains that Mr. Stacy's allegation of an occupational lung disease was reported to MSHA on September 6, 1988, in a timely fashion within 10 days of the compromise settlement reached on August 31, 1988, and the Order of the Commission approving the settlement.

The respondent argues that since the cited reporting regulation is penal in nature, it should be strictly construed against MSHA, and that the issuance of the citation two and 1-1/2 years following the filing of its September 6, 1988, report makes it almost impossible to determine the construction MSHA placed on the regulations at the time the violation was issued. The respondent points out that the violation was issued because it allegedly was notified of Mr. Stacy's occupational illness in September, 1986, and did not report it until September of 1988. The respondent further points to the testimony of Inspector Smith

that based of his interpretation of section 50.20(a), the respondent was required to report to MSHA on or before November 12, 1985, 10 days after the November 2, 1985, date of the "Accident" (Illness), shown in item #6 of the MSHA reporting form submitted by safety director Kendrick (Exhibit P-1).

The respondent concludes that MSHA does not rely on a literal interpretation of section 50.20(a). The respondent points out that Mr. Stacy alleged that he had received a diagnosis of an occupational disease on November 2, 1985. Since it is uncontradicted that the respondent was unaware of the alleged diagnosis until late April or early May, 1986, respondent concludes that a literal application of the regulation would make it impossible for it to have reported the occupational illness within 10 days of the alleged diagnosis.

The respondent further concludes that the only way for a violation to materialize out of the regulations and circumstances of this case is for MSHA to read into the regulation a notice requirement. In support of this conclusion, the respondent asserts that even though the regulation does not require it to take any reporting action based on notification, Inspectors Smith and Worrell have interpreted it that way, but the respondent has not.

In response to Inspector Worrell's suggestion that the purpose of the cited reporting requirement is "to give MSHA a handle on how many illnesses and injuries are happening in the coal industry", the respondent asserts that no explanation is offered as to how an interpretation that requires the reporting of a notification of alleged diagnoses of occupational lung diseases helps in attaining that goal. Respondent concludes that the reporting of diagnoses of alleged occupational lung diseases could result in nothing but badly skewed "factual" data, and it submits that the information that is actually sought by the regulation is how many injuries or illnesses occur, and not how many employees allege that a doctor has given them a diagnosis of an occupational lung disease or how many doctors have allegedly given employees diagnoses of occupational lung diseases, without regard to the actual existence or non-existence of the disease process.

Finally, the respondent maintains that there is no reportable occupational illness under the circumstances of a claim such as Mr. Stacy's (where an employee is seeking monetary benefits based upon allegations that he has an occupational lung disease) until the conclusion of the compensation claim either by settlement or the entry of an award finding that the claimant does have an occupational disease. The respondent suggests that there is no reportable occurrence if an employee has no occupational disease, or it is found that he has no occupational disease. Further, if as suggested by MSHA, the alleged diagnosis



of an occupational disease by virtue of an alleged interpretation of a chest X-ray consistent with an occupational disease is all that is required to trigger the reporting requirements, then on the facts of Mr. Stacy's claim, respondent concludes that it was impossible for it to comply with the regulatory reporting time requirements, and in either event, the violation should be vacated.

### Findings and Conclusions

The respondent is charged with an alleged violation of the reporting requirements found in 30 C.F.R. § 50.20(a), which states in relevant part as follows:

Each operator shall maintain at the mine office a supply of MSHA Mine Accident, Injury, and Illness Report Form 7000-1. . . . Each operator shall report each . . . occupational illness at the mine. The principal officer in charge of health and safety at the mine or the supervisor of the mine area in which . . . an occupational illness may have originated, shall complete or review the form in accordance with the instructions and criteria in sections 50.20-1 through 50.20-7. If an occupational illness is diagnosed as being one of those listed in section 50.20-6(b)(7), the operator must report it under this part. The operator shall mail completed forms to MSHA within 10 working days after . . . an occupational illness is diagnosed . . . (Emphasis added).

Section 50.20-6(b)(7)(ii) states the criteria and instructions for completing MSHA Form 7000-1, and reporting an occupational illness, and it states in relevant part as follows:

(7) Item 23. Occupational Illness. Circle the code from the list below which most accurately describes the illness. These are typical examples and are not to be considered the complete listing of the types of illnesses and disorders that should be included under each category. In cases where the time of onset of illness is in doubt, the day of diagnosis of illness will be considered as the first day of illness.

\* \* \* \*

(ii) Code 22-Dust Disease of the Lungs (Pneumoconioses). Examples: Silicosis, asbestosis, coal worker's pneumoconiosis, and other pneumoconioses.

In the course of pretrial discovery in this matter, the petitioner provided the respondent with a copy of an MSHA Policy

Letter No. P92-III-2, effective May 6, 1992, after the date of the issuance of the contested citation, clarifying the Part 50 "silicosis or other pneumoconioses" reporting policy. The letter states in relevant part as follows:

Diagnosis of an occupational illness or disease under Part 50 does not automatically mean a disability or impairment for which the miner is eligible for compensation, nor does the Agency intend for an operator's compliance with Part 50 to be equated with an admission of liability for the reported illness or disease. MSHA views a disability as distinguishable from a diagnosis of silicosis or other pneumoconioses in that a diagnosis would be reportable to MSHA if there is evidence of exposure coupled with an X-ray reading of 1/0 or above, using the International Labor Office (ILO) classification system . . . (Emphasis added)

MSHA's position is that any medical diagnosis of a dust disease or illness must be reported under 30 C.F.R. part 50 reporting procedures. A medical diagnosis may be made by a miner's personal physician, employer's physician, or a medical expert.

If a chest x-ray for a miner with a history of exposure to silica or other pneumoconioses causing dusts is rated at 1/0 or above, utilizing the ILO classification system, it is MSHA's policy that such a finding is a diagnosis of an occupational illness, in the nature of silicosis or other pneumoconioses within the meaning of 30 C.F.R. Part 50 and, consequently, reportable to MSHA.

MSHA Program Policy Information Bulletin No. 87-4C and 87-2M, also produced during pretrial discovery, dated August 31, 1987, states in relevant part as follows:

Title 30, Code of Federal Regulations, Part 50 requires mine operators to report occupational illnesses of miners. A miner is defined as "any individual working in a mine," and occupational illness is defined as "an illness or disease which may have resulted from work at a mine or for which an award of compensation is made." Illnesses that are reportable include . . . coal worker's pneumoconiosis (black lung), . . . Part 50 further requires that the operator mail a completed Form 7000-1 to the Mine Safety and Health Administration (MSHA) within 10 working days after a miner is diagnosed as having an occupational illness.

Industry reporting activity for occupational illness suggests there is operator uncertainty about the relationship between Part 50 reporting obligations and the information provided to the operator through Federal and State occupational illness compensation programs.

In order to ensure that data reported by mine operators reflects the incidence of occupational illnesses associated with the mining industry, the reporting requirements of Part 50 apply when compensation programs provide an operator notice that an individual has been awarded compensation for or is diagnosed as having an occupational illness resulting from employment in a mine, regardless of whether the individual is currently working as a miner. Thus within 10 days of becoming aware of any such compensation award or diagnosis, the operator must report the occurrence by completing and mailing a Form 7000-1 to MSHA. (Emphasis added)

Section 50.20(a) requires the reporting of an "occupational illness". As defined by section 50.2(f), an "occupational illness" is an illness or disease (1) which may have resulted from work at a mine, or (2) for which an award of compensation is made. If such an occupational illness or disease is diagnosed as one of those listed in 50.20-6(b)(7), section 50.20(a) requires that it be reported to MSHA on Report Form 7000-1. Coal worker's pneumoconiosis (black lung) is among those listed illnesses or diseases which must be reported. The time frame for reporting a diagnosed case of black lung is within 10 days of the diagnosis.

On the facts of this case, the respondent apparently views its compromise settlement of Mr. Stacy's black lung compensation claim as an "award of compensation", and it relies on the "award of compensation" definition found in section 50.2(f), to support its belief that it was only obliged to file a report with MSHA after that award (compromise settlement) was approved and made. However, section 50.20(a) provides no time frame for the reporting of black lung compensation awards, nor does it contain any language which directly, or by reasonable inference, permits a mine operator to wait until such an award is made before reporting to MSHA.

The regulatory time frame for reporting a diagnosed black lung illness or disease is within 10 working days after such a condition is diagnosed. Although it is true that it would have been impossible for the respondent to have reported Mr. Stacy's black lung diagnosis of November 5, 1985, within 10 working days because it did not become aware of it until 1986, I take note of the fact that the respondent is charged with a violation for its failure to report Mr. Stacy's illness when it received

notification of a black lung diagnosis in September, 1986, and not when the initial diagnosis was made on November 2, 1985.

The respondent is correct in its assertion that the inspectors read a notification requirement into the reporting language found in section 50.20(a). The inspectors both confirmed that they had always construed the 10 days reporting time frame to begin when a mine operator is notified that an employee has black lung or has been diagnosed as having that disease (Tr. 26, 28, 41). The inspectors' interpretation and application of the reporting time frame is consistent with MSHA's Part 50 Policy Letter of August 31, 1987, which states that an operator must report to MSHA within 10 days of becoming aware of a compensation award for black lung or a diagnosis of black lung.

The fact that section 50.20(a) does not, on its face, impose a reporting requirement based on notification to a mine operator that an employee has been diagnosed as having black lung does not in my view warrant vacation of the contested citation in this case. I find MSHA's policy application, as stated in its August 31, 1987, policy bulletin, requiring an operator to report an occupational illness diagnosis within 10 days of becoming aware of such a diagnosis, and the inspector's similar interpretation and practice, to be reasonable. If it were otherwise, a mine operator would be placed in the rather arbitrary and untenable position of being held accountable for a reportable illness diagnosis which may never have been brought to its attention.

The respondent's suggestion that it is only required to report a proven case of black lung disease is rejected. I also reject the respondent's assertion that since Mr. Stacy was seeking monetary benefits based on his allegation that he was diagnosed as having black lung disease, its reporting obligation pursuant to section 50.20(a) would only begin when Mr. Stacy's compensation claim is either concluded by a settlement of his claim or he is awarded compensation based on a finding that he in fact had black lung.

I conclude and find that Mr. Stacy's diagnosis of black lung was in connection with a disease which one may reasonably conclude may have resulted from his work at a mine. The respondent does not dispute the fact that Mr. Stacy was one of its mine employees, and Mr. Prater the respondent's manager of worker's compensation, acknowledged that he filed a report with the State of Virginia on February 23, 1987, which states that Mr. Stacy "alleges to have contracted coal workers pneumoconiosis while employed at Jewell Smokeless Coal Corp." (Tr. 83; exhibit P-4). Mr. Prater also confirmed that he was aware at the time that report was filed that Mr. Stacy had supplied some evidence that he had black lung disease (Tr. 85).

Mr. Prater confirmed that in late April, 1986, he was made aware of Mr. Stacy's black lung claim, and the supporting x-ray reports of his doctors (Eryilmaz and Fisher) (Tr. 85-87; 110; Exhibits P-5 through P-7). Mr. Prater further confirmed that after learning from Mr. Stacy's attorney that the original x-ray film of November 2, 1985, had been lost, another x-ray film was sent to him or to the respondent's attorney on September 12, 1986. That film was reviewed by several doctors for the respondent, as well as Mr. Stacy's doctors, and following the submission of all of this evidence Mr. Stacy's claim was scheduled for a state hearing on August 31, 1988. However, the claim was settled, and the matter never proceeded to hearing (Tr. 89-92; 94-95; Exhibits R-1 and R-3). Notwithstanding the conflicting doctor's interpretations of Mr. Stacy's x-rays, I conclude and find that the readings made by Mr. Stacy's doctors in support of his claim constituted diagnoses of pneumoconiosis within the meaning of section 50.20(a).

I am not convinced that the respondent was ignorant or confused about its reporting obligations pursuant to section 50.20(a). Mr. Prater, the respondent's manager of worker's compensation, was aware of Mr. Stacy's compensation claim filed against the respondent alleging that he had received a diagnosis of an occupational disease (Tr. 82). Mr. Prater did not assert that he was unaware of the regulatory language of section 50.20(a) requiring a report to MSHA within 10 working days of a diagnosis of an occupational illness. His contention is that he was not aware of Mr. Stacy's diagnosis until it came to his attention in 1986, and he relied on his practice of not reporting an alleged diagnosis of an occupational illness until such time that a definitive decision is forthcoming from the state industrial commission upholding a compensation award.

Mr. Kendrick, the company official responsible for filing the MSHA Report Form 7000-1, acknowledged that the November 2, 1985, "date of injury" shown on the state workers compensation report, and on the MSHA report which he submitted, would be considered the date of diagnosis (Tr. 121; Exhibits P-1 and P-4).

Inspector Smith's testimony that Mr. Kendrick acknowledged at the time of the audit that he was aware of the need to report Mr. Stacy's alleged black lung diagnosis in 1986, but was told by company management to wait until the matter went to court and was settled before reporting it to MSHA, is memorialized in his inspection notes made at the time of his audit.

Mr. Kendrick made no notes of his conversation with Mr. Smith at the time of the audit. Mr. Kendrick testified on direct examination that he had no specific recollection of what was said during the conversation, and that he could not recall discussing the need to report within 10 days of learning about Mr. Stacy's black lung claim or within 10 days of the diagnosis.

Mr. Kendrick recalled that he told Mr. Smith that he thought that all confirmed cases of black lung which went to court, were settled, or were filed with the state commission, should be reported. He further contended that his purported statement that he was aware that a report was required to be made in 1986, was taken out of context, and that it was his understanding that MSHA's regulations required the reporting of confirmed cases of black lung or black lung cases in which compensation awards have been made. Mr. Kendrick also testified that he told Mr. Smith that if Mr. Stacy had pneumoconiosis in 1986, "it probably should have been reported" (Tr. 115-116).

Mr. Kendrick did not contend that he was ignorant of the regulatory requirement found in section 50.20(a) requiring the reporting of a black lung diagnosis to MSHA within 10 working days. His defense, like Mr. Prater's, is that only proven cases of black lung need be reported to MSHA. Even though Mr. Kendrick agreed that the initial November 2, 1985, x-ray reports concerning Mr. Stacy would be considered the date of diagnosis, he took a contrary position when he contended that this date was "inappropriate", and that only the date on which an illness is "totally confirmed" should be used for reporting purposes.

Having viewed the witnesses in the course of the hearing, and after careful scrutiny of the testimony of Mr. Smith and Mr. Kendrick, I find Mr. Smith's testimony to be more credible, and I find Mr. Kendrick's testimony to be rather equivocal and unconvincing. As the responsible reporting company official, Mr. Kendrick is charged with the responsibility of familiarizing himself with the language found in section 50.20(a), particularly the requirement for reporting diagnosed cases of occupational illnesses to MSHA within 10 working days. I cannot conclude that Mr. Kendrick was oblivious of this requirement. I believe that he, like Mr. Parater, erroneously interpreted section 50.20(a), to require only the reporting of proven cases of black lung.

In view of the foregoing findings and conclusions, and after careful consideration of all of the evidence in this case, including the arguments advanced by the parties with respect to the interpretation and application of the reporting requirement of section 50.20(a), I conclude and find that the petitioner's position is correct. I also conclude and find that the petitioner has established by a preponderance of all of the credible and probative evidence in this case that the respondent failed to timely report Mr. Stacy's diagnosed case of black lung within 10 working days after being notified of that diagnosis in September 1986. Under the circumstances, I further conclude and find that the petitioner has established a violation of the cited reporting standard found at 30 C.F.R. 50.20(a). Accordingly, the contested citation IS AFFIRMED.

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

The petitioner presented no additional evidence with respect to the size of the respondent's mining operation. However, a copy of the proposed assessment pleading (MSHA Form 1000-179) reflects that the respondent's total 1990 coal production was 23,317,212 tons, and that the subject preparation plant had no coal production. I conclude and find that the respondent is a large mine operator, and the parties have stipulated that the payment of the proposed civil penalty assessment for the violation in question will not adversely affect the respondent's ability to continue in business.

## History of Prior Violations

An MSHA computer print-out (Exhibit P-9), reflects that for the period March 20, 1989 to March 19, 1991, the respondent paid civil penalty assessments for fifteen (15) violations issued at the subject preparation plant. None of these prior violations concerned reporting violations. The petitioner's assertion at page 12 of its brief that the respondent's history of prior violations is "moderately high" IS REJECTED. For an operation of its size, I cannot conclude that the evidence presented by the petitioner supports any conclusion of a "moderately high" history of prior violations. In any event, I conclude and find that the respondent has a good compliance record and I have taken this into consideration in assessing the civil penalty for the violation which has been affirmed.

## Gravity

The inspector found that the violation was non-"S&S", and in the absence of any evidence to the contrary, I conclude and find that it was non-serious,

## Good Faith Compliance

The petitioner concedes that the respondent demonstrated good faith in abating the violation within the time constraints set by the inspector (Posthearing brief, pg. 12). I agree, and I have taken this into consideration in this case.

## Negligence

Inspector Smith's "high negligence" finding was based on his belief that the respondent was aware of the reporting requirements found in section 50.20(a), but waited approximately 2 years after being notified of Mr. Stacy's black lung diagnosis before reporting it to MSHA (Tr. 21-22). Supervisory Inspector Worrell concurred with Mr. Smith's finding, and he stated that the respondent knew or should have known about the reporting

requirements, and in the absence of any mitigating circumstances, Mr. Smith was required to find "high negligence" (Tr. 43, 50).

In a recently decided case, Consolidation Coal Company, 14 FMSHRC 956 (June 1992), the Commission affirmed Chief Judge Merlin's decision affirming several reporting violations issued pursuant to 30 C.F.R. § 50.30-1(g)(3). The Commission also affirmed Judge Merlin's "high" negligence findings, notwithstanding its recognition of the ambiguous language of the cited standard, and it quoted with approval the following conclusion by Judge Merlin at 12 FMSHRC 1146, of his decision:

Whatever difficulties may be presented by the Secretary's interpretation of the Act and regulations, no operator is free to take the law into its own hands by deciding for itself what the law means and how it can best be applied.

I take note of the fact that Judge Merlin based his "high" negligence finding on his belief that the mine operator engaged in "egregious and clandestine conduct" and "chose to act in secret until the Secretary found out", 12 FMSHRC 1146. In the instant case, I find no evidence of such conduct on the part of the respondent. Although I have concluded that Mr. Prater and Mr. Kendrick's interpretation of the cited standard was erroneous, I find no evidence that they deliberately sought to avoid compliance. I take note of the fact that MSHA's August 31, 1987, policy bulletin acknowledges that it was issued in response to mine operator uncertainty concerning the reporting of an occupational illness. I also note that subsequent MSHA Part 50 reporting policy letters, which became effective on September 6, 1991, and May 6, 1992, do not contain any statements informing mine operators to report to MSHA within 10 days of becoming aware of a diagnosis of pneumoconiosis. Under all of these circumstances, I conclude and find that the violation in this case was the result of the respondent's failure to exercise reasonable care to insure compliance and that this constitutes ordinary negligence.

#### Civil Penalty Assessment

Taking into consideration all of the civil penalty assessment criteria found in section 110(i) of the Act, I conclude and find that a civil penalty assessment of \$20 is reasonable and appropriate for the violation which I have affirmed.

#### ORDER

The respondent IS ORDERED to pay a civil penalty assessment in the amount of \$20, for the section 104(a) non-"S&S" Citation No. 3509275, March 20, 1991, 30 C.F.R. § 50.20(a). Payment is to



be made to MSHA within thirty (30) days of this decision and order, and 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

THE FEDERAL BUILDING

ROOM 280, 1244 SPEER BOULEVARD

DENVER, CO 80204

AUG 19 1992

SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 92-544-DM
ON BEHALF OF ROBERT W.	:	WE MD 92-28
BUELKE,	:	
Complainant	:	Rabbit Creek Mine
v.	:	
	:	
SANTA FE PACIFIC GOLD	:	
CORPORATION,	:	
Respondent	:	

ORDER OF TEMPORARY REINSTATEMENT

Appearances: Gretchen M. Lucken, Esq., Office of the Solicitor,  
U.S. Department of Labor, Arlington, Virginia,  
for Complainant;  
Charles W. Newcomb, Esq., Stephen E. Hosford, Esq.,  
Sherman & Howard, Denver, Colorado,  
for Respondent.

Before: Judge Cetti

I

This temporary reinstatement proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act"). Section 105(c) of the Mine Act, 30 U.S.C. § 815(c) (1988), prohibits operators of mines from discharging or otherwise discriminating against a miner who has filed a complaint alleging safety or health violations at a mine. If a miner believes that he has been discharged in violation of this section, he may file a complaint with the Secretary of Labor ("Secretary"), who is required to initiate a prompt investigation of the alleged violation. If the Secretary finds that the miner's complaint was "not frivolously brought," she must apply to the Federal Mine Safety and Health Review Commission ("Commission") for an order temporarily reinstating the miner to his job, pending a final order on the complaint. The Commission is required to grant such an order if it finds that the statutory standard (not frivolously brought) has been met.

Although the Act does not require a hearing on the Secretary's application for temporary reinstatement, the Commission's

regulations provide an opportunity for a hearing upon request of a mine operator, prior to the entry of a reinstatement order. See 29 C.F.R. § 2700.44(b) (1990). The scope of such a hearing is limited to a determination by the Administrative Law Judge "as to whether the miner's complaint is frivolously brought," with the Secretary bearing the burden of proof on this standard. Jim Walter Resources v. Federal Mine Safety and Health Review Commission, 920 F.2d 738 (11th Cir. 1990), see also the Commission's decision Secretary of Labor on behalf of Yale E. Hennessee v. Alamo Cement Company, 8 FMSHRC 1857-1858 (December 8, 1986).

## II

### Findings and Conclusions

1. Jurisdiction of this action is conferred upon the Federal Mine Safety and Health Review Commission (Commission) pursuant to Section 113 of the Act, 30 U.S.C. 823.

2. This action is brought by the Secretary of Labor (Secretary) pursuant to authority granted by Section 105(c)(2) of the Act, 30 U.S.C. 815(c)(2).

3. The Commission and its Administrative Law Judge has jurisdiction in this matter.

4. At all relevant times hereinafter mentioned, Respondent Santa Fe Pacific Gold Corporation, a New Jersey corporation, authorized to do business in Nevada operated the Rabbit Creek Mine in the production of gold and is therefore an "operator" as defined by Section 3(d) of the Act, 30 U.S.C. 802(d).

5. Respondent's Rabbit Creek Mine, located in or near Winnemucca, Humboldt County, Nevada, is a surface metal mine, the products of which enter commerce within the meaning of Sections 3(b), 3(h), and 4 of the Act, 30 U.S.C. 802(b), 802(h), and 803.

6. At all relevant times, Complainant Robert W. Buelke, was employed by Respondent as an electrician and was a miner as defined by Section 3(g) of the Act, 30 U.S.C. 802(g).

7. Mr. Buelke was employed as an electrician at the Rabbit Creek Mine from June 6, 1990, until his discharge on July 1, 1991, and after temporary reinstatement by the Order in Docket No. WEST 92-243-DM was again employed from March 9, 1992 to April 13, 1992, when he was again discharged.

8. Following Mr. Buelke's second discharge by Santa Fe Pacific Gold Corp. on April 13, 1992, Mr. Buelke filed his second complaint with the Secretary of Labor pursuant to Section 105(c) of the Mine Act, 30 U.S.C. § 815(c)(2) alleging he was fired in retaliation for his protected activity.

9. After commencing the required investigation of the complaint and determining that it was not brought frivolously, the Secretary filed an application with the Commission for temporary reinstatement of Mr. Buelke.

10. Santa Fe Pacific Gold Corp. filed a request for hearing on the application pursuant to 29 C.F.R. § 2700.44(b). The hearing was held on the date agreed by the parties, August 6, 1992 at Reno, Nevada. The parties agreed that irrespective of whether or not the presiding Administrative Law Judge issued a bench order that the close of the hearing would be the date the transcript of the hearing was filed.

11. At the hearing, the Secretary presented the testimony of Robert W. Buelke, the applicant, and David J. Brabank, the MSHA Special Investigator. The Respondent presented the testimony of David Wolfe, Safety Supervisor at the mine, and Debra Thompson, Human Resources Supervisor.

12. The evidence presented, particularly the credible evidence presented by Mr. Buelke and MSHA Special Investigator David Brabank established that there was a viable non-frivolous issue as to whether or not there was illegal discrimination under the provisions of Section 105(c) of the Act.

13. The evidence presented at the hearing of February 27, 1992, in Docket No. WEST 92-243-DM and the August 6, 1992, hearing clearly established that Mr. Buelke's present application for temporary reinstatement was not frivolously brought.

14. Evaluated against the "not frivolously brought" standard, the Secretary has made a sufficient showing of the elements of a complaint under Section 105(c) of the Act to grant the application for an Order of Temporary Reinstatement of Robert W. Buelke.

### III

Mr. Buelke while employed as an electrician by Santa Fe Pacific Gold Corp. was discharged on two occasions. After his first discharge on July 1, 1991, he was reinstated pursuant to an Order of Temporary Reinstatement issued by this Administrative Law Judge in Docket No. WEST 92-243-DM which the parties agree is

part of the present record. To avoid unnecessarily prolonging the August 6, 1992 hearing on Mr. Buelke's current Application for Temporary Reinstatement following his second discharge of April 13, 1992, the parties agreed that the evidence presented and the record made in Docket No. WEST 92-243-DM need not be repeated and that the Judge would take judicial or official knowledge of everything in that record.

The Order of Reinstatement after the February 27, 1992 hearing reads as follows:

#### ORDER

My ruling in this matter is limited to the single issue of whether Mr. Buelke's application for temporary reinstatement is frivolously brought. I heard the testimony of only two witnesses, both presented by the Solicitor. I see no reason to doubt their credibility. Evaluated against the "not frivolously brought" standard, I conclude that the Secretary has made a sufficient showing of the elements of a complaint under Section 105(c) of the Act. Therefore, the application for an Order of Temporary Reinstatement of Robert W. Buelke is **GRANTED**.

Respondent is **ORDERED** to immediately reinstate Mr. Buelke to his position as electrician from which position he was discharged, at the same rate of pay, and with the same or equivalent duties assigned to him immediately prior to his discharge.

As previously stated the scope of this temporary reinstatement hearing is limited to my determination as to whether Mr. Buelke's discrimination complaint is frivolously brought. The Respondent will have a full opportunity to respond, and the parties will be afforded an opportunity to be heard on the merits of the discrimination complaint filed. The parties will be notified as to the time and place of any hearing requested on the discrimination complaint.

Pursuant to this Order Mr. Buelke returned to work for Respondent on March 9, 1992 and continued to work as an electrician until his second discharge on April 13, 1992. I am satis-

fied from the present record which includes both Docket Nos. WEST 92-243-DM and WEST 92-544-DM that the evidence presented on behalf of Mr. Buelke made a strong showing and established for purpose of the present proceeding for temporary reinstatement only that Buelke engaged in protected activity and that a viable non-frivolous issue exists as to whether or not either or both discharges were motivated by Respondent's desire to retaliate against him for his protected activity. There is a viable non-frivolous issue as to whether or not Respondent would have discharged Mr. Buelke for his non-protected conduct or activities alone and whether or not Respondent's proffered reasons for disciplinary action and discharge of Mr. Buelke were pretextual. Some evidence was also presented to support Mr. Buelke's claim of disparate treatment. These are viable non-frivolous issues on which both parties will have a full opportunity to present evidence and be heard on the merits in the issues involved in the two discrimination complaints filed and now pending before the Commission in Docket Nos. WEST 92-545 and WEST 92-243-A-DM. Both of these dockets were assigned to the undersigned Administrative Law Judge on July 23, 1992 for hearing and decision.

### III

#### BACKGROUND

On February 7, 1992, the Secretary pursuant to Section 105(c)(2) of the Mine Act and Commission Rule 29 C.F.R. § 2700.44(a), filed an application for an order requiring Respondent, Santa Fe Pacific Gold Corporation ("Pacific Gold"), to temporarily reinstate Robert W. Buelke to his job as an electrician at Pacific Gold, Rabbit Creek Mine from which he was discharged July 1, 1991.

On August 6, 1991, Mr. Buelke filed his discrimination complaint with MSHA at the Reno field office. His complaint in part reads as follows:

- I. Have worked as a mine electrician approximately 15 years. Resume Attached.
- II. Have had numerous encounters with supervisors in trying to get electrical installations done correctly, or repaired correctly; have tried to get them taken care of "in house", written a couple of letters/reports of concern, and have been put down and fired mainly because of these -- see attached letter.

If you need any additional information, please feel free to contact me.

Thank you for your concern, time and consideration.

Sincerely,

/s/  
Robert W. Buelke

cc: Perry Tenbrink  
Ray Nicholson

The application for temporary reinstatement states that the Secretary has determined that the Respondent's discharge of Robert W. Buelke was motivated by his protected safety activity and that this constitutes an act of illegal discrimination which provided the basis for a non-frivolous cause of action under Section 105(c)(2) of the Act. Attached to the application is an affidavit setting forth the factual basis for the Secretary's determination.

The affidavit reads as follows:

AFFIDAVIT

James E. Belcher, being duly sworn, deposes and states:

1. I am the Chief, Office of Technical Compliance and investigation Division, Metal and Nonmetal Safety and Health

2. I am responsible for reviewing discrimination complaints filed pursuant to the Federal Mine Safety and Health Act of 1977 ("the Mine Act"). I have reviewed the special investigation filed in the above-captioned case.

3. My review of the investigative file disclosed the following facts.

a. At all relevant times, Respondent, Santa Fe Pacific Gold Corporation, engaged in the production of gold and is therefore an operator within the meaning of Section 3(d) of the Mine Act;

b. At all relevant times, Applicant, Robert W. Buelke, was employed by Respondent as an electrician and was a miner as defined by Section 3(g) of the Mine Act;

c. Rabbit Creek Mine, located near Winnemucca, Humboldt County, Nevada, is a mine as defined by Section 3(h) of the Mine Act, the products of which affect interstate commerce;

d. The alleged act of discrimination occurred on July 1, 1991, when Applicant Robert W. Buelke was discharged by Perry Tenbrink, Maintenance Supervisor;

e. Applicant Buelke engaged in protected activity by making numerous safety complaints to management concerning electrical equipment and by submitting letters to Mine Manager Michael Surratt on January 23 and May 13, 1991. The letters detailed safety complaints by Buelke concerning electrical equipment;

f. The letters concerning safety complaints were received with hostility. Buelke was told that he had no business writing letters to mine management. Buelke's supervisors became hostile in tone and work assignments after the letters were submitted;

g. On May 29, 1991, Buelke was given a step one disciplinary notice allegedly for failing to correct an electrical grounding problem in a timely manner.

h. The Respondent's articulated basis for the May 29, 1991, disciplinary action was pretextual.

i. On July 1, 1991, having been absent for one week due to legitimate illness, Buelke received three disciplinary notices for violation of the one hour rule which requires employees to call in sick at least one hour prior to the start of the shift.



j. Buelke suffered disparate treatment, as other employees violated the one hour rule and received no disciplinary action or less severe action.

4. In view of the foregoing facts, I have determined that the Applicant Robert W. Buelke was discharged for engaging in protected safety activity and the complaint filed by him is not frivolous.

/s/

James E. Belcher

Taken, subscribed and sworn before me this  
3rd day of February, 1992.

Catherine L. Falatko

Notary Public

Evidence Presented At The Feb. 27, 1992 Hearing

Mr. Buelke at the February 27, 1992 hearing testified that he was concerned about employee safety; that he made numerous safety complaints to management concerning electrical equipment. He wrote two letters detailing safety complaints, one to the mine manager, Mr. Surratt and the other to the Safety Supervisor, David Wolfe. The first letter dated January 23, 1991, a memorandum with the heading Internal Correspondence, reads as follows:

Whereas I'm the only MSHA Electrician on the Rabbit Creek Mine Site, and not in a position to advise, design, or change many of the electrical installations here, I would appreciate your naming someone who is responsible and liable for all electrical installations, and operations. Under MSHA regulations, and being a card-ed MSHA electrician, I automatically become totally liable for all electrical installations, and operations should there be any violations of the codes or accidents, unless I have a written notice from you relieving me of this responsibility and specifically naming someone else.

Since this mine has been in operation for 6 months and turned over from the contractor to Rabbit Creek and we are now coming under full

MSHA jurisdiction, I'm obligated as a MSHA electrician to shut down and tag out (until corrected) any electrical equipment that is in violation of the code and/or safety hazard.

I would appreciate a reply before February 1, 1991 thereafter I will be obligated to carry out my duties.

Mr. Buelke's second letter, dated May 13, 1991, addressed to David Wolfe, the Head of the Safety Department, reads as follows:

Whereas it has been a very busy time since our last meeting, around the first of March with off site schools, new used trucks, a new P&H shovel, and general maintenance on the rest of our fleet, I regret that I have not been able to get a list of electrical (sic) problem areas, to your attention, before this time. I have decided, due to my limited time available to research and verify each problem, that I will try to get a list of three problems to you each month, for you to get corrected or verified.

The following three items are submitted for your verification and corrective action this month:

1. The need for a static ground line on the 34,500 volt pit-shovel supply line for the following reasons:

- a. Common safety practice. (sic)
- b. Required by MSHA in all mines (metal or non-metal) and strictly enforced in the Midwest - even the iron mines.
- c. Falls under the N.E.C. Section 250 on grounding as high-lited on attached copies.

2. The need to correct the Main 375Kw/480v Pit Generator feed for the following reasons:

- a. The generator output leads have been changed and no longer meet code Section 445; high-lited.

b. A second branch circuit is required to protect the 2/0 pump cable Section 240, high-lited.

c. Pump must be additionally (separtly) (sic) grounded or cable must be provided with ground check monitor, Section 250.

3. The need to correct the new 4160/480 volt pit pump transformer/distribution panel (located on the lower hopper level) for the following reasons:

a. All service panels over 1000 amp must be protected with Ground Fault Interrupter breaker, Section 230 and 240, high-lited.

b. A main disconnect means shall be provided on all service panels over 6 circuits (present 7 - and has additional spaces available), Section 230.

If you need any additional information, please feel free to contact me.

Thank you for your concern, time, and consideration.

Mr. Buelke also testified that his concern for employee safety from electrical hazards due to improper grounding of the 2800 substation, led him to tag out the substation on May 14, 1991, and again on May 20, 1991. He stated that the improper grounding could have resulted in a miner sustaining serious injury or death.

It is Applicant's position that Pacific Gold took adverse action against Mr. Buelke in the form of disciplinary notices and the July 1, 1991, discharge in retaliation for his protected activity. On May 29, 1991, Mr. Buelke received a step-one disciplinary notice allegedly for failure to correct a grounding problem on the substation in a timely manner while time permitted. The electrical log book entries, and the testimony of Mr. Buelke and Mr. Brabank indicated that Mr. Buelke's actions were consistent with good practice and that Mr. Buelke acted diligently and responsibly with regard to the substation. The Applicant contends that the May 29, 1991, disciplinary notice was pretextual, and that Mr. Buelke was in fact punished for engaging in protect-

ed safety activity, including his previous safety complaints and tagging out the substation to ensure proper grounding on May 20, 1991.

Testimony was presented at the hearing that tended to show that Mr. Buelke has an excellent work record and had never been disciplined in any way prior to May 29, 1991, concerning performance of his duties. Mr. Buelke has on occasion been called out to perform electrical work that more senior electricians could not perform.

Mr. Buelke received three consecutive disciplinary notices on the same day on July 1, 1991, for failure to report off sick prior to one hour before the start of the shift, which allegedly formed the basis for his discharge. Mr. Buelke testified as to matters that appear to be mitigating circumstances. Evidence and arguments were presented to show that other employees violated the one hour rule and received no or less severe disciplinary action. The evidence shows that Mr. Buelke received the three disciplinary notices on the same day without any verbal warning or discussion, after returning from a legitimate illness of which the company was aware. The evidence indicated that Mr. Buelke had no history of lateness or absenteeism and had never been disciplined in any way for attendance problems prior to July 1, 1991, the date of his discharge.

Special Investigator David Brabank, Western District, MSHA, testified concerning the conduct of the 105(c) investigation, including the purpose and scope of the investigation. Mr. Brabank testified as to information he obtained with respect to disparate treatment in the enforcement of the one hour reporting rule. Mr. Brabank testified as to why in his opinion, based on the special investigation, the complaint is non-frivolous. See also Special Investigator Brabank's "Final Report" received as Respondents Exhibit 13 at the February 27, 1992, hearing in Docket No. WEST 92-243-DM.

Respondent's position broadly stated is that Mr. Buelke did not engage in protected activity and adverse actions taken against him were not motivated by that activity and in any event Mr. Buelke's job-related misconduct warranted the termination of his employment under company policies. Respondent asserts that Mr. Buelke was properly discharged for receiving two or more disciplinary notices within 12 months in accordance with company policy.

At the conclusion of the February 27, 1992, hearing after reviewing all the evidence and arguments presented, I ruled from the bench that the Secretary had made a sufficient showing of the elements of a complaint under Section 105(c) of the Act. I granted the application for an Order of Temporary Reinstatement in Docket No. WEST 92-243-DM. I affirm in writing the oral ruling made from the bench.

I stated to the parties that my ruling in this matter was limited to the single issue of whether Mr. Buelke's complaint of discrimination was frivolously brought. I credited the testimony of the two witnesses who testified, Mr. Buelke and Mr. Brabank. I saw no reason to doubt their credibility. Evaluated against the "not frivolously brought" standard, I conclude that the Secretary has made a sufficient showing of the elements of a complaint under Section 105(c) of the Act and granted the application for an Order of Temporary Reinstatement of Robert W. Buelke.

#### IV

#### The August 6, 1992 Hearing

On March 29, 1992, 20 days after his return to work under the first Reinstatement Order, Buelke was assigned to repair an electrical malfunction by Lead Electrician Nathan Allen. Buelke testified that Allen instructed him to perform the task in either of two ways, depending on the results of his trouble shooting. Allen instructed Buelke to correct the problem either at the junction box or at the switch house.

Mr. Buelke testified he changed the wiring at the junction box, in accordance with sound electrical principles and the common practice at the mine. Mr. Brabank, MSHA Special Investigator, testified that Mr. Allen told him that he had also performed the task in the same manner as Buelke in the previous two months, and that there was no policy at the mine contrary to this practice. This was confirmed by the testimony of David Wolfe, the Safety Supervisor.

Mr. Buelke injured his back while performing the repair at the junction box. He reported the injury and was treated by Dr. Bernard McQuillan on March 30, 1992, who was authorized to treat him. Dr. McQuillan diagnosed the condition as an acute dorsal strain. Dr. McQuillan prescribed pain medication and issued a light duty work release for Mr. Buelke. He also referred Mr. Buelke to a specialist, Dr. Herz, and arranged an appointment for April 30, 1992.

Mr. Buelke returned to light duty work on March 30, 1992, and performed light duty work as assigned. Mr. Buelke's assigned work routine at the mine was four days work, followed by four days off work. During his four days off beginning March 31, 1992, Mr. Buelke had an opportunity to drive to Tacoma, Washington with a friend to visit family. When he arrived in Tacoma, Mr. Buelke experienced more severe pain in his back and sought treatment from a chiropractor, Dr. Nyren, to relieve the pain and allow him to return to Nevada.

Dr. Nyren contacted Dr. McQuillan and obtained approval to x-ray Mr. Buelke and provide treatment to relieve the pain. Dr. Nyren also diagnosed Mr. Buelke as having a strain of the thoracic spine, and recommended that Mr. Buelke visit Dr. McQuillan for a re-evaluation upon returning to Winnemucca, Nevada.

Mr. Buelke had been scheduled to work on April 4, 5, 6, and 7, 1992. On these days he was under treatment by Dr. Nyren in Tacoma. On each day he was scheduled to work, Mr. Buelke called in from Tacoma and reported off sick to his supervisors, explaining that he was under the care of Dr. Nyren for severe back pain. Mr. Buelke testified that Santa Fe Pacific Gold Corporation management did not advise Mr. Buelke that he was in violation of company policy or that he needed a work release from Dr. Nyren or a doctor's excuse indicating that he was unable to work for the four shifts he missed because of back pain and needed treatment to relieve the pain so he could return from Tacoma.

Dr. Nyren has indicated that Mr. Buelke needed the treatment he received in Tacoma to relieve his back pain to the point where he was capable of driving back to Winnemucca. In his report to Mr. Brabank dated May 31, 1992, Dr. Nyren states "had Mr. Buelke returned immediately to Winnemucca he would have experienced moderate to severe back pain ... ."

Mr. Buelke returned to Winnemucca and was re-evaluated by Dr. McQuillan on April 10, 1992. Dr. McQuillan continued the light duty release. Safety Director David Wolfe instructed Mr. Buelke not to come in for his scheduled shift over the weekend, but to come in on Monday, April 13, 1992. When Mr. Buelke came to work on that day, Respondent gave him two disciplinary notices and discharged him.

The first disciplinary notice states that he failed to comply with an assigned duty and failed to recognize a safe working practice in performing the electrical repair on March 29, 1992. The second disciplinary notice states that Mr. Buelke was absent

without leave on April 4, 5, 6, and 7, 1992, because he was off work without a doctor's permission for a back injury and that the doctor's release was for light duty.

The Secretary asserts that the disciplinary notice and discharge is a pretext for illegal discrimination in retaliation of Mr. Buelke's protected activity.

## V

Respondent presented evidence tending to rebut or refute portions of the evidence presented on behalf of Mr. Buelke. This evidence tended to give some support to Respondent's claim that it would have discharged Mr. Buelke based upon his unprotected activity alone. Considering the record as a whole, I am not persuaded that Respondent in this proceeding has established it would have discharged Mr. Buelke for his unprotected activity alone.

It has been held that in a temporary reinstatement proceeding, applicant does not have to prove likelihood of ultimate success on the merits of his case; applicant must only make the minimal showing that his discrimination complaint is not frivolous. Sec. of Labor on behalf of Haynes v. DeCondor Coal Co., Docket No. WEVA 89-31-D, 10 FMSHRC 1810 (Dec. 27, 1988). It has also been held that although the record contained some evidence tending to rebut or refute portions of the Secretary's evidence, temporary reinstatement pending a decision on the merits is proper where miner's discrimination complaint was not clearly without merit, fraudulent, or pretextual. (Sec. of Labor on behalf of Joseph A. Smith v. Helen Mining Co., Docket No. PENN 92-15-D, 13 FMSHRC 1808 (Nov. 5, 1991).)

In this case the record as a whole establishes that Mr. Buelke's complaint of discrimination was not frivolously brought.

## VI

Respondent points to its Employees Handbook disciplinary policy which states:

"Two Disciplinary Notices within any 12 month period regardless of the reason issued, will be cause for discharge."

The Employee Handbook disciplinary policy also states, "It is the intent and purpose of the company to administer company rules in a consistent and reasonable manner and this is accom-

plished through the company's disciplinary procedures described below. The seriousness and/or frequency of violations will determine which of the four (4) disciplinary actions that will be taken. These actions include:

- 1) oral reprimand which may include supervisor's personal contact
- 2) Disciplinary Notice
- 3) Disciplinary Notice and suspension from work without pay, and
- 4) discharge"

"The level of discipline for any violation will depend on all of the circumstances involved including the severity of the misconduct, willfulness, history of discipline, and any mitigating considerations." (emphasis added)

It is well established and has been stated many times that direct evidence of actual discriminatory motive is rare. Short of such evidence, illegal motive may be established if the facts support a reasonable inference of discriminatory intent. Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510-11 (Nov. 1981), rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp. 709 F2d 86 (D.C. Cir. 1982); Sammons v. Mine Services Co., 6 FMSHRC 1391, 1398-99 (June 1984). As the Eighth Circuit analogously stated with regard to discrimination cases arising under the National Labor Relations Act in NLRB v. Melrose Processing Co., 351 F2d 693, 698 (8th Cir. 1965):

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

## VII

In Jim Walter Resources supra, the court in footnotes 10 and 11 stated:



10. Because of our prior conclusion that the "not frivolously brought" standard is the functional equivalent to the "reasonable cause to believe" standard implicitly upheld in *Roadway Express* we find it unnecessary to consider further whether the probable value of a stricter standard of proof in reducing the risk of erroneous deprivations outweighs the additional fiscal or administrative burdens that would be imposed. See *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976).
11. Even assuming that the "not frivolously brought" is a less stringent standard [than reasonable cause to believe] we find that it accurately reflects a "societal judgment about how risk of error should be distributed between [mine operators and mine employees]." *Santosky*, 455 U.S. at 755, 102 S.Ct. at 1395; see also *Addington v. Texas*, 441 U.S. 418, 423-25, 99 S.Ct. 1804, 1807-09, 60 L.Ed.2d 323 (1979). In placing an antidiscrimination provision in the Act, Congress clearly expressed its intent that individual miners would be an integral part of this nation's attempt to ensure the safety of mining facilities and that they should be protected from unjust discharges in such activities. See *Brock ex rel. Parker v. Metric Constructors, Inc.*, 766 F.2d 469, 472 (11th Cir. 1985). In furtherance of this expressed policy, Congress, in enacting the "not frivolous brought" standard, clearly intended that employers should bear a proportionately greater burden of the risk of an erroneous decision in a temporary reinstatement proceeding. Any material loss from a mistaken decision to temporarily reinstate a worker is slight; the employer continues to retain the services of the miner pending a final decision on the merits. Also, the erroneous deprivation of an employer's right to control the makeup of his workforce under Section 105(c) is only a temporary one that can be rectified by the Secretary's decision not to bring a formal complaint or a decision on the merits in the employer's favor. In light of these considerations, we are unable to accept JWR's contention

that the "reasonable cause to believe" standard is better calibrated than the "not frivolously brought" standard in reflecting society's judgment about how the risk of error should be borne as between miners and operators.

### Conclusion

At the conclusion of the hearing in this matter on August 6, 1992, after reviewing all the evidence and arguments presented, I ruled from the bench that the Secretary had made a sufficient showing and found that the discrimination complaint was not frivolously brought. I granted the application for an Order of Temporary Reinstatement. I hereby affirm in writing the substance of the oral ruling made from the bench.

### ORDER

My ruling in this matter is limited to the single issue of whether Mr. Buelke's application for temporary reinstatement is frivolously brought. Evaluated against the "not frivolously brought" standard, I conclude that the Secretary has made a sufficient showing of the elements of a complaint under Section 105(c) of the Act. Therefore, the application for an Order of Temporary Reinstatement of Robert W. Buelke is **GRANTED**.

Respondent is **ORDERED** to immediately reinstate Mr. Buelke to his position as electrician from which position he was discharged, at the same rate of pay, and with the same or equivalent duties assigned to him immediately prior to his discharge.



August F. Cetti  
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 1992

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 90-356
Petitioner	:	A. C. No. 15-16477-03526
v.	:	
	:	Docket No. KENT 90-399
LJ'S COAL CORPORATION,	:	A. C. No. 15-16637-03528
Respondent	:	
	:	No. 3 Mine
	:	
	:	Docket No. KENT 90-400
	:	A. C. No. 15-16477-03529
	:	
	:	Docket No. KENT 90-401
	:	A. C. No. 15-16637-03505
	:	
	:	No. 4 Mine

DECISION ON REMAND

Before: Judge Weisberger

On August 4, 1992, the Commission issued a decision in these cases in which it remanded the cases to me "...for the limited purpose of determining whether the failure to report an unplanned roof fall in violation of 30 C.F.R. § 50.10, was S&S. In this regard, the judge shall analyze each element of the Mathies test and set forth findings of fact and conclusions of law, and the reasons or bases supporting his determinations." (14 FMSHRC \_\_\_\_\_, slip op. p.6, Docket No. KENT 90-356 et al (August 4, 1992)).

In its decision (14 FMSHRC, supra, slip op p.4-5) the Commission set forth as follows the four elements of the Mathies test.

In Mathies Coal Co., 6 FMSHRC 1 (January 1984), the Commission further explained:

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

reasonably serious nature. 6 FMSHRC at 3-4. See also, Austin Power Co. v. Secretary, 861 F.2d 99, 104-05 (5th Cir. 1988), aff'g 9 FMSHRC 2015, 2021 (December 1987) approving Mathies criteria).

In the case at bar, I previously found a violation of 30 C.F.R. § 50.10, in that the Operator had not reported a roof fall. This finding was based on the testimony of the inspector, that was not impeached or rebutted, that a cavity in the roof was evidence of a rock fall, and that it was not reported. I conclude that the first element of the Mathies, supra test has been met.

The second element in the Mathies test requires the Secretary to prove a danger to safety "contributed by the violation." Mathies supra. Hence, the inquiry is to focus on whether the violation has contributed to a discrete safety hazard, i.e. whether the failure to report the roof fall contributed to a safety hazard.

As a consequence of the roof fall herein which was not reported, a roof-bolting machine was entrapped. According to the inspector, the machine was removed by the operator without the use of supports. The inspector further indicated that the area of roof fall, approximately 20 to 30 feet wide and 20 feet high, would require a "considerable" amount of support in the form of bolts, cribbing, and posts in order to remove the bolter (Tr.80).

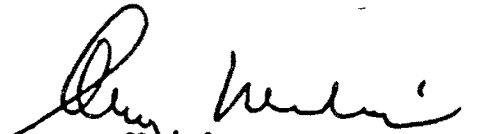
According to the inspector, upon notification of a roof fall which entrapped equipment, MSHA would issue an order ensuring the safety of the area pending an investigation. Also, the operator might be required to submit a plan instructing all employees on how the roof will be supported, and the manner in which work will be advanced to recover the equipment. Under these circumstances, the failure to report the roof fall contributed to the hazard of miners being exposed to unsupported roof.

The third element set forth in Mathies, supra, requires proof of a reasonable likelihood that the hazard contributed to will result in an injury. In this connection the inspector indicated that, based on the "massive" (Tr.85) nature of the fall, and the hazards involved in the removal of the entrapped bolter without the installation of a roof supports, he concluded that a injury would be reasonably likely to occur "because of this condition" (Tr.84). This opinion was not contradicted or unpeached by the operator. I conclude that the third element set forth in Mathies, supra has been met.

Should an injury have occurred as a result of miners working under unsupported roof as a consequence of the violation herein, it is clear that there would have been a reasonable likelihood that the resulting injury would have been of a reasonably serious

nature. Hence, the forth element set forth in Mathies has been met.

For all these reasons, I conclude that the violation herein was significant and substantial.



Avram Weisberger  
Administrative Law Judge

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

AUG 21 1992

CONSOLIDATION COAL COMPANY,  
Contestant  
v.

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

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

CONSOLIDATION COAL COMPANY,  
Respondent

: CONTEST PROCEEDINGS  
:  
: Docket No. WEVA 91-204-R  
: Citation No. 3315865; 2/8/91  
:  
: Docket No. WEVA 91-205-R  
: Order No. 3315867; 2/11/91  
:  
: Docket No. WEVA 91-196-R  
: Citation No. 3307899; 2/12/91  
:  
: Blacksville No. 1 Mine  
:  
:  
: CIVIL PENALTY PROCEEDINGS  
:  
: Docket No. WEVA 91-1964  
: A.C. No. 46-01867-03904  
:  
: Docket No. WEVA 91-1965  
: A.C. No. 46-01867-03905  
:  
: Docket No. WEVA 92-148  
: A.C. No. 46-01968-03937  
:  
: Docket No. WEVA 92-187  
: A.C. No. 46-01867-03915  
:  
: Blacksville No. 1 Mine  
:  
: Docket No. WEVA 91-1833  
: A.C. No. 46-01452-03789  
:  
: Arkwright No. 1 Mine

**DECISION**

Appearances: Walter J. Scheller III, Esq., Consolidation Coal  
Company, Pittsburgh, Pennsylvania for  
Consolidation Coal Company;  
Robert Wilson, Esq., Office of the Solicitor, U.S.  
Department of Labor, Arlington, Virginia for  
Secretary of Labor.

Before: Judge Weisberger

These cases were consolidated for hearing, and are before me based on petitions for assessment of civil penalties filed by the Secretary (Petitioner) alleging various violations of mandatory safety standards set forth in Volume 30 of the Federal Code of Federal Regulations. Pursuant to notice the cases were heard in Morgantown, West Virginia on May 19, 1992. At the hearing, Lynn Arthur Workley, and Richard Gene Jones, testified for Petitioner. Robert W. Gross, testified for the Operator (Respondent).

Docket No. WEVA 91-187, WEVA 92-148, and WEVA 91-205-R and WEVA 91-196-R

It is ORDERED that the stay orders previously issued in docket nos. WEVA 91-205-R and WEVA 91-196-R are hereby lifted.

Petitioner filed a Motion to Approve a Settlement reached by the parties concerning these cases. A reduction in penalties from \$1,350 to \$856 is proposed. I have considered the representations and documentation submitted in these cases, and conclude that the proffered settlement is appropriate under the terms set forth in Section 110(i) of the Act.

Docket No. WEVA 91-1833

Citation Nos. 3306386, 3315573, 3315574, 3314482, and 3314483.

Petitioner filed a motion to approve a settlement agreement regarding citation numbers 3306386, 3315573, 3315574, 3314482, and 3314483. A reduction in penalty from \$1,009 to \$774 is proposed. I have considered the representations and documentation submitted with the motion, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act.

Citation Nos. 3315576, 3315577, 3315578, 3315579, 3315580, and 3314481.

The parties stipulated that citation nos. 3315576 - 3315581 involve the same issue, and that only Citation No. 3315576 would be tried. The parties further agreed that the decision with regard to Citation No. 3315576 is to apply to citation nos. 3315577 - 3315581.

Prior to the presentation of evidence Petitioner moved for Summary Judgment on these citations based on collateral estoppel. After hearing argument, the motion was denied.

## Findings of Fact and Discussion

### I.

On March 6, 1991, Lynn Arthur Workley, an MSHA Inspector, inspected certain coal cars at Respondent's Arkwright No. 1 Mine and issued six citations. In three of the citations Workley alleged violations of 30 C.F.R. § 75.1405, in that a device on a coal car to allow uncoupling from a safe distance, was inoperative. In three citations he alleged that on the three other cars the lever on this device was "froze-up". Respondent does not contest the existence of the violations of Section 75.1405, supra, as alleged, but does challenge the assertions of Workley, as set forth in the citations, that the violations were "significant and substantial".

### II.

Each of the coal cars in question is equipped with a lever located at the end of the car, which enables a miner to uncouple the car without going between the cars. When downward pressure is placed on the lever, a chain attached to the lever is pulled up, which releases a coupler, uncoupling the car. Workley explained that on three of the cars the fulcrums were rusted preventing the levers from being moved, and on the remaining three the chains were broken.

Workley opined that the violations herein were reasonably likely to have resulted in a reasonably serious injury of a crushing nature involving an extremity. He stated that if the uncoupling devices are broken or inoperable, the only way for one to uncouple the car, is to go between the cars and physically uncouple them. He indicated, in essence, that as a result of the violation herein, it was likely that an employee would go between the cars. In this connection, he stated that at the day he issued the citations in question he observed Jack Pack, an employee of Respondent, putting his right foot and right leg between two moving cars while attempting to uncouple them.

According to Workley, Pack had told him that most of the time he did not need an extension bar and referred to it as a "sissy bar". Workley did not specifically identify the cars that Pack had uncoupled as being those that were cited. There is no evidence that the uncoupling device that Pack was working on was inoperative.

According to Robert W. Gross, a Safety Supervisor employed by the Respondent, if a lever does not work, an extension bar, four and a half feet long, can be attached to the lever in order to provide more leverage to push it down, and hence uncouple the cars. It is not necessary to stand between the cars to use the bar which extends twenty four inches beyond the cars. Such bars



were located at the dump and tipple, the only sites where cars are uncoupled in normal mining operations. Spare bars were kept in the safety office. Also, other bars were located at the loading point and tipple to enable persons to uncouple cars if the chain on the uncoupling device is broken. Written safety work instructions provided to Respondent's employees who perform uncoupling of the cars require employees to use these bars. Instructions also provide that if an uncoupler on a car is not working properly, another car instead is to be uncoupled. In addition, signs located on all the cars warn employees not to go between the cars. Written notices to that effect were posted at the tipple, dump, and on the surface.

The Commission has set forth in Mathies Coal Company 6 FMSHRC 1(1984) the elements that must be established to prove a violation in 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 reasonable serious nature. (6 FMSHRC, supra, at 3-4.)

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129 (August 1985), 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).

With regard to the first element, there is no dispute that a mandatory safety standard, Section 75.1405, supra, was violated. Also, with regard to the second element set forth in Mathies, supra, I find that the violation herein, contributed to a safety hazard, i.e., and the danger of a miner going between 2 cars to uncouple them, and being injured thereby. I also find that, based on the uncontradicted testimony of Workley, should a miner go between two moving cars to uncouple them, a serious crushing injury could result. Hence, the fourth element has been satisfied.

The key issue for resolution, is whether the third element has been established, i.e., whether there was a reasonable likelihood that the hazard attributed to would result in an injury. For the reasons that follow, I conclude that Petitioner has met her burden in this regard.

In Consolidation Coal Company 13 FMSHRC 1314 (1991) Judge Melick, in finding that a violation by Respondent of Section 75.1405 for damaged and inoperative cut-off levers on supply cars was significant and substantial, noted that the inspector had previously seen a miner at that mine (Respondent's Loveridge Mine) position himself between two supply cars in attempting to uncouple the cars. In the instant case, Workley observed Pack going between two moving cars in attempting to uncouple them. According to Workley, on other occasions he had observed a miner going between the cars to uncouple them at Respondent's Humphrey Mine. In all these situations, it can not be said with certainty that the miners involved went between the cars to uncouple them because the devices were damaged or inoperative. Hence, if miners have gone between cars to uncouple them in situations where there is not a definite indication that the devices were inoperative, then, a fortiori, it can be concluded that there is a reasonable likelihood that these employees will go between cars to uncouple cars having damaged or inoperative devices, in spite of the training, warning signs, and bars provided by Respondent. Hence, I conclude that the violation herein was significant and substantial. (See Mathies Coal Company 6 FMSHRC, 1 (1984) U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (1984); Consolidation Coal Company 13 FMSHRC, supra).

### III.

In analyzing the degree of Respondents' negligence regarding the violations found herein, I take into account Respondent's history of violations concerning the standard at issue. Respondent did not contest the issuance of a citation at its Loveridge No. 2 Mine, citing inoperative and damaged cut-off levers on two supply cars (Consolidation Coal Company, supra). Also, on July 10, 1990, Respondent was cited for the same condition on six cars. Further, according to the uncontradicted testimony of Workley, "You could tell just by looking at them" that "about half" of the switches were broken (Tr. 55). He explained that chains were broken or missing, eyes were broken, and the cut-off levers were broken or bent. However, there is no evidence how long the violative conditions existed prior to their being cited by Workley.

I find the degree of Respondent's negligence to be mitigated by its policy of warning employees not to go between cars. Also as mitigating factors are the provision of extension bars and other bars. Should one of Respondent's employees have disregarded its instructions and warnings and have gone between

the cars to physically uncouple one of the cars whose device was not in operating condition, the results could have been a serious injury, even an amputation.

Taking all the above factors into account, as well as the remaining factors set forth in Section 110(i) of the Act, as stipulated to by the parties, I conclude that a penalty of \$200 is appropriate for each of the violations cited herein.

Docket Nos. WEVA 91-1964, WEVA 91-1965 and WEVA 91-204-R

Citation 3315908 (Docket Nos. WEVA 91-1965,  
and WEVA 91-204-R).

The Secretary filed a motion to approve partial settlement with regard to citation No. 3315908. The Secretary indicated that the operator has agreed to pay the full amount of the assessed penalty of \$276. Based on the the representations and documentation set forth in the motion, I conclude that the proffered settlement is appropriate under the terms of Section 110(i) of the Act.

Citations 3315803 (Docket No. WEVA 91-1965),  
and 3315865 (Docket No. WEVA 91-1964).

It was stipulated to by the parties that the issues presented in Citation No. 3315865 are the same as those presented in Citation No. 3315803 which is the subject matter of Docket Nos. WEVA 91-1964 and WEVA 91-204-R. The parties stipulated that the decision concerning Citation No. 3315803 is to apply to Citation No. 3315865.

#### Findings of Fact and Discussion

On March 5, 1991, Richard Gene Jones, an MSHA inspector, inspected the P-8 Longwall section at Respondent's Blacksville No. 1 Mine. He cited Stopping No. 3 located in a crosscut between an intake escapeway entry, and the adjoining track entry, as having an 8 inch by 16 inch hole. He noted that air was coursing from the track entry to the intake entry. The citation alleges a violation of 30 C.F.R. § 75.1707 which, as pertinent, provides that the escapeway which is required to be ventilated with intake air "... shall be separated from the belt and trolley haulage entries of the mine for the entire length of such entries to the beginning of each working section ... ."

Neither the pertinent regulations, nor the Federal Mine Safety and Health Act of 1977, nor its predecessor, the Federal Coal Mine Health and Safety Act of 1969, whose statutory provisions has been set forth as Section 75.1707 supra, contain any definition of either the type or degree of separation that is required between the track (haulage) and escape entries. Nor

does the legislative history of either Act shed any light on this issue. Hence, in interpreting legislative intent, reliance is placed upon the common meaning of the term "separate". Webster's Third New International Dictionary ("Webster's") (1986 Edition) defines the word separate as "1a: to set or keep apart: ... 4: to block off: BAR, SEGREGATE... ."

The cited stopping was permanent in nature, constructed of cement blocks, and was approximately 15 inches wide, by approximately 6 1/2 feet high. Although it contained an 8 inch by 16 inch hole, there can be no doubt that the stopping did separate the escape (intake) entry from the adjacent travel entry, as it was placed in the crosscut between these two entries. There is no requirement in either the plain language of Section 75.1707, or the legislative history, mandating that the air in the intake escapeway be sealed from the air in the travel entry, or that the mandated separation, i.e., the stopping in issue be air tight. Accordingly, I conclude that it has not been established that Respondent herein violated Section 75.1707 supra, as alleged.

Citation 3315802 (Docket No. WEVA 91-1964).

#### I. Violation of the Ventilation Plan ("the Plan")

On March 5th, Jones cited two haulage doors located in the crosscut at the No. 1 Block, between the intake and the track entries for not being maintained "reasonably air tight". Jones indicated that the haulage door on the track side had a hole that had extended about 12 feet, and was between 1 to 5 inches wide. He also stated that on the door on the intake side, there were 4 locations where there were holes approximately 4 inches by 5 inches. In essence, the citation alleges a violation of the ventilation plan ("The Plan") which provides, as pertinent, as follows:

"Reasonably air tight haulage doors ... may be used in lieu of a permanent stopping. They are used to isolate the air from the intake escapeway and the belt entries from the track, for the purpose of crib building, construction work, etc., on the longwall retreat or development panels ... They will provide the same protection as that of a permanent stopping."

Hence, in summary, according to the Plan, the haulage doors which are required to be "reasonably air tight", may be used in lieu of a stopping, and are to "... provide the same protection as that of a pertinent stopping." Also, according to the Plan, the intake escapeway "... shall maintain a constant pressure on the intake to the track where these doors are installed."

As observed by Jones, although each of the doors in questions had holes in them, air was going in the direction from the intake to the track entry. However, a pressure door which was located in close proximity in the intake entry, was closed. Jones opined that if the pressure door, which is designed to maintain pressure in the intake escapeway would be opened, then the air flow would reverse, and air would go from the track entry to the intake entry. He indicated that in the normal course mining the pressure door is opened approximately 4 to 5 times a shift, in order to allow traffic such as supplies to traverse the area. None of these statements were impeached by Respondent. Nor did Respondent adduce any evidence to contradict these statements. Accordingly, I conclude that in the normal course of mining, given the holes in the haulage doors, there would not be maintained a "constant pressure on the intake to the track where these doors are installed". Thus, I conclude that the ventilation plan herein was violated by Respondent.

## II. Significant and Substantial

According to Jones, the violation herein is significant and substantial in that, in the event of a fire in the track entry, with no-air tight separation between the intake and track entries, smoke and carbon monoxide would enter the intake entry. Workers inby would thus be exposed to the hazard of smoke inhalation and carbon monoxide poisoning. He also indicated that a decrease in visibility caused by smoke could cause lack of orientation, which could result in contusions. Jones noted the existence of fire sources such as a high voltage cable, the liberation of methane which would accumulate in a roof cavity,<sup>1</sup> and the fact that the gauge of the trolley track is incorrect which causes the trolley pole to jump off the wire, and hit the trolley which causes arcing.

In analyzing whether it has been established that the violation was significant and substantial, I note my finding, infra, of the violation by Respondent of the ventilation plan. Further, I find that the violation contributed to the hazard of miners in the intake entry being exposed to the dangers of smoke, should a fire occur in the track entry. Also, the hazards of smoke exposure could certainly result in serious injury as set forth in Workley's uncontradicted testimony.

The issue for resolution, is the likelihood of a fire causing smoke to course from the track entry, through the holes in the doors at issue, to the intake entry. (See, Bethenergy Mines, Inc., 14 FMSHRC \_\_\_\_\_, Docket Nos. PENN 88-149-R etc., slip op. P.11, (August 4, 1992)). In other words, since the

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<sup>1</sup> The mine is classified by MSHA as one that liberates more than one million cubic feet of methane in a 24 hour period.

holes in the door contribute to a hazard only in the event of a fire, it must be established that the event of the fire was reasonably likely to have occurred. (See, Bethenergy, supra).

The mere existence of various potential fire sources can not support a conclusion that the event of a fire was reasonably likely to have occurred in the normal course of mining operations. There is no evidence of the existence of any fault in the condition of the high voltage cable. Further, on cross-examination, Jones indicated that the portion of the track where the gauge is not correct is not within the P8 Panel, i.e., the panel at issue.<sup>2</sup> He conceded that, accordingly, a fire started by arcing caused by the incorrect track gauge should not affect the P8 panel in issue, unless the fire gets out of control. There is no evidence that this would be reasonably likely to occur. Also, contrary to Petitioner's assertion in her brief that the mine in question has a history of mine fires, the only evidence on this point is the testimony of Jones that there was a fire causing fatalities in 1972. I thus conclude that, inasmuch as the record fails to establish the likelihood of a hazard producing event i.e., a fire, it must be concluded that the violation herein was not significant and substantial (See, Mathies Coal Co., 6 FMSHRC 1 (1984)).

### III. Civil Penalty

In evaluating the negligence, if any, of the Respondent with regard to the specific violation cited herein, not much weight is placed on the fact that on various dates in January and February 1991, Jones issued citations to Respondent alleging violations of Section 75.1707 supra, with regard to stoppings located at other longwall panels. The issuance of these citations is accorded little weight in evaluating whether Respondent knew or reasonably should have known of the existence of the specific holes in the doors in question.

Jones indicated that during inspections on February 21, 1991, and February 26, 1991, he cited the same doors as containing holes, and being in violation of the Ventilation Plan. However, he indicated on cross-examination that the holes that were in existence on March 5th and cited by him, were not the same holes as were cited in February. Also, although he had cited the same doors, in February, they were at a different location.

Jones indicated that the holes were "very obvious" (Tr. 48) and that the doors themselves were approximately 20 to 25 feet from where he got off the mantrip. However, there was no

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<sup>2</sup> The parties stipulated that the site of the incorrectly gauged trolley track is between the P7 and P8 Panels.

evidence as to how long these holes existed prior to the inspection, nor is there any evidence to indicate what caused these holes.

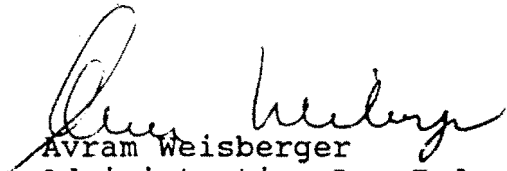
I find, for the above reasons, that there is insufficient evidence to base a conclusion that the Respondent's negligence herein was more than a slight degree. Taking into account the remaining factors in Section 110(i) is stipulated to by the parties I conclude that a penalty of \$100 is appropriate for the violation cited in Citation No. 3315802.

ORDER

It is ordered that, within 30 days of this decision, the operator shall pay \$3,206 as a civil penalty for the violations found herein.

It is further ordered that citation numbers 3315803 and 3315865 be DISMISSED.

It is further ordered that citation number 3315802 be amended to reflect the fact that the violation cited therein is not significant and substantial.

  
Avram Weisberger  
Administrative Law Judge  
(703) 756-6215

Distribution:

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/fas

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

AUG 24 1992

VINCENT BRAITHWAITE, : DISCRIMINATION PROCEEDING  
Complainant :  
v. : Docket No. WEVA 91-2050-D  
: MORG CD 91-06  
TRI-STAR MINING, INC., :  
Respondent :

DECISION

Appearances: Vincent Braithwaite, Piedmont, WV,  
Pro Se;  
Thomas G. Eddy, Esq., Eddy &  
Osterman, Pittsburgh, PA, for  
Respondent.

Before: Judge Fauver

This case was brought under § 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq, alleging a discriminatory discharge.

Having considered the hearing evidence, the arguments of the parties, and the record as a whole, I find that a preponderance of the substantial, probative, and reliable evidence establishes the following Findings of Fact and further findings in the Discussion that follows:

FINDINGS OF FACT

1. At all times relevant, Tri-Star Mining, Inc.,<sup>1</sup> operated a strip mine where it employed about 27 employees on one production shift, producing about 800 tons of coal daily for sale or use in or substantially affecting interstate commerce.

2. Complainant was employed by Respondent at such mine from July 24, 1989, until April 2, 1991, when he was discharged for refusing to operate a Euclid 120-ton rock truck (known as a Euclid R-120). Previously, he was employed by Respondent's affiliate, BTC Trucking Company, from October 14, 1988, until he was laterally hired by Respondent on July 24, 1989. At BTC

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<sup>1</sup> The caption is hereby amended to include "Inc." in the Respondent's name, to conform to the evidence.



Trucking Company, Complainant regularly drove a coal truck and a loader and occasionally drove Respondent's Cline 50-ton dump truck on an "as needed" basis.

3. On July 24, 1989, Complainant was called to Respondent's office and told that he was being "transferred to Tri-Star Mining....to be a Cline operator." Tr. 36. Complainant was told to initial various entries showing training or experience on MSHA Form 5000-23, and to sign the form. It was also initialed by his foreman, Ray Tighe, and signed by George Beener, mine superintendent, certifying that Complainant was a "Newly Employed, Experienced Miner" qualified to operate the following equipment:

Crusher  
745 Loader Cline Truck  
945B Loader  
555 Loader  
FB 35 Loader  
Euclid R-120 Truck  
Euclid R-100 Truck  
FD50 Dozer

4. As of July 24, 1989, Complainant had only the following experience or training concerning the above equipment:

<u>Equipment</u>	<u>Experience or Training as of July 24, 1989</u>
Crusher	None
Cline Truck	Some experience running it.
745 Loader	None
945 B Loader	None
555 Dresser	None
FB 35 Loader	Some experience running it.
Euclid R-120 Truck	None
Euclid R-100 Truck	None
FD50 Dozer	None

5. On September 25, 1990, Complainant's foreman, Ray Tighe, asked him to operate the Euclid R-120. Complainant did not feel qualified to operate the truck safely, and told Tighe he did not feel comfortable running it. Tighe sent him to see George R. Beener, the President of Respondent and superintendent of the mine. Complainant told Beener that Tighe wanted him to operate the R-120, but that he did not feel comfortable running it, and that Tighe sent him to see Beener. Beener considered the matter and told Complainant to return to work to run the Cline truck and if it needed repairs, he could help the mechanic (Jeff Coleman) work on it; "Dale Jones is going to run the Uke." Tr. 123.

6. The only training or experience that Complainant had on the Euclid R-120 truck from July 24, 1989, when he was hired, until September 25, 1990, when he refused to operate the Euclid R-120, was as follows: Once he rode with William Durst, an operator of the Euclid R-120, for about one hour and observed him operate it, and then switched places with Durst and operated the machine for about one-half hour. Another time, for about two or three days in a row, there was no other work and he ran the Euclid R-120. Complainant summarized his experience in this period as follows: "Well, 7/24/89 to September 25th, like I said, was five, six times...." Tr. 137. He corrected his prehearing unsworn statement that he ran the Euclid R-120 5 to 10 times "from the latter part of 1990 to April 2, 1991," testifying that this was in error and that he ran the Euclid R-120 5 or 6 times before September 25, 1990, and only two hours after that date. Tr. 137. I credit Complainant's testimony.

7. Complainant did not feel confident, safe, or properly trained to operate the Euclid R-120. It was much larger than his regular truck (the Cline truck), it leaned from side to side when he operated it, and it regularly traveled over uneven terrain. Out of concern for his own safety and the safety of others, he did not feel comfortable operating the R-120.

8. The Euclid R-120 was used to haul overburden from the coal pit to a dumping point. The driver would back the truck under the shovel -- a large earth-moving machine -- which would load the truck. The truck was then driven to the edge of the dumping pile, where the driver dumped the load of rocks and dirt.

9. On September 27, 1990, Respondent asked Complainant to sign another MSHA Form 5000-23, certifying that he was trained to run the same equipment listed on the July 24, 1989, form plus a number of other vehicles. Complainant testified that he believed he signed this form in blank, and someone else must have filled in his initials indicating training on various equipment. Whether he signed it in blank or initialed the entries, it is clear that this form was an inaccurate representation by Respondent as to Complainant's actual training and qualifications to operate Respondent's equipment. MSHA Inspector Aaron B. Justice signed an interview statement, taken by an MSHA special investigator (who investigated Complainant's initial complaint to MSHA alleging a discriminatory discharge) indicating that he examined the September 27, 1990, MSHA Form 5000-23 on Complainant and concluded as follows:

In my opinion it does not appear that Braithwaite could have possibly been properly trained in the operation of the equipment listed. For a miner to be trained in the operation of a piece of equipment it takes time to make sure that he is competent in the

operation of that equipment.

10. On April 2, 1991, about 1:00 p.m., Foreman Tighe told Complainant he wanted him to operate the Euclid R-120. Tighe told him to "park the Cline" because "there was no work with the Cline" (Jt. Ex. 1). Complainant told Tighe he felt "uncomfortable running it" and "I already talked to Mr. Beener about it." Tr. 30. When he refused, Tighe told him to turn over the maintenance records for the Cline truck and to "hit the road." Complainant took that to mean that he was fired, and left the mine.

11. Complainant did not quit on April 2, 1991, and reasonably concluded that his foreman's order to turn over his truck records and to "hit the road" meant he was fired.

#### DISCUSSION WITH FURTHER FINDINGS

Respondent's action on April 2, 1991, through Foreman Tighe, in telling Complainant to turn over the maintenance records on the Cline truck and to "hit the road" constituted a discharge. Cf. Conaster v. Red Flame Coal Company, Inc., 11 FMSHRC 12, 14 (1989).

To establish a prima facie case of discrimination under § 105(c) of the Act, a miner has the burden to prove that (1) he engaged in protected activity and (2) the adverse action complained of was motivated "in any part" by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds, sub. nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. If the operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action in any event for the unprotected activity alone.

A miner's refusal to perform work is protected under the Mine Act if it is based upon a reasonable, good faith belief that the work involves a hazard. Pasula, supra, 2 FMSHRC at 2789-96; Robinette, supra, 3 FMSHRC at 807-12; Secretary v. Metric Constructors, Inc., 6 FMSHRC 226, 229-31 (1984), aff'd sub nom. Brock v. Metric Constructors, Inc., 766 F.2d 469, 472-73 (11th Cir. 1988); Consolidation Coal Co. v. FMSHRC, 795 F.2d 364, 366 (4th Cir. 1986). It is further required that "where reasonably possible, a miner refusing work should ordinarily communicate ... to some representative of the operator his belief in the safety or health hazard at issue." Secretary on behalf of Dunmire and

Estle v. Northern Coal Co., 4 FMSHRC 126, 133 (1982); see also Simpson v. FMSHRC, supra, 842 F. 2d at 459; Secretary on behalf of Hogan and Ventura v. Emerald Mines Corp., 8 FMSHRC 1066, 1074 (1986), aff'd mem., 829 F.2d 31 (3rd Cir. 1987).

Responsibility for the communication of a belief in a hazard underlying a work refusal lies with the miner. Dillard Smith v. Reco, Inc., 9 FMSHRC at 992, 995,-96 (1987). Among other purposes, the communication requirement is intended to avoid situations in which an operator is forced to divine the miner's motivations for refusing to work. Dillard Smith, supra, 9 FMSHRC at 995. The communication of a safety concern "must be evaluated not only in terms of the specific words used, but also in terms of the circumstances within which the words are used and the results, if any, that flow from the communication." Hogan and Ventura, supra, 9 FMSHRC at 1074. A "simple, brief" communication by the miner of a safety or health concern will suffice (Dunmire & Estle, supra, 4 FMSHRC at 134). An expression of fear or reluctance in operating a piece of equipment may suffice, if the circumstances reasonably indicate the miner's safety concern.

Complainant had a good work record, and had not previously refused to carry out any work orders. On September 24, 1990, he communicated to his foreman that he did not feel comfortable operating the R-120 truck and on the same day communicated more fully to the mine superintendent that he did not feel safe operating the equipment. Considering Complainant's overall cooperative work attitude and history of compliance with all work orders, and the nature of his complaint to his foreman and mine superintendent, I find that, on September 24, 1990, Complainant gave a sufficient communication of a safety concern to Respondent, indicating that he did not feel properly trained or qualified to operate the R-120 truck safely. Respondent could have addressed this safety concern by giving Complainant more training on the equipment or by relieving him of the duty to operate the equipment. On September 24, 1990, the mine superintendent resolved the matter by relieving Complainant of the duty to operate the Euclid R-120. When Complainant returned from his meeting with the superintendent, he told the foreman that the superintendent said he did not have to operate the Euclid R-120. The foreman testified that, after Complainant told him that, he spoke to the mine superintendent privately on September 24, 1990, and the superintendent told him that Complainant would regularly drive the Cline truck but on occasion would be required to operate the Euclid R-120. However, the foreman never told Complainant of his conversation with the mine superintendent. After the foreman talked to the mine superintendent, he had an obligation to tell Complainant, if such were the case, that the mine superintendent said Complainant would be required to drive the R-120 on occasion or lose his job. Indeed, if the mine superintendent gave such instruction to the

foreman, the foreman had a duty to address Complainant's safety concern and offer further training to help Complainant meet the superintendent's requirement. Instead, by remaining silent, the foreman left Complainant in the position of believing that he was relieved from any duty to operate the R-120, because of what the superintendent told Complainant on September 24, 1990, and what Complainant relayed to the foreman. Specifically, when Complainant returned from talking to Beener on September 25, 1990, Tighe asked him what Beener had said and Complainant told Tighe that Beener said, "[Y]ou do not have to run a Euclid, that we will keep you on a Cline." Tr. 126. Tighe never told Complainant that Beener changed his instructions.

Complainant's only experience with the Euclid R-120 after September 24, 1990, was operating it one hour on one day and one hour on the following day. Complainant explained these occasions as follows:

\*\*\*Then after September the 25th, I ran it approximately two hours because we worked late one night and they asked me to run it for --- it was only a short haul, I figured I could do it and I did it just for that.

Judge Fauver

Was that the last time you ran it?

A: Yes, Sir.

Judge Fauver

Was that a few days after September 25th?

A: It was like a month or so after.

Judge Fauver

You ran it for two hours?

A: Well, like an hour one day, we hauled coal out late and like a couple days later it was supposed to rain and we worked down what they called phase two. It's like down at the bottom of the hill there. They was supposed to get the coal out so I ran it just enough to get the rocks off and I ran down and got a dump truck. It was down at BTC Shop and I ran a dump truck that one day.

Judge Fauver

Did you have any problems in running it those two days when you ran it for a couple hours?

A: Just like any other day, you know, I just felt uncomfortable running it, but I tried to help them out. I'm not going to just leave them set. I tried it. [Tr. 32-33.]

On April 2, 1991, Tighe told Complainant to "park the Cline" because "there was no work with the Cline" and that he wanted him to drive the Euclid R-120. Complainant told Tighe he felt "uncomfortable running it" and that "I already talked to Mr. Beener about it." Tr. 30; Joint Exhibit 1. Complainant had a good faith belief that he was not qualified to operate the R-120 safely and reasonably believed that Beener had relieved him of any duty to operate that equipment. Instead of telling Complainant that Beener later told him that Complainant would have to run the R-120 on occasion or lose his job, Tighe fired him, by telling him to turn over the maintenance records on his truck (the Cline truck) and "to hit the road."

Complainant testified that, had Tighe told him that Beener changed his mind and told Tighe that Complainant would have to drive the R-120 on occasion or lose his job, then Complainant would have asked Respondent for more training on the R-120 in order to keep his job. I find that Respondent did not properly address his safety concern, because Tighe did not correct Complainant's belief that Beener had relieved him (on September 24, 1990) of any duty to drive the R-120. If Tighe had told Complainant of what he (Tighe) understood Beener to say on September 24, 1990, Complainant could have asked for more training on the R-120, to save his job. Such a request, considering the little training he had received on the R-120 as of April 2, 1991, would itself have been a protected work refusal under § 105(c).

The reliable evidence preponderates in showing that Complainant's work refusal on April 2, 1991, was a protected activity and Respondent's response by discharging him was in violation of § 105(c) of the Act.

CONCLUSIONS OF LAW

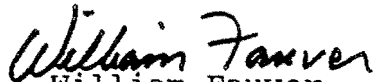
1. The judge has jurisdiction in this proceeding.
2. Respondent discharged Complainant on April 2, 1991, in violation of § 105(c) of the Act.
3. In light of Complainant's rejection of an offer to

reinstate him on April 29, 1992 (at the hearing of this case), Complainant is entitled to back pay and other appropriate damages accruing from April 2, 1991, to April 29, 1992, with interest, plus litigation expenses. He is not entitled to a new offer of reinstatement.

ORDER

1. A separate hearing on damages will be scheduled by separate notice.

2. This Decision shall not be a final disposition of this case until a supplemental decision on damages is entered.



William Fauver  
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 25 1992

ASARCO MINING COMPANY,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. WEST 92-624-RM
v.	:	Citation No. 4124076; 8/6/92
	:	
SECRETARY OF LABOR,	:	Troy Unit
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Mine ID 24-01467
Respondent	:	

DECISION

Appearances: Henry Chajet, Esq., Washington, DC,  
for Contestant;  
Robert J. Murphy, Esq., Office of the Solicitor,  
U.S. Department of Labor, Denver, Colorado,  
for Respondent.

Before: Judge Morris

This is a contest proceeding initiated by contestant pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (the "Act"). Contestant seeks to invalidate Citation No. 4124076 issued on August 6, 1992, by the Secretary of Labor for the alleged violation of 30 C.F.R. § 57.3360.

An expedited hearing was requested and was held in Spokane, Washington, on August 13, 1992. The parties waived post-trial briefs, submitted the case on oral arguments and requested an expedited decision.

Citation No. 4124076 issued herein provides as follows:

Ground support was not provided and installed on the ribs of the U.Q.1 haulage drift to prevent ground fall in this area. A ground support system shall be installed and maintained throughout the U.Q. 1 haulage drift to control the ground in this area where persons are require[d] to work or travel in performing their assigned task. The ground support shall be installed approximately (5) feet from the floor of the drift, and up into the back area. The miners are require[d] to use this drift on a regular routine each day.



The regulation, 30 C.F.R. § 57.3360 provides as follows:

**\$57.3360 Ground support use.**

Ground support shall be used where ground conditions, or mining experience in similar ground conditions in the mine, indicate that it is necessary. When ground support is necessary, the support system shall be designed, installed, and maintained to control the ground in places where persons work or travel in performing their assigned tasks. Damaged, loosened, or dislodged timber use for ground support which creates a hazard to persons shall be repaired or replaced prior to any work or travel in the affected area.

**Summary of the Evidence**

SIEBERT L. SMITH has been an MSHA inspector for 14 years of his 26 years in mining. He is experienced in safety in connection with metal/nonmetal mines. He has inspected the Asarco Troy unit 100 or more days.

On July 13, 1992, Mr. Smith arrived at the mine to investigate a fatal accident. He was met by Bruce Clark, safety director, Doug Miller, unit manager, and miner representative, Dave Young. Accompanied by the management representatives, the party went to the accident scene, UE 158, about 150 feet from the UQ 1 haulway. (Exhibit G-2 is a drawing illustrating UQ 1 and UE 158).

Mr. Smith noticed loose ground by UE 158; further, there had been a large ground fall in the area.

Asarco's preliminary report of the accident stated in part as follows:

Two miners heard a fall of ground at the UE 158 South Heading. The miners went to the heading to check and found the victim laying on the right side of the Atlas Copco Room Jumbo Drill and about 3 feet from the face. There were no signs of falling material on the victim. Investigation revealed the victim was hit on the head (crushing his skull) by falling material. (Ex. G-2).

Mr. Smith investigated the ground support system and the roof support in the area. At the intersection of UQ 1 and UE 158 he required that some of the roof be scaled down. Exhibit G-3 is a photograph of the roof before the loose was removed; Exhibit G-4 shows the debris after it was barred down. Several tons were barred down with a Jumbo drill.

After the investigation, Mr. Smith returned up the drift and he saw that roof bolts were sticking out two or three feet in the UQ 1 drift.

Mr. Smith had not previously seen fractured ribs of the type he observed in UQ 1. Because of these conditions, he asked that engineers and geologists from MSHA Denver Tech Center inspect the drift.

Denver Tech representatives arrived July 29 about 7:30 a.m. The group met with Mr. Bruce Clark and they went underground to the UQ 1 drift. After leaving the pickup the group started to walk the 800-900 feet of UQ 1. The drift was 17 to 19 feet wide and 22 feet high. The rock conditions were the same as previously stated. Larger pieces had broken up. The bottom of UQ 1 lacked a support system.

UQ 1 is a haulage drift used to haul ore or waste rock from the area.

After observing the rock, Mr. Smith considered the roof of UQ 1 to be dangerous. Small pieces of loose rock could fall. As a result he felt that ground support was necessary on the ribs.

On August 6, 1992, Mr. Siebert wrote Citation No. 4124076. He designated the citation as significant and substantial. The evaluation was made because the regulation was violated and a possible ground fall could occur. Further, the hazard would reasonably cause injury.

Mr. Siebert agreed that he did not hear any popping sounds in UQ 1. He issued his initial citation on July 13 for the loose roof at the intersection of UQ 1 and UE 158. The fatal accident had occurred 100 to 150 feet away. The two areas appeared to be the same color. The fatality was caused by a back or roof fall.

By way of abatement Mr. Smith wants ground support to hold the small rock and materials. He also suggested timber support.

On July 29th Mr. Smith and Mr. Hansen spent an hour looking at UQ 1 with miner lights and a high density light. There were places where the roof was stable but there were no support for the ribs.

The size of the material barred down was a couple of feet long, about two feet. It broke after it fell. The area started at the corner and went 25 feet in the drift and 12 feet up on the ribs.

SID HANSEN, a mining engineer experienced in mining, graduated from the Colorado School of Mines in 1972. He now works for the MSHA's Denver Tech support group which offers technical support to MSHA's enforcement group.

Mr. Hansen has been with MSHA since 1986 evaluating mines. He has done 6 rock surveys in various mines.

Mr. Hansen is not a geologist. In evaluating rock stability in a mine he doesn't think the geological formations are relevant.

Before beginning his survey, Mr. Hansen reviewed various reports including a report of the fatality, a computer printout of the mine, mine maps and a ventilation map. He also reviewed a report from MSHA's Jerry Davidson involving a pillar fall. The fatality at UE 158 was caused by a small roof fall.

Mr. Hansen arrived on July 29th after the start of the shift. Bruce Clark, safety director, Doug Miller, unit manager and a Montana state mine inspector accompanied them.

Initially the group went to an older section where Asarco was bringing down a section of roof. They then went to UQ 1 to evaluate the area around the accident scene. After being dropped off at the top of the drift they walked to the bottom. Messrs. Smith and Donaldson accompanied Mr. Hansen. The 800-900 foot walk took about an hour. They carried a 300,000 foot candle power light in the 18 foot entry.

In looking at the roof and ribs it was obvious the operator was having roof control problems. Many roof falls had occurred in the ceiling leaving cathedral formations. Some roof bolts were hanging down three feet. The roof looked bad the entire way down. The ribs showed evidence of alteration. White clay was present and he was able to dig out the clay with his fingers.

Mr. Hansen also pulled down a good chunk of roof. The condition he found was from the bottom up to the roof. Exhibit G-5 was marked to show the location of UQ 1. The ground conditions Mr. Hansen found were "pretty much" from start to finish.

UQ 1 had been driven through a shear zone, i.e., an ore body on two different horizons. Driving a drift through a shear zone presents problems as it fractures the rock. Mr. Hansen's testimony was illustrated on Exhibit G-6.

The entry had been driven through bad ground. The rock mass was faulted, weakened and intensely jointed. A cave-in had also occurred off UQ 1.

Mr. Hansen did not go to the area where the fatality occurred but the ground conditions at that location were different. The roof at the accident site was a rock of better quality.

Primary ground support is the ability of rock to hold itself up without outside support. Secondary ground support is wire mesh, cribbing and roof bolts.

At the close-out conference on July 30th, the MSHA representative told the operator that the situation was a concern to MSHA. Roof bolting was discussed in UQ 1. They also discussed primary ground control. Mr. Miller, Asarco's representative, did not agree any support was needed in the area. He also explained what he thought about the conditions.

Exhibit G-7 is MSHA's written memorandum of the ground stability evaluation at Asarco's Troy unit.

The ribs were not supported by an interlocking system. Mr. Hansen pulled rock off the ribs from the weakened bedding plane. Blocks do not support themselves and wet clay can help keep the blocks in place.

In cross examination, Mr. Hansen admitted he was not knowledgeable in many geological areas. He did not know the composition of rock in the drift nor did he analyze it. However, the rock composition is an important feature.

The individual blocks from UQ 1 to the accident site did not vary that much. The blocks he pulled off indicated the bedding was weak.

Mr. Hansen removed two or three pieces of rock along the 800-900 foot drift. They were representative of the rock.

Exhibit 3, a photograph shows rock that Mr. Hansen could pluck off the bottom. The ribs along the entry could have been barred down as they were falling out on their own. MSHA was concerned about the danger of smaller rock falling out.

The pickup diesels passing through the UQ 1 drift had not left any soot residual in the drift.

Mr. Hansen's brief notes of the UQ 1 drift inspection (Ex. G-9) indicated the drift was 17 feet wide; severely sheared; rabbly; clays exposed; recommend mesh; and ribs not bolted.

Mr. Hansen marked on Exhibit G-2 places where he removed mud from two locations.

In his inspection, Mr. Hansen concentrated on the left rib and checked from top to bottom. Near the bottom of the drift conditions improved. The place where the clay was located is marked "MUD" on Exhibit G-2. Mr. Hansen did not examine the right rib but he assumed it looked like the left rib.

Mr. Hansen saw water seeping in from the side. He did not hear any ground working. However, the ribs would not be working because there was nothing to induce stress on the pillars.

The rock in UQ 1 is waste rock.

Mr. Hansen agreed that roof bolt locations should be determined on the basis including the height of the seam and nature of the rock. As a rule roof bolts should be no further apart than their length.

The minimum size pins to be used in UQ 1 would be whatever ties the mesh to the sides. Mr. Hansen believed bolts could be put into the ribs and he further described the installation of split sets.

MSHA was trying to stop smaller rocks from striking the miners.

Mr. Hansen did not notice one of the crosscuts on the right side of UQ 1.

Bruce Clark told the group there was a roof fall on UQ 2 directly across the drift from another intersection. The roof fall is shown on Exhibit G-2.

#### ASARCO'S EVIDENCE

DAVE YOUNG, mine superintendent at the Troy unit, is a person experienced in mining. He graduated from the University of Colorado School of Mines in 1983 and he is a registered professional engineer.

The Troy unit produces silver and copper; the concentrate is shipped elsewhere. Asarco uses jumbo drills, electric bolters and diesel 88's. The equipment has protective canopies. Asarco moves about three million tons of material per year. There has been no prior fatalities at the mine.

Mr. Young described the UQ 1 and UQ 2 haulways (see Ex. A-1). These two haulage ways are approximately 18 to 20 feet wide. A normal haulaway is 40 to 50 feet wide.

Asarco handles the drift by barring down whatever is loose. In addition, they install roof bolts where they are necessary. Workers are instructed in the ground control procedures.

Mr. Young indicated rib bolting on previous occasions was a disaster since the bolting created a further lack of stability.

Mr. Young identified the mine map as shown in Exhibit A-1. The intersection shown between 5 and 6 has been in existence since May/June 1992.

The mine is 1.5 miles by .33 miles. The UQ 1 and UQ 2 drifts were started the first of January (1992). UQ 1 is designed to the mine plan but is not a production heading.

A difference exists between UQ 1 and the site of the fatality. The difference is caused by the drift crossing through the bedding plane. Also the rock composition changes.

Steel set supports were put in UQ 2 but they were not related to the ground fault.

Mr. Young has walked UQ 1 at least 100 times. He goes into the drift to see that the miners are working safely.

Soot buildup on the ribs and back help the operator to monitor the rock situation as white spots will show where any rocks are dislodged.

In the 100 times he has been in UQ 1, Mr. Young has not heard any snapping or popping sounds of the ground working.

Mr. Young was last in UQ 1 on Sunday. The ribs were normal and stable. He did not see any hazardous loose ground. The conditions appeared the same as on other occasions.

There was no water in UQ 1 but water can collect from some drilling; also muck piles are watered down to control dust.

Asarco uses a No. 7 rebar ceiling bolt 8 feet long. The company's experience shows that replacing bolts in the ribs is a disaster. The best control is the continued monitoring of the ribs and barring down as required. Based on the history of the mine, the installation of wire mesh with bolts would reduce safety. Further, such installation has not worked previously.

Mr. Young agreed Mr. Smith issued a citation for the three tons of ore that were barred down. However, a bar was not used; rather, a jumbo drill was used.

Exhibit G-9 indicates the Asarco's Troy Mine had three rock falls in 1984; two rock falls in 1985; three rock falls in 1987; four in 1989 and the same number in 1990.

A canopy does not offer exclusive protection.

DR. WILLIAM HUSTRULID, a professional engineer, serves as a Professor of Mining Engineering at the University of Colorado School of Mines. He is an expert in the field of rock mechanics and safety. His resume lists his many publications. (Ex. A-4).

He has visited hundreds of mines working for mining companies as well as unions.

Dr. Hustrulid has been at the Troy Mine on two other occasions. His most recent visit on August 11, 1992, was to evaluate the UQ 1 drift. On his visit he examined and reviewed the geology and the rock structure. In addition, he measured the strike and dip, an important facet when considering the stability of the ground.

In examining UQ 1, Dr. Hustrulid looked at the ground conditions on both sides of the drift. (Mr. Hansen had only looked at one side).

He found the overburden at the upper end of the drift was about 800 feet; the overburden at the lower end was 900 feet. The thrust of the drift went from top to bottom and up again.

In Dr. Hustrulid's opinion a person cannot observe the condition of any ground from 100 feet away.

At the intersection of UQ 1 and UE 158 there were several changes in the rock formations.

In UQ 1 Dr. Hustrulid observed no hazardous or loose ground. In addition, there was no popping sounds nor any water, cracks or fissures. The roof was reinforced with No. 7 resin bolts, 9 foot long pins; there were about 700 bolts. The other ground control is from the inherent strength of the rock material.

Asarco uses the appropriate technique of scaling down any loose material with a mechanical pick and scaling bar. Asarco, which is required to make the ground safe, drills, blasts and reinforces the ground. Asarco's practices are consistent with standard mining practices.

The UQ 1 ground conditions are safe and stable.

Dr. Hustrulid discussed how a roof bolts pattern should be established. It is normal for some roof bolts to become dislodged; when this occurs Asarco rebolts the area. This is a positive type of reinforcement since the remaining non-loose bolts also provide support.

The clay in UQ 1 was of a grayish color but only located near a fault. Dr. Hustrulid estimated that 5 percent of the drift was clay.

The faults cross the drift at high angles. Such faults vary from 30 degrees to vertical. When he observed these areas there was no disturbance of the rock.

The walls of the ribs are nearly vertical. It is important that such vertical lines be maintained.

Dr. Hustrulid disagrees with MSHA's recommendation to place bolts in the ribs of the drift. Exhibit G-6 shows rock blocks.



They tend to stay together. It is one to several feet between bedding planes. Rock bolt hammers in use today have 10 to 20 horsepower. Pounding on pieces of rock will help tear the ribs apart. In this jointed rock area if you start pounding a wall you are asking for trouble.

Bolts with mesh presents problems. Wire mesh would fix an area but it is not a good solution.

The drift should be inspected regularly to observe changes in ground conditions. Miners can see when things are changing. If such a change occurs, you can come up with an operating plan.

Gunitite shot into the ribs can tie adjacent blocks together but it does not affect any blocks behind those in the front. In addition, gunitite might mask problems by covering them. However, if gunitite is installed you can see a piece of loose rock develop.

In Dr. Hustrulid's opinion the best course of action to maintain stability in UQ 1 is to observe, monitor and evaluate changes that occur. He encourages miners to make thorough examinations.

It is much safer and easier to maintain UQ 1 due to its 18 foot width as compared to a normal 45 foot wide entry. The ribs in UQ 1 are safe today.

Dr. Hustrulid does not use the terms "primary and secondary ground support systems." He spent three hours in UQ 1 and did not hear any snapping or popping.

The roof bolts that were hanging down were no problem because they had been replaced with other bolts.

The term "bedding" means a process by which material is laid down in a ground formation.

Installing roof bolts to the ribs is a bad idea. If you drill into the ribs you compromise the ground support. However, wooden lagging shouldn't disturb the ribs.

Asarco could use a loader to rock the ribs. That is, the loader could go down the drift and knock down any that are loose.

OWEN ERICKSON is Asarco's underground mine foreman. Mr. Erickson's job involves ground control.

Mr. Erickson scaled down the ground pointed out by Inspector Smith. He considered the ground stable and he used the full force of the Jumbo drill to knock it down.

On July 13th the various crosscuts shown on Asarco's mine map were in existence.

In Mr. Erickson's opinion UE 158 was stable.

WILLARD R. COOPER, is a grade 10 miner, roof bolter and Jumbo operator.

Mr. Cooper has worked on a daily basis in UQ 1. He was there last Saturday. The ribs and ground in UQ 1 are different from the ribs and ground at the accident site.

He has never heard any popping sounds nor has he heard ground working. There was no water in UQ 1.

Soot from the diesel covers the ribs. If the ribs were working you would see evidence of spalding.

Based on his experience Mr. Cooper thought the best solution was to monitor the area on a daily basis.

If bolts were used, the UQ 1 ribs would be more unstable.

Mr. Cooper agrees he sounds the roof when using a scaling bar. It is a general policy to scale but it depends on the machine and its operator. A miner should make his own work area safe.

JOSEPH A. OLSEN, JR., a miner first class has been 11.5 years at the Troy unit. He does Jumbo drilling.

He was worked UQ 1 and was elected by miners for 2.5 years as a miner's representative.

Mr. Olsen has attempted rib bolting in the mine, in the 10 West area. The efforts were not successful. They did not make the conditions safe.

In UQ 1 the ground is different from where the fatality occurred.

Mr. Olsen started in January in UQ 1. He has never seen anyone put mesh in the ribs.

### MSHA REBUTTAL

JERRY DAVIDSON, is employed as a geologist for Denver Tech Support. Mr. Davidson graduated from the University of North Dakota and he is experienced in mining.

Mr. Davidson has investigated about 200-300 ground stability problems and he has been to the Troy Mine on three occasions.

He provides geology support for MSHA mining engineers. He furnished the geology to Mr. Hansen.

On July 29th, Mr. Davidson visited Asarco's mine with Messrs. Hansen and Clark. They visited the UQ 1 drift. Initially they got out at the top of the decline. They used a Q beam, over 100,000 candle power and looked for clay seams and mineral alterations.

The rock near the top was fractured from perpendicular to a high angle. The stability was marginal.

Walking down the drift Mr. Davidson noted the fractures were not consistent. There were clay seams along the bedding planes. Such seams decrease the stability of the ground mass.

Mr Davidson discussed faults in detail. It appeared to him that there were chemical alterations in the drift, a condition he found not particularly unique. It was fractured rock.

In Mr. Davidson's opinion the stability was marginal because of the crushed nature of the rock. MSHA's recommendations that the ribs be reinforced were made in a written memorandum.

Mr. Davidson agrees the Troy Mine is a bedded formation. Further, he didn't examine every square inch of the drift. His examination took less than an hour.

He did not hear any popping noise as he walked through the drift.

### Discussion

This case does not lack for credibility issues. One such issue deals with whether the ground in UQ 1 was the same type of ground where the roof fall occurred causing the fatality.

The evidence indicates that Mr. Hansen did not closely observe the site of the accident due to a water accumulation. MSHA's evidence shows their representatives were within 100 feet of the site to make their observations. Basically, I agree with Dr. Hustrulid that effective observations of roof conditions cannot be made from 100 feet or more away. In addition, virtually all of Asarco's witnesses testified that the roof conditions where the fatality occurred was different and more stable than the UQ 1.

The principal credibility issue presented in this case is whether the rock in UQ 1 is stable. In this connection I generally credit MSHA's evidence. Messrs. Smith, Hansen, and Davidson testified as to the unstable areas in UQ 1. The MSHA representatives were using a high powered Q beam to inspect the ribs and roof and described their detailed examination of the 800-900 foot drift. I believe they would be in a better position to observe actual conditions as compared to the Asarco employees who worked in UQ 1 and described the conditions as stable. A person working in an area is more likely to be concerned with his work than in observing rib conditions.

Asarco claims that soot deposited on the ribs by diesel equipment would quickly show any instability in the ribs. I am not persuaded by this argument. The UQ 1 haulage way was started January 1, 1992. The citation was issued in August 1992. This appears to be an insufficient amount of time to allow any appreciable amount of soot to accumulate.

A conflict also exists between the testimony of Mr. Hansen and Dr. Hustrulid. Mr. Hansen, a mining engineer, and a ground stability expert believes generally that the geological formations are not relevant. His rock surveys in six mines qualify him to speak on the issue of stability of the ribs in UQ 1 of Asarco's Troy Mine. Mr Hansen described his findings including clay that he scraped out with his fingers. Dr. Hustrulid confirmed the presence of the clay in UQ 1. He indicated it was 5 percent of the drift.

Asarco attacks the credibility of witness Hansen on the basis that Mr. Hansen did not see one of the crosscuts in UQ 1, also he did not examine both sides of UQ 1. I agree with Asarco's assertions but I do not find that the credibility of Mr. Hansen was destroyed by such evidence.

I recognize that the Commission has indicated that evidence such as popping noises or sounds of ground working area are rele-

vent in cases of this type. It is true there was no such evidence here. Principally this is because the thrust of MSHA's evidence dealt with the safety of miners who might be struck by relatively small (softball size) pieces of rib. As Mr. Hansen noted, there was no pressure on pillars hence there was no working ground or popping sounds.

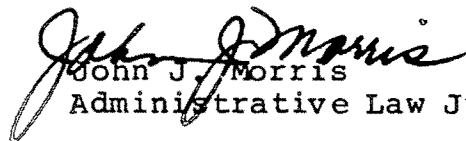
Asarco's defense is two-fold. Initially, the operator stated the roof and ribs in UQ 1 were stable at the time of the contested citation. On the other hand, the operator contends that the same ribs are so fragile that it would be a disaster to insert roof bolts to be used as an anchor for wire mesh. It appears to the Judge that such inconsistency only serves to confirm the lack of stability of the ribs.

On the issue of abatement: Asarco's petition herein states it has filed pursuant to Section 101(c) of the Mine Act for a modification of the application of 30 C.F.R. § 57.3360.

The parties have agreed to extend abatement to a certain time. Concerning methods of abatement: the record supports the view that possibly roof bolts inserted at an angle could support wire mesh without creating further instability. In addition, wooden lagging might also be considered as a support for the ribs.

In any event, it appears reasonable that miners could be injured by loose ground falling from the ribs. For this reason, the Judge declines to further stay the abatement date.

For the foregoing reasons, Asarco's contest of Citation No. 4124076 is DENIED and the case is DISMISSED.

  
John J. Morris  
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 28 1992

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 91-185-M
Petitioner	:	A.C. No. 48-00152-05595
v.	:	
	:	FMC Trona
FMC WYOMING CORPORATION,	:	
Respondent	:	

DECISION

Appearances: Kristi Floyd, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;  
Henry Chajet, Esq., James G. Zissler, Esq., Washington, D.C., for Respondent.

Before: Judge Morris

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

A hearing on the merits was held in Salt Lake City, Utah on March 4-5, 1992.

The parties filed post-trial briefs.

Citation No. 3633617 states:

There was a gap in excess of .004 inch in the main power inlet master control box top cover plate. Arcing would occur inside this box due to the switching on and off of the controls. Cover plates must be maintained in permissible condition to help prevent methane gas ignition/explosions. The violation occurred in number 2 room in a Joy miner panel.

The regulation allegedly violated, 30 C.F.R. § 57.22305 provides:

Equipment used in or beyond the last open crosscut and equipment used in areas where methane may enter the air current, such as pillar recovery workings, longwall faces and shortwall faces, shall be approved by MSHA under the applicable requirements of 30 CFR parts 18 through 36. Equipment shall not be operated in atmospheres containing 1.0% or more methane.

30 C.F.R. § 18.31(a)(6) provides a maximum permissible clearance of .004 inch for the plane flange joint in question.

#### Issues

The issues are whether a violation occurred. If affirmative, then was the violation significant and substantial and due to the unwarrantable failure of FMC. Finally, if a violation occurred, what penalty is appropriate.

#### Summary of the Evidence

WAYNE DOUGLAS PILLING, a person experienced in safety and health, has been a federal mine inspector for more than 15 years. (Tr. 27-31).

On November 19, 1990, he wrote Citation No. 3633617 for a permissibility violation on a Joy Continuous Miner ("CM"). In particular, he cited the cable entrance box on top of the master control box in the CM operator's cabin. The continuous miner was in-by the last open crosscut.

When it is in operation, the continuous miner is located at the face. When the inspector arrived, the continuous miner had just backed out of a previous cut and was ready to start cutting a new drift. (Tr. 32, 33, 79).

The control box houses approximately nine switches which operate the cutter heads, tram motors, conveyor and main controls. These switches all produce incentive arcing which is capable of igniting methane. (Tr. 33, Ex. G-1). The top portion measures 6 by 17 inches. The enclosure itself is approximately 4200 cubic inches. (Tr. 34).

Mr. Pilling identified the gap with an arrow on Exhibit G-1. (Tr. 37, 38).

The citation alleged FMC violated § 57.22305 as well as 30 C.F.R. § 18.31(a)(6) which was applicable. (Tr. 38).

The volume of the box was greater than 124 cubic inches. (Tr. 39). The allowable gap on a box of this type is .004 of an inch.

Exhibit G-2, an MSHA publication on permissibility, illustrates the plane flange joint. (Tr. 43). Mr. Pilling drew a circle on the exhibit showing where he inserted his feeler gauge.<sup>1</sup> The gap accepted a .005 feeler gauge for 1.5 to 2 inches. Mr. Pilling estimated the gap was .010 of an inch. (Tr. 45, 46). He further estimated the gap was several inches in length. (Tr. 47).

Mr. Pilling explained that a permitted gap will cool any flames before they reach the outside atmosphere. Ventilation is needed to cool the heat from electrical equipment and also to dry up the moisture. (Tr. 47).

Inspector Pilling issued the citation as a significant and substantial ("S&S") violation. This is a gassy mine and the percentage of methane collected on October 31, 1990, was .190, .047, .007 and .127. (Tr. 52-54, Ex. G-3). The total methane liberated on that date was 1,539,118 cubic feet. It is considered significant if a mine liberates over one million cubic feet in 24 hours. Such an amount triggers a five day gas check.

The other main factors included the numerous ignition sources inside the master control box. The throwing of the switches creates an incentive arcing inside of the control box which can ignite methane. Mr. Pilling drew an "A" over the switches on the control box panel. (Tr. 55, 56, 65).

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<sup>1</sup> A feeler gauge was described as being a .5 inch wide and consisting of a thin, shiny material. (Tr. 46).



The gap was on the top box but the arcing occurred in the bottom box. (Tr. 56). This is because there was an opening 5.5 inches by 11 inches between the 11 box and the master control box.<sup>2</sup> (Tr. 57). In sum, if an ignition occurred in the master cable entrance box, it would propagate up through the small cable entrance box that was cited. In the inspector's opinion, it was reasonably likely that a methane gas ignition or explosion could occur. (Tr. 58, 65).

A methane readout at the time of the inspection showed 0.0 percent concentration. (Tr. 58). However, the inspector didn't consider this as a factor since the ventilation system was working. Further, the CM was idle and not cutting into undeveloped ground. The ventilation was rendering harmless any methane that might have been present. (Tr. 58, 59). The CM was equipped with a methanometer which warns the miner operator at a 1 percent methane concentration. At 1.5 percent concentration, it will deenergize the machine. (Tr. 60).

On occasions before 1990, FMC was cited for violations involving its methane monitors on the continuous miners. (Tr. 61, Ex. G-8, G-9, G-10). On these occasions FMC's two sensor units were plugged with trona. There was also fire equipment in the area but this was not a factor in issuing the citations as S&S. (Tr. 64).

If the inspector had detected an explosive level of methane, he would have written an imminent danger order. (Tr. 65).

Exhibit G-4, a document dated January 27, 1986 from MSHA's Green River, Wyoming office involved a methane gas ignition at the FMC Trona Mine at their longwall panel. (Tr. 70, 71). The ignition occurred while the company was repairing the longwall shear. They were between the chalk line and the face of the longwall section at zero level. As they were welding on the wig wheel, sparks jumped from the arc weld and ignited a small raider of methane. The ventilation system was running at the time. At the time 24,000 and 40,000 CFM were being coursed through the chalk line and face area. There was a methane monitor at the headgate and one at the tailgate about 400 feet away. (Tr. 73).

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<sup>2</sup> This information came from MSHA's Approval and Certification Center in Tridelfia, West Virginia. (Tr. 57).

Miner representative Erspamer told Inspector Pilling that the highest percentage of methane gas he had found was 10 percent. Mr. Thomas, a management representative with the inspection team, then told Mr. Erspamer not to talk to the inspector. (Tr. 87).

When Mr. Thomas was told by the inspector that the citation would be S&S, he replied that "This is the one we've been waiting for." (Tr. 88).

MICHAEL J. ERSPAMER, an underground miner for FMC, runs a 913 front-end loader. Mr. Erspamer has held various jobs including fire boss. (Tr. 173, 175). He described his operation of the continuous miner. (Tr. 176-180). When he was roof bolting, Mr. Erspamer had struck pockets of methane in the roof. When the pressure is released, the gas gushes out into the atmosphere, depending on the size of the pocket. (Tr. 181). When roof bolting, he would strike such pockets daily. (Tr. 182). Methane is in the oil shale above and below the trona. It enters the mine atmosphere through cracks in the floor, roof or through gas holes drilled in the roof. If the trona is a foot thick, the roof is good and it acts as a barrier to the oil shale. (Tr. 183).

FMC has eight ventilation shafts. (Tr. 184). In his 16 years at FMC Mr. Erspamer has detected methane at 1 percent "probably hundreds of times." He has detected with the same concentrations, methane between .1 percent and 1 percent. Different concentrations can be found at different locations. (Tr. 188). At FMC methane is continually liberated into the atmosphere.

FMC tries to maintain two production shifts to each maintenance shift. (Tr. 189). The preventive maintenance crew does the permissibility checks. (Tr. 193).

Mr. Erspamer accompanied Mr. Pilling on November 19, 1990. He told the inspector he had gotten methane readings as high as 10 percent. (Tr. 195). Generally, these would be in a working block with a fan in the room (Tr. 196). Some of these concentrations were in continuous miner sections. When he would find such concentrations of methane, Mr. Erspamer would restore the ventilation. He would also make daily reports to be countersigned by the shaft superintendent. (Tr. 197). Mr. Erspamer agreed you can feel the change in conditions if the face fan shuts down. (Tr. 200).

Methane is primarily contained in the oil shale above the trona. (Tr. 202). On November 19, 1990, the ventilation system

was functioning. The system reduces the hazards of methane. The foreman uses his methane monitor on a regular basis. (Tr. 204, 205).

On November 19, 1990, Mr. Erspamer saw no standing water nor did he detect the smell of ammonia which would indicate methane was present. (Tr. 206).

When observing at the monitor on the mining machine you can detect changes in amounts of the methane levels. (Tr. 207). Everyone at FMC knows the ventilation must be maintained. (Tr. 208).

MERLE VENTERS, an MSHA electrical specialist is experienced in mining as an electrical maintenance permissibility expert. (Tr. 245-269).

The 12-C Joy described in the citation is approved by MSHA. The control box panel starts and stops the motors. Any open switches may deteriorate and allow an unintentional arc. The witness explained how arcing occurred and the types of hazards it creates. (Tr. 270, 271). The requirement that the gaps be maintained at .004 of an inch or less has been required since the 1970's. (Tr. 271, 274). It is not difficult to find such an opening. (Tr. 272). MSHA requires the .004 of an inch to prevent flame from escaping. (Tr. 273). A gap of less than .004 of an inch will not allow flame to escape to a hazardous level. If the gap is greater than .004, it will allow the flame to escape to a hazardous level.

Permissibility violations occur because the equipment is improperly assembled, was struck by a roof fall or collided with another machine. (Tr. 275, 276). Explosions have occurred because a plane joint was closed. (Tr. 277, 278).

Mr. Venters agreed that ventilating the area keeps fuel away from any arc. (Tr. 283). Coal mines that are gassy have small ignitions fairly frequently. (Tr. 284). However, Mr. Venters did not know of any ignitions in trona mines nor was he aware of any explosions or ignitions at the FMC Trona Mine. (Tr. 284, 285). A high quantity of methane does not, at all times, translate into a high percentage of methane. (Tr. 286). Boxes on the other side of the CM have the same ignition hazards as the box that was cited. There is no methane in the trona itself. (Tr. 298). It would be important to know where concentrations of methane are located in a mine. (Tr. 302, 303).

Additional ventilation increases the dilution effect on methane and reduces the hazard. (Tr. 304). Protection against methane hazards include permissibility, good maintenance and ventilation.

The testimony of MSHA's witnesses Jerry Palmer Davidson, Jerry Lee Fuller and Ken Porter is considered, infra.

### FMC's Evidence

JOHN HEAD, a mining engineer, is experienced in methane hazards and safety in gassy mines. (Tr. 398-407, Ex. R-4).

In January (1992) Mr. Head visited the FMC Mine to gather information. (Tr. 408-412, 427, 428).

FMC's mine is approximately six miles east/west and about five miles north/south. (Tr. 413).

In 1990 there were ten operating CM sections and two CM sections on standby in the longwall sections. (Tr. 413).

Mr. Head estimated FMC has over 100 pieces of permissible equipment. (Tr. 415). He examined a Joy miner identical to No. 8 and made a detailed examination of a typical CM section. The No. 14 panel where the contested citation was issued could not be entered as it had been sealed and was not maintained. (Tr. 416). He also took bottle samples of air. FMC preshift inspections for gas checks and the ventilation must be in place before the crew begins work. (Tr. 418). The miners take steps to reduce methane concentrations below 1 percent whenever that level is found.

In CM sections, the miner operator stays at least a foot from the top of the trona bed. (Tr. 418).

Mr. Head described the method and location where he took 10 bottle samples. (Tr. 419-421). The results he obtained were similar to MSHA's methane readings. (Tr. 420, 423). Bottle samples provide accuracy down to 1 or 2 parts per million. (Tr. 223). The results indicated readings as low as 5 PPM and as high as 25 PPM (10 parts per million is 0.0010). (Tr. 424-427).

Mr. Head found the travel roadways were in excellent shape and there was no significant cracking or roof movement. (Tr. 428). The witness further described in detail FMC's ventilation system. The three primary intake air shafts deliver slightly under 1,500,000 cubic feet of intake air, about 50 percent more

air than required. (Tr. 431-435, 436, 439). The distribution of air throughout the system is very effective. (Tr. 439).

Drill holes close to the southern end of No. 14 panel were shown in a stratigraphic representation. (Tr. 440, 445). The representation shows the trona seam to be about 15.5 feet thick. (Tr. 442).

The shale above the trona is the area from which methane gas would be liberated if the roof is disturbed. (Tr. 444, 445). The trona seam being mined is about 13 or 14 feet thick. After being mined 5.5 feet or so of trona would remain. (Tr. 445). The thicker the trona the more stable the drifts or crosscuts. (Tr. 446). Panel 14 had a particularly good roof. (Tr. 447). After November 19, it would take an additional six or seven months to complete mining panel 14.

Mr. Head described the ventilation system for panel 14 on November 19 in relation to where Joy CM No. 8 was located. (Tr. 452).

Methane is contained in the shale members above and below the trona. Only trace amounts of methane are contained in the crystalline structure of the trona. (Tr. 455).

On his visit to the plant, Mr. Head inspected the Joy No. 8 CM. The cover plates were removed to inspect and photograph the internal parts. The witness described his findings. There was no evidence of arcing. (Tr. 456, 462).

A concentration of methane between 5 and 15 percent is hazardous and can explode. The volume of methane is almost irrelevant in terms of assessing the hazard. The ambient air in Wyoming contains 2 PPM methane or, .0002 percent. (Tr. 463).

There was no evidence in the stratigraphy that there was any degree of gas pressure exerted in the roof strata. (Tr. 464). The permissibility gap of .004 of an inch might be the thickness of a sheet of paper; .010 might be the thickness of several sheets of paper. (Tr. 466, 467).

Mr. Head described MSHA's testing procedures for boxes. (Tr. 468-470). Further, he described the cycling of temperature. (Tr. 470-472). In addition, he compared the heating and cooling cycles to a home with windows, a bonfire outside the home and the smoke produced from the bonfire. (Tr. 473-475).

Ventilation through the main circuit and in the face dilutes the methane to harmless concentrations. (Tr. 475).

Monitoring devices included hand-held methanometers used for preshift inspections and continuous reading methane sensors on the continuous miners. (Tr. 476).

FMC has numerous elements in the training and safety policies of the mine to control methane hazards. (Tr. 476).

Interviews with the mine operator and the foreman on duty on November 19, 1990 confirmed the FMC policies were in place. (Tr. 476-478). Documents confirmed the preshift inspections showing zero methane. (Tr. 479, 480, Ex. R-5).

The monitors on the Joy No. 8 CM warn the operator at a 1 percent methane concentration and shut down the power to the machine at 1.5 percent. (Tr. 477).

The maintenance department installed a new methane monitor on No. 8 Joy CM on November 8th. The unit was recalibrated on November 15, 1990. (Tr. 477). FMC has one maintenance shift for each two production shifts. (Tr. 477).

FMC has been in operation for more than 40 years with no explosions of methane nor any injuries or fatalities resulted from explosions. (Tr. 481).

Mr. Head concluded that he would expect to find low concentrations of methane in No. 14 panel. The history indicates the methane concentration is almost always 0.0 percent and never more than 1 percent. (Tr. 481).

Elevated levels of methane occur only in other areas of the mine where specific activities occur such as cutting into the shale for an overpass or caving in a longwall section (these activities were not taking place in the 14 panel). (Tr. 481, 482).

The only other time when there had been a significant concentration of methane reported at the mine was after an extended shutdown of the ventilation system either when a panel's ventilation was shut down or after a holiday. This did not occur at 423 West, section 14 panel. In this panel there was a thick roof beam, no ground control problems, no obvious cracks and no bellying of the roof as a result of gas pressure. (Tr. 482, 483).

There was about 26,000 CFM in the panel itself. Vent tubes and auxiliary fans were developing 5,000 to 8,000 CFM in the face. (Tr. 483).

In arriving at his conclusion Mr. Head relied on the specific characteristics of the fans in other working places. (Tr. 483).

The FMC preshift for panel 14 indicated 0.0 percent methane. Further, the inspection team found no methane nor did the CM monitors. In addition, an explosive concentration of methane could not enter the control box. (Tr. 484).

FMC's fire control policy was also considered by Mr. Head in reaching his opinion about the operator's successful program. (Tr. 485).

In Mr. Head's opinion the likelihood of a methane ignition arising from the conditions described in the citation (if mining had continued) was so unlikely as to approach zero probability. (Tr. 487).

Mr. Head agrees methane in the explosive range of 5 to 15 percent is potentially hazardous. (Tr. 491). The witness was examined as to his experience at the Morton Salt Company and the Morton Salt Mines. (Tr. 492-498).

Some roof falls have occurred at FMC. (Tr. 501).

A limited ignition could occur. (Tr. 503). However, it is unlikely that methane could be liberated in the explosive range in a CM section in the mine. (Tr. 504).

The ten methane bottle samples taken at various places including within the collar of a 15-foot vertical probe hole ranged from .0002 to .2910 (within the hole). All of the samples were below the explosive range. (Tr. 509-512).

In Mr. Head's opinion, in panel 14 the concentration in the return airway would approach .004 percent. He would be very surprised if it would be .1 or .15 percent. (Tr. 513, 514). The concentration at the face, because of the ventilation fans, would be zero. (Tr. 514).

Issue: Did FMC violate 30 C.F.R. § 57.22305

The uncontroverted testimony of MSHA's Inspector Wayne Pilling shows: He inspected FMC's No. 8 Joy Continuous Miner inby the last open crosscut. He found the plane flange joint on the top cover plate of the master control box violated the permissibility requirement. There was a gap in excess of .004 inches. The volume of the control box enclosure containing the gap was approximately 4200 cubic inches.

FMC contends the Secretary did not meet her burden of proof because the inspector did not measure the gap to determine its size. (Tr. 127). Further, the feeler gauge had not been calibrated or measured. (Tr. 126). In sum, FMC argues the inspector failed to conduct the necessary measurements to establish the gauge was actually .005. Specifically, it so argued the Secretary failed to meet her burden of proof that an excessive gap existed. In addition, it is argued the inspector's estimate is only a guess. Finally, FMC attacks the promulgation of the regulation.

FMC has misconstrued the evidence and the scope of the regulation. The Secretary is not required to prove the gap was .005 (or greater). Rather, a violation was established when the gap accepted a .005 feeler gauge for a distance of 1.5 to 2 inches.

FMC's argument that Section 57.22305 does not require that the permissibility gaps be "maintained" is rejected. Section 57.22305 specifically adopts 30 C.F.R. Parts 18 through 36. The referenced section mandates a maximum permissible clearance of .004 for the plane flange joint in question.

The operator argues the regulation is distinctly different from the coal standard [§ 75.506, 506-1(a)] and contends it should not be extrapolated to include a requirement not expressly contained therein nor promulgated through the rule making process. In sum, the operator argues that the lack of a requirement for a permissibility check in metal/nonmetal mines confirms a different intent for the standards applicable in this case.

I agree that the requirements of the coal and the metal/non-metal regulations are different. However, the regulation here, § 57.22305 must be read in conjunction with § 57.22001. The latter provides in part that "(m)ines shall operate in accordance with the applicable standards in this subpart to protect persons against the hazards of methane gas ... ." In sum, permissibility compliance is required by the Secretary's regulations.



The regulations involved here were duly published in the Federal Register, FMC has failed to cite any authority or to allege in what manner the Secretary's actions conflict with Section 101 of the Mine Act, 30 U.S.C. § 811.

On the basis of the testimony of Inspector Pilling, I conclude that FMC violated 30 C.F.R. § 57.22305.

**Issue: Was the violation properly classified as Significant and Substantial**

Inspector Pilling expressed the opinion that the violation at the FMC Mine was S&S. John Head, testifying for FMC, expressed a contrary view.

Before reviewing the credibility issues, it is appropriate to consider the applicable case law:

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." 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).

Texasgulf, Inc., 10 FMSHRC 498 (1988) is particularly informative since it involves a trona mine and the issue of whether the violation should be designated as S&S.

Inspector Pilling's views, summarized in greater detail above, are based on several critical facts:

The FMC Mine liberates over 1,000,000 cubic feet of methane in 24 hours. As such, it is a gassy mine subject to heightened inspections under Section 103(i). The CM, operating in virgin territory, has nine control switches capable of incentive arcing. Such arcing can ignite methane.

In January 1986, a methane gas ignition occurred at FMC's longwall panel. Inspector Pilling believed it was reasonably likely that a methane gas ignition or explosion could occur in the mine.

On the S&S issue, specifically as to the ventilation capability, I credit the testimony of FMC's witness John Head. His testimony, summarized above, principally focuses on the ventilation at the FMC plant. To a large degree, as noted, Mr. Head's testimony is confirmed by Inspector Pilling's testimony. Mr. Head found FMC delivers 50 percent more air than required by law. He also took 10 bottle samples for methane. The readings were as low as 5 PPM and as high as 25 PPM.

Although panel 14 had been sealed, Mr. Head calculated the ventilation in the panel.

Basically, the ventilation diluted the methane to harmless concentrations.

FMC documents indicated there was "zero" methane at the time the citation was issued. Further, in over 40 years of operation, FMC has had no methane explosions.

In the No. 14 panel methane is almost always 0.0 percent and never more than 1 percent.

Based on Mr. Head's testimony the third element of the Mathies formulation was not established. In sum, as the Commission has stated, the formulation "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., supra. We have emphasized that, in accordance with the language of Section 104(d)(1), 30 U.S.C. § 814(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. Id. In addition, the evaluation of reasonable likelihood should be made in terms of "continued normal mining operations." Texasgulf, Inc., supra, 10 FMSHRC at 500.

In order for ignitions or explosions to occur, there must be a confluence of factors, including a sufficient amount of methane in the atmosphere surrounding the impermissible gaps and ignition sources. At the time the instant citation was issued, the methane levels were well below the 1.0 percent concentration necessary for an ignition.

Further, it is not reasonably likely that ignitable or explosive concentrations would have been encountered had normal operations continued. The trona<sup>3</sup> roof in panel 14, after mining, would be approximately 5.5 feet thick. The roof was particularly good in panel 14.

Inspector Pilling's testimony, in many ways, confirms FMC's evidence.

Mr. Pilling has been inspecting the FMC Mine since 1977. He only knew of one ignition, namely the one as described that

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<sup>3</sup> Trona only contains trace amounts of methane in the crystalline structure. (Tr. 455).

occurred during a cutting and welding process in the longwall. The welding process was not involved on November 19, 1990. (Tr. 88, 89). In fact, the ignition had no relationship to the citation of November 19. (Tr. 140). He further confirmed that no injuries have resulted from methane at the FMC Mine. (Tr. 89). Mr. Pilling considers methane a hazard, regardless of quantity and the percentage. (Tr. 96).

On the day he issued the instant citation, Mr. Pilling found the air was excellent. (Tr. 101). During his inspection, there was no indication there was going to be a ventilation breakdown. (Tr. 122). At that time of the inspection Mr. Pilling agreed it was very unlikely that methane would accumulate to an explosive level. (Tr. 123). There were no ignition sources except for those cited. (Tr. 125).

A further credibility issue arises as to whether the CM controls were capable of arcing on November 19 and whether such arcing could cause a methane explosion. (The premise presumes an explosive concentration of methane was present.)

I credit the testimony of MSHA's representatives Pilling and Venters. Mr. Pilling concluded the nine switches operating the cutter heads, tram motor conveyor and main control produce incandescence capable of igniting methane. (Tr. 33). Mr. Venters also discussed arcing and explained how it can occur in any switch. (Tr. 270). Arcing will ignite any methane in the box. However, if the box is not properly maintained, flame could escape and ignite methane outside the box. (Tr. 271).

I do not credit Mr. Head's expert testimony. FMC's expert explained in detail the thermal cycles required for methane to enter the control box of the miner in question and how it simply was not possible under the mining conditions in FMC. (Tr. 468-473).

As noted above, the premise of this evidence is that an explosive concentration of methane was present. Such a concentration could enter the inside of a control box through a .010 gap.

Mr. Head found no evidence of arcing when he inspected the CM. However, in view of the extensive control switches, it is likely that incandescence arcing could occur.

It is appropriate to consider Secretary's views as expressed in her post-trial brief. The initial issue of whether a violation of 30 C.F.R. § 57.22305 occurred has been decided in favor of the Secretary.

The Secretary further asserts that the third element of the Mathies formula does not require the Secretary to prove that it is more probable than not that an injury will result, but rather, that the violation presents a substantial possibility of resulting in an injury. In support of her position Secretary cites Consolidated Coal Co., 13 FMSHRC 748, 750 (April 1991) and Green River Coal Co., 13 FMSHRC 1287 (August 1991).

For an S&S violation the Commission requires the Secretary to establish a "reasonable likelihood" that the hazard contributed to will result in an event ... ."

The Secretary would change the test of "reasonable likelihood" to "substantial possibility." We generally recognize that anything is possible and I reject the position urged by the Secretary since it deviates from the Commission mandate. The cases relied on support the Secretary but they are not binding on the writer since they are Judge's decisions. I believe the Commission has clearly articulated its view of S&S. "Substantial possibility" is not one of the views accepted by the Commission.

The Secretary urged that Inspector Pilling's S&S citation written November 19, 1990, is based on his extensive knowledge of FMC, the fact the mine was liberating over 1.5 million cubic feet of methane in a 24-hour period and upon his belief the CM master switch was arcing.

I agree the FMC mine was liberating over 1.5 million cubic feet of methane in a 24-hour period (considerably more than was liberated in the Texasgulf mine). I further concur that the inspector believed the master switch on the CM was arcing. However, the Inspector found no methane present in the panel nor does the evidence establish that a sufficient amount of methane would accumulate or be liberated in panel 14 to cause a hazard.

A Section 103(i) gas test confirmed the absence of methane in the return entry. (Tr. 116). FMC personnel also found zero methane. (Tr. 484).

Inspector Pilling has conducted over 8,000 tests for methane at FMC over a nine-year period and has never detected methane in the ignitable range. (Tr. 119, 120). The history shows that the concentration of methane was almost always 0 percent and never more than 1 percent. (Tr. 481).

The Secretary states the CM was about to cut into virgin trona. Such a mining procedure would release methane.

The Secretary is in error; methane is liberated from the oil shale. Unlike coal, trona contains only trace amounts of methane. (Tr. 202, 298).

The Secretary also relies on the testimony of Michael Erspamer.

A summary of Mr. Erspamer's testimony, entered above, indicates that when roof bolting he would strike pockets of methane. In addition, there were occasions when he had detected methane of various described high concentrations, including concentrations as high as 10 percent.

I am not persuaded by Mr. Erspamer's testimony that he detected 10 percent methane on several occasions unrelated to the citation. I am not persuaded because in cross examination he identified several methanometers and acknowledged that his was incapable of reading 10.0 percent concentration. (Tr. 226).

I find Mr. Erspamer's testimony about releasing methane during roof bolting to be credible. However, there was no evidence (expert or otherwise) to establish whether the release constituted a dangerous concentration of methane. I appreciate such matters are not always subject to precise proof but the Judge's conclusions must be reasonably drawn from the facts.

In any event, Mr. Erspamer's roof-bolting activities were shown to be very limited. When asked about the extent of the roof bolting he testified:

- A. I never did permanently, but I did as a relief operator. When I was a miner operator, the roof bolter operator was qualified to run the miner, and so we'd trade off once in a while and break up the monotony by doing each other's jobs. (Tr. 180).

Mr. Erspamer also testified and I find his testimony credible that he detected concentrations of methane at 1 percent "probably hundreds of times." (Tr. 188). However, these were instances when Mr. Erspamer was firebossing. On these occasions the fans were down or overcasts were being cut. The very purpose of the fireboss inspections are to clear out the methane. (Tr. 136, 196, 216, 217, 223). Inspector Pilling believed that the high readings of methane detected were "to be expected" because they were found during pre-shift fire boss inspections. (Tr. 136).

Witnesses Merle Venters and Jerry Davidson confirmed that "outbursts" or "inrushes" of methane do not occur at FMC. (Tr. 296, 348).

**Issue: Was the violation properly classified as Significant and Substantial due to the nature of the mine**

The Commission has ruled that the nature of the mine is a factor to be considered in determining whether a violation is S&S. Texasgulf, Inc. supra, 10 FMSHRC at 501.

As the Commission has also noted, the geological structure of a mine should be evaluated to reasonably evaluate future liberation of methane. Texasgulf, Inc., supra, 10 FMSHRC at 503.

JERRY PALMER DAVIDSON, a geologist experienced in mining, is employed by the Denver Ground Support Group for MSHA. (Tr. 331). Mr. Davidson is familiar with the FMC Mine as part of an MSHA ground stability investigation of all trona mines in Green River, Wyoming. (Tr. 333). The occurrence of methane was not a part of MSHA's report. (Tr. 340).

Methane is one of the volatile constituents of oil shale. (Tr. 341). Trona contains thin seams of oil shale, an eighth or quarter of an inch. During the mining process, oil shale and methane are released into the atmosphere. (Tr. 342, 343). Cracks or fissures are very common in a trona mine. (Tr. 345).

While he was in the mine Mr. Davidson observed fissures in the continuous miner areas. (Tr. 347). The fissures serve as a conduit for volatile vapors such as methane which can be in the roof. (Tr. 347).

A roof fall fractures all the strata in the fall. This produces a larger amount of whatever formation gasses existed in the roof. Methane exists with the oil shale in the FMC roof. Another source of methane is the thin seams of oil shale in the bed being mined. (Tr. 348). In addition, methane can come up from the floor. In the FMC mine it is not possible to predict when a roof fall, fracture or crack will occur. (Tr. 349).

The FMC had a roof fall in 1989 in the continuous miner section but the witness did not know the location of the fall. (Tr. 357, 358). As methane enters the atmosphere it is possible to check its concentration with gas bottles or methanometers. (Tr. 359). When methane enters the atmosphere, the concentration

and location varies. (Tr. 360). When a continuous miner cutter head hits a fissure, whatever gas is in the fissure immediately comes into the mine atmosphere. (Tr. 360). Mr. Davidson agreed the strata differs from east of the trona mine in a general way. (Tr. 370). FMC's mine is several miles in area. (Tr. 372).

In MSHA's report (Ex. G-13, R-3) it was recommended that one to two feet of trona should be left in place. (Tr. 376, 377, Ex. R-3). Mr. Davidson was not aware of any explosions, blowouts or outbursts in the FMC Mine. (Tr. 383, 384).

Bed 17 is one of the largest trona beds being mined. There are three companies mining the bed. (Tr. 386). Exhibit G-13 is MSHA's general ground control investigation of all the trona mines in the Green River Basin. (Tr. 388, 389).

### Evaluation

Mr. Davidson's testimony fails to establish how the geology of FMC's mine might cause a hazardous concentration of methane. There is no "confluence" as required in Texasgulf, Inc.

JERRY LEE FULLER, senior mining engineer for MSHA and a rebuttal witness, has been so employed for over 14 years. (Tr. 525). Mr. Fuller, a graduate from the Colorado School of Mines, teaches classes in ventilation. (Tr. 525).

As a ventilation expert, Mr. Fuller is familiar with methanometers mounted on continuous miners. (Tr. 537). He is also familiar with the aliphatic hydrocarbons generally associated with oil shale. The higher hydrocarbons tend to interfere with methanometers on the side of safety. (Tr. 537). That is, the higher hydrocarbons will show as methane when none is present.

A roof fall in an airway will obstruct ventilation to some degree. Based on a reasonable engineering certainty a ventilation system does not always dilute, render harmless and carry away methane. (Tr. 545). The ventilation system can't ventilate every nook and cranny of the mine. It is necessary to control the ignition sources as well as ventilate as close to them as possible. The standards address two main areas: they seek to control ignition sources and ventilate to dilute hazardous gasses. (Tr. 548). The ventilation system cannot compensate for a breakdown in a permissibility system. (Tr. 560). It is possible to have ignitions when a ventilation system is running because the ventilation system cannot ventilate every nook and cranny of the mine. It is possible for ignitions to occur in underground gassy trona mines even with 26,000 CFM in the area being mined.



### Evaluation

Mr. Fuller does not establish a dangerous concentration of methane was reasonably likely. He appears to state that FMC's mine, as a Category III mine, liberates methane concentrations which are explosive or can become explosive when diluted. (Tr. 545, 546).

However, the record indicates Mr. Fuller was not testifying as to the FMC mine. He was rather quoting (somewhat incorrectly) MSHA's categorization regulation, 30 C.F.R. § 57.22003. The regulation provides as follows:

(3) Category III applies to mines to which noncombustible ore is extracted and which liberate a concentration of methane that is explosive, or is capable of forming explosive mixtures with air, or have the potential to do so based on the history of the mine or the geological area in which the mine is located. The concentration of methane in such mines is explosive or is capable of forming explosive mixtures if mixed with air as illustrated by Table 1 below, entitled "Relation Between Quantitative Composition and Explosibility of Mixtures of Methane and Air".

KEN PORTER is the supervisor for the Electrical Power Systems Branch at MSHA's Approvals and Certification Center in Triadelphia, West Virginia. (Tr. 561). His initial responsibility was in the Field Activities Branch responsible for approving longwalls. His present duties include approving all types of electrical equipment. (Tr. 562, 563).

On December 11, 1991, he responded to a request by Inspector Pilling. (Tr. 563). MSHA has records that correspond to a model of the machine inspected by Mr. Pilling. (Tr. 565, 568).

Inspector Pilling inquired as to how the enclosures were constructed and whether the components within the enclosure were capable of igniting the methane air mixture. (Tr. 573, 574). The witness described where arcing would occur in the box. (Tr. 575). The vacuum contractor on the equipment will interrupt the 950 volt cutter motor circuits within a vacuum bottle. This reduces the arcing. (Tr. 586). Arcing would occur inside the box even if the box contained vacuum breakers. Such arcing could be caused by the seven control switches and the circuit breaker. (Tr. 598).

### Evaluation

Mr. Porter's testimony did not enhance the S&S allegations as it relates to hazard concentrations of methane.

For the reasons stated above I credit Mr. Head's testimony as to the effectiveness of FMC's ventilation and the unlikelihood of a methane explosion. I further reject Inspector Pilling's opinion that the violation was S&S since his opinion conflicts with the Commission's stated criteria.

In addition, I conclude the nature of the mine and its geological structure does not support a designation that the violation was significant and substantial.

It is appropriate to compare cases upholding S&S findings: In U.S. Steep Mining Co., Inc., 6 FMSHRC 1866, 1867-69 (August 1984) a coal mine liberated over 1,000,000 cubic feet of methane in a 24-hour period. In addition, the mine had a history of methane ignitions and there were excessive accumulations of coal nearby; in United States Steel Mining Co., Inc., *supra* at 1128-30 (August 1985) coal mine liberates over 1,000,000 cubic feet of methane in a 24-hour period, has a history of past methane ignitions, can liberate dangerous levels of methane in a relatively short period and where ventilation is below that required; in Youghioghenny & Ohio Coal Co., 9 FMSHRC 673, 677-678 an S&S designation was upheld where a coal mine was subject to inspection pursuant to Section 103(i) and sudden outburst of methane had occurred recently.

The above cases all involve a dangerous concentration of methane, a factor not established in the FMC mine and not reasonably likely.

Finally, on the authority of Texasgulf, Inc., I conclude the violation of 30 C.F.R. § 57.22305 was not significant and substantial. Accordingly, the S&S allegations should be stricken.

**Issue: Was the Violation Due to FMC's Unwarrantable Failure**

In Emery Mining Corp., 9 FMSHRC 1997, 2004 (December 1987) and Youghioghenny & Ohio Coal Company, 9 FMSHRC 2007, 2010 (December 1987). The Commission defined unwarrantable failure as aggravated conduct constituting more than ordinary negligence by a mine operator in relation to a violation of the Act." Emery examined the meaning of unwarrantable failure and referred to it in such terms as "indifference," "willful intent," "serious lack of reasonable care," and "knowing violation."

FMC's extensive mine safety program includes a maintenance shift for every two production shifts which means a permissibility check is done each day. (Tr. 189, 192-194).

Witness John Head testified to the numerous layers of protection in place at FMC including training of personnel, excellent ventilation, methane testing by foremen, continuous monitors on the Joy miners with automatic shutoff at 1.5 percent, one maintenance shift for every two production shifts, voluntary drilling of gas holes and an effective fire prevention program in place. (Tr. 475-486).

It is true that FMC has violated this standard 49 times in the two years preceding the November 19, 1990, citation. However, prior violations must be considered against the fact that FMC has 100 pieces of permissible equipment (Tr. 415) operating over 700 production shifts per year (Tr. 189) production shifts for every maintenance shift X 365 equals 730 production shifts per year; thus conservative estimates (700 shifts X 100 pieces of equipment X 2 years) indicate FMC had 140,000 permissible equipment shifts over the two year period. Each piece of permissible equipment contains thousands of locations where a gap can exist. Thus, out of 140,000 permissible equipment shifts, 49 were cited.

A continuous miner is, no doubt, subject to hard use in the mine. However, the evidence fails to indicate that FMC was guilty of aggravated conduct. Accordingly, the allegations of unwarrantable failure should be stricken.

**Issue: Should FMC's request for Declaratory Relief be granted**

FMC requests declaratory relief. Specifically, the operator requests that given similar conditions, permissibility violations in continuous miner sections are not significant and substantial.

The Commission has recognized that it may grant declaratory relief in appropriate proceedings. Beaver Creek Coal Co., 11 FMSHRC 2428, 2430 (December 1989); Kaiser Coal Corp. 10 FMSHRC 1165, 1170-71 (September 1988); Climax Molybdenum Co., 2 FMSHRC 2748, 2751-52 (October 1980), aff'd sub nom., Climax Molybdenum Co. v. Secretary of Labor, 703 F.2d 447, 452 (10th Cir. 1983); see also Youghioghenny & Ohio Coal Co., 7 FMSHRC 200, 203 (February 1985) ("Y&O"). The sources of this authority are section 105(d) of the Act, 30 U.S.C. § 815(d), empowering the Commission to "direc[t] other appropriate relief," and section 5(d) of the Administrative Procedure Act, 5 U.S.C. § 554 (e)(1982) ("APA"),

which is incorporated by reference into the Mine Act, 30 U.S.C. § 815(d).

I decline to grant declaratory relief. Given the dynamics of mining closely similar conditions to those found in this case are not likely to exist. In short, in granting declaratory relief the Commission would "express legal opinions on academic theoreticals which might never come to pass" American Fidelity & Casualty Co. v. Pennsylvania Threshermen & Farmers Mutual Casualty Insurance Co., 280 F.2d 453, 461 (5th Cir. 1960).

### Civil Penalty

Section 110(i) of the Mine Act mandates the consideration of six criteria in assessing appropriate civil penalties.

In considering the statutory criteria I conclude FMC, by the size of its mine, is a large operator. The Secretary's Proposed Assessment indicates the size of FMC's mine is 1,915,560 production tons or hours worked. Accordingly, I believe the penalty assessed is appropriate in relation to the company's size.

In the absence of evidence to the contrary I conclude the penalty hereafter assessed will not affect the operator's ability to continue in business.

FMC's prior adverse history as evidenced by Exhibit G-12 indicates the company was assessed and paid 314 violations for the two years preceding November 18, 1990.

FMC was negligent. Inspector Pilling located the permissibility violation. FMC's maintenance crew should have also located it as it was readily accessible.

The gravity is high. Permissibility violations inby the last open crosscut are serious violations.

FMC demonstrated statutory good faith in abating the violative condition.

Considering all of the statutory factors, I deem that a civil penalty of \$200 is appropriate.

For the foregoing reasons I enter the following:

ORDER

1. The significant and substantial allegations are **STRICKEN**.
2. The unwarrantable failure allegations are **STRICKEN**.
3. Citation No. 3633617, as amended, is **AFFIRMED**.
4. A civil penalty of \$200 is **ASSESSED**.
5. Respondent's motion for declaratory relief is **DENIED**.

  
John J. Morris  
Administrative Law Judge

Distribution: Certified Mail

Kristi Floyd, Esq., Office of the Solicitor, U.S. Department of Labor, 1585 Federal Office Building, 1961 Stout Street, Denver, CO 80294

Henry Chajet, Esq., JACKSON & KELLY, 1701 Pennsylvania Avenue, N.W. Suite 650, Washington, DC 20006

sh

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

**AUG 31 1992**

LONNIE D. MULLINS,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	
v.	:	Docket No. KENT 92-238-DM
	:	MSHA Case No. SE-MD-91-02
SATURN MATERIALS, INC.,	:	
BLACK GOLD COAL COMPANY,	:	
and TALBERT BALL,	:	
Respondents	:	

**ORDER OF DISMISSAL**

Before: Judge Melick

Complaint requests authority to withdraw his complaint in the captioned case on the basis of a settlement agreement resolving all disputed claims. Under the circumstances herein, permission to withdraw is granted. 29 C.F.R. § 2700.1. This case is therefore DISMISSED.



Gary Melick  
Administrative Law Judge

**Distribution:**

Tony Oppegard, Esq., Mine Safety Project Appalachian Research  
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/lh

## ADMINISTRATIVE LAW JUDGE ORDERS





FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

AUG 10 1992

IN RE: CONTESTS OF RESPIRABLE ) Master Docket No. 91-1  
DUST SAMPLE ALTERATION )  
CITATIONS )

SUPPLEMENTAL ORDER ON CONTESTANTS'  
MOTION TO COMPEL PRODUCTION OF  
EXCISED PORTIONS OF CERTAIN DOCUMENTS

On July 17, 1992, I issued an order granting in part and denying in part the motion of Contestants Kentucky Carbon, et al., to compel production of excised portions of certain documents. The order also directed the Secretary to submit certain documents for my in camera inspection.

On July 27, 1992, the Secretary submitted the documents referred to above for in camera inspection. She has withdrawn the claim of privilege for the calendar notes of Ronald Schell dated March 4, 1991, and will produce the document for counsel for Contestants, and place it in the Document Repository.

I. PAROBECK NOTES

The Secretary claims the deliberative process privilege and the work product doctrine for the note dated October 1, 1989 (incorrectly referred to as October 1, 1991). The note records certain tests on cassettes performed by Parobeck and plans for further tests. I conclude that it is protected by the deliberative process privilege. It does not contain opinions or conclusions and there is no indication that the document was prepared in anticipation of litigation. Therefore, it is not protected by the work product doctrine. Contestants have not shown a need for the document sufficient to override the Government's interest in non-disclosure. The motion to compel will be denied.

II. BEEMAN NOTES

Page 5, entitled Peluso AWC and not dated, records a discussion among MSHA personnel of certain AWC characteristics. The Secretary asserts that it is protected by the work product doctrine. The note does not appear to contain opinions or theories. Nothing in the document shows that it was prepared in anticipation of litigation. The claim of privilege is denied, and the Secretary will be ordered to disclose the document.

On page 13, the Secretary excised a portion of a notation on November 28 which records an agreement among MSHA personnel concerning proposed civil penalties for AWC violations. The Secretary claims the deliberative process privilege. The document clearly records agency deliberations and proposals. Contestants have not shown a need for the document sufficient to override the Government's interest in non-disclosure. The motion to compel will be denied.

### III. HUGLER 1989 CALENDAR ENTRIES

Item 7 (the entries are not dated or the dates are not legible) records MSHA's plans for expansion of the investigation and the use of MSHA staff in the investigation. The Secretary claims the deliberative process and investigative privileges. The document is clearly covered by both privileges and Contestants have not shown an overriding need for disclosure. The motion to compel will be denied.

### IV. HUGLER 1990 CALENDAR ENTRIES

Item 10 (not dated) records Hugler's thoughts and plans concerning potential civil penalty strategy including the amount of proposed penalties. The Secretary asserts the deliberative process privilege. The document records the thoughts and deliberations of an MSHA official. It is protected by the privilege, and Contestants have not shown an overriding need for disclosure. The motion to compel will be denied.

Items 12 and 14 (dated Thurs. 11/29) records Hugler's thoughts concerning potential civil penalties and criminal prosecutions. The Secretary claims the deliberative process privilege for the two excisions on this page. The excised notes concern strategy for Government enforcement. They are protected by the privilege. Contestants have not shown an overriding need for the document. The motion to compel will be denied.

### V. HUGLER 1991 CALENDAR ENTRIES

January 11 contains two excisions. Item 1 discusses a press conference concerning the Peabody AWC case, with suggestions for Assistant Secretary Tattersall. Item 2 concerns a press release and discusses civil penalties for other operators. The Secretary claims the deliberative process privilege for item 1, and the attorney-client, attorney work product and deliberative process privileges for item 2. I am unable to discern any deliberations or proposals for official action other than the press conference in item 1. Nor do I find any confidential communications between attorney and client or evidence of attorney work product in item 2. Item 2 does however contain some references to future civil penalties and this portion is protected by the deliberative process privilege. I will grant the motion to compel with

respect to item 1 and with respect to the first two lines of item 2.

January 25 contains two excisions (items 4 and 5), both containing target dates for issuing citations and identifying a coal operator as a target. I conclude that both are protected by the deliberative process privilege. I do not find that item 5 is protected by the attorney-client privilege. The motion to compel will be denied.

January 31 contains an excision (item 6) of a discussion with the Solicitor's office concerning a proposed briefing of the Acting Secretary on the dust sampling program, a history of AWCs, and future proposals. I conclude that this excision is protected by the deliberative process privilege but not by the work product doctrine or the attorney-client privilege. Contestants having shown no overriding need for the excised portion of the document, the motion to compel will be denied.

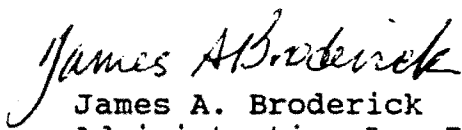
February 6 contains an excision (item 8) of Hugler's deliberations on the manner of the issuance of citations. The Secretary claims the deliberative process privilege and the work product doctrine and I conclude that the excised portion of the entry is protected by both. Contestants have not shown an overriding need for the material and the motion to compel will be denied.

#### VI. TATTERSALL NOTES

The two excisions of this single page document have to do with the grand jury investigation of Peabody and a potential investigation of another coal company. Both are protected by the investigative privilege and the former also by the work product doctrine. Contestants have not shown an overriding need for the excised portions of the document and the motion to compel will be denied.

#### ORDER

In accordance with the above discussion the Secretary is ORDERED to produce on or before September 1, 1992, page 5 of the Beeman notes, excision no. 1 of the Hugler 1991 calendar entries, and the first two lines of excision no. 2 of the Hugler 1991 calendar entries. In all other cases, her claim of privilege is upheld and the motion to compel is DENIED.

  
James A. Broderick  
Administrative Law Judge

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

2 SKYLINE, 10th FLOOR

5203 LEESBURG PIKE

FALLS CHURCH, VIRGINIA 22041

**AUG 13 1992**

IN RE: CONTESTS OF RESPIRABLE ) Master Docket No. 91-1  
DUST SAMPLE ALTERATION )  
CITATIONS )

## ORDER

### INTRODUCTION

On June 26, 1992, counsel for the Secretary filed with the Commission a copy of a letter sent the same day to counsel and representatives for all Contestants in this proceeding. The letter states that the Secretary will propose that a case be selected to be tried first, which should meet certain criteria with respect to the number of citations and other matters outlined in the Secretary's letter. The letter proposes that case-specific depositions for this trial be taken between August 17 and November 13, 1992; that stipulations, witness lists, and exhibit lists be filed by December 11, 1992; and that the trial commence January 12, 1993.

On July 1, 1992, Contestants (with a few exceptions) represented by the law firms of Jackson & Kelly, Crowell & Moring, Buchanan Ingersoll, and Smith, Heenan & Althen filed a motion for consolidation of their actions for the purposes of a separate trial on the issue of the causation of "abnormal white centers" (AWCs). Contestants filed a memorandum in support of their motion. On June 15, 1992, the Secretary filed a statement in opposition to the motion.

Pursuant to notice, a prehearing conference was called on July 17, 1992, in the Commission hearing room in Falls Church, Virginia. At the conference, counsel discussed their different conceptions of what the basic issue in the proceedings is, and offered different views on the question of consolidation for an issues trial or the trial of a bellwether case. At the conclusion of the conference, I invited counsel to file memoranda stating what they consider an appropriate statement of the issues in the case, and to submit their further views on the most appropriate way to handle the trial. Such memoranda were filed by the Secretary, the Contestants represented by the four law firms named earlier herein, a separate memorandum filed by KTK Mining & Construction, Inc., which received a single citation and is represented by Smith, Heenan & Althen, a memorandum filed by U.S. Steel Mining Co., Inc., and a statement filed by Energy

designated expert witnesses. Many designated the same witnesses. In all, six different experts were listed: Dr. Richard Lee, Dr. Larry Grayson, Dr. Thomas Malloy, Dr. Chaoling Yao, Dr. Morton Corn, and Dr. Andrew McFarland. The Secretary has elsewhere listed her generic expert witnesses as Dr. Virgil Marple, Dr. Kenneth Rubow, Dr. James Vincent, Thomas Tomb, and Lewis Raymond. In her memorandum, the Secretary states that she now agrees to a common issues trial, to be immediately followed by a trial of an operator with a substantial number of citations.

### CONSOLIDATION

This master docket presently contains contests and penalty proposals concerning approximately 4000 citations, most issued on April 4, 1991, charging violations of 30 C.F.R. §§ 70.209(b), 71.209(b), or 90.209(b). Part 70 involves underground coal mines, Part 71 surface facilities, and Part 90 special provisions for miners who have evidence of the development of pneumoconiosis. The three sections contain identical language. The 4000 citations are virtually identical except for mine identification. The issue in each case is the same. Most of the witnesses for the Secretary will be required to testify in each case that is tried. Many of the Contestants' witnesses are common. The complexity and volume of these cases make it imperative that common issues be tried together: the time and expense required to try each case separately would be prohibitive, both to the Government and the mine operators. Therefore, pursuant to Rule 42, Fed. Rules of Civ. P., I hereby ORDER that all cases in this docket presently assigned to me be CONSOLIDATED for the purpose of trying the issues common to all the cases. The issues will be discussed and defined hereafter in this order. So far as practical, I will be guided by the Manual for Complex Litigation, 1-Pt. 2 Moore's Federal Practice §§ 10 et seq. (2d ed. 1986), in the trial. A decision following the trial will be binding on all parties.

### ISSUES

Although these cases have been before the Commission for more than a year and the parties have engaged in extensive pretrial discovery, in much of which the presiding judge has been involved, only now does it appear that there is a sharp disagreement as to the basic issue presented for resolution. The Secretary asserts that the issue is whether she can show by a preponderance of the evidence that the weight of a cited filter was altered (which she apparently equates with reduced or changed) while the filter was in the control of the operator. She denies that proving the operator's intent, or indeed that the operator took an affirmative act in causing the alteration, is part of her burden in establishing the violation. The Contestants argue that the issue is whether the operators intentionally altered the weight of the cited filter cassettes

while in the operators' custody.

Each of the citations contested herein charges the mine operator with violating the provisions of Section 209(b) of Part 70, Part 71, or Part 90. The standard in Section 209(b) provides:

The operator shall not open or tamper with the seal of any filter cassette or alter the weight of any filter cassette before or after it is used to fulfill the requirements of this part.

All the citations allege a violation of the cited standard in virtually identical language:

The weight of the respirable dust cassette no. \_\_\_\_\_ collected on [date] from a sampling entity at this mine has been altered while the cassette was being submitted to fulfill sampling requirements of Title 30 C.F.R. Parts 70, 71 or 90.

All the citations allege that the violations resulted from Contestants' "reckless disregard" which as explained in 30 C.F.R. 100.3(d) represents the highest category of negligence and shows that "[t]he operator displayed conduct which exhibits the absence of the slightest degree of care."

When penalties were proposed for the contested violations, a narrative statement was issued to all respondents containing the following language:

On April 4, 1991, MSHA issued section 104(a) citations at the \_\_\_\_\_ mine. \_\_\_\_\_ was cited for \_\_\_\_\_ violations of 30 C.F.R. 70.209(b), 71.209(b) or 90.209(b) because the respirable dust samples that were submitted to MSHA were invalid; respirable dust had been intentionally removed from the samples before they were submitted to MSHA.

The Secretary proposed penalties ranging from \$1000 to \$1800 for each violation of 70.209(b) and 71.209(b), and penalties of \$10,000 for each violation of 90.209(b). There can be no doubt that the Secretary was alleging that each of the 4000 violations was the result of an intentional altering of the weight of a dust cassette, including a substantial number of violations at mines receiving only one or two citations.

As I stated above, the parties disagree on what is prohibited by Section 209(b): does it proscribe conduct on the

part of the mine operator, forbidding him to tamper with or alter the weight of a filter cassette, as Contestants argue, or is the standard violated simply if the weight of the cited filter is altered (changed or reduced) while the filter is in the custody of the operator, as the Secretary asserts?

The standard is written in the active voice. Reading the words of the standard according to their ordinary meaning, they proscribe conduct, rather than outlawing a condition. The Secretary's discussion of the Mine Act's strict liability for violations of mandatory standards begs the question, which is, what constitutes a violation?

The word "alter" is defined in Webster's 3rd New International Dictionary (1986), p. 63, as "1. to cause to become different in some particular characteristic (as measure, dimension, course, arrangement or inclination) without changing into something else ..."

The terms "alter" and "tamper" or "tamper with" are, if not exact synonyms, closely related words. See William C. Burton, Legal Thesaurus (1980), pp. 21, 488, 539.

If the weight of a filter cassette is "altered," the alteration can only be caused in one of two ways: either some person or persons actively caused it, or it resulted accidentally. The words of the standard in Section 209(b) according to their plain meaning refer to an action, proscribe conduct, include the concept of intention, and exclude an accidental occurrence. The Secretary has not directly argued that an accidental alteration of the filter weight while it is in the operator's custody violates the standard, but that is the clear implication of her present stated position.

Whatever her position on what is necessary to prove a violation of the standard in the abstract, she has clearly taken the position with respect to the contested citations in this litigation that the violations resulted from intentional acts.

In response to interrogatory no. 17(h) served by Contestant Utah Power & Light the Secretary responded:

Whether it is the Secretary's contention that the alleged AWC on the cited sample could not occur in any manner other than by the intentional act of an individual.

Answer: Yes (January 10, 1992).

The deposition of Robert Thaxton taken on July 25, 1991, contains the following:

Q [By Ms. Beverage] But it was in your own mind sufficient upon which you could make a determination in the 4945 filters cited that they were indeed violations of the law and resulted from deliberate tampering; is that a fair statement?

A. It was enough to write the violations as issued that visual observation of the filter face indicated dust removal.

Q. Dust removal resulting from deliberate tampering?

A. There is nothing in the citation about that.

Q. The citations are issued resulting from the reckless disregard of a coal operator, are they not?

A. Yes, they are.

Q. And what does that mean to you in the context of this batch of citations?

A. The reckless disregard indicates that a deliberate act has taken place.

\* \* \*

Q. Okay. So that you believe that the phenomenon described in those citations resulted from deliberate dust removal; correct?

A. It resulted from a deliberate act, yes.

Q. That resulted in dust removal; correct?

A. Correct.

pp. 310-12.

Later in the same deposition, Mr. Thaxton stated that if a single sample was received having characteristics similar to those of an AWC, it "would not be classed as a sample that would be AWC" and therefore would not be violative. Id. at 426. This apparently was based on the conclusion that a single such sample could result from accidental means. However, three, four, or five such samples from the same mine in a three week period would render an accidental cause "illogical" and "very unlikely."



Id. at 429. Mr. Thaxton's testimony makes it clear that he cited only AWC filters that he concluded resulted from deliberate dust removal.

The report of Mr. Thaxton on February 7, 1992, entitled 'AWC' Citation Determination Report concludes as follows:

Based on my observations of the face of normal respirable dust filters and my experience in reproducing the dust deposition patterns on the cited "AWC" filters, it is my opinion that the occurrence of the "AWC" filters could not result from the normal sampling process. Based on my observation of the filter face of each cited "AWC" cassette, I have concluded that respirable dust was removed by deliberate action after or near the end of the sampling period.

Contestants have pointed to the Secretary's Statement in Opposition to Contestants Motion to Vacate Citations (April 27, 1992) wherein she stated that her "multifaceted and protracted" investigation was used "to exclude all reasonably likely accidental causes of the AWC phenomenon."

Contestants have also cited public statements and Congressional testimony by Labor Department officials, including the Secretary, tending to show that she is charging that Contestants intentionally tampered with or altered the weight of dust sample filters. In fashioning this order, I am not considering such statements, which are not part of the record in this case.

The Secretary argues that the cases raise two issues: first, whether the weight of a cited dust sample was altered while in the custody of the mine operator; second, if so, whether the alteration was deliberate or intentional. She asserts that if she prevails on the first issue a violation is established, and that the second issue "is a matter related solely to the statutory factor of negligence for assessment of a penalty." I have considered this argument and reject it. There obviously may be degrees of culpability and degrees of negligence associated with a violation of Section 209(b), but the violation itself necessarily includes an intentional action on the part of the mine operator. The plain words of the standard will bear no other interpretation.

I believe it important, indeed essential to a proper framing of the issue, that I clearly state my conception of the scope of the standard in Section 209(b) prior to the trial. Therefore, I hold that as a matter of law the accidental, unintentional altering (changing, reducing) the weight of a filter cassette

while the cassette is in the custody of the mine operator is not a violation of 30 C.F.R. 70.209(b), 71.209(b), or 90.209(b).

#### FURTHER PREHEARING MATTERS

1. All expert witness discovery shall be completed on or before October 2, 1992. Case-specific discovery will be stayed pending the trial on the common issues.

2. On or before October 30, 1992, the parties shall exchange lists of witnesses expected to be called to testify and exhibits expected to be offered, and shall file copies with me by the same date.

3. The parties shall attempt to stipulate as to facts not in dispute and to agree on trial procedures and shall file stipulations and trial briefs with me on or before November 13, 1992.

4. A prehearing conference will be held commencing at 10:00 a.m. Tuesday, November 17, 1992, in the Hearing Room, 5203 Leesburg Pike, Falls Church, Virginia, for the purposes of further discussing trial procedures.

#### LEAD COUNSEL COMMITTEE

Pursuant to the Manual for Complex Litigation, I appoint the following as a lead Contestants counsel committee who shall be chiefly responsible for conducting the common issues trial on behalf of all Contestants:

Laura E. Beverage and Jackson & Kelly  
Timothy M. Biddle and Crowell & Moring  
Michael T. Heenan and Smith, Heenan & Althen  
R. Henry Moore and Buchanan Ingersoll  
John C. Palmer IV and Robinson & McElwee  
H. Thomas Wells and Maynard, Cooper, Frierson  
& Gale.

The lead counsel committee shall consult with one another and with counsel for other Contestants and formulate procedures for conducting the issues trial in the most expeditious manner possible consonant with the complexity of the case and fairness to all parties. Specifically, they shall agree upon a combined opening statement and the conduct of the examination and cross examination of each witness by a single attorney. In exceptional circumstances examination and cross examination of a witness may be conducted by more than one attorney by leave. In no event will duplicative cross examination by multiple attorneys be permitted.

The lead counsel committee will be responsible for preparing

and filing the prehearing documents called for in this order, and for formulating in concert with the Secretary's counsel stipulations of fact and trial procedures. The lead counsel committee shall file a trial brief on behalf of all Contestants.

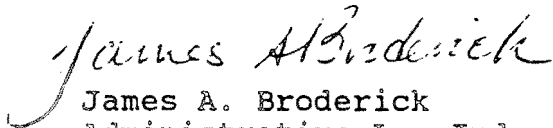
#### NOTICE OF HEARING

The parties will take notice that the consolidated cases will be called for hearing on the common issues described below commencing at 9:00 a.m. Tuesday, December 1, 1992, at a hearing location in the Washington, D.C. area. I will notify the parties of the hearing site by a subsequent notice. The hearing will continue each weekday from December 1 through December 22, 1992. If not completed, it will resume on Tuesday, January 5, 1993.

#### ISSUES AND EVIDENCE

The basic common issue for the trial of which these cases are consolidated and which will be resolved in the trial is: Whether an abnormal white center (AWC) on a cited filter cassette establishes that the operator intentionally altered the weight of the filter?

Evidence bearing on this issue will include the scientific evidence - the opinions of expert witnesses as to the possible causes of AWCs. It may also include statistical evidence concerning the occurrence of AWCs before and after the contested citations were issued, and the number of AWCs found in particular mines. It may include evidence as to any changes in MSHA's procedures in examining filters for AWCs. It may include evidence concerning the finding of AWC patterns on MSHA inspector samples. It may include other evidence reasonably related to the basic issue stated above. Concerning this issue, the Secretary has the burden of establishing her case by the preponderance of the evidence.

  
James A. Broderick  
Administrative Law Judge

Distribution:

All Counsel and Representatives on the attached list by Certified Mail.

/fas

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

AUG 19 1992

IN RE: CONTESTS OF RESPIRABLE ) Master Docket No. 91-1  
DUST SAMPLE ALTERATION )  
CITATIONS )

## ORDER

On June 29, 1992, the Commission affirmed my orders of September 13, September 27, and October 7, 1991, insofar as they required the production of certain documents claimed to be protected by the deliberative process privilege. It remanded the case to me for a ruling on the documents claimed by the Secretary to be protected by the work product privilege (apparently including document no. 17 concerning which I upheld the Secretary's claim that it was protected by the attorney-client privilege. See fns. 26 and 32 of the Commission Decision). The Commission affirmed my rulings in which I upheld the Secretary's claims of privilege (except with respect to document 17) "without prejudice to Contestant's right to file" a motion for in camera inspection of any particular document. It also directed me to rule on the Secretary's reliance on Rule 6(e) of the Federal Rules of Criminal Procedure as a basis for not disclosing folders 11 and 12 of Document 406.

### I. Background

I issued orders on June 30 and July 10, 1992, directing the Secretary to resubmit documents 3, 365, 366, 367, 401, and 424 for in camera inspection, and permitting Contestants to file a motion for in camera inspection of any document concerning which the Secretary's claim of privilege was upheld. I directed the parties to submit memoranda in support of their respective positions on the Secretary's work product privilege claim, and on the applicability of Rule 6(e).

The requested documents were furnished by the Secretary and have been inspected in camera. Both parties filed memoranda of law. Contestants filed a motion for in camera review of documents 111 (p. 9119), 119, 130, 131, 134, 137, 142, 145, 152, 155, 156, 157, 160, 200, 326, 327, 328, 339, 340, 384, 394, 402, 403, 407, 426, 441, 459, 471, 476, and 481.

## II. Work Product Doctrine

The attorney work product doctrine protects from disclosure materials assembled by or for an attorney in anticipation of litigation. Fed. R. Civ. P. 26(b)(3) and (4). It includes documents prepared by other than an attorney. The protected documents may be ordered disclosed only upon a showing that the party seeking discovery has substantial need for them and is unable to obtain their substantial equivalent by other means. "In ordering discovery . . . the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation." Fed. R. Civ. P. 26(b)(3).

Documents 367, 365, 3, and 366 (in chronological order) all concern a report of Warren R. Myers Ph.D. and Allen Wells M.S. of the Department of Industrial Engineering, West Virginia University. Document 367 is the draft of a report by Dr. Myers and Mr. Wells dated February 20, 1990, with handwritten comments and questions by an unidentified person (presumably with MSHA) suggesting changes in the report. Document 365 is a letter dated March 16, 1990, to Dr. Myers from Glenn Tinney of MSHA with comments and questions on Dr. Myers' draft report. Document 3 is a second draft of a report of Dr. Myers dated April 11, 1990. Document 366 is a letter from Mr. Tinney to Dr. Myers, May 4, 1990, with further suggestions concerning the report. These documents were all prepared and assembled in anticipation of litigation. Therefore, they come within the work product doctrine. However, Dr. Myers' final report has been disclosed to Contestants. I conclude (as I concluded in ruling on the deliberative process privilege) that fairness to the Contestants necessitates that they be apprised of the draft reports, suggested changes, and revisions that led to the final report. They are not able to obtain their substantial equivalent by other means. The notations, questions, and suggestions made by MSHA personnel do not constitute mental impressions, conclusions, opinions, or legal theories of an attorney or other representative concerning the litigation. Contestants' need for the documents outweighs the Secretary's interest in keeping them confidential.

Rule 26(b)(4)(B) is not applicable because Dr. Myers' final report has been made available in the Document Repository. Contestants are not seeking so much to discover facts known or opinions held by the expert as to learn what went into his opinion which has already been disclosed.

Documents 401 and 424 are related to the Pittsburgh Health Technology Center report. Document 401 contains copies of drafts of the report dated October 1989 describing certain tests performed on coal dust samples, and a memorandum from an MSHA official concerning the report and certain changes in the report.

Document 424 is a draft largely handwritten by an unidentified author describing tests showing weight differential on filters following certain tests. I conclude that these documents come within the work product doctrine as materials prepared in anticipation of litigation. I further conclude that their disclosure is necessary to Contestants' defense. They do not constitute mental impressions, conclusions, opinions, or legal theories of an attorney or other representative concerning the litigation. Contestants' need for the documents outweighs the Secretary's interest in keeping them confidential.

Document 17 is described as a note to the file dated February 21, 1990, from an Assistant U.S. Attorney, of a telephone conversation with the attorney for a coal mine operator. I treated this as a communication from the U.S. Attorney to MSHA and upheld the Secretary's claim of attorney-client privilege. Apparently (see fns. 26 and 32 of the Commission Decision) the Commission and the Secretary disagree. In order to determine whether it is part of the attorney work product, and, if so, whether Contestants' need for the document outweighs the Government's interest in confidentiality, I will order it disclosed to me for in camera inspection.

### III. Rule 6(e)

Rule 6(e) of the Federal Rules of Criminal Procedure prohibits disclosure of "matters occurring before [a] grand jury" by a Government employee deemed necessary by a Government attorney to assist in the enforcement of federal criminal law. The Secretary contends that folders 11 and 12 of Document 406, described as interview notes of grand jury witnesses taken at the request of the U.S. Attorney and copies of third-party documents received pursuant to Rule 6(e), may not be disclosed because prohibited by Rule 6(e). The documents are in the possession of Robert Thaxton, who is an agent of the grand jury. Rule 6(e) prohibits the disclosure not only of transcripts of witness testimony, but memoranda summarizing witness testimony, and information which would reveal the identity of witnesses or jurors, the substance of testimony, and the strategy or direction of the investigation. Fund for Constitutional Government v. National Archives and Records Service, 656 F.2d 856 (D.C. Cir. 1981); 8 Moore's Federal Practice 6.05 [6] (2d ed. 1992). On July 8, 1992, I was informed by counsel for the Secretary that there are continuing grand jury investigations concerning coal mine dust tampering. Since the prohibition of 6(e) is claimed, it is not possible for me to examine the documents in camera. Contestants' remedy, if any, is to apply to the District Court where the grand jury was empaneled for disclosure of the documents. Fed. R. Crim. P. 6(e)(3)(C)(i) and 6(e)(3)(D). I uphold the Secretary's non-disclosure on the basis of Rule 6(e).

#### IV. Motion for In Camera Inspection

Contestants have requested in camera inspection of 30 documents concerning which I upheld the Secretary's claims of privilege in my orders of September 13, September 27, and October 7, 1991. Contestants assert that in camera review is appropriate to determine whether the claimed privileges apply and whether the subject matter of the documents is such that Contestants' need for the information outweighs the Secretary's interest in non-disclosure. Contestants did not advance any arguments as to their need for any specific documents. Since I have already upheld the claims of privilege in an order which was affirmed by the Commission, I will direct in camera review only if the document description does not tell what the nature of the document is, or if it indicates in some way that the Contestants need it to prepare their defense.

Document 111. Page 9119 of the document contains notes of Ronald Franks dated May 16, 1991, concerning an investigative program being developed involving other potential violations of the dust sampling program. I upheld the Secretary's claim of investigative privilege. The document is dated subsequent to the date of the citations contested herein and there is no showing of need for it by Contestants. The motion will be denied.

Document 119. MSHA internal memo concerning AWC investigation. I upheld the Secretary's claim of deliberative process privilege. To determine whether it is necessary to Contestants' case, I direct that it be disclosed to me for in camera inspection.

Document 130. Letter from U.S. Attorney to MSHA concerning a criminal investigation. I upheld the Secretary's claim of attorney-client privilege. The privilege is not a qualified one. The motion will be denied.

Document 131. Memorandum to the Secretary from the Assistant Secretary dated April 12, 1991, concerning potential agency action subsequent to the contested citations. I upheld the deliberative process privilege and there is no showing of need for the document by Contestants. The motion will be denied.

Document 134. Memorandum from Chief, Office of Investigations, MSHA to Supervisory Special Investigator, December 14, 1990, concerning data for the U.S. Attorney on AWC cases. I upheld the Secretary's claim of investigative privilege. There is nothing in the document description to indicate that Contestants need disclosure to defend their case. The motion will be denied.

Document 137. Memorandum from Robert P. Davis to the Secretary, August 30, 1989, concerning the Peabody investigation.

I upheld the claim of attorney-client privilege which is an unqualified privilege. The motion will be denied.

Document 142. Memorandum to Associate Solicitor from Counsel for Trial Litigation, August 28, 1989, concerning dust fraud investigation. The work product privilege was upheld. Because the document description is deficient (it does not indicate whether the investigation concerns the criminal or the civil cases), I will order it produced for an in camera inspection.

Document 145. Memorandum to Associate Solicitor from Counsel for Trial Litigation, March 21, 1989, concerning AWC criminal investigation. I upheld the work product privilege. Because the document relates to the criminal investigation, there is no indication that Contestants will need it for their defense in this case. The motion will be denied.

Document 152. An undated list of mine operators and AWC occurrences prepared for the U.S. Attorney. I upheld the attorney work product and investigative privileges. There is no indication that Contestants need the document for their defense. The motion will be denied.

Document 155. List of mine operators with handwritten marks prepared at the direction of the U.S. Attorney. I upheld the work product privilege claim. Since the document is related to the criminal investigation, and there is no indication that it is necessary to Contestants' defense, the motion will be denied.

Document 156. List of mine operators and AWC occurrences prepared at the direction of the U.S. Attorney. I upheld the work product privilege claim. The motion will be denied for the reason given for Document 155.

Document 157. Undated memorandum concerning the criminal investigation and studies to be performed to assist the U.S. Attorney in the criminal investigation. I upheld the work product privilege. The motion will be denied for the reason given for Document 155.

Document 160. Undated memorandum from the Assistant Secretary to the Secretary concerning the AWC investigation. I upheld the deliberative process privilege, but to determine whether the document is needed for Contestants' defense, I will direct that it be produced for in camera inspection.

Document 200. Note to file concerning a FOIA request which includes advice received from the Solicitor's Office. The attorney-client privilege was upheld. This is an unqualified privilege. The motion will be denied.



Documents 326, 327, 328. These are documents prepared at the request of the U.S. Attorney's Office and are related to the criminal investigation. The attorney work product privilege was upheld. The motion will be denied for the reason given for Document 155.

Document 339. Document titled "AWC Test Case" prepared by Counsel for Trial Litigation. I upheld the work product privilege. There is no indication that the document is needed by Contestants. The motion will be denied.

Document 340. Document titled "Dust Case (Civil)" by attorneys in the Solicitor's Office. I upheld the work product privilege. The motion will be denied for the reason given for Document 339.

Document 384. Notes of Robert Thaxton, March 7, 1990, of a conference call with U.S. Attorney's Office and Solicitor's Office, including discussion of opinions of agency officials and direction of the investigation. The investigative privilege was upheld. The motion will be denied for the reason given for Document 155.

Documents 394, 407, and 426 comprise the calendar entries of Robert Thaxton from October 1989 to January 30, 1990 (Document 426); from January 18, 1990, to November 14, 1990 (Document 394; apparently it overlaps Document 426); and from December 1990 to March 12, 1991 (Document 407). The Secretary provided Contestants with the specific privileges claimed for each entry by an enclosure to a letter dated March 27, 1991.

In Document 426, the October 1989 note section is described as revealing directions on information to gather for the criminal investigation. The entries on October 20, October 31, November 1, November 13, November 14, and November 15, 1989, and January 30, 1990, all have to do with the criminal investigation and the investigatory privilege is claimed. I uphold the claim and there is no showing that Contestants will require these documents for their defense. For the October 20 and November 13 entries the Secretary also asserts the attorney-client privilege. October 20 notes reveal information requested from the U.S. Attorney for the investigation. November 13 notes reveal instructions from the U.S. Attorney on items to prepare for use in the investigation. For the November 15 entry, the Secretary claims the informant privilege since the entry reveals the identity of an informant. She claims the prohibition of Rule 6(e) Fed. R. Crim. P. for the December 5 entry which reveals the pace and tactics of the investigation and grand jury procedures. For the January 6 entry she claims the attorney-client, work product, and investigative privileges. The entry contains instructions from the U.S. Attorney. I uphold the privileges claimed and since there is no showing that Contestants

will need these documents for their defense, I will deny the motion to produce this document for in camera inspection.

In Document 394, the Secretary claims the investigative privilege for entries on January 18, January 31, February 6, March 5, March 6, March 7, March 8, March 11, March 26, March 27, March 28, May 3, May 14, May 15, May 24, July 12, November 13, and November 14. In addition, she claims the informant privilege for the February 6 and May 15 entries, the attorney-client privilege for the March 5, March 6, and March 26 entries; the work product doctrine for the November 13 and November 14 entries; and the deliberative process privilege for the March 26 entry. Because all the entries are related to the criminal investigation and Contestants have not shown that they are necessary to their defense, the motion will be denied. In addition, I uphold the claim of attorney-client privilege for the March 26 entry.

Document 407 contains December notes for which the Secretary claims the deliberative process and investigative privileges. The entry contains a discussion of civil citations and possible strategies. I will grant the motion to produce this entry for in camera inspection. The February 8, February 20, March 6, and March 12 entries are related to the criminal investigation. Contestants have not shown that these entries are needed for their defense. The prohibition of Rule 6(e) is claimed for the March 12 entry. The motion will be denied as to these entries.

Document 402 is a report prepared for the U.S. Attorney's Office entitled "Tampered Samples Summary for Southern West Virginia." I upheld the work product privilege. There is no indication that the document is needed for Contestants' defense. The motion will be denied.

Document 403 contains notes of a telephone conversation between G. Tinney and Robert Thaxton, concerning the AWC investigation and including opinions and deliberations of the agency and advice from the Solicitor. I upheld the claim of the deliberative process privilege. There is no indication that the document is needed for Contestants' defense. The motion will be denied.

Document 441 is a letter dated April 4, 1989, from Robert Thaxton to the F.B.I. concerning the criminal investigation. I upheld the investigative privilege claim. There is no indication that the document is needed for Contestants' defense. The motion will be denied.

Document 459 contains revisions to the first draft of the West Virginia University report (Document 2) with accompanying letter from Dr. Myers. Douglas White (Solicitor's Office) made handwritten notations and interlineations. The Secretary claims

the attorney-client, deliberative process, and work product privileges. I uphold her claim of attorney-client privilege and will deny the motion to produce the document for in camera inspection.

Document 471 contains notes of Jerry Spicer of March 14, 1991, which were excised because they reveal the timing and progress of a criminal investigation. I uphold the claim of investigative privilege. There is no indication that the document is needed for Contestants' defense. The motion will be denied.

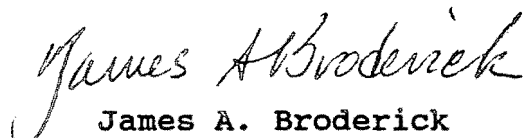
Documents 476 and 481 contain excised notes of Robert E. Nesbit and Glenn Tinney. The Secretary claims the attorney-client, deliberative process, investigative, and work product privileges, but does not describe the documents. I will order both of them produced for in camera inspection.

Therefore, IT IS ORDERED that

1. The Secretary shall produce to Contestants and place in the Document Repository on or before September 15, 1992, Documents 367, 365, 3, 366, 401, and 424.

2. The Secretary shall submit to me for in camera inspection on or before September 15, 1992, Documents 17, 119, 142, 160, the December notes of Document 407, 476, and 481.

3. The motion for in camera inspection of Documents 406 (folders 11 and 12), 111, 130, 131, 134, 137, 145, 152, 155, 156, 157, 200, 326, 327, 328, 339, 340, 384, 426, 394, 407 (except for the December notes), 402, 403, 441, 459, and 471 is DENIED.

  
James A. Broderick  
Administrative Law Judge

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

**AUG 25 1992**

IN RE:        CONTESTS OF RESPIRABLE        )        Master Docket No. 91-1  
              DUST SAMPLE ALTERATION        )  
              CITATIONS                        )

**ORDER GRANTING IN PART AND DENYING IN  
PART CONTESTANTS' MOTION TO COMPEL**

**ORDER DIRECTING INSPECTOR GENERAL  
TO SUBMIT DOCUMENTS FOR  
IN CAMERA INSPECTION**

At the request of Contestants represented by the law firm of Jackson and Kelly, I issued a subpoena duces tecum which was served on the United States Department of Labor, Office of the Inspector General (OIG) on July 2, 1992. The subpoena directed the OIG to produce all documents in its possession concerning MSHA Internal Investigation No. 890014, OIG Case No. 30-0801-0036, relating to the investigation of alleged tampering with coal dust cassette samples. Some documents were withheld in whole or in part based on claims of privilege.

On July 6, 1992, Contestants filed a motion to compel arguing that the privileges claimed by the OIG do not permit their refusal to comply with the subpoena. On July 7, 1992, Contestants filed an amended motion to compel, seeking, in addition to an order compelling the production of documents called for in the subpoena, the address of Carter Elliott the lead OIG investigator in the case. On July 14, 1992, Contestants filed a supplement to the motion to compel, seeking, in addition to the order sought by the prior motion, an order compelling "a search of possibly related OIG files for AWC materials." On July 22, 1992, Contestants filed a second supplement to the motion to compel. On July 29, 1992, after an order was issued granting an extension of time, OIG filed an opposition to the motion to compel. It filed a memorandum in support of its opposition and a declaration of the Inspector General Julian W. De La Rosa. Also submitted with the opposition were copies of additional documents with certain excisions provided in response to the subpoena duces tecum.

The declaration of Inspector General De La Rosa describes in numbered paragraphs the documents or portions of documents withheld, and the privilege or privileges asserted for the non-disclosure. For convenience in deciding the motion, I will use

Paragraphs 6 and 7 of the declaration indicate that 66 of the 67 Reports of Interviews originally withheld are released to Contestants with the names of the persons interviewed and other information which would lead to disclosure of their identities excised. Also withheld are dust data cards and related materials attached to some of the reports because these would identify the persons interviewed. The declaration further states that excisions were made of any part of interviews which would divulge any OIG investigative techniques or strategies, but I have not seen any indication of such excisions in the 66 reports. The excisions are based on the investigative privilege and the informant privilege. The investigative privilege protects from disclosure documents prepared or received in the course of a civil or criminal investigation, especially when disclosure would interfere with enforcement proceedings. Black v. Sheraton Corporation of America, 564 F.2d 531 (D.C. Cir. 1977); Bristol Meyers Co. v. Federal Trade Commission, 424 F.2d 935 (D.C. Cir. 1970), cert. denied, 400 U.S. 824 (1970). The informant privilege (also termed the informer's privilege) protects from disclosure the identity of persons furnishing information to law enforcement officials. Rovaro v. United States, 353 U.S. 53 (1957); Secretary/Logan v. Bright Coal Company Inc., 6 F.M.S.H.R.C. 2520 (1984). Both are qualified privileges and where disclosure is essential to a fair determination of a case, the privilege must yield. In this case the names of the inspectors who were the subjects of the OIG investigation have been disclosed to Contestants. They have not shown or even asserted that disclosure of the identities of the inspectors for each of the disclosed reports is necessary for their defense. The motion to compel and the motion for in camera inspection will be denied with respect to the excisions having to do with the identity of the subjects of the interviews covered by the reports. The OIG also excised portions of one sentence from four interview reports which contain information covered by Rule 6(e). I accept the representations of the Inspector General with respect to these excisions and will deny the motion to compel. The declaration (paragraph 7) also states that one Report of Interview is being withheld in its entirety because it "contains extremely sensitive information and allegations which are raw and uncorroborated." The long term intelligence gathering abilities of OIG would be compromised, according to the declaration, if it were disclosed. I accept the representations and will not order disclosure of that one Report of Interview.

Paragraph 8 of the declaration asserts the investigative and informant privileges for 19 pages of OIG memoranda memorializing reviews of personnel files and credit bureau checks on persons OIG intended to interview. The memoranda reveal the identities of such persons and other personal information. I uphold the claims of privilege, and will deny the motion to compel and the request for an in camera inspection.

Paragraph 9 asserts the investigative privilege for a memo of a conversation between an OIG agent and a New Jersey State Police Detective. The memo concerns the OIG's use of a specific investigative technique used during the investigation, and the declaration states that disclosure of the technique could compromise future OIG investigations. Disclosure of such information is not needed in Contestants' defense, and I will deny the motion to compel and the request for in camera inspection.

Paragraph 10 invokes the deliberative process privilege for three documents (one page each) related to the OIG closing memo sent to MSHA: (1) an undated draft version of the closing memo prepared by Raymond Carroll with handwritten notes by Assistant I.A. Bassett; (2) an undated fax transmission from Carroll to Bassett; and (3) a memo from Carroll to Bassett containing comments on the final version. The documents come within the protection of the deliberative process privilege, but I will direct that they be submitted to me for in camera inspection so that I may determine whether Contestants' need for the document outweighs OIG's interest in confidentiality.

Paragraph 11 asserts the investigative and informant privileges for withheld portions of the table of contents from the OIG file "in order to protect the identities of those persons interviewed by OIG ...." I uphold the claims of privilege, and will deny the motion to compel and the motion for in camera inspection.

Paragraph 12 asserts the investigative and informant privileges for withheld portions of letters from Raymond Carroll to two Assistant U.S. Attorneys. I uphold the claims of privilege, and will deny the motion to compel and the motion for in camera inspection.

Paragraph 13 asserts the investigative and informant privileges for portions of a memorandum from Raymond Carroll to OIG Regional Inspectors which identify a mine inspector and disclose the location of interviews. I uphold the claims of privilege, and will deny the motion to compel and the motion for in camera inspection.

Paragraph 14 asserts the investigative privilege for the withheld portion of a letter from Raymond Carroll to an Assistant U.S. Attorney which contains information regarding the investigative techniques used by OIG. I uphold this privilege claim. It also claims the deliberative process privilege for a portion of paragraph five of the letter which "contains a personal characterization by OIG Special Agent Carter Elliott which does not reflect the conclusions of the OIG ...." I uphold the privilege claim, but will direct that this portion of the letter be submitted to me for in camera inspection so that I may

determine whether Contestants' need for the document outweighs OIG's interest in confidentiality.

Paragraph 15 asserts the investigative privilege for the withheld portions of a report of Carter Elliott containing information concerning the investigative techniques used by OIG during the investigation. I uphold the claim of privilege, and will deny the motion to compel and the motion for in camera inspection.

Paragraph 16 asserts the deliberative process privilege for withheld portions of a memorandum of Raymond Carroll containing "a personal characterization ... which does not reflect the opinion of the OIG ...." In addition the locations of the personal residences of MSHA inspectors have been withheld, on the basis of "personal privacy concerns." I uphold the deliberative process privilege, but will direct that the withheld portion of the document containing the "personal characterization" be submitted for in camera inspection. The personal residences of MSHA inspectors need not be disclosed or submitted for inspection.

Paragraph 17 indicates that the withheld portions of the OIG "predication memorandum" have been disclosed.

Paragraph 18 asserts the deliberative process privilege for a draft memorandum from I. A. Bassett of OIG to Jerry Spicer of MSHA. The draft was prepared by Raymond Carroll and forwarded to OIG headquarters but no further action was taken and it was never sent to Spicer. I uphold the claim of privilege, but will direct that the document will be submitted for in camera inspection so that I may determine whether Contestants' need for the document outweighs OIG's interest in confidentiality.

Paragraphs 19 and 20 refer to information received from the U.S. Attorney and from an agent of the grand jury which is stated to be subject to Rule 6(e) of the Federal Rules of Criminal Procedure. I will deny Contestants' motion to disclose the information and their motion for in camera inspection for reasons previously given in this order.

Paragraph 21 asserts the investigative and informant privileges for a handwritten note containing a reference to the location of an interview conducted by OIG. I uphold the claims of privilege, and will deny the motion to compel and the motion for in camera inspection.

Paragraph 22 asserts the attorney-client privilege for a note from Raymond Carroll concerning a telephone conversation with OIG counsel Howard Shapiro. The note describes information and advice given to Carroll. I uphold the claim of privilege, and will deny the motion to compel and the motion for in camera

inspection.

Paragraph 23 claims the attorney-client privilege for withheld portions of a handwritten note from Carroll concerning a meeting involving Carroll, MSHA counsels Doug White and Page Jackson, OIG counsels Sylvia Horowitz and Howard Shapiro, and OIG agent Carter Elliott. The withheld portions of the document describe information and advice provided by OIG counsel to Carroll. I uphold the claim of privilege, and will deny the motion to compel and the motion for in camera inspection.

Paragraph 24 states that the Inspector General believes "it is inappropriate" to disclose the home address of former OIG Special Agent Carter Elliott and has instructed OIG counsel to resist such disclosure. Carter Elliott was, according to Contestants' motion to compel, the lead OIG investigator in the investigation of the MSHA inspectors. He has since retired from the Government. According to OIG counsel he is aware of the outstanding subpoena for his testimony. OIG counsel argues that Mr. Elliott's address is contained in his official personnel file which is protected from disclosure by the Privacy Act, 5 U.S.C. 552a(a)(5). Section (b)(11) of the Act permits disclosure "pursuant to the order of a court of competent jurisdiction." OIG argues that as an administrative law judge I am not a court of competent jurisdiction. It does not dispute my jurisdiction to compel discovery under the Fed. Rules of Civ. P., nor my jurisdiction to issue subpoenas. In Barron's Law Dictionary, (2d ed. 1984) p. 82, a "competent court" is defined as "one having proper jurisdiction over the person and property at issue." The issue in the cases before me are whether mine operators, including Contestants, were involved in altering the weights of respirable dust samples. The OIG investigation concerned a closely related matter, "the possible tampering of respirable dust sample cassettes by mine safety inspectors." (OIG memorandum, p. 2). Mr. Elliott was involved as a Government agent in that investigation. He may have information important to Contestants' defense. The cases before me have been consolidated for an issues trial scheduled to commence on December 1, 1992. To facilitate the early completion of discovery, I will order OIG to disclose the home address of Mr. Elliott unless he agrees to present himself for his deposition. If, as OIG counsel asserts, the release of his address may compromise his and his family's safety, and subject him to harassment, he can avoid these consequences by agreeing to testify.

Contestants further seek an order to compel a search of other OIG files possibly related to those covered by the subpoena duces tecum. No good reason has been advanced for broadening the scope of the subpoena, and the request will be denied.



ORDER

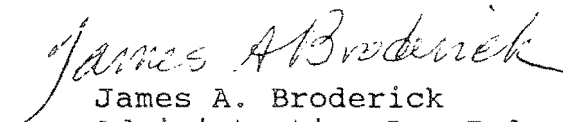
Therefore, IT IS ORDERED

1. The motion to compel is DENIED with respect to the withheld documents or portions of documents described in paragraphs 6, 7, 8, 9, 11, 12, 13, that part of paragraph 14 referring to a description of investigative techniques, 15, 19, 20, 21, 22, and 23 of the Declaration of Inspector General Julian W. De La Rosa.

2. The motion to compel is GRANTED with respect to paragraph 24 of the Declaration referring to the home address of Carter Elliott, unless on or before September 15, 1992, Mr. Elliott agrees to present himself for a deposition by Contestants' counsel.

3. The OIG is DIRECTED to submit to me for in camera inspection on or before September 15, 1992, the withheld documents or portions of documents described in paragraph 10, that part of paragraph 14 referring to paragraph five of the letter, that part of paragraph 16 containing the personal characterization of Raymond Carroll, and paragraph 18 of the Declaration of the Inspector General.

4. The motion to compel a search of other "possibly related OIG files for AWC materials" is DENIED.

  
James A. Broderick  
Administrative Law Judge

Distribution:

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All Others Regular Mail

/fas

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

AUG 26 1992

SECRETARY OF LABOR,	)	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	)	
ADMINISTRATION (MSHA),	)	Master Docket No. 91-1
Petitioner	)	Docket Nos. WEST 91-475
v.	)	through WEST 91-476
	)	
ENERGY FUELS COAL, INC.,	)	A.C. Nos. 05-03455-03594D
Respondent	)	and 05-03771-03526D
	)	
	)	Southfield and Raton
	)	Creek No. 1 Mine

ORDER DENYING PROTECTIVE ORDER  
ORDER STAYING DISCOVERY

On June 25, 1992, the Secretary filed a motion for a protective order to provide that the Secretary need not answer the written discovery propounded by Respondent Energy Fuels on June 12, 1992. The Secretary contends that the discovery requests are untimely under the Discovery Plan. Energy Fuels filed a response on July 10, 1992.

The discovery requests of Energy Fuels are clearly case-specific. Therefore, they are not untimely under the Discovery Plan. The motion for a protective order is DENIED.

However, my order of August 13, 1992, scheduling a common issues trial stayed case-specific discovery. In accordance with that order, the discovery sought by Energy Fuels in its Requests for Admissions, Interrogatories and Requests for Production of Documents served on the Secretary June 12, 1992, is STAYED until further order.

*James A. Broderick*

James A. Broderick  
Administrative Law Judge

# 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 1992**

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 92-31
Petitioner	:	A. C. No. 36-00958-03917
	:	
v.	:	Mine No. 84
	:	
BETHENERGY MINES,	:	
INCORPORATED,	:	
Respondent	:	

## DECISION DENYING SETTLEMENT MOTION

Before: Judge Fauver

This case involves a petition for assessment of civil penalties under § 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

The parties have moved for approval of a settlement.

### The Meaning of a "Significant and Substantial" Violation

Since the settlement motion proposes to reduce the alleged violation from "significant and substantial" to "non-significant and substantial" violations, it will be helpful to review the meaning of this statutory term.

The Commission has held that a violation is "significant and substantial" if there is a "reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." U.S. Steel Mining Co., Inc., 7 FMSHRC 327, 328, (1985); Cement Division, National Gypsum Co., 3 FMSHRC 822, 825, (1981); Mathies Coal Co., 6 FMSHRC 1, 3-4, (1984). This evaluation is made in terms of "continued normal mining operations" (U.S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1574 (1984)), and must be based on the particular facts surrounding the violation. (Texasgulf, Inc., 10 FMSHRC 498, (1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 1007, (1987)).

Analysis of the statutory language and the Commission's decisions indicates that the test of an S&S violation is a practical and realistic question whether, assuming continued

possibility of resulting in injury or disease, not a requirement that the Secretary of Labor prove that it is more probable than not that injury or disease will result. See my decision in Consolidation Coal Company, 4 FMSHRC 748-752 (1991). The statute, which does not use the phrase "reasonably likely to occur" or "reasonable likelihood" in defining an S&S violation, states that an S&S violation exists if "the violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard" (§ 104(d) (1) of the Act; emphasis added). Also, the statute defines an "imminent danger" as "any condition or practice.... which could reasonably be expected to cause death or serious physical harm before [it] can be abated,"<sup>1</sup> and expressly places S&S violations below an imminent danger.<sup>2</sup> It follows that the Commission's use of the phrase "reasonably likely to occur" or "reasonable likelihood" does not preclude an S&S finding where a substantial possibility of injury or disease is shown by the evidence, even though the proof may not show that injury or disease was more probable than not.

**The Proposed Settlement**  
**Citation No. 3689748**

Inspector Violet Statlers issued § 104(a) Citation No. 3689748 on July 31, 1991, alleging a violation of 30 C.F.R. § 75.1704. The Inspector observed that the alternate escapeway out of the 53P active section was not maintained in safe travelable condition for all persons, including disabled persons, because of an accumulation of water from rib to rib, 18 to 20 inches deep, in a low slope between the end of the track and the load center for a distance of 15 to 20 feet. The Inspector found that failure to observe the safety standard was due to moderate negligence because the violative condition would have been readily apparent to an experienced mine foreman. He found that injury to one person was reasonably likely to occur as a result of this hazard, and, therefore, that the violation was "significant and substantial." MSHA proposed a penalty of \$265.

The settlement motion states that, after further review, particularly the facts that (1) SCSR's are stored at the entrance to the intake escapeway, (2) a CO monitor system was in place which would alert miners if there was smoke in the alternate escapeway before smoke became thick, and (3) if the water was an impediment the adjacent belt entry could be traveled until the

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<sup>1</sup> Section 3(j) of the 1969 Mine Act, unchanged by the Federal Mine Safety and Health Act of 1977; emphasis added.

<sup>2</sup> Section 104(d) (1) limits S&S violations to conditions that "do not cause imminent danger...."

water was bypassed, MSHA seeks<sup>3</sup> to modify the citation as follows:

- a. Item 10 a, change to "unlikely."
- b. Item 10 c, change to "non S&S."

The motion does not state or present facts sufficient to conclude that the water accumulation in the alternate escapeway did not present a substantial possibility of injury or harm to miners who might try to use the escapeway in an emergency including fire, smoke, or an effort to take an injured or unconscious person out of the mine.

Citation No. 3689771

Inspector Alvin L. Shade issued § 104(a) Citation No. 3689771 on July 31, 1991, alleging a violation of 30 C.F.R. § 75.1712-3(a). The Inspector observed that the bathing facilities at the truck repair shop were not maintained in a sanitary condition as mildew was accumulated on the walls approximately four feet in height. The Inspector found that failure to observe the safety standard was due to moderate negligence because the violative condition would have been readily apparent to an experienced mine foreman. He found that injury or sickness was reasonably likely to occur as a result of this hazard, and, therefore, that the violation was "significant and substantial." MSHA proposed a penalty of \$206.

The settlement motion states that, after further review, particularly of the fact that this was not the main shower area and there was no condition found presenting an immediate hazard, MSHA seeks to modify the citation as follows:

- a. Item 10 a, change to "unlikely."
- b. Item 10 c, change to "non S&S."

The motion does not state or present facts sufficient to conclude that the mildew condition did not present a substantial possibility of resulting in injury or sickness.

The parties may file an amendment to delete the requested modifications, or file a revised motion showing reasonable factual bases for the proposed modifications.

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<sup>3</sup> The motion states that MSHA has already modified the citation. However, MSHA has no authority to settle, reduce, or modify a charge of violation after a petition for civil penalty has been filed with the Commission, without approval of the presiding judge or the Commission. The motion is therefore deemed to be a request for approval to modify the citation.

Accordingly, the settlement motion is DENIED.



William Fauver  
Administrative Law Judge

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