AUGUST 1994

COMMISSION DECISIONS AND ORDERS

ADMINISTRATIVE LAW JUDGE DECISIONS

ADMINISTRATIVE LAW JUDGE ORDERS

AUGUST 1994

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

Secretary of Labor, MSHA v. Susquehanna - Mt. Carmel, Inc., Docket No. PENN 93-119. (Chief Judge Merlin, unpublished Default issued November 22, 1993)

Secretary of Labor, MSHA v. RNS Services, Inc., and Mase Transportation Company, Docket No. PENN 93-343, etc. (Judge Melick, June 27, 1994)

Secretary of Labor, MSHA v. Mechanicsville Concrete, Inc., t/a Materials Delivery, Docket No. VA 93-145-M. (Judge Amchan, July 7, 1994)

Secretary of Labor, MSHA v. Boyer Ready Mix Sand & Rock, Docket No. CENT 93-39-M. (Chief Judge Merlin, unpublished Default issued June 28, 1994)

Secretary of Labor, MSHA v. Monarch Cement Company, Docket No. CENT 94-96-M. (Chief Judge Merlin, unpublished Default issued July 20, 1994)

Secretary of Labor, MSHA v. COntractors Sand & Gravel Supply, Inc., Docket Nos. WEST 93-62-M, etc. (Judge Cetti, July 21, 1994)

Review was denied in the following case during August:

Larry Swift, Mark Snyder & Randy Cunningham v. Consolidation Coal Company, Docket No. PENN 91-1038-D. (Judge Melick, June 30, 1994)

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 1, 1994

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. PENN 93-119
SUSQUEHANNA - MT. CARMEL, INC.	:	

BEFORE: Jordan, Chairman; Backley, Doyle and Holen, Commissioners

ORDER

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988). On November 22, 1993, Chief Administrative Law Judge Paul Merlin issued an Order of Default to Susquehanna - Mt. Carmel, Inc. ("Susquehanna") for its failure to answer the Secretary of Labor's proposal for assessment of civil penalty or the judge's July 27, 1993, Order to Show Cause. The judge ordered the payment of civil penalties of $4,400.

In a letter to the judge dated May 16, 1994, Joseph Rasmus requests that the default order against Susquehanna be set aside. Rasmus states that the Secretary does not oppose the operator's request. Rasmus does not offer an explanation for Susquehanna's failure to file an answer to the Secretary's penalty proposal or to respond to the judge's Order to Show Cause.

The judge's jurisdiction over this case terminated when his decision was issued on November 22, 1993. Commission Procedural Rule 69(b), 29 C.F.R. § 2700.69(b)(1993). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). Susquehanna did not file a timely petition for discretionary review within the 30-day period and the Commission did not sua sponte direct this case for review. Thus, the judge's decision became a final decision of the Commission 40 days after its issuance. 30 U.S.C. § 823(d)(1).

Relief from a final Commission judgment or order on the basis of inadvertence, mistake, surprise or excusable neglect is available to a party under Fed. R. Civ. P. 60(b)(1). 29 C.F.R. § 2700.1(b)(Federal Rules of Civil Procedure apply "so far as practicable" in the absence of applicable Commission rules); Lloyd Logging, Inc., 13 FMSHRC 781, 782 (May 1991). It

appears from the record that Susquehanna wishes to pursue its contest of the alleged violations.

In the interest of justice, we reopen this proceeding and deem Susquehanna's May 16 letter to be a request for relief from a final Commission decision incorporating a late-filed petition for discretionary review and excuse its late filing. See, e.g., Kelley Trucking Co., 8 FMSHRC 1867, 1868-69 (December 1986). On the basis of the present record, however, we are unable to evaluate the merits of Susquehanna's position. We remand the matter to the judge, who shall determine whether default is warranted. See Hickory Coal Co., 12 FMSHRC 1201, 1202 (June 1990); Cougar Coal Company, Inc., 15 FMSHRC 967, 968 (June 1993).

For the reasons set forth above, we vacate the judge's default order, grant the petition for discretionary review, and remand for further proceedings.

Mary Lu Jordan, 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, N.W., SIXTH FLOOR
WASHINGTON, D.C. 20006

August 5, 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. CENT 93-39-M
BOYER READY MIX SAND & ROCK, INC.	:	

ORDER

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"). On June 28, 1994, Administrative Law Judge August F. Cetti issued a Default Decision to Boyer Ready Mix Sand & Rock, Inc. ("Boyer") for failing to answer the July 27, 1993, Prehearing Order or the judge's April 8, 1994, Order to Show Cause. The judge assessed the civil penalty of $6168 proposed by the Secretary of Labor ("Secretary").

On July 25, 1994, the Commission received a letter from Boyer's President, Bill Boyer, stating that he had engaged in settlement discussions with two attorneys representing the Secretary and had agreed to settle the cases. Mr. Boyer apparently believes that substitution of counsel by the Secretary delayed the filing of a settlement motion with the judge, who had issued his decision by the time the motion was filed.

The judge's jurisdiction in this matter terminated when his decision was issued on June 28, 1994. Commission Procedural Rule 69(b), 29 C.F.R. § 2700.69(b)(1993). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). We deem Boyer's letter to be a timely filed Petition for Discretionary Review, which we grant. See, e.g., Middle States Resources, Inc., 10 FMSHRC 1130 (September 1988).

On the basis of the present record, we are unable to evaluate the merits of Boyer's position. In the interest of justice, we remand this matter to the judge, who shall determine whether default is warranted. See Hickory Coal Co., 12 FMSHRC 1201, 1202 (June 1990)

For the reasons set forth above, we vacate the judge's default order and remand this matter for further proceedings.

Mary Lu Jordan, Chairman

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 5, 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket Nos. VA 93-59-M
	:	VA 93-80-M
W.S. FREY COMPANY, INC.	:	VA 93-89-M

BEFORE: Jordan, Chairman; Backley, Doyle and Holen, Commissioners

ORDER

BY THE COMMISSION:

On July 5, 1994, W.S. Frey Co., Inc. ("Frey") filed with the United States Court of Appeals for the Fourth Circuit a petition for review of the decision of Administrative Law Judge David F. Barbour in this matter. (No. 94-1860); 16 FMSHRC 975 (April 1994)(ALJ).[1] On that same day, Frey filed with the Commission a Motion for Stay Pending Appeal asserting that it has "exhausted all administrative remedies available," that it "has filed a petition for review" with the Fourth Circuit, and that it will request the Court to set aside the judge's decision. The Secretary has opposed Frey's motion on the grounds that Frey failed to address any of the elements required for a stay.

Frey's motion was made pursuant to Rule 18 of the Federal Rules of Appellate Procedure, which provides that "[a]pplication for a stay of a decision or order of an agency pending direct review in the court of appeals shall ordinarily be made in the first instance to the agency." Section 106(a)(1) of the Mine Act, 30 U.S.C. § 816(a)(1), states that, upon appeal of a final decision of the Commission, the court of appeals shall have exclusive jurisdiction in the proceeding at such time as the record before the Commission is filed with the court. Because the record has not yet been filed, the Commission has jurisdiction to consider Frey's motion. Secretary on behalf of Smith v. Helen Mining Co., 14 FMSHRC 1993, 1994 (December 1992).

In Secretary on behalf of Price and Vacha v. Jim Walter Resources, Inc., 9 FMSHRC 1312 (August 1987), the Commission held that a party seeking a stay must satisfy the factors in Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958). Those factors include: (1) likelihood of prevailing on the merits of the appeal; (2) irreparable harm if the stay is not granted; (3) no adverse effect on other interested parties; and (4) a showing that the stay is in the public interest. Virginia Petroleum, 259 F.2d at 925. The court made clear that a stay constitutes "extraordinary relief." Id.

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[1] The Commission did not direct review of the judge's decision and it became a final decision of the Commission pursuant to 30 U.S.C. § 823(d)(1).

Upon consideration of Frey's motion and the Secretary's opposition, we conclude that Frey has failed to show the factors justifying stay of an agency order pending judicial review. Accordingly, Frey's motion is denied.

Mary Lu Jordan, 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 16, 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	CIVIL PENALTY PROCEEDING Docket No. CENT 94-96-M
v.	:	
MONARCH CEMENT COMPANY	:	

ORDER

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"). On July 20, 1994, Chief Administrative Law Judge Paul Merlin issued an Order of Default to Monarch Cement Company ("Monarch") for failing to answer the proposal for assessment of penalty filed by the Secretary on March 16, 1994, and the judge's May 16, 1994, Order to Show Cause. The judge assessed the civil penalty of $506 proposed by the Secretary.

On July 25, 1994, the Commission received a letter from Monarch, addressed to Judge Merlin, requesting that he reconsider the Order of Default. Attached to Monarch's letter of reconsideration were letters dated March 30, 1994, and May 20, 1994, addressed to the Commission's Washington D.C. office, in which Monarch had responded to the penalty proposal and the Order to Show cause, respectively.

The judge's jurisdiction in this matter terminated when his decision was issued on July 20, 1994. Commission Procedural Rule 69(b), 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823 (d)(2); 29 C.F.R. § 2700.70(a). We deem Monarch's letter to be a timely filed Petition for Discretionary Review, which we grant. See, e.g., Middle States Resources, Inc., 10 FMSHRC 1130 (September 1988).

On the basis of the present record, we are unable to evaluate the merits of Monarch's position. In the interest of justice, we remand this matter to the judge, who shall determine whether default is warranted. See Hickory Coal Co., 12 FMSHRC 1201, 1202 (June 1990).

For the reasons set forth above, we vacate the judge's default order and remand this matter for further proceedings.

Mary Lu Jordan, Chairman

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 17, 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of RONNY BOSWELL	:	
v.	:	Docket No. SE 93-48-DM
NATIONAL CEMENT COMPANY	:	

BEFORE: Jordan, Chairman; Backley, Doyle and Holen, Commissioners

DECISION

BY: Backley, Doyle and Holen, Commissioners

This discrimination proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)("Mine Act" or "Act"), presents the issue of whether National Cement Company ("National Cement") unlawfully suspended Ronny Boswell for three days in violation of section 105(c)(1) of the Act, 30 U.S.C. § 815(c)(1).[1] Administrative Law Judge Gary Melick dismissed the discrimination complaint filed on Boswell's behalf by the Secretary of Labor. 15 FMSHRC 1250 (June 1993)(ALJ). The judge concluded that, although the Secretary had established a prima facie case of discrimination, National Cement

[1] Section 105(c)(1) of the Mine Act provides:

> No person shall discharge or in any manner discriminate against ... any miner ... because such miner ... has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine....

had defended affirmatively by proving that it would have suspended Boswell in any event for his unprotected activity alone. The Commission granted the Secretary's petition for discretionary review. For the reasons stated below, we affirm the judge's decision.

I.

Factual and Procedural Background

Ronny Boswell operated a front-end loader at National Cement's plant in Ragland, Alabama. On December 27, 1991, Boswell, working the night shift, carried out the required examination of a 950 payloader before operating it. 15 FMSHRC at 1252-53. There were two sets of lights on the front of the loader, one factory-installed set seven feet above the ground and an additional set installed by National Cement on the cab, 12 feet above the ground. Id. at 1253. Boswell noticed that the bracket holding one of the lower lights was bent, causing the beam to be misdirected, and that the other lower light was burnt out; the upper lights were in working order. Id.; Tr. I 38-39, 48-50. He indicated in his inspection report that the lower lights were faulty and also noted that "[t]otal disregard" by the operator of defects in mobile equipment could lead to damage or injury. 15 FMSHRC at 1252-53; Tr. I 38-39; G. Ex. 1.[2] During the preceding 12 days, he had reported problems with the loader's lights on nine different occasions but had operated the equipment. 15 FMSHRC at 1252-53; G. Ex. 2.

That night, Boswell operated the 950 loader in the clay house, where overhead lighting eliminated the need for equipment lights. Around 12:30 a.m., Rudy Hall, a temporary foreman, talked with Boswell about his inspection report and Boswell stated that he meant what he wrote. Hall ordered Boswell to shut down the loader and operate the only other loader at the plant, a 540 payloader. 15 FMSHRC at 1253; Tr. I 59, 61; Tr. II 8, 48. Boswell parked the 950 loader in front of the break shack.

After operating the 540 loader for about 25 minutes, Boswell smelled antifreeze fumes emanating from a leak. He reported this condition to Hall, complaining that he "couldn't breathe." 15 FMSHRC at 1253; Tr. I 62-63, 66. Hall then instructed Boswell to return to the 950 loader, which was still parked in the break shack area; it had not been tagged out or removed from service. 15 FMSHRC at 1256; Tr. I 66, 143-44.

Boswell refused to restart the 950 loader, telling Hall that "it's in the company safety book that you can't start it up until the problem is fixed." 15 FMSHRC at 1253; Tr. I 66-68. Boswell referred to National Cement's repair requirements, which were contained in a

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[2] The judge stated that Boswell noted defects in the loader's upper lights (15 FMSHRC at 1253), but it is evident from the record and the judge's other findings that the defects were in the lower pair.

document entitled "National Cement Company Safety Procedures and Requirements."[3] 15 FMSHRC at 1253; Tr. I 66-68; G. Ex. 3. Boswell also testified at hearing that he was prohibited by the Secretary's regulations, including 30 C.F.R. § 57.14100(c), from resuming operation of the 950 loader until it was repaired.[4] Tr. I 70-73, 76, 123; Tr. II 169.

Boswell and Hall argued over the work assignment, and Boswell requested a safety review by his union representative. Hall declined to contact the representative but did call Cedric Phillips, the company safety director, who came to the plant and examined the loader. At Phillips' direction, the bent light bracket was straightened and Boswell replaced the burnt-out light. Boswell then resumed operating the 950 loader and continued for the remainder of the shift. 15 FMSHRC at 1254.

On January 13, 1992, National Cement disciplined Boswell, suspending him from work for three days because of the events of December 27. 15 FMSHRC at 1254; G. Ex. 6. Boswell filed a discrimination complaint with the Department of Labor's Mine Safety and Health Administration ("MSHA") and, on October 28, 1992, the Secretary filed the present complaint on Boswell's behalf, pursuant to section 105(c)(2) of the Mine Act, 30 U.S.C. § 815(c)(2).

The judge found that Boswell had engaged in protected activities when he reported the 950 loader's defective lights in his December 27 inspection report, when he complained about the lights on prior occasions, and when he refused to operate the 540 loader because of the antifreeze fumes in the cab. 15 FMSHRC at 1254-55. The judge further found that the disciplinary action against Boswell was motivated, at least in part, by these protected activities and, accordingly, determined that the Secretary had established a prima facie case of discrimination. Id. at 1255.

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[3] Paragraph (g) on page 4 of that document states:

> Report and, if possible, repair any defects found. Do not use machine with uncorrected safety defects which present a hazard. If the loader is unsafe and removed from service, tag it to prohibit further use until repairs are completed.

G. Ex. 3.

[4] 30 C.F.R. 57.14100(c) provides:

> When defects make continued operation hazardous to persons, the defective items including self-propelled mobile equipment shall be taken out of service and placed in a designated area posted for that purpose, or a tag or other effective method of marking the defective items shall be used to prohibit further use until the defects are corrected.

The judge concluded, however, that National Cement affirmatively defended against the prima facie case by proving that it would have taken the adverse action against Boswell solely on the basis of his unprotected activity, i.e., his insubordination in refusing to operate the 950 loader for reasons unrelated to safety. 15 FMSHRC at 1255-56. The judge noted that a miner's right to refuse work under the Act must be premised on a belief that the work involves a hazard, and he emphasized that Boswell insisted that he had no such belief or concern. Id. at 1256. The judge rejected the Secretary's contention that a miner should be permitted to refuse work on the basis of a good faith, reasonable belief that the work violates a mandatory standard. Also, assuming arguendo that the Secretary's "legal theory [was] correct," the judge determined that the evidence did not demonstrate, within the meaning of section 57.14100(c), that the 950 loader had been removed from service. Id. The judge concluded that Boswell had failed to meet his burden of proving a good faith, reasonable belief that operating the loader would have violated a standard and, accordingly, he dismissed the discrimination complaint. Id.

II.

Disposition

The principles guiding the Commission's analysis of discrimination under the Mine Act are settled. A miner establishes a prima facie case of prohibited discrimination by proving that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-800 (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. Pasula, 2 FMSHRC at 2799-800. If the operator cannot rebut the prima facie case in this manner, he nevertheless may defend affirmatively by proving that he also was motivated by the miner's unprotected activity and would have taken the adverse action in question for the unprotected activity alone. 2 FMSHRC at 2800; Robinette, 3 FMSHRC at 817-18; see also Eastern Assoc. Coal Corp. v. FMSHRC, 813 F.2d 639, 642 (4th Cir. 1987).

The Secretary urges the Commission to recognize a miner's right under the Act to refuse work that the miner believes would violate a mandatory standard, even when he does not believe that the work poses a hazard. He seeks remand for analysis of the evidence under that test. Alternatively, the Secretary argues that Boswell's refusal to restart the 950 loader was a continuation of his prior protected activities and that the judge erred in treating the latter conduct as unprotected. In response, National Cement contends that Boswell's refusal to restart the 950 loader was unprotected and was separate from his protected activities. It further asserts that, in order for Boswell's work refusal to be protected, it must have been based on a threat to health or safety, and that a perceived violation of a mandatory standard, by itself, is not sufficient to justify a work refusal.

The primary issue on review is whether the judge erred in finding that National Cement affirmatively defended against the prima facie case by showing that Boswell's conduct in refusing to restart the loader was unprotected and that he would have been suspended for that unprotected activity alone. We conclude that the judge did not err.

The fundamental purpose of the Mine Act is to provide miners with more effective protection against hazardous conditions and practices. 30 U.S.C. § 801. Section 2(a) of the Act emphasizes that "the first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource - the miner." 30 U.S.C. § 801(a).

The Act grants miners the right to complain of a safety or health danger or violation, but does not expressly grant the right to refuse to work under such circumstances. Nevertheless, the Commission and the courts have inferred a right to refuse work in the face of a perceived hazard. See Secretary on behalf of Cooley v. Ottawa Silica Co., 6 FMSHRC 516, 519-21 (March 1984), aff'd 780 F.2d 1022 (6th Cir. 1985); Paula Price v. Monterey Coal Co., 12 FMSHRC 1505, 1514 (August 1990)(citations omitted). In order to be protected, work refusals must be based upon the miner's "good faith, reasonable belief in a hazardous condition." Robinette, 3 FMSHRC at 812; Gilbert v. FMSHRC, 866 F.2d 1433, 1439 (D.C. Cir. 1989). The complaining miner has the burden of proving both the good faith and the reasonableness of his belief that a hazard existed. Robinette, 3 FMSHRC at 807-12; Secretary on behalf of Bush v. Union Carbide Corp., 5 FMSHRC 993, 997 (June 1983). A good faith belief "simply means honest belief that a hazard exists." Robinette, 3 FMSHRC at 810. Miners may, under existing case law, justify a work refusal based on a violation of a standard if that violation also involves a hazard.

To date, neither the Commission nor the Courts of Appeals have extended the right of work refusal to encompass refusals based on violations of standards that do not involve hazardous conditions. The Secretary's theory that the Act protects a work refusal premised on a belief in a nonhazardous violation of a standard proposes a substantial and unwarranted departure from the Commission's case law.

Boswell maintained throughout the hearing that he did not regard the 950 loader as hazardous or unsafe to operate. 15 FMSHRC at 1256; Tr. I 59-60, 76-80, 91, 177-78. To accord protection to a work refusal premised on a nonhazardous condition would go beyond the language of section 105(c) and the basic purpose of the Act. We reject the Secretary's suggestion that the Commission substantially extend miners' rights to refuse work under the Act.

Even if we were to assume, arguendo, as the judge did, that a miner has a right to refuse nonhazardous work on the basis that such work would violate a safety standard, we agree with the judge that the Secretary failed to prove that Boswell entertained a good faith, reasonable belief that operation of the 950 loader would have violated section 57.14100(c). 15 FMSHRC at 1256. Indeed, Boswell's belief, as it is presented in the record, would weigh

against any conclusion that section 57.14100(c) was violated; that section expressly addresses the operation of hazardous equipment and Boswell, by his own testimony, maintained that a hazard did not exist. Further, the evidence demonstrates that the loader had no hazardous defect and it had not been removed from service and placed in a designated area or otherwise tagged out. We note that the Secretary did not cite the operator for a violation of section 57.14100(c). Finally, as the judge found, it was not clear that Boswell even raised the safety standard to Foreman Hall at the time of his work refusal. 15 FMSHRC at 1253. The Commission has held that a miner's failure to communicate his safety concern to the operator may strip a work refusal of its protection under the Act. Braithwaite v. Tri-Star Mining, 15 FMSHRC 2460; 2464-65 (December 1993).

We reject the Secretary's alternative argument that Boswell's refusal to restart the loader was inextricably connected to his previous complaints and should share their protected status. Although Boswell had made various complaints about the defective lights on the 950 loader, his refusal to restart the loader, according to his own statements at trial, was not based on safety concerns. Thus, we conclude that Boswell's earlier protected activities did not render his work refusal protected. See, generally, Cooley, 6 FMSHRC at 520-22.

Accordingly, we affirm the judge's determination that Boswell's refusal to restart the loader was not protected and that National Cement affirmatively defended against the Secretary's prima facie case.

III.

Conclusion

For the foregoing reasons, the judge's decision is affirmed.

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

Jordan, Chairman, concurring in the result:

I agree with my colleagues that the judge's decision dismissing Boswell's discrimination complaint should be affirmed. I reach that result on the basis that substantial evidence supports the judge's determination that Boswell did not entertain a reasonable belief that operating the 950 loader would have violated a mandatory safety standard.[1] Given that fact, I find it unnecessary to address the issue of whether a work refusal can ever be protected under section 105(c), when the miner has a reasonable belief that performing such work would violate a mandatory safety standard, but does not believe the job would pose a hazard.

By its terms, the standard which Boswell purportedly thought operation of the 950 loader would violate, 30 C.F.R. §57.14100(c), applies "[w]hen defects make continued operation hazardous to persons . . ." (emphasis supplied). Boswell repeatedly testified, however, that he did not believe that the 950 loader presented a safety hazard. Tr. I 58-60, 76-77, 79, 85, 91, 997; 15 FMSHRC at 1256. Moreover, Boswell admitted that he had read section 57.14100 on several occasions prior to the work refusal at issue here, and that he was familiar with the regulation. Tr. I 71-73. In light of this testimony, there is no reason not to charge Boswell with actual knowledge that section 57.14100 applies only when defects cause a hazard. Therefore, like my colleagues, I agree with the judge's conclusion that Boswell did not have a reasonable, good faith belief that operating the 950 loader would violate section 57.14100(c). Unlike the majority, however, I would stop there, and refrain from reaching the broader question posed by the Secretary: whether a miner has a right under the Act to refuse work that he or she reasonably and in good faith believes would violate a mandatory standard, irrespective of the existence of a hazard.

I also do not reach the Secretary's alternative theory that Boswell's work refusal, though unprotected, falls under the penumbra of earlier protected activities engaged in by Boswell in connection with his assertion of safety complaints pertaining to the 950 loader. In my view this contention is not properly before us because it was not first addressed to the judge.

Section 113(d)(2)(A)(iii) of the Act, 30 U.S.C. §823(d)(2)(A)(iii), provides in pertinent part: "Except 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). In his post-hearing brief to the judge, the Secretary argued only that Boswell's refusal to restart the 950 loader was in and of itself protected activity due to Boswell's reasonable belief that to restart

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[1] The Commission is bound by the terms of the Mine Act to apply the substantial evidence test when reviewing an administrative law judge's decision. 30 U.S.C. § 823(d)(2)(A)(ii)(I). The term "substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (November 1989), *quoting Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).

that equipment would violate a mandatory safety standard. Sec. Post Trial Br. at 9. The Secretary did not argue below, as he does on appeal, that "Boswell's refusal to restart the 950 loader was inextricably linked to . . . two prior protected activities and therefore could not stand as independent ground for adverse action." PDR at 7. In light of his failure to squarely raise this theory before the judge, it is not surprising that the judge did not rule on the question whether an unprotected work refusal could nevertheless fall within the ambit of earlier protected activities because of the nexus between the protected and unprotected activities.

The Secretary's failure to raise this theory below is fatal to his request for Commission review on this point. The Commission has previously held that the provisions of section 113 bar Commission review of theories newly articulated on appeal. See, e.g., Beech Fork Processing, Inc., 14 FMSHRC 1316 (August 1992).

Accordingly, I would affirm the judge's decision based on his conclusion that "Boswell has [not] met his burden of proving that he entertained a good faith and reasonable belief that to operate the 950 loader would have . . . violated the cited mandatory standard."

Mary Lu Jordan, Chairman

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 25, 1994

CYPRUS PLATEAU MINING CORP.	:	
	:	
v.	:	Docket Nos. WEST 92-370-R
	:	WEST 92-485(A)
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	

BEFORE: Jordan, Chairman; Backley, Doyle and Holen, Commissioners

DECISION

BY THE COMMISSION:

This consolidated contest and 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"), involves a citation issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to Cyprus Plateau Mining Corporation ("Cyprus"), alleging a violation of 30 C.F.R. § 75.1725(a).[1] Administrative Law Judge John J. Morris upheld the citation and concluded that the violation was the result of Cyprus's unwarrantable failure to comply with the standard.[2] 15 FMSHRC 1738 (August 1993)(ALJ). Cyprus timely filed a petition for discretionary review, challenging the judge's finding of violation and his

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[1] Section 75.1725(a) states:

> Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.

[2] In his decision, the judge also ruled on a citation that alleged Cyprus violated its roof control plan. Docket No. WEST 92-371-R. The Secretary petitioned for discretionary review of portions of the judge's decision relating to that violation. We are issuing a separate decision on that petition. Cyprus Plateau Mining Corporation, 16 FMSHRC ____, (August 26, 1994). We have denominated the two civil penalty proceedings (Docket No. WEST 92-485) as (A) and (B), respectively.

conclusion as to unwarrantable failure. For the reasons that follow, we affirm.

I.

Factual and Procedural Background

Cyprus operates the Star Point No. 2 Mine, an underground coal mine, in Carbon County, Utah. On March 10, 1992, MSHA Inspector William Taylor investigated a section 103(g) complaint,[3] which alleged that on February 12 a shuttle car had been run with inoperative service brakes. Following interviews with miners and representatives of Cyprus, Taylor issued a citation, alleging that Cyprus violated section 75.1725(a) by failing to remove unsafe equipment from service. 15 FMSHRC at 1740, 1752-53.

The shuttle car in issue was a 1977 Joy model, electrically powered and weighing over 33,000 pounds. It had a top speed of less than five miles per hour and generally carried about ten tons of coal. The car had two seats so that the operator could face the direction of travel. Tram pedals, one under each seat, powered the car. In order to stop, the operator used a foot, or service, brake. An emergency brake was generally used in order to keep the car stationary. Use of the emergency brake to stop the car resulted in a delay of several seconds and an abrupt stop. 15 FMSHRC at 1753-54, 1755.

On February 12, 1992, Seldon Barker, one of the most experienced shuttle car operators at the mine, was operating the shuttle car in the number 3 section. The car ran between the face, where it was loaded by a continuous miner, and a feeder breaker, where it dumped the coal to be loaded onto a conveyor belt. The car carried the coal 600 to 700 feet, traveling over wet, uneven surfaces and around corners. Each trip took five to seven minutes; the production goal was 100 trips for each ten hour shift. 15 FMSHRC at 1753-55, 1759.

As his shift progressed, Barker found that the shuttle car's service brakes were weakening. Two hours before the end of the shift, the service brakes ceased functioning altogether. Barker spoke to his foreman, Paul Downard, who had formerly been employed as a mechanic servicing mining equipment, including shuttle cars. Barker and Downard added hydraulic fluid to the master cylinder and then bled the brakes, but no fluid was reaching them. Downard ordered a new master cylinder. Because obtaining and installing the new master cylinder would have taken the remainder of the shift, Barker suggested that

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[3] Section 103(g), 30 U.S.C. § 813 (g) provides:

> Whenever a ... miner ... has reasonable grounds to believe that a violation of this Act or a mandatory health or safety standard exists ..., such miner ... shall have a right to obtain an immediate inspection by giving notice to the Secretary....

he could continue operating the shuttle car if Downard notified everyone that the car was in an unsafe condition. 15 FMSHRC at 1754-55, 1756, 1759-60.

Barker resorted to "reverse tramming" or "feathering" the tram to stop the shuttle car. Reverse tramming involves the operator's placing his foot under the tram pedal and lifting it, thereby reversing the shuttle car's direction. Feathering the tram involves gradually engaging the tram pedal and then releasing it. Barker could also use the emergency brake to stop the shuttle car. 15 FMSHRC at 1755, 1757, 1759.

Later in the shift, Barker told Shift Foreman William Burton that the brakes were bad, that the crew had been notified, and that he was running the car "fine." Downard also mentioned to Burton that there was a problem with the brakes. 15 FMSHRC at 1755, 1758, 1760.

While Barker was at the feeder breaker unloading the shuttle car, his foot was off the tram pedal as he changed seats in anticipation of his return trip, and the shuttle car rolled about three or four feet. When Barker saw that Sheldon Anderson had walked in front of the car, he reverse trammed. Anderson, who had not been told about the bad brakes, jumped out of the way and yelled at Barker. 15 FMSHRC at 1755, 1761.

When the brakes were repaired during the next shift, a rock, which had blocked the flow of fluid, was found in the line from the master cylinder. Downard apologized to the crew for not informing everyone that the car had no brakes. 15 FMSHRC at 1755, 1757.

Cyprus contested the citation. Following an evidentiary hearing, the judge determined that Cyprus had violated section 75.1725(a). The judge further concluded that the violation was significant and substantial and resulted from Cyprus's unwarrantable failure. 15 FMSHRC at 1760-62. The Commission granted Cyprus's petition for review of the judge's decision and heard oral argument.

II.

Disposition of Issues

A. Basis for Violation

Cyprus argues that the citation was improperly based on a standard that does not specifically address shuttle car brakes. Cyprus asserts that, because there is a safeguard criterion (30 C.F.R. § 75.1403-10(1)) applicable to brakes on haulage equipment,[4] the

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[4] Section 75.1403-10(1) provides: "All self-propelled rubber-tired haulage equipment should be equipped with well maintained brakes, lights, and a warning device."

Secretary can properly cite Cyprus for the defective brakes only after first issuing a safeguard notice. Cyprus further argues that the judge committed reversible error when he failed to address this issue. C. Br. at 16-17.

In response, the Secretary argues that his issuance of a safeguard is discretionary and that Commission precedent requires the use of a mandatory standard in this situation. The Secretary asserts that the judge's failure to address this issue was harmless error. Sec. Br. at 8-12.

We agree with the Secretary. The Commission has held that, in general, it is within the Secretary's discretion "to issue mandatory standards or to issue safeguards for commonly encountered transportation hazards." Southern Ohio Coal Co., 14 FMSHRC 1, 9 (January 1992). The Commission has noted, however, that an inspector's decision to issue a safeguard "must be based on his consideration of the specific conditions at the particular mine." Id. at 7. The United States Court of Appeals for the District of Columbia Circuit has stated, "[T]he Secretary should utilize mandatory standards for requirements of universal application." UMWA v. Dole, 870 F.2d 662, 672 (1989).

In light of the foregoing principles, the Secretary's citation of Cyprus, based on a standard that requires an operator to remove unsafe equipment from operation, was proper. The hazard posed by the use of unsafe equipment does not arise from conditions specific to particular mines and thus is not properly addressed by issuance of a safeguard. Compare Green River Coal Co., 14 FMSHRC 43, 44-45, 48 (January 1992). The mine hazard at issue is amenable to a mandatory standard of universal application. We affirm the judge's holding that the use of a shuttle car without service brakes is unsafe within the meaning of section 75.1725(a), and that such equipment must be removed from service immediately. 15 FMSHRC at 1760.

We conclude that the judge, by considering the merits of the alleged violation, implicitly rejected the argument that the Secretary should have proceeded by first issuing a safeguard. See Asarco Mining Co., 15 FMSHRC 1303, 1305-06 (July 1993). We reject Cyprus's argument that, because the Commission and its judges have decided few cases involving defective brakes under section 75.1725(a), the standard has been improperly applied here.

B. Unwarrantable Failure

Cyprus argues that the judge's determination of unwarrantable failure[5] is not

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[5] The unwarrantable failure terminology is taken from section 104(d)(1), which establishes more severe sanctions for any violation that is caused by "an unwarrantable failure of [an] operator to comply with ... mandatory health or safety standards...."

supported by substantial evidence. It asserts that Foreman Downard conducted a reasonable investigation into the condition of the brakes and relied on Barker's opinion that the shuttle car could be operated, and that an unwarrantable failure determination cannot be based on the brief conversation between Barker and Shift Foreman Burton. C. Br. at 4-15. The Secretary responds that the judge's decision is supported by substantial evidence and notes that the Cyprus foremen knew of the condition of the shuttle car brakes or had sufficient information to warrant investigation of their condition. Sec. Br. 14-22.

In Emery Mining Corp., 9 FMSHRC 1997, 2001 (December 1987), 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. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." 9 FMSHRC at 2003-04; Rochester & Pittsburgh Coal Corp., 13 FMSHRC 189, 193-94 (February 1991). The Commission's determination was also based on the purpose of unwarrantable failure sanctions in the Mine Act, the Act's legislative history, and judicial precedent. Emery, 9 FMSHRC at 2002-03.

The judge concluded that the operator was highly negligent because both Downard and Burton were aware of the shuttle car's serious brake problem and failed to follow up appropriately by remedying it. 15 FMSHRC at 1762. There is substantial evidence in the record to support the judge's findings.[6] Tr. 589-90, 737, 739-40. Shift Foreman Burton testified that Barker told him that the brakes were "bad or they were screwed up." Tr. 721-22. Further, both Downard and Burton were aware that Barker had insisted that the crew be put on notice of the shuttle car's unsafe condition. Tr. 593. See Tr. 721. Additionally, Downard thought the problem was significant enough to require a new master cylinder. Tr. 590-91.

The shuttle car should have been removed from service by either Downard or Burton because both knew that the brakes were not operable. The judge correctly found that the violation was due to the operator's unwarrantable failure. See Quinland Coals, Inc., 10 FMSHRC 705, 708-09 (June 1988).

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[6] The Commission is bound by the substantial evidence test when reviewing an administrative law judge's factual determinations. 30 U.S.C. § 823(d)(2) (A)(ii)(I). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." Rochester & Pittsburgh Coal Co., 11 FMSHRC 2159, 2163 (November 1989), quoting Consolidation Edison Co. v. NLRB, 305 U.S. 197, 229 (1938).

III.

Conclusion

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

Mary Lu Jordan, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 26, 1994

CYPRUS PLATEAU MINING CORPORATION	:	
v.	:	Docket Nos. WEST 92-371-R
	:	WEST 92-485(B)
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	

BEFORE: Jordan, Chairman; Backley, Doyle and Holen, Commissioners

DECISION

BY THE COMMISSION:

This consolidated contest and 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"), involves a citation issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to Cyprus Plateau Mining Corporation ("Cyprus"), alleging a violation of 30 C.F.R. § 75.220(a)(1).[1] Administrative Law Judge John J. Morris upheld the citation but concluded that the violation was not significant and substantial ("S&S") and was not due to Cyprus's unwarrantable failure.[2] 15 FMSHRC 1738 (August 1993) (ALJ).

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[1] 30 C.F.R. § 75.220(a)(1) provides:

> Each mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used at the mine. Additional measures shall be taken to protect persons if unusual hazards are encountered.

[2] In his decision, the judge also ruled on a citation alleging Cyprus failed to remove from production a shuttle car with inoperative brakes. Docket No. WEST 92-370. The Secretary petitioned for discretionary review of portions of the judge's decision relating to that violation. We have issued a separate decision on that petition. Cyprus Plateau Mining

The Secretary timely filed a petition for discretionary review, which challenges the judge's conclusions as to S&S and unwarrantable failure. For the reasons that follow, we reverse.

I.

Factual and Procedural Background

Cyprus operates the Star Point No. 2 Mine, an underground coal mine, in Carbon County, Utah. On or about September 13, 1991, five or six miners working in either the second right or third right section under the direction of Foreman Robert Powell removed ventilation tubing from a section of the roof in the number 2 entry to avoid damaging the tubing when a continuous miner extended a crosscut into the entry. Although the entry had been permanently supported, the last 15 to 20 feet of the crosscut had not been roof bolted or otherwise supported. 15 FMSHRC at 1741, 1743, 1748. Tr. 31-32, 136-37, 235-36; Exh. M-2.

After the opening of the intersection, the ventilation tubing was rehung under the last row of roof bolts closest to the newly mined area of the crosscut. While miners supported the tubing, other miners secured it to the roof bolts with chain. The installation took several minutes to complete. 15 FMSHRC at 1748-49. Tr. at 107-08, 110-11, 239-40, 241-43, 279, 303.

On March 12, 1992, MSHA Inspectors William Taylor and Dale Smith investigated a section 103(g) complaint about the incident.[3] After interviewing several of the miners involved, MSHA issued a citation alleging Cyprus had violated its roof control plan when, after mining into a permanently supported entry from a crosscut, miners hung ventilation tubing in the intersection. 15 FMSHRC at 1740-41. Exh. M-4. Section Q of Cyprus's roof control plan stated:

> UNSUPPORTED OPENINGS AT INTERSECTIONS
>
> When a mine opening holes into a permanently supported entry, room or crosscut, or when new openings are created by starting a side cut, no work shall be done in or inby such intersection until the new opening is either

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Corp., 16 FMSHRC ____ (August 25, 1994). We have denominated the two civil penalty proceedings (Docket No. WEST 92-485) as (A) and (B), respectively.

[3] Section 103(g), 30 U.S.C. § 813(g) provides:

> Whenever a ... miner ... has reasonable grounds to believe that a violation of this Act or a mandatory health or safety standard exists, such miner ... shall have a right to obtain an immediate inspection by giving notice to the Secretary....

permanently supported, timbered off with at least one (1) row of temporary support (posts or jacks) or at least one (1) row of permanent supports are installed across the opening in the bolting pattern.

15 FMSHRC at 1741-42. Exh. M-3.

The intersection extended from the rib adjacent to the crosscut to the rib on the opposite side of the entry. Thus, under Cyprus's roof control plan, even though that area had previously been roof bolted, once the crosscut was opened up, further work in or inby the intersection was prohibited until the new opening was supported. 15 FMSHRC at 1741, 1748. Tr. 34-38; Exh. M-2.

In response to MSHA's citation and penalty proposal, Cyprus filed a notice of contest. Following an evidentiary hearing, the administrative law judge held that Cyprus had violated section 75.220(a)(1). The judge found that "work (hanging the tubing) was being done 'inby' the intersection without the new opening being supported in any manner." 15 FMSHRC at 1748. Additionally, the judge found that there was a reasonable likelihood that, while hanging the tubing, miners had stepped under the section of the crosscut that lacked any support. Id. at 1749.

The judge found that the violation was not S&S, concluding that the Secretary had failed to show a reasonable likelihood that the hazard created by the violation would result in an injury. The judge also found that the violation did not arise from the operator's unwarrantable failure, noting that Foreman Powell had "a good faith belief (although mistaken)" that some activity was permitted in the area. 15 FMSHRC at 1750-51. The Commission granted the Secretary's petition for review.

II.

Disposition of Issues

A. Significant and Substantial

The Secretary argues that the judge's determination that the violation was not S&S is not supported by substantial evidence. He further asserts that compelling evidence shows the inherent danger of working under unsupported roof, as well as the bad roof conditions existent in this mine. Sec. Br. at 4-8. In response, Cyprus argues that the judge's determination is correct, asserting that the Secretary relied on overstated evidence that addressed general roof conditions in the mine, rather than conditions specific to the violation. C. Reply Br. at 10-15.

The Commission is bound by the substantial evidence test when reviewing an administrative law judge's factual determinations. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as

adequate to support the judge's conclusion." Rochester & Pittsburgh Coal Co., 11 FMSHRC 2159, 2163 (November 1989), quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938). We are guided by the settled principle that, in reviewing the whole record, an appellate tribunal must also consider anything in the record that "fairly detracts" from the weight of the evidence that supports a challenged finding. Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951).

A violation is S&S[4] if, based on 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, 825-26 (April 1981). 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. [Footnote omitted]

See also Austin Power, Inc. v. Secretary, 861 F.2d 99, 103-04 (5th Cir. 1988), aff'g, 9 FMSHRC 2015, 2021 (December 1987) (approving Mathies criteria).

Substantial evidence does not support the judge's conclusions. In determining that the violation was not S&S, the judge concluded that the Secretary had not proven the third element of the Mathies test. He found that the Secretary's evidence did not address the specific roof conditions in the entry, that the inspector did not discuss roof conditions with the miners, and that the inspectors were not present at the time of the breakthrough. 15 FMSHRC at 1750. The judge's approach to the evidence presented in support of the S&S determination was unduly restrictive.

The Secretary's primary evidence consisted of the testimony of Inspector Taylor, who had inspected the mine on many occasions over an eight year period and was familiar with it. Tr. 20. He noted the generally poor condition of the mine roof, the history of roof falls, and the particular dangers present in newly mined intersections due to the stresses placed on both ribs and roof. Inspector Taylor noted that the crew was hurriedly attempting to complete a

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[4] 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 ...."

job before the end of the shift, when miners would be most tired, and that it would have been almost impossible to complete the work without moving under the unbolted area. Tr. 37-38, 41-45, 96-98. In addition, miners testified as to the adverse condition of the mine roof; the obstruction created by the ventilation tubing, which blocked their view of the roof and the last row of roof bolts; and the likelihood that miners moved under the unsupported roof of the crosscut while hanging the tubing. Tr. at 114-16, 138, 142-43, 154, 157-59. Commission case law makes clear that an MSHA inspector need not be present at a mine when a violation occurs in order to designate the violation S&S. See Nacco Mining Co., 9 FMSHRC 1541, 1546-47 (September 1987); White County Coal Corp., 9 FMSHRC 1578, 1580-82 (September 1987); Emerald Mines Corp., 9 FMSHRC 1590, 1593-95 (September 1987).

We reject Cyprus's argument that the Secretary's evidence was too generalized and not directed at the specific place in the mine where the violation occurred. In evaluating the presence of a hazard, the Commission has previously considered conditions on a mine-wide basis. See Texasgulf, Inc., 10 FMSHRC 498, 503 and cases cited (April 1988)(methane emissions). See also VP-5 Mining Co., 15 FMSHRC 1531, 1536-37 (August 1993)(friction generated by roof falls as an ignition source). Viewing the record as a whole, we find that it does not support the judge's conclusion that Cyprus's violation was not reasonably likely to result in an injury. Accordingly, we reverse the judge's determination that the violation was not S&S.

B. Unwarrantable Failure

The Secretary asserts that Foreman Powell "knew or should have known" that hanging ventilation tubing under unsupported roof was unsafe and prohibited under the ventilation plan, and that, if Powell mistakenly believed that the plan permitted that activity, his belief must be held in good faith and must be reasonable. Sec. Br. at 9-13. Cyprus argues that a "should have known" standard is contrary to Commission precedent, that a mistaken but good faith belief in an interpretation of a ventilation plan does not support an unwarrantable determination, and that Powell properly weighed the miners' limited exposure in hanging tubing versus what he believed to be the greater hazard miners face when they install temporary supports. As a final point, Cyprus notes, in support of Powell's interpretation of the roof control plan, that the sole plan approval criterion pertaining to unsupported openings at intersections refers to "work or travel" (see 30 C.F.R. § 75.222(e)), and Cyprus's roof control plan prohibited only "work." C. Reply Br. at 15-22.

Cyprus is correct that, according to Commission precedent, a "should have known" standard is not determinative of unwarrantable failure. Virginia Crews Coal Co., 15 FMSHRC 2103, 2107 (October 1993). In Emery Mining Corp., 9 FMSHRC 1997, 2001

(December 1987), the Commission determined that unwarrantable failure[5] 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. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference" or a "serious lack of reasonable care." 9 FMSHRC at 2003-04; Rochester & Pittsburgh Coal Co., 13 FMSHRC 189, 193-94 (February 1991). This determination was also based on the purpose of the unwarrantable failure sanctions in the Mine Act, the Act's legislative history, and judicial precedent. Emery, 9 FMSHRC at 2002-03.

The judge found that Foreman Powell had a good faith, albeit mistaken, belief that the roof control plan permitted some activity, including the installation in question, in or inby the unsupported intersection. 15 FMSHRC at 1750-51. Cyprus argues that the Commission should not review the reasonableness of Powell's interpretation of the roof control plan. See Oral Arg. Tr. at 40, 43. We disagree; the Commission has imposed a requirement as to reasonableness of belief in prior cases. The Commission has recognized that "if an operator reasonably believes in good faith that the cited conduct is the safest method of compliance with applicable regulations, even if it is in error, such conduct is not aggravated conduct constituting more than ordinary negligence." Southern Ohio Coal Co., 13 FMSHRC 912, 919 (June 1991), citing Utah Power and Light Co., 12 FMSHRC 965, 972 (May 1990). See Florence Mining Co., 11 FMSHRC 747, 753-54 (May 1989). Moreover, the Commission has used a similar approach in work refusal cases under section 105 (c), 30 U.S.C. § 815(c). A miner's work refusal constitutes protected activity when he has a good faith belief that the work involves a hazard and that belief is also reasonable. See Paula Price v. Monterey Coal Co., 12 FMSHRC 1505, 1514-15 (August 1990).

The judge erred in failing to consider the reasonableness of Powell's belief. Powell testified that, because the plan prohibited "work" but not all activity in or inby unsupported intersections, some activity was permitted, including preshifting, pulling bad ribs, sound testing for bad roof, rock dusting, and establishing ventilation; mining and roof bolting were prohibited. Tr. 245-46.

Powell's interpretation of the plan was at odds with that of Cyprus's manager of safety and health, Richard Tucker, who was responsible for roof control training at the mine. Tucker testified that the plan did not permit miners to go inby an unsupported intersection for any reason. Tr. 318. The record indicates that, on prior occasions, Powell's crew generally had not hung ventilation tubing in unsupported intersections. See Tr. 138-39. Powell's

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[5] The unwarrantable failure terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which establishes more severe sanctions for any violation that is caused by "an unwarrantable failure of [an] operator to comply with ... mandatory health or safety standards ...."

inconsistent actions in applying the provision further detract from the reasonableness, as well as the good faith, of his interpretation.

We conclude that, Powell's narrow interpretation of work, as not including the hanging of ventilation tubing, is unreasonable. We note that his interpretation of work would include only selected stages of the extraction process. It would exclude essential activities that are regulated under the Act and have long been accepted as mining work.

We reject Cyprus's argument that its weighing of miners' exposure to unsupported roof during the installation of temporary supports compared to their exposure during the task at issue militates against a finding of unwarrantable failure. Installation of temporary roof supports is required by Cyprus's roof control plan and is necessary for safe mining practice.

Powell's disregard of the requirements of the roof control plan in ordering miners to work in the intersection amounted to a serious lack of reasonable care. Accordingly, we reverse the judge's determination that the violation did not result from the operator's unwarrantable failure.

III.

Conclusion

For the foregoing reasons, we reverse the judge's decision on S&S and unwarrantability, and remand for recalculation of the civil penalty.

Mary Lu Jordan, 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 30, 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)		
v.	Docket Nos.	WEST 92-340 WEST 92-384
WYOMING FUEL COMPANY, n/k/a BASIN RESOURCES, INC.		
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)		
v.	Docket No.	WEST 93-186
EARL WHITE, employed by WYOMING FUEL COMPANY, n/k/a BASIN RESOURCES, INC.		

BEFORE: Jordan, Chairman; Backley, Doyle and Holen, Commissioners

DECISION

BY: Backley, Commissioner[1]

This consolidated 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 Secretary of Labor has charged Basin Resources, Inc. ("Basin") with two violations of 30 C.F.R. § 75.316

[1] Commissioner Backley is the only Commissioner in the majority on all issues presented.

(1991).[2] Administrative Law Judge John J. Morris concluded that Basin violated its ventilation plan and, thus, section 75.316 by: (1) making an unauthorized, major change in its ventilation system and (2) permitting excessive levels of methane to accumulate. 15 FMSHRC 1968, 1969-74, 1978-80 (September 1993)(ALJ). The judge also determined that the violation involving the change to the ventilation plan was significant and substantial ("S&S") but was not the result of Basin's unwarrantable failure to comply with the standard, and that the mine's General Manager, Earl White, had not "knowingly authorized, ordered, or carried out" the violation within the meaning of section 110(c) of the Mine Act, 30 U.S.C. § 820(c). Id. at 1974-78, 1981-82. He determined that the methane violation was neither S&S nor the result of unwarrantable failure. Id. at 1980.

For the reasons that follow, the Commission affirms in result the judge's conclusion that Basin violated its ventilation plan by changing its ventilation system; remands the issue of whether that violation was S&S; affirms the judge's determinations that this violation was not the result of unwarrantable failure and that White was not personally liable for the violation under section 110(c); and reverses the judge's determination that the methane accumulation violated Basin's ventilation plan.[3]

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[2] 30 C.F.R. § 75.316 provided:

> A ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator and set out in printed form on or before June 28, 1970. The plan shall show the type and location of mechanical ventilation equipment installed and operated in the mine, such additional or improved equipment as the Secretary may require, the quantity and velocity of air reaching each working face, and such other information as the Secretary may require. Such plan shall be reviewed by the operator and the Secretary at least every 6 months.

On November 16, 1992, 30 C.F.R. § 75.316 was superseded by 30 C.F.R. § 75.370, which imposes similar requirements.

[3] With respect to the ventilation change, all Commissioners affirm in result the judge's finding of violation. With respect to whether that violation arose from the operator's unwarrantable failure, Commissioners Backley, Doyle and Holen vote to affirm the judge's determination that it did not. Commissioners Backley, Doyle and Holen also affirm the judge's determination that White was not personally liable for the violation under section 110(c). Chairman Jordan dissents on the unwarrantable failure and section 110(c) issues. As to whether the ventilation change violation was S&S, all Commissioners vote to remand the issue. Chairman Jordan and Commissioner Backley do not reach the issue of whether a final uncontested imminent danger order can be used to establish that a violation is S&S.

I.

Factual and Procedural Background

On June 1, 1991, the Golden Eagle Mine, an underground coal mine in Weston, Colorado was purchased from Wyoming Fuel Company ("Wyoming Fuel") by Entech, Inc., the parent company of Basin. During that month, the Northwest No. 1 section, where longwall mining was being conducted, experienced methane liberation problems. In order to deal with the situation, General Manager Earl White decided on Sunday, June 23, to make a major change in the air flow. Basin changed return entry No. 3 on the longwall's headgate side to an intake entry and converted intake entries Nos. 2 and 3 on the tailgate side to return entries.

The next morning, White telephoned Inspector Donald Jordan of the Department of Labor's Mine Safety and Health Administration ("MSHA") and informed him of the change. The following morning, June 25, MSHA Inspectors Jordan and Roland Phelps visited the mine, reviewed the mine's ventilation plan, and confirmed that the plan's specified air flow in the longwall section had been changed. Inspector Jordan issued withdrawal order No. 3244406, pursuant to section 104(d)(2) of the Act, 30 U.S.C. § 814(d)(2), alleging that, by reversing the air flow, Basin was out of compliance with its ventilation plan, and that the violation was S&S and the result of unwarrantable failure.[4] The Secretary subsequently filed

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Commissioner Doyle and Commissioner Holen would reverse the judge's determination on that issue. In Pennsylvania Electric Co., 12 FMSHRC 1562, 1563-65 (August 1990), aff'd on other grounds, 969 F.2d 1501 (3d Cir. 1992), the Commission determined that the effect of an evenly split vote, in which at least two Commissioners would affirm a judge's decision, is to leave the decision standing as if affirmed. No Commissioner votes to affirm the judge's S&S determination. As a corollary to those principles, the vote of Chairman Jordan and Commissioner Backley, closest in effect to the judge's decision, is the Commission's disposition. All Commissioners reverse the judge's finding of violation based on the methane accumulations. Commissioners' separate opinions follow the decision.

[4] Order No. 3244406 states:

> The methane, ventilation and dust control plan, approved April 16, 1991 was not in compliance in the North West #1 Long Wall, MMU 009-0 in that page 3 of this addendum shows #3 headgate entry as a return air course. The air was redirected on 6-23-91 in this entry and it is now an intake and in turn the air is coursed through #1 and #2 bleeder entries toward the new proposed exhaust shaft. At the shaft, the air is coursed to #58 crosscut of the tailgate return.

a civil penalty petition against White, pursuant to section 110(c) of the Act, alleging that White had knowingly authorized the violation.

Later in the day on June 25, Inspectors Jordan and Phelps inspected the Northwest No. 1 section. Using handheld methane detectors, they measured methane concentrations of 4% to 5% and higher in the tailgate area, four feet outby the Kennedy stoppings at crosscuts 62 and 63, between the No. 3 and 4 tailgate entries. 15 FMSHRC at 1978; Tr. 35, 121-22. They also took two bottle samples of the air, which, upon testing, showed explosive concentrations of methane at 6.8% and 9.4%. Tr. 36-37, 123.

Based on these methane levels, the inspectors issued an imminent danger order to Basin pursuant to section 107(a) of the Act, 30 U.S.C. § 817(a). They also cited Basin under section 104(a) of the Act, 30 U.S.C. § 814(a), alleging, as later modified, that the methane concentration was an S&S violation of the ventilation plan and section 75.316.[5] On June 28, 1991, MSHA approved, with some modifications, Basin's ventilation changes. Gov't Ex. M-2; Tr. 165-66, 240-41, 405.

Following an evidentiary hearing, the judge concluded that, by altering the air flow required by its plan without having obtained MSHA's prior approval, Basin had failed to comply with its ventilation plan, thereby violating section 75.316. 15 FMSHRC 1970-74. The judge based his determination on a provision requiring prior approval set forth in an MSHA cover letter, which he found was part of the ventilation plan. Id. at 1971-74. He concluded that the violation was S&S, finding that a reasonable likelihood of injury had been established by the uncontested imminent danger order. Id. at 1976. He further found that the violation had not resulted from Basin's unwarrantable failure because White had a good

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[5] Citation No. 3244408 states:

> Methane in excess of 4.0% and 5.0% was present outby the Kennedy stoppings in xcut #62 and #63 between #3 and #4 entries in the #3 side of the NW LW Tailgate area. Also oxygen in amounts of 17.1% was measured with hand held detectors at least 4 ft. outby the stopping in #62 crosscut. Both samples were collected to substantiate this citation and order. This was the main contributing factor to the issuance of imminent danger order #3244407....

The citation was modified on June 27, 1991, by citation No. 3244408-01:

> Citation no. 3244408 issued 06/25/91 is hereby modified to add in part 8 that this is a violation of the methane and ventilation and dust control plan as approved on page 37, November 15, 1990, and to change part 9.C from a violation of 75.329 to 75.316.

faith, although mistaken, belief that his actions complied with the Secretary's regulations. Id. at 1976-78. The judge concluded that White was not personally liable under section 110(c) for this violation because his conduct was not "aggravated." Id. at 1981. With regard to the cited methane concentrations, the judge determined that the high methane levels violated the plan and, thus, section 75.316. Id. at 1978-80. He concluded, however, that this methane violation was not S&S or the result of Basin's unwarrantable failure. Id. He assessed a penalty of $300 for the first violation and $400 for the second violation. Id. at 1982.

The Commission granted the parties' cross-petitions for discretionary review and heard oral argument. The Secretary's petition sought review of the judge's holdings that the ventilation change was not the result of unwarrantable failure, that White was not liable under section 110(c), and that the methane accumulation was not S&S or the result of unwarrantable failure. Basin's petition sought review of the judge's determinations that the ventilation change and the methane accumulations were violations and that the ventilation change violation was S&S.

II.

Disposition

A. Change in Ventilation[6]

1. Validity of section 104(d)(2) order

As a threshold matter, Basin argues in its brief on review that the section 104(d)(2) order alleging a violation based on the change in the ventilation plan was procedurally defective. Basin argues that, because the underlying section 104(d)(1) order was issued not to Basin but to its predecessor, Wyoming Fuel, there was no "predicate" order in place and, thus, a section 104(d)(2) order could not properly be issued.[7] The order citing the ventilation plan

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[6] All Commissioners affirm in result the judge's conclusion that Basin violated section 75.316 by failing to comply with the air flow requirements of its ventilation plan.

[7] If an inspector finds a violation that is S&S and results from an unwarrantable failure by the operator to comply, a citation noting those findings is issued. This citation is commonly referred to as a "section 104(d)(1) citation" (30 U.S.C. § 814(d)(1)). Greenwich Collieries, Div. of Pa. Mines Corp., 12 FMSHRC 940, 945 (May 1990), citing Nacco Mining Co., 9 FMSHRC 1541, 1545 n.6 (September 1987). If, during the same inspection or a subsequent inspection within 90 days of such citation, another violation resulting from unwarrantable failure is found, a withdrawal order is issued under section 104(d)(1) of the Act. This is a "predicate" order. If subsequent inspections of the mine reveal additional unwarrantable failure violations, withdrawal orders are issued under section 104(d)(2) of the Act until such time as an inspection of the mine discloses no further unwarrantable failure violations. Greenwich Collieries, 12 FMSHRC at 945.

violation reflects that MSHA issued the predicate section 104(d)(1) order to Wyoming Fuel on March 21, 1991. Basin raised this issue below, but the judge did not rule on it.

Basin did not raise this issue in its petition for discretionary review, nor did the Commission direct its review sua sponte. Under the Mine Act and the Commission's procedural rules, review is limited to the questions raised in the petition and by the Commission sua sponte. 30 U.S.C. §§ 823(d)(2)(A)(iii) and (B); 29 C.F.R.§ 2700.70(f) (1993). Therefore, Basin's procedural challenge is not properly before the Commission.[8]

2. Violation

Under section 75.316, which repeated the language in section 303(o) of the Mine Act, 30 U.S.C. § 863(o), an operator was required to adopt and operate under "a ventilation system and methane and dust control plan and revisions thereof" that have been approved by the Secretary. The judge determined that Basin violated section 75.316 because it failed to obtain MSHA's prior approval before changing the air flow. 15 FMSHRC at 1970-74. He found that a prior approval requirement was contained in an MSHA cover letter attached to the mine's ventilation plan, adopted by Basin from Wyoming Fuel. Id. at 1974. Basin argues that it had no notice that MSHA's prior approval was necessary and that it was not aware of the cover letter. B. Br. 15-18. The Secretary responds that the cover letter was an effective part of the plan. S. Reply Br. 8-12.

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[8] Section 104(d)(2) provides:

> If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine.

30 U.S.C. § 814(d)(2)(emphasis added).

We note that the plain language of section 104(d)(2) addresses repeated violations at a mine, regardless of ownership. Section 104(d)(2) lifts the probationary chain only when the mine passes an inspection without an unwarrantable failure violation. Moreover, even if the section 104(d)(2) order were modified, the allegations of violation would survive. See Consolidation Coal Co., 4 FMSHRC 1791, 1794-98 (October 1982). The judge's failure to rule on Basin's argument was harmless error.

We conclude that the cover letter, upon which the judge relied, merely reiterated to the operator that, under section 75.316, a ventilation plan and revisions thereof must first be approved by MSHA. For the reasons set forth below, we reject as unreasonable the assertion of counsel for the Secretary at oral argument that, absent the cover letter, Basin's ventilation change would not have required prior approval. Oral Arg. Tr. 27-30.[9]

Once a ventilation plan is approved and adopted, its provisions and revisions are enforceable as mandatory standards. UMWA v. Dole, 870 F.2d 662, 671 (D.C. Cir. 1989); Zeigler Coal Co. v. Kleppe, 536 F.2d 398, 409 (D.C. Cir. 1976); Freeman United Coal Mining Co., 11 FMSHRC 161, 164 (February 1989); Jim Walter Resources, Inc., 9 FMSHRC 903, 907 (May 1987). Basin's ventilation plan required use of the No. 3 headgate entry as a return entry and tailgate entries No. 2 and 3 as intake entries. Gov't Ex. M-1 (ventilation diagram labeled p. 3). There is no dispute that, on June 23, Basin converted the No. 3 headgate entry to an intake entry and the two tailgate entries to return entries. It is also undisputed that Basin did not secure MSHA's prior approval. This unilateral, major change in the ventilation system constituted a failure to comply with the approved plan and violated section 75.316. We note the regulatory history of current section 75.370, the successor to section 75.316. The preamble to section 75.370 states that MSHA's "existing practice" under section 75.316 required prior approval of proposed major revisions. 57 Fed. Reg. 20868, 20899 (May 15, 1992). Both the Mine Act and the Secretary's regulations recognize the potential dangers attendant upon major ventilation changes by setting forth procedures for implementation of such changes. 30 U.S.C. § 863(u); 30 C.F.R. § 75.322 (1991), superseded by 30 C.F.R. § 75.324 (1992).

The Commission rejects, as did the judge, Basin's assertion that 30 C.F.R. §§ 75.308 and 75.309(a) (1991)[10] undercut any requirement of prior approval because those regulations authorized ventilation "changes or adjustments" when methane reached 1% in face areas and return aircourses. 15 FMSHRC at 1974. The "changes or adjustments" in those sections referred only to "increasing the quantity of air ... or improving the distribution of air." 30 C.F.R. §§ 75.308-1, 75.309-3 (1991).[11] As noted, White's air reversal was a major ventilation change.

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[9] We note further that the Secretary was unable to produce the cover letter during discovery and did not do so until the hearing. 15 FMSHRC at 1973; Tr. 362-64.

[10] In 1992, sections 75.308 and 75.309(a) were superseded by 30 C.F.R. §§ 75.323(b)(ii), 75.323(c), and 75.323(d)(2)(i), which impose similar requirements.

[11] Similarly, we reject Basin's suggestion, made at oral argument, that the ventilation change was authorized by a plan provision that mirrored 30 C.F.R. § 75.308 (1991). Gov't Ex. M-1, p. 17; Oral Arg. Tr. 9-13.

For the foregoing reasons, the Commission concludes that Basin did not comply with its plan when it unilaterally changed the air flow and, accordingly, that Basin violated section 75.316. The Commission affirms in result the judge's finding of violation.

3. S&S[12]

The S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to more serious violations. A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to by the violation will result in an injury or illness of a reasonably serious nature. Cement Division, National Gypsum Co., 3 FMSHRC 822, 825-26 (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 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.

Id. at 3-4; see also Austin Power, Inc. v. Secretary, 861 F.2d 99, 103-04 (5th Cir. 1988), aff'g, 9 FMSHRC 2015, 2021 (December 1987) (approving Mathies criteria). An evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. U.S. Steel Mining Co., 7 FMSHRC 1125, 1130 (August 1985).

The major dispute on review is the third Mathies element, a reasonable likelihood of resulting injury. The judge, focusing solely on the somewhat speculative terms used by the inspectors, found that the Secretary had failed to establish that element. 15 FMSHRC at 1975-76. The judge determined, however, that the uncontested imminent danger order established a reasonable likelihood that the hazard contributed to would result in an injury. Id. The judge's conclusion regarding the preclusive effect of the uncontested imminent danger order fails to provide any analysis nor does it direct us to any relevant legal authority.

Basin asserts, also without providing us with any relevant legal authority, that, as a matter of law, an uncontested imminent danger order cannot provide a basis for sustaining an

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[12] All Commissioners vote to remand the judge's S&S determination. Chairman Jordan and Commissioner Backley do not reach the judge's determination that a final uncontested imminent danger order established the facts alleged in that order. Commissioners Doyle and Holen vote to reverse that holding. Accordingly, this section of the decision reflects the rationale of Chairman Jordan and Commissioner Backley. See n.3, supra.

S&S designation. Basin argues further that if allegations in an uncontested imminent danger order are held to establish the S&S element of a related citation as a matter of law, "operators would be forced to litigate imminent danger orders merely to preserve the opportunity to litigate a 'significant and substantial' allegation in a related citation." B. Reply Br. 5. Finally, Basin asserts that, in any event, by the time the imminent danger order was issued on June 25, Basin had returned to use of the plan's approved ventilation scheme so that the conditions referenced in the order could not have been linked to the earlier air reversal.

The Secretary relies, without discussion or reference to relevant citations, on the judge's conclusion that the imminent danger order established the third step of the Mathies test. The Secretary fails to address the policy issue raised by Basin concerning needless litigation, and limits his S&S argument to contending that the weight of the evidence demonstrates that Basin had not changed the air back when the high methane concentrations were found and that, accordingly, the concentrations stemmed from the impermissible change to the ventilation.

The Commission need not resolve in this case whether, as a general rule, an uncontested imminent danger order may be used to establish a reasonable likelihood of injury in a related citation. Cf. generally Ranger Fuel Corp., 12 FMSHRC 363, 370-73 (March 1990). Here, regardless of the fact that the inspectors issued the order, the record evidence supports a finding that a dangerous condition reasonably likely to lead to injury existed on the afternoon of June 25. It is uncontroverted that explosive levels of methane were detected at that time in an area containing several ignition sources. Tr. 123-24. Moreover, the Golden Eagle Mine is a highly gassy mine liberating over 1,000,000 cubic feet of methane during a 24-hour period and is subject to five-day spot inspection pursuant to section 103(i) of the Mine Act, 30 U.S.C. § 813(i). Tr. 25. In addition, the mine had experienced a very serious methane explosion only five months prior to the air reversal. See 15 FMSHRC at 1978; Tr. 38-39. The judge, relying solely on the imminent danger order for his S&S findings, overlooked all of this evidence. Accordingly, we vacate the judge's finding that the Secretary failed to offer evidence establishing the reasonable likelihood of injury.

Under Mathies, the Secretary must show that the hazardous condition is caused by the violation of the cited safety standard in order to make out the special finding of S&S. Here the hazardous condition involved methane accumulations. The cited violation concerned the operator's failure to comply with the approved ventilation plan. The unanswered question is whether the deviation from the ventilation plan caused the methane accumulations. The judge's decision fails to address the causal link required under Mathies.

The record evidence linking the methane levels to the air flow change is controverted. The inspectors testified that the explosive levels of methane that they detected resulted from Basin's air reversal and reflected the serious hazards associated with the reversal. Tr. 35-36, 54, 123-24. Inspector Jordan testified that when he measured the methane levels on June 25, the intake and return entries were still functioning in the altered form that General Manager White had implemented. Tr. 374-76. Jordan's contemporaneous notes support his testimony.

Id. Jordan's testimony was further supported by former mine foreman David Huey, who testified that White's ventilation changes remained in effect until later in the week. Tr. 86-87. White, on the other hand, maintained that, on June 25, before Inspector Jordan took the methane measurements, Huey and another manager had already returned the intake and return entries to the pre-June 23 configuration. Tr. 211-15.

The Commission is bound by the terms of the Mine Act to apply the substantial evidence test when reviewing an administrative law judge's factual determinations. 30 U.S.C. § 823(d)(2)(A)(ii)(I). That standard of review requires that a fact finder weigh all probative record evidence and that a reviewing body examine the fact finder's rationale in arriving at his decision. Mid-Continent Resources, Inc., 16 FMSHRC 1218, 1222 (June 1994), citing Universal Camera Corp. v. NLRB, 340 U.S. 474, 487-89 (1951). A judge must analyze and weigh the relevant testimony, make appropriate findings, and explain the reasons for his decision. Mid-Continent, 16 FMSHRC at 1222, citing Anaconda Co., 3 FMSHRC 299, 299-300 (February 1981).

The judge failed to analyze any of the evidence concerning whether the methane accumulations were, in fact, caused by the air reversal. Nor did he make a finding concerning this issue of causality. Accordingly, we vacate the judge's conclusion that the violation was S&S, and remand for further analysis consistent with this decision.

4. Unwarrantable Failure[13]

The unwarrantable failure terminology is taken from section 104(d) of the Act and refers to more serious conduct by an operator in connection with a violation. In Emery Mining Corp., 9 FMSHRC 1997 (December 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. Id. at 2001. 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"). Id. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference" or a "serious lack of reasonable care." Id. at at 2003-04; Rochester & Pittsburgh Coal Corp., 13 FMSHRC 189, 193-94 (February 1991). This determination was also based on the purpose of the unwarrantable failure sanctions in the Mine Act, the Act's legislative history, and judicial precedent. Emery, 9 FMSHRC at 2002-03.

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[13] Commissioners Backley, Doyle and Holen vote to affirm the judge's finding that this violation did not result from Basin's unwarrantable failure to comply with the standard. Chairman Jordan votes to vacate and remand. This section of the decision is based on the rationale of Commissioners Backley, Doyle and Holen.

In analyzing whether the violation arose from Basin's unwarrantable failure, the judge examined General Manager Earl White's conduct because it was White who decided to make the ventilation change. The judge found that White believed that section 75.316 did not require MSHA's prior approval of the change. 15 FMSHRC at 1976-78. The judge reasoned that "there cannot be an unwarrantable failure resulting from a good faith, although mistaken belief that [an operator's] actions were in compliance with regulations." Id. at 1977 (citations omitted). The judge is correct that, under Commission caselaw, unwarrantable failure does not result from good faith, although mistaken, belief that an operator was complying with regulations. Florence Mining Co., 11 FMSHRC 747, 754 (May 1989).

The Secretary argues that White, as mine manager, should have known that prior approval was required and that, according to Commission cases, Basin's conduct was unwarrantable. S. Br. 8-11 & n.7. Citing Virginia Crews Coal Co., 15 FMSHRC 2103 (October 1993), Basin asserts that this is insufficient to establish unwarrantable failure. B. Br. 24. Basin is correct that, according to Commission precedent, a "should have known" standard is not determinative of unwarrantable failure. Virginia Crews, 15 FMSHRC at 2107. "Use of a 'knew or should have known' test by itself would make unwarrantable failure indistinguishable from ordinary negligence." Id. Here, as in Virginia Crews, we reject such an interpretation of the Commission's decision in Emery. Id.

The Secretary objects to the judge's finding on the grounds that he should have determined not only that White had a good faith belief but whether, under the totality of the circumstances, that belief was reasonable. The Secretary further contends that the weight of evidence demonstrates that White's belief was not reasonable. In response, Basin asserts that substantial evidence supports the judge's determination.

The Secretary is correct that the operator's good faith belief must be reasonable under the circumstances. Cyprus Plateau Mining Corp., No. WEST 92-371-R, 16 FMSHRC ___, slip. op. at 6 (August 26, 1994); see Southern Ohio Coal Co., 13 FMSHRC 912, 919 (June 1991), citing Utah Power & Light Co., 12 FMSHRC 965, 972 (May 1990), aff'd, 951 F.2d 292 (10th Cir. 1991). Moreover, the Commission has used a similar approach in work refusal cases under section 105(c) of the Mine Act, 30 U.S.C. § 815(c). A miner's work refusal constitutes protected activity when he has a good faith belief that the work involves a hazard and that belief is also reasonable. See Paula Price v. Monterey Coal Co., 12 FMSHRC 1505, 1515 (August 1990).

It is undisputed that, in directing the ventilation change, White was attempting to improve the mine's ventilation. In June 1991, the Northwest No. 1 longwall section was experiencing serious methane liberation problems. Following a number of unsuccessful adjustments (Tr. 219-21, 306-07), White decided to make the reversal in order to deliver more intake air to that section. Tr. 396. The judge found that White reasonably believed that "he could have been cited for failing to correct the problems in the ventilation system." 15 FMSHRC at 1977.

The Secretary's evidentiary objections to the judge's findings are unpersuasive. The Secretary argues that two of White's subordinates informed him that MSHA should be notified before making the contemplated changes. The judge found that White responded by consulting 30 C.F.R. Part 75 and, in particular, section 75.316, but found no requirement for such prior approval. 15 FMSHRC at 1977. Section 75.370(c), which superseded section 75.316, now explicitly requires that major changes to the ventilation system "shall be submitted to and approved by the district manager before implementation." The earlier standard, in effect at the time, did not contain this express requirement. Moreover, Inspector William Denning conceded that, under the regulations in place in June 1991, there was no guidance for mine operators as to the type of changes that could or could not be made without prior approval. Tr. 162-63. The Secretary's position at oral argument that, absent the cover letter, prior approval was not required (Oral Arg. Tr. 27-30), further supports the reasonableness of the operator's belief that, based on the language of the regulation, prior approval was not required. The Commission does not find unreasonable White's good faith belief that prior approval was not required.

The Secretary further asserts that White's belief was unreasonable based on Inspector Jordan's testimony that, one week before the air reversal, he advised White that MSHA approval was necessary for ventilation changes. The inspector stated, "We had discussed it and, if I remember correctly, I indicated to Mr. White, whatever he did, to make sure that approval was obtained before it was done." Tr. 53 (emphasis added). White denied discussing a prior approval requirement with anyone from MSHA. Tr. 264. The inspector's testimony was uncertain; it does not overcome the substantial evidence supporting the judge's determination that White, whose testimony the judge credited, had a good faith belief that he was complying with the regulations. 15 FMSHRC at 1977-78. The Commission has often emphasized that a judge's credibility determinations may not be overturned lightly. E.g. Quinland Coals, Inc., 9 FMSHRC 1614, 1618 (September 1987).

Substantial evidence supports the judge's conclusion that Basin had a good faith, although mistaken, belief that it was complying with the Secretary's regulations when it attempted to improve the safety of the mine's ventilation system. The judge implicitly found that White's belief was reasonable under the circumstances and that determination also has substantial support in the record. Accordingly, the Commission affirms the judge's determination that Basin's conduct was not aggravated and, thus, that the violation did not result from unwarrantable failure.

B. Section 110(c) Liability[14]

Section 110(c) of the Mine Act provides that, whenever a corporate operator violates a

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[14] Commissioners Backley, Doyle and Holen vote to affirm the judge's determination that White was not liable for the violation under section 110(c) of the Act. Chairman Jordan votes to vacate and remand. This section of the decision is based on the rationale of Commissioners Backley, Doyle and Holen.

mandatory safety or health standard, any agent of the corporate operator who "knowingly authorized, ordered, or carried out such violation" shall be subject to civil penalty. 30 U.S.C. § 820(c). The Commission has held that a "violation under section 110(c) involves aggravated conduct, not ordinary negligence." BethEnergy Mines, Inc., 14 FMSHRC 1232, 1245 (August 1992).

The judge determined that the General Manager, Earl White, had not knowingly authorized the violation. The Secretary contends that all the evidence supporting a finding that the ventilation change resulted from Basin's unwarrantable failure also compels a conclusion that White should be held liable under section 110(c). White responds that his reasonable, good faith belief that he was acting within the regulations to improve safety precludes a finding of section 110(c) liability.

Substantial evidence supports the judge's conclusion that White is not liable. White's concern in implementing the ventilation change was safety; he was attempting to rectify a serious ventilation problem. The judge found that, although White was mistaken, he had a good faith belief that he did not need MSHA's prior approval for the ventilation change. 15 FMSHRC at 1977. The Commission has affirmed the judge's implicit finding that White's belief was reasonable. The Commission concludes that substantial evidence supports the judge's determination that White did not engage in aggravated conduct and affirms the judge's dismissal of the section 110(c) complaint.

C. High Methane Levels[15]

The second citation, as modified, alleged that Basin violated its ventilation plan in that the mine's bleeder systems were to meet or exceed the criteria set forth in 30 C.F.R. § 75.316-2(e) through (i)(1991).[16] See Gov't Ex. M-1, p. 37. The judge found a violation

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[15] All Commissioners reverse the judge's determination of violation with respect to the methane accumulations.

[16] Section 75.316-2, in effect in June 1991, provided in relevant part:

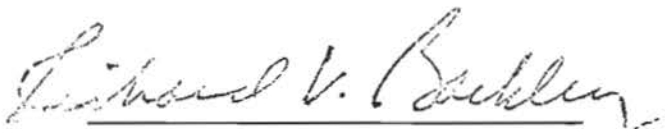
> (h) The methane content of the air current in the bleeder split at the point where such split enters any other air split should not exceed 2.0 volume per centum.
>
> (i) When the return aircourses from all or part of the bleeder entries of a gob area and air other than that used to ventilate the gob area is passing through the return aircourses, the bleeder connectors between the return aircourses and the gob shall be considered as bleeder entries and the concentration of methane should not exceed 2.0 volume per centum at the intersection of the bleeder connectors and the return aircourses.

In 1992, these provisions were superseded by 30 C.F.R. § 75.323(e).

because the MSHA inspectors measured methane levels of 4% to 5% and more in the tailgate section four feet from the Kennedy stoppings at crosscuts 62 and 63, some 60 feet from the No. 3 return entry. 15 FMSHRC at 1978. He determined that the inspector "measured the methane at the proper location and manner." Id. at 1980. Basin argues that MSHA measured the methane at a location other than that required by the plan. It asserts that the readings were taken no more than four feet outby the stoppings separating the gob from the bleeder taps, 50 to 60 feet inby from where the measurements should have been taken, i.e., the mixing point where the bleeder connectors intersect the return entry. The Secretary counters that the measurements were taken at the appropriate place and that the ventilation change caused impermissible levels of methane to accumulate in the section.

As discussed earlier, we are bound by the substantial evidence test when reviewing an administrative law judge's factual determinations. The Commission is guided by the settled principle that, in reviewing the record, an appellate tribunal must consider anything in the record that "fairly detracts" from the weight of the evidence that supports a challenged finding. Universal Camera Corp. v. NLRB, 340 U.S. at 488.

The cited plan provisions address methane levels at the intersection of bleeder connectors and return air courses (n.16, supra). The record evidence, relied on by the judge (15 FMSHRC at 1978), reveals that the inspectors measured the methane at two locations in the bleeder connectors nearly 60 feet inby the mixing point where the connectors intersect the return entry. The Secretary presented no evidence or argument that these locations were valid testing points for the bleeder-return intersections. Thus, the judge's finding that the measurements were taken at proper locations lacks substantial evidentiary support, and the Commission reverses his determination of violation.[17]



Richard V. Backley, Commissioner

The separate opinions of Commissioners follow.

[17] We do not reach the S&S and unwarrantable failure issues associated with this violation. We note, however, that the Secretary argued on review that Basin's methane violation was the result of unwarrantable failure, although he neither charged this nor argued the point below. In his decision, the judge inadvertently addressed unwarrantable failure and found that such an allegation had not been proven.

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

We concur with the opinion in all respects except that we must respectfully dissent in part from the rationale set forth for the determination of whether the violation based on the ventilation change was significant and substantial ("S&S").

We agree with the judge that Inspector Jordan's testimony to the effect that "anything that has the potential for serious injury or bodily harm is automatically significant and substantial" and his further testimony that "it is only a 'guesstimate'" as to the consequences of the violation conflict with the Commission's settled law. 15 FMSHRC at 1975. Under Commission precedent, neither statement would support an S&S finding. Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984).

We believe that our colleagues err in failing to reach the issue on which the judge based his decision, i.e., that an uncontested imminent danger order, by virtue of being a final Commission order, establishes that an imminent danger actually existed. 15 FMSHRC at 1976. They remand for further analysis of the evidence. Slip op. at 10. Although we agree that further analysis is required, the imminent danger order issue should be decided at this stage. The judge's ruling on the effect of the imminent danger order served as the sole basis for his S&S finding and must be disposed of before the adequacy of the judge's analysis of the record evidence is reached. Further, should the judge on remand again find that the Secretary failed to establish S&S, his conclusion on the effect of the imminent danger order would be left standing and another Commission proceeding would be required to decide that issue.

We would reverse the judge's determination. Section 107(e)(1) of the Mine Act provides operators with the opportunity to challenge section 107(a) imminent danger orders within 30 days after issuance. 30 U.S.C. § 817. The finality of such orders is not referenced in the Mine Act, except in section 111, as a basis for compensation to miners who are idled as a consequence. 30 U.S.C. § 821. The judge's opinion appears to be based on a theory that the imminent danger order, as a final order of the Commission, is equivalent to a final judgment on a litigated issue. Under this theory, Basin is prohibited, presumably under the doctrine of either res judicata or collateral estoppel, from challenging whether an imminent danger actually existed on June 25. We disagree that this is the effect of a final imminent danger order.

The judge offers no legal theory or other basis for his conclusion that the allegations set forth in a final imminent danger order can be used in another proceeding to irrebuttably establish those allegations. The Mine Act and Commission precedent address the finality of an imminent danger order only in the context of compensation proceedings arising under

section 111. The doctrines of res judicata and collateral estoppel would not preclude challenge to such a final order because those doctrines require the claim or issue to have been previously litigated. Moreover, those doctrines have "the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation." Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 (1979), citing Blonder-Tongue Lab., Inc. v. University of Ill. Found., 402 U.S. 313, 328-329 (1971).

Here, neither purpose would be served. Presently, an operator has, in most instances, no reason to contest an imminent danger order unless compensation is in issue. Penalties are not assessed in connection with an imminent danger order. Nor are alleged violations giving rise to an imminent danger order part of the imminent danger order itself, but rather are set forth in other citations and orders issued in connection with the dangerous condition, as was the case here. Under the judge's logic, operators desiring to avoid a per se finding of reasonable likelihood of injury, the third element of the Commission's S&S test, would need to litigate each and every imminent danger order, irrespective of whether compensation were in issue. Where no imminent danger was found, the reasonable likelihood allegation, which could be based on a less dangerous and less immediate threat to safety, would still be in issue and subject to litigation.

To the extent our colleagues' opinion suggests that Ranger Fuel Corp., 12 FMSHRC 363 (March 1990), would support the judge's conclusion, we believe it is in error. Slip op. at 9. Ranger is not relevant here. That case involved section 111 compensation to miners arising from an imminent danger withdrawal order. Under section 111, limited compensation is payable to miners irrespective of the validity of the withdrawal order but the further compensation sought in Ranger was contingent upon the relevant order becoming "final." 30 U.S.C. § 821; 12 FMSHRC at 373. The operator attempted to contest the validity of a final imminent danger order in the compensation proceeding although, under section 111, the challenged compensation was contingent only upon the order being final, not on the actual existence of an imminent danger. See 30 U.S.C. § 821. The Commission denied Ranger's challenge. 12 FMSHRC at 373. Here, the issue is not whether the order is final but whether a final unlitigated imminent danger order can be used in a penalty proceeding to irrebuttably establish that an imminent danger actually existed.

We join in vacating the judge's determination that the Secretary had failed to offer evidence establishing reasonable likelihood of injury. On remand, we would ask the judge for further analysis of the record, including Inspector Denning's testimony that the ventilation change implemented by the operator caused methane to accumulate in the tailgate as well as his testimony that such accumulation, along with the ignition source of the longwall

equipment, had, in fact, created an imminent danger. Tr. at 123-24. We would also ask the judge to resolve expressly whether the ventilation change instituted by Mr. White remained in effect at the time of the citation. Contrary to our colleagues' view, we would leave to the judge the evaluation of whether an explosion five months earlier is relevant. Slip op. at 9.

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

Chairman Jordan, concurring in part and dissenting in part:

I concur with Parts I., II. A. 1-3, and II. C. of the opinion. I cannot join my colleagues in affirming the judge's determination that the unauthorized change to the ventilation plan was not the result of the operator's unwarrantable failure to comply with 30 C.F.R. § 75.316 (1991). I also dissent from the majority's section 110(c), 30 U.S.C. § 820(c), determination.

I.

The judge decided that the allegations of unwarrantable failure should be stricken because "the operator through its manager [Earl White] had a good faith honest belief that he was complying with the regulations." 15 FMSHRC at 1978. I find this conclusion lacking in two respects. First, the judge based his good faith finding on irreconcilably conflicting credibility determinations and failed to analyze important record evidence bearing on good faith. Second, the judge has failed to determine the reasonableness of any belief on White's part that his actions constituted the safest way of adhering to the requirements of section 75.316. The judge's failure to analyze the reasonableness of White's belief is particularly troublesome in light of significant record evidence that casts doubt on Basin's claim that White reasonably believed he did not need the approval of the Department of Labor's Mine Safety and Health Administration ("MSHA") before reversing the air flow from the configuration set forth in the ventilation plan. Accordingly, I would vacate the judge's finding that there was no unwarrantable failure and remand it for further consideration consistent with the analysis contained in this opinion.

The violation occurred when White unilaterally revised the ventilation system on Sunday, June 23, 1991,[1] so that it deviated substantially from the ventilation plan that had been approved by MSHA. Basin maintains that White reasonably and in good faith believed that section 75.316 permitted him to implement the major ventilation changes that were carried out on June 23 before obtaining MSHA's approval. The question to be determined is whether the judge properly analyzed the twin factors of reasonableness and good faith in the context of the circumstances confronting White at the time.

The Commission has held that "if an operator reasonably believes in good faith that the cited conduct is the safest method of compliance with applicable regulations, even if it is in error," the operator will not be found to have acted with the aggravated conduct necessary to establish a finding that the conduct resulted from unwarrantable failure. Southern Ohio Coal Co., 13 FMSHRC 912, 919 (June 1991). The Commission's requirement that the operator demonstrate a good faith and reasonable belief that it was pursuing the safest method of complying with applicable regulations is analogous to the Commission's doctrine that a miner's work refusal is protected when he entertains a reasonable, good faith belief that his assigned duties involve a hazard. Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 808-12 (April 1981).

[1] All dates are 1991.

An operator's belief that his violative conduct was the safest method of complying with MSHA regulations must be both reasonable and held in good faith in order to establish a defense to a charge of unwarrantable failure. Southern Ohio Coal Co., supra; see Robinette, supra. "Good faith belief simply means honest belief" that the conduct constitutes the safest method of complying with applicable regulations. See Robinette, 3 FMSHRC at 810. But a good faith belief in and of itself is not sufficient to defend against the unwarrantable failure charge. "Good faith also implies an accompanying rule requiring validation of reasonable belief." Id. at 811. In the work refusal context, the Commission has held that reasonableness "is a simple requirement that the miner's honest perception be a reasonable one under the circumstances." Id. at 812 (emphasis in original). Similarly, in the unwarrantable failure setting, the operator's good faith belief should meet the same requirement.

A.

Bearing in mind that "in reviewing the whole record, an appellate tribunal must also consider anything in the record that 'fairly detracts' from the weight of the evidence that supports a challenged finding," (Asarco Mining Co., 15 FMSHRC 1303, 1307 (July 1993), citing Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951)), it is my view that the judge made credibility determinations which cannot be squared with his finding that White "had a good faith honest belief that he was complying with the regulations." 15 FMSHRC at 1978.

At the outset, I note that the good faith with which the Commission must be concerned here has nothing to do with blameworthiness or good intentions. Rather, good faith simply means that the operator in fact entertained the belief that his course of action was designed to safely comply with applicable regulations. The good faith requirement insures that fraudulent or deceptive operator claims to be mistakenly acting in accordance with MSHA regulations will not shield the operator from an unwarrantable failure finding. See Robinette, 3 FMSHRC at 810. It is therefore irrelevant for the purposes of the good faith inquiry whether the operator is motivated to violate a safety standard in the hope or expectation that the result will be a safer working environment. If the operator believes that he is violating MSHA regulations, his good intentions will not translate into a good faith belief that he is safely complying with applicable standards.

Thus, the judge did not base his finding that White acted in good faith on White's motivation for making the ventilation change. Rather, the judge found that "White did not believe that 30 C.F.R. § 75.316 required that he obtain prior approval from MSHA before implementing changes in the ventilation system." 15 FMSHRC at 1977. In explaining their agreement with the judge's unwarrantable failure finding, however, the majority finds relevant the fact that "in directing the ventilation change, White was attempting to improve the mine's ventilation." Slip op. at 11. This conclusion misses the mark. While I accept at face value

Basin's protestations that White was motivated by a desire to improve the ventilation,[2] unless it is shown that he believed that he was complying with MSHA regulations, he cannot be found to have acted in good faith.

The judge found White's belief that section 75.316 permitted him to change the ventilation before getting MSHA approval to be "based on the language in the regulations and his previous experience," and he concluded that "this evidence is credible." 15 FMSHRC at 1977. Thus, the judge's conclusion regarding unwarrantable failure was based, at least in part, on credibility determinations. The judge apparently credited White's testimony regarding what White believed to be his obligations under section 75.316. The judge offered no explanation why he found White's testimony concerning the requirements under section 75.316 to be "credible" when, at the same time, he determined White was not telling the truth regarding the events that led up to his decision to implement the ventilation change.

White's deputies, Steve Salazar and David Huey, testified that in the course of discussing White's proposed ventilation changes, they warned him of the need to obtain prior approval from MSHA. Tr. 63-64, 80-82. White flatly denied receiving these warnings. Tr. 240. The judge, however, credited the testimony of the deputies, concluding: "It is true that Salazar and Huey told White prior notification was necessary." 15 FMSHRC at 1977. According to Salazar, White responded to the warning about the need for prior approval by stating that "he was in charge of the operation, not MSHA, and that he was going to run the operation." Tr. 64; see also Tr. 82. This comment is hardly indicative of someone who is attempting in good faith to ascertain his obligation under the law. Neither the judge nor my colleagues discuss this comment, which I view as detracting mightily from the conclusion that White was acting in good faith. Nor do they discuss the impact of White's untruthfulness here on the judge's finding credible White's asserted belief that section 75.316 permitted White to make major ventilation changes without prior MSHA approval.

Similarly, Inspector Jordan testified that he specifically warned White just days before the incident that MSHA approval was required before any change to the ventilation plan could be made. Tr. 53. Again, White denied that Jordan warned him to contact MSHA first. Tr. 264. There is no hint in the judge's decision that he even considered the differing versions of Jordan and White, much less that he credited White over Jordan concerning this conversation, as my colleagues imply. Slip op. at 12. Yet this evidence bears directly on whether White in

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[2] Indeed it is difficult to imagine a situation in which an operator would deliberately reverse the direction of the air flow without intending to improve the ventilation. Good intentions, however, don't always translate into safe results. Between Sunday, when White implemented the ventilation change, and Tuesday morning, when MSHA arrived at the mine, the miners were working under a ventilation scheme that, while it represented White's view of the best way to provide air to the No. 1 longwall, did not have the benefit of MSHA's review and approval. Tr. 55, 208. During this time, the mine apparently experienced methane accumulations resulting in the cessation of operations for over an hour. Tr. 329.

fact believed that he was complying with MSHA regulations when he made the ventilation change.[3]

As the judge did not find White to be a credible witness concerning his deputies' explicit warning that prior notification of MSHA was necessary, and because he failed to even discuss Jordan's testimony that Jordan had specifically warned White about the requirement of prior MSHA approval, the judge's conclusion that White's action was based on an honest good faith belief that he was complying with section 75.316 cannot be said to be supported by substantial evidence.

B.

Equally damaging to the judge's unwarrantable failure conclusion is his failure to discuss the reasonableness requirement at all or reach a conclusion with respect thereto. Because an operator seeking to avoid the unwarrantable failure sanction must establish reasonableness in addition to good faith, the judge's conclusion that "[t]here was no unwarrantable failure because the operator through its manager had a good faith honest belief that he was complying with the regulations" is, as a matter of law, erroneous. 15 FMSHRC at 1978. This formulation by the judge addresses only half of the two-pronged test under the good faith reasonable belief defense to unwarrantable failure.[4]

The language of section 75.316 casts serious doubt on the reasonableness of White's belief that he could unilaterally deviate from the approved ventilation plan. Section 75.316 tracked section 303(o) of the Mine Act, 30 U.S.C. § 863(o), and provided in pertinent part:

> A ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining

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[3] Jordan testified: "We had discussed it and, if I remember correctly, I indicated to Mr. White, whatever he did, to make sure that approval was obtained before it was done." Tr. 53. Emphasizing the phrase "if I remember correctly," the majority characterizes Jordan's testimony as "uncertain." Slip op. at 12. I disagree. I construe Jordan's words as a common locution employed by witnesses on the stand, rather than as a query whether Jordan is in fact inventing the conversation to which he himself is testifying. In any event, the point here is that whatever I or the majority believe this phrase means, we cannot know what the judge thought it meant, since he did not advert to Jordan's testimony at all.

[4] The judge's failure to even address the reasonableness question is not cured by the majority's finding that "[t]he judge implicitly found that White's belief was reasonable . . . ." Slip op. at 12 (emphasis added). As we have already had occasion to observe in this case, "[a] judge must analyze and weigh the relevant testimony, make appropriate findings, and explain the reasons for his decision." Slip op. at 10, citing Mid-Continent Resources, Inc., 16 FMSHRC 1218, 1222 (June 1994) and Anaconda Co., 3 FMSHRC 299, 299-300 (February 1981).

> system of the coal mine and approved by the Secretary shall be adopted by the operator and set out in printed form on or before June 28, 1970. . . .

30 C.F.R. § 75.316 (emphasis added).

I fail to see how the plain language of section 75.316 supports a view that an operator is free to deviate from its approved ventilation plan as long as that operator subsequently informs MSHA. Indeed it would appear that by requiring an operator to adopt a ventilation plan that is approved by the Secretary, the opposite assumption should arise: that an operator is not free to deviate from the ventilation requirements without prior recourse to the approval process that created them. The specific requirement that "revisions" to the plan also be "approved" by the Secretary lends further support to this view.

The judge found that when White was told about the need to inform MSHA of his planned ventilation change, he read section 75.316 and stated, "Show me in the book where it says I have to notify MSHA of this change." 15 FMSHRC at 1977. White apparently took the view that, since section 75.316 did not contain language explicitly prohibiting variance from the approved ventilation plan, he was free to deviate from the plan and simply inform MSHA about it later. My colleagues and the judge below apparently consider it reasonable that White could reach this conclusion after reading section 75.316. I decline to affirm a judge's ruling which appears to accept as reasonable a view of the law which I find to be not only illogical, but also contradicted by the regulatory language and the case law.

The case law concerning enforcement of ventilation plans undermines the reasonableness of any belief on White's part that he could unilaterally change the ventilation plan. A manager of White's experience[5] may be fairly charged with knowledge of the basic holdings under the Mine Act, just as a miner claiming to have engaged in a protected work refusal may be charged under certain circumstances with knowledge of the applicable safety standard. See Secretary on behalf of Boswell v. National Cement Co., Inc., No. SE 93-48-DM, 16 FMSHRC ____, slip op. at 8 (August 17, 1994) (Chairman Jordan, concurring). It is well established under Commission and court precedent that once a ventilation plan is approved and adopted, its provisions and revisions are enforceable as mandatory standards. UMWA v. Dole, 870 F.2d 662, 671 (D.C. Cir. 1989); Freeman United Coal Mining Co, 11 FMSHRC 161, 164 (February 1989); Jim Walter Resources Inc., 9 FMSHRC 903, 907 (May 1987). Just as it would be unreasonable for an operator to assume that it could deviate from the requirements of a mandatory safety standard, it is equally unreasonable for an operator to assume that it may unilaterally change its approved ventilation plan, which is enforceable as a mandatory safety standard.

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[5] White has worked in the mining industry since 1965. Tr. 244.

The judge's decision fails to analyze the reasonableness of White's belief in the context of the language of section 75.316 or the cases interpreting that standard. Moreover, the majority's conclusion that White's interpretation of section 75.316 was reasonable conflicts with the judge's stated view that "[i]f the Commission accepts White's theory then the ventilation regulations would be meaningless." 15 FMSHRC at 1972. On this last point at least the judge was on target. Obviously, if an operator were permitted to change its approved ventilation plan at will, and notify MSHA post hoc, section 75.316's requirement that the mine operate under a "ventilation . . . plan and revisions thereof . . . approved by the Secretary" would be a nullity. I am unable to conclude that an operator who insists on acting in accordance with a view of the law that makes the ventilation requirements "meaningless" should be considered to entertain a reasonable belief that his conduct complies with the ventilation regulation.

The case might be otherwise had White been faced with an emergency requiring immediate action without the possibility of contacting MSHA. But the judge made no such finding, and the record here certainly does not suggest this was the case. The record in fact contains significant evidence that undercuts any claim that White was confronted with an unexpected emergency situation which prevented him from obtaining the necessary prior approval from MSHA.

Thus, Inspector Denning testified that the conditions prompting the air change had developed over an extended period of time, and that proper plans could have been submitted to and approved by MSHA. Tr. 137-38. Inspector Jordan described the problem as an "ongoing" one that had been occurring for at least two to three weeks. Tr. 41. According to him, White's unauthorized changes to the ventilation system converted what had been a "borderline" problem into an "imminent danger" prompting the issuance of a withdrawal order on the evening of Tuesday, June 25.[6] Tr. 36. Basin's project engineer described the problem as occurring "off and on from early June up to the 21st." Tr. 419. It is also clear from the record that White did not need to fear that any increase in the severity of the problem would go undetected. Mine Foreman Salazar explained that subsequent to an explosion which had occurred five months earlier, employees were monitoring the area "24 hours a day" and were working with MSHA on the ventilation in that area. Tr. 62; see Tr. 27. Moreover, as counsel for Basin conceded at oral argument, there is nothing in the record that indicates MSHA warned White that he might be cited unless he made significant changes in the ventilation system. Oral Arg. Tr. 43.

The closest the judge comes to even hinting at the existence of an exigent situation is his conclusion that "White felt he could have been cited for failing to correct the problems in

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[6] The record contains conflicting testimony about whether White's changes caused the conditions which prompted the issuance of the imminent danger order. Because the judge failed to reconcile the conflict and make the necessary findings of fact, the Commission has vacated the S&S finding and remanded for additional proceedings. Slip op. at 8-10.

the ventilation system." 15 FMSHRC at 1977. But the judge failed to discuss any evidence relating to this issue, nor did he make any findings of fact which would allow us to conclude that White's concern in this regard was in fact reasonable.[7]

The majority relies on the explicit requirement in section 75.370, the successor to section 75.316, that major changes to the ventilation system must be submitted to and approved by the MSHA district manager before implementation. Slip op. at 12. My colleagues also cite MSHA inspector Denning's testimony to the effect that section 75.316 provided "no guidance" for mine operators as to the type of changes that could be made without prior approval, and they point to the Secretary's position at oral argument that, absent the cover letter, prior approval was not required. Id. On the basis of this evidence, the majority concludes that it "does not find unreasonable White's good faith belief that prior approval was not required." Id.

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[7] The judge's sole record reference to the conditions in the mine prior to the ventilation change is a parenthetical instruction to "see Exhibit BR-1" in order to learn of "apparent problems in the system." 15 FMSHRC at 1977. BR-1 consists of a 3-page typed chronology covering the period from June 1 through June 29 with 279 pages of supporting documents including preshift, daily and on-shift reports. It is certainly not apparent from these examination reports that conditions arose which caused White to decide on Friday, June 21, that he must implement immediate changes. Indeed the opposite conclusion arises. For instance, under the heading "Violation or Hazardous Condition," the preshift exam for the Northwest longwall at 4:00 a.m. that day reports "[n]one observed." The on-shift report shows the highest level of methane to be 0.5% and reports that the area was "safe at time of inspection." The preshift at 1:04 p.m. on June 21 reports no hazardous conditions and the highest methane level to be 0.5%, the same reading reported in the on-shift report for that evening. The six examination reports dated June 22 likewise reflect methane levels well under 1% (although the chronology prepared by White inexplicably refers to a reading of 1.1 - 1.3% for that date).

The judge's conclusion that White feared being cited for failing to change the ventilation system might be a reference to White's testimony that other regulations, such as 30 C.F.R. §§ 75.308 and 75.309, mandate changes or adjustments when certain levels of methane are found in specified areas of the mine. Tr. 248-49, 370. Of course, whether White actually considered these regulations at the time he made his decision is open to question since, according to the version of events described by White's deputies and accepted by the judge, it would appear that White's sole reference in determining his obligation to obtain prior authorization from MSHA was section 75.316. 15 FMSHRC at 1977. While reliance on these other regulations might be a relevant consideration in assessing whether an operator acted unwarrantably, the judge has made no findings which would allow us to conclude either that White in fact relied on these regulations or that such reliance was reasonable under the circumstances.

This conclusion is unfounded. The commentary accompanying MSHA's rulemaking indicates that MSHA viewed the prior approval requirement for major ventilation changes as a continuation of the practice already in existence. 57 Fed. Reg. 20868, 20899 (May 15, 1992). Moreover, while Inspector Denning may not have been able to point to exact guidelines that spelled out the type of ventilation changes that could not be made without prior approval, he was certain that "[a] major change, such as reversing the air in an air course, would definitely require approval." Tr. 173.[8] Finally, the comment of Secretary's counsel that the majority rely on to support the reasonableness of White's belief has itself been rejected as an unreasonable view of the regulation. Slip op. at 7.

Whether White could reasonably conclude he did not need MSHA's prior authorization must be determined on the basis of the particular circumstances confronting White at the time. In this regard, I consider it relevant that when White decided to unilaterally implement the ventilation change, the mine in question was a gassy mine[9] and only five months earlier had experienced a major explosion which caused varying degrees of injury to eleven miners. Tr. 27, 39. Moreover, the explosion occurred in the very section of the mine, the Northwest No. 1 longwall panel, where White planned to change the ventilation design. Tr. 142-43.[10] It seems to me these facts alone, which were not considered by the judge, would seriously undermine the reasonableness of White's belief that no prior authorization from MSHA was needed before implementing changes that significantly departed from the approved ventilation plan. Here, however, we have the additional fact that White reversed the air flow in the face of explicit warnings by his two subordinates that MSHA insisted on approving ventilation changes at the Golden Eagle Mine prior to their implementation. Tr. 63-64, 80-82. The judge should have considered whether White's insistence on going forward under these circumstances, when he could have easily picked up the phone and clarified his obligations,[11]

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[8] Before implementing a change of this magnitude, White had to idle the mine and shut off the power; White's change was therefore a far cry from merely adjusting a line curtain or opening a regulator, the kinds of adjustments to ventilation that Inspectors Denning and Reitz testified were authorized by 30 C.F.R. §§ 75.308 and 75.309 and would not require prior approval. Tr. 157, 189-90, 207-08. White himself seemed to recognize the distinction. While he provided MSHA with post-hoc notification of his air reversal, he did not feel it necessary to provide even such after-the-fact notification when he opened a regulator to provide more air on the longwall. Tr. 261-62.

[9] Inspector Jordan testified that the Golden Eagle Mine "is number one in the State of Colorado for methane liberation." Tr. 26.

[10] Although White took over the operation of the mine on June 1, he had been at the property on a daily basis since April 9 and during that time learned about the explosion that occurred. Tr. 339-40.

[11] At oral argument, counsel for the Secretary confirmed that someone from MSHA would have been available on the weekend to handle calls. Oral Arg. Tr. 35.

amounted to a willful intent to remain in the dark about what section 75.316 required. The judge should have determined whether such action fell outside the protection of the good faith and reasonable belief defense the Commission has articulated, and accordingly constituted aggravated conduct.

II.

The judge's failure to reconcile inconsistent credibility determinations, and his failure to consider evidence which detracts from a finding that White acted reasonably and in good faith, cause me to conclude that the judge's finding of no unwarrantable failure is not supported by substantial evidence and should therefore be vacated and the matter remanded for further proceedings. With respect to the Secretary's assessment of a civil penalty against White personally pursuant to section 110(c) of the Mine Act, the judge merely stated, "The evidence as to White has been previously reviewed. His conduct was not 'aggravated.'" 15 FMSHRC at 1981. Because the judge's analysis of that evidence was flawed, as I have detailed above, I would also vacate and remand the judge's section 110(c) finding.

Mary Lu Jordan, Chairman

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 30, 1994

SECRETARY OF LABOR,	:	Docket Nos. WEST 93-62-M
MINE SAFETY AND HEALTH	:	WEST 93-406-M
ADMINISTRATION (MSHA)	:	WEST 93-407-M
	:	WEST 93-463-M
vs.	:	WEST 93-117-M
	:	WEST 93-141-M
CONTRACTORS SAND AND	:	WEST 93-408-M
GRAVEL SUPPLY, INC.	:	WEST 93-409-M
	:	WEST 93-462-M

O R D E R

These consolidated civil penalty proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act"). On July 21, 1994, Administrative Law Judge August F. Cetti issued a Default Decision to Contractors Sand And Gravel Supply, Inc. ("Contractors") for failing to show cause, pursuant to an order issued on June 22, 1994, why default should not be entered for its failure to comply with a prehearing order.[1] The judge ordered Contractors to pay civil penalties of $15,149 to the Secretary of Labor ("Secretary").

The judge's jurisdiction in this matter terminated when his decision was issued on July 21, 1994. Commission Procedural Rule 69(b), 29 C.F.R. §2700.69(b) (1993). Under the Mine Act and the Commission's Procedural Rules, relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. §823(d)(2); 29 C.F.R. §2700.70(a). On August 19, 1994, the Commission received a letter from Contractors stating that it requests review of the default decision. In the letter, Contractors states that it understood that the proceedings in question "were to be combined

[1] The Default Decision mistakenly refers to "the Prehearing Order issued on May 5, 1993." Slip op. at 1. That order was stayed by the judge on June 4, 1993, and was superseded by a Second Prehearing Order dated April 6, 1994. The judge issued the show cause order because of Contractors' failure to comply with the Second Prehearing Order. Order to Show Cause at 1.

with . . . about 120 [other] alleged citations . . ." and that the large number of citations issued to it suggested harrassment.

We deem Contractors' letter to be a timely filed petition for discretionary review, which we grant. See, e.g., Middle States Resources, Inc., 10 FMSHRC 1130 (September 1988). On the basis of the present record, we are unable to evaluate the merits of Contractors' position. Accordingly, we reopen this matter, vacate the judge's default order, and remand this matter to the judge, who shall determine whether default is warranted. See Hickory Coal Co., 12 FMSHRC 1201, 1202 (June 1990).

Mary Lu Jordan, Chairman

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

Distribution

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Administrative Law Judge August Cetti
Federal Mine Safety & Health Review Commission
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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

AUG 1 1994

JAVIER SANCHEZ, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEST 93-460-D
v.	:	DENV CD 93-05
	:	
LION COAL COMPANY, Respondent	:	Swanson Mine

DECISION

Appearances: Mr. Javier Sanchez, Price, Utah, pro se;
Brian Steffensen, Esq., Salt Lake City, Utah,
for Respondent.

Before: Judge Hodgdon

This case is before me on a complaint of discrimination brought by Javier Sanchez against Lion Coal Company under Section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). For the reasons set forth below, I find that Mr. Sanchez did not engage in activities protected under the Act and, therefore, was not discriminated against by Lion Coal.

Mr. Sanchez filed a discrimination complaint with the Secretary of Labor pursuant to Section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2). The Secretary concluded that the facts disclosed during its investigation did not constitute a violation of Section 105(c). Mr. Sanchez then instituted this proceeding before the Commission pursuant to Section 105(c)(3), 30 U.S.C. § 815(c)(3).

The case was heard on June 14, 1994, in Green River, Wyoming. Mr. Sanchez testified in his own behalf. George Herne and Anna Marie Boden testified for Lion Coal.

FINDINGS OF FACT

Mr. Sanchez was employed by Lion Coal to work in it's Swanson Mine, located in Huntington Canyon, Utah, from October 1989 until December 31, 1992. He was seriously injured in a mine accident in August 1991 and did not return to work until August 1992. On his return he was limited to "light duty."

In September 1992, Mr. Sanchez fell off of a ladder and aggravated a back injury. After going to the doctor he was advised that he could not return to work until October 1, 1992. When he reported this to Lion Coal, he informed them that he wished to seek a second opinion. Mr. Sanchez did not return to the mine to go to work until March 10, 1993. At that time, he was told that he had been terminated by the company on December 31, 1992, and no longer worked for them.

Mr. Sanchez testified that he kept Lion Coal fully apprised of his medical status and was surprised when they would not take him back. To corroborate this, he submitted a telephone bill indicating that he had called Lion Coal on November 24, 1992. (Comp. Ex. A.)

On the other hand, the witnesses for Lion Coal testified that they never heard from Mr. Sanchez after he told them that he wanted to get a second opinion in October 1992. Ms. Boden, Lion Coal's Safety Administrator, stated that she did not remember receiving a telephone call from Mr. Sanchez on November 24, nor did she have any record of it, although she normally makes a record of all telephone calls.

Mr. Herne testified that he made the decision to terminate Mr. Sanchez at the end of 1992 after determining that the Safety Department had not been contacted by Mr. Sanchez since October. He recounted that the company had learned from Workers' Compensation that Mr. Sanchez had received temporary total disability from November 1, 1992, until November 13, 1992, at which time it was determined that Mr. Sanchez could return to work. (Resp. Ex. 2.) He stated that when Mr. Sanchez did not return to work in December or otherwise contact the company, they took him off of the payroll and transferred his status from active to terminated at the end of the month.

FURTHER FINDINGS OF FACT AND CONCLUSIONS OF LAW

Section 105(c)(1) of the Act, 30 U.S.C. § 815(c)(1), provides that a miner cannot be discharged, discriminated against or interfered with in the exercise of his statutory rights because: (1) he "has filed or made a complaint under or related to this Act, including a complaint . . . of an alleged danger or safety or health violation;" (2) he "is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101;" (3) he "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, (4) he has exercised "on behalf of himself or others . . . any statutory right afforded by this Act."

There is no doubt that Mr. Sanchez was discharged by Lion Coal. However, in order to establish a prima facie case of discrimination under Section 105(c) of the Act, a complaining miner bears the burden of establishing (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2768 (1980), rev'd on other grounds sub nom. Consolidation Coal Company v. Marshall, 663 F2d. 1211 (2d Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981); Secretary on behalf of Jenkins v. Hecla-Day Mines Corporation, 6 FMSHRC 1842 (1984); Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508 (1981), rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983).

Mr. Sanchez has not established that he engaged in protected activity. He does not maintain that he filed or made a complaint of any dangers or safety or health violations or any other matter under, or related to, the Act. Nor is there any evidence in the record to indicate that he did so. There is no evidence that his medical condition had anything to do with evaluations and potential transfer under a standard published pursuant to Section 101 of the Act, 30 U.S.C. § 801. The only proceeding, under the Act, that he instituted and testified in was the instant one, which occurred after, and as a result of, his discharge. Finally, Mr. Sanchez does not claim to have exercised any statutory right afforded him by the Act.

The record is uncontroverted that Mr. Sanchez was terminated because he neither was present for work, nor informed Lion Coal as to why he was not present for work, from October 1 until December 31, 1992. In fact, he did not return to work until March 1993. Giving him the benefit of every doubt, the record still demonstrates that he could have returned to work after November 13, 1992, and that he only contacted, or attempted to contact, the company on November 24, 1992.

It is not, however, necessary to resolve these issues because they clearly do not come within the four areas of protected activities listed in the Act. I find, as have several Commission judges before me, that a claim of protected activity must be based on an alleged violation of a health or safety standard or result from some hazardous condition or practice existing in the mine environment for which the operator is responsible. Frye v. Pittston/Clinchfield Coal Co., 11 FMSHRC 187, 190 (February 1989, Judge Weisberger); Bryant v. Clinchfield Coal Co., 4 FMSHRC 1380, 1421 (July 1982, Judge Kennedy); Kaestner v. Colorado Westmoreland Inc., 3 FMSHRC 1994, 1996 (August 1981, Judge Boltz).

Mr. Sanchez has not met this requirement. Accordingly, I conclude that the adverse action that Mr. Sanchez complains of did not result from his engaging in protected activity.

ORDER

It is **ORDERED** that the complaint filed by Javier Sanchez against Lion Coal Company for violation of Section 105(c) of the Act is **DISMISSED.**

T. Todd Hodgdon
Administrative Law Judge

Distribution:

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Anna Marie Boden, Safety Administrator, Lion Coal Company, P.O. Box 6117, Rock Springs, WY 82901 (Certified Mail)

Brian Steffensen, Esq., 3760 South Highland Drive, Suite 200, Salt Lake City, UT 84106 (Certified Mail)

/lbk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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AUG 4 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. LAKE 93-217
	:	A.C. No. 11-02790-03557
v.	:	
	:	Kathleen Mine
APOGEE COAL COMPANY, d/b/a ARCH OF ILLINOIS, Respondent	:	

DECISION

Appearances: Miguel J. Carmona, Esq., Office of the Solicitor, Chicago, Illinois, for Petitioner; Frenchette C. Potter, Esq., Arch Mineral Corporation, St. Louis, Missouri, and David S. Hemenway, Esq., St. Louis, Missouri, for Respondent.

Before: Judge Amchan

FACTS AND ISSUES PRESENTED

On the afternoon of February 19, 1993, Respondent conducted a fire or escapeway drill during its A shift at the Kathleen mine in Southern Illinois. That day the A shift worked from 8:00 a.m. to 4:00 p.m (Tr. 109-114). During the drill all miners working in the third, fifth, and seventh west sections walked approximately 2,000 feet out from the working face (Tr. 55, 113). Then two miners and the foreman from each section walked out to the mine surface through the primary intake air escapeway. The rest of the crews returned to their sections (Tr. 55).

Although pre-shift examinations had been done of the working sections and areas travelled by miners to reach these sections prior to the start of the A shift at 8:00 a.m., no preshift examination was conducted in the primary intake air escapeway (Tr. 17). However, at about 1:00 p.m., just before the escapeway drill, Albert Dudzik, the shift manager of the A shift and a certified person for purposes of 30 C.F.R. 75.361, performed a "supplemental examination" of the primary escapeway (Tr. 111-112).

On March 17, 1993, MSHA received a section 103(g) complaint regarding the lack of a preshift examination of the primary escapeway on February 19 (Tr. 14). The complaint was submitted by Local 16 of the United Mine Workers of America, which represents the employees at the Kathleen mine. The next day, Inspector John Winstead visited the mine and interviewed representatives of management and the union. He also inspected pre-shift examination records and fire drill records. He then issued citation No. 4053762 (Tr. 14-16) [1]. The citation alleged a violation of 30 C.F.R. § 75.360(a), in that "[a] planned fire drill was conducted on two (2) shifts on 2-19-93 (8-4 and 4-12 shifts) in the 3rd west and 5th west, and a pre-shift examination was not conducted. . ."

Section 75.360(a) requires that within 3 hours preceding the beginning of any shift, a preshift examination shall be performed by a certified person. Section 75.360(b) requires that the certified person look for hazardous conditions, test for methane and oxygen deficiency, and determine if the air is moving in its proper direction in a number of different locations. The locations relevant to this case are those in § 75.360(b)(1), "roadways, track haulageways, and other areas where persons are scheduled to work or travel during the oncoming shift." The issue in this case is whether the primary escapeway was an area in which persons were scheduled to work or travel during the 8:00 a.m. - 4:00 p.m. and 4:00-11:59 shifts on February 19, 1994.

MSHA contends that a preshift examination was required of the primary intake escapeway because the fire drills of February 19, 1994, were scheduled or planned prior to the beginning of the shift during which they were conducted. Respondent contends that the decision to conduct the fire drills on the A shift on February 19, 1994, was not made until midway through the shift and, therefore, it was not required to conduct a pre-shift examination. Further, Respondent contends that it complied with MSHA's regulations by conducting a supplemental examination pursuant to section 75.361. As to the later shift, Respondent contends that no escapeway drill was conducted in the third and fifth west sections as alleged in the citation.

Resolution of Disputed Facts

The testimony at hearing centered primarily on whether the escapeway or fire drill of February 19, 1994, was scheduled or planned prior to the commencement of the A shift at 8:00 a.m. that day. Stephen Sharp, the mine manager at Kathleen, and

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[1]This docket also includes citation No. 3037094 issued on May 4, 1993, by inspector Bill Henson (Exh. J-1, stipulation # 7). At hearing Respondent withdrew its contest of the $50 penalty proposed for that citation (Tr. 131).

Albert Dudzik, the A shift manager, testified that on Monday, February 15, 1994, the mine's safety manager informed them and other supervisory personnel that an escapeway (fire) drill had to be performed that week (Tr. 100-02, 108-09).

Dudzik testified that he did not decide to conduct the escapeway drill on his shift until noon on February 19 (Tr. 110-111). He then conducted his examination of the primary escapeway (Tr. 111). Upon reaching the mine surface he called his three section foremen and instructed them to conduct the drill, which they did almost immediately (Tr. 112-114). I find the testimony of Mr. Sharp and Mr. Dudzik credible and find that the timing of the drill was determined just as they stated.

However, Robert Caraway, a roof bolter on the 7th west section on the A shift, testified that he found out about the escapeway drill on the previous day when his foreman, Gary Culpepper, told the section crew to pick two nonsupervisory employees to walk to the surface during the drill (Tr. 54-57). [2] I find Caraway a credible witness and find that Culpepper did tell his crew to pick two men to walk to the mine surface with him the following day. In so doing I find his testimony more persuasive on this point than the testimony of Stephen Sharp. Sharp interviewed all his supervisors and each one, including Gary Culpepper, who did not testify at the hearing, denied that they had announced the escapeway drill on the previous day (Tr. 94, 103-04)

Although at first blush it appears inconsistent to credit Caraway as well as Respondent's testimony that no decision regarding the drill was made until the afternoon of February 19, these accounts are not necessarily inconsistent. February 19, 1994, was a Friday. In the time period of the alleged violation, it was apparently not uncommon for the mine to operate on Saturdays (Tr. 82). However, a decision to work on Saturday was generally not made until two days beforehand, on Thursday (Tr. 103).

Culpepper had been told that the escapeway drill would be performed the week of February 15-19, and may not have known whether the mine would operate on Saturday. Even if he did know

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[2]Similar testimony was elicited from Eugene McCario, who testified that he was informed the day before the drill that it would be conducted the next day (Tr. 63-64). McCario worked in the 7th west section on the 4:00 p.m. to midnight shift. The citation does not allege a violation with regard to the 7th west section, only the 3rd and the 5th. Although Caraway also worked in the 7th west section, his testimony is relevant because it suggests that the A shift foremen knew on February 18 that an escapeway drill would be performed on the 19th.

he may have guessed that Friday would be the day of the drill. I find the fact that Culpepper told his crew Thursday, that the drill would be conducted on Friday, not necessarily inconsistent with Dudzik instructing his foremen on Friday that the drill was to be conducted that afternoon.

RESPONDENT DID NOT VIOLATE SECTION 75.360(A)

I conclude that Respondent did not violate section 75.360(a) because prior to the commencement of the A shift, employees were not scheduled to work or travel in the primary intake escapeway. Therefore, no preshift examination was required. As to the B shift, there is no evidence that a fire drill was conducted in the third and fifth west sections on February 19, 1993, as alleged in the citation.

The Secretary suggests that Respondent was avoiding its obligations under the preshift examination regulation by waiting until the shift began to announce the exact timing of its escapeway drill, which had been planned the preceding Monday (Secretary's post-trial brief, pp. 5-6). However, MSHA's regulation regarding escapeway drills, section 75.383, does not require that an operator determine the timing of such drills prior to the beginning of the shift in which the drill is conducted.

Moreover, I conclude that Respondent's conduct in this matter is also consistent with the scheme of the Secretary's regulations regarding workplace examinations. The regulation on supplemental examinations, section 75.361, seems to give a mine operator a choice. Either the operator can decide before a shift to conduct a drill and do a preshift examination of the escapeway, or it can decide during the shift to conduct the drill and perform a supplemental examination of the escapeway.

There appears to be no difference with regard to safety and health between a preshift and a supplemental examination. The only apparent distinction in the requirements of sections 75.360 and 75.361 is that a preshift examination must be recorded in a book on the mine surface before non-certified persons enter the inspected areas (75.360(g)), while non-certified persons may enter an area subject to a supplemental examination without the recording of the results of the supplemental examination, 57 Fed. Reg. 20895 (May 15, 1992).

The preamble to MSHA's revised ventilation regulations suggests that a supplemental examination provides the same degree

of protection to miners as does a pre-shift examination. Indeed, it raises a question as to what, if anything, was at stake in the instant litigation [3].

> There is no need to require areas of the mine where persons are not scheduled to work or travel to be examined. . . the supplemental examination required by section 75.361 permits the certified person to perform examinations of his or her own working areas and requires a supplemental examination to be made by a certified person within 3 hours prior to any person's entering any underground area in which a preshift examination for that shift has not been made. 57 Fed. Reg. 20893 (May 15, 1992).

In light of the fact that Respondent complied both with the letter and spirit of the Secretary's regulations, I vacate citation No. 4053762.

ORDER

1. Citation No. 4053762 is VACATED.

2. Respondent is ordered to pay the $50 civil penalty which was proposed for citation No. 3037094 within 30 days of this decision.

Arthur J. Amchan
Administrative Law Judge

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[3] Underlying the section 103(g) complaint which gave rise to the instant citation was a dispute between Respondent and UMWA Local 16 as to whether union employees or management employees should perform onshift examinations (Tr. 58-59, 71-72). The situation at the time of the inspection was that union employees conducted pre-shift examinations and management employees conducted on-shift and supplemental examinations.

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AUG 4 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEST 94-120
	:	A.C. No. 48-01248-03520
v.	:	
	:	Fort Union Coal Mine
FORT UNION, LTD. Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Amchan

This case is before me upon petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. sections 801 et seq. Petitioner has filed a motion to approve a settlement agreement and to dismiss the case. Respondent has informed the undersigned that it has no objection to my approving this agreement. The terms of the settlement are that the penalty for citation 3409185 is reduced from $3,000 to $1,200.

I have considered the representations and documentation submitted and I conclude that the proffered settlement is consistent with the criteria in section 110(i) of the Act.

ORDER

WHEREFORE IT IS ORDERED that the motion for approval of settlement is GRANTED and Respondent shall pay the approved penalty within 30 days of this decision. Upon such payment this case is DISMISSED.

A. J. Amchan

Arthur J. Amchan
Administrative Law Judge
703-756-6210

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AUG 4 1994

RIVERTON CORPORATION, Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. VA 94-31-RM Order No. 4288859; 12/9/93
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. VA 94-41-RM Order No.4288860; 12/9/93
	:	Quarry No. 1 Mine
	:	Mine ID# 44-00101
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. VA 94-56-M A.C. No. 44-00101-5541
v.	:	Docket No. VA 94-57-M A.C. No. 44-00101-05542
RIVERTON CORPORATION, Respondent	:	Docket No. VA 94-58-M A.C. No. 44-00101-05543
	:	Docket No. VA 94-59-M A.C. No. 44-00101-05544
	:	Docket No. VA 94-63-M A.C. No. 44-00101-05545
	:	Quarry #1

DECISIONS

Appearances: Glenn M. Loos, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Petitioner/Respondent;
Dana L. Rust, Esq., McGuire, Woods, Battle and Boothe, Richmond, Virginia, for the Contestant/Respondent.

Before: Judge Koutras

Statement of the Proceedings

These consolidated proceedings concern Notices of Contests filed by the Contestant Riverton Corporation pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, challenging the legality of two section 104(a) imminent danger orders (Docket No. VA 94-31-RM and VA 94-41-RM). Docket Nos. VA 94-56-M, VA 94-57-M, VA 94-58-M, VA 94-59-M, and VA 94-63-M concern civil penalty proposals filed by the petitioner MSHA against the respondent Riverton Corporation pursuant to section 110(a) of the Act, 30 U.S.C. 820(c), seeking civil penalty assessments for seventy-one (71), violations of certain mandatory safety standards found in Part 56, Title 30, Code of Federal Regulations. Hearings were held in Charlottesville, Virginia, and the parties appeared and participated fully therein.

Issues

The issues presented in Contest Docket Nos. VA 94-31-RM and VA 94-41-RM, are whether the cited conditions constituted an imminent danger and "significant and substantial" violations of the cited mandatory safety standard.

The issues presented in the civil penalty cases include the fact of violation, whether some of the violations were "significant and substantial", and the appropriate civil penalty assessments to be made for the violations.

Applicable Statutory and Regulatory Provisions

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

2. Sections 105(d), 107(a), and 110(a) of the Act.

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

Admissions and Stipulations

In its responses to certain discovery requests by MSHA's counsel, Riverton has admitted that it is the owner and operator of the mine at which the citations and orders in these proceedings were issued, that its mining operations are subject to the jurisdiction of the Mine Act, as well as the Commission and the presiding judge in these proceedings.

Discussion

In the course of the hearings the parties were afforded an opportunity to discuss settlements of all of the contested violations in these proceedings, and information was presented

with respect to the six statutory civil penalty assessment criteria found in section 110(i) of the Act. In addition to trial counsel, the MSHA inspector who issued all of the disputed orders and citations, and Riverton's manager of operations were present in the courtroom and actively participated in the settlement negotiations. Arguments in support of the proposed settlement disposition of these cases were presented on the record, and I issued bench decisions approving the dispositions pursuant to Commission Rule 31, 29 C.F.R. § 2700.31. These decisions are herein reaffirmed.

John E. Gray, Riverton Corporation's Manager of Operations, confirmed that Riverton's mining operation at the No. 1 quarry consists of a limestone quarry that produces material for use in its masonry plant for the production of masonry products, agricultural lime, and pre-mix cement products. He characterized the operation as an "old" quarry and plant that has been in operation for many years. He stated that the operation has an annual production of approximately 400,000 to 600,00 tons. MSHA's counsel asserted that MSHA's records reflect a production of 431,797 tons for the year 1992.

MSHA Inspector James E. Goodale, who issued all of the citations and orders in issue in these proceedings, agreed to the age, size, and scope of Riverton's mining operations, and he stated that Riverton's management was cooperative and timely abated all of the citations in good faith.

Findings and Conclusions

I conclude and find that Riverton's No. 1 quarry and plant operations constitute a medium-to-large mining operation. I have also reviewed all of the citations and abatements issued by Inspector Goodale and I conclude and find that Riverton timely abated all of the cited conditions in good faith within the time fixed by the inspector, and in several instances abated the conditions prior to the time fixed by the inspector.

With respect to Riverton's history of prior violations, MSHA's counsel produced a computer print-out of the mine compliance record for the period beginning in October, 1983 through March, 1994. Counsel asserted that the respondent's history of prior violations does not warrant any penalty assessment increases over those which have been made in these proceedings, and upon review of the print-out I agree.

In the absence of any evidence to the contrary, I conclude and find that the payment of the penalty assessments agreed to by the parties in these proceedings will not adversely affect Riverton's ability to continue in business.

Docket Nos. VA 94-31-RM and VA 94-41-RM

These dockets concern two combined Section 107(a) - 104(a) imminent danger orders and citations initially issued on December 9, 1993, and subsequently modified on January 19, 1994, by MSHA Inspector James E. Goodale after he found that certain electrical starter switches in the No. 1 and No. 4 mill starters were not provided with overload protection as required by mandatory safety standard 30 C.F.R. § 56.12001. The inspector concluded that the cited conditions constituted imminent dangers pursuant to section 107(a) of the Act.

MSHA's counsel filed motions to approve proposed settlements of these cases. In support of the motions, counsel asserted that after further review of the factual circumstances surrounding the alleged violations MSHA agrees that no imminent dangers or violations existed in these cases. In support of these conclusions, counsel has provided a full discussion of the circumstances presented at the time the orders were issued, including MSHA's findings that the existing 300 amp fuses for the equipment in question were of the correct type and capacity and provided the required overload protection. Under the circumstances, MSHA has agreed that the contested orders should be vacated. Further, MSHA's counsel asserted that appropriate administrative action will be taken to vacate the citations and to withdraw any proposed civil penalty assessments based on those citations.

After careful review and consideration of the motions and pleadings filed in these cases, I rendered bench decisions approving the proposed settlement disposition with respect to the contested orders. My bench decisions are herein re-affirmed. The orders ARE VACATED, and the contests filed by the contestant ARE GRANTED.

Docket No. VA 94-56-M

This docket concerns twenty (20) alleged violations. The respondent conceded the fact of violations with respect to Citation Nos. 4288854, 4288856, 4288684, 4288685, 4288686, 4288861, 4288690, 4288691, and 4288862, and agreed to accept the citations as issued and to pay the proposed penalty assessments.

The petitioner agreed to vacate Citation Nos. 4288855, 4288857, 4288687, 4288688, 4288689, 4288693, 4288858, and 4288682. The petitioner also agreed to delete the "S&S" designations with respect to citation Nos. 4288681 and 4288683 and to modify the citations to non-"S&S". The petitioner amended its proposed penalty assessments to reflect proposed penalties of fifty-dollars ($50) for each of the citations. The respondent agreed to accept the amended citations and to pay the amended proposed penalty assessments.

With regard to citation No. 4288692, the parties agreed to a modification of the citation to reflect a violation of mandatory safety standard 30 C.F.R. § 56.12032, and the respondent agreed to accept the amended citation and to pay the proposed penalty assessment.

Docket No. VA 94-57-M

This docket concerns twenty (20) alleged violations. The respondent conceded the fact of violations with respect to citation Nos. 4288864, 4288865, 4288867, 4288868, 4288870, 43288872, 4288873, 4288874, 4288875, 4288876, and 4288878, and agreed to accept the citations as issued and to pay the proposed penalty assessments.

The petitioner agreed to vacate Citation Nos. 4288863, 4288866, 4288694, 4288879, and 4288695. The petitioner also agreed to delete the "S&S" designations with respect to Citation Nos. 4288869, 4288877, 4288871 and to modify the citations to non-"S&S". The petitioner also amended its proposed penalty assessments to reflect proposed penalties of fifty-dollars ($50) for each of the citations. The respondent agreed to accept the amended citations and to pay the amended proposed penalty assessments.

With regard to Citation No. 4288880, the parties agreed to a modification of the citation to reflect a violation of mandatory safety standard 30 C.F.R. § 56.12013, and the respondent agreed to accept the citation, as amended, and to pay the proposed penalty assessment.

Docket No. VA 94-58-M

This docket concerns twenty (20) alleged violations. The respondent conceded the fact of violations with respect to Citation Nos. 4288696, 4288697, 4288699, 4288700, 4288701, 4288702, 4288704, 4288705, 4288706, 4288709, 4288710, 4288713, and 4288717, and agreed to accept the citations as issued and to pay the proposed penalty assessments. The petitioner agreed to vacate citation Nos. 4288703 and 4288707.

With regard to Citation Nos. 4288712, 4288716, 4288718, 4288719, and 4288720, the petitioner agreed to delete the "S&S" designations and to modify the citations to non-"S&S". The petitioner amended its proposed penalty assessments to reflect proposed penalties of fifty-dollars ($50) for each of the citations. The respondent agreed to accept the amended citations and to pay the amended proposed penalty assessments.

Docket No. VA 94-59-M

This docket concerns nine (9) alleged violations. With respect to Citation Nos. 4288721, 4288722, and 4288728, the respondent conceded the fact of violations and the petitioner agreed to delete the "S&S" designations and to modify the citations to non-"S&S". The petitioner also amended its proposed penalty assessments to reflect proposed penalties of fifty dollars ($50) for each of the citations, and the respondent agreed to pay the amended proposed penalty assessments.

With regard to Citation Nos. 4288723, 4288724, 4288727, and 4288729, the respondent conceded the fact of violations, and agreed to accept the citations as issued and to pay the proposed penalty assessments. The respondent also conceded the fact of violation with respect to Citation Nos. 4288726, and the petitioner agreed to reduce the inspector's gravity finding to "no likihood of injury", and the respondent agreed to pay a reduced penalty assessment of twenty-five dollars ($25) for the violation. The petitioner also agreed to vacate citation No. 4288725.

Docket No. VA 94-63-M

This docket concerns two (2) alleged violations of mandatory safety standard 30 C.F.R. § 56.15003, which provides as follows:

> All persons shall wear suitable protective footwear when in or around an area of a mine or plant where a hazard exists which could cause an injury to the feet.

The record reflects that MSHA Inspector James E. Goodale served section 104(a) "S&S" Citation Nos. 4288773 and 4288774, on the respondent citing violations of section 56.15003, because two employees of Robb Electric Company were observed at the No. 4 mill area without wearing safety shoes. After further consultation with the inspector the petitioner asserted that it will vacate the citations served on the respondent and will take appropriate action to cite the independent contractor Robb Electric for the alleged violations. A similar disposition was made with respect to Section 104(a) "S&S" citation No. 4288866, issued on December 9, 1993, by Inspector Goodale to the respondent for an alleged violation of Section 56.15003, after he observed that an employee of independent contractor Lloyd Electric Company was not wearing safety toed shoes while at the No. 1 and No. 2 mill areas (Docket No. VA 94-57-M).

ORDER

In view of the foregoing, IT IS ORDERED as follows:

Docket Nos. VA 94-31-RM and VA 94-41-RM

Section 107(a) Imminent Danger Order Nos. 4288859 and 4288860, issued on December 9, 1993, by MSHA Inspector James E. Goodale ARE VACATED.

Docket No. VA 94-56-M

The following Section 104(a) citations ARE AFFIRMED, and the respondent IS ORDERED to pay the civil penalty assessments.

Citation No.	Date	30 C.F.R. Section	Assessment
4288854	12/8/93	56.20003(a)	$157
4288856	12/8/93	56.12013	$50
4288684	12/9/93	56.11002	$157
4288685	12/9/93	56.14107(a)	$50
4288686	12/9/93	56.14107(a)	$50
4288861	12/9/93	56.11002	$157
4288690	12/9/93	56.20003(a)	$50
4288691	12/9/93	56.20003(a)	$50
4288862	12/9/93	56.20003(a)	$157

Section 104(a) Citation Nos. 4288855, 4288857, 4288687, 4288688, 4288689, 4288693, 4288858, and 4288682 ARE VACATED, and the petitioner's proposed civil penalty assessments ARE DENIED and DISMISSED.

Section 104(a) "S&S" Citation Nos. 4288681 and 4288683 ARE MODIFIED to non-"S&S" citations, and as modified they ARE AFFIRMED. The respondent IS ORDERED to pay civil penalty assessments of fifty-dollars ($50) for each of the citations.

Section 104(a) non-"S&S" Citation No. 4288692, IS MODIFIED to reflect a violation of mandatory safety standard 30 C.F.R. § 56.12032, and as modified IT IS AFFIRMED. The respondent IS ORDERED to pay a civil penalty assessment of fifty-dollars ($50) for the violation.

Docket No. VA 94-57-M

The following section 104(a) citations ARE AFFIRMED, and the respondent IS ORDERED to pay the civil penalty assessments.

Citation No.	Date	30 C.F.R. Section	Assessment
4288864	12/9/93	56.11001	$50
4288865	12/9/93	56.11001	$50
4288867	12/9/93	56.12006	$50
4288868	12/9/93	56.12032	$50
4288870	12/9/93	56.12013	$252
4288872	12/9/93	56.12008	$50
4288873	12/9/93	56.12008	$50
4288874	12/9/93	56.12032	$50
4288875	12/9/93	56.12013	$50
4288876	12/9/93	56.11001	$50
4288878	12/9/93	56.12032	$50

Section 104(a) citation Nos. 4288863, 4288866, 4288694, 4288879, and 4288695 ARE VACATED, and the petitioner's proposed civil penalty assessments ARE DENIED AND DISMISSED.

Section 104(a) "S&S" citation Nos. 4288869, 4288877, and 4288871 ARE MODIFIED to non-"S&S" citations, and as modified they ARE AFFIRMED. The respondent IS ORDERED to pay civil penalty assessments of fifty-dollars ($50) for each of the citations.

Section 104(a) non-"S&S" citation No. 4288880, IS MODIFIED to reflect a violation of mandatory safety standard 30 C.F.R § 56.12013, and as modified IT IS AFFIRMED. The respondent IS ORDERED to pay a civil penalty assessment of fifty-dollars ($50) for the violation.

Docket No. VA 94-58-M

The following section 104(a) citations ARE AFFIRMED, and the respondent IS ORDERED to pay the civil penalty assessments.

Citation No.	Date	30 C.F.R. Section	Assessment
4288696	12/14/93	56.14109	$50
4288697	12/14/93	56.14109	$50
4288699	12/14/93	56.11002	$50
4288700	12/14/93	56.12018	$50
4288701	12/14/93	56.11002	$50
4288702	12/14/93	56.20003(a)	$50
4288704	12/14/93	56.12008	$50
4288705	12/14/93	56.12013	$50
4288706	12/14/93	56.11002	$252
4288709	12/14/93	56.12032	$50
4288710	12/15/93	56.16005	$50
4288713	12/15/93	56.14107(a)	$204
4288717	12/15/93	56.12034	$252

Section 104(a) Citation Nos. 4288703 and 4288707, ARE VACATED, and the petitioner's proposed civil penalty assessments ARE DENIED AND DISMISSED.

Section 104(a) "S&S" Citation Nos. 4288712, 4288716, 4288718, 4288719, and 4288720 ARE MODIFIED to non-"S&S" citations, and as modified they ARE AFFIRMED. The respondent IS ORDERED to pay civil penalty assessments of fifty-dollars ($50) for each of the citations.

Docket No. VA 94-59-M

The following Section 104(a) citations ARE AFFIRMED, and the respondent IS ORDERED to pay the civil penalty assessments.

Citation No.	Date	30 C.F.R. Section	Assessment
4288723	12/15/93	56.12032	$50
4288724	12/15/93	56.16005	$50
4288727	12/16/93	56.11001	$252

Section 104(a) "S&S" Citation Nos. 4288721, 4288722, 4288728, ARE MODIFIED to non-"S&S" citations, and as modified they ARE AFFIRMED. The respondent IS ORDERED to pay civil penalty assessments of fifty-dollars ($50) for each of the citations.

The inspector's gravity finding with respect to Section 104(a) non-"S&S" citation No. 4288726, IS MODIFIED to reflect "no likelihood of injury", and as modified IT IS AFFIRMED. The respondent IS ORDERED to pay a civil penalty assessment of twenty-five dollars ($25) for the violation.

Section 104(a) "S&S" Citation No. 4288725, IS VACATED and the petitioner's proposed civil penalty assessment IS DENIED AND DISMISSED.

Docket No. VA 94-63-M

Section 104(a) "S&S" citation Nos. 4288773 and 4288774, ARE VACATED, and the petitioner's proposed civil penalty assessments ARE DENIED AND DISMISSED.

IT IS FURTHER ORDERED that the respondent shall pay the aforementioned civil penalty assessments to the petitioner (MSHA) within thirty (30) days of the date of these decisions and orders, and upon receipt by MSHA, these civil penalty proceedings ARE DISMISSED.

George A. Koutras
George A. Koutras
Administrative Law Judge

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/ml

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

AUG 8 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. KENT 93-455 A. C. No. 15-16318-03572
v.	:	
MANALAPAN MINING COMPANY, INCORPORATED, Respondent	:	Docket No. KENT 93-482 A. C. No. 15-16318-03570 Docket No. KENT 93-599 A. C. No. 15-16318-03573 Docket No. KENT 93-614 A. C. No. 15-16318-03576 Docket No. KENT 93-615 A. C. No. 15-16318-03577 Docket No. KENT 93-883 A. C. No. 16-16318-03581 No. 6 Mine Docket No. KENT 93-486 A. C. No. 15-17045-03524 No. 10 Mine Docket No. KENT 93-613 A.C. No. 15-05423-03733 Docket No. KENT 93-645 A.C. No. 15-05423-03732 Docket No. KENT 93-646 A.C. No. 15-05423-03734 Mine No. 1 Docket No. KENT 93-882 A. C. No. 15-12602-03567 Prep Plant

: Docket No. KENT 93-884
: A. C. No. 15-16733-03546
:
: Docket No. KENT 93-918
: A. C. No. 15-16733-03547
:
: Mine #7

DECISION

Appearances: Joseph B. Luckett, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, TN for Petitioner
Susan C. Lawson, Esq., Buttermore, Turner, Lawson & Boggs, P.S.C., Harlan, KY 40831 for Respondent.

Before: Judge Weisberger

Statement of the Case

These cases are before me based upon Petitions for Assessment of Civil Penalty filed by the Secretary of Labor ("Petitioner") seeking civil penalties and alleging violations by Operator ("Respondent"), of various mandatory standards setforth in Title 30 of the Code of Federal Regulations. Pursuant to notice the cases where scheduled and heard on March 1, 2, and 3, 1994, and April 26-28, 1994[1].

On March 1, 1994, at the commencement of the hearing, Respondent withdrew the Motions it had made to compel discovery with the exception of a motion to require production of material excised by Respondent in the notes taken by MSHA inspector James W. Poynter, that Petitioner had served in response to Respondent's request. At the hearing, I ordered Petitioner to produce the unexcised notes for an in camera examination. After such an examination, and after hearing oral arguments, I concluded that although the excise names of informants were relevant, there was no need established that out weighed the informant's privilege, especially in light of the fact that Petitioner had served Respondent with notes of the interviews of these informants. Hence, under Bright Coal Co., 6 FMSHRC 2520 (November 1984), the motion was denied.

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[1] The parties elected to file a single brief addressing all the cases that were heard on March 1-3 and April 26-28, 1994. Accordingly, all the above listed docket numbers are consolidated for purposes of issuing a decision.

At the conclusion of the hearing, counsel for both parties requested an opportunity to file post-hearing briefs, and the requests were granted. The briefs were required to be filed not later than three weeks after receipt of the transcript. The transcript was received in the Office of the Administrative Law Judges on April 4, 1994. On May 10, 1994, Respondent filed a motion requesting an extension until July 15, 1994 to file its brief. Petitioner did not file any opposition to the motion and, on May 26, the parties were advised that Respondent's Motion was granted, and the time to file briefs was extended to July 15, 1994. On July 15, 1994, in a telephone conference call convened at the initiation of Respondent, the parties were granted a further extension until July 19, 1994 to file their briefs. On July 21, 1994 the parties' briefs were received.

Findings of Fact and Discussion

I. Docket No. KENT 94-455.

A. Citation No. 3380843.

On May 22, 1992, at approximately 5:30 p.m., Steve Collins was bolting from the front of a bolter on the 002 section of the No. 6 mine. He noticed smoke coming from the bolter from the area behind him. He attempted to put the fire out. The fire appeared to go out, but started to flame again after a few minutes, and Collins called for help. Richard Daniel Cohelia, Respondent's safety director, was notified and arrived at the site at approximately 7:30 p.m. He stated that the area was smokey. Cohelia discussed with the superintendent various means of putting the fire out. According to MSHA inspector James W. Poynter, who subsequently investigated the incident, Cohelia informed him that the fire was completely out, and the bolter was cool to the touch by 11:30 p.m. Cohelia indicated that when he exited the mine at approximately 12:30 a.m., he realized that the fire had not been reported to MSHA. At that time he determined not to call and wake up an inspector, as the fire was out and there was no longer any danger. The following morning, at approximately 9:30 a.m., Cohelia, after attempting to contact MSHA officials, Jim Ray and Elmer Smith and not being able to reach them, contacted Robert Blanton, an MSHA roof control ventilation specialist at home and reported the fire to him.

Subsequently, on May 26, 1992, MSHA Supervisory Inspector James W. Poynter, and MSHA accident investigator Daniel Lynn Johnson, were notified and directed to investigate the fire. On May 29, 1992, Poynter and Johnson issued a citation alleging a violation of 30 C.F.R. § 50.10 which, as pertinent, provides that "If an accident occurs, an operator shall immediately contact the MSHA District or Subdistrict Office having jurisdiction over its

mine." (Emphasis added). 30 C.F.R. § 50.9(b) defines an "accident," as pertinent, as "an unplanned fire not extinguished within 30 minutes of discovery." The undisputed evidence establishes that the fire at issue was not extinguished within 30 minutes of discovery. It also is uncontroverted that Respondent did not contact MSHA until approximately 9:30 a.m. on May 23, 1992. Since the fire started at approximately 5:30 p.m. on May 22, and was extinguished at the latest at 11:30 p.m., on May 22, and was not reported until approximately 9:30 a.m., the next morning, I find that Respondent did not immediately notify MSHA of a fire that was not extinguished within 30 minutes of discovery. Hence, I conclude that Respondent did not immediately contact MSHA upon the occurrence of an accident. I find that Respondent did violate Section 50.10, supra.

According to Poynter, the requirement of notifying MSHA of an accident allows MSHA to make a determination whether an inspector should be immediately sent to the area where an accident had occurred in order to take action to protect miners. The fire at issue did not cause any injuries to any persons. Respondent's employees were engaged in extinguishing the fire until approximately 11:30 p.m. Once the fire was extinguished there was no longer any danger, nor was there any urgency to contact MSHA. I find Respondent was only negligent to a low degree in connection with this violation. I find a penalty of $100[2] is appropriate for this violation.

B. Citation No. 3380844

1. Violation of 30 C.F.R. § 75.400

The unreported fire on May 22, 1994 had occurred inside a metal compartment[3] approximately 5 feet wide and 18 inches deep, that was located on a bolter. According to Poynter, when he examined the compartment on May 27, there was a significant

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[2] In evaluating the size of business of the operator, for purposes of assessing a penalty under Section 110(i) of the Act, I note that, disregarding the conglomeration of corporations relied on by Petitioner, the production figures for Manalapan alone, indicate that it is a large operation. Accordingly, I find that a penalty to be assessed for the various violations found in this decision, infra, should not be lowered based on the size of Respondent's operations.

[3] Under normal operations, the compartment is closed. There are a number of holes on the bottom of the compartment.

amount of ash[4] and unburnt materials which appeared to be loose coal in the area of the electric motors and hydraulic pump. On other areas of the bolter, he observed loose coal, coal dust, some float coal dust, and hydraulic fluids.

Johnson, who also examined the compartment, observed a mixture of loose coal, coal dust, and rocks, which he estimated were 65 to 80 percent combustible. He said that most of the material was ash. Johnson indicated further that ash looked like pieces of burnt hose. In addition, there were burnt pieces of coal and oil that covered some rocks. Johnson said that he observed that the combustible material was packed on almost all of the visible surfaces.

Larry Bush, an MSHA inspector inspected the mine on May 26, but was not part of the investigation team. He stated that he observed oil soaked coal dust, and "cinder like material" "around the operator's deck of the drill." (Tr. 123, March 1, 1994).

Poynter and Johnson issued a citation alleging a violation of 30 C.F.R. § 75.400, which provides that coal dust and other combustible materials ". . . shall not be permitted to accumulate in active workings, or on electrical equipment therein."

Steve Collins, who was a roof bolter operator/crew leader on the dates in issue, testified that some time between a month and two weeks prior to the incident at issue, he had an occasion to look inside the compartment. He indicated that he did not see any coal dust or any oil accumulation. According to Collins, after the fire was discovered on May 22, rock dust was spread into the compartment.

On May 22, 1992, after the fire had been extinguished, Michael E. Osborne, a repairman, sprayed the compartment with a pressure hose for about 30 minutes. He then opened the lid of the compartment. He noticed that everything was "completely burnt." (Tr. 163, March 1, 1994). He said that the metal components had melted. He indicated that he did not see any oil accumulation, coal dust, float coal dust, or pieces of coal.

Greg Perkins repaired the compartment subsequent to the fire.[5] He stated that he did not know when he first observed the compartment after May 22. According to Perkins, the inside of

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[4] According to Poynter, when coal burns it becomes ash.

[5] Perkins made his observations when the bolter had been moved to the repair shop. According to Richard Daniel Cohelia, Respondent's Safety Director, the bolter was moved to the shop 3 or 4 days after May 26.

the compartment contained ashes and hoses. He did not see any dust, coal or puddles of oil. Perkins stated that a cable going to a motor inside the compartment had a hole in it. He opined that this hole was a "blowout unit" that could have caused the fire. (Tr. 177, March 1, 1994).

Richard Daniel Cohelia, Respondent's Safety Director, testified that on May 26, when he examined the compartment, its lid was off. He indicated that he observed that all the hoses[6] were burnt, and there was a lot of soot by the motor. Cohelia said that he saw ashes from the burnt hoses, but did not see any coal dust, float coal dust, or accumulation of oil.

No witnesses observed any accumulation of combustible material prior to the fire. The testimony of eyewitness is in conflict as to whether combustible materials were observed in the compartment when the lid was removed after the fire. In resolving the conflict of the testimony, I accord more weight to the testimony of the three inspectors Poynter, Johnson, and Bush, rather than Respondent's witnesses, as the record does not contain any evidence to suggest any improper motive on the part of the inspectors. (See, Texas Industry, Inc., 12 FMSHRC 235 (February 1990), (Judge Melick)), I thus conclude that they were motivated solely by the desire to fulfill their official duties. I further do accord much weight to the responses of Respondent's witnesses in response to leading questions from Respondent's counsel. I accept the testimony of Petitioner's witnesses as to their observations. I do not consider their testimony to have been diluted by any negative inferences raised by the fact that holes in the floor of the compartment might have caused the accumulations to have fallen out as argued by Respondent. Also, due to that experience, especially Johnson's experience as an accident investigator, I accept their opinions that the materials they observed in the compartment were the residue of burnt coal and coal dust. Since the accumulations were observed by the inspectors only 4 days after the fire, and since the bolter had been removed from operation on the day of the fire, I conclude that the observed accumulations existed in the compartment prior to the fire. Although the inspectors did not test the combustibility of the accumulated materials, I accept their testimony that coal and coal dust are combustible. I thus find that Respondent did violate Section 75.400 supra.

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[6] Cohelia estimated that there were 100 hoses in the compartment. The hoses supply oil to the bolter.

2. 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 822, 825 (April 1981).

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

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

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

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

I have found as discussed above, that Respondent violated Section 75.400 supra. Also, I find that the presence of combustible material, i.e., the violation herein, contributed to the fire that occurred. Although the record does not convincingly establish the cause of the fire, I find that

presence of combustible materials did contribute to the hazard of the fire. An injury producing event, i. e., a fire did occur. Although no injuries resulted, I find that, due to the presence of smoke, reasonably serious injuries were reasonably likely to have occurred as a result of this violation. I thus conclude that the violation was significant and substantial.

The accumulated materials at issue were located in a fully enclosed compartment covered by a lid. It was not possible to have observed the accumulations without the removal of the lid. When this was last done there was no evidence of any accumulation. I thus find that Respondent's negligence herein was of a low degree. I find that a penalty of $100 is appropriate for this violation.

II. Docket No. KENT 93-599, (Citation Nos. 4241524, 4241533, 4241537 and 4241539).

A. Citation No. 4241524.

On February 10, 1993, Adron Wilson, an MSHA inspector, inspected the No. 7 belt flyte. He stated that he observed a piece of belt attached to the No. 8 head belt roller. He testified that the belt piece was not attached to the tail belt, and extended to cover only half of the diameter of the tail roller which was below the head belt roller. Wilson indicated that the bottom of the tail belt was 2 inches above the ground, and the top of the tail belt was 16 inches above the ground.

Wilson said that because the belt piece was not securely attached, a person could fall onto the belt, and could come in contact with the belt. In this connection, he indicated that two times each shift a person shoveled in the area to clean under the belt. Wilson opined that due to vibration of the belt, coal falls off the belt, and causes stumbling hazards in the area. He also noted anchor pins in the area which create stumbling hazards. Wilson said that contact with the belt roller could cause bruises, lacerations, or broken fingers. He opined that it is common to clean the belt when it is in operation, and hence an injury will occur. On cross-examination, he conceded that a person would have to stumble before there is a possibility of contact with the belt or the roller, and that if the belt is not in operation there is no danger. However, he said that belt was running when he observed it.

George Smith, a repairman who accompanied Wilson, did not contradict the latter's testimony that the piece of belt was not attached at the bottom. According to Smith, to the best of his recollection, the piece of belt material covered the entire tail roller. He described the belt as "pretty sturdy." (Tr. 14,

March 2, 1994). He said that it was more than a quarter of inch thick, and flexible. He opined that if one fell against the belt, one would not come in contact with the roller.

Cohelia testified that he is not aware of any injuries at any of Respondent's mines resulting from use of belt material as a guard. He opined that should a shovel contact a roller, the shovel would be kicked out due to the direction of the belt. This testimony was not rebutted. Cohelia stated that if one fell onto the belt, one would hit the frame of the tail piece. He said the belt was fairly stiff, and a quarter inch to a half inch thick.

Wilson issued a citation alleging a violation of 30 C.F.R. § 75.1722(b) which provides, in essence, that guards at tail pulleys ". . . shall extend a distance sufficient to prevent a person from reaching behind the guard and becoming caught between the belt and the pulley."

Section 75.1722(b), does not specify the material of a guard, nor does it specify the specific manner in which the guards are to be installed and secured. Section 75.1722(b) is violated only when a guard does not extend a sufficient distance to prevent a person from reaching behind, and being caught between the belt and the pulley. Wilson testified that the guard extended to a point that covered only half of the diameter of the roller, leaving the bottom half exposed. Smith who accompanied Wilson testified that, to the best of his recollection, the belt material covered the tail roller. A contemporaneous drawing made by Wilson similarly indicates that the material covered the pulley. (GX 20).

The citation written by Wilson does not allege that the guard covered only half the pulley. The citation reads as follows: "A guard is not provided for the tail roller of the No. 7 belt flight. No guard is found in the area. The tail roller is self-cleaning type and rotates at a very fast RPM. This is a 15 inch tail roller fully exposed. A piece of belt is attached to the #8 head drive unit. But must be removed to clean muck out from the under the head drive unit created by the belt scraper, and tail roller leaving the person who cleans this area fully exposed to the hazard." (sic) Hence, it appears that the gravemen of the allegation in the citation, is that the belt must be removed when cleaning exposing the cleaner to the hazard of contact with the tail roller. I find that the weight of the evidence establishes that the belt material extended to the end of the roller. Since this material was at least a quarter inch thick, and extended to a point that covered roller, I find that it did extend a sufficient distance to prevent a person from reaching out behind it and being caught between the belt and the

pulley. I thus include the Respondent did not violate Section 75.1722(b), and accordingly, Citation No. 4241524 should be dismissed.

B. Citation Nos. 4241533, 4241537, and 4241539.

Wilson also observed that a guard was not provided at the tail roller for the No. 5 belt flyte. He issued a citation (No. 4241533) alleging a violation of Section 1722(b), supra. Wilson also issued another two citations for essentially the same conditions, alleging significant and substantial violations of Section 75.1722(b), supra. I accept the essentially uncontradicted testimony of Wilson that this tail roller was not guarded. Also, I accept the essentially uncontradicted testimony of Wilson that the tail roller cited in Citation No. 4241537 was partially covered by belt material, but that 6 inches on the left side of the diameter of the roller was exposed. Similarly, I accept the uncontradicted testimony of Wilson that the belt covering the roller cited in Citation No. 4241539 extended to cover only the top half of the roller and left the bottom half exposed. Essentially, the hazards associated with these conditions are the same.[7]

George Smith, a repairman employed by Respondent, accompanied Wilson. He described the belt that covered the rollers at issue as being pretty sturdy, and more than a quarter of an inch thick. He opined that if one touched the belt, or fell against it one would not come in contact with the roller.

Smith explained that the top of the tail belt is 10 inches above the bottom of the head belt. Also, the head drive belt extends laterally 2 feet beyond the tail belts.

Osborne explained that the roller is located within a frame, and most of the frames come over the top of the roller. He estimated that the rollers were recessed approximately 8 to 10

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[7] Wilson indicated regarding the area of the tail roller cited in Citation No. 4251533 that, 4 feet from the cited area, a pin which extended approximately 2 inches off the floor was located approximately 8 to 10 inches into the walk way. He said that a chain was attached to a eyelet at the top of the pin and extended to the belt. The pin and chains constituted tripping hazards. Although Wilson did not indicate the presence of such pins in proximity to the other cited rollers, Cohelia stated that such pins which extended approximately 2 inches off the floor were located 8 to 10 inches into the walkway, in the area of the other cited rollers.

inches. Neither Smith nor Osborne noted any hazardous material in the walkway adjacent to the belts. Cohelia, who has been the safety director since 1982 when Respondent commenced its operations indicated that there have not been any accidents involving the tailpieces or rollers along the belt.

Cohelia explained that it is Respondent's policy for employees not to clean belts when the belts are in operation, and in general employees follow this guideline. According to Smith, when citation numbers 4241533, 4241537, and 4241539 were issued, the belt was not in operation.

I conclude that, although contact with the moving rollers was not likely, given the continuation of mining operations, which necessitated movement of the belt, it was possible that contact could occur with either a portion of a roller that was exposed or covered with belt material that was not secured at the bottom tail roller. Accordingly, I find Respondent did violate Section 75.1722(b), supra, as alleged in these citations.

The record establishes the following: (1) it is Respondent's policy for men to shovel under the areas in question when the belt is not in operation; (2) the rollers in question were approximately at knee height or lower; (3) the lack of significant stumbling hazards specifically in the areas at issue; (4) the available walkaway was 12 feet wide; and (5) the cited rollers were recessed beyond the vertical plane of the upper head rollers, and were recessed beyond a frame covering the portion of the top of the roller. I conclude that within this framework, it has not been established that an injury producing event was reasonably likely to have occurred. (See, U.S. Steel, supra). This is especially true regarding those rollers that were partially or fully covered by the belt material. Accordingly, I find that it has not been established that the violation was significant and substantial.

Larry Bush, an MSHA inspector who inspected the mine in question in 1991 and 1992 indicated that he had received a memorandum "from Arlington" (Tr. 148, March 2, 1994) to eliminate fence wiring and chain link guards due to their hazards. He agreed that he may have suggested to Respondent to use belt material as guards and agreed that "using a belt was a pretty good form of guarding around head pieces" (Tr. 150). Also, Cohelia's testimony was uncontradicted that he was informed by an MSHA inspector to change the guards from fences to belt material, and that four MSHA inspectors had observed belt material guarding rollers, and did not issue any citations. I thus find that Respondent was negligent to only a low degree in connection with the violations herein. I also find that there was a low likelihood of an injury producing event as a consequence of the

cited violations. Also, based on Wilson's testimony, I find that as a consequences of the cited violations possible injuries would be limited to lacerations, bruises, or possibly broken fingers. I find that these violations were of a low level of gravity. I conclude that a penalty of $20.00 is appropriate for each of these violations.

C. Citation No. 4241535.

1. Violation of 30 C.F.R. § 75.400

Wilson indicated that when he made his examination on February 11, he observed an accumulation of float coal along the entire 1200 foot length of the No. 5 belt. He described this float coal dust as paper thin and black. He said it extended rib to rib in the 20 foot wide entry, and also was in the cross-cuts. He issued a citation alleging a violation of 30 C.F.R. § 75.400 which, in essence, mandates that combustible materials shall not be allowed to accumulate. Respondent does not contest the fact of the violation. Based upon Wilson's testimony, I conclude that Respondent did violate Section 75.400, supra.

2. Significant and Substantial

Wilson testified that float coal dust is combustible, and can explode in the presence of methane. He also noted heat sources such as friction from a belt running across broken rollers at the 94th cross-cut, and touching the bottom of belt stands. He noted that in these circumstances a fire could have occurred. Wilson also conceded that a fire was not reasonably likely to have occurred. At the hearing, Respondent moved to vacate Wilson's finding of significant and substantial violation. In response thereto, Petitioner agreed that the violation was not significant and substantial. Based on the record before me, I conclude that an injury producing event, i.e., a fire or explosion, was not reasonably likely to have occurred. I find that the violation was not significant and substantial.

3. Penalty

According to Wilson, employees were working on the broken rollers to correct that condition. There is no evidence as to how long the accumulations had been in existence. Should the violative condition herein have resulted in coal dust being placed in suspension, and should a fire or explosion have occurred, the consequences could have been serious. I conclude that due to the extent of accumulations a penalty of $500 is appropriate for this violation.

III. Docket No. KENT 93-614

A. Violation of mandatory standards

1. Citation No. 4241527

On February 10, 1993, Wilson inspected the No. 7 belt. According to Wilson, at a point 10 crosscuts inby the No. 7 headdrive, he observed that the fire sensor cable was in two separate pieces. He indicated that an auditory and visual signal would not be emitted, and the presence of a fire would not be reported. In this connection, he issued a citation alleging a violation of 30 C.F.R. § 75.1103 which provides for the installation of devices for the belts to give an automatic warning when a fire occurs on or near the belt. Based on the testimony of Wilson which was not contradicted or impeached, I find that the violation has been established.[8]

2. Citation No. 4241525

Wilson also observed an accumulation of coal dust which he said extended the entire 1500 foot length of the No. 7 belt flyte. He said that the dust, which was paper thin, extended rib to rib, was gray to black in color, and was paper thin. Wilson said that the dust extended to the crosscut, and was dry. He said that the belt was in operation. Wilson issued a citation alleging a violation of 30 C.F.R. § 75.400 which, in essence, proscribes the accumulation of combustible materials.

David Smith, a repairman, who was present at the inspection, testified that the dust was mostly gray, and only black "here and there." (Tr. 127, March 3, 1994). He also did not recall seeing any coal dust on the ribs.

I place more weight on the testimony of Wilson, based on my observation of the witnesses' demeanor. Based on the essentially uncontradicted testimony of Wilson, I find that it has been established that there was an accumulation of coal dust. Thus it has been established there was a violation of 30 C.F.R. § 75.400.

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[8] Respondent argues that Section 75.1103 supra, was not violated, as it does not address or require that the fire sensor system be in a workable condition. I reject this interpretation as being unduly restrictive as it disregards, the well established principle that the mandatory standards are to be interpreted to ensure safe working conditions for miners (Westmoreland Coal Company v. FMSHRC, 606 F2d 417, 419-420 (4th Cir. 1979)). Hence, the requirement to install a sensor cable includes the requirement that the cable function properly.

3. Citation No. 4241531

Wilson stated that in the No. 7 belt he saw 20 rollers that were not rolling. He indicated that most of these were located in consecutive order, and were on the bottom of the belt. He said the belt was in operation, and he saw evidence that the belt was rubbing the vertical stands. Wilson touched these stands, and detected heat. His testimony regarding the stuck rollers was not contradicted or impeached. Based upon this testimony, I find that Respondent did violate Section 75.1725, supra.

4. Citation No. 4241528

Wilson stated that he observed black coal dust, 1/8 of inch thick, on top of the No. 7 belt starter box. This box was approximately 4 feet long, 30 inches wide, and 30 inches high. It contained various electrical components which were energized. Wilson also observed float coal dust that was at a depth of 1/8 of an inch inside the starter box. According to Wilson, the dust was on the electric circuits, and wiring. He indicated that the electrical components inside the starter box produce an electrical arc when they make and break contact in their normal operation. Wilson said that the starter box was within 6 or 7 feet of the No. 7 belt head.

Wilson issued a citation alleging a violation of Section 75.400, supra.

Smith testified that he did not see any arcing. He also indicated that there was rock dust beneath the coal dust. He opined that there was not enough of an accumulation to go into suspension, or to cause an ignition. Cohelia opined that dust in a box will not ignite until the electric coil in the box is red hot.

I find that Smith's testimony is insufficient to rebut Wilson's testimony as to his observations. I also find that the testimony of Respondent's witnesses is not sufficient to rebut Wilson's testimony concerning the presence of combustible materials i.e., materials capable of being combusted. On the basis of his testimony, I find that Respondent did violate Section 75.400 as alleged.

5. Citation No. 4238729

Wilson continued his inspection and observed that there was no guard guarding the 15 inch diameter tail roller for the No. 6 belt flyte which abuts the No. 7 belt. He stated that the belt was in operation. He issued a citation alleging a violation of Section 75.1722(a), supra. Wilson's testimony that the 15 inch

diameter roller was exposed was not contradicted or impeached. I find that Respondent did violate Section 75.1722(a) as alleged.

6. Citation No. 4241529

Wilson had the deluge spray system manually tested, and found that at the No. 7 head drive it did not operate. He issued a citation alleging a violation of 30 C.F.R. § 75.1101-1. Based on the testimony of Wilson that was not contradicted or impeached, I find that a violation of Section 75.1101-1 did occur as alleged.

7. Citation No. 4241530

Wilson next observed that a wire leading to a light bulb was loosely wrapped on the 110 volt tap of the transformer located inside the starter box. He said that normally wires attached to this tap are secured by a screw. According to Wilson, loose wires generate heat and an electrical arc. He testified that he had observed an arc the size of the point of a ball-point pen. He also observed coal dust all over the inside of the box, and on the wire at issue up to the edge of its insulation. Wilson issued a citation alleging a violation of 30 C.F.R. § 75.514 which provides that electrical connections shall be "mechanically and electrically efficient and suitable connectors shall be used." (Emphasis added)

Smith indicated that he did not see an arc. I find Smith's testimony insufficient to rebut the testimony of Wilson whom I find credible on this point, based on my observations of his demeanor. Also, there is no evidence that Smith and Wilson were looking at the same place at the same time Wilson observed the arc. I find, based on Wilson's testimony, that Respondent did violate Section 75.514 as alleged, as the wire connecting to the starter box was loosely wrapped, and not secured by a "suitable connector."

8. Citation No. 4241532

Lastly, Wilson observed that a shaft was protruding about 11 inches from the roller at the No. 7 head drive. He said that the circumference of the shaft had a groove cut out of it approximately one quarter of an inch, by a quarter of an inch. The groove extended back to the roller. According to Wilson, the shaft was not guarded. He was concerned that if a person's clothes contacted the rotating shaft a serious injury could result.

Smith, who was present, indicated that a guard was approximately 12 to 14 inches away to left of the shaft, and was in place at that point. However, he did not contradict or impeach the testimony of Wilson that the shaft was not guarded. I thus find, based on Wilson's testimony, that Respondent did violate Section 75.1722(a) supra as alleged.

B. Imminent Danger Withdrawal Order (Order No. 4241526)

According to Wilson, based on all these above 8 conditions he issued a written 107(a) withdrawal order.[9] He explained that all of the conditions were in very close proximity, and they all posed hazards. He said that the hazards were obvious, and he felt there was a lot of danger to himself and miners. He said that a lot of the hazards were inter-connected but that "all" the conditions "in general" formed the basis for the 107(a) order. (Tr. 54) He said that taken alone, the presence of dust, and the non-functioning rollers did not constitute an imminent danger.

Section 107(a) of the Act provides as follows:

> If, upon any inspection or investigation of a coal or other mine which is subject to this [Act], an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in Section [104(c)], to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exists.

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[9] According to Wilson, after he observed the broken sensor cable (infra, III(A)(1)), the dust accumulation in the No. 7 belt flyte, drive (infra, III (A)(2)), the dust in the starter box (infra, III(A)(4)), the broken rollers (infra, III(A)(3)), and also observed that the tail roller was not guarded, he "made the determination at that time that a lot of work needed to be done here before I could allow any coal miner to come back through that area" (Tr. 60, March 3, 1994). On that basis, at approximately 8:55 p.m., he orally issued a Section 107(a) withdrawal order.

The term "imminent danger" is defined in Section 3(j) of the Act to mean ". . . 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).

To support a finding of imminent danger, the inspector must find that the hazardous condition has a reasonable potential to cause death or serious injury within a short period of time. An inspector abuses his discretion when he orders the immediate withdrawal of a mine under Section 107(a) in circumstances where there is not an imminent threat to miners. Utah Power & Light Co., 13 FMSHRC 1617 (1991).

As the Commission has recently stated:

> [A]n 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. 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. [Citation omitted.] Wyoming Fuel Co., 14 FMSHRC 1282, 1291.

Although, the conditions present herein did present discrete hazards, and some were inter-connected, there is a lack of evidence that these conditions, either singularly or in combination had a reasonable potential to cause death or serious injury within a short period of time. (See, Utah Power & Light, supra). Wilson testified regarding the dangers of these conditions, and their proximity to each other, but did not at all opine or setforth any observations regarding any time element. I thus find that the record presents insufficient evidence of any conditions having a reasonable potential to cause death or serious injury within a sort period of time. I thus find that Section 107(a) withdrawal order was not properly issued, and should be dismissed.

c. Whether the cited conditions were significant and substantial.

1. Citation Nos. 4238729 and 4241532.

Regarding Citation No. 4238729 (lack of guard on tail rollers), Wilson's testimony did not set forth with any degree of specificity the specific conditions which would make likely the occurrence of an injury producing event, i.e., inadvertent contact with the exposed rotating roller. Accordingly, I find this violation was not significant and substantial. For essentially the same reason, I find the violative condition cited in Citation No. 4241532 (Shaft not guarded) was not significant and substantial.

2. Citation Nos. 4241525,[10] 4241527[11] 4241528 [12], 4241531[13], 4241530 [14], 4241529 [15]

Each of these citation's taken singularly and in combination, contribute to the hazard of a fire, or the propagation of a fire. In evaluating whether a fire was reasonably likely to have occurred, I note the existence of the following conditions: (1) the extent of the accumulation of dust in the No. 7 belt flyte; (2) the accumulation of dust in the starter box in combination with the occurrence of arcing, and a loose wire which generates heat; and (3) the presence of 20 rollers that did not function, producing function and heat on the vertical stands of the belt. I conclude that with the continuation of the normal mining operations, given the presence of fuel for a fire i.e., coal dust, and numerous actual sources of ignition, a fire or explosion was a reasonably likely to have occurred. Thus, the violations cited were all significant and substantial.

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[10] Coal dust along the belt flyte.

[11] Broken fire sensor cable.

[12] Coal dust in the starter box.

[13] Belt rollers not rolling.

[14] Loosely wrapped wire in starter box.

[15] Inoperative deluge spray system.

D. Penalty

The record does establish how long the above cited conditions had been in existence. Cohelia's testimony tends to establish that Respondent's employees were in the process of cleaning another area. I find Respondent's negligence to have been moderate in connection with all these citations. I find, considering the factors set forth in Section 110(i) of the Act, that the following penalties, are appropriate for the following Citation Nos.: 4241525 - $5,000; 4241527 - $2,200; 4241528 - $2,100; 4241530 - $2,400; 4241531 $2,200; 4241529 - $2,300; 4241532 - $100; 4238729 - $100.

IV. Docket No. KENT 93-486, (Citation Nos. 3164670 and 3164679)

Elmer Thomas, an MSHA inspector, inspected Respondent's Manalapan #10 Mine on January 28, 1993. He observed that one of the permanent stoppings located at the 20th crosscut, was missing. The stoppings are designed to separate the belt entry from the adjacent return entry. He issued a citation (No. 3164670) alleging a violation of 30 C.F.R. § 75.352 which provides as follows: "Entries used as return air courses shall be separated from belt haulage entries by permanent ventilation controls." Respondent has conceded the fact of the violation. Based on the testimony of Thomas, and Respondent's concession, I find that Respondent did violate Section 75.352, supra.

On February 3, 1993, Thomas observed that in the No. 1 belt line, there was another stopping that was out, and another one was partially torn at the 13 or 14th crosscut. Thomas issued another citation (No. 3164679) alleging another violation of Section 75.352, supra. Respondent has not contested the facts of this violation, and based upon the testimony of Thomas, I find that Respondent did violate Section 75.352, supra.

In essence, Thomas opined that because there was a bad roof in the section in question, especially in the No. 1 belt line, and the roof had already fallen in some parts, it was reasonably likely that, over time, a roof fall would have occurred knocking out stoppings, and separating the belt entry from the adjacent intake entry. In this event, not all the air traveling up the intake entry to ventilate the face would have reached the face, as some of it would have short circuited and entered the belt entry through the portion of the permanent stoppings that had been knocked down by a roof fall. Thomas was concerned that since testing results obtained after his inspection indicated the presence of 1/10 of 1% of methane, methane could have accumulated in the area in question, since it was more than a mile deep. Should methane had been accumulated in explosive concentrations, and not have been swept away from the face due to air having been short circuited from the intake entry to the belt entry, the

methane would had been exposed to ignition sources at the face such as the miner, bolter, scoop and charger. In addition, he indicated that the belt line contained other ignition sources such as non-permissible starters, motors, and electric cables.

In order for a violation to be significant and substantial, it must be established that there was a ". . . measure of danger to safety contributed to by the violation:" (Mathies Coal Company, 6 FMSHRC 1, at 3) (January 1984) (Emphasis added). The hazards that were the subject of the concern of Thomas are those associated with an accidental removal of a stopping between the cited belt entries and the intake entry. In contrast, the cited violative conditions were stoppings that were missing between the belt entries and the return entry. There is an absence of any nexus between the cited violations and the hazards testified to by Thomas. I conclude that Petitioner has failed to establish that there was any danger to safety that was contributed to by the violative conditions cited. Accordingly, I find that it has not been established that the violations were significant and substantial.[16]

According to Thomas, J. D. Skidmore told him that the stopping that was missing at the 20th crosscut in the belt entry, had been taken down intentionally, in order for a scoop to pass through the area. Skidmore was not called to testify. In contrast, Johnny Helton, the assistant to the superintendent at the subject mine, testified that the first indication that he had that the stoppings at issue were missing on January 28, the date of the inspection. He also indicated that he was told that the stopping, which were cited by Thomas as having been missing on February 3, had been crushed either by a roof fall, or from a heave of the floor. There is no evidence as to how long the stoppings had been missing in the No. 1 belt line before they were observed and cited by Thomas. Within this framework, I conclude that Respondent was moderately negligent in connection with the violations cited herein. I find that a penalty of $200 is appropriate for each of the cited violations.

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[16] At the hearing, at the conclusion of petitioner's case Respondent made a motion for the entry of judgment in its favor on the issue of significant and substantial. A decision was reserved on this motion, and it is presently granted for the reasons stated above.

V. Docket No. KENT 93-613

A. Citation No. 3164651.

MSHA inspector Roger Pace, testified that while inspecting the subject mines on April 6, 1993, he noted that a fire curtain at the tail piece of the belt in the belt entry at the 006 section was lying on the ground. He cited Respondent for violating 30 C.F.R. § 75.370(a)(1), which in essence requires it to comply with its ventilation system and methane and dust control plan ("ventilation plan"). The ventilation plan, as pertinent, requires the placement of a fire curtain in the belt entry 2 to 3 crosscuts out by the face. Based on the testimony of Pace, which was not contradicted or impeached, I conclude that Respondent did violate its plan, and accordingly there was a violation herein of Section 75.370(a)(1), supra.

According to Pace, if the fire curtain, which is flame retardant, is not in place, air from the belt entry would no longer be prevented from going inby to the face. He indicated that there were various ignition sources present in the belt entry such as cables, starter boxes, power units, and bottom rollers which could freeze and cause friction. In the event of a fire caused by one of these ignition sources, in the absence of the fire curtain at issue, smoke could go to the face where eight men worked, and serious fatal injuries due to smoke inhalation could result. However, the record fails to establish the existence of any specific conditions relating to the potential ignition sources that would have rendered it reasonably likely for a fire to have occurred. Accordingly, I conclude that it has not been established that, as result of the violation herein, an injury-producing event, i.e., a fire, was reasonably likely to have occurred (c.f., Mathies, supra). Accordingly, I find that the violation was not significant and substantial. There is no evidence in the record to base any finding as to what caused the fire curtain to have fallen to the floor, and when this occurred. I thus conclude that Respondent's negligence was no more than moderate. I find that a penalty of $200 is appropriate for this violation.

B. Citation No. 3164652.

Pace issued another citation alleging a violation of the ventilation plan, based upon his observation that a regulator, used to allow belt air to enter the adjacent return entry, was not in place. Respondent did not contradict or impeach this testimony, I find that the ventilation plan requires such a regulator, and since it was missing, Respondent was in violation of the ventilation plan and hence did violate Section 75.370(a)(1).

Essentially, Pace opined that the violation herein was significant and substantial. He reasoned that, in the event of a fire outby the missing regulator, smoke could travel inby to the face where eight men are located. However, due to the absence of any proof that any equipment or other potential ignition source was in such a condition as to render the event of an ignition reasonably likely to have occurred, I concluded that the violation was not significant and substantial. There is no evidence before me as to the amount of time that elapsed between the regulator not being in place, and the inspection at issue. Nor is there any evidence as to indicate why the regulator was not in place. I find that a penalty of $200 is appropriate for this violation.

C. Citation No. 3164653.

According to Pace, the water pressure on the sprays on the miner on the 006 section on April 6, 1993 was only 100 pounds per square inch, (psi) whereas the "ventilation plan" calls for 120 psi. Respondent did not contradict or impeach Pace's testimony in these regards. Hence, inasmuch as the water pressure was less than mandated by the plan, it is concluded that Respondent did violate the ventilation plan. Hence Section 75.370(a)(1) was violated.

Pace indicated that he observed dust from the miner drifting outby to the miner operator. He indicated that, with continued operation, there was a chance the operator and other persons would breathe a large amount of respirable dust, and suffer injuries to their lungs. There is no evidence that the amount of dust to which the miner operator was being exposed, was in violation of any mandatory standard. Also, it is noted that the sprays were operating with water pressure at 100 psi. There is no evidence that the 20 psi deficit in water pressure from that called for by the ventilation plan, caused any significant increase in dust exposure to the operator of the miner, or his helper. I conclude that the violation under these circumstances was not significant and substantial.

Petitioner did not contradict or impeach the testimony of Helton that it is not possible by a visual examination to detect the difference between water sprays operating with 110 psi, rather than 120 psi. As such, the violation herein cannot be found to have been easily observable. I thus find Respondent's negligence to have been only moderate. I conclude that a penalty of $150 is appropriate.

VI. Docket No. KENT 93-646

A. Citation No. 3164716

1. Violation of 30 C.F.R. § 75.1101

Jim Langley, an MSHA inspector, inspected Respondent No. 1 mine on February 22, 1993. Langley issued a citation to Respondent because he had observed that the 006 section belt drive was not provided with a deluge fire suppression system in violation of 30 C.F.R. § 75.1101. In essence, Section 75.1101 mandates the installation of deluge water sprays at the main, and secondary belt-conveyor drives. Respondent did not rebut or impeach Langley's testimony regarding the facts of the violation. Accordingly I find that Respondent did violate Section 75.1101, supra.

2. Unwarrantable failure.

According to Langley, Helton told him that the belt had been in operation for three weeks. Helton did not impeach or contradict this testimony. He stated that when the belt was set up, there was a notation put in the maintenance report to install the deluge system. He indicated that the maintenance foreman works for him, but that he (Helton) is not responsible for seeing that the maintenance shift installs the deluge system. He said that he had thought that the deluge system had been installed. Since the belt had been in operation for three weeks without a deluge system, and there are no facts adduced by Respondent to mitigate its conduct in not having had a system installed, I conclude that the violation herein was the result of Respondent's unwarrantable failure (See Emery Mining Corp., 9 FMSHRC 1997, 2004 (1987)).

B. Order No. 3164717.

Langley testified, in essence, that on February 22, 1993, he also observed black coal dust at the head drive of the "F" belt. He said that the dust was on the floor and both ribs, and extended for 26 crosscuts. He indicated that the accumulations extended the full width of the 18 to 20 foot wide entry, and into the crosscuts. He also indicated that there was float dust on the belt. Langley indicated that it is likely that areas of the accumulations were wet. He also noted that the area was rock dusted.

Helton, who was present, testified that the belt in section was wet, and that the coal that was being run from the face was wet. He opined that the coal that spilled off the belt would be

wet. Helton said, in essence, that the material that was "gobbed off" at the head drive "was a wet mud-like build up" (Tr. 155, April 26, 1994). He opined that the likelihood of the accumulation catching on fire when wet would be a lot less than if it was dry. However, he indicated that he agreed there was a violation.

Cohelia opined that wet coal is not combustible.

Langley, in rebuttal opined that even though coal dust is rock dusted, if there would be an explosion the coal dust would be "kicked up" in the air, (Tr. 167, April 26, 1994) and could still explode. He also indicated that wet coal dust will still ignite and burn.

Langley issued an order alleging a violation of 30 C.F.R. § 75.400 which, in essence, provides that coal dust, loose coal and other combustible materials shall not be permitted to accumulate in active workings.

Based on the testimony of Langley, I conclude that Respondent did violate Section 75.400. Langley opined that the violation was the result of Respondent's unwarrantable failure, because of the amount of the accumulations. He also indicated that prior to citing the area in question, he had examined three other belts, and cited them for having accumulations of float dust. The record does not contain any evidence as to how long the accumulations at issue had existed prior to the order that was issued by Langley. In the absence of any such evidence, I find that it has not been established that there was any aggravated conduct on the part of Respondent. I thus find that it has not been established that the violation herein resulted from Respondent's unwarrantable failure.

C. Significant and Substantial (Citation No. 3164716, and Order No. 3164717).

According to Langley, the violations cited in Citation No. 3164716 and Order No. 3164717, were both significant and substantial due to the presence of possible ignition sources such as the belt drives, rollers, belt boxes, cables, drive rollers and bottom rollers. He also took cognizance of the quantity of the accumulated float dust and loose coal, the present of float dust in the starter box, the lack of the deluge system, the absence of a sensor line, and the absence of a fire hose at the belt drive. Also, he indicated that the breakers and contactors create an arc whenever the belt is turned on, an event that occurs at least twice a day. However, on cross-examination he indicated that the arc produced would not be sufficient to make a fire. Although they were potential fire sources present, there

is no evidence to predicate a conclusion that these sources were in such a physical condition as to render an ignition or explosion reasonably likely to have occurred. Hence, in the absence of evidence of a reasonably likelihood of an injury producing event, i.e., a fire or explosion, I conclude that it has not been establish that these violations are significant and substantial. I find that a penalty of $2,000 is appropriate for the violation of Section 75.1101, supra, and a penalty of $500 is appropriate for the violation of Section 75.400, supra.

VII. Docket No. KENT 93-615, (Citation No. 9885267).

On February 22, 1993, Roger Pace issued a citation alleging a violation of 30 C.F.R. § 70.101 based upon the testing of respirable dust in the mechanized mining unit which indicated a concentration of 1.8 milligrams per cubic meter of air (GX 44 AP [17]). Respondent did not rebut or impeach the testing results. Section 70.101, supra provides, in essence, that "When the respirable dust in the mine atmosphere of the active workings contains more than 5 percent quartz, the operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active workings is exposed at or below a concentration of respirable dust, expressed in milligrams per cubic meter of air as measured with an approved sampling device and in terms of an equivalent concentration determined in accordance with § 70.206 (Approved sampling devices; equivalent concentrations), computed by dividing the percent of quartz into the number 10." According to Langley, applying this formula to the cited section, the percentage of quartz found divided into 10 led to a dust standard of 1.3 milligrams per cubic meter. Cohelia indicated, in essence, that the cited section had been under the reduced dust standard of Section 70.101 supra, for 3 or 4 years. Pursuant to Section 70.101, supra, as applied to the area cited, once it is revealed that the presence of quartz is more than 5 percent of the respirable dust, the operator shall continuously maintain quartz below 1.3. Since the concentration of quartz found on testing exceeded this standard, I find that Respondent violated Section 70.101 supra.

At issue is whether the violation was significant and substantial. Following the dictates of the Commission in Consolidation Coal Company, 8 FMSHRC 890, 899 (1986), I find that the violation herein, i.e., respirable dust in excess of the

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[17] The exhibits admitted in evidence at the hearing on April 26-28, 1994, will be referred to with the suffix "AP" to distinguished them from the exhibits admitted at the hearing on March 1-3, 1994.

standards setforth in Section 70.101, supra, raises a presumption that the violation was significant and substantial. Respondent did not proffer any evidence that miners in the cited section were not in fact exposed to the hazards posed by excessive concentration of respirable dust. (See, Consolidation Coal, supra, at 899). Hence, I find that the presumption that the violation was significant and substantial has not been rebutted. I find that a penalty of $5,200 is appropriate.

VIII. Docket No. KENT 93-482

A. Citation No. 2787470.

During an inspection on December 29, 1992, Langley observed that in the MMU 001 section, six doors leading to an escapeway were not marked with any sign. Respondent did not contradict or impeach the testimony of Langley. Based upon his testimony, I find that the Respondent did violate Section 75.333(c)(2) as cited by Langley in the citation that he issued.

Cohelia testified that, just prior to the effective date of Section 75.333(c)(2) he had ordered 500 signs, and installed them. He indicated that sometime subsequent to November 19, 1992, he placed another order for the signs. He indicated that, prior to the promulgation of the regulation at issue, there was some dispute as to where the signs were to be placed. He said that at one time he was told that arrows were needed along with a sign indicating "man door", but that later he was told that only arrows were needed. Nick Wright, a crew leader who was with the inspector on December 29, indicated that the doors at issue were readily observable, and that more signs had been ordered. Based on the testimony of Respondents' witnesses, I find that Respondent's negligence is mitigated somewhat. I find that a penalty of $100 is appropriate.

B. Citation No. 2787471

On December 29, 1992, Langley cited Respondent for being in violation of its ventilation plan which requires a water spray at both bridge conveyors with a minimum pressure of 50 psi. According to Langley, the MMU 001 section was producing coal at the time. A continuous miner was cutting coal, and dumping it on a bridge conveyor ("bridge"). He observed that the water spray was not operating at this bridge. Respondent has not contradicted or impeached this testimony. On the basis of Langley's testimony, I find that Respondent was in violation of its ventilation plan, and hence it did violate Section 75.370(a)(1), supra.

The continuous miner at issue was equipped with a scrubber to control dust. In addition, the miner was equipped with approximately 30 water sprays to control dust. These were operating at 140 psi which exceeds the ventilation plan requirement of 100 psi. The operator of the bridge was located in intake air approximately 5 feet outby the spray. Also, in the entry at issue, dust produced at the face from the mining process is vented down a return entry (located to the left, looking inby, of the entry in question). The velocity of the air at the face was more than required. Within this context, I conclude that the violation was not significant and substantial. (See, U.S. Steel).

The lack of functioning sprays on the bridge was apparent. However, there is no evidence as to how long this condition had been in existence before it was cited by Langley. In this connection, Nick Wright, who accompanied Langley, testified that when he and Langley first came on the section and went to the face, no coal was being produced. I find that a penalty of $300 is appropriate.

C. Citation No. 2787473

According to Langley, on December 30, 1992 in the No. 1 entry in the 002 section 9 or 10 cuts, 20 feet wide and approximately 52 to 60 feet long, had been cut into in a section that had already been pillared out. He indicated that Respondent should have had a plan showing how water was going to be pumped out of the pillared area. Also, there should have been a plan allowing for drilling into the area of the cuts. He indicated that Cohelia told him that they did not have a plan. Cohelia did not rebut or contradict Langley's testimony. Langley issued a citation alleging a violation of 30 C.F.R. § 75.389(a)(1) which requires that an operator shall develop and follow a plan for mining into areas penetrated by bore holes. Based on the testimony of Langley I find that Respondent did violate Section 75.389(a)(1).

Cohelia testified that it was unclear to him what MSHA wanted an operator to place in a plan, as the mandatory standard was relatively new, having been promulgated on May 15, 1992.[18] Cohelia testified that he attended an MSHA question and answer session on the plan. He said that the officials present did not answers questions regarding what had to be placed in the plan. They said these officials told him that they would get back to

[18] In this connection Langley indicated that compliance with this section was extended to November 16, 1992.

him, but they did not get back to him before the citation at issue was issued. I thus find that Respondent's negligence herein was very low, and assess a penalty of $10.

D. Citation No. 3380767

On March 19, 1992, Johnnie Smith, an MSHA inspector inspected Respondent's Mine No. 6. He observed a personnel carrier. This is a self-powered vehicle that travels on rails. It is used to transport two miners under ground. The vehicle was equipped with two headlight bulbs at one end, and one bulb at the other end. None of these headlight bulbs worked. He issued a safeguard requiring as follows: "All self-propelled track-mounted personnel vehicle be equipped with headlights or its equivalent" (sic). He indicated that he issued the safeguard to provide for the observation of hazards such as the loose shale roof, and the high voltage cable that was hung approximately 6 feet from the bottom rail. He indicated that the mine had a history of the floor rolling and pitching. He was concerned that if a vehicle broke down in a dip, and did not have any headlights, another vehicle travelling on same track could hit it. He also was concerned with the need to observe the loose shale roof to determine whether it needed scaling. He indicated that the height of the mine was approximately 4 feet. I find that the safeguard was properly written, and validly issued.

On January 11, 1993, Wilson inspected the same mine. He observed a self-propelled track mounted personnel carrier that did not have any headlights on one end of the vehicle. This side of the vehicle is the front-end when the vehicle travels outby. Based on the testimony of Wilson that was not contradicted or rebutted, I conclude that Respondent did violate the safeguard, and hence Respondent did violate Section 75.1403-6(a)(2).

Wilson indicated that the shale roof was loose.[19] In essence, he stated that he had observed it falling out between the roof bolts. He said that the mine floor was uneven and there was swags throughout. Also he noted that the tracks were slippery, and there was foot traffic in the area. He said that there was close clearance of the vehicle in the area where there was cribbing. He was concerned that, in the absence of a headlight, it would not have been possible to closely observe the roof conditions from the carrier when travelling outby. He opined that a proper determination could not have been made as to whether scaling was necessary. Langley expressed his concern

[19] Wright indicated that the roof needs to be scaled regularly.

that in the absence of headlights, the vehicle in question could have collided with another vehicle travelling on the same track, inasmuch as operators customarily signals each other with headlights. Also, he indicated that it would be harder for pedestrians to see the vehicle, if it did not have any headlights.

Wright who was with the inspector, indicated that he did not have any problems seeing when he traveled outby in the carrier in question. Neither Wright, nor Michael E. Osborne, who have worked in the cited area for approximately 3 years, were aware of anyone being hit by roof falling on a carrier. Osborne opined that in the absence of a headlight, it is still possible to see. Cohelia indicated that in the absence of headlights, the operator of the vehicle can signal to an oncoming vehicle with bells, or with his cap light. In addition, he indicated that it is possible to hear the vehicle from a long distance. Also, Wilson indicated the area was well rock dusted which increases illumination.

I accept the testimony proffered by Wilson regarding the roof and floor conditions in the entry in question. In the context of this testimony, and considering the hazards associated with the lack of headlights, I find that the violation was significant and substantial. (See, U.S. Steel, supra). I find that a penalty of $900 is appropriate.

IX. Docket No. KENT 93-918 (Citation No. 4257585).

A. Citation No. 4257585

On June 7, 1993, inspector Roger Pace inspected Respondent's No. 7 mine. He observed a total of 13 employees travelling into the mine on two man-trips. He said that these employees were not using safety glasses. He indicated that the man-trip is open on the top. According to Pace, the slate roof continually scales and falls. He opined that it was likely for a person in the open man-trip to have been hit by falling particles from the roof. He said that some of the very thin scales that fall off the roof could cause an eye injury resulting in the loss of an eye. Pace issued a citation alleging a violation of 30 C.F.R. 75.1720(a), which in essence provides miners are required to wear face-shields or goggles ". . . when other hazards to the eyes exist from flying particles."

Allen Johnson, who has been the mine foreman at the subject mine since September 1990, indicated that he is not aware of any eye injuries caused by failure to wear safety glasses.

Based on the testimony of Pace that was not contradicted or rebutted, I find that the miners were riding in a open man-trip without wearing safety goggles. I also find that they were subjected to a hazard of being hit in the eyes by scales falling off the roof. I thus conclude that it has been established that Respondent violated Section 75.1720(a).

Pace opined that, in essence, because of the scales continually falling from the roof, a miner in the open man-trip not wearing glasses could be hit in an eye by these scales. I conclude that such an injury was reasonably likely to have occurred. I conclude that the violation was significant and substantial.

According to Pace, the fact that 13 employees were not wearing safety goggles was readily apparent. Johnson indicated that if he had observed the miners without wearing goggles, he would have been reminded them to wear glasses. In this connection, he indicated that only three of the miners in the man-trips could not produce their glasses. He said that glasses are issued to all miners, and replacements are available. At the time the citation was issued neither man-trip provided a supervisor. Cohelia indicated that in the annual training, miners are told of the importance of wearing glasses. In these circumstances, I conclude that the violation herein resulted from only a low degree of negligence on the part of Respondent. However an eye injury as a result of the violation herein, is of a high level of gravity. I find that a penalty of $350 is appropriate.

B. Citation No. 4257457

According to Langley, on June 15, 1993, he observed an exposed pinch-point on the "D" belt head drive roller. He indicated that the 2 foot diameter roller was 3 feet above the ground, and that a guard covered only part of the roller. According to Langley, the belt was in operation. He opined that due to the inadequate guard, a person's arm could get caught in the pinch-point. He indicated that the unguarded roller was on the narrow side of the belt. He opined that persons are required to work on the narrow side in order to rock dust the belt, and to service the head drive. He estimated that there was approximately 3 to 4 feet between the roller and the wall on the narrow side. He said that the roller was turning at high revolution per minute. He explained that a person could fall on the pinch point, or his clothing could get caught on the pins that stick out of the belt. He issued a citation alleging a violation of 30 C.F.R. § 75.1722(a) supra.

Johnson, who was with the inspector, testified that it is normal practice for persons to walk on the wide side. He explained that normally persons toss rock dust under the roller from the wide side to the narrow side. He indicated that miners shovel from the wide side, as there is no room on the narrow side. He also indicated that the rollers on the narrow side are serviced from the wide side. He said that the mine floor in the area had only some irregularity caused by the continuous miner, and he did not recall seeing any stumbling hazards. He also indicated that he has been working in the mine since September 1990, and no one has slipped or fallen on the narrow side of the belt and gotten caught in the belt.

I find, based upon the testimony of Langley, that because the pinch point of the roller was exposed, that a person may have inadvertently contacted the pinch point, and an injury might have resulted. Thus, I find that it has been established that Respondent did violate Section 75.1722(a).

However, I find that due to the absence of any significant stumbling hazard in the area, and the relevantly low height of the exposed pinch point, it has not been established that the violation was significant and substantial. I find that a penalty of $100 is appropriate.

C. Citation No. 4257459

According to Langley, on June 15, 1993 he observed a belt starting box for the "D" belt. He indicated that a cable supplying power to the starting box entered the box through a round hole. He indicated that the box was metal, and there was nothing between the cable and the hole. He said that the outer surface of the cable was skinned back at the point where the cable entered the box. He said that the leads were resting on the metal part of the hole. Langley issued a citation alleging a violation of 30 C.F.R. § 75.515 which provides as follows: "Cables shall enter metal frames of motors, slice boxes, and electric compartments only through proper fittings. When insulated wires other than cables pass through metal frames, the holes shall be substantially bushed with insulating bushings." (Emphasis added.)

Johnson, who was with the inspector testified that at the point where the cable entered the metal hole, it was completely insulated. However, there was no contradiction or impeachment of the inspector's testimony that there were not any improper fittings at the point where the cable entered the box. Accordingly, I find that Respondent did violate Section 75.515 supra.

Langley indicated that the belt drive was only 2 to 3 feet away. He opined that vibration from the belt drive could cause the thin metal[20] of the box to cut into the leads causing the box to become energized. Should this occur, and should a person then come in contact with the box, an electrical shock, burns, or death could result. He termed the condition obvious.

According to Johnson, at the point that the cable entered the hole, it was covered with a thick rubber outer insulation which he estimated as being between a quarter and half inch thick.

Wilson opined that contactors inside the box open and close, causing vibration. However, neither Wilson nor Langley testified that they observed or felt any vibration in the starter box. Nor is there any other evidence in the record that the starter box actually vibrated. There is insufficient evidence in the record to base a finding that the box vibrated. [21] Considering all the above, I find that the violation was not significant and substantial. I find that a penalty of $200 is appropriate.

X. Docket No. KENT 93-884

A. Citation No. 3835998

On June 28, 1993, MSHA inspector Elmer Thomas, inspected Respondent's No. 7 mine. He asked the operator of a John Deer front-end loader where the fire extinguisher was located. According to Thomas, the operator looked, "and there wasn't one." (Tr. 353, April 27, 1994). Thomas issued a citation alleging a violation of 30 C.F.R. § 77.1109(c)(1) which provides that front-end loaders shall be equipped with at least one portable fire extinguisher. Respondent did not contradict or impeach the testimony of Thomas. Accordingly, based upon Thomas' testimony, I find that Respondent did violate Section 77.1109(c)(1), supra.

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[20] Langley indicated that the edge of the hole through which the cable entered the box was approximately the thickness of a dime.

[21] Since I find that there is insufficient evidence that the box vibrates, the case at bar is distinguished from U.S. Steel Mining Corporation, 7 FMSHRC 327 (1985) relied on by Petitioner. In U.S. Steel, supra, the Commission's finding of a violation therein of Section 75.515, supra, was based on the fact, inter alia, that the pump through which the cited wire passed vibrated, and the vibration was "constant" (U.S. Steel, supra, at 329).

Thomas opined that the violation was significant and substantial. He said that the front-end loader was in operation when he observed it loading a truck. He said that there were battery wires in the same area as oil hoses and the brake lines. He indicated that engine and hydraulic oil, and brake fluid, are all combustible. He concluded that in the case of a fire, considering the absence of a fire extinguisher, an accident producing injury was reasonably likely to have occurred.

I find that it has not been established that an injury producing event i.e., a fire was reasonably likely to have occurred. The record establishes the presence of only potential fire ignition sources. I thus find that it has not been established that the violation was significant and substantial. (See, U.S. Steel, supra).

According to Thomas, the operator of the front-end loader told him that he did not check to see if it contained an extinguisher. I thus find that Respondent was moderately negligent regarding this violation. I find that a penalty of $400 is appropriate.

B. Order No. 4238749

On April 20, 1993, Wilson inspected the 707 section of Respondent's No. 7 Mine. At the time, no coal was being produced. Four miners, Jim Brassfield, Greg Perkins, Ovie Penix, and Corneilus Simpson were present, repairing a bolter. Simpson and Penix were certified to perform preshift examinations, however, they did not perform any preshift examination that morning. Nor did anyone else perform a preshift examination of the area where the men were working. Wilson issued an Order alleging a violation of 30 C.F.R. § 75.360(a) which provides, as pertinent, as follows: "Within 3 hours preceding the beginning of any shift and before anyone on the oncoming shift, . . . enters any underground area of the mine, a certified person designated by the operator shall make a preshift examination." The record establishes that there was no examination made prior to the time Brassfield, Perkins, Penix and Simpson went underground. Accordingly, I find Respondent violated Section 75.360(a), supra.

According to Wilson, since there was no pre-shift examination, the miners who were in the section were exposed to unknown hazards such as the possibility of the existence of methane, the possible lack of oxygen, and adverse roof conditions. In this connection, Langley testified that the roof in the mine has a tendency to fall, and several roof falls have occurred.

Right after Wilson cited Respondent, the area at issue was inspected by Allen Johnson, and no hazardous conditions were observed. No facts have been adduced to predicate a finding that an injury producing event was reasonably likely to have occurred as a result of the failure to conduct the pre-shift examination. Within the context of this record, I conclude that it has not been established that the violation was significant and substantial.[22]

Simpson testified that he was not instructed to do any pre-shift examination. He indicated that if he enters an area of the mine by himself, he then pre-shifts that area. In this instance, he indicated that because he and the rest of the crew were late entering the mine, he thought that Allen Johnson had done the pre-shift examination. Johnson testified that since Simpson was certified to make inspections, he assumed that Simpson had done the pre-shift examination that morning. Johnson testified that had he known that the inspection was not done, he would have done it himself. Within this framework, I find that Respondent's conduct herein was more than ordinary negligence, and constituted aggravated conduct. (See, Emery, supra)). I find that a penalty of $3,000 is appropriate.

XI. Settlements

At the hearings, motions were made to approve settlements that the parties agreed to regarding the following citations/orders: 4241521, 3000263, 2787458, 4257455, 4257456, 4257922, 4257926, 9885301, 4257454, 4257938, 3835999, 4248402, 2793750, 2793751, 2793752, 4239200, 4257401, 3000239. A reduction in penalty from $19,724 to $9168 is proposed. I have considered the representations and documentation submitted in these cases, and I conclude that the proffered settlements are appropriate under the criteria set forth in Section 110(i) of the Act.

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[22] I chose not to follow Emerald Mines Corp., 7 FMSHRC 437, (March 25, 1985) (Judge Broderick), relied on by Petitioner. The key issue for resolution is whether Petitioner established that an injury producing event was reasonably likely to have occurred as a result of the failure to examine the area. There are no facts in the record to base a finding that Petitioner met this burden.

The motions for approval of the settlements are **GRANTED**.

ORDER

It is ordered as follows:

1. The following citations/orders are to be amended to indicated violations. They are not significant and substantial: 4241535, 4238729, 4241532, 3164651, 3164652, 3164653, 3164716, 3164717, 2787471, 4257457, 4257459, 3835998, and 4238749.

2. Order No. 3164717 be amended to indicate that the violation cited was not the result of the Operator's unwarrantable failure.

3. Citation Numbers 4241524 and 4257589 (vacated by Petitioner) are to be DISMISSED.

4. Respondent shall, within 30 days of this decision, pay a total civil penalty of $40,338.

Avram Weisberger
Administrative Law Judge
(703) 756-6215

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

August 5, 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION,	:	TEMPORARY REINSTATEMENT PROCEEDINGS
on behalf of LESLIE COLLINS, Complainant	:	Docket No. SE 94-474-DM SE MD 94-05
on behalf of LAWRENCE L. DUKES, Complainant	:	Docket No. SE 94-475-DM SE MD 94-06
on behalf of RAYMOND SAPP, Complainant	:	Docket No. SE 94-476-DM SE MD 94-08
on behalf of DAVID M. WILSON, Complainant	:	Docket No. SE 94-477-DM SE MD 94-09
v.	:	Plant No. 1 Mine ID 09-00111-RG2
REMOVAL & ABATEMENT TECHNOLOGIES, INC., Respondent	:	

DECISION

Appearances: James Crawford, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia for the Secretary of Labor;
Stephen E. Shepard, Esq., Augusta, Georgia, for the Respondent.

Before: Judge Melick

These consolidated cases are before me upon the request for hearing filed by Removal & Abatement Technologies, Inc., (RATI) 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 45(c), 29 C.F.R. 2700.45(c), to contest the Secretary of

Labor's application for Temporary Reinstatement on behalf of Leslie Collins, Lawrence L. Dukes, Raymond Sapp and David M. Wilson. [1]

The proceedings are governed by Commission Rule 45(d), 29 C.F.R. § 2700.45(d). That rule provides as follows:

> "The scope of a hearing on an application for temporary reinstatement is limited to a determination as to whether the miners' complaint was frivolously brought. The burden of proof shall be upon the Secretary to establish that the complaint was 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 was 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 (1087). See JWR v. FMSHRC, 920 F.2d 738 (11th Cir. 1990).

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[1] The substantive statutory framework for discrimination complaints is set forth in section 105(c)(1) of the Act. That section provides as follows:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment 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.

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 page 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 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).

Jurisdiction

As a preliminary matter, respondent maintains that the Secretary is without jurisdiction under the Act to enforce the temporary reinstatement provisions of section 105(c) in the cases at bar. It is undisputed, however, that during relevant times RATI was an independent contractor (under verbal contract with Dublin Industries which in turn was under contract with the mine operator of the Kaolin processing facility at issue, ECC International) performing the services of removing asbestos roofing panels from the filter building at the subject plant in Sandersville, Georgia.

It is further undisputed that ECC International (ECCI) then operated Kaolin clay mines in the vicinity of this processing facility and utilized the subject facility in the work of preparing the Kaolin clay for various commercial uses. In particular, the filter building at issue was used to separate impurities from the Kaolin mine product. It is further undisputed that the subject Kaolin processing plant has been operated by ECCI under the jurisdiction of the Act and has accordingly been assigned a mine identification number by the Department of Labor's Mine Safety and Health Administration (MSHA). There should be no question that Kaolin clay is a mineral since the term "embraces all inorganic and organic susbtances [sic] that are extracted from the earth for use by man". A Dictionary of Mining, Mineral, and Related Terms, U.S. Department of the Interior, 1968.

Under section 3(h)(1) of the Act, "coal or other mine" includes "lands ... structures, facilities, equipment ... used in, or to be used in, the milling of such minerals [i.e. extracted in non-liquid form] or the work of preparing coal or other minerals ... . " Under section 3(d) of the Act the term

"operator" is defined as "any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine . . ."

Respondent appears to claim that its contacts with the mining industry were so minimal as to exclude its activities as an independent contractor from jurisdiction under the Act. In this regard John Hewitt, Secretary-Treasurer of RATI testified that its work at the ECCI processing plant on November 30, 1993 represented less than one half of one percent of its total man hours of work. It also appears that RATI had worked for 3 days at the ECCI Kaolin clay processing facility up to the time of the Complainants' discharge and was then working its fourth day.

There is, however, no limitation set forth in the Act restricting jurisdiction based upon the frequency or duration of an independent contractor's mine activities. Indeed, in Otis Elevator Company v. Secretary of Labor and FMSHRC, 921 F.2d 1285 (D.C. Cir. 1990), the court held that in section 3(d) of the Act the "phrase 'any independent contractor performing services ... at [a] mine' means just that". The court "did not confront ... whether there is any point at which an independent contractor's contact with a mine is so infrequent, or de minimis, that it would be difficult to conclude that services were being performed since [Otis] conceded that it was performing limited but necessary services at the mine" (921 F.2d at 1290 n. 3). Otis had a contract to service the shaft elevators at a mine.

In Lang Brothers, Inc., 14 FMSHRC 413 (1991), Lang Brothers had an annual contract to clean and plug gas well sites for Consolidation Coal Company "to ensure that natural gas does not seep through the well into a mining area and create a safety hazard." 14 FMSHRC 414. In holding that Lang Brothers was an "operator," the Commission stated:

> Lang's work at the well sites ... was integrally related to Consol's extraction of coal. Cf. Carolina Stalite, 734 F.2d at 1551. The sole purpose of Lang's cleaning and plugging contract with Consol was to facilitate Consol's extraction of underground coal. 14 FMSHRC at 418.

The Commission did not adopt the restrictive interpretation of Old Dominion Power Company v. Secretary of Labor and FMSHRC, 772 F.2d 92 (4th Cir. 1985) (implying that an independent contractor must have a "continuing presence at the mine" to be an "operator" under the Act). Rather, it held that the de minimis standard may be measured by the significance of the contractor's presence at the mine, as well as the duration or frequency of its presence. The Commission noted that even though Lang's actual presence at

the mine to clean and plug wells was for a short period its activity was an integral part of Consol's extraction process.

In Bulk Transportation Services, Inc., 13 FMSHRC 1354 (1991), the contractor had a contract with a coal mine operator to transport coal from the mine to a generating station 40 miles away. The Commission noted that Bulk had a substantial presence at the mine -- "[T]here is a constant flow of truck drivers in and out ... four to five days a week" -- 13 FMSHRC at 1359 -- but it focused on the significance of Bulk's activities to the extraction process in determining that Bulk was an operator subject to the Mine Act. "Given the undisputed fact that Bulk was Beth Energy's exclusive coal hauler between Mine No. 33 and the generating station, and given the quantities of coal hauled by Bulk, we agree with the judge that Bulk's services in hauling coal were essential and closely related to the extraction process." 13 FMSHRC at 1359.

While, as noted, the Act does not, on its face, condition the jurisdiction of independent contractors upon their relation to the extraction process or upon the duration or frequency of their contact with a mine, even assuming, arguendo, that the present Commission nevertheless would require evaluation of such factors, the activities of respondent herein would meet those tests. It is undisputed that respondent herein was at the ECCI preparation plant facility for four consecutive days on a project that was as of that date yet incomplete. During that period it maintained a work crew consisting of a foreman and at least six men working full time at the removal of an asbestos laden roof of the filter building.

It is undisputed, moreover, that these roof panels had deteriorated and presumably, therefore, constituted a hazard to the ECCI miners working in the filter plant from both asbestos fibers and the possibility of injury from such deteriorated roof panels falling. It is also clear that the processing that occurred within the subject filter building was essential to the commercial use of the Kaolin clay product. Within the filter building and beneath the deteriorating roof were centrifuge machines, rotary drum filters and sand grinders with motors and gears. It may reasonably be inferred that RATI's presence at the subject mine using its expertise in handling asbestos to remove the deteriorating asbestos panels prevented the interruption of the processing of the mine product. The presence of RATI was, therefore, significant and related to the processing of a mineral and its continual presence for at least four consecutive days was of such duration as to warrant a finding that such presence meets the various tests previously utilized by the Commission. Under the circumstances, the jurisdictional prerequisites described in prior Commission decisions have been met in these cases. In any event, the test of jurisdiction in these Temporary Reinstatement Proceedings, as with other issues presented in these cases, is

whether there is "reasonable cause to believe" that the Secretary has jurisdiction under the Act. That standard is clearly met herein.

The Merits

Under its contract, RATI was to remove asbestos-laden roof panels varying in size from 5 to 9 feet long by 3 to 4 feet wide from the ECCI filter building. The subject roof was 40 feet above ground at the eves rising to 45 to 50 feet above ground at its peak. Beneath the roof were centrifuge machines, rotary drum filters, and sand grinders with motors and gears on top. Where there was no machinery, there was bare concrete floor. It is undisputed that the roof panels were deteriorated and unsafe to walk upon and as the panels were removed there were increasing areas exposing open space between support beams.

RATI commenced work at the subject plant on November 30, 1993. On December 3, 1993 a six man crew began work around 7:00 a.m. supervised by Foreman Rick Greene. The panel fasteners had, for the most part, already been removed during the previous two days and the work of removing the panels was to begin at this time. Bennie Bryan, ECCI construction supervisor, had previously supplied safety harnesses, fall arresters (with 20 foot retractable cables attached) and 250 to 300 feet of steel safety cable with turnbuckles to Glen Shriver of Dublin Industries for the use of the RATI employees working on the roof. According to Bryan, RATI Foreman Rick Greene was aware that these safety devices had been provided. Bryan testified that the steel cable, which was the responsibility of Dublin Industries to install, was not used and necessary anchor points were never welded into place.

Bryan testified that on one occasion early in the morning of December 3 he saw Foreman Greene on the roof without his safety belt attached and warned him about working without being secured. He then also observed two of work crew on the roof wearing their safety belts but he could not then tell whether those belts had been properly tied off.

Complainant Lawrence Dukes testified that he had worked for RATI for 6 years prior to December 3. He had prior experience working on roofs and working with safety belts. Using photographs of the work scene taken on December 4 Dukes described the area. The area depicted in the photograph identified as Government Exhibit 3 shows the roof area with some roof panels still in place in the left side of the photograph, an area with some panels removed in the center of the photograph and, to the right, what is known as a "walkboard". Dukes described the scene depicted in the photograph identified as Government Exhibit 4 as the end of one of the walkboards not tied down. According to

Dukes, this condition also existed at the time of the crew's work refusal on December 3.

Dukes testified that on the first day at the ECCI job site on November 30 the RATI employees received safety training and unloaded their work materials but performed no work on the roof. On December 1 and 2 they worked on the roof but only removing the nut and bolt fasteners on the panels. In performing this work they were able to attach their safety belts with their three-foot-long lanyards onto a walkboard placed parallel with the roof. The short lanyards did not interfere with this work.

According to Dukes, they began removing the panels on December 3. Wilson and Walker initially removed the panels and passed those panels to Hayes and Sapp. Hayes and Sapp would then walk to the peak of the roof with the panels, down the other side and hand the panels to Dukes who then lowered them to the ground with a rope adjacent to the catwalk ladder. (See Government Exhibit 6). According to Dukes, only two safety harnesses were then made available to the six crewmen. These harnesses were distinguishable from the safety belts used by the remainder of the crew in that they offered greater support and were provided with fall arresters attached to a retractable 20 foot cable. These fall arresters work similar to an automobile seat belt in that upon a sudden movement or fall the arrester grabs hold and prevents further movement while at the same time provides a retractable cable enabling work up to 20 feet from the tie off point. These harnesses were provided to Wilson and Walker because, according to Foreman Rick Greene, they were performing the most dangerous work in removing the panels while exposed to the open roof area. Because of Wilson's large size he was, however, unable to use the full harness and, therefore, used only his safety belt with a fall arrester attached. According to Wilson he later transferred this harness and the fall arrester to "Nathaniel" (presumably Nathaniel Dukes) who later substituted for Wilson in the particularly dangerous work of removing the panels.

At that time Wilson, along with the other three crew members on the roof were dragging the panels to the roof peak and down the other side to be lowered to the ground. According to their testimony, their safety belts and short three-foot-long lanyards could not be tied off to anything that would permit them to continue performing their assigned work. According to the complainants the only thing they could tie their lanyards into was the walkboards but with only a three foot lanyard it would then be impossible to transport the panels in accordance with their assigned duties. According to Dukes, they would be "locked down" onto the walkboard and would be unable to move except for short distances and could not handle the large panels. Since there was nothing for those employees to tie onto, they were walking about the roof area transporting the panels without their

safety belts secured. They were, accordingly, exposed to the hazard of falling through the open space where the panels had been removed, through one of the deteriorated panels, or off the edge of the roof.

According to Dukes, following the removal of some of the panels the work crew returned to the ground for their 9:00 a.m. break. At that time they told Foreman Rick Greene that it was unsafe to work on the roof without the steel cable (earlier provided by Bryan but not installed) to hook onto. Around this time RATI field superintendent James Bellamy arrived at the worksite and was told by all of the work crew that the roof was unsafe since there was no way to tie off their safety lines. According to Dukes, Bellamy went onto the roof himself and returned telling the crew that the roof was safe and that if we wanted our jobs "you better get your asses back onto the roof". When the crew continued to refuse to return to the roof, Bellamy reportedly stated that "if you don't go back on the roof, you're quitting". When the crew continued their work refusal they returned with Bellamy to the RATI offices in Augusta to meet with company president Ernest Hall. Apparently not then able to meet with Hall they were told to return later that day to pick up their checks.

The crew later returned to Hall's offices around 4:00 p.m. and were handed their checks in an envelope, which also contained termination slips. Apparently a heated meeting thereafter followed between the work crew and Bellamy and Hall. They wanted to know why they were terminated. According to Dukes they told Hall that they had no way to tie off with their safety belts. Hall apparently responded that they had what they needed to work with and that they were being dismissed for refusing to do their job. Dukes recalled that during this meeting Carl Walker, one of the work crew, asked for more pay and Hall responded that he had already promised him more pay. According to Dukes, there was no other discussion about pay.

Dukes has had no disciplinary problems in his previous 6 years with the company. He had previously worked on roofs for RATI but been provided with a tie-off similar to the steel cable which was available but not used in this case. Dukes further testified that the white rope appearing in photographs Government Exhibits 7 and 8 could not safely be used to tie onto because it was not strong enough. It was used only as a device to warn people from accidently walking off the edge of the roof. According to ECCI construction supervisor Bennie Bryan, the rope was only one-half inch to five eighths inch thick.

Bryan corroborated the testimony of Dukes in essential respects. Bryan testified that on the morning of December 3 all four of the complainants reported to him that it was unsafe to work "up there on the roof" and that Rick Greene would not do

anything about it. Bryan further testified that one of the group approached him around 8:35 that morning and also told him that they were having problems and that it was unsafe to work on the roof. He had no prior complaints from the crew. Following these complaints Bryan approached RATI Foreman Rick Greene. Greene responded that there was nothing unsafe and that the only thing they wanted was more money. Subsequently, after Greene met with his field superintendent James Bellamy, Greene told Bryan that he was taking his crew back to Augusta and that he was having trouble with them. It was Bryan's opinion that the steel cable should have been used to enable the work crew to tie onto. It was the "proper way to do it".

Another one of the complainants, David Wilson, testified that he had worked for RATI for over three years as an asbestos worker removing asbestos and roofing materials. He corroborated the testimony of Dukes and Bryan in essential respects. He clarified that on December 1 and 2 while they were removing the bolt fasteners from the panels they used three walkboards vertically up the roof and one walkboard horizontally across the roof. With this system they could slide along the horizontal walkboard with their safety belts attached. Wilson further explained that on December 3 as they began removing the panels they had only one walkboard in a vertical position as depicted in photograph Government Exhibit 3. Initially Wilson had a fall arrester attached to his safety belt while he was lifting the panels and passing them to the next man on the walkboard. Later he gave his arrester to another crewman who was prying the panels loose and Wilson was then dragging panels up the roof as they were handed to him and passing them on to Sapp and Collins on the other side of the roof. At that time there was nothing onto which to attach his safety belt. Likewise when he passed the panels over to Sapp and Collins on the other side they had nothing to tie onto. Wilson further testified that during the course of their work that morning he stepped on an unsecured walkboard which moved, causing Sapp to almost fall. According to Wilson only three of the eight walkboards had been tied down.

According to Wilson, when they returned to the ground on their break, Dukes told Foreman Greene that the roof was unsafe and asked him that he would appreciate it if they would put the cable up. In addition, when field superintendent Bellamy showed up he was told that the roof was unsafe and that they needed the cable. Bellamy thereafter checked the roof and told the crew that it looked fine to him. They were told that if they wanted their jobs to get their "asses" on the roof. Wilson denies that he had asked for any increased pay. Wilson also corroborates Dukes that in the meeting at 4:00 p.m. with Hall they told him that "all he had to do was put up the safety cable and the job would be finished." Wilson had never previously been disciplined.

Complainant Leslie Collins had worked as an asbestos worker for RATI for approximately 6 months prior to December 3, 1993. Collins corroborates the testimony of the previous witnesses in essential respects and noted that while he was working on the roof on December 3 he too had nothing to tie his safety belt onto while he was working. The panels were handed to him by others and he lowered the panels by rope to the floor below. He also maintains that Foreman Greene observed him from the ground below working without being tied off. Collins admits that he had been suspended by RATI for 30 days in a disciplinary action. He maintains that he did not ask for more pay.

Complainant Raymond Sapp also corroborates the other complainants in essential respects. He had worked for three years as of December 3 for RATI and had never previously been disciplined. During the morning of December 3 he and Hayes were carrying the panels to Dukes and Collins. They would walk up the walkboards with the panels in hand but had nothing to tie their safety belts onto. At one time he almost fell off the building when another worker stepped on the same unsecured walkboard on which he was standing. Sapp also maintains that he never asked for more pay.

I find the testimony of the complainants to be credible. That testimony is also corroborated in critical respects by the testimony of ECCI construction supervisor Bennie Bryan and, indeed, by RATI Foreman Ricky Greene. On the basis of that testimony and evaluating that testimony under the principles governing analysis of discrimination cases under the Act I conclude that the complaints herein were not frivolously brought and the applications for temporary reinstatement must, therefore, be granted.

The principles governing analysis of a discrimination case under the Act are well settled. A miner establishes a prima facie case of prohibited discrimination by proving that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-800 (1980), rev'd on other grounds, sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (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. Pasula, 2 FMSHRC at 2799-800. If the operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action in any event for the unprotected activity alone. Pasula, 2 FMSHRC at 2800; Robinette, 3 FMSHRC at

817-18; see also Eastern Assoc, Coal Corp. v. United Castle Coal Co., 813 F.2d 639, 642 (4th Cir. 1987).

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. Robinette, 3 FMSHRC at 808-12; Conatser v. Red Flame Coal Co., 11 FMSHRC 12, 17 (1989); see also Simpson v. FMSHRC, 842 F.2d 453, 458 (D.C. Cir. 1988). In considering whether a miner's fear was reasonable in terms of a hazard, the perception of the hazard must be viewed from the mine's perspective at the time of the work refusal. Secretary of Labor on behalf of PLratt v. River Hurricane Coal Co., 5 FMSHRC 1529 (1983); Haro v. Magma Copper Co., 4 FMSHRC 1935 (1982). To be accorded the protection of the Mine Act, the miner need not objectively prove that an actual hazard existed. Secretary of Labor on behalf of Hogan & Ventura v. Emerald Mines Corp., 8 FMSHRC 1066 (1986); Secretary of Labor on behalf of Cooley v. Ottawa Silica Co., 6 FMSHRC 516 (1984).

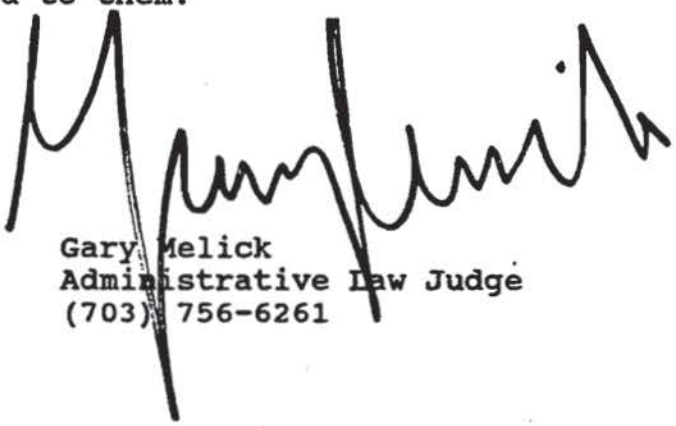
The Commission has also held that: "Proper communication of a perceived hazard is an integral component of a protected work refusal, and responsibility for the communication of a belief in a hazard underlying a work refusal lies with the miner." Conatser 11 FMSHRC at 17, citing Dillard Smith v. Reco, Inc., 9 FMSHRC 992, 995-96 (1987). "[T]he communication requirement is intended to avoid situations in which the operator at the time of a refusal is forced to divine the miner's motivations for refusing work." Smith, 9 FMSHRC at 995. The miner's failure to communicate his safety concern denies the operator an opportunity to address the perceived danger and, if permitted, would have the effect of requiring the Commission to presume that the operator would have done nothing to address the miner's concern. Id. Thus, a failure to meet the communication requirement may strip a work refusal of its protection under the Act. Finally, the Commission has held that 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 ....'" Conatser, 11 FMSHRC at 17, quoting Secretary on behalf of Hogan and Ventura v. Emerald Mines Corp., 8 FMSHRC 1066, 1074 (1986), aff'd mem., 829 F.2d 31 (3d Circ. 1987).

Within the above framework of law and considering the credible testimony of the Complainants and its corroboration I find that the Secretary has clearly met his burden of proving that the four complaints herein were not frivolously brought. In reaching these conclusions I have not disregarded the argument of Respondent that the only issue raised by Complainants was one of money, i.e., that they wanted $1.00 an hour wage increase to continue working. However, I can give this argument but little weight, not only in light of the credible testimony of the Complainants themselves but considering the testimony of RATI Foreman Rick Greene.

Greene acknowledged that the Complainants in fact did raise with him the issue of dangerous conditions on the roof. Greene testified that he in fact thereafter went onto the roof himself to inspect the conditions but concluded that it was not unsafe and thereafter did nothing to address the complaints. Of course, if the work refusal was, in fact, based solely on a demand for higher pay as Respondent argues, there would have been no reason for Greene to have proceeded back onto the roof to make his own safety evaluation after the work crew expressed its work refusal. The Complainants' testimony is significantly corroborated also by the disinterested testimony of ECCI construction supervisor Bennie Bryan, to whom the Complainants also raised the issue of safety and, in conversations with Greene, was told by Greene that "he was having a problem getting his people to work on top of roofs because they (workers) thought it was unsafe to work on top of roofs." (Respondent's Exhibit 1).

ORDER

Removal and Abatements Technologies, Inc. is hereby directed to immediately reinstate Leslie Collins, Lawrence L. Dukes, Raymond Sapp and David M. Wilson to the positions that they held immediately prior to "compensation status" or to a similar position at the same rate of pay and benefits and with the same, or equivalent, duties assigned to them.



Gary Melick
Administrative Law Judge
(703) 756-6261

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

AUG 8 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. WEST 94-84-M
	:	A.C. No. 24-01873-05504
v.	:	
	:	Docket No. WEST 94-131-M
	:	A.C No. 24-01873-05505
WOODRING COMPANY, Respondent	:	

DECISION

Appearances: Kristi Floyd, Esq., Office of the Solicitor, U. S. Department of Labor, Denver, Colorado, for Petitioner;
Mark L. Stermitz, Esq., Warden, Christiansen, Johnson, & Berg, Kalispell, Montana, for Respondent.

Before: Judge Amchan

Overview of the Case

Earl Woodring is the sole proprietor of Respondent. He works intermittently crushing rock at two sites near Kalispell, Montana, and sells it to his sons, who are in the road construction business, and a few other people (Tr. 6, 251-52, 293). He generally works alone but in late July, 1993 he hired an employee, Joseph Hartley, to assist him in preparations for a move from his Batavia Lane site to his other work location on Blackmore Lane (Tr. 250-56).

On the afternoon of July 27, 1993, MSHA Inspector Ronald Goldade drove by Respondent's Batavia Lane worksite and noticed that the crusher was operating (Tr. 199, 307). He returned the next morning to conduct an inspection. Respondent had to crush a certain quantity of rock in order to extricate its crusher from the Batavia site to move it (Tr. 256, 295). Despite working 8 hours on the July 28, Respondent had to continue crushing rock at the site on July 29 and 30, before it could move its equipment (Tr. 316).

By the end of the inspection, Goldade had issued Respondent 17 citations, many for failure to guard or adequately guard a

number of pulleys, drive shafts, and pinch points. The issue with regard to most of these citations is whether there was sufficient miner exposure to these unguarded or insufficiently guarded areas to mandate guarding under MSHA standards. MSHA proposed a civil penalty totalling $1,389 for the alleged violations. I affirm most of the citations and assess civil penalties totalling $818.

The individual citations

Citation 4331562: Inspector Goldade observed the tail pulley to the crusher feed conveyor system which was completely unguarded (Tr. 14-15, Exhibits 2a-2c). This pulley was 2 feet above ground level and was adjacent to a narrow walkway (Tr. 15, 18). A guard had been in place over the pulley prior to July 28. Mr. Woodring apparently removed the guard on the morning of July 28 to remove mud and debris from the conveyor and did not replace it (Tr. 259-60). Mr. Hartley was observed by the inspector in all areas around the crusher, including near the cited tail pulley (Tr. 15-16, 210).

Goldade issued citation No. 4331562 to Respondent alleging a significant and substantial violation of 30 C.F.R. § 56.14112(b). That standard requires that guards be securely in place while machinery is operated. Contact with the unguarded pulley was reasonably likely in that a person could trip or fall on the rubble in the walkway and touch the pulley while reaching out to break his fall (Tr. 21). In the event of such an accident, it is reasonably likely that one would incur a disabling injury to his finger or hand (Tr. 21).

The fact that Respondent had guarded this pulley prior to July 28, suggests that it recognized that guarding was required. Even if that were not the case, the possibility that an employee may trip or fall into an unguarded moving machine part is sufficient to mandate guarding under MSHA standards, even if the unguarded moving machine part is not in an area in which employees normally perform work Brighton Sand & Gravel, 13 FMSHRC 127 (ALJ January 1991).

I find that the Secretary has established the violation as alleged, although it may have been more appropriately cited under section 56.14107(a), the provision requiring the guarding of moving machine parts. I also find that the violation was significant and substantial ("S&S").

To establish an "S&S" violation the Secretary must show 1) a violation of a mandatory safety standard; 2) a discrete safety hazard; 3) a reasonable likelihood that the hazard contributed to will result in an injury in the course of continued normal mining operations; and 4) a reasonable likelihood that the injury in question will be of a reasonably serious nature, Mathies Coal

Company, 6 FMSHRC 1 (January 1984); U. S. Steel Mining Co., Inc., 6 FMSHRC 1573 (July 1984). These elements have been established with regard to citation No. 4331562.

I assess a $111 penalty, the same as that proposed by the Secretary. I conclude that Respondent's negligence, in failing to replace a guard when it planned to operate the crusher, and the gravity of the injury that would likely occur if the unguarded pulley was contacted, warrant such a penalty. This penalty is consistent with the other section 110(i) penalty criteria. Respondent has stipulated that the total proposed penalty will not compromise its ability to stay in business (Tr. 5). Woodring's prior history of violations (Exh. P-1), its size, and good faith in abating the violation, do not make such a penalty inappropriate.

Citation No. 4331563: On the primary crusher feed conveyor, Inspector Goldade observed a guard over a pulley and drive shaft which was hinged on one side and not affixed to the other side so that it could be lifted up to lubricate the shaft (Tr. 22-26, 263, Exh. 3a, 3b).

The citation was issued pursuant to section 56.14112(b), which requires guards to be securely in place while machinery is being operated. I vacate this citation because I conclude that the guard was securely in place. Contact with the drive shaft could not occur accidently. The moving machine part could be exposed only if an employee purposely lifted the guard (Tr. 29).

In the past MSHA accepted hinged guards (Tr. 31-32). However, its policy changed with regard to such guards due to injuries incurred by miners moving these guards. MSHA policy changes are not binding on the Commission or the regulated community, See e.g., King Knob Coal Company, 3 FMSHRC 1417 (June 1981). As the standard does not by its express terms prohibit hinged guards, and MSHA at one time interpreted its standard to allow them, a change in this substantive requirement can only be made through notice and comment rulemaking.

Citation No. 4331569: This citation alleges that the guard on the under conveyor system on the primary jaw crusher was not provided with a means to secure the guard in place in that the guard was constructed with hinges. The last sentence of the citation states, "The guard provided adequate coverage of the tail pulley area but must be secured in place during operation."

At hearing the Secretary introduced photographic exhibit P-9 in support of the alleged violation. Inspector Goldade testified that material build-up had pushed the guard away from the conveyor frame, exposing the pulley (Tr. 34-36). Nothing in the citation itself, however, indicates that the pulley cited was exposed. The essence of the violation described in the citation

is that the guard was of a hinged construction. Given this apparent discrepancy, I am not persuaded that Exhibit P-9 depicts the condition described in citation No. 4331569.

As with citation No. 4331563, I do not believe that the Secretary can prohibit the use of a hinged guard under section 56.14112(b) without rulemaking. I, therefore, vacate citation No. 4331569.

Citation No. 4331564: Inspector Goldade observed the bull wheel drive to the jaw crusher in motion (Tr. 39-42). Although most of this wheel was guarded, the bottom two feet, which was 4 feet 10 inches above the ground was not (Tr. 42-49, exhibits P-4, 4b). Goldade concluded that the wheel had spokes because he could see through it (Tr. 212). Mr. Woodring, however, testified that the wheel was solid (Tr. 265-66), which would clearly make it less dangerous. Given the fact that Exhibit P-4 makes it appear that the wheel was solid, I credit Mr. Woodring's testimony.

Their remains the issues of whether there was sufficient exposure to the wheel and whether a solid wheel can cause injury, thus, requiring guarding under section 56.14107(a). In this regard I credit the testimony of the inspector that contact with the wheel was possible if an employee tripped or fell (Tr. 49) and conclude that an employee could sustain a minor injury, such as a burn (Tr. 301-02). I, therefore, affirm the citation and assess a $25 civil penalty--given the low gravity and negligence of Respondent.

Citation No. 4331565: In one area of the crusher there was a 3 1/2 foot high stairway leading to an elevated platform (Tr. 52, Exh. P-5a). Inspector Goldade observed Mr. Hartley used this stairway and platform (Tr. 216). Underneath this platform and stairway was an unguarded drive shaft with protruding bolts, 3 feet above the ground, and nearby was an unguarded set of trunion wheels rotating in the opposite direction of a large roto vater drum (Tr. 50-59, 68, Exh 5a-5c).

The preponderance of the evidence is that the roto vater drum rotated upwards which made injury by getting caught between the drum and the trunion wheels unlikely (Tr. 267). Although I find that this violation is not "S&S", the potential hazard is sufficient to affirm a violation under the standard.

Similarly, although the drive shaft could be contacted by an employee who fell or tripped in his normal route of travel, such an accident was unlikely because the drive shaft was underneath the elevated walkway. I, therefore, find this also to be non "S&S" and assess a $25 civil penalty for this citation.

Citation No. 4331567: At the end of the crushing process, the green stacker conveyor expels the crushed rock onto a stockpile (Tr. 70). On this conveyor the head pulley was completely unguarded and the tail pulley was partially guarded (Tr. 70, 76, Exh. 7c). The head pulley area had a protruding shaft as well as an unguarded chain drive (Exhs. 7a and 7b).

As to the tail pulley, which was 18 inches above the ground and accessible to employees, Respondent concedes that the guard did not extend forward sufficiently to protect the protruding shaft from contact (Tr. 310-311). On this basis alone I affirm this citation as an "S&S" violation with regard to the tail pulley.

With respect to the head pulley, the parties disagree as to whether it was within 7 feet of the ground. If it was more than 7 feet above the ground it did not have to be guarded under section 56.14107. Inspector Goldade testified that he held a tape from the ground directly below to the head pulley and measured a distance of 4 feet (Tr. 72, 85). Respondent contends that the pulley was at least 8 feet above the ground and the point from which Goldade measured is not directly below the pulley (Tr. 269-272, Exhs. 7a and 7b). Because Mr. Woodring did not take measurements himself on the day of the inspection, I credit the testimony of Mr. Goldade and find an "S&S" violation with regard to the head pulley area.

The shaft and chain drive were completely unguarded and it is reasonably likely that in the normal course of mining operations an employee could contact these hazards and sustain a serious injury. Given the criteria in section 110(i), particularly the negligence and gravity of Respondent, I assess the $111 civil penalty proposed by the Secretary.

Citation No. 4331568: Next to a 16-inch wide walkway on the crusher, Inspector Goldade observed a head pulley drive shaft that was guarded on the side but not on the top (Tr. 87-99, 220-24, Exh. P-8b). He issued a citation alleging a violation of section 56.14107(a) because he was concerned that an employee might slip or fall and accidently reach behind the guard and contact the universal joint of the drive shaft (Tr. 223-24).

I conclude that there was sufficient exposure to the hazard to affirm a violation but that it was not reasonably likely that someone would contact this shaft. I, therefore, affirm the violation as a non-significant and substantial violation. As I also think the need for a guard on the shaft was not obvious, I consider Respondent's degree of negligence to be very low. I assess a $25 civil penalty for the violation.

Citation No. 4331571: At the secondary crusher system, Inspector Goldade found a pulley and drive shaft that were

exposed because part of the guard covering them had been cut away (Tr. 101-105, 227-228, Exhs. 10a and 10b). If an employee slipped or fell while walking through this area they could contact either the pulley or the drive shaft, although they would have to reach up under the guard to touch the drive shaft (Tr. 228).

Given the fact that an employee who slipped would be kept away from the shaft and pulley by the upper portion of the guard that remained, I conclude that injury was not reasonably likely and affirm this citation as a non-significant and substantial violation. Also considering Respondent's negligence in not extending the guard as low, I assess a $25 civil penalty for this violation.

Citation No. 4331566: This citation was issued pursuant to section 56.11002 because two elevated walkways and a staircase were not provided with railings (Tr. 108-116, Exhs. 5a & 5b, 6a & 6b). One of the walkways and the staircase were located over the unguarded shaft and near the trunion wheels discussed with reference to citation No. 4331565. The handrails in this area had been removed by Respondent the previous day in preparation for moving the crusher (Tr. 277). Given the fact that work other than breaking down the crushing machine continued at the site on the day of the inspection, the impending move is not a mitigating circumstance.

The other walkway without handrails was 8 feet above ground level and, therefore, a fall from it was reasonably likely to result in serious injury (Tr. 109-110, 116). I affirm the citation as a significant and substantial violation and assess a $75 penalty, which I deem appropriate giving particular consideration to what I believe is the moderate gravity of the violation.

Citation No. 4331572: Inspector Goldade cited Respondent for failure to make available to MSHA records of his daily examinations of the workplace for hazardous conditions pursuant to section 56.18002(b). Goldade testified that he asked Mr. Woodring for the records and that Woodring said he didn't have any (Tr. 119). Mr. Woodring testified that he does maintain such records but couldn't produce them on July 28 because he had sent them to his other worksite in anticipation for his move (Tr. 278).

If Respondent made such records, kept them at a different location, and offered to make them available to the Secretary, I would vacate the citation. Section 56.18002(b), unlike section 50.40, for example, does not require that the subject records be kept at the mine site. I, therefore, conclude that, if Respondent made the records and kept them at another site, it would not necessarily violate the instant regulation.

However, I affirm this citation. Respondent is required to make an examination of the worksite every day and make a record of it. Woodring worked at the Batavia Lane site on July 27 and there is no evidence that would lead me to believe that if an examination was made on the 27th that the record made of it was sent that evening or the following morning to the other worksite. I find that, at least for July 27, Respondent violated the cited regulation in failing to keep a record of its workplace examination and making it available to the Secretary. I assess a $25 civil penalty.

Citation No. 4331573: Respondent was cited for failure to have adequate first aid supplies, including stretchers and a blanket, pursuant to section 56.15001. Although Mr. Goldade's testimony suggests that Respondent had no first aid supplies on site, I credit Mr. Woodring's testimony that he had all the required items except for the stretchers and blanket (Tr. 124, 278-29).

Nevertheless, the standard requires that stretchers and blankets be kept convenient to working areas. Therefore, a violation of the regulation has been established. I assess a $25 civil penalty for this violation.

Citation No. 4331574: Inspector Goldade observed a compressed oxygen and a compressed acetylene cylinder in the back of a pick-up truck at the site. The valves of these cylinders were not covered (Tr. 127-131). He, thus, cited Respondent for a violation of section 56.16006, which requires that such valves be covered while being transported or stored.

Mr. Woodring testified that he used these cylinders on July 28 for about a half-hour to weld a guard (Tr. 279, 311-12). This raises the issue of what is "stored" within the meaning of the regulation. In FMC Corporation, 6 FMSHRC 1566, 1569 (July 1984), the Commission held that the word "storage" includes short-term storage, Also see Phelps Dodge Corporation, 6 FMSHRC 1930 (ALJ, August 1984). I conclude that when Respondent finished using the cylinders in this case they were "stored" within the meaning of the regulation. There is nothing in the record to indicate that Respondent had an imminent need or intention to reuse the cylinders. I, therefore, affirm the violation and assess a $25 civil penalty.

Citations No. 4331720 and No. 4331561: On July 28, Mr. Woodring operated a front end loader at the worksite which did not have an operational reverse signal alarm and which was not equipped with a seat belt (Tr. 133-147, 244, 280-81). The loader had been used at the worksite for several days but the alarm apparently worked prior to July 28 (Tr. 147, 280-81).

With regard to the reverse signal alarm, Inspector Goldade cited Respondent for a significant and substantial violation of 30 C. F. R. 56.14132(a). The parties disagree as to how many people were exposed to the hazard of being hit by the front end loader while it was being operated in reverse. Mr. Woodring contends that only he and Mr. Hartley were at the worksite on July 28 (Tr. 280-81). The inspector insists that he observed several trucks come to the site to be loaded by Mr. Woodring and that the drivers got out of their trucks and walked around (Tr. 137-38). I credit the testimony of Inspector Goldade on this point. When pressed on his recollection, Mr. Woodring admitted that, while he did not remember any trucks coming to the site that day, he was not be sure (Tr. 280-84).

I conclude that injury was reasonably likely and was likely to be serious. I, therefore, affirm an "S&S" violation with regard to the reverse signal alarm and assess a $100 penalty in view of the gravity of the violation and Mr. Woodring's awareness of the violation.

The absence of the seat belt is undisputed. Apparently, Mr. Woodring, Respondent's owner, was the only person exposed to a hazard due to this violation. An individual or individuals who own a mine are "miners" within the meaning of the Act, 30 U.S.C. § 802(g), Marshall v. Kraynak, 604 F.2d 231 (3d Cir. 1979). Thus, the fact that only Mr. Woodring was exposed to the violation is no impediment to affirming the citation.

I also have no difficulty in finding this violation to be significant and substantial. Vehicle accidents are common at mines and similar worksites. The absence of a seat belt is reasonably likely to result in an injury of a serious nature.

The Secretary proposed a $136 civil penalty for this violation. I assess a $75 penalty in part because on this record it appears that only Respondent's owner was exposed to the hazards created by the violation. I would consider Respondent's negligence to be much greater and would assess a much larger penalty if the record indicated that an employee was assigned to use equipment which Respondent knew was not equipped with a required safety device.

Citation No. 4331570: Inspector Goldade looked inside a van in which Respondent stored flammable and combustible greases and oils. He saw no sign prohibiting smoking or open flames (Tr. 148-151). Goldade, therefore, issued Respondent a citation alleging a violation of section 56.4101, which provides that, "[r]eadily visible signs prohibiting smoking and open flames shall be posted where a fire or explosion hazard exists."

Mr. Woodring testified that there were signs on the outside doors of the truck which prohibited smoking (Tr. 285-87). He

concedes that they did not mention open flames (Tr. 287). While Goldade recalls that there were no signs on the outside of the van, his testimony reveals sufficient uncertainty that I credit Mr. Woodring (Tr. 149).

The requisite signs on the outside of the vehicle would appear to satisfy the standard if the doors to the van were kept closed when the greases and oils were not being used. However, since there was admittedly no sign prohibiting open flames I affirm the violation.

I assess a $10 civil penalty because I consider the gravity and negligence for this violation to be very low. The presence of a no smoking sign should have been sufficient to alert a reasonable person that open flames would be hazardous in the back of the van as well.

Citation No. 4331575: During the inspection Goldade sampled the noise exposure of miner Joseph Hartley and Mr. Woodring (Tr. 153-162, Exh. P-15). Woodring's exposure was well under the permissible exposure limit (PEL) in section 56.5050(a) of 90 dba averaged over an 8-hour shift. However, Hartley was exposed to 677% of the PEL, or average of 103 dba (Tr. 158-59, Exh. G-15). [1]

This violation was cited as non-significant and substantial because Mr. Hartley was wearing earplugs which would reduce the noise reaching his inner ear by 31 dba--if he was wearing them properly (Tr. 163, citation 4331575, block 8). A violation is established because there is a feasible engineering control by which Mr. Hartley's noise exposure could have been brought within the limits of the standard. That control is an insulated, air-conditioned crusher control booth, which is used by many other operators (Tr. 163-64).

I conclude that the inspector's unrebutted testimony that such booths are employed on many crushers establishes the feasibility of this control method under existing Commission precedent, Callanan Industries, Inc., 5 FMSHRC 1900 (November 1983). Given the fact that Mr. Hartley was wearing ear protection and that the evidence indicates that normally

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[1] Respondent at page 8 of its post-trial brief suggests that MSHA's noise exposure calculation is flawed because it did not account for the fact that Mr. Woodring and Mr. Hartley took a lunch break at the site or that the machinery was off for about an hour due to a mechanical breakdown. Actually, sampling during these periods is to the operator's benefit as the relatively lower noise exposure of the lunch break and repair period produces a lower time-weighted average for the whole day (Tr. 238-40).

Mr. Woodring did not employ anyone who would be exposed to excessive noise levels, I assess a civil penalty of $25.

Citation No. 4331733: [2] During the inspection samples were taken of the respirable dust exposure of Mr. Woodring and Mr. Hartley (Tr. 182). The samples taken by Mr. Goldade were analyzed by MSHA's laboratory in Denver, Colorado and were determined to consist of approximately 24% silica (Tr. 176).

MSHA's regulation, at 30 C.F.R. § 56.5001, incorporates by reference the threshold limit values (TLVs) adopted by the American Conference of Governmental Industrial Hygienists in 1973. Given 24% silica the TLV allows exposure to an 8-hour time weighted average of 37 milligrams of respirable dust per cubic meter of air (Tr. 176-78). Mr. Hartley was exposed to 95 milligrams (Tr. 173-74, 178, Exh. G-16).

This violation was characterized as significant and substantial because Mr. Hartley wore only a paper dust mask, which would be virtually useless in protecting him from the effects of respirable silica (Tr. 187, 235). Exposure to excessive amounts of respirable dust containing silica is reasonably likely to contribute to the development of serious respirable disease (Tr. 185-87), and is presumed to be "S&S", Twentymile Coal Company, 15 FMSHRC 941 (June 1993).

The citation also charged a violation of section 56.5005 for failure to implement feasible engineering controls. The record establishes that the type of control booth discussed with reference to the noise violation is such a feasible engineering control (Tr. 188-89). I, therefore, affirm the citation with regard to both of the standards cited.

I assess a $136 civil penalty for this citation, as proposed by the Secretary of Labor. The gravity of the violation warrants such a penalty, as does Respondent's negligence. Virtually all crushing operations encounter some silica and one in this business should be aware that they are likely to be in violation of these standards if they do not implement engineering controls (Tr. 194-96) [3].

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[2]This citation is incorrectly described as number 4331437 at Tr. 169. Additionally the term "error factor" used in discussing this citation was incorrectly transcribed as "air factor" at Tr. 181.

[3]However, at Respondent's other worksite at Blackmore Lane near Columbia Falls, Montana, little dust is generated because the ground is frozen year-round (Tr. 317-18).

ORDER

The following penalties shall be paid for the citations listed below within 30 days of this decision:

Citation	Penalty
4331562	$111
4331564	$ 25
4331565	$ 25
4331566	$ 75
4331567	$111
4331568	$ 25
4331571	$ 25
4331572	$ 25
4331573	$ 25
4331574	$ 25
4331720	$100
4331561	$ 75
4331570	$ 10
4331575	$ 25
4331733	$136
Total:	$818

Citations No. 4331563 and No. 4331569 and the corresponding proposed penalties are vacated.

Arthur J. Amchan
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 9 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
v.	:	
	:	Docket No. KENT 93-792
MANALAPAN MINING COMPANY, INC., Respondent	:	A. C. No. 15-05423-03738
	:	Docket No. KENT 93-821
	:	A. C. No. 15-05423-03737
	:	Docket No. KENT 93-823
	:	A. C. No. 15-05423-03736
	:	Docket No. KENT 93-824
	:	A. C. No. 15-05423-03739
	:	Docket No. KENT 94-106
	:	A. C. No. 15-05423-03742
	:	Mine No. 1
	:	Docket No. KENT 93-793
	:	A. C. No. 15-16318-03579
	:	Docket No. KENT 93-794
	:	A. C. No. 15-16318-03580
	:	Docket No. KENT 93-888
	:	A. C. No. 15-16318-03582
	:	Docket No. KENT 94-19
	:	A. C. No. 15-16318-03584
	:	Docket No. KENT 94-46
	:	A. C. No. 15-16318-03585
	:	Mine No. 6
	:	Docket No. KENT 93-825
	:	A. C. No. 15-16733-03544
	:	Docket No. KENT 93-919
	:	A. C. No. 15-16733-03548
	:	Docket No. KENT 93-920
	:	A. C. No. 15-16733-03549

:	Docket No. KENT 93-921
:	A. C. No. 15-16733-03550
:	
:	Docket No. KENT 93-993
:	A. C. No. 15-16733-03551
:	
:	Docket No. KENT 94-47
:	A. C. No. 15-16733-03552
:	
:	Mine No. 7
:	
:	Docket No. KENT 93-795
:	A. C. No. 15-17016-03530
:	
:	Mine No. 8

DECISION

Appearances: Joseph B. Luckett, Esq., Office of the Solicitor, U. S. Department of Labor, Nashville, Tennessee, for the Secretary;
Susan C. Lawson, Esq., Buttermore, Turner, Lawson & Boggs, P.S.C., Harlan, Kentucky, for Respondent.

Before: Judge Maurer

In these consolidated cases, the Secretary of Labor (Secretary) has filed petitions for assessment of civil penalties, alleging violations by the Manalapan Mining Company, Inc., (Manalapan) of various and sundry mandatory standards set forth in Part 30 of the Code of Federal Regulations. Pursuant to notice, these cases were heard before me on March 15-16, 1994, and May 17-18, 1994, in London, Kentucky. The parties filed posthearing briefs and proposed findings of fact and conclusions of law on July 1, 1994, which I have duly considered in writing this decision.

During the course of the trial of these cases and even subsequent thereto, the parties have discussed and negotiated settlements concerning most of the citations contained in these 17 dockets. I will deal with and dispose of those settled citations in this decision as well as decide the remaining issues concerning the still contested citations, in order, by docket number.

In addition to the arguments presented on the record in support of the proposed settlements, the parties also presented information concerning the six statutory civil penalty criteria found in section 110(i) of the Act. After careful review and consideration of the pleadings, arguments, and submissions in support of the proposed settlements, and pursuant to Commission Rule 31, 29 C.F.R. § 2700.31, I rendered bench decisions

approving the proposed settlements. Upon further review of the entire record, I conclude and find that the settlement dispositions which have been previously approved are reasonable and in the public interest, and my bench decisions are herein reaffirmed.

Docket No. KENT 93-792

CITATION NO.	DATE	30 C.F.R. SECTION	ASSESSMENT	SETTLEMENT
3835991	5/24/93	75.400	$1155	$ 50*
3835992	5/24/93	75.364(b)(2)	1155	50*
3835993	5/24/93	75.203(e)(1)	690	690
		TOTAL		$ 790

* Citation modified to delete "S&S" special findings.

Docket No. KENT 93-793

CITATION NO.	DATE	30 C.F.R. SECTION	ASSESSMENT	SETTLEMENT
4239192	5/12/93	75.1725(a)	$ 690	$ 345
4239193	5/12/93	75.1725(a)	690	345
9885298	5/18/93	70.207(a)	595	595
		TOTAL		$ 1285

Docket No. KENT 93-794

CITATION NO.	DATE	30 C.F.R. SECTION	ASSESSMENT	SETTLEMENT
3836066	6/7/93	75.362(d)	$1019	$ 50*

* Citation modified to delete "S&S" special findings.

Docket No. KENT 93-795

CITATION NO.	DATE	30 C.F.R. SECTION	ASSESSMENT	SETTLEMENT
9885286	4/9/93	70.100(a)	$ 506	$ 506
9885289	4/9/93	70.208(a)	900	900
		TOTAL		$ 1406

Docket No. KENT 93-821

The parties have agreed to settle four of the eleven citations included in this docket as follows:

CITATION NO.	DATE	30 C.F.R. SECTION	ASSESSMENT	SETTLEMENT
4239218	5/17/93	75.516	$ 431	$ 50*
3835986	5/19/93	75.1101-3	431	431
3835988	5/19/93	75.1100-2(b)	431	50*
3835990	5/19/93	75.1101	431	50*

* Citation modified to delete "S&S" special findings.

Seven citations remain to be decided in this docket which were tried before me and were subsequently briefed by the parties. Citation No. 4239291 alleges a "significant and substantial" violation of the standard found at 30 C.F.R. § 75.400 and charges as follows:

> Loose coal and float coal dust has been allowed to accumulate inside the power center on the 006 section.

Manalapan admits the violation of 30 C.F.R. § 75.400 (see proposed conclusions of law), but disputes the "significant and substantial" special finding in this instance.

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).

Inspector Thomas testified that the accumulations were black in color and were on all of the electrical components in the power center and on the bottom of the power center, which was activated. He opined that any electrical arc could ignite the accumulations. He therefore reasoned that it was reasonably likely that the power center could explode, and at least one miner could be expected to suffer burns or other reasonably serious injuries as a result.

Inspector Thomas has personally had a previous bad experience with this type of violative condition in that a power center once exploded when he was working nearby and he was hospitalized for 4 to 5 days after the incident.

Mr. Gluck also testified that float coal dust is volatile matter which will burn when ignited. He further opined that the presence of float coal dust inside a power center on and near energized electrical components presents a clear danger. There are numerous potential ignition sources, such as a heat rise, or a malfunction causing a short circuit or a break down of an electrical component could cause an electrical arc. Insulators sometimes will break down due to atmospheric conditions, and these can cause an electrical arc. Mr. Gluck also testified that power centers have been known to melt down or malfunction and catch on fire. He testified that the lowest temperature of an electrical arc would be around 1150 to 1200 degrees Fahrenheit. A temperature of only 900 degrees Fahrenheit will ignite float coal dust.

Finally, Mr. Gluck testified that when turning the power on or off a power center which uses a knife blade system could result in an electrical arc at the knife blade switches. The act of putting a breaker in could also result in an electrical arc. Inspector Thomas testified that the power would have to be turned off on the power center to move it, and he stated that the power center is moved about every 2 or 3 days to pull it closer to the working face. It would then be turned back on.

Mr. Fred Kelly, who testified on behalf of Manalapan, agreed that there is a danger of arcing and sparking when the power center is turned on or off, but he opines that it would be outside the power center and away from the accumulated float coal dust inside. He also testified that there could be arcing when the disconnect switch at the power center is activated. This arcing would admittedly be inside the power center but 16 to 20 inches above the floor, where in his opinion, at least, it would be improbable for the loose coal or float coal dust to come into contact with it and thereby cause an ignition. But, I note here that Mr. Kelly did not observe the float coal dust accumulations cited by the inspector.

In my opinion, the Mathies test has been met. The record is replete with testimony from various witnesses that electrical arcs and sparking can and do occur inside the power center and although the respondent's witnesses minimized the risks, they generally agreed that the arcing and sparking is possible. The potential ignition sources combined with the accumulations of loose coal and float coal dust found inside the power center is sufficient, in my opinion, to make this an "S&S" violation.

Therefore, I conclude that there was a reasonable likelihood that the hazard contributed to by the violation herein would result in an injury-producing event. Accordingly, I conclude that it has been established that the violation herein was significant and substantial and serious.

Upon careful consideration of all of the statutory criteria in section 110(i) of the Act, including the Manalapan Mining Company, Inc.'s own production figures, making it a "large" operator in its own right, I assess a civil penalty of $450.

Citation No. 4239220 alleges a "significant and substantial" violation of the standard found at 30 C.F.R. § 77.1605(k) and charges as follows:

> Berms were not provided on the access road to the surge impoundment.

On May 17, 1993, Inspector Thomas and another inspector observed two cars coming across the elevated road to the left of the ponds at what he describes as a high rate of speed. He was

unable, however, to state what speed that was. The inspector claimed that if the driver lost control of his vehicle, he could reasonably be expected to go off either side of the road and be involved in a serious accident, resulting in at least broken bones.

The road is admittedly not provided with berms, but is usually blocked by wire ropes. The road is not wide enough to put berms on and still allow the necessary access to dip the ponds due to the width of the required equipment for that operation. That is why the road is blocked and the company has advised the miners not to use it.

In my opinion, when they do drive on it, it is a violation, and could in the proper circumstances, be a significant and substantial violation. It is up to the company to keep their employees off of it. A failure to do so will result in the assessment of civil penalties.

Roy Ellis, a foreman for Manalapan, testified that the road could not be traveled at an unsafe or high rate of speed due to the nature of the road, and Inspector Thomas admitted that the road in question was in better shape than the road the miners normally travel because it is used infrequently.

Giving Manalapan the benefit of the doubt on a close issue, I conclude that the Secretary has failed to prove by a preponderance of the evidence that this was a significant and substantial violation. The citation will be so modified.

Reading the record as a whole and considering that this was the second such incident in as many months, I am going to assess a civil penalty of $100 for the violation found herein.

Citation Nos. 3835982, 3835984, 3835985, 3835987, and 3835989 were all issued on May 19, 1993, by Inspector Elmer Thomas. All allege violations of 30 C.F.R. § 75.400 in the vicinity of various belt lines in the No. 1 Mine.

Citation No. 3835982 was issued on the A belt at the No. 1 Mine. This is the first belt as the mine is entered. Inspector Thomas testified that he observed accumulations of float coal dust and loose coal under and alongside the belt for a distance of approximately 150 feet. The accumulations were black in color and from paper thin to 3 or 4 inches in depth. The belt was running when the violation was observed, and the belt was not trained. This means that the belt was not running evenly, that the metal splices of the belt were hitting the bottom stands of the belt, creating metal to metal contact which could cause sparking.

Manalapan does not dispute the violation, but does contest the "significant and substantial" special finding. I will treat the "S&S" issue for all five of these "accumulations" citations together at the end of this section.

Citation No. 3835984 was issued on the B belt at the No. 1 Mine. This belt dumps on the A belt. Inspector Thomas observed accumulations of float coal dust and loose coal extending from the head drive the entire length of the belt to the tail roller. The accumulations extended from the track, under the belt, to the rib side, a distance of approximately 12 feet. The accumulations were black in color and more extensive than those found at the A belt, from paper thin to perhaps a couple of inches thick at different locations.

Manalapan likewise does not dispute the fact of this violation, but does contest the "S&S" special finding.

Citation No. 3835985 was issued on the C belt at the No. 1 Mine. The C belt dumps on the tail roller of the B belt. The citation was issued because the belt control box for the C head drive was full of float coal dust. This control box is about 2 feet wide and approximately 10 to 12 feet long. It is located approximately 5 to 6 feet from the belt. It supplies electricity to the drive motors on the belt, and contains various electrical conductors and electrical connections.

Inspector Thomas testified that the box was opened and was found to contain float coal dust, black in color, both suspended inside the box and on the electrical components inside the box. The belt was running at the time the violation was discovered.

Once again, Manalapan, while admitting the violation, disputes the "S&S" special finding.

Citation No. 3835987 was also issued on the C belt at the No. 1 Mine. The C belt, like the other belts previously discussed, had accumulations of loose coal and float coal dust under and alongside the belt. The accumulations were at various locations, and were black in color. They were from paper thin to 2 to 3 inches in depth and extended from the mine ribs to the track, a distance of approximately 9 to 10 feet.

The belt was running at the time the violation was observed. This belt was also not trained, and was running off to one side so that it was hitting the legs of the stands on the bottom rollers. This created a danger of sparking due to the metal to metal contact.

Manalapan admits the basic violation, but disputes the "S&S" finding.

Citation No. 3835989 was issued on the E belt at the No. 1 Mine. The electrical control box for the E belt was found to contain float coal dust. The dust was black in color and was on the electrical components in the control box.

Manalapan, as in the previous instances, admits the basic violation of 30 C.F.R. § 75.400, but once again disputes the "S&S" finding.

All five of these citations have as a common theme accumulations of loose coal and/or float coal dust either under and alongside the various belts or inside the belt electrical control boxes.

It is beyond dispute that in the event an ignition did occur, the loose coal and coal dust accumulations could contribute to the hazard of fire and/or explosion or at the very least, propagate the results of an otherwise unrelated explosion and/or fire which could in turn spread throughout and even beyond the cited areas. Apropos of this point, I note that the cited belts were all connected and Mr. Gluck testified that after an ignition the fire will travel as far as there is fuel to sustain it. He likened a flame to a sheet of paper which when ignited will propagate itself. In front of the ignition is a compression of air caused by rapid expansion of the flame path. This air pressure will cause float coal dust to be thrown into suspension. Thus an ignition at one belt will travel the length of the various belts if each contains accumulations to propagate the fire. Since the various belts all contain accumulations, any ignition source on one belt makes an accident as reasonably likely to spread to all.

The record establishes a number of potential ignition sources. One is the belt rollers turning in the coal accumulations under the belt. There is a clear potential for friction ignition should one or more of these rollers become stuck and get hot. There was testimony that a malfunction of this sort can create sufficient heat to ignite coal accumulations. Another identifiable ignition source is the fact that in several places the belt itself was not running true and was rubbing on the framework of the conveyor, thereby creating friction heat as well as the potential for sparking from the metal splices on the belt itself. Additionally, there are the electrical components, such as those inside the control boxes that are adjacent to the belt lines, and which were found to contain float coal dust. The inside of the electrical contactor or belt starter which was presented at the hearing was heavily blackened due to sparking, and the outside, although less blackened, still showed some evidence of sparking.

There was also testimony to the effect that much of these accumulations were wet or at least damp, and/or mixed with noncombustible materials. I accept Mr. Gluck's opinion that while this factor may make them harder to ignite, they will still burn. Damp coal dries in the presence of fire and heat and wet coal can dry out in a mine fire and subsequently ignite.

The Commission has previously held that a construction of 30 C.F.R. § 75.400 "that excludes loose coal that is wet or that allows accumulations of loose coal mixed with noncombustible materials, defeats Congress' intent to remove fuel sources from mines and permits potentially dangerous conditions to exist." Black Diamond Coal Mining Company, 7 FMSHRC 1117, 1121 (August 1985). It has further held that dampness is not determinative of whether a coal accumulation violation is "significant and substantial" or not. Utah Power & Light Company, 12 FMSHRC 965, 970 (May 1990).

Therefore, I find that the circumstances in these citations satisfy the Commission's significant and substantial criteria set out in Mathies, supra. Accordingly, I find that the above five cited violations of 30 C.F.R. § 75.400 were properly designated as significant and substantial and serious.

After considering the statutory criteria contained in section 110(i) of the Act, I assess a civil penalty of $400 for each of the five citations. In so doing, I considered only Manalapan Mining Company's production record and violation history as requested by Manalapan.

Docket No. KENT 93-823

The parties have agreed to settle 17 of the 20 citations included in this docket as follows:

CITATION NO.	DATE	30 C.F.R. SECTION	ASSESSMENT	SETTLEMENT
3000232	2/26/93	75.400	$ 431	$ 50*
3000233	2/26/93	75.400	506	50*
3000234	3/1/93	75.517	50	50
3000237	3/1/93	75.503	431	50*
3000238	3/1/93	75.523-3	431	431
3004283	3/2/93	75.364(b)(2)	50	50
3004289	3/4/93	75.517	50	50
3000213	3/10/93	75.1100-2(d)	431	50*
3000214	3/10/93	75.360(b)(5)	50	50
3000215	3/11/93	75.360(b)	431	431
3000216	3/11/93	75.400	431	431
3000218	3/11/93	75.202(a)	431	431
3000219	3/11/93	75.220	431	431

CITATION NO.	DATE	30 C.F.R. SECTION	ASSESSMENT	SETTLEMENT
4239005	3/18/93	75.706	50	50
4239006	3/18/93	75.370(a)(1)	431	50*
4239007	3/18/93	75.403	1155	1155
3835981	5/17/93	75.312(f)	50	Vacated

* Citation modified to delete "S&S" special findings.

Three citations remain to be decided in this docket which were tried before me and were subsequently briefed by the parties.

Citation No. 3000229 alleges a "significant and substantial" violation of the standard found at 30 C.F.R. § 75.1101 and charges as follows:

> The deluge type fire suppression system provided for the mmu-004 section belt was not operative when tested.

Manalapan admits the violation of 30 C.F.R. § 75.1101, but disputes the "significant and substantial" special finding in this instance.

A deluge-type system is activated by heat and automatically sprays water over the head drive and belt for a distance of 50 feet. The Safety Director for the respondent conceded that this system is the only automatic fire suppression system in the area of the belt head. The belt itself is 700 feet long, but the deluge system only covers the first 50 feet from the head drive. Inspector Langley testified that when the test button was pushed the water would not spray on the belt head drive. The belt was running at the time of the inspection.

Inspector Langley opined that the negligence was "moderate," because the system is supposed to be checked weekly and he believed that the respondent should have been aware of the problem. He also opined that an accident was reasonably likely due to a number of possible ignition sources along the belt line, including possible friction sources and the presence of several electrical cables and the belt starting box. Inspector Langley stated that one person would probably be affected by the violation, as there is a man assigned to take care of all of the belts at the mine. This person could be burnt or overcome by smoke if there were a fire. Also the smoke could travel to the section and affect every person on the section with smoke inhalation.

Mr. Gluck testified that most fires which occur on belt lines take place at the head drive. This is an area where float coal dust accumulates and there are electrical components in the area to run the head drive. Due to the problem of fires at head drives, certain regulations, such as the one requiring a deluge-type water spray system, were promulgated.

Manalapan's position is that this violation was not "significant and substantial" due to the immediate lack of an ignition source. It is the position of the Secretary that, when dealing with a regulation that is designed to only take effect in an emergency, the existence of the emergency must be presumed when determining whether the violation is significant and substantial. Obviously the regulation at issue here presumes the existence of an emergency, a fire, when it requires a deluge of water to put the fire out.

It is clear from the testimony that fires are a definite hazard at belt heads. Inspector Langley testified that the drive roller at the head drive presents a possible source of ignition due to friction. The belt itself is fire resistant, but not fire proof, and could catch on fire. Although fire hose and fire extinguishers were present, the violation was still considered significant and substantial by the inspector because there is no one permanently stationed at this belt. The assigned belt man covers all the belts in the mine.

I therefore find that the Mathies, supra, test has been met. It is clear that this violation is significant and substantial. Without the deluge system a fire could clearly become far worse and someone could become injured when he finally arrived to fight the fire or could be overcome by smoke even prior to arriving on the scene. To find otherwise, that the petitioner must prove that an actual ignition source presently existed would ignore the fundamental hazard of fires at the head drives that the regulation was designed to prevent.

With regard to the operator's negligence concerning this violation, I find that it is "low" vice "moderate" because the deluge system was checked on a weekly basis as required, but yet became inoperative without warning or notice to the operator.

Considering the statutory criteria, I assess a civil penalty of $300 for the "S&S" violation of 30 C.F.R. § 75.1101 found herein.

Citation No. 3000217 issued by Inspector Langley on March 11, 1993, alleges a "significant and substantial" violation of the standard found at 30 C.F.R. § 75.202(a) and charges as follows:

> Loose coal ribs were observed along the coal pillars of the mmu-400 section.

Manalapan admits the violation of 30 C.F.R. § 75.202(a), but disputes the "significant and substantial" special finding associated with the instant citation.

Inspector Langley testified that this citation was issued because loose coal ribs were observed along the coal belts on the working section of the mine. The ribs were approximately 4 1/2 to 5 feet in height and anywhere from 5 to 10 feet in length. These ribs had pulled or gaped away from the pillars from 2 to 3 inches. There were approximately 11 or 12 ribs involved in the violation covering a distance of approximately 108 feet. He also testified that the section foreman and a repairman are generally working in the area where the violative conditions were found. The inspector opined that it was reasonably likely that an accident might happen, because these persons could be struck by the coal ribs if they should fall off or slip off. Inspector Langley stressed the number of loose ribs which were present and the fact that the section foreman certainly would be in the area on foot. It is obvious that this violation meets the Mathies test. It is uncontradicted that there were people present in the area of the violation with a significant number of loose coal ribs. These ribs could easily fall or "roll" causing broken bones or greater injuries to a miner.

Accordingly, I will affirm the citation, in its entirety, and assess the proposed civil penalty of $431 for the violation.

Citation No. 4239003 is similar to Citation No. 4239220 in that it involves the same road, the same unlocked gates, the same lack of berms, and the same mandatory standard. It preceded, by 2 months, the citation contained in Docket No. KENT 93-821 and discussed earlier in this decision. Basically, it is an elevated road that is not provided with berms, but is usually blocked by wire ropes. But, on the date the citations were issued, the ropes were down and the road was being traveled in violation of the standard.

My decision is the same regarding this Citation No. 4239003 as it was concerning Citation No. 4239220 in the previous docket, but since this was the first violation in point of time, I assess a penalty of $50 for the non "S&S" violation of the standard.

Continuing with settlements, as before:

Docket No. KENT 93-824

CITATION NO.	DATE	30 C.F.R. SECTION	ASSESSMENT	SETTLEMENT
3000220	3/11/93	75.364(b)(2)	$1134	$ 50
4239001	3/11/93	75.364(a)(2)(iii)	1134	50
3835983	5/19/93	75.1101-3	431	431
		TOTAL		$ 531

Docket No. KENT 93-825

CITATION NO.	DATE	30 C.F.R. SECTION	ASSESSMENT	SETTLEMENT
3828418	11/19/92	75.1710	$ 362	$ 136
2787574	4/13/93	75.400	2301	2301
2787575	4/13/93	75.400	431	431
4238594	4/14/93	75.518	431	215
4238595	4/14/93	75.518	431	216
4238741	4/14/93	75.503	50	50
4238743	4/14/93	75.400	431	50*
4238799	4/14/93	75.1715	50	50
4238800	4/14/93	75.220	431	50*
4239261	4/14/93	75.333(b)(2)	431	50*
4239262	4/14/93	75.220	431	431
3835662	4/15/93	75.220	431	431
3828818	5/11/93	75.1719-1(b)	431	50*
3828819	5/11/93	77.502	431	50*
		TOTAL		$ 4511

* Citation modified to delete "S&S" special findings.

Docket No. KENT 93-888

CITATION NO.	DATE	30 C.F.R. SECTION	ASSESSMENT	SETTLEMENT
2793753	6/7/93	75.362(d)(1)(i)	$ 793	$ 793
2793754	6/7/93	75.1102	690	690
2793755	6/7/93	75.400	690	690
2793756	6/9/93	77.205	690	50*
2793757	6/9/93	75.1722(a)	690	690
4257403	6/9/93	75.1101	690	345

CITATION NO.	DATE	30 C.F.R. SECTION	ASSESSMENT	SETTLEMENT
4257796	6/15/93	75.517	267	133
4257404	6/16/93	77.410(c)	690	345
4257797	6/16/93	75.807	690	345
2793758	6/21/93	77.1605(d)	690	Vacated
2793759	6/21/93	77.1606(c)	690	Vacated
4257406	6/21/93	75.807	690	345
2793760	6/22/93	75.1722(a)	690	50*
		TOTAL		$ 4476

* Citation modified to delete "S&S" special findings.

Docket No. KENT 93-919

CITATION NO.	DATE	30 C.F.R. SECTION	ASSESSMENT	SETTLEMENT
4257930	6/24/93	75.380(d)(1)	$ 903	$ 50*
4257934	6/24/93	75.1719-1(e)(5)	431	431
4257936	6/24/93	75.1100-3	431	50*
4257937	6/24/93	75.1725(a)	431	431
4257940	6/24/93	77.1109(d)	431	50*
		TOTAL		$ 1012

* Citation modified to delete "S&S" special findings.

Docket No. KENT 93-920

CITATION NO.	DATE	30 C.F.R. SECTION	ASSESSMENT	SETTLEMENT
4238597	4/14/93	75.503	$ 750	$ 50
2787576	4/15/93	50.10	950	Vacated
2787577	4/15/93	75.902	3800	3230
2787578	4/15/93	75.601-1	5700	4845
2787580	4/15/93	75.400	5900	5900
3828782	4/16/93	75.400-2	506	Vacated
3828783	4/16/93	75.1101-23(c)	690	100
4248401	6/28/93	75.364(a)(2)(iii)	690	50*
		TOTAL		$14175

* Citation modified to delete "S&S" special findings.

Docket No. KENT 93-921

Section 104(d)(2) Order No. 3828600, which was issued on June 29, 1993, and alleged a violation of 30 C.F.R. § 75.220 was vacated. This is the only citation/order contained in this docket and it is therefore dismissed.

Docket No. KENT 93-993

CITATION NO.	DATE	30 C.F.R. SECTION	ASSESSMENT	SETTLEMENT
9885302	6/3/93	70.100	$1019	$ 1019

Docket No. KENT 94-19

CITATION NO.	DATE	30 C.F.R. SECTION	ASSESSMENT	SETTLEMENT
2793766	8/4/93	75.523	$ 690	$ 690
2793767	8/5/93	75.503	690	50*
2793768	8/5/93	75.606	690	50*
2793769	8/5/93	75.1100-3	267	267
		TOTAL		$ 1057

* Citation modified to delete "S&S" special findings.

Docket No. KENT 94-46

CITATION NO.	DATE	30 C.F.R. SECTION	ASSESSMENT	SETTLEMENT
2793771	8/11/93	75.1106-3(a)(2)	$ 690	$ 50*
2793776	8/23/93	75.400	690	50*
2793778	8/24/93	75.312(f)	1610	Vacated
4257749	8/26/93	75.400	690	50*
		TOTAL		$ 150

* Citation modified to delete "S&S" special findings.

Docket No. KENT 94-47

CITATION NO.	DATE	30 C.F.R. SECTION	ASSESSMENT	SETTLEMENT
9885300	6/3/93	70.101	$1019	$ 1019

Docket No. KENT 94-106

CITATION NO.	DATE	30 C.F.R. SECTION	ASSESSMENT	SETTLEMENT
9885299	5/24/93	70.101	$ 1779	$ 750
2996296	8/11/93	75.202(a)	690	690
2996298	8/12/93	75.220	690	50*
4040121	8/13/93	75.1722	690	345
4040122	8/13/93	75.220	690	50*
3835565	8/23/93	75.1720(a)	690	690
		TOTAL		$ 2575

* Citation modified to delete "S&S" special findings.

Turning now to the issue of the basis upon which I arrived at the civil penalties I assessed in these cases or approved as the result of settlements arrived at between the parties in these cases, the starting point is always section 110(i) of the Mine Act.

The statutory standards for assessing civil penalties for violations are set forth in section 110(i) of the Act, as follows:

> The Commission shall have authority to assess all civil penalties provided in this chapter. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. In proposing civil penalties under this chapter, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors.

If an operator contests the Secretary's proposed civil penalties, the Secretary brings an action before the Commission. Hearings before a Commission Administrative Law Judge are de novo and the judge applies the six statutory criteria contained in section 110(i) of the Act without consideration of the Secretary's administrative formulas and regulations for proposing civil penalties. See Sellersburg Stone Co. v. Federal Mine Safety and Health Review Commission, 736 F.2d 1147 (7th Cir. 1984).

This is precisely how I arrived at the penalties I am assessing in these cases. I considered Manalapan to be a "large" coal operator and considered evidence concerning its production record and violation history alone, as well as its negligence, the gravity of each violation and gave credit for good faith abatement of the subject citations.

ORDER

In view of all the foregoing findings and conclusions, all the citations included in these dockets are affirmed, modified or vacated as recited in the body of this decision and it is **ORDERED** that the respondent, Manalapan Mining Company, Inc., **PAY** the assessed civil penalties of $41,778 to the Secretary of Labor within 30 days of this decision. Upon receipt of payment, these cases are **DISMISSED.**

Roy J. Maurer
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

AUG 1 2 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF, FRANK SISK, Complainant v. FRONTIER-KEMPER CONSTRUCTORS, INC., d/b/a DELTA SHAFT CONSTUCTION COMPANY, Respondent	:	DISCRIMINATION PROCEEDING Docket No. KENT 94-395-D MSHA Case No. MADI CD 93-11 Baker Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF, FRANK SISK, Complainant v. FRONTIER-KEMPER CONSTRUCTORS, INC., Respondent	:	DISCRIMINATION PROCEEDING Docket No. KENT 94-560-D MSHA Case No. MADI CD 93-11 Baker Mine

DECISION APPROVING SETTLEMENT

Before: Judge Hodgdon

These cases are before me on complaints of discrimination under Section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). The Secretary, by counsel, has filed a motion to approve a settlement agreement. The settlement agreement, signed by all parties, provides that the terms of the agreement shall be specifically incorporated in this decision. Having considered the representations and documentation submitted, I conclude that the proffered settlement is appropriate under the Act and is in the public interest.

Accordingly, the motion for approval of settlement is **GRANTED** and it is **ORDERED** that:

(1) Nothing contained in the Settlement Agreement shall be deemed an admission of liability or wrongdoing on the part of the Respondent.

(2) The Respondent will expunge from its personnel files all records of, and references to, the Respondent's July 7, 1993, discharge of the complaining miner, Frank Sisk.

(3) The complaining miner, Frank Sisk, will be entitled to future employment with the Respondent in accordance with his experience, training, abilities and relative seniority.

(4) The Respondent shall pay the complaining miner the sum of $40,000.00 in damages by check which shall be made payable to "Frank Sisk" and delivered to counsel for the Secretary for immediate disbursement upon the issuance of this decision.

(5) The Respondent shall pay a civil penalty in the sum of $10,000.00 by check made payable to "USDOL-MSHA," which shall be delivered to counsel for the Secretary for immediate disbursement upon the issuance of this decision.

(6) Each party shall bear its own fees and other expenses incurred in connection with any stage of the proceedings.

Upon payment of the damages to Frank Sisk and the civil penalty to the Secretary, these proceedings are **DISMISSED.**

T. Todd Hodgdon
Administrative Law Judge

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AUG 9 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. KENT 94-326 A.C. No. 15-16708-03580
v.	:	
	:	No. 1 Mine
NEW HOPE OF KENTUCKY, INC., Respondent	:	

DECISION

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner;
John Robbins, Supervisor, New Hope of Kentucky, Inc., Pineville, Kentucky, for the Respondent.

Before: Judge Feldman

This matter concerns a petition for civil penalty filed by the Secretary of Labor against the respondent pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (the Act). The petition seeks to impose a total civil penalty of $1,642 for three alleged violations of the mandatory health and safety standards contained in Part 75 of the regulations. 30 C.F.R. Part 75.

The above proceeding was called for hearing on July 14, 1994, in Pineville, Kentucky. The respondent was represented by John Robbins who is the respondent's supervisor. Ana Robbins, John Robbins' wife, is the President of the respondent corporation.

At the commencement of trial, the parties informed me they had reached a settlement. Counsel for the Secretary presented the settlement terms for my approval. Citation No. 4240224 cited an alleged violation of section 75.310(d), 30 C.F.R. § 75.310(d), because the weak walls and explosion doors associated with the mine's main fan were not constructed in conformity with the regulatory requirements. The parties moved to reduce the degree of negligence associated with this violation from moderate to low because the main fan had been in existence for a prolonged period

of time and its construction and design had been inspected by the Mine Safety and Health Administration (MSHA) on numerous occasions. Consequently, the parties averred that the deficiency in the fan's design was not readily apparent. Therefore, the parties moved to reduce the proposed penalty from $506 to $216.

The proposed civil penalties for Citation Nos. 4240258 and 4240259 were $724 and $412, respectively. The settlement terms included reducing the degree of negligence associated with these citations from moderate to low and a corresponding reduction in the proposed penalties to reflect a $382 penalty for Citation No. 4240258 and a $292 penalty for Citation No. 4240259. The reduction in penalties was predicated on the assertion that the cited violations were primarily attributable to the mining of an adjacent mine by another operator.

Thus, the settlement motion presented on the record contemplated a reduction in total civil penalties from $1,642 to $890. At the hearing the respondent emphasized that its agreement to settle this matter should not be construed as an admission of liability or negligence. In this regard, the parties settlement terms include the following statement:

> The parties agree that for purposes of actions or proceedings other than actions or proceedings under the Federal Mine Safety and Health Act of 1977 (Mine Act), nothing contained herein shall be deemed an admission by the respondent New Hope of Kentucky, Inc., that it violated the Mine Act or its regulations or standards.

ORDER

In view of the above, the parties' motion to approve settlement **IS GRANTED**. Accordingly, **IT IS ORDERED** that the respondent pay a civil penalty of $890 in satisfaction of the three citations in issue. Payment is to be made to the Mine Safety and Health Administration within 30 days of the date of this decision. The failure of the respondent to remit timely payment will result in the imposition of the initial proposed civil penalty of $1,642. Upon timely receipt of the $890 payment, this case **IS DISMISSED**.

Jerold Feldman
Administrative Law Judge

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AUG 9 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of **DAVID R. SKELTON**, Complainant	:	DISCRIMINATION PROCEEDINGS Docket No. LAKE 94-204-D VINC CD 92-02
v.	:	
PEABODY COAL COMPANY, Respondent	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of **MICHAEL E. KRESS**, Complainant	:	Docket No. LAKE 94-205-D VINC CD 92-03 Squaw Creek Mine
v.	:	
PEABODY COAL COMPANY, Respondent	:	

ORDER DISMISSING PROCEEDINGS

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern complaints of alleged discrimination filed by the Secretary of Labor on May 9, 1994, against the respondent pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2). The complaints were filed on behalf of two miners employed by the respondent (David R. Skelton and Michael E. Kress).

It would appear from the pleadings that Mr. Skelton and Mr. Kress filed their initial complaint with MSHA on August 17, 1992, after they were verbally reprimanded on June 23, 1992, by their supervisor for allegedly "taking too long for lunch and operating their pans (scrapers) too slow on open roadways to the point of being unproductive and insubordinate". In support of their complaint, Mr. Skelton and Mr. Kress stated that they "were operating our equipment in a safe manner as conditions dictated," and they demanded that the reprimands be removed.

The Secretary alleges that Mr. Skelton and Mr. Kress engaged in protected activity "by refusing to drive the vehicles they were driving, in the performance of their mining activities, because they had a good faith and reasonable belief, that operating at higher speeds would cause injury to themselves or to others". The Secretary also alleges that Mr. Skelton and Mr. Kress were discriminated against and reprimanded for driving their vehicles too slowly. It is not clear whether the Secretary is alleging two protected activities (refusing to drive the scrapers and/or operating them too slowly).

The pleadings reflect that the local UMWA union filed a grievance on behalf of Mr. Skelton and Mr. Kress on July 6, 1992, alleging that "mine management is creating an unsafe condition and practice by interfering with the safety rights of the members of local union 1189 and others". The grievance proceeded through several steps pursuant to the 1988 union/management agreement, and it was resolved and withdrawn on August 21, 1992, "with the understanding that management will not use intimidation to interfere with the safety rights of the members of local union 1189". It is not clear whether the verbal reprimands were ever recorded or removed from the employment records of Mr. Skelton and Mr. Kress.

The Secretary requests the following relief:

1. A finding that Mr. Skelton and Mr. Kress were unlawfully discriminated against when they were reprimanded for engaging in protected activity.

2. Expungement from the respondent's employment records of any and all references to the reprimands.

3. The posting of a Notice at the mine for a period of not less than 60 days which states the respondent's recognition of the miners' statutory rights to file discrimination or hazard complaints with MSHA, and the respondent's commitment to honor these rights and not to interfere in any manner with the exercise of these rights.

4. A civil penalty assessments of $8,500, against the respondent for the alleged violations of section 105(c)(1).

In its answer, the respondent admitted that Mr. Skelton and Mr. Kress were verbally reprimanded by their supervisor for operating the scrapers too slowly on the haul road and for taking excessively long lunch periods. However, the respondent denied any discrimination, and asserted that the filing of the Secretary's complaints approximately two (2) years after the alleged discriminatory reprimand, and approximately twenty (20)

months after the miners' complaints were filed with MSHA are untimely and have prejudiced the respondent in its efforts to respond to and defend against the complaints.

On June 15, 1994, I issued an Order to Show Cause requiring the Secretary to State why these cases should not be dismissed as untimely. The Secretary's response was received on July 8, 1994. The respondent filed a reply to the Secretary's response, and it was received on July 11, 1994.

The Secretary's Arguments

The Secretary takes the position that the complaints should not be dismissed as untimely because a dismissal would not serve to protect the health and safety of mine workers. The Secretary further believes that the respondent would not be materially prejudiced if the complaints were allowed to go forward, and he points out that the respondent has not stated the nature of any prejudice and only gives a vague reference that it would be prejudiced in trying to defend the complaints. The Secretary concludes that the claim of prejudice by the respondent is merely based upon the Secretary's failure to meet the statutory time limits set forth in section 105(c)(3) of the Act. The Secretary asserts that these time limits are not jurisdictional, and that the rights of the complaining miners to be free of intimidation in the exercise of their protected rights far outweighs any claim of prejudice by the respondent.

The Secretary argues that the respondent has not shown any legitimate claim of material prejudice. Citing Secretary of Labor (MSHA) ex rel Donald R. Hale v. 4-A Coal Company, 8 FMSHRC 905 (June 1986), where the Commission reversed an ALJ decision dismissing an untimely complaint which had been filed by the Secretary more than two years after the miners' complaint had been filed with MSHA, the Secretary asserts that his failure to meet any of the statutory deadlines was subjugated by the miner's rights, and that the innocent miners should not be prejudiced or lose their protected rights because of the Secretary's failure to timely meet his obligations.

Commenting on my reference to the Commission's "untimely filing" decisions in Joseph W. Herman v. IMCO Services, 4 FMSHRC 2135 (December 1982), and David Hollis v. Consolidation Coal Company, 6 FMSHRC 21 (January 1984), upholding the dismissal of the complaints as untimely (eleven months in one case, and more than six months in the other), the Secretary asserts that those cases are distinguishable from the instant complaints in that the respondent mine operators apparently had no notice that the miners were alleging discrimination until their complaints were filed with the Commission.

The Secretary maintains that the respondent in the present cases had ample notice that the two miners had filed complaints and were pursuing their rights under the Act, as well as their rights under the labor/management grievance procedure. The Secretary points out that the investigation of the complaints commenced within the time set by statute, that the respondent was notified of the complaints by mail on August 25, 1992, and that the respondent's counsel was present when its supervisory employees were interviewed.

The Secretary asserts that the respondent cannot claim unfair surprise because it has been aware for some time that the complaints were pending, and that prudence would have dictated that the respondent place itself in a position to defend against the potential claims from the outset, until respondent was informed that the investigation had been concluded, and the Secretary issued his findings.

The Secretary states that he has good reasons for the delay in the filing of the complaints in these cases. In support of this conclusion, the Secretary asserts that the cases are somewhat novel in that there is no request for a monetary "make whole" remedy from the complainants, but only for a civil penalty assessment for the alleged acts of discrimination. The Secretary further states that the grievance which arose out of the same set of facts giving rise of the instant cases was withdrawn after the respondent agreed that it would not intimidate the miners in the exercise of their rights. The Secretary further states that additional guidance was needed in order to determine whether any more of his scarce resources should be invested in these cases, when the objectives of the Mine Act might have been served through the BCOA/UMWA labor contract grievance process.

The Secretary further argues that there were more levels of review in these cases than normal, and that certain portions of the cases had to be reinvestigated before a final determination that complaints should be filed with the Commission. In addition, because of the additional levels of review, the investigation file had several destinations and was misplaced for a time and the file had to be duplicated for the Secretary's counsel who eventually filed the complaints. The Secretary states that in Secretary v. M. Jamieson Company, 12 FMSHRC 901 (March 1990), Chief Judge Paul Merlin allowed late filing of penalty contests where a file was misplaced.

In conclusion, the Secretary states that the time limits set by Congress were not only to avoid the bringing of stale claims, but also to bring swift relief for a miner who had been wronged in the exercise of his statutory rights. The Secretary admits that he failed to make his determination quickly, but maintains that the miners should not lose their rights for his failure particularly since they did what was required of them. The

Secretary believes that the objectives of the Mine Act will only be served by allowing the claims of Mr. Skelton and Mr. Kress to go forward.

The Respondent's Arguments

With regard to the Commission's decision in the 4-A Coal Company case cited by the Secretary, holding that a complaining miner "should not be prejudiced by the failure of the Government to meet its time obligations", the respondent asserts that these rationale applies with greatly diminished force in the instant cases where the Secretary has admitted that he seeks no monetary remedy for the miners and only seeks civil penalty assessments against the respondent.

The respondent candidly admits that it does not allege that any witnesses have died or become otherwise unavailable or that documentary evidence has been lost or destroyed in the nearly two years in which the Secretary was deciding what to do with these cases. However, the respondent asserts that the longer the interval between event and trial, the more difficult it is to present a case because memories of details dim, while witnesses' versions of events harden like cement in their minds, and the search for truth is impeded. In addition to this general prejudice, the respondent maintains that it will be inconvenienced by the Secretary's delay in that the Superintendent of Squaw Creek Mine at the time of the alleged discrimination has been reassigned to another mine in the interim and his participation as a witness in these proceedings, involving a mine for which he is no longer responsible, will interfere with his ability to manage the mine for which he is currently responsible.

In response to the Secretary's contention that the respondent failed to act prudently when it was initially informed of the complaints in the Summer of 1992, the respondent asserts that the Secretary ignores the fact that he does not necessarily inform operators when he concludes his investigations, and that the respondent's counsel is still waiting to hear from the Secretary on a discrimination claim filed by a miner four years ago. Further, the respondent points out that it requested production of the Secretary's written determination of discrimination in these cases and that the Secretary objected to production on the grounds that the documents were privileged. Under the circumstances, the respondent believes that "it borders on the disingenuous for the Secretary to suggest that PCC should have waited for the Secretary's findings."

In response to the Secretary's proferred excuses for his substantial delay in filing the complaints, the respondent states that the Secretary does not describe the "additional guidance" needed in these cases or why it took more than a year to obtain such guidance.

With regard to the Secretary's assertion that he wanted to await the outcome of the grievance proceedings to insure that his "scarce resources" were not wasted, the respondent points out that the attachments to the Secretary's response to my show-cause order show that the grievance was withdrawn on August 21, 1992, just four days after the miner's complaints in the these cases were filed in the MSHA field office.

With regard to the Secretary's misplacement of the investigative file and the need to replace it by duplication of the investigating office's file, the respondent believes that two weeks is a generous time allowance for copying a file and that the actual delay was on the order of 18 months. The respondent points out that in response to its interrogatory seeking an excuse for his delay the Secretary did not mention any lost file and the respondent believes that the Secretary's attitude toward the time limits of section 105(c) of the Act is that those limits need not be taken very seriously.

The respondent states that the Secretary's position appears to be that unless a witness had died or left the country, any delay by the Secretary in filing a discrimination complaint, no matter how long and no matter how flimsy his excuse, must be tolerated. The respondent concedes that there may be justification for such a position where the rights of miners would be prejudiced by dismissal, but it emphasizes that in this case the Secretary does not seek an relief for the miners, only a civil penalty. The respondent believes that the Secretary would be the only party to suffer for his dilatory handling of this matter if the complaints were dismissed, and since the Secretary has shown no substantial excuse for his delay, the respondent concludes that the complaints should be dismissed.

Discussion

Section 105(c)(3) of the Mine Act requires the Secretary to proceed with expedition in investigating and prosecuting a miner's discrimination complaint. Section 105(c)(2) and (c)(3) require the Secretary to act within the following time frames:

1. Commence the investigation of the complaint within 15 days of its receipt from the miner.

2. Within 90 days of the receipt of the complaint, notify the complaining miner of any determination as to whether a violation has occurred.

3. If a determination is made that a violation has occurred, immediately file a complaint with the Commission.

The Commission's Rules, at Part 2700, Title 29, Code of Federal Regulations, implement the statutory time provisions. Rule 40(a), 29 C.F.R. § 2700.40(a), requires the Secretary to file a complaint after an investigation if he finds that a violation has occurred. Rule 41(a), 29 C.F.R. § 2700.41(a), requires the Secretary to file the complaint within 30 days after his written determination that a violation has occurred.

The 4-A Coal Company case cited by the Secretary concerned a discharged miner who claimed he was fired for making safety complaints. While it is clear that the Commission relied on the legislative history reflecting congressional intent "to protect innocent miners from losing their cause of action because of delay by the Secretary," 8 FMSHRC 908, the Commission also recognized that Congress was equally aware of the due process problems that may be caused by the prosecution of stale claims. In this regard, the Commission stated as follows at FMSHRC 908:

> * * * * The fair hearing process envisioned by the Mine Act does not allow us to ignore serious delay by the Secretary in filing a discrimination complaint if such delay prejudicially deprives a respondent of a meaningful opportunity to defend against the claim. * * * * If the Secretary's complaint is late-filed, it is subject to dismissal if the operator demonstrates material legal prejudice attributable to the delay.

See also fn. 4, at 8 FMSHRC 909, where the Commission stated as follows:

> We reject the Secretary's contention that because he filed his complaint within 30 days of determining that a violation had occurred, he acted in a timely fashion. This contention ignores the 90-day time frame specified in section 105(c)(3) and the possibly prejudicial effect of the considerable delay involved here.

The Secretary also relies on a ruling by Chief Judge Merlin in Secretary v. M. Jamieson Company, 12 FMSHRC 901 (March 2, 1990), a civil penalty case in which Judge Merlin allowed the late filing of the Secretary's proposed civil penalty assessment due to a misplaced file. In excusing the delay, Judge Merlin relied on the fact that a relatively short period of time was involved, the Secretary's response to this show-cause order was prompt, and the operator did not allege or show any prejudice.

In Lawrence Ready Mix Concrete Corporation, 6 FMSHRC 246 (February 1984), Judge Merlin dismissed the Secretary's proposed civil penalty petition filed a year and a half late. Judge Merlin ruled that the Secretary's excuse that the delay was caused by the placing of certain documents in the wrong file and

the inadvertent failure to file the petition did not constitute good cause "for such an extraordinarily long delay", and he concluded that the operator should not have to answer such a stale claim.

In Salt Lake County Road Department, 3 FMSHRC 1714 (July 1981), the Secretary argued that its two-month delay in filing a proposed civil penalty assessment was due to an extraordinarily high caseload and lack of clerical personnel. In denying the operator's contention that the penalty proposal should have been dismissed because of the late filing, the Commission held that on balance, and in the absence of prejudice to the operator, dismissal of the case because of a procedural error would not further the public interest in effectuating the Mine Act's substantive civil penalty scheme. However, the Commission took note of the fact that the operator made no effort to demonstrate prejudice, and while recognizing that mistakes can happen because of the voluminous Secretarial litigation nationwide, the Commission stated as follows at 3 FMSHRC 1717:

> The Secretary's reason for delay, an extraordinarily high caseload and lack of clerical personal, might be deemed an improper excuse for filing a simple, two-page pleading two months late. As Salt Lake points out, almost any law office in the country can claim the same "cause" as an excuse to evade every time limit in the various rules of civil procedure. However, the Secretary is engaged in voluminous national litigation and mistakes can happen. We believe that the Secretary minimally satisfied the adequate cause standard in this case. This is not to say that we will tolerate a practice of filing relatively uncomplicated pleadings late. Therefore, we cannot too strongly urge the Secretary to comply with Commission Rule 27, to the end that the enforcement goals embodied in section 105(d) be realized. (Emphasis added).

Medicine Bow Coal Company, 4 FMSHRC 882 (May 1982), concerned a 15-day delay in the filing of civil penalty proposals by the Secretary. In affirming the trial judge's conclusion that the delay did not warrant a dismissal of the case, the Commission relied on its decision in Salt Lake County Road Department, a two-part test, namely, a showing by the Secretary that there was adequate cause for the delayed filing, and mine operator prejudice caused by the delayed filing. The Commission concluded that the operator failed to show a delay so great that preparation or presentation of its case was prejudiced.

In The Anaconda Company, 3 FMSHRC 1926, (August 1981), Judge Morris dismissed the Secretary's civil penalty petition that was filed nearly two years late. Citing the Salt Lake County Road Department decision, Judge Morris stated as follows at 3 FMSHRC 1927:

> The Commission established a two prong test to determine if the late filing of the proposal for penalty addressed to the Commission is in substantial compliance with the Act and, therefore, should not result in the dismissal of the case. The Secretary must show that there was adequate cause for the delay. The mine operator must show that it has been prejudiced by the delay. These two requirements are to be balanced against each other with the scales weighing heavily on the side of enforcement. However, the objective of effective enforcement can be thwarted by the Secretary's inexcusable delay over a substantial period of time. The Commission warned the Secretary against any unwarranted dilatory action.
>
> The above test is directly applicable here. Congress perceived that the prompt assessment of a penalty was necessary for effective enforcement. In the present case, the delay of nearly two years is on its face a blatant disregard of this objective. Contrary to the Secretary's statement in its response to the motion, Section 815(a) of the Act provides the statutory authority for the vacation of a citation where the Secretary has been so dilatory in assessing a penalty that effective enforcement of the Act is impossible.

In Price River Coal Company, 4 FMSHRC 489 (March 1982). Judge Morris sustained the operator's motion to dismiss the Secretary's untimely civil penalty proposals, citing Salt Lake County Road Department. Judge Morris concluded that the Secretary's asserted excuse of a high volume of case workload and lack of clerical personnel were inadequate reasons for the delay, and the absence of a key witness prejudiced the mine operator's case.

The Commission has on several occasions in the past admonished the Secretary for failing to meet the Mine Act's statutory time limits for filing discrimination complaints, and in my view, these cases are an example of unjustified and unreasonable delays. If the time constraints found in the Act and the Commission's Rules are to have any meaning, I believe the Secretary should set the example, and be sensitive to those requirements, particularly in cases brought on behalf of miners who may find their protected rights in jeopardy because of his failure to timely bring case before the Commission.

After careful review and consideration of the Secretary's reasons for the protracted delay in these cases, they are rejected, and I conclude and find that they are insufficient and inadequate reasons for justifying the delay. The asserted "novelty" of these cases is no excuse. Indeed, the fact that these cases, in their present posture, were admittedly filed by the Secretary "only for a civil penalty assessment for the alleged acts of discrimination" is all the more reason for insuring compliance with the time limitations of the Act and the Commission's Rules. Protracted unjustified delays in cases where the Secretary's primary reason for filing the complaints is to seek civil penalty assessments of $8,500, against a mine operator are inherently prejudicial to an operator's expectation and right to defend and be heard within a reasonable time.

With regard to the union grievance that was filed by Mr. Skelton and Mr. Kress, I take note of the fact that it arose out of the same set of facts giving rise to the instant complaints and that it was withdrawn on August 21, 1992, approximately twenty-one (21) months before the filing of the complaints by the Secretary on May 10, 1994. I fail to understand why the disposition of the grievance, which apparently resolved the safety dispute between the parties, added to the protracted delay.

With respect to the additional reasons advanced by the Secretary for the delay (additional levels of review, reinvestigation, and lost files), I am not persuaded that they justify the delay in filing these complaints.

The Secretary admits that the misplaced file was duplicated for his counsel who filed the complaints. The Secretary does not state how long the file was misplaced, and it would appear to me that the file located at the MSHA investigating office was not lost or misplaced and was readily available.

Although the respondent in these proceedings admittedly does not allege that any witnesses are unavailable, or that any documentary evidence has been lost or destroyed, the supporting affidavit of its trial counsel states that the passage of time inevitably hinders and impedes the effective preparation and presentation of a case. Counsel confirms that the respondent was notified of the initial filing of the miners's complaints with MSHA in August 1992, and that he represented management's witnesses during the interviews with MSHA's investigators. However, after the passage of 6 months, with no further notice from MSHA, counsel assumed that MSHA decided not to proceed further.

Respondent's counsel further maintains that the longer the interval between the alleged discriminatory act and the trial, it is more difficult to present a case because memories of the

details and the witnesses' versions of the events dim with the passage of time. I conclude and find that the respondent has made a minimum showing of prejudice. I reject the respondent's assertion that it will be inconvenienced if it had to produce the miner superintendent who is no longer working at the mine where the alleged reprimand of the miners took place. Everyone who participates in trials in cases of this kind may, in one manner or another, claim that is not convenient for them to appear or participate. There is no showing that the superintendent cannot be deposed at the mine where he is now employed.

After careful review and consideration of the pleadings and arguments filed by the parties, I conclude and find that the Secretary's delay in bringing these cases to the Commission is not justified and I agree with the respondent's position in support of its motion to dismiss. I am not unmindful of the fact that the dismissal of a discrimination complaint may prejudice the rights of miners who are not responsible for the delay, and that dismissals are not to be taken lightly. However, on the facts of these cases where it appears that the identical issue was pursued by the miners through the grievances they filed and that the grievances were withdrawn, and the Secretary has admitted that he is not seeking a "make whole" remedy for the miners but only a civil penalty assessment, I believe that on balance, the scales tip in favor of the respondent. Further, I am not convinced that the public interest is served by continually allowing the Secretary to avoid the timely filing of cases of this kind, particularly where he is seeking rather substantial civil penalty assessments for an alleged incident of discrimination that appears to have been resolved nearly 2 years ago through the grievance process. I believe that basic fairness dictates that the Secretary act with reasonable dispatch in pursuing a case. I simply cannot conclude that he has done so in these cases.

ORDER

In view of the foregoing, the respondent's motion to dismiss these cases as untimely IS GRANTED, and the complaints ARE DISMISSED.

George A. Koutras
Administrative Law Judge

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AUG 1 5 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. WEST 93-123-M A.C. No. 26-02214-05501
v.	:	Yankee Project
D.H. BLATTNER & SONS, INC., Respondent	:	Docket No. WEST 93-286-M A.C. No. 45-03280-05502
	:	Van Stone Mine
D.H. BLATTNER & SONS INC., Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. WEST 94-5-RM Citation No. 4138847; 9/2/93
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Aurora Mine

DECISION

Appearances: Robert Cohen, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington Virginia, for Petitioner;
Michael S. Lattier, Esq., GOUGH, SHANAHAN, JOHNSON & WATERMAN, Helena, Montana, for Respondent.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration (MSHA), charges Respondent, D.H. Blattner & Sons, Inc. ("Blattner"), with violating the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq. (the "Act").

A hearing was held in Sparks, Nevada, on December 8-9, 1993. The parties filed post-trial briefs.

ISSUES

The issues are whether Blattner, an independent contractor, is required to file a legal identity report (Form 2000-7) as provided in 30 C.F.R. § 41.20.

The cited regulation provides as follows:

> **Subpart C--Operator's Report to the Mine Safety and Health Administration**
>
> **§ 41.20 Legal identity report.**
>
> Each operator of a coal or other mine shall file notification of legal identity and every change thereof with the appropriate district manager of the Mine Safety and Health Administration by properly completing, mailing, or otherwise delivering Form 2000-7 "legal identity report" which shall be provided by the Mine Safety and Health Administration for this purpose. If additional space is required, the operator may use a separate sheet or sheets.

SUMMARY OF THE CASES

These consolidated cases involve three separate citations for failure to file a legal identity report. The first citation, issued on September 14, 1992, relates to the Yankee Pit or Yankee Project Mine located in the state of Nevada.

The second citation, issued on November 2, 1992, relates to the Van Stone Mine, located in the state of Washington.

The third citation, issued on September 2, 1993, relates to the Aurora Partnership Mine, located in the state of Nevada.

Although worded somewhat differently, each citation charges Blattner with violating 30 C.F.R. § 41.20 (1992) in that Blattner failed to file a "Form 2000-7 Legal Identity Report." Blattner contests the three citations and the proposed penalties.

EVIDENCE

The evidence offered by each party is essentially uncontroverted. Blattner's evidence shows it is a construction company founded in the early 1900s. It has been involved in various heavy construction activities for most of this century. Blattner did not become involved in mining until approximately 1979. (Tr. 314). Bill Blattner, the president of the company, estimated its

mining activity ranges from 30 to 60 percent of its total work at any given time. It continues be involved in heavy construction activities, such as highway construction, which continues to be a major part of its business. (Tr. 315).

Prior to the issuance of the citations at issue herein, Blattner obtained a three-digit contractor identification number. Blattner used that number on all jobs at the mines in which it worked. Prior to the issuance of the citations, Blattner was never asked to file a legal identity report. (Tr. 318). Blattner is currently working at nine mines providing essentially the same type of service at each mine. (Tr. 315-316).

1. Yankee Project.

On October 17, 1991, Blattner entered into a contract with USMX, Inc., to provide certain services for USMX at their Yankee Project Mine, which is an open pit, heap leach gold mine. (Jt. Ex. 1). The services which Blattner provides at the mine include, primarily, loading ore and waste onto their haul trucks, hauling that material to stockpiles and waste dumps, and dumping the material at the appropriate places. Blattner retained a subcontractor, ICI, to perform the drilling and blasting work. Blattner is paid on the basis of the tonnage of material hauled. It does not receive any royalties. (Tr. 319-320).

USMX was in charge of the project and had overall control and direction of the project. (Kentopp Dep. at 14, 36, 37). It simply hired Blattner to provide equipment and manpower. (Kentopp Dep. at 45). USMX did all the planning and engineering for the project and also ran the crushing and leaching operation. Blattner had no input in the design of anything at the mine. (Kentopp Dep. at 8, 10, 20).

It was necessary for USMX personnel to be on-site daily to run the mine. They could not have run the mine by telephone. (Kentopp Dep. at 11). USMX surveyors worked in the pit area daily laying out pit limits, laying out blast patterns, collecting blast hole samples, cutting stakes for drilling, laying out grade stakes during the mining, and staking out the boundaries to determine who the pit was to be mined. (Kentopp Dep. at 11, 18, 19, 20).

USMX engineers were in the pit to insure Blattner was mining according to the plans. This required daily on-site monitoring by USMX. Any work that was defective could be rejected by USMX. (Kentopp Dep. at 21-22). USMX geologists were in the pit directing Blattner as to what was ore and what was waste and where to dump the ore and waste. USMX personnel were in contact with Blattner personnel several times a day. There were weekly pro-

duction meetings between USMX and Blattner. USMX gave Blattner direction as to where it should be mining and how it should be accomplished. (Tr. 541-542).

ICI, the drilling and blasting subcontractor, supervised and trained its own employees. ICI provided its own safety training to its employees. Blattner had no involvement in the training and safety training of ICI's employees. ICI provided and maintained its own equipment. ICI determined itself how it should best accomplish its job; however, it was provided with certain specifications and direction by USMX. (Tr. 540-541).

MSHA admitted at the hearing that USMX was responsible for production at the mine. (Tr. 544).

2. Van Stone Mine.

On November 19, 1990, Blattner entered into a contract with Equinox Resources (Equinox) to provide certain services for Equinox at the Van Stone mine. The Van Stone mine is a lead and zinc mine. Blattner provided the same type of service to Equinox as it did for USMX; namely, it loaded the ore and waste, hauled it to the dump sites and stockpile, and dumped the material. Blattner retained subcontractor Roundup Powder for drilling and blasting. (Tr. 497).

Equinox had approximately 43 employees at the mine. Those employees included surveyors, engineers, supervisors, crusher and mill workers, and mill maintenance personnel. (Tr. 493). Equinox's employees were in contact with Blattner's employees on an hourly basis. Surveyors were in the pit almost all day and geologists were in the pit at least half a day every day. (Tr. 504). Equinox's geologists were in the pit directing Blattner at all times. They told Blattner employees what was ore and what was waste. (Tr. 500). It was absolutely necessary for Equinox's mine manager, Hans Gertsma, and other Equinox employees to be on-site to supervise their contractors, including Blattner. (Tr. 494).

Equinox controlled everything Blattner did at the mine. This included specifying how many trucks Blattner could have on the road, when and where it should repair them, where it should drill, where to bring the ore and waste, and whom it employed. (Tr. 495). Equinox provided all the specifications regarding how drilling and blasting should be accomplished. Equinox monitored every blast and required adjustments as needed. (Tr. 498-500). Equinox required Blattner and Roundup Powder to attend daily meetings with its geologists, surveyors, and mine superintendent to discuss what was going to take place that day and what Equinox needed regarding where the mining would be conducted. (Tr. 501).

Safety on the property was totally the responsibility of Mr. Gertsma. Equinox made sure that Blattner conducted safety meetings. Blattner and Equinox employees jointly attended MSHA training sessions. The safety and health of Blattner's employees was very important to Gertsma. He was just as concerned about the safety and health of Blattner's employees as he was about production at the mine. (Tr. 508-509, 537).

Equinox had overall control and direction as to how the mine was run. Equinox was the operator of the mine. It was responsible for the mining being conducted in the pits. Equinox was responsible for securing all necessary permits to conduct the mining. Blattner was simply hired to move material. (Tr. 509, 520-521, 533-534).

Blattner's relationship with Roundup Powder was the same as its relationship with ICI at the Yankee Project. (Tr. 474).

3. Aurora Partnership Mine.

On June 16, 1993, Blattner entered into a contract with The Aurora Partnership (Aurora) to provide certain services to Aurora at the Aurora Partnership Mine. (Jt. Ex. 3). Aurora Partnership Mine is an open pit, heap leach gold mine. Blattner provides the same type of services for Aurora as it does at the Yankee Project and Van Stone mines. Blattner itself provides the loading, hauling, and dumping work for Aurora. It has ICI as a subcontractor who provides the drilling and blasting services, while Fisher Industries, another subcontractor, provides crushing services. (Tr. 445).

Aurora has approximately 24 employees working at the mine. These employees work in all areas of the mine on a daily basis. Their services are necessary to operate the mine. (Tr. 398). Aurora provides all the exploration, all the mine planning and engineering, delineation of the ore bodies, development of the mine plan and schedule, oversees the mining of the ore body, oversees that Fisher is crushing to specifications, operates the heap leach process, and obtains all necessary permits to mine. (Tr. 401-402).

It is necessary for Jim Burt, the general manager for Aurora, and other Aurora personnel, to be on the property to supervise Blattner. Selective mining practices are critical. In order to ensure that dilution of the ore is minimized, it is vital for Aurora to oversee the day-to-day operations at the mine. This job could not be done by telephone. (Tr. 399-400).

Aurora personnel are in the pit approximately 80 percent of the time on a daily basis. They are in contact with Blattner personnel on a daily basis, continually providing them with information. (Tr. 421-422). Blattner cannot mine any material

until Aurora determines what it is and gives its approval. Aurora's geologist is in the pit continually directing Blattner's employees bucketload by bucketload as to what is ore and what is waste. The geologist also specifies whether Blattner should use a loader or a shovel. (Tr. 414, 454).

Aurora is concerned with safety in the mine. An Aurora employee goes into the pit on a daily basis to monitor stope control. (Tr. 403). Aurora also places one of its employees in the pit as a spotter, whose job was to overlook the walls and check for movement. (Tr. 461). Mr. Burt is very concerned about the safety of Blattner's employees. Aurora periodically conducts safety audits on Blattner to ensure that Blattner's operation is safe and that it meets with Aurora's satisfaction. Anything Aurora sees that is unsafe, it instructs Blattner to correct. Aurora requires Blattner to report to it any safety concerns raised by Blattner employees and requires those concerns to be addressed. Aurora also has the right to have any of Blattner's unsafe equipment shut down and removed from the premises. (Tr. 404, 408-409, 440).

As Mr. Burt testified at the hearing, Blattner is their contractor. Aurora has overall responsibility for the mine. Aurora directs Blattner and Blattner is under its control with regard to mining. As the owner, Aurora is responsible for overseeing the contractors on the site. (Tr. 424, 429).

APPLICABLE STATUTES

The Federal Mine Safety and Health Act of 1977 provides:

Section 2

(a) The first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource--the miners; [30 U.S.C.A. § 801(a)]

Section 3

(d) "Operator" means any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine; [30 U.S.C.A. § 802(d)]

Section 102

(h) In addition to such record as are specifically required by this Act, every operator of a coal or other mine shall establish and maintain such records, make such reports, and provide such information as the Secretary or the Secretary of Health, Education and Welfare may reasonably require from

time to time to enable him to perform his functions under the Act. [30 U.S.C.A. § 813(h)]

DISCUSSION

The citations involved here concern alleged violations of 30 C.F.R. § 41.20. The regulation is set forth above. Stripped of its surplusage, it requires "each operator" of a coal or other mine to file notification of legal identity ... or otherwise deliver a Form 2000-2007 "Legal Identity Report."

In view of the wording of § 41.20, it is necessary to consider the meaning of the term "operator."

Part 41 relates to the "notification of legal identity" forms. Subpart A, § 41.1(a), defines an operator as follows:

> **§ 41.1 Definitions.**
>
> (a) **Operator** means any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any designated independent contractor performing services or construction at such mine.

As it relates to the instant case and, stripped of its surplusage, § 41.1(a) identifies, in part, as an operator:

> " ... any designated independent contractor performing services at such mine."

It is apparent that Blattner meets the statutory definition of an "operator."

I

The Secretary is not limited to dealing with Blattner strictly as an independent contractor merely because Blattner had a contractor's I.D. Number at another mine property.

Blattner claims that because it is an "independent contractor," the Secretary has no authority to deal with it as an "operator" in any other context, for example, as a "person who controls or supervises a coal or other mine." In other words, Blattner's legal position is that the term "independent con-

tractor" and all other terms in the Mine Act which define the term "operator" are mutually exclusive. (Emphasis added).

A review of the case law under the 1969 Coal Act clearly demonstrates the lack of merit in Blattner's position. Under the 1969 Coal Act, the term "operator" is defined as " ... any owner, lessee, or other person who operates, controls, or supervises a coal mine." In Association of Bituminous Contractor v. Andrus, 581 F.2d 853 (D.C. Cir. 1978), the D.C. Circuit Court of Appeals addressed the issue of whether an independent contractor could be classified as an "operator" under the Coal Act. In reversing the decision of the lower court and holding that an "independent contractor" was an operator under the Coal Act, the court clearly rejected the conclusion that only one party on a mine property (which Blattner claims would be the property owner) could actually operate, control, or supervise the mine. The court stated:

> There is always an owner of a coal mine, yet the statute includes lessees and "other persons" within the definition of operator as well. So there must be some cases where the person who operates, controls, or supervises is not the owner; 581 F.2d 862.

The court also specifically rejected the concept that independent contractors, when they are on mine property, are not in control of the actual mining activities, but are only performing a service under the direct supervision of the property owner.

> It is not a stretching of the statute to hold that companies who profess to be independent of the coal mine owners as these construction companies purport to be, do control and supervise the construction work they have contracted to perform over the area where they are working. If a coal mine owner of lessee contracts with an independent construction company for certain work within a certain area involved in the mining operation, the supervision that such a company exercises over that separate project clearly brings it within the statute. Otherwise, the owner would be constantly interfering in the work of the construction company in order to minimize his own liability for damages. The Act does not require such an inefficient method of insuring compliance with mandatory safety regulation; 581 F.2d 862, 863.

Also, a reading of the term "production operator" found in 30 C.F.R. § 45.2(d) reveals that with the exception of adding the words "or other mine" it is defined with the identical language as "operator" in Section 3(d) of the 1969 Coal Act. Since the courts have previously held that the language of Section 3(d) of the 1969 Act includes independent contractors, there is no reason for the presiding administrative law judge to hold that the same language in Part 45.2(d) of the regulations now excludes independent contractors. In following decisions of the Federal Courts, by adding the independent contractor's language to the definition of "operator" in Section 3(d) of the 1977 Mine Act, Congress clearly did not intend to limit the underlying premise of those decisions that "other persons" besides a property owner can control and supervise specific areas of mines.

Furthermore, in cases litigated under the 1977 Mine Act, the Federal Courts have held that Congress was clearly aware that there could be more than one operator of a single mine. See International Union, UMWA v. FMSHRC, 840 F.2d 77, 82 (D.C. Cir. 1988).

The Secretary submits that it follows that in situations where there are multiple operators of a single mine, there can be multiple "production operators" at that mine, to which MSHA can assign separate legal identification numbers.

II

The Decision of MSHA to require D.H. Blattner to comply with the provisions of 30 C.F.R. § 41.20 is within the agency's enforcement discretion.

30 C.F.R. § 41.20, which implements the statutory report filing requirements of Section 109(d) of the Mine Act, requires each operator of a mine to file a notification of legal identity with the appropriate MSHA District Manager. The method of notification prescribed in the regulation is for an operator to complete and return to MSHA Form 2000-7, Legal Identity Report. Since all contractors performing mining services at a mine are "operators" under the 1977 Mine Act, the Secretary could require all contractors to comply with the provisions of 30 C.F.R. § 41.20. The fact that he is requiring only those contractors who also meet the definition of a production operator to comply with the regulation is clearly within his discretion to enforce the regulations in a manner which he believes will best serve the objectives of the Mine Act.

In Secretary v. Bulk Transportation services Inc., 13 FMSHRC 1354 (September 1991), the Commission recognized, in affirming a citation issued to Bulk Transportation for a violation committed by one of its subcontractors, that some contractors do, in fact,

by one of its subcontractors, that some contractors do, in fact, exercise direct supervision and control of their subcontractors on mine property.

On page 1361 of its decision, the Commission stated:

> Significantly, the record shows that Bulk has a continuing relationship with BethEnergy and may be in the best position to influence the safety practices of all its drivers. Bulk chooses its drivers and may refuse to retain those drivers who cause safety violations. (Tr. 101-103). We believe that it is unreasonable to require the Secretary to pursue each of Bulk's 70 to 100 contractors.

Furthermore, it is well-established that an Agency's decision to enforce its statute by adopting one remedy as opposed to another, lies within the Agency's unreviewable discretion as long as that remedy is not inconsistent with the purposes of the statute. See NLRB v. Gissel Packing Co., 395 U.S. 575 (1969). In view of the testimony of the MSHA witnesses that at the three mines at issue, D.H. Blattner was a production operator and also was directly responsible for the safety and health of the miners working under its control, requiring Blattner to comply with 30 C.F.R. § 41.20, directly promotes the safety goals of the Act.

The evidence demonstrates that Blattner exercised direct supervision and control over the ore extraction process and the health and safety of the miners so involved.

Yankee Pit Mine

MSHA Inspector Steve Cain testified that before he began his inspection at the mine, he met with USMX's safety director (the property owner), who explained to him Blattner was doing the extraction of the mineral in the pit area and supplying it to USMX to process at its mill. (Tr. 28, 29). Blattner hired its own subcontractors including ICI Explosives, who did the blasting in the pit area. (Tr. 37). According to Inspector Cain, no USMX personnel supervised the employees of Blattner or its subcontractors during the extraction process. (Tr. 39).

Inspector Cain further testified that the most important factor to him was who was in control of the health and safety of the miners. (Tr. 34). Only the legal identity report (Form 7000-7002) which is specific for each mine site, and not a contractor I.D. number provides that information to MSHA. Blattner had its own safety director, did its own training, and was responsible for all health and safety activities in the pit area. (Tr. 38).

Van Stone Mine

MSHA Supervisor Colin Galloway testified that the Van Stone Mine was an open pit zinc mine, located in Northeastern Washington. Blattner began working on the property in the spring of 1992. After an MSHA staff meeting where the subject of Blattner's activities on mine property was discussed, he asked Don Downs, one of his inspectors, to find out what Blattner was doing at the Van Stone Mine. (Tr. 126). Downs informed him that Blattner was doing the mining in the pit area and Equinox (the property owner) was running the mill. (Tr. 126). Prior to issuing a citation, he spoke to Hans Gertsma, the manager for Equinox, and Steve Prozinski, the safety director for Blattner. Galloway told Prozinski that Blattner was a production operator and would need to file for a seven-digit legal identification number, because it was responsible for the health and safety of miners in the pit area. (Tr. 130). Only after Prozinski informed Galloway that Blattner was not going to comply with 30 C.F.R. § 41.20 did Galloway issue the citation.

Aurora Partnership

MSHA Inspector Robert Morley testified that Blattner took over the mining activities at the Aurora Mine from Lost Dutchman, who previously had a seven-digit legal I.D. number. (Tr. 167). He issued his citation 30 days after he was informed by Bob Cameron, Blattner's safety director, that Blattner was doing the mining at Aurora. (Tr. 171). Morley had a letter from Larry Turner, Aurora's senior mine engineer, dated July 29, 1993, stating that Blattner would be the prime contractor for mining activities and the drilling and blasting would be handled by a subcontractor, ICI Explosives. Also, the letter indicated that Blattner would be the prime contractor for crushing activities on the property and that Fisher Industries, a subcontractor would be doing the actual crushing. The letter stated that both subcontractors would be under Blattner's direct control as the prime contractor. (Gov't. Ex. 8).

III

MSHA correctly based its decision to issue the citations to Blattner, not on the contractual relationship between the parties, but upon a determination of what Blattner was actually doing on mine property.

All three MSHA inspectors who issued the citations testified that they did not consider the written contracts between Blattner and the property owners, prior to taking enforcement action. MSHA inspectors are not trained to review complex con-

tracts, but to issue citations based upon conditions they actually observe or have determined to exist. In Bulk Transportation at page 1358, the Commission agreed stating:

> On focus is the actual relationship between the parties and is not confined by the terms of their contracts.

While a written contract may be evidence of a contractual relationship (in this case a long-term relationship between Blattner and the property owners), what is important is that MSHA be actually aware of who was in control of the worksite.

Nevertheless, the Secretary submits that the specific language of the contracts clearly supports the conclusion, that in those areas of the mines covered by the contracts, Blattner was in control of mining activities including the health and safety of the miners.

For example, the contract between USMX and Blattner at the Yankee Project states:

Article 5 Contractor's Responsibilities:

> **Supervision and Superintendence:** Contractor shall supervise and direct all work and shall ensure that same is conducted in a competent and efficient manner. Contractor shall be solely responsible for the means, methods, techniques, sequences, and procedures of the work and for coordinating all aspects of the work to meet the owner's objectives, including without limitation the objectives of mining the property for the production and segregation of ore and waste. Contractor shall be responsible to see that all work complies fully with the requirements of this Agreement. Owner nevertheless shall have the right to provide overall planning, oversight, and direction for the work to be performed pursuant to the agreement. However, it's specifically understood and agreed that, because of the contractor's expertise relative to the work for which it has been re-retained, matters regarding the site, specific manner of accomplishing any task, issues of safety precautions, safety programs and site safety relative to the officers and em-employees, and scope of work of the contractor shall be exlusively within the province, discretion, and control of the contractor.

A fair reading of the language of the USMX Blattner contract makes it apparent that the actual supervision of the miners is Blattner's responsibility. USMX retains some planning and oversight functions for the work, but Blattner is in direct control.

IV

The specific language of MSHA's Program Policy Manual (PPM) should not be a controlling factor in determining the issues in this case.

Each of the MSHA inspectors who testified at the hearing stated they relied upon the specific language of the Mine Act and the regulations and the discussion with their supervisors, in determining to issue the citations to Blattner. MSHA's Program Policy Manual (PPM) was given a limited role in their respective decision. The Secretary believes that the MSHA inspectors made the correct decision, because a review of Part 41 and 45 in the PPM makes it clear that the issues in this case are not adequately addressed in the manual and that other sources of information must be considered.

On page 1, part 41 of the PPM Gov't Ex. 6, the following statement regarding the manual's use is made.

> These are general guidelines for the assignment of new identification numbers and will apply to the majority of operations. Individual circumstances may arise where district personnel will have to decide on a case-by-case basis, whether operations are related or independent for the purposes of assigning identification numbers.

In determining how much weight to give the MSHA's PPM, the Judge is guided by the decision in King Knob Coal Company, Inc., 3 FMSHRC 1417, 1420 (1981), wherein the Commission stated:

> Regarding the Manual's general legal status, we have previously indicated that the Manual's instructions are not officially promulgated and do not prescribe rules of law binding on this Commission ... . In general, the express language of a statute or regulation unquestionably controls over material like a field manual.

In view of the foregoing, any language in the Manual which could be construed as in conflict with the specific language or intent of Section 109(d) of the Mine Act, or Parts 41 and 45 of 30 C.F.R. should be given no weight. In addition, Blattner pro-

duced no evidence that it relied upon the specific language in the PPM to its detriment.

V

The MSHA inspectors who issued the citations at issue, properly relied upon their supervisors' judgment and experience in taking enforcement action against Blattner.

As the testimony of the MSHA witnesses confirmed, the decision to require Blattner to comply with the provisions of 30 C.F.R. § 41.20 was not a routine matter within MSHA. (Tr. 209). The decision involved matters of policy and the proper classification of mine operators working on mine property. In addition, Blattner was the first contractor operator who actually refused to file a Form 7000-7002, when requested by MSHA. Under the circumstances, it was prudent of the inspectors to consult with their supervisors, including Mr. Gomez, the District Manager, and inform them of the situation. It is not usual for senior MSHA officials, who have been briefed on the facts, to make final decisions on the enforcement action. See Peabody Coal v. Mine Workers, 1 FMSHRC 1785 (November 1979), 1 MSHC 2220, 2223.

VI

Blattner was not the victim of a selective enforcement policy by MSHA with regard to the compliance with 30 C.F.R. § 41.20.

According to the testimony of Bill Blattner Jr., President of D.H. Blattner & Sons, his company has only been required to comply with the notification requirements of 30 C.F.R. § 41.20 at three properties in MSHA's Western District and not in the other locations where Blattner was doing work for mine owners. (Tr. 319). Even assuming Mr. Blattner's assertion was correct and his company was performing similar work at its other operations (an allegation which was not the focus of this hearing) MSHA's lack of enforcement action at Blattner's other operations would not be a bar to MSHA's present enforcement position. The Secretary cannot be estopped from citing a violation simply because that same condition was not cited during a previous inspection, or not cited at another mine. Therefore, collateral estoppel cannot be used to prevent government agencies from carrying out their statutory enforcement responsibilities. See, Emery Mining Corporation v. Secretary of Labor, 744 F.2d 1411, 1416 (10th Cir. 1984) and King Knob Coal Co., Inc., 3 FMSHRC 1417, 1421-1422 (1981).

Furthermore, Vernon Gomez, presently MSHA's Administrator for Metal and Nonmetal, stated in his deposition that as far as he was aware, the notification requirements of 30 C.F.R. § 41.20, were being applied equally across the country. He also testified that, as the former District Manager of the Rocky Mountain and Western MSHA districts, there was no difference in MSHA's district enforcement policies and agreed that if Blattner's operations in Montana were similar to those at the Yankee Pit, the Montana operation should also be required to have a seven-digit legal I.D. number; see Gomez Transcript of Deposition, pp. 120-123 (April 30, 1993).

Mr. Gomez also specifically denied that MSHA's enforcement policy with regard to compliance with 30 C.F.R. § 41.20 has anything to do with increased funding for MSHA. The budget for MSHA districts is determined by the number of miners within a district and not by the number of seven-digit I.D. numbers. (Gomez Tr. 60, 119). Clearly, Blattner's attempt to imply that MSHA really had "other motives" for requiring contractors to file legal identity forms has no credibility.[1]

It is also obvious from a review of the record in this case that Blattner failed to establish how it suffered any harm from MSHA's enforcement of 30 C.F.R. § 41.20 at the three properties where Blattner was cited. It has already been established that irrespective of the notification requirements of 30 C.F.R. § 41.20, Blattner, as a contractor on mine property, can be cited as an "operator" for any violations of the mandatory standard which occurred on mine property under its control. Also, there was no evidence introduced that Blattner's civil penalty assessments would increase if it complied with 30 C.F.R. § 41.20.

When Mr. Blattner was asked why his company refused to file a seven-digit legal I.D. form, he replied concerning potential problems with his bank and insurance company, but could not provide any details. (Tr. 330-332). He also testified that Blattner entered into contracts with owner-operators based on the assumption that Blattner would be providing a service to them and not that Blattner would be the operator of the mine.

The Secretary asserts that, regardless of Mr. Blattner's assumption to the contrary, he does not understand the fact that under the Mine Act, Blattner is an operator when working on mine property. Also, that any of the company's liabilities for health

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[1] An agency's motivation for taking a particular legal action is irrelevant to determining whether an agency's action was authorized under a statute. See Hammond v. Hull, 131 F.2d 23 (D.C. Cir. 1942).

and safety violations has essentially nothing to do with which legal I.D. form MSHA requires it to file.

The Secretary submits that Blattner failed to establish that it was treated differently than any other of the major contractor/operators in the Western District. As Paul Belanger, an MSHA supervisor testified, a number of other contractors including Degerstrom, Brown & Root, and Selland Construction, who were doing similar work to Blattner's, were requested to file a legal I.D. form and every contractor complied except Blattner. (Tr. 203). Also, he stated that the contractors filed these I.D. reports prior to 1992, when the Gomez memorandum was issued. (Tr. 207).

Penalties

In assessing a civil penalty, I have considered Blattner's size, the effect of the penalty on the the operator's ability to continue in business, Blattner's prior history, negligence, gravity, and good faith.

I further conclude that the penalties assessed in the order are appropriate.

For the foregoing reasons, I enter the following:

ORDER

1. **WEST 93-123-M:** Citation No. 4137837 and the proposed penalty of $50.00 are **AFFIRMED.**

2. **WEST 93-286-M:** Citation No. 3644861 and the proposed penalty of $50.00 are **AFFIRMED.**

3. **WEST 94-5-RM:** This contest proceeding is **DISMISSED.**

John J. Morris
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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AUG 16 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. KENT 93-337
	:	A.C. No. 16-16508-03555
v.	:	
	:	Docket No. KENT 93-411
JBD INDUSTRIAL FUELS, INC., Respondent	:	A.C. No. 15-16508-03561
	:	
	:	Harlan #1 Mine

DECISION

Appearances: Marybeth Bernui, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner;
Mr. Jefferson B. Davis, President, JBD Industrial Fuels, Inc., Pathfork, Kentucky, for Respondent.

Before: Judge Fauver

These actions for civil penalties were brought under § 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

Having considered the hearing evidence and the record as a whole, I find that a preponderance of the substantial, reliable, and probative evidence establishes the Findings of Fact and Further Findings in the Discussion below:

FINDINGS OF FACT

1. Respondent, JBD Industrial Fuels, Inc., a small-sized coal company, operates an underground mine known as Harlan No. 1. The mine produces coal for sales in or substantially affecting interstate commerce.

2. On November 2, 1992, Federal Mine Inspector Roger Dingess issued § 104(d)(1) Order No. 3003138 at the mine, alleging a violation of 30 C.F.R. § 75.303 for failure to conduct an adequate preshift examination. The inspector observed that there was float coal dust on the number one belt, the fire sensor line was severed in several places and there were power cables that had exposed wires. These hazards were not reported in the preshift book and were not corrected before the miners went underground.

3. The float coal dust on the No. 1 belt could propagate a fire and, if put in suspension with an ignition source, could cause a mine explosion. Ignition sources present included power wires and belt rollers. The float coal dust observed by Inspector Dingess was from 1/4 to 1/2 inch deep.

4. The fire sensor line was cut in several places in two locations, about 10 feet apart. This was an unsafe condition. If a fire occurred, with the line cut there would be no warning to the outside attendant. The severance of the fire sensor line was obvious.

5. On the same day, Inspector Dingess issued § 104(d)(1) Citation No. 3003133 alleging a violation of 30 C.F.R. § 75.400 for the float coal dust accumulations found on the No. 1 belt. This citation was not contested by the operator.

6. On November 2, 1992, Inspector Dingess issued Order No. 3003136 alleging a violation of § 75.1722. Inspector Dingess observed that the roller fins and pinch points of the tail roller on the No. 1 belt were exposed and not adequately guarded.

7. Section 107(a) Order No. 3832918, Citation No. 3832919, and Citation No. 3832920 were all issued on September 9, 1992, concerning a roof fall that trapped the mine owner and shift foreman around 11:30 p.m., September 8, 1992.

8. Inspector Dingess issued the § 107(a) order when he observed there had been a roof fall and miners were working under an unsafe roof. In conjunction with the order, the inspector issued Citation No. 3832919 for a violation of § 75.220, alleging that the approved roof control plan was not being followed. The inspector observed unsafe roof conditions in the three entries that were being mined in the area where the roof fall had occurred. He found that crossbars or steel straps required by the roof control plan were not installed.

9. Inspector Dingess issued Citation No. 3832920 on September 9, 1992, for a violation of § 50.10, alleging that the operator had failed to notify MSHA immediately after the roof fall accident on September 8, 1992, at 11:30 p.m. MSHA was not notified of the accident until about 10:30 a.m. the following day.

10. Respondent withdrew its contest of Citation No. 3003151, issued on November 20, 1992, for a violation of § 75.1714, and agreed to pay the proposed penalty of $50.

DISCUSSION WITH FURTHER FINDINGS, CONCLUSIONS

Order No. 3003138

This order was issued for failure to conduct an adequate preshift examination, in violation of § 75.303. The evidence shows there was float coal dust on the No. 1 belt, the fire sensor line was severed in several places, and there were power cables in the same area with exposed wires. These conditions were unsafe and should have been reported and corrected before miners were sent underground.

Section 75.303 of the regulations repeats section 303(d)(1) of the Mine Act, which was carried over without change from the 1969 Act. As both the Senate Report and the Conference Report explain:

> No miner may enter the underground portion of a mine until the preshift examination is completed, the examiner's report is transmitted to the surface and actually recorded, and until hazardous conditions or standards violations are corrected.

Birchfield Mining Co., 11 FMSHRC 31 (1989) citing 94th Cong., 1st See. Part I Legislative History of the Federal Coal Mine Health and Safety Act of 1969 at 183 and 1610 (1975).

Respondent's failure to conduct a proper preshift examination was a significant and substantial violation.[1] The accumulation of float coal dust is one of the most serious hazards in mining which Congress sought to eradicate in passing the Mine Act. As the Commission stated in Black Diamond Coal Mining, 7 FMSHRC 117, 1120 (1985):

> We have previously noted Congress' recognition that ignitions and explosions are major causes of death and injury to miners: "Congress included in the Act mandatory standards aimed at eliminating ignition and fuel sources for explosions and fires. [Section 75.400] is one of those standards." Old Ben Coal Co., 1 FMSHRC 1954, 1957 (December 1979) . . . . The goal of reducing the hazard of fire or explosions in a mine by eliminating fuel sources is effected by prohibiting the accumulation of materials that could be the originating sources of

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[1] A violation is "significant and substantial" if there exists a reasonable likelihood that the hazard contributed to will result in an injury of a reasonably serious nature. Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (1981).

explosions or fires and by also prohibiting the accumulation of those materials that could feed explosions or fires originating elsewhere in a mine.

In addition to hazardous accumulations of float coal dust and exposed wires, the fire sensor line had been cut so that in the event of a fire or explosion the miners would not have been alerted to evacuate the mine.

I also find that this was an unwarrantable violation, which the Commission has defined as a violation due to aggravated conduct constituting more than ordinary negligence. An unwarrantable violation is especially clear when the person who committed the violation was a supervisor. Youghiogheny & Ohio, 9 FMSHRC 2007, 2011 (1987). In the instant case, the preshift examination was conducted by the shift foreman who, despite the existence of unsafe conditions in the area where the miners were required to work or travel, failed to report the hazards in the preshift examination book and have them corrected before sending the miners underground.

Order No. 3003136

This order was issued on the same day as the previous order. The inspector observed the tail roller unguarded in an area where the coal seam height was only 28 to 32 inches and visibility was poor. Persons passing by the unguarded tail roller had to crawl with limited illumination (their cap lights). It was reasonably likely that persons passing by the unguarded tail roller would come into contact with moving parts and suffer a serious injury. The violation was therefore significant and substantial.

An unwarrantable violation may be indicated where the mine has a history of similar violations. See e.g., Quinland Coals, 10 FMSHRC at 709 (a history of similar bad roof conditions); and Peabody Coal Co., 8 FMSHRC 1258, at 1263 (operator cited 17 times for a violation of the same standard in the preceding six and one-half months). In the instant case, Respondent had been cited at least six times for similar violations in the preceding 18 months, including a citation in August 1992 for an unguarded tail roller on the No. 2 belt.

An unwarrantable violation may also be indicated where the violation was obvious and existed for a substantial period. Inspector Dingess testified that the unguarded tail roller was obvious to anyone who crawled by it and that material on top of the folded-back guard was dry and packed, indicating the tail roller had been unguarded for several days.

On balance, I find the violation charged in Order No. 3003136 was due to aggravated conduct beyond ordinary negligence and was therefore an unwarrantable violation.

Citation Nos. 3832919 and 3832920

These citations were issued during an investigation of a roof fall that had trapped the mine owner and shift foreman for over one and one-half hours. Citation No. 3832919 charges a violation of 30 C.F.R. § 75.220 for failure to comply with the operator's approved roof control plan after the accident.

The evidence substantiates this charge. The plan required roof bars and steel straps in areas of pots and slips, as well as narrowing the area down to 14 feet with wooden roof supports. The night before the investigation, the owner and shift foreman were working on the section when the roof fell and trapped them for about one and one-half hours. Despite this accident, the owner and foreman failed to provide the additional roof support required by the roof control plan, thus exposing the miners working in the area to the hazards of another roof fall. The Inspector observed that these measures had not been taken in an area where pots and slips revealed an unsafe roof.

Respondent contends that Inspector E.C. Smith had been to the mine a day or so before the roof fall and failed to issue a citation with regard to the roof conditions. MSHA records indicate the last time Inspector Smith was on the section before the roof fall (on September 8, 1992) was August 26, 1992. Failure by an inspector to issue a citation for a particular violation does not estop him or another inspector from issuing a citation for that violation during a subsequent inspection. Midwest Minerals Coal Co., Inc., 3 FMSHRC 1417 (1981); Missouri Gravel Co., 5 FMSHRC 1359 (1983); and Conesville Coal Preparation Co., 12 FMSHRC 639 (1990). Moreover, the roof fall on September 8, 1992, placed an added burden on Respondent to examine the roof and add support where needed.

Citation No. 3832920 charges a violation of § 50.10 because the operator failed to notify MSHA immediately after the roof fall accident. The operator could have called MSHA's 24-hour phone number to comply with this regulation. However, the operator delayed almost 12 hours. The requirement that an operator immediately report certain types of accidents to MSHA is an important part of mine safety and enforcement in terms of both accident investigation and assistance to injured or trapped miners. I find that this was a serious violation although it was not "significant and substantial" within the meaning of § 104(d) of the Act.

Assessment of Civil Penalties

Respondent is a small-sized operator producing less than 100,000 tons of coal a year. Its compliance history (Exhibit G-1) shows Respondent has been delinquent in paying prior civil penalties. However, after the hearing Respondent negotiated a payment plan with MSHA and has been making timely payments. Respondent made a good faith effort to achieve rapid compliance after notification of each violation cited in this case.

Considering all the criteria for assessing civil penalties in § 110(i) of the Act, I find the following civil penalties to be appropriate for the violations found herein:

Order or Citation	Civil Penalty
No. 3003138	$2,500
No. 3003136	$ 400
No. 3832919	$1,200
No. 3832920	$ 250
No. 3003151	$ 50
	$4,400

CONCLUSIONS OF LAW

1. The judge has jurisdiction.
2. Respondent violated the safety standards as alleged in Orders Nos. 3003138 and 3003136 and in Citations Nos. 3832919, 3832920, and 3003151.

ORDER

WHEREFORE IT IS ORDERED that Respondent shall pay civil penalties of $4,400 within 30 days from the date of this decision.

William Fauver
Administrative Law Judge

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AUG 16 1994

RANDALL PATSY, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. PENN 94-132-D
	:	MSHA Case No. PITT CD 93-27
BIG "B" MINING COMPANY, Respondent	:	

ORDER REINSTATING DISMISSAL

Before: Judge Feldman

This discrimination proceeding arising under Section 105(c) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. § 815(c), concerns alleged protected activity associated with an incident that occurred on or about October 23, 1992, that involved the preparation of a mobile home site in the Peter Rabbit Campgrounds. A threshold question in this case is whether the complainant, Randall Patsy, was a "miner" as defined by section 3(g) of the Act, 30 U.S.C. § 802(g), at the time of the alleged discriminatory discharge.

Patsy has expressed a reluctance to prosecute his complaint on several occasions. In correspondence dated April 7, 1994, Patsy stated there may be ". . . no sense of pursuing this any farther (sic)." In an April 18, 1994, written statement Patsy concluded that "[he]. . . would be better off to pursue this as a civil suit locally." The latter statement was made in response to an April 14, 1994, Order to Show Cause requesting Patsy to state unequivocally whether he wished to pursue his complaint.

On May 13, 1994, Patsy's discrimination complaint was dismissed in view of his apparent disinclination to pursue this matter. Order of Dismissal, 16 FMSHRC 1094 (May 1994). However, on June 2, 1994, Patsy requested that his case be reopened. The Commission deemed Patsy's June 2, 1994, request as a timely filed petition for discretionary review. Consequently, on June 21, 1994, the Commission vacated the May 13 Order of Dismissal and remanded this matter to me for further proceedings. Order, 16 FMSHRC 1237 (June 1994).

Consistent with the Commission's Order, on July 11, 1994, I issued a combined Order On Remand and Notice Of Hearing scheduling this matter for trial on September 20, 1994. The Notice Of Hearing noted a fundamental issue was whether Patsy was a "miner" as defined by the Act at the time the alleged discrimination occurred. Noting that neither party was represented by counsel, I directed the parties' attention to the Commission's decision in Cyprus Empire Corporation, 15 FMSHRC 10, 14 (January 1993), that an individual's status as a "miner" under the Act is determined by whether the individual works in a mine and not by whether one is employed by a mine operator. Copies of the Cyprus case were provided to the parties to facilitate their preparation for hearing.

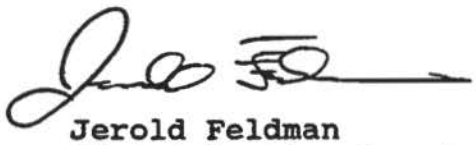
Patsy responded to the July 11, 1994, Notice of Hearing on July 20, 1994. The text of Patsy's response is as follows:

> After reading the decision made for Cyprus Empire Corporation I cannot prove I was a miner at the time I was fired. I was employed by a mine operator, though I was working at a mobile home park he was developing. Being I don't fall under the miner category, is there some other agency I should contact[?]

In an abundance of caution, given Patsy's propensity for equivocation, my office contacted Patsy on July 25, 1994. Patsy was asked if he wanted his case dismissed. Patsy replied, "I don't have a leg to stand on after reading the Cyprus decision attached." However, Patsy expressed a desire to confer with his attorney. In response to Patsy's inquiry concerning other regulatory alternatives, Patsy was provided with the telephone number of the Occupational Safety and Health Division.

On August 5, 1994, Patsy was again contacted by my office. He indicated his attorney was on vacation and would return on August 9, 1994. Patsy stated he would contact his attorney on August 10, 1994, and inform my office of his attorney's recommendation. To date I have not heard from Patsy. Nor has any attorney filed an appearance in this matter.

In view of Patsy's July 20, 1994, statement, which is entirely consistent with his previous statements evidencing a waning interest in this matter, the May 13, 1994, Order dismissing this case **IS HEREBY REINSTATED**. Accordingly, the discrimination complaint in Docket No. PENN 94-132-D filed by Randall Patsy **IS DISMISSED** with prejudice.



Jerold Feldman
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

AUG 16 1994

FMC WYOMING CORPORATION, Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. WEST 94-317-RM
v.	:	Citation No. 4125677; 3/24/94
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. West 94-318-RM
	:	Citation No. 4125678; 3/24/94
	:	FMC Trona Mine
	:	Mine ID 48-00152

DECISION

Appearances: Henry Chajet, Esq., Jackson & Kelly, Washington, DC, for Contestant;
Robert Murphy, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Respondent.

Before: Judge Fauver

These are contest proceedings under § 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. FMC seeks to vacate two § 104(a) citations that allege violations of 30 C.F.R. § 57.22305, which 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 C.F.R. parts 18 through 36. Equipment shall not be operated in atmospheres containing 1.0 percent or more methane.

A key issue is whether the term "last open crosscut" as used in this regulation applies to longwall mining. FMC contends that the term applies and means the crosscut in which the longwall equipment is operating. The Secretary contends that the term applies and means the closest crosscut outby the longwall face.

For the reasons set forth below, I find that as used in § 57.22305, the term "last open crosscut" does not apply to longwall mining.

The next issue is whether the equipment cited was in "areas where methane may enter the air current, such as . . . longwall faces . . . ." I find that the evidence does not preponderate in showing a risk of methane entering the air current in the cited areas. Accordingly, the citations will be vacated.

Having considered the hearing evidence and the record as a whole, I find that a preponderance of the substantial, reliable and probative evidence establishes the Findings of Fact and Further Findings in the Discussion below:

FINDINGS OF FACT

1. FMC Wyoming Corporation is a large mine operator engaged in mining trona for sales in and affecting interstate commerce.

2. FMC pioneered the mining of trona. The first longwall operation was installed at FMC in 1981.

3. At the subject mine, longwall production equipment includes the shearer and face conveyer and longwall support and service equipment. These include a crusher, stage loader (which puts the ore on a rubber conveyor belt for transport out of the mine), service and maintenance vehicles, shield haulers, lube trucks, grease jeeps, diesel trucks equipped with a welder, diesel-powered forklifts and front-end loaders.

4. The purpose of 0 Room at FMC's mine is to provide access to perform maintenance and service on the longwall production equipment, particularly the shearer. Zero Room was designed to accommodate equipment needed for these functions.

5. It takes the longwall about 10 days to retreat from one crosscut to another. The longwall face is about 480 feet long. The width of the crosscut in which the longwall is installed is about 16 feet.

6. FMC's trona mine is a Category III mine under MSHA's standards and is regulated by safety standards specific for the trona industry. The mine liberates substantial quantities of methane.

DISCUSSION WITH FURTHER FINDINGS, CONCLUSIONS

History of the Safety Standard

From 1969 until July 1, 1987, safety standards for trona mines (1) prohibited the operation of equipment in any atmosphere where flammable gas ("methane" beginning January 29, 1985) exceeded 1.0 percent and (2) required permissible equipment "beyond the last open crosscut or in places where dangerous quantities of flammable gases are present or may enter the air current." 30 C.F.R. §§ 57.21076 and 57.21078 (and predecessors).

When FMC installed its trona longwall, in 1981, MSHA inspected the system and interpreted the safety standards as permitting nonpermissible equipment in intake air in the closest crosscut and entry room (0 Room in this case) outby the longwall face. It does not appear that MSHA considered the term "last open crosscut" applicable to trona longwall mining in determining the area for permissible equipment. Instead, MSHA apparently considered trona longwall mining to be governed only by the second phrase in § 57.21078: "or in places where dangerous quantities of flammable gases are present or may enter the air current."

On June 4, 1985, MSHA proposed the following safety standard to revise and combine §§ 57.21076 and 57.21078:

§ 57.36302 Permissible Equipment

> All electrical and diesel-powered equipment used in or beyond the last open crosscut shall be permissible. Equipment shall not be operated in atmospheres containing 1.0 percent or more methane. Nonpermissible electrical and diesel-powered equipment shall be kept at least 150 feet from pillar recovery workings, longwall faces and shortwall faces.
>
> This proposal would revise and combine existing standards §§ 57.21076 and 57.21078, and appeared as draft proposals §§ 58.21-178, 58.21378, 58.21-478, and 58.21-678. It requires that only permissible equipment be used at the face. 50 F.R. at 23626. The proposal would require that nonpermissible electric and diesel-powered equipment be kept at least 150 feet from pillar recovery workings, longwall faces and shortwall faces. 50 F.R. at 23627. [50 F.R. 23612, 23639; June 4, 1985.]

After considering trona industry objections to the 150-foot restriction, MSHA deleted it and adopted the following final standard:

§ 57.22305 Approved Equipment (III Mines)

> 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 C.F.R. Parts 18 through 36. Equipment shall not be operated in atmospheres containing 1.0 percent or more methane.

In the Preamble to the final rule, MSHA gave this explanation:

> Comments for Category III mines objected to the proposed 150-foot restriction for nonapproved equipment used in pillar recovery workings, longwall faces, or shortwall faces, stating that the restrictions on nonapproved equipment inby the last open crosscut are sufficient. The Agency agrees and the specific limitation of 150 feet has been omitted from the final rule. Performance-oriented language is substituted in the final rule which addresses the potential for methane forced out of gob areas due to caving resulting from pillar recovery and longwall and shortwall mining.

Consistent with its earlier enforcement policy, MSHA interpreted the new standard as permitting FMC to operate nonpermissible equipment in intake air in the closest crosscut and entry room outby the longwall face.

In January 1994, MSHA decided to apply the standard differently. Under its new policy, nonpermissible equipment is not allowed in and beyond the closest crosscut outby the longwall face. A meeting was held in the District Manager's office on January 24, 1994, at which MSHA's position was explained to FMC. Following the conference, a letter from the District Manager to FMC, on February 1, 1994, repeated MSHA's position and included several maps demonstrating what MSHA expected for future enforcement purposes. The citations at issue were issued in March 1994.

FMC contends that MSHA's new interpretation amounts to rulemaking in contravention of § 101 of the Act (requiring formal notice and comment rulemaking).

The Secretary contends that in § 57.22305 the term "last open crosscut" means the closest crosscut outby the longwall face and rulemaking proceedings are not required to commence applying this interpretation. FMC contends that this crosscut is not an "open crosscut" because it does not provide ventilation from the intake entry to the return entry. FMC submits that the "last open crosscut" is the crosscut in which the longwall face and equipment are located. Under this interpretation, the last open crosscut is immediately inby the longwall face.

A key to interpreting § 57.22305 is the language substituted for the 150-foot restriction that was deleted in the final rule. As stated, the Preamble explained this change as follows:

> Performance-oriented language is substituted in the final rule which addresses the potential for methane forced out of the gob areas due to caving resulting from pillar recovery and longwall and shortwall mining. [52 Fed. Reg. at 24937; emphasis added.]

MSHA's witnesses testified as to their understanding of the "performance-oriented language" that was inserted in the new standard. For example, Mr. Fuller testified:

FULLER: The requirement that they substituted performance-oriented language in the standard, which is the requirement that they maintain some separation distance.

MURPHY: And how was that separation distance maintained?

FULLER: What they left us with when they took out the 150-feet separation distance was, at a minimum, the width of the last open crosscut. [Tr. 301.]

Likewise, Mr. Koenning testified:

MURPHY: So what type of performance language, in your opinion, has been put into 57.22305?

KOENNING: The performance that is required is that a separation be maintained that is at least the width of the last open crosscut. [Tr. 397.]

I find that the performance-oriented language referenced by the Preamble is the phrase: "and equipment in areas where methane may enter the air current, such as pillar recovery workings, longwall faces and shortwall faces . . . ." I do not agree with the Secretary's contention that this language means that nonpermissible equipment must be kept a specific minimum distance from the longwall face, e.g., the width of the closest crosscut outby the longwall face.

Nor do I agree with the parties' contention that the term "last open crosscut" as used in § 57.22305 applies to longwall mining. The term "last open crosscut" or "last crosscut" is not defined in either the Mine Act or its implementing regulations. In general, a "crosscut" is a passageway or opening driven between entries for ventilation and haulage purposes (U.S. Department of Interior, Dictionary of Mining, Mineral, and Related Terms 280 (1968)), and the "last open crosscut" is "that open passageway connecting entries closest to the working face" (Jim Walter Resources, Inc., 11 FMSHRC 21, 26 (1989)).

The Commission has recognized that "in any given coal mine, the mining methodology used may uniquely determine the last open crosscut" (Peabody Coal Company, 11 FMSHRC 9, fn 8 (1989)) and that "each standard using the term 'last open crosscut' requires 'that certain activities be conducted in an area in which it has been deemed most crucial'" (JWR decision supra, at 26; citations omitted). The Commission has also held that it is "not fatally inconsistent or conflicting" to hold that the "last open crosscut" in one safety standard may be a certain crosscut but

another safety standard using the term "last open crosscut" would not apply to that crosscut. Finally, the Commission has found that the term "last open crosscut" is interchangeable with "last crosscut" when the logic and safety intent of the Act are best served by this flexible interpretation. Id. at 25-26.

The decisions of the Commission and its judges thus indicate a flexible approach to the term "last open crosscut" in order to consider the unique mining methodologies involved, while ensuring compliance with the Congressional intent to protect the safety of miners. Although their approach is very flexible, the decisions show a consistent distinction between development mining and longwall or retreat mining. The term "last open crosscut" has been applied only to development mining in determining the location of permissible equipment. [1] Indeed, the coal regulations (§ 75.1002-1) require that nonpermissible equipment be at least 150 feet from "pillar workings" (which would include a longwall), rather than use the term "last open crosscut."

The Category III regulations for trona mining indicate a similar intention, in fixing the place for permissible equipment, to confine the term "last open crosscut" to development mining. I conclude that, in longwall trona mining, the § 57.22305 requirement for permissible equipment is limited to the phrase "equipment used in areas where methane may enter the air current, such as pillar recovery workings and longwall faces and shortwall faces" and the phrase "last open crosscut" does not apply.

Accordingly, the controlling issue is whether the equipment cited in 0 Room was in "areas where methane may enter the air current . . . ." The diesel-powered vehicle and the electric light cited were in intake air and there is no evidence that methane was ever found there. The parties offered conflicting opinion evidence as to the possibility of methane entering 0 Room. On balance, I find that the evidence does not preponderate in showing a risk of methane entering the intake air current in the cited areas.

If the Secretary believes a specific separation distance would be a better rule than the current standard, he must proceed through notice and comment rulemaking under § 101 of the Act. Consideration of the issue in rulemaking may indicate that the 150-foot standard for longwall coal mining would be appropriate for longwall trona mining as well (as originally proposed in 1985).

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[1] In Jim Walters Resources, supra, the Commission held that the term "last open crosscut" was properly applied to a "unique longwall method of mining . . . resulting in large, uneven pillars (blocks) of coal and in interrupted crosscuts between various entries." However, the facts indicate the standard was actually applied to development mining used to set up future longwall panels, and not to longwall equipment outby a longwall face.

CONCLUSIONS OF LAW

1. The judge has jurisdiction.

2. The term "last open crosscut" as used in 30 C.F.R. § 57.22305 does not apply to FMC's trona longwall section.

3. The Secretary did not meet his burden of proving that the cited equipment was "in areas where methane may enter the air current" within the meaning of 30 C.F.R. § 57.22305. Accordingly, he did not prove a violation of that standard.

ORDER

WHEREFORE IT IS ORDERED that Citations Nos. 4125677 and 4125678 are VACATED.

William Fauver
William Fauver
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 16, 1994

ICI EXPLOSIVES USA, INCORPORATED, Contestant	:	CONTEST PROCEEDING
	:	Docket No. WEVA 94-283-R
v.	:	Order No. 4195443; 5/3/94
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Pax Surface Mine Mine ID 46-06877-NTD

ORDER OF DISMISSAL

Before: Judge Merlin

This case is an application for review of a withdrawal order issued by an inspector of the Mine Safety and Health Administration under section 107(a) of the Federal Safety and Health Act of 1977, 30 U.S.C. § 817(a). Section 107(e)(1) of the Act, 30 U.S.C. § 817(e)(1), authorizes the institution of suits for review of such orders and sets forth the conditions under which they may be brought as follows:

> 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.

Accordingly, an application for review of a 107(a) withdrawal order must be filed within 30 days of the date the operator was notified of the order. The order in this case was issued on May 3, 1994, and the application for review was filed on June 3, 1994. It was, therefore, one day late. On this basis the Secretary moves to dismiss.

In its response to the Secretary's motion, the operator argues that under Commission Rule 22(a), 29 C.F.R. § 2700.22(a), it had 30 days from the date of the termination of the order to file its application. Rule 22(a) provides that a notice of contest of a 107 order, or any modification thereof, may be brought by a contesting party within 30 days of the order, or modification or termination. However, the rule cannot, and there is no indication that it was intended to, expand the right of action created by the Act. 58 F.R. 12158 (March 3, 1993). As set forth above, section 107(e) gives operators only the right to contest an order, while a representative of miners may contest the issuance, modification or termination of an order. The

legislative history repeats this distinction. S. Rep. No. 95-181, 95th Cong., 1st Sess. 38 (1977), reprinted in, Legislative History of the Federal Mine Safety and Health Act of 1977, at 626 (1978).

A long line of decisions going back to the Interior Board of Mine Operations Appeals has held that actions instituted under section 105(d) of the Act, 30 U.S.C. § 815(d), contesting the issuance of a citation must be brought within the statutorily prescribed period of 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 1029 (1979), aff'd by the Commission, 1 FMSHRC 989 (August 1979); Amax Chemical Corp., 4 FMSHRC 1161 (June 1982); Peabody Coal Company, 11 FMSHRC 2068 (October 1989); Big Horn Calcium Company, 12 FMSHRC 463 (March 1990). In Prestige Coal Company, 13 FMSHRC 93, at 94 (January 1991), I adhered to these precedents in dismissing a late filed notice of contest under section 105(d) and stated, "*** the subsequent modifications of the citations cannot affect the operator's duty to file within the prescribed time." See also, C and S Coal Company, 16 FMSHRC 633 (March 1994); Asarco, Inc., 16 FMSHRC 1328 (June 1994).

Upon review of the Act and legislative history I find no reason to treat an application under section 107(e) for review of an imminent danger withdrawal order differently from notices of contest filed under section 105(d) with respect to citations and other types of withdrawal orders. The statutory provisions provide parallel avenues of relief. In both instances operators have the opportunity subsequently to challenge penalty aspects of the matters involved.

I recognize that this action was filed one day late. However, consideration of this fact in the matter at hand would open all operator applications and contests to an evaluation of degrees of timeliness and particular circumstances. Since I believe that actions under 105(d) and 107(e) should be viewed in pari materia, acceptance of such an approach would constitute a departure from settled precedent which I am unwilling to undertake absent instruction to the contrary.

In light of the foregoing, it is **ORDERED** that this case be, and is hereby **DISMISSED.**

Paul Merlin
Chief Administrative Law Judge

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AUG 17 1994

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 94-365-D
ON BEHALF OF	:	
JOHNNY ROBINSON,	:	PIKE CD 93-22
Complainant	:	
v.	:	No. 12 Surface
	:	
SUNNY RIDGE MINING COMPANY,	:	
INCORPORATED,	:	
Respondent	:	

DECISION

Appearances: MaryBeth Bernui, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Complainant;
Herman W. Lester, Esq., Pikeville, Kentucky, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a complaint of alleged discrimination filed by the Secretary of Labor against the respondent pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c)(2). The complaint was filed on behalf of Johnny Robinson, a former employee and drill operator of the respondent who claimed that he was discharged on or about August 16, 1993, because he made a series of health and safety complaints regarding the condition of the drill.

The respondent denied any discrimination, and it contended that Mr. Robinson was discharged for damaging the company drill that he was operating on August 16, 1993, the day that he was discharged.

A hearing was held in Pikeville, Kentucky. The petitioner filed a posthearing brief, but the respondent did not. However, I have considered its oral arguments made at the hearing in the course of my adjudication of this matter.

Issues

The critical issue in this case is whether Mr. Robinson's discharge was prompted in any way by any health or safety complaints that he may have made concerning the drill, or whether it was the result of his damaging the drill as claimed by the respondent. 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, 30 U.S.C. § et seq.

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

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

Stipulations

The parties agreed to the following (Tr. 9-12).

1. Mr. Robinson was hired by the respondent on April 12, 1993, as a general laborer-drill operator, at a salary rate of $10 per hour, based on a 40-hour week. He subsequently received a raise to $11 per hour, and his overtime rate was $16.50 per hour. His last day of employment was August 16, 1993.

2. The subject mine is a non-union operation, and Mr. Robinson is a "miner" as defined by the Act.

3. The complaint was filed by the Secretary pursuant to section 105(c)(2) of the Act, and the Commission has jurisdiction in this matter.

4. The respondent is a coal mine operator engaged in the business of mining coal in interstate commerce and is subject to the Act.

Complainant's Testimony and Evidence

Johnny M. Robinson, the complainant in this case, testified that he has a tenth grade education and has worked in the mining industry for 9 or 10 years. He worked for the respondent at the No. 12 surface coal mine on the day shift as a drill operator and rock truck driver, as needed. He was hired by Phillip Rife, the mine foreman, and Mr. Rife was his supervisor for the entire time he worked at the mine. He confirmed that his normal work hours were 7:00 a.m. to 5:00 p.m., six days a week and the mine

operated one shift when he was there. He stated that he received no training or orientation when he was hired and no one explained any company policies or procedures to him. He had never been disciplined prior to his discharge on August 16, 1993 (Tr. 16-19).

Mr. Robinson explained his duties, and he described the drill that he usually operated on a daily basis (Tr. 21-22). He stated that one of the levers on the 35B Gardner Denver drill that he operated was hard to pull and he had to use both hands to pull it. He believed the lever operated the blower. He also stated that the dust collector and air conditioner were not working (Tr. 23). He stated that he mentioned all of these problems to Mr. Rife, to the mine operator Tommy Potter, and to Gary Minix, the mechanic (Tr. 24).

Mr. Robinson stated that he experienced "bad chest pains" and that he "got to smothering a lot" and had to go to the hospital emergency room as a result of the problems with the drill. He stated that he was not admitted but was given an E.K.G. test and x-rays were taken, and he also took a stress test. He informed Mr. Rife about his health problems and explained as follows at (Tr. 27):

> A. He said there was nothing wrong with my heart. I said, "I don't think so either, Phillip. If it's anything wrong with me, it's the lever and breathing the dust that I've been breathing." He said, "There ain't nothing wrong with you."

Mr. Robinson stated that Mr. Potter told him that he was trying his best to repair the drill lever and agreed that it was hard to pull (Tr. 25). Mr. Robinson stated further that Mr. Rife responded to his complaints about the drill, and he explained as follows at (Tr. 24-25):

> A. He said they was planning on getting them fixed, he said, as soon as they could get somebody up here to work on the air conditioner, the air-conditioning. And he said the dust collector and everything would be fixed, in time.
>
> Q. Was the dust collector ever repaired?
>
> A. Let's see. I was off for two weeks. And when I come back to work, the dust collector was working. And I run it about two or three days after that and I was fired.
>
> Q. What about the air conditioner ?
>
> A. Yes, it was working.

Q. How long had that been repaired before you were fired?

A. They done all this maintenance in the two weeks I was off.

Q. How about the lever on the drill?

A. It was never repaired.

Mr. Robinson stated that on August 16, 1993, he was operating the drill on the haulage road that is located from the parking lot out to the work area and he was drilling a drainage ditch against the highwall. Mr. Rife assigned him that job and acknowledged that he would be drilling in a "tight area" because of passing coal haulage trucks. Mr. Rife told him to "be careful and take your time" but not to hold up any of the coal trucks (Tr. 28-29).

Mr. Robinson stated that four coal trucks and other vehicular traffic passed by him on the haulage road while he was operating the drill, and when the coal trucks passed he was a foot and a half away and he positioned himself as close as he could to the highwall. He would sometimes back up to a wider part of the road if he were close enough to do so before the coal trucks reached his area (Tr. 30-32).

Mr. Robinson stated that he realized that the drill blower was damaged that same evening after he parked the drill at the parking lot and began to check the oil and water to prepare the machine for work the next day. He explained that he was removing some tree limbs and leaves from the machine and noticed that the blower was bent. He then called Mr. Rife on his truck C.B. and asked him to come to the drill. He and Mr. Rife examined the damage, and Mr. Robinson stated as follows at (Tr. 36):

* * * I said, "Phillip," I said, "I'm sorry for bending the blower on the drill." I said, "I was in a tight spot." He said, "Yeah, I know you was in a pretty rough spot." I said, "Well, I tried my best, you know, to take care of the equipment."

And he said, "Well, I don't know what the owners is going to say about it. I said, "Well, like I said, I'm sorry I bent the blower on the drill." And then he asked me, he said, "Are you working tomorrow?" And I said, "Yeah." He said, "Well, I guess I can put you driving the water truck." I said, "Okay. I'll see you in the morning." That was about -- I guess, about ten minutes till five.

Mr. Robinson stated that Mr. Rife called him at home on the evening of August 16, at 8:30 or 9:00 p.m. and told him that he no longer needed his services. Mr. Robinson stated that he responded "Ten-Four" and that "it choked me that I got fired". Mr. Robinson then called Mr. Minix, the mechanic, and informed him that he had been fired and Mr. Minix told him that he could not be fired over the phone and that "he has got to fire you to your face" (Tr. 38).

Mr. Robinson stated that he went to work the next day, August 17, and was preparing to operate a piece of equipment when Mr. Rife appeared and informed him that he had been fired the previous day. Mr. Rife then told him that "I'll tell it to your face. You're a fired man now" (Tr. 39). Mr. Robinson further explained his encounter with Mr. Rife as follows at (Tr. 39-40):

> * * * Anyway, it got into us hollering, cussing. I got mad and started cussing Phillip. Phillip was saying his stuff and he told me to get my blank off the hill. I said, "Well" -- I started cussing him and I turned around and went back to get my lunch bucket and thermos.
>
> I kept noticing Phillip out of the corner of my eye and he came running at me. And when he got about six foot away from me, I wheeled around with my right arm cocked. And I said, "You come on and hit me" and I said "I'll knock your teeth out." Like he was running to hit me. And he said, "Well, get your... blank" lunch bucket and get the . . . blank. . .off the job."
>
> I said, "Okay." I said, "I'm going to." He said, "Get in the truck." He said, "Get in the truck. I'll take you around the hill." I said, "I don't want in the truck. I don't want a ride. I'll walk out of here." And I did.

Mr. Robinson stated that he also spoke with "one of the Darnell brothers" who stopped along the road while he (Robinson) was walking to the parking area after Mr. Rife fired him. Mr. Robinson stated that he told Mr. Darnell that Mr. Rife fired him for bending the drill blower the previous day (Tr. 41).

Mr. Robinson denied that he was ever under the influence of alcohol while working at the mine (Tr. 43). He stated that two other employees damaged equipment at the mine but were not fired and he identified them as Chuck Griffith and Eddie Taylor (Tr. 43-44).

Mr. Robinson stated that after he was fired by the respondent he looked for other work and found a job at Branham and Baker Mining Company at $12.50 an hour, and worked there from

October 1993, to March 31, 1994. He has continued to seek further employment with other mine operators since that time (Tr. 45-46).

On cross-examination, Mr. Robinson confirmed that he received a pay raise during his employment with the respondent and that he was off for two weeks because of lack of work before he was fired (Tr. 49). He confirmed that both Mr. Rife and Mr. Potter cautioned him to be careful for his personal safety and not to damage the machine while he was drilling on August 16, and they also instructed him not to hold up the coal trucks and to keep out of their way. He denied that Mr. Rife and Mr. Potter pointed out several wide places in the roadway where he could take the drill when the trucks passed (Tr. 51-52).

Mr. Robinson could not state how many times he may have struck the highwall when he was drilling on August 16, and he stated that "if I hit it, I never felt it. I didn't acknowledge it" (Tr. 54). He confirmed that if he did hit the highwall, the blower part of the machine would have struck it. He acknowledged that the blower was bent but did not remember when it happened (Tr. 55).

Mr. Robinson confirmed that he was warned to keep the drill out of the highwall trees but indicated that this was difficult because the trees stick out over the highwall. He confirmed that the drill was into the trees several times on the day in question and that he knocked down some small limbs and leaves, and on one occasion had to remove "a pretty good size branch" from the drill (Tr. 56-57). Mr. Robinson confirmed that Mr. Manix cautioned him about getting into the trees with the drill (Tr. 58). Mr. Robinson explained his conversation with Mr. Rife when they examined the drill as follows at (Tr. 59-60):

> A. I told him, I said, "I guess I've run into the highwall, Philip." That is what I said to him.
>
> JUDGE KOUTRAS: What other explanation would there be? Do you know?
>
> THE WITNESS: Pardon?
>
> JUDGE KOUTRAS: What other explanation is there? I mean, the blower wouldn't have gotten into the trees, would it? It's low.
>
> THE WITNESS: No, it wouldn't have got in the trees. I would have had to hit the highwall. I had to hit the highwall. I'm not saying I didn't hit it.
>
> * * * * * * *

Q. You didn't tell Philip you were sorry about damaging the machine, did you, that day?

A. Yes, I did.

Q. You told him, to quote things I've seen throughout this, "Accidents happen."

A. No sir, I did not. I told him I was sorry I bent that blower.

Q. You deny making that statement.

A. I do deny it.

Mr. Robinson was of the opinion that the drill was operable without the blower working the day after it was damaged. Even though the purpose of the blower is to keep the dust away from the drill operator, he would have operated the drill in that condition and stated that "I had done it before" (Tr. 62-63).

Mr. Robinson denied that he had been drinking the evening he was fired, or the next morning, and he denied returning to work after Mr. Rife phoned him and fired him to challenge Mr. Rife's authority or to "get into a cussing match" with him (Tr. 64-65). When asked why he was fired, Mr. Robinson responded as follows at (Tr. 65-66):

Q. What was the reason you were fired, John?

A. I would say for denting the blower on the drill. That is what I was told anyway.

Q. Is that your understanding, too?

A. That is what I was told.

Mr. Robinson stated that Mr. Minix was present during his encounter with Mr. Rife. He confirmed that after inviting Mr. Rife to hit him and telling Mr. Rife that he would knock his teeth out, Mr. Rife walked away from him (Tr. 66-67).

Mr. Robinson identified a copy of an employment application that he signed when he applied for a job with the Branham and Baker Coal Company on September 20, 1993. He admitted that he stated on the application that he was a high school graduate, which was not true, and he explained that "there is not too many people hire you anymore without having a high school education" (Tr. 69). He also admitted that the November 10, 1992, date shown on the application as the date he was hired by the respondent is not correct, and that the statement that he was still working for the respondent on September 20, 1993, was also

not true. He also admitted that he did not disclose that he was fired by the respondent and simply indicated that he left because he only worked three or four days a week, and he explained that "who is going to hire me if I told them another company fired me?" (Tr. 70). Mr. Robinson admitted that he certified that the answers given by him on the application form were true and correct and knew that the information he gave with respect to his employment with the respondent was not correct (Tr. 71).

Mr. Robinson stated that Branham and Baker Coal Company hired him in October 1993, and terminated him in March 1994 (Tr. 71). He explained that he was fired by the company president and was told that he was not performing his duties as a drill operator (Tr. 73). He confirmed that he filed a discrimination complaint with MSHA against Branham and Baker and suggested that he was fired because of his discrimination complaint against the respondent (Tr. 77, 82). MSHA's counsel confirmed that Mr. Robinson's complaint against Branham and Baker is under investigation (Tr. 78).

Mr. Robinson believed that the drill lever that was hard to pull operated the blower, but he was not sure, and he confirmed that all of the other levers were operational. He also confirmed that Mr. Potter worked on the lever after he complained about it, and that a mechanic also worked on it (Tr. 84-85).

Mr. Robinson stated that other employees also complained about the air conditioning when it stopped operating. He confirmed that Mr. Rife told him that he was trying to get someone to repair the air conditioning, that there was no one on the job who could make the repairs, and that a certified mechanic was required. Mr. Robinson also confirmed that Mr. Rife had a mechanic from another mine site repair the air conditioning as it would go out and that it was working on the day he was fired (Tr. 86-87). He stated that he never made any safety or health complaints to any MSHA or state mine inspectors (Tr. 88).

Mr. Robinson reviewed a copy of his prior deposition of May 10, 1994, in this case, and he confirmed that he testified that his employment problems with the respondent all related to the damage to the drill and had nothing to do with any complaints about safety or health violations. Mr. Robinson confirmed that Mr. Rife informed him that he was fired for damaging the drill and that he (Robinson) understood that this was the reason for his discharge and that it had nothing to do with his health or safety complaints. Mr. Robinson confirmed that he reviewed his deposition and did not change any of his testimony regarding the reasons for his discharge when he signed the deposition after receiving it from the court reporter (Tr. 90-94).

In response to further questions, Mr. Robinson could not explain why he misstated the date of his hiring by the respondent

on the application he filed with Branham and Baker. He confirmed that he stated that he was still employed by the respondent in order to get the Branham and Baker job and that he needed to work, and he did not disclose his discharge because he believed he would not have been hired. He also acknowledged that he stated he was a high school graduate because it would be easier to get the job (Tr. 97-98).

In further explanation of his prior deposition testimony, Mr. Robinson responded as follows to questions by MSHA's counsel (Tr. 98-99):

> Q. Now, I want to talk to you about your deposition, on page forty-seven. Mr. Lester already read into the record his questions and your response to his questions on page forty-seven. I would like to read into the record and show you your response to my questions on page fifty-three, beginning with question one.
>
> Question One -- and this is direct examination by me, page fifty-three. "I just want to clarify a few things now. You were told that you were fired from Sunny Ridge for damaging the drill, correct?.
>
> A. Yes.
>
> Q. Answer, "Yes, I was." Is that your answer?
>
> A. Yes.
>
> Q. Question two, "Do your feel you were fired because you made all those complaints?"
>
> Answer, "It's a possibility. I'm not saying for sure, because I don't now for sure. "Was that your answer?
>
> A. Yes, it was.
>
> Q. Can you explain that?
>
> A. I was told I was fired for damaging the drill. They never said nothing to me about my complaints or firing me over my complaints or none of the above. So I really didn't know -- I give the most honest answer I could. I didn't know if that was the reason why I got fired.
>
> Q. What do you believe?
>
> A. I believe it was due to all of it; the blower, the dust, the complaints and me damaging the drill. All of it wrapped up in one.

Everett Potter, employed by the Corbin Coal Company as a night shift supervisor, testified that he was employed by the respondent as an equipment operator for four months during May through August of 1993. He worked the same shift with Mr. Robinson and Philip Rife was the mine foreman and their supervisor. He stated that Mr. Robinson worked regularly and he heard him complain to Mr. Rife about the hot, dry, and dusty conditions because of the lack of air conditioning for the drill that he operated. Mr. Potter characterized Mr. Robinson's complaints as complaints about "normal breakdowns and normal stuff", and he could not recall Mr. Robinson complaining about the drill lever.

Mr. Potter considered Mr. Robinson to be a "fair drill man" and he never observed him drinking alcohol while on the job. Mr. Potter confirmed that he was working the day Mr. Robinson was fired and that Mr. Rife told him about it the next day. Mr. Potter did not believe that Mr. Robinson complained about the lack of air conditioning more than any other employee.

Mr. Potter stated that he quit his job with the respondent for a better job offer and more benefits and money. He stated that he "ruined" a front wheel on an end-loader that he was operating while employed by the respondent and he was not fired. He stated that one month before he quit his job the equipment air conditioning was in working order (Tr. 112-119).

On cross-examination, Mr. Potter confirmed that when he worked at the mine there was no equipment air conditioning, that it was hot, and everyone complained about this. He stated that he observed Mr. Robinson drinking alcohol on mine property "once or twice a week" at the mine parts trailer area after his work shift was over. Mr. Potter confirmed that he was not at the mine when Mr. Robinson was fired, or the next day. He stated that he would "probably" hire Mr. Robinson. He also indicated that the question of whether to fire an employee for damaging equipment would be a judgment call by the foreman or supervisor. He confirmed that the respondent performed maintenance on its equipment.

Mr. Potter stated that the damage to the tire that he ruined was the result of an accident, and that it was not intentional or the result of gross negligence on his part. He confirmed that when he worked at the mine the respondent had someone come from another job to service the equipment air conditioners (Tr. 119-127).

Ruben Hylton, employed by the Sidewinder Mining Company since late August of 1993, as a mechanic, testified that he was employed by the respondent at the No. 12 mine as a greaser maintaining the equipment for approximately one-and-one half to two years. He worked on the same shift with Mr. Robinson and

confirmed that Mr. Rife was his supervisor and his father-in-law. Mr. Hylton stated that he performed maintenance on the drill operated by Mr. Robinson and that one of the levers was "stiff". He confirmed that he heard Mr. Robinson state that the lever was stiff, but he could not recall who he told about this.

Mr. Hylton knew of no other employee who was ever fired by the respondent for damaging equipment. He stated that he was told that "if you tear up equipment, that's it" and he knew that "if I messed up", he would be subject to discharge (Tr. 128-135).

On cross-examination, Mr. Hylton stated that he left his job with the respondent voluntarily to work with his father. He stated that he has observed Mr. Robinson drinking alcohol at the mine after his work shift. He stated that during the work shift on August 16, 1993, the day Mr. Robinson was fired, he was working with Mr. Minix, the equipment mechanic, and that Mr. Minix warned Mr. Robinson about operating the drill "in the trees" at the highwall and Mr. Hylton observed that a large tree branch had fallen on the drill. When Mr. Minix brought this to Mr. Robinson's attention, Mr. Robinson responded "was I in those trees?" Mr. Hylton stated that Mr. Robinson bent the drill dust blower on the highwall and that he observed several equipment scrapes against the highwall.

In response to further questions, Mr. Hylton stated that he observed Mr. Robinson drinking after his work shift at the parts trailer area where employees parked their vehicles and that on one occasion he smelled alcohol on Mr. Robinson's breath (Tr. 135-148).

Darwin Bailey, testified that he was employed by the respondent as a rock truck driver and that Mr. Rife was his supervisor. He worked on the same shift with Mr. Robinson and believed that he was "a pretty good drill men." He stated that on one occasion he heard Mr. Robinson complain about a lever on the drill that he was operating and that it was repaired. He confirmed that Mr. Robinson complained about the lack of air conditioning on his drill and that Mr. Rife responded by stating that the repairman "was on his way". Mr. Bailey stated that he never heard Mr. Robinson complain about dust and he did not know if Mr. Robinson complained more than any other employee. Mr. Bailey believed that the air conditioning was repaired approximately a week after Mr. Robinson was fired.

Mr. Bailey stated that he was working at the mine on the day Mr. Robinson was fired when "he came down and started the trouble". He stated that Mr. Robinson was highly upset and told him that Mr. Rife had fired him. He stated that Mr. Robinson cursed Mr. Rife, and told him he would "see him in court".

Mr. Bailey could not recall any company discharge policy, or that he was ever informed about any policy stating that an employee would be discharged for damaging equipment. Mr. Bailey stated that dozer operator "Chuck" Griffith had an accident when a truck pulled in front of his dozer, and that he was not fired (Tr. 148-163).

On cross-examination, Mr. Bailey reiterated that he only heard Mr. Robinson complain one time about his drill lever and that it was repaired. He also confirmed that he never heard Mr. Robinson complain about dust, but that he did complain about the lack of air conditioning. He confirmed that everyone had air conditioning after it was repaired.

Mr. Bailey further confirmed that Mr. Robinson was screaming and cursing at Mr. Rife and wanted to fight him after Mr. Rife informed him that he had been fired. Mr. Bailey did not know whether he smelled any alcohol on Mr. Robinson at that time and he characterized Mr. Rife as a "good, fine, boss". Mr. Bailey believed that Mr. Griffith was not fired because his equipment damage was an "accident" (Tr. 163-172).

Charles I. Griffith, employed by Sidney Harwoods as a dozer operator, testified that he was employed by the respondent from approximately April, 1992, to August, 1993, at the No. 12 mine as a dozer and loader operator. He stated that Mr. Rife was the mine foreman and his supervisor, and that Mr. Rife had hired him. Mr. Griffith stated that he worked the same shift with Mr. Robinson and that Mr. Robinson had a "regular attendance" record, and he considered Mr. Robinson to be a "fair and competent" drill operator.

Mr. Griffith stated that Mr. Robinson expressed his concerns about the lack of air conditioning on his drill and "just different things". Mr. Griffith was also aware that Mr. Robinson had complained one time about a drill lever but he could not recall any further details. With regard to any dust problems, Mr. Griffith stated that Mr. Robinson usually complained to Mr. Rife or to "whoever" over the C.B. radio on his equipment. Mr. Griffith "guessed" that Mr. Robinson complained more than the other employees. Mr. Griffith never observed Mr. Robinson drinking on the job, but they would have a few beers off mine property after work.

Mr. Griffith stated that the air conditioning on the equipment that he operated "worked sometimes, and sometimes it didn't". He further stated that none of the equipment air conditioning was operational all of the time but that Mr. Rife tried to get it repaired and that a maintenance crew came to the mine during "the first of July" and made repairs. Mr. Griffith also stated that some of the equipment had open cabs that were not equipped for air conditioning. Mr. Griffith stated that when

"something went wrong with the equipment", employees would complain and that "it was usually fixed".

Mr. Griffith stated that he observed Mr. Robinson operating the drill the day he was fired and learned the next day that Mr. Rife had fired him. He rode out of the work site with Mr. Rife and saw Mr. Robinson at the parking lot. Mr. Griffith stated that Mr. Rife showed him the damaged drill and told him that Mr. Robinson had "torn it up". Mr. Griffith stated that he observed indentations in the highwall where "the drill got into it" and observed that the drill blower "was bent pretty bad". Mr. Griffith stated that he was shown the company policy about damaging company equipment when he was first hired.

Mr. Griffith stated that a few months before Mr. Robinson was fired he (Griffith) had an accident with his endloader while loading coal. He explained that he struck the hood of a truck that he could not see with his dozer blade raised, but was not fired. He also stated that he knocked an oil tank off when he was close to the highwall. He was also aware that drill operator Eddie Taylor had a hydraulic motor torn off the drill he was operating and was not disciplined at that time.

Mr. Griffith stated that when he had his accident with the truck Mr. Rife cautioned him to be more careful and admonished him for being careless. Mr. Griffith stated that after Mr. Robinson was fired in August, he (Griffith) was pushing shot and spoil with his dozer and knocked a hole in the radiator. He reported this to Mr. Rife and showed him the damage. Mr. Rife then left to summon a mechanic and Mr. Rife discussed the matter further with Mr. Griffith. Mr. Rife informed him that "he had no other choice", and Mr. Griffith stated that "I picked up my bucket and left the mine" (Tr. 172-187).

On cross-examination, Mr. Griffith stated that it "was pretty well known", that on any strip mining job if an employee continuously damaged his equipment his job may be in jeopardy. However, he was not aware of anything in writing. Mr. Griffith stated that he left his job with the respondent after his third incident of damaging equipment (the damaged radiator), and he confirmed that Mr. Rife told him that he took "too many chances" with his equipment. Mr. Griffith admitted that he took chances that he should not have taken, and has since learned to be more cautious about not damaging equipment and "not to rush so much". He stated that the damaged radiator resulted in production down time and it "cost thousands" to repair the damage.

Mr. Griffith stated that at the time Mr. Robinson damaged the drill blower he observed "five or six gouges" in the blower and he was of the opinion that the damage could have been prevented if Mr. Robinson had exercised more reasonable care. He confirmed that he never heard mine management state that they

would get rid of Mr. Robinson for any safety complaints. Mr. Griffith stated that he has operated equipment with no air conditioning. He also stated that he was sure that Mr. Robinson was fired for damaging the drill (Tr. 187-225).

Respondent's Testimony and Evidence

Gary Minix, mechanic, No. 12 Mine, testified that he was familiar with the Gardner-Denver drill that was operated by Mr. Robinson. He stated that he repaired a number of broken chains and hoses that occurred when Mr. Robinson was operating the machine, but that after he left there was a decrease in the repairs that he had to make to the drill. Mr. Minix stated that on one occasion Mr. Robinson admitted to him that he had intentionally damaged a hose because he was mad at Mr. Rife, but later apologized for doing this.

Mr. Minix stated that the drill lever that controlled the air used to blow out the material from the drilled holes was "harder than usual" to operate and that he obtained new parts to repair the lever. However, after adjusting the lever tension, the repairs were not needed and the lever is still operative and in use. With regard to the equipment air conditioning, Mr. Minix stated that repairs are made by licensed mechanics when they can get to it and he explained that in view of the presence of freon in the air conditioning units licensed contractor mechanics must make the repairs.

Mr. Minix stated that on August 16, 1993, the day Mr. Robinson was fired, he observed him operating his drill at approximately 8:30 or 9:30 A.M., and found that a tree limb had fallen into the drill mast. Mr. Minix stated that he removed the limb and informed Mr. Robinson about several other trees "around the hill". Mr. Minix returned an hour or so later and observed that the drill dust collector was bent, and Mr. Robinson informed him that he couldn't help it. Mr. Minix stated that he warned Mr. Robinson again to stay out of the trees and he heard the sound of another tree that had fallen near the drill but it did not land on the machine. Mr. Minix then left the area.

Mr. Minix stated that he later observed Mr. Rife and Mr. Robinson discussing the damaged drill dust collector and heard Mr. Robinson comment "shit happens" as he proceeded to retrieve a beer from a cooler and leave the area. Mr. Minix stated that Mr. Robinson called him later that evening and informed him that Mr. Rife had fired him. Mr. Minix stated that he told Mr. Robinson that he could not be fired by telephone, and he believed that Mr. Robinson was fired because of attitude problems and damaging the drill. He stated that he and Mr. Robinson were friends and that he often gave Mr. Robinson rides to work.

Mr. Minix stated that he was present when Mr. Robinson came to the mine the next morning after he was fired and that he smelled alcohol on Mr. Robinson's breath. Mr. Minix stated that he observed and heard Mr. Robinson cursing Mr. Rife in a loud voice, calling him "bad names", and attempting to get Mr. Rife to fight him. Mr. Minix estimated that it would take several hours, and cost several thousand dollars to replace the damaged dust collector. He stated that the drill was repaired, but a new dust collector was not installed (Tr. 225-252).

On cross-examination, Mr. Minix stated that the damaged drill was out of operation for approximately five to nine hours. He believed that the damage could have been avoided if Mr. Robinson had exercised reasonable care (Tr. 252-257).

Philip Rife, Mine Foreman, No. 12 mine, testified that he has served as foreman for two years and that the day shift has 16 employees. He stated that he hired Mr. Robinson as a drill operator on April 12, 1993, and was his supervisor until August 16, 1993. He had no complaints about Mr. Robinson's work and stated that he came to work every day and did an acceptable and suitable job.

Mr. Rife stated that two or three weeks before he fired Mr. Robinson there was a change in his attitude. Mr. Rife stated that he received a telephone call from someone from the child welfare office in Prestonsburg inquiring about Mr. Robinson's wages. Mr. Robinson informed him that his ex-wife was after him for child support and had him jailed. Mr. Rife stated that Mr. Robinson told him he would force him to fire him because he did not want to pay his ex-wife any child support.

Mr. Rife confirmed that Mr. Robinson complained to him about the lack of air conditioning on his drill, and that others had also complained. Mr. Rife explained that it was difficult to maintain the air conditioning because certified mechanics had to perform the work because of the presence of freon. He stated that the drills had recently been inspected by MSHA and OSM and were in good order. He also confirmed that Mr. Robinson had complained about a drill lever used to blow dust out of the drilled holes, but that the mechanic had sprayed it with WD-40, and this took care of the problem and no further complaints were made.

Mr. Rife stated that he fired Mr. Robinson for damaging the drill on August 16, 1993. Mr. Rife stated that he personally observed and counted 21 places and paint marks on the highwall where Mr. Robinson had struck it with the drill while he was operating it that day. The damage rendered the drill inoperable, and when he discussed the matter with Mr. Robinson, he (Robinson) commented that "shit happens" and never indicated that he was sorry or that it was an accident. Mr. Robinson did not inform

him that he had struck any trees with the drill, but Mr. Minix informed him that Mr. Robinson had in fact "been in the trees" with the drill.

Mr. Rife confirmed that other employees had damaged mine equipment but were not fired. He explained that the incident involving Mr. Griffith was an accident and that Mr. Griffith apologized. He stated that Mr. Robinson had a bad attitude and he believed that he intentionally damaged the drill for not doing what was asked of him to stay out of the trees. Since the drill hit the highwall 21 times, Mr. Rife concluded that Mr. Robinson knew what he was doing. Mr. Rife stated that pursuant to company policy, intentionally damaging equipment is a discharge offense.

Mr. Rife believed that he got along well with all of his employees and he denied that he harbored any ill will against Mr. Robinson or that the "had it in" for him for complaining about the drill air conditioning. Mr. Rife stated that he would not have fired Mr. Robinson, if he did not have "an attitude problem" and had not damaged the drill (Tr. 258-278).

On cross-examination, Mr. Rife further explained his deposition testimony concerning Mr. Robinson's child support problems (Tr. 278-280). He confirmed that he previously stated that Mr. Griffith was not fired and quit his job on his own accord and that he told MSHA's special investigator Hamilton that Mr. Griffith was fired for damaging equipment after he had been warned two or three times, and that he had been fired a few days after Mr. Robinson. He also confirmed that he told Mr. Hamilton that Mr. Robinson had complained two or three times about the drill blower lever being hard to pull and that he gave him some WD-40 oil to free the lever and that it was harder than normal to operate (Tr. 282-283).

Mr. Rife stated that a former employee, Fred Bailey, quit his job at the mine and told him that he was leaving because of the dust and heat and because the air conditioning not working. He confirmed that Mr. Bailey had complained to him about these matters, but denied that he quit because his complaints were not taken care of (Tr. 285-286).

Mr. Rife testified about his encounter with Mr. Robinson on the morning after he fired him by telephone as follows at (Tr. 286-288):

> A. I had come in the job and there he was with Gary Minix, the mechanic. I said "Johnny, what are you doing out here?" He said, "If you have anything to say to me, you say it in front of tater," which is Gary Minix.

I said, "Well, Okay, You're fired. Come on, I'll take you on out of here." And when I said that, he went to cussing and calling me every kind of a name there was.

Q. Did you cuss him back?

A. No, sir. No, I didn't cuss him back.

Q. Did you get close to him or he get close to you?

A. He run right in my nose. He got right in my face.

Q. Do you recognize the smell or alcohol on someone's breath?

A. Yes.

Q. Did you recognize it on his?

A. Yes.

Q. All right. What happened after that?

A. Well, I went on back out to the other end to pick up the men and bring them out. And I tried to get him to come on and get in the truck and let me bring him out. He walked from one end of the job, out to the other parking lot.

And when he got out to the other parking lot, he went to cussing and kicking and swooping. When he pulled out, he went up the hill and across the county road, toward the Virginia line, cussing me, spinning, throwing gravels.

Mr. Rife denied that he informed anyone at Branham and Baker Coal Company that he had fired Mr. Robinson, or that he tried to get Mr. Robinson fired from his job at that company (Tr. 288-289).

Mr. Robinson was called in rebuttal and he denied that he ever told Mr. Rife that he would fire him so that he would not have to pay child support (Tr. 295). He produced paycheck stubs from his employment with Branham & Baker, and confirmed that part of his pay was garnished in order to make child support payments (Tr. 296-297).

Findings and Conclusions

In order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, a complaining miner bears the burden of production and proof to establish (1) that he

engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Company, 2 FMSHRC 2768 (1980), rev'd on other grounds sub nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3 Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981); Secretary on behalf of Jenkins v. Hecla-Day Mines Corporation, 6 FMSHRC 1842 (1984); Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510-2511 (November 1981), rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no way motivated by protected activity. If an operator cannot rebut the prima facie case in this manner it may nevertheless affirmatively defend by proving that it was also motivated by the miner's unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Company, 4 FMSHRC 1935 (1982). The ultimate burden of persuasion does not shift from the complainant. Robinette, supra. See also Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983); and Donovan v. Stafford Construction Company, No 83-1566 D.C. Cir. (April 20, 1984) (specifically-approving the Commission's Pasula-Robinette test). See also NLRB v. Transportation Management Corporation, _____U.S._____, 67 L.ed.2d 667 (1983), where the Supreme Court approved the NLRB's virtually identical analysis for discrimination cases arising under the National Labor Relations Act.

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

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

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

Protected Activity

It is clear that Mr. Robinson had a statutory right to voice his concern about the condition of his drill and to make safety complaints in this regard to mine management without fear of retribution by management. Management is prohibited from interfering with such activities and may not harass, intimidate, or otherwise impede Mr. Robinson's right to complain. Secretary of Labor ex rel. Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981), and Secretary of Labor ex rel. Robinette v. United Castle Coal Co., 3 FMSHRC 803 (April 1981). Baker v. Interior Board of Mine Operations Appeals, 595 F.2d (D.C. Cir. 1978); Chacon, supra.

Mr. Robinson's Communication of his Safety Complaint to Mine Management

In a number of safety related "work refusal" cases, it has been consistently held that a miner has a duty and obligation to communicate complaints to mine management in order to afford the operator with a reasonable opportunity to address them. See: Secretary ex rel. Paul Sedgmer et al. v. Consolidation Coal Company, 8 FMSHRC 303 (March 1986); Miller v. FMSHRC, 687 F.2d 194 (&th Cir. 1982); Simpson v. Kenta Energy, Inc., 8 FMSHRC 1034, 1038-40 (July 1986); Dillard Smith v. Reco, Inc., 9 FMSHRC 992 (June 1987); Sammons v. Mine Services Co., 6 FMSHRC 1391 (June 1984); Charles Conatser v. Red Flame Coal Company, Inc., 11 FMSHRC 12 (January 1989), review dismissed Per Curiam by agreement of the parties, July 12, 1989, U.S. Court of Appeals for the District of Columbia Circuit, No. 89-1097.

Although Mr. Robinson's protected activity concerned safety complaints rather than work refusals, I conclude and find that the same principles apply and that the Secretary has the burden of establishing that Mr. Robinson made and communicated his safety complaints to mine management and that management retaliated against him by discharging him for complaining. In short, in order to prevail in this case, the Secretary must establish a nexus between Mr. Robinson's complaints and any adverse discriminatory actions (the discharge) which followed. See: Sandra Cantrell v. Gilbert Industrial, 4 FMSHRC 1164 (June 1982); Alvin Ritchie v. Kodak Mining Company, Inc., 9 FMSHRC 744 (April 1987); Eddie D. Johnson v. Scotts Branch

Mine, 9 FMSHRC 1851 (November 1987); Robert L. Tarvin v. Jim Walter Resources, Inc., 10 FMSHRC 305 (March 1988); Connie Mullins v. Clinchfield Coal Company, 11 FMSHRC 1948 (October 1989).

Mr. Robinson testified about certain "problems" that he experienced with the drill, and he identified these as a lever which was difficult to pull, and a dust collector and air conditioning unit that were inoperative (Tr. 23). The dust collector was the same one that he subsequently damaged (Tr. 85). He stated that he mentioned these matters to the mine operator Tommy Potter, mine foreman Phillip Rife, his immediate supervisor, and mine mechanic Gary Minix (Tr. 24). Mr. Potter was not called as a witness in this case.

In addition to his complaints about the drill, Mr. Robinson also mentioned a visit to a hospital emergency room after he "got to smothering a lot" and experienced "bad chest pains". Mr. Robinson attributed this visit to the problems that he experienced with the drill, and he testified that he informed Mr. Rife about these health problems (Tr. 27).

Former Shift Supervisor Everett Potter testified that he heard Mr. Robinson complain to Mr. Rife about his drill and the lack of air conditioning (Tr. 116). Former maintenance greaser Ruben Hylton testified that he heard Mr. Robinson complain about the "stiff" drill lever, but he could not recall who he complained to (Tr. 133). Rock truck driver Darwin Bailey testified that Mr. Robinson complained to Mr. Rife and Mr. Minix about the drill lever and the air conditioning, but never heard him complain about any dust (Tr. 152-153). Former dozer operator Charles Griffith testified that Mr. Robinson complained one time about the lever and that he complained to Mr. Rife about the dust over his C.B. radio (Tr. 176-177). Mr. Rife acknowledged that Mr. Robinson complained to him about the drill lever and lack of air conditioning (Tr. 264-265; 268).

Based on the foregoing testimony, I conclude and find that Mr. Robinson made safety complaints concerning his drill and timely communicated them to mine foreman Rife. I further conclude and find that Mr. Robinson's safety communications met the requirements enunciated by the Commission in Secretary on behalf of Dunmire and Estle v. Northern Coal Co., 4 FMSHRC 126 (February 1982), Secretary on behalf of John Cooley v. Ottawa Silica Company, 6 FMSHRC 516 (March 1984); and Gilbert v. Sandy Fork Mining Company, supra.

The Respondent's Responses to Mr. Robinson's Complaints

When a miner has expressed a reasonable, good faith fear of a safety or health hazard, and has communicated this to mine management, management has a duty and obligation to address the

perceived hazard or safety concern in a manner sufficient to reasonably quell his fears, or to correct or eliminate the hazard. Secretary v. River Hurricane Coal Co., 5 FMSHRC 1529, 1534 (September 1983); Gilbert v. Sandy Fork Mining Company, 12 FMSHRC 177 (February 1990), on remand from Gilbert v. FMSHRC, 866 F.2d 1433 (D.C. Cir. 1989), rev'g Gilbert v. Sandy Fork Mining Co., 9 FMSHRC 1327 (1987).

There is no evidence in this case that Mr. Robinson ever refused to operate the drill because of any perceived safety hazards. Indeed, he acknowledged that he often operated the drill when the dust collector was not functioning properly.

Mr. Robinson acknowledged that Mr. Rife responded to his drill complaints and informed him that he would summon someone to the mine to make the repairs. Mr. Robinson confirmed that during the two-weeks prior to his discharge when he was off for a lack of work, the drill dust collector and the air conditioning were repaired and were functioning properly when he returned to work (Tr. 24-25). Mr. Robinson further testified that Mr. Rife explained to him that a certified mechanic was required to make the air conditioning repairs and that Mr. Rife would bring a mechanic from another mine site to repair the air conditioning whenever it malfunctioned and that the air conditioning was working on the day he was fired (Tr. 86-88).

Former equipment operator Charles Griffith, called as a witness for Mr. Robinson, testified that Mr. Rife attempted to have the air conditioning repaired when it malfunctioned, or when the employees complained about it. He characterized the complaints as "gripes", and he stated that Mr. Rife usually kept the equipment in repair and that he had a maintenance crew make repairs during July, 1993, (Tr. 176, 194-195).

Former equipment operator Everett Potter, who was also called as a witness for Mr. Robinson, characterized the drill complaints as complaints resulting from "normal equipment wear and breakdowns" (Tr. 115-116, 119). He confirmed that his end-loader air conditioning was operational for a month or a month and-a-half when he left the mine in September, 1993 (Tr. 118). He also confirmed that someone would come to the mine to check and service the equipment air conditioning (Tr. 125-126).

With respect to the drill lever that Mr. Robinson claimed was difficult to pull, he confirmed that Mr. Potter worked on the lever after he complained about it, and that a mechanic also worked on it (Tr. 84-85). Rock truck driver Darwin Bailey, also a witness for Mr. Robinson, testified that the lever was repaired by the mechanic, Gary Minix, the day after Mr. Robinson complained about it (Tr. 151-152). Although Mr. Bailey "believed" that the air conditioning was repaired approximately a week after Mr. Robinson was discharged, I conclude that he was

mistaken. Mr. Robinson himself confirmed that the air conditioning was repaired while he was off before his discharge and that it was operating properly when he returned to work.

Mine Mechanic Minix acknowledged that the drill lever in question was "harder than usual" to operate. He testified that new parts were obtained to repair the lever, but that the new parts were not used because the lever was restored to normal after the tension was adjusted and that it is still functioning properly with no further complaints from anyone (Tr. 231-232). He also confirmed that the air conditioning was repaired when qualified technicians licensed to make the repairs were available to do the work (Tr. 233-235).

After careful consideration of all of the testimony and evidence in this case, I conclude and find that the respondent took reasonable and appropriate measures to correct the drill conditions that Mr. Robinson complained about. Indeed, Mr. Robinson himself acknowledged that repairs were made to the dust collector and air conditioning during the two-week period before he was discharged and that this equipment was operating properly the day he was fired. With respect to the drill lever, I conclude and find that it too was repaired in response to Mr. Robinson's complaint. Further, after viewing all of the witnesses in the course of the trial, I am persuaded by the credible testimony of the former employees of the respondent who testified that foreman Rife reacted affirmatively in making equipment repairs, or arranging for the repairs to be made, when breakdowns occurred, or when complaints were made, particularly during the hot and dry summer period when the surface working conditions may have been less than ideal.

With respect to Mr. Robinson's assertions and suggestions that the problems associated with the drill he was operating were responsible for his chest pains which prompted his visit to a hospital emergency room, I find absolutely no credible or probative evidence to support these conclusions and they are rejected as less than credible and totally lacking any medical support. Indeed, when questioned from the bench concerning any evidentiary support for Mr. Robinson's conclusions that his fears of a "heart attack", which according to his unsworn statement of September 9, 1993, to the MSHA special investigation (Exhibit C-6), occurred on a Sunday, July 24, 1993, the Secretary's counsel asserted that she had certain hospital records verifying that Mr. Robinson visited the hospital, but could not read them or "understand a word it says" (Tr. 105).

Alleged Disparate Treatment

Mr. Robinson asserted that two other employees damaged equipment but were not discharged, and he identified them as "Chuck" Griffith and Eddie Taylor (Tr. 43-44). Mr. Griffith

testified in this case, but Mr. Taylor was not called. However, Everett Potter, a former employee not mentioned by Mr. Robinson, but called as one of his witnesses, testified that he "ruined" a front wheel on an end-loader while employed by the respondent, and he was not fired. Mr. Potter explained that the damage to the tire was the result of an accident, rather than gross negligence, the lack of care, or an intentional act on his part. As a foreman himself, he believed that judgments and distinctions must be made with respect to an employee accidentally damaging a piece of equipment, and an intentional or negligent act resulting from a lack of care (Tr. 124-125).

Mr. Griffith confirmed that he dislodged an oil tank from an end-loader when he got too close to the highwall, and that he also damaged the hood of a truck when his vision was obscured by the raised loader blade. He explained that this was an accident and that Mr. Rife admonished and cautioned him to be more careful, but did not fire him.

Mr. Griffith further confirmed that he subsequently damaged the radiator of a dozer "three days prior to his dismissal", and that after viewing the damage, Mr. Rife informed him that he had "no other choice," and Mr. Griffith interpreted this as a discharge and he left the mine and sought employment elsewhere (Tr. 186-187).

Mr. Rife acknowledged that other employees had damaged equipment but were not fired. However, he explained that "accidents happen", but "if you tear a piece of equipment up intentinally, you're discharged" (Tr. 273). Mr. Rife confirmed that he told the MSHA special investigator on October 7, 1993, that Mr. Griffith was fired after he had been warned three times about damagining equipment (Tr. 282; Exhibit C-4). I take note of the fact that in his pre-trial deposition of May 10, 1994, Mr. Rife stated that Mr. Griffith was not fired and quit and left on his own accord (Exhibit C-3; pg. 30). Although these statements are inconsistent, I still find Mr. Rife to be a credible witness.

Although Mr. Rife's earlier statement that Mr. Griffith was fired is in conflict with his later deposition statement that Mr. Griffith left on his own accord, it is not in conflict with Mr. Griffith's testimony explaining the incident. Mr. Griffith confirmed that while Mr. Rife did not make a direct statement that he was fired for damaging equipment after receiving prior warnings, Mr. Griffith understood that this was the case when Mr. Rife told that "he had no other choice." Mr. Griffith confirmed that he "picked up his bucket and left the mine" and explained that "I wanted to just get up and say, well, I'll quit real fast, so I wouldn't have a discharge on my employment record. But I jsut saved him the agony of telling me, I guess, exactly, your fired" (Tr. 208).

Mr. Rife acknowledged that he previously told the MSHA special investigator that there was no written or verbal company policy concerning the discharge of employees for damaging equipment but that mine operators Tommy and Mitch Potter instructed him not to let anyone damage equipment (Tr. 281-282). At his deposition, Mr. Rife confirmed that there was no written policy, but stated that "if you tear it up your fired" and that this was a verbal policy that he informed Mr. Robinson of on more than one occasion (Exhibit C-3; pgs. 31-32).

As noted earlier, former equipment operator Potter, who is now employed as a foreman for another mine operator, believed that discharging someone for damaging equipment is a judgment call, and he distinguished equipment damage resulting from an accident, and damage resulting from an intentional act or gross negligence.

Former mechanic Hylton testified that when he worked for the respondent he was told that "if you tear up equipment, that's it", and he knew that he was subject to discharge if he "messed up". He believed that if he or anyone else deliberately or carelessly damaged a piece of equipment, he would expect to be fired or would have left expecting to be fired (Tr. 134-136).

Rock truck driver Bailey, who could not recall any company policy regarding discharges for damaging equipment, and who was called as a witness for Mr. Robinson, was of the opinion that his presence at the hearing was "a waste of time", and he explained as follows at (Tr. 157-158):

> THE WITNESS: The man messed up, tore the drill up, okay? It's Mr. Potter's job. It's his money that has to pay for fixing it, okay? He has got the right to decide what needs to be what. If he don't want the man, fire him because he tore up equipment it's his right, or Philip Rife's right to fire the man, you see?

Mr. Griffith, who acknowledged that he knew "that was it" after his third incident of damaging equipment, and who comfirmed that no one spoke to him about any company discharge policy when he was first hired, nonetheless testified that while he was not specifically told about being fired for damaging company equipment, he was aware that this was the case (Tr. 183, 188). He stated that "that is something that, if you work on a strip job, you pretty well know -- or any job, for that matter. If you continually tear up equipment, you know, you're losing the company money" (Tr. 188-189). He also believed that anyone on any job would know that he was jeopardizing his employment for damaging equipment (Tr. 191).

There is no evidence to support any conclusion that Mr. Rife, or mine management, harbored any ill-will towards Mr. Robinson or that anyone connected with management ever harassed, intimidated, threatened,or otherwise displayed any displeasure with Mr. Robinson beause of any safety or health complaints. There is also no evidence that Mr. Robinson ever complained to any MSHA or state mine inspectors about any mine safety or health conditions that he considered hazardous.

I find no credible or probative evidence to establish or suggest that Mr. Robinson was singled out for discharge or that he was treated differently from other employees because of his complaints. I find credible Mr. Rife's testimony that he informed Mr. Robinson on more than one occasion that damaging company equipment would be cause for discharge, and as noted earlier, several of Mr. Robinson's witnesses confirmed and acknowledged that it was a known fact that carelessly damaging equipment could result in a discharge. I take note of the fact that Mr. Robinson has worked in the mining industry for nine or ten years, and while there is no evidence that the respondent had any written company policy, I find Mr. Rife's testimony to be credible and I believe that he had spoken to Mr. Robinson about the consequences of damaging equipment, and I find Mr. Robinson's testimony to the contrary to be less than credible.

I find credible Mr. Rife's testimony that accidental equipment damage that does not involve intentional or careless conduct by an employee would not be a dischargeble offense. I also find his explanations as to why certain other employees may not have been discharged after damaging equipment, to be credible, reasonable, and plausible. I further find that equipment damage was the reason that Mr. Griffith left his employment with the respondent and the evidence adduced in this case supports a reasonable conclusion that Mr. Griffith was constructively discharged because of this.

Management's motivation for Mr. Robinson's Discharge

The evidence establishes that Mr. Robinson was discharged by foreman Rife. Mine operator Tommy Potter was not called to testify in this case, but Mr. Rife's deposition testimony suggests that Mr. Rife may have called Mr. Potter and had his approval for the discharge.

During his deposition of May 10, 1994, Mr. Robinson testified as follows (Exhibit R-2; pg. 47):

> Q. The problem concerning your employment with Sunny Ridge all related around the damage to that drill?
>
> A. Exactly.

Q. And really to cut through the chase and everything, it had nothing to do with any complaints of safety or health violations?

A. Not as I know of.

Mr. Robinson clarified this testimony as follows at (Depo. Tr. pg. 53):

Q. I just want to clarify a few things now. You were told that you were fired from Sunny Ridge for damaging the drill, correct?

A. Yes, I was.

Q. Do you feel you were fired because you made all those complaints?

A. It's a possibility. I'm not saying for sure because I don't know for sure.

In the course of the hearing, and in further explanation of his prior statements, Mr. Robinson reiterated that he was told that he was fired for damaging the drill, and he believed that his discharge "was due to all of it; the blower, the dust, the complaints and me damaging the drill. All of it wrapped up in one" (Tr. 66, 98-99).

Mr. Rife believed that Mr. Robinson did an acceptable job and came to work every day, and he stated that he would not have fired him if he did not have "an attitude problem" and had not intentionally damaged the drill (Tr. 277). Mr. Rife explained that Mr. Robinson's work attitude changed two or three weeks before he fired him, and he suggested that he was having problems with his ex-wife over child support (Tr. 280). Mr. Rife stated that "there was nothing I could do to satisfy him whatsoever. Whatever I asked him to do, he didn't want to do it" (Tr. 275).

Mr. Rife believed that Mr. Robinson deliberately damaged the drill by running it into the highwall. In support of this conclusion, Mr. Rife stated that he counted 21 places on the highwall where the drill struck the highwall while it was operated by Mr. Robinson the day he was fired, and Mr. Rife believed that Mr. Robinson intentionally caused the damage by not heeding Mr. Minix's warnings to stay clear of the highwall trees. Mr. Rife considered the fact that Mr. Robinson did not apologize for damaging the drill, did not inform him that he had been in the trees, and simply commented "shit happens" when asked about the incident. Mr. Minix testified credibly that he heard Mr. Robinson make this comment as he retrieved a beer from a cooler and left the area after his discussion with Mr. Rife.

Mr. Minix also indicated that he had warned Mr. Robinson about staying out of the highwall trees early in his shift before he damaged the drill blower.

Mr. Griffith, who viewed the damaged drill on the day Mr. Robinson was discharged, testified that he noticed at least five or six indentations in the highwall as he passed it, and he believed from experience that they were caused by the drill blower striking the highwall with enough force to leave the impressions in the highwall. He was of the opinion that the drill damage could have been prevented if Mr. Robinson had exercised reasonable care (Tr. 192-193). Truck driver Bailey believed that Mr. Rife had a right to fire Mr. Robinson for damaging the drill.

Mr. Robinson testified that he was unaware that he had struck the highwall while operating the drill until after he noticed the damaged blower at the end of the shift. He also claimed that he apologized for the damage, and he denied making the remark attributed to him by Mr. Rife, and overheard by Mr. Minix. I take note of the fact that Mr. Minix testified that he and Mr. Robinson were friends, that he often gave Mr. Robinson a ride to work, and that he advised Mr. Robinson that Mr. Rife could not fire him over the telephone. Under the circumstances, I see no reason why Mr. Minix would not be truthful, and his testimony that Mr. Robinson had on a previous occasion intentionally damaged a drill hose because he was mad at Mr. Rife stands unrebutted.

With regard to Mr. Robinson's encounter and confrontation with Mr. Rife when he returned to the mine the day after Mr. Rife fired him over the telephone, and then fired him again in person, I conclude and find that Mr. Robinson was the aggressor and that he cursed Mr. Rife, threatened him with bodily harm, and in effect invited him to fight. Although this incident occurred after his discharge, I believe it is indicative of Mr. Robinson's temperment and supports Mr. Rife's belief that he had an "attitude" problem. Having viewed Mr. Robinson's demeanor during his testimony concerning the confrontation with Mr. Rife, Mr. Robinson appeared antagonistic, hostile, and somewhat combative with respect to Mr. Rife.

Mr. Robinson acknowledged that he was not truthful when he filed his application for employment after his discharge by the respondent, and that he lied about his discharge, the duration of his employment with the respondent, and his prior educational level. Although Mr. Robinson admitted that he lied because he feared he would not get the job and needed the work, the fact remains that he was not truthful when he filed his job application. Under the circumstances, I believe he would color his testimony in this case to his advantage and I have serious doubts about his credibility.

I find Mr. Rife's explanation as to why he discharged Mr. Robinson to be credible and plausible. Having viewed both Mr. Rife and Mr. Robinson in the course of the hearing, I find Mr. Rife to be more credible.

I find Mr. Rife's testimony that he observed at least 21 locations at the highwall where the drill made contact with the highwall to be credible, and it reasonably supports Mr. Rife's belief that Mr. Robinson knowingly or intentionally operated the drill in such a manner as to continuously cause it to collide with the highwall during the shift and without regard to the instructions given him to avoid the trees and the highwall. Mr. Rife's conclusion is supported in part by Mr. Griffith who believed that the drill collided with the highwall with such force as to leave impressions at five or six locations, and that Mr. Robinson exercised less than reasonable care in operating the drill. I reject as less than credible Mr. Robinson's claim that he was unaware that he was colliding with the highwall.

I conclude and find that Mr. Rife was justified in discharging Mr. Robinson for damaging the drill, and I find no persuasive evidence, direct or circumstantial, from which to draw any reasonably supportable inference of discriminatory intent on motivation on the part of Mr. Rife with respect to his discharge of Mr. Robinson. I further find no credible or probative evidence from which I can reasonably conclude that Mr. Robinson's discharge was in any way related to any of his drill complaints.

CONCLUSION AND ORDER

In view of the foregoing findings and conclusions, and after careful consideration of all of the credible evidence and testimony adduced in this case, I conclude and find that the complainant has failed to establish a prima facie case of discrimination on the part of the respondent. Accordingly,the complaint IS DISMISSED, and the complainant's claims for relief ARE DENIED.

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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AUG 17 1994

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 94-18-M
Petitioner	:	A.C. No. 44-00040-05501 QHV
v.	:	
	:	Docket No. VA 94-19-M
A & L CONSTRUCTION, INC.,	:	A.C. No. 44-00040-05502 QHV
Respondent	:	
	:	Eastern Ridge Lime Co.

DECISIONS

Appearances: Caryl L. Casden, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Petitioner;
George W. Link, President, A & L Construction, Inc., Newport, Virginia, pro se, for the Respondent.

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking civil penalty assessments for three (3) alleged violations of certain mandatory safety standards found in Part 57, Title 30, Code of Federal Regulations. The respondent filed timely answers and contests and hearings were conducted in Roanoke, Virginia. The parties waived the filing of post-hearing briefs (Tr. 195).

Issues

The issues presented in these cases are (1) whether the conditions or practices cited by the inspector constitute violations of the cited mandatory safety standards, (2) whether one of the alleged violations was "significant and substantial" (S&S), and (3) the appropriate civil penalties to be assessed for the violations, taking into account the civil penalty assessment criteria found in section 110(i) of the Act.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977; Pub. L. 95-164, 30 U.S.C. § 801 et seq.

2. Section 110(i) of the Act, 30 U.S.C. § 820(i).

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

Stipulations

The parties stipulated to the following (Tr. 7-12):

1. The MSHA inspector who issued the violations was acting in his official capacity as an authorized representative of the Secretary of Labor.

2. True copies of each of the contested citations and order were served on the respondent or its authorized agent as required by the Mine Act.

3. Payment of the proposed civil penalty assessments for the violations in issue will not put the respondent out of business.

In a response to the petitioner's interrogatory, the respondent stated that payment of the penalty assessment of $1,500 in Docket No. VA 94-19-M, will not affect the respondent's ability to continue in business. However, the respondent believed that the proposed penalty is excessive.

The petitioner's counsel submitted a computer print-out concerning the respondent's history of assessed violations, and she confirmed that the respondent has no prior history of paid violations (Exhibit G-9; Tr. 16, 145-148). Counsel further confirmed that the citations issued by the inspector constituted the first time the respondent has been cited, and that the respondent timely abated and corrected the cited conditions in good faith (Tr. 156).

Petitioner's counsel also presented a computer print-out that reflects that the respondent is an independent contractor who worked 342 hours at the Eastern Ridge Lime Company Mine in 1993 (Exhibit G-10; Tr. 146-148). Respondent's owner and president, George Link, characterized his business as a "small grading contractor", and he confirmed that he uses backhoes, endloaders, and dump trucks in his work and that he was working at the mine site in question in 1993, when the citations were issued (Tr. 150, 155-156). He also confirmed that he has 15 to 18 employees (Tr. 160, 163).

Discussion

Docket No. VA 94-18-M

This case concerns two alleged violations with proposed civil penalty assessments of $50, for each occurrence, and they are as follows.

Section 104(a) non-"S&S" citation No. 4286834, August 5, 1993, cites an alleged violation of mandatory safety standard 30 C.F.R. § 57.14132(a), and the condition or practice cited is described as follows:

> The reverse-activated, automatic signal alarm was not operating on the Ford 8000 haul truck Co. No. 6. The truck was hauling spoil from the sediment pond to the spoil stockpile. No foot traffic observed in the area.

Mandatory safety standard 30 C.F.R. § 57.14132(a), provides as follows:

> (a) Manually operated horns or other audible warning devices provided on self-propelled mobile equipment as a safety feature shall be maintained in functional condition.

Section 104(a) non-"S&S" citation No. 4286835, August 5, 1993, cites an alleged violation of mandatory safety standard 30 C.F.R. § 57.14100(b), and the condition or practice cited is described as follows:

> The protective covering on the operator's seat of the white haul truck, S/N BJ0134719218 was missing. The exposed metal springs of the seat showed stress fatigue in the back and side area and could break and puncture the back of the operator. A cushion was observed between the operator's back and the exposed springs.

Mandatory safety standard 30 C.F.R § 57.14100(b), provides as follows:

> (b) Defects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons.

Docket No. VA 94-19-M

This case concerns a combined section 107(a)-104(a) "S&S" imminent danger order and citation No. 4286833, issued by Inspector Thomas W. Bonifacio, on August 5, 1993, and subsequently modified on August 18, 1993, to cite an alleged violation of mandatory safety standard 30 C.F.R. § 57.14101(a)(3). The

proposed civil penalty is $1,500, and the cited condition or practice states as follows:

> The brake diaphragm was missing on the back right side and the air supply line plugged behind the drive axel on the white model 43640VC haul truck S/N 8J0134719218, hauling spoil material from the mill sediment pond below the refuse disposal area. The truck traveled an approximate 1,000 foot long, 10% grade access road. Foot and vehicular traffic was observed in the work area. The diaphragm had fallen off the haul truck on 8-4-93. The company mechanic was instructed to plug the air supply line in order to put the unit back into service.

Mandatory safety standard 30 C.F.R. § 57.14101(a)(3), provides as follows:

> (3) All braking systems installed on the equipment shall be maintained in functional condition.

As correctly stated by the petitioner's counsel, the respondent did not timely contest the imminent danger order within thirty-days of its issuance, and she took the position that the order is not in issue in this proceeding (Tr. 17-18). I agreed with counsel, but ruled that I would consider the inspector's imminent danger finding as part of the gravity associated with the cited conditions (Tr. 19-23).

In support of the violation, the petitioner called Inspector Bonifacio who testified as to his experience, duties, and training, and his reasons for issuing the violation. He also testified as to his reasons for his special "significant and substantial" (S&S) finding, as well as his negligence and other gravity findings (Tr. 24-95). He was also cross-examined by the respondent's president, George W. Link, who appeared pro se in this case (Tr. 95-98).

The petitioner also presented the testimony of Bruce E. Dial, an MSHA instructor at the Department of Labor's National Mine Health and Safety Academy at Beckley, West Virginia. Mr. Dial's experience includes prior service as an MSHA mine inspector, and he has extensive teaching and practical experience in braking systems and the hazards associated with surface coal haulage, including the writing of a training manual used to train inspectors and the publication of several safety bulletin articles (Tr. 98-105).

Mr. Dial confirmed that he was familiar with the violative conditions cited by Inspector Bonifacio, and referring to several hearing exhibits and a demonstration model of a truck braking system, he explained the operation of the braking system with

respect to the cited truck and the hazards associated with the conditions cited by the inspector (Tr. 105-128). Mr. Dial was cross-examined by Mr. Link (Tr. 130-137; Exhibits G-6, G-7, and G-8).

George W. Link, the owner and president of A & L Construction, Inc., testified in his defense to the contested violation as well as to the scope of the work that he was performing at the mine site in question at the time that his truck was cited by the inspector (Tr. 150-174). The inspector was also called in rebuttal and testified further about his observations in connection with the operation of the haulage trucks on the day the violation was issued (Tr. 174-180).

Mr. Link testified that he did not realize that he was subject to the Mine Act or MSHA's enforcement jurisdiction while performing work on the mine surface areas and he stated that he was never inspected by any state mining inspectors (Tr. 186-187). Petitioner's counsel stated that she had no information that Mr. Link knew he was subject to MSHA's enforcement jurisdiction, and Inspector Bonifacio confirmed that Mr. Link was performing work at the mine site without an MSHA Identification number and that he had not previously known about the respondent and had never previously met Mr. Link until he came to the site after the violations were issued (Tr. 188-191).

With respect to the citation concerning the missing brake diaphragm on the cited haul truck, Mr. Link took the position that there was no dangerous condition presented because the truck driver was a safe and conscientious driver and that the road conditions consisted of soft materials that would allow the truck wheels to sink into the road surface and slow down the vehicle (Tr. 151-154).

Findings and Conclusions

Docket No. VA 94-18-M

Petitioner's counsel informed me at trial that the parties agreed to settle these citations, and that the respondent agreed to pay the full amount of the proposed penalties for each of the violations. Arguments in support of the settlement were heard on the record, and Inspector Bonifacio, who issued the citations, was present in the courtroom. The settlement was approved from the bench (Tr. 11, 13-16). My bench decision is herein affirmed, and the settlement IS APPROVED.

Docket No. VA 94-19-M

In this case, petitioner's counsel informed me after the hearing that the parties agreed to settle the matter. Counsel

subsequently filed a motion pursuant to Commission Rule 31, 29 C.F.R. § 2700.31, seeking approval of the proposed settlement.

In support of the proposed settlement, petitioner's counsel states that upon review of all of the evidence admitted at trial, the parties agree that it does not support a penalty assessment of $1,500. Counsel believes that the evidence would support a penalty of $700, and the respondent has agreed to pay this amount. Based on all of the relevant criteria, including the respondent's size, the degree of negligence, the gravity of the violation, the respondent's good faith abatement, and its history of prior violations, the petitioner concludes that the proposed settlement is reasonable and will serve to effect the intent and purposes of the Act.

After careful review of all of the testimony and evidence adduced at the hearing, and the motion filed by the petitioner in support of the proposed settlement, I conclude and find that the proposed settlement disposition is reasonable and in the public interest. Accordingly, pursuant to 29 C.F.R. § 2700.31, the motion is GRANTED, and the settlement IS APPROVED.

ORDER

In view of the foregoing, IT IS ORDERED AS FOLLOWS:

1. Docket No. VA 94-18-M. The contested section 104(a) non-"S&S" Citation Nos. 4286834 and 4286835, issued on August 5, 1993, ARE AFFIRMED as issued, and the respondent shall pay civil penalties of $50 for each of the citations ($100 total).

2. Docket No. VA 94-19-M. The section 107(a) - 104(a) "S&S" Order/Citation No. 4286833, August 5, 1993, as modified on August 18, 1993, citing a violation of 30 C.F.R. § 57.14101(a)(3), IS AFFIRMED as issued, and the respondent shall pay a civil penalty assessment of $700, for the violation.

IT IS FURTHER ORDERED that the respondent pay the aforementioned civil penalties to MSHA within thirty-days (30) of the date of these decisions and order. Upon receipt of payment, these matters are dismissed. Failure by the respondent to pay the agreed upon penalties may result in an order requiring the respondent to pay the full amount of the original penalty proposed in Docket No. VA 94-19-M.

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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AUG 18 1994

PEABODY COAL COMPANY, Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. KENT 94-308-R
	:	Citation No. 3860043; 12/08/93
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Camp No. 1 Mine
	:	I.D. No. 15-02709

DECISION

Before: Judge Melick

This case is before me upon the motion for summary decision filed by Peabody Coal Company (Peabody) pursuant to Commission Rule 67, 29 C.F.R. § 2700.67.[1] Peabody seeks to vacate the Secretary's attempted modification of Citation No. 3860043 on the grounds that there is no genuine issue of material fact as to a controlling legal question and that Peabody is entitled, as a matter of law, to a summary decision vacating the attempted modification. The underlying question presented is whether the Secretary can modify a citation after the citation has been terminated and the civil penalty thereon has been assessed and paid by the mine operator.

The undisputed facts are as follows. Citation No. 3860043 was issued at Peabody's Camp No. 1 Mine on July 14, 1993, for its alleged failure to comply with the mine's approved roof control plan. The citation was issued under Section 104(d)(1) of the Federal Mine Safety and Health Act of 1977, the "Act," 30 U.S.C. § 801 et seq. On September 8, 1993, following a health and safety conference, the citation was modified from "high" to "moderate" negligence and by changing its format from a citation issued under Section 104(d)(1) of the Act to one

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[1] Commission Rule 67(b) provides as follows:
"Grounds. A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions and affidavits, shows:
(1) That there is no genuine issue as to any material facts; and
(2) That the moving party is entitled to summary decision as a matter of law."

issued under Section 104(a) of the Act. The modified citation was thereafter assessed a civil penalty of $1,155.00 and, on November 10, 1993, Peabody paid that penalty by check. The check was cashed on November 15, 1993.

Thereafter, on December 8, 1993, the Secretary attempted to further modify the citation. This attempted modification did not change the description of the condition or practice alleged to constitute the violation but altered the charges from an alleged violation of the roof control plan to a violation of 30 C.F.R. § 75.212(c) and changed the citation to a section 104(d)(1) citation with "high" negligence. The attempted modification stated that "[e]vidence developed during a Section 110 investigation, which was not known at the time of the Health and Safety Conference (September 8, 1993), established that the operator knew or should have known of the violative condition, and there are no mitigating circumstances."

Peabody served interrogatories on the Secretary requesting identification of the "[e]vidence developed during a Section 110 investigation" referred to in the December 8, 1993 modification of the citation. The Secretary responded, in pertinent part, as follows:

> On or about December 1, 1993, I [Conference Officer Arthur J. Parks] was notified that Citation No. 3860043 as modified to 104(a) was inconsistent with the 110(c) charges filed against the individuals involved in the citation. At that time, I reevaluated the case and determined that 30 C.F.R. § 75.212(c) was the more appropriate section to cite for this situation and since it was regulation as opposed to plan requirements these individuals should have known the violation existed, and were acting in disregard to the law.

Upon these undisputed facts Peabody maintains it is entitled to summary decision. Peabody argues that a citation may not be modified after it has been terminated, assessed a civil penalty and the penalty thereupon paid. It maintains that such a citation has thereby become a final order of the Commission and cannot thereafter be modified except by leave of the Commission under Fed. R. Civ. P. 60(b). In support of its argument Peabody cites Jim Walter Resources, Inc., 15 FMSHRC 782 (1983). In that case the operator paid, without contest, the civil penalties assessed under the Secretary's 1990 "excessive history" program policy letter and sought to reopen those cases and obtain a partial refund after the Commission validated the program policy letter in Drummond Company, Inc., 14 FMSHRC 661 (1992). In Jim Walters, the Commission held that an uncontested assessment became a final

order of the Commission which the Commission could reopen in accordance with Fed. R. Civ. P. 60(b). 14 FMSHRC at 786-789. Jim Walters dealt however with a challenge to the civil penalty itself and not to the underlying citation.

The Commission has also held that payment of a civil penalty ordinarily moots any pending pre-penalty contest proceeding. In Old Ben Coal Co., 7 FMSHRC 205 (1985), the Commission stated:

> ... an operator cannot deny the existence of a violation for purposes connected with the Mine Act and at the same time pay a civil penalty. For purposes of the Act, paid penalties that have become final orders reflect violations of the Act and the assertion of violation contained in the citation is regarded as true. See generally Amax Lead Co. of Missouri, 4 FMSHRC 975, 977-80 (June 1982).
>
> Therefore, in view of the language of sections 105(a) and 105(d), and Congress' intent to tie penalties to the particular facts surrounding a violation, we hold that the fact of violation cannot continue to be contested once the penalty proposed for the violation has been paid.

See also Local U. 2333, UMWA v. Ranger Fuel Corp., 19 FMSHRC 612 (1988); and Westmoreland Coal Co., 11 FMSHRC 275 (1989). Within this framework, I conclude that once Citation No. 3860043 was paid, it became a final order of the Commission. It would therefore be necessary for the Secretary to apply to the Commission by motion under Fed. R. Civ. P. 60(b)in order to reopen the citation and modify it. Rule 60(b) authorizes relief from final judgments and orders under certain circumstances, including mistake, inadvertence, surprise, excusable neglect and fraud.

The Secretary argues, however, citing Wyoming Fuel Co., 14 FMSHRC 1282 (1992) and Ten-A Coal Co., 14 FMSHRC 1296 (1992), that a citation may be modified after it has been terminated, assessed and even paid. In the above cases, the Commission held that a citation may be modified by the Secretary after it has been terminated (but not in those cases yet paid) if the operator suffers no legal prejudice thereby. The Commission further noted that "the 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 analogized the modification of a citation to an amendment of pleadings under Fed. R. Civ. P. 15(a).

As Peabody observes, however, neither Wyoming Fuel nor Ten-A Coal dealt with an attempted modification, as in the case herein, of an uncontested and paid citation. I agree that the above cited cases are inapposite because of the distinguishing finality in this case attached to the payment of and acceptance by the Secretary of the penalty for the citation. Clearly, Fed. R. Civ. P. 15(a) providing for amendment of pleadings is no longer applicable once there is a final disposition of the citation. Even should amendment of pleadings be permitted after final disposition of the citation, Peabody would be prejudiced by such an amendment in this case since the time for contesting the underlying violation has long since expired.

The Secretary argues, alternatively but only hypothetically, that if the citation were to be considered a final order of the Commission, Fed. R. Civ. P. 60(b) would allow it to be reopened for modification. The Secretary however has not in fact filed a motion under that rule, nor has he asserted any specific grounds for obtaining relief under that rule. Whether the citation could be reopened for modification under Rule 60(b) is therefore conjecture and is not therefore before me.

Under the circumstances, Peabody's Motion for Summary Decision and the Contest herein is **GRANTED**. The modification of Citation No. 3860043 on December 8, 1993, is **VACATED**.

Gary Melick
Administrative Law Judge

Distribution:

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/lh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 19, 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. KENT 92-303 A. C. No. 15-16367-03549
v.	:	
	:	No. 3 Mine
REEDY COAL COMPANY, INCORPORATED, Respondent	:	

DECISION APPROVING SETTLEMENT
ORDER TO PAY

Before: Judge Merlin

The parties have filed a joint motion to approve settlements of the three violations involved in this matter. The originally assessed amounts were $993, and the proposed settlements are for $993. The parties' motion discusses the violations and justifies the proposed settlements in accordance with the six statutory criteria set forth in section 110(i) of the Act.

Accordingly, the recommended settlements are **APPROVED** and the operator is **ORDERED TO PAY** $993 within 90 days of the date of this decision.

Paul Merlin
Chief Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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AUG 19 1994

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 94-55
Petitioner	:	A. C. No. 11-00877-04031
v.	:	
	:	Docket No. LAKE 94-79
AMAX COAL COMPANY,	:	A. C. No. 11-00877-04034
Respondent	:	
	:	Mine: Wabash Mine

DECISION

Appearances: Christine M. Kassak, Esq., Office of the Solicitor U.S. Department of Labor, Chicago, Illinois, for the Petitioner;
R. Henry Moore, Esq., Buchanan Ingersoll, Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Feldman

These civil penalty proceedings concern petitions for civil penalties filed by Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (the 1977 Mine Act). These matters were heard on June 14, 1994, in Evansville, Indiana. The parties' post-hearing proposed findings and conclusions are of record.

At the hearing, the parties stipulated to facts that are common to both docket proceedings and to facts that are unique to each proceeding. The stipulated facts common to both proceedings are as follows:

1. The Federal Mine Safety and Health Review Commission has jurisdiction over these proceedings.

2. At all times relevant to these proceedings, Respondent, Amax Coal Company (hereinafter, "Respondent") and its mines are subject to the provisions of the Federal Mine Safety and Health Act of 1977 (hereinafter, the "Act").

3. At all times relevant to these proceedings, Respondent owned and operated the Wabash Mine, a bituminous coal mine located in Wabash County, Illinois.

4. Respondent's operations affect interstate commerce.

5. The Wabash Mine produced 1,838,272 tons of bituminous coal from January 1, 1992 through December 31, 1992.

6. Respondent, Amax Coal Company, produced 38,939,422 tons of bituminous coal at all of its mines from January 1, 1992 through December 31, 1992.

7. The subject citations were properly served by a duly authorized representative of the Secretary of Labor upon an agent of the Respondent on the date indicated therein.

LAKE 94-79

The Respondent stipulated to the fact of occurrence of prohibited coal dust accumulations on its continuous miner in violation of the mandatory safety standard in Section 75.400, 30 C.F.R. § 75.400. The language in Section 75.400 is identical to the provisions of Section 304(a) of the 1977 Mine Act, 30 U.S.C. § 864(a). Section 75.400 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.

Citation No. 4054831 described the subject accumulations as:

> Accumulation of loose coal and oil soaked loose coal was allowed to accumulate in and upon the JOY continuous miner. Accumulation in the operator's compartment measured 7 inches deep, 2 feet in width, and 4 feet in length, also the loose coal was allowed to accumulate upon conduits, lights, panels and motors up to 6 inches in depth.

The only issue for determination is whether the violation of Section 75.400 was properly designated as significant and substantial. The parties stipulated to the following facts that are specific to Docket No. LAKE 94-79:

1. On October 7, 1993, Michael Dean Rennie (the "inspector") issued Citation No. 4054831 at Respondent's Wabash Mine, Wabash County, Illinois (hereinafter the "Wabash Mine"), alleging a violation of 30 C.F.R. § 75.400 because Inspector Rennie had determined that the Respondent allowed loose coal and oil soaked loose coal to accumulate in and upon the JOY continuous miner (serial number J.M. 3870), which was

located on the 3W/MWS unit, 010 M.M.U., at Survey Station 39857.

2. At the time Citation No. 4054831 was issued, the JOY continuous miner was located on the 3W/MWS unit, 010 M.M.U., at Survey Station 39857, an area of the Wabash Mine where miners normally work or travel.

3. Loose coal and oil soaked coal are combustible materials.

4. There are three (3) necessary factors which must be present simultaneously for a fire to begin: fuel, heat and oxygen. If any factor is absent, fire becomes impossible.

5. The heat necessary to ignite a fire varies with the particle size of the fuel. The larger the particles, the higher the temperature necessary to ignite the fire.

6. The JOY continuous miner at issue here comes within the definition of "electric equipment" referred to in 30 C.F.R. § 75.400.

7. Amax agrees that the conditions cited constitute a violation of Section 75.400. The issue before the Administrative Law Judge is whether the condition was significant and substantial. Also at issue would be the appropriate size of the penalty.

8. At this time, the parties have identified from the available MSHA data that, for the period 1978 to 1992, there were five (5) fires reportable under 30 C.F.R. Part 50 on the continuous miner in an underground coal mine. In two (2) such fires, a person was injured as a result of such fire. Such injuries involved burns and lost workdays. One such fire occurred as a result of cutting and welding on a continuous miner.

Findings of Fact

A continuous miner ("miner") is a mining machine designed to remove coal from the face and to load that coal into cars or on conveyors. A continuous miner is required to be maintained in permissible condition to ensure that all enclosures for motors, controllers, junction boxes and headlights are designed to prevent sparks from exiting the enclosure in order to contain an internal explosion. (Tr. 69-70, 85-87, 155). A permissible enclosure will prevent any flame or arc from propagating outside the enclosure and igniting material deposited on the enclosure. (TR. 86-87, 156). The trailing cable of the miner is a shielded

cable. (Tr. 70, 90, 139). The remote control box is equipped with a "kill" or panic bar switch which be deenergizes the miner (Tr. 80).

At the time Citation No. 4054831 was issued the continuous miner was in a permissible condition. (Tr. 69, 114). The miner was equipped with a fire suppression system that includes nozzles located in the area of the electrical and hydraulic components. (Tr. 107, 140, 153). The fire suppression system can be activated in three independent ways: by a switch in the operating compartment of the miner; by a switch on the control box used to operate the miner remotely; and by means of a valve within a hose running from the remote control box to the miner. (Tr. 141). This last method of activation of the fire suppression system permits activation even if power to the continuous miner is lost or if the continuous miner is under unsupported roof. (Tr. 141). Once activated, the fire suppression system covers the entire machine. (TR. 153-154). The continuous miner is also equipped with a water hose near the operator's compartment which can be used to extinguish a fire. (Tr. 87-88, 142).

The electrical cables in the continuous miner are located within a 3/16 inch conduit. (Tr. 136). The electrical cable and conduits that cover the cables do not generate any heat. (Tr. 138). Even if the conduit was damaged, the interior cable has additional protection around the conductors. (Tr. 70, 90, 139).

The shielding of each conductor protects the cable from damage or sparking. If the cable itself were damaged, short circuit protection would deenergize the continuous miner. (Tr. 107, 114-115, 139). The continuous miner's extensive system of electrical protection includes short circuit, overcurrent, undervoltage and ground fault protection, which would remove power from the miner in the event of damage to an electrical conductor located within a protective conduit, or, if there was a problem with an electrical motor or component. (Tr. 83-85, 114-115, 134-136). Short circuit protection for the continuous miner is instantaneous in that a short circuit would immediately deenergize the miner. (Tr. 83, 134). Overload protection prevents the cables from becoming hot and ground monitoring protection prevents energization of the machine unless the ground fault system is functioning properly. (Tr. 134-135).

There are eight motors on the continuous miner: two tram motors; two motors to operate the conveyor; two cutting motors; the hydraulic pump motor; and the scrubber motor. (Tr. 143-145). Each motor has short circuit and overload protection (Tr. 85, 136). The motors on the continuous miner are water cooled except for the scrubber motor. (Tr. 69, 138-145).

The continuous miner is equipped with several dust control/ suppression systems. A scrubber device takes in air near the

head of the miner and subjects it to a water scrubber system as well as filtration. (Tr. 138, 144-147). There are also water sprays near the head of the miner as well along the conveyor in the center of the miner. (Tr. 90-91, 120). The use of these sprays result in the wetting of any coal accumulations on the miner, thus making the accumulations harder to ignite. (Tr. 92-93, 120).

Two miners, an operator and a helper, are assigned to operate the continuous miner. (Tr. 63). Although the subject JOY continuous miner had an operator's compartment, it was being operated by remote control on the day the citation was issued. (Tr. 61-63). There were no ignition sources on the floor of the operator's compartment (Tr. 95). All gauges and other electrical components which are located in the operator's compartment are permissible. (Tr. 95, 140).

Rennie conceded that coal dust accumulations can reasonably be expected to accumulate on the continuous miner during its operations. (Tr. 107-108, 126). However, Rennie stated that coal dust deposited on a permissible light or motor of an operational continuous miner during the course of mining does not pose a hazard. (Tr. 123-124).

In describing the nature and extent of the cited accumulations, inspector Rennie testified the accumulations were not "mere spillage" from the shift. (Tr. 49-51). Rather, Rennie testified the color and compaction of the accumulations gave him reason to believe that the accumulations "had been there for sometime." (Tr. 51, 94). Consequently, Rennie thought too much coal had accumulated and opined that the accumulations had existed approximately two weeks. Therefore, Rennie concluded nothing had been done to clean the machine during that time. (Tr. 107-108, 122-124).

Significant and Substantial Issue

A violation is properly designated as being significant and substantial (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 Coal Co., 6 FMSHRC 1 (January 1984) the Commission explained:

> In order to establish that a violation of a mandatory safety standards 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).

Applying the Mathies test, the Respondent has stipulated to the fact of the violation satisfying the first element. With respect to the second element, it is clear that the cited combustible accumulations contributed to the discrete safety hazard of ignition or explosion.

However, resolution of the third and fourth elements of Mathies is more contentious. Addressing the third element, the Respondent argues that, given the continuous miner's permissibility, short circuit protection and fire suppression system, there was no reasonable likelihood that the combustion hazard contributed to by the violation of Section 75.400 would result in an event, i.e., a fire, which would cause serious injury. In response, the Secretary asserts that heat from the continuous miner's lights and water cooled motors could lead to spontaneous combustion; (2) the conveyor chain rubbing metal against metal could cause a spark; and (3) in the event of a roof collapse, power cables and conduits could rupture causing a spark and fire. (Tr. 48, 68, 94, 96-97, 107, 109).

Analysis of element three in Mathies as it pertains to this proceeding must be made in the context of the likelihood of fire given "continued normal mining operations." U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574 (July 1984). In this regard, the Respondent contends that for the Secretary to prevail, I must conclude that a continuous mining machine operated in a normal mining environment is inherently hazardous. I am sensitive to the Respondent's argument in that I cannot conceive of an operable continuous mining machine without accumulations of coal dust which are a normal byproduct of the extraction process. I am also reluctant to assume the "confluence of factors", such as a roof collapse, resulting cable rupture, spark and ignition, that must result a fire or explosion. See Texasgulf, Inc., 10 FMSHRC 498, 501 (April 1988).

However, in this instance, the evidence does not reflect that the continuous miner was being operated under normal circumstances in that it is uncontroverted that its coal dust

accumulations were as much as 7 inches in depth and that these accumulations had existed for approximately two weeks. While I am not inclined to conclude that coal dust accumulations on a continuous miner constitute a per se significant and substantial violation, I am likewise not persuaded that such accumulations are per se not significant and substantial. Rather, this issue must be resolved on a case by case basis.

There is a positive correlation between the duration of a hazardous condition and the likelihood of an event precipitated by that hazard. In this case, the two week duration of extensive accumulations provides an adequate basis for determining it was reasonably likely that an intervening result (a permissibility defect or a cable rupture) could occur which would create an ignition source and cause combustion. The duration of the accumulations also reflects that this condition would have remained unabated for a significant period of time without the intervention of Inspector Rennie. My determination may have been different had the accumulations existed for only one or two shifts. Thus, the Secretary has met his burden of proof with respect to the third element of Mathies.

However, the Secretary does not prevail on the issue of significant and substantial unless all four elements of Mathies are satisfied. Element four requires a reasonable likelihood the event, in this case a fire or explosion, will result in injuries of a reasonably serious nature. The respondent argues that the fire suppression system on the continuous miner would quickly extinguish a fire thus removing the likelihood of serious injury.

At the outset, I note that a fire suppression system would not prevent the serious injury or death of the continuous miner operator or helper in the event of an explosion. Moreover, the presence of a hose in a working place is not an appropriate mitigating factor when considering the significant and substantial nature of violations contributing to the likelihood of a fire. Likewise, a fire suppression system on a continuous miner is not a mitigating factor. Rather, it is a system of last resort. Accordingly, I conclude that the Secretary has established the violation in Citation No. 4054831 was properly designated as significant and substantial.

In considering the appropriate civil penalty to be imposed for this citation, I note the serious gravity of the violative condition as it exposes personnel to the danger of combustion. However, this gravity is mitigated by the propensity for dust accumulation on a continuous miner. Therefore, I find the operator's negligence to be no more than moderate in degree. Accordingly, the $309 civil penalty assessment proposed by the Secretary will be affirmed.

LAKE 94-55

Docket No. Lake 94-55 concerns Citation Nos. 4054082, 4054083, and 4054084 which were issued on September 22, 1993, by Mine Safety and Health Administration (MSHA) Inspector Steven Miller. These citations allege violations of Section 75.400 for coal dust accumulations found on diesel equipment operating in the Respondent's active workings. The parties agreed that my decision in Citation No. 4054082 would govern the other two citations in this docket proceeding. (Tr. 220-221).

The Respondent does not contest the cited coal dust accumulations described in the stipulations below. Rather, the contestant disputes the fact of occurrence of a Section 75.400 violation contending that the cited mandatory safety standard applies to electric rather than diesel equipment. The parties have stipulated to the following facts in Docket No. LAKE 94-55:

1. On September 22, 1993, Steve Miller (the "inspector") issued Citation No. 4054082 at Respondent's Wabash Mine, Wabash County, Illinois, alleging a violation of 30 C.F.R. § 75.400 because he determined that Respondent permitted loose coal saturated with oil, coal float dust, oil, and grease to accumulate on the WAGNER diesel scoop, company number 48 (serial number 3A11P0305), which was being operated on the 4 East Right Travelway. A complete and accurate copy of the citation will be offered into evidence at the hearing.

2. At the time Citation No. 4054082 was issued, the WAGNER diesel scoop was operating in the 4 East Right Travelway, an area of the Wabash Mine where miners are normally required to work or travel.

3. On September 22, 1993, the inspector issued Citation No. 4054083 at Respondent's Wabash Mine, alleging a violation of 30 C.F.R. § 75.400 because he determined that Respondent permitted loose coal saturated with oil, coal float dust, oil, and grease to accumulate on the JEFFREY diesel ram car, company number 106 (Serial number 38979), which was located on the 3 South East (MMU-004). A complete and accurate copy of the citation will be offered into evidence at the hearing.

4. At the time Citation No. 4054083 was issued, the JEFFREY diesel ram car was located on the 3 South 4 East (MMU-004), an area of the Wabash Mine where miners are normally required to work or travel.

5. On September 22, 1993, the inspector issued Citation No. 4054084 at Respondent's Wabash Mine, alleging a violation of 30 C.F.R. § 75.400 because he determined

that Respondent permitted loose coal saturated with oil, coal float dust, oil, grease and paper to accumulate on the WAGNER diesel scoop, company number 63 (serial number SA11P0299), which was being operated on the 4 East Right construction area. A complete and accurate copy of the citation will be offered into evidence at the hearing.

6. At the time Citation No. 4054084 was issued, the WAGNER diesel scoop was being operated on the 4 East Right construction area, an area of the Wabash Mine where miners are normally required to work or travel.

7. The materials referenced in the subject citations (i.e., loose coal saturated with oil, coal float dust, oil, grease and paper) are combustible materials.

8. The first use of diesel-powered equipment in an underground coal mine in the United States was in 1946.

9. Diesel equipment did not achieve significant usage in underground coal mines until the 1970's.

10. In 1974, there were 150 units of diesel equipment operating in underground coal mines in the United States.

11. In 1987, there were over 1300 units of diesel equipment operating in 107 underground coal mines in the United States.

12. Historically, the type of mining equipment most suited to diesel applications has been production haulage equipment such as load haul dump units (LHD's) and shuttle cars, personnel carriers, and diesel-powered auxiliary vehicles.

13. The WAGNER diesel scoops and the JEFFREY ram car at issue here are diesel-powered equipment.

14. Stipulation numbers 8 through 12 above are derived from the July 1988 Report of the Mine Safety and Health Administration Advisory Committee on Standards and Regulations for Diesel-Powered Equipment in Underground Coal Mines.

15. The Secretary hereby agrees to drop his determination that the conditions cited were of a significant and substantial nature.

16. The parties agree that, should the violations be found, an appropriate penalty for each violation would be $100.

17. The parties stipulated to the locations of the three (3) subject pieces of diesel equipment in the Wabash Mine, on or around the time that the citations were issued and agreed that the map prepared by the Secretary be admitted as Joint Stipulation.

As indicated above, the issue in this docket proceeding is whether the prohibition against coal dust accumulations in Section 75.400, which is identical to the statutory language in Section 304(a) of the 1977 Act, applies to diesel equipment in active workings. Statutory and regulatory provisions must always be viewed in the context of their intended purpose. In this regard, I am reminded of an incident that occurred in the early 1970's in Long Island, New York, for which I cannot provide documentation or further citation, where the town counsel passed a local ordinance. The ordinance provided that as of midnight on a specified date '. . . the owner of any dog who permits the dog to wander the streets without a leash will be put to sleep (emphasis added).' Thankfully, case precedent has provided a solution for such problems.

Although the ordinary meaning of words is important, such meaning ". . . must [not] prevail where that meaning . . . thwart[s] the purpose of the statute or lead[s] to an absurd result." Utah Power & Light Company, 11 FMSHRC 1926, 1930 (October 1989), citing Emery Mining Corp., 9 FMSHRC 1997, 2001 (December 1987) and In re Trans Alaska Pipeline Rate Case, 436 U.S. 631 (1978). Thus, regulations and statutes should be interpreted to harmonize rather than conflict with their intended objective. See Emery Mining Corp. v. Secretary of Labor, 744 F.2d 1411, 1414 (10th Cir. 1984).

The applicability of Section 75.400 to diesel equipment is not a matter of first impression. Judge Fauver recently denied the Respondent's Motion for Summary Decision on this issue in a recent proceeding. See Decision Denying Motion for Summary Decision in Docket No. Lake 94-74 (July 15, 1994). Judge Fauver, citing Black Diamond Coal Mining Company, 7 FMSHRC 1117, 1120 (August 1985) and cases cited therein, noted the Commission has repeatedly recognized the "strong Congressional intention to prohibit combustible accumulations anywhere in active workings."

Thus, the Respondent's reliance on Jones & Laughlin Steel Corp., 5 FMSHRC 1209 (July 1983), rev'd on other grounds, sub nom., International Union, UMWA v. FMSHRC and Vesta Mining Co., 731 F.2d 995 (D.C. Circuit 1984), aff'd on remand, 8 FMSHRC 1058 (July 1986) wherein the Commission stated "active workings

generally are areas or places in a mine, not equipment (emphasis added)" is not dispositive. In Jones & Laughlin, the Commission held that coal conveyor belts are not in and of themselves "active workings" and thus subject to preshift examinations.

While equipment may not constitute an active working area or place, the legislative history, when viewed in the context of the parties' stipulations, clearly reflects that "electric equipment" should be interpreted to include all permissible equipment including diesel-powered equipment. The predecessor to Section 304(a) of the 1977 Mine Act was Section 304(a) of the 1969 Coal Mine Health and Safety Act (the 1969 Mine Act), 30 U.S.C. § 864(a). The provisions of Section 304(a) of the 1969 Mine Act are the same as the provisions in Section 304(a) of the 1977 Mine Act and the language in the regulatory standard in Section 75.400.

The parties' stipulations reflect virtually no use of diesel equipment in underground mines when the 1969 Act was promulgated. Diesel equipment satisfying MSHA's permissibility specifications as required by Section 36.2(b), 30 C.F.R. § 32(b), particularly with respect to hydraulic rather than electric starters to suppress a potential ignition source, has only recently been approved for underground use. (Tr. 244). Consequently, underground diesel equipment has only recently become commonplace. Therefore, the failure to include diesel equipment in Section 304(a) of the 1969 or 1977 Mine Acts does not evidence a Congressional intent to distinguish diesel from electric equipment.

Significantly, the Respondent has failed to provide any rational basis for viewing electric equipment and diesel equipment differently. Both types of equipment require permissibility approval by MSHA as defined by Section 75.2 of the regulations, 30 C.F.R. § 75.2. See also 30 C.F.R. § 36.2(b). Rather, it is clear that the Congressional concern about electric equipment as a potential ignition source is equally applicable to diesel equipment. In fact, Respondent witness Robert Kudlawiec, Project Engineer at the Respondent's Wabash Mine, testified that any powered equipment creates a safety issue concerning a potential ignition source. (Tr. 300). Kudlawiec further stated that the considerations regarding prevention of an ignition source are the same for diesel and electric equipment. Consistent with Kudlawiec's opinion, at the hearing counsel for the Respondent conceded that combustible accumulations on diesel equipment is a serious concern. (Tr. 339, 349-350).

Finally, I recognize that mandatory safety standards must provide reasonable and adequate notice of prohibited mine practices and conditions. Ideal Cement Company, 12 FMSHRC 2409, 2416 (November 1990); Alabama By-Products, 4 FMSHRC 2128, 2129 (December 1982). However, I cannot imagine a mine operator

disregarding combustible accumulations on diesel equipment while conscientiously removing such accumulations on electric equipment under a good faith alleged color of authority of Section 75.400. Obviously, any such claim must be rejected.

Consequently, I conclude common sense and established case law dictate that "electric equipment therein" must be interpreted to include all permissible equipment, including diesel equipment. It follows that the subject accumulations constitute violations of the mandatory safety standard in Section 75.400 as well as violations of the provisions of Section 304(a) of the 1977 Mine Act.

The parties have stipulated that the three violations in Docket No. LAKE 94-55 are nonsignificant and substantial. Accordingly, Citation Nos. 4054082, 4054083 and 4054084 are modified to delete the significant and substantial designation and are affirmed as modified. While I retain jurisdiction to assess the appropriate civil penalties in this matter, I will defer to the parties' stipulation of a $100 civil penalty assessment for each citation.

ORDER

In view of the above, **IT IS ORDERED** that Citation No. 4054831 in Docket No. LAKE 94-79 **IS AFFIRMED. IT IS FURTHER ORDERED** that the significant and substantial designations in Citation Nos. 4054082, 4054083 and 4054084 in Docket No. LAKE 94-55 are deleted and that these citations **ARE AFFIRMED** as modified. The Respondent **SHALL PAY** a total civil penalty of $609 within 30 days of the date of this decision in satisfaction of the four citations in issue. Upon timely receipt of payment, these cases **ARE DISMISSED**.

Jerold Feldman
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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AUG 2 4 1994

THUNDER BASIN COAL COMPANY, Contestant	:	CONTEST PROCEEDING
	:	Docket No. WEST 94-238-R
	:	Citation No. 3589040; 2/22/94
v.	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Black Thunder Mine

DECISION FOLLOWING REMAND

Procedural History

On May 11, 1994, I granted summary decision in favor of the Secretary of Labor in this case, affirming citation 3589040 and order 3589101, despite the fact that the Secretary contended that this matter was not ripe for summary decision for either party, Thunder Basin Coal Company, 16 FMSHRC 1070. The citation and order were issued to Thunder Basin Coal Company alleging a violation of 30 C.F.R. 40.4 for its refusal to post a form designating Dallas Wolf and Robert Butero, employees of the United Mine Workers of America (UMWA), as walkaround representatives for eight employees at Thunder Basin's non-union mine [1]. Both parties filed a petition for review with the Commission.

On June 27, 1994, the Commission remanded the instant matter to the undersigned for appropriate proceedings. The Commission noted the Secretary's assertions that he had been deprived of an opportunity to present his legal position to the judge and that certain material factual findings are not supported by substantial evidence. The Commission order states, "[w]e intimate no view regarding the judge's legal conclusions in this matter." 16 FMSHRC 1239.

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[1] Dallas Wolf was at the time of the designation the principal UMWA organizer in the Powder River Basin of Wyoming, and Mr. Butero is a UMWA safety and health representative operating out of Trinidad, Colorado (Contestant's Exhibit 15 at pages 27-28, Secretary's Exhibit 18 at page 269). The principal function of a miners' walkaround representative is to accompany MSHA personnel during their inspections of operators' worksites.

On July 14, 1994, the parties filed a Joint Procedural Stipulation agreeing that no further evidentiary hearing was necessary. The parties agreed to file briefs based on the existing record created with respect to Contestant's Application for Temporary Relief and its Motion for Summary Decision, and the Secretary's opposition to both.

The Commission's decision in Kerr-McGee controls the disposition of the instant case and requires the affirmation of citation 3589040. [2]

In Kerr-McGee Coal Corporation, 15 FMSHRC 352 (March 1993), appeal pending, D. C. Cir. No. 93-1250, the Commission held that it is the conduct of a miners' representative during an inspection, rather than the motivation of such person in becoming a walkaround representative, that must be examined to determine whether there has been an abuse of the Mine Safety and Health Act's walkaround provisions, 15 FMSHRC at 361.

The Commission also held that the Secretary is not required to integrate National Labor Relations Act concepts into his regulations implementing the walkaround provisions of the Mine Act, 15 FMSHRC at 362. Thus, the fact that the miners' representatives in this case are employees of a union not authorized to represent Contestant's employees under the NLRA, is irrelevant to the disposition of this case.

In Kerr-McGee, the Commission also addressed evidence of the sort that Thunder Basin contends distinguishes this case from Kerr-McGee. After its evidentiary hearing Kerr-McGee moved the trial judge to reopen the record to receive newly discovered evidence. Included in the evidence proffered was "a series of internal UMWA memoranda to and from [Dallas] Wolf, which it asserted, revealed that Wolf had been designated as a walkaround representative in order to facilitate ongoing UMWA organizing activities.", 15 FMSHRC at 355. The judge denied the motion to reopen, finding that the documents merely revealed that union organizing was taking place and that this was established and undisputed at trial.

The Commission's decision in affirming the trial judge's denial of the motion to reopen the record in Kerr-McGee implies that the Commission also did not consider documents indicating that the walkaround designation was motivated by UMWA organizing activities to be material. Therefore, I conclude all the documentation offered to establish the same conclusion in this case is irrelevant to its disposition.

---

[2] The factual findings at pages 3-5 of my May 11, 1994 Summary Decision are hereby incorporated by reference.

Both parties extensively briefed the question of whether the designation of Wolf and Butero was made for the purpose of assisting the UMWA's organizational drive at Contestant's mine (See Secretary of Labor's brief at page 4, Contestant's brief generally). Under the current state of the law the motivation of the UMWA, Wolf, Butero, and the eight Thunder Basin employees who signed the designation form is totally irrelevant to the disposition of the contested citation.

Kerr-McGee stands for the proposition that designation of union employees, including one whose principal function is to organize, as walkaround representatives at a non-union mine which they are trying to organize is not invalid per se. [3] That decision is controlling and leads me to conclude that citation 3589040 must be affirmed.

ORDER

Citation 3589040 is affirmed.

Arthur J. Amchan
Administrative Law Judge
(703) 756-6210

[3] Regardless of whether the eight Thunder Basin employees hoped to facilitate the UMWA organizing campaign, it is not unreasonable for a miner to desire the assistance of persons with expertise with regard to safety issues and MSHA regulations during an inspection, rather than relying on the miner's own limited knowledge or experience. As Mr. Butero explained, such assistance would most likely be rendered with regard to a major safety or health dispute during an accident or complaint inspection, rather than during a regularly scheduled "AAA" inspection (Secretary's exhibit 10 at page 196).

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 29, 1994

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Petitioner	: : : : :	CIVIL PENALTY PROCEEDING Docket No. LAKE 92-199 A. C. No. 21-02647-05511
v.	:	
KINKAID STONE COMPANY, Respondent	: :	Kinkaid Stone

DECISION APPROVING SETTLEMENT
ORDER TO PAY

Before: Judge Merlin

This case is before me pursuant to Order of the Commission dated February 23, 1994.

On March 8, 1994, I issued an order vacating the order of dismissal previously entered and reinstating this case. Upon a motion from the Secretary I determined that this matter had been dismissed in error because the penalty assessment did not involve excessive history. The parties were ordered to confer to determine if this case could be settled.

On August 11, 1994, the Solicitor filed a settlement motion for the one violation in this matter. The original assessed amount was $50 and the proposed settlement is $35. I have reviewed the documentation and representations made in this case, and conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is **GRANTED** and it is **ORDERED** that the operator **PAY** $35 within 30 days of this decision.

Paul Merlin
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 29, 1994

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Petitioner	: : : :	CIVIL PENALTY PROCEEDING Docket No. WEST 94-213-M A. C. No. 05-04245-05506
v.	:	
KIEWIT WESTERN COMPANY, Respondent	: :	 Universal Portable Crusher

ORDER ACCEPTING RESPONSE
DECISION APPROVING SETTLEMENT
ORDER TO PAY

Before: Judge Merlin

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.

On May 17, 1994, the Solicitor filed a motion to approve settlement for the two violations in this case. The Solicitor sought approval of a reduction in the penalties from $4,267 to $1,267. The Solicitor proposed to reduce the penalty for one of the violations, Citation No. 4335289, from $4,000 to $1,000. With respect to the remaining violation, the operator has agreed to pay the proposed penalty in full. On June 15, 1994, an order was issued disapproving the settlement and directing the Solicitor to file additional information to support his motion. On July 25, 1994, the Solicitor filed an amended motion to approve settlement.

Citation No. 4335289 was issued for a violation of 30 C.F.R. § 56.12016 because the control circuit was not locked out while maintenance work was performed. The violation contributed to a moving machinery accident, which caused injuries to an employee's arm. The basis for the reduction remains that negligence was less than originally thought. The Solicitor now has explained the circumstances surrounding the accident, and his statement that the accident was attributed to a "communication mix up". According to the Solicitor, the belt had been shut down and was locked-out properly in order to clear material from the under-conveyor belt. The conveyor belt inspection plate was removed and the material was shoveled from the belt. The belt was then restarted in accordance with proper procedures. However, the

miner in the control room unilaterally stopped the belt so that material could clear the crusher's rotovator. At this time, another miner decided that the conveyor belt inspection plate could be safely installed and began to do so which resulted in the injury.

I accept the Solicitor's representations and I conclude that the settlements are appropriate under the six criteria set forth in section 110(i) of the Act.

In light of the foregoing, it is **ORDERED** that the settlement motion filed July 25 is **ACCEPTED** as a response to the June 15 order.

It is further **ORDERED** that the recommended settlement be **APPROVED** and the operator **PAY** $1,267 within 40 days of the date of this decision.

Paul Merlin
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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AUG 31 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. SE 93-108
	:	A.C. No. 40-02971-03584
v.	:	
	:	Docket No. SE 93-244
CROSS MOUNTAIN COAL INC., Respondent	:	A.C. No. 40-02971-03595
	:	
	:	Docket No. SE 93-245
	:	A.C. No. 40-02971-03597
	:	
	:	Docket No. SE 93-255
	:	A.C. No. 40-02971-03596
	:	
	:	Mine No. 6

DECISION

Appearances: Brian W. Dougherty, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner; Edward H. Adair, Esq., Reece and Lang, London, Kentucky, for the Respondent.

Before: Judge Barbour

The above captioned cases were brought pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977 (Mine Act or Act), 30 U.S.C. §§ 815, 820, when the Secretary, on behalf of the Mine Safety and Health Administration (MSHA), filed petitions for the assessment of monetary civil penalties against Cross Mountain Coal Co., Inc. (Cross Mountain) for violations of various safety and health standards promulgated pursuant to the Act and found in 30 C.F.R. Part 75. The Secretary alleged that the violations occurred at Cross Mountain's No. 6 Mine, a bituminous coal mine located in Campbell County, Tennessee, and that several constituted significant and substantial (S&S) violations to mine safety hazards caused by Cross Mountain's unwarrantable failure to comply with the cited regulations. Cross Mountain denied the Secretary's allegations.

The matters were consolidated and were heard in London, Kentucky. At the commencement of the hearing counsels stated they had settled several of the violations. Counsel for the Secretary also stated that two of the citations in which violations were alleged had been or would be vacated. I will approve the settlements and note the citations to be vacated when I discuss the dockets to which they pertain.

STIPULATIONS

Counsels stipulated as follows:

1. Cross Mountain is subject to the Act.

2. Cross Mountain's No. 6 Mine has an effect on interstate commerce within the meaning of the Act.

3. Cross Mountain and its No. 6 Mine are subject to the jurisdiction of the Federal Mine Safety and Health Review Commission, and the Administrative Law Judge has the authority to hear these cases and issue a decision.

4. Cross Mountain is a large-sized operator.

5. A reasonable penalty will not affect Cross Mountain's ability to remain in business.

DOCKET NO. SE 93-108

Citation	Date	30 C.F.R. §	Proposed Assessment
3824679	10/14/92	75.902	$4,400

Section 75.902 essentially restates section 309(c) of the Act, 30 U.S.C. § 862(c), and requires in pertinent part:

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

Citation No. 3824679, issued pursuant to section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), states:

> Two ground mon[i]tors had been jumped out with copper wire on the 001 section power centers. The mon[i]tor for the 001 section head drive and the No. 1 battery charger.

(Gov. Exh. 7). The inspector found that the alleged violation of section 75.902 was S&S and the result of Cross Mountain's unwarrantable failure.

THE TESTIMONY

The citation in question was issued by MSHA inspector Stanley Sampsel. Sampsel, who is not a certified electrician, stated that a ground wire is a safety feature within a machine's power system. It is a wire that runs from the origination point of the power system to the frame of the machine. If there is a short circuit in the machine, or in the cable to the machine, the voltage feeds back on the ground wire to the origination point of the power causing circuit breakers or other disconnects to trip the power. This eliminates the shock hazard created by the short circuit (Tr. II 205-206, 217).

Sampsel also described a ground monitor. He stated that it is a "second ground system that creates a loop circuit through the cable to the machine and back to the power system" (Tr. II 206). This system monitors the integrity of the ground system. However, the ground monitor system's short circuit protection can be defeated by installing a wire in the cable receptacle to provide a path around the system for electricity (Tr. II 208-209). (This practice is referred to as "jumpering.")

Sampsel conducted an inspection of the 001 section of Mine No. 6 on October 14, 1992. The section had recently resumed development operations and there were two power centers on the section. A few days before the inspection an anonymous note had been left on Sampsel's car while it was parked in the mine parking lot. The note stated that it was a practice on the section to jumper the short circuit protection. Therefore, Sampsel went to the section to look for evidence of jumpering (Tr. II 220-221, 237-239).

There were two power centers on the section (Tr. II 211). At the first power center Sampsel examined the cable that ran from the power center to the section belt drive (Tr.II 217). Sampsel initially testified that the cable coupler was positioned so that power was not flowing through the cable to the belt drive. In effect, the cable and belt drive were disconnected (Tr. II 212). (Later, Sampsel appeared to change his testimony when he stated that there was power running to the belt drive at the time he came to the power center (Tr. II 217).)

Sampsel had the cable coupler removed from the receptacle. He could not recall whether he or Steve Cox, the mine superintendent and company representative, removed it (Tr. II 225). When the coupler was removed Sampsel saw a piece of copper wire fall from between the coupler and the receptacle (Tr. II 212, 223). According to Sampsel, the wire "conformed to the configuration needed to complete a jumper wire" (Tr. II 212, 213). In his opinion it had been used to connect the frame of the receptacle to the ground monitor lug and thus to jumper the ground monitor system (Tr. II 212).

Cox was on Sampsel's right and Sampsel believed that Cox saw the copper wire fall when the coupler was removed from the receptacle (Tr. II 214). Sampsel explained, "[Cox] was right beside me. We was there for the sole purpose of looking at these. That was my intentions and that's what I told him my intentions were" (Tr. II 224). Sampsel further explained that when he told Cox the wire had fallen from the receptacle, Cox replied he had not seen it (Tr. II 224). Because the wire was lying directly beneath the receptacle, Sampsel picked it up and showed it to Cox. Cox reiterated he had not seen the wire fall and added that he had not observed the wire in the coupler (Tr. II 215).

Sampsel then inspected one of the couplers at the second power center. Sampsel was uncertain if Cox went with him (Tr. II 219, 227). The coupler was connected to a power cable that provided electricity to a battery charger (Tr. II 218). When the coupler was removed from the receptacle, Sampsel found a copper wire of the same length as the previous one. The second wire did not fall, rather it remained in the coupler. Sampsel believed it had been used to defeat the ground monitor system of the battery charger (Tr. II 216).

Sampsel spoke with whoever was with him at the time about the wire and a company employee removed the wire from the receptacle (Tr. II 229. Sampsel told the company representative the wire should not have been there, that it was a violation and that he would issue a citation (Tr. II 230).

Sampsel stated that the company's certified electricians were responsible for working on the couplers and receptacles at the power centers (Tr. 218-219).

In Sampsel's view, the purpose of section 75.902 is to ensure that any short circuit or ground fault will result in the automatic deenergizing of the machinery and thus to eliminate instantly the hazard of shock or electrocution (Tr. II 216-217). He stated that he believed it was "highly likely" that both jumperings would have resulted in an electrocution (Tr. II 218). He added that the hazard depended "more or less ... [on] how well the cables [and] equipment ... [were] being maintained" (Tr. II 218).

Foster Brock, an MSHA electrical inspector, gave a somewhat different explanation of what happens when the ground monitor system is jumpered. Brock explained that the system is defeated by providing a connection between the ground monitor system and the ground system so that the ground monitor only monitors the ground in the new and smaller circuit between the jumpering wire and the power center. The circuit from the jumper to the equipment is not monitored (Tr. II 277, 279). In this situation, there is no way for a miner to be assured that the grounding

system actually will trip the power in the event of a fault (Tr. II 280, 294). Brock summarized the purpose of the ground monitor system as "... a safety system that ensures that you have a ground wire ... . When you jumper out a ground check monitor you're taking that one safety feature and doing away with it" (Tr. II 289).

Steve Cox, Cross Mountain's superintendent, testified that he was with Sampsel during the October 14 inspection. He explained that in order to inspect the power center for the head drive, both he and Sampsel had to crawl, because the floor to ceiling height was 40 inches (Tr. II 244). Three couplers were plugged into the power center in close proximity to one another (Tr. II 251; see Resp. Exh. 5-B). When Sampsel told Cox that he wanted to inspect the grounding system on the belt drive, Cox unplugged the belt drive cable coupler. Because the coupler weighed about 35 to 40 pounds, and because he was on his knees, Cox had to move his body over the coupler to unlatch it (Tr. II 245; Resp. Exh. 5-A).

According to Cox, he unplugged the coupler, laid it down and Sampsel told him there was a wire present. Cox told Sampsel he did not see a wire. When Sampsel responded that the wire had been used to jumper the grounding, Cox disagreed because the circuit breaker was working properly and there was no need to jumper the system (Tr. II 252). There were no reports that anything was wrong with the system (Tr. II 257, 258, 260). Cox stated, however, that the wire could have been used to jumper the system and that whoever did it had neglected to remove the wire, but Cox did not believe this was likely (Tr. II 258). Cox maintained that electricians frequently left pieces of wire laying around power centers (Tr. II 262).

Cox testified that he and Sampsel then traveled to the power center for the battery charger. Cox believed that they were joined by the section electrician who unplugged the coupler to the battery charger. Cox stated that he did not see a wire in the coupler or receptacle. If one had been present, he would have noticed (Tr. II 263, 265).

Cox stated that Sampsel did not ask him to remove a wire from the coupler and that if Sampsel asked the section electrician to remove one, he (Cox) did not hear the request (Tr. II 264). However, Cox agreed there was a lot of noise at the power center. "[I]t's buzzing like a beehive," he said. Id. Cox was not standing beside Sampsel, but rather was about one foot from the section electrician, who was about five feet from Sampsel (Tr. II 265).

THE VIOLATION

The parties agree that the electrical systems for the section head drive and the battery charger required ground check monitor circuits. The circuits must continuously monitor the equipment's grounding circuits. I accept the testimony of the Secretary's witnesses that if a ground check monitor circuit is jumpered, it can no longer effectively monitor the grounding circuit. In sum, and as Foster Brock persuasively testified, such jumpering defeats the purpose of the ground check monitor system (Tr. II 208-209, 277-280).

The question of whether a violation existed hinges upon whether the Secretary established, in either instance, that the ground check monitor systems were in fact defeated. Put another way, the question is whether or not the wires were used to jumper one or both of the systems.

Sampsel was certain that when Cox removed the belt drive cable coupler from the receptacle at the first power center a copper wire fell from between the coupler and receptacle (Tr. II 212, 233). Sampsel was equally certain the wire had been used to short circuit the belt drive ground monitor circuit. Cox did not dispute the presence of the wire. Rather, he testified he did not see the wire fall. He suggested that the wire might have been left in the area by a company electrician who was trouble-shooting the equipment. However, he also agreed it was possible the wire had been used to jumper the system prior to the inspection and that it had not been removed because the person who inserted it forgot about it (Tr. II 258).

I credit Sampsel's version of events. Unlike Cox, Sampsel was certain the wire had fallen from between the coupler and the receptacle (Tr. II 212, 223). Cox removed the coupler from the receptacle. Because of the low height at the power center Cox and Sampsel had to crouch. Further, because of the weight of the coupler, Cox had to place his body up and over the coupler (Tr. 245; see also Resp. Exh. 5-A). Given this position and, given the fact Cox was intent on removing the coupler, whereas Sampsel was intent upon looking for evidence of jumpering, it is not surprising Cox did not see the wire until it was pointed out to him.

Having accepted as fact that the wire fell as Sampsel described, the question is what purpose the wire served. I accept Sampsel's unchallenged testimony that the configuration of the wire was that which would have been needed to jumper the ground monitor system (Tr. II 212-213). Cox suggested the wire might have been the subject of legitimate use by an electrician. However, he also agreed it was possible it was used as a jumper wire. In my view, the most reasonable inference to draw from the testimony is that it was being used to jumper the ground

monitor circuit. Cox's suggestion that the wire might have been used for troubleshooting is undermined by his repeated assertions that there was nothing wrong with the belt drive's grounding system (Tr. II 252, 257-258, 260). I therefore find that the violation existed as charged at the first power center.

At the second power center Sampsel maintained that he found a similar copper wire in the receptacle for the cable to the battery charger when the coupling was unplugged from the receptacle (Tr. II 216). Sampsel also testified that at his direction a company employee removed the wire from the receptacle (Tr. II 229). Again, Cox testified that he did not see the wire. He believed he would have seen it if the wire had been where Sampsel stated it was located (Tr. II 263, 265). Further, Cox did not hear Sampsel ask the section electrician, the only other company employee with Sampsel and Cox, to remove the wire from the receptacle (Tr. II 264).

I find both Sampsel's and Cox's testimony to be credible. I also find, however, that accepting Cox's testimony does not preclude a finding the wire was present. Cox described himself as being about five feet from Sampsel, rather than immediately next to him (Tr. II 265). He agreed that it was noisy at the power center (Tr. II 264). It is reasonable to conclude that the distance between Sampsel and Cox, together with the buzzing of the power center, could have afforded Cox less than a clear view of the coupling and receptacle and prevented Cox from hearing Sampsel ask the other employee to remove the wire.

As with the situation at the belt drive power center, I conclude the weight of the evidence establishes a finding the wire was located where Sampsel testified. The only plausible explanation offered for the presence of the wire was that it was used to jumper the system. Cross Mountain did not suggest a credible alternative reason. Therefore, I also conclude that a violation of section 75.902 existed with respect to the battery charger ground check monitoring circuit.

S&S and GRAVITY

The Commission has held a violation is "S&S" if, based on 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 stated:

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

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

I have concluded that a violation of mandatory safety standard section 75.902 existed as charged. Moreover, the testimony establishes there was a discrete safety hazard contributed to by the violation in that, with the ground check monitor defeated, there was no way to ensure the affected electrical equipment had short circuit protection. Without such certainty, a short could have lead to the shock or electrocution of anyone touching the equipment's frame or cable. This clearly meets the reasonably serious nature element of the Commission's S&S definition (Tr. II 208-209).

As is frequently the case when the Secretary alleges that a violation is S&S in nature, the question is whether the Secretary has established a reasonable likelihood the hazard in question would have resulted in an injury? In other words, if normal mining operations continued would there have been a reasonable likelihood of "an event in which there [would have been] an injury?" U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). After considering all of the evidence, I conclude that the Secretary has failed to meet his burden of proof.

Although Sampsel testified that he believed it "highly likely" that jumpering of the ground monitor circuits would have resulted in an electrocution, neither he nor Brock offered any testimony regarding the frequency of miners' exposure to the conditions (Tr. II 218, 235). In order for there to have been any likelihood of an injury or injuries from the hazards created by the violative conditions, miners had to be exposed to the conditions. When, as here, the record is silent in this regard, the Secretary has failed to prove the third element of the Mathies formula.

The fact that a violation fails to meet all of the tests required to support a finding of S&S does not mean it is a non-serious violation. The Commission has recognized that under the Mine Act the concepts of S&S and gravity are not identical, although they are frequently based upon the same or similar factual considerations. Quinland Coals, Inc., 9 FMSHRC 1614, 1622 n. 11 (September 1987). The dangers posed by the inability to rely on short circuit protection were grave in that in the event an undetected short circuit the violation could have resulted in the serious shock injury or electrocution of anyone touching the frames of the equipment, or the cables. I therefore find that the violation was serious in nature.

UNWARRANTABLE FAILURE and NEGLIGENCE

The Commission has held that unwarrantable failure is aggravated conduct constituting more than ordinary negligence by a mine operator in relation to a violation of the Act. Emery Mining Corp., 9 FMSHRC 1997, 20004 (December 1987); Youghiogheny & Ohio Coal Co., 9 FMSHRC 20007, 2010 (December 1987). The Commission has explained that this determination is derived, in part, from the ordinary meaning of the term "unwarrantable failure" ("not justifiable" or "inexcusable"), "failure" ("neglect of an assigned, expected or appropriate action"), and "negligence" ("the failure to use such are as a reasonably prudent careful person would use, characterized by "inadvertence," "thoughtlessness," and inattention."). Eastern Associated Coal Corporation, 13 FMSHRC 178, 185 (February 1991); citing Emery. 9 FMSHRC at 2001.

Brock offered no testimony regarding this issue, and Sampsel's testimony was limited. He stated he believed the company's certified electricians were responsible for maintaining the couplers and receptacles and that they performed all work on such equipment (Tr. II 218-219). Cox also testified that maintenance on the power centers would have been performed by certified persons (Tr. II 272-273). This testimony alone does not establish that the company's certified electricians jumpered the circuits. Sampsel was not asked who he thought installed the wires. Nor was he asked how long he thought the wires had been installed and whether the company should have known about them. Finding the violation was the result of more than ordinary negligence on the part of the company would require conjecture outside the record. I conclude, therefore, that the Secretary has not established that the violation was the result of Cross Mountain's unwarrantable failure to comply with section 75.902.

Although I cannot find Cross Mountain unwarrantably failed to comply with the cited standard, I can and do find that the company was negligent. No matter who jumpered the ground check monitor circuits, the company failed to meet the standard of care required of it by allowing the conditions to go undetected and corrected. Cross Mountain was responsible for ensuring the grounding systems on the equipment, including the ground check monitor systems, were operating properly. The integrity of the systems was the company's responsibility. In failing to discover and remove the wires, the company failed to meet the standard of care required of it.

DOCKET NO. SE 93-244

SETTLED VIOLATIONS

Citation No.	Date	30 C.F.R. §	Proposed Penalty	Settlement
3824750	10/26/92	70.202(a)	$650	$500
3824751	10/26/92	70.202(a)	$650	$500

The Secretary alleged that respirable dust samples were not taken and submitted by a certified person as required by section 70.202(a). At the hearing, counsel for the Secretary stated that although the inspector found that these violations were the result of Cross Mountain's high negligence, in fact the company exhibited an ordinary or moderate lack of care and that the Secretary agreed to modify the citations accordingly (Tr. I 12). I accepted the settlements (Tr. I 13).

Citation No.	Date	30 C.F.R. §	Proposed Penalty	Settlement
3824775	1/14/93	70.100(a)	$690	$0

The Secretary alleged that a roof bolting machine operator was working in a concentration of respirable dust that exceeded the allowable limit. The violation was based upon a single sample of respirable dust collected in the working environment of the miner. At the commencement of the hearing Cross Mountain's motion to vacate the citation was pending. Cross Mountain maintained the alleged violation was based upon an improperly obtained respirable dust sample. Counsel for the Secretary did not oppose the motion and stated that MSHA agreed to vacate the citation (Tr. I 8, 12-13). I dismissed the Secretary's petition with respect to the alleged violation on the understanding the citation was or would be vacated.

DOCKET NO. SE 93-245

Citation No.	Date	30 C.F.R. §	Proposed Penalty
3824983	1/11/93	75.603	$6,500

Section 75.603, in pertinent part, states:

> Temporary splices in trailing cables shall be made in a workmanlike manner and shall be mechanically strong and well insulated .... As used in this section, the term "splice" means the mechanical joining of one or more conductors that have been severed.

Citation No. 3824983, issued pursuant to section 104(d)(1) of the Act, states:

> 001 Section No. 1 Fletcher roof bolter serial No. 89019 the trailing cable providing 440 v[olt] three phase power had not been properly spliced. A splice had been made that had not been effectively insulated and sealed, proper connectors were not used the wire had been twisted and tied together. Two of the three phases were exposed, the outer jacket was missing.

(Gov. Exh. 4) The inspector found the violation was S&S and the result of Cross Mountain's unwarrantable failure.

THE TESTIMONY

Sampsel stated he had been trained in the observation of trailing cables and their splices. Sampsel testified that a temporary splice is made in a cable so that production can resume until a permanent splice is completed (Tr. I 271, 275). (He further stated that permanent splices usually are made during a maintenance shift and that the maintenance shift is frequently the midnight shift. Id.)

There are five conductors inside a trailing cable, three phase wires, a ground wire and a ground monitor wire (Tr. I 277). Temporary splices are made by reconnecting and reinsulating the conductors when they have broken or otherwise separated. Temporary splices need to be well insulated because trailing cables are handled by miners. If a splice is not well insulated, a miner can be electrocuted by touching the splice (Tr. I 273).

When making a temporary splice the severed conductors inside the cable are reconnected and are reinsulated equivalent to their original insulation (Tr. I 277). This is the same way a permanent splice is made, except a permanent splice has a bonded rubber sleeve applied around the splice, whereas a temporary splice can be wrapped with tape (Tr. I 278, 302). Pursuant to section 75.603, a temporary splice must be made in a "workmanlike manner." A temporary splice is permissible for up two 24-hours after which it must be replaced with a permanent splice (Tr. I 279).

On January 11, 1993, Sampsel inspected the trailing cable of a roof bolting machine that was located on the 001 section of Cross Mountain's No. 6 Mine. (Sampsel could not recall inspecting the machine itself, other than to get the serial number off of it (Tr. I 298). Nor could he recall whether the machine was energized.) Upon examining the machine's

trailing cable Sampsel noticed a splice with exposed copper wires (Tr. I 283, 290). The copper wires were plainly visible and he did not have to pick up the splice to see them (Tr. I 304).

Closer observation revealed the copper wires were phase wires and that the splice was not properly made in that the wires were tied and twisted together. Electrical connectors had not been used to reattach the wires (Tr. I 283). Although the phase wires had been wrapped with tape, the splice "showed an extreme amount of wear" in that the tape around the conductors had been scraped off causing exposure of the copper wires (Tr. I 283-284, 309).

Sampsel could not recall the name of the person from Cross Mountain who accompanied him when he looked at the splice. He remembered, however, that someone from the company cut the splice out of the cable and that he was then able to pick it up and observe it closely (Tr. I 302). It was at this time that Sampsel found the splice had been "tied together and twisted and so on" (Tr. I 303). It was also at this time that Sampsel confirmed the wires he had seen were phase wires (Tr. I, 304). While Sampsel was examining the splice, company personnel were at work reconnecting the cable (Tr. I 306).

According to Sampsel, the splice violated section 75.603 in several respects. The copper wires were exposed, the tape was scraped away so that it was not insulated to the same extent as the original cable, and the phase conductors were tied together rather than joined with connectors (Tr. I 285). Tieing the wires was unacceptable because the splice was more likely to break apart and sharp ends of the spliced wire could poke through the insulation (Tr. I 287). If connectors had been used, there would have been an even strain on the wires and they would have been less likely to break. Further, the wires would have been enclosed within the sleeve of the connector and would not have poked through the insulation (Tr. I 287-288).

In view of the condition of the splice Sampsel believed that an injury was highly likely. The roof bolting machine was located in the active workings of the section, an area where miners were required to work and travel. He noted that scoops and the continuous mining machine had to travel past the cable and that the cable had to be hung for the equipment to get through (Tr. I 318). Moreover, the roof bolting machine operator frequently had to handle the cable (Tr. I 288-289). In Sampsel's view, the defective splice could very easily have been contacted by persons working in the area and a fatality or serious injury easily could have occurred (Tr. I 292). He therefore found the alleged violation was S&S in nature (Tr. I 292-293).

When asked why he found the condition to have been the result of Cross Mountain's unwarrantable failure to comply with section 75.603, Sampsel stated:

> I felt that the splice ... was made at the mines (sic.)...and...this type of splice being made at the mine, the people are required to be recertified yearly. It's common knowledge to electrical people as well as inspectors that square knotting or granny knotting or twisting cables together is not an acceptable method of making a splice.
>
> * * * *
>
> [T]his type of splice was intentionally made improperly. (Tr. I 294-295)

In Sampsel's view, a certified electrician acts on behalf of the operator. Therefore, the negligence of the electrician who made the splice was attributable to Cross Mountain (Tr. I 320-321). Although making the splice was the type of work that Sampsel believed "could show up in an electrical examination book," Sampsel did not know if he had reviewed the book on the day of the inspection (Tr. I 298, 299). (When Sampsel was shown a page of the book for January 11, 1993, he agreed that he had looked at the book, although he could not state that everything appearing on the page was there at that time (Tr. I 300; Resp. Exh. 3.)

The Secretary also called electrical inspector Foster Brock as a witness. Brock testified that the problem with the splice was that twisted wires could pull loose if the cable was hung (Tr. II 138). Where the wires were tied with square knots, the knots created more heat than connectors, and the heat caused the wires to break at the end of the knots. In addition, the knots created a splice that was larger in size than one made with connectors. The larger splice was subject to more wear and tear (Tr. II 143, 144-145, 146). Because of these problems MSHA considered the use of twisting and square knots to be "unworkmanlike" (Tr. II 146). Brock admitted, however, that he had not conducted any tests to establish that conductors spliced with square knots created more heat (Tr. II 161). He had simply noticed that splices made with connectors lasted longer that those made with square knots (Tr.II 162).

Finally, Brock observed that when a coupler was connected to the power center, and the circuit breaker was off, the power could be turned back on by any miner. As Brock stated "[Y]ou don't have to be a certified electrician to energize a circuit breaker, that's in the regs. Anyone can put the breaker in" (Tr. II 156).

As its first witness, Cross Mountain called George Bob Smith, a certified electrician at the No. 6 Mine. Smith agreed

with Sampsel that the responsibility for making splices at the No. 6 Mine rested with the certified electricians (Tr. II 17). Smith stated that he accompanied Sampsel during the January 11 inspection. According to Smith, because of the low height on the section, he and Sampsel had to crawl. The cable was closer to the rib than to the middle of the entry, and as they crawled past the cable, they observed the temporary splice in question (Tr. II 19). Smith described the splice as "ragged but ... made strong" (Tr. II 20). It had mud and dirt on it and in some places the tape was torn (Tr. II 21). According to Smith, when he and Sampsel saw a wire sticking out of the splice they agreed the splice had to be examined (Tr. II 20). Smith did not get another look at the cable before Sampsel started cutting into it (Tr. II 84).

Smith believed the second shift mechanic made the splice in order to add additional cable so the roof bolting machine could be moved. The machine had been idle for three or four weeks. It was scheduled to be put back into production within three more shifts. The temporary splice would not have been present then because an electrical inspection was scheduled for the third shift on the same day the conditions were cited. As a result of the inspection, the temporary splice would have been replaced with a permanent splice (Tr. II 49-50, 70-71, 74).

Smith believed the roof bolting machine had been moved on the shift before he and Sampsel observed the splice (Tr. II 24-25). Smith highlighted on a map of the section the entries he believed the roof bolting machine had traveled (Tr. II 29; Resp. Exh. 2). The cable containing the splice was 700 to 750 feet long and, at the time the citation was written, 300 to 400 feet of the cable was piled within 25 feet of the power center (Tr. II 33-34). The splice was within 10 feet of the piled cable and the power center was 25 feet from the splice (Tr. II 32, 34).

Smith testified that the cable's coupler was plugged into the power center, but he did not know if the power was on (Tr. II 32). However, if the power was not on, he acknowledged that any miner could have gone to the power center and activated the roof bolter (Tr. II 58). In any event, the area containing the splice was not highly traveled and Smith did not think the cable was in an area where it would have needed to be moved, handled or hung out of the way of other equipment (Tr. II 34-35).

Smith and another mechanic cut the splice from the cable. When asked if he had a good opportunity to view the splice, Smith replied: "[A]fter we cut it out, we just laid it down ... it had tape, insulation on the phase wire of it. I do know that" (Tr. II 35). Smith testified that all of the wires were spliced with square knots (Tr. II 176, 180-181, 186). (Smith's testimony in this regard was confirmed by Patrick Graham, Cross Mountain's

Vice President for Health and Safety, who saw the knotted wires (Tr. II 193-192).)

Smith believed the exposed wire was the neutral ground wire. If phase wires also were exposed, he did not see them, and he believed he would have seen them because he was "right over top of ... [the splice] just looking at it" (Tr. II 46). Smith did not believe there was any hazard from handling an energized cable with an exposed neutral ground wire. "I don't see that you'd be executed or juiced" (Tr. II 38). There is no power in the ground wire, and if power ever did go through it, the power would trip the circuit breaker and the electricity would be disconnected (Tr. II 39).

Smith further testified that the splice had an outer covering of tape that probably had been wrapped three times around the splice. The tape was ragged and worn from being dragged along the mine floor and around corners (Tr. II 40, 43). In addition, the phase, ground and ground monitor wires were individually wrapped (Tr. II 40). The phase wires usually were wrapped with a half-lap of tape at least four or five times, which meant there were at least four or five thicknesses of tape wrapped around the phase wires (Tr. II 41). According to the manufacturer of the tape, it was one mil thick and a thickness of one mil provided protection against 1,000 volts (Tr. II 42). The phase wires in the cable carried 227 volts (Tr. II 44). Smith believed the cited splice was mechanically strong and well insulated (Tr. II. 45).

In Smith's opinion, square knots were used in the cable rather than connectors because the cable had to be pulled a long way and splices made with square knots were stronger than those made with connectors (Tr. II 44). When connectors were used, the wires were joined by crimping them together. If the cable was subject to a lot of tugging, the crimped wires tended to pull apart (Tr. II 45). Smith had seen splices made with connectors come loose many times (Tr. II 48-49). However, Smith also agreed that there were times when connectors were used. If an electrician had a connector on his or her person, and did not have to go the power center to get one, and if the trailing cable did not have added lengths to it so that it was dragged a lot on the mine floor, an electrician might use a connector (Tr. II 55).

Certified electrician Bobby Laymance was the company's next witness. Lamaynce was not present when Sampsel cited the alleged violation. However, he understood the roof bolting machine was idle at the time the violation was cited and had been idle for about four weeks (Tr. II 90). Laymance agreed with Smith that the roof bolting machine would have been put into use two or three shifts after the alleged violation was cited (Tr. II 108).

According to Laymance, he examined the roof bolting machine one week prior to January 11 (Tr. II 93-94). This was before the machine was trammed to its location on January 11 (Tr. II 96). Laymance did not think the cited splice was in the cable when he examined the machine. If it had been, he would have corrected the condition and noted his action in the electrical examination book (Tr. II 97-98). There was no such notation in the book (Tr. II 98).

Laymance was scheduled to examine the machine again on January 11 (Tr. II 112-113). During such examinations he always inspected the cable and he would have removed the temporary splice (Tr. II 114). He believed that the tramming of the roof bolter from the place he inspected it last to the place where it was positioned on January 11 could have caused the wear on the temporary splice that Sampsel found (Tr. II 103).

Laymance believed that the ground and ground monitor wires and phase wires were spliced by being tied in square knots rather then by being twisted (Tr. II 172). Laymance described why square knots were used in temporary splices. "Quick," he explained, "plus they are a whole lot stronger" (Tr. II 103). According to Laymance, connectors were used for permanent splices (Tr. II 121-122). Laymance also believed that the exposure of a ground wire would not have created a hazard (Tr. II 114-115).

THE VIOLATION

Section 75.603 defines a splice as "the mechanical joining of one or more conductors that have been severed" and it requires temporary splices in trailing cables to be "made in a workmanlike manner" and to be "mechanically strong and well insulated." The Secretary alleges the splice in the trailing cable to the roof bolting machine was not made in a workmanlike manner, was not mechanically strong and was not well insulated. The evidence establishes these contentions.

First, there is no doubt that the part of the cable Sampsel cited was a "splice." The witnesses who saw the cable agreed that the three phase conductors, the ground monitor wire and the ground wire had been severed and rejoined.

MSHA has a long and consistent history of interpretation of Section 75.603. This interpretation has guided both MSHA's inspectors and the nation's underground coal operators in resolving questions raised by the standard's practical application. In regard to one of the fundamental questions in this case, I note that more than fifteen years ago Commission Administrative Law Judge George Koutras, citing the 1978 Inspector's Manual, concluded that "[s]pliced conductor wires that have been tied in square knots or twisted together are

not made in a workmanlike manner and mechanically joined" and that "[t]he intent of the standard and the manual guidelines is to insure that such splices are uniformly made by means of mechanical devices, such as rings and connectors to prevent their separating under stress and undue abuse." Empire Energy Corp., Docket No. DENV 78-442-P (December 8, 1978); reported at 1 MSHC (BNA) 1751.

The most recent instructions to MSHA's inspectors and the nation's operators are found in the Program Policy Manual (PPM). There, MSHA again clearly states that "splices made by twisting conductors together or by tying knots in conductors, splices that have bare or exposed conductors ... constitute noncompliance." V PPM Part 75 at 63-64 (July 1, 1988). While these prohibitions are stated with respect to the suitability of splices (30 C.F.R. §75.514), I believe they also apply to temporary splices in trailing cables since such splices too must be "suitable." Moreover, the manual requires that "[e]ach power conductor, grounding conductor, and ground-check conductor ... be individually spliced using a proper splicing sleeve, ring or clamp," devices that by their nature exclude the use of twisted wire and square knots.

I do not doubt that the use of square knots produces a splice that is less likely to pull apart, as Smith testified. However, I also do not doubt that heat produced by the knots makes conductors more likely to break at the end of the knots, as Brock testified. Brock's opinion was based on his many years of practical experience. I also accept as fact that splices made with knots are larger than splices made with connectors and therefore are subject to more wear and tear when dragged throughout the mine.

For all of these reasons, I conclude that the subject temporary splice was not made in a workmanlike manner as required by section 75.603.

In addition, the condition of the splice violated the "well insulated" requirement of the regulation. Sampsel and Smith agreed that there were wires extruding from the splice. Indeed, this is what initially attracted Sampsel's attention to the problem. The exposed wires signaled the inadequacy of the insulation.

I therefore conclude the violation existed as charged.

S&S and GRAVITY

I conclude the violation was S&S. As I have just found, there was a violation of section 75.603. Moreover, the evidence establishes a discrete safety hazard in that I accept the testimony of Sampsel that the wires poking through the temporary splice were those of a phase conductor and that this subjected a

miner who might touch the wires to the danger of serious shock injury or electrocution, consequences of a reasonably serious nature to say the least.

While Laymance and Smith believed the ground wires were exposed, Laymance was not present when Sampsel observed the violation and Smith, who was present, did not have as close a look at the splice as Sampsel. Sampsel actually held the splice and cut into it. Smith did not pick up the splice, and, though he stated he was over the splice when he looked at the cable, he was less than precise in describing what he was able to see (Tr. II 46, 84, see also Tr. II 35). Moreover, in my opinion, even if only the ground wire had been exposed, a discrete safety hazard still would have existed. If there had been a short circuit coupled with a failure of the short circuit protection, any miner touching the wire would have been subjected to the danger of serious electrical injury or electrocution.

Fortunately, a serious electrical injury or electrocution did not result. Nevertheless, I conclude that one was reasonably likely. It is not clear whether the roof bolting machine was energized when Sampsel found the defective splice. However, the roof bolting machine obviously was energized when it was moved, and it is reasonable to infer the splice became defective during the move and put miners who had to move the cable along with the machine in danger of serious injury or electrocution.

Cross Mountain takes the position that, in the context of continued mining, the defective splice would have been replaced with a permanent splice before the machine was put into service and that the electrical inspector on the oncoming shift would have corrected the condition (Tr. II 49-50, 70-71, 74). In my view, the reasonable likelihood of an injury existed independently of what might have happened in the future because the splice was present when the machine was moved to the position where it was located when the violation was cited.

Further, the machine was going to be put into use within the next three shifts and, as both Smith and Brock agreed, with its coupler plugged into the power center a miner could have energized the machine at any time (Tr. II 58, 156). The splice was located close to the power center. At least a few miners were required to travel and had traveled in the area. I accept Smith's explanation that the low height of the area meant that miners would have had to crawl by the splice. I conclude that regardless of whether miners ever had to hang the cable, they were likely to inadvertently touch the splice with their hands or bodies as they crawled passed it. Had Laymance neglected to replace the temporary splice before this occurred, a serious shock injury or electrocution was reasonably likely.

I also find that this was a serious violation. The likelihood of a significant injury or death resulting from the infraction made it so.

UNWARRANTABLE FAILURE AND NEGLIGENCE

Sampsel and Smith agreed that the splice was made by a certified electrician since all splices at the No. 6 Mine were so made (Tr. I 294-295; Tr.II 17). Cross Mountain offered no justification or excuse for the certified electrician who made the subject splice violating section 75.603, other than the fact that tying the conductors with square knots was quick, convenient and durable (Tr. II 44-45, 48-49, 103, 121-122). While this may be true, it is clear that such a splice was not permissible under the standard. The lack of an acceptable justification or excuse for the violation, together with the fact that it was deliberately committed by a representative of mine management, establishes that the violation was due to Cross Mountain's unwarrantable failure to comply with section 75.603.

In addition, Cross Mountain was obviously negligent in that its certified electrician failed to exhibit the standard of care required by the circumstances. Indeed, and, as I have found, the company's negligence in this regard was more than ordinary.

Citation Nos.	Date	30 C.F.R. §	Proposed Penalties
3824999	2/2/93	75.202(a)	$7,000
3824998	2/2/93	75.220(a)(1)	$7,000

Section 75.202(a), in pertinent part, states:

> The roof ... of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof.

Section 75.220(a)(1), in pertinent part, states:

> Each mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions and the mining system to be used at the mine.

Citation No. 3824999, issued pursuant to section 104(a) of the Act, and, in association with an imminent danger order of withdrawal, states in part:

> [In the] 001 section the roof where persons were required to work was not being properly supported or otherwise controled [sic] to protect persons from

hazards related to falls of the roof. Only 8 of 25 required timbers had been set where the final two cuts were taken from the belt entry blocks of the pillar section.

Citation No. 3824998, which also was issued pursuant to section 104(a) of the Act and in association with the same imminent danger withdrawal order, states, in part:

> The operator was not complying with his approved pillar plan on the section shift[.] The final two cuts were take[n] from the belt entry blocks and only 8 of 25 timbers had been set[.] The wings between No. 16A and 18, 17 and 15A had also been removed. (Gov. Exh 2).

The inspector found the alleged violations were S&S and the result of Cross Mountain's "high" negligence.

THE TESTIMONY

Inspector Sampsel explained that on February 2, 1993, he was on a regular inspection at the No. 6 Mine (Tr. I 26-27). The company was engaged in mining the pillars on the 001 pillar section of the mine. Sampsel identified Cross Mountain's plan for pillar recovery (the pillar plan) (Joint Exh. 1; Tr. I 31-32). (The parties introduced a copy of the plan that was substantially similar to the plan in effect on February 2, 1993 (Joint Exh. 1).)

The pillar plan required pillars to be mined and posts to be set in a specific sequence (Tr. I 40; See Joint Exh. 1). Referencing the plan, Sampsel explained that when pillar Nos. 2 and 3 were mined, the plan required that a wing be left in each pillar. (A wing is a portion of the pillar about three feet wide and of varying length.) The wings offered additional roof support while portions of the pillar were extracted (Tr. I 38). As the wings picked up more and more weight and started to crush, they offered some warning as to when the roof would collapse (Tr. I 38-39). The same warning was given by posts as they started to break under pressure from the roof (Tr. I 75). Accord-ing to Sampsel, in addition to the wings, pegs were required to be left at the corners of the blocks. The pegs were small triangular pillars of coal that also served to support the roof until it caved in (Tr. I 53; Joint Exh. 1).

Sampsel maintained that when he positioned himself in the belt entry between pillar Nos 6 and 7 (X on Joint Exh. 1), he observed that the final cuts had been taken on pillar Nos. 2 and 3 (the two innermost pillars being mined), but that only eight of 25 required posts (Posts I and K on Joint Exh. 1) had been set (Tr. 1 62, 93). The eight posts were on one side, at I, located

between pillars 6 and 2 (Tr. I 63, 95). No posts had been set at K between pillars 3 and 7, although the plan called for 15 posts (Tr. I 63).

In Sampsel's opinion, the posts should have been set to protect those miners whose job it was to operate the remote controlled continuous mining machine and to extend the continuous haulage system. The posts were intended to stop a roof fall from encroaching on the miners (Tr. I 105-107; Joint Exh. 2). In addition, Sampsel believed that miners setting posts in preparation for the next mining sequence also were exposed to the danger of falling rock. He stated that if a roof fall had started it could easily have traveled down the track entry (Tr. I 69). Had the posts been set as required, they would have limited the fall up to the timbers and not let it progress into the belt entry intersection (Tr. I 73, 86, 88).

Sampsel maintained that not only was it a violation for Cross Mountain to fail to conform to its approved pillar extraction plan, but the company was mining without proper roof support because it had exposed an area of excessive unsupported roof (Tr. I 68). Sampsel described the company's failure to follow the plan as a "very big safety hazard ... especially when you don't follow it to the degree that this has not been followed" (Tr. I 71). If the violation continued, Sampsel believed it would have lead to a fatal injury (Tr. I 72).

In Sampsel's view, the section foreman who oversaw the removal of the pillars and the work of the crew and who had direct control of mining as it progressed was responsible for the violation (Tr. I 76, 81). He described the foreman as "constantly ... overseeing" the mining of the pillars (Tr. I 80, 84; See also Tr. I 115). In his experience, the foreman on duty usually had a copy of the roof control plan, as did other miners working on pillar extraction. (Cross Mountain stipulated that this was so (Tr. I 81, 83).)

Sampsel found the conditions created an imminent danger and that they constituted a violation of Sections 75.202(a) and 75.220(a)(1). (The imminent danger finding is not at issue.) In addition, he believed that the likelihood of a serious injury was "very high" (Tr. I 88) and that the violations were the result of the foreman's aggravated conduct (Tr. I 89).

Cross Mountain abated the violations by holding a safety meeting with all miners and discussed the roof control plan, as well as the hazards related to roof falls (Tr.I 89).

As its first witness, Cross Mountain called Bob Brandenburg, the general mine foreman. Although Brandenburg was not present when the 001 section was mined, he and Bobby Laymance accompanied Sampsel during the February 2, 1993 inspection (Tr.I 131-132,

146). After the second shift came out of the mine, the inspection party proceeded to the 001 section. Sampsel first checked the equipment for permissibility, then he inspected the faces. He began on the right hand side of the section and proceeded to the left side.

Brandenburg agreed that Sampsel observed the conditions he found to have been violations when he reached the belt entry. Brandenburg also generally agreed with Sampsel's description of where Sampsel had stood (the X between pillars 6 and 7 on Joint Exhibit 1) (Tr. I 134). The inspection party remained in the belt entry for approximately 25 to 30 minutes. Id.

Referencing Joint Exhibit 3, Brandenburg recalled the condition of pillar numbers 2 and 3 (the two pillars Sampsel believed had been mined). According to Brandenburg, cuts 15 and 15A had been taken in their entirety on pillar 2. Cuts 16 and 16A had been only partially taken on pillar 3 because draw rock had started to fall from the roof (Tr. I 136). (Brandenburg saw the rock on the mine floor (Tr. I 151).) Cut 17 on pillar 2 and cut 18 on pillar 3 had not been taken. Those parts of the pillars were still standing (Tr. I 136).

Brandenburg stated that between pillars 2 and 6 adjacent to the track entry (I on Joint Exh. 1) eight posts were set, just as depicted on Joint Exhibit 3 (Tr. I 140). According to Sampsel these would have been set immediately after cuts 15 and 15A had been completed (Tr I 141). In Brandenburg's opinion, if this was the case, the continuous miner operator would have been standing next to the inby corner of block 6 adjacent to the track entry, away from the roof fall hazard. (Brandenburg marked this position with a red X on Joint Exh. 2.) Further, he believed that when cuts 16 and 16A were taken the continuous miner operator would have been at the corresponding position with respect to block 7 (Tr. I 143). He stated the only other miner who might have been in the area would have been the section foreman (Tr. I 143).

In Brandenburg's opinion, the section foreman would have been present when posts were set and would have known whether all were set as required by the plan (Tr. I 147). After Cross Mountain's unsuccessful efforts to fully mine cuts 16 and 16A no miners would have been exposed to inadequately supported roof because the remote controlled continuous mining machine was withdrawn and posts were installed at L (Tr. I 144).

Brandenburg stated that after Sampsel observed the conditions Sampsel told Brandenburg that he was going to cite Cross Mountain for violations of its plan. Subsequently Brandenburg did not talk to Sampsel (Tr. I 138). He did not see any point in further discussion (Tr. I 157).

Brandenburg also did not speak with the section foreman about the area and did not ask him whether posts had been set as required by the plan or if cuts 17 and 18 had been made (Tr. 151). When asked why he did not speak with the foreman about the cuts, Brandenburg explained, in effect, that he did not ask because he could see the plan had not been violated. Further, in the days following the inspection he did not speak with the foreman because the foreman was suspended after the citations were issued (Tr. I 154, 159).

David Altizer, the resident engineer for Cross Mountain and author of the roof control plan for the No. 6 Mine, also testified. Altizer stated the plan was designed specifically to keep miners away from areas being mined. The continuous miner was remote controlled so that miners did not have to go near the pillar faces. Coal was removed by bridge conveyors and the miner who was responsible for the operation of the conveyors was approximately 84 feet from the face (Tr. I 167).

Altizer was not present on the day of the inspection and never observed the cited conditions. However, Altizer did not believe Cross Mountain was in violation of the plan. With regard to the number of posts set, Altizer believed that it had been decided not to take the two last cuts in the mining sequence, cuts 17 and 18, because draw rock had started to fall. Noting that the plan stated "[p]rior to mining Cut No. 17, Post K will be installed," Altizer maintained that if cut 17 was not mined, the posts at K need not have been set (Tr. I 172, 193-194). Concerning the posts at I, Altizer was unaware a citation had been issued because only eight posts were set in lieu of the ten required under the plan at that location. Id. Posts are set on four feet centers, therefore, in Altizer's view, if the width of the entry where posts I should have been located was 17.3 feet or less, rather than the normal 20 feet, eight posts would have complied with the plan (Tr. I 174). However, Altizer agreed he did not know the width of the entry (Tr. I 198).

Even if the crosscut in which posts I were located was cut 20 feet wide on the perpendicular, eight posts might have complied with the plan if they were "skew[ed] ... around ... so that they ran perpendicular to the ribs in the crosscut instead of parallel to the entry" (Tr. I 175).

Altizer stated that the typical height on a pillar section was 40 inches or less and that because of the low height Sampsel's perspective easily could have been distorted and he could have thought cuts 17 and 18 had been taken when, in fact, they had not been cut (Tr. I 177, 218).

Altizer also did not think there had been a violation of section 75.202. The standard states that the roof shall be supported to protect persons from roof falls. In Altizer's

view the only person who would have been in the crosscut when cuts 16A was mined was the continuous mining machine operator. The miner in charge of the bridge conveyor and the miner or miners setting the posts would be outby the crosscut. If cuts 17 and 18 had been mined, none of these people would have been exposed to a roof fall hazard in that everyone would have been even with the intersection of the belt entry and the crosscut, if not completely outby it (Tr. I 183-184). (However, he did not believe cuts 17 and 18 had been mined because the roof had not fallen in the subject crosscut. If the cuts had been taken the roof probably would have collapsed (Tr. I 188, 218-219).)

Finally, Altizer agreed that if, as asserted by Sampsel, cuts 17 and 18 had in fact been mined and posts had not been set at K, the roof control plan would have been violated (Tr. I 196). In his opinion, the section foreman would have been present when cut 17 was taken and, if posts had not been set, the foreman would have been obligated to cease mining and to rectify the situation (Tr. I 213-214).

Mine superintendent Steve Cox testified regarding the suspension of section foreman David Sweeney. According to Cox, Sweeney was suspended pending the company's investigation of the circumstances leading to the order and citations. Following the company's review, it was determined that Sweeney had done nothing wrong and he was called back to work (Tr. I 228-230). Cox stated that Sweeney had no recollection of the events leading to the issuance of the withdrawal order and citations. Prior to Sampsel finding the alleged violations, Sweeney had left the section and gone to the mine telephone to call out the results of the preshift examination (Tr. I 229-230).

Bobby Laymance was the company's final witness. In addition to being a certified electrician, Laymance was in charge of the third shift maintenance crew. He testified that cuts 17 and 18 had not been taken and that cut 16A was only partially taken. In his view, mining had been discontinued because of the presence of draw rock (Tr. I 236). He also was of the opinion that the height of the section was about 36 inches (Tr. I 238).

According the Laymance, there were eight posts set at location I. He was certain because he, Sampsel, and Brandenburg had counted them (Tr. I 247-248). The posts were set as depicted on Joint Exhibit 3. They were parallel with the belt entry between blocks 2 and 6. See Joint Exh. 3. In Laymance's opinion, once cuts 16 and 16A had been mined, the crew had pulled back, posts had been set at L (the last posts required to be set under the plan) and no miners had re-entered the area.

THE VIOLATIONS

The alleged violations of sections 75.202(a) and 75.220(a)(1) arose out of the same factual circumstances and may be considered together. The Secretary charges that the roof control plan was violated (section 75.220(a)(1)) in that "[o]nly eight of 25 required timbers had been set where the final two cuts were taken from the belt entry blocks of the pillar section" (Gov. Exh. 1). In addition, these same conditions meant that "the roof where person were required to work was not properly supported or otherwise controlled to protect persons from hazards related to falls of the roof" (section 75.202(a)(1)).

Sampsel and Cross Mountain's witnesses are in agreement that the company was engaged in pillar recovery on the section. In addition, the parties are in agreement that under the approved roof control plan pillar recovery was governed by a pillar plan essentially identical to that set forth on Joint Exhibit 1. The plan contains the required sequence for the mining of the pillars and the setting of posts so that the roof will fall only in the area from which pillar support has been removed by mining. The posts break the fall of the roof to protect from falling roof miners who may be working in the crosscut between the pillar line being mined and the pillar line immediately outby. The posts also protect equipment located in the same area. In order to determine whether the company violated its pillar plan, and thus its roof control plan, the requirements of the plan must be compared with the factual conditions as established by the testimony.

The pillar plan, in pertinent part, states:

> 10.) After mining Cut No. 15A, and prior to mining Cut No. 16, Post I will be installed.
>
> 11.) Prior to mining Cut No. 17, Post K will be installed.
>
> 12.) After mining Cut No. 18, Post L will be installed.

(Joint Exh. 1) It further states: "The cut sequence shown is typical. Cuts may be deleted if roof conditions warrant, as determined by mine management" (Id).

The record establishes that there were no posts installed at K, that the eight posts referenced by Sampsel in the citations were installed at I. It is also clear from the testimony that posts required to be present at L were in fact there. The Secretary contends that the plan was violated in that only

eight posts were set at I, whereas the plan requires ten and that although cut 17 was mined, no posts were set at K. It is Cross Mountain's contention that eight posts were permissible at I, that cut 17 was not mined due to adverse conditions, and that no posts were required at K.

After weighing these contentions and the evidence, I conclude the Secretary has established that Cross Mountain violated the plan. First, I find that there should have been ten posts at I, rather than eight. This finding is based upon the plan itself. Joint Exhibit 1, which is substantially similar to the plan that was in existence on February 2, 1993, shows ten posts between pillars 2 and 6, and there is no dispute that only eight were present. The plan requires that the posts at I be installed "[a]fter mining Cut 15A, and prior to mining Cut 16" (Joint Exh. 1). Cross Mountain's general mine foreman viewed the area with Sampsel and he stated that cuts 15 and 15A had been mined in their entirety and that mining had started on cuts 16 and 16A (Tr. I 135-136). I am persuaded that, in fact, as both Sampsel and Brandenburg maintained, cuts 15A and 16 had been made. Therefore, under the plan the posts at I should have been installed.

In my view, the number of posts required was exactly as shown on the plan, that is to say, ten. The plan speaks for itself. If, as Altizer suggested, the plan allowed less than five posts per row, depending on the width of the entry and the direction of the post row; or, if the plan left discretion to the operator to determine the number of posts to be set, the plan should have so stated. (In this regard I note that the pillar plan specifically allowed management the discretion to delete cuts "if roof conditions warrant" (Joint Exh. 1).) As the plan's author Altizer presumably understood the importance of stating the requirements of the plan clearly and specifically.

The question of whether the lack of 15 posts at K violated the plan depends upon whether cut 17 was mined. The pillar plan states, "Prior to mining Cut No. 17 Post K will be installed" (Joint Exh. 1). Sampsel testified that he viewed pillar No. 2 and that cut 17 had been mined (Tr. I 62, 93). Brandenburg, who was with Sampsel and who viewed the same area, stated that cut 17 had not been mined (Tr.I 136). I credit Sampsel's testimony, and conclude that cut 17 had been taken and therefore that the lack of posts at K violated the plan. I find Brandenburg's description of the conditions to be less reliable than Sampsel's because of Brandenburg's admission that he did not try to convince Sampsel that no violation existed. It is inconceivable to me that if the general mine foreman believed the company truly was in compliance with its plan he would not have tried to convince the inspector of the same. Further, Brandenburg acknowledged that the section foreman would have known whether or not Cross Mountain complied with the plan, yet Brandenburg did

not discuss the matter with the section foreman (Tr. I 147, 151). Nor, for that matter, did Cross Mountain call the section foreman to testify, even though it concluded he "had done nothing wrong" (Tr. I 228). I find mine foreman Cox's explanation that the section foreman had no recollection of the conditions that lead to the alleged violation implausible. After all, the same conditions lead to an imminent danger order of withdrawal, which is hardly a garden variety incident at a mine. I infer that had the section foreman been called as a witness his testimony would have been adverse to the company (Tr. I 229-230).

I also discredit Laymance's testimony that cut 18 had not been taken (Tr. I 236). I find Sampsel's assertion to the contrary more believable and conclude cut 18 had been mined. I again note the lack of any on-site attempt to convince Sampsel he was wrong in his assessment of conditions on the 001 Section and the failure of the section foreman to testify.

In addition to the violation of section 75.220(a)(1), I conclude the Secretary has established a violation of section 75.202(a). The standard requires, in pertinent part, that the roof where persons work or travel be supported or otherwise controlled to protect persons from falls. A violation of the roof control plan does not necessarily establish in and of itself that the roof was not supported or controlled to protect persons from falls. Eight posts were present at I and, although ten were required under the plan, the record does not establish that eight would have failed to act as an effective breaker for the roof as it began to collapse following the mining of Cut 15A.

However, there were no posts at K. I agree with Sampsel that the total lack of posts endangered the miners who set the last posts in the sequence at L to the dangers of falling roof. I have found that cut 18 was made. It is clear that the theory of pillar removal was that the roof would collapse after the cuts were made and that the collapse would be controlled by the breaker posts. Sampsel persuasively explained that once cut 18 was taken and the roof began to collapse there was nothing to prevent the fall from traveling into the belt entry and over the miners setting posts at location L (Tr. I 73, 86, 88).

Altizer's explanation that there was no danger because everyone would have been in the belt entry and crosscut or outby them is not reassuring. The fact remains that without the posts at K there was nothing to hinder the progression of a fall caused by the removal of the pillar at cut 18. Nor do I find that the previous roof bolting of the crosscut and belt entry lessened the danger of roof fall to those setting the posts at L. As Altizer himself noted, even given the presence of the roof bolts it is probable the roof would not have remained in tact (Tr. I 221-222). Indeed, the approved pillar plan contemplated that it

would fall. For these reasons, I find that a violation of section 75.202(a) has been established.

S&S and GRAVITY

I conclude also that the violations were S&S. The evidence establishes the standards were violated. Moreover, both violations presented a discrete safety hazard. Because of the violations miners setting posts as required by the pillar plan were subjected to the danger of falling roof.

Further, I conclude that it was reasonably likely such a hazard would have occurred. Sampsel's fear that the lack of breaker posts at K would have facilitated a roof fall beyond K into the belt entry where miners were installing posts at L was a real one. Altizer, who was Cross Mountain's witness, testified to the probability that with cuts 17 and 18 taken the roof would fall. Moreover, it is common knowledge that pillar removal is one of the most dangerous operations in mining, as witnessed by Cross Mountain's use on the section of remote controlled mining equipment. The remote controlled miner and bridge conveyor to extract the pillars was described by Altizer as "much safer" than a traditional extraction system and bespeaks the heightened hazards of pillar removal (Tr. I 184).

Finally, any injury that would have occurred as a result of miners being struck by falling roof while setting posts would almost certainly have been serious, if not fatal.

The violations were also serious. They presented the hazard of miners being struck by falling roof. Given the fact that cut 18 had been taken, that no posts had been set at K, and that the roof was supposed to fall, I conclude that the lack of posts at K meant that it was probable the fall would travel into area L when miners were setting posts there.

NEGLIGENCE

Sampsel testified that the section foreman oversaw pillar removal on the section and had direct control over mining of the pillars as it progressed (Tr. I 76, 81). It was the section foreman who bore overall responsibility for compliance with the plan. In fact, as Cross Mountain agreed, the section foreman usually carried on his person a copy of the plan (Tr. I 81, 83, 115). I credit Sampsel's testimony.

I further conclude that the inherently dangerous nature of pillar removal required of the section foreman a high standard of care to insure there was compliance with the plan, and I agree with Altizer that if cut 17 was mined the section foreman, who would have been present, was obligated to set the posts at K (Tr. I 213-214). Since I have found that, in fact, cut 17 was

mined and that the posts at K were not set, it follows that the section foreman did not meet the standard of care the situation demanded.

The thrust of the testimony of Cross Mountain's witnesses was that the presence of adverse mining conditions (i.e., draw rock) caused the section foreman to discontinue mining before the mining sequence was completed. It may be that the crew encountered draw rock on the section. However, because cuts 17 and 18 were mined, the record suggests that rather than abandon the mining sequence the foreman chose to mine to its end. Given the high standard of care required of the section foreman, I find that he was highly negligent in failing to insure compliance with the plan and in failing to prevent the roof conditions from exposing miners under his direction to the hazards of roof fall.

DOCKET NO. SE 93-255

SETTLED VIOLATIONS

Citation No.	Date	30 C.F.R. §	Proposed Penalty	Settlement
3824922	10/21/92	50.20(a)	$300	$225

The Secretary alleges that Cross Mountain failed to report an injury within ten days as required by the standard. Counsel for the Secretary stated that, although the inspector found the violation of section 50.20(a) was the result of Cross Mountain's "high" negligence, in fact the company was moderately negligent and the Secretary had agreed to modify the citation accordingly (Tr. I 13). I accepted the settlement (Tr. I 14).

Citation No.	Date	30 C.F.R. §	Proposed Penalty	Settlement
3824776	1/14/93	70.100(a)	$690	$0

The Secretary alleged that a respirable dust sample for a designated occupation indicated a miner was working in an environment containing excessive respirable dust. At the commencement of the hearing, Cross Mountain's motion to vacate the citation was pending. Cross Mountain maintained the alleged violation was based on improperly obtained respirable dust samples. Counsel for the Secretary stated that the Secretary did not oppose the motion and that MSHA agreed to vacate the citation (Tr. I 14). I dismissed the Secretary's petition with respect to the alleged violation on the understanding the citation was or would be vacated. Id.

OTHER CIVIL PENALTY CRITERIA

The history of previous violations at the No. 6 Mine indicates that in the 24 months prior to October 14, 1992

(the date of the first alleged violation found in this case), 471 violations were assessed and paid (Gov. Exh. 6). (The computer printout listing the history of previous violations was submitted post-hearing pursuant to the agreement of the parties (Tr. II 297-299).) Of these violations, four were violations of section 75.902, two were violations of section 75.202(a), and 18 were violations of section 75.220. There were no previous violations of section 75.603. I find that the overall applicable history of previous violations at the mine was large and that the history of previous violations of the roof control plan was such as to moderately increase the civil penalty that must be assessed for the violation of section 75.220(a)(1).

The parties have stipulated that the mine is large in size and that Cross Mountain's ability to continue in business will not be affected by the assessment of a "reasonable penalty" for each violation (Stipulation 5).

I find that Cross Mountain exhibited good faith in attempting to achieve rapid compliance after being cited for the violations.

CIVIL PENALTIES

The Secretary has proposed a civil penalty of $4,400 for the violation of section 75.902. The proposal was based upon a special assessment made as a result of the S&S and unwarrantable findings that accompanied the violation. In view of my findings that the Secretary has failed to establish the S&S and unwarrantable failure findings, the proposal is highly excessive.

The violation was serious and Cross Mountain was negligent in allowing the violation to exist. The highest penalty previously paid for a violation of section 75.902 was $178. Given the fact that the No. 6 Mine is large in size and has a large history of previous violations, I find a civil penalty of $300 to be appropriate.

The Secretary has proposed a civil penalty of $6,500 for the violation of section 75.603. The proposal was based upon a special assessment made as a result of the S&S and unwarrantable findings that accompanied the violation. I have upheld those findings. Further, I have found the violation was serious and was caused by Cross Mountain's more than ordinary negligence. Given these factors and the criteria previously mentioned relating to the mine size and overall history of previous violations, as well as Cross Mountain's ability to continue in business and good faith abatement, I conclude a civil penalty of $3,000 is appropriate. This is far more than Cross Mountain has paid for any previous violations and the amount is meant

to alert the company to the fact that S&S and unwarrantable violations must be deterred.

The Secretary has proposed civil penalties of $7,000 each for the violations of section 75.202(a) and section 75.220(a)(1). The proposals were based upon the violations having been issued in association with an imminent danger order. The order was not before me; however, I have found the violations were very serious and in allowing them to exist Cross Mountain was highly negligent. Given these factors, and the other factors previously mentioned, I conclude civil penalties of $4,000 appropriate for the violations. Finally, based on Cross Mountain's history of previous violations of its roof control plan, the assessment for the violation of section 75.220(a)(1) is increased by $300 to $4,300.

ORDER

DOCKET NO. SE 93-108

Within 30 days of the date of this decision, the Secretary is **ORDERED** to modify Citation No. 3824679 by deleting the S&S and unwarrantable findings and to indicate the citation is issued pursuant to section 104(a) of the Act. 30 U.S.C. §814(a). Cross Mountain is **ORDERED** to pay a civil penalty of $300 for the violation of section 75.902.

DOCKET NO. SE 93-244

The settlement of Citation Nos. 3824750 and 3824751 is **APPROVED**. Within 30 days of the date of this decision, the Secretary is **ORDERED** to modify the citations by deleting the "high" negligence findings and by substituting findings of "moderate" negligence. Cross Mountain is **ORDERED** to pay civil penalties of $500 for each violation. In addition, the settlement of Citation No. 3824775 is **APPROVED**, within 30 days of the date of this decision, the Secretary is **ORDERED** to vacate Citation No. 3824775, if he has not already done so.

DOCKET NO. SE 93-245

Citation No. 3824983 is **AFFIRMED**. Within 30 days of the date of this decision Cross Mountain is **ORDERED** to pay a civil penalty of $3,000 for the violation of section 75.603. In addition, Citations No. 3824998 and 3824999 are **AFFIRMED** and within 30 days of the date this decision Cross Mountain is **ORDERED** to pay a civil penalty of $4,000 for the violation of section 75.202(a) and of $4,300 for the violation of section 75.220(a)(1).

DOCKET NO. SE 93-255

The settlement of Citation No. 3824922 is APPROVED. Within 30 days of the date of this decision the Secretary is ORDERED to modify the citation by deleting the "high" negligence finding and substitute a finding of "moderate" negligence and Cross Mountain is ORDERED to pay a civil penalty of $225 for the violation of section 50.20(a) In addition, the settlement of Citation No. 3824776 is APPROVED. Within 30 days of the date of this decision the Secretary is ORDERED to vacate Citation No. 3824776, if he has not already done so.

Upon compliance with these orders these matters are DISMISSED.

David F. Barbour

David F. Barbour
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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AUG 31 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEST 92-435-M
	:	A.C. No. 45-03085-05507
	:	
	:	Docket No. WEST 92-734-M
v.	:	A.C. No. 45-03085-05508
	:	
	:	Docket No. WEST 93-24-M
	:	A.C. No. 45-03085-05509
WALLACE BROTHERS, INC., Respondent	:	
	:	Docket No. WEST 93-594-M
	:	A.C. No. 45-03085-05510
	:	
	:	Wallace Portable Crusher #1

DECISION

Appearances: Jay A. Williamson, Esq., Office of the Solicitor, U.S. Department of Labor, Seattle, Washington, for Petitioner;
James A. Nelson, Esq., Toledo, Washington, for Respondent.

Before: Judge Morris

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

A hearing was held in Seattle, Washington. The parties filed post-trial briefs.

JURISDICTIONAL

Threshold Issues

Wallace owns and operates a portable crusher. Wallace also owns a rock pit located along the Cowlitz River, a few miles south of Toledo, Washington. Crushing operations take place at this pit intermittently, and may last for one or two weeks, or

may extend up to two or three months, depending upon whether they are stockpiling the crushed rock or crushing for a specific job. The majority of the crushing operations take place at various rock pits owned by the Federal Government, the state of Washington, individual counties, or private individuals. Wallace bids on contracts, either as a prime contractor or sub-contractor, on contracts where rock is needed to build logging roads on government property, both federal and state; on timber company property; state and local road construction projects; and various other jobs where crushed rock is needed. The length of time Wallace spends at each location depends upon the amount and type of rock produced, and varies from two or three days to several months. The size of the crew used in operating the crusher is normally three men.

In this case, Wallace raises the issue of whether its portable crusher is a mine within the meaning of Section 3(h)(1)(c) of the Act. The equipment crushes the rock taken from the pit. After being crushed, the rock is then taken several hundred yards to an asphalt plant to be further processed.

DISCUSSION

Section 3(h)(1) of the Act defines a "coal or other mine" as

> (A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground; (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and working structures, facilities, equipment, machines, tools, or other property, including impoundments, retention dams, and tailing ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal facilities.

The definition is not limited to an area of land from which minerals are extracted but, as is noted, it also includes facilities, equipment, machines, tools, and other property used in the extraction of minerals from their natural deposits and in the milling or preparation of the minerals. See, e.g., Donovan v. Carolina Stalite Co., 734 F.2d 1547 (D.C. Cir. 1984); Oliver M. Elam, Jr. Co., 4 FMSHRC 5 (January 1982). In determining cover-

age, we must give effect to Congress's clear intention in the Mine Act, discerned from "text, structure, and legislative history." Coal Employment Project v. Dole, 889 F.2d 1127, 1131 (D.C. Cir. 1989). Congress determined to regulate all mining activity. The Senate Committee stated that "what is considered to be a mine and to be regulated under this Act [shall] be given the broadest possible interpretation, and ... doubts [shall] be resolved in favor of inclusion of a facility within the coverage of the Act." S. Rep. No. 181, 95th Cong., 1st Sess. 14 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 602 (1978).

This broad interpretation has been adopted by the courts. See, e.g., Carolina Stalite Co., supra at 1554. The definition of "coal or other mine" has been applied to a broad variety of facilities that are not "an area of land from which minerals are extracted." See, e.g., Harman Mining Corp. v. FMSHRC, 671 F.2d 794 (4th Cir. 1981) (operator loaded previously extracted and prepared coal onto railroad cars for transportation); Stoudt's Ferry, 602 F.2d 589 (3d Cir. 1979) (operator separated sand and gravel from material that has been dredged from a river by the Commonwealth of Pennsylvania); Carolina Stalite, supra at 1547 (D.C. Cir. 1984) (operator heated previously mined slate in a rotary kiln to create a lightweight material used in making concrete blocks.

In a recent case, Commission Judge August F. Cetti held that the portable crusher cited by MSHA and used to crush rock into smaller usable sizes "is properly characterized as the "work of preparing coal or other minerals. Fred Knobel, 15 FMSHRC 742, 744 (April 1993).

The fact that the rock, after being crushed, is removed to an asphalt plant several hundred yards away to be further processed does not avoid the initial coverage of the Mine Act.

Wallace's objections to MSHA's jurisdiction are **REJECTED.**

Docket No. WEST 93-24-M

Citation No. 3924000

This citation alleges a non-S&S violation of 30 C.F.R. § 56.18002.[1] The citation reads:

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[1] The regulation provides:

§ 56.18002 Examination of working places.

A person designated by the operator was not examining each working place at least once a shift for conditions which may adversely affect safety or health. A record of such examinations was not kept at the plant.

The Evidence

When MSHA Inspector Pederson initiated his inspection on July 21, he requested to see the records relating to an examination of working places kept by the operator pursuant to § 56.18002. (Tr. 129, 134). Foreman Dan Fischer said the areas had been examined and records kept but such records were at home or in his truck. (Tr. 130).

The Inspector gave the operator the chance to produce the records until the time he ended the inspection. When the records were not produced, Inspector Pederson issued a citation. (Tr. 131, 132, 354-355). The Inspector also informed the foreman that if the records were produced at a later date, he would vacate the citation. (Tr. 132). The foreman did not recall this offer but I credit the Inspector's version since his recollection is confirmed by his notes. (Tr. 534, 552). In any event, the records were never produced even at the time of the hearing. (Tr. 132, 550, 552).

(a) A competent person designated by the operator shall examine each working place at least once each shift for conditions which may adversely affect safety and health. The operator shall promptly initiate appropriate action to correct such conditions.

(b) A record that such examinations were conducted shall be kept by the operator for a period of one year, and shall be made available for review by the Secretary or his authorized representative.

(c) In addition, conditions that may present an imminent danger which are noted by the person conducting the examination shall be brought to the immediate attention of the operator who shall withdraw all persons from the area affected (except persons referred to in section 104(c) of the Federal Mine Safety and Health Act of 1977) until the danger is abated.

Discussion

I find that Respondent's crusher foreman Dan Fisher, a competent person designated by the operator, examined the working places. (Tr. 515, 546-547).

However, Section 56.18002(b) requires that the record of such examinations be made available for review by the Inspector. Since the records were not available for review, Citation No. 3924000 should be affirmed and a penalty assessed.

Docket No. WEST 93-435-M

Citation No. 3640530

This citation alleges a non-S&S violation of 30 C.F.R. § 56.1000.[2] The citation reads:

> The mine operator failed to notify MSHA field office of the opening and closing and the location of their portable crushing operation. The operator in the past has moved to several locations and never informed MSHA of the approximate opening and closing dates or the location as required by the standard. (Ex. P-3).

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[2] The regulation provides:

§ 56.1000 Notification of commencement of operations and closing of mines.

The owner, operator, or person in charge of any metal and nonmetal mine shall notify the nearest Mine Safety and Health Administration and Metal and Nonmetal Mine Safety and Health Subdistrict Office before starting operations, of the approximate or actual date mine operation will commence. The notification shall include the mine name, location, the company name, mailing address, person in charge, and whether operations will be continuous or intermittent.

When any mine is closed, the person in charge shall notify the nearest subdistrict office as provided above and indicate whether the closure is temporary or permanent.

With respect to this citation, Wallace renews its objections previously considered under "Threshold Issues." The same rulings apply.

Wallace also asserts that which constitutes a "mine opening" and "mine closing" is a matter left to the owner, operator, or person in charge of a metal and nonmetal mine.

I disagree. Section 56.1000 requires that MSHA be notified "before starting operations." Further, MSHA shall be notified "when any mine is closed."

In reply to Wallace's questions: The regulations are explicit. A portable crusher such as the Wallace crusher is required to report to the nearest MSHA office each time it moves from one open pit (mine) to another open pit (mine). This is true regardless of the number of times the crusher moves each year.

On the merits, Wallace urges there is ample evidence to prove that its Crusher No. 1 did report to MSHA whenever it moved from one pit to another. I disagree. The citation in issue here was issued pursuant to an audit initiated on April 25, 1991, and concluded on May 1, 1991. An audit conducted by MSHA reviews various forms required to be kept by an operator subject to the Mine Act. (Tr. 29-30; 54).

Inspector Pederson testified in detail as to how notifications are handled in the MSHA field office. (Tr. 39-40, 204, 363-363).

The Secretary argues that since the notification form is not in the permanent file or the Inspector's file of the MSHA (Bellevue) office, then no such notification was sent.

Discussion

In resolving these issues, I conclude Wallace did not file the requisite notices with the MSHA office. Mr. Wallace, in a discussion with the Inspector, stated that "he did not have time to go making out all kinds of paperwork." He just did "not want to bother with it." (Tr. 33). Mr. Wallace testified at length in the hearing but no evidence was offered to rebut his statements.

It is further apparent from even a casual reading of the transcript that Mr. Wallace relies to a large degree on his accountants. It is accordingly significant that when counsel for the company searched the accounting records, he found no notification to MSHA. (Tr. 249). In addition, no one protested on behalf of the company when the citation was originally issued. (Tr. 33, 492-493).

Finally, the company accountant, Mr. Cournyer, agrees the MSHA forms (Ex. R-2, R-3,and R-4) were not used until after the May 1, 1991, audit. (Tr. 249-250).

Notification required by MSHA can be important as it may relate to safety matters as well as termination of outstanding violations.

In sum, Citation No. 3640530 should be affirmed and a penalty assessed.

Docket No. WEST 93-594-M

Citation No. 3923999

This citation alleges a non-S&S violation of 30 C.F.R. § 56.12028.[3] The citation reads:

> The operator did not have a continuity and resistance of the grounding system tested and a record kept of such a test. This test would assure that a ground path for fault current was intact.

The Evidence

Inspector Pederson requested a copy of the operator's electrical testing records from Foreman Dan Fisher. Specifically, he requested a copy of the continuity and resistance of the plant's electrical system. (Tr. 135, 136).

The purpose of these tests is to assure the operator and any of his employees that the integrity of his electrical cables, the

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[3] The regulation provides:

> **§ 56.12028 Testing grounding systems.**
>
> Continuity and resistance of grounding systems shall be tested immediately after installation, repair, and modification; and annually thereafter. A record of the resistance measured during the most recent tests shall be made available on a request by the Secretary or his duly authorized representative.

wiring connections, and the power system itself, is safely installed. If a fault occurred, a full current would have a place to return to the generator via the equipment ground conductor. (Tr. 136; Ex. P-15).

Mr. Fischer said he did not have any records at all.

Inspector Pederson found nothing hazardous with the system when he tested it. (Tr. 138).

Discussion

Wallace, in its brief, raises the defense that it actually conducted the systems tests and merely failed to maintain a record of the most recent tests.

Wallace's argument lacks merit. The regulation provides that a "record of the most recent tests shall be made available on a request by the Secretary or his duly authorized representative." Since the record was not made available, this citation should be affirmed.

An appropriate penalty will be discussed hereafter.

Docket No. WEST 93-594-M

Citation No.4127301

This citation alleges a non-S&S violation of 30 C.F.R. § 56.14107(a).[4] The citation reads:

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[4] The regulation provides:

§ 56.14107 Moving machine parts.

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

(b) Guards shall not be required where the exposed moving parts are at least seven feet away from walking or working surfaces.

Two idler pulleys on the transfer conveyor return belt, between the shaker screen and conveyer to load out bunker and one side of the self-cleaning tail pulley opening, did not have guards installed to prevent incidental contact. No foot-traffic was observed within area during operations.

Discussion

The issue presented here by Respondent is whether the exposed moving parts were within seven feet of the working surfaces.

I am persuaded here by Inspector Pederson's detailed description of the unguarded tail pulley and idler rollers. These were not guarded on the open side where a person could be exposed. Further, the tail pulley was about a foot off the ground. There were also additional unguarded parts 3.5 to 4 feet off the ground. (Tr. 141-149). Exhibit P-16 is a drawing (not to scale) illustrating the conveyor.

On the other hand, Mr. Wallace did not know which pulleys the Inspector was testifying about. (Tr. 505). In addition, he did not know if the tail pulley had a guard on it. (Tr. 506-507).

As a result of the above evidence, I am not persuaded by Mr. Wallace's testimony that the return roller on the belt was "right close to seven or maybe over a little bit [above]." (Tr. 446).

Citation No. 4127301 should be affirmed and penalty assessed.

Docket No. WEST 93-594-M

Citation No. 4127302

This citation alleges an S&S violation of 30 C.F.R. § 56.11027.[5] Prior to the hearing, the Secretary modified the

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[5] The regulation provides:

§ 56.11027 Scaffolds and working platforms.

Scaffolds and working platforms shall be of substantial construction and provided with handrails and maintained in good condition.

citation to allege a violation of 30 C.F.R. § 56.11002, which provides:

> **§ 56.11002 Handrails and toeboards.**
>
> Crossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction provided with handrails, and maintained in good condition. Where necessary, toeboards shall be provided.

Discussion

Leave to amend "shall be freely given when justice so requires." Foman v. Davis, 371 U.S. 178, 182, 82 S. Ct. 227.9 L.Ed 2d 222 (1962). Rule 15(a) FRCP; Cyprus Empire, 12 FMSHRC 911, 916 (May 1990).

On the record here it is clear that a portion of the railing was missing from the side of the dragline. It is uncontroverted that the walkway was used by the operator of the dragline to go to the engine compartment of the crane. (See Ex. R-5 through R-10). The walkway itself was 15 feet long and 6 feet of it lacked a railing. The walkway was five to seven feet above the ground. If a person were to fall, he was on the exposed side and could fall to the ground. (Tr. 155-158, 322, 337, 435-455, 508-509). (See Exhibit R-5 marked to show missing rail.)

The principal focus of Respondent's argument (Brief, pp. 26, 27) is that no violation of 30 C.F.R. § 56.11002 has been established.

Wallace argues the dragline violation does not come within § 56.11002. Contrary to this view, § 56.11002 is explicable if the facts fall within the prohibition of the regulation. In this case, the dragline operator used the walkway to service the engine. In this situation, he was exposed to the hazard.

Wallace also argues the walkway located at least five feet above the ground is not "elevated" within the meaning of 30 C.F.R. § 56.11002.

> Floor boards shall be laid properly and the scaffolds and working platforms shall not be overloaded. Working platforms shall be provided with toeboards when necessary.

The Code of Federal Regulations does not define "elevated." Accordingly, it is appropriate to consider the dictionary definition:

> "Elevated" 1. raise up above the ground or other surface [an ~ highway]. Webster's New Collegiate Dictionary, 1979 at 365.

Wallace further argues that the section of the missing guardrail was not along the path used by the dragline operator to reach to the engine compartment. (Tr. 451-451). Rather, it is argued that Mr. Wallace correctly stated the evidence when he testified "and, when you got the door open, the door covers the end of it where you can't fall off it either." (Tr. 454).

I reject this argument. Exhibit R-5 shows the portion of the rail that was missing. A door could not cover such an area.

Wallace further argues any violation of Citation 4127302 is not "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 822, 825) (April 1981).

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained:

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

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

> 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). (Emphasis in original.)

The question of whether any particular violation is S&S must be based on the particular facts surrounding the violation. Secretary of Labor v. Texasgulf, Inc., 10 FMSHRC 498 (April 1988); Youghiogheny and Ohio Coal Company, 9 FMSHRC 2007 (December 1987). In addition, any determination of the significant nature of a violation must be made in the context of continued normal mining operations. National Gypsum, supra, at 329. Halfway, Inc., 9 FMSHRC 8, 12 (January 1986); U.S. Steel Mining Co., 7 FMSHRC supra, at 1130 (August 1985).

Concerning the S&S designation: it is clear that there was an underlying violation of 30 C.F.R. § 56.11002. A measure of danger, i.e., the violation contributed to the discrete hazard of falling off the walkway to the ground below, a distance of five to seven feet. (Tr. 157-158). The unrebutted testimony of Inspector Pederson that the injuries reasonably likely to occur, were there to be a fall, would be a broken ankle, broken leg, broken back, sprains or bruises - all reasonably serious injuries. (Tr. 164-165).

Finally, the remaining issue is the third paragraph of the Mathies formulation.

Inspector Pederson observed that handrails prevent a person from falling off the platform where a worker could lose his balance and fall. (Tr. 160-161). Given the fact that there was a six-foot length of walkway lacking a handrail worsens this potential since if a worker stumbled, there would be nothing he could reach to prevent the fall. (Tr. 161, 164). In addition, there was no planking along the entire route. The lack of planking increases the likelihood of falling. The dragline was being operated near water. Material or water on the walkway could make normal usage slippery. (Tr. 325-326).

The evidence establishes the walkway is used each day the mine is in operation. (Tr. 160, 459, 508).

The record establishes that there was a reasonable likelihood of an injury when viewed in the context of continued mining operations.

For the above reasons, the citation and the S&S designation should be affirmed.

Docket No. WEST 93-734-M

Citation No. 3640554

This citation alleges a non-S&S violation of 30 C.F.R. § 56.5050(b).[6] The citation reads:

> On day shift 5/29/91, the primary crusher operator's exposure to mixed noise levels exceeded unity (100%) by 1.6776 times

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[6] The regulation provides:

PERMISSIBLE NOISE EXPOSURES

Duration per day, hours of exposure	Sound level dBA slow response
8	90
6	92
4	95

PERMISSIBLE NOISE EXPOSURES--CONTINUED

Duration per day, hours of exposure	Sound level dBA slow response
3	97
1	100
1 1/2	102
1	105
1/2	110
1/4 or less	115

§ 56.5050 Exposure limits for noise.

(b) When employees' exposure exceeds that listed in the above table, feasible administrative or engineering controls shall be utilized. If such controls fail to reduce exposure to within permissible levels, personal protection equipment shall be provided and used to reduce sound levels within the levels of the table.

(167.76%) as measured with a Quest dosimeter. This is equivalent to an 8-hour exposure to 92.8 dBA. Personal hearing protection was being worn. Feasible engineering or administrative controls were not being utilized to eliminate the need for hearing protection.

The Evidence

On May 29, 1991, MSHA's Inspector Pederson measured the noise level on Respondent's portable crusher while it was processing sand and gravel. (Tr. 68-70, 368-371).

The Inspector placed the microphone of the dosimeter on the lapel of the crusher operator in a manner consistent with his training as provided by MSHA and the ANSI standards. (Tr. 75, 374-375).

The dosimeter had been properly calibrated as of March 27, 1991. (Tr. 76-79, 301-303, 375). The calibrator used by the Inspector had also been properly calibrated. (Tr. 85; Ex. P-8). After the inspection, the calibration was rechecked and found to be accurate. (Tr. 91).

The crusher operator wore the dosimeter from approximately 7:30 a.m. until 4:30 p.m.. (Tr. 93). This time period included two hours when the crusher was not operating. (Tr. 92, 94-95, 300).

The noise level on Charles Warner, the crusher operator, measured 173.41 percent. (Ex. P-6). This level of exposure exceeded permissible levels in 30 C.F.R. § 56.5050 despite the two hours of down time. (Tr. 97). In addition, the reading was consistent with the spot readings obtained from the sound level meter. (Tr. 97-98).

Discussion

Wallace offered no contrary evidence as to the noise levels. However, Respondent argues it satisfies the requirements of the regulation by having the operator wear personal hearing protection even if feasible administrative or engineering controls exist which are not utilized by the operator.

Wallace's arguments lack merit. The plain wording of Section 56.5050(b) requires that when exposure to employees exceeds permissible limits, feasible administrative or engineering controls shall be utilized. In addition, if such controls are inadequate, then personal protective equipment is the option.

Wallace also claims the above ruling denies equal protection of the law since, in effect, it cannot use personal protective equipment ahead of feasible administrative or engineering controls as provided in 30 C.F.R. § 71.805 relating to coal mines.

I am not persuaded by the operator's claim. Section 71.805(2)(ii) [relating to coal mines] merely directs that personal protective devices shall be made available to miners. When the coal operator files a plan with MSHA, Section 71.805(2)(iv) requires that MSHA be advised of "administrative and engineering controls that it [the operator] has instituted to assure compliance with the standard."

I believe the parallel regulations basically set the same requirements.

Wallace also raises the issue of whether feasible engineering controls exist which could be used to reduce the noise exposure to the operator of the primary crusher to within permissible limits. In Callahan Industries, Inc., 5 FMSHRC 1900 (November 1983), a leading Commission decision, it was held that economic as well as technological factors must be taken into account in determining whether a noise control is "feasible" under the standard. However, the Commission specifically rejected a "cost-benefit analysis" in determining whether noise control is required.

The evidence here shows that Inspector Pederson, an MSHA Inspector for 17 years, has inspected hundreds of portable crushers. The Inspector identified the main source of noise as that coming from the jaw crusher. (Tr. 101).

MSHA found that the most effective and frequently used noise control for employees operating such a crusher is an acoustically treated control booth. (Ex. P-9). In the Inspector's opinion, the noise level experienced by the operator could easily have been reduced 10 decibels in this case. (Tr. 113-114). The Inspector estimated the cost of building such a booth to be about $2,000.00.

Wallace's own witnesses indicated there was a reduction of almost eight decibels through the use of a booth. The cost estimated by the witness was $2,410.00. (Tr. 116, 411-412).

The evidence clearly establishes that economically and technologically feasible controls exist that would bring the noise exposure of the crusher operator to levels below the maximum specified in 30 C.F.R. § 56.5050.

Citation No. 3640554 should be **AFFIRMED.**

Civil Penalties

Section 110(i) of the Act, 30 U.S.C. § 820(i), mandates several criteria to be used in assessing civil penalties.

Wallace appears to be a small operator. In addition, there is no evidence concerning the operator's financial condition. In the absence of any facts to the contrary, I find that the payment of penalties will not cause the operator to discontinue its business. Asphalt, Incorporated, 15 FMSHRC 2206 (October 1993); Associated Drilling, Inc., 3 IBMA 164 (1974); Buffalo Mining Co., 2 IBMA 226 (1973).

The operator has an excellent prior history with a total of only six violations from May 29, 1989. (Exs. P-12, P-13).

The operator was negligent since it should have known of its obligation to comply with the various regulations.

While the gravity for the single S&S violation is high, the gravity is low for the reporting violations. I further consider the moving machine parts violation (No. 4127301) to be "moderate."

Wallace demonstrated statutory good faith in attempting to achieve prompt abatement of the violative conditions.

Considering all of the statutory criteria, I believe the penalties set forth in the order of this decision are appropriate.

Accordingly, I enter the following:

ORDER

1. Citation No. 3924000 is **AFFIRMED** and a civil penalty of $50.00 is **ASSESSED.**

2. Citation No. 3640530 is **AFFIRMED** and a civil penalty of $20.00 is **ASSESSED.**

3. Citation No. 3923999 is **AFFIRMED** and a civil penalty of $50.00 is **ASSESSED.**

4. Citation No. 4127301 is **AFFIRMED** and a civil penalty of $50.00 is **ASSESSED.**

5. Citation No. 4127302 is **AFFIRMED** and a civil penalty of $100.00 is **ASSESSED.**

6. Citation No. 3640554 is **AFFIRMED** and a civil penalty of $20.00 is **ASSESSED.**

John J. Morris
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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AUG 3 1 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 92-725 A.C. No. 05-00301-03814R
v.	:	Dutch Creek
MID-CONTINENT RESOURCES, INC., Respondent	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 93-99 A.C. No. 05-00301-03817A
v.	:	Dutch Creek Mine
WILLIAM L. PORTER, employed by MID-CONTINENT RESOURCES, INC. Respondent	:	

DECISION

Appearances: Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Edward Mulhall, Jr., Esq., Delaney & Balcomb, P.C., Glenwood Springs, Colorado, for Respondent.

Before: Judge Cetti

I

These cases are before me upon petition for assessment of civil penalties under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act" or "Act"). The Secretary of Labor (Secretary) seeks civil penalties from Respondent, Mid-Continent Resources, Inc. ("Mid-Continent") and individually under Section 110(c) of the Mine Act from William L. Porter, employed by Mid-Continent.

The issues in Docket No. WEST 92-725 are whether Mid-Continent violated the Dutch Creek Mine's ventilation plan and, if so, whether that violation was of a significant and substantial ("S&S") nature and caused by Mid-Continent's unwarrantable failure to comply with the ventilation plan. Also in issue in the consolidated Docket No. WEST 93-99 is whether William L. Porter was individually liable under Section 110(c) of the Mine Act, 30 U.S.C. § 820(c) for knowingly authorizing, ordering or carrying out the violation. [1]

II

STIPULATIONS

1. All mining operations at Mid-Continent Coal Basin Mine, the Dutch Creek Mine, which includes the M-Seam and headgate entries of the 211 longwall section, were permanently shutdown on January 25, 1991. "Shutdown" as used herein means "not producing coal."

2. No mining operations have been conducted in the Dutch Creek Mine or any of its several mining sections from and after January 25, 1991. "No mining operations" for purpose of this stipulation means "not producing coal." No coal has been produced at the Dutch Creek Mine after January 25, 1991.

3. On February 12, 1992, Mid-Continent filed a petition under Chapter 11 of the Bankruptcy Act in the United States Bankruptcy Court for the District of Colorado, as Case No. 92-11658-PAC.

III

Following an ABC inspection of Respondent's Dutch Creek Mine, Inspector Phillip R. Gibson issued the Section 104(d)(2) order in question - Order No. 3586609. The order in essence charges Mid-Continent with the violation of 30 C.F.R. § 75.316 for failing to comply with the mines approved ventilation plan

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[1] Section 110(c) of the Mine Act provides:

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

along the No. 6 belt conveyor entry. [2] The plan at the time of inspection in pertinent part required that permanent stoppings be built and maintained in the connecting crosscuts between the belt entry and the return entry and that the regulator was to be left open so that air could exit out the lower entry.

The alleged violation of 30 C.F.R. § 75.316(1991) is described by Inspector Gibson in the Order in question as follows:

> The operator's approved ventilation system and methane and dust control plan was not being complied with along the No. 6 belt conveyor entry. A permanent stopping (wooden block) erected between the belt entry and the return entry was partially dismantled; leaving an opening 40 inches in height and 96 inches in width. The metal pan constructed regulator erected across the lower entry (return) was closed off with metal pans and overlaid with brattice cloth. The down dip inby end of the overcast erected across the belt entry at the protected site of the 2nd extension of the 212 longwall section tailgate was not closed but left open. The opening was 5 feet high and 5 feet wide. The operator's approved ventilation plan supplement, dated January 15, 1991 addressing the 211 longwall extension, disclosed that permanent stopping were to be built and maintained in the connecting crosscuts between the belt entry and the lower return entry. The regulator was to be left open so that the air could exit out the lower entry. These combined conditions resulted in the general body of air in the belt entry containing 1.0 percent methane from the overcast to and including the headgate corner of the 211 longwall section, about 700 feet inby the overcast. A brattice cloth was installed across the inside of the overcast which limited the airflow toward the 211 longwall section.

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[2] Although 30 C.F.R. § 75.316 on its face does not spell out the requirement that an operator must comply with its ventilation plan, the Commission in Jim Walter Resources, Inc., 9 FMSHRC 903 (May 1987) held that "Once the plan is approved and adopted, these provisions are enforceable as mandatory standards."

I credit the testimony of Inspector Gibson and Mr. Denning. On the basis of their testimony I find that the conditions described in the above quoted citation existed at the mine at the time of the inspection with one minor modification. The modification being that the inspectors bottle sample, which is considered more accurate than the meter reading, gave a reading of .9 methane.

The record clearly established that some time after January 25, 1991, when the mine stopped producing coal, changes were made in the ventilation along the No. 6 belt conveyer entry and that as a result of those changes the mine was no longer in compliance with the mine ventilation plan that was in effect at the time of the inspection. This noncompliance included the partial dismantling of a stopping required by the plan in the connecting crosscuts between the belt entry and the return entry and the closing off of a regulator erected across the lower entry return that was required by the plan to remain open.

The citation was timely abated by repairs and adjustments that brought the mine into compliance with the ventilated plan. This abatement included repairing the stopping and the hole in the overcast, and adjusting the regulator across the lower entry to allow passage of air through the regulator.

Mid-Continent's primary defense was that the ventilation plan was not in effect at the time of inspection because the mine was no longer producing coal. Mid-Continent points out that the mine's ventilation plan was written and approved while the mine was actively producing coal prior to the January 25, 1991, "shutdown" and contends that the plan had no proper application to the idle, shutdown mine that existed after January 25, 1991. It is Mid-Continent's position that after the mine shutdown of January 25, 1991, it was not required to seek or obtain MSHA approval prior to making the cited ventilation changes.

Respondent's contention that MSHA approval was not required to make ventilation changes after the January 25, 1991, shutdown is rejected. As pointed out by the Solicitor only in extreme circumstances, where a mine suddenly experiences excessive methane, can an operator make a change without prior approval. In this case, there was no methane problem prior to the ventilation change. There was no emergency that necessitated an immediate ventilation change. There was adequate time to discuss the problem with MSHA and work out a suitable plan amendment prior to Mid-Continent unilaterally making the cited ventilation change.

Even though no coal has been produced at the mine since January 25, 1991, the mine was not abandoned. The mine has been continually patrolled and pumped twenty-four hours a day, seven days a week. Since January 25, 1991, eighteen (18) miners have been employed full time on three 8-hour shifts each day so that

twenty-four hours a day seven days a week there was always some miner working underground. In addition extra people were brought underground from time to time to do specific jobs in the mine. Clearly the mine had to be ventilated in accordance with its approved plan.

If Mid-Continent or its supervisor, M.J. Turnipseed, believed changes in the ventilation plan were necessary they should have first sought and obtained MSHA approval for any needed ventilation change before unilaterally making ventilation changes even if they believed that the ventilation changes would enhance safety. The evidence present clearly establish a violation of the cited safety standard, 30 C.F.R. § 75.316.

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:

> 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:

> 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). (Emphasis in original).

The question of 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 (April 1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987). In addition, any determination of the significant nature of a violation must be made in the context of continued normal mining operations. National Gypsum, supra, at 329. Halfway, Inc., 8 FMSHRC 8, 12 (January 1986); U.S. Steel Mining Co., 7 FMSHRC supra, at 1130 (August 1985).

It is undisputed that the Dutch Creek Mine is a "gassy" mine. While it is true that the methane measured in the section was a nonhazardous accumulation at the time the citation was issued, an evaluation of the reasonable likelihood of injury should be made in terms of the continuing normal mining operations.

Inspector Denning testified:

> Q. Will you tell me, please -- the ventilation plan that you have in front of you requires a stopping and it requires a regulator. Would you tell us, please, what effect on the ventilation removing that stopping and covering the regulator would have, what effect would those two things have on the ventilation?
>
> A. The covering of the regulator and removal of the stopping created a dead air space in the sump area that allowed methane to accumulate.
>
> Q. And in your opinion did that change of ventilation, that removal of a stopping and the covering of the regulator, did that create a hazard in the area?
>
> A. Yes, it did. It --
>
> (Tr. 273-274).
>
> * * * * *
>
> There was methane -- well, the methane was allowed to accumulate in the sump area and created a high concentration of methane in

the explosive range which could create an imminent danger.

Q. Are you familiar with any explosions that had occurred at this mine prior to February 7th, 1991?

A. Yes, I am.

Q. And could you tell us, please, when and what those explosions were?

A. There was an explosion of methane gas in 1981 which resulted in the death of 15 miners at the Dutch Creek Mine. Then there was an explosion in the 1960's of methane gas that resulted in the death of nine miners.

In this case, the normal operations are the ones that existed after January 25, 1991 shutdown. As stated by the Commission in U.S. Steel Mining Co., Inc., 6 FMSHRC "The fact that the methane was low when the violation was cited is not fatal per se to the establishment of "reasonable likelihood." After the unilateral ventilation changes were made and before the date of inspection, Jerry Highfill and Mike Walpole found excessive amounts of methane in the area in question. The buildup of methane was caused by the unilateral ventilation changes; the knocking out of the stopping and blocking the regulator. On two separate occasions after these unilateral ventilation changes were made they measured 5 to 8 percent methane in the area. They immediately deenergized the pump in that area by going to the power center and shutting down all of the power to that section. They then cleared the area of methane by returning the ventilation to the aircourse required by the plan.

Based upon the testimony of Jerry Highfill the former 212 Longwall Coordinator, Mike Walpole the former Longwall Maintenance Superintendent and Inspector Gibson, I find the preponderance of the evidence established all four elements of the Mathies, supra, formula. The violation in question was significant and substantial.

Unwarrantable Failure

In Emery Mining Corp., 9 FMSHRC 1997, 2004 (December 1987), 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, and is characterized by "inadvertence," "thoughtlessness," and "inattention"). 9 FMSHRC at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference" or a "serious lack of reasonable care." 9 FMSHRC at 2003-04; Rochester & Pittsburgh Coal Co., 13 FMSHRC at 189, 193-94 (February 1991).

It is clear from the record that the Respondent, Mid-Continent Resources, unilaterally without seeking or obtaining prior MSHA approval deliberately changed the ventilation so that it was no longer in compliance with the approved plan and changed it back and forth several times. The changes, in the ventilation were intentional changes with reckless disregard or at least "indifference" to the requirements of the approved ventilation plan. I agree with Inspector Gibson that this violation was unwarrantable.

Section 110(c) Liability

In relevant part, Section 110(c) provides:

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

Respondent presented considerable evidence that after the mine's shutdown on January 25, 1991, the 18 full-time miners who formerly held positions of some authority were all on equal parity with each other and had the same salary. M.J. Turnipseed was the only supervisor for the 18 member caretaker crew. Only M.J. Turnipseed had authority over other employees and only he had authority to order anyone to remove the stopping or otherwise make changes in the MSHA approved ventilation plan.

John Reeves, the President and chief operating officer of Mid-Continent, was asked about this and testified as follows:

> Q. Was there a chain of command or a hierarchy among those people (working after the shutdown) so that one could give orders to the other(s)?
>
> A. No, they were all equal.
>
> (Tr. 343).

Jesus Meraz, the former Master Maintenance Mechanic, testified concerning the status of the mine employees after the January 25, 1991, shutdown and testified in effect everybody was essentially on a parity as follows:

> Q. As between you and the guy that you were working on-shift with, Bill Porter, who was the boss?
>
> A. There wasn't any such a thing. He couldn't tell me to do anything, I couldn't tell him, hey, you know, I want you to do this or that. It was an understanding that, hey, we had a job to do and we'll do it together.
>
> Q. Okay. How did you get direction each day as to what you were to do?
>
> A. Well, I'd say it had to be through M.J. Turnipseed. He wouldn't give us direct orders other than we were supposed to keep the water pumped out of the mine and patrol the mine.
>
> Q. All right. Is it your understanding that Mr. Porter had the authority to make a ventilation change?
>
> A. Well, I don't think Mr. Porter was in any other position than the rest of us. We were all the same, fireboss/pumpers is what we were. [Emphasis supplied.]
>
> (Tr. 386).

The Respondent Porter described the status of the mine employees as told to them at the employee meeting immediately following the shutdown at 11:00 o'clock A.M. on January 25, 1991, Tr. 431-432:

> M.J. (Turnipseed) was the main speaker of the meeting and he told us at that time we were all relieved of our duties as supervisors and any position was held at that time was no longer in need. There was a [sic] a certain few of us that he was going to keep on as a salary employee [sic] but just doing firebossing and pumping of the mine, maintaining the property, basically. And everybody else was let go.

* * * * *

Q. And you were told, as you recall it, that everybody was going to be retained as -- or the people were going to be retained as principally firebosses and pumpers, is that correct?

A. Yes.

(Tr. 431-432).

The hope of Mid-Continent after the shutdown and the purpose of the remaining employees was described by Porter:

Q. Did Mr. Turnipseed outline to you what was going to be done with this (the mine) after this shutdown, what they were trying to achieve?

A. Yes. He more or less told us that he -- or that the company was going to take care of the property and put it on the market and try and sell it. They was [sic] bringing in a company to advertise and do the selling of the property. We was [sic] to more or less take care of the property.

Q. You were the housekeepers?

A. Yes.

(Tr. 433).

The work scheduling of the post-shutdown employees was also described by Porter:

A. And who devised the scheduling for the employees on who's going to work on what shift, who was going to partner with who and that sort of thing? How was that assigned.

A. M.J. Turnipseed.

Q. You didn't have any part of that?

A. No, I didn't.

(Tr. 433).

The Respondent Porter, consistent with the testimony of the other fireboss/pumpers, testified about his lack of authority to order the stopping removed.

> Q. Let's go to the 211 section and the stuff that's the subject matter of Mr. Gibson's D-2 [sic] order that was issued on February 7th, 1991. There is a stopping up here and that stopping got shot out. My question to you, here and that stopping got shot out. My question to you, Mr. Porter, did you order that stopping to be shot out?
>
> A. No, I didn't.
>
> Q. Did you have any authority to order anyone to shoot out that stopping?
>
> A. No. There was nobody that took orders from me.
>
> (Tr. 437).

While the question of whether any member of the caretaker crew other than M.J. Turnipseed was an agent of the corporation within the meaning of Section 110(c) after January 25, 1991, may be an open and interesting question. I find in this case it is not necessary or appropriate to reach that question. The reason I so find is that I credit Porter's testimony that he did not order or otherwise authorize the cited violative ventilation changes. The heresay evidence in this case may be sufficient to create a suspicion but the evidence presented is insufficient in my mind to establish the charge against him in view of Porter's credible testimony.

Conclusion

I find that Porter did not knowingly authorize, order or carry out the cited violation of the miners ventilation plan. For this reason the Section 110(c) civil penalty proceeding against Porter shall be dismissed.

Disposition of Remaining Citations in Docket No. WEST 92-725

The parties reached an amicable settlement of the seven remaining citations in Docket No. WEST 92-75 and jointly move for approval of their agreement. Under the proffered settlement Respondent agrees to reduce the proposed penalties by 40 percent based on Respondent's ability to pay and accordingly amend the proposed penalties as follows:

Citation/ Order No.	Proposed Penalty	Amended Proposed Penalty
34105564	$ 91.00	$ 55.00
3586784	20.00	20.00
3586798	79.00	47.00
3586800	20.00	20.00
3586721	20.00	20.00
3586829	20.00	20.00
3586830	50.00	30.00
TOTAL	$300.00	$212.00

After due consideration of the record, including consideration of Respondent's financial condition as a debtor-in-possession under Chapter 11 of the Bankruptcy Code. I find the proposed settlement of the seven remaining citations is reasonable, in the public interest and consistent with the criteria in § 110(i) of the Mine Act. I therefore approve the agreed amended proposed penalties.

With respect to the proposed penalty for the unwarrantable S&S violation of the ventilation plan I find on consideration of the statutory criteria that Mid-Continent's conduct was such that even considering Mid-Continent's financial condition the full initial proposed MSHA penalty assessed is the appropriate penalty without any reduction. Thus the total civil penalty payable to the Secretary for the violations found in this docket is $828 payable to the Secretary of Labor. Pursuant to Federal Rule of Bankruptcy Procedure, payment of the proposed penalties is subject to the approval of the United States Bankruptcy Court.

ORDER

Docket No. WEST 92-725

Respondent filed a case under Chapter 11 of the Bankruptcy Code and is operating its bankruptcy estate as a debtor-in-possession. Accordingly, upon approval of the United States Bankruptcy Court in Case No. 91-11658PAC, it is **ORDERED** that civil penalties be and are assessed against the Respondent in the amounts shown above and Petitioner is authorized to assert such assessment as a claim in Respondent's bankruptcy case.

The 110(c) civil penalty proceeding is **DISMISSED.**

August F. Cetti
Administrative Law Judge

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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

JUL 22 1994

MADISON BRANCH MANAGEMENT Contestant	:	CONTEST PROCEEDINGS Docket No. WEVA 93-218-R Order No. 3976643: 3/1/93
v.	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Respondent	:	Docket No. WEVA 93-219-R Citation 3976644; 3/1/93 Docket No. WEVA 93-220-R Citation 3976647; 3/4/93 Job. No. 3 Mine ID 46-05815
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 93-373 A.C. No. 46-05815-03520
v.	:	Madison Branch Job No. 3
MADISON BRANCH MANAGEMENT, Respondent	:	Docket No. WEVA 93-412 A.C. No. 46-05815-03521 Job No. 3
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 03-415 A.C. No. 46-05815-03501HWZ
PROTECTIVE SECURITY SERVICES Respondent	:	Job No. 3

ORDER DENYING JOINT MOTION FOR SUMMARY DECISION
AND
AMENDED NOTICE OF HEARING

The above proceedings concern the carbon monoxide intoxication death of Allen Garrett, a night watchman employed by Protective Security Services at Madison Branch Management's Job No. 3 mine site. A central question in this case is whether the respondents have adequately removed the risk of carbon monoxide poisoning of security personnel who continue to use stationary

vehicles for prolonged periods of time with no alternative means of warmth and shelter. The ". . . Secretary's position [is] that requiring security guards to have access only to their vehicles [with the engine runnng] for shelter is not inherently dangerous. Rather, [the Secretary asserts] it is the condition of the vehicle . . . that leads to a specific hazard." The Secretary's Second Amended Motion to Approve Settlements, p. 5.

Investigating authorities determined that Allen Garrett fell asleep in his vehicle and was asphyxiated on March 1, 1993, between 12:48 a.m., when the last entry in his log book was made, and 6:10 a.m., when he was found unconscious in his vehicle. At the time Garrett was discovered, his vehicle was parked in the coal-haulage roadway with the engine running, the dome light on and the heater running on high. At the time of this incident, the weather had been cold with a temperature of approximately 25 degrees fahrenheit, and, it had been snowing. MSHA's investigation revealed Garrett's vehicle had one large crack at the exhaust manifold located near the firewall and large cracks on the exhaust pipe on each side of the muffler.

It is undisputed that Garrett remained in his stationary vehicle for warmth and shelter during his 8 hour shift. In this regard, Madison Branch Management has stated ". . . there are no structures on the site of its Job No. 3 which can be accessed by security personnel to provide warmth and shelter. (Respondent's Joint Response, p. 7). Madison Branch Management has also stated that ". . . security personnel did continue to use their vehicles for shelter and heat during the winter after March 1, 1993 . . ." Id.

As a result of Garrett's fatality, the Mine Safety and Health Administration (MSHA) issued citations to both Madison Branch Management and Protective Security Services for an alleged violation of section 77.404(a), 30 C.F.R. § 77.404(a). This mandatory safety standard requires, in pertinent part, that mobile equipment must be maintained in safe operating condition.

In addition, MSHA issued a citation to Madison Branch Management for an alleged violation of section 48.31(a), 30 C.F.R. § 48.31(a). This mandatory safety standard requires that hazard training must be provided to all miners. Section 48.31(a) requires hazard training to include instruction on "hazard recognition and avoidance" and "safety rules and safe working procedures."

On June 8, 1994, I issued a combined Order Denying Motions for Approval of Settlements, Prehearing Order and Notice of Hearing in these matters. The Order noted the issue before me is the appropriateness of the proposed civil penalties and that the Commission is not bound by the Secretary's proposed assessments. See Sellersburg Stone Co., 5 FMSHRC 287 (March 1983), aff'd

Sellersburg Stone Co. v. FMSHRC, 736 F.2d 1147, 1153 (7th Cir. 1984). In establishing the proper penalty amounts, the Order further noted that the statutory mandate in section 110(i) of the Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. § 820(i), as well as established case precedent, requires the Commission to consider the statutory penalty criteria including the gravity of the violation and the ". . . demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation." 30 U.S.C. § 820(i). The Commission's oversight responsibility with respect to the penalty criteria in the Act cannot be circumvented by the Secretary's acquiescence to abatement actions that do not remove the hazard contributed to by the violative conduct.[1] Whether the subject hazard of carbon monoxide poisoning has been ameliorated is an issue to be determined through the fact finding process. See Dolese Brothers Company, 16 FMSHRC 689, 695 (April 1994). A discussion of the Commission's jurisdictional basis for resolution of this question is addressed in my June 8, 1994, Order and is incorporated by reference herein.

My June 8, 1994, Order set this matter for hearing in the vicinity of Charleston, West Virginia. The Order specified that the issue to be resolved at the hearing is whether the hazard has been alleviated by the proposed abatement actions and whether these actions constitute good faith efforts to achieve rapid compliance. These actions include the reported vehicle inspection program at 90 day intervals by Protective Security Services and warnings to employees not to keep vehicle windows tightly closed to avoid carbon monoxide poisoning.

The June 8 Order requested the Secretary, as the proponent of settlement terms that include the aforementioned abatement efforts, to call Chief Medical Examiner Irvin Sofer, a minimum of two qualified safety and health experts employed by the Occupational Safety and Health Administration (OSHA), and a licensed automobile mechanic familiar with the maintenance and repair of automotive exhaust systems, as witnesses to address the propriety of the proposed abatement efforts.

To facilitate discovery, the June 8 Order required the parties to exchange witness lists on or before July 19, 1994. The Secretary's Witness List was filed pursuant to the Order. In

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[1] The Secretary's reliance on Wyoming Fuel Co., 14 FMSHRC, 1282, 1289 (August 1992), for the proposition that terminated citations and orders cannot be modified to direct further abatement is misplaced. The Commission's statutory obligation to evaluate the Section 110(i) penalty criteria to determine the appropriate assessment, including the question of good faith efforts to achieve rapid compliance, is not altered by MSHA's termination of the underlying citation.

the Secretary's filing, counsel stated "[t]he Secretary does not intend to call those witnesses identified by the Administrative Law Judge in the June 8, 1994, Prehearing Order and Notice of Hearing." With regard to the scheduled hearing, counsel stated:

> Nevertheless, there remain no genuine issues of material fact in this matter. Consequently, summary judgement is appropriate. 29 C.F.R. § 2700.67. The parties will be filing a joint motion for summary judgment which will clearly indicate, through stipulations, that there are no genuine issues of material fact. The Secretary does not intend to offer any evidence beyond that stipulated to in the parties's joint motion for summary judgment (emphasis added).

I am construing the above statement as a joint motion for summary decision which **IS HEREBY DENIED**. The motion is denied in accordance with Commission Rule 67 because of the following unresolved issues of material fact:

1. The nature of carbon monoxide intoxication and the correlation between the level of toxicity and the period of exposure;

2. Given the characteristics of carbon monoxide, whether the risk of carbon monoxide intoxication to individuals who seek warmth and shelter in stationary vehicles for extended periods of time can be effectively alleviated by the methods proposed by the respondents;

3. Whether remaining in a stationary vehicle for prolonged periods with the engine and heater running is a "recognized hazard" that is prohibited by section 5((a)(1) or Section 5(a)(2) of the Occupational Safety and Health Act of 1970, 20 U.S.C. § 654(a)(1) and 5(a)(2);

4. The qualifications of the individual assigned by Protective Security Services to inspect employee vehicle exhaust systems and the methods of such inspection; and

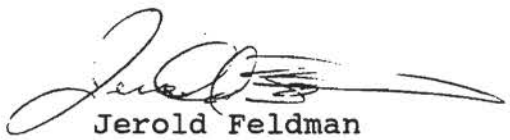
5. The requisite qualifications, equipment and procedures necessary for performing an adequate vehicle exhaust system inspection.

The parties are advised that Dr. Irvin Sofer, Chief Medical Examiner of the West Virginia Department of Health and Human Services will be called upon by the court as an expert witness. Dr. Sofer's testimony will include his expert opinions with regard to the hazards associated with carbon monoxide poisoning

as well as testimony concerning any pertinenet articles or publications he has written.[2]

The Secretary is advised that the failure to call OSHA safety and health experts, who are employees under the supervision and control of the Secretary, may result in an adverse inference that their testimony concerning the OSHA "recognized hazard" question in issue 3 above would be detrimental to the Secretary's position with respect to the abatement question. NLRB v. Laredo Coca-Cola Bottling Co., 613 F.2d 1338 (5th Cir. 1980); NLRB v. Dorn's Transportation Co., 405 F.2d 706 (2nd Cir. 1969) (cases permitting an adverse inference concerning missing witnesses' statements or motivations).

Accordingly, these matters will proceed to hearing on September 22, 1994, in Charleston, West Virginia, as scheduled. The hearing location will be specified in a subsequent order. The parties may stipulate on the record at trial as to matters that are not in dispute provided that the stipulations do not relate to conclusions of law with respect to the Section 110(i) penalty criteria.



Jerold Feldman
Administrative Law Judge
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[2] Dr. Sofer performed the autopsy on Allen Garrett. In view of the Secretary's disinclination to call Dr. Sofer, on July 21, 1994, I telephoned Dr. Sofer to determine if he was available to testify in this matter and to ascertain his area of expertise. Dr. Sofer stated that he is familiar with carbon monoxide poisoning and that he has written on the subject. Dr. Sofer expressed a willingness to testify as a court expert witness.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 29, 1994

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. LAKE 94-155-M
Petitioner	:	A. C. No. 11-00039-05516
	:	
v.	:	
	:	Columbia Quarry & Mill #9
COLUMBIA QUARRY COMPANY,	:	
	:	
Respondent	:	

DECISION DISAPPROVING SETTLEMENT
ORDER TO SUBMIT INFORMATION

Before: Judge Merlin

This case is before me upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977.

The Solicitor has filed a motion to approve settlement for the one violation in this case. A reduction in the penalty from $400 to $250 is proposed.

Citation No. 4307486 was issued for a violation of 30 C.F.R. § 50.10 because an accident occurred at the plant and was not immediately reported to MSHA. The violation was designated as non-significant and substantial but negligence was characterized as high. In her motion the Solicitor advises that gravity and negligence remain the same. She states that the sole basis for the proposed reduction is for the purpose of settlement since the parties do not want to pursue further litigation of this matter. The Solicitor make no reference to the six criteria in section 110(i) of the Act.

I am unable to approve this settlement. The parties are reminded that the Commission and its judges bear a heavy responsibility in settlement cases pursuant to section 110(k) of the Act. 30 U.S.C. § 820(k); See, S. Rep. No. 95-181, 95th Cong., 1st Sess. 44-45, reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 632-633 (1978). It is the judge's responsibility to determine the appropriate amount of penalty, in accordance with the six criteria set forth in section 110(i) of the Act. 30 U.S.C. § 820(i); Sellersburg Stone Company v. Federal Mine Safety and Health Review Commission, 736 F.2d 1147 (7th Cir. 1984). A proposed reduction must be based upon a consideration of these criteria.

Based upon the Solicitor's representation, I cannot properly discharge my statutory responsibilities because I have not been given sufficient basis upon which to conclude that the recommended penalty of $250 for Citation No. 4307486 is appropriate under the six criteria of section 110(i).

In light of the foregoing, it is **ORDERED** that the motion for approval of settlement be **DENIED.**

It is further **ORDERED** that within 30 days of the date of this order the Solicitor submit additional information to support her motion for settlement. Otherwise, this case will be set for further proceedings.

Paul Merlin
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 29, 1994

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Petitioner	: : : : :	CIVIL PENALTY PROCEEDING Docket No. WEST 94-478-M A. C. No. 04-04157-05534
v.	:	Corona Plant
CHANDLER'S PALOS VERDES SAND & GRAVEL COMPANY, Respondent	: : :	

DECISION DISAPPROVING SETTLEMENT
ORDER TO SUBMIT INFORMATION

Before: Judge Merlin

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.

The Solicitor has filed a motion to approve settlements for the two violations in this case. A reduction in the penalties from $7,000 to $5,250 is proposed. The two violations in this case contributed to an accident which caused an injury to a miner.

Citation No. 3932600 was issued for a violation of 30 C.F.R. § 56.16002(b) because a work platform was not provided for the top of the two washed concrete sand storage silos. The originally assessed penalty was $2,000 and the proposed settlement is $1,500. Citation No. 3934261 was issued for a violation of 30 C.F.R. § 56.16002(c) because a plant repairman entered a washed concrete sand bunker without wearing a safety belt and lifeline. The originally assessed penalty was $5,000 and the proposed settlement is $3,750.

In his motion for settlement approval the Solicitor gives no reasons to support the proposed reductions in the penalties. The violations in this case were serious and contributed to an accident resulting in an injury. The Solicitor must provide a basis for me to approve such a settlement, especially because an injury occurred. The fact that the suggested penalties remain substantial does not in and of itself, warrant approval.

The parties are reminded that the Commission and its judges bear a heavy responsibility in settlement cases pursuant to section 110(k) of the Act. 30 U.S.C. § 820(k); See, S. Rep. No. 95-181, 95th Cong., 1st Sess. 44-45, reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 632-633 (1978). It is the judge's responsibility

to determine the appropriate amount of penalty, in accordance with the six criteria set forth in section 110(i) of the Act. 30 U.S.C. § 820(i); Sellersburg Stone Company v. Federal Mine Safety and Health Review Commission, 736 F.2d 1147 (7th Cir. 1984).

Based upon the Solicitor's motion, I have no grounds upon which to conclude that the recommended penalties of $5,250 are appropriate under the criteria of section 110(i).

In light of the foregoing, it is **ORDERED** that the motion for approval of settlement be **DENIED.**

It is further **ORDERED** that within 30 days of the date of this order the Solicitor submit additional information to support his motion for settlement. Otherwise, this case will be set for further proceedings.

Paul Merlin
Chief Administrative Law Judge

Distribution: (Certified Mail)

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