AUGUST 1995

COMMISSION DECISIONS AND ORDERS

ADMINISTRATIVE LAW JUDGE DECISIONS

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

Lance Paul v. Newmont Gold Company, Docket No. WEST 95-228-DM. (Judge Feldman, June 29, 1995 - published in this issue)

Secretary of Labor, MSHA v. Amax Coal Company, Docket No. LAKE 94-74. (Judge Fauver, July 12, 1995)

Secretary of Labor, MSHA v. Faith Coal Company, Docket No. SE 91-97, etc. (Judge Barbour, July 19, 1995)

Review was not granted in the following cases during the month of August:

D.H. Blattner & Sons v. Secretary of Labor, MSHA, Docket No. CENT 95-121-RM. (Chief Judge Merlin, June 23, 1995)

Kellys Creek Resources, Inc. v. Secretary of Labor, MSHA, Docket No. SE 92-122-R, etc., Judge Weisberger, July 29, 1995)

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 8, 1995

LANCE PAUL	:	
	:	
v.	:	Docket No. WEST 95-228-DM
	:	
NEWMONT GOLD COMPANY	:	
	:	

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

ORDER

BY THE COMMISSION:

This discrimination proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act" or "Act"). On February 13, 1995, Lance Paul initiated an action pursuant to section 105(c)(3) of the Mine Act, 30 U.S.C. § 815(c)(3), alleging that he had been discriminated against by Newmont Gold Company ("Newmont") in violation of the Act. On May 23, 1995, Administrative Law Judge Jerold Feldman issued an order setting the matter for hearing. On June 27, Newmont filed a motion to dismiss on the basis that it was unable to locate Paul. On June 29, the judge issued an order granting the motion and dismissing the case.

On July 28, 1995, the Commission received a letter addressed to Judge Feldman from Paul, requesting that his complaint be reopened. Paul states that he had informed MSHA of his new address in January, and that he had arranged with the Postal Service to have his mail forwarded for one year. He states that, although he had received the order of dismissal, he had not received the notice of hearing.

The judge's jurisdiction in this matter terminated when his decision was issued on June 29, 1995. 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 Paul'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 Paul's position. In the interest of justice, we remand this matter to the judge, who shall determine whether dismissal is warranted. *See Hickory Coal Co.*, 12 FMSHRC 1201, 1202 (June 1990).

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

Mary Lu Jordan, Chairman

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

Marc Lincoln Marks, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 14, 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEST 93-129
JOY TECHNOLOGIES INC. - COAL FIELD OPERATIONS	:	

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

DECISION

BY: Jordan, Chairman; Doyle and Holen, Commissioners

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act" or "Act"). It presents the issues of whether Joy Technologies Inc. - Coal Field Operations ("Joy") is an independent contractor-operator within the meaning of section 3(d) of the Mine Act, 30 U.S.C. § 802(d),[1] and, if so, whether it was liable for a violation of 30 C.F.R. § 48.28.[2] Commission Administrative Law Judge Gary Melick concluded that Joy was an operator under the Mine Act and that it was liable for the violation. 15

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[1] Section 3(d) of the Mine Act provides:

> "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. § 802(d).

[2] Section 48.28(a), which implements the refresher training requirement of section 115(a) of the Mine Act, 30 U.S.C. § 825(a), provides: "Each miner shall receive a minimum of 8 hours of annual refresher training as prescribed in this section." Section 115(a) of the Mine Act provides in part: "all miners shall receive no less than eight hours of refresher training no less frequently than once each 12 months . . . ." 30 U.S.C. § 825(a).

FMSHRC 2147 (October 1993) (ALJ). The Commission granted Joy's petition for discretionary review. For the reasons that follow, we affirm the judge's decision.

I.

Factual and Procedural Background

Joy manufactures, sells and services mining equipment, and has provided equipment to Somerset Mining Company for use at its Sanborn Creek Mine, an underground coal mine. 15 FMSHRC at 2147. Joy employs service representatives who, after an equipment sale, provide follow-up services to customers. *Id.* at 2147-48; Tr. 13.

Dixson McElhannon is the Joy service representative for the Sanborn Creek Mine. 15 FMSHRC at 2148. His responsibilities include assuring that equipment is delivered in proper condition, advising and assisting in assembly and repairs, and procuring necessary parts. *Id.* at 2147-48; Tr. 13-14, 34-35, 43-44. He "troubleshoots" when problems arise with Joy equipment. 15 FMSHRC at 2148; Tr. 13. McElhannon performs services both on the surface and underground. Tr. 36; Stip. 10; Ex. M-2. Consistent with Joy's policy, McElhannon's service calls at Sanborn Creek Mine continued after the warranties on Joy equipment expired. 15 FMSHRC at 2148; Tr. 46.

Service reports filed by McElhannon show that, during the 2 ½ month period from January 24 through April 7, 1992, he visited the mine on at least four occasions, twice for two-day periods, for a total of six days. 15 FMSHRC at 2148-50. McElhannon also visited the mine on other occasions but did not prepare a report. *Id.* at 2148.

During his visit on March 2 and 3, McElhannon assisted in the unloading of two new shuttle cars. *Id.* at 2149. He checked the cars to ensure that they were in working condition, provided technical assistance in identifying a problem with one of the cars, and obtained a replacement part. *Id.*

On April 6, 1992, he visited the mine to oversee the unloading and assembly of a new Joy continuous miner and to ensure that it worked properly when assembled. *Id.* at 2149-50; Tr. 31-32. After unloading, the miner was taken in sections to the maintenance shop; assembly of the miner began on April 7. 15 FMSHRC at 2150. While assisting in the assembly, McElhannon operated the remote control to move the mining machine so that the maintenance workers could insert pins. *Id.*

That same day, Inspector Larry Ramey from the Department of Labor's Mine Safety and Health Administration ("MSHA") arrived in the shop to continue his inspection of the mine. Tr. 62-63; 15 FMSHRC at 2150. At that time, the maintenance workers were having some difficulty with the equipment's hydraulic system. Tr. 64-65, 106-07. Ramey observed McElhannon at the

remote controls, raising and lowering the cutter head. Tr. 64-65. A coal miner was standing in front of the head while it was being raised and lowered. 15 FMSHRC at 2150; Tr. 63-65. Ramey believed that the equipment operator was endangering the safety of that miner; the inspector was primarily concerned that the head could become energized and strike the employee, causing his death. Tr. 63-64. Ramey determined that McElhannon had not received refresher training within the preceding year and issued Order No. 3581501, which required the withdrawal of McElhannon from the mine pursuant to section 104(g)(1) of the Mine Act,[3] 30 U.S.C. § 814(g)(1). 15 FMSHRC at 2148; Tr. 66, 71; Ex. M-3.

Following an evidentiary hearing, the judge concluded that Joy was an independent contractor-operator subject to liability under the Mine Act. 15 FMSHRC at 2150-52. He based his determination on Joy's performance of "continuing services in connection with . . . contracts of sale." *Id.* at 2151. The judge also found that "Joy's representative was . . . performing limited but necessary services at the Sanborn Creek Mine . . . ." *Id.* Relying on section 3(d) of the Act, on *Otis Elevator Co. v. Secretary of Labor*, 921 F.2d 1285 (D.C. Cir. 1990), and on the Commission's decisions in *Bulk Transportation Services, Inc.*, 13 FMSHRC 1354 (September 1991), and *Lang Brothers, Inc.*, 14 FMSHRC 413 (September 1991), the judge concluded that, because Joy was providing essential services closely related to the extraction process, Joy's presence at Sanborn Creek Mine was sufficient to make Joy an operator within the meaning of Section 3(d) of the Act. 15 FMSHRC at 2151-52.

The judge also found that, because McElhannon had not received annual refresher training, Joy had violated section 48.28(a). *Id.* at 2152. He concluded that the violation was not significant and substantial and assessed a civil penalty of $100. *Id.*

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[3] Section 104(g)(1) of the Mine Act provides in part:

> If . . . the Secretary . . . shall find employed at a . . . mine a miner who has not received the requisite safety training as determined under section 115 of this Act, the Secretary . . . shall issue an order under this section which declares such miner to be a hazard to himself and to others, and requiring that such miner be immediately withdrawn from the . . . mine, and be prohibited from entering such mine until . . . the Secretary determines that such miner has received the training required by section 115 of this Act.

II.

Disposition

A. Whether Joy is an Independent Contractor

Joy asserts that it is not an independent contractor within the meaning of section 3(d) of the Mine Act. It relies on the definition of independent contractor set forth in 30 C.F.R. § 45.2[4] and argues that it has not contracted to perform services at Sanborn Creek Mine. J. Br. at 9-11. The Secretary responds that section 3(d) of the Mine Act does not require the existence of a contract to establish independent contractor-operator status. S. Br. at 22 n.8.

We reject Joy's argument that the absence of a service contract precludes a finding that Joy is an independent contractor. In *Bulk*, the Commission stated:

> Our focus is on the actual relationships between the parties, and is not confined to the terms of their contracts. . . . [T]he determination of whether a party is properly designated to be within the scope of section 3(d) of the Act is not based upon the existence of a contract, nor the terms of such a contract.

13 FMSHRC at 1358 n.2. Moreover, it is settled law that an entity may be held to be an independent contractor based on its performance of work "in connection with, or for the purpose of carrying out, the contract of sale . . . ." 41 Am.Jur.2d, Independent Contractors § 18. We conclude that the regulation's reference to "contracts to perform services" is not restricted to written contracts and encompasses services performed incident to a contract of sale. Accordingly, we affirm the judge's conclusion that Joy is an independent contractor.

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[4] Section 45.2 states:

> As used in this part:
>
> . . . .
>
> (c) *Independent contractor* means any person, partnership, corporation, subsidiary of a corporation, firm, association or other organization that contracts to perform services or construction at a mine . . . .

B. Whether Joy is an Operator

The parties also disagree on the appropriate standard for determining operator status under section 3(d) of the Mine Act. Asserting that it provided only limited services at Sanborn Creek Mine and, therefore, was not an operator, Joy argues that the Commission cases cited by the judge were wrongly decided. J. Br. at 11-20. Relying on the decision of the United States Court of Appeals for the Fourth Circuit in *Old Dominion Power Co. v. Donovan*, 772 F.2d 92 (1985), in which the court held that a power company that installed, maintained and read an electric meter monthly at a substation separated by a chain link fence from the rest of the mine property was not an operator within the meaning of section 3(d), Joy urges the Commission to adopt a narrow definition of operator. J. Br. at 15-22.

The Secretary responds that the Commission should adopt the broad definition of operator set forth by the United States Court of Appeals for the D.C. Circuit in *Otis Elevator Co. v. Secretary of Labor*, i.e., that section 3(d)'s reference to "any" independent contractor performing services at a mine "means just that -- *any* independent contractor . . . ." S. Br. at 8-9, *quoting* 921 F.2d at 1290 (footnote omitted) (emphasis in original). In the alternative, the Secretary contends that, in light of the frequency of McElhannon's visits to the mine, his travels underground, and the importance of his work to the mining and transporting of coal at Sanborn Creek Mine, Joy is an independent contractor-operator either under the Commission's line of cases interpreting the term "operator" or under *Old Dominion*. S. Br. at 13-20.

As the Commission has noted, section 3(d) of the Mine Act expanded the definition of "operator" contained in the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976) (amended 1977), to include "any independent contractor performing services or construction at such mine." *E.g.*, *Bulk Transportation*, 13 FMSHRC at 1357. In the *Otis Elevator Co.* cases, 11 FMSHRC 1896 (October 1989) ("*Otis I* ") and 11 FMSHRC 1918 (October 1989) ("*Otis II* "), *aff'd on other grounds*, 921 F.2d 1285, the Commission set forth a two-pronged test for determining whether an independent contractor may be considered an operator under section 3(d). First, "the independent contractor's proximity to the extraction process" and whether its work is "sufficiently related" to that process are examined. *Otis I* at 1902. The Commission has found a contractor's activity to be sufficiently related to the extraction process where its employees are exposed to mining hazards and have "a direct effect on the safety of others . . . ." *Id.* Second, the Commission examines "the extent of [the contractor's] presence at the mine." *Otis I*, 11 FMSHRC at 1902. The Commission has formulated this test as whether the contractor's "contacts with the . . . mine were not so rare, infrequent, and attenuated as to bring this case within the holding of *Old Dominion* . . . ." *Otis II*, 11 FMSHRC at 1922-23. As the Commission noted in *Otis I*, "there may be a 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." 11 FMSHRC at 1900-01, *quoting National Indus. Sand Ass'n v. Marshall*, 601 F.2d 689, 701 (3d Cir. 1979).

We conclude that Joy's presence at Sanborn Creek Mine was sufficient to satisfy the test set forth in the Commission's *Otis* cases and their progeny. As to the first prong of the analysis, the parties stipulated that the continuous miner is an "essential piece of mining equipment." Tr. 34; Stip. 5. McElhannon testified that the Joy shuttle cars used at the mine are essential to the mining process. Tr. 41. We agree with the judge that, in troubleshooting problems with the Joy continuous miner and shuttle cars, providing technical assistance related to the unloading, assembly and operation of Joy equipment, and securing needed parts, Joy's representative engaged in activities essential to the extraction process. Coal could not be mined without the continuous miner and shuttle cars. The first prong is also satisfied because, in performing his service work in the maintenance shop and underground, McElhannon was exposed to the hazards of the Sanborn Creek Mine and his work directly affected the safety of miners. The withdrawal order was issued because Inspector Ramey believed that McElhannon's operation of the continuous miner was endangering the safety of an employee working nearby. We conclude that substantial evidence supports the judge's determination that Joy's work is sufficiently related to the extraction process to satisfy the first prong of the Commission's operator test.

As to the second prong of the test, Joy's contacts with the mine were more than *de minimis*. McElhannon visited Sanborn Creek Mine regularly. He spent at least six days at the mine during a 2 ½ month period, and his contacts could be expected to continue. Joy was present at the mine at least as frequently as the contractors in *Otis I* (six hours per month) and *Lang Bros.* (seven to ten days on a non-continuing basis). As the judge concluded, Joy's contacts were sufficient to establish that services were being performed. 15 FMSHRC at 2151. Moreover, in *Lang Bros.*, the Commission explained that "[a]n independent contractor's presence at a mine may appropriately be measured by the significance of its presence, as well as by the duration or frequency of its presence." 14 FMSHRC at 420. We conclude that substantial evidence supports the judge's determination that Joy's presence at Sanborn Creek Mine also satisfies the second prong of the Commission's operator test.

We are not persuaded by Joy's argument that, based on *Old Dominion*, we should narrowly construe the term "operator." In *Old Dominion*, the court set forth a two-part test for determining whether a contractor is an operator under the Mine Act: whether the contractor is "engaged in the extraction process" and whether it has a "continuing presence at [a] mine." 772 F.2d at 96-97.

In *Otis I*, the Commission declined to construe *Old Dominion* narrowly, stating:

> To adopt . . . [a] restrictive interpretation of *Old Dominion* . . . would . . . frustrate Congress' clear intent, when it expanded the definition of "operator" in the Mine Act, to broaden and facilitate direct regulation of independent contractors on mine property.

11 FMSHRC at 1901-02. The Commission's interpretation of *Old Dominion* is consistent with recent case law in the Fourth Circuit. In *United Energy Services, Inc. v. MSHA*, 35 F.3d 971 (4th

Cir. 1994), decided after the filing of the briefs in this case, the court did not narrowly construe the term "operator." The contractor in *United Energy* maintained a conveyor belt, a small portion of which was located on mine property, that was used to transport coal waste to an adjacent power plant. *Id.* at 973. The court stated:

> [T]he activities of United Energy's employees are part of the coal preparation process and thus are sufficiently a part of the mining process to qualify United Energy as an independent contractor covered by the Act. We therefore conclude that United Energy had contacts with the mine site of sufficient frequency and of such a nature as to meet those requirements for being an "independent contractor" performing services at a coal mine. *Cf. Otis Elevator Co. v. Secretary of Labor*, 921 F.2d 1285, 1290-91 (D.C. Cir. 1990) (interpreting statutory language to include *any* independent contractor performing services at a mine).

Id. at 976 (emphasis in original).

In light of our disposition, we do not reach the Secretary's argument that the Commission should adopt the operator test set forth by the D.C. Circuit in its decision affirming *Otis I* and *II*. Clearly Joy would be a statutory operator under that test.

C. Joy's Other Contentions

We reject Joy's contention that it should not be held to have violated § 48.28(a) because it could not have provided the necessary training. As the Secretary points out, Joy may arrange with Sanborn Creek Mine to provide the training, as was done to abate the cited violation. S. Br. at 22-23. Nor does Joy's liability for the violation in this case automatically subject it to liability for all health and safety violations at the mine, as Joy argues. J. Br. at 21-22. The Secretary notes that, "[i]f a regulation pertains to a matter over which Joy and its employees truly have no control, there is no reason to expect that Joy would be held responsible for a violation of that regulation." S. Br. at n.10. *See also* III *MSHA Program Policy Manual* 6 ("some provisions of the Act, standards or regulations may not be directly applicable to independent contractors or their work"). In any event, Joy may challenge future citations if it believes the owner-operator should have been the object of the Secretary's enforcement action. "[T]he Commission has recognized that its review of the Secretary's action in citing an operator is appropriate to guard against abuse of discretion." *W-P Coal Co.*, 16 FMSHRC 1407, 1411 (July 1994) (citations omitted).[5]

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[5] In its Petition, Joy also assigned as error the judge's failure to address its contention that McElhannon was not a "miner." Pet. at 9. We do not address this issue because Joy did not argue it in its brief. *See Asarco Mining Co.*, 15 FMSHRC 1303, 1304 n.3 (July 1993).

III.

Conclusion

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

Mary Lu Jordan, Chairman

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

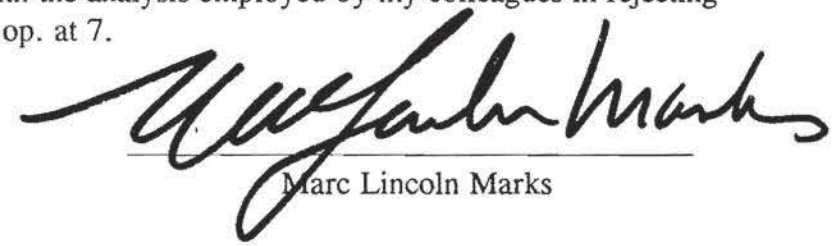
Commissioner Marc Lincoln Marks, concurring:

I concur in the result reached by my colleagues in this case; however, I reach that common result by means of a different analytical path.

Specifically, in my view, the D.C. Circuit's opinion in *Otis Elevator Co. v. Secretary of Labor*, 921 F.2d 1285 (D.C. Cir. 1990) ("*Otis Elevator*") represents the most reasoned approach to interpreting the term "operator" under section 3(d) of the Mine Act, 30 U.S.C. § 802(d). The D.C. Circuit in *Otis Elevator* strictly construed section 3(d) of the Mine Act, which provides that the term "operator" includes "*any* independent contractor performing services . . . at [a] mine." Section 3(d) of the Mine Act (emphasis added). The court stated that "any" meant "*any* independent contractor performing services at a mine." 921 F.2d at 1290, quoting Section 3(d) of the Mine Act (emphasis in original). The D.C. Circuit found no warrant in the plain language of the Act, or in the legislative history, for diluting the term "any." *Id.*; *c.f. Old Dominion Power Co. v. Donovan*, 772 F.2d 92 (4th Cir. 1985); *Bulk Transportation Services, Inc.*, 13 FMSHRC 1354 (September 1991); *Lang Brothers, Inc.*, 14 FMSHRC 413 (September 1991); *Otis Elevator Co.*, 11 FMSHRC 1896 (October 1989); and *Otis Elevator Co.*, 11 FMSHRC 1918 (October 1989). Neither do I. Along with the D.C. Circuit, I leave open the question of 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." 921 F.2d at 1290, n.3.

In my view, this case presents the Commission with an opportunity to align its interpretation of this section of the Mine Act with that set forth in *Otis Elevator*. In contrast to my colleagues, I take this opportunity and adopt *Otis Elevator*. Applying *Otis Elevator*, I conclude that the record amply supports the judge's determination that Joy, an independent contractor,[1] was performing services at a mine. Specifically, the record reveals that Joy's representative: (1) was troubleshooting problems with the Joy shuttle car and continuous miner; (2) provided technical assistance related to the unloading, assembly, and operation of Joy equipment; (3) secured needed parts; and (4) operated a continuous miner in a way that resulted in the instant citation. Such activities clearly constitute the performance of services at a mine by an independent contractor.

Finally, I agree completely with the analysis employed by my colleagues in rejecting Joy's impossibility defense. *See* slip op. at 7.



Marc Lincoln Marks

[1] For the reasons set forth by my colleagues, I agree that Joy is an independent contractor. *See* slip op. at 4.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 31, 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket Nos. WEST 92-216-R
v.	:	WEST 92-421
ENERGY WEST MINING COMPANY	:	

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

DECISION

BY: Jordan, Chairman; Doyle and Holen, Commissioners

This consolidated contest and civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act" or "Act"), involves a citation issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to Energy West Mining Company ("Energy West") alleging a violation of 30 C.F.R. § 75.316 (1991).[1] Upon cross motions for summary decision, former Administrative Law Judge Michael

[1] Section 75.316, which restated 30 U.S.C. § 863(o), provided as follows:

> 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.

A. Lasher, Jr. determined that Energy West violated the standard and he assessed a civil penalty of $20. 15 FMSHRC 1185 (June 1993) (ALJ). For the reasons set forth below, we vacate the judge's decision and remand for further proceedings.

I.

Factual and Procedural Background

At 4:10 a.m. on December 26, 1991, MSHA Inspector Robert Baker issued a citation[2] to Energy West at its Deer Creek Mine in Emery County, Utah. The citation alleged that Energy West violated the approved ventilation system and methane and dust control plan it had adopted pursuant to 30 C.F.R. § 75.316 and section 303(o) of the Act, 30 U.S.C. § 863(o). 15 FMSHRC at 1187. The citation stated that the 6th Right longwall section was required to be ventilated by 30,000 cubic feet of air per minute ("cfm"). *Id.* The inspector measured the air quantity to be 22,680 cfm, which is not disputed by Energy West. *Id.* at 1188.

Energy West contested the citation and, on August 17, 1992, filed a motion for summary decision pursuant to former Commission Procedural Rule 64, 29 C.F.R. § 2700.64.[3] In support of its motion, Energy West asserted that the requirement for 30,000 cfm set forth on the individual water spray schematic for mechanized mining unit ("MMU") No. 051-0 was the sole basis for the Secretary's citation. Energy West also asserted that the provision applies only during periods of coal production, not during idle periods, and that the citation was issued "during an idle shift when no coal production was occurring." E. Mot. at 3-5, citing S. Resp. to Interrog. at 3-4. The operator contended that, because the provision is set forth only on the individual MMU water spray schematic, the 30,000 cfm requirement is linked to the need for water spraying and argued that, because spraying is required only during active mining, the 30,000 cfm requirement is likewise limited to production shifts. Energy West referred to other

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

[2] The citation states:

> The approved ventilation, methane, and dust control plan was not being complied with in the 6th Right longwall section as the plan requires 30,000 C.F.M. of air to reach the intake end of the longwall face, the air reading was 22,680 C.F.M. reaching the intake end of the longwall. The crew had been withdraw[n] to the headgate befor[e] my arrival on the section.

[3] Subsequent changes to Rule 64 do not affect the instant case. *See* 29 C.F.R. § 2700.67 (1993).

parts of its ventilation plan and to its fan stoppage plan to support its position that the ventilation plan distinguishes between periods of active mining and idle periods.[4] *Id.* at 3-4, 7-8. The motion was supported by an affidavit from Dave Lauriski, Energy West's Director of Health, Safety and Training, who developed the ventilation plan.

The Secretary filed a cross motion for summary decision, asserting that the pertinent plan provision is unambiguous and that the 30,000 cfm requirement applies at all times whether or not coal is being mined. S. Mot. at 3. The Secretary disagreed that the provision was intended to apply only during periods of coal production or that Energy West had consistently interpreted the provision in the manner it now advocates. *Id.* at 1-2. He further disputed that the shift was idle and contended that the reason coal was not being produced at the time was because the MMU was being repaired. *Id.* at 3.

Relying on 30 C.F.R. §§ 75.301 and 75.301-3(c),[5] the Secretary argued that the longwall

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[4] Energy West relied on the following provisions of its ventilation plan:

VII. VENTILATION OF IDLE AREAS. "1. Appropriate measures will be taken in idle areas to insure the air quality standards required under parts 75.301-2 and 75.301-5."

XVII. LONGWALL SET-UP AND EXTRACTION VENTILATION. "6. Minimum air quantities for set-up and extraction faces are: . . . IDLE PERIODS - At idle periods during the set-up and extraction process a minimum of 3,000 cfm of air will be maintained across the set-up and extraction faces."

Energy West relied on the following provision of its fan stoppage plan:

C. RESUMPTION OF WORK. 3. BACK-UP FAN OPERATION. "b. Idle work may be done as long as the work area has been examined in accordance with 30 C.F.R. 75.303 . . . ."

E. Mot. Attachments B and C.

[5] Section 75.301 provided in pertinent part: "the minimum quantity of air reaching the intake end of a pillar line shall be 9,000 cubic feet a minute . . . . The authorized representative of the Secretary may require in any coal mine a greater quantity and velocity of air when he finds it necessary to protect the health or safety of miners." 30 C.F.R. § 75.301 (1991).

Section 75.301-3(c) stated that "[w]hen longwall mining is practiced the volume of air shall be measured in the intake entry or entries at the intake end of the longwall face and the longwall shall be constructed as a pillar line." 30 C.F.R. § 75.301-3(c) (1991).

face must be constructed "as a pillar line." S. Mot. at 3. The Secretary asserted that, although the minimum quantity of air required under the standard at a pillar line is 9,000 cfm, the Secretary may require a greater quantity and, in this case, had required 30,000 cfm. *Id.* at 3. The Secretary supported his motion for summary decision with an affidavit from MSHA Supervisory Mining Engineer William P. Reitze, who, as a member of the MSHA Denver Ventilation Group, reviews and evaluates coal mine ventilation plans. Affidavit at 1-2. Reitze averred that the 30,000 cfm requirement for the longwall face during idle periods ensures that methane and other harmful gases are cleared from the bleeder system as well as from the face. *Id.* at 2-3. In its response to the Secretary's cross motion for summary decision, Energy West disputed the Secretary's assertions.

The judge granted summary decision in favor of the Secretary. He concluded that the plan provision clearly required 30,000 cfm of air at all times and, thus, that a violation had been established. The Commission granted Energy West's petition for discretionary review, which challenged the judge's decision on both procedural and substantive grounds.

II.

Disposition

Energy West contends on review that the 30,000 cfm requirement applies only during active coal production, not when the section is idle. PDR at 8-10. Energy West also argues that the Secretary should be required to demonstrate that it was on notice of the Secretary's interpretation. *Id* at 14. It maintains that the finding of violation should be reversed. Reply Br. at 6. Alternatively, if the Commission determines that a genuine issue of material fact exists, the operator seeks remand. PDR at 15. The Secretary asserts that the judge correctly found the disputed provision to be unambiguous and to apply at all times. S. Br. at 8-15.

Summary decision may be granted only where: (1) the entire record, including pleadings, affidavits, and answers to interrogatories, establishes that there is no genuine issue as to any material fact; and (2) the moving party is entitled to summary decision as a matter of law. 29 C.F.R. § 2700.67(b). *See generally Missouri Gravel Co.*, 3 FMSHRC 2470, 2471 (November 1981); *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). We conclude that the disputed plan provision is ambiguous and that the judge's determination to the contrary was erroneous. We also conclude that the record before the judge contained disputed facts material to determining the requirements of Energy West's ventilation plan. For these reasons, summary decision was inappropriately entered. *See Energy West Mining Co.*, 16 FMSHRC 1414, 1419 (July 1994).

The plan contains a separate schematic entitled "water spray diagram" for each MMU longwall section in the mine. 15 FMSHRC at 1188. It is undisputed that the 30,000 cfm

requirement is set forth in one place only, as one of four "controls and practices" on the water spray diagram. *See* S. Br. at 14; 15 FMSHRC at 1186. One possible inference from the placement of the requirement is that it is linked to the provision of water sprays and that, like water sprays, the requirement applies only while the longwall is in operation. Furthermore, as Energy West argues, air quantity requirements in the plan vary, depending on whether mining is occurring or the section is idle. PDR at 9-10; Reply Br. at 4-6. We therefore conclude that the disputed plan provision is unclear. Accordingly, a determination must be made as to whether the Secretary's interpretation of the provision is reasonable and we remand to that effect.[6]

In the event the judge determines that the Secretary's interpretation of the provision is reasonable, he should also address the operator's notice argument and determine whether the operator had notice that the provision was to apply at all times. "The Commission's task is . . . to determine whether the Secretary's interpretation of [a] regulation is reasonable and whether the operator was given fair notice of its requirements." *Consolidation Coal Co.*, 14 FMSHRC 956, 969 (June 1992). Commission precedent expressly recognizes notice as an appropriate inquiry as to ventilation and roof control plan provisions. *Jim Walter Resources, Inc.*, 9 FMSHRC 903, 908 (May 1987); *Mettiki Coal Corp.*, 13 FMSHRC 3, 7 (January 1991).

Because the plan provision is enforceable as a mandatory standard, the operator is entitled to the due process protection available in the enforcement of regulations. "[T]he due process clause prevents . . . deference from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires." *Gates & Fox Co. v. Occupational Safety and Health Review Comm'n*, 790 F.2d 154, 156 (D.C. Cir. 1986).[7] When "a violation of a regulation subjects private parties to criminal or civil sanctions, a regulation cannot be construed to mean what an agency intended but did not adequately express." *Phelps Dodge Corp. v. Federal Mine Safety and Health Review Comm'n*, 681 F.2d 1189, 1193 (9th Cir. 1982), *quoting Diamond Roofing Co., Inc. v. Occupational Safety and Health Review Comm'n*, 528 F.2d 645, 649 (5th

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[6] An agency's reasonable interpretation of its regulations is entitled to deference. *Secretary of Labor v. Western Fuels-Utah,* 900 F.2d 318, 321 (D.C. Cir. 1990).

[7] We find *Sewell Coal Co. v. Federal Mine Safety and Health Review Comm'n*, 686 F.2d 1066 (4th Cir. 1982), cited by our colleague, to be unpersuasive. As noted by Judge Widener in his dissent, neither *SEC v. Chenery Corp.*, 332 U.S. 194 (1947), nor *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974), "involved the imposition of a fine without notice." 686 F.2d at 1073. In *Bell Aerospace*, the Supreme Court explicitly acknowledged this distinction, stating: "[T]his is not a case in which some new liability is sought to be imposed on individuals for past actions which were taken in good faith reliance on Board pronouncements. *Nor are fines or damages involved here. . . .*" *Id.* at 295 (emphasis added). Neither *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969), nor *Molina v. INS*, 981 F.2d 14 (1st Cir. 1992), also cited by our colleague, dealt with imposition of liability without prior notice; in *Molina* the court expressly notes that no due process claim is involved. 981 F.2d at 19.

Cir. 1976). *Accord General Electric Co. v. EPA,* 53 F.3d 1324, 1328 (D.C. Cir. 1995); *Secretary of Labor v. Western Fuels-Utah, Inc.* 900 F.2d 318, 326 (D.C. Cir. 1990) (Edwards, J., dissenting). Laws must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972); *Lanham Coal Co.*, 13 FMSHRC 1341, 1343 (September 1991). The enforcement actions at issue were vacated for lack of notice in *Gates & Fox* (790 F.2d at 156-57), *Phelps Dodge* (681 F.2d at 1193) and *General Electric* (53 F.3d at 1330).[8]

The Commission has not required the Secretary to provide an operator with actual notice of the Secretary's interpretation prior to enforcement. Rather, the Commission has applied an objective standard of notice, i.e., the reasonably prudent person test. *E.g., Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (December 1982); *Otis Elevator Co.*, 11 FMSHRC 1896, 1906 (October 1989), *aff'd*, 921 F.2d 1285, 1291 (D.C. Cir. 1990). The Commission has summarized this test as "whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard." *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (November 1990).

We note that Energy West has conceded that a violation occurred if active mining had been only temporarily halted for repairs of the MMU. E. Opp'n to S. Mot. at 8. *See Mid-Continent Coal and Coke Co.*, 3 FMSHRC 2502, 2504 (November 1981). Thus, depending on the judge's conclusions regarding the interpretation and application of the ventilation plan provision, the status of the longwall section at the time of citation could bear on whether a violation occurred. In the event the judge determines that the Secretary's interpretation is not reasonable, or if he sustains the operator's argument as to lack of notice, he must determine whether, at the time of citation, the longwall section had been only temporarily idled for repairs as asserted by the Secretary (S. Br. at 11-12), or whether the section was idled for the entire shift, as asserted by Energy West. PDR at 13.[9]

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[8] Chairman Jordan notes that, in *General Electric*, the court held that an agency's interpretation may be reasonable and entitled to deference even though the interpretation "would not be obvious to 'the most astute reader'" and might "diverge significantly from what a first-time reader of the regulations might conclude was the 'best' interpretation of their language." 53 F.3d at 1327. The court deferred to the agency's interpretation because it was "logically consistent with the language of the regulation[s]," but found that the interpretation was "so far from a reasonable person's understanding of the regulations that they could not have fairly informed GE of the agency's perspective." 53 F.3d at 1330. Although the agency could require future compliance with its interpretation, the lack of fair notice led the court to reverse the enforcement action taken in that particular instance. 53 F.3d at 1328, 1330.

[9] We do not reach Energy West's objection to the judge's adoption of language from the Secretary's cross motion in his decision. However, we note that such incorporation of language is "questionable judicial practice." *Energy West Mining Co.*, 16 FMSHRC at 1419 n.8.

III.

Conclusion

For the foregoing reasons, we reverse the judge's determination that the plan provision is unambiguous, vacate his decision, and remand this matter to the Chief Administrative Law Judge for assignment to a judge for an evidentiary hearing.[10]

Mary Lu Jordan, Chairman

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

[10] Judge Lasher has retired.

Commissioner Marc Lincoln Marks, concurring in part and dissenting in part:

I concur in the result reached by my colleagues. I agree that the disputed plan provision is ambiguous for the reasons set forth by them and that the judge's determination to the contrary was erroneous. I also agree that the record before the judge contained disputed facts material to determining the requirements of Energy West's ventilation plan and; therefore, the judge inappropriately entered summary decision. *See Energy West Mining Co.*, 16 FMSHRC 1414, 1419 (July 1994). I agree with my colleagues that this case must be remanded to the judge for a determination of whether the Secretary's interpretation of the provision is reasonable and, thus, entitled to weight.[1]

However, I dissent from my colleagues' view that, in addition to a determination that enforcement of a ventilation plan is based on a reasonable interpretation of its requirements, enforcement actions are subject to a *separate* "notice" requirement. In my view, the Secretary can enforce ventilation plans based on reasonable interpretations of their requirements and that such enforcement actions are not also subject to a *separate* "notice" requirement. *Sewell Coal Co. v. Federal Mine Safety and Health Review Comm'n*, 686 F.2d 1066, 1069 (4th Cir. 1982) ("*Sewell*"). In *Sewell*, the Fourth Circuit Court of Appeals held that Sewell's argument that the Secretary's interpretation, unknown to it at the time, should not be retroactively applied was foreclosed by a number of Supreme Court decisions. *Id.* at 1069-70, *citing NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974); *NLRB v. Wyman-Gordan Co.*, 394 U.S. 759 (1969); *SEC v. Chenery Corp.*, 332 U.S. 194 (1947). The Fourth Circuit further held that "retroactive application of a novel principle expounded in an adjudicatory proceeding does not infringe the rights secured by the due process clause." *Sewell*, 686 F.2d at 1070.

The Secretary is not prevented from enforcing a reasonable interpretation of an ambiguous plan provision simply because the operator has relied on an alternative interpretation; on the contrary, the Commission must give weight to a reasonable interpretation by the Secretary, even if it is not the only one permitted by the language of the standard. *E.g., Sewell*, 686 F.2d at 1069; *Secretary of Labor v. Western Fuels-Utah*, 900 F.2d 318, 321 (D.C. Cir. 1990). Requiring pre-enforcement "notice" of a reasonable interpretation of a plan provision would allow the operator to escape liability in cases of first impression. Due process does not require the Secretary to enforce a reasonable interpretation of the ventilation plan requirements only prospectively (i.e., only after providing "notice"). *See SEC v. Chenery*

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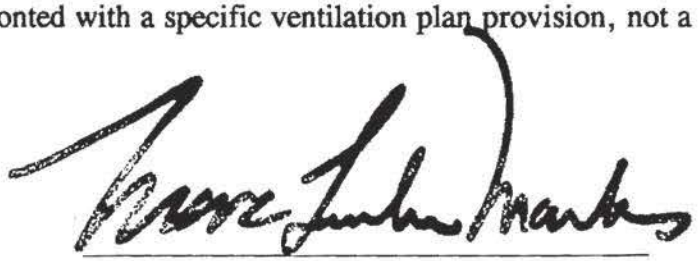
[1] The Senate committee report on the Mine Act states that because the Secretary "is charged with responsibility for implementing this Act, it is the intention of the Committee, consistent with generally accepted precedent, that the Secretary's interpretations of the law and regulations shall be given weight by both the Commission and the courts." S. Rep.No. 181, 95th Cong., 1st Sess. 49 (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 637 (1978).

Corp., 332 U.S. at 202-03; *Sewell*, 686 F.2d at 1069. "[R]etroactive application of new principles in adjudicatory proceedings is the rule, not the exception. And, agencies have broad legal power to choose between adjudication and rulemaking proceedings as vehicles for policymaking." *Molina v. INS*, 981 F.2d 14, 23 (1st Cir. 1992), *citing SEC v. Chenery Corp.*, 332 U.S. 194 (1947).[2]

Further, I also believe that the "reasonably prudent person test" is inapposite in this case. I do not address whether this test is ever an appropriate analytical framework for "evaluat[ing] the fairness of the application of *broad standards* to particular factual settings." *Ideal Cement Co.*, 12 FMSHRC 2409, 2415 (November 1990) (emphasis supplied). However, even assuming that the test is an appropriate analytical framework for broad standards, the Commission here is confronted with a specific ventilation plan provision, not a broad standard.



Marc Lincoln Marks, Commissioner

[2] It is true, as pointed out by my colleagues, slip op. at 5 n.7, that in *Molina* the court noted "[t]here is no claim here that the federal definition exceeds the bounds that some other part of the Constitution (say, the 'due process' clause) might set." *Molina*, 981 F.2d at 19. However, my colleagues neglect to point out that the court went on to note that it found "nothing 'fundamentally unfair' about [the federal] definition." *Id.*

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUN 2 9 1995

LANCE A. PAUL,	:	DISCRIMINATION PROCEEDING
Complainant	:	
v.	:	Docket No. WEST 95-228-DM
	:	WE MD 95-04
NEWMONT GOLD COMPANY,	:	
Respondent	:	Gold Quarry
	:	Mine ID 26-00500

ORDER OF DISMISSAL

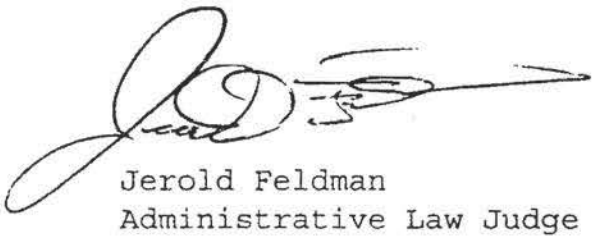
Before: Judge Feldman

This matter concerns a discrimination complaint filed by Lance A. Paul pursuant to Section 105(c)(3) of the Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(3). On May 23, 1995, a Notice of Hearing scheduling this case for trial on August 15, 1995, in Elko, Nevada was sent to Paul via certified mail at Paul's address of record. The notice was returned as unclaimed. The respondent has advised that Paul is now living on an Indian reservation in Nevada with his Native American spouse. However, Paul's address is unknown. Commission Rule 5(c), 29 C.F.R. § 2700.5(c), requires a complainant to promptly notify the Commission and all parties of any change in address.

The respondent has filed a Motion to Dismiss Paul's complaint in view of the fact that his whereabouts are unknown. Issuance of an Order to Show Cause would serve no purpose given the absence of a valid forwarding address.

Accordingly, under the circumstances herein, the respondent's Motion to Dismiss **IS GRANTED**. Consequently, the hearing scheduled in this proceeding **IS CANCELED** and the above

captioned discrimination complaint **IS DISMISSED** without prejudice. The complainant may reopen his discrimination complaint upon a showing of good cause.



Jerold Feldman
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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AUG 1 1995

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 94-639
Petitioner	:	A.C. No. 40-02934-03549
v.	:	
	:	Mine No. 78
KELLYS CREEK RESOURCES INC.,	:	
Respondent	:	

DECISION

Appearances: Thomas A. Grooms, Esq., U.S. Department of Labor, Office of the Solicitor, Nashville, Tennessee, for the Petitioner;
Hollis Rogers, President, Kellys Creek Resources, Inc., Whitwell, Tennessee, for the Respondent.

Before: Judge Weisberger

This case is before me based upon a Petition for Assessment of Civil Penalty, filed by the Secretary (Petitioner) alleging a violation by Kellys Creek Resources (Respondent) of 30 C.F.R. § 75.388(a)(2). Subsequent to notice, the case was scheduled and heard in Chattanooga, Tennessee, on April 6, 1995. Tommy Frizzell testified for the Petitioner, and Hollis Rogers testified for the Respondent. At the conclusion of the hearing, Petitioner indicated he intended to file a brief. Respondent was accorded the same privilege. Briefs were ordered to be filed three weeks after receipt of the transcript. The transcript was received by the Commission on May 8, 1995. After requesting extentions, Petitioner filed his brief on July 26, 1995. No brief was filed by Respondent.

Findings of Fact and Discussion

Tommy Frizzell, an MSHA Inspector, was notified by the Respondent on January 27, 1994, that a cut had been made into a sealed area, and that the operator had withdrawn miners from the area. Frizzell went to the mine and was informed by Jerry McGowan, the section foreman, that low oxygen was detected at the cut-through.

According to Frizzell, the cut-through measured 3 feet wide, and 6 to 8 inches high. Frizzell indicated that the crosscuts were 40 feet apart. He examined the ribs for test holes, five crosscuts out by the cut-through, and did not see any evidence of any test holes. Frizzell issued a citation alleging a violation of 30 C.F.R. § 75.388(a)(2) which, in essence, provides that boreholes shall be drilled when the working place approaches within 200 feet of an area of the mine not shown by surveys that are certified. Respondent stipulated to the fact of the violation. Based on this stipulation and the testimony of Frizzell, I find that the Respondent did violate Section 75.388(a)(2), supra.

Unwarrantable Failure

In order for a violation to be found to be the result of an operator's unwarrantable failure, the Secretary must establish that its actions constituted more than ordinary negligence and reached the level of aggravated conduct (See Emery Mining Corp., 9 FMSHRC 1997, 2203-2204 (1987)). According to Frizzell, on June 11, 1990, Hollis Rogers, who was the Respondent's president on January 27, 1994, was cited for mining within 200 feet of an adjacent sealed mine, and not having any boreholes in violation of 30 C.F.R. § 75.1701, the predecessor of Section 75.388(a)(2), supra. Frizzell alleges that Hollis has had considerable mining experience, including training of miners and rescue teams, and therefore he should have known that in the time period at issue, he was mining near an abandoned mine. Frizzell explained that the dotted lines encircled in green on Government Exhibit 5-A depict a sealed area that abutted the area being mined on January 27, 1994, that was not surveyed and was not certified. In this connection, he noted that broken lines on mine maps are universal symbols used by engineers to indicate areas that are not certified to be accurate. Frizzell's testimony does not

provide any specific factual foundation to support his conclusion that broken lines on a mine map indicate areas not surveyed. The legend on the mine map in issue does not indicate that the broken lines symbol stands for unsurveyed areas. To the contrary, a handwritten notation on the bottom of the printed legend indicates that a broken line is the symbol for "line curtain."

Rogers testified that the broken lines on a mine map do not necessarily indicate areas not certified. He testified, in essence, that broken lines are used to indicate the point where surveyors cannot enter any further. According to Rogers, the broken lines depicted in the map at issue represent a gob area or loose rock within the gob area.

Rogers testified that when the cut-through was made, he thought he "was 90 feet away" (Tr. 124).

Frizzell testified that he had asked McGowan, the section foreman, why boreholes were not drilled in advance of the work. According to Frizzell, McGowan told him that he was told by Rogers that "he didn't have to drill those test holes until he got within 50 feet of that area" (Tr. 39).

Based on the above facts, I conclude that Petitioner has not established that the level of Respondent's negligence rose to the level of aggravated conduct. I thus find that the violation was not a result of Respondent's unwarrantable failure.

Significant and Substantial

In essence, according to Frizzell, boreholes are to be drilled in order to detect the presence of low oxygen in the sealed area, which, if it were to escape in an unplanned cut-through, could cause the death of miners. Also, boreholes are to be used to detect methane in the atmosphere of the sealed area which, if in an exposure range, could cause an explosion resulting in fatalities. Frizzell explained that at a point 6 inches outby the cut-through, the amount of oxygen detected was 15 1/2 percent. He explained that a person exposed to an oxygen level of 10 percent would become unconscious.

I find that accordingly, the violation here contributed to a measure of danger to safety. However, in order for the violation

to be considered significant and substantial it must be established that there was a "reasonable likelihood" that the hazard contributed to will result in an injury." (Mathies Coal Company, 6 FMSHRC 1, 3-4 (January 1984)).

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, the Commission stated 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).

Hence, it must be established by the Secretary that there was a reasonable likelihood of an injury producing event, i.e., a fire, explosion, or exposure to low oxygen contributed to by the lack of boreholes. An injury producing event can occur attendent upon a cut-through into an area containing low oxygen or methane in an explosive range. This event in turn depends upon the manner to which the continous miner is being operated, its distance to the sealed area, and the presence in the sealed area of low oxygen and explosive methane. These factors all operate independently of the failure to drill boreholes, the violative acts herein. I thus find that it has not been established that an injury producing event was likely to have occurred as a result of the violation herein. I find that it has not been established that the violation was significant and substantial.

Penalty

I find that the level of Respondent's negligence herein was only moderate. However, since the violative actions could have led to unexpected exposure of miners to hazardous amounts of methane and low amounts of oxygen, both of which could be fatal,

I find that the violation was of a very high level of gravity. On the other hand, the level of the penalty to be assessed should be reduced taking into account its effect on the Respondent's ability to continue in business for the reasons set forth in Kellys Creek Resources, 17 FMSHRC 1085, 1092, (June 29, 1995). [1] Taking all the above into account, I find that a penalty of $500 is appropriate.

ORDER

It is ORDERED that the order at issue be amended to a section 104 (a) citation that is not significant and substantial. It is further ORDERED that respondent shall, within 30 days of this decision, pay a civil penalty of $500.

Avram Weisberger
Administrative Law Judge

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/ml

[1]At the hearing of the case at bar, the parties stipulated to the proof adduced in the earlier hearing between these parties, Kellys Creek Resources, Inc., 17 FMSHRC, supra, as it relates to the appropriateness of the penalty to the size of Kellys Creek's ability to continue in business.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

AUG 3 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. CENT 92-334-M
	:	A. C. No. 23-01924-05520
v.	:	
	:	Fort Scott Fertilizer-Cullor, Inc.
FORT SCOTT FERTILIZER-CULLOR, INC., Respondent	:	
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. CENT 93-117-M
	:	A. C. No. 23-01924-05523 A
v.	:	
	:	Fort Scott Fertilizer-Cullor, Inc.
JAMES CULLOR, Employed by FORT SCOTT FERTILIZER-CULLOR, INC., Respondent	:	

DECISION ON REMAND

Before: Judge Feldman

These civil penalty matters, brought by the Secretary pursuant to the provisions of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. § 801 *et. seq.*, were remanded by the Commission on July 21, 1995. 17 FMSHRC ___. These matters involve a citation and a withdrawal order issued by the Mine Safety and Health Administration (MSHA) to Fort Scott Fertilizer-Cullor, Inc. (Fort Scott) on May 27, 1992, for alleged violations of 30 C.F.R. § 56.14101. This mandatory safety standard, in pertinent part, requires mobile equipment to "be equipped with a service brake system capable of stopping and holding the equipment with its typical load on the maximum grade it travels." The Secretary, pursuant to section 110(c) of the Act, 30 U.S.C. § 820(c), also seeks to impose a civil penalty

against corporate agent James Cullor "for knowingly authorizing, ordering, or carrying out" the violations of section 56.14101.

Specifically, these proceedings concern inoperable brakes on a 30 ton "big" Euclid truck and a 15 ton "small" Euclid truck. The respondents have stipulated to the inoperable brakes on these trucks. They have also stipulated there was a reasonable likelihood that the hazards contributed to by these conditions could result in injuries of a reasonably serious nature. (Tr. 12-18, 195, 212). However, the respondents contend the brakes were intentionally disabled by truck drivers William Burris and Timothy Ragland.

In my initial decision, I concluded there was sufficient circumstantial evidence to support the respondents' contention that brake tampering had occurred. 15 FMSHRC 2354, 2361 (November 1993). However, the Commission ordered me to reconsider my finding of misconduct in view of my application of a negative inference based on the Secretary's failure to provide investigative reports or MSHA testimony concerning the validity of the discrimination complaints Burris and Ragland filed with MSHA. In their complaints, Burris and Ragland alleged their June 1, 1992, discharges were discriminatorily motivated by their May 27, 1992, complaints of defective brakes.

As a consequence of my misconduct finding, I concluded sabotage, which is intended to create hazards, is an anathema to the Mine Act's goal of preventing unsafe conditions and should not be given recognition. 30 U.S.C. § 801(e). Thus, I vacated the defective brake citations holding that intentional disabling of equipment, as distinguished from other employee misconduct (*e.g.*, a violation of a mandatory safety standard caused by an employee's failure to follow company safety procedures) was an exception to the strict liability application of the Mine Act. 15 FMSHRC at 2362-63.

In its remand, the Commission, citing, *inter alia*, its decision in *Ideal Cement Co.*, 13 FMSHRC 1346, 1351 (September 1991), concluded the Mine Act imposes strict liability on operators for the violative acts of its employees, even when such acts involve "significant employee misconduct." Thus, the Commission determined I erred in treating intentional tampering as a defense to liability under the Mine Act. 17 FMSHRC at ___,

slip op. at 4. The Commission, however, also noted miner misconduct is not imputable to the operator in determining the degree of negligence for penalty purposes. *Id.* at ___, slip op. at 5.

Having concluded tampering is not a defense, the Commission reinstated the citation and order given the respondents' stipulation concerning the defective condition of the cited brake systems. The Commission remanded these matters for a decision regarding the significant and substantial and unwarrantable failure issues. The Commission also remanded the issue of the personal liability of James Cullor under section 110(c).

Findings of Fact

The violations occurred on May 27, 1992, at Fort Scott's limestone quarry in El Dorado Springs, Missouri. Gary Cullor is President of Fort Scott, a close family corporation. Cullor's wife, Sally Cullor, is Secretary and Treasurer of the corporation and a 100 percent shareholder. Gary Cullor's uncle, James Cullor, worked in a management capacity at the quarry.

Burris and Ragland were employed by Fort Scott as quarry truck drivers. Burris was hired on September 16, 1991. Ragland was hired on March 26, 1992. Both Burris and Ragland are qualified interstate truck drivers. Each holds a certified commercial driver's license (CDL) in the State of Missouri. As CDL licensees, they are required to be familiar with the operation and maintenance of trucks, including truck braking systems. (Tr. 90-92, 152-153).

Burris and Ragland became upset over the subsequent hiring of Jerry Carpenter who, in addition to other duties, was a welder. (Tr. 117). Carpenter's salary was higher than the wages of Burris and Ragland. (Tr. 166). Burris "thought it was wrong" and that he "deserved more [money]" (Tr. 118). Ragland also did not "think [Carpenter's higher salary] was right." (Tr. 166). Burris and Ragland knew Fort Scott had to timely complete its performance on a state job that it had bid for. (Tr. 117, 166).

Threats were made concerning some type of adverse action against Fort Scott if pay raises were not received. (Tr. 118, 166-168). Burris and Ragland received small pay raises on May 18, 1992, which they apparently considered inadequate.

Shortly thereafter, on Friday, May 22, 1992, Ragland telephoned the MSHA office and spoke to Inspector Michael Marler's supervisor. At that time, Ragland requested an MSHA inspection because the quarry trucks reportedly had no brakes. (Tr. 96, 165, 259, 278-279). Burris knew an inspector would soon inspect the El Dorado Springs facility. (Tr. 96). Despite Ragland's May 22 MSHA complaint, Burris testified he did not experience brake problems on the days immediately preceding Marler's May 27, 1992, inspection. (Tr. 106).

Burris and Ragland started hauling mud and water out of the quarry pit at approximately 8:00 a.m. on Wednesday, May 27, 1992. Burris was driving the big Euclid and Ragland was operating the small Euclid. (Tr. 88). Burris and Ragland made several trips into the pit to haul mud between 8:00 a.m. and 9:00 a.m. During this period, the small Euclid became stuck in the mud. (Tr. 96, 287-288). Normal quarry operations were then suspended at approximately 9:00 a.m. because the high loader was experiencing steering problems. (Tr. 31, 184). Contemporaneous with the high loader breakdown, Burris and Ragland complained to James Cullor that their truck brakes were not working. Although Cullor testified he did not observe any brake problems, Cullor told Burris and Ragland to park their trucks by the work shed so the trucks could be checked out. (Tr. 287, 289-90).

Inspector Marler testified he arrived at the quarry at approximately 10:00 a.m., shortly after the trucks were taken out of service because of the high loader malfunction (Tr. 184, 258). Marler asked to talk to the drivers of the haulage trucks (Tr. 186). Marler spoke to Burris who told him the big Euclid's brakes would not hold going down into the quarry. Burris stated that he had told Jim Cullor who reportedly told Burris to keep driving and not to complain so much about the equipment. (Tr.186). Marler tested the big Euclid and determined that the brakes would not hold the truck in gear on level ground. Therefore, Marler issued 104(d)(1) Citation No. 4110164, citing a violation of the mandatory standard in section 56.14101, 30 C.F.R. § 56.14101, for defective brakes on the big Euclid.

Marler also spoke to Ragland who complained about the brakes on the small Euclid. (Tr. 215). Consistent with Burris' complaint, Ragland informed Marler that he had reported the brake problems to James Cullor who did nothing about it. (Tr. 216). Marler determined the brakes would not stop the small Euclid on a 6 percent grade, even when unloaded. Consequently, Marler issued 104(d)(1) Order No. 4110167, citing a violation of section 56.14101 for ineffective brakes.

Although there were several maintenance problems on these trucks that required attention, items requiring preventative maintenance (*e.g.*, brake shoe replacement and replacement of one leaking axle oil seal) must be distinguished from systematic loosened slack adjusters on three of the trucks' four wheels. For example, MSHA's examination of the big Euclid truck driven by Burris revealed loosened slack adjusters on the left front wheel and the rear left and rear right wheel. *See* July 9, 1992, termination of 104(d) Citation No. 4110164 issued by Michael Marler. MSHA's findings are consistent with Fort Scott truck mechanic Raymond Jenkins' testimony that loosened slack adjusters on three of the four wheels on the big and small Euclid trucks accounted for the trucks' brake malfunctions. (Tr. 32-36, 37-38, 49-49).

On June 1, 1992, Burris and Ragland were terminated by Fort Scott because they reportedly did not have steel-toed boots. (Tr. 164). Both subsequently filed discrimination complaints pursuant to section 105(c) of the Act. On July 14, 1992, MSHA advised Fort Scott that it had determined that Burris and Ragland had not been discriminated against.

Further Findings and Conclusions

The Primary Cause of Brake Failure

At the outset, it is helpful to explain the function of slack adjusters. Slack adjusters are located on the inside of each wheel. They consist of a bolt that can be tightened with an ordinary wrench. If slack adjusters are not properly tightened, they prevent the brake shoe from contacting the brake drums. (Tr. 206). In view of the large diameter of the truck tires,

slack adjusters can be easily tightened from a squatting position without removing the wheels. (Tr. 50) Properly adjusted, they are fully tightened and then turned back one-half turn. (Tr. 51).

The slack adjustment procedure was described by the respondent's truck mechanic, Raymond Jenkins, as being "real easy" (tr. 49); "a minute" to adjust (tr.50-51); and "there ain't nothing to it, really." (Tr. 36). Issuing MSHA Inspector Michael Marler corroborated Jenkins testimony opining that "anyone could walk up to [a slack adjuster] with a wrench and change [it] if they want." (Tr. 221).

As previously noted, Jenkins, who was called to testify on behalf of the Secretary, found loose slack adjusters on three of the four wheels on the big and small Euclid trucks. (Tr. 32-36, 37-38, 48-49). Marler's testimony was equivocal. Marler testified the slack adjusters were loose, but not loose enough to prevent the shoes from contacting the drums (Tr. 206). Marler also conceded that loose slack adjusters on three wheels "could have contributed" to the malfunctioning of the brakes. (Tr. 301, 304). However, Marler also testified he did not determine to what extent the slack adjusters were out of adjustment. (Tr. 229; *See also* July 9, 1992, termination of Citation No. 4110164).

Jenkins testified the major reason why the brakes could not hold the Euclid trucks on grade was the loosened slack adjusters. (Tr. 38-39, 48). Jenkins' opinion is consistent with Marler's testimony that slack adjusters can be loosened to the point where they would render the brakes ineffective. (Tr. 221-222). Accordingly, I credit the testimony of truck mechanic Jenkins that the primary brake defects on the subject Euclid trucks were the loosened slack adjusters.

Significant and Substantial

In its remand, the Commission requested I revisit the question of significant and substantial noting that my initial decision stated the respondents had stipulated "to the fact that there was a reasonable likelihood that the hazards contributed to by [the defective brakes] *could* result in injuries of a reasonably serious nature." 15 FMSHRC at 2355 (emphasis added).

However, the Commission emphasized that "could have" does not satisfy the significant and substantial test in *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), which requires a finding that the hazard contributed to by the cited violation *will* result in injury of a reasonably serious nature. 17 FMSHRC at ___, slip op. at 7.

In evaluating whether a violation is properly designated as significant and substantial, the likelihood of serious injury must be viewed in the context of continuous exposure to the hazard caused by the violation assuming the violation continued unabated in the face of normal mining operations. *Southern Oil Coal Co.*, 13 FMSHRC 912, 916-17 (June 1991); *Halfway, Inc.*, 8 FMSHRC 8, 12 (January 1986); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1473, 1574 (June 1984). Here, it is obvious the defective brakes, that could not hold on multi-ton dump trucks traversing up and down an open pit haulage road, posed a substantial likelihood that serious or fatal injuries would occur. Thus, the violations in question were properly designated as significant and substantial.

Unwarrantable Failure

An operator has demonstrated an unwarrantable failure if the operator's violation of the cited mandatory safety standard is attributable to the operator's aggravated conduct. Such conduct requires more than ordinary negligence or carelessness. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (December 1987). The Commission has characterized "aggravated conduct" as conduct that is inexcusable or not justifiable. Consequently, an unwarrantable failure exists if the operator's conduct evidences a "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04. Thus, resolution of the issue of unwarrantable failure in this instance is dependent upon whether the reported May 27, 1992, brake complaints were made in good faith and ignored by James Cullor as an agent of Fort Scott, or, whether the slack adjusters were loosened as a result of misconduct.

Marler's testimony best describes the potential for tampering by individuals who are motivated to disrupt quarry operations. Marler stated a slack adjustment is "a very simple adjustment, it takes one wrench and a few seconds to do." (Tr. 200).

My initial decision noted strong circumstantial evidence of this simple act of tampering. The complaining truck drivers had the motive and opportunity to loosen the slack adjusters. Their own testimony reflects they were disgruntled employees and threats had been made about disrupting quarry operations. Moreover, the complainants were responsible for routine truck maintenance. (Tr. 87). Marler testified one of the first things a truck driver experiencing brake problems should check are the slack adjusters. (Tr. 29). Yet Burris and Ragland, licensed by the State of Missouri to drive eighteen-wheeler trucks, continued to use their trucks without brakes without this rudimentary check. (Tr. 91). In addition, the pattern of loosened slack adjusters on three out of four wheels on both trucks driven by Burris and Ragland is further evidence of tampering.

Furthermore, Ragland's May 22, 1992, complaint to MSHA that the quarry trucks' brakes were ineffective is also suspect for several reasons. Significantly, despite complaining to MSHA that Fort Scott ignored their brake complaints, Fort Scott truck mechanic Jenkins testified Burris and Ragland never complained to him about brake problems. (Tr. 70). Of greater significance is Burris' testimony that the cited 30 ton Euclid's brakes "held" when he last operated the truck on May 25, 1992, during the interim period between Ragland's May 22 MSHA complaint and Marler's May 27 inspection. (Tr. 106). I can find no reasonable explanation short of tampering to account for this spontaneous remission in the big Euclid's brake system.

Moreover, Burris' testimony lacked credibility. Although Jenkins and Marler testified it is not uncommon for truck drivers to adjust slack adjusters, Burris was reluctant to admit he knew how to make such adjustments. (Tr. 26-27, 36-37, 92, 221). However, both Burris and Ragland ultimately conceded they were familiar with the maintenance function of slack adjusters. In fact, Ragland told Marler "he knew a little bit about repairing trucks." (Tr. 200).

Marler's testimony concerning the proximate cause of the brake malfunctions must be viewed cautiously. Understandably, Marler's witness demeanor evidenced he was not enamored with the respondents' allegations that he was manipulated by Burris and Ragland. Although Marler conceded loose slack adjusters on three of the small Euclid truck's wheels could have contributed to malfunctioning of the brakes, Marler chose to rely on other factors to justify the purported complaints. (Tr. 304). For example, Marler was certain the sticking of the S-cam shaft on the left front wheel of the small Euclid truck, which was stuck in mud on the morning of his May 27 inspection, supported Ragland's May 22 complaint and was unrelated to the muddy quarry conditions. To support his conclusion, Marler speculated that one application of mud on the s-cam shaft would act as "a lubricant." (Tr. 302).

Given the circumstantial evidence of tampering discussed above, the Secretary has failed to establish by a preponderance of the evidence that the May 27, 1992, brake complaints were legitimate and/or communicated to James Cullor. In reaching this conclusion, I am not unmindful that the Commission's remand requested that I evaluate the credibility of the Burris and Ragland allegations that previous brake complaints were ignored. 17 FMSHRC at ___, slip op. at 7. I find these allegations to be self-serving and refuted by Jenkins who denied ever receiving pertinent complaints. Moreover, as previously noted, the legitimacy of these complaints is also undermined by Burris' admission that the big Euclid's brakes held on May 25, 1992, after Ragland had complained to MSHA about the quarry trucks' brakes three days earlier. Furthermore, Marler's testimony that James Cullor ignored the May 27, 1992, complaints by Burris and Ragland, made approximately 15 minutes before Marler's arrival at the quarry, is inconsistent with the evidence that the trucks were parked by the work shed and not in service (although not tagged out) when Marler arrived. (Tr. 191, 287, 289-94). Finally, it strains credulity that experienced truck drivers, with longstanding serious concerns about their trucks' brakes, would continue to operate their trucks with three out of four loose slack adjusters.

Thus, there is no adequate basis for concluding that James Cullor's conduct, attributable to Fort Scott, manifested an unwarrantable failure. Similarly, the evidence fails to support James Cullor knowingly authorized, ordered or carried out the violations of section 56.14101.

Finally, the Secretary has the burden of proving all elements of an alleged violation of a mandatory safety standard. *Southern Ohio Coal Company*, 14 FMSHRC 1781, 1785 (November 1992) *and cases cited therein*. The Secretary's burden of proof in a civil penalty case is not relieved by his prosecutorial discretion in discrimination matters or his qualified privilege against disclosure of investigatory files.

While I have not drawn any negative inferences, as the trier of fact I am obligated to weigh the evidence presented. The validity of the brake complaints is the linchpin of the Secretary's unwarrantable failure case. MSHA Inspector Harold Yount investigated the legitimacy of these complaints which occurred five days prior to Burris and Ragland's discharge. (Tr. 130). For reasons best known to the Secretary, the Secretary opted not to call investigator Yount, who was present in the courtroom assisting counsel, to support the alleged complaints of Burris and Ragland, and to rebut the probative circumstantial evidence of tampering. (Tr. 7). The evidence the Secretary has presented is inadequate to satisfy his burden of proving the cited violations are attributable to Fort Scott's unwarrantable failure.

Civil Penalty

As noted in the Commission's remand, in considering the appropriate civil penalty to be assessed, employee misconduct may be a relevant mitigating factor in evaluating the degree of an operator's negligence. 17 FMSHRC at ___, slip op. at 5. Misconduct by rank-and-file employees is not imputable to the operator for negligence purposes absent a showing the misconduct was related to deficient training or supervision. *Western Fuels-Utah, Inc.*, 10 FMSHRC 256, 261 (March 1988), *aff'd on other grounds*, 870 868 F.2d 711 (D.C. Cir. 1989); *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1464 (August 1982). Although Fort Scott's

salary decisions may have motivated the apparent tampering in this case, there is no evidence of deficient training or a significant lack of supervision. Thus, there is no basis to impute any negligence to Fort Scott.

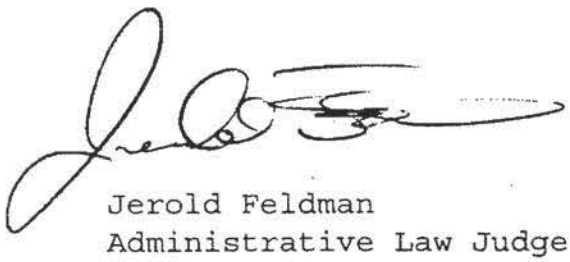
Accordingly, the imposition of strict liability, without evidence of negligence on the part of Fort Scott, warrants nominal penalties for the cited violations of section 56.14101. Consequently, I am assessing a civil penalty of $10.00 for each of the two violations.

ORDER

In view of the above, **IT IS ORDERED** that 104(d)(1) Citation No. 4110164 and 104(d)(1) Order No. 4110167 **ARE MODIFIED** to 104(a) citations thus deleting the unwarrantable failure charges.

IT IS FURTHER ORDERED that Fort Scott Fertilizer-Cullor Inc., **SHALL PAY**, within 30 days of the date of this decision, a total civil penalty of $20.00 in satisfaction of these two citations. Upon timely receipt of payment of this $20.00 penalty, as well as receipt of payment of the $550.00 civil penalty previously assessed in my initial November 18, 1993, decision in this proceeding for Citation Nos. 4110166 and 4110171, Docket No. CENT 92-334-M **IS DISMISSED**.

IT IS FURTHER ORDERED that the case against James Cullor, as an agent of Fort Scott Fertilizer-Cullor, Inc., in Docket No. CENT 93-117-M **IS DISMISSED**.



Jerold Feldman
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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AUG 4 1995

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 94-267
Petitioner	:	A. C. No. 15-07201-03628
v.	:	
	:	Docket No. KENT 94-309
HARLAN CUMBERLAND COAL COMPANY,	:	A. C. No. 15-07201-03630
Respondent	:	
	:	C-2 Mine
	:	
	:	Docket No. KENT 94-822
	:	A. C. No. 15-08414-03619
	:	
	:	Docket No. KENT 94-844
	:	A. C. No. 15-08414-03620
	:	
	:	Docket No. KENT 94-845
	:	A. C. No. 15-08414-03621
	:	
	:	H-1 Mine

DECISION

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor, U. S. Department of Labor, Nashville, Tennessee, for the Secretary;
H. Kent Hendrickson, Esq., Rice and Hendrickson, 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 Harlan Cumberland Coal Company (Harlan Cumberland) of various and sundry mandatory standards set forth in Title 30 of the Code of Federal Regulations. Pursuant to notice, these cases were heard before

me on February 22-23, 1995, in London, Kentucky. The parties filed posthearing briefs and proposed findings of fact and conclusions of law on June 28, 1995, which I have duly considered in writing this decision.

During the course of the trial of these cases, the parties discussed and negotiated settlements concerning some of the citations contained in these five dockets. I will deal with and dispose of these 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 94-267

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

CITATION NO.	DATE	30 C.F.R. SECTION	ASSESSMENT	SETTLEMENT
3835289	7/30/93	75.400	$ 412	$ 350
3835291	7/30/93	75.400	412	350
4040231	8/13/93	75.330	147	124
4040189	9/28/93	75.220	147	124
4040190	9/28/93	75.400	204	173

One citation remains to be decided in this docket which was tried before me and was subsequently briefed by the parties. Citation No. 3835295, issued on July 30, 1993, by MSHA Inspector Larry L. Bush, alleges a violation of the standard found at 30 C.F.R. § 75.370(a)(1) and charges as follows:

> The operator has made a major ventilation change by shutting down the Louellen side fan and taking it out of service without prior approval from MSHA to do so.

This citation has an unbelievably long and tortured history, beginning even before November 18, 1992, when MSHA Inspector Robert Rhea issued an earlier citation, Citation No. 2996273, to this operator. Inspector Rhea issued this earlier citation for a violation of 30 C.F.R. § 75.310(b)(1) because the respondent was operating the No. 2 mine fan (the Louellen side fan) from a power circuit inside the mine rather than from an independent power circuit as required by the mandatory standard.

For many years before this, the respondent had operated this extra fan on the Louellen side under a waiver from the MSHA District Manager based on the permissive language in a now repealed mandatory standard (30 C.F.R. § 75.300-2(c)(1)). The use of the word "should" in that standard rather than "shall" was interpreted by MSHA to allow the District Manager to exempt operators from the requirement that they have an independent circuit for electrically powered mine fans.

In 1992, new regulations went into effect making independent power circuits for mine fans mandatory rather then permissive. On September 2, 1992, respondent applied for a modification of this new standard to allow it to continue providing power to its No. 2 mine fan from a power circuit inside the mine just as it had done under waiver since 1984. While this request was pending, Inspector Rhea issued Citation No. 2996273 on November 18, 1992, for a violation of the new standard, 30 C.F.R. § 75.310(b)(1). However, taking note of the pending Petition for Modification, the abatement of the citation was continually extended, eventually up to July 1, 1993.

On July 8, 1993, MSHA denied Harlan Cumberland's Petition for Modification. Respondent at that point then had 30 days within which to file an appeal (that is, request a formal hearing at the Department of Labor) of that denial.

Meanwhile, back at the Harlan Field Office, Inspector Rhea became aware that the modification petition had been denied and he was informed by Mr. Clyde Bennett, the General Manager of Harlan Cumberland Coal Company, that an appeal was going to be filed. Rhea also states that at some point Mr. Bennett later informed him that the appeal was going to be withdrawn. Harlan Cumberland disputes this and in fact did file a timely appeal on July 28, 1993, 2 days before the citation at bar was issued by Inspector Bush.

In any event, Rhea, assuming that Harlan Cumberland was not going to pursue the modification petition any further, sent Inspector Bush out to terminate Citation No. 2996273.

This citation could have been abated by either shutting down the No. 2 mine fan (the option taken) or installing a generator or running a power line in from outside.

When Bush arrived at the mine on July 30, 1993, the No. 2 mine fan had been shut down. He therefore terminated Citation No. 2996273. But one thing leads to another. The abatement of Citation No. 2996273 was in its turn a violation of 30 C.F.R. § 75.370(a)(1) and the cause for the issuance of Citation No. 3835295, the citation at bar. The shutting down of the auxiliary fan was a major ventilation change done without the prior approval of the District Manager.

The violation itself is straightforward. The inspector simply found that a major change in ventilation had taken place because of the shutdown of the fan without the approval of the District Manager, period.

The point of contention concerning this citation turns on what really amounts to a matter of courtesy or perhaps it could be called "custom and practice". The operator's position is that the citation at bar should not have been issued and the earlier citation should have been extended rather than terminated, until

such time as the Petition for Modification was finally decided. Inspector Bush himself allows that he would not have issued the citation at bar had he known an appeal had been taken from the initial denial of the operator's petition. But he did not know, and no one at the mine bothered to tell him. If he had known, he testified that he would have just extended the abatement period for Citation No. 2996273, with the No. 2 fan still running, as it had since 1984.

The Secretary makes the excellent point in his brief that with the appeal being mailed from Gray's Knob, Kentucky, on July 28, 1993, it is highly unlikely that anyone at MSHA had notice of the appeal until after the issuance of the citation at bar on July 30, 1993.

This citation was eventually abated by the installation of a temporary generator and, later, a permanent power line.

In the final analysis, I find a simple violation of the cited standard is proven as charged.

As for the factual disputes in the testimony about who said what to whom, I do not find that Bush or Rhea at any time ordered the No. 2 fan shut down, although there undoubtedly was some discussion about that option as well as the company's option to continue to pursue their Petition for Modification. I also find that neither Bush nor Rhea was aware of the company's appeal as of July 30, 1993, the date the citation at bar was written. Had either of them understood that an appeal was pending, the citation would not have been issued as a matter of courtesy to the operator or the existing "custom and practice" of that office.

Nonetheless, the citation was in fact issued, it does state a violation, and I am going to affirm it herein.

After consideration of all the statutory criteria in section 110(i) of the Act, I find a civil penalty of $300 to be appropriate.

Docket No. KENT 94-309

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
4040315	10/13/93	75.1101-1	$ 157	$ 120
4040316	10/19/93	75.1103-5(a)(2)	147	110
4040319	10/19/93	75.523	147	110
4040320	10/19/93	75.342(a)(4)	157	120

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

Citation Nos. 4248531 and 4248533 were issued by MSHA Inspector Lloyd Sizemore on July 29, 1993. Both allege nearly identical violations of 30 C.F.R. § 75.603, which standard provides, in relevant part, that "[t]railing cables or hand cables which have exposed wires. . . shall not be used."

Harlan Cumberland admits the violations of 30 C.F.R. § 75.603 (see proposed findings), but disputes the "significant and substantial" special findings in each citation.

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).

The trailing cables in question were providing power to the two shuttle cars noted in the citations (GX-7 and GX-9). These shuttle cars move coal from the mine to the dumping point and are continuously powered by these trailing cables.

Inspector Sizemore observed exposed conductor wires in both of these cables. He testified that he could see approximately 1 inch of the exposed copper wire conductor in each of these two cables. These cables carry 277 volts which Sizemore opined would cause death or permanent disability from electrical shock if contacted by a miner.

The company's position on these citations is that the cables are on an automatic reel and are only occasionally manipulated by hand. Also, Mr. Eddie Sergent testified on behalf of the respondent that there are many safety features incorporated into the cable to knock the power off the circuit if a short occurred. He also contradicted the inspector's opinion regarding the likelihood of someone being injured by the condition of these cables as described by the inspector. Sergent testified that miners do not normally handle these cables when the power is on, but he conceded that someone could be injured if he touched an exposed conductor on the cable.

It seems to me, however, that having miners working in close proximity to an electrical hazard that might not be immediately obvious to the casual observer, even if these cables are only occasionally manipulated by hand is an accident waiting to happen. It is reasonably likely in my opinion that on one of those "occasions," a miner could be reasonably expected to contact the exposed wire and be electrocuted. Therefore, I conclude that there was a reasonable likelihood that the hazard contributed to by the violation herein would result in at least an injury-producing event. Accordingly, I find that it has been established that the violations found herein were "significant and substantial" and serious.

Upon careful consideration of all of the statutory criteria in section 110(i) of the Act, I assess a civil penalty of $1200 for each violation, or $2400 for the two.

Citation No. 4248534 alleges a "significant and substantial" violation of the standard found at 30 C.F.R. § 75.520 and charges as follows:

> The start switch on the No. 2 off standard side 21 SC Joy shuttle car, will not return to the position that allows the holding circuit to be activated. The switch stays in the start position therefore when the cable is energized the car will start. This car is located on the No. 4 section. This citation is being issued as a contributing factor to imminent danger withdrawal order No. 4248532. Therefore no abatement is set. Order dated 07-29-93.

After starting the motor, the start switch is supposed to spring back to the neutral mode. The basic problem here was the start switch would not return to the neutral mode once it was activated. This created two separate potential problems: First, if it was already energized and for some reason the shuttle car operator could not hear the car running, he could unintentionally start the car moving if he accidentally hit the foot switch, which essentially functions like the gas pedal on an automobile. Secondly, in an emergency situation where the shuttle car operator had some reason to use the panic bar or deenergization device to stop the shuttle car, the car would start up again on its own when the panic bar was released.

I find the violation to be proven as charged. The citation was terminated upon the repair of the start switch, which brought it into compliance with the mandatory standard. I therefore will affirm the citation, as modified herein.

I agree with the operator on the issue of gravity and the "significant and substantial" special finding. These shuttle cars have an auto-braking system installed that even Inspector Sizemore agrees would also have to be unintentionally released to allow the car to move. To recap, two completely separate, independent and unintentional actions would have to be taken, that is, release the auto-brake lever and press the tram foot switch in order to allow the shuttle car to move. In my opinion, too many independent conditions have to co-exist for the car to unintentionally move. It is possible, but that is not enough to carry the Secretary's burden of proof on "S&S". Accordingly, Citation No. 4248534 will be affirmed as a non "S&S" citation and assessed a civil penalty of $400 in accordance with section 110(i) of the Act.

Citation Nos. 4040061, 4040439, and 4040440 were all issued by Inspector Bush on August 30, 1993. All allege violations of 30 C.F.R. § 75.220 in the No. 1 and 2 left rooms off the No. 7 belt main off the 6th right panel.

Inspector Bush identified these three cited areas of the mine where he found adverse roof conditions, which according to the operator's extended cut plan, required the respondent to limit the depth of the cut to a "distance compatible with the prevailing conditions." That phraseology "prevailing conditions" is the bone of contention here.

Harlan Cumberland's extended cut plan allows extended cuts up to 32 feet, but when adverse roof conditions are encountered, they must limit their cuts in accordance with prevailing conditions. This is a very subjective call, and as the respondent points out in its brief, the foreman on the scene has to make it, subject to an MSHA inspector's later disagreement. And, of course, in case of a disagreement, the inspector's opinion prevails, and the citation issues.

In connection with the area cited in Citation No. 4040061, Inspector Bush observed heavy rib sloughage, heavy crushing action on the pillars, rib rolls and the mine floor heaving. With regard to the area cited in Citation No. 4040440, Bush testified that there was heavy roof sloughage, stretch cracks and the roof was loaded up with pressure. With regard to Citation No. 4040439, Bush testified that like the other two areas, there were adverse roof conditions which in his opinion precluded the taking of deep cuts in this area of the mine.

The crux of these violations are that Bush measured these deep cuts as 27 feet (Citation No. 4040061), 25 feet (Citation No. 4040439) and 31 feet (Citation No. 4040440) whereas he believes the prevailing conditions were such that the operator should have limited the cuts to 20 feet in each of the three instances. Whether the company gets a violation or not is entirely dependent on whether or not the inspector believes adverse conditions exist. Although initially the operator has discretion under the plan to cut up to 32 feet, if the inspector subsequently disagrees, the operator is issued a citation for violating its roof control plan as happened here.

In this case, the respondent produced expert testimony on the basic underlying issue of whether or not there were adverse conditions extant in these areas which testimony I find somewhat persuasive, at least on the issue of the quantum of negligence the respondent is properly chargeable with.

Mr. Kenneth B. Miracle testified that he has worked 40 years in underground coal mines, including 3 years as an inspector for MSHA's predecessor agency, MESA. I found him to be an expert in roof control, and allowed him to state his opinion on the ultimate issue in this controversy, i.e., whether the conditions were so adverse so as to preclude the extended cuts that were taken. He personally viewed the areas in question and was

convinced that these areas were safely minable. His findings contrasted with and contradicted Bush in several important respects concerning the state of the floor and the ribs in the cited areas.

I am nevertheless going to go along with Inspector Bush's finding that the operator was in violation of its Roof Control Plan because sufficiently adverse conditions existed in the cited areas that should have alerted them to the requirement to cease taking extended cuts. I am also going to find as a fact that taking deep cuts in the face of these conditions exposed the miners working and traveling in these panels to the hazards of roof and rib falls because these deep cuts increased the pressure on the roof and pillars which, in turn, increased the likelihood of rib rolls which could reasonably be expected to lead to injuries to the miners working in these areas. If the sloughing of the mine roof or ribs had continued unabated, it is reasonably likely that a serious injury would have occurred. I therefore am going to affirm the three aforementioned citations as "S&S" citations.

In assessing a civil penalty for these violations, however, I find only "moderate" negligence vice "high" negligence involved. I do not believe there is any evidence in this record of "high" negligence. Rather, I find that the conflicting expert opinions of whether or not the prevailing conditions were adverse in the cited areas demonstrates the closeness and subjectiveness of this call, and it is a judgement call made at the operator's peril, with little or no objective criteria to rely on. After considering all the statuary criteria in section 110(i) of the Act, I assess a civil penalty of $500 for each violation, or $1500 for the three.

Section 104(d)(1) Citation No. 4040438 (GX-13), issued August 30, 1993, alleges a violation of the standard found at 30 C.F.R. § 75.220 and charges as follows:

> Evidence indicates that the operator had in use a roof drill on 004 section and did use this drill in heights exceeding the ATRS reach. The maximum extended reach of the ATRS is 94 inches and areas were measured at 107, 110, 105 inches from floor to roof, thus roof bolting was done in unsupported roof inby support.

The ATRS (Automated Temporary Roof Support) system is a hydraulic roof support system physically attached to the roof bolter and its purpose is to provide roof support while the bolt machine operator and his helper install roof bolts. This is accomplished when hydraulic jacks set a bar, 9 to 11 feet long and 8 to 10 inches wide, under pressure against the mine roof while bolting takes place.

As Inspector Bush explained, the ATRS mechanism must be pressed against the mine roof in order to function as it was designed. If it is not under pressure against the roof, it essentially leaves the miners under unsupported roof.

Bush's testimony as to what he observed and the basis for his conclusion that there was in fact, a violation of the cited standard is as follows in pertinent part (Tr. 205-206):

> Q. All right. What seam height did you measure in government Exhibit 13?
>
> A. I measured heights at 107, 110 and 105.
>
> Q. All right. And how high is the extended reach of the ARTS system?
>
> A. I had the bolter operator extend it as far out as it would go and it would only expand to 94 inches.
>
> Q. Did you measure that?
>
> A. Yes, I did.
>
> Q. So, what was the obvious conclusion from that measurement?
>
> A. Any places they bolted--any cut places that the miner had just cut they would have technically, or basically be under unsupported roof while bolting.
>
> Q. And did Mr. Shuler tell you that they had in fact bolted some places that were higher than 94 inches?
>
> A. Yes, he did.
>
> Q. Is that the basis for your issuing the D1 citation?
>
> A. Yes, sir.

Q. Based on his knowledge?

A. Yes, sir.

Basically, Bush measured three places that had been bolted, found that those floor to ceiling measurements were 107, 110, and 105 inches, respectively, and that since each measurement exceeded the 94 inch reach of the ATRS, he deduced that there must have been a violation. He also deduced that no temporary supports had been used.

Anticipating the operator's defense, Bush was questioned about the use of temporary supports as follows (Tr. 207-208):

Q. Now, when you questioned Mr. Shuler about the use of this 94 inch ATRS system in areas that were higher than that, did you ask--did he indicate to you in any way that they had set temporary supports in that area?

A. No, sir. He did not.

Q. And you conclude they had not?

A. Yes, sir.

Q. And that's why you issued the citation?

A. Yes, sir.

But on cross-examination, it was also brought out he had not asked Shuler anything about temporary supports either (Tr. 208):

Q. Did you ask him specifically if he had used temporary support? You said you concluded that he hadn't, but did you ask him?

A. It's my memory, if it serves me correctly, there was no temporary supports on the roof.

Q. I mean, did you ask Mr. Shuler had he used any?

A. No. sir. But there was no temporary supports on the drill.

I agree with the respondent that Bush's rationale for issuing this citation, gleaned from his own trial testimony, is all based on an assumption or deductive reasoning at best, that an ATRS violation must have occurred at the three points he measured. He arrived at this conclusion because: (a) the operator had in fact bolted some places that were higher than 94 inches and (b) Shuler volunteered nothing to him about the use of temporary roof supports during the bolting process. Clearly, he did not witness a violation, he assumed it, or to cast it in a somewhat better light, deduced it from Shuler's silence.

The fact that Bush saw no temporary supports on the drill on August 30, 1993, really adds nothing to the inquiry since no evidence of when the suspected violative drilling took place was introduced into the record. Not only could Bush not remember where he made the three measurements, he made them at places that had already been bolted, adding confusion to when the roof bolting had taken place.

The respondent, on the other hand, did produce credible evidence of its general practice to use steel screw jacks if the ATRS system cannot reach the ceiling, i.e., when roof heights exceed the reach of the ATRS, as here. The Secretary has made no showing in rebuttal that this general practice was not followed whenever and wherever the bolting was performed at the three places Bush measured.

Accordingly, I find that the Secretary has failed to carry his burden of proof with regard to this citation and it will be vacated herein.

Docket No. KENT 94-822

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

CITATION NO.	DATE	30 C.F.R. SECTION	ASSESSMENT	SETTLEMENT
3835491	11/18/93	75.400	$ 178	$ 178
3835492	11/18/93	75.700	168	168
3835495	11/18/93	75.1100-2	178	178

Citation No. 3835490 alleges a "significant and substantial" violation of the standard found at 30 C.F.R § 77.205(e) and charges as follows:

> The inclined steps leading from ground to drive level on surface did not have side rails or guards to prevent falling from side. Steps are approximately 5 ft high.

Inspector Bush testified that this stairway was approximately 5 feet high and steep, being more like a ladder than a stairway. He testified that these steps went almost straight up and did not have toe boards to prevent a person's foot from slipping between the steps.

Bush further testified that this mine was classified by MSHA as being in BE status, that is, nonproducing, but some persons were working. He stated that he found Mr. Bill Shuler, the mine foreman and one other miner inside the mine working on the belt entry setting timbers. He also observed footprints on this stairway and a well-used pathway from the top of the stairway to the mandoor going into the belt entry where he found Shuler and the other miner working within 100 to 150 feet of this portal.

The stairway was not covered and was exposed to the weather, causing a further slipping hazard. Bush opined that a miner could suffer an injury to his back, neck, arms or legs if he fell from this unguarded stairway. He recounted a tale of a disabling back injury that had occurred to a friend of his who fell on his own self-rescuer.

Bush served the citation on Bill Shuler, whom he believed had probably travelled into the mine by way of these steps on the date he issued this citation. Shuler told Bush that he (Shuler) would have to get the construction crew back to the mine site to install the handrails.

The operator's defense is that the steps were simply still under construction. They were not yet complete, but Mr. Sergent, who testified for the operator, was unable to state how long the steps had set there without the handrails.

The operator also argues that the likelihood of an injury is remote because of the limited exposure of miners to the hazard. But I note that whether the footprints and foot traffic are attributable to the construction crew or the miners, the risk of injury is not reduced and the gravity remains the same. Any person, miner or construction worker, using these steps is exposed to the serious slip and fall hazard presented.

Accordingly, I am going to affirm the citation as issued and assess a civil penalty of $168, as proposed by the Secretary.

Citation No. 3835496 alleges a "significant and substantial" violation of the standard found at 30 C.F.R § 75.1106-5(a) and charges as follows:

> The oxygen gauge located at No. 4 belt tailpiece was damaged and cutting pressure could not be determined.

At trial, Inspector Bush was unable to recall the nature of the damage to the pressure gauge which allegedly caused it to be inoperative. Consultation with his notes failed to shed any light on the subject. All he could testify to was that the oxygen gauge was somehow damaged and cutting pressure could not be determined. But that is the allegation contained in the citation, almost word for word, not the proof of the facts to support that allegation. I pointed out to the witness and counsel for the Secretary at the hearing, that this citation and these factual matters have now been contested by the respondent and they are entitled to factual proofs of these allegations.

It boils down to the proposition that the Secretary was proving the fact of the violation by the fact that Inspector Bush issued the citation. He told us that he does not issue frivolous citations. If it is not a violation, he would not issue a citation. Learning that provided little comfort for the respondent and they moved to vacate the citation. That motion is granted for failure of proof and Citation No. 3835496 will be vacated herein.

Docket No. KENT 94-844

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

CITATION NO.	DATE	30 C.F.R. SECTION	ASSESSMENT	SETTLEMENT
3835498	11/23/93	75.370(a)	$ 168	$ 168
3835500	11/23/93	75.370(a)	168	168
4257801	11/23/93	75.370(a)	168	168
4257802	11/23/93	75.370(a)	168	168
4257803	11/23/93	75.370(a)	168	168
4257804	11/23/93	75.370(a)	168	168

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

Citation No. 3835497 alleges a "significant and substantial" violation of the standard found at 30 C.F.R § 75.202(a) and charges as follows:

> There is an area of loose broken roof approximately 20 ft X 20 ft 4 crosscuts inby the No. 3 belt power center in the intake air course.

Although the roof was bolted, it had broken at an angle up over the bolts so that the roof bolts were exposed. You could see the bolts above the roof that had separated. The hazard was the loose broken roof itself and the fact that its located in the intake air course, which is the main escapeway. Because it is the primary escapeway for the mine, it has to be examined at least weekly when men are working at the mine. Furthermore, there were pumps and seals located inby the area of this roof and when miners are working underground, a preshift examination would have to be performed daily.

At the time this citation was written, the mine was in a BE status, that is, it was not producing coal, but two men were working underground nevertheless.

The violative condition is unrebutted in the record. The operator instead has focused on the likelihood of exposure to this roof fall hazard that its two miners working underground would have faced. According to Bush, this mine has a history of bad roof conditions and he testified that if this condition had not been abated, the roof would have collapsed. He went on to state that if such a collapse occurred with a miner in the immediate area, he would have expected the injury to be at least of a disabling nature depending on the amount of material which fell out of the roof.

While the miners exposed to the hazard created by this broken and loose roof may have been limited in number, it nevertheless subjected them to a serious likelihood of injury. Accordingly, I am going to affirm this citation as issued and assess the proposed civil penalty amount of $220.

Citation No. 3835499 alleges a "significant and substantial" violation of the standard found at 30 C.F.R. § 75.202(a) and charges as follows:

> There is an area of unsupported roof in the entry leading to the No. 2 and 3 seal. Area is approximately 20 ft. long and 10 ft wide.

This was a completely bare area of the roof, that is, one lacking any kind of roof support. The cribs which had been installed earlier down the middle of the entry, were rotten and deteriorating.

This was also an area through which the miner examining the No. 2 and 3 seals would have had to travel to make his examination, and this roof hazard subjected him to at least a reasonably likely threat of death or serious injury from roof fall.

Accordingly, I find the violation proven as charged, will affirm the citation as written and assess a civil penalty in the amount of $220, as originally proposed by the Secretary.

Citation No. 4257806 alleges a "significant and substantial" violation of the standard found at 30 C.F.R § 75.400 and charges as follows:

> The power center, 4160 V.A.C., located at the start of the slope to fan had accumulation of float coal dust inside the power center and on the electrical components therein.

Inspector Bush testified that he observed a heavy concentration of float coal dust inside this power center which was black in color and covered the component parts of the power center, including the connecting leads, fuses, and insulators. He further stated that the power center was turned on when he observed the float coal dust and that it had various pieces of electrical equipment connected to it, including a battery charger and a conveyor belt power junction box.

Inspector Bush also described the various ignition sources in the power center which in his opinion could cause this float coal dust accumulation to explode or burn. He named the transformers, bus bar, and input/output cables. He also testified that there are electrical arcing sources of ignition as well as heat sources inside this power center and he stated that the turning on and off of the power center can produce electrical arcing which would ignite or cause this float coal dust to burn. Miners working in the vicinity of this power center or inby would be exposed to fire and/or smoke inhalation hazards as well as a potential explosion of this float coal dust. Bush described an incident at another mine where a power center had caught fire and burned for two hours, emitting smoke and fumes to such an extent that caused the mine to be evacuated, and the miners to suffer respiratory damage.

I conclude that the Secretary has established an "S&S" violation of the cited standard. The inspector described a heavy concentration of black float coal dust inside this power center which contained a variety of ignition sources. If this condition went unabated, I find it would be reasonably likely, in the face of continuing use, that an explosion or fire would occur, resulting in at least serious injury to the miners working near-by or inby this power center.

Upon careful consideration of all of the statutory criteria contained in section 110(i) of the Act, I find a civil penalty of $168, as originally proposed by the Secretary, to be appropriate, reasonable, and in the public interest.

Docket No. KENT 94-845

The parties have agreed to settle both of the citations contained in this docket on the following terms:

CITATION NO.	DATE	30 C.F.R. SECTION	ASSESSMENT	SETTLEMENT
3835488	11/18/93	75.512	$ 178	$ 89*
4257805	11/23/93	75.202(a)	987	400**

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

** The section 104(b) order issued in conjunction with this citation, Order No. 3164779 is also vacated as a part of this settlement.

Accordingly, I enter the following:

ORDER

Docket No. KENT 94-267

1. Citation Nos. 3835289, 3835291, 4040231, 4040189, 4040190, and 3835295 **ARE AFFIRMED.**

2. Respondent **IS ORDERED TO PAY** the assessed civil penalties of $1421 to the Secretary of Labor within 30 days of this decision. Upon receipt of payment, this case **IS DISMISSED.**

Docket No. KENT 94-309

1. Citation Nos. 4040315, 404316, 4040319, 4040320, 4248531, 4248533, 4040061*, 4040439*, 4040440* **ARE AFFIRMED.**

* Modified negligence finding from "high" to "moderate".

2. Citation No. 4248534 **IS AFFIRMED** as a non "S&S" citation.

3. Citation No. 4040438 **IS VACATED.**

4. Respondent **IS ORDERED TO PAY** the assessed civil penalties of $4760 to the Secretary of Labor within 30 days of this decision. Upon receipt of payment, this case **IS DISMISSED.**

Docket No. KENT 94-822

1. Citation Nos. 3835491, 3835492, 3835495, and 3835490 **ARE AFFIRMED.**

2. Citation No. 3835496 **IS VACATED.**

3. Respondent **IS ORDERED TO PAY** the assessed civil penalties of $692 to the Secretary of Labor within 30 days of this decision. Upon receipt of payment, this case **IS DISMISSED.**

Docket No. KENT 94-844

1. Citation Nos. 3835498, 3835500, 4257801, 4257802, 4257803, 4257804, 3835497, 3835499, and 4257806 **ARE AFFIRMED.**

2. Respondent **IS ASSESSED** civil penalties of $1616, and having already paid $1008 of this penalty to the Secretary of Labor previously, **IS ORDERED TO PAY** the remaining $608 to the Secretary of Labor within 30 days of this decision. Upon receipt of payment, this case **IS DISMISSED.**

Docket No. KENT 94-845

1. Citation No. 4257805 **IS AFFIRMED.** The section 104(b) order issued in conjunction with this citation, Order No. 3164779 **IS VACATED.**

2. Citation No. 3835488 **IS AFFIRMED** as a non "S&S" citation.

3. Respondent **IS ORDERED TO PAY** the assessed civil penalties of $489 to the Secretary of Labor within 30 days of this decision. Upon receipt of payment, this case **IS DISMISSED**.

Roy J. Maurer
Administrative Law Judge

Distribution:

Thomas A. Grooms, Esq., Office of the Solicitor, U. S. Department of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 372215-2862 (Certified Mail)

H. Kent Hendrickson, Esq., Rice & Hendrickson, P. O. Box 980, Harlan, KY 40831 (Certified Mail)

dcp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

AUG 4 1995

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 95-53
Petitioner	:	A.C. No. 46-05890-03502 MHF
v.	:	
	:	Tug Valley Coal Processing
COAL PREPARATION SERVICES,	:	
INCORPORATED,	:	
Respondent	:	

ORDER OF DISMISSAL

Appearance: Javier I. Romanach, Esq., U.S. Department of Labor, Office of the Solicitor, Arlington, Virginia, for the Petitioner.

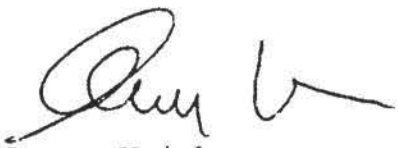
Before: Judge Weisberger

On April 27, 1995, this case was originally scheduled for hearing for July 13, 1995, in Huntington, West Virginia, at a site to be designated by a subsequent Order. On June 27, 1995, this case was reassigned to me. On June 26, 1995, in anticipation of the reassignment of this case to me, I convened a telephone conference call with Javier I. Romanach, Esq., of the Office of the Solicitor, representing Petitioner, and Sam Hood, representing Respondent. The representatives indicated that they were each amenable to having this case rescheduled and heard on July 12, 1995. It was agreed that the hearing in this case would take place on July 12, 1995. On June 27, 1995, a Notice of Hearing was issued scheduling this case for hearing on Thursday, July 12, 1995, at the following location: City Hall, Council Chambers, 800 5th Avenue. Huntington, West Virginia. The Notice indicates it was sent to Sam Hood, Coal Preparation Services, Inc., P.O. Box 1237, 717 6th Avenue, Huntington, West Virginia 25714 (Certified Mail). A Return Receipt for this notice is postmarked July 12, 1995.

On July 14, 1995, a Show Cause Order was issued directing Respondent to show cause why a Default Order should not be entered based on Respondent's failure to appear at the hearing. On July 20, 1995, a statement was pertinent, as follows: "In reference to your 7-14-95 Order to Show Cause, I went to the hearing on Thursday, 7-13 and nobody was there."

I find that Respondent has not established good cause why the case should not be dismissed. My finding is based on the following: 1) On June 26, 1995, Respondent's representative, Sam Hood, agreed to the rescheduling of the hearing in the case from July 13 to July 12; 2) On June 27, 1995, a notice was issued, scheduling this case for hearing on July 12 at a specifically designated site; 3) Respondent did not appear at the hearing; 4) Respondent, in its Response to the Show Cause Order, did not set forth any facts or assertions to explain why he failed to appear at the hearing site on July 12, the date agreed to on June 26, and set forth in the Notice issued on June 27; and 5) Respondent asserted in his Response that "I went to the hearing on Thursday, July 13." He attached to the Response a copy of their original Notice issued April 27. However, this Notice did not designate a site for the hearing. A specific site was only designated in the Notice issued June 27, scheduling this case for hearing on July 12, 1995.

It is ORDERED that a default decision in this case be entered in favor of Petitioner. It is further ordered that within 30 days of this decision, Respondent shall pay a civil penalty of $162.



Avram Weisberger
Administrative Law Judge

Distribution:

Javier I. Romanach, Esq. Office of the Solicitor, U.S. Department of Labor, Room 516, 4015 Wilson Blvd., Arlington, VA 22203 (Certified Mail)

Sam Hood, Coal Preparation Services, Inc., P.O. Box 1237, 717 6th Avenue, Huntington, WV 25714 (Certified Mail)

/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 4 1995

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. YORK 94-73-M
Petitioner	:	A.C. No. 37-00181-05505
v.	:	
	:	Construction Materials
CONSTRUCTION MATERIALS CORP.,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Weisberger

This case is before me upon a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). Petitioner has filed a motion to approve settlement agreement and to dismiss the case. A reduction in penalty from $645 to $516 is proposed. I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is **GRANTED**, and it is **ORDERED** that Respondent pay a penalty of $516 within 30 days of this order.

Avram Weisberger
Administrative Law Judge

Distribution:

Gail E. Glick, Esq., Office of the Solicitor, U.S. Department of Labor, One Congress Street, 11th Floor, P.O. Box 8396, Boston, MA 02114

John W. Douglas, III, Vice President, Construction Materials Corporation, 810 Fish Road, Tiverton, RI 02878

/ml

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 7 1995

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
ON BEHALF OF JAMES RIEKE,	:	Docket No. LAKE 95-201-DM
Petitioner	:	NC-DC 94-10
	:	
v.	:	Cleveland Mine
	:	Mine ID 33-06994
AKZO SALT COMPANY,	:	
Respondent	:	

DECISION

Appearances: Lisa A. Gray, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois for Complainant;
William Michael Hanna, Esq., Squire, Sanders and Dempsey, Cleveland, Ohio for Respondent

Before: Judge Melick

This case is before me upon the complaint by the Secretary of Labor on behalf of James Rieke pursuant to Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, *et seq.*, the "Mine Act", alleging that the Akzo Salt Company (Akzo) transferred Mr. Rieke in violation of Section 105(c)(1) of the Act.[1]

---

[1] Section 105(c)(1) 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 the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical

More particularly, Mr. Rieke states in his complaint filed with the Mine Safety and Health Administration (MSHA) as follows:

> I think Jim Bannerman is harassing me is [sic] because of the safety report I wrote on him. He received a D-1 from that. This took place on the 10th of February 1994. He has threatened me on my job and talks to me very loud and abusive. Now on 3-31-94 Jim Bannerman gives me a paper that states that I am disqualified on powder and on Eimco which reads - Mr. Rieke over the past few months your attitude as a powderman and its related work has reach [sic] the point that it can no longer be tolerated you are being disqualified as a powderman and Eimco operator as of March 31st, 1994.

In his complaint before this Commission the Secretary states in part as follows:

> The Complainant was removed from his job as blaster on March 31, 1994. The mine operator's stated reason for the removal of the complainant from the blasting position was the Complainant's attitude.
>
> The Complainant filed his complaint of discrimination on May 2, 1994. In that compliant, Rieke alleged that Jim Bannerman, the complainant's foreman, was harassing him because of a safety report that the Complainant filed against Bannerman on February 10, 1994.
>
> The Complainant was witness to Bannerman removing a safety tag from a piece of equipment before Bannerman ascertained that the equipment had been repaired, and told Rieke and another miner to use the equipment, on February 10, 1994. The Complainant reported the incident to his safety committeeman, the safety committeeman reported the incident to MSHA. MSHA inspected Cleveland Mine and, after an

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Footnote 1 continued

> evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

investigation of the alleged violation, the inspector issued Citation No. 4308683 on February 16, 1994, naming Bannerman as the company agent who committed the violation.

The Complainant suffered adverse action in that he was demoted to a laborer, with a reduction in his hourly wage because of his exercise of rights under Section 105 of the Mine Act.

Factual Background

Complainant James Rieke testified that he is presently a haul truck driver for Akzo and has been since he lost his job as a powderman (blaster). He became a powderman in 1990. In that capacity he was responsible for scaling the faces loading the "ANFO" explosive and shooting the faces. Powdermen were also expected to fill-in for the Eimco front-end-loader drivers on their breaks. This procedure is known as "breaking out the Eimcos."

According to Rieke, on March 31, 1994, he was breaking-in a trainee as a new powderman and had five places to blast. In the first location they were scaling the face when Production Foreman Jim Bannerman approached and asked if he knew they had five places to finish that day. He told Rieke that if they were not completed before the end of the day "I will have something for you". They reached the second place to be blasted around 10:30 that morning and found that this face also needed scaling. Rieke called Maintenance Foreman Mike Decapite to obtain the mechanical scaler but it was not available. Around that time Mine Superintendent Matt Kajfez, Foreman Bannerman and miner's representative, Dan Bierschwal appeared and asked what the problem was. Rieke reported that the face needed scaling. Kajfez told Bannerman to "handle it the way he saw fit". The record does not show how many faces Rieke had actually powdered that day.

At the end of the shift Bannerman asked Rieke for his keys to the powder truck and told him that he was being disqualified as a powderman. Bannerman offered no explanation for the disqualification.

Rieke subsequently received a letter of disqualification signed by Bannerman and stating as follows:

> Over the last few months your attitude as a powderman and its related work has reach [sic] the point that it can no longer be tolerated. You are being disqualified as a powderman and Eimco operator as of March 31, 1994. (Respondent's Exhibit No. 1)

The Secretary maintains that Bannerman's action on March 31, in removing Rieke from the powderman job, was motivated by, and was in retaliation for, Rieke's safety complaint on February 10, 1994, to his union safety committeeman and MSHA which resulted in the issuance by the Secretary of a "Section 104(d)(1)" citation to Akzo and naming Bannerman as the responsible agent.[2]

According to Rieke, on February 10, 1994, his co-worker, Paul White, observed a "down tag" on the powder rig. In spite of that, Foreman Bannerman purportedly directed them to operate the rig without determining whether repairs had been completed. According to Rieke, Bannerman removed the "down tag", stating that "we know the problem". Mine Superintendent Kajfez also came by at that time and although apprised of the circumstances also told Rieke and White to operate the rig. Both White and Rieke continued to believe that it was unsafe to operate the rig with the unrepaired hydraulic leak so Rieke reported this to his union safety committeeman. According to Rieke when Bannerman learned that he had called the committeeman he yelled at him saying "why would you guys run it yesterday and not today?" Rieke responded that it was because there was no "down tag" on it the day before. The union representative subsequently re-tagged the equipment, again taking it out of service and an inspector for the Mine

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[2] Section 104(d)(1) of the Act provides as follows:

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

Safety and Health Administration (MSHA) subsequently appeared and, based in part on the report by Rieke, issued Citation No. 4308683 naming Rieke on its face.[3]

Shortly after this incident Rieke was transferred to work under Foreman Herb Kanzeg in a different section of the mine. Rieke thought the transfer was the result of "communications problems" with Bannerman. Rieke maintains that driving the Eimco's was not part of his job even though his job description required him to perform "other work as assigned". Rieke maintains, however, that such "other work as assigned" was to be performed only when he had nothing else to do. Rieke testified that he did not mind breaking out the Eimcos as long as he had nothing else to do. However, if he was in the midst of powdering he did not believe it was appropriate for the company to tell him to do something else. He asserts that they have the right to assign other duties only if someone is ill or off work. Rieke concedes that he did not like being pulled off his job as powderman to break out the Eimcos.

Paul White testified that he was working with Rieke as a powderman on February 10, 1994. On that date he and Rieke arrived at the face and found a tag on the powder rig. They called Foreman Bannerman who observed the tag and told White to nevertheless start the equipment. According to White, Bannerman apparently did not see the hydraulic leak causing the problem and told them to operate the rig. Rieke later reported this incident to the union safety committeman and was told to "down it" if it was unsafe. They thereafter "downed it" and reported this to Bannerman. According to White, Bannerman was "upset" that they were not going to run it and raised his voice "quite a bit" at Rieke. He finally just "gave up" and told White to take the rig to the shop. White observed that there was a "personality conflict" between Bannerman and Rieke and noted that Rieke did not like to relieve the Eimco drivers. White also agreed that

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[3] The citation issued on February 16, 1994, states as follows:

"On the day shift 2-10-94, according to two blasters, the foreman, Jim Bannerman, was observed removing an out-of-order tag from the No. 602 powder rig and instructed employees Jim Rieke and Paul White to operate this machine without checking to see if repairs had been completed. This piece of equipment had been removed from service because of a crack in the work platform lifting cylinder. The two employees used this elevated work platform to load explosives at working faces in height ranging from floor level to approximately 12 to 13 feet high. A fall from this height could cause broken bones or dislocations. The No. 602 powder rig has since been repaired. This is an unwarrantable failure."

Rieke was "just looking for trouble concerning Bannerman" but at the same time Bannerman was "harder" on Rieke than on other employees. Former powderman Steven Dean confirmed that Bannerman was "harder" on Rieke than anyone else.

Union steward and an 18-year employee for Akzo, Don Bierschwal, attended Rieke's first step grievance proceeding in March 1994. According to Bierschwal, the only reason Bannerman gave for the disqualification was Rieke's "attitude". No one explained what was meant by the term and Bierschwal was unaware of any previous disqualification for "attitude". In the past, disqualification from a job had usually been based on something like tearing up equipment and even then only after several written reprimands. Rieke's purported refusal to break out the Eimco's was not raised during the processing of the grievance as a basis for the disqualification. Bierschwal was also present underground when Bannerman asked Rieke why he was taking so long to scale the face. According to Bierschwal, Rieke responded that it was because he was hand scaling. Bierschwal noted that Bannerman appeared surprised by Rieke's explanation and admitted that he would not have called out mine superintendent Kajfez, Baker and Bierschwal if he had known the reason for Rieke's difficulties. Bannerman had apparently failed to inquire.

Gregory Ruble, an Akzo electrician and former union steward, also testified that he had never seen anyone at Akzo disqualified because of "attitude". Ruble also observed that Akzo's normal disciplinary procedures were not followed in Rieke's case. It had been the long standing practice to first provide counseling, followed by a verbal warning and two written notices.

Ruble also attended the first step grievance proceedings following Rieke's disqualification and heard the mine superintendent state that Rieke's problem was that he was always writing safety reports and requesting safety men and shop stewards. According to Ruble, management representatives also stated at the grievance proceeding that Rieke's problem was that he "didn't want to work under certain conditions that he felt was unsafe". Ruble also testified that Rieke's purported refusal to break out the Eimco's was not brought up at the grievance as a basis for his disqualification.

Production Foreman James Bannerman testified that his problems began with Rieke on September 20, 1993, in regard to breaking out the Eimcos. He directed Rieke to break out an Eimco but later saw it parked. Rieke purportedly stated that he thought it was broken down. On September 22 Rieke again purportedly failed to break out the Eimco's. Bannerman told Rieke that he wanted him to break out the Eimcos in the future without being told.

On March 31, 1994, Bannerman was acting as Rieke's foreman when he observed that Rieke had by 10:00 a.m. powdered only one place. He asked Rieke what the problem was since they had five places to powder that day. Rieke purportedly responded that "we will do what we can." Bannerman maintains that he told Rieke that he expected him to complete all five places or he would have "something" for him. Bannerman testified that a powderman should be able to powder an average of five rooms a day but admitted that on some days they were able to powder only two rooms.

Around noon Bannerman noted that Rieke and his partner were still working at only the second place to be powdered so Bannerman called Mine Superintendent Kajfez, Bill Baker and Shop Steward Bierschwal to talk with Rieke. According to Bannerman he asked "why are we having a problem with you" and Rieke responded because the rest of the guys are "suck asses". Bannerman maintains that he then walked away. He claims that he never heard Rieke say that the delay was caused by having to hand scale the faces. Moreover, Bannerman testified that in any event in his opinion the rooms did not need further scaling. Bannerman testified that he decided to disqualify Rieke because of his previous problems breaking down the Eimcos, for what he believed was Rieke's work slowdown on March 31 and for his "attitude" in referring to other employees as "suck asses". Bannerman maintains that when he disqualified Rieke on March 31 he had no knowledge that Rieke had made a safety complaint giving rise to the MSHA citation naming Bannerman as a mine official responsible for illegally removing an out-of-order tag on February 10, 1994.

Akzo's Human Resources Manager, Russell Ryon, also attended Rieke's second step grievance proceeding. Rieke stated at that proceeding that it was necessary to make the places safe by hand scaling and this was one reason why he could not complete his work that day. Ryon recalled that Bannerman disagreed with Rieke, maintaining that the places did not need scaling. Ryon also noted that if Bannerman was named in the citation he would have known that the February 10, 1994, citation had, in fact, been issued. Plant Manager Bruce Higgins confirmed that, in fact, as soon as they received the "(d)(1)" citation they began an investigation in which he personally interviewed Bannerman. The interview took place within a few days of the issuance of the citation on February 10, 1994.[4]

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[4] Subsequent to Rieke's disqualification as a powderman a letter was placed in Bannerman's personnel file for his connection with the violation charged in Citation No. 4308683. He was also subsequently charged by the Secretary under Section 110(c) of the Act for a "knowing" violation.

Analysis

The Commission has long held that a miner seeking to establish a *prima facie* case of discrimination under section 105(c) of the Mine Act bears the burden of persuasion 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, 2797-2800 (1980), *rev'd on grounds, sub nom. Consolidation Coal Co. v. Marshall,* 663 F.2d 1211 (3rd Cir. 1981); and *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 the protected activity. If an operator cannot rebut the *prima facie* case in this manner, it may nevertheless defend affirmatively by proving that it would have taken the adverse action in any event on the basis of the miner's unprotected activity alone. *Pasula, supra; Robinette, supra. See also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987); *Donovan v. Stafford Construction Co.*, 732 F.2d 954, 958-59 (D.C. Cir, 1984); *Boich v. FMSHRC,* 719 F.2d 194, 195-96 (6th Cir. 1983)(specifically approving the Commission's *Pasula-Robinette* test). *Cf. NLRB v. Transportation Management Corp.*, 462 U.S. 393, 397-413 (1983)(approving nearly identical test under National Labor Relations Act).

Within this legal framework and the undisputed evidence, it is clear that Complainant Rieke engaged in protected activity on February 10, 1994, as alleged when he filed a safety complaint to Akzo management through his union safety committeemen concerning the purported illegal and unsafe activities of his foreman, Jim Bannerman, in removing a danger tag from the powder rig, and, subsequently, by reporting the incident to an MSHA inspector who subsequently issued a citation to Akzo for the violation.

The second element of a *prima facie* case of discrimination is a showing that the adverse action was motivated in any part by the protected activity. As this Commission noted in *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), "[d]irect evidence of motivation is rarely encountered; more typically, the only available evidence is indirect." The Commission considered in that case the following circumstantial indicia of discriminatory intent: knowledge of protected activity; hostility towards protected activity; coincidence of time between the protected activity and the adverse action; and disparate treatment. In examining these indicia the Commission found that the operator's knowledge of the miner's protected activity is "probably the single most important aspect of the circumstantial case".

In this case it is clear that Akzo management and, in particular, Rieke's foreman, Jim Bannerman, knew of Rieke's protected activity. Indeed, Rieke was named on the face of the citation issued to Akzo on February 16, 1994. In addition, Akzo plant manager, Bruce Higgins, testified that he conducted an investigation within a few days of the issuance of the citation which included an interview about the citation with Bannerman. Human Resources Manager Russell Lyon, who testified that if Bannerman had been named in the citation as he was, he would have known of it fairly soon after it was issued. Finally, since both Rieke and his co-worker were the miners Bannerman directed to remove the "out-of-order" tag from the powder rig, were the employees directed to operate the powder rig, and were named on the face of the citation it would have been obvious that they were the source of information leading to the issuance of the subject citation.

Significantly, Bannerman's denial at hearing that he knew of the citation prior to his disqualification of Rieke is directly contradicted by Akzo's own witnesses, Plant Manager Higgins and Human Resources Manager Russell Ryon. I conclude from this evidence that not only did Bannerman have prior knowledge that Rieke had been the source of information leading to the issuance of the subject citation naming him (Bannerman) as a culpable management official, but also that Bannerman tried to conceal in his testimony the fact that he had such knowledge. This not only demonstrates a lack of credibility in itself but also may be construed as evidence of a guilty mind - - a further indicia of discriminatory motive.

The credible evidence suggesting that Bannerman became angry and yelled at Rieke after he learned that Rieke had reported the unsafe powder rig to the safety committeeman demonstrates animus and is another circumstantial factor pointing to discriminatory motive. In addition, according to Gregory Ruble, the former union steward who attended Rieke's first step grievance proceeding, the mine superintendent stated at that proceeding that one of Rieke's problems was that he was always filing safety reports and safety requests and asking for the shop steward. Such evidence of hostility towards Rieke's protected activities, which may reasonably be inferred to include his safety complaint on February 10, 1994, was not merely a circumstantial factor but a direct factor pointing to discriminatory motivation.

As the Commission also noted in *Chacon*, coincidental timing is another indication of illegal motive. Rieke's initial safety complaint in this case occurred on February 10, 1994, and his complaint to the MSHA inspector preceded the citation issued on February 16, 1994. The disqualification of Rieke by Bannerman took place on March 31, 1994 -- within six weeks or less of the protected activity.

Finally, there is credible evidence of disparate treatment. According to Gregory Ruble, the former union steward at Akzo, he had never previously seen anyone at Akzo disqualified for the reason Akzo asserted in Rieke's case, i.e. "attitude". Moreover, Ruble observed that the normal disciplinary procedures were not followed in Rieke's case. According to Ruble, it had been the long standing practice to first provide counseling to an employee presumably before taking action such as the job disqualification here taken against Rieke. In addition, Rieke's testimony is undisputed that the procedures for disciplinary action first provided for counseling, then a verbal warning, two written reprimands and then a final notice. Bierschwal also corroborates this testimony.

Within the above framework of credible evidence, I therefore conclude that the adverse action against Rieke was, indeed, motivated at least in part by discriminatory reasons. Akzo maintains however that it would have taken the adverse action against Rieke in any event on the basis of his unprotected activity alone, i.e. his refusal to break out the Eimcos, his purported work slowdown on March 31, 1994, and for his "attitude" in purportedly referring to other employees as "suck asses". These, of course, were the reasons cited by Bannerman at trial as the underlying basis for his disqualification of Rieke. This argument relates to an affirmative defense under the *Pasula* analysis.

In *Chacon* the Commission explained the proper criteria for analyzing an operator's business justifications for an adverse action:

> Commission judges must often analyze the merits of an operator's alleged business justification for the challenged adverse action. In appropriate cases, they may conclude that the justification is so weak, so implausible, or so out of line with normal practice that it was a mere pretext seized upon to cloak discriminatory motive. But such inquiries must be restrained.
>
> The Commission and its judges have neither the statutory charter nor the specialized expertise to sit as a super grievance or arbitration board meting out industrial equity. *Cf. Youngstown Mines Corp.*, 1 FMSHRC 990, 994 (1979). Once it appears that a proffered business justification is not plainly incredible or implausible, a finding of pretext is inappropriate. We and our judges should not substitute for the operator's business judgment our views on "good" business practice or on whether a particular adverse action was "just" or "wise." *Cf. NLRB v. Eastern Smelting & Refining Corp.*,

598 F.2d 666, (1st Cir. 1979). The proper focus, pursuant to *Pasula*, is on whether a credible justification figured into motivation and, if it did, whether it would have led to the adverse action apart from the miner's protected activities. If a proffered justification survives pretext analysis ...., then a *limited* examination of its substantiality becomes appropriate. The question, however, is not whether such a justification comports with a judge's or our sense of fairness or enlightened business practices. Rather, the narrow statutory question is whether the reason was enough to have legitimately moved that the operator to have disciplined the miner. *Cf. R-W Service System* Inc. 243 NLRB 1202, 1203-04 (1979) (articulating an analogous standard).

In this case I reject Akzo's purported business reasons for Rieke's disqualification as pretextual. First, none of the reasons advanced by Bannerman can be believed because of his established lack of credibility in denying knowledge of the issuance of Citation NO. 4308683 prior to his disqualification of Rieke. Second, the only reason initially given for Rieke's disqualification was his "attitude". Even at Rieke's grievance proceeding it appears that no explanation for this grounds was furnished and "attitude" had never before in the memory of former union steward Gregory Ruble been cited as a grounds for disqualification. While there is some evidence that Rieke's purported work slowdown may have been raised at one of the grievance proceedings as a reason for the disqualification that in itself may very well have been a protected activity in that the delay in powdering faces appears to have been due to the safety need for hand scaling. Significantly, according to former shop steward Ruble these reasons were also not cited at the grievance proceeding. It is also noteworthy that two of the reasons Bannerman cited at trial - refusing to break out the Eimco's and calling other employees "suck-asses" were also not, according to the evidence, ever raised at the grievance proceedings as a basis for disqualification.

Under all the circumstances I conclude that, indeed, Rieke suffered discrimination in violation of the Act for his disqualification from the job of powderman on March 31, 1994. Accordingly, Complainant James Rieke must be returned to his position as a powderman/blaster.

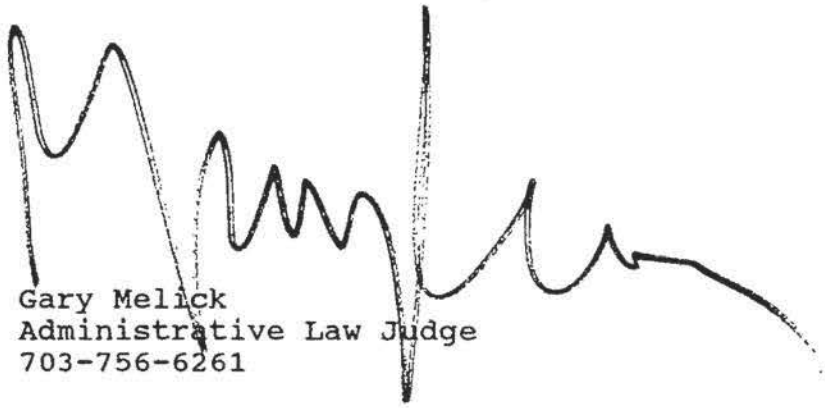
Civil Penalty

Considering the criteria under Section 110(i) of the Act, I also find that a civil penalty of $2,000 is appropriate. Rieke's disqualification was serious in its potential impact on the

exercise of miner's rights under the Act. Moreover this action was obviously based on his protected activities and therefore may be deemed to be the result of high negligence.

ORDER

Akzo Salt Company, Inc. is directed to immediately reinstate James Rieke to his position as powderman/blaster. The parties are further ordered to confer regarding any claimed damages and to report by telephone to the office of undersigned on or before August 25, 1995, as to whether such damages can be stipulated. If such damages cannot be stipulated by that date, hearings limited to the issue of damages will be held on August 31, 1995, at 9:00 a.m. in Medina, Ohio. Inasmuch as issues regarding damages have not been resolved, a final order regarding payment of civil penalties will be deferred. This decision is accordingly not a final decision. *Boone* v. *Rebel Coal*, 3 FMSHRC 1900 (1981).



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

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AUG 9 1995

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 94-710-M
Petitioner	:	A.C. No. 45-03085-05512
v.	:	
	:	Wallace Portable Crusher #1
WALLACE BROTHERS, INC.,	:	
Respondent	:	

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 Amchan

Factual Background

On May 11, 1994, MSHA representative Rodney Ingram issued two non-significant and substantial citations to Respondent alleging violations of 30 C.F.R. §56.14107(a), which requires the guarding of moving machine parts. Citation No. 4129345 alleged that the standard was violated in that a 5-inch x 8-inch gap existed in the guard of the self-cleaning tail pulley on Respondent's portable crusher (Tr. 15-20). Citation No. 4129346 alleged that the back side of a v-belt drive was unguarded (Tr. 22-28).

Ingram asked Respondent's foreman, Dan Fisher, if two days would be sufficient to abate these violations. Fisher indicated that it would be sufficient. The inspector therefore set May 13,

1994, as the date by which abatement or termination of the violations was required (Tr. 20, 28).

On June 8, 1994, Ingram returned to the Respondent's worksite. Four citations issued the month before had not been timely abated. With regard to two citations, Ingram extended the abatement or termination date. For one, an electrical grounding violation, Ingram accepted Respondent's explanation that it had contacted an electrician, but that the electrician had not been able to come out to the crusher (Tr. 37). Ingram also extended the abatement period for a citation issued for a supervisor's lack of first-aid training. He accepted Fisher's representation that he was having trouble scheduling the class (Tr. 42).

Fisher told Inspector Ingram that he forgot about the guarding citations (Tr. 38-40). Ingram issued Respondent two section 104(b) withdrawal orders (Nos. 4129356 and 4129357) for its failure to timely correct these violations. When Ingram returned to the crusher on June 9, these violations were abated (Tr. 43-47). MSHA subsequently proposed a $1,500 civil penalty for each of the citations/section 104(b) orders[1].

A civil penalty of $1,300 is assessed for each of the citations/section 104(b) orders

Respondent does not contest that the standards were violated on May 11, 1994, nor that these violations were not corrected within the period set forth in the original citations (Tr. 4-5). Rather, it contends that the proposed civil penalties are too high, considering the penalty criteria in the Act and MSHA's regulations regarding penalty calculations at 30 C.F.R. Part 100.

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[1]Although the proposed penalty assessment lists only the numbers of the section 104(a) citations, the document and attached narrative clearly indicate that the penalties are for the section 104(b) orders as well. Any confusion in this regard was eliminated by the Secretary's May 5, 1995 prehearing exchange.

Wallace Brothers points to the fact that it purchased the crusher on which the two violations occurred in 1966 (Tr. 84). The crusher had been inspected by MSHA many times prior to May 1994, and none of the inspectors had previously indicated that the inside of the v-belt drive needed to be guarded. Respondent does not know how long the gap in the tail pulley guard existed prior to the citation (Tr. 84-85).

Utilizing MSHA's regulations for proposing civil penalties, Respondent argues that penalties of $210 and $159 should be assessed, rather than those proposed by the Secretary. However, in a contested civil penalty assessment case, the Commission is not bound by MSHA's penalty assessment regulations or practices. The Commission assesses penalties de novo by applying the statutory criteria set forth in section 110(i) of the Act to the evidence of record, Sellersburg Stone Company, 5 FMSHRC 287, 292 (March 1983).

Moreover, an operator's failure to timely correct a citation warrants a substantially greater penalty than the citation itself. This is reflected in section 110(b) of the Act, which authorizes the Secretary to propose and the Commission to assess a penalty of up to $5,000 a day for each day during which each failure to correct a violation continues[2].

The daily penalty for failure to abate orders provides a powerful disincentive for ignoring the abatement requirement of a citation or order. An unabated violation constitutes a potential threat to the health and safety of miners, Legislative History of the Mine Safety and Health Act of 1977, at page 618.

It is one thing to overlook an MSHA violation before a citation or order is issued and another to ignore it after a citation has been issued. Given the number of inspectors, the Act relies, to a great extent, on the mine operator to discover and correct safety and health hazards and to timely correct cited violations. Particularly, in instances in which abatement is not required immediately, it is critical that the operator abate

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[2]The maximum daily penalty for a section 104(b) violation was increased from $1,000 to $5,000 by Public Law 101-508, Title III, §3102,(November 1990).

within the reasonable time period set forth in the citation. This is so because the inspector is unlikely to be present on the day on which abatement is required.

Upon discovering a failure to abate, an inspector must apply a rule of reason in determining whether to issue a section 104(b) order or to extend the abatement date, Martinka Coal Co., 15 FMSHRC 2452 (December 1993). In the instant case, Inspector Ingram gave Respondent the benefit of any reasonable doubt by extending the abatement period for two citations. He accepted at face value the excuses of Respondent's foreman. It certainly was reasonable for him not to extend the abatement period for the two citations for which Respondent had no excuse.

To assess a civil penalty of the magnitude suggested by Respondent is to invite dilatory conduct by some operators in timely abating citations and orders. A daily penalty, on the other hand, serves as a warning that such conduct will not be tolerated either by MSHA or the Commission. I therefore assess a $1,300 penalty for each of the guarding citations/section 104(b) orders in this case.

I arrive at this figure by starting with the $50 single-penalty assessment that MSHA would most likely have proposed under section 30 C.F.R. §100.4. I conclude that this is an appropriate penalty for the initial citations in this case considering the criteria in section 110(i) of the Act. However, I multiply this penalty by 26 days to account for Respondent's failure to abate within in the time specified in the citations[3].

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[3]I note that 30 C.F.R. §100.3(f) suggests that the only consequence of an operator's timely failure to abate may be the addition of 10 penalty points in computing the proposed civil penalty. This suggestion, in some situations, may lead to a result that is entirely inconsistent with the statutory scheme of the Federal Mine Safety and Health Act. For example, adding 10 points to a 30 point violation under MSHA's penalty conversion table results in a penalty of $270, rather than $135. This strikes the undersigned as inconsistent with section 110(b), which contemplates penalizing the operator for each day that it fails, without sufficient excuse, to correct a violation after the abatement period has expired.

ORDER

Citation No. 4129345 and section 104(b) Order No. 4129356 are affirmed and a $1,300 civil penalty is assessed.

Citation No. 4129346 and section 104(b) Order No. 4129357 are affirmed and a $1,300 civil penalty is assessed.

The $2,600 in assessed civil penalties shall be paid within 30 days of this decision.

A J Amchan

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 1995

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 95-25-M
Petitioner	:	A.C. No. 45-03300-05502
v.	:	
	:	Docket No. WEST 95-50-M
ASSOCIATED SAND & GRAVEL	:	A.C. No. 45-03300-05503
COMPANY, INC.,	:	
Respondent	:	Butler Pit Wash Plant

DECISION

Appearances: Matthew L. Vadnal, Esq., Office of the Solicitor, U.S. Department of Labor, Seattle, Washington; Paul A. Belanger, Conference and Litigation Representative, Mine Safety and Health Administration, U. S. Department of Labor, Vacaville, California, for Petitioner; Brent Eddings, Safety Manager, Associated Sand and Gravel Company, Inc., Everett, Washington, for Respondent.

Before: Judge Amchan

At the outset of the hearing in this matter, the Secretary withdrew Citation No. 4341895 and the corresponding $500 proposed penalty. This was the only item in Docket No. WEST 95-50-M. Towards the end of the hearing, Respondent withdrew its contest to the $50 penalty proposed for Citation No. 4341891 in Docket No. WEST 95-25-M. Remaining are two $50 penalties proposed for Citation Nos. 4341893 and 4341894.

The first of these citations was issued because a 110 volt electrical outlet in Respondent's maintenance shop was not effectively grounded. The second was issued because the oil

storage area on the outside of this shop was not posted with signs prohibiting smoking and open flames (Tr. 30-37, 65).

Respondent does not dispute the existence of the violative conditions (Tr. 65). It contends, however, that the citations and proposed penalties should be vacated because the shop area was not part of its mine and therefore not subject to MSHA jurisdiction.

The MSHA inspection of the shop area at the Butler Pit

On July 12, 1994, MSHA Inspector James Hudgins issued the instant citations at a worksite in Burlington, Washington. At that site Respondent maintains a sand and gravel pit, facilities for sizing aggregate, a wash plant to rinse material that is to be used in the production of concrete, a ready-mix concrete plant and an asphalt plant (Tr. 16-17).

Hudgins inspected the sand and gravel pit and the wash plant. He did not inspect the concrete or asphalt production facilities because he concluded that they were not subject to MSHA jurisdiction (Tr. 18). He decided to inspect the maintenance shop because James Salley, Respondent's concrete dispatcher, told him that mining equipment was repaired in this building (Tr. 43, 65)[1].

The maintenance shop is next to the asphalt plant, approximately 100 yards from the sand and gravel pit (Tr. 43). Hudgins observed a front-end loader partially inside this building (Tr. 44-45). Respondent's employees were fixing a horn and a parking brake which Hudgins had cited at the wash plant (Tr. 45).

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[1] Respondent contends that Mr. Salley was not knowledgeable about its mining operations and suggests that he may have exceeded the scope of his authority in discussing the repair of mining equipment with Inspector Hudgins (Tr. 59-60). However, Respondent never contradicted Salley's statement to Hudgins that mining equipment was repaired in the shop (Tr. 43). I conclude therefore that mining equipment was repaired in this shop on occasions other than the day of the inspection.

The maintenance shop was built to service the concrete and asphalt production facilities at the site. Respondent contends that very little work is performed on mining equipment in this shop. Most repairs on mining equipment are performed outdoors or at Respondent's Everett, Washington maintenance facility (Tr. 57, 73-75).

At Everett, Respondent has different maintenance facilities for its mining and non-mining operations. This was done in part to avoid having the same facility subject to inspection by MSHA and the State of Washington's OSHA program (Tr. 73-75).

Respondent's maintenance shop is within the jurisdiction of MSHA

In a recent case, the Review Commission held that a garage used by an operator's sand and gravel mine and its asphalt plant was subject to Mine Act jurisdiction, W. J. Bokus Industries, Inc., 16 FMSHRC 704 (April 1994). I consider that decision to be controlling in the instant case.

In W. J. Bokus, the garage was used primarily for the support of the asphalt plant. However, employees of both the asphalt plant and the sand and gravel mine used the garage to store, repair and maintain equipment. Crushing and screening equipment for the sand and gravel operation was also manufactured in the garage.

The use of the garage by the mining operation in W. J. Bokus appears to be more substantial than Respondent's use of the maintenance shop in this case. However, I do not see this as a factor which would enable me to distinguish the Commission decision in that case from the instant one. To the contrary, the Commission decision stands for the proposition that if a facility is used in support of mining activities to any extent, MSHA may choose to assert its jurisdiction.

Miners employed by Respondent were at least potentially exposed to the hazards created by the violations cited by Inspector Hudgins. The legislative history of the Act states that, "[w]hat is considered a mine and to be regulated under this Act [shall] be resolved in favor of ... coverage of the Act." S. Rep. No. 181, 95th Cong., 1st Sess. 14 (1977), Legislative

History of the Federal Mine Safety and Health Act of 1977, at 602 (1978). Thus, I find that the maintenance shop at the Butler Pit is subject to the Act.

ORDER

Docket No. WEST 95-50-M is **DISMISSED**. Citation Nos. 4341893, 4341894 and 4341891 in Docket No. WEST 95-25-M are affirmed. A $50 civil penalty is assessed for each of these violations. These penalties shall be paid within 30 days of this decision.

Arthur J. Amchan
Administrative Law Judge

Distribution:

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Brent Eddings, Safety Manager, Associated Sand & Gravel Co., Inc., P.O. Box 2037, Everett, WA 98202 (Certified Mail)

/lh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

AUG 10 1995

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 95-1-M
Petitioner	:	A. C. No. 14-00164-05524
v.	:	
	:	Kansas Falls Quarry & Mill
WALKER STONE COMPANY, INC.,	:	
Respondent	:	

DECISION

Appearances: Ann M. Noble, Esq., Office of the Solicitor, U. S. Department of Labor, Denver, Colorado, for the Secretary;
Keith R. Henry, Esq., Weary, Davis, Henry, Struebing & Troup, Junction City, Kansas, for Respondent.

Before: Judge Maurer

STATEMENT OF THE CASE

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," charging Walker Stone Company, Inc., with two violations of the regulatory standards found in Part 56, Title 30, Code of Federal Regulations. The general issues before me are whether the respondent violated the cited regulatory standards and, if so, the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act.

Pursuant to notice, the case was heard at Fort Riley, Kansas, on March 14, 1995. At the hearing, Inspectors Curtis W. Dement and Eldon E. Ramage testified for the Secretary of Labor. Mr. David S. Walker, the President of Walker Stone Company, Inc., and Mr. Clifford Moenning, the plant foreman, testified for respondent.

STIPULATIONS

At the hearing, the parties entered the following stipulations into the record (Tr 8):

1. Walker Stone Company, Inc. is engaged in the operation of a limestone quarry and mill in the United States, and its mining operations affect interstate commerce.

2. David S. Walker is the owner and operator of Kansas Falls Quarry and Mill Mine, MSHA I.D. 14-00164-05521.

3. Walker Stone Company, Inc. is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801 et seq. ("the Act").

4. The Administrative Law Judge has jurisdiction in this matter.

5. The subject citations were properly served by a duly authorized representative of the Secretary upon an agent of respondent on the dates and places stated therein, and may be admitted into evidence for the purpose of establishing their issuance, and not for the truthfulness or relevancy of any statement asserted therein.

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

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

8. The operator demonstrated good faith in abating the violations alleged in Citation Nos. 4332611 and 4409171.

9. Walker Stone Company is a limestone mine operator with 97,089 hours of production in 1993.

10. The certified copy of the MSHA Assessed Violations History accurately reflects the history of this mine for the 2 years prior to the date of the citations.

DISCUSSION, FINDINGS AND CONCLUSIONS

Citation No. 4332611

Citation No. 4332611, issued on November 16, 1993, alleges a violation of the standard found at 30 C.F.R. § 56.14107[1] and charges as follows:

> The self cleaning tail pulley on the second conveyor between the crusher and the surge bin was not provided with a guard to protect persons from contacting the moving parts that can cause injury. A build up of material under the conveyor allows persons to become with in less than 6 1/2 foot or (1.98) meters of the underside of moving machinery.

Inspector Dement testified that he and Inspector Ramage, accompanied by his supervisor, located an unguarded tail pulley on a belt conveyor between the crusher and the surge bin. In his opinion, this was a hazard because he thought it possible for a person to get his clothing caught up in it, a coat sleeve, for example.

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[1]/ 30 C.F.R § 56.14107 provides:

(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.

Dement also testified that he determined the bottom of the unguarded tail pulley was about 6 1/2 feet off the ground. But he allowed that the space between the ground and the tail pulley had been closed due to spillage off the belt conveyor and that if the spillage had been cleaned up, the tail pulley would have been okay without the guard, because then it would have been at least 7 feet off the ground. In fact, if the spillage of crushed rock off the conveyor, which he estimated to be somewhere in the neighborhood of 24 inches thick, had been 6 inches less, the citation would not have been issued and the pulley, which had gone unguarded for the previous 24 years, would in all likelihood still be unguarded.

Inspector Ramage testified in corroboration of Dement's testimony and added that he had had a prior discussion with plant foreman Moenning in June of 1993, wherein he told Moenning that the 7 foot distance would have to be maintained in order to stay in compliance with the standard. He stated that he had observed the unguarded tail pulley many times, but had never cited it because the build-up of crushed rock underneath it had never placed the pinch point of the pulley within 7 feet of the ground at the time he observed it. On the cited occasion, however, he concurs that it was closer than the 7 feet required by the standard.

Mr. Moenning also testified on this point and agreed that the distance between pulley and ground was about 6 1/2 feet or between 6 1/2 and 7 feet. Moenning further opined that there is no work area or walkway for employees in the vicinity of that tail pulley, but he did state that the crushed rock spillage is cleaned up every day using a Bobcat.

The preponderance of the evidence is to the effect that the unguarded tail pulley was within 7 feet of the ground, represented by the top of the spillage pile. It is also uncontroverted that a person, operating a Bobcat, cleans up this spillage on a daily basis, and thereby is exposed to the hazard presented, however unlikely he might actually become entangled in the tail pulley. The Secretary concedes the point that it is unlikely. I would only add that in my opinion it is highly unlikely that anyone would get entangled in this tail pulley, but that is not relevant to the limited inquiry at bar.

Accordingly, I find a violation of the mandatory standard as cited and assess the proposed civil penalty of $50.

Citation No. 4409171

Citation No. 4409171 was originally issued as a section 104(d)(1) order, but was later modified to a (d)(1) citation upon the vacation of the earlier (d)(1) citation on which it was based. It was originally issued on June 30, 1994, for an alleged violation of the mandatory standard found at 30 C.F.R. § 56.14103(b)[2] and charges as follows:

> The windshield of the light blue F150 Ford pickup was severely cracked. The cracked windshield impaired the operators vision. The pickup is seldom used but sun striking these cracks could temporarily blind the operator. The plant manager had driven the pickup on the afternoon of 6-29-94.
>
> At times there were several customer trucks and a company front-end loader in the area the pickup was operated.
>
> This is unwarrantable failure.

Inspector Ramage issued this citation to the operator because the windshield was cracked in the subject pickup truck, which obstructed the operator's view, in his opinion.

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[2]/ 30 C.F.R. § 56.14103(b) provides:

(b) If damaged windows obscure visibility necessary for safe operation, or create a hazard to the equipment operator, the windows shall be replaced or removed. Damaged windows shall be replaced if absence of a window would expose the equipment operator to hazardous environmental conditions which would affect the ability of the equipment operator to safely operate the equipment.

The truck was operated at least once a day in an area where customer's trucks were also operating. A front-end loader also operated in this area and there was a plant man that could be on foot in the area as well.

There was a nonissue raised concerning the ownership of the truck. Mr. Moenning claimed that it was his personal pickup truck, given to him by Mr. Walker. However, a sign displayed on the side of the truck said: "Walker Stone Co., Inc., Chapman, Kansas."

In reality, it does not matter whose truck it is. Since it is being used on mine property, for mine business, it is the operator's responsibility to ascertain that it meets the applicable mandatory safety standards.

The only genuine issue of material fact to be tried in regard to this citation is whether or not the windshield was cracked severely enough to be considered unsafe for operation.

Based on the evidence in this record, most particularly the photographs of the truck (GX-6 and GX-7), which quite clearly depict the damage, I conclude that it is insufficient to establish that the windshield cracks noted by the inspector impaired the operator's visibility to any significant extent. In this regard, I also find Mr. Moenning's testimony that his vision was not impaired when he drove the truck to be credible. I also note that Inspector Ramage admitted that he never got into the truck and looked through the windshield himself to determine whether the cracks would affect the operator's visibility. Accordingly, the citation fails of proof and will be vacated herein.

ORDER

1. Citation No. 4332611 **IS AFFIRMED.**

2. Citation No. 4409171 **IS VACATED.**

3. The Walker Stone Company, Inc. **IS ORDERED TO PAY** the Secretary of Labor a civil penalty of $50 within 30 days of the date of this decision.

Roy J. Maurer
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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AUG 14 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of CODY CHERRY, Complainant	:	TEMPORARY REINSTATEMENT PROCEEDING
	:	Docket No. WEST 95-423-DM
	:	TVX Mineral Hill Mine
v.	:	Mine I.D. 24-01145
TVX MINERAL HILL MINE, Respondent	:	

ORDER OF DISMISSAL

Before: Judge Manning

The Secretary of Labor has moved to withdraw its application for temporary reinstatement of Cody Cherry. The motion states that Mr. Cherry no longer wishes to be reinstated to his previous position at the mine because he has found other employment. The motion further states that the Secretary may decide to pursue back pay and a civil penalty in a separate discrimination proceeding. For good cause shown, the motion is **GRANTED**, and this proceeding is **DISMISSED.**

Richard W. Manning
Administrative Law Judge

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RWM

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AUG 15 1995

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 95-165-M
Petitioner	:	A.C. No. 45-03208-05515
v.	:	
	:	Shine Quarry
SHINE QUARRY INC.	:	
Respondent	:	

DECISION

Appearances: Cathy L. Barnes, Esq., Office of the Solicitor, U.S. Department of Labor, Seattle, Washington, for Petitioner;
Erwin P. Jones, Jr., Sequim, Washington, for Respondent.

Before: Judge Amchan

Background

On August 18, 1994, MSHA Inspector Wallace Myers issued Imminent Danger Order/Citation No. 4341786 alleging that Respondent violated sections 107(a) and 104(a) of the Act and section 56.3200 of Volume 30 of the Code of Federal Regulations. MSHA subsequently proposed a $315 civil penalty for this alleged violation. The penalty was contested and this matter came to hearing on June 8, 1995, in Seattle, Washington.

Section 56.3200 provides as follows:

> Ground conditions **that create a hazard** to persons shall be taken down or supported before other work or travel is permitted in the affected area. Until corrective action is completed, the area shall be posted with a warning against entry and when left unattended, a barrier shall be installed to impede unauthorized entry (emphasis added).

The August 18, 1994 inspection

Respondent operates a basalt rock quarry on the Olympic Peninsula, west of Seattle, Washington. The basalt is separated from the quarry wall by drilling and blasting (Tr. 71, 103-04). It is crushed, sized and then sold primarily to small local contractors for use on private driveways and in the construction of ornamental walls (Tr. 111). There is no evidence that any of the mine's product is sold outside of the State of Washington (Tr. 111).

When Inspector Myers arrived at the quarry on August 18, 1994, he observed one of Respondent's employees operating a Caterpillar front-end loader approximately 14 to 20 feet from the quarry wall. The loader operator was clearing rocks off of a roadway on the quarry floor (Tr. 14-15, 38-39, 63, 89-90).

The quarry wall is approximately 700 feet long and from 50 to 70 feet high (Tr. 16, 71). Respondent had blasted sections of this wall on August 12 and on August 17, 1994 (Tr. 41, 104, 109, 118). On the day of the inspection Myers observed several large boulders on the quarry wall which he considered unstable. He also observed some smaller rocks dribbling down the slope of the wall for approximately a minute (Tr. 15-34).

Beneath the newly blasted areas were "muck piles" which are ramp-like projections extending out from the wall approximately 30 to 50 feet (Tr. 45, 119-20, Exhs. P-7, 8 and 9, R-2 and 3). In some areas there were indications that a muck pile had been disturbed by some of Respondent's equipment (Tr. 38, P-8). Inspector Myers concluded that the unstable boulders presented an imminent danger to the front-end loader operator and any other miner who might go near the quarry wall. He therefore issued section 107(a) order/section 104(a) Citation No. 4341786.

In response to this order, Respondent erected a barricade of rocks (Tr. 47, Exh. P-7). On the day after the order/citation was issued, Respondent's driller/blaster Lloyd Fultz drilled four holes and then blasted one large boulder off the quarry wall (Tr. 126-28). On August 22, 1994, Inspector Myers returned to the quarry and the citation/order was terminated (Tr. 124-25).

Respondent's Quarry is Subject to the Mine Act

Respondent argues that because it sells only to local contractors who construct driveways and ornamental walls, it is not engaged in interstate commerce and thus is not subject to the Federal Mine Safety and Health Act. However, Respondent buys parts and supplies from a firm in Portland, Oregon, and uses Caterpillar brand equipment (Tr. 113-14), which is generally manufactured in the State of Illinois. I find these factors alone sufficient to establish MSHA jurisdiction, United States v. Dye Construction Company, 510 F.2d 78, 83 (10th Cir. 1975).

Congress intended to exercise its authority to regulate interstate commerce to the "maximum extent feasible" when it enacted the Mine Act, Jerry Ike Harless Towing, Inc. and Harless, Inc., 16 FMSHRC 683 (April 1994); U.S. v. Lake, 985 F.2d 265, 267-69, (6th Cir. 1985). Thus, if Respondent's quarry falls within the scope of the commerce clause, it is subject to MSHA jurisdiction.

Purely local activity falls within the commerce clause if it affects interstate commerce, Wickard v. Filburn, 317 U. S. 111 (1942). Indeed, regardless of the strictly local nature of a particular business, Congress can regulate its affairs on the basis of the class of activity in which it engages, Perez v. United States, 401 U.S. 146 (1971).

In enacting the Federal Mine Safety and Health Act, Congress found that "the disruption of production and the loss of income to operators and miners as a result of coal or other mine accidents or occupationally caused diseases unduly impedes and burdens commerce," 30 U.S.C. § 801(f). Thus, regardless of the local nature of its business, Respondent is subject to the Act simply by virtue of the fact that it is engaged in mining.

The evolution of Supreme Court cases since Wickard v. Filburn has brought virtually every commercial activity in the United States within the purview of the commerce clause. This trend continues despite the recent decision in United States v. Lopez, 514 U.S. ___, 131 L.Ed 2d 626, 115 S Ct ___ (1995). In Lopez, the Court invalidated the Gun-Free School Zones Act of 1990 on the grounds that it exceeded congressional authority under the commerce clause.

Chief Justice Rehnquist stated in the opinion of the court that to determine whether an activity affects interstate commerce "the proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce," 131 L.Ed 2d at 637. However, it is clear that the decision rests on the proposition that the invalidated statute has nothing to do with "commerce" or any sort of economic enterprise, 131 L.Ed 2d at 638, 642 (Chief Justice Rehnquist), and 653 (Justices Kennedy and O'Connor, concurring). I therefore conclude that the decision has no bearing on whether a mining operation, even one which is purely intrastate in scope, is subject to the Act. Thus, as was the case before United States v. Lopez, Respondent falls within the commerce clause and is covered by the Federal Mine Safety and Health Act.

The Substantive Issue Presented

Respondent's President, Clifford Larrance, arrived at the quarry on August 18, shortly after Inspector Myers departed from the mine (Tr. 87). Larrance contends that the quarry wall did not create a hazard to persons because the muck piles prevent any loose material on the wall from reaching any miner who works on the pit floor (Tr. 92-93, and 100-101, testimony of Lloyd Fultz). The muck piles consist of loose, unconsolidated material which absorbs the energy of any rocks that may fall, preventing them from rolling or bouncing down to the pit floor (Tr. 92-93).

The essence of this case is whether, in view of the muck piles underneath the recently blasted areas, the condition of the quarry wall was shown to create a hazard to persons[1]. As this is a subjective judgement, the question under Commission law is whether a reasonably prudent employer familiar with the mining industry and the protective purposes of the standard would have recognized that the condition of Respondent's quarry wall posed a

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[1]Respondent's driller/ blaster, Lloyd Fultz, testified about a rock that "looked pretty bad" at first glance but upon close examination "wasn't that bad" (Tr. 105). From this one might conclude that a particular boulder did pose a potential hazard to persons on the pit floor. However, without evidence as to why Respondent's muck pile was inadequate to protect miners on the quarry floor, I decline to draw such an inference.

hazard to persons on the pit floor, Ideal Cement Company, 12 FMSHRC 2409 (November 1990).

It is a normal condition to have loose material on a quarry wall after blasting (Tr. 65). MSHA does not require that all such material be taken down before miners are allowed to work below it. Thus, before finding an operator in violation of section 56.3200, it is only proper that conditions be shown to pose a danger from an objective standpoint.

Given the instant record, I find that the Secretary has not established a violation of section 56.3200. I therefore vacate Citation No. 4341786 and the proposed penalty. Although Inspector Myers considered the quarry wall hazardous, he has limited training and experience in ground control and related disciplines (Tr. 6-8, 57, 66). I do not regard his opinion as representing the standard of care of a reasonably prudent mine operator in this case.

In view of what appears to be an honest difference of opinion as to the safety of Respondent's quarry, the Secretary must do more than present the opinion of a non-expert inspector to meet its burden of proof under a general standard such as section 56.3200. For example, in Cyprus Tonopah Mining, 15 FMSHRC 367 (March 1993), the Commission upheld a violation of this standard where the Secretary's case was supported by the testimony of a mining engineer regarding the stability of the operator's wall.

Much of the testimony in this matter, which appears to be relevant at first glance, has little bearing on the validity of the citation. For example, there was some discussion as to whether the muck pile had been disturbed and whether the loader operator would have been closer to the quarry wall than he was when observed by Inspector Myers.

I conclude that the only issue is whether the Secretary has shown that the muck piles were insufficient to protect employees from loose material on the quarry wall. Since I find that he has not done so, it does not matter how close the loader operator, or other employees, may have come to the muck pile. There is no evidence that would support a finding that any person went on top of the muck pile, had reason to go on the muck pile, or that any

muck pile was disturbed at a time when the portion of the quarry wall above it posed a hazard[2].

ORDER

Citation No. 4341786 and the corresponding proposed penalty are **VACATED**.

Arthur J. Amchan
Administrative Law Judge

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[2]A muck pile was apparently disturbed with a Caterpillar shovel on or before August 12, 1994 (Tr. 38, 72-74).

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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AUG 16 1995

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 95-16-M
Petitioner	:	A. C. No. 25-01065-05519
v.	:	
	:	Pit No. 2
FRICK SAND & GRAVEL, INC.,	:	
Respondent	:	

DECISION

Appearances: Kristi L. Floyd, Esq., Office of the Solicitor, U. S. Department of Labor, Denver, Colorado, and Dennis J. Tobin, Conference and Litigation Representative; Mine Safety and Health Administration, Grand Junction, Colorado, for the Secretary;
Thomas E. Frick, President, Frick Sand & Gravel, Inc., McCook, Nebraska, for Respondent.

Before: Judge Maurer

STATEMENT OF THE CASE

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," charging Frick Sand & Gravel, Inc., with two violations of the regulatory standards found in Part 56, Title 30, Code of Federal Regulations. The general issues before me are whether the respondent violated the cited regulatory standards and, if so, the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act.

Pursuant to notice, the case was heard at Colby, Kansas, on June 1, 1995. At the hearing, Inspector Steve Ryan testified for the Secretary of Labor. Mr. Thomas Frick, the President of Frick Sand & Gravel, Inc., testified for respondent.

STIPULATIONS

At the hearing the parties entered the following stipulations into the record (Joint Ex. No. 1):

1. Frick Sand & Gravel, Inc. is engaged in mining and selling of sand and gravel in the United States, and its mining operations affect interstate commerce.

2. Frick Sand & Gravel, Inc. is the owner and operator of Pit No. 2 Mine, MSHA I.D. No. 25-01065.

3. Frick Sand & Gravel, Inc. is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801 et seq. ("the Act").

4. The Administrative Law Judge has jurisdiction in this matter.

5. The subject citations/orders were properly served by a duly authorized representative of the Secretary upon an agent of respondent on the dates and places stated therein, and may be admitted into evidence for the purpose of establishing their issuance, and not for the truthfulness or relevancy of any statements asserted therein.

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

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

8. The operator demonstrated good faith in abating the violation relating to Citation No. 4332411.

9. The operator did not abate the violation in Citation No. 4332414 in a timely manner and a 104(b) order was issued. The violation was subsequently abated.

10. Frick Sand & Gravel, Inc. is a small mine operator with 15,746 hours of production in 1993.

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

DISCUSSION, FINDINGS AND CONCLUSIONS

Citation No. 4332411

Citation No. 4332411, issued on March 21, 1994, alleges a violation of the standard found at 30 C.F.R. § 56.14100(b)[1] and charges as follows:

> The brake lights on the Cat 966C F.E.L. were not operational. The wiring had been broken and seemed to have been that way for some time. Defects on machinery that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to a person.

Mr. Frick admits the brakes lights were inoperative and also admits that that is a violation of 30 C.F.R. § 56.14100(b).

Accordingly, I find a violation of the mandatory standard as cited and assess the proposed civil penalty amount of $50.

Citation No. 4332414

Citation No. 4332414, issued on March 22, 1994, alleges a violation of the standard found at 30 C.F.R. § 56.18010[2] and charges as follows:

> Neither the pit foreman or any of the employees have been trained in first aid. Selected supervisors and all interested employees shall be trained in first aid to help minimize as much as possible the severity of possible injuries at the pit.

---

[1]/ 30 C.F.R. § 56.14100 (b) provides:
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.

[2]/ 30 C.F.R. § 56.18010 provides:
Selected supervisors shall be trained in first aid. First aid training shall be made available to all interested employees.

Mr. Frick admits his pit foreman did not have the required first aid training. He also admits that that is a violation of 30 C.F.R. § 56.18010.

His only problem with this citation is that the inspector did not give him enough time to get his foreman trained, given the paucity of evening training classes in their area of the country.

A woman teaches the first aid course on an irregular basis in the evenings, based on demand for it. That is, if she schedules a course, but only two or three persons enroll, she cancels and reschedules the course at a later date. This happened many times in this situation according to Mr. Frick.

I am going to affirm the citation, but reduce the proposed civil penalty in this instance from $195 to $50, based on the fact that I find credible Mr. Frick's claim that he did the best he could to get the first available evening first aid class set up for his pit foreman.

ORDER

1. Citation Nos. 4332411 and 4332414 **ARE AFFIRMED.**

2. Frick Sand & Gravel, Inc. **IS ORDERED TO PAY** the Secretary of Labor a civil penalty of $100 within 30 days of the date of this decision.

Roy J. Maurer
Administrative Law Judge

Distribution:

Kristi L. Floyd, Esq., Office of the Solicitor, U. S. Department of Labor, 1999 Broadway, Suite 1600, Denver, CO 80202-5716 (Certified Mail)

Dennis J. Tobin, Conference and Litigation Representative, U. S. Department of Labor, Mine Safety and Health Administration, 764 East Horizon Drive, Room 226, Grand Junction, CO 81506 (Certified Mail)

Thomas E. Frick, President, Frick Sand & Gravel, Inc., P. O. Box 589, McCook, NE 69001 (Certified Mail)

dcp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

AUG 17 1995

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 95-112-M
Petitioner	:	A.C. No. 41-03698-05515-A
v.	:	
	:	Tarrant Aggregates Corp.
ROBERT CODNER, Employed by	:	
TARRANT AGGREGATES	:	
CORPORATION,	:	
Respondent	:	

DECISION

Appearances: Mary K. Schopmeyer, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner; Jim Minter, Esq., Fort Worth, Texas, for Respondent.

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(c), charging the respondent with two alleged "knowing" violations of certain mandatory safety standards found in Part 56, Title 30, Code of Federal Regulations. The respondent is charged as an agent of the mine operator while employed as a plant operator. The respondent contested the alleged violations, and a hearing was convened in Fort Worth, Texas.

Issues

The principal issue presented in this case is whether or not the respondent knowingly authorized, ordered, or carried out the alleged violations. If he did, the next question presented is the appropriate civil penalties to be assessed against the respondent taking into account the civil penalty criteria found in Section 110(a) of the Act.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, P.L. 95-164.

2. Section 110(c) of the 1977 Act, 30 U.S.C. § 820(c).

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

Discussion

Section 104(d)(1) "S&S" Citation No. 4321326, issued at 9:25 a.m., on January 4, 1994, cites an alleged violation of 30 C.F.R. 14107(a), and the cited condition or practice is described as follows:

> The V-belt drive for the horizontal masonry conveyor belt was not provided with a guard. The V-belt drive is located approx. five feet from ground level and there was an employee shoveling in that area at the time of inspection. The plant foreman stated that he knew the guard was off and had records dated on September 25, 1993, that the guard was off.

Section 104(d)(1) "S&S" Order No. 4321327, issued at 10:40 a.m., on January 4, 1994, cites an alleged violation of 30 C.F.R. 56.14107(a), and the cited condition or practice is described as follows:

> The guard provided for the tail pulley on the over-size conveyor belt had a hole cut in the east side fourteen inches by 8 inches exposing

the self cleaning tail pulley. The tail pulley is located approx. three feet from ground level and employees walk directly beside the pulley two to ten times daily. The plant foreman stated that he knew the hole was in the guard and records showed the guard had been wrote up on 9-25-93. This is an unwarrantable failure.

Upon entering their respective appearances in this matter, and in the course of a pre-hearing bench conference prior to the presentation of testimony from witnesses who were present in the courtroom, including one subpoenaed witness, counsel for the parties informed me that they proposed to finalize a settlement in this matter and they filed a joint motion and a settlement agreement for my consideration (Tr. 9-10).

The parties were afforded an opportunity to present arguments in support of the proposed settlement. The parties agreed that the respondent's employer is a small sand and gravel pit operator with a total of 38 employees at two plants. The No. 1 plant where the respondent worked had two employees and the respondent supervised one employee. Respondent's counsel stated that the respondent was an hourly employee earning $10 an hour, and that he is married with several children and is their sole support. Counsel asserted that the payment of the full amount of the proposed civil penalty assessments will adversely impact financially on the respondent (Tr. 18-28).

With respect to section 104(d)(1) Order No. 4321327, the petitioner's counsel stated that upon further investigation it has been concluded that the evidence does not support a "knowing" violation of the cited mandatory safety standard found at 30 C.F.R. 56.14107(a). Under the circumstances, counsel asserted that the section 110(c) action predicated on that order has been vacated by MSHA.

The petitioner asserted that after further review and consideration of the respondent's financial status and the six statutory civil penalty criteria found in section 110(i) of the Act, it has determined that the initial proposed civil penalty assessment of $1,200 for section 104(d)(1) Citation No. 4321326

is unduly burdensome to the respondent. Under the circumstances, the petitioner agreed to modify the assessment and reduce the proposed penalty to $500 for the alleged violation.

MSHA Inspector Ricky J. Horn, who was present in the courtroom, and who issued the citation and order, expressed his approval of the proposed settlement disposition of this matter (Tr. 30).

The respondent has agreed to pay a civil penalty assessment of $500, in settlement of Citation No. 4321326. He agreed to pay an initial payment of $100, with four (4) additional monthly installments of $100, due each 30 days thereafter, until the total amount of $500 is fully paid (Tr. 37-38).

Conclusion

After careful review and consideration of the pleadings and arguments in support of the proposed settlement disposition of this case, I rendered a bench decision granting the joint motion and approving the settlement (Tr. 37). My decision in this regard is herein re-affirmed. I conclude and find that the settlement disposition is reasonable and in the public interest. I take note of the fact that the respondent is employed by a small sand and gravel pit operator, is the sole support of his family through hourly wages, timely abated the conditions and presented some mitigating circumstances associated with the cited conditions as part of his answer in this proceeding. Under all of these circumstances, and pursuant to Commission Rule 31, 29 C.F.R. 2700.31, the joint settlement motion **IS GRANTED**, and the settlement **IS APPROVED**.

ORDER

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

1. The proposed civil penalty assessment associated with Section 104(d)(1) "S&S" Order No. 4321327, January 4, 1994, 30 C.F.R. 56.14107(a), **IS DENIED** and **IS DISMISSED**.

2. The respondent Robert Codner shall pay a civil penalty assessment in the amount of $500 in satisfaction of section 104(d)(1) "S&S" Citation No. 4321326, January 4, 1994, 30 C.F.R. 56.14107(a).

3. The respondent Robert Codner shall make an initial payment of $100 within thirty (30) days of the date of this decision and order. Payment shall be by check or money order made payable to the Mine Safety and Health Administration.

4. After payment of the first installment, the respondent Robert Codner shall make additional payments to MSHA in four (4) equal installments of $100, each due within thirty (30) days of the previous payment, until the full amount of $500 is paid.

The payments shall include a reference to the date of this decision and order approving settlement and requiring payment, and Docket No. CENT 95-112-M, and A.C. No. 41-03698-05515-A.

This decision will not become final until such time as full payment of the $500 is made by the respondent to MSHA, and I retain jurisdiction in this case until payment of all installments are remitted and received by MSHA. In the event the respondent fails to comply with the terms of the settlement, the petitioner may file a motion seeking appropriate sanctions or further action against the respondent, including a reopening of the case.

George A. Koutras
Administrative Law Judge

Distribution:

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/lh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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AUG 2 1 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 93-452-M A.C. No. 42-01975-05504
v.	:	Lakeview Rock Products
LAKEVIEW ROCK PRODUCTS, INC., Respondent	:	

DECISION

Appearances: Ann Noble, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Gary V. Smith, North Salt Lake City, Utah, for Respondent.

Before: Judge Cetti

This case is before me upon a petition for assessment of civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act". The Secretary of Labor on behalf of the Mine Safety and Health Administration (MSHA), seeks civil penalties from Respondent Lakeview Rock Products, Inc., ("Lakeview") for the alleged violation of four mine safety standards found in Part 56, Title 30, Code of Federal Regulations.

Lakeview filed a timely answer contesting the existence of each of the violations and the assessment of penalties. Pursuant to notice to the parties the case was heard at Salt Lake City, Utah. Oral and documentary evidence was presented and the matter submitted for decision.

Stipulations

At the hearing the parties entered the following stipulations into the record:

1. Lakeview Rock Products, Inc., is engaged in mining and selling of sand and gravel in the United States and its mining operations affect interstate commerce.

2. Lakeview Rock Products, Inc., is the owner and operator of Lakeview Rock Products, Inc., MSHA I.D. No. 42-01975.

3. Lakeview Rock Products, Inc., is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. ("the Act").

4. The Administrative Law Judge has jurisdiction in this matter.

5. The subject citations were properly served by a duly authorized representative of the Secretary upon an agent of respondent on the dates and places stated therein, and may be admitted into evidence for the purpose of establishing their issuance, and not for the truthfulness or relevancy of any statements asserted therein.

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

7. The operator demonstrated good faith in abating the violations.

8. Lakeview Rock Products, Inc., is a small mine operator with 8,720 hours of work in 1992.

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

10. The issue regarding Citation No. 4120260 is whether a portion of the berm at the grizzly was missing or inadequate.

11. A ramp ran from the plant area to the primary plant feed. Tracked vehicles used this ramp. The issue with regard to Citation No. 4120281 is whether the berms for the ramp were improperly missing or inadequate.

12. The V-belt drive and feeder chain on the primary crusher were not guarded at the time of the inspection. The issue, with regard to Citation No. 4120282, is whether such guarding was required.

13. The tail pulley on the stacker conveyor belt was not guarded at the time of the inspection. The issue, with regard to Citation No. 4120283, is whether such guarding was required.

Citation No. 4120260

This citation alleges a violation of 30 C.F.R. § 56.8300(a). The citation reads as follows:

> The berm at the primary grizzly was not maintained in a condition to prevent equipment from dropping over the retaining wall. A 10-foot section of the berm was missing on the south side of the approach.
>
> It is unlikely that a vehicle would drop over the retaining wall, since the missing berm was located near the grizzly and the equipment was nearly stopped at that point.

The cited safety standard provides:

> (a) Berms or guardrails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment.

Inspector Pennington testified that he observed a rubber tired front-end loader pick up material and carry it to the primary grizzly. The approach to this grizzly had a berm consisting of a retaining wall constructed with dirt and concrete blocks. The purpose of the berm was to protect vehicles and machinery using this approach from the hazard of a 10 to 13 foot drop-off. Inspector Pennington testified there was a 10-foot section with no berm along the south side of the approach. Pennington conceded that it was unlikely that a vehicle would drop over the edge since the missing section of berm was located near the grizzly where the front-end loader bringing material to dump in the grizzly slows to a near stop.

Respondent presented evidence that the loader was wider than the missing 10-foot section of berm and that an accident was unlikely. Respondent promptly abated the violation within 20 minutes after the citation was issued.

I find there was a violation of the cited safety standard; that there was no reasonable likelihood that the hazard contributed to would result in an injury. Since injury was unlikely, the inspector properly issued the citation as a 104(a) violation that was not significant and substantial.

Upon consideration of the penalty criteria set forth in section 110(a) of the Act I find the MSHA proposed penalty of $50.00 is the appropriate penalty for this non-S&S, 104(a) violation of this safety standard.

Citation No. 4120281

This citation also alleges a violation of 30 C.F.R. § 56.900(a) regarding berms. The citation reads as follows:

> A 50-foot section of the berm was missing from the ramp. The missing berm was located on the south side of the ramp and the maximum drop-off was approximately 10 feet. The drop-off was a gradual slope and it is unlikely that a serious injury would occur if a vehicle should leave the roadway.

Inspector Pennington testified that there was a 50-foot section without a berm near the bottom half of the 100-foot long ramp. The ramp extended from the bottom area of the pit to the primary feeder located at a higher level. There was a 10-foot drop from the edge of the ramp along the section that was cited for not having a berm.

On cross-examination, the inspector agreed that the ramp was used only occasionally and that the drop-off was not vertical. The drop-off was sloped two to one. The inspector conceded that injury was unlikely.

The evidence presented established a violation of the cited safety standard. The inspector properly evaluated the violation as non-significant and substantial and Respondent's negligence was moderate. I have considered the statutory criteria in section 110(a) of the Act and find that the MSHA $50.00 proposed penalty is the appropriate penalty for this non-S&S violation of the cited safety standard.

Citation No. 4120282

This citation alleges a violation of 30 C.F.R. § 56.14107(a).

The citation reads as follows:

> The V-belt drive and feeder chain was not guarded on the primary crusher. The exposed pinch points were located 4 feet from a travelway and 5 feet above the ground.
>
> Employees do not enter into this area when the plant is running. Their (sic) is a danger of being struck by falling rock from the grizzly located above the feeder. Employees are aware of the hazards and stay out of the area.

30 C.F.R. § 56.14107 subsections (a) and (b) provide as follows:

> § 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.

Inspector Pennington testified that there was a feeder chain and a V-belt drive on the primary crusher. Neither had a guard. The exposed pinch points were located four feet from a travelway and five and one-half feet above the ground. The inspector acknowledged that if an employee were to enter the area where he would be exposed to the hazard of the pinch points there is a danger he would be struck by falling oversize rocks. These rocks fall down a distance of about 10 feet from the top of the grizzly whenever the machinery is operating. Employees are aware of this hazard and consequently never enter this area when the plant is running.

The inspector testified that the alleged violation was abated not by guarding the pinch points but by cleaning out the rock pile below the grizzly. The inspector freely admitted that when the rocks that were piled on the ground below the grizzly were cleaned out there was a distance of seven feet from the ground to the pinch points. The inspector further explained that the rocks that had fallen from the top of the grizzly had accumulated so that it sloped up about five feet above ground level. The inspector took his four foot measurement from the top of the rock pile to the pinch point.

Scott Hughes, the pit manager, at the site for the last 12 years was called by Respondent. He testified whenever the plant is operating there are rocks falling 8 to 10 feet from the top of the grizzly to the area below where the unguarded pinch points are located.

Mr. Hughes testified the pinch point on the V-belt and pulley drive and the chain feeder are approximately 10 feet above the ground level. No employee has been in that area when the plant is operating during the 12 years he has been at the pit. When Inspector Pennington showed up for the inspection, Respondent shut everything down including all the machinery so Mr. Pennington could conduct his inspection without any interference.

At the end of each shift the rocks below the pinch points are cleaned out by use of a rubber tired loader with full overhead protection. There is no manual cleaning of the area below the pinch points.

Mr. Hughes also testified that the V-belt and chain drive assembly are maintenance free. They do not use grease or any other lubricant. He also stated that to even try to get close to the pinch points an employee would have to climb the rock pile on his hands and knees and if he attempted to do this while the machinery was running he would also be exposed to the hazard of being struck by the oversize rocks falling from the top of the grizzly.

Subsection (b) of the 30 C.F.R. § 56.14107 clearly states that guards shall not be required where the moving parts are at least sevem feet away from walking or working surfaces. On the basis of the testimony of both the inspector and plant manager and also the photograph of the rocks below the pinch point introduced as Petitioner's exhibit 3, I find the rock pile below the exposed pinch point is not a "walking" or "working surface" within the meaning of the cited safety standard. The unguarded exposed moving parts were at least seven feet from walking or working surfaces and thus clearly falls within the exclusion of the need to guard specified in subsection (b) of the cited safety standard. For this reason Citation No. 4120282 is vacated.

Citation No. 4120283

This citation issued under 104(a) of the Act alleges a violation of 30 C.F.R. § 56.14107(a).

The citation reads as follows:

> The tail pulley on the stacker conveyor belt was not guarded. This pulley was a smooth drum type and located approximately 3 feet above the ground. The exposed pinch point was created where the return conveyor belt meets the tail pulley. It is unlikely that an incident would occur since employees do not enter the area when the plant is running. There is a fall of rock hazard from the primary grizzly located near-by.

30 C.F.R. § 56.14107 subsection (a) and (b) provide as follows:

> § 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.

It is undisputed that the tail pulley for the stacker conveyor belt did not have a guard. The tail pulley was flat and the conveyor belt was 30 to 36 inches wide. There was an exposed pinch point between the return conveyor belt and the tail pulley.

The inspector testified he believed it was unlikely that anyone would enter the area where they would be exposed to the hazard of the unguarded pulley because of the hazard of being hit by rocks falling down from the top of the grizzly whenever the machinery is operating.

The cited violation was abated by installing a guard over the tail pulley. The inspector evaluated the Respondent's negligence as moderate.

On cross-examination the inspector testified that a person could walk up to the unguarded tail pulley and that his 3-foot measurement was taken from the ground to the pinch point and not from the top of any build-up. This was confirmed by the notes he took during his inspection.

Mr. Smith, the plant manager, testified that he believes the inspector took the 3-foot measurement from the top of the build-up to the tail pulley and not from the ground. He stated the pulley "is about seven feet above the ground."

I credit the testimony of Inspector Pennington and find the cited safety standard was violated since the tail pulley had no guard and the unguarded tail pulley was less than seven feet from a walking surface. I also agree with the inspector that the operator's negligence was no more than moderate. Upon consideration of the statutory criteria in section 110(i) of the Act I find the appropriate penalty for this violation is the MSHA proposed penalty of $50.00.

ORDER

Based upon the foregoing findings and conclusions it is **ORDERED** that:

1. Citation No. 4120260 is **AFFIRMED** and a civil penalty of $50.00 is assessed for this violation.

2. Citation No. 4120821 is **AFFIRMED** and a penalty of $50.00 is assessed.

3. Citation No. 4120282 along with its proposed penalty is **VACATED.**

4. Citation No. 4120283 is **AFFIRMED** and a penalty of $50.00 is assessed.

5. **RESPONDENT SHALL PAY** a civil penalty of $150.00 to MSHA within 40 days of this decision. Upon receipt of payment this case is dismissed.

August F. Cetti
Administrative Law Judge

Distribution:

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Mr. Gary V. Smith, LAKEVIEW ROCK PRODUCTS, INC., 900 North Redwood Road, North Salt Lake, UT 84054 (Certified Mail)

/sh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 22, 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. WEVA 95-16
	:	A. C. No. 46-07062-03619
v.	:	Docket No. WEVA 95-64
FERN COVE INCORPORATED, Respondent	:	A. C. No. 46-07062-03623
	:	Coalbank Fork No. 12
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEVA 95-65
	:	A. C. No. 46-06329-03657
v.	:	Tanglewood No. 2
TANGLEWOOD ENERGY, INCORPORATED, Respondent	:	

ORDER OF DEFAULT

Before: Judge Merlin

A show cause order was issued in Docket No. WEVA 95-16 on February 8, 1995.

A show cause order was issued in Docket No. WEVA 95-65 on February 28, 1995.

A show cause order was issued in Docket No. WEVA 95-64 on February 28, 1995.

On April 27, 1995, an order was issued staying these cases. The operator had petitioned the Commission for relief in 120 civil penalty cases where it failed to either timely contest the civil penalty assessment or was held in default for failing to answer the Secretary's penalty petition. Therefore, these matters were stayed pending a decision by the Commission in theses cases.

On July 13, 1995, the Commission issued a decision with respect to the operator's petition for relief. The Commission denied the operator's request to reopen the 120 civil penalty cases. The Commission found that the operator failed to provide sufficient grounds or adequate explanations to justify relief from the final orders. Tanglewood Energy Inc. and Fern Cove Inc., 17 FMSHRC 1105.

The files contain the return receipt showing that the operator received a copy of the April 27 order on May 9, 1995.

In addition, the files contain return receipts showing that the operator received a show cause order for Docket No. WEVA 95-16 on February 16, 1995, for Docket No. WEVA 95-64 on March 2, 1995, and Docket No. WEVA 95-65 on March 2, 1995. The operator did not file an answer or response to the show cause orders in any of these cases. More than 30 days has past since the Commission's decision and the operator still has not filed any response. Therefore, these cases are now ripe for default.

Accordingly, it is ORDERED that the operator be held in DEFAULT for the penalty amounts in these cases totaling $39,049 and that it PAY this sum immediately.

Paul Merlin
Chief Administrative Law Judge

Distribution: (Certified Mail)

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Mr. Randy Burke, President, Fern Cove, Inc., P. O. Box 554, Oakland, MD 21550

/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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AUG 2 3 1995

JIM WALTER RESOURCES, INC.,	:	CONTEST PROCEEDING
Contestant	:	
v.	:	Docket No. SE 94-586-R
	:	Order No. 3184217; 7/22/94
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	No. 4 Mine
ADMINISTRATION (MSHA)	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. SE 94-429
Petitioner	:	A.C. No. 01-01247-04120
	:	
v.	:	Docket No. SE 94-448
	:	A.C. No. 01-01247-04122
JIM WALTER RESOURCES, INC.,	:	
Respondent	:	No. 4 Mine
	:	
	:	Docket No. SE 94-394
	:	A.C. No. 01-01322-03957
	:	
	:	No. 5 Mine
	:	
	:	Docket No. SE 95-430
	:	A.C. No. 01-01401-04011
	:	
	:	No. 7 Mine

DECISION

Appearances: William Lawson, Esq., Office of the Solicitor, U.S. Department of Labor, Birmingham, Alabama, for Respondent and Petitioner;
David M. Smith, Esq., Maynard, Cooper & Gail, Birmingham, Alabama, for Contestant and Respondent;
R. Stanley Morrow, Esq., Jim Walter Resources, Inc., Brookwood, Alabama, for Contestant and Respondent.

Before: Judge David Barbour

These consolidated cases involve one contest proceeding and four civil penalty proceedings brought under the Federal Mine Safety and Health Act of 1977 (Act) (30 U.S.C. § 801 et seq. (1988)). In the contest proceeding, Jim Walter Resources, Inc. (Jim Walter) challenges the validity of an order of withdrawal issued pursuant to section 104(d)(2) of the Act (30 U.S.C. § 814(d)(2)). In the civil penalty proceedings, the Secretary of Labor (Secretary), on behalf of his Mine Safety and Health Administration (MSHA), petitions for the assessment of civil penalties for numerous violations of mandatory safety and health standards.

The cases were heard in Hoover, Alabama. Prior to the hearing, counsels for the parties announced that they had settled many of the alleged violations in the civil penalty proceedings, but they had been unable to settle the issues relating to the contest of the order of withdrawal (Docket No. SE 94-586-R), and to two of the alleged violations of health standards (Docket No. SE 94-448). I advised counsel that I would hear their explanations of the settlements after all of the evidence had been submitted regarding the contested issues. I stated that if I believed the settlements were warranted, I would approve them on the record and affirm my approvals in this decision.

The Issues

The order of withdrawal contested in Docket No. SE 94-586-R alleges a violation of 30 C.F.R. § 72.630(a), a health standard requiring the control of dust resulting from the drilling of rock.

The order also contains special findings alleging that the violation was a significant and substantial (S&S) contribution to a mine health hazard and was the result of Jim Walter's unwarrantable failure to comply with section 72.630(a).

The alleged violations in Docket No. SE 94-448 are each of 30 C.F.R. §70.440-3, a health standard that required dust from a rock drill to be readily distributed and carried away from the drill operator or other workers in the area. The citations in which the violations are alleged also contain S&S findings. The Secretary proposed civil penalties of $1,610 for each of the alleged violations.

The issues in the contest proceeding are whether Jim Walter violated section 76.630(a) and, if so, whether the special findings are valid. The issues in the civil penalty case are whether Jim Walter violated section 70.400-3, whether the S&S findings are valid, and the amount of any civil penalties to be assessed. Finally, the parties agreed that if I concluded the violation cited in the contested order existed, I should make findings regarding the gravity of the violation and the negligence of Jim Walter in order to guide the parties in resolving the civil penalty aspects of the case (Tr. 7).

The Standards

Section 70.400, of which section 70.400-3 is a subsection, was in effect until April 18, 1994. Section 70.400 stated:

> The dust resulting from drilling in rock shall be controlled by use of permissible dust collectors, or by water, or water with a wetting agent, or by ventilation, or by any other method or device approved by the Secretary which is as effective in controlling such dust.

Section 70.400-3 stated:

> To adequately control dust from drilling rock, the air current shall be so directed that the dust is readily dispersed and carried away from the drill operator or any other workers in the area.

On April 19, 1994, Section 70.400 was replaced by section 72.630(a), and section 70.400-3 was replaced by section 72.630(d) (See 59 Fed. Reg. 8327 (1994)). The new standards are virtually identical to the old.

Section 72.630(a) states:

> Dust resulting from drilling in rock shall be controlled by use of permissible dust collectors, or by water, or water with a wetting agent, or by ventilation, or by any other method or device approved by the Secretary that is as effective in controlling the dust.

Section 72.630(d) states:

> To adequately control dust from drilling rock, the air current shall be so directed that the dust is readily dispersed and carried away from the drill operator or any other miners in the area.

The Citations and The Order

Citation No. 3186828 (Docket No. SE 94-448), which alleges a violation of section 70.400-3, was issued on March 21, 1994, at the No. 4 Mine. It states, in part:

> According to statements made by management and labor employees, rock drilling is being conducted on the No. 2 longwall ... with ventilation as the only method of dust control. The drilling is being done on-shift and affected employees are not being removed downwind on the longwall face. Training shall be conducted on all three shifts in the requirement that with ventilation as the only means of dust control during rock drilling, the air shall either be directed away from the face or the affected employees removed from the area. The drilling is being done with gopher ... drills (Gov. Exh. 4).

Citation No. 3186829 (Docket No. SE 94-448) was issued on the same date, at the No. 4 Mine, and alleges a violation of the same health standard. It states, in part:

> According to statements made by management and labor employees, rock drilling has been conducted on the face and belt entry of the [N]o. 1 longwall ... with ventilation as the only method of dust control. The drilling is being done on shift and affected employees are not being removed from downwind on the longwall face. Training shall be conducted on all three shifts in the requirement that with ventilation as the only means of dust control during rock drilling, the air shall either be directed away from the face or the affected employees removed from the area. The drilling is done with gopher ... drills (Gov. Exh. 5).

Order No. 3184217 (Docket No. SE 94-586-R), which alleges a violation of section 72.630(a), was issued on July 22, 1994, at the No. 4 Mine. It states, in part:

> Statements given by labor and management employees ... show that dust resulting from drilling in rock was not being controlled by use of permissible dust collectors, or by water, or by water with [a] wetting agent, or by ventilation controls. Employees who were drilling the No. 1 longwall section roof with pneumatic rotation drills on [the] 7-21-94 owl shift were exposed to this dust while installing permanent roof supports. As many as four (4) drills were in operation at any one time and none of the drills were equipped with dust suppression devices (Gov. Exh. 8).

The Arguments

In opening his case, counsel for the Secretary stated that the regulations regarding the control of rock dust from drilling provide essentially for three means of control -- approved dust collectors, water, or ventilation. Because workable dust collectors are not available for pneumatic rock drills, dust control can be a serious problem unless water or effective ventilation is used (Tr. 11). The citations and order were issued because Jim Walter used pneumatic rock drills, but did

not use water or properly use ventilation. The ventilation in the cited areas was ineffective in that the rock dust traveled over miners who were downwind of the drills (Tr. 12).

Counsel for Jim Walter agreed that no effective dust collectors were available for the rock drills and that the company had to use either water or ventilation. Water posed a hazard to the miners operating the drills, and the configuration of ventilation on the longwall sections made it impossible to use ventilation for dust control (Tr. 16). Counsel asserted that Jim Walter did an "excellent job in maintaining a safe and healthy environment" nonetheless (Tr. 16), and that the situation the company faced was "more [like] an impossibility of compliance position" than anything else (Tr. 17).

The Secretary's Witnesses

Judy McCormick

Judy McCormick is in charge of the health inspection activities at MSHA's Birmingham, Alabama, subdistrict office. As part of her work, she supervised three inspectors who conduct dust and noise surveys (Tr. 19-20). McCormick stated that when section 70.400 was in effect, it was usually applied to percussion-type rock drills that drilled mine roofs (Tr. 21).

McCormick testified that section 70.400 required dust from drilling in rock to be controlled by permissible dust collectors, water, water with a wetting agent, ventilation or "any other method that [was] approved by the Secretary" (Tr. 22). She understood that if ventilation was used as a means of dust control, the air had to be directed so the dust was carried away from a drill operator and other miners. If a miner was downwind from the drill operator and dust from the drill passed over him or her, a violation of the standard occurred. The volume of the air made no difference as to whether the violation existed (Tr. 39). In McCormick's view, section 72.630 contained the same requirements as section 70.400.

McCormick identified a citation that was issued by MSHA Inspector Newell Butler at Jim Walter's No. 3 Mine on March 15, 1994 (Gov. Exh. 3). The citation alleged a violation of section

75.400-3. It was issued for drilling rock on the No. 2 longwall section with ventilation as the only means of dust control and with miners downwind of the drilling. According to McCormick, these were essentially the same conditions that six days later resulted in the alleged violations of section 70.400-3 at the No. 4 Mine, and that six months later caused the contested order to be issued at the mine (Tr. 26.).

The alleged violations of section 70.400-3 were not based upon the personal observation of the inspector, but rather upon his interviews with labor and management personnel. McCormick explained:

> [T]he longwalls of Jim Walter's [were] having compliance problems. And it was brought to our attention by the United Mine Workers that drilling was being done with the Gopher [percussion-type] drills ... and people on the longwall faces were being exposed to this dust (Tr. 28).

McCormick testified that in April 1994, she taught an MSHA sponsored class for coal operators regarding compliance with Part 72. Jim Walter sent two employees, one of whom was Wyett Andrews, the safety supervisor at the No. 4 Mine (Tr. 30-31). During the course, section 72.630 was discussed. Neither Andrews nor the other Jim Walter employee who attended told McCormick that the company was unable to comply with the standard (Tr. 31).

McCormick was asked about health hazards associated with drilling rock. Her answer was succinct -- "[e]xposure to crystalline silica or quartz resulting in silicosis" (Tr. 32). She explained that the mandatory dust standards of Part 70 limit respirable dust in the atmosphere of active workings of an underground coal mine to 2.0 milligrams of dust per cubic meter of air when no quartz or less than five percent quartz is present (30 U.S.C. § 70.100). When more than five percent quartz is present, the limit decreases (30 C.F.R. § 70.101). The reduced allowable concentration is mandated because of the heightened possibility of contracting silicosis due to increased quartz in the mine atmosphere (Tr. 33).

In the two years prior to the hearing, a reduced respirable dust limit was in effect at the No. 4 Mine (Tr. 33). In other words, during that time Jim Walter had to maintain the average concentration of respirable dust in the mine atmosphere of both longwalls at a standard lower than 2.0 milligrams per cubic meter of air. McCormick stated that MSHA had cited the company for violating the reduced standard (Tr. 34-35).

McCormick was asked about "bulk samples." She explained that such samples were taken when a mine was experiencing a "quartz problem." The purpose of the samples was to identify the source of the quartz. The samples consisted of bulk material from the coal face, the roof or the floor (Tr. 35).

Bulk samples were collected at the No. 4 Mine during the winter of 1993 (Tr. 37-38). According to McCormick, analysis of the samples "showed that the presence of quartz was extremely high in the Middle Man rock in the face, which is a rock part in between the coal [,] ... negligible in the Blue Creek coal seam ... high in the roof, high in the floor and extremely high in the Mary Lee coal seam" (Tr. 37). The samples were taken at Jim Walter's request to help the company isolate the source of quartz on the longwall. The results of the analysis of the samples were given to the company's manager of ventilation.

No bulk samples were taken for the exact areas covered by the subject citations, or, for that matter, within 100 feet of the areas, nor were respirable dust samples taken (Tr. 44). McCormick did not know what the respirable dust concentrations were on the longwall sections when the alleged violations occurred (Tr. 45). When asked how MSHA could determine the quartz content of the dust being breathed by miners if samples were not taken and analyzed, McCormick replied that the hazard from rock dust was so great, "it was not necessary to prove an overexposure to any standard, only to prove an exposure" (Tr. 63). She added that the quartz content of the dust did not matter, there was an assumption that exposure would result in silicosis at some point (Tr. 64).

McCormick also stated that if miners wore respirators, an operator would still have to comply with the standards. However, use of personal protection equipment might affect the S&S nature of the violation (Tr. 38, 39, 55).

McCormick believed the minimum air quantity required for the No. 1 longwall was 65,000 cubic feet per minute when mining was in progress. The quantity required was less when mining ceased and the longwall was being recovered. She did not know how much less, and she did not know the volume of air present on the No. 1 longwall when the contested order was issued. Nonetheless, she insisted that whatever the volume was, it had no bearing on the alleged violation, nor on its S&S nature (Tr. 52, 55-57).

When promulgating Part 72, the Secretary, through MSHA, stated:

> Under some circumstances, continuous mining machines and roof bolters work on a single split of air, and this can result in only the drillers being protected while persons working downwind could be exposed. If proper precautions are taken, however, ventilation can be an effective method of dust control. MSHA, therefore, has not deleted paragraph (d) [of section 72.630]. MSHA will continue to determine compliance with this requirement under the final rule as it has enforced § 70.400-3; i.e., through the measurement of air quantity or other measures set forth in a mine's ventilation and methane and dust control plan (59 Fed. Reg. 8325 (1994)).

McCormick was asked whether this statement indicated that compliance with section 72.630(d) should be based upon air quantity measurements. McCormick responded, "No" (Tr 56-57). In McCormick's view, to establish a violation of section 72.630(d), all an inspector needed to know was the method of dust control being employed by the operator. If ventilation was being used, and if miners were downwind of the drill, there was a violation (Tr. 60-61).

Gary Don Greer

Inspector Gary Don Greer works in the MSHA safety division. He worked previously in the health division and administered

the taking of respirable dust samples (Tr. 67-68). Greer testified about the events that lead him to issue the contested order.

On July 21, 1994, Greer conducted an inspection at the No. 4 Mine. He arrived underground as the crew from the third shift or "owl shift" was leaving (Tr. 150). (The owl shift began at 11:00 p.m. on July 20, and ended at 7:00 a.m. on July 21 (Tr. 110).) Greer was accompanied by miners' representative, Glynn Loggins. (Loggins is also a member of the United Mine Workers of America (UMWA) mine safety committee (Tr. 69-70).)

Greer and Loggins traveled to the No. 1 longwall section, and arrived about 30 minutes after the end of the owl shift (Tr. 122-123). Loggins told Greer about "the problems that labor had ... with negotiations with management concerning drilling rock, and having people work downwind in ... drilling operations" (Tr. 70). Loggins also told him that a section 103(g) complaint would likely be filed for having miners working downwind while rock was drilled (Tr. 147, 161-162). (Section 103(g) of the Act (30 U.S.C. § 813(g)) provides that a representative of miners has the right to obtain an immediate inspection on request if the representative has reasonable grounds to believe a violation exists.)

Recovery operations were underway at the longwall face. On the headgate side of the section, the operations required installation of a monorail, a rail type system used to hang cables (Tr. 21). The work necessitated drilling holes into the roof with percussion-type drills (Gopher drills) (Tr. 71, 142).

Greer explained that a Gopher drill weighs approximately 150 pounds (Tr. 90, 142). It can be carried by two people without much difficulty. The drill steel is hollow. Pressurized air courses up the steel and turns the bit. As the bit rotates, it pulverizes the roof rock. Unless the pulverized rock is collected or wetted, the dust is forced out of the drill hole by the air and enters the mine atmosphere in a visible cloud (Tr. 90-91). When water is used, no dust enters the atmosphere (Tr. 97).

Greer did not know of any dust collection devices that would work on Gopher drills. He believed the only way to control the dust was with water or ventilation (Tr. 101-102). Although Jim Walter had been mining longwalls since 1980, until the inspection of July 21, Greer never saw water used to control rock dust (Tr. 103). Prior to July, he never issued a citation for miners working downwind when ventilation was the only means of rock dust control (Tr. 104).

The longwall section foreman was Ed Scalla. According to Greer, Scalla asked how Jim Walter could operate drills on the section and comply with section 72.630 (Tr. 148, see also Tr. 71). (Greer speculated that Scalla inquired about the problem because the UMWA and Jim Walter had been discussing it (Tr. 75).) Greer told Scalla that Jim Walter could provide water or water with a wetting agent to the drills or could use ventilation (Tr. 72-73).

Greer asked how many drills were available on the section, and Scalla stated that there were two (Tr. 72-73). Greer responded that with two drills operating and with ventilation used as the means of dust control, miners could not work below the upwind drill (Tr. 73-74).

According to Greer, following the discussion with Scalla, Eugene Averette, the longwall maintenance supervisor, fitted one of the two drills with water by connecting a water line to the drill. It took approximately 15 minutes (Tr. 76, 109).

Greer then watched while the drill was used and water was coursed through the drill steel into the drill hole (Tr. 76-77). It was the first time Greer had seen water used with a percussion-type rock drill (Tr. 103, 126). Six or seven bolts were installed in the roof. It took approximately three or four minutes to drill a hole (Tr. 90-91). Some water came out of the hole as it was drilled, but the water did not interfere with the operation of the drill (Tr. 126). When the hole was finished, the drill was picked up and moved over five feet and the next hole was drilled (Tr. 92).

Greer and Loggins also observed both drills in operation at the same time. The drills were from 100 feet to 250 feet apart (Tr. 92). The miners located downwind did not have dust passing

over them from the upwind drill because the water on the upwind drill was effective in controlling the dust (Tr. 77). Greer asked the miners operating the upwind drill if the water caused them any problems, and they replied that it did not (Tr. 78). Greer also asked Loggins if he believed there was any danger in using water and Loggins replied that he did not (Tr. 154). No one from mine management asked any questions about the operation of the drill, or indicated any problem with the water (Tr. 79).

Greer testified that water was readily available on a longwall section. When mining was in progress, it was used to wet the coal, and during recovery operations, a water line for fire fighting ran to the end of the track (Tr. 78-79).

When Greer returned to the surface, he was told that McCormick wanted him. Greer called McCormick, who advised him that she had received a section 103(g) inspection request from the UMWA. The request stated that miners were required to work downwind during roof drilling operations and that the drills were not equipped with water (Tr. 80). Greer told McCormick that because of his recently completed inspection, he was aware of the problem and that he would "handle the request" (Tr. 81).

Greer returned to the mine the next day. Pursuant to the section 103(g) request, he interviewed several miners, including Keith Burgess, owl shift union safety committeeman, and Loggins (Tr. 81). Greer also interviewed Wyatt Andrews and the foreman of the owl shift (Tr. 82).

In Greer's view, the section 103(g) request was referring to conditions that had existed on the July 21 owl shift. Greer asked management personnel if roof bolts had been installed during that shift. He was told that they had been and that as many as four Gopher drills had been used at one particular time (Tr. 83).

Greer asked the shift supervisor if he was aware that a citation had been issued in March because drills were not equipped with water and effective ventilation controls were not used. The supervisor told him he was not aware of the citation (Tr. 84). However, Greer maintained that Wyatt Andrews and Jerry Maddox, the longwall manager, were aware of the previous

citations (Tr. 84-85). Maddox told Greer that he believed the use of water to control dust could create a hazard (Tr. 96). Greer acknowledged that injecting water into the roof could add weight to the roof (Tr. 117).

Greer's discussions with Jim Walter supervisory personnel and UWMA employees yielded identical information regarding the July 21 owl shift -- that none of the drills in operation at any one time were equipped with dust suppression devices or water (Tr. 122). Greer believed there was a violation of section 72.630(a) because the investigation revealed that Jim Walter failed to provide water, or water with an agent, to allay dust generated by drilling rock and failed to implement any type of ventilation control that carried drill dust away from people working downwind (Tr. 86-87).

Greer found the violation of section 75.630(a) was caused by the company's unwarrantable failure to comply, in that Jim Walter management knew that the practice of drilling without protective devices and with miners downwind was a violation of the standard (Tr. 87). In other words, the violation was deliberate. He stated, "I asked ... Andrews and I asked ... Maddox if they were aware that violations of a similar nature had been issued, and both stated that ... they were aware" (Tr. 87-88).

Greer found the violation was S&S because the drilling of rock that contained quartz could lead to quartz-bearing respirable dust, and exposure to the dust could cause breathing problems and silicosis (Tr. 89). However, Greer admitted that when he wrote the order he had no information about the volume of ventilation in the affected area, the content of respirable dust in the atmosphere, nor any information about the specific composition of the dust (Tr. 131, 138). He stated his finding that the violation was "highly likely" to lead to illness was an "educated guess" (Tr. 132).

William Keith Burgess

William Keith Burgess is a longwall helper at the No. 4 Mine. He has been employed by Jim Walter since January 1980, and he is a member of the UMWA safety committee (Tr. 167). (The committee meets with management on a monthly basis and discusses specific problems with management on a daily basis (Id.).

Burgess stated that some days before July 22, he was present when the committee and management discussed the issue of controlling dust from rock drilling (Tr. 168-169). (He believed the subject had been discussed by the union and management previously. However, this was the first time he was involved (Tr. 172).) At the meeting, Wyett Andrews and Fred Kozell, the deputy mine manager, represented management. Burgess, Loggins and another miner were the union representatives (Tr. 168-169, 172). The reason for the meeting was that rank-and-file miners knew Gopher drills would be used during forthcoming longwall recovery work. According to Burgess, when the union personnel asked Kozell if water was going to be used to control the rock dust, Kozell responded affirmatively and said that he would have the drills fitted for water (Tr. 170).

Burgess described a Gopher drill as approximately three feet high with a swing-type handle. Two levers are located in the middle of the handle, one controls the air that is blown into the drill steel, and the other extends the drill into the roof (Tr. 174-175). Burgess stated that visually observed dust is created when water is not used (Tr. 176).

On July 21, Burgess was working on the owl shift as a longwall helper and drill operator. He recalled four Gopher drills in use during the shift. Two were on the section when the crew arrived and two were brought to the section by the crew (Tr. 179). (Several other inoperable drills were on the section when the crew arrived (Id.).) Drilling went on during the entire owl shift and Burgess was not aware of water used on any of the drills during the shift (Tr. 183-184, 222).

Burgess testified that the four drills were operated at the same time (Tr. 179). Although he could not see other drills operating when he was drilling, when he stood back, he could see more than one drill operating, and none of the drills were fitted for water (Tr. 216-217, 221, 226, 227).

The drills were along the longwall face between the headgate and tailgate (Tr. 181-182). One drill was located at the headgate. Because the air on the longwall moved from the headgate to the tailgate, the other drills were located downwind from the

first drill (the headgate drill) (Tr. 182-183). Burgess believed he was operating the third drill (Tr. 183). While he was drilling, Burgess observed dust coming toward him from the other drills (Tr. 228).

Burgess described some of the roof being drilled as "bad top" (Tr. 199). At times, the drill steel passed through breaks in the roof strata, which indicated to him that the strata was cracked (Tr. 199-200, 201).

Shortly before entering the mine on July 21, the owl shift crew was told by Ed Hertzog, the foreman, to get respirators (Tr. 186). Burgess testified that he had never previously been issued a respirator (Tr. 188). According to Burgess, Hertzog stated the respirators were to replace water on the drills (Tr. 191, 225-226).

Once on the section, Burgess attempted to wear his respirator, but removed it because it pulled his head down and he could not watch the roof (Tr. 190). Only one miner wore a respirator during the entire shift. All other miners on the crew wore their respirators at least for an hour (Tr. 190, 218).

When it became clear that water was not going to be used on the drills, Burgess discussed with the other safety committee members the possibility of requesting a section 103(g) inspection (Tr. 192-193). Burgess believed an inspection was warranted due to "the issue of [the] health of the miners" (Tr. 193). He also stated that one drill operator was concerned about what would happen if water got into the roof strata (Tr. 204, 205).

Bobby Horton

MSHA Inspector Bobby Horton is supervised by McCormick. He stated that he issued the March 21 citations to Jim Walter. The citations alleged violations of section 70.400-3 at the No. 4 Mine (Tr. 229-230; Gov. Exhs. 4 and 5). He did not go underground to observe the conditions described on the citations, rather he obtained the information from interviewing miners (Tr. 231).

The citations were issued subsequent to McCormick's instructions to check rock drills (Tr. 231). After interviewing miners and management employees, Horton determined that the drills were not equipped with water or with permissible dust collectors (Tr. 232). Jim Walter personnel who were present during the interviews included Wyett Andrews and Fred Kozell. Union members were also present (Tr. 232-233).

Horton was told during the interviews that miners at the No. 1 and No. 2 longwalls were working downwind while drilling and that no water or dust suppression devices were used to control the dust (Tr. 233, 237). Kozell confirmed this (Tr. 238). Therefore, Horton found that violations of 70.400-3 had occurred.

Horton also found that because the violations presented the hazard of contracting silicosis, they were S&S (Tr. 236-237). Horton did not take any dust samples in connection with the citations and he had no knowledge of the dust content of air on the longwall sections. Horton did not know the degree of any miner's actual exposure (Tr. 242, 243). Nevertheless, he found the alleged violations posed a likelihood of illness because of the "history of quartz and samples that [came] back from Jim Walter's No. 4 [M]ine" (Tr. 243). He testified, "[y]ou can get disabled. Breathing quartz, people can get silicosis" (Tr. 244).

Horton believed that up to ten miners were exposed to the hazard because the dust from the drills had passed over them (Tr. 237).

Glynn Loggins

Loggins accompanied Greer to the No. 1 longwall at the start of the July 21 day shift. He and Greer observed roof bolting operations when water was used on the drills. Loggins heard Greer ask a drill operator if the drill operator had any problems using the drill with water. The drill operator replied that he did not (Tr. 396-397).

Jim Walter's Witnesses

Jeffrey Wade Maddox

Jeffrey Wade Maddox, the longwall manager at the No. 4 Mine has worked on longwalls for 13 years. As the longwall manager, Maddox is responsible for the operation of the mine's two longwalls and for the miners working on the longwall sections (Tr. 250). The work day on each longwall section is divided into three shifts. Each shift has a production foreman and a maintenance foreman. In addition, each day shift has a longwall coordinator, who reports directly to Maddox (Tr. 250).

Maddox normally works the day shift, but he is responsible for longwall operations 24 hours a day. When a longwall is being recovered, Maddox is at the mine from ten to twelve hours a day. When he is not at the mine, he is "on call" (Tr. 272, 309, 312). According to Maddox:

> I will meet the evening shift supervisors coming in on their oncoming shift, and talk to them several times during their shift. The owl shift supervisor will be contacted prior to his shift. And 30 percent of the time, they call me at home during the a.m. hours (Tr. 272-273).

The No. 1 longwall panel was approximately 950 feet wide and 6,350 feet long (Tr. 252). According to Maddox, in July 1994, the roof along the face became increasingly hard to control. As a result, longwall mining ceased 125 feet short of projections, and recovery started (Tr. 251).

The Blue Creek coal seam is mined at the No. 1 Mine longwall. Above the Blue Creek coal is a seam of rock (the Middle Man seam) which varies in thickness from ten inches to five feet. Above the rock is another coal seam, the Mary Lee seam, and above the Mary Lee seam is sandstone (Tr. 253-254, 255). Jim Walter prefers to use the Middle Man seam as the roof (Tr. 256).

When mining stopped on the No. 1 longwall, the Middle Man seam constituted about one fourth of the roof (i.e. the first 25 shields). The Middle Man seam had become increasingly narrow. As a result, the Mary Lee coal seam was mined and the remaining three fourths of the roof (approximately 160 shields) consisted of sandstone (Tr. 256-257). This roof was unstable and some of it was falling before it could be pinned (Tr. 258-259, 283). One fall measured 35 feet long, five feet wide and four to five feet thick (Tr. 260).

Maddox was aware that water or other dust control measures were needed for the drills (Tr. 277). After Jim Walter received the March citations, it experimented with water, but each experiment had an associated problem (Tr. 227-228).

Following a consultation with the distributor of the drills, the company tried a system whereby water came through a drill's handle. When this did not work, the system was modified to allow a hose to be plugged in at a different point. On July 19, six drills that were fitted in this way were used on the No. 1 longwall (Tr. 279-280, 281). They only worked for a short while. One problem encountered was that if the drill steel hit a crack or void in the roof strata and water dispersed into the strata, the steel would "hang up" and could not be removed (Tr. 278).

During the evening shift on July 20, Piper, the No. 1 longwall foreman, called Maddox at home and told Maddox he could not keep the drills operational. Maddox understood the problem to be that the water was "tearing the heads up" (Tr. 283). In addition, when the drill steel hung up, the drill operators were afraid to pull out the drill steel for fear of pulling down the roof (Tr. 285). Because the drills were inoperable the mine production report for the evening shift stated that the company needed "to get [the] powered respirator[s] charged" for the oncoming owl shift (Tr. 343-344; JWR Exh. 2 at 11).

Around 4:00 a.m., during the owl shift, Maddox, who was still at home, spoke with longwall foreman Hertzog (Tr. 346). Hertzog said he was using two drills, and asked if Maddox wanted water hooked up to the drills. Maddox told Hertzog to try water on one of the drills (Tr. 287). However, Maddox did not know if this was done (Tr. 347).

Maddox testified that on July 22, he attended a meeting with Greer and others and discussed the problem (Tr. 291). According to Maddox, Greer asked if he was aware that drills were in operation without water and Maddox stated he was aware of it. Greer also asked if Maddox was aware of the citations written in March, and Maddox stated that he was (Tr. 291). Greer asked why the drills were being operated without water and Maddox responded that Jim Walter was in a hurry to bolt the roof because it was bad (Tr. 291-292). Maddox later testified that time was of the essence and that the longer the roof remained unbolted, the more it deteriorated (Tr. 376).

Maddox stated that Greer did not inquire about the efforts Jim Walter had made to operate the drills with water (Tr. 292). Nor did Maddox volunteer any information about the company's attempts to use water. When asked why he did not tell Greer about this, he responded, "[t]he question wasn't asked" (Tr. 292, 356). When Maddox saw that Greer was writing an order of withdrawal, Maddox became angry and he abruptly ended his conversation with Greer (Tr. 374).

Maddox did not advise UMWA safety committee members of the efforts Jim Walter had been making to provide water for the rock drills. Nor did he contact MSHA's technical support division or the MSHA subdistrict health division about the problems Jim Walter was experiencing with the rock drills (Tr. 354-355, 357-358).

Maddox testified that a day or two before the withdrawal order was issued, he received complaints from day shift drill operators about infusing water into the roof (Tr. 294, 334-335). Maddox stated that the miners were concerned because, "[t]he roof was extremely bad" (Tr. 294). However, he agreed that roof conditions are dynamic and can change from shift to shift (Tr. 372). Maddox did not speak with the miners again about the problem (Id.).

Wyett Andrews

Wyett Andrews, who is the safety supervisor at the No. 4 Mine, stated that during the evening shift of July 20, he was in deputy mine manager Kozell's office when it was reported

that there was a problem using water while drilling (Tr. 381-382). As a result, Kozell directed Andrews to get the power respirators prepared for the owl shift (Tr. 382). Andrews had the respirators' batteries charged so that the respirators would be ready (Tr. 384).

The July 21 owl shift crew took the respirators into the mine (Tr. 384). Andrews believed that if the respirators were worn they would protect the miners from respirable dust (Tr. 391). He acknowledged that most miners did not like to wear the respirators because they are bulky and uncomfortable. As a result, Jim Walter did not require that they be worn, only that they be available for wear (Tr. 392).

Andrews believed that after the March citations were issued, Jim Walter abated them, in part, by training its miners in compliance. The training took two or three minutes and consisted of instructing longwall miners, supervisors and longwall coordinators that if the drills did not have water, personnel were not to be located downwind of the drills (Tr. 394, 395). Andrews was certain that Maddox took part in the training (Tr. 396). (Interestingly, Maddox did not recall much regarding the training (Tr. 323-325). He stated:

> We came in and sat down ... They went over the instruction with me over what had to be done. The drills had to be converted to water. And we were going to try that to see how it worked (Tr. 324).)

Finally, Andrews testified that on July 20, 21 and 22, the air volume on the No. 1 longwall ranged from between 78,260 cfm to 85,550 cfm (JWR Exh. 3 pp 2-7; Tr. 385). Under the mine's ventilation plan, the minimum air volume required during longwall recovery was 18,000 cfm (Tr. 386).

The Violations

The alleged violations are based on substantially similar facts and, as noted, the standards alleged to have been violated are substantively identical. Section 70.400 required, and section 70.630(a) requires, that dust resulting from drilling in rock be controlled by use of permissible dust collectors, water, water with a wetting agent, or by ventilation. Section 70.400-3

explained, and section 72.630(d) explains, that ventilation control is adequate when the ventilation is so directed that dust is carried away from the drill operator and/or any other miners.

Bobby Horton, who issued the March 21 citations, stated that he learned through interviews that rock drills in use at the No. 4 Mine were not equipped with permissible dust collectors or with water, and that miners were downwind while the drills were operated (Tr. 231, 233, 237). In addition, Horton stated that Mine Manager Kozell confirmed that Jim Walter was not using any means to suppress the dust (Tr. 238).

Horton's testimony went unchallenged and I accept it. It establishes that Jim Walter was not controlling the dust resulting from drilling by any of the methods specified in section 70.400. Jim Walter was not using permissible dust collectors, water, or water with a wetting agent. Because the longwalls were ventilated on what was essentially a single split of air that traveled from the tailgate to the headgate, and because I accept Horton's testimony that miners were working downwind from the drills while the drills were operated,, it is clear that the dust was not controlled adequately by ventilation. Therefore, I conclude the March violations existed as charged.

I further find that there was a violation of 72.630(a) on the owl shift on July 21, 1994. Burgess' firsthand testimony establishes the violation. Burgess worked on the owl shift, and I accept his assertion that drilling took place during the entire shift (Tr. 183). I also accept his testimony that as many as four drills were used at one time, that the first was located at the headgate and the others were located downwind, along the longwall (Tr. 181-183). In this regard, I note his assertion that when he "stood back," he saw more than two drills in operation, and that none was fitted with water (Tr. 221, 227). The fact that water was not used is also attested by Burgess' statement that he saw dust coming toward him from an upwind drill, and by his testimony that Hertzog told him the respirators were a replacement for using water when drilling (Tr. 191, 225-226, 228).

None of Jim Walter's witnesses undermined Burgess' testimony. Maddox stated that he told Hertzog to hook up water on one drill, but he was not present on the section and he admitted that

he did not know if it was done (Tr. 287, 347). Thus, the testimony of Burgess compels the conclusion that during the owl shift of July 21, dust resulting from drilling rock was not controlled by dust collectors or water and, because miners were working downwind in dust from the drilling, was not controlled by ventilation.

In concluding that the violations existed as charged, I have considered Jim Walter's argument that the Secretary's failure to take air measurements and dust samples on the longwall sections warrants vacation of the citations and order (JWR Br. 17-19). Jim Walter asserts that without such measurements and samples, "MSHA cannot measure the health risk to the miners from the dust and cannot reasonably contend that Jim Walter was not suppressing the dust ... by dilution with ventilation" (JWR Br. 18).

It is true that when the Secretary promulgated section 72.630, he seems to have stated that he would determine whether ventilation was an adequate means of dust control through the measurement of air quantity and other measures set forth in the mine's ventilation, methane and dust control plan. ("MSHA will continue to determine compliance with th[e] requirement [of section 72.630 (d)] ... as it has enforced § 70.400-3, i.e., through the measurement of air quantity or through other measures set forth in a mine's ventilation ... plan (59 Fed. Reg. at 3825).)

However, the intent and actual meaning of the statement is an enigma to me. Counsel for the Secretary has not offered an explanation. No testimony was offered by either party that compliance with section 70.400-3 was determined through the measurement of air volume. The Secretary's Program Policy Manual -- the official repository of the Secretary's interpretation of the regulations and of his enforcement practices -- is silent regarding the matter.

In any event, because the standards themselves are very clear, I conclude that the statement is beside the point. The standards require dust resulting from drilling to be controlled by the methods indicated. If ventilation is a chosen method, they require the air current to be directed so that dust is carried away from the drill operator or other miners in the area. The regulations contain not one word about air measurements

and/or dust samples. I cannot conclude that the Secretary intended to condition compliance upon requirements he did not promulgate.

S&S

A S&S violation is described in section 104(d)(1) of the 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 S&S, "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature" (Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981)).

In Consolidation Coal Co., 8 FMSHRC 890 (June 1986), aff'd sub nom Consolidation Coal Co. v. FMSHRC, 824 F.2d 1076 (D.C. Cir. 1987), the Commission concluded that the S&S analysis it adopted in Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), with certain adaptations, is appropriate in determining whether certain health-related standards are S&S. The Commission stated that to prove a mandatory health standard is S&S, the Secretary must establish:

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

Consol, 8 FMSHRC at 897.

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129 (August 1985), the Commission stated:

> We have explained further that the third element of the ... formula [enunciated in Consol] 'requires that the Secretary establish a reasonable likelihood

> that the hazard contributed to will result in an event in which there is an injury [or illness]' (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 Co., Inc., 6 FMSHRC 1573, 1574-75 (July 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 & Ohio Coal Company, 9 FMSHRC 2007 (December 1987)). Further, any determination of the significant nature of a violation must be made in the context of continued normal mining operations (National Gypsum, 3 FMSHRC at 329; Halfway, Inc., 8 FMSHRC 8, 12 (January 1986); U.S. Steel Mining Co., 7 FMSHRC at 1130).

I have found that the violations existed as charged. Thus, the first element of the Consol test has been established. I further find that the violations presented a discrete health hazard. I accept the testimony of McCormick that previous bulk samples showed a high presence of quartz in the roof and elsewhere on the longwall section (Tr. 33, 37). The Commission observed in Consol that, "[s]ilicosis has been recognized for a long time as a disease associated with coal miners, and the inhalation of silica-bearing dust has been causally linked to the disease" (8 FMSHRC at 1279). When rock dust is not controlled by methods other than ventilation, when the ventilation control is inadequate in that miners work in and breath the dust, and when the dust is reasonably likely to contain quartz, a discrete health hazard is established.

However, the Secretary's proof fails to meet the third element of the Consol test. In the context of a violation of sections 70.400-3 and 72.630(a), this element requires the Secretary to establish a reasonable likelihood that the hazard contributed to will result in an illness. In other words, the Secretary must prove it was reasonably likely that inhalation

of the rock dust traveling downwind would result in the miners becoming ill as mining continued on the longwall.

Because bulk samples of the area of the roof being drilled were not collected, and because the respirable dust content of the mine atmosphere in which the miners were working was not sampled, none of the Secretary's witnesses could testify to the exact silica content of the subject roof area, to the silica content of the drill dust, or to the actual concentration of respirable dust to which the miners were exposed. Nor did the witnesses offer testimony regarding the respirable dust exposure limits on the longwall sections on March 21, 1994 and on July 21, 1994, or what the average concentration of respirable dust in the longwall atmospheres reasonably might have been.

Rather than testimony regarding the specific facts needed to find a reasonable likelihood of illness or the specific facts needed to make a reasonable inference of such a likelihood, the Secretary's witnesses testified to a lack of specific knowledge and to generalities. Such testimony is insufficient to establish the reasonable likelihood of illness.

In reaching this conclusion, I have considered the Secretary's assertion that,"once a violation of the drill dust control regulation is established, a presumption arises that it is reasonably likely that the health hazard contributed to will result in an illness" (Sec. Br. 12). The Secretary cites Commission decisions finding such presumptions when exposure-related health standards are violated; i.e., Consol, 8 FMSHRC at 890 (finding a violation of section 70.100(a) S&S), and U.S. Steel Mining Co., Inc., 8 FMSHRC 1274 (September 1986) (finding a violation of section 70.101 S&S). These presumptions are based upon the fact that the exposure levels set in the standards are "the maximum level allowed to achieve [Congress's] stated goal of preventing disabling respiratory disease" (U.S. Steel, 8 FMSRHC 1279-1280). Because cumulative exposures to respirable dust above the limits are an important risk factor, and because the state of scientific and medical knowledge does not make it possible to determine the precise point at which respirable diseases induced by the dust will present, the Commission presumed that a documented overexposure established a reasonable likelihood that illness would develop.

The standards for drill dust control are not based upon findings linking their violation to the reasonable likely development of disease. Rather, the standards themselves are the primary means of controlling drill dust exposure (59 Fed. Reg. 8325 (1994). This means that the Secretary must establish, for each violation, that the particular circumstances cited are reasonably likely to result in disease as mining continues.

As I have noted, the Secretary did not do so here. He offered no evidence regarding the average concentration of respirable dust that Jim Walter had to maintain on the longwall section on March 21 and July 21. Nor did he present testimony regarding the actual level of exposure of the miners, or the reasonably likely level of exposure on those dates.

This is not to say that the Secretary necessarily had to offer the results of bulk samples and/or of respirable dust samples, to establish the inspectors' S&S findings. It is conceivable he could have offered testimony from which a reasonable likelihood of exposure in excess of the applicable permissible limit or limits could have been inferred. However, he did not.

Rather, the Secretary proved that in the past the longwall sections were under a reduced, but unspecified exposure level. This does not lead inevitably to a conclusion that on March 21 and July 21 miners in the same sections who were working under similar conditions were exposed to respirable dust concentrations whose average exceeded the level allowed. They might have been or they might not have been, and S&S findings can not rest upon the past tense of "may."

Gravity

Although the violations were not S&S, they were serious. Jim Walter was operating rock drills without dust control devices and miners were downwind from the drills. Further, the roof being drilled was composed of rock may have had a high silica content. The ventilation on the longwalls was carrying the rock dust over the downwind miners. The miners were subjected to the possibility of inhaling silica bearing dust at a level in excess

of that allowed. This is enough to establish the seriousness of the violations.

I have considered Andrews testimony that respirators were available for use by miners on the owl shift (Tr. 382-384). Had Jim Walter established that the respirators were worn throughout the owl shift by all miners who were downwind from the drills, the gravity of the July 21 violation might have been mitigated.

The company made no such showing. Andrews acknowledged the respirators were bulky and uncomfortable and that most miners did not like to wear them (Tr. 392). Moreover, he admitted that Jim Walter did not require they be worn, only that they be available for wear (Id.). The fact that availability did not foster continuing use was confirmed by Burgess. He stated that only one miner wore a respirator for the entire shift (Tr. 190, 218). Although the rest of the crew wore respirators for one hour at least, that did nothing to mitigate their exposure during the remainder of the shift.

Unwarrantable Failure and Negligence

In Emery Mining Corp. (9 FMSHRC 1997, 2004 (December 1987)) the Commission held that unwarrantable failure is aggravated conduct constituting more than ordinary negligence and that it is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or "a serious lack of reasonable care" (Rochester and Pittsburgh Coal Co., 13 FMSHRC 189 (December 1991)).

By July 21, 1994, Jim Walter was on notice regarding the requirements of section 72.630 and of the Secretary's intent to enforce the standard. Six months before, three citations had been issued for essentially the same conditions. Andrews and Maddox told Greer they were aware of the March citations issued at the No. 4 Mine (Tr. 84-85). Moreover, Andrews was one of two Jim Walter employees who attended MSHA sponsored classes on Part 72, classes in which compliance with section 72.630 was discussed (Tr. 84-85).

Despite this knowledge, Jim Walter argues, in part, that any failure to comply was due to the need to speedily bolt the roof before it deteriorated (JWR Br. 32). Jim Walter presented testimony to this effect, in that Maddox stated that the roof was bad and needed to be bolted in a hurry (Tr. 291-292). In addition, Jim Walter argues that it was not indifferent to the requirements of the regulation, that it was making diligent efforts to comply but was having trouble developing a system whereby water could be used and the drills could be kept operational (JWR Br. 31-32).

While I do not doubt the company had problems with the roof, I do not believe the company was trying diligently to comply. If, in fact, Jim Walter was having compliance problems, it is logical that this would have been explained to Greer. It was not (Tr. 374), and Maddox's excuse -- that Greer did not ask about the problems -- strains credulity given the consequences of Jim Walter's indifference (Tr. 292, 356, 357).

If Jim Walter could not successfully fit and operate its drills with water, it is reasonable to think that the company would have contacted MSHA about the problem and perhaps even have advised the UMWA safety committee, since it knew of the miners' concerns about working in drill dust (Tr. 354-355, 357-358).

Therefore, I find that Jim Walter fully understood what was required, but was indifferent to compliance. Its failure to control dust from rock drilling on the owl shift on July 21, was the result of a serious lack of reasonable care and hence was the result of the company's unwarrantable failure to comply with section 72.630(a).

In exhibiting a serious lack of reasonable care, Jim Walter failed to meet the standard of care required by the circumstances. Consequently, I also conclude the company was highly negligent in allowing the violation of section 72.630(a).

Finally, I conclude that Jim Walter exhibited ordinary negligence in allowing the violations of section 70.400-3 to exist. The first time Jim Walter was cited for a violation of the standards relating to drill dust control was March 15, 1994. The citation was issued six days before the citations at the

No. 4 Mine. Jim Walter personnel should have known that the conditions which elicited the citation at the No. 3 Mine were likely to result in similar citations at the No. 4 Mine, and reasonable care required that the conditions not be repeated at the No. 4 Mine.

Other Civil Penalty Criteria

A MSHA computer print out indicates that in the 24 months prior to March 21, 1994, the total number of paid violations at the No. 4 Mine was 1,050 (Gov. Exh. 11). While this is a large number of previous violations, there were no previous paid violations of section 70.400 (Id.).

Jim Walter is a large operator and the No. 4 Mine is a large mine.

There has been no showing that the size of the penalties will effect Jim Walter's ability to continue in business, and I conclude that it will not.

Jim Walter demonstrated good faith in attempting to achieve rapid compliance with section 70.400-3 and section 72.630(a).

Civil Penalties

Docket No. SE 94-448

Order/ Citation No.	Date	30 C.F.R. §	Proposed Penalty	Assessed Penalty
3186828	3/21/94	70.400-3	$1,610	$600
3186829	3/21/94	70.400-3	$1,610	$600

The violations were serious. They were caused by Jim Walter's ordinary negligence. Given the ordinary negligence and the fact that the violations represent the first time the drill dust standard was enforced at the mine, I conclude that penalties significantly less than those proposed are appropriate. Accordingly, I will assess penalties of $600 for each violation.

Settlements and Orders

At the close of the hearing, Jim Walter's counsel explained, on the record, the nature of the settlements to which the parties had agreed (Tr. 406-412). Having considered the proposed settlements and the reasons supporting them, I find they are appropriate and consistent with the purposes of the Act. Accordingly, as set forth below, the settlements are approved.

Docket No. SE 94-429

Order/ Citation No.	Date	30 C.F.R. §	Proposed Penalty	Settlement
31824519	2/3/94	75.523	$4,000	$1,000

(The Secretary agrees the unwarrantable failure finding cannot be sustained and he will modify the order to a citation issued pursuant to section 104(a) (30 U.S.C. §814(a)) (Tr. 406).)

Order/ Citation No.	Date	30 C.F.R. §	Proposed Penalty	Settlement
3185367	3/14/94	75.380(g)	$1,610	$850

(The parties agree that the number of persons affected by the violation was four or five not ten as found by the inspector. (Tr. 406-407))

Order/ Citation No.	Date	30 C.F.R. §	Proposed Penalty	Settlement
3183302	3/17/94	77.1605(b)	$50	$50

Order/ Citation No.	Date	30 C.F.R. §	Proposed Penalty	Settlement
3183203	3/17/94	77.1605(b)	$50	$50

Order/ Citation No.	Date	30 C.F.R. §	Proposed Penalty	Settlement
3183204	3/21/94	75.220	$ 50	$ 50
3185374	3/21/94	75.206(a)(2)	$506	$506

(Jim Walter agrees to pay in full the penalties proposed (Tr. 407).)

Order/ Citation No.	Date	30 C.F.R. §	Proposed Penalty	Settlement
3185375	3/21/94	75.700	$595	$150

(The Secretary agrees that the S&S finding cannot be sustained and he will modify the citation (Tr. 407).)

Order/ Citation No.	Date	30 C.F.R. §	Proposed Penalty	Settlement
3185376	3/21/94	75.380(g)	$1610	$850

(The parties agree that the number of persons affected by the violation was four or five not ten as found by the inspector. (Tr. 407).)

Order/ Citation No.	Date	30 C.F.R. §	Proposed Penalty	Settlement
3183306	3/22/94	75.403	$793	$250

(The Secretary agrees that the S&S finding cannot be sustained. He will modify the citation (Tr. 408).)

Order/ Citation No.	Date	30 C.F.R. §	Proposed Penalty	Settlement
3185377	3/22/94	75.1100-2(b)	$ 50	$ 50

(Jim Walter agrees to pay in full the penalty proposed (Tr. 408).)

Order/ Citation No.	Date	30 C.F.R. §	Proposed Penalty	Settlement
3185378	3/22/94	75.400	$1,298	$ 600

(The parties agree that the number of persons affected by the violation was two not six as found by the inspector. (Tr. 408).)

Order/ Citation No.	Date	30 C.F.R. §	Proposed Penalty	Settlement
3185379	3/22/94	75.400	$793	$600

(The parties agree that the number of persons affected by the violation was two not three as found by the inspector (Tr. 408-409).)

Order/ Citation No.	Date	30 C.F.R. §	Proposed Penalty	Settlement
3185380	3/23/94	75.381(c)(4)	$50	$50

(Jim Walter agrees to pay in full the penalty proposed (Tr. 409).)

Jim Walter is **ORDERED** to pay the penalties shown.

The Secretary is **ORDERED** to modify the order and citations as indicated.

Docket No. SE 94-448

Order/ Citation No.	Date	30 C.F.R. §	Proposed Penalty	Settlement
3185543	2/7/94	75.503	$617	$500

(The Secretary agrees the unwarrantable failure finding cannot be sustained. He will modify the order to a citation issued pursuant to section 104(a) (30 U.S.C. § 814(a)) (Tr. 409).)

Order/ Citation No.	Date	30 C.F.R. §	Proposed Penalty	Settlement
3185551	2/23/94	75.335	$506	$ 0

(The Secretary agrees the area cited was not covered by the standard. He will vacate the citation (Tr. 409).)

Order/ Citation No.	Date	30 C.F.R. §	Proposed Penalty	Settlement
2807401	3/16/94	75.207(a)	$50	$50
2807381	3/21/94	75.370(a)(1)	$50	$50
2807382	3/21/94	75.370(a)(1)	$50	$50

(Jim Walter agrees to pay in full the penalties proposed (Tr. 409).)

Order/ Citation No.	Date	30 C.F.R. §	Proposed Penalty	Settlement
2807384	3/30/94	75.370(a)(1)	$1,610	$500

(The parties agree that the number of persons affected by the violation was two not ten as found by the inspector. (Tr. 410).)

Order/ Citation No.	Date	30 C.F.R. §	Proposed Penalty	Settlement
3584781	4/11/94	75.403	$506	$150

(The Secretary agrees that the S&S finding cannot be sustained and he will delete it (Tr. 410).)

Order/ Citation No.	Date	30 C.F.R. §	Proposed Penalty	Settlement
3185922	4/11/94	75.342	$ 595	$ 0

(The Secretary agrees the citation does not state a violation. He will vacate the citation (Tr. 409).)

Order/ Citation No.	Date	30 C.F.R. §	Proposed Penalty	Settlement
3183479	4/12/94	75.1725	$595	$150

(The Secretary agrees that the S&S finding cannot be sustained. He will modify the citation (Tr. 410).)

Jim Walter is **ORDERED** to pay the penalties shown.

The Secretary is **ORDERED** to modify the order and citations as indicated and to vacate the citations indicated.

Docket No. SE 94-394

Order/ Citation No.	Date	30 C.F.R. §	Proposed Penalty	Settlement
3186004	1/3/94	75.1725(a)	$5,800	$1,500

(The Secretary agrees the unwarrantable failure finding cannot be sustained. He will modify the order to a citation issued pursuant to section 104(a) (30 U.S.C. §814(a)) (Tr. 411).)

Jim Walter is **ORDERED** to pay the penalty shown.

The Secretary is **ORDERED** to modify the order as indicated.

Docket No. SE 94-430

Order/ Citation No.	Date	30 C.F.R. §	Proposed Penalty	Settlement
3185568	2/16/94	50.20	$ 50	$ 50
3182854	2/22/94	75.1722(a)	$267	$267

(Jim Walter agrees to pay in full the penalties proposed (Tr. 411).)

Order/ Citation No.	Date	30 C.F.R. §	Proposed Penalty	Settlement
3182858	3/7/94	75.370(a)	$851	$400

(The Secretary agrees the unwarrantable failure finding cannot be sustained and that he will modify the order to a citation issued pursuant to section 104(a) (30 U.S.C. §814(a)) (Tr. 411-412).)

Jim Walter is **ORDERED** to pay the penalties shown.

The Secretary is **ORDERED** to modify the order as indicated.

Docket No. SE 94-586-R

Order No.	Date	30 C.F.R. §
3184217	7/22/94	72.630(a)

The inspector's finding of a violation of section 72.630(a) is **AFFIRMED**, as is his finding that the violation was due to Jim Walter's unwarrantable failure to comply. The inspector's S&S finding is **VACATED**. The Secretary is **ORDERED** to modify the order accordingly.

Dismissal of Proceedings

Jim Walter shall pay the assessed penalties within 30 days of the date of this decision. The Secretary shall modify and vacate the referenced citations and orders within the same 30 days. These proceedings 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 2 4 1995

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 94-118-M
Petitioner	:	A. C. No. 14-00211-05502
v.	:	
	:	Vondra Clay Pit
ACME BRICK COMPANY,	:	
Respondent	:	

DECISION

Appearances: Kristi L. Floyd, Esq., Office of the Solicitor, U. S. Department of Labor, Denver, Colorado, and Dennis J. Tobin, Conference and Litigation Representative, Mine Safety and Health Administration, Grand Junction, Colorado, for the Secretary;
Steven R. McCown, Esq., Littler, Mendelson, Fastiff, Tichy and Mathiason, Dallas, Texas, for Respondent.

Before: Judge Maurer

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801 et seq., the "Act," charging the Acme Brick Company with two violations of the regulatory standard found at 30 C.F.R. § 56.14101(a)(3). The general issues before me are whether the respondent violated the cited regulatory standard and, if so, the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act.

Pursuant to notice, the case was heard at Hays, Kansas, on May 31, 1995. At the hearing, Inspector James G. Enderby testified for the Secretary of Labor. Mr. Clinton L. Bunch, plant manager, testified for respondent.

STIPULATIONS

At the hearing the parties entered the following stipulations into the record (Joint Ex. No. 1):

1. Respondent is engaged in mining and selling of clay in the United States, and its mining operations affect interstate commerce.

2. Respondent is the owner and operator of Vondra Clay Pit, MSHA I.D. No. 14-00211.

3. Respondent is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801 et seq. ("the Act").

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

5. The subject citation and order were properly served by a duly authorized representative of the Secretary upon an agent of respondent on the date and places stated therein, and may be admitted into evidence for the purpose of establishing their issuance, and not for the truthfulness or relevancy of any statements asserted therein.

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

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

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

9. Respondent is a medium sized mine operator with 196,073 tons/hours of production in 1992.

DISCUSSION, FINDINGS AND CONCLUSIONS

On October 20, 1993, MSHA Inspector James G. Enderby issued section 104(d)(1) Citation No. 4336451 to the respondent because an International Harvester truck had the brake lines to the front service brakes disconnected, rendering them inoperable. Fifteen minutes later, he issued section 104(d)(1) Order No. 4336452 on a second International Harvester truck for essentially the same reason.

The particular section of the mandatory standards that the inspector cited, 30 C.F.R. § 56.14101(a)(3), provides that : "**All** braking systems installed on the equipment shall be maintained in functional condition." (Emphasis added).

The standard requires that **all** braking systems, including front braking systems, installed on the equipment be maintained in functional condition. The evidence clearly establishes that the front service brakes on the cited equipment were completely disconnected and therefore not functional. That is a violation of the standard. It is as simple as that.

Respondent also believes the citation and order should be vacated because MSHA conducted the inspection outside the geographical confines of its jurisdiction.

The Vondra Clay Pit is a small clay pit that the company mines clay from and then hauls it, using these two trucks, to a production plant 3 miles away to make the finished product, face brick. The clay pit is subject to MSHA jurisdiction, while the production facility is under OSHA jurisdiction.

Inspector Enderby conducted his inspection of the two trucks in question while they were parked at the production plant, OSHA country. However, the inspector had previously observed these trucks being operated at the clay pit earlier that month and both the plant foreman, Mr. Lamia and the maintenance man, Mr. Modrow, informed him that the vehicles had had the front service brakes disconnected ever since they had been delivered to this operation, years ago. The front brakes are purportedly removed

from service as a standard practice because of a folkloric notion popular among truck drivers that you will have better control of the vehicle in an emergency stop situation without the front service brakes locking up the front wheels.

Although in an ideal world the inspector would have inspected the trucks and cited the trucks while they were operating in an MSHA-regulated environment, I do not find that fatal to the Secretary's case. The inspector testified that earlier that month he had personally observed these trucks operating at the Vondra Clay Pit, and Mr. Bunch also testified to the effect that these trucks were used to haul material from the clay pit to the plant. Mr. Bunch also admitted that the trucks had been operating in the cited condition, vis-a-vis the front service brakes, since their arrival at the pit in 1985 in the one case and 1987 in the other. Accordingly, I find the two violations of the standard proven as charged.

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).

Inspector Enderby opined that if the truck driver had to stop in an emergency, he would not have sufficient braking power to safely stop the vehicle. However, I note that with the exception of the front service brakes all the other braking systems on the trucks were functional. In addition, one of the trucks pulls a trailer which also has an independent braking system. I also note that there is a complete lack of evidence in the record as to any testing or empirical determination of whether these trucks would safely come to a stop in the cited condition. After all, they had been operating in this configuration for 6-8 years before this violation without mishap.

Really, the only evidence the Secretary submitted of any hazard with regard to operation of these trucks in the cited condition was the unsubstantiated conclusion of Inspector Enderby that such a hazard existed. That is not enough to satisfy the Secretary's burden of proof. I therefore find that it has not been established that an injury producing event was reasonably likely to have occurred. Accordingly, it is concluded that the violations found herein, were not significant and substantial ("S&S").

Inasmuch as Citation No. 4336451 does not recite an "S&S" violation, it must be modified to a citation issued under section 104(a) of the Act. Likewise, since Order No. 4336452 relies on Citation No. 4336451 to start the "d" chain, and since itself does not recite an "S&S" violation, it must also be modified to a section 104(a) citation.

On the basis of the foregoing findings and conclusions, and taking into account the civil penalty assessment criteria found in section 110(i) of the Act, I conclude and find that a civil penalty of $100 for each of the violations found herein, or $200 total, is a reasonable and appropriate civil penalty.

ORDER

1. Citation No. 4336451 and Order No. 4336452 **ARE MODIFIED** to delete the "S&S" finding and, as modified to section 104(a) citations, **ARE AFFIRMED**.

2. The Acme Brick Company **IS ORDERED TO PAY** the Secretary of Labor a civil penalty of $200 within 30 days of the date of this decision.

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 2 4 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. PENN 94-63
	:	A.C. No. 36-02053-03544
v.	:	
	:	Docket No. PENN 94-64
BUCK MOUNTAIN COAL COMPANY, and RICHARD KOCHER, SR.,	:	A.C. No. 36-02053-03545
	:	
OSCAR BLOUGH, JR., DAVID ZIMMERMAN, PAUL ZIMMERMAN, and HAROLD SCHNOKE, as PARTNERS,	:	Docket No. PENN 94-65
	:	A.C. NO. 36-02053-03546
	:	
	:	Docket No. PENN 94-66
Respondents	:	A.C. No. 36-02053-03547
	:	
	:	Docket No. PENN 94-104
	:	A.C. No. 36 02053 03548
	:	
	:	Buck Mountain Slope
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	
	:	Docket No. PENN 94-597
	:	
v.	:	Docket No. PENN 94-618
	:	
BUCK MOUNTAIN COAL COMPANY, and DAVID ZIMMERMAN, PAUL ZIMMERMAN, HAROLD SCHNOKE, PARTNERS,	:	Docket No. PENN 94-619
	:	
	:	A.C. No. 36-02053-03559
	:	
Respondents	:	Buck Mountain Slope

DECISION

Appearances: Gayle Green, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Petitioner; David Zimmerman, Paul Zimmerman,[1] Harold Schnoke, Richard D. Kocher, Sr.,[2] and Oscar Blough, Jr., pro se, partners Buck Mountain Coal Company, Pine Grove, Pennsylvania, for the Respondent.

Before: Judge Feldman

Preliminary Matters

These proceedings concern a total of 88 citations issued to Buck Mountain Coal Company (Buck Mountain), a general partnership, during the period September 1992 through July 1993. A preliminary hearing in these matters was held on October 25, 1994, in Harrisburg, Pennsylvania, to determine whether the named partners in these proceedings are jointly and severally liable for any/or all of the citations in issue.

The preliminary hearing was followed by my Partial Decision on liability, which is incorporated by reference, wherein I concluded general partners David Zimmerman, Paul Zimmerman and Harold Schnoke are jointly and severally liable for all citations issued to Buck Mountain for violations occurring on or before April 13, 1993. *Partial Decision*, 16 FMSHRC 2367 (November 1994). Thus, the Zimmermans and Schnoke are jointly and severally liable for 80 citations in this matter for which the Secretary has proposed a total civil penalty of $160,938.

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[1] David Zimmerman appeared on behalf of his father Paul Zimmerman who has severe, chronic obstructive pulmonary disease. (Resp. Ex. 1).

[2] Kocher appeared at the October 25, 1994, preliminary hearing. Blough represented Kocher's partnership interests at the hearing conducted on June 13, 1995.

I further concluded that the Zimmermans and Schnoke assigned their interest in Buck Mountain, including Buck Mountain's mineral lease rights at the Buck Mountain Slope, to Richard Kocher and Oscar Blough, Jr., as of April 14, 1993. 16 FMSHRC at 2368. Thus, Kocher and Blough are jointly and severally liable for eight citations with a total proposed civil penalty of $12,372.

A hearing on the merits was conducted in Harrisburg, Pennsylvania, on June 13, 1995. At the hearing, counsel for the Secretary moved for the approval of a settlement agreement reached with Kocher and Blough. The settlement concerns all eight of the citations issued after April 13, 1993. These citations are comprised of three citations issued in Docket No. PENN 94-66 and five of the 20 citations issued in Docket No. PENN 94-104. The parties propose a reduction in total civil penalties from $12,372 to $2,000 to be paid by Blough in monthly installments of $50.00. The $2,000 penalty represents a $1,850 penalty in Docket No. PENN 94-104[3] and a $150 civil penalty in Docket No. PENN 94-66.

Blough affirmed the settlement terms on behalf of the partnership in the absence of Kocher, who is incarcerated for conduct related to the cited violations. Although the settlement terms relieve Kocher from civil penalty liability, as a general partner, Kocher is jointly liable for the $2,000 settlement penalty. Accordingly, I will approve the settlement and proposed payment terms advanced by the parties. However, Blough may seek to recover Kocher's share of the $2,000 payment.

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[3] Docket No. PENN 94-104 concerns 20 citations. This decision imposes joint and several liability on Paul Zimmerman, David Zimmerman and Harold Schnoke for a $2,500 civil penalty in Docket No. PENN 94-104 for the 15 citations attributable to their mining operations on or before April 13, 1993. Thus, considering the $1,850 liability of Blough and Kocher for the five remaining citations, the total civil penalty in Docket No. PENN 94-104 is $4,350.

Statement of the Case

David Zimmerman, Paul Zimmerman and Harold Schnoke were general partners of Buck Mountain Coal Company since April 1986. On April 10, 1986, partners D. Zimmerman, P. Zimmerman and Schnoke leased the right to extract anthracite coal from the Buck Mountain Slope from the G.M.P. Land Company, Inc., in return for a payment of $7.00 per net ton of coal removed. (P. Ex. 3). A Legal Identity Report completed May 5, 1986, by Paul Zimmerman, lists the partners of Buck Mountain as David Zimmerman, Harold Schnook (sic) and Paul Zimmerman. The parties stipulated that Buck Mountain, which operated exclusively at the Buck Mountain Slope in Eastern Pennsylvania, is a very small operator that produced approximately 14,816 tons of coal in 1993. (Sec'y Br. at 4, 5). During this period Buck Mountain had a total of six or seven employees, including the partners.

On March 5, 1993, an explosion occurred at the Buck Mountain Slope Mine causing serious burn injuries to three underground miners. As a consequence of the explosion, the Mine Safety and Health Administration (MSHA) dispatched an inspection team to secure the mine and investigate the causes of the explosion. As a result of the investigation, 80 citations pertaining to the Zimmermans and Schnoke were issued to Buck Mountain. Of these 80 citations and orders, four orders and one citation, totaling $130,102 of the $160,938 total proposed civil penalties, pertain to cited violations that contributed to the March 5, 1993, explosion. The investigation revealed the contributing causes of the explosion were the presence of a non-permissible 40-volt battery locomotive inby the last open crosscut; a broken compressed airline that operated auxiliary fans ventilating the No. 5 face and No. 6 chute; the failure to conduct an adequate preshift examination; and an insufficient velocity of air ventilating the face.

The investigation was conducted by James Dickey and Leonard Sargent. On March 11 and March 26, 1993, Kocher allegedly threatened Dickey with bodily harm. On March 29, 1993, Dickey was accompanied to the mine by Sargent whereupon Kocher allegedly threatened both inspectors. Dickey returned to the mine on April 20, 1993, where he was allegedly threatened by Paul Zimmerman.

Kocher plead guilty to one count of threatening Federal officials Dickey and Sargent on March 29, 1993, in violation of 18 U.S.C. § 115(a)(1)(B). Kocher also plead guilty to falsifying training records in violation of 18 U.S.C. §§ 1001 and 1002(b). Kocher was sentenced to 18 months in prison.

Paul Zimmerman plead guilty to one count of threatening Federal official Dickey on April 20, 1993, in violation of 18 U.S.C. § 115(a)(1)(B). Zimmerman was sentenced to three years probation and fined $100.00.

Findings of Fact and Conclusions of Law

At the hearing, the parties stipulated to the fact of occurrence of the 80 cited violations, as well as to the degree of negligence and the gravity referenced in the citations and orders in issue. Thus, the only outstanding issue to be resolved is the appropriate civil penalties to be assessed.

It is well settled that the Commission and its judges are not bound by the Secretary's proposed civil penalty assessments. *Warren Steen Construction, Inc.*, 14 FMSHRC 1125 (July 1992); *Sellersburg Stone Co.*, 5 FMSHRC 287, 291 (March 1983), *aff'd Sellersburg Stone Co. v. FMSHRC*, 736 F.2d. 1147, 1153 (7th Cir. 1984). Rather, the proper penalty to be assessed must be determined by the trier of fact based upon findings concerning the statutory penalty criteria in section 110(i) of the Act, 30 U.S.C. § 820(i).

Section 110(i) of the Act requires consideration of six criteria in assessing appropriate civil penalties:

> (1) the operator's history of previous violations; (2) the appropriateness of the penalty to the size of the business of the operator; (3) whether the operator was negligent; (4) the effect on the operator's ability to continue in business; (5) the gravity of the violation; and (6) whether good faith was demonstrated in attempting to achieve prompt abatement of the violation. (Emphasis added).

Specific factual findings supported by the record developed during the course of an adjudicatory proceeding must be made for each of the statutory civil penalty criterion. *Dolese Brothers Company*, 16 FMSHRC 689, 695 (April 1994); *Westmoreland Coal Company*, 8 FMSHRC 491, 492, (April 1986). As noted, the civil penalties to be assessed *de novo* in these proceedings can appropriately be greater than, less than, or the same as those proposed by the Secretary. *Sellersburg*, 5 FMSHRC at 293. Here, the Secretary seeks to impose total civil penalties of $160,938. Thus, an analysis of the applicable penalty criteria follows.

The record reflects a history of 39 violations cited during 46 inspection days that occurred during the 24 month period preceding the March 5, 1993, explosion. I view less than one violation per inspection day as a neutral statutory penalty factor that does not materially impact on the appropriate penalty to be assessed.

As aggravating factors, the magnitude of the proposed penalty is supported by the high degree of negligence manifested by the aggravated conduct specified in the stipulated orders associated with the March 5, 1993, explosion. Similarly, this high penalty is also consistent with the extremely serious gravity of the cited violations that contributed to the explosion as demonstrated by the resultant serious burn injuries. A further aggravating circumstance is the lack of good faith efforts to achieve rapid compliance given the threats by Paul Zimmerman and Kocher, who was then the foreman of Buck Mountain.

However, the fundamental task in this process is to determine the appropriate penalty to be assessed. In this regard, the statutory criteria mandates the civil penalty must be appropriate to the size of the business of the operator. Thus, imposition of a penalty without regard to the size of the operator is contrary to the Act. Similarly, a very large penalty imposed on a very small operator is inappropriate.

The parties have stipulated to Buck Mountain's production of only 14,816 tons of annual coal production in 1993. MSHA Supervisory Inspector James Schoffstall testified Buck Mountain's extraction efforts consisted of only one unit staffed by six or seven people who mined by hand after separating the coal by

drilling and blasting. (Tr. 129, 131).[4] In fact, Schoffstall opined Buck Mountain's operations were so small that investment in mechanized mining equipment "wouldn't be feasible." (Tr. 131). With regard to the respondents' profitability, Schoffstall stated, "you could make a living, that's about it.[5] (Tr. 132). In recognition of this undisputed evidence, the Secretary concedes "there is no question Buck Mountain is a very small business in comparison to coal mines nationally ..." (Sec'y Br. at 5).

Finally, although David Zimmerman and Schnoke continue to be employed as miners by successors at the Buck Mountain Slope, the record reflects the Buck Mountain partnership consisting of the Zimmermans and Schnoke ceased to exist as an operator as of April 14, 1993. While the imposition of a $160,000 civil penalty undoubtedly would have had an adverse effect on this small operator's ability to continue in business, the Commission has not addressed the applicability of the effect of the penalty on an operator's ability to continue in business when the operator is no longer in business. *See Spurlock Mining Co., Inc.*, 16 FMSHRC 697 (April 1994).

However, the criteria in section 110(i) are not mutually exclusive. Thus, the fact that a small operator is no longer in business does not invalidate the other statutory criteria. For example, gravity and the degree of negligence remain relevant to imposition of the proper civil penalty. Similarly, the size of the operator during the one year period preceding the cited violations remains a relevant statutory consideration despite the operator's termination of business.

As a final matter, there is a rebuttable presumption that the imposition of a civil penalty will not adversely effect an operator's ability to continue in business. *Sellersburg*, 5 FMSHRC at 287. An operator has the burden of proving,

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[4] All references to transcript pages in this decision refer to the June 13, 1995, hearing.

[5] Tax returns for 1993 for David Zimmerman, Paul Zimmerman and Harold Schnoke reflect partnership income of $24,809, $14,843 and $23,510, respectively. (Resp. Exs. 3, 6, 10).

through the introduction of financial documentation, that a proposed penalty should be reduced for financial reasons. *Spurlock*, 16 FMSHRC at 700. If established by a respondent, an inability to pay a proposed penalty may be a mitigating consideration in lowering the penalty. Therefore, it is not uncommon for respondents to furnish personal financial information to support a reduction in penalty.

However, the Secretary has advanced the converse theory that the ability to pay a civil penalty, based on one's personal assets, is a factor that should be superimposed on the penalty criteria, thus increasing a penalty that would otherwise be inappropriate under section 110(i). For example, the Secretary has sought to obtain bank statements and real estate appraisals of the respondents' homes and property to support higher penalties despite Buck Mountain's diminutive size. However, financial information, such as bank accounts, tax returns and property appraisals, cannot be used to overcome the statutory penalty criteria that precludes very large penalties for small operators.

In view of the very small nature of the Buck Mountain partnership, I am reducing the Secretary's proposed penalties in these proceedings as follows:

Docket No.	**Proposed Penalty**	**Assessed Penalty**
PENN 94-63	$ 1,964	$ 200
PENN 94-64	$ 1,546	$ 150
PENN 94-65	$ 1,726	$ 150
PENN 94-104	$ 25,600	$ 2,500
PENN 94-597 PENN 94-618 PENN 94-619	$130,102[6]	$13,000
Total	**$160,938**	**$16,000**

[6] Identical Docket Nos. PENN 94-597, PENN 94-618 and PENN 94-619 were created for each of the named partners, David Zimmerman, Paul Zimmerman and Harold Schnoke.

In reducing these proposed penalties, I note the percentage reduction is compatible with the degree of reduction in the Secretary's settlement agreement with Blough and Kocher. I also note MSHA Conference and Litigation Representative Gerald Moody's testimony that "[Kocher, as mine foreman] was the number one negligent person in this whole situation." (Tr. 107). Kocher's negligence, as an operator's agent, is imputable to the respondent partnership. *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189 (February 1991). However, even the concept of imputed negligence has its limitations in the face of the disproportionate $160,938 proposed penalty in these cases.[7]

In imposing these reduced penalties, I am sensitive to the Secretary's concern that the gravity of the March 5, 1993, accident must not be trivialized by a substantial reduction in penalties. (Sec'y Br. at 30). Rather, the Secretary urges me not to permit "the small size of the mine [as] a factor to be considered in determining the amount of the penalties ... to outweigh the high gravity and negligence which has been stipulated to in this case." (Sec'y Br. at 29). However, I do not consider a $16,000 penalty on a very small operator to be trivial. Moreover, the penalty criteria in section 110(i) of the Act must be applied as a whole. The negligence and gravity criteria cannot overcome the statutory mandate that the ultimate penalty must be appropriate to the size of the business.[8]

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[7] Ironically, the Secretary's proposed settlement with Blough sought to relieve Kocher of liability for civil penalties incurred by Kocher's partnership.

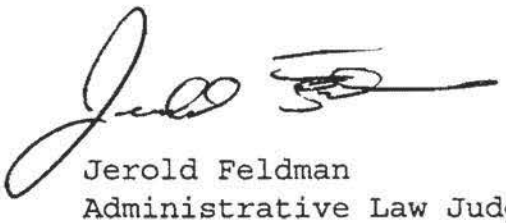
[8] While not asserted by the Secretary, an argument could be made that the statutory penalty criteria applies to individual penalties proposed for each citation. However, the cumulative effect of numerous citations (in this case 80 citations) does not alter the requirement of proportionality for the total penalty sought to be imposed.

ORDER

In view of the above, all citations and orders in these docket proceedings ARE AFFIRMED.

Pursuant to the parties' settlement agreement, Richard Kocher, Sr., and Oscar Blough, Jr., are jointly and severally liable, as partners, for payment of a total civil penalty of $2,000 consisting of a $1,850 penalty in Docket No. PENN 94-104 and a $150 penalty in Docket No. 94-66. Consistent with the parties' agreement, payment is to be made in forty (40) monthly installments of fifty dollars ($50.00) each. The first installment is due on October 1, 1995, with subsequent payments due on the first of each month until the full $2,000 civil penalty is received. Upon timely receipt of the entire $2,000 civil penalty, these matters ARE DISMISSED.

As indicated above, Paul Zimmerman, David Zimmerman and Harold Schnoke are jointly and severally liable as partners of Buck Mountain Coal Company for a total civil penalty of $16,000 in Docket Nos. PENN 94-63, PENN 94-64, PENN 94-65, PENN 94-66, PENN 94-104, PENN 94-597, PENN 94-618 and PENN 94-619. Full payment is to be made in four quarterly installments of $4,000 each. The first $4,000 payment is due on September 30, 1995, with subsequent payments due on December 30, 1995, March 30, 1996 and June 30, 1996. Upon timely receipt of the entire $16,000 civil penalty, these docket proceedings **ARE DISMISSED.**



Jerold Feldman
Administrative Law Judge

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AUG 2 5 1995

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 95-125-DM
ON BEHALF OF	:	SE MD 94-12
BENITO OCASIO HERNANDEZ,	:	
Complainant	:	Cantera Espinosa
v.	:	
	:	
SAN JUAN CEMENT COMPANY, INC.,	:	
Respondent	:	

DECISION

Appearances: James A. Magenheimer, Esq., Office of the Solicitor, U.S. Department of Labor, New York, New York for the Complainant;
Rafael Cuevas Kuinlam, Esq., Hato Rey, Puerto Rico for the Respondent.

Before: Judge Hodgdon

This case is before me on a complaint of discrimination brought by the Secretary of Labor on behalf of Benito Ocasio Hernandez against San Juan Cement 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, while Mr. Ocasio engaged in activities protected under the Act, the Respondent was not motivated in any part by that activity in suspending him for eight days.

The case was heard on June 7 and 8, 1995, in Hato Rey, Puerto Rico. Roberto Torres Aponte, Jose Luis Mojica, Marcos E. Rivera and the Complainant testified in support of his case. Victoriano Garcia Santiago, Florentino Coreano Moreno and Rolando Melendez Santiago testified for the Respondent. The parties also filed briefs which I have considered in my disposition of this case.

MOTION TO DISMISS

As a preliminary matter, the Respondent argues that this case should be dismissed because the Secretary has not followed his own rules. Specifically, the company contends that Commission Rule 41(a), 29 C.F.R. § 2700.41(a), which requires the Secretary to file a discrimination complaint "within 30 days after his *written determination* that a violation has occurred" (emphasis added), was not complied with because the company never received such a written determination. This argument is without merit.

Initially, it should be noted that the rule in question is the Commission's and not the Secretary's so that the well settled principle of law that an administrative agency must follow it's own rules would not be applicable in this case. Secondly, when read in conjunction with Section 105(c)(3) of the Act, 30 U.S.C. § 815(c)(3), which requires that "[w]ithin 90 days of the receipt of a complaint . . . the Secretary shall notify, *in writing*, the miner . . . of his determination whether a violation has occurred" (emphasis added), it is apparent that the written determination referred to in Rule 41(a) is the written determination required by the Act to be given to the Complainant. Thus, there is nothing in either the Act or Rule 41(a) that requires a written determination to be given to the company.

Finally, although the record is silent concerning whether the Secretary filed this complaint within 30 days of notifying the Complainant that a violation had occurred, the Commission has long held that the time limitations in discrimination cases are not jurisdictional and that dismissal is only appropriate "if the operator demonstrates material legal prejudice attributable to the delay." *Secretary on behalf of Hale v. 4-A Coal Company, Inc.*, 8 FMSHRC 905, 908 (June 1986) (citations omitted); *see also Secretary on behalf of Nantz v. Nally & Hamilton Enterprises, Inc.*, 16 FMSHRC 2208, 2215 (November 1994); *Boswell v. National Cement Co.*, 14 FMSHRC 253, 257 (February 1992). In this case, the Respondent has not alleged any prejudice resulting from its

failure to receive a written determination, and, in fact, has admitted that it was not prejudiced by not receiving a written determination. (Tr.1, 87-8.)[1]

The Respondent's claim that the failure of the Secretary to provide it with a written determination that a violation occurred should result in the dismissal of the complaint is unsupported by either the facts or the law. Therefore, the motion to dismiss is **DENIED**.

FACTUAL SETTING

The basic facts are not disputed. On April 18, 1994, Victoriano Garcia, a maintenance foreman, told Luis Mojica, a mechanic, and Benito Ocasio, his helper, to go the ash silo and retrieve a vibrator for use in another part of the plant. Although Mojica and Ocasio were apparently aware that the silo was in a restricted area due to dangerous conditions, they both proceeded to the area. On arriving, they discovered the area blocked off by pylons and yellow ribbons. Unable to perform their duties, they returned to the locker area to await further assignment. Garcia was informed that the vibrator was not obtained because the area could not be entered.

On April 20, 1994, Garcia assigned Mojica and Ocasio, along with Marcos Rivera, a welder, to repair a screw conveyor. While waiting for the acetylene for the welder to be brought to the conveyor, Ocasio took a piece of steel to the heavy equipment shop to have it cut into a plate to be used for heating food. When Garcia observed Ocasio in the shop, he told Ocasio to return to his workplace. Ocasio did so.

Shortly thereafter, Ocasio saw Garcia coming by the conveyor and called him over. A confrontation over the incident in the shop ensued resulting in both parties accusing the other of a lack of respect.

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[1] There is a separate transcript, beginning with page one, for each day of the hearing. Accordingly, the transcript for June 7 will be cited as "Tr.1" and the transcript for June 8 will be cited as "Tr.2."

Garcia reported this confrontation to his supervisor, Florentino Coreano. Coreano asked Garcia to make a written report of the incident. After consulting with Rolando Melendez, the Director of Human Resources and Industrial Relations, Coreano went to where Ocasio was eating breakfast, told him he was suspended and directed him to go to Melendez' office with his union delegate.

Melendez discussed the incident with Ocasio and his delegate in his office. At that time, Melendez had Garcia's written report and some notes he had made on the report based on his telephone conversation with Coreano. (Comp. Ex. 2.) Melendez informed Ocasio that he was suspended until a meeting with the union was held the next day, April 21, at which time a further decision on discipline would be made.

The meeting with union was held on April 21, but Ocasio did not appear, so his case was not discussed. At the next meeting, April 29, Ocasio was present along with Garcia, Mojica, Marcos Rivera, Coreano and the union officials. After interviewing the witnesses, Melendez concluded that an eight day suspension was sufficient and terminated it.

The April 18 episode concerning the aborted attempt to get the vibrator was not mentioned by any party at either the April 20 or April 29 meeting with Melendez. However, by April 29 Melendez was aware that Ocasio was claiming that his suspension was the result of his refusal to enter the restricted area to obtain the vibrator because Ocasio had filed a discrimination complaint with the Mine Safety and Health Administration (MSHA) on April 21, (Resp. Ex. N.), and the company had been informed of the complaint sometime before April 29.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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 Co. v. Marshall*, 663 F.2d

1211 (2d Cir. 1981); *Secretary on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (1981); *Secretary on behalf of Jenkins v. Hecla-Day Mines Corp.*, 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).

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 the 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 was also motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *Id.* at 2800; *Robinette, supra* at 917-18.

In this case, the Complainant argues that he engaged in protected activity when he refused to enter the danger area in the silo to retrieve a vibrator and that because of that refusal, the company suspended him for eight days. In response, San Juan Cement avers that Mr. Ocasio was suspended for his insubordination to his foreman two days later and maintains that the suspension had nothing to do with his refusal to enter a dangerous place. Mr. Ocasio contends that the insubordination is merely a subterfuge for action taken because of the protected activity. The evidence, however, does not support the Complainant's contention that his suspension was for having engaged in protected activity.

It is well settled that when a miner refuses to work in conditions he believes, reasonably and in good faith, to be dangerous, his refusal is protected under the Act. *Simpson v. FMSHRC*, 842 F.2d 453 (D.C. Cir. 1988); *Miller v. FMSHRC*, 687 F.2d 194 (7th Cir. 1982); *Secretary on behalf of Pratt v. River Hurricane Coal Co.*, 5 FMSHRC 1529 (September 1983); *Secretary on behalf of Bush v. Union Carbide Corp.*, 5 FMSHRC 993 (June 1983); *Haro v. Magma Copper Co.*, 4 FMSHRC 1935 (November 1982); *Robinette, supra.* Consequently, I conclude Mr. Ocasio engaged in protected activity when he declined to go beyond the pylons and ribbons marking the danger area to get the vibrator.

However, Mr. Ocasio has failed to show that his subsequent suspension was motivated by that refusal. The only evidence to support his claim is his own testimony and at every significant point his testimony is uncorroborated. Furthermore, his portrayal of his testimony as corroborated, when in fact it was not, among other factors, reflects adversely on his credibility.

Mr. Ocasio testified that he and Mojica went to the silo area as directed by Garcia, but could not enter because it was cordoned off. He stated that Garcia came up to them in that area and asked if the vibrator had been removed and when they told him that it had not because of the danger, Mr. Ocasio "noticed that he [Garcia] became very upset, and he removed his hardhat in order to throw it on the floor." (Tr.1, 26.)

The Complainant related that he encountered Garcia later in the afternoon and Garcia again told him to remove the vibrator. He claimed that when he again refused because of the risk, Garcia said "[t]hat if I didn't remove it, I would pay dearly." (Tr.1, 29.) Mr. Occasio testified that Mojica was not present during this encounter.

Concerning the same incident, Mr. Garcia testified that he told Mojica and Ocasio to go to the silo to get the vibrator and that later he saw them standing near the silo and Mojica yelled "Garcia, it says that you can't come in." (Tr.1, 136.) Garcia said that he did not reply to them, but "[s]ince I already had an emergency, I decided right there to just keep walking and mention it to Mr. Felipe Santiago that there was an emergency dealing with safety." (Tr.1 137.) He denied that he insisted that the Complainant enter the restricted area or tell him that he would "pay dearly" if he did not. (Tr.1, 138.)

A third version of the incident was given by Mr. Mojica. He testified that Garcia directed Ocasio and him to go to the silo to get a vibrator, that when they got to the silo they found the area cordoned off, so they returned to the tool shed. According to Mr. Mojica, after the initial order he did not see Garcia again and the Complainant, alone, "went over there and told Garcia that we couldn't go into the area because it was fenced in." (Tr.2, 53.) Mr. Mojica stated further that Ocasio did not "say anything" about Garcia's response when informed that they could not get the vibrator. (Tr.2, 54, 63.) Finally,

Mr. Mojica related that Garcia had never mentioned the vibrator to him again, nor had he been subjected to any type of adverse action for refusing to remove the vibrator.

If Garcia had reacted as described by the Complainant, that is taking off his hat as if he was going to throw it on the ground and accosting Ocasio a second time to insist that he retrieve the vibrator and threatening that he would pay dearly if he did not, then it would be possible to infer that there was some connection between the refusal and the suspension. However, no other evidence supports the Complainant's version.

According to Garcia and Mojica, the refusal to enter the silo was not consequential. In addition, Mojica was not present to see Garcia become angry at the refusal as claimed by Ocasio. Finally, if Ocasio was alone when he told Garcia that they would not get the vibrator, and Garcia reacted angrily, and if Garcia later threatened Ocasio, it is curious that Ocasio never mentioned any of this to Mojica, or that Mojica was never disciplined for the refusal in view of Garcia's alleged anger.

Essentially, what the evidence in this case shows, if the Complainant's testimony is not accepted, as I do not, is a refusal to enter an unsafe area on April 18, and a suspension on April 20. Other than the proximity in time, there is nothing to connect one with the other. At the time the Complainant was suspended by the personnel director on April 20, the personnel director was not even aware of the April 18 incident. Nor did anyone, including Ocasio, mention it to Mr. Melendez when he met with Ocasio and his union delegate to inform them of the suspension.

The Commission has held that "[c]oincidental timing can be indicative of discriminatory motivation." *Meek v. Essroc Corp.*, 15 FMSHRC 606, 612 (April 1993); *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 992 (June 1982); *Chacon, supra* at 2511. However, in these cases there were other indications of discriminatory intent. Here there is nothing else.

Accordingly, I conclude that the Complainant has not met his burden of proving that his suspension was based in any part on his refusal to enter a dangerous area. Furthermore, I conclude that even if Mr. Ocasio had established a *prima facie* case, the

company has successfully rebutted the case by proving that the suspension was for the confrontation with Garcia on April 20 and not for the refusal on April 18, which the person suspending him did not even know about.

ORDER

Since the Secretary has failed to show that Mr. Ocasio's eight day suspension was, in any part, the result of his refusal to enter a restricted area, it is **ORDERED** that the complaint of the Secretary filed on behalf of Benito Ocasio Hernandez against San Juan Cement Company under Section 105(c) of the Act is **DISMISSED**.

T. Todd Hodgdon
Administrative Law Judge
(703) 756-4570

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, SUITE 1000
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

AUG 2 5 1995

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 95-143
Petitioner	:	A.C. No. 01-01322-03990
v.	:	
	:	No. 5 Mine
JIM WALTER RESOURCES, INC.,	:	
Respondent	:	

DECISION

Appearances: William Lawson, Esq., Office of the Solicitor, U.S. Department of Labor, Birmingham, Alabama, for the Petitioner;
R. Stanley Morrow, Esq., Birmingham, Alabama, for the Respondent.

Before: Judge Melick

This case is before me upon a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). At hearings Petitioner filed a motion to approve a settlement agreement and to dismiss the case. Vacation of Citation No. 3182463 and a reduction in penalty for the remaining violations from $19,500 to $10,500 were proposed. I have considered the representations and documentation submitted in this case, including the representations on the record at hearing, and I conclude that the proffered settlement is acceptable under the criteria set forth in Section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is **GRANTED**, and it is **ORDERED** that Respondent pay a penalty of $10,500 within 30 days of this order.

Gary Melick
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

August 25, 1995

SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
MINE AND SAFETY AND HEALTH	:	PROCEEDING
ADMINISTRATION (MSHA),	:	
ON BEHALF OF	:	Docket No. VA 95-69-DM
DELBERT W. BENNETT,	:	MSHA Case No. NE MD 95-05
v.	:	
Applicant	:	Grayson Quarry
	:	
CARDINAL STONE COMPANY,	:	
Respondent	:	
	:	

ORDER OF TEMPORARY REINSTATEMENT

On August 11, 1995, the Secretary filed an application for temporary reinstatement on behalf of Delbert W. Bennett. The application for temporary reinstatement was mailed to Cardinal Stone Company, (Respondent), by certified mail, return receipt requested.

On August 25, 1995, the Secretary filed a motion for temporary reinstatement. Attached to the motion is a copy of a return receipt, indicating receipt by Respondent of the application for temporary reinstatement on August 14, 1995. To date, the Respondent has not advised the Chief Administrative Law Judge on his designee, whether a hearing is requested. The Secretary asserts that Respondent has not notified the Secretary whether a hearing is requested.

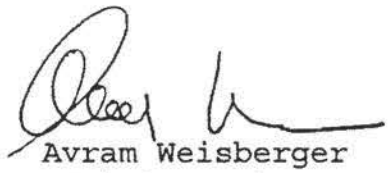
29 C.F.R. § 2700.45(C) provides, as pertinent, as follows:

> Within 10 days following receipt of the Secretary's application for temporary reinstatement, the person against whom relief is sought shall advise the Commission's Chief Administrative Law Judge or his designee, and simultaneously notify the Secretary, whether a hearing on the application is requested. If no hearing is requested, the Judge assigned to the matter shall review

> immediately the Secretary's application and if based on the contents thereof the Judge determines that the miner's complaint was not frivolously brought, he shall issue immediately a written order of temporary reinstatement.

More that ten days have elapsed following receipt by Respondent of the Secretary's a application for temporary reinstatement. No request has been received from the Respondent requesting a hearing on the application. I have reviewed the Secretary's application. Based on the contents thereof, I determine that the complaint of Delbert W. Bennett was not frivolously brought.

According, it is **ORDERED**, that the respondent reinstate Delbert W. Bennett to the position he held immediately prior to being fired or to a similar position at the same rate of pay, and with the same or equivalent duties assigned to him. It is further ORDERED that the reinstatement shall remain in effect pending a final order by the Commission upon Applicant's Complaint of Discrimination.



Avram Weisberger
Administrative Law Judge
(703) 756-5233

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
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AUG 2 5 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. WEST 93-375 A.C. No. 42-01697-03653
v.	:	
C.W. MINING COMPANY, Respondent	:	Bear Canyon No. 1 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Docket No. WEST 94-399 A.C. No. 42-01697-03667 A
v.	:	
CYRIL JACKSON, employed by C.W. MINING COMPANY, Respondent	:	Bear Canyon No. 1 Mine

DECISION

Appearances: Kristi Floyd, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Carl E. Kingston, Esq., Salt Lake City, Utah, for Respondents.

Before: Judge Manning

These cases are before me on petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against C.W. Mining Company ("C.W. Mining") and Cyril Jackson, pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 ("Mine Act"). The petitions allege that each respondent violated the mine's ventilation plan. For the reasons set forth below, I find that C.W. Mining violated the ventilation plan, that the violation was of a significant and substantial nature, but that it was not caused by C.W. Mining's unwarrantable failure. I assess a civil penalty in the amount of $2,000. I find that Cyril Jackson did not knowingly violate the ventilation plan and I dismiss the proceeding filed against him.

A hearing was held in these cases on February 7, 1995, in Salt Lake City, Utah. The parties presented testimony and documentary evidence and filed post-hearing briefs.

I. FINDINGS OF FACT

The Bear Canyon No. 1 Mine is an underground coal mine in Sevier County, Utah. On January 20, 1993, MSHA Inspector Fred Marietti issued C.W. Mining an order of withdrawal (the "order") under section 104(d)(2) of the Mine Act alleging a violation of 30 C.F.R. § 75.370(a)(1) at its Bear Canyon No. 1 Mine.[1] The order states the following:

> The continuous mining machine was cutting and loading coal in the pillar split between No. 4 and 5 rooms. There appeared to be little air over the machine. The air was measured with an anemometer, and no movement was indicated. The split was broke through on the right corner about a 3 feet X 3 feet opening to the gob. The hole was partially blocked off by cave gob. The section foreman was observing the mining standing next to the writer. It was obvious that there was little air. The dust was boiling back towards the operator's compartment. This machine was in the east bleeder section, MMU006.

In the order the inspector indicated that the alleged violation was significant and substantial and was caused by C.W. Mining's high negligence. The Secretary assessed a penalty of $2,500 against C.W. Mining under section 110(a) of the Act and a penalty of $3,000 against Cyril Jackson under section 110(c).

After arriving at the mine, Inspector Marietti proceeded to the east bleeder section. On his way to the face area he observed Cyril Jackson, a section and production foreman, in Room 4 setting a breaker row with other miners.[2] (Tr. 61-62, 84, 170, 218). The inspector was accompanied by Ken Defa, the mine superintendent. Marietti and Defa then proceeded to Room 5. (Tr. 85, 109). In this area, the inspector observed a shuttle car. Id.

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[1] The cited safety standard provides that all coal mine operators "shall develop and follow a ventilation plan approved by the district manager." The order alleges that C.W. Mining was not following its approved ventilation plan.

[2] Inspector Marietti apparently used incorrect numbers when referring to various rooms on the section. (Tr. 85, 171). I have used his numbering system because his numbers were used by all witnesses throughout the hearing.

He later returned to the shuttle car and issued a citation because it was not in permissible condition. (Tr. 163, 260; Ex. G-8). Marietti and Defa then proceeded to the face area. (Tr. 171). In the meantime, Jackson had walked past Marietti and Defa to the face and arrived in that area before they did. (Tr. 171, 219-220).

At the face, Ryan Thompson was operating a continuous mining machine. C.W. Mining was retreating from the east bleeder section and was, therefore, removing the pillars. The pillar between crosscut 4 and 5 had been split on a previous shift.[3] For reasons that are not clear, the entire split was not cut and a wall of coal was left at the back. A hole about three by five feet in diameter was cut on the right side of this wall. (Tr. 58, 156). The gob was behind this wall and the hole was partially blocked because the roof had caved in the gob. Id. Thompson was cutting into the pillar of coal to the right of the split, called a fender, when Jackson arrived. Coal dust was blowing back over the continuous miner. (Tr. 59-60, 81-82, 124).

The parties offered conflicting testimony as to the events that followed. C.W. Mining's witnesses testified that Thompson had just started mining the fender and had not completely filled the first shuttle car with coal when Jackson arrived. (Tr. 159). In addition, they testified that Jackson arrived at the face less than a minute before the inspector. (Tr. 171-172, 220-222). Jackson stated that he immediately saw that there was a ventilation problem and attempted to signal Thompson to stop mining. (Tr. 220-222). Defa testified that when he saw the dust, he started examining the curtains to find the problem. (Tr. 87, 173). When the inspector told Defa and Jackson that he was issuing an order, they replied that they saw the violation, but that they did not understand why an order was being issued. (Tr. 68, 177, 222).

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[3] Mr. Thompson testified that he mined part of the split earlier on the same shift. (Tr. 121). I have not relied upon this testimony because it is contrary to the testimony of Defa and Jackson and because it would have been difficult, if not impossible, for Thompson to have finished cutting the split that morning. (Tr. 203, 237-238). C.W. Mining is required to cut pillars in an approved pattern and bolt the roof after each cut. (Tr. 51; Ex. G-3). There was no dispute that the pillar split was bolted and clean at the time Inspector Marietti arrived at about 9:45 a.m. Earlier in the shift, Thompson had been removing the stump from another pillar. (Tr. 121, 215-216). There was not enough time after the start of the shift, 6:00 a.m., for him to have removed the stump, mined the last section of the split, and for the crew to have cleaned and bolted the area. (Tr. 66).

The Secretary takes the position that Jackson arrived at the face several minutes before the inspector and he made no attempt to stop Thompson from mining. (Tr. 60-61, 77-78, 255). Inspector Marietti testified that he waited a short time for Jackson to take some action and, when he did not, he told Jackson that he was going to issue an order. Id. The inspector testified that Jackson then asked him if Thompson could finish loading the shuttle car before he shut down. (Tr. 101). When the inspector refused this request, Jackson shut down the continuous miner. (Tr. 100-101, 108).

Inspector Marietti issued the unwarrantable failure order based on the conditions he observed and the events that occurred at the face. (Tr. 60-61). The violation was abated a few hours later by tightening existing curtains and installing a line curtain brought in from another section. (Tr. 69, 70-71, 128, 201).

II. SUMMARY OF THE PARTIES' ARGUMENTS

C.W. Mining does not dispute that the conditions observed by Inspector Marietti violated the mine's ventilation plan. It contends, however, that the violation was not S&S, was not caused by its unwarrantable failure, and that Jackson did not knowingly authorize the violation.

A. Secretary

The Secretary contends that the violation was S&S because, if left unabated, the condition "would reasonably likely result in an accident, resulting in an injury of a very serious nature." (S. Br. 6). He argues that C.W. Mining was grossly out of compliance with its ventilation plan because the inspector detected no air movement with his anemometer. The Secretary maintains that the conditions presented three distinct hazards: inhalation of respirable dust, ignition or explosion of coal dust, and methane accumulations. He further argues that there were a number of ignition sources in the area that could ignite the coal dust or methane.

The Secretary maintains that the violation was the result of C.W. Mining's unwarrantable failure to comply with the ventilation plan because the violation was "extremely obvious." (S. Br. 8). He argues that C.W. Mining should have been aware that the area was not adequately ventilated because there was only a small, partially blocked hole at the back of the split. He contends that Jackson should have addressed the problem before the fender was cut. The Secretary further maintains that Jackson arrived at the face well before the inspector and that his failure to take corrective action, either before or after the inspector arrived at the face, constituted aggravated conduct. Finally, the fact that Jackson asked the inspector to delay shutting down the continuous miner until the shuttle car was

loaded demonstrates C.W. Mining's lack of concern about the inadequate ventilation.

The Secretary argues that Cyril Jackson knowingly authorized, ordered, or carried out the violation. The Secretary contends that Jackson knew that his crew was mining the right fender of the split, that there was only a small hole at the back of the split, and that it was his responsibility to assure adequate ventilation. Despite this knowledge, the Secretary contends that Jackson did nothing to correct the situation and, in addition, asked the inspector if he could continue mining to finish loading the shuttle car.

A. C.W. Mining

C.W. Mining contends that the Secretary did not establish that the violation was S&S. It states that the condition existed for a few minutes at the most, and that Mr. Jackson stopped the continuous miner once he observed the dusty conditions. C.W. Mining states that the inadequate ventilation would not have continued once the shuttle car was loaded. Thus, it maintains that the Secretary failed to establish that there was a reasonable likelihood that the dusty conditions would have caused an injury or illness.

C.W. Mining also contends that, because the inadequate ventilation observed by the inspector had existed only for a few minutes and Jackson started taking remedial steps as soon as he became aware of it, the violation was not the result of its unwarrantable failure and Mr. Jackson did not knowingly authorize, order, or carry out the violation. C.W. Mining also argues that it has a good history of compliance with its ventilation plan and it regularly instructs its continuous miner operators to stop mining if the ventilation is not sufficient.

III. DISCUSSION WITH FURTHER FINDINGS AND CONCLUSIONS OF LAW

A. Significant and Substantial

The Commission has established a four-part S&S test, as follows:

> In order to establish that a violation of a mandatory safety standard is significant and substantial ..., the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete 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.

Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984). An evaluation of the reasonable likelihood of an injury should be made assuming continued normal mining operations. U.S. Steel Mining Co., 7 FMSHRC 1125, 1130 (August 1985).

I find that the Secretary established that the violation was S&S. C.W. Mining does not seriously dispute that the Secretary established the first two elements of the Mathies test. It contends, however, that the third and fourth elements were not met. I agree with C.W. Mining that the continuous miner had been cutting into the fender for only a minute or so when Jackson arrived at the face.[4] Assuming continued normal mining operations, however, the condition would likely have continued for a longer time.

The hazards of coal dust are well known. Although MSHA did not take a dust survey at the time, I believe that the evidence establishes that a significant amount of coal dust was boiling back over the continuous miner and was not being carried away by the ventilation system. (Tr. 73). Inspector Marietti could detect no perceptible movement of air in the area.

The miners in the area were not wearing respirators and were exposed to the coal dust. (Tr. 76). Pneumoconiosis is a progressive disease that can afflict coal miners who are exposed to dust over a period of years. Apparently, no miner who has worked at the Bear Canyon No. 1 Mine has ever filed a claim for black lung benefits. (Tr. 185). That fact, however, does not lessen the hazard.

Inspector Marietti testified that he discovered a permissibility violation on a shuttle car in the section and an accumulation of coal on one part of continuous miner. (Tr. 103-104). This evidence is not contested by C.W. Mining. (Tr. 163-164, 182). The permissibility violation was a potential ignition source for the dust and the accumulation could help spread a

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[4] Mr. Thompson testified that he had been mining in the fender for 15 or 20 minutes and that he had cut about 20 feet. (Tr. 128-129). I have not relied upon this testimony because it is contrary to the testimony of the inspector, Defa, and Jackson. (Tr. 65, 77, 159, 225, 231). In addition, the metal surfaces of the continuous miner were clean of coal dust. (Tr. 182-183; Ex. R-1). Given the amount of dust that was being produced, the machine would have been dusty if Thompson had been mining for 15 or 20 minutes.

fire. Although the coal seam does not contain large amounts of rock, the bits of the continuous miner could, never-theless, strike a rock and create a spark causing an ignition of the coal dust. (Tr. 29, 74, 103). Finally, although excessive amounts of methane are not emitted at the mine, methane could be released at the face and mix with the coal dust thereby increasing the likelihood of an ignition. (Tr. 75). In order for an ignition to occur, there must be a confluence of factors. Texasgulf, Inc., 10 FMSHRC 498, 501 (April 1988). In the present case, the shuttle car with impermissible gaps would have traveled to the dusty area, assuming continued normal mining operations.

Taking into consideration the health risk and ignition hazard posed by the violation, I find that there was a reasonable likelihood that the hazard contributed to would have resulted in an injury.[5] I also find that the Secretary established the fourth element of the Mathies S&S test. If there was an ignition in the area, miners could be burned or killed. In addition, black lung disease is a serious progressive disease.

B. Unwarrantable Failure

In Emery Mining Corp., 9 FMSHRC 1997, 2001 (December 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or "serious lack of reasonable care." Id. at 2003-04; Rochester & Pittsburgh Coal Corp., 13 FMSHRC 189, 193-194 (February 1991).

I find that the Secretary did not establish that the violation was caused by C.W. Mining's unwarrantable failure to comply with the ventilation plan. The Secretary is asking that I conclude that C.W. Mining engaged in aggravated conduct based on inferences drawn from events and conversations that occurred at the face in a very short period of time. As discussed below, I believe during this period there was a breakdown in communications and that this breakdown is the primary source of the conflicting testimony.

I credit the testimony of Defa and Jackson that Jackson arrived at the face only moments before the inspector. (Tr. 171-172, 220). Jackson walked from Room 4 to the face via the same route as the inspector. Inspector Marietti also proceeded to the face with only a momentary stop at a shuttle car. Jackson could not have been at face very long before the inspector arrived.

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[5] In addition, I find that the violation was S&S considering the ignition and fire hazard alone.

I also credit the testimony of Defa and Jackson that Jackson attempted to signal Thompson to stop the continuous miner. (Tr. 172, 178-179, 220-221). Jackson is an experienced miner and is familiar with the MSHA inspection process. It is hard to believe that he would stand there, knowing that Inspector Marietti was on the way, and do nothing about the violation that everyone said was obvious. Apparently, Thompson did not see his signal and kept mining. (Tr. 126). The dark, noisy environment of underground coal mining makes communication difficult.

I believe that Inspector Marietti perceived that Jackson was not doing anything to correct the violation because the continuous miner operator was still mining when he arrived. (Tr. 59, 76-77). The inspector did not see Jackson's signal. Inspector Marietti testified that Jackson asked him if the operator could finish filling the shuttle car before he shut down. (Tr. 76, 101). Jackson denied making this statement and testified that the inspector told him that if he had stopped the continuous miner before the shuttle car was loaded, then a citation would have been issued, rather than an order. (Tr. 222). A shuttle car is usually filled in about a minute. (Tr. 99, 126, 146, 159). Accordingly, this discrepancy is not particularly significant.[6] I cannot assume that Jackson was disregarding the hazard presented by the violation based on the inspector's testimony about this conversation.

The Secretary also contends that Jackson should have known, before Thompson started mining, that the ventilation would not be sufficient because there was only a small hole at the back of the pillar split and it was partially blocked. Jackson examined the split about 30 minutes before Thompson started mining the fender, but he did not measure the air flow. (Tr. 216, 247; Ex. G-9). Nevertheless, I believe that Jackson's failure to adjust the ventilation earlier in the shift constitutes, at most, ordinary negligence, not aggravated conduct. First, the configuration of the pillar split with the hole in the back was somewhat unusual. (Tr. 90, 243). There is no indication that a line curtain is usually needed when making the first cut into a fender. (Tr. 35-36, 156). Second, it is not clear when the gob caved behind the split and partially blocked the hole. It is common for the roof in the gob to cave during retreat mining and the resulting bump can affect ventilation. (Tr. 91, 174-175, 223, 229). Defa and Jackson testified that they heard the roof cave a few minutes before they were at the face. (Tr. 174, 176, 218, 223-224, 238).

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[6] The shuttle car that Thompson was loading was the first shuttle car to be filled on that shift. (Tr. 172, 224). As a consequence, it is unlikely that Jackson was motivated by production concerns. For the reasons set forth in footnote 4, I have not given any weight to Thompson's testimony that he had loaded eight to ten shuttle cars. (Tr. 136-137).

They thought the hole was clear before that time. Id. Thompson, on the other hand, testified that the hole was partially blocked when he arrived at the split. (Tr. 122, 126, 132-133). Finally, there were curtains in the area to direct air into the split. (Tr. 55-58, 92-94; Exs. G-4, G-6). Apparently, C.W. Mining was having difficulty keeping the curtains tight, in part because of the bumps. (Tr. 80, 94, 174, 198, 223). Inspector Marietti testified that if all of the curtains that were in place had been tight, the ventilation at the face may have been adequate. (Tr. 98).

C. Liability of Cyril Jackson under Section 110(c)

Section 110(c) of the Mine Act provides that, whenever a corporate operator violates a mandatory health or safety standard, any agent of such corporate operator who "knowingly authorized, ordered, or carried out such violation" shall be subject to a 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).

C.W. Mining is a corporate operator and Mr. Jackson was an agent of the corporation. In addition, as discussed above, the corporate operator violated the mine's ventilation plan and, as a consequence violated 30 C.F.R. § 75.370(a)(1). I find, however, that Jackson did not knowingly authorize, order, or carry out the violation. I reach this conclusion for the same reasons that I concluded that the violation was not unwarrantable, as discussed above. I find that Jackson was somewhat negligent by not checking the air flow before Thompson started cutting. I conclude, however, that he did not knowingly violate the ventilation plan. Based on the facts available to him, Jackson did not have "reason to know that a violative condition or conduct would occur" and he did not fail "to take appropriate preventive steps." Roy Glenn, 6 FMSHRC 1583, 1586 (July 1984). He believed that there was sufficient air in the split. He also took steps to stop production once he saw that the ventilation was inadequate. Inspector Marietti assumed that because he did not see Jackson try to stop the continuous miner, Jackson had not, in fact, done so. (Tr. 108, 222, 257).

The Secretary bases its 110(c) allegation, in large measure, on the events that took place at the face in the first few moments after the inspector arrived. (Tr. 221). I have determined that there was a miscommunication between Inspector Marietti and Jackson at that time. As discussed above, I find that Jackson tried to signal Thompson to stop mining, but the inspector did not see him do so. When Jackson stood there a few moments without taking any action, Inspector Marietti concluded that Jackson was indifferent to the violation and issued the withdrawal order. (Tr. 60-61, 257-258).

IV. CIVIL PENALTY ASSESSMENT

Section 110(i) of the Mine Act, 30 U.S.C. § 820(i), sets out six criteria to be considered in determining the appropriate civil penalty. Based on this criteria, I assess a penalty of $2,000 for the violation. I find that C.W. Mining was issued 148 citations and orders in the 24 months preceding the inspection in this case. (Ex. G-1). I also find that C.W. Mining is a medium-sized operator that produced between 300,000 and 400,000 tons of coal in 1992. I find that the civil penalty assessed in this decision would not affect C.W. Mining's ability to continue in business. The violation was timely abated by C.W. Mining. I further find that the violation was very serious, and that C.W. Mining's negligence was moderate. In assessing the penalty, I gave special consideration to the violation's high level of gravity.

V. ORDER

In WEST 93-375, Order No. 3852378 is **MODIFIED** to a section 104(a) citation by deleting the unwarrantable failure designation and reducing the level of negligence to moderate. As modified, the citation is **AFFIRMED** and C.W. Mining Company is **ORDERED TO PAY** Secretary of Labor the sum of $2,000.00 within 40 days of the date of this decision.

In WEST 94-399, Order No. 3852378 is **VACATED** against Cyril Jackson and the civil penalty proceeding is **DISMISSED**.

Richard W. Manning
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

AUG 3 0 1995

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 94-720-M
Petitioner	:	A. C. No. 42-02089-05505
v.	:	
	:	Wiser Portable No. 1
WISER CONSTRUCTION LLC,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Hodgdon

This case is before me on a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The Secretary, by counsel, has filed a motion to approve a settlement agreement. A reduction in penalty from $4,300.00 to $2,150.00 is proposed. Having considered the representations and documentation submitted, I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act, 30 U.S.C. § 820(i).

Accordingly, the motion for approval of settlement is **GRANTED** and it is **ORDERED** that Respondent pay a penalty of $2,150.00 within 40 days of the date of this order. On receipt of payment, this case is **DISMISSED**.

T. Todd Hodgdon
Administrative Law Judge
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

AUG 31 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	DISCRIMINATION PROCEEDING
ON BEHALF OF JAMES RIEKE, Petitioner	:	Docket No. LAKE 95-201-DM NC-DC 94-10
v.	:	Cleveland Mine Mine ID 33-06994
AKZO SALT COMPANY, INC., Respondent	:	

DECISION

Appearances: Lisa A. Gray, Esq., Ruben R. Chapa, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois for Complainant;
William Michael Hanna, Esq., Squire, Sanders and Dempsey, Cleveland, Ohio for Respondent

Before: Judge Melick

Pursuant to the interlocutory decision issued in this case on August 7, 1995, the parties have stipulated to damages due the complainant, James Rieke, of $2,542.04.

ORDER

In addition to the other remedies directed in the decision dated August 7, 1995, Akzo Salt Company, Inc. is hereby directed to pay within 30 days of the date of this decision (1) a civil penalty of $2,000 and (2) damages of $2,542.04 to James Rieke.

Gary Melick
Administrative Law Judge
703-756-6261

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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AUG 31 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF JAMES RIEKE, Petitioner	:	DISCRIMINATION PROCEEDING
	:	Docket No. LAKE 95-201-DM
	:	NC-DC 94-10
v.	:	Cleveland Mine
	:	Mine ID 33-06994
AKZO SALT COMPANY, INC., Respondent	:	

DECISION AND ORDER DENYING MOTION FOR RELIEF

Before: Judge Melick

In his complaint of discrimination on behalf of James Rieke, filed July 17, 1995, the Secretary specifically requested reinstatement of James Rieke to his former position as "powderman/blaster". In his testimony at hearings on May 11, 1995, Mr. Rieke himself confirmed that he was seeking reinstatement as "powderman". Finally, in his post hearing brief the Secretary again demanded Rieke's reinstatement to his former job as "powderman." In the interlocutory decision issued August 7, 1995, in which the Secretary prevailed on the merits, the Respondent was accordingly ordered to immediately reinstate Mr. Rieke to his former job as "powderman/blaster."

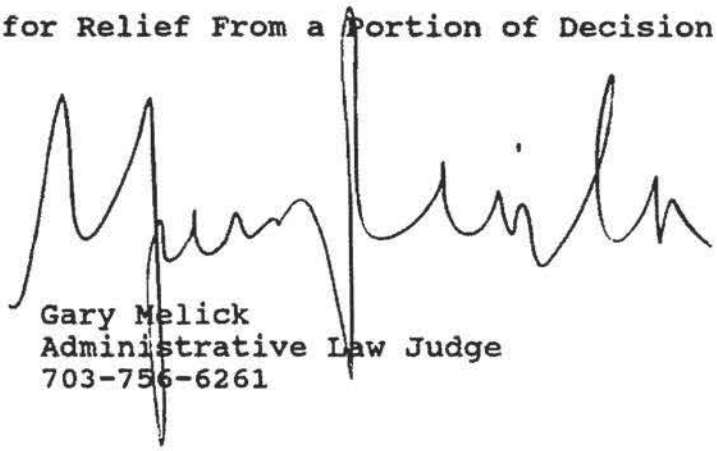
On August 25, 1995, the Secretary moved pursuant to Rule 60(b) Federal Rules of Civil Procedure, for relief from this order stating that, while Respondent has, in fact, complied with the order and has reinstated Rieke, Rieke apparently no longer wishes to work in the position of "powderman/blaster". In the proposed order submitted August 28, 1995, the Secretary seeks to have Rieke now returned to the position of haul truck driver -- the position he held at the time of hearings and at the time of his requested reinstatement to the position of "powderman".

It is the position of Respondent that it has reinstated Rieke as ordered and has already filled Rieke's former position as haul truck driver and cannot now fairly, nor within the terms of its collective bargaining agreement, displace that employee. Under the circumstances it appears that the order issued August 7, 1995, which granted the precise remedy sought by complainant, cannot now be modified without harming a third party

innocent employee and violating the provisions of the collective bargaining agreement. Within this framework and considering the equities, I find that the Secretary's Motion for Relief must be denied.

ORDER

The Secretary's Motion for Relief From a Portion of Decision and Order is denied.



Gary Melick
Administrative Law Judge
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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3577/FAX 303-844-5268

May 17, 1995

ASARCO, INC., Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. CENT 95-8-RM Citation 4444361; 9/20/94
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. CENT 95-9-RM Citation 4328815; 9/21/94 Sweetwater Mine Mine I.D. 23-00458
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of DAVID HOPKINS, Complainant	:	DISCRIMINATION PROCEEDING Docket No. CENT 95-122-DM Sweetwater Mine Mine I.D. 23-00458
v.	:	
ASARCO, INCORPORATED, Respondent	:	

ORDER DENYING, IN PART, ASARCO'S MOTION TO COMPEL

Asarco, Inc. filed a request for the production of documents in these proceedings. In response, the Secretary of Labor provided certain documents but refused to provide others on the basis of the informant's privilege, the deliberative process privilege, and the attorney-client privilege. Subsequently, Asarco filed a motion to compel production of three types of documents: (1) statements of miners made to MSHA investigators; (2) a special investigation report of the discrimination complaint prepared by Ms. Judy Peters, an MSHA employee; and (3) a case analysis prepared by Ms. Peters. The Secretary opposed the motion to compel. By order dated May 4, 1994, I ordered the Secretary to provide, for my in camera inspection, a copy of each contested document. There is no dispute that the requested material is relevant to these proceedings. For the reasons discussed below, Asarco's motion to compel is denied, in part, and granted, in part.

I. Statements of Miners

During MSHA's investigation of Mr. Hopkins' discrimination complaint, Ms. Judy Peters, an MSHA investigator, interviewed a number of miners. During these interviews, she either tape-recorded the interview or took written statements. The taped interviews were typed in question and answer format. These interview transcripts and written statements (collectively referred to as "statements") were forwarded to me for my review. After reviewing each of the statements, I conclude that all but one are protected by the informant's privilege.

The Commission has stressed the importance of the informant's privilege under the Mine Act. Bright Coal Co., 6 FMSHRC 2520 (November 1984). The Commission held that this privilege is applicable to the furnishing of information to government officials concerning violations of the Mine Act. 6 FMSHRC at 2524. It is the name of the informant, not the contents of the statement, that is protected, unless disclosure of the contents would tend to reveal the identity of an informant. Asarco, 12 FMSHRC 2548, 2554 (December 1990) ("Asarco I"), citing Roviaro v. United States, 353 U.S. 53, 60 (1957). The Secretary bears the burden of proving facts necessary to support the existence of the privilege. Asarco I, 12 FMSHRC at 2553.

Each of the statements at issue in this case contains the name of the informant making the statement. In addition, given the detail contained in the statement, I find that disclosure of the contents of each statement would tend to reveal the identity of the informant. Finally, each statement contains the names of other miners, many of whom are also informants. Accordingly, I conclude that each statement is protected by the informant's privilege. Redacting out names and identifying sentences or paragraphs is not feasible because of the detailed nature of the statements. It would not be possible for the Secretary to provide Asarco with meaningful portions of the statements without revealing the identity of one or more informants.

Because the informant's privilege is a qualified privilege, I must perform a balancing test to determine if Asarco's need for the statements is greater than the Secretary's need to maintain the privilege to protect the public interest. Bright, 6 FMSHRC at 2526. The burden is on Asarco to prove facts necessary to show that disclosure of the statements is necessary to a fair determination of the case. Id. Factors to be considered in conducting this balancing test include whether the Secretary is in sole control of the requested material and whether Asarco has other avenues available from which to obtain the substantial equivalent of the requested information. Id. In performing the balancing test in this case, the issue is whether Asarco can get substantially the same information by deposing those miners who

have knowledge of the events leading up to Mr. Hopkins' discharge. Asarco, 14 FMSHRC 1323, 1331 (August 1992)("Asarco II")

I conclude that Asarco could get substantially the same information by interviewing or deposing miners at the Sweetwater Mine who worked with Mr. Hopkins and with the 1311 High Scaling Rig that is the subject of these proceedings. Those are the individuals with knowledge of the events that are important to these cases and Asarco can get substantially the same information by talking to those individuals.

Asarco maintains that it believes that it is "quite likely" that some of the statements contain information that is favorable to its position in these cases. Asarco states that such information is essential for a fair determination of the issues. In Bright, the Commission held that "an informer is entitled to anonymity, regardless of the substance of the information he furnishes." 6 FMSHRC at 2524. The "applicability of the informer's privilege to the Mine Act does not rise or fall based on the substance of a person's communication with government officials concerning a violation of the law." 6 FMSHRC at 2525. Accordingly, Asarco's contention is unfounded.

I conclude, however, that Asarco is entitled to a copy of the statement made by Mr. Hopkins. This proceeding is being brought by the Secretary on Mr. Hopkins' behalf. There can be no doubt in anyone's mind that Mr. Hopkins is an informant and that his identity as an informant is known to Asarco because a discrimination complaint was filed on his behalf. The Secretary would not file a discrimination proceeding without interviewing the complainant.[1] Accordingly, I conclude that the informant's privilege has been waived with respect to Mr. Hopkins.

Asarco will be entitled to the names of all the Secretary's witnesses two days before the trial. 29 C.F.R. § 2700.62; Asarco II, 14 FMSHRC at 1331. At or about that time, Asarco may be able to obtain the statement of any miner who will be called as a witness in order to refresh that witness's recollection or to

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[1] My holding is consistent with the Commission's decision in Secretary on behalf of Gregory et. al. v. Thunder Basin Coal Co., 15 FMSHRC 2228 (November 1993). The Commission held that the informant's privilege is not waived when an unfair labor practice charge brought by the United Mine Workers Union names a number of miners in the complaint. 15 FMSHRC at 2235-36. The inclusion of a particular miner in the complaint "is not tantamount to disclosure of [the miner] as an informant." 15 FMSHRC at 2236. The unfair labor practice action could have been brought without obtaining information from the miner in question. In the instant case, however, there can be no dispute that Mr. Hopkins is an informer.

impeach his testimony. Asarco II, 14 FMSHRC at 1331. Asarco's right to the statements of miner witnesses at the time of trial is a separate and procedurally distinct issue from the discovery issue presented here. Id. (citation omitted).

II. Special Investigation Report Prepared by Ms. Peters

The special investigation report ("report") prepared by Ms. Peters consists of two parts: a summary of the interviews and statements Ms. Peters took of miners and a conclusion that Asarco violated section 105(c) of the Mine Act when it terminated Mr. Hopkins. The report recommends that a complaint be filed on his behalf. The report, which is in the form of a memorandum, was prepared by Ms. Peters and is directed to Raymond C. Austin, MSHA District Manager for the South Central District, through Jimmie L. Jones, Supervisory Mine Safety and Health Specialist. I find that this document is protected from disclosure by the informant's privilege and the deliberative process privilege.

Most of the report is a summary of the statements of miners described in section I, above. This summary also includes the summary of statements made to Ms. Peters by a few management employees. The definition of "miner" under the Mine Act includes "any individual working in a ... mine." 30 U.S.C. § 802(g); 29 C.F.R. § 2700.2. Thus, the informant's privilege applies to statements made to the government by both management and hourly employees. For the reasons set forth in section I above, I believe that these summaries are protected by the informant's privilege. In addition, for the reasons discussed above, Asarco's need for the statements is not as great as the Secretary's need to maintain the privilege to protect the public interest. Asarco has access to all of these individuals and could simply depose or interview them.

The remainder of the report is protected by the deliberative process privilege. This privilege protects communications between subordinates and supervisors within the government that are "antecedent to the adoption of an agency policy." Contests of Respirable Dust Sample Alternation Citations, 14 FMSHRC 987, 992 (June 1992), quoting Jordan v. Dept. of Justice, 591 F.2d 753 (D.C. Cir. 1978). The communications must be "related to the process by which policies are formulated." Id. The conclusion and recommendation section easily fits within the deliberative process privilege. This section of the report contains the recommendation of Ms. Peters, a subordinate, to Mr. Austin, a supervisor, that the agency pursue this case. It is not the final agency decision.[2]

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[2] The portion of the report that summarizes the statements of miners also summarizes interviews with Michael R. Roderman, an MSHA inspector, and Michael P. Sheridan, an MSHA engineer. I

I also conclude that Asarco's need for the recommendation section does not outweigh the Secretary's interest in keeping it confidential. Ms. Peter's one page recommendation puts her gloss on the interviews she conducted and states that the information obtained during her investigation "indicates that a violation of Section 105(c) occurred." It is simply her opinion and, since this proceeding is de novo, it will carry no weight. The Secretary's interest in keeping its decision making process confidential far outweighs Asarco's need for this section of the report.

III. Case Analysis

Counsel for the Secretary states that a case analysis prepared by Ms. Peter does not exist. The only case analysis she prepared is the report discussed in section II, above. The Secretary provided for my in camera review, a two-page "case analysis" prepared by an analyst in MSHA's Arlington, Virginia, headquarters. As it does not contain any details, it appears that it may be a transmittal memorandum for the report prepared by Ms. Peters. In any event, like the report, it is protected by the deliberative process privilege. It is a memorandum prepared by a subordinate to a supervisor that recommends that a discrimination complaint be filed against Asarco on behalf of Mr. Hopkins. The Secretary's interest in keeping its decision-making process confidential outweighs Asarco's need for this document.

ORDER

Accordingly, Asarco's motion to compel is **DENIED**, except with respect to the transcript of the taped interview of Mr. Hopkins taken on September 19, 1994. The Secretary is **ORDERED** to provide counsel for Asarco with a copy of this transcript within ten days of the date of this order. The Secretary should redact the names of other informants that are contained in the transcript and, to the extent necessary, those portions of the transcript that would tend to reveal the identity of an informant.

Richard W. Manning
Administrative Law Judge

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find that these summaries are protected by this privilege because they reflect the deliberative process and are not purely factual in nature. I believe that report must be viewed as a whole and that the summary of Ms. Peters' interviews of MSHA officials is part of the decision making process rather than merely a factual predicate for the decision to bring these cases. See, Respirable Dust Cases, 14 FMSHRC at 992-93.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 8, 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. CEDAR CREEK QUARRIES, INC., Respondent	: : : : : : : : :	CIVIL PENALTY PROCEEDING Docket No. WEST 94-637-M A. C. No. 35-03123-05514 Cedar Creek Quarry
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. ROBERT G. WIENERT, Employed by, CEDAR CREEK QUARRIES, INC., Respondent	: : : : : : : : :	CIVIL PENALTY PROCEEDING Docket No. WEST 95-306-M A. C. No. 35-03123-05516 A Cedar Creek Quarry
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. DENNIS McCASLIN, Employed by, CEDAR CREEK QUARRIES, INC., Respondent	: : : : : : : : :	CIVIL PENALTY PROCEEDING Docket No. WEST 95-307-M A. C. No. 35-03123-05517 A Cedar Creek Quarry

ORDER DENYING MOTIONS TO DISMISS
ORDER OF CONSOLIDATION
ORDER OF CONTINUANCE

Before: Judge Hodgdon

These cases are before me on petitions for civil penalty pursuant to Sections 105(d) and 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815(d) and 820(c). Respondents Robert G. Wienert and Dennis McCaslin have moved to

dismiss the petitions against them. The Secretary opposes the motions. In addition, the Secretary has moved to consolidate these cases for hearing and to continue the August 8, 1995, hearing date. The Respondents oppose a continuance. For the reasons set forth below, the motions to dismiss are denied, the cases are consolidated for hearing and the hearing is continued.

Motions to Dismiss

The Secretary has filed petitions seeking civil penalties under Section 110(c) of the Act against Wienert, President of Cedar Creek Quarries, Inc., and McCaslin, a foreman employed by Cedar Creek Quarries, Inc., for knowingly authorizing, ordering or carrying out, as officers or agents of Cedar Creek Quarries, Inc. several violations of the Secretary's mandatory health and safety standards. The violations are all alleged to have occurred on December 7, 1993. The Respondents were officially notified that the Secretary was assessing such penalties on March 17, 1995. After Respondents stated that the wished to contest the penalties, the instant petitions were filed on May 10, 1995. The Respondents argue that the approximately 15 month time period between the violations and notification of liability constitutes an unreasonable delay which requires that the petitions be dismissed.[1]

The Respondents assert that there are four reasons for dismissing the cases. The first is the "concept of *laches*" because the delay resulted in prejudice to the Respondents' ability to defend themselves. The Second is that Section 110(c) violates the equal protection and due process requirements of the Fifth Amendment by making officers, directors or agents of

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[1] The Respondents also allege a 31 month delay from the time the company was cited for the same type of violations on July 22, 1992. While the July 22, 1992, violations were mentioned in the orders given to the company on December 7, 1993, and may have some bearing on the Respondents' liability under Section 110(c) for the December 7 violations, the Secretary is not seeking civil penalties against the Respondents under Section 110(c) for the July 22 violations. Consequently, the only pertinent delay for consideration in connection with the motion to dismiss is the 15 month delay.

corporate operators liable for knowing violations of the Act or regulations, but not agents of noncorporate operators. Third, Respondents maintain that giving individuals "less notice and opportunity for administrative resolution" of violations than operators who are immediately given a citation or order also violates the equal protection and due process guarantees of the Fifth Amendment. Finally, Respondents contend that Section 56.12001 of the Regulations, 30 C.F.R. § 56.12001, is so vague as to be fundamentally unfair. None of these arguments is persuasive.

The "Doctrine of *laches*" is an equitable concept which holds that "neglect to assert a right or claim which, taken together with lapse of time and other circumstances causing prejudice to adverse party, operates as bar in court of equity." *Black's Law Dictionary* 875 (6th ed. 1990). Since this is not a court of equity, the Respondents advance that a similar concept should apply in this case. In their view, Judge Melick's decision in *Island Creek Coal Co.*, 15 FMSHRC 735 (April 1993), is precedent for such a theory.

This argument, however, fails for two reasons. First, "[a]n unreviewed decision of a Judge is not a precedent binding upon the Commission." Commission Rule 72, 29 C.F.R. § 2700.72. Secondly, Judge Melick's decision was based solely on the failure of the Secretary to file a petition for assessment of penalty within 45 days of receipt of a timely contest of a proposed penalty assessment as required by Commission Rule 27(a), 29 C.F.R. § 2700.27(a) [now Rule 28, 29 C.F.R. § 2700.28]. Thus, he held that the Secretary had failed to file a timely request for an extension of time to file a petition, *Island Creek* at 737; that the Secretary had failed to show "adequate cause" for the late filing, *id.* at 738; and that the Respondents had been actually prejudiced by this late filing, *id.* at 739.

In the instant cases, there has been no violation of a statutory deadline. Judge Melick's discussion of prejudice suffered by the respondents as a result of the time lag between the violations and their notification that they were being assessed a penalty under Section 110(c) was to demonstrate that the respondents had been prejudiced as a result of the Secretary's untimely filing under the rule. It did not establish that a delay in bringing a Section 110(c) case is itself a ground for dismissing such petitions.

Furthermore, in these cases the Respondents have not shown that they have suffered actual prejudice. The alleged inability to locate the electricians who installed and dismantled the electrical equipment in question does not mean that there is no way to defend against the orders. As the Secretary has pointed out, there are other means of defense, such as finding equipment with the same specifications, using testimony from the equipment manufacturer or using wiring diagrams and drawings furnished by the manufacturer.

Next, Respondents have not been denied equal protection or due process under the Fifth Amendment. At least two federal circuits, as well as the Commission, have held that Section 110(c) is not a denial of equal protection. *U.S. v. Jones*, 735 F.2d 785 (4th Cir. 1984), *cert. denied*, 469 U.S. 918 (1984); *Richardson v. Sec. of Labor*, 689 F.2d 632 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983).

Nor does the fact that the orders were immediately served on the mine operator but the Respondents were not notified of their liability until 15 months later violate due process or equal protection. Interestingly, the orders in this case were served on Mr. McCaslin, so he did have notice of the violations even if he did not know at the time that he might be considered personally liable. Similarly, Mr. Wienert, as president of the company, must have become aware of the orders shortly after their issue. In addition, on April 6, 1994, and shortly thereafter, both respondents were interviewed by the special investigator and should have been aware at that time of their potential liability.

Finally, the regulation is not void for vagueness. Section 56.12001, 30 C.F.R. § 56.12001, provides that "[c]ircuits shall be protected against excessive overload by fuses or circuit breakers of the correct type and capacity." The fact that "correct type and capacity" is not defined does not mean that the regulation is vague since it is clear from the regulation that fuses and circuit breakers of the correct type and capacity are those which protect against excessive overload.

Furthermore, even if this were not apparent, the Commission has held that broadly worded regulations must be evaluated "in light of what a 'reasonably prudent person, familiar with the

mining industry and the protective purpose of the standard, would have provided in order to meet the protection intended by the standard.'" *Ideal Cement Co.*, 12 FMSHRC 2409, 2415 (November 1990)(citations omitted). Therefore, at the very least, this would be a matter of proof at the hearing.

Having considered the contentions of the parties as set forth in their briefs, the Respondents' motions to dismiss are **DENIED**. That being the case, Docket Nos. WEST 95-306-M and WEST 95-307-M are **CONSOLIDATED** for hearing with Docket No. WEST 94-637-M.

Motion for Continuance

Hearing in Docket No. WEST 94-637-M is presently scheduled for August 8, 1995, in Newport, Oregon. The Secretary has requested that the hearing be continued because his two main witnesses have medical problems which would prevent them from being present to testify on August 8. Citing the passage of time set out in the motions to dismiss, the Respondents oppose the continuance.

While I am sensitive to the Respondents' concerns, the delays in these cases have not been inordinate, or as indicated above, of a nature to justify the extreme remedy of dismissal. In addition, the request for continuance by the Secretary is due to circumstances beyond his and his witnesses control. Nor is the request for a three month continuance excessive in view of the fact that one of the witnesses has just had open heart surgery. Therefore, I will grant the continuance.

Accordingly, the motion for continuance is **GRANTED**. The hearing in the above-captioned cases is **CONTINUED** until **November 14, 1995**, at 9:00 AM, in **Newport, Oregon**. A specific hearing site will be designated in a subsequent order.

In preparation for the hearing, the parties are directed to complete the following on or before **November 3, 1995**: (1) attempt to stipulate as to all relevant matters that are not in substantial dispute; (2) exchange written statements of the issues as they see them; (3) exchange lists of exhibits and, at the request of a party, produce exhibits for inspection and copying; (4) stipulate as to those exhibits which may be admitted

in evidence without objection, and as to others indicate whether the exhibit is accepted as authentic; and (5) except for the Secretary's miner witnesses, exchange witness lists with a summary of the testimony expected from each witness (counsel for the Secretary shall furnish the names and expected testimony of miner witnesses on November 10).

The parties are further **ORDERED** to file with the judge, so that it is received on or before **November 10, 1995**, a preliminary statement setting forth: (1) the parties' statement of the issues; (b) lists of exhibits and witnesses with a summary of the expected testimony for each witness; and (c) any stipulations.

The parties should mark their exhibits, in the order that they expect to offer them, before the hearing. The Secretary's exhibits should be marked "Gov't. Ex. 1" *et seq.* and the respondents' exhibits should be marked "Resp. Ex. A" *et seq.* If both parties wish to offer the same exhibit, it may be marked as a joint exhibit. Exhibits consisting of more than one page should have the pages numbered.

T. Todd Hodgdon
Administrative Law Judge
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