

AUGUST 2002

THERE WERE NO COMMISSION DECISIONS OR ORDERS

ADMINISTRATIVE LAW JUDGE DECISIONS

08-07-02	Lodestar Energy Incorporated	KENT 2001-53	Pg. 803
08-09-02	John R. Peterson v. Sunshine Precious Metals, Inc.	WEST 1998-307-DM	Pg. 810
08-15-02	Darwin Stratton & Son, Inc.	WEST 2002-146-M	Pg. 817
08-22-02	Sec. Labor on behalf of Richard M. Bundy v. Kennecott Utah Copper Corporation	WEST 2001-608-DM	Pg. 822
08-23-02	Cannelton Industries Incorporated	WEVA 2000-113	Pg. 840

ADMINISTRATIVE LAW JUDGE ORDERS

08-13-02	Jerry Polly v. Powell Mountain Coal Co.	KENT 2002-253-D	Pg. 864
08-22-02	Black Beauty Coal Company	LAKE 2002-20	Pg. 866

AUGUST 2002

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

Secretary of Labor, MSHA v. Cannelton Industries, Inc., Docket Nos. WEVA 2002-111-R and WEVA 2002-112-R. (Judge Hodgdon, July 10, 2002).

Secretary of Labor, MSHA v. Dacotah Cement, Docket No. CENT 2001-218-M. (Judge Schroeder, July 31, 2002).

No cases were filed in which Review was denied during the month of August

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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August 7, 2002

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2001-53
Petitioner	:	A. C. No. 15-14492-03838
v.	:	
	:	Docket No. KENT 2001-64
LODESTAR ENERGY INCORPORATED,	:	A. C. No. 15-14492-03836
Respondent	:	
	:	Docket No. KENT 2001-166
	:	A. C. No. 15-14492-03837
	:	
	:	Docket No. KENT 2001-198
	:	A. C. No. 15-14492-03840
	:	
	:	Docket No. KENT 2001-199
	:	A. C. No. 15-14492-03841
	:	
	:	Docket No. KENT 2001-200
	:	A. C. No. 15-14492-03843
	:	
	:	Docket No. KENT 2001-201
	:	A. C. No. 15-14492-03844
	:	
	:	Docket No. KENT 2001-295
	:	A. C. No. 15-11704-03565
	:	
	:	Docket No. KENT 2001-346
	:	A. C. No. 15-14492-03849
	:	
	:	Docket No. KENT 2001-347
	:	A. C. No. 15-14492-03850
	:	
	:	Docket No. KENT 2001-349
	:	A. C. No. 15-14492-03852

	:	Docket No. KENT 2001-350
	:	A. C. No. 15-14492-03853
	:	
	:	Baker Mine
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2001-52
Petitioner	:	A. C. No. 15-13920-03942
v.	:	
	:	Docket No. KENT 2001-141
	:	A. C. No. 15-13920-03944
LODESTAR ENERGY INCORPORATED,	:	
Respondent	:	Wheatcroft Mine
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2001-223
Petitioner	:	A. C. No. 15-16855-03555
v.	:	
	:	
LODESTAR ENERGY INCORPORATED,	:	
Respondent	:	Miller Creek Mine No. 1

DECISION

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, on behalf of Petitioner;
Stanley Dawson, Esq., Lodestar Energy Incorporated, Lexington, Kentucky, on behalf of Respondent.

Before: Judge Melick

These cases are before me upon petitions 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 (1994) *et seq.*, the "Act" charging Lodestar Energy Incorporated (Lodestar) with multiple violations of mandatory standards and proposing civil penalties for those violations. Citations No. 7646106, 7646137, 7647120 and 7645346 were vacated by the Petitioner at hearing and other citations were the subject of settlement agreements submitted and approved at hearing. A corresponding order approving settlement for the appropriate citations will be incorporated herein.

Six citations remained in dispute and were the subject of evidentiary hearings. Citations No. 7646256, 7646257, 7646233, 7646103 and 7646265, each allege violations of the mandatory standard at 30 C.F.R. § 75.321(a)(1). That standard provides, as relevant hereto, that “the air in areas where persons work or travel . . . shall contain at least 19.5% oxygen . . .”

More specifically, Citation No. 7646256 charges as follows:

The oxygen reading taken at the upper right side of Seal #2 of the #10 set was 18.8%. The upper right side of the #1 seal of the #10 set was 19.1%.

Inspector Abel De Leon, of the Department of Labor’s Mine Safety and Health Administration (MSHA), has an associate degree in mining technology and significant underground coal mining experience. He also received specific classroom and on-the-job training by MSHA in the proper methods for taking air readings. In particular, he was taught of the need to take air samples at least 12 inches from the roof, ribs, faces and seals.

On December 16, 2000, De Leon, accompanied by miner’s representative Kenneth Mallory, was approaching Seal No. 2 of the No. 10 Set when the alarm went off on his “spotter.”¹ Using his “spotter” and taking readings at least 12 inches from the roof, ribs and seal, De Leon obtained a reading only 18.8% oxygen at the upper right side of seal No. 2 of the No. 10 set. De Leon obtained a bottle sample at the same location and forwarded this sample for analysis. The undisputed result of the sample analysis at that location was 18.34% oxygen (Gov’t Exh. No. 3). De Leon also took a second reading with his “spotter” at the upper right side of the No. 1 seal at the No. 10 set. Holding the “spotter” more than 12 inches from the roof, ribs and seal, he obtained a reading of 19.1% oxygen. A bottle sample taken at this location showed 19.09% oxygen (Gov’t Exh. No. 3).

Citation No. 7646257 alleges a violation of the same standard and charges as follows:²

The #1 seal of the #11 set of seals had an oxygen reading of 15 percent and a methane reading of 2.1 percent, (upper right side) and upper left side. Also the #5 seal, middle to right side of the seal, 19.2 - 19.4%. No. 6 seal, middle to left

¹ De Leon described his “spotter” as a hand-held TMX 412 mechanical detector used to ascertain oxygen, carbon monoxide and methane levels. The detector is set to sound an alarm in an atmosphere of less than 19.5% oxygen.

² In its posthearing brief, Lodestar offered to “withdraw its contest of this citation and the associated penalty.” To date the Secretary has not assented to this proposal. Accordingly the citation remains at issue in this decision.

side, 19.1 - 19.4 percent. Air bottle samples were taken.

Inspector De Leon testified that he took readings with his "spotter" at the locations noted in the citation, making sure that he was more than 12 inches from the roof, ribs and seal. He obtained readings of 15% at both locations. He also obtained bottle samples at the same locations and the results of those samples showed 15.37% at the No. 1 seal of the No. 11 set of seals and 18.91% at the No. 5 seal, middle to right side of seal. (Gov't Exh. No. 3).

Miner's representative Kenneth Mallory testified that he accompanied De Leon on his December 16, 2000, inspection into the sealed areas and he too detected low oxygen with his "spotter." The alarm on his "spotter" was triggered two or three feet from the seal at the same time that De Leon's was also triggered. He observed De Leon take his bottle samples more than 12 inches from the roof, ribs and seals. Mallory had previously accompanied De Leon on at least 50 occasions during some of which De Leon obtained gas samples. According to Mallory, De Leon always performed his inspections in a professional manner and within the law.

Citation No. 7646265, issued February 20, 2000, as amended at hearing, alleges a violation of the same standard on December 20, 2000, and charges as follows:

The air quality was 17.1 percent oxygen and 2.1 percent methane in front of the #3 seal of the #8 set. An air bottle sample was taken.

De Leon testified without contradiction that he found oxygen levels of 17.1% in front of the No. 3 seal of the No. 8 set. Analysis of a bottle sample taken at the same location showed 17.08% oxygen. (Gov't Exh. No. 6).

Citation No. 7646233, issued November 27, 2000, alleges another violation of the same standard and charges as follows:

The air bottle sample taken on 11/03/2000 showed an oxygen analysis 19.19%. This bottle sample was taken at Seal #2, #14 Set of Seals. A minimum of 19.5% Oxygen is required.

According to Inspector De Leon, on November 3, 2000, he obtained a reading at the cited location close to the 19.5% oxygen level. He therefore deferred issuing a citation until obtaining the analysis of a bottle sample taken at the same location. The analysis of the bottle sample showed 19.19% oxygen and, therefore, on November 22, 2000, De Leon issued the instant citation. (See Gov't Exh. No. 9).

Citation No. 7646103, issued November 20, 2000, alleges another violation of the same standard and charges as follows:

The upper left portion of the #2 Seal of the #24 set of Seals had an oxygen

reading of 18.8% and a Methane reading of 2.0%. A bottle sample was taken.

According to Inspector De Leon, on November 20, 2000, he detected 18.5% oxygen with his "spotter" at the cited location. Analysis of a bottle sample taken at the same location showed an oxygen level of 13.95%. (Gov't Exh. No. 11).

Within the above framework of evidence I conclude that the violations have been proven as charged. This credible evidence demonstrates that Inspector De Leon obtained his "spotter" samples as well as his bottle samples at least 12 inches from the ribs, roof and seals, in each of the cited cases. The test results are indeed undisputed and each shows oxygen levels below the minimum required by the cited standard.

In reaching these conclusions I have not disregarded Lodestar's arguments that there will invariably be oxygen deficiencies in the vicinity of seals and that Inspector De Leon moved his "spotter" around the seal areas until he obtained an oxygen deficient reading. However, even assuming, *arguendo*, that these statements were factually accurate, such facts nevertheless would not negate the existence of the violations as charged.

I have also not disregarded Lodestar's argument that the Secretary must prove that the oxygen deficient air is located precisely in the same area in which the exposed person would intake a breath. According to this argument Lodestar would require the Secretary to prove the location of the mouth and nostrils of each person who would work or travel in the cited areas and then limit oxygen testing to only those precise locations where such mouths and nostrils would appear. I find no such requirement in the cited standard and accordingly reject Lodestar's argument in this regard.³

The parties conditionally stipulated (assuming that the violations had been proven) that the violations were of low gravity and the result of only moderate negligence. These conclusions were based upon the fact that there had been prior low oxygen readings near the seals thereby giving Lodestar some notice of potential oxygen deficiencies in these areas. They were also based on the fact that the cited oxygen deficiencies were only slightly below the required level and that no one in the inspection party suffered any ill effects from the oxygen deficient atmosphere. It has also been stipulated by the parties that the penalties issued herein would have no affect on the operator's ability to continue in business and that the operator abated the violations in a good faith and timely manner. Lodestar is a large mine operator and has a significant history of violations (Gov't Exh. No. 1). Considering all of the "section 110(i)" criteria, I find that the civil penalties originally proposed by the Secretary are appropriate: i.e.,

³ Respondent's additional argument - - that these citations should be vacated because they were written as to areas where "persons" do not work or travel - - was previously rejected in an Order Denying Motions for Summary Decision issued March 8, 2002. The substance of that Order is incorporated herein by reference.

Citation No. 7646256 - \$55.00, Citation No. 7646257 - \$55.00, Citation No. 7646265 - \$55.00, Citation No. 7646233 - \$55.00 and Citation No. 7646103 - \$55.00.

Citation No. 7646334, issued February 27, 2001, alleges a violation of the standard at 30 C.F.R. § 75.1722(c) and, as amended at hearing, charges as follows:

Because of the position of the No. 3 Unit ID 007 belt tail roller and tail piece, the tail roller guard needed to be extended to an area where the belt hung below the conveyor belt frame exposing miners to the hazard of being pulled into the tail roller. An expanded metal guard providing this protection was present but was not secured to the conveyor belt frame.

The cited standard, 30 C.F.R. § 75.1722(c), provides that “[e]xcept when testing the machinery, guards shall be securely in place while machinery is being operated.” MSHA inspector Ronald Oglesbee testified that on February 27, 2001, he was performing an inspection at Lodestar’s Baker Mine when he observed in the feeder area of the conveyer, what he believed to be an extension to the tail roller guard that was not secured. The item was propped onto the conveyor frame and was not attached to the frame. The tail roller was admittedly guarded however. According to Oglesbee, there was a danger to the section foreman and belt workers who frequently traveled the area. In particular he believed that a shovel could become caught under the moving belt thereby dragging a miner into the belt. He concluded that the violation was of low gravity because the area was guarded although not secured.

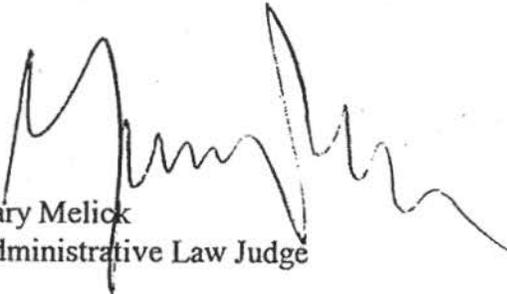
Lodestar’s compliance coordinator, Kevin Vaughn, testified that he was present at the time the citation was issued. According to Vaughn, the guard found by Inspector Oglesbee lying against the belt frame was actually an old guard that had been removed and replaced by a welded steel guard protecting the tail roller. According to Vaughn, the welded guard provided full protection for the tail roller area and there were no moving parts exposed beyond the guard. Vaughn further testified that the new welded guard had been in place for about two months and one or two inspectors had examined this condition without issuing any citations. He also admitted however that the subject tailpiece would have been moved every four days thus altering the extant conditions. He also testified that Lodestar had utilized similar guards elsewhere in the mine without citation by inspectors.

I find Vaughn’s testimony sufficient to vacate the citation at issue. His testimony is undisputed that the old guard had been replaced by a new welded guard and it is acknowledged by the Secretary that the welded guard fully protected the tail roller. The fact that the old guard had remained in the vicinity of the tail roller leaning against the belt structure cannot be taken, under the circumstances, to mean that it was intended to be, or was needed as, a fixed guard. Within this framework of credible evidence I find that the item, which was formerly a guard, could not, at the time the citation was issued, be considered a “guard” within the meaning of 30 C.F.R. § 75.1722(c). At the same time the welded guard protecting the tail roller was securely in place as required by the cited standard. Indeed, if the welded guard was deemed inadequate then

a violation should properly have been charged under subsection (a) or (b) of the cited standard -- not subsection (c). Citation No. 7646334 must accordingly be vacated.

ORDER

Citation No. 7646334 is hereby vacated. Citation Nos. 7646256, 7646257, 7646265, 7646233 and 7646103 are hereby affirmed and Lodestar Energy Incorporated is hereby directed to pay civil penalties of \$55.00 for each violation within 40 days of the date of this decision. In addition, pursuant to the settlement agreement submitted at hearing, Lodestar Energy Incorporated is directed to pay civil penalties of \$11,353.00 within 40 days of the date of this decision.



Gary Melick
Administrative Law Judge

Distribution: (By Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 9, 2002

JOHN R. PETERSON,	:	DISCRIMINATION COMPLAINT
Complainant	:	
	:	Docket No. WEST 98-307-DM
v.	:	WE MD 98-04
	:	
SUNSHINE PRECIOUS METALS,	:	Sunshine Mine
INCORPORATED,	:	Mine ID 10-00089
Respondent	:	

DECISION

Appearances: John R. Peterson, Coeur D'Alene, Idaho, *pro se*;
Fred M. Gibler, Esq., John S. Simko, Esq., EVANS, KEANE, Kellogg, Idaho,
on behalf of Respondent.

Before: Judge Cetti

This case is before me upon the complaint of discrimination filed by John R. Peterson, pursuant to Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, the "Mine Act." In his original complaint filed with MSHA, Mr. Peterson states that on September 16, 1997, while employed as a Gypo contract miner by the Sunshine Mining Company, he was discharged for insubordination. His original complaint to MSHA states the date of the alleged discriminatory action occurred with his discharge on September 16, 1997.

Peterson was reinstated by Sunshine Mines to his position as a Gypo contract miner, working in the stope of his choice, in October 1998. This reinstatement was pursuant to an arbitration finding and award which Peterson's union pursued and obtained on Peterson's behalf. Pursuant to the Finding and Award and a later settlement agreement, Sunshine paid Peterson total back wages of \$52,748.80, less the standard government's required deductions. The settlement was approved by the arbitrator who heard the case and issued the findings and award. (Complaint Ex. 1)

The final event that occurred just prior to Peterson's discharge involved the abatement of Citation No. 4135775, received in evidence as Complainant's Exhibit 6. The citation was issued to Sunshine Mine on September 4, 1997, and required the ventilation problem described in the complaint to be corrected by September 7. The ventilation problem was caused by waste rock

that the miners placed in a drift that was the exhaust drift for an underground shop, which maintained and serviced three loaders that were kept at the shop. This shop was located in Peterson's stope, in an area close to where he was mining. For some unknown reason, the citation was not abated by the date specified in the citation. Peterson first learned of the citation from his mining partner Mr. McNutt. Peterson's shift boss, Stan Mayo, as the first step in the abatement of the citation, instructed Peterson to install a fiberglass ventilation tubing in a mined-out area at the mine so the miners could move the blocking waste rock out of the exhaust drift of the shop into the mined out area. Ventilation of the mined out area was necessary for the miners to perform this work. Peterson's shift boss, Stan Mayo, needed this ventilation tubing installed as the first step in abatement of the citation and instructed Peterson to do that installation the first thing on the morning of September 9. The shift was half over when the shift boss Stan Mayo came to where Peterson was working and found that the ventilation tubing had not been installed. Peterson explained why the installation of the ventilation tubing had not been done. One of the primary reasons was he did not know where to obtain the needed ventilation tubing. Apparently neither Stan Mayo nor mine management believed him nor accepted his excuses as valid reasons to delay the installation of the needed ventilation tubing.

Peterson was given a five-day letter required by the Union contract before discharging him for his refusal to follow what mine management considered a direct order. The arbitrator, however, disagreed, and in his finding and award stated that Sunshine Mine had to offer something more to establish a "deliberate refusal" than the "speculative argument" that Peterson "could have" or "should have" known where to get the Y ventilation tubing. The Arbitrator therefore issued the Finding and Award reinstating Peterson and making him economically whole for all loss resulting from his discharge. Peterson, upon receiving the arbitrator funding and award wrote to the undersigned as follows:

"Arbitrator James Reed has found in my favor, an unjust termination. He has awarded myself back wages at contract rate, my seniority, my choice of bids awarded while I was discharged, vacation, safety awards, holidays, medical and dental expenses while discharged."

Peterson was obviously pleased with the award but he still believes Sunshine should give him more back pay than the \$52,748.80 gross amount back wages that Sunshine mine paid him, pursuant to the finding to award and the later settlement approved by the Arbitrator Reed who heard his case. (Resp's Exhibit 1)

At the hearing under the Mine Act, once it became clear to Peterson that there could be no recovery under the "Mine Act" for additional compensation for pain and suffering, the major issue that concerned the parties was whether or not Peterson had already received under the Arbitrator's Finding and Award and the latter approved settlement, the correct amount of back pay for loss resulting from his discharge. It is Respondent's position that Peterson has already been paid everything he could receive even if he were successful in proving his discharge constituted a violation of Section 105(c) of the Mine Act. For the reason stated in more detail

below, I find Peterson has been paid in full for all economic losses that resulted from his discharge.

The union contract provides for the operator to set up an incentive pay system for Gypo contract miners where they can earn more than a day's pay. Under the incentive pay system, Sunshine Mine paid the Gypo miners additional wages called a "bonus" which was based on the number of feet the Gypo miner advanced the face of his respective stope. Under the system, the mine would periodically set up a so-called contract for each stope that was ready for mining and set the price per foot for each particular stope as a bonus. The mine would then set out for bidding by the Gypo miners each of the stope contracts management prepared. The gypo miners bid on the stope they wished to mine. Mine management awarded contracts at each stope to the Gypo miners on the basis of the miner's seniority. Before bidding on this contract for a stope, each miner would team up with another Gypo miner to form a team of two for the purpose of bidding on the contract for mining the stopes of their choice. The bidding was awarded on the basis of the seniority of the senior member of each team. At times there would be a second team of Gypo miners working on the same stope but on a different shift. Thus the pay of each of the four miners would be based on the number of feet the four miners advanced the face of the stope. This advance would be measured periodically.

Adding vacation days and holidays, there apparently was a potential maximum of 2,208 hours of pay that Peterson could have earned during the time between his discharge and his reinstatement.

At the hearing, the judge asked Mr. Peterson if the wages to be paid to Gypo contract miners were set forth somewhere in the Union contract. Peterson responded "No" and emphatically elaborated his answer as follows:

Peterson: No, it's not. That's on the company's discretion, totally whether they like you or not.

Judge: What do you mean by that, "... at the company's discretion"?

Peterson: That means that they pay by the foot. But they don't gotta pay you the same as anybody else. They pay whatever they want to whoever they want per foot. Then they can do things like give somebody a two-yard loader, which—and only give you a one-yard loader to muck with. But you're only gonna haul half the rock of a two-yard loader. If they give somebody better equipment, a jumbo, they're gonna get drug away faster that you are with a jack leg. And a jumbo has a ten-foot steel on it, and a jack leg that you're manhandling has only got a six-foot steel on it.

Sunshine Mine first paid Peterson \$40,048.80 for his loss of wages from the time between his discharge and his reinstatement. This amount was reduced by reimbursement of \$6,360.00 for Idaho State Unemployment, which he received during the time he was off. There were also the standard government wage deductions required by law, as set forth in Respondent's Ex. B. This figure of \$40,048.80 was based on Peterson's past performance and earnings during the 18 months he worked for Sunshine Mine as a Gypo contract miner before his discharge. Under the facts of this case, it was proper to use past earnings to compute Peterson's wage loss resulting from his discharge. Any other method of computing wage loss under the fact of this case would involve considerable unacceptable speculation. Peterson's average earnings prior to his discharge were 1.584311 times a regular day's pay, which at that time was \$10.45 per hour. Claimant's Ex. 3. His average pay was therefore approximately \$17.00 per hour, which resulted in the \$40,048.80 first paid to Peterson. However, the union, through intense negotiation with Respondent, was able to obtain an additional \$12,700.00 of back wages for Peterson. The \$12,700.00 was paid pursuant to settlement of his loss approved by the trial arbitrator. Peterson cashed each check of back wages he received from Sunshine, but before cashing each check, he wrote on the back of the check "partial payment." Peterson was paid a total of \$52,748.80 which was about \$25 per hour. Peterson contends he should have received the same amount of pay as his replacement. However, there was no replacement as such. The stope that Peterson now says he would have bid on if he were working for Sunshine at the time that contract was passed out for bidding was contracted out to a truly "independent contract company, the "Atlas Faucet Contracting Company," (Atlas Faucet), which had two employees who were paid by Atlas Faucet. There is no evidence as to what those two Atlas Faucet employees received in the way of wages. The only evidence available was the amount Sunshine paid the independent contractor, Atlas Faucet Contractors Company. Out of what Sunshine paid Atlas Faucet came not only the wages Faucet paid their two employees who did the mining but also the burden an employer carries such as workers' compensation, health insurance, holiday and vacation pay, and perhaps some profit.

Peterson had no medical or dental expenses.

On review of all the relevant evidence, I find that Respondent Sunshine Mine paid Peterson for his economic losses resulting from his discharge. He has been made "whole" economically. Sunshine Mine paid Peterson for all economic loss that could potentially be payable to him if he were to win his claim under the Mine Act.

Peterson stated several times that Sunshine management acknowledged that he was a productive worker. He then asks, "Why did they fire me?" It appears that a large part of the answer to his question can be found in Peterson's Exhibit 1, the favorable decision, findings, and award that his friend Lavern A. Milton, Subdistrict Director of United Steel Workers of America, was able to obtain for him in the arbitration proceeding. The arbitrator James C. Reed in his 11-page decision stated the following at page 2:

During his tenure at the mine, which was about one and one half years, he displayed a work disciplinary record that, to say the least, was not exemplary. Starting in January 1997 with an attendance problem. Again in June another safety violation. In September another attendance problem.

His personal record shows a history of twenty seven (27) days absent for various reasons. Counseling in May 1997 for harassment of other employees. Counseling in May 1977 for absenteeism. Counseling again for absenteeism in June, and at this session he was advised of the Company's employee assistance program. In June 1997, the Grievant was observed and tested for alcohol while on duty. He was removed from work for that shift. Later a grievance was filed for that incident, but it has nothing to do with this grievance concerning the Grievant's discharge. Again in August 1997 the Grievant was charged with another safety violation. In August of 1997, he was instructed to install a vent line and the work was not done two days later. Some of these items in the Grievant's record are merely notes to the file, and some are pending grievances, but the overall record are merely notes to the file, and some are pending grievances, but the overall record of this Grievant is still that of a less than good employee.

With respect to the employer's position , the Arbitrator on page 3 of his decision stated:

The Grievant was expected to install the vent line system as a part of his job as a contract miner. It is not unusual for a work assignment of this nature and the 52-pound "Y" is light enough for one person to install, and if the Grievant needed help, he could have asked the nipper to help him.

Instead of asking for help, the Grievant simply decided on his own to not install the vent line and instead installed rock bolts in the ceiling of S76A Stope, a task, which according to testimony by the Company, was not necessary at the time. The Grievant was not required to work by himself; he had plenty of help available to him.

The grievant was issued a corrective action memorandum for failing to perform work as instructed. The decision to terminate the Grievant was made after reviewing his entire work record, as indicated in the Collective Bargaining Agreement at Article 15.13, where if the Grievant in question has less than five years seniority, as in this case, his entire

work record may be considered when the Company is making a determination concerning discipline of the Grievant.

On page 4 the Arbitrator in his decision states:

There is also the matter of the Grievant's position on the incident changing over time. At step four of the grievance proceedings, he, or the Union, argued that he could not hang the vent line by himself. But at hearing, the reason changed to-he did not perform the task as directed because he could not find the "Y" fitting. This position of the Union's at hearing was contradicted by the nipper's testimony that he knew where the fitting was and would have assisted the Grievant if required.

The discharge of the Grievant was appropriate since he, without a justifiable reason, disobeyed a direct order given him by the Company, which is a basis for discipline under Section 23.3 of the CBA. In addition, given the Grievant's 18-month work history, discharge was the appropriate outcome.

In the end, the Grievant could very well have done the task assigned to him if he had elected to do it. The "Y" fitting did not weigh 90 pounds as the Union argued; it weighed 50 pounds. The Grievant was not required to work alone as he has stated, instead, there was help available from the nipper if he needed it. But according to the nipper's testimony, he was never asked to help.

The Grievant made excuses why he did not install the vent line. He testified that he couldn't find the fitting, yet his partner and nipper, who worked here less than a year, knew where it was. He said he had to install the rock bolts for safety reasons, yet the Union safety representative testified it was not necessary to install the rock bolts before installing the vent line. He also said he did not have a loader to assist him, yet the nipper and his partner both had loaders.

The Grievant's testimony was brief, but a few matters became evident. Despite Article XXVI of the CBA he felt he was more competent to manage the Mine than management. His work record shows over the short period of his employment he failed to follow orders on other occasions and felt that he was "above" the work he was required to do.

In the end, there is not much question that the Grievant is a lousy employee and eventually he will be terminated for something, but not this time. There is simply not enough evidence to determine that the Grievant deliberately refused to change the ventilation

system. It was a job that, according to testimony, would have taken him only about 20 to 30 minutes and it just doesn't make any sense that, unless he simply did not know where to find a "Y" he would have not installed it.

Peterson did participate in a meeting with management involving the potential disciplinary action against him for absenteeism. This occurred on June 18, about three months before he was discharged. At that meeting, Peterson asked for the telephone number and address of MSHA but no one responded to his question. However, he could have easily gotten this information from the safety department or from one of his fellow miners who was a representative of the union. I do not believe his request for MSHA's phone number and address constituted protected activity. Peterson, at no time, called MSHA nor did he discuss any problem with an MSHA representative before his discharge.

CONCLUSION

On review of the record, I find that there is no persuasive, credible evidence of protected activity prior to his discharge. Assuming argument that there was protected activity, there is no direct or indirect circumstantial evidence from which to draw any reasonable inference that the adverse action was motivated in whole or in part by protected activity. The complaint is **DISMISSED**.



August F. Cetti
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3577/FAX 303-844-5268

August 15, 2002

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2002-146-M
Petitioner	:	A.C. No. 42-02283-05506
	:	
v.	:	
	:	Rattlesnake Pit
DARWIN STRATTON & SON, INC.,	:	
Respondent	:	

DECISION

Before: Judge Manning

The Secretary of Labor filed a petition for assessment of civil penalty against Darwin Stratton & Son, Inc. ("Darwin Stratton") proposing a penalty of \$1,000 for Citation No. 6281686. The citation alleges a violation of section 103(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 813(a), for refusing to permit an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") to inspect the Rattlesnake Pit. When Darwin Stratton did not file an answer to the petition, as required by 29 C.F.R. § 2700.29, the Commission's chief administrative law judge issued an order to show cause to Darwin Stratton. In response to the order to show cause, Mr. Pat Morgan acting for Darwin Stratton filed a letter stating:

We do not feel that FMSHRC can be or will be fair and impartial in the hearing of Docket No. WEST 2002-146-M, A.C. No. 42-02283-05506 in regard to the CANCELED and Permanently Closed Mine ID No. 42-02283. The former alleged Rattlesnake [Pit] situs NEVER was a mine or pit and NEVER was under the jurisdiction of MSHA. Therefore, your March 19, 2002, ORDERED threat of default and penalty (punishment) continues the process of force and fear by FMSHRC, MSHA, and the Office of the Solicitor.

(emphasis in original). Darwin Stratton enclosed a number of documents, including a Motion for the Voluntary Recusal of the Honorable David Sam,¹ a memorandum in support of this recusal motion, and a copy of MSHA's Quarterly Employment Form for the first quarter of 2002 on which Morgan had stamped "CANCELED." The chief judge accepted this response to the order to show cause and the case was assigned to me.

Citation No. 6281686 was issued on November 8, 2000, by MSHA Inspector Stephen Wegner and alleges a violation as follows:

Pat Morgan, a consultant acting on Darwin Stratton & Son Inc.'s behalf, refused to allow an authorized representative to enter the mine for the purpose of conducting an inspection of the mine.

Mr. Morgan refused to acknowledge Judge Manning's October 3, 2000, decision stating that MSHA has jurisdiction to inspect the Rattlesnake Pit. Mr. Morgan felt that he had canceled all review commission action last July. Mr. Morgan was told that refusal to allow the inspection was in violation of the provisions of section 103(a) of the Mine Act.

In *Darwin Stratton & Son, Inc.*, 22 FMSHRC 1265 (Oct. 2000), I held that the Rattlesnake Pit is a mine subject to the jurisdiction of MSHA. In that case, Darwin Stratton requested a hearing on citations and orders issued at the Rattlesnake Pit. I set the case for hearing, at Darwin Stratton's request, but Darwin Stratton and Mr. Morgan refused all mail service from me and from the Office of the Solicitor. 22 FMSHRC 1269-70. No representative from Darwin Stratton appeared at the hearing held in Washington, Utah, on October 3, 2000.

Based on evidence presented by the Secretary at the hearing, I concluded that the Rattlesnake Pit was subject to the jurisdiction of MSHA at the time of the inspection in late April 2000. I based this determination, in part, on the fact that the wash plant at the facility was used to prepare excavated rock and that this rock was then fed into a hopper and conveyed to a single-deck screen to separate out oversized material. 22 FMSHRC 1267-69. The Mine Act defines a mine broadly to include "lands, excavations . . . structures, facilities, equipment, machines, tools, or other property . . . on the surface or underground, used in, or to be used in, or resulting from, the work of extracting minerals from their natural deposits, . . . or used in, or to be used in, the milling of such minerals, or the work of preparing . . . minerals . . ." 30

¹ The Secretary brought an action against Darwin Stratton in the United States District Court for the District of Utah seeking temporary and permanent injunctions against Darwin Stratton for refusing to allow MSHA inspectors to enter its facilities. Judge Sam sits on the District Court and I presume he has jurisdiction over the injunction actions.

U.S.C. § 802(h)(1). Thus, the fact that Darwin Stratton was, at a minimum, milling or preparing minerals at the site that had been extracted from their natural deposits, established MSHA jurisdiction. Stone, rock, gravel, and sand are “minerals” as that term is used in the Mine Act. *Richard E. Seiffert Resources*, 23 FMSHRC 426, 427 (April 2001) (ALJ). I also held that the sale of the prepared minerals entered or affected interstate commerce. 22 FMSHRC 1269. I entered similar findings with respect to Darwin Stratton’s Airport Pit in *Darwin Stratton & Son, Inc.*, 24 FMSHRC 403 (April 2002).

On May 17, 2002, I issued a prehearing order in the present case directing the parties to confer in an effort to settle the case. I also addressed the jurisdiction issue raised by Darwin Stratton and stated that if Darwin Stratton permanently closed the Rattlesnake Pit between April and November 8, 2000, MSHA jurisdiction may have terminated.

By letters dated June 28, and July 8, 2002, John Rainwater, counsel for the Secretary, advised me that he had made several unsuccessful attempts to contact Mr. Morgan to discuss the case. He also talked to people at Darwin Stratton’s office who advised him that Mr. Morgan would be available by phone in Darwin Stratton’s office on July 1, 2002. Mr. Rainwater was unable to reach Mr. Morgan and Mr. Morgan did not return any of his phone calls.

On July 16, 2002, I issued an order directing Darwin Stratton to advise me, in writing, whether it will appear at a hearing and present evidence on the jurisdictional issues. In his response, Mr. Morgan reiterated that Darwin Stratton canceled ID. No. 42-02283 and that MSHA officials have “first-hand knowledge” of this cancellation. Mr. Morgan stated that he previously notified me that Darwin Stratton was “waiving the prehearing order and request to a review on the CANCELED MINE ID No. 42-02283.” (emphasis in original).² With respect to settlement, Mr. Morgan stated that the jurisdiction issue must be resolved “in the District Court venue and, if necessary, even to the Supreme Court.” In the final paragraph, Mr. Morgan stated that “Respondent once again waives its request for a hearing by the FMSHRC due to the fact that it cannot be fair or impartial to the Respondent.” (emphasis in original).

Based on the statements contained in documents filed by Darwin Stratton in this case, I conclude that Darwin Stratton is no longer requesting a hearing. Under 29 C.F.R. § 2700.3(b)(4), Mr. Morgan is authorized to represent Darwin Stratton and he is the only person who has responded to the Commission’s orders in this case and the other cases involving Darwin Stratton. Consequently, I enter findings of fact and conclusions of law based on the record in this case and the record in previous cases before me involving the Rattlesnake Pit.

² Mr. Morgan attached a letter addressed to me, dated June 24, 2002, which states that Respondent has “decided to waive the prehearing order and proceed to resolve this whole matter in the District Court venue.” I do not recall seeing this letter but, because it does not contain a docket number, it may have been misfiled.

On April 21, 2000, an employee of Darwin Stratton was fatally injured at the Rattlesnake Pit when she became entangled in a moving conveyor-belt tail-pulley that was not guarded. MSHA conducted an investigation and issued a number of citations against Darwin Stratton. I held a hearing in that case on October 3, 2000, but no representative of Darwin Stratton appeared at the hearing. The Secretary presented evidence as to the nature of the operations at the Rattlesnake Pit. Based on that evidence, I concluded that the Rattlesnake Pit was a "coal or other mine" as that term is defined in section 3 of the Mine Act. 22 FMSHRC at 1267-70. I described the Rattlesnake Pit as follows:

The Rattlesnake Pit is a small sand and gravel mine owned and operated by Darwin Stratton near Hurricane, Utah, in Washington County. Sand and gravel is extracted from a dry stream bed, transported by truck to an adjacent wash plant, and stockpiled. The stockpiled material is fed into a hopper and conveyed to a single-deck screen where oversized material is separated. The sand is then fed into a screw classifier and mixed with water to remove unwanted material.

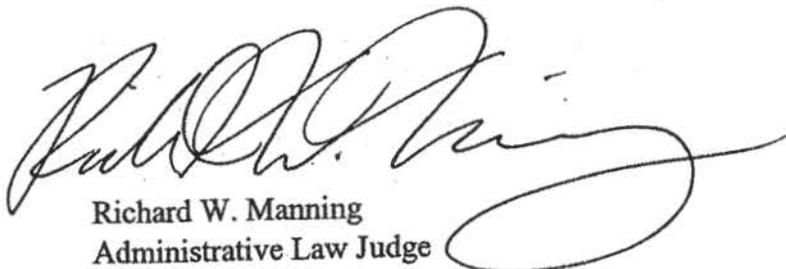
22 FMSHRC at 1267. In my prehearing order in the present case, I advised Darwin Stratton that if it permanently shut down the Rattlesnake Pit between April and November 2000, MSHA's jurisdiction may have ceased, but it waived its right to present evidence on this issue.

I conclude that the Rattlesnake Pit is a "coal or other mine" and that it is subject to the jurisdiction of the Secretary under section 4 of the Mine Act. Consequently, I find that Darwin Stratton violated section 103(a) of the Mine Act when it refused to allow an MSHA inspector onto its property at the Rattlesnake Pit.

Section 110(i) of the Mine Act sets out six criteria to be considered in determining an appropriate civil penalty for a violation of the Mine Act. The petition for penalty states that 27 citations were issued at the pit during the previous 24 months. Darwin Stratton is a small operator. The citation was not abated in good faith and section 104(b) Order No. 6281687 was issued. There has been no showing that the penalty assessed in this decision will have an adverse effect on Darwin Stratton's ability to continue in business. The violation was serious because it was reasonably likely that an inspection would have revealed hazardous conditions that needed correction. Darwin Stratton's negligence was high because it intentionally refused to allow the inspection in the face of a previous finding of jurisdiction. Darwin Stratton had not notified the local MSHA office that it closed the pit after April 2000 and it did not so advise Inspector Wegner. It simply stamped "Canceled" on MSHA documents to indicate that it was refusing MSHA jurisdiction. An operator cannot unilaterally nullify MSHA jurisdiction. Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess a penalty of \$1,000 for this violation.

ORDER

Accordingly, section 104(a) Citation No. 6281686 and section 104(b) Order No. 6281687 are **AFFIRMED** and Darwin Stratton & Son, Inc., is **ORDERED TO PAY** the Secretary of Labor the sum of \$1,000.00 within 40 days of the date of this decision.


Richard W. Manning
Administrative Law Judge

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RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1244 SPEER BOULEVARD #280
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August 22, 2002

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2001-608-DM
on behalf of RICHARD M. BUNDY	:	
Complainant	:	Bingham Canyon Mine
	:	
v.	:	Mine I.D. 42-00149
	:	
KENNECOTT UTAH COPPER CORP.,	:	
Respondent	:	

DECISION

Appearances: Gregory W. Tronson, Esq., and Jennifer A. Casey, Esq., Office of the Solicitor, U. S. Department of Labor, Denver, Colorado, for Complainant;
James M. Elegante, Esq., Kennecott Utah Copper Corp., Bingham Canyon, Utah, and Melissa H. Bailey, Esq., Ray, Quinney & Nebeker, Salt Lake City, Utah, for Respondent.

Before: Judge Manning

This case is before me on a complaint of discrimination brought by the Secretary of Labor on behalf of Richard M. Bundy against Kennecott Utah Copper Corporation (“Kennecott”) under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(c) (the “Mine Act”). The complaint alleges that Kennecott terminated Mr. Bundy from his employment in violation of section 105(c). An evidentiary hearing in this case was held in Salt Lake City, Utah, and the parties filed post-hearing briefs.

I. FINDINGS OF FACT

Kennecott is the operator of the Bingham Canyon Mine, a large open-pit copper mine in Salt Lake County, Utah. Mr. Bundy worked at the mine as a repair gang machinist from March 21, 2000, until he was terminated on March 21, 2001, after he refused to work overtime on the evening of March 15, 2001. He told his supervisor that he was too tired to work safely during the overtime shift and left the mine at 11:30 p.m. at the end of his regular shift.

At the time of Mr. Bundy's termination, the mine worked three shifts. Bundy worked the B shift, which started at 3 p.m. and ended at 11:30 p.m. His supervisor was Michael Ragsdale. As a repair gang machinist, Bundy helped repair and maintain electric shovels and drills at the mine. Mr. Bundy was suspended without pay on March 16, 2001. Following an investigation and a disciplinary hearing conducted by Kennecott on March 19, Bundy was terminated from his employment on March 21, 2001. (Ex. R-26).

The circumstances giving rise to his suspension and termination stem from events on March 15, 2001. Bundy arrived for work at the beginning of his shift and was directed by Ragsdale to help repair the No. 56 shovel (the "shovel"). The transmission for the shovel had been removed on the previous shift, but the crew on that shift could not remove the swing shaft. The transmission is connected to this swing shaft, which functions as a pinion to rotate the very large metal-toothed wheel under the superstructure of the shovel. As this wheel is turned, the deck of the shovel, the house containing the machinery and controls, as well as the crane for the shovel, rotate. The swing shaft is quite large and heavy. In theory, the swing shaft should simply fall out when the transmission is removed but, more often than not, the swing shaft has been deformed from use. A number of techniques are used to remove the swing shaft so that it can be replaced with a new one.

About five members of the B crew, including Bundy, were assigned to remove the swing shaft, which is in a small compartment under the deck of the shovel. The crew determined that the best way to remove this swing shaft was to weld blocks in this compartment and then maneuver the swing shaft free using hydraulic jacks. One end of the jack was placed against the block and then pressure was exerted against the swing shaft to loosen it. The compartment containing the swing shaft measures about 44 inches wide, 66 inches deep, and 34 inches high. The jack weighs about 30 pounds and is capable of exerting 30 tons of pressure.

Bundy testified that he spent more than three hours of his shift in this compartment with the hydraulic jack attempting to dislodge the swing shaft. He testified that he was the only member of his crew who worked in the swing shaft compartment for a substantial period of time. He had to sit in the cramped compartment as he worked. Although Bundy believes that he made some progress in loosening the swing shaft, the swing shaft was still in place at the end of the shift.

Bundy testified that by 11 p.m., he was very tired and was ready to go home. Ragsdale believed that he needed three B shift employees to work overtime on the C shift to remove the swing shaft and to perform other jobs that he wanted to complete before the start of the A shift the next morning. These overtime employees would work with the four members of the C shift.

The employees at the mine are represented by several unions. The repair gang machinists are represented by Local 568 of the International Association of Machinists and

Aerospace Workers (the "union"). There is a single collective bargaining agreement ("CBA") at the mine that applies to seven unions including this union. The CBA has specific procedures that Kennecott must follow when it seeks to have employees work overtime. As applied here, Kennecott must first seek volunteers for overtime, starting with those on the crew with the most seniority. If Kennecott cannot recruit a sufficient number of volunteers, it can force employees to work overtime. In such an instance, the company must start with the employee on the crew with the least seniority and work up the seniority list until it secures the number of overtime employees that it is seeking.

On the night of March 15, Ragsdale began informally soliciting volunteers to work overtime as the crew was beginning to wrap up its work at the shovel and at the other locations where crew members were working. After the crew had driven to the changing room at about 11 p.m., Ragsdale again sought volunteers. When no employees volunteered for overtime, he announced that he would have to force three employees to work overtime. The person at the bottom of the seniority list, Danny Turquoise, volunteered. The next eligible employee up from the bottom of the seniority list, Duane Barton, "volunteered" to work overtime after Ragsdale told him that he was going to force him to. The next employee up on the seniority list was Bundy. Ragsdale asked Bundy to work overtime. Bundy declined. Bundy testified that he believed that he was too tired to work safely and he believed that he would be placing himself and others at risk if he worked with heavy equipment and machinery during the C shift.

Ragsdale continued to press Bundy to work overtime. Bundy refused, saying on several occasions that he was "too tired and unsafe" to work overtime. Ragsdale continued to press Bundy to work overtime and Bundy continued to refuse. This dispute continued over a 15- to 20-minute period. Ragsdale had a number of other responsibilities that he had to tend to before 11:30 p.m. so the exchange between Ragsdale and Bundy was not continuous. During the shift, Ragsdale did not observe Bundy working in the compartment under the deck but saw him joking around with other employees and Bundy did not appear to be particularly tired to him.

Ragsdale advised Bundy that the company would have to make a determination as to whether Bundy should be excused from working overtime. Bundy then advised Ragsdale that he could not stay because he was having carpet installed in his home at 7 a.m. the next morning. Ragsdale told Bundy that he would be home in plenty of time for the carpet installers. When Ragsdale believed that they had reached an impasse, he went to his office and looked at the CBA to make sure that he was following the required procedures for forcing overtime on an employee and to review the procedure for resolving disputes. After reviewing the CBA, Ragsdale discussed the procedures for forcing overtime with the union representative on the shift, J. T. Timothy, to see if he was proceeding correctly. Mr. Timothy advised Ragsdale that he had the right to force Bundy to work overtime that night. Bundy did not seek union representation and he did not talk to Timothy about his rights.

Ragsdale approached Bundy one more time and told him that he could be forced to work overtime and that they would have to resolve their dispute and talk to a union representative. Bundy went to the time clock, punched out, and said "I punched out . . . I [am] on my own time now . . . I [am] going home . . . quit talking to me." (Tr. 38). As Bundy left, Ragsdale said that their dispute could not wait until the next day and, if he left, he would face disciplinary action. Mr. Bundy left the mine. After Bundy left, Ragsdale wrote up what is called a "Notice of Investigation and Hearing" under the CBA, which is commonly referred to as a "disciplinary ticket." He wrote the ticket because Bundy left the mine without permission. The next day, when Ragsdale advised Jerry Kinyon, the Field Maintenance Superintendent, what had happened on the B shift, Kinyon agreed that Ragsdale had followed the terms of the CBA.

Ragsdale, Danny Turquoise, and Duane Barton worked the C shift that night. Ragsdale does not ordinarily work on the C shift but he did so that night to make sure that the shovel was repaired. The C shift crew removed the swing shaft using a different method which did not require anyone to enter the frame of the shovel or to work in a tight space. Several individuals on the crew performed that task while others worked in the warehouse and obtained supplies from the shop.

On March 16, 2001, after Bundy arrived at the start of the B shift, Kinyon gave Bundy the disciplinary ticket. A representative from the union was present at this meeting in Kinyon's office to represent Bundy, but Bundy refused representation and he signed a waiver releasing the union from its obligations to represent him.¹ Bundy was suspended until a disciplinary hearing was held on March 19, 2001. Bundy, Ragsdale, Kinyon, two union representatives, and a Kennecott human resources department representative were present. Although Bundy refused union representation, the union officials wanted to attend because the outcome of the hearing could have an impact on future cases involving union members. At this hearing, Ragsdale explained what happened and Bundy responded by defending his actions. After reviewing Kennecott's Code of Conduct and the CBA, Kinyon recommended that Bundy be dismissed from his employment at Kennecott. Kinyon's decision was based, in part, on Bundy's violation of the second paragraph of the Code of Conduct, which covers the "[f]ailure or refusal to comply with instructions, perform work assignments, or complete responsibility of the job." (Ex. R-20).

II. MOTION TO EXCLUDE TESTIMONY OF TERRY HURST AND DAVID PARSONS

¹ Utah is a "right-to-work" state. Bundy is not a member of the union. At all times pertinent in this case, whenever Bundy was asked by Kennecott officials if he wanted a union representative, Bundy declined and, when requested by the union, he signed a release relieving the union of its obligation to represent him.

At the hearing, the Secretary called Terry Hurst and David Parsons as witnesses. Kennecott objected to their testimony because the Secretary did not list them as witnesses on her witness list provided in response to my Amended Notice of Hearing issued on January 7, 2002. The Secretary also did not list these individuals as potential witnesses in her response to Kennecott's interrogatories. In response, the Secretary maintains that these witnesses were informants protected under 29 C.F.R. § 2700.61 ("Commission Rule 61") and that she was not required to disclose their names until two days before the hearing under Commission Rule 62. At the hearing, I allowed the Secretary to present these witnesses and asked the parties to brief this issue. I stated that if I granted Kennecott's motion, the testimony of these witnesses would be stricken.

Terry Hurst was employed by Kennecott on several occasions. His most recent employment by Kennecott was between January 1998 and June 22, 2001. He worked as a repair gang machinist. He voluntarily left Kennecott in June 2001 to take a job in the aircraft industry at Hill Field Air Force Base. David Parsons worked at Kennecott from January 25, 2000, until February 3, 2002, as a repair gang mechanist. At the time of the hearing, he was living in Garland, Texas, and was looking for work with Ingersoll-Rand and other mining-related companies. Both of these men were working on the same shift as Bundy on March 15, 2001.

The Secretary maintains that, although Hurst and Parsons were no longer employed by Kennecott at the time of the hearing, "they both worked at the Bingham Canyon Mine in March 2001 when Bundy was terminated from his position and [they] provided confidential information to MSHA regarding Bundy's protected activity and subsequent termination." (S. Br. 7). She further argues that "the possibility for retaliation for communicating with MSHA lingers for Hurst and Parsons in the same manner as it would for current employees working for Kennecott." *Id.* The Secretary contends that these witnesses should be afforded the same protection from disclosure as current Kennecott employees. In making this argument, the Secretary relies on case law on the informant's privilege, including *Bright Coal Co.*, 6 FMSHRC 2520 (Nov. 1984).

Kennecott contends that the Secretary was obligated to provide it with the names of Hurst and Parsons because neither of these individuals are miners. It argues that Commission Rules 61 and 62 only apply to individuals "currently employed in mining operations." (K. Br. 19). The term "miner" is defined in section 3 of the Mine Act as "any individual working in a coal or other mine." 30 U.S.C. § 802. Kennecott argues that there was no potential for intimidation or retaliation against Hurst and Parsons and that Rules 61 and 62 do not apply to them. The Secretary violated the Commission's rules when it failed to identify Hurst and Parsons as witnesses and, consequently, their testimony should be stricken. In addition, Kennecott maintains that the Secretary failed to provide the names of these witnesses two days prior to the start of the hearing as required by Rule 62.

The Commission has two related procedural rules that govern the disclosure of the identity of informants and witnesses who are miners. Rule 61 provides that a judge shall not, except in extraordinary circumstances, order a person to disclose to an operator or his agent the name of an informant who is a miner. In broadly interpreting the informant's privilege, the Commission noted that the language of the Mine Act and its legislative history "reflect congressional concern about the possibility of retaliation against miners who participate in enforcement of the Act." *Bright*, 6 FMSHRC at 2524. The Commission went on to state:

We believe that these expressions of congressional concern for protecting the identity of miners who contact the Secretary regarding violations of the Act, and otherwise protecting miners who participate in enforcement of the Act, underscore the need for the recognition and proper application of the informer's privilege in Mine Act proceedings. Therefore, in order to maximize the lines of communication with the Secretary concerning violations of the Mine Act, we hold that a person's status as an informer is not dependent on whether that person is an employee of a mine operator.

Id. The Commission discussed this issue because the operator in that case had ceased all operations and it was not clear whether the informants were still employed in the mining industry. Consequently, an individual who was an eyewitness to events that may be in violation of section 105(c) of the Mine Act may be an informant notwithstanding the fact that he is no longer employed by a mine operator. In such an instance, that individual's identity would be protected from discovery by the informant's privilege. *See also Asarco, Inc.*, 12 FMSHRC 2548, 2552-57 (Dec. 1990); 14 FMSHRC 1323, 1327-28 (Aug. 1992). The Secretary maintains that Hurst and Parsons were informants protected by this privilege.

Although the language of Rule 61 can be interpreted to protect the identity "of an informant who is a miner" and not informants who are no longer employed by a mine operator, the Commission has not adopted this interpretation. It has consistently interpreted the informant's privilege broadly. The Commission has not implied that Rule 61² is to be construed more narrowly than or inconsistently with its broad interpretation of the informant's

² When the Commission's cases on the informant's privilege were issued, the provisions of Rules 61 and 62 were contained in Rule 59. *See Bright*, 6 FMSHRC at 2523 n 2. When the Commission revised its rules, it split Rule 59 into two rules. In the preamble, the Commission noted that a "miner informant may also be a witness in Commission proceedings" and stated that a judge shall not disclose under Rule 62 whether any miner witnesses "were also informants." 58 *Fed. Reg.* 12158, 12163 (March 3, 1993).

privilege. In any event, I am prohibited by Commission case law from revealing the identity of informants who are not miners.³

Rule 62 provides that a judge shall not, “until 2 days before a hearing, disclose or order a person to disclose to an operator or his agent the name of a miner . . . whom a party expects to summon or call as a witness.” This rule applies to all miners who are called as witnesses, including miners who are not informants. How this two-day rule should be applied to witnesses who are not informants and who are no longer employed in the mining industry is not before me. What is before me is how this rule should be interpreted for witnesses who are informants but who are no longer employees of a mine operator. As discussed above, a judge is prohibited from ordering the Secretary to disclose the identify of an informant. I hold that Rule 62 is an exception to this prohibition with respect to informants who are to be called as witnesses. If the Secretary intends to call an informant as a witness, she must identify him two days prior to the hearing. If she does not intend to call an informer as a witness, his identity need not ever be revealed. Given the Commission’s interpretation of the informant’s privilege, discussed above, Rule 62 must also apply to individuals who are not employed in the mining industry at the time of the hearing.⁴

I find that Hurst and Parsons were informants as that term has been interpreted by the Commission and that the Secretary was within her rights to protect their identity. As a consequence, for the reasons set forth above, the Secretary was not required to reveal their identity until two days before the hearing under Rule 62. My holding in this case is consistent with my holdings in two previous cases. *Mobile Premix Sand & Gravel Co.* 19 FMSHRC 220 (Jan. 1997); *Basin Resources, Inc.*, 18 FMSHRC 1125 (June 1996).⁵

³ Because the informant’s privilege is a qualified one, if the judge determines that the privilege applies, he must perform a “balancing test to determine whether the respondent’s need for the information is greater that the Secretary’s need to maintain the privilege to protect the public interest.” *Bright*, 6 FMSHRC at 2526. Because of the manner in which the issue arose, the balancing test does not apply.

⁴ If I interpret the word “miner” in Rule 62 to include only individuals who are employed by operators at the time of the hearing, then the Secretary would not be required to reveal the identity of “non-miner” witnesses who are informants. An informant’s identity would be protected by the informant’s privilege and Rule 62 would not apply because the informant is not a “miner.” I reject this interpretation.

⁵ In making its arguments, Kennecott relies on orders of Commission Judge Feldman. *Laurel Run Mining Co.*, 19 FMSHRC 1229 (June 1997), 19 FMSHRC 1607 (Sept. 1997). That case arose out of a different set of facts but, to the extent that Judge Feldman’s holding is inconsistent with the holding in this case, I respectfully disagree with his reasoning.

Kennecott argues that the Secretary did not comply with Rule 62, in any event, because she provided it with the names of these witnesses less than two days prior to the start of the hearing. It is undisputed that the Secretary advised Kennecott that she was calling Hurst and Parsons as witnesses on Saturday, March 16, 2002, at about 11 a.m. (S. Br. Ex. C). The hearing commenced at 9 a.m. on Tuesday, March 19, 2002. Kennecott points to Commission Rule 8, which states that when a prescribed time period is less than seven days, "intermediate Saturdays, Sundays, and federal holidays shall be excluded in the computation." As a consequence, Kennecott maintains that the Secretary was obligated to provide the names of these witnesses at 9 a.m. on Friday, March 15, 2002.

The Secretary does not dispute Kennecott's argument that she was required to provide the names of Hurst and Parsons on the morning of Friday, March 15. She argues that counsel for the Secretary misinterpreted the Commission's rules. She contends, however, that the sanction of striking the testimony of these two witnesses is too extreme. She maintains that I should take into consideration the reason for the delay and whether the delay prejudiced Kennecott. The Secretary argues that Kennecott failed to establish actual prejudice caused by the delay. She points to the fact that Kennecott engaged in active discovery but did not take any depositions in this case, Kennecott had knowledge that Hurst and Parsons were on Bundy's crew and had informally interviewed them about the facts in this case. The Secretary contends that Kennecott "obtained detailed, factual information concerning Bundy's allegations" before this case was initiated. (S. Br. 11). The Secretary maintains that if Kennecott believes that it was prejudiced by the delay, it could have requested a one-day continuance of the hearing. Finally, the Secretary believes that Bundy's interests should not be compromised by the failure of the government to meet its time obligations.

I hold that the Secretary was obligated to disclose the names of these informant witnesses at or about 9 a.m. on March 15. Under the facts of this case, however, I find that Kennecott did not suffer any prejudice by the Secretary's short delay. The testimony of Hurst and Parsons was consistent with the testimony of the other witnesses and consistent with what they told Kinyon when he interviewed them on March 26, 2001. (Ex. R-27). Consequently, the motion to strike the testimony of Hurst and Parsons is **DENIED**.

III. SUMMARY OF THE PARTIES' ARGUMENT

A. Secretary of Labor

The Secretary contends that Bundy had a reasonable, good faith belief that he was so tired that if he continued working on the shovel he could injure himself or others. A miner who refuses to work is not required to establish that an actual hazard exists, but he must show that he had an "honest belief that a hazard exists." *Robinette*, 3 FMSHRC at 810. Nevertheless, the miner must attempt to communicate his safety concerns to the operator. *Sec'y of Labor on behalf of Dunmier v. Northern Coal Co.*, 4 FMSHRC 126, 133 (Feb. 1982).

The Secretary maintains that when Bundy told Ragsdale that he was too tired to work safely, he had a reasonable good faith belief that he would put himself and others in danger if he continued working on the shovel. The Secretary argues that his refusal to work beyond his normal work shift was protected activity under section 105(c) of the Act. Because Kennecott discharged Mr. Bundy as a direct result of this work refusal, it violated section 105(c). The Secretary relies, in part, on a decision of former Commission Judge Koutras in which he held that a refusal of a miner to work overtime because he was too tired is protected activity. *James Eldridge v. Sunfire Coal Co.*, 5 FMSHRC 408 (March 1983). The Secretary also relies on the Commission's decision in *Sec'y of Labor on behalf of Bowling v. Mountain Top Trucking Co.*, 21 FMSHRC 265 (March 1999) in which the Commission held that a work refusal based on fatigue as a result of excessive work hours was protected under the Mine Act.

The Secretary rests on the fact that Bundy "conducted uniquely difficult work" on the B shift on March 15. (S. Br. 15). He was working in a small compartment in the frame of the shovel using hydraulic jacks weighing about 30 pounds to exert pressure on the swing shaft. Because the compartment was dark and dusty, he used a flashlight to see. Bundy testified that he worked in this compartment for about 3½ hours and that it was "back-breaking" work. (Tr. 20). Bundy testified that he was mentally and physically exhausted at the end of his regular shift.

The Secretary also states that Kennecott did not tell Bundy what overtime work he would be performing during the C shift. Consequently, he assumed that he would be "conducting the same back-breaking work" that he performed on the B shift. Ragsdale told the crew that he was seeking miners to work overtime because the swing shaft had not been removed on the B shift. Bundy honestly believed that he could not safely continue to remove the swing shaft on the next shift. The Secretary maintains that Bundy communicated his safety concerns to Ragsdale on several occasions. Despite Bundy's repeated attempts to communicate his safety concerns, Ragsdale did nothing to address these issues or to ease his fears. The Secretary also believes that Ragsdale expressed animus towards Bundy's safety concerns. Finally, the Secretary contends that Bundy was terminated as a direct result of his work refusal.

B. Kennecott

Kennecott maintains that the record in this case does not support the Secretary's position that Bundy entertained a reasonable, good faith belief that a hazard existed at the time he refused to work overtime. Kennecott believes that Bundy raised the safety issue to mask his real reason for his work refusal. He simply did not want to work another four hours but wanted to go home. Bundy offered a string of excuses to get out of his obligation under CBA to work overtime. Thus, Kennecott contends that the safety concern was a pretextual excuse rather than one made in good faith. Kennecott points to the fact that, in a conversation with Kinyon, Bundy stated that Kennecott "was missing the boat" by not having 12-hour shifts. (Tr. 375-76).

Kennecott contends that Bundy's refusal to work overtime and his subsequent decision to walk off the job was also unreasonable. Kennecott maintains that Ragsdale tried to keep Bundy from leaving the mine so that Bundy and the company could follow the dispute resolution process in Article 18J of the CBA. Because Bundy is not a member of the union, he refused to comply with the requirements of the CBA. Kennecott states that if Bundy had stayed at the mine, he would not have been required to work around the shovel or perform any other heavy work while the parties attempted to resolve the issue under Article 18J and he would have been compensated for this time. Thus, even if Bundy's safety concern was initially reasonable, it became unreasonable, and therefore unprotected, when he refused to allow the company to follow the procedures set forth in the CBA to resolve the issue. If Bundy was concerned about safety, he would have stayed at the mine because he would not have been required to place himself in a position where he could be injured. As a consequence, Bundy's testimony was not credible as further evidenced by the fact that he told Ragsdale that he was having carpet laid at his home at 7 a.m., which Bundy now admits was not true.

Even if Bundy's work refusal was protected, the Secretary failed to establish that his dismissal was motivated in any part by his protected activity. Although Kennecott had knowledge of Bundy's safety concerns, the company never had a chance to address them because Bundy abruptly left the mine. As a consequence, Kennecott was never given the opportunity to make a determination whether Bundy was too tired to work safely. There is no evidence in the record that Kennecott has any animus towards work refusals due to safety concerns. Bundy was terminated from his employment, after a hearing on the merits, because he refused to stay at the mine to have the matter resolved under the procedures set forth in the CBA.

IV. DISCUSSION WITH FURTHER FINDINGS AND CONCLUSIONS OF LAW

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Mine Act. The purpose of the protection is to encourage miners "to play an active part in the enforcement of the [Mine] Act" recognizing that, "if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation." S. Rep. No. 181, 95th Cong., 1st Sess. 35 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 623 (1978).

A miner alleging discrimination under the Mine Act establishes a *prima facie* case of prohibited discrimination by proving that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-800 (October 1980), *rev'd on other grounds*, 663 F.2d 1211 (3d. Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981). The mine operator may rebut the *prima facie* case by showing 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 mine operator cannot rebut the *prima facie* case in this manner, it nevertheless may defend 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.*; *Robinette*, 3 FMSHRC at 817-18; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987).

In a discrimination case involving an alleged work refusal, the complainant is not required to establish that a hazard actually existed. The complainant must show that his work refusal was based on his reasonable, good faith belief that a hazard exists. To meet this burden of proof, the Secretary must establish that Mr. Bundy's belief that he could not continue to work safely was reasonable, that it was made in good faith, and that he at least attempted to communicate his belief that he could not continue to work safely to a representative of Kennecott. *Sec'y of Labor on behalf of Dunmire v. Northern Coal Co.*, 4 FMSHRC 126, 133 (Feb. 1982). The "perception of the hazard must be viewed from the miner's perspective at the time of the work refusal." *Gilbert v. FMSHRC*, 866 F. 2d 1433, 1439 (D.C. Cir 1989).

I find that Bundy acted in good faith when he told Ragsdale that he was too tired to work safely. "Good faith belief simply means honest belief that a hazard exists." *Robinette*, 3 FMSHRC at 810. I find that the preponderance of the evidence establishes that Bundy honestly believed that he was too tired to continue working safely with heavy equipment. At first he did not give Ragsdale any reason why he did not want to work overtime. He raised the safety issue once they reached the change room. When that failed, he told Ragsdale that people were coming to install new carpets in his house at 7 a.m. the next morning. As a consequence, Kennecott maintains that the Secretary did not establish that Bundy was acting in good faith when he raised safety issues. Kennecott states that his lack of good faith is underscored by the fact that he told Kinyon the next day that Kennecott should institute 12-hour shifts. Kennecott also argues that I should not credit Bundy's testimony because, in order to obtain unemployment benefits, he told the hearing officer at the benefits hearing, while under oath, that he did not have carpeting installed the next day. (Tr. 51-52, 83-84). Kennecott also points to the fact that Bundy's statements about having carpet installed has changed several times and that his testimony at the hearing in this case was also inconsistent on this issue. (K. Br. 29-30; Tr. 49, 82).

Although Bundy's lack of candor is troubling, I find that his testimony at the hearing as to why he raised the carpet issue with Ragsdale to be credible. He testified that he did not need to be home when the carpet was installed and that he told Ragsdale about the carpet installers in the hope that Ragsdale "would let me go home." (Tr. 50). Bundy testified that he did not want to work overtime because he felt that he was too tired to work safely, but he raised the carpet issue thinking that perhaps Ragsdale would accept that excuse, since he did not believe that he was getting anywhere with the safety issue. I give Bundy the benefit of the doubt on this issue.

The closer question is whether Bundy's safety concerns were reasonable. The Secretary contends that Bundy's safety concerns were reasonable because he had been working with heavy equipment for at least three hours in a very small, dark compartment under the deck of the shovel. Bundy assumed that he would be doing the same "back-breaking" work during overtime because the swing shaft had not been removed from the shovel. (Tr. 93). Ragsdale told the crew that he needed three individuals to work overtime so that the repair work on the shovel could be completed. At the hearing in this case, Bundy stated that he was concerned that "if you are not mentally and physically able to work, in a split second you can get crushed, maimed, or even kill yourself or a fellow coworker." (Tr. 40). The Secretary contends that the reasonableness of Bundy's concerns is emphasized by that fact he had worked about 300 overtime hours during the previous year thereby demonstrating that he was not someone who evaded work responsibilities. Finally, the Secretary argues that Bundy's safety concerns were clearly communicated to his supervisor, Ragsdale.

Kennecott argues that Bundy was not being reasonable on the evening of March 15. It maintains that it terminated Bundy for walking off the job, not for raising safety issues. He did not know what work he would be required to perform during the C shift and the Mine Act does not regulate working hours or allow miners to refuse to perform work that does not present any particular hazards. Moreover, even assuming that Bundy had legitimate safety concerns, he refused to stay at the mine so that the matter could be handled under the dispute resolution provision in the CBA. Kennecott contends that Ragsdale "worked to convince Bundy to follow the dispute resolution procedure of Article 18J of the CBA to make a determination as to whether a safety hazard existed." (K. Br. 27; Tr. 254). Bundy's refusal to submit to this procedure because he was not a member of the union was unreasonable. Kennecott contends that Bundy would not have had to perform any work while the matter was being resolved. As a consequence, if Bundy had stayed at the mine, as instructed by Ragsdale, he would not have been exposed to any safety hazards.

Under the appropriate circumstances, I hold that a miner has the right to refuse to perform a job assignment if he is too tired to safely conduct the work. Former Commission Judge Koutras held that a miner is engaged in protected activity when he refused to work overtime because he was "too tired and exhausted" to continue extracting pillars in a coal mine. *Eldridge*, at 464. Commission Judge Feldman held that miners, who drive large multi-ton haul trucks, had the right to refuse to continue driving their vehicles because of fatigue in the face of the long hours that they had worked during the preceding weeks driving these trucks over mountainous terrain on narrow and winding roads. *Sec'y on behalf of Bowling v. Mountain Top Trucking Co.*, 19 FMSHRC 166 (Jan 1997); *aff'd on this issue* 21 FMSHRC 265, 274 (March 1999).

I find, however, that Complainant did not establish that Bundy's refusal to work overtime on the night of March 15, 2001, was protected activity under section 105(c) of the Mine Act because his refusal was not reasonable at the time he left the mine. Bundy's initial concern that he was too tired to continue trying to remove the swing shaft was reasonable, but

his refusal to stay at the mine until the matter was resolved or until he was assigned work that he considered to be hazardous considering his fatigued state was not reasonable. In reaching this conclusion, I have considered the facts from the perspective of Mr. Bundy at the time of his work refusal.

First, it was not reasonable for Bundy to assume that he would be required to continue the “back-breaking” job of attempting to remove the swing shaft from inside the compartment under the deck for the shovel. Bundy was never assigned to perform that task by management. Bundy undertook to be the employee on the B shift to work in the compartment on his own. He could have asked another employee to take over that work during overtime, or asked Ragsdale to assign him a different, less demanding task. Several of the employees who worked overtime performed tasks that did not involve working with heavy equipment or working in areas that presented a hazard. Indeed, Mr. Herbert, who worked the C shift that night, testified that he told Ragsdale that overtime employees would not be needed that night. (Tr. 181-83). Bundy had no reasonable basis to conclude that he would be forced to continue working in the compartment under the deck of the shovel. His refusal to work was too anticipatory to be afforded protection. In contrast, the miners who refused to work in the *Eldridge* and *Bowling* cases had been assigned to complete specific jobs. Mr. Eldridge was told that he would be pulling pillars until the job was completed. The miners in *Bowling* were truck drivers who would be required to continue driving their haul-trucks over narrow maintain roads. If Bundy had stayed at the mine and Ragsdale required him to work in or around heavy equipment or put him in a dangerous position, taking into consideration his fatigued state, Bundy would have had a statutory right to refuse to perform those tasks. Instead, Bundy left the mine at the end of his shift despite requests from Ragsdale to stay so that the matter could be discussed and resolved.

Complainant emphasizes the fact that Bundy raised the safety issue in the context of whether he could be required by Kennecott to work overtime. The Mine Act does not regulate the working hours of miners. Thus, the issue is whether Bundy had a reasonable belief that he could not safely perform an assigned task because of his fatigued state, irrespective of the time in which he raised the issue. A miner who is mentally and physically exhausted may reasonably believe that he cannot safely perform a specific task in the middle of his shift, particularly if the shift is longer than eight hours. In such an instance, his refusal may constitute protected activity. On the other hand, a miner who does not know what task he will be required to perform cannot refuse to perform any work because he is fatigued.⁶ It is important to understand that there has been no showing that Bundy was so tired that he could not do any productive work. Complainant’s case was premised on the assumption that Bundy

⁶ Situations may arise where a miner is so exhausted that he cannot perform any productive work. There has been no showing that Bundy was in such a condition. Some of the miners who worked on the C shift that night performed work that was not arduous and did not involve the use of heavy equipment.

would be required to perform a task that was too demanding for him to safely perform. Bundy assumed, without justification, that he would be forced to work in the compartment of the shovel doing the same work he did during the B shift. Although Bundy stated that he was also mentally tired, which could have clouded his thinking, he did not wait to see what job he was assigned. He also did not attempt to negotiate with Ragsdale to get an easier job assignment. Bundy only told Ragsdale that he could not be forced to work overtime because he was too tired.

Mr. Timothy was the union representative on the B shift that evening. Any hourly worker, including a worker who is not a member of the union, has the right to talk to the representative about his rights and to request representation. Ragsdale asked Bundy if he wanted to talk to Timothy. Bundy refused by saying that he had no use for unions and that the union could not help him. Ragsdale talked to Timothy, but only in the context of making sure the union did not dispute his right to force Bundy to work overtime. It is not clear whether Timothy understood the nature of Bundy's refusal but he advised Ragsdale that he could force Bundy to work overtime under the CBA.

Complainant argues that Kennecott failed to notify Bundy of his rights under section 18J of the CBA. It is clear that Bundy was advised of his safety rights and his rights under the CBA at the time of his orientation when he was hired by Kennecott. As a general matter, an employer is not required to offer its interpretation of a union contract to its employees and in some instances an employer would violate the National Labor Relations Act if it does so. More importantly, it is clear that Bundy was well aware of his right to request union representation. It was not necessary for Bundy to understand all of the nuances of the CBA because he could ask a union representative. Union representative Timothy was available to Bundy but he waived his right to seek his representation or his advice. (Tr. 284).

Section 18J of the CBA, "Disputes Resolution," establishes a step-by-step procedure that the company and union will follow when an employee "believes an unsafe condition exists which is beyond the normal hazards inherent in the operation which involves an immediate danger of injury to his person . . ." (Ex. R-6). Under this procedure, the employee notifies his immediate supervisor when he believes that such a condition exists. If the supervisor determines that an immediate danger of injury does not exist, the employee may request union representation. If the union representative and the supervisor cannot reach an agreement, the matter proceeds to subsequent steps which involves calling in higher levels of management, calling in company and union safety officials and, in certain instances, calling in medical personnel. This procedure has been used in similar situations such as when miners ask to leave their shift early because they feel tired or sick.

I credit the testimony of Kennecott witnesses that the company would have called in those people necessary to resolve the dispute between Ragsdale and Bundy on the night of March 15. If Bundy had remained at the mine, he would not have been required to work until the matter was resolved, but he would have been paid for his time. Because Bundy refused to

discuss the matter with Timothy and he left without Ragsdale's permission, the dispute resolution procedures were never implemented. Complainant faults Ragsdale because he did not lay out this procedure in detail for Bundy before he left. As stated above, Mr. Timothy was available to assist Bundy. Ragsdale testified that Bundy told him that he did not need the union's help and that he could handle the matter on his own. (Tr. 254). It must also be understood that Ragsdale had to tend to many other matters between 11:10 and 11:30 that night, including lining up the oncoming crew to give them their assignments and advising that crew's leadman of the status of the work to be completed. It was unreasonable for Bundy to insist that Ragsdale determine whether he should be excused from working overtime during this 20-minute period. When Ragsdale kept talking about it, Bundy told him to "quit talking to me." (Tr. 38).

Throughout this proceeding Bundy maintains the he was in the best position to know whether he was too tired to work safely. The implication is that once Bundy told Ragsdale that he was too tired to work safely, he should have been excused from working overtime. Given the subjective nature of such a claim, it is reasonable for an employer to want to evaluate such a claim. When an employee asks to be excused from working at the Bingham Canyon Mine because he is sick or exhausted, Kennecott sends him to its on-site medical clinic for an examination. (Tr. 118-19, 155). In at least one instance, an employee who asked to be excused from working overtime because he was not feeling well was sent home after he was examined by clinic personnel. If the clinic is closed, an EMT is available to examine the employee. It is impossible to know how Mr. Bundy's situation would have been resolved had he remained at the mine. I find that because Bundy left the mine before he was given a work assignment and before Kennecott was given the opportunity to review his claim that he was too tired to work safely, his refusal to remain at the mine for overtime was not reasonable and was not protected by section 105(c) of the Mine Act.

When "a miner expresses a reasonable, good faith fear in a hazard, the operator has a corresponding obligation to address the perceived danger." *Gilbert*, 866 F.2d at 1440. In *Gilbert*, a miner raised concerns about the condition of a roof in a mine. Although the miner had not been told that he was going to be working in the same area, he left the mine after he came to work the next morning because of his continued concerns about the condition of the roof. When he inquired about the roof that morning, he was told that it was "none of his concern". *Id.* After reviewing the events leading up to his work refusal, the court held that the Commission's conclusion that he could not have "entertained a reasonable or good faith belief that he would be required to work in a hazardous [area]" was not supported by the record. The court remanded the case to determine "whether management addressed [the miner's safety] concerns in a way that his fears reasonably should have been quelled." *Id.* at 1441.

The facts in this case differ significantly from the facts in *Gilbert*. In *Gilbert*, the miner had a reasonable, good faith belief that he would be required to work under a hazardous roof. In the present case, none of the conditions at the mine presented a hazard that concerned Bundy. His safety concern was that, because he was tired from working under the deck of the

shovel for three hours during his regular shift, he could not continue to safely perform that task or another arduous task without jeopardizing his safety and the safety of others. In *Gilbert*, the miner was concerned that management had not done enough to determine the extent of the roof control problem and had not taken sufficient steps to secure the roof. In this case, by leaving the mine, Bundy prevented management from making a determination whether he was indeed too tired to work safely. Thus, the only option for Kennecott was to take Bundy at his word, allow him to go home, and force the next person up the seniority list to work overtime.

I credit the testimony of Ragsdale that he told Bundy that they would have to resolve their dispute that night and that he would be disciplined if he left at the end of his shift. (Tr. 253-55). Although these statements did not address Bundy's concerns about his fatigued state, it is clear that Bundy was not going to be asked to work under the deck of the shovel until his concerns were discussed further. It appears that Bundy did not particularly like Ragsdale and did not completely trust him. But given the nature of Bundy's safety concern, it was incumbent on him to remain at the mine until Kennecott could evaluate his fitness to work. Thus, Bundy's initial concern that Ragsdale would make him get right back into the compartment under the shovel or perform other arduous work "reasonably should have been quelled," at least enough for him to stay at the mine to see if Ragsdale was acting in good faith. It was not reasonable for Bundy to leave before the dispute was resolved or before he was assigned a task that he believed he could not safely perform. It is important to remember that Ragsdale had not required Bundy to work under the deck of the shovel during the B shift, so Bundy's continuing concern that he would be forced to perform such work during overtime was illogical and unreasonable.

In determining whether a mine operator's adverse action was motivated by the miner's protected activity, the judge must bear in mind that "direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect." *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (November 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir 1983). "Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence." *Id.* (citation omitted). In *Chacon*, the Commission listed some of the more common circumstantial indicia of discriminatory intent:

(1) knowledge of the protected activity; (2) hostility or animus towards the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant. *See also Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 530 (April 1991).

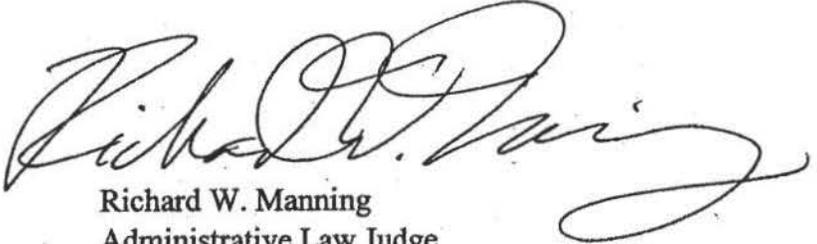
In applying this test to the present case, it is clear that Kennecott had knowledge of the protected activity and that there was a coincidence in time between the protected activity and the adverse action. Any hostility exhibited by Ragsdale concerned Bundy's refusal to work overtime and to stay at the mine to resolve the matter. There has been no credible showing that Ragsdale and Kennecott were hostile to miners' safety concerns or that Ragsdale issued the disciplinary ticket because Bundy raised safety issues. Bundy was disciplined because he left

the mine. In the termination letter, Kinyon stated “[s]ince you chose not to have further discussions with your supervisor, refused to stay, used foul and abusive language towards him, then left the property, the Company has decided to terminate your employment effective the date of this letter for your insubordinate behavior as described above.” (Exs. R-26, G-6). Finally, Complainant did not establish disparate treatment. There is little evidence on this issue. A union officer was given a disciplinary ticket for refusing overtime, but the ticket was vacated when the company discovered that he refused overtime because he had to tend to union business. On February 22, 2001, Bundy refused to work overtime after Ragsdale told him he was going to force him to work but, before the matter came to a head, another employee voluntarily agreed to work overtime. (Tr. 214; Ex. R-3). Bundy had not been previously disciplined and he received favorable performance evaluations. No employee had been terminated at the mine under similar circumstances because there is no evidence that anyone had refused to work overtime and then left the mine in a similar manner. I find that there is insufficient evidence to hold that Bundy was treated differently than other employees because he raised a safety issue.

In conclusion, I find that although Bundy’s initial concern about his fatigued condition was reasonable, his refusal to remain at the mine after the end of his shift to resolve the matter under the CBA was not reasonable and was not protected by section 105(c). I find that the adverse action was not motivated by Bundy’s protected activity but was prompted by his unprotected activity alone, as discussed above.

V. ORDER

For the reasons set forth above, the complaint filed by the Secretary of Labor on behalf of Richard M. Bundy against Kennecott Utah Copper Corporation under section 105(c) of the Mine Act is **DISMISSED**.



Richard W. Manning
Administrative Law Judge

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August 23, 2002

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2000-113
Petitioner	:	A. C. No. 46-03317-03655
v.	:	
	:	Mine: Lady Dunn Preparation Plant
CANNELTON INDUSTRIES,	:	
INCORPORATED,	:	
Respondent	:	

DECISION

Appearances: Robert S. Wilson, Esq., U. S. Department of Labor, Office of the Solicitor, Arlington,

Virginia, for the Secretary;

David J. Hardy, Esq., Heenan, Althen & Roles, Charleston, West Virginia, for the Respondent.

Before: Judge Barbour

This civil penalty proceeding is brought by the Secretary of Labor (Secretary) on behalf of her Mine Safety and Health Administration (MSHA) pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. §§ 815, 820). The Secretary is seeking the assessment of civil penalties against Cannelton Industries, Incorporated (Cannelton) for three alleged violations of mandatory training and safety standards. The case arises out of MSHA's investigation of a fatal accident that occurred at Cannelton's Lady Dunn Mine, a facility that includes the Dunn Coal and Dock Strip Mine, the Dunn Hollow Haulroad and the Lady Dunn Preparation Plant, on June 28, 1999. The accident took the life of Roy Whitt, an employee of Cannelton's contractor, Wiggles Trucking Company (Wiggles).

Cannelton denied the violations occurred, and the parties engaged in extensive pretrial discovery. The case was tried in two sessions in Charleston, West Virginia. During the first session, the testimony of nonexpert witnesses was heard. During the second session, the expert witnesses testified.

STIPULATIONS

At the commencement of the first session the parties agreed to the following 16 stipulations:

1. Cannelton . . . is the operator of the [Lady Dunn Mine;]
2. Operations of the [mine] are subject to the jurisdiction of the [Mine Act;]
3. [The] case is under the jurisdiction of the . . . Commission and its designated Administrative Law Judge pursuant to . . . the Mine Act [;]
4. William Uhl was acting in his official capacity as an authorized representative of the Secretary . . . [i.e., as a federal mine inspector] when [the] citation[s] . . . were issued[;]
5. True copies of [the] citation[s] . . . were served on . . . [Cannelton] or its agent as required by the Mine Act[;]
6. The total proposed penalty . . . will not affect . . . [Cannelton's] ability to continue in business[;]
7. [Gov. Exh. 1] is an authentic copy of [C]itation No. 7157394 . . . and may be admitted into evidence for the purpose of establishing its issuance[;]
8. [Gov. Exh. 2] is an authentic copy of [C]itation No. 7157395 . . . and may be admitted into evidence for the purpose of establishing its issuance[;]
9. [Gov. Exh. 3] is an authentic copy of [C]itation [N]o. 7187482 . . . and may be admitted into evidence for the purpose of establishing its issuance[;]
10. Assuming that the violations . . . are affirmed . . . [they] were abated in good faith[;]
11. The Proposed Assessment . . . [Gov. Exhibit 5], accurately sets forth[:]
 - a. [T]he size of Cannelton . . . in production tons or hours worked per year[;]
 - b. [T]he size, in production tons or hours worked per year, of . . . [the mine] in which the citations . . . were . . . issued[;]
 - c. [T]he total number of assessed violations for the period of July 1998 through May 2000, and[;]
 - d. [T]he total number of inspection days for that same period[;]

12. [Gov. Exh.6], the . . . printout of prior violations, may be admitted into evidence and may be used for determining the assessment of a penalty if the citations at issue are affirmed[;]

13. Coal was hauled from the Dunn Coal [and] Dock Strip [M]ine to the preparation plant via the Dunn Hollow haulroad on June 28, 1999[;]

14. On June 28, 1999, the Dunn Coal [and] Dock Strip [M]ine, the Dunn Hollow [H]aulroad and the Lady Dunn [P]reparation [P]lant were all on property leased or owned by Cannelton . . .[;]

15. On June 28, 1999, at approximately 6:00 p.m., while driving a loaded haulage truck on the Dunn Hollow [H]aulroad, going from the Dunn Coal [and] Dock Strip [M]ine to the Lady Dunn [P]reparation [P]lant, Roy E. Whitt was involved in a haulage accident and received fatal injuries [;]

16. The decline grade of the Dunn Hollow [H]aulroad in the vicinity of the accident ranged from 10.6 to 17.4 percent[;] [Gov. Exh. 8] . . . is an accurate depiction of the grade of the haulroad in the vicinity of where the accident occurred and may be admitted into evidence.

(Tr. 14; see also Joint Exh. 1).

THE FACTS

The mine is a surface complex where bituminous coal is extracted, hauled and processed. As the stipulations indicate, the mine includes the Dunn Coal and Dock Strip Mine (the pit), where the coal is mined and stockpiled, and the Lady Dunn Preparation Plant, a coal preparation and tipple facility. The pit and the processing area are connected by the Dunn Hollow [H]aulroad (the road). The pit's elevation is considerably higher than that of the processing area. As a result the connection road has several areas of steep decline.

If the company's speed limits are observed, it takes approximately 15 minutes to drive from the pit to the processing area. Due to the elevation difference the route is somewhat circuitous. The road leaves the pit and, after its initial descent, reconnects with a public road before resuming its course on mine property and descending to the processing area. Primarily, the road is used by coal haulage trucks. However, the road also is used by other mine vehicles, and the short public part of the road is open to general traffic (Tr. 119, 688).

Jack Hatfield, the safety manager of Cannelton since 1977, explained that the mine began operating in late 1992 or early 1993 (Tr. 569). After it opened, the road was used intermittently. As 1999 began, the road which had been out of service was upgraded and reopened (Tr. 573). Cannelton then contracted with Bridgeport Trucking Company (Bridgeport) to haul coal from the pit to the processing area (Tr. 575-576). However, on June 13, 1999, Bridgeport informed Cannelton it no longer would haul (Tr. 578, 676). Because Cannelton could not get its coal to

the processing area without trucks, Cannelton immediately sought to replace Bridgeport with another firm (Tr. 676).

On June 18, Cannelton selected Big G Trucking Company as its new contractor. After the company decided on Big G, Hatfield told George Arthur, Big G's president, that all of Big G's drivers, mechanics, and bosses should come to the mine for training. A training class was scheduled to be held on Saturday, June 19. Hatfield maintained that he assembled the men and began a hazard training session in which he reviewed hazards associated with the road and the processing area (Tr. 584). Hatfield discussed escape ramps with the drivers (Tr. 586) and explained that they should rely on their citizens' band (CB) radios to report trouble and request assistance (Tr. 588-589). Also, Hatfield emphasized the drivers should wear seat belts and should not pass on the road (Id.).

In the meantime, George Arthur's relative, William Arthur, heard about the job at the mine. William Arthur owned Wiggles Trucking Company, a coal haulage firm that owned 11 trucks and employed approximately 30 persons.¹ William Arthur wanted the work for his company. After discussing the matter, Wiggles subcontracted the work from Big G (Tr. 30-32). Thus, it was Wiggles' drivers who actually hauled for Cannelton.

After Hatfield's training session ended, William Arthur, who was at the mine, introduced himself to Hatfield. As the owner of Wiggles, William Arthur was in charge of all work done by his employees. As he put it, he was responsible for "run[ning] the jobs" (Tr. 29). After the two men met, Hatfield got in William Arthur's pickup truck and guided Arthur up the road to the pit. Along the way, Hatfield spoke to Arthur about various aspects of the road, including the escape ramps and the berms. Hatfield noted that there was a flat area near the top of the hill where the drivers could pull over. He told Arthur to instruct the drivers that when they left the pit and began to descend toward the tipple, they could stop in that area, gear down and then proceed down the hill (Tr. 682).

When the tour of the road was finished, Hatfield felt that Arthur "could lead the trucks . . . and . . . talk to [the] drivers" (Tr. 590-591). Hatfield believed Arthur would tell the drivers which gears to use when they came down the hill (Tr. 591). Arthur agreed that Hatfield gave a good overview of the road. "He showed me the whole road . . . all the escape ramps and everything" (Tr. 191).

¹/ Subsequent to the accident, Wiggles filed for bankruptcy. It no longer engages in trucking (Tr. 27-28).

Hatfield testified he told Arthur that if Arthur was going to bring in drivers other than those Hatfield already had met, Arthur should “make sure they have all their training, they have been hazard trained, [and] . . . they’re legal” (Tr. 598). Hatfield felt certain Arthur understood Cannelton did not want untrained persons on its property and that Cannelton was concerned about safety (Tr. 656). For his part, Arthur was not clear what Cannelton officials asked about Wiggles’ safety program. At first, he seemed to agree that representatives of Cannelton asked whether his company had a safety training program (Tr. 216), but a short time later he stated he did not recall whether or not anyone asked (Tr. 218). Arthur was sure, however, that the representatives of Cannelton made it clear that Wiggles’ drivers had to be trained as MSHA required (Tr. 218).

Hatfield also testified he told Arthur that Cannelton needed copies of Form 5000-23 for the drivers to show they had been trained.² According to Hatfield, Arthur responded that a person named Greg Holestin conducted training for Wiggles, that Arthur would contact Holestin, and that Holestin would provide the documents. Hatfield felt comfortable that Wiggles’ drivers had the required training (Tr. 593).

After Hatfield’s and Arthur’s conversation ended, Wiggles’ drivers went up the hill to the pit. Hatfield believed Arthur would lead the drivers down the road to the processing area and the tipple. Hatfield did not accompany the drivers because he “felt confident [Arthur] had seen the road, and escape ramps, and . . . [would] convoy . . . [the drivers] . . . and show them these things” (Tr. 681).

The next day, June 20, the mine did not operate. The drivers returned to the mine for work on Monday, June 21, and they worked the rest of the work week. Hatfield stated that during this week he was not aware of any safety issues at the mine involving the drivers (Tr. 596). Arthur agreed that things went well. However, because of a large amount of coal in the pit, Hatfield kept asking Arthur for more drivers, and Arthur testified he felt pressure to provide them (Tr. 34, 194-195).³

A short time later Wiggles hired two laid-off former employees, one was Whitt and the other was David Fields (Tr. 34-35). Arthur had known Whitt for 20 years (Tr. 36). Whitt was then working in the Cleveland, Ohio area (*Id.*). Holestin called Whitt on June 24 or June 25, and left a message for Whitt to return to West Virginia, if he wanted to work at the mine (Tr. 196).

^{2/} Upon completion of a miner’s training, an operator is required to record and to certify that the miner has received the training specified. The operator does so on MSHA Form 5000-23, a copy of which is given to the miner and a copy of which is retained by the operator (30 U.S.C. § 48.9).

^{3/} Arthur maintained that Hatfield told him if Wiggles could not provide more drivers, Cannelton would let someone else do the job (Tr. 41).

Whitt agreed to report for work on Monday, June 28 (Tr. 83-84, 197). Fields also agreed to come to work that Monday.

Holestin testified that he let Cannelton officials know Whitt and Fields would be reporting for work by writing their names on a piece of paper and leaving the paper on a desk at Cannelton's mine office (Tr. 75). Holestin stated he did not sign the paper (Tr. 87).⁴

Whitt and Fields reported for work around 5:00 p.m. on June 28 (Tr. 198). The men stopped where Wiggles' trucks were parked. Arthur estimated that he spent approximately 45 minutes to 1 hour "training" both men (Tr. 38, 163).⁵ He explained that the training was the same he had "done for 15, 16 years or 20 years" (Tr. 164-165). It involved him and the men preshift examining the trucks by checking their brakes, lights, horns, and other components (Tr. 165). Arthur had great confidence in the men's driving abilities, and he noted that neither asked any questions regarding the trucks (Tr. 165-166, Tr. 170). After he was finished with the "training," Arthur filled out Whitt's and Fields' task training papers.

Arthur completed the forms even though he was not certified by MSHA to provide training (Tr. 38-39, 158). He stated he did not know he was required to be certified, that he had provided training "for 23 years," and that prior to the accident "[e]very inspector in West Virginia ha[d] looked at it and it was fine" (Tr. 38).⁶

After the papers were signed, Whitt and Fields got in their trucks and headed for the pit. Arthur told them when they reached the pit, they should not try to take their trucks down the road on their own. Rather, the first time they descended the road, they should follow another driver, Ronald Hunt (Tr. 41). Arthur viewed Hunt as an "excellent truck driver" (Tr. 38), "one of the best . . . on the job" (Tr. 167). Hunt was "head strong when it [came] to safety" (Id.).

Whitt and Fields did as they were told. When they reached the pit, their trucks were loaded, and they formed a "convoy" with other trucks. Hunt lead the way down the hill followed

⁴/ The paper was not addressed to anyone, and Holestin had no knowledge of what happened to it (Tr. 74-75). Cannelton's witnesses testified that they never saw it.

⁵/ Arthur later seemed to hedge his testimony regarding the time he spent with the men. He agreed that when he met with Inspector Uhl and a representative of the State of West Virginia after the accident, he might have said he spent 10 to 15 minutes with Whitt and Fields (Tr. 52, 163).

⁶/ Fields described how his training papers were completed. Fields placed his social security number and the date on the forms, and Arthur filled out the rest (Tr. 110, 125). As Fields recalled, it took about 5 minutes (Tr. 108, see also Tr. 125). He believed that the same procedure was followed with regard to Whitt (Tr. 110).

by Fields, Whitt, a driver named John Harless, and another Wiggles driver (Tr. 126-127). Fields understood that Hunt would explain the “lay of the land” to him and Whitt (Tr. 127). As the trucks proceeded down the hill, Hunt spoke to the drivers over their CBs (Tr. 108, 127-128). Fields remembered Hunt telling them to stay in first gear. According to Fields, Hunt talked to the men all of the way down the hill (Tr. 130). Once the trip was completed, Fields believed he was introduced to the haulage road and that he understood what was required to drive it (Tr. 112).

In the meantime, another driver, Randy Halstead, had stayed from the previous shift to work during the evening shift. Halstead was assigned to use Wiggles’ Truck No. 425. Halstead checked the truck’s brakes and tires, and found nothing wrong (Tr. 375). He was not surprised the brakes exhibited no problems because approximately 2 1/2 months previously new brake shoes had been installed on the truck (Tr. 365-366). Halstead proceeded to the pit in Truck No. 425 where the truck was loaded. Truck No. 425 was equipped with a “Jake brake,” a device for slowing the engine and hence the truck. It also was equipped with a retarder.⁷ Prior to starting down the hill, Ron Hunt told Halstead that he only should use the Jake brake and that he should stay in first gear (Tr. 377, 378).

As he began his descent, Halstead put the truck into first gear and applied the Jake brake. He had no trouble getting down the hill. In addition, when he applied the truck’s service brakes at the bottom of the hill, they worked as they should (Tr. 379-380).

After Halstead reached the bottom and dumped his coal at the tipple, he heard someone on the CB tell Whitt that something was hanging underneath Whitt’s truck. Halstead pulled up beside Whitt, got out of Truck No. 425, and looked under Whitt’s truck. A brace for a fuel line had come loose and was hanging below the truck. Halstead told Whitt to use Truck No. 425, that he, Halstead, would take Whitt’s truck and have it repaired (Tr. 356-357).

Whitt agreed to switch trucks with Halstead. Halstead explained to Whitt that Truck No. 425 had a larger engine than the truck Whitt had been driving. Whitt responded that he could “handle it” (Tr. 357). As the men drove up the hill and before Halstead went to the repair area, Halstead remained in touch with Whitt over the CB. Whitt reported no problems with

⁷ A “retarder” is generally defined as a device for restraining movement (See e.g. U. S. Department of the Interior *A Dictionary of Mine, Mineral & Related Terms* (1968 at 918). William Arthur, described the function of a retarder as being to “hold you back on the hill where you don’t have to use your brakes and get them hot” (Tr. 49). Fields explained that a retarder “slows the drive shaft down and [thus] help[s] to slow the truck down” (Tr. 114). Fields cautioned – and almost all of the other witnesses who addressed the point agreed – that if a driver tried to down-shift and to take the truck out of gear while the retarder was engaged, the driver could not get the truck back into gear and the retarder would have no effect on controlling the truck’s speed (Tr. 114-115).

Truck No. 425 (Tr. 381).

Near the top of the hill, Halstead turned off to go to the repair area, and Whitt continued to the pit. A short time later, Whitt asked over the CB how to work the retarder. Halstead was not surprised. He believed a driver would not necessarily know how to use a retarder, especially if he or she never had driven a truck equipped with one (Tr. 371).

Halstead thought it was dangerous for such a driver to use the retarder. If the driver tried to shift and go out of gear, he or she could stall the engine. The result would be “just like putting . . . [the] truck in neutral” (Tr. 363). Once the engine stalled, the driver instinctively would apply the service brakes, but the truck would be traveling at such a speed it would require repeated application of the brakes to even begin to slow it, which in turn would make the brake drums hot and the brakes quickly would lose their effectiveness (Tr. 367). Therefore, Halstead told Whitt “you don’t need the retarder . . . use your Jake brake . . . and first gear . . . until you get to the bottom of the mountain” (*Id.*). Whitt again replied he could “handle” the truck, and Halstead had the impression that Whitt was comfortable driving it (Tr. 372).⁸

When Whitt reached the pit, Cannelton miner Tommy Campbell was loading trucks with a front-end loader (Tr. 401- 402). Whitt pulled his truck into the wrong place, and Campbell called him on the CB and asked him to move the truck closer to the front-end loader, which Whitt did (Tr. 404-405). Campbell testified that Cannelton officials had told him and other loader operators that new drivers would be coming and had asked them to “make sure . . . [the new drivers] were . . . task trained before . . . [the operators] loaded them” (Tr. 406). As a result, Campbell believed when a new driver arrived in the pit, the front-end loader operators always asked if the driver was task trained (*Id.*).⁹

Because Whitt was a new driver, Campbell maintained that he loaded Whitt’s truck “lighter” than he loaded the other trucks (Tr. 407). Campbell was certain he had been told to “to do that” by the mine superintendent (Tr. 407). Because the coal was not piled above the truck’s side rails, Campbell estimated Whitt’s load was about 75 percent that of an experienced driver (Tr. 408).

⁸/ Fields overheard the discussion. Fields version of what was said essentially tracked Halstead’s. He stated that Whitt “asked [Halstead] something about the . . . retarder and [Halstead] told him not to fool with it, just [to] put the truck . . . in first gear and do down the hill” (Tr. 113). Fields did not know whether Whitt had prior experience driving a truck equipped with a retarder (Tr. 189).

⁹/ Campbell never specifically stated he asked the question of Whitt (*See* Tr. 405-407). Rather, he testified that he was “sure he . . . would have [asked Whitt] or I wouldn’t have loaded him” (Tr. 412). Campbell also stated he had no first hand knowledge Whitt actually received such training (*Id.*).

After Field's truck was loaded, the men were ready to make their second trip down the hill to the tipple. Fields proceeded Whitt. Because he was ahead of Whitt, Fields did not see what happened next (Tr. 107). However, John Harless did.

Harless had been working at the mine for about a week. On June 28, he too was hauling coal from the pit to the tipple on the evening shift. When Whitt and Fields left the pit, Harless also started for the tipple. Harless reach a spot where he had a good view of the road. Harless described what happened:

[I] slowed down and looked . . . I saw a truck break away, and I saw it flip over . . . coal dust went up . . . 30, 40 feet in the air.¹⁰ I started . . . hollering at Roy [over the CB]. [There was] no response. And I thought Roy was still in the truck because Roy always wore a seat belt . . . I hollered back up to the strip. I said you need to get 911 up here there's been an accident (Tr. 233; see also Tr. 240)).

Harless drove to a level spot and parked. He got out and began running down the road toward Whitt's truck. He rounded a curve and saw Whitt laying in the middle of the road. The truck had traveled on for a considerable distance before running off the road and overturning. Harless took off his shirt and covered Whitt. He told Whitt that everything was going to be all right. Whitt did not respond. Another miner arrived and checked Whitt's pulse. The other miner told Harless to return to his truck and there was nothing Harless could do. Whitt was dead (Tr. 234-235).

MSHA was notified of the accident, and later that evening, Inspector Uhl arrived at the mine. He made sure that an order was issued under section 103(k) of the Act (30 U.S.C. § 813(k)) to "freeze" the accident site until MSHA's investigation was completed. He traveled the haulroad to familiarize himself with the road, and he requested that representatives of MSHA's technical support unit come to the mine and inspect the overturned truck. Uhl also arranged for MSHA to interview those who had information about the accident, and he requested the truck's maintenance records and the road's shift examination reports (Tr. 423). Finally, he asked to see the training records of Wiggles' and Cannelton's employees (Tr. 424).

In addition to Uhl, MSHA sent to the mine supervisory investigator Dennis Ferlich, who holds a BS degree in mechanical engineering from Penn State University (Tr. 834-835). Ferlich

¹⁰/ Harless described the truck as traveling faster than if it had been in first or second gear. In fact, it was going so fast, he believed it could have been totally out of gear (Tr. 241, 261).

arrived on June 30, and spent the next 3 days inspecting the truck (Tr. 748).¹¹ He took photographs and kept notes of his findings (Tr. 749).

Although, Ferlich found the steering, the transmission, the gears, the electronic system, the pneumatic system, and the structure of the truck to be sound, he believed there were defects in the trucks' service braking system (Tr. 778-779, 843, 867-868). He explained there were six service brakes on the truck. Two wheels on the truck's front steering axle each had brakes, and four wheels on the truck's back axles each had brakes. The brakes were applied through hydraulic air pressure which was activated when the driver pushed the brake pedal. The brakes worked as follows: When the driver stepped on the brake pedal, the air pushed forward the pushrods, which contacted the slack adjusters, which pushed the S-cams, which pushed against the rollers, which pushed the brake shoes outward and into the inside of the brake drums. Since this happened virtually simultaneously on the six wheels, the contact between the brake shoes and the brake drums caused the wheels to slow and, if need be, to stop (Tr. 755, 766-767, 768; see Gov. Exh. 20-7).

In Ferlich's view, the nature of the contact between the pushrods and the slack adjusters was critical to the effective functioning of the brakes. The distance the pushrods moved (the pushrod stroke) determined whether the slack adjusters adequately caused the S-cams to move sufficiently to cause the rollers to propel the brake shoes out against the brake drums. Ferlich stated that the goal was to keep the pushrod strokes to a minimum so that a S-cams "didn't have to turn too far to push the [brake] shoes . . . against the drum[s]" (Tr. 770). The strokes should extend no more than 2 inches (Id.). Ideally, each stroke should be "in the neighborhood of an inch and a half" (Tr. 771).

Ferlich found the pushrod stroke on the right middle brake to be 2 1/4 inches, which, in Ferlich's view "reduced the braking force on that brake" (Tr. 781). In addition, two of the three other rear brakes were at or near their limit. The left-rear brake had a stroke of 2 inches and the right rear brake had a stroke of 1 15/16 inches. (The stroke on left middle brake was 1 9/16 inches (Tr. 781; see also Tr. 843-844).)

Ferlich also testified there were limits to allowable wear on the brake drums. He measured the wear and found that "all of the brake drums were over the maximum allowable wear limits" (Tr. 783). The drums were "severely worn . . . beyond what the manufacture[r] allow[ed]" (Id.). In his view, the wear was so great the drums should have been "throw[n] . . . out" (Tr. 799). Each drum had a "ridge build up on the edges" and the ridge showed that excessive use had worn the drums down (Tr. 783).

^{11/} On June 30, the truck was still located where it had come to rest after it careened off the road. The only change in the truck's physical condition since the accident was that it had been returned to an upright position (Tr. 862).

In addition, each drum was discolored by scorching, which indicated to Ferlich that the drums had been subjected to temperatures “anywhere above 6 to 8 hundred degrees Fahrenheit” (Tr. 783). Finally, a piece measuring approximately 2 1/4 inches had broken off the edge the right middle brake drum (Tr. 782; see Gov. Exh. 20-10).

Upon the completion of his on-site inspection of the truck, Ferlich returned to his office where he prepared a report summarizing his findings (Id.). Then, after consulting with Ferlich, Uhl issued the subject citations to Cannelton.

THE ALLEGED VIOLATIONS

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>
7157394	9/21/99	48.26

Citation 7157394, which alleges a significant and substantial violation of section 48.26, states:

Based upon testimony and records obtained during this accident investigation, adequate experienced miner training was not provided to Roy Whitt, driver and victim of the . . . haulage accident which occurred June 28, 1999. The training he received did not provide adequate information and instruction about the recognition and avoidance of hazards he would encounter at the mine, more specifically on the haul road where he was assigned to drive. This inadequate training was determined to be a factor contributing to the accident which resulted in fatal injuries to the driver (Gov. Exh. 1).

At the time the alleged violation occurred (June 28, 1999), section 48.26(a) required newly employed experienced miners to complete a training course as “prescribed in the section” before beginning work duties. Section 48.26(b) specified the topics for the course, which included: (1) an introduction to the work environment (section 48.26 (b)(1)); (2) mandatory health and safety standards pertinent to the task(s) the miner [would] be assigned (section 48.26(b)(2)); (3) review of the line of authority of supervisors and miners’ representatives, and an introduction to the operator’s rules and procedures for reporting hazards at the mine (section 48.26(b)(3)); (4) instruction on the procedures for riding on and in mine conveyances, the controls for the transportation of miners and materials, and the use of communication systems, warning signals and directional signs at the mine (section 48.26(b)(4)); (5) escape and emergency evacuation plans and fire warning and firefighting procedures at the mine (section 48.26(b)(5)); (6) instruction in work procedures around highwalls and pits (section 48.26(b)(6)); (7) the recognition of hazards in the mine and their avoidance (section 48.26(b)(7)); (8) and such other courses of instruction as may be required by MSHA’s

District Manager based on the circumstances and conditions of the mine (section 48.26(b)(8)).¹²

The citation charges that “adequate experienced miner training was not provided to Roy Whitt” (Gov. Exh. 1). The parties accept the fact that Whitt was an “experienced miner” (as defined in section 48.22 (30 C.F.R. § 48.22)), who was newly employed. As such, section 48.26 required that he be trained according to its mandates. There is no dispute that Cannelton did not provide Whitt with training. Thus, whatever training Whitt received was provided by Wiggles.

I credit Arthur’s testimony that on the afternoon of June 28, the trucks that Whitt and Fields were going to drive were preshift examined in Whitt and Fields presence (Tr. 106, 159, 165). I also find that after the trucks were examined, Whitt and Fields drove them to the pit where they were loaded, that the men then followed Hunt down the hill (Tr. 41), and that on the way down, Hunt pointed out the escape ramps and other safety-related features of the road (Tr. 167).

I conclude, however, that none of this “training” complied with the existing requirements of the standard. There is nothing in the standard indicating that miners observation of and/or participated in preshift examination of trucks they would be driving in and of itself met any of the prescribed training requirements. Further, even if Whitt’s “convoyed” introduction to the road qualified as instruction in “the recognition and avoidance of hazards present in the mine” (section 48.26 (b)(7)), a dubious assumption given the rather imprecise description of the content of Hunt’s instruction given in the testimony (See Tr. 126-130), section 48.26(a) required the training to be given before Whitt was “assigned to work.” Here, the journey down the road did not occur before Whitt was assigned to work, that is to carry a load of coal to the tipple. Rather, it followed his visit to the pit and it coincided with his first trip down the road in a loaded truck (Sec. Br. 10).

Moreover, the training requirements for newly employed experienced miners were premised on the requirement that most of the training would be provided by MSHA approved instructors (See section 48.23(g)). Arthur acknowledged that he was not certified by MSHA to provide training. Nor was Arthur authorized to sign a certificate of training (Tr. 38, 41, 542-543). Hunt, too, was not authorized by MSHA to provide training. For these reasons, I find the Secretary proved that Whitt was not provided with experienced miner training as required and that section 48.26 was violated.

Having found a violation, the question arises whether Cannelton can be held responsible for it, and I conclude it can. The law is clear. In a case whose facts resembled those at hand, the Commission stated:

^{12/} Effective July 1, 1999, section 48.26 was revised. Among other things additional requirements for a “minimum course of instruction” were add to the regulation (30 C.F.R. § 48.26 (July 1, 1999)).

Operators are liable without regard to fault for violations of the Mine Act and its standards. *E.g. Fort Scott Fertilizer-Cullor, Inc.* 17 FMSHRC 1112, 1115 (July 1995); *Western Fuels-Utah, Inc.*, 10 FMSHRC 256, 260-61 (Mar. 1988) aff'd on other grounds, 870 F.2d 711, 716 (D.C. Cir. 1989); *Asarco, Inc. - Northwestern Mining Dept.*, 8 FMSHRC 1632, 1634-36 (Nov. 1986), aff'd, 868 F.2d 1195, 1198 (10th Cir. 1989). . . .[T]he mine operator . . . is strictly liable for all violations of the Act that occur at its mine, including those committed by its contractors' employees. *See Bulk Transportation Services, Inc.*, 13 FMSHRC 1354, 1359-60 (Sept. 1991) ("the Act's scheme of liability provides that an operator, although faultless in itself, may be held liable for the violative acts of its employees, agents and contractors"); *see also Cyprus Indus. Minerals Co. v. FMSHRC*, 664 F.2d 1116, 1119 (9th Cir. 1981) (mine operators are strictly liable for the actions of independent contractor violations") (*Bluestone Coal Corporation*, 19 FMSHRC 1025, 1032) (June 1997)).

Thus, a production-operator may be liable without regard to fault for violations committed by its contractor's employees, and it is within the Secretary's discretion to cite the production-operator, the contractor, or both. The Commission and its judges may review the decision of the Secretary in order to guard against an abuse of discretion. (*Bluestone*, 19 FMSHRC at 1032 (citing to W-P Coal Co., 16 FMSHRC at 1404, 1411 (July 1994))).

The facts support the Secretary's decision to cite Cannelton. As the Commission has pointed out, a factor indicative of a proper exercise of the Secretary's discretion is whether the violation affects the safety of the production-operator's employees (*Mingo Logan Coal Co.*, 19 FMSHRC 246, 250 (Feb. 1997); aff'd 133 F3d 916 (4th Cir. 1998)). Whitt did work alone or only with Wiggles' drivers. His operated his truck in areas where Cannelton's employees and the public occasionally were present. Employees of Cannelton worked in the pit and the processing area (Tr. 243), and at times equipment other than haulage trucks was driven by Cannelton's employees on the haulage road. Finally, the public had access to the small part of the road that belonged to the state (Tr. 589). An untrained driver, such a Whitt, was a danger to Cannelton's employees as well as to the public when he had to travel in the pit, the processing area, and on Cannelton's and the state's parts of the road (Tr. 244). Cannelton had a duty to protect those employees and citizens by ensuring that its contractor's employees were properly trained.

Moreover, as the Court noted in *Mingo Logan*, "holding production-operators liable for the training violations of their independent contractors encourages production-operators to employ only those independent contractors with exemplary health and safety records, thereby promoting the protective purposes of the Mine Act" (*Mingo Logan*, No. 97-1392, slip op 8 (4th Cir. Jan. 8, 1998)). In addition, holding production-operators liable for the training

violations of their independent contractors promotes production-operator oversight and, thus, encourages contractor compliance. Training prescribed by the regulations is vital to ensuring a safe work place and the ultimate responsibility for ensuring a safe workplace lies with the production-operator.

SIGNIFICANT AND SUBSTANTIAL (S&S) AND GRAVITY

Inspector Uhl found that the violation was S&S. He based his finding on the fact that the lack of training meant hazards associated with descending the road and ways to avoid such hazards were not properly pointed out to Whitt. Uhl believed the violation directly contributed to Whitt's death. (Tr. 480-481).

Although the evidence does not establish an unequivocal causal link between the accident and Whitt's lack of experienced miner training, I agree with Uhl's conclusion as to the S & S nature of the violation. A condition or practice is S&S if: (1) it is a violation of a mandatory safety standard; (2) if it contributes to a discrete safety hazard; (3) if there is a reasonable likelihood that the hazard contributed to will result in an injury; and (4) if there is a reasonable likelihood that the injury will be of a reasonably serious nature (*Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981); *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984)). When evaluating the "reasonable likelihood" element, "likelihood" is viewed in terms of continued normal mining operations without any assumption as to abatement (*U.S. Steel Mining Co., Inc.* 6 FMSHRC 1573, 1574 (July 1984); *Halfway, Inc.*, 8 FMSHRC 1, 12 (Jan. 1986); *Southern Ohio Coal Co.*, 13 FMSHRC 912, 916-917 (June 1991)).

I have found a violation of section 48.26. The failure to provide Whitt with required experienced miner training made him a danger to himself and to others, specifically to those at the mine who worked in the pit and tippie areas, who drove on the road, and to those members of the public who used the state's part of the road. This was especially true given the fact that Whitt had not driven a loaded coal haulage truck for a number of months and the fact that he was totally unfamiliar with the steeply graded road. The situation created by Whitt's lack of training was an accident waiting to happen. Finally, given the weight of the truck, the speed at which the truck could move, the steepness of the road, as well as the other vehicles the truck could encounter as mining continued, it was reasonably likely that any injuries resulting from Whitt's lack of training would be serious or worse.

In addition to being S&S, the violation was very serious. As I have noted, training is critical to maintaining a safe work place. Whitt was not given the training required. He had not driven a coal haulage truck for months, and he was unfamiliar with the conditions at the mine, the most potentially hazardous of which was the steep descent of the haulage road. He was expected to work in the vicinity of other miners and, to a limited extent, in the vicinity of the public. Allowing him to work under such conditions without first providing him the required prescribed training placed him and others in a very dangerous situation.

NEGLIGENCE

Negligence is the failure to exercise the care required by all of the circumstances. I conclude that although Cannelton tried to exercise some oversight of contractor training, it did not implement sufficient procedures to make the oversight effective and, therefore, did not exhibit the care required. In finding Cannelton negligent, I note, again, that it is the production-operator who bears the ultimate responsibility to ensure training is given as required.

Essentially, Cannelton relied on Wiggles to be responsible for the training of new drivers. Cannelton's reliance was exemplified by the fact that Hatfield showed William Arthur the haulage road so that Arthur could instruct the new drivers in its hazards (Tr. 590-591), and by Hatfield telling Arthur to make sure the Wiggles' drivers were trained properly (Tr. 598, see also Tr. 28). For his part, I am persuaded that Arthur lead Hatfield to think all of Wiggles' drivers were trained as required (Tr. 616). I am also persuaded that Arthur was asked by a Cannelton representative whether Wiggles had a training program. Arthur testified this "probably" happened, and it is something a production-operator, relying on its contractor to provide training, would have done (Tr. 216-217). Moreover, I credit Arthur's testimony that Cannelton officials had made it clear to him Wiggles' drivers had to be current in their training (Tr. 218). This also would have been consistent with Cannelton's reliance.

There was nothing wrong with Cannelton relying on Wiggles. Required training can be provided by the contractor, the production-operator, or by both. The problem was that Cannelton's efforts to monitor Wiggles' compliance were woefully inadequate. In fact, there is no indication that Cannelton instituted any systematic checks to ensure that before a contract miner was assigned work, he or she was properly trained by a certified trainer. For example, Cannelton did not insist that prior to beginning work a newly employed contract employee review his or her training status with someone from the company and from Wiggles.¹³ True, Hatfield requested copies of Wiggles' employees training certificates (Tr. 610), but this was not enough because it left Cannelton in the position of relying on what the certificates stated without attempting to confirm their accuracy.

Further, even if rank-and-file front-end loader operator, Tommy Campbell, and other loader operators were told by Cannelton officials to make sure new drivers were trained before they loaded the drivers' trucks (Tr. 406), by the time the loader operators would have asked, untrained newly employed experienced drivers would have been assigned to work and would have embarked upon their duties. In other words, the loader operators' questions would have come too late to further full compliance with section 48.26(a). ("A newly employed experienced miner shall receive and complete training . . . before such miner is assigned to work duties")

^{13/} This is not to say that the mechanics of a production-operator's oversight must include such a check. Oversight methods are up to the operator. However, whatever methods it chooses to employ, they must be effective, and Cannelton's were not.

(30 C.F.R. § 48.26(a)).¹⁴

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>
7157395	9/21/99	48.27

The citation, which alleges a S & S violation of section 48.27, states:

Based on the testimony obtained and the failure to provide records of task training for operating the Mack RD-854-SX coal haulage truck, it is determined that task training was not proved for Roy Whitt, driver and victim of the fatal powered haulage accident which occurred on June 28, 1999. This was the victim[']s first day of employment at this mine site and his first trip on the haulage road with this particular type vehicle. He was operating it in the production process and was not under direct supervision. This failure to provide training was determined to be a factor contributing to the accident which resulted in fatal injuries to the driver (Gov. Exh. 2).

With regard to Whitt, section 48.27 then required he be: (1) instructed in an on-the-job environment in the health and safety aspects of safe operating procedures relating to the operating of the coal haulage trucks at the mine and relating to the hauling of coal (30 C.F.R. § 27(a)(1)); and, (2) because he was to begin work immediately, be instructed in the supervised operation of the coal haulage truck during production (30 C.F.R. § 48.27(a)(2)(ii)). Whitt was required to abstain from driving a truck until the training "ha[d] been completed" (30 C.F.R § 48.27(a)).

It is clear that Uhl based the citation on the fact that after Whitt's first trip down the haulage road, he changed to Truck No. 425, a truck that was equipped with a retarder. In Uhl's opinion, the presence of the retarder required new task training because the regulation required training whenever a miner used a new or modified piece of equipment that he or she had not used

^{14/} While I conclude Cannelton was negligent because it failed to exercise effective oversight of Wiggles' compliance, I recognize Wiggles also did not exercise the care required. Indeed, Wiggles' lack of care was greater than Cannelton's. Arthur was primarily responsible for failing to see that Whitt was trained properly before he was assigned work. Wiggles' greater negligence, however, does not excuse Cannelton's failure.

before.¹⁵ In Uhl's view, the retarder qualified as such a modification because if a miner was unfamiliar with its purpose and use the miner's ignorance could create a serious safety hazard for himself or herself and others (Tr. 487, 526). Uhl believed Whitt did not understand the function of the retarder because Whitt asked Halstead over the truck's CB about the retarder's purpose (Id., see also Tr. 360).

I agree with Uhl that Whitt needed new task training (Tr. 487, 523). The regulation encompasses the exact situation in which Whitt found himself when it requires operators of equipment to be "instructed in safe operating procedures applicable to . . . modified . . . equipment[,] . . . which requires . . . new or different operating procedures" (section 47.27(a)(3)). The retarder's purpose, as stated by Wiggles' driver, John Harless, was to slow the truck (Tr. 239). However, while the testimony establishes that a retarder can be helpful in keeping a truck under control as it descends an incline, the record also reveals the retarder can be dangerous if its purpose and function are not understood. As Halstead and others explained, a driver must realize if the retarder is engaged and he or she tries to shift, the transmission can go out of gear and the engine can stall. If this happens, and the truck is loaded and starts to run away, the truck's brakes will not hold it on steep grades such as those of the haulage road (See e.g. Tr. 363).

I accept as a fact that Whitt asked Halstead over the CB radio how to work the retarder since there is no testimony discrediting Halstead's assertion that this is what happened and since Halstead's description of the conversation was essentially confirmed by Fields (See e.g. infra (Tr. 360)). Whitt's question reveals that the retarder was new to him and that training was required – training he did not receive. Other than being told by Halstead not to "fool around" with the retarder, there is no indication Whitt was advised about the device's purpose, function and safe use (or, nonuse, as the case may be (Tr. 360)). Thus, Whitt was placed in a situation where misuse of the retarder easily could cause the truck to run away. Therefore, I find that a violation of section 47.27 occurred as charged.

S&S and GRAVITY

The violation was S&S. The lack of training contributed to the hazard that Whitt would try to use the retarder and would endanger himself and/or others. Given the particular circumstances under which the violation occurred – the grades of the road, the necessity to maintain complete control of the truck when on the road, Whitt's general lack of familiarity with the road, the fact that shifting gears with the retarder "on" could cause the truck to go into neutral and stall, and the fact that Whitt was likely to downshift to try to control the speed of the truck – it was reasonably likely that lack of training in the purpose and function of the retarder could lead to a runaway situation which, in turn, could result in an accident causing injury to Whitt or

¹⁵/ Uhl also testified that the truck's larger engine size also required new task training (Tr. 526), but he did not explain why, and the entirety of his testimony abundantly indicates he based the citation almost solely upon the presence of the retarder.

to anyone the uncontrolled vehicle hit. Finally, such an accident was reasonably likely to at least cause serious injury to Whitt and perhaps to others as well.

In addition, to being S & S, the violation very serious. While I am not holding that the accident was caused by misuse of the retarder – no one knows for certain its cause – it is clear to me that lack of training in the purpose and function of the retarder created the conditions under which the accident or one like it easily could have happened. This alone is sufficient to make the violation very serious.

NEGLIGENCE

I also find that the violation was due in part to Cannelton's negligence. Cannelton's management representatives did not know that Whitt had started work, changed trucks, and was unfamiliar with a retarder. However, Cannelton knew that new employees of Wiggles were likely to be arriving and especially that they might be present on June 28. (I credit Arthur's testimony that Cannelton was anxious to have more drivers on the job (Tr. 195-196) and that Arthur told Hatfield more drivers would be coming to work that Monday (Tr. 195)).

As I have already noted, Cannelton made some general efforts to check on the training of its contractor's employees, but what the testimony does not reveal and what I conclude did not exist was systematic, effective and ongoing oversight by Cannelton to make sure all of the employees of its contractor were trained as required. There were things that a production-operator exercising reasonable care might have done, and which Cannelton did not do, to exercise effective oversight. Had Cannelton systematically overseen training compliance by its contractor, Arthur would have been more likely to make certain that Whitt be properly trained before he drove a truck like Truck No. 425. Although Arthur, acting for Wiggles, assumed the primary duty of making sure all required training was provided, Cannelton also had a duty that it fully failed to meet. Its negligence was less than Wiggles', but Cannelton's lack of a systematic and (most importantly) effective effort to make sure the training requirements were enforced, means that the violation of section 48.27 also was due to its negligence.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>
7187482	9/21/99	77.404(a)

The citation, which alleges a S & S violation of section 77.404(a), states:

[The truck] that was being driven by Roy Whitt to haul coal at the mine on June 28, 1999, was not maintained in a safe operating condition in that: 1. One brake on the axles was beyond the maximum allowable adjustment range[;] 2. The other three brakes on the drive axles were at or near the maximum allowable adjustment range[;] 3. The brake drums of all four drive axle brake units and the two front steering axle brake units were worn beyond the maximum allowable wear limit stamped on the drums by the manufacturer. These conditions

decreased the braking capacity of the truck. This reduced braking capacity, in combination with the fact that the truck was operating on a steep grade that ranged from 10.6 to 17.4 percent over a distance of approximately 1000 feet in the area of the accident site and the fact that the truck was routinely carrying significantly more than its rated capacity, contributed to the accident that resulted in fatal injuries to the driver (Gov. Exh. 3).

Section 77.404(a) requires in pertinent part that “[m]obile . . . equipment . . . be maintained in safe operating condition and . . . equipment in unsafe condition . . . be removed from service immediately.” The Commission has held that section 77.404(a) imposes two duties: (1) to maintain equipment in safe operating condition; and (2) to remove unsafe equipment from service immediately (*Peabody Coal Company*, 1 FMSHRC 1494, 1495 (Oct. 1979)) and that “[d]erogation of either duty violates the regulation” (1 FMSHRC at 1495; see also *Ambrosia Coal & Construction Co.*, 18 FMSHRC 1552, 1556 (Sept. 1996)). Truck No. 425 was mobile equipment. Obviously, it was not removed from service before the accident. Therefore, if the conditions cited by Uhl existed, and if they singly or in combination rendered it unsafe to operate the truck, a violation occurred.¹⁶ The issue of whether the truck was unsafe must be determined by deciding whether “a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous conditions, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action” (See *Alabama By-Products Corporation*, 4 FMSHRC 2128, 2129 (Dec. 1982) (involving identical standard applicable to underground coal mines)). The burden of proof is on the Secretary.

Ferlich was the only witness who conducted a detailed, post-accident investigation of the state of the subject truck's braking system, and I find that the conditions he found, particularly the pushrod stroke lengths, the brake drum wear and discoloration, and the missing piece of the right rear middle brake drum, existed as he described them.

Would a reasonably prudent person consider these conditions to have rendered Truck No. 425 unsafe? The question must be answered based on the testimony of Ferlich and Steven Chewing, President of Traffic Safety Consultants of Richmond, Virginia. (Chewing conducted a study of the accident for Cannelton (Tr. 906-907)). Having considered the testimony of both, I conclude that the Secretary established the violation. My conclusion is based upon a combination of conditions as they affected the brakes and upon the circumstances under which the truck was used. In my view, together they created a situation in which a reasonably prudent person would have recognized a hazard and would have withdrawn the truck from service.

Ferlich believed the braking capacity of the truck was diminished by what he found. He stated that the pushrod for the brake on the right rear axle being 1/4 inch above the limit reduced its braking capacity. Ferlich persuasively and logically explained why a stroke exceeding the

^{16/} Equipment may be defective and not be in violation of the standard if the defect does not affect safe operation of the equipment during its normal intended use (See *Hobet Mining, Inc.*, 19 FMSHRC 411, 414 (Feb. 1997) (ALJ Maurer)).

2 inch limit meant the S-cam could not propel the right rear brake shoe far enough so it had adequate contact with the brake drum (Tr. 770-771, 781). Ferlich was a credible witness, and I accept his testimony that the braking capacity of the right rear brake was lessened.

I am also persuaded that, due to wear, all of the brake drums were thinner than they should have been (Tr. 783, 786-788, 799). I credit Ferlich's testimony that because they were thin, the drums had less structural integrity and a tendency to heat faster than brake drums with lesser wear. Further, I credit his explanation that as the temperature rose, the drums then expanded and, when the brakes were applied to the expanded drums, the brake shoes could not maintain effective contact with the drums because the drums had pulled away from the shoes (Tr. 786-787, 789-790). (This is the phenomenon Ferlich referred to as "brake fade" (Tr. 788)). The credibility of Ferlich's testimony regarding the condition of the drums and the consequences to the braking system is supported by the fundamental and unchanging rule of physics that friction produces heat and that heat causes metal to expand.

Ferlich was less convincing when he testified regarding the hazard posed by the three pushrods that were "at or near the limits" (Tr. 781). The stroke of the three pushrods measured 2 inches, 1 15/16 inches, and 1 9/16 inches (*Id.*). Although he believed the length of these strokes minimized a driver's ability to stop, he did not satisfactorily explain why (Tr. 786), and the fact remains that the strokes' distances were within an allowable range. I cannot conclude that a perfectly permissible condition would have signaled a hazard to a reasonable miner.

Also, while I accept as a fact that a piece measuring approximately 2 1/4 inches in length was missing from the right middle drum, I am not convinced the missing "chunk" posed a hazard (See Tr. 791). In his testimony Ferlich did not connect the missing piece to any particular hazard. His general view seemed to be that somehow the missing chunk compromised the integrity of the braking system, but he did not fully explain why. Without an adequate explanation I cannot find that the missing piece posed or contributed to a hazard, especially when, as here, the missing chunk was not mentioned in the citation as a cause of the violation.¹⁷

Thus, during the course of a work day, Truck No. 425 – a truck, with diminished braking capacity on one wheel and with six worn brake drums – would have been required to descend a haulage road carrying a load of coal. The question is whether a reasonable miner would have concluded that travel down the road in such a loaded truck posed a hazard warranting correction.

^{17/} In addition, there was much discussion by Ferlich and by Chewing about the significance of the brake drums' blue color. Their testimony revolved around the issue of whether "bluing" was indicative of brake fade (Tr. 820) and thus, indicative of the immediate cause of the accident. Very little, if any, of the testimony concerned whether a reasonable miner would have noted the bluing as indicating a hazard prior to the accident. In fact, Ferlich agreed he could not say for certain if the "bluing" was present prior to the accident and thus would have been seen by such a miner (Tr. 856, 885). Therefore, I will not consider it as a condition that would have signaled a hazard.

I conclude the answer is “yes” because the pushrod stroke being above the limit on one of the rear brakes reduced the capacity of that brake to function as it should, and, therefore, the full force of the truck’s braking system could not be applied when needed. In addition, the record fully supports finding that the thin brake drums meant they were more likely to crack or to lose a piece because their integrity was less than when they were manufactured and that they would heat up and expand faster and lead to brake fade (Tr. 786-789). Not only does Ferlich’s credible testimony support this conclusion, so do elementary physical principles.

Ferlich’s description of the brakes as “the “last line of defense in an emergency” was accurate (Tr. 809). As he explained, if the Jake brake and the retarder did not slow the truck sufficiently, the service brakes had to be used (Tr. 808). For example, if the drive shaft broke, the truck would have nothing to slow it but its service brakes (Tr. 809). Also, Ferlich persuasively testified that brakes in pristine condition are designed to stop the truck on a 20 percent grade (Tr. 879). Here, the grade was approximately 17 percent at its steepest, close to the maximum grade on which the truck could be safely operated. The fact that the brakes were in far from pristine condition meant that Truck No. 425 had diminished braking capacity where it might be needed most. While the diminished capacity might not have been a problem if the truck had been operated on generally level roads, on a road with grades as steep as those at the mine, diminished capacity presented a definite hazard. Therefore, I conclude Truck No. 425 was in an unsafe condition, and a reasonably prudent person familiar with the truck and the conditions under which it was operating would have fixed or adjusted the pushrod stroke and installed new brake drums or would have removed the truck from service.

S&S and GRAVITY

The violation was S&S. The violation of section 77.404(a) contributed to the hazard that the truck would be unable to stop. Given the particular circumstances under which the violation occurred – the grade of the road, the necessity to maintain control of the truck, the need to make frequent trips down the road with the truck, the driver’s unfamiliarity with the road and with the truck – I conclude that as mining continued it was reasonably likely that the lack of full braking capacity could contribute to a situation which was reasonably likely to result in an accident causing serious injury to Whitt and/or to anyone the uncontrolled vehicle hit. Obviously, the violation also was serious.

NEGLIGENCE

William Arthur testified that, prior to the accident, no one from Cannelton inquired about Wiggles’ truck maintenance program (Tr. 42-43). There is no testimony to refute this assertion, nor any testimony that Cannelton made any independent checks of Wiggles’ trucks. While primary responsibility for the violation lay with Wiggles, Cannelton also exhibited negligence. Cannelton could have – and should have – instituted some sort of systematic check (perhaps a periodic spot check) to ensure its contractor’s equipment was in compliance with applicable safety standards. In particular, Cannelton had a duty to ensure its contractor used equipment that

either was maintained in safe condition or, if it could not be so maintained, was removed from service. In the case of Truck No. 425, Cannelton did not meet this duty.

ABILITY TO CONTINUE IN BUSINESS

The parties stipulated that the total of the proposed penalties would not affect Cannelton's ability to continue in business (Stip. 6).

SIZE

The parties stipulated that the proposed assessments were based, in part, on accurate figures regarding Cannelton's size (Stip. 11(a),(b); Gov. Exh. 5). The figures reveal that Cannelton has an annual tonnage of 43,607,666 (See Gov. Exh. 5; Petition For Assessment of Civil Penalty, Exh. A). Cannelton is a large operator.

GOOD FAITH ABATEMENT

The parties stipulated that if the violations are affirmed, they were abated in good faith (Stip. 10 infra).

HISTORY OF PREVIOUS VIOLATIONS

The parties stipulated that the printout of the mine's prior violations for June 27, 1997 through June 27, 1999, "may be used determining the assessment of a penalty" (Stip. 12). The printout indicates that there were 34 applicable violations during this period, a number which represents a moderate history of pervious violations.

CIVIL PENALTY ASSESSMENTS

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Assessment</u>
7157394	9/21/99	48.26	\$25,000

I have found the violation was very serious and was in part the result of Cannelton's negligent failure to effectively oversee Wiggles' training of its employees. The violation was abated in good faith, and any penalty assessed will not affect the ability of Cannelton, which is a large company with a moderate history of previous violations, to continue in business. Given the factors and especially in view of Cannelton's shared negligence and moderate history of prior violations, I conclude an assessment of \$5,000.00 is appropriate.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Assessment</u>
7157395	9/21/99	48.27	\$20,000

I have found the violation was very serious. I also have found that it was in part the result of Cannelton's failure to effectively oversee Wiggles' training of its employees. The violation was abated in good faith, and any penalty addressed will not affect the ability of Cannelton, which is a large company with a moderate history of previous violations, to continue in business. Given these factors and especially in view of Cannelton's shared negligence and a moderate history of previous violations, I conclude an assessment of \$4,000 is appropriate.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Assessment</u>
7187482	9/21/99	77.404(a)	\$20,000

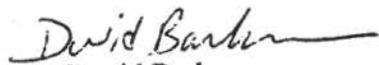
I have found the violation was serious. I also have found it was, in part, the result of Cannelton's failure to meet its duty to ensure the equipment operated by its contractor was either safe or removed from service. The violation was abated in good faith, and any penalty assessed will not affect the ability of Cannelton, which is a large company with a moderate history of previous violations, to continue in business. Given these factors and especially in view of Cannelton's shared negligence and moderate history of previous violations, I conclude an assessment of \$1,500.00 is appropriate.

ORDER

Within 30 days of the date of this decision, Cannelton **SHALL** pay to the Secretary a total of \$10,500.00 for the violations found above, and upon payment of the penalties this proceeding is **DISMISSED**.¹⁸

^{18/} In issuing this order, I note that the Secretary chose to propose very substantial penalties for these violations. In so doing the Secretary presumably was attempting to "send a message" to Cannelton and to other production-operators that they must increase oversight of their contractors' compliance efforts and proactively encouraging compliance. While I do not disagree with the Secretary regarding production-operators overall responsibility for compliance and their need to effectuate that responsibility, I question whether the assessment of substantial penalties without a prior "warning" is equitable. It is clear from the testimony of Bowman and Hatfield that before the accident they discussed Cannelton's responsibility for contractors' violations including the operator's need for oversight (Tr. 272-273, 282-283, 296-297; 648-649). What is not clear from this record is whether there has been a prior consistent effort on MSHA's part to enforce oversight by Cannelton and/or other production-operators. For example, MSHA might have insisted that operators include in their training plans provisions for effective oversight . . . something MSHA apparently did not do when it came to Cannelton (Tr. 659), or MSHA might have sent cautionary letters to production-operators, something about which the record is silent.

Payment may be sent to: Mine Safety and Health Administration, U. S. Department of Labor, Payment Office, P. O. Box 360250M, Pittsburgh, Pennsylvania 15251.



David Barbour

Chief Administrative Law Judge

Distribution:

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET, N.W., Room 6003

WASHINGTON, D. C. 20006-3868

Telephone No.: 202-653-5454

Telecopier No.: 202-653-5030

August 13, 2002

JERRY POLLY,	:	DISCRIMINATION PROCEEDING
Complainant,	:	
v.	:	Docket No. KENT 2002-253-D
	:	
POWELL MOUNTAIN COAL	:	BARB-CD-2002-04
COMPANY, INC.,	:	
Respondent	:	Mine: Kentucky Wallins Mine

ORDER DENYING MOTION TO DISMISS
ORDER TO RESPONDENT TO FILE AN ANSWER

Before: Judge Barbour

On July 17, 2002, the Respondent, Powell Mountain Coal Company, Inc. ("Powell"), filed a motion to dismiss the above captioned discrimination case. In support of the motion, Powell asserts the Complainant, Jerry Polly, failed to file a discrimination complaint with the Commission within 30 days notice by the Mine Safety and Health Administration ("MSHA") that no violation occurred under Section 105(c) of the Mine Act ("the Act"). Resp. Mot. at 1. Powell argues that Polly was required to file a complaint with the Commission by May 15, 2002, but Polly did not mail the complaint until June 4, as shown by a copy of the envelope. Mot. at 2; Resp. Exhibit 4.

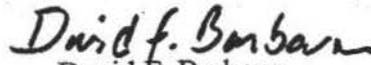
Section 105(c)(3) of the Act states in pertinent part: "[i]f the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination." 30 U.S.C. § 815(c)(3).

The record indicates, as Powell correctly states in its motion, that MSHA's letter is dated April 15, 2002, and, therefore, Polly had until May 15, 2002, to file a complaint with the Commission. However, Powell is mistaken in asserting that Polly did not timely file a complaint. My office received Polly's complaint on May 13, 2002, two days before the deadline. Subsequently, on May 14, 2002, I sent a letter to Polly - as is normal practice - instructing him to file additional information, within 30 days, including a copy of the return receipt indicating he had sent a copy of the complaint to Powell. If Polly had not already sent a copy of the complaint to Powell, I instructed him, in the alternative, to do so via certified mail, return receipt requested. My office timely received the required information on June 14, 2002.

Thus, the record clearly indicates that Polly was in compliance with MSHA's April 15 letter and my May 14 letter. Polly timely filed his documents with my office. Polly's apparent error was in failing to timely serve Powell with a copy of the complaint, an error that likely was the root of Powell's belief that Polly did not timely file a complaint. Commission Rule 7(a) (29 C.F.R. § 2700.7(a)) requires all documents filed with the Commission to be served on all parties. However, Polly, who is appearing pro se, may have been unaware of the rule. He is now, and I expect him to fully comply in the future.

In light of the foregoing, Powell's motion to dismiss is **DENIED**.

Further, Powell is **ORDERED** to file an answer to the complaint within 30 days of the date of this order.


David F. Barbour
Chief Administrative Law Judge

Distribution:

Jerry W. Polly, HC 61, Box 199, Pineville, KY 40977 (Certified Mail)

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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

August 22, 2002

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2002-20
Petitioner	:	A. C. No. 12-02010-03609
v.	:	
	:	
BLACK BEAUTY COAL COMPANY,	:	Air Quality No. 1 Mine
Respondent	:	

ORDER DENYING MOTION TO LIFT STAY

Proceedings in this case were stayed on February 6, 2002, pending completion of a 110(c) investigation, 30 U.S.C. § 820(c), involving Respondent's employees. The Respondent has now filed a Motion to Terminate Stay of Proceedings. The Secretary opposes the motion. For the reasons set forth below, the motion is denied.

When the Secretary filed the original motion to stay, she indicated that the investigation was expected to be completed within 90 to 120 days. Pointing out that more than 120 days have elapsed, the Respondent states that three of its employees, who were present during the inspection which resulted in the citations in this case, no longer work for the company.

In response to the motion, the Secretary requests that the stay remain in effect because the matter has been referred to the U.S. Attorney for criminal investigation. Included with the response, is a letter from the U.S. Attorney's office requesting that the Secretary seek a stay in the case.

The Commission has held that the following factors should be considered in determining whether to lift a stay in a case where the possibility of criminal prosecution exists: (1) the commonality of evidence in the civil and criminal matters; (2) the timing of the stay request; (3) prejudice to the litigants; (4) the efficient use of agency resources; and (5) the public interest. *Buck Creek coal, Inc.*, 17 FMSHRC 500, 503 (April 1995). After considering these factors, I conclude that the stay should remain in place.

Here it appears that the evidence in the civil and criminal matters will be the same. The Commission has noted that it is proper to stay civil proceedings if they "churn over the same

evidentiary material” as the criminal case. *Id.* (citing *Peden v. United States*, 512 F.2d 1099, 1103 (Ct. Cl. 1975)). Thus, I find that this factor supports retaining the stay.

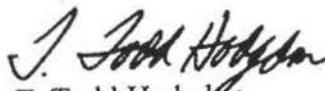
Turning to the second factor, the Commission has held that where there has been no criminal investigation and, therefore, no reference to the U.S. Attorney for criminal prosecution there is a “reduced need for a . . . stay.” *Capitol Cement Corp.*, 21 FMSHRC 883, 890 (August 1999). The opposite, however, is true in this case. The matter has been referred to the U.S. Attorney for criminal investigation. Accordingly, I find that this factor also supports retaining the stay.

The third factor requires consideration of prejudice to the litigants. Black Beauty asserts that three potential witnesses have left its employ and that “at least one of these witnesses has moved to another state.” (Resp. Mot. at 2.) The Respondent does not contend, however, that these witnesses are unavailable or that their evidence cannot be memorialized, if it has not already been, to refresh recollections. Nor does the company aver that these are the only witnesses available to it. The company’s bare assertion, without more, is not sufficient to establish that it will be prejudiced if the stay continues. This does not preclude it from conducting its own investigation. Consequently, I find that this factor does not militate against retaining the stay.

The fourth factor also supports retaining the stay. Any witness who may be subject to criminal prosecution is likely to assert his privilege against self-incrimination if called to testify in the civil penalty proceeding. This would hinder rather than advance the efficient use of agency resources.

Finally, only the fifth factor results in the conclusion that the stay should be lifted. As the Commission observed over 20 years ago, “there is a substantial public interest in the expeditious determination of whether penalties are warranted.” *Scotia Coal Mining Co.*, 2 FMSHRC 633, 635 (March 1980).

After considering all of the factors involved in granting or denying a stay, it is clear that four of the five either support, or are not contrary to, retaining the stay. Accordingly, the Motion to Terminate Stay of Proceedings is **DENIED**.


T. Todd Hodgdon
Administrative Law Judge
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