September 1981

Commission Decisions

Administrative Law Judge Decisions

Commission Decisions

SEPTEMBER

The following cases were Directed for Review during the month of September:

Secretary of Labor, MSHA v. Shamrock Coal Company, KENT 80-292; (Judge Lasher, July 30, 1981).

Secretary of Labor, MSHA v. Old Ben Coal Company, LAKE 80-399; (Judge Moore, July 31, 1981).

Secretary of Labor, MSHA v. Amax Lead Company of Missouri, CENT 81-63-M; (Judge Morris, September 4, 1981 Order Granting Interlocutory Review).

Secretary of Labor, MSHA v. Medicine Bow Coal Company, WEST 81-163, 164; (Judge Morris, August 7, 1981 Opinion, Interlocutory Review).

Review was Denied in the following cases during the month of September:

Johnny Howard v. Martin Marietta Corporation, SE 80-24-DM; (Judge Broderick, July 31, 1981).

Secretary of Labor, MSHA v. Paramont Mining Corp., VA 81-45; (Judge Koutras, August 19, 1981 Order, Interlocutory Review).

Secretary of Labor, MSHA, on behalf of James Miller v. Mine Shaft & Tunnel Corporation, WEST 81-226-DM; (Judge Vail, September 2, 1981 Order, Interlocutory Review).

Secretary of Labor, MSHA v. Amax Coal Company, LAKE 81-37; (Judge Kennedy, August 21, 1981).

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 22, 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. DENV 76-29-P
v.	:	IBMA 77-45
MANUEL PALACIOS	:	

ORDER

The Secretary of Labor's motion for voluntary dismissal and respondent's request for dismissal of his cross-appeal are granted.

Richard V. Backley, Chairman

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, D.C. 20006

September 22, 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. HOPE 75-680
and	:	
UNITED MINE WORKERS OF AMERICA	:	IBMA 75-39
	:	IBMA 75-40
v.	:	
POCAHONTAS FUEL COMPANY	:	

ORDER

On December 31, 1980, the United States Court of Appeals for the District of Columbia Circuit issued its decision reversing the decision of the Interior Department Board of Mine Operations Appeals. Pocahontas Fuel Co., 7 IBMA 121 (1976), rev'd sub nom. Mullins v. Andrus, No. 77-1086, D.C. Cir., December 31, 1980. On August 21, 1981, the Court issued its mandate. The Court remanded to the Secretary of Interior, but acknowledged that further proceedings would take place before the Commission pursuant to section 301(c)(3) of the Federal Mine Safety and Health Amendments Act of 1977, 30 U.S.C. §961(c)(3)(Supp. III 1979).

Accordingly, the case is remanded to the administrative law judge for further appropriate proceedings. */

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

*/ Chairman Backley did not participate in the consideration or disposition of this matter.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 22, 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket Nos. LAKE 79-103-M
v.	:	LAKE 79-137-M
	:	LAKE 79-139-M
THE HANNA MINING COMPANY	:	

DECISION

This civil penalty case is brought under the 1977 Mine Act, 30 U.S.C. §801 et. seq. (Supp. III 1979). On review the Hanna Mining Company contests the administrative law judge's findings of violation with respect to five citations issued by an inspector of the Mine Safety and Health Administration (MSHA). For the reasons stated below, we affirm the judge's decision.

CITATION 290181

This citation alleges a violation of 30 CFR §55.9-54, which states:

> Berms, bumper blocks, safety hooks, or similar means shall be provided to prevent overtravel and overturning at dumping locations.

The citation was issued after the inspector observed a large haulage truck preparing to dump waste material. The truck had a 100 ton capacity, a 1,000 horsepower engine, and its tires were about 9 feet in diameter. The cab of the truck was about 5-1/2 to 6 feet high and the driver was seated about 20 feet from the back of the truck. The truck's back wheels were 1-1/2 to 3 feet from the dump ledge and resting against a 2 to 3 foot high berm. The ledge was 75 to 80 feet high and the berm was constructed of loose, unconsolidated material. The judge affirmed the citation finding that the berm "was not sufficient to prevent overtravel or overturning," and that "[t]he evidence [did] not establish that other means were provided to prevent overtravel or overturning."

Hanna argues that the finding of a violation was based "solely" on a "secret" berm height requirement. This argument is based upon the inspector's testimony that, as a "rule of thumb", in order for a berm to properly perform its warning and restraining functions it should be equal in height to the rear axle of the largest truck on the jobsite. Hanna argues that reliance on this requirement not found in the standard's language is inappropriate. Hanna submits the evidence establishes that a berm was provided at the dumpsite and, therefore, that it was in compliance with the standard.

We find substantial evidence of record supporting the judge's finding of a violation. We find that the record as a whole reveals that the 2 to 3 foot high berm present at Hanna's dumpsite was inadequate "to

prevent overtravel and overturning." Thus, the facts of this case establish noncompliance with the standard's plain language. Resort to the inspector's asserted "mid-axle" guideline is unnecessary to establish a violation. Cf. Clinchfield Coal Co., NORT 78-417-P (1979)(administrative law judge)(1 MSHC 2027), aff'd, No. 79-1306, 4th Cir., April 18, 1980 (1 MSHC 2337)(finding of illumination violation not based on agency guidelines).

The judge's finding that 30 CFR §55.9-54 was violated is therefore affirmed. 1/

CITATION 294629

This citation alleges a violation of mandatory standard 30 CFR §55.11-1, which states:

> Safe means of access shall be provided and maintained to all working places.

The inspector issued the citation based on his observation of an area where workers could travel underneath an overhead belt. The judge found that this area was an unsafe means of access to a working place, and, therefore, that a violation existed. The judge also found that there was another means of access to the same working place and that this means of access was safe.

Hanna contends that the standard's mandate was met given the judge's finding of one safe means of access to the working place. We disagree. We agree with the Secretary and the judge that the standard requires that each "means of access" to a working place be safe. This does not mean necessarily that an operator must assure that every conceivable route to a working place, no matter how circuitous or improbable, be safe. For example, an operator could show that a cited area is not a "means of access" within the meaning of the standard, by proving that there is no reasonable possibility that a miner would use the route as a means of reaching or leaving a workplace.

In the present case, Hanna failed to make such a showing and there is substantial evidence to support the judge's finding that the cited area was an unsafe means of access to a working place. Therefore, we affirm the violation. 2/

1/ The judge also found that the evidence failed to establish that "other means" were provided to prevent overtravel or overturning. Hanna argues that a dumpman was present at the site and that this constituted a "similar means" of compliance as provided for by the standard. Hanna assumes, and we agree, that the judge implicitly found that no dumpman was present at the time of the alleged violation. We conclude that substantial evidence of record supports a finding that no dumpman was present. Therefore, we need not decide whether such a person, if present, would constitute a "similar means" to prevent overtravel and overturning within the meaning of the standard.

2/ We note that at the hearing the area where the cited and alternative routes were located was depicted through blackboard drawings which were not preserved. The use of such evanescent exhibits unnecessarily complicates meaningful review and may seriously disadvantage parties who later seek to rely upon them.

CITATION 294667

This citation also alleges a violation of 30 CFR §55.11-1 for failure to provide a safe means of access.

The inspector issued this citation based on his observation of a large ore spill in an aisle. The spill consisted of a pile of egg-size or larger taconite pellets located in an aisle bounded on one side by the outside wall of the building and on the other side by a row of machines. The accumulation was approximately chest high and extended out 15 to 18 feet from the apex of the pile. The spill was caused by a mechanical defect in a conveyor belt located above the aisle. The immediate area around the accumulation was not barricaded, nor was notice of the hazard posted to keep persons from entering the area. The judge found that the area was a means of access to a working place. He held that as a result of the spill, and the fact that material was still falling at the time of inspection, the means of access was unsafe and violative of 30 CFR §55.11-1.

Hanna contends that alternative safe means of access were provided and that the pile itself presented a barricade blocking travel in the aisle so that the aisle was no longer a "means of access."

Again, we disagree. As we previously stated, 30 CFR §55.11-1 requires an operator to make each means of access to a working place safe. Therefore, if the aisle was a "means of access" Hanna's duty was to make the aisle safe regardless of the presence of additional safe routes. As with the previous citation, Hanna did not show that there was no reasonable possibility that a miner would use the aisle as a means of access. Indeed, substantial evidence of record belies Hanna's claim that the pile presented a natural barricade to travel. The pile was chest high at its apex and became progressively lower. Even if the center of the pile had a limited barricading effect due to its size, the undisputed testimony was that the spill gradually extended out some 15 to 18 feet, thus posing a tripping or slipping hazard. Also, the judge's finding of violation was based in part on the fact that pellets were still falling from the elevated walkway above.

Thus, we affirm the judge's conclusion that the spill in the aisle rendered the aisle an unsafe means of access.

CITATION 294696

This citation involves an alleged violation of mandatory standard 30 CFR §55.11-12, which states:

> Openings above, below or near travelways through which men or materials may fall shall be protected by railings, barriers, or covers. Where it is impractical to install such protective devices, adequate warning signals shall be installed.

The inspector observed three floor openings along the length of an elevated walkway. One floor opening was bordered by a toeboard. The other two were not. At the hearing all parties agreed that the openings in the floor were small enough that a worker could not fall completely through them to the floor below. However, the inspector testified that the hazard he foresaw was that a worker's foot or lower leg could fall into the openings. In the inspector's view, as a result of the unprotected floor openings an accident could result causing broken bones, sprains,

lacerations and bruises. Further, the inspector testified that the toeboard surrounding the one opening actually presented a stumbling hazard since it was not used in conjunction with a railing.

The judge found that a person or materials could fall "into or through such an opening" and that the toeboard as constructed did not provide "sufficient protection" as contemplated by the standard. Hanna contends that the judge erred in interpreting 30 CFR §55.11-12 as being violated when men or materials may fall "into" as well as "through" an opening. Hanna further argues that the record does not support a finding that men or materials could fall "through" the openings in question.

We reject Hanna's arguments and affirm the judge's conclusions. In the context of the cited standard we interpret the word "through" as encompassing falling into, as well as completely through, a floor opening. This construction is in accord with the well-established rule that remedial legislation and its implementing regulations are to be liberally construed as long as such an interpretation is reasonable and promotes miner safety. E.g., Freeman Coal Mining Co. v. IBMOA, 504 F.2d 741, 744 (7th Cir. 1974). Accord, Cleveland Cliffs Iron Co., Inc., 3 FMSHRC 291, 293-94 (1981). 30 CFR §55.11-12 is concerned with the hazard presented to miners by the presence of unprotected openings on travelways. In this regard, a worker is exposed to the risk of injury whether he falls completely through or only into unprotected openings. Furthermore, the reasonableness of this interpretation is well-founded in common usage. See Webster Third New International Dictionary, 2384 (1971); and 86 C.J.S. "Through" at 813. Accordingly, the judge's finding of a violation of 30 CFR §55.11-12 is affirmed.

CITATION 294654

This citation alleges a violation of 30 CFR §55.11-16, which states:

> Regularly used walkways and travelways shall be sanded, salted, or cleared of snow and ice as soon as practicable.

The inspector issued the citation based on his observation of a thin accumulation of ice on the bottom step of a metal open-grated stairway. The stairway led to the bottom area of the screen house and the inspector testified that maintenance people, electricians, mechanics, and others would be in that area. At the time of the inspection, however, there was no activity in the area, and the inspector could not determine how frequently the stairway was used, or how long the ice had been on the step. The inspector testified that the source of the ice was a leaking water pipe which sprayed down on the step. Ice formed because of extreme winter temperatures and the fact that there was a crack in the outside wall of the building adjacent to the stairway.

The judge upheld the violation finding that there was an accumulation of ice on the bottom stairway and that the stairway was a regularly used travelway. He acknowledged that it was not clear how long the condition had existed, but inferred that the accumulation had been there for some time in view of the source of the ice and the fact the inspector discovered the condition three hours after the work shift began. Therefore, he concluded that the ice was not removed "as soon as practicable" as required by the standard.

Hanna argues that the judge erred in finding that the stairway was a regularly used travelway, that the ice was caused by water leaking from a pipe, and that the ice had not been removed as soon as practicable.

We reject each of Hanna's arguments. We affirm the judge's finding that the stairway was a regularly used travelway. The inspector's uncontradicted testimony was that in performing their duties maintenance and other workers would be in the bottom area of the screen house. We believe that it is reasonable to infer that the stairway would be used by these employees in their regular travel. We note that Hanna, the party in the best position to offer evidence respecting the use, or lack thereof, of the stairway did not do so.

We reject Hanna's assertion that the judge erred in accepting the inspector's testimony concerning the source of the water. The judge's finding that the source was a drip or spray from a pipe above the stairway is supported by substantial evidence of record, namely the testimony of the inspector as well as Hanna's safety director. In any event, it is the presence of the ice that is important rather than its source.

Finally, Hanna's argument that the judge erred in finding that the ice was not removed as soon as practicable is also rejected. We agree with the judge that in view of the conditions at Hanna's workplace, i.e., the leaking pipe and the cracked exterior wall, and the fact that the inspector discovered the ice on the stairway three hours after the working shift had begun, the ice was not removed as soon as practicable. Therefore, the judge's finding of a violation is affirmed.

In sum, the decision of the administrative law judge is affirmed.

Richard V. Backley, Chairman

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
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September 23, 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	Docket Nos.	LAKE 79-119
		LAKE 80-190
		LAKE 80-209
v.		LAKE 80-212
		LAKE 80-246
QUARTO MINING COMPANY,		LAKE 80-251
NACCO MINING COMPANY,		LAKE 80-252
THE NORTH AMERICAN COAL CORPORATION,		LAKE 80-182
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)		
v.		
THE NORTH AMERICAN COAL CORPORATION,	Docket No.	LAKE 80-276
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)		
v.		
NACCO MINING COMPANY,	Docket No.	LAKE 80-290
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)		
v.		
QUARTO MINING COMPANY	Docket Nos.	LAKE 80-311
		LAKE 80-360
		LAKE 80-384
		LAKE 80-385

ORDER

The issue in each of the above-captioned cases is the same: whether the administrative law judge correctly held that a provision of the operator's dust control plan, adopted pursuant to 30 C.F.R. §75.316, is too vague to be enforced. The dust control provisions at issue in these cases are identical. Subsequent to our directing these cases for review,

each of the operators adopted, with the Secretary's approval, a new dust provision replacing the dust control provision at issue here. As a result of that change, we no longer believe that these cases present a substantial question of law, policy or discretion. Accordingly, the directions for review in the above-captioned cases are vacated.

Richard V. Backley, Chairman

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

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Administrative Law Judge Decisions

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SEP 3 1981

GLEN MUNSEY, Applicant	:	Application for Review of Discharge or Discrimination
v.	:	
	:	Docket No. NORT 71-96
SMITTY BAKER COAL COMPANY, INC., P & P COAL COMPANY, AND RALPH BAKER, Respondents	:	IBMA 72-21

DECISION

Appearances: Stephen B. Jacobson, Esq., Los Angeles, California, for Applicant, Glen Munsey;
J. Edward Ingram, Esq., Knoxville, Tennessee, for Respondents, Smitty Baker Coal Company, Inc., and Ralph Baker;
Joseph E. Wolfe, Esq., Norton, Virginia, for Respondent, P & P Coal Company.

Before: Judge Stewart

FACTUAL AND PROCEDURAL BACKGROUND

This is a proceeding on remand by the Federal Mine Safety and Health Review Commission (Commission) for additional findings on (1) whether appropriate offers of reinstatement have already been made by (i) P and P Coal Company or (ii) Ralph Baker, (2) the amount of lost wages due Glen Munsey, and (3) the costs and expenses to be awarded. 1/

This case began on April 22, 1971, when Glen Munsey (Applicant) filed an application for review of an alleged discriminatory discharge by the Smitty Baker Coal Company, Inc., on April 15, 1971. The application sought relief under section 110(b) of the Federal Coal Mine Health and Safety Act of 1969 (the Act), 30 U.S.C. § 820(b).

Applicant, a jacksetter, left his job underground at the face of Smitty Baker No. 1 Mine along with two other miners due to alleged unsafe roof conditions in the area where he was working. When outside the mine, Applicant asked if he could go home and return to work the next day. It was explained to him that it would be unfair to allow him to go home while there were other miners who chose to stay and work in the area where the roof had been checked

1/ Munsey v. Smitty Baker Coal Company, Inc., P & P Coal Company and Ralph Baker, 2 MSHC 1052 (1980) (hereinafter, Munsey II).

and found to be safe. After Munsey refused to return to his regular duties at the face, he was offered the opportunity to do different work sufficiently far removed from the allegedly dangerous area to dispel any fear which he may have had regarding returning to work setting jacks.

At a meeting on April 29, 1971, Applicant's union representative made Ralph Baker an offer to waive back pay if he put Munsey back to work immediately at Smitty Baker Coal Company. There was also a confrontation involving a threat that the operator would be put out of business if the Applicant was not rehired. Under these circumstances, Ralph Baker declined to rehire Munsey immediately but indicated that he would take Applicant 2/ back to work later. In its first decision remanding the case to the Board of Mine Operation Appeals (Board), the U.S. Court of Appeals, District of Columbia Circuit, made it clear that a wrongful failure to rehire could be discriminatory action under the Act. It included an order that the Board decide whether the refusal to rehire was actuated by a forbidden retaliatory motive.

Pursuant to a motion by the Applicant, the Board, in the absence of a timely objection, added three Respondents, P & P Coal Company, Mr. Ralph Baker, and Mr. Smitty Baker to the proceeding without prejudice to the presentation of any defenses on the merits by them.

On July 7, 1975, the Board issued a Memorandum and Order which retained jurisdiction over the proceeding but referred it for further hearing and a written recommended decision by an Administrative Law Judge.

In that decision which was issued on June 25, 1976, after the second hearing conducted December 2-4, 1975, the Administrative Law Judge made recommended findings and conclusions concerning the nine specific issues presented on remand and those germane to the case at that time, including a finding that the failure to rehire Munsey on April 29, 1971, was in violation of the Act.

On the second appeal, the United States Court of Appeals for the District of Columbia affirmed the Administrative Law Judge's recommended finding that Smitty Baker Coal Company and Ralph Baker violated section 110(b) of the Federal Coal Mine Health and Safety Act of 1969 but remanded the case to the Federal Mine Safety and Health Review Commission (Commission) to consider additional issues. 3/ Since the time that the controversy arose in 1971,

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2/ Munsey was joined in his application by miners Ernest and Arnold Scott. They subsequently withdrew from the case, filing affidavits stating that they had only participated initially because they were advised that they had to do so by officials of the United Mine Workers of America. These two miners were later rehired by Ralph Baker.

3/ These findings were required due to the changed posture of the case. Although the Board of Mine Operations Appeals declined to adopt the recommended decision that the failure to rehire on April 29, 1971, was in violation of the Act it specifically indicated that the relevant issues had been considered. Glen Munsey v. Smitty Baker Coal Company, Inc., Ralph Baker, Smitty Baker, and P & P Coal Company, IBMA 72-21 (June 30, 1977); 8 IBMA 47, 48, 50.

Smitty Baker Coal Company has ceased mining operations, including those at the No. 1 Mine where Munsey had been employed; P & P Coal Company has obtained a lease from Peabody Coal Company and opened a mine on property which had been the former Smitty Baker Mine designated as the No. 2 Mine; and Ralph Baker has incorporated a new mining company, Mason Coal Company, in a different location from that of the former Smitty Baker Coal Company operation.

The Commission in its decision issued on December 4, 1980, held that Ralph Baker can be ordered to reinstate Munsey at Mason Coal Company; that P & P Coal is a successor to Smitty Baker Coal Company; and that Ralph Baker, Smitty Baker Coal Company, and P & P Coal Company are jointly and severally liable for the illegal discrimination against Glen Munsey.

Upon assignment of the case for rehearing, a hearing was set for December 16, 1980. When Applicant indicated that he had not yet received the Commission's decision and could not be prepared by that date, the hearing was reset for January 13, 1981, and the hearing was held on that date in Abingdon, Virginia. Applicant was not prepared to submit evidence concerning earnings, attorney's fees, and costs. The record was left open for late filing of statements of attorney's fees, costs and Munsey's earnings that were to be obtained from the Social Security Administration.

At the hearing, the attorneys for the respective parties agreed that, with regard to the prior testimony in the two earlier hearings conducted in this case, counsel for Respondents would designate within 10 days of the date of the latest hearing those portions of the testimony which they deemed to be pertinent to the three issues under consideration herein. Thereafter, counsel for Applicant would have the opportunity to designate back to counsel for Respondents any portion of the record that it deemed pertinent to the issues under consideration. At that point, counsel for Respondent would undertake the responsibility of reproducing copies of those portions designated and would supply them to the Judge for inclusion in the record of this proceeding. These materials were filed on March 3, 1981.

Counsel for the parties agreed to the following schedule for the filing of briefs in this matter. Within 25 days from receipt of the transcript from the reporter, Respondents would brief the reinstatement issue. 4/ Within 25 days from receipt of Respondents' brief on the reinstatement issue and the filing of late materials that had been agreed to, Applicant would thereafter file its brief as to all issues in the case. Within 10 days from receipt of

4/ The posthearing brief for Respondents Ralph Baker and Smitty Baker Coal Company was filed on March 3, 1981. Counsel for Respondent P & P Coal Company requested, and was granted an extension of time in which to file a brief on the issue of reinstatement. This brief was filed on April 15, 1981, and the time constraints for the filing of subsequent briefs were adjusted accordingly. Applicant filed his posthearing briefs on June 25, 1981. Respondents Ralph Baker and Smitty Baker Coal Company filed a reply brief on July 14, 1981. The Applicant failed to file its final reply brief within the prescribed time.

Applicant's brief on all issues in the case, Respondents would file a reply brief on the reinstatement issue and their principal brief as to the issues of back pay and attorneys' fees in this case. Within 10 days of receipt of Respondents' briefs on those matters, Applicant would file a reply brief as to all issues in the case.

Proposed findings of fact and conclusions of law in the briefs filed by the parties which are immaterial to the issues presented or inconsistent with this decision are rejected. 5/

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Reinstatement

In its decision on remand, the Commission noted that the record raises a question as to whether Baker may have already made a suitable offer of reinstatement since Baker testified in December, 1975, that he offered Munsey employment at Mason Coal Company "maybe a year ago, maybe not that long." In his testimony, Munsey mentioned neither an offer of employment from Baker nor a request for a job at Mason Coal. The Administrative Law Judge had recommended that Munsey be awarded $2,013.26 for his loss of pay during the period from April 30, 1971, until October 30, 1971, when Smitty Baker Coal Company ceased operations. After remand by the D.C. Circuit and a finding that P & P Coal Company was a successor to Smitty Baker Coal Company and that Ralph Baker could be ordered to reinstate Munsey at Mason Coal Company, it became necessary to make specific findings on the issue of whether a suitable offer of reinstatement had been made. 6/ The Commission, in its decision on remand, included findings to the effect that, if a suitable offer was made and refused,

5/ Parts of the posthearing briefs were devoted to issues which have already been resolved by the Commission and the U.S. Court of Appeals D.C. Circuit. Respondents Smitty Baker Coal Company, Inc., and Ralph Baker argued that since no complaint has been filed charging discrimination on April 29, 1971 (failure to rehire), or at any time other than April 15, 1971 (date of discharge) Munsey has failed to complain of discrimination on April 29, 1971, and that matter may not now be considered. Respondents also argued that because of statement in Munsey's posthearing brief that "Applicant no longer contends that Ralph Baker and Smitty Baker as individuals may be held responsible * * *" he has waived any claim against either Ralph Baker or Smitty Baker by abandoning any contentions against them after the second administrative hearing. Respondents further argued that the cessation of operations of Smitty Baker Coal Company, Inc., on October 1, 1971, was due to a strike and was not a subterfuge, and that Mason Coal Company is not a proper party to these proceedings. Since these issues have been previously resolved, they were not reconsidered in this proceeding.

6/ Munsey II at 1053.

then the need to offer reinstatement now is moot and that the making of a suitable offer would toll the accumulation of lost wages due to Munsey as a a result of the violation.

An offer of reinstatement can be considered "suitable" or "appropriate" if it was made unconditionally, unequivocally, and in good faith. Lipman Brothers, Inc., 164 NLRB No. 850 (1967). The offer must be one of full reinstatement to his former position, or should that position no longer exist, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges.

The record on remand establishes that although no appropriate offer of reinstatement was made by P & P Coal Company, appropriate offers of reinstatement were made by Ralph Baker at Mason Coal Company.

Munsey, or someone representing him, discussed reemployment on a number of occasions with Clyde Poe, Charlie Poe 7/ or Ralph Baker. Respondents' witnesses related occasions on which offers of employment were made to Munsey. At the hearing on remand, Munsey testified that he did not remember such offers being made but he did not introduce evidence sufficient to rebut the clear and convincing testimony that the conversations concerning the offers occurred.

Munsey related occasions on which Respondents turned down requests for employment made by him or on his behalf. Respondent made no attempt to rebut much of this testimony. It was established, however, that in the course of a number of these conversations, Munsey stated that he already had a good job elsewhere. The detailed findings on the issues of whether P & P Coal Company or Ralph Baker made a suitable offer of reinstatement are set forth below.

No Suitable Offer of Reinstatement Made by P & P Coal Company

A suitable offer to reinstate Glen Munsey was not made by P & P Coal Company. Although employment was discussed by Munsey, or someone representing him, and a representative of P & P Coal Company on several occasions, at no time did P & P Coal Company make an unconditional, unequivocal, good faith offer to hire Munsey.

1. At the 1981 hearings herein, Clyde Poe testified that on or about Friday, March 10, 1972, he and Charlie James Poe met Munsey as they were going into a bank. Charlie James Poe asked in a "light-hearted manner" if Munsey wanted a job and Munsey replied that he had a job already and did not want a

7/ Charlie James Poe and Clyde Poe were co-owners of P & P Coal Company at the times pertinent herein and remained so at the time of the hearing held January 13, 1981.

job at P & P. Clyde Poe characterized the conversation as "light-hearted" because Charlie James Poe is a very talkative person. He acknowledged that it was not a serious conversation.

Although Munsey testified at the most recent hearing that he did not recall this conversation, the clear and convincing testimony of Clyde Poe establishes that the conversation took place. Poe also truthfully admitted the circumstances and the manner in which Munsey was asked if he wanted a job even though they were such that the conversation cannot be considered an appropriate offer of reinstatement.

2. At the hearing held in 1975, Charlie James Poe testified that he had a conversation relating to employment with Munsey on or about Saturday, March 11, 1972. He testified that he met Glen Munsey and Fred Coeburn 8/ in a parking lot and that Munsey asked him for a job. Poe responded, "Well, Glen, I'm hiring men off Ralph's panel and if you're on his seniority list, I'll get to you and give you a job." In reply, Munsey laughed and said: "No, I don't want no job up there. I got a good job over in Kentucky." Poe asserted that Munsey then told him the name of his employer.

Prior to this testimony by Charlie James Poe, Munsey had testified on cross-examination that he did not remember a conversation of this nature. Although Munsey's testimony might be construed as a denial that the conversation on March 11, 1972, 9/ occurred, it certainly was not as convincing as that of Poe who was certain of all aspects of the conversation except the exact date on which it occurred. Here again, Poe gave the full details of the conversation, including those detrimental to his case. Charlie Poe's "offer" of a job to Glen Munsey on this occasion was made contingent upon Munsey being a member of the panel of former Smitty Baker Coal Company employees. This panel listed the former employees by seniority and served as the basis by which P & P hired its miners. Those miners hired from the panel were chosen by seniority without further screening.

On Sunday, March 12, 1972, a meeting called by Charlie James Poe was held in the UMWA hall in St. Charles. At this meeting, P & P hired its employees from the panel comprised of the former employees of Smitty Baker Coal Company. Munsey went to the meeting but left after he and a number of other former employees who had been fired by Smitty Baker Coal Company were told that they were not on the panel. Munsey did not actually check to see if his name was on the panel or not.

At the 1975 hearing, Charlie James Poe testified that he did not hire Munsey at the time because Munsey had informed him that he already had a job

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8/ Fred Coeburn was the section foreman at Smitty Baker Coal Company who had allegedly discharged Munsey on April 15, 1971.

9/ At the hearing held in 1973, counsel inferred during cross-examination that this conversation occurred on March 13, 1972.

and did not want to work for P & P. Poe believed that all of Smitty Baker's men were on the list but he did not check the panel list used by the union and he did not do the actual hiring. The evidence fails to establish that Munsey was on the panel comprised of Smitty Baker Coal Company employees at the time the company ceased operations. His name was not likely to be on such a panel since he had previously terminated his employment with that company. Neither Munsey nor Charlie James Poe saw the actual panel list from which former employees of Smitty Baker Coal Company were chosen by the union. Poe believed that Munsey's name was on his list of panel members and assumed that Munsey was included on the union's list. On the other hand, Munsey and a number of other miners were denied employment specifically because they were not on the panel.

The offer of employment made by Charlie James Poe on March 11, 1972, was premised on Munsey being a member of the panel of Smitty Baker Coal Company employees. The qualification attached to this "offer" rendered it, in effect, no offer at all.

4. P & P Coal Company signed a contract with the UMWA on March 11, 1972, 10/ or thereabouts. Ed Gilbert testified that on the day that the contract was signed, he went to Charlie James Poe at his home and spoke with him about the rehiring of Mr. Munsey and the Scotts. 11/ In the course of this conversation, Charlie Poe did not say absolutely whether he would hire either Munsey or the Scotts. Mr. Gilbert stated the UMWA position and asked Poe to put them back to work. According to Gilbert, Mr. Poe responded that he had worked out a deal with Smitty Baker whereby Smitty Baker would be responsible for anything that would happen and that they were not going to hire them. 12/ At the 1975 hearing, Charlie James Poe denied the existence of any agreement with Ralph Baker to discriminate against Munsey. While the conversation may not have included an absolute refusal to rehire Munsey, there was no appropriate offer of reinstatement at that time.

5. At the 1975 hearing, Munsey testified that he asked P & P Coal Company three times for a job and he described two of those occasions. His testimony was, in substance, that he spoke with Charlie James Poe about 2 weeks after Poe took over the mines. Poe was putting in

10/ At the hearing held in 1975, Ed Gilbert mistakenly testified that P & P signed the UMWA wage agreement on March 13, 1972.
11/ The Scotts were two miners who had left the employment of Smitty Baker Coal Company at the same time as Munsey.
12/ At the 1975 hearing, Ed Gilbert testified that he told Poe at the time of this conversation that the discrimination case was pending. On the other hand, Charlie James Poe testified at that hearing that he did not speak with Ralph Baker about any agreement not to hire certain of the employees of Smitty Baker Coal Company and that the first he heard of the discrimination case was when he came into the hearing on that morning. This conflict in testimony has already been effectively resolved in finding that P & P Coal Company, Inc., was a successor to Smitty Baker Coal Company, Inc.

a crusher at the mines on a Saturday. When Munsey asked him for a job, Poe responded "You wouldn't want to work here at this place." Poe did not give any reason for this statement.

Munsey's testimony on this point, although lacking in some detail, was given in a straightforward manner. The approximate date, the gist of the conversation, and the circumstances surrounding the incident were stated in such a manner as to establish that the incident did occur.

Munsey also testified that "he went back to Charlie James Poe once again and asked him about a job and was told by Poe at that time they were not doing any hiring." There were no witnesses present. At the 1981 hearing, Munsey reiterated that he had asked Charlie James Poe for a job and Poe said that he was not hiring anybody. Although Munsey's testimony regarding this incident lacked clarity and detail, it was given in such a manner as to establish that the conversation did occur. It is clear that no appropriate offer of reinstatement was made in the course thereof.

6. Approximately 9 months to a year after P & P Coal Company opened, Munsey asked Ed Gilbert to intercede with Charlie Poe to get him a job with P & P Coal Company. Ed Gilbert spoke with Poe over the telephone. Poe told Gilbert that he was not hiring because his business was in a slump. There was clearly no appropriate offer of reinstatement on the occasion.

7. Approximately 2 years before the December 5, 1975, hearing, Glen Munsey's wife went to Clyde Poe's store and asked him for a job on behalf of Glen Munsey. Mr. Poe responded that P & P Coal Company was not hiring. Again, there was no offer of reinstatement on this occasion.

Suitable Offer of Reinstatement Made by Ralph Baker

Smitty Baker Coal Company closed down operations in October, 1971. Ralph Baker started the Mason Coal Company early the next year, opened the mine in May, 1972, and started running coal in June of 1972.

The record establishes a pattern by Munsey of requesting employment at both P & P Coal Company and Mason Coal Company even though he already had a job and had no intention of leaving to accept another. It was not established whether this course of conduct was idle conversation between acquaintances or a deliberate attempt to make a case for his discrimination proceeding. In any event, while P & P Coal Company did not make an appropriate offer, Mason Coal Company needed Munsey's services and made more than one suitable offer to reinstate him.

Glen Munsey testified that he did not go to Smitty Baker Coal Company or anybody connected with it and request that he be rehired after April 29, 1971; that he never spoke with Mr. Baker regarding employment at Mason Coal Company, nor had he ever conferred with anyone he knew to be or thought might be a foreman or a superintendent at Mason Coal Company about working for that company, and that to his recollection, he never had anyone else contact Baker for him. Under the circumstances this testimony lacks credibility.

Munsey also testified that from 1971 through 1974, he worked for Helen Ann Coal Company. His job with that company was "running bridge * * * on a miner." The "bridge" is a short conveyor which carries the coal cut by the continuous miner back to the main conveyor. Mr. Munsey's station as a bridge operator was approximately 90 feet outby the coal face but he had to approach the face regularly in the performance of his job. When Munsey was employed by Smitty Baker Coal Company, he was a jacksetter, a job which required him to work in the immediate vicinity of the coal face. Munsey did not work as a jacksetter at Helen Ann Coal Company. 13/ Munsey testified that he did not seek any particular job when he applied for work at Helen Ann Coal Company but also that he "wanted out from the face * * * [and so he] learned to start running the bridge."

Munsey admitted that, during the time he was working with Helen Ann Coal Company, he had no thought of leaving that company to get a job at Mason Coal. He stated that he would have considered working at Mason Coal Company after he left Helen Ann Coal Company in 1974 if "they had offered me a job" but that he would not have left Helen Ann Coal Company in 1972, 1973, or 1974 to work for Mason Coal Company. During the time he worked for Helen Ann Coal Company, the company was signatory to the UMWA contract. It is clear that Munsey would not have left his job as a bridge operator and forfeited his union status with the UMWA to go to work at the face at Mason Coal Company as a jacksetter. Munsey stated that he would not have given up a job at a union mine for one at a non-union mine. It was later established that Mason Coal Company had a contract with the Southern Labor Union.

Ralph Baker testified that, after establishing Mason Coal Company in 1972, he was asked by Munsey for a job several times; Baker told Munsey that he should come to work but Munsey never did. Baker testified in detail as to two occasions on which he offered to hire Munsey. Baker also testified that Munsey had asked him for work on four or five other occasions when the two passed on the street. Munsey never went in and filled out one of the written applications for employment but he had inquired about working at Mason Coal Company until the time that Adrian Belcher quit. After Belcher quit in 1975, Munsey did not talk to Baker or any of his foremen regarding a job.

Baker's testimony in regard to the first of the two specific occasions on which Munsey was offered employment was that Munsey asked for a job 2 or 3 months after Mason had started running coal in June, 1972. Mason Coal had been shipping coal on spot orders to the Tennessee Valley Authority and to other utilities. The conversation took place close to the Southern Railway Depot in St. Charles. Glen Munsey started the conversation by asking if he could have a job. Ralph Baker agreed to give him a job.

13/ Munsey testified that he never worked as a jacksetter with Helen Ann Coal Company but that he had "set jacks at Bee Coal [Company]."

Munsey then told Baker that he did not want a job--that he was already working. Baker had no idea why Munsey asked him for a job when he did not want a job, but did not think this was strange. He stated that people frequently asked him for jobs when they did not really want them.

As noted above, Munsey originally testified that he never conferred with anyone at Mason Coal Company regarding employment. On rebuttal, he softened his position somewhat. In response to the question whether this conversation in St. Charles occurred, Munsey replied "Not as I can remember." Munsey neither explained nor denied the conversation with Baker but rested on a general, equivocal denial.

In June, 1973, Munsey asked for and was given a job by Baker's foreman, Adrian Belcher. In summary, Baker's testimony was that Munsey had been sitting in a car with Adrian Belcher, a section foreman at Mason Coal Company. Baker walked up to the car and was told by Belcher that he, Belcher, had hired Munsey as a jacksetter. Baker "told him that was good." Mr. Belcher appeared to Baker to have been serious. Baker believed that Munsey said something but could not remember what it was. Nothing was said about seniority or back pay.

Munsey testified that Baker came over to the car and spoke with Adrian Belcher while he was in the car but does not know or remember what Baker and Belcher spoke about. Munsey asserted that Mr. Belcher did not hire him to work at Mason Coal Company at that time and that he did not even know that Belcher was a foreman at Mason Coal Company. In view of Munsey's presence in the car with Mr. Belcher when Mr. Belcher and Mr. Baker were talking, it is improbable that he was unaware at the time of the substance of the conversation. His assertions that "(he does not) know what they were talking about," followed by the assertion that he did not remember what was said will not serve to rebut Baker's testimony in this regard.

The evidence establishes that Ralph Baker agreed to employ Glen Munsey 2 or 3 months after Mason Coal Company started running coal in June of 1972 and that he again agreed to employ Glen Munsey in June of 1973. Although Ralph Baker had refused to rehire Munsey and the Scotts at Smitty Baker Coal Company on April 29, 1971, he conditioned his refusal by stating that he would not rehire them "at that time." The record clearly shows that he was willing to hire them the succeeding year after establishing Mason Coal Company. Baker hired back Arnold and Ernest Scott, former Applicants in this proceeding. They made no agreement with Baker when they came back to work to drop their cases nor did Baker expect that they would do so when they did come back to work. No mention was made of the case nor was seniority given to them at the time. No back pay was given. Baker believed that Munsey was a skilled jacksetter and his unrebutted testimony was that he would have been glad to have Munsey working at Mason Coal in that capacity.

Surrounding circumstances lend credence to Ralph Baker's testimony. Munsey's purported refusal of employment is consistent with his testimony that he would not have left his employment as a bridge operator at Helen Ann

Coal Company to work as a jacksetter at Mason Coal Company at the time the offer was made.

Baker was serious about giving Munsey a job on the two occasions related above. At no time did he make the acceptance of a job contingent upon dropping any claims for back pay that Munsey might have against him. The offers were unequivocal, unconditional and made in good faith. Under the circumstances of this case, it is clear that the offers of reinstatement were suitable even though a specific promise to give back pay was not included. 14/

The relief provisions of the Act were intended to compensate for injury suffered, not to place Munsey in a better position than he would have otherwise occupied. Therefore, the offers of reinstatement were suitable even though no consideration was given to lost seniority or privileges. Mason Coal Company, from its inception, had a collective bargaining agreement with the Southern Labor Union rather than the United Mine Workers of America, the collective bargaining agent at the Smitty Baker Coal Company operation. Ralph Baker testified that a number of the former employees of Smitty Baker Coal Company were hired by Mason Coal Company. These employees were not accorded seniority or privileges at Mason Coal Company by virtue of their prior employment with Smitty Baker Coal Company. This practice was uniformly applied.

It is found that Ralph Baker made Glen Munsey an appropriate offer of reinstatement on two separate occasions. The first such occasion occurred 2 or 3 months afer Mason Coal Company began running coal in June of 1972. The second occasion occurred in June, 1973.

Relief to be Accorded

Pursuant to the terms of section 110 of the Act, Munsey is entitled to an order requiring Respondents "to take such affirmative action to abate the violation as the Secretary deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner * * * to his former position with back pay."

Because a suitable offer of reinstatement has been made and refused, the need to offer reinstatement is now moot. Moreover, the making of the suitable offer has tolled the accumulation of lost wages due Munsey as of the date the offer was made. Respondent Ralph Baker was unable to establish the

14/ See N.L.R.B. v. Midwest Hanger Company, 550 F.2d 1101 (8th Cir. 1977). The court therein stated at 1103: "It is clear that had the Company's offer of reinstatement been conditioned solely on its refusal to give back pay * * * then the offer of reinstatement would not have been invalidated." Citing D'Armigene, Inc., 148 NLRB 2, 15 (1964), enforced as modified, 353 F.2d 406 (2d Cir. 1965); Reliance-Clay Products, 105 NLRB 135 (1953).

exact date on which the first conversation took place. He was able to testify only that the conversation occurred 2 to 3 months after Mason Coal Company began running coal in June, 1972. This failure to provide a specific date must be resolved in Munsey's favor. If the operation began at the end of June, the offer could have been made as late as October 1. For the purposes of determining the relief to be accorded, the date on which this suitable offer of reinstatement occurred will be taken as October 1, 1972.

Munsey is entitled to be paid those wages he would have earned but for the illegal discrimination against him. It has already been determined that $2,013.26 was due Munsey for wages lost through October 1971, when Smitty Baker Coal Company ceased operations. P & P Coal Company which has been found to be a successor began operations on April 1, 1972. 15/ Respondents are, therefore, liable for any wages lost by Munsey from April 1, 1972, until October 1, 1972, the date on which the accumulation of wages was found above to have tolled.

The figures provided by Munsey 16/ for the amount of wages he would have earned at P & P Coal Company were computed on the assumption that it operated on a 5-day work week at a rate of $38.75 per day. If Munsey had been employed from April 1, 1972, through the end of the quarter, June 30, 1972, by P & P Coal Company, he would have earned $2,518.75. The figure provided for the second half of 1972 was calculated on the basis of 95 days worked at a rate of $38.75 and 35 days at a rate of $41.75. An appropriate figure for the third quarter wages paid by P & P Coal Company cannot be accurately reached by dividing the total half-year figure, $5,412.50, in half. Rather, it is appropriate to multiply the number of work days in the third quarter (65) times the rate in effect ($38.75). On this basis, Munsey would have earned $2,518.75 in the third quarter of 1972 had he been employed by P & P Coal Company. 17/

Munsey appended to his posthearing brief an itemized earnings statement provided by the Social Security Administration. His earnings during the

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15/ While the record provides indications that P & P Coal Company may have commenced operations in some form as early as March 13, 1972, Munsey asserted in his posthearing brief that operations actually began on April 1, 1972. The figures for lost pay offered by Munsey are calculated as of April 1, 1972.

16/ No objection was made by Respondents to the dollar amounts estimated by Munsey for the period of time from April 1, 1972, through September 30, 1972.

17/ It is arguable that calculations must also be made of the amount of wages lost by Munsey because of the failure of Ralph Baker to offer him employment at Mason Coal Company until October, 1972.

The exact date on which Munsey might first have been employed by Mason Coal Company has not been established. Ralph Baker stated that the company first began running coal in June of 1972, but Respondent's Exhibit No. 2, a "Recapitulation/Work Time and Pay Rates" for Mason Coal Company, indicates

second (April-June) and third (July-September) quarters of 1972 were indicated thereon as follows:

April-June, 1972	$2,446.80
July-September, 1972	$1,746.00

In view of the above, it is found that Munsey is entitled to $72 in lost wages for the second quarter of 1972 and $773 in lost wages for the third quarter. These amounts reflect the difference between what Munsey would have earned had he worked at P & P Coal and his actual earnings during the pertinent period of time.

Costs and Expenses

Section 110(b)(3) of the Act reads as follows:

> (3) Whenever an order is issued under this subsection, at the request of the applicant, a sum equal to the aggregate amount of all costs and expenses (including the attorney's fees) as determined by the Secretary to have been reasonably incurred by the applicant for, or in connection with, the institution and prosecution of such proceedings, shall be assessed against the person committing such violation.

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fn. 17 (continued)
that a considerable number of shifts were worked prior to June 30, 1972. No indication exists on the record, however, as to the number of employees working or the nature of the work performed.

The computation of earnings which Munsey would have made had he worked for P & P Coal Company or Mason Coal Company were both determined on a bi-annual basis. The figures provided for Munsey's actual earnings were determined on a quarterly basis.

Mason Coal Company began operations during the second quarter of 1972. If Munsey had worked at Mason Coal Company from the day it began operations through June 30, 1972, he would have earned $1,557.50. This figure reflects the wages due for 44-1/2 shifts at a rate of $35 per shift.

A total of 62-1/2 shifts were worked at Mason Coal Company at a rate of $38 per shift during the entire second half of 1972. In the absence of information which would allow a breakdown of this total by quarters, the number of shifts ascribed to the third quarter is taken to be one-half of the total or 31-1/4. Muney's earnings at Mason Coal Company in the third quarter of 1972 would, therefore, have amounted to $1,187.50.

The amount that Munsey would have earned at Mason Coal Company is less than he would have earned at P & P Coal Company. Since this provides an inaccurate basis on which to calculate Munsey's loss, the calculations are based on his earnings at P and P Coal Company.

On the basis of this provision, Munsey asserts that he is entitled to attorney's fees of $108,962.50 and costs of $367.16.

Mr. Munsey testified that he was represented first by Charles Widman, then by Willard Owens and finally, by the current attorney of record, Steven Jacobson. Charles Widman and Willard Owens were salaried member of the legal staff of the UMWA during the time they represented Glen Munsey. Steven Jacobson was a salaried member of the UMWA legal staff until September, 1976. Thereafter, Mr. Jacobson continued his representation of Glen Munsey in a private capacity.

Munsey stipulated that he had never been charged for expenses and is not expected to pay back fees. He testified that he was not obligated to the Union for its provision of the services of these three attorneys. Munsey also testified that he never discussed fees with any of these attorneys, including Mr. Jacobson.

Section 110(b)(3) is couched in terms which, in pertinent part, provide for assessment against Respondents of the costs and expenses, including attorney's fees reasonably incurred by the Applicant. As a threshold question, it must be determined whether recovery may be had by Munsey despite his stipulation that he did not incur any obligation to pay attorney's fees, costs, or expenses.

Congress enacted the provision for attorney's fees in section 110(b)(3) to encourage individuals injured by unlawful discrimination to vindicate their private rights under the Act even though the personal recovery anticipated by the Applicant would, in some cases, be far less than the costs and expenses incurred in maintaining the action. Provision of costs and expenses was, therefore, a critical element of the enforcement scheme envisioned by Congress. In order to vindicate the right of miners as a class to be free from unlawful discrimination, the inherent disincentive presented by costs and expenses in excess of anticipated recovery was removed.

Respondent asserts that the Act specifically limits the recoverable costs and expenses to those actually incurred by the Applicant. It was argued that Munsey did not incur attorney's fees because he was not personally obligated for costs and expenses to those who represented him.

Respondents' argument is without merit. It places undue emphasis on the phrase "incurred by applicant," and, if adopted, would eviscerate the enforcement scheme envisioned by Congress. It makes no sense to restrict recovery of costs and expenses to applicants who have formally agreed to pay these costs and expenses when section 110(b)(3) was enacted in recognition of the chilling effect that such obligations would have on the assertion of the rights afforded by the antidiscrimination provisions of the Act. Munsey did not incur a formal obligation to pay costs and expenses because he could not afford to meet such an obligation. His situation was precisely that which Congress intended to remedy with the enactment of section 110(b)(3).

No reason can be found to warrant reduction in the level of enforcement afforded by section 110(b) by attaching significance to a formalized obligation to pay. An attorney providing free legal services in the vindication of section 110(b) rights stands in the same position as one to whom a fee is owed.

Compensation for legal services rendered in the absence of legal obligation on the part of the client to pay have been awarded to attorneys in private practice, private legal services organizations, foundations, and public-interest law firms pursuant to statutory provisions for awarding of attorney's fees. Applicant has advanced no convincing reason nor any legal authority to justify the extension of the right to recover fees or expenses under such circumstances to unions or collective bargaining agents. It is likewise inappropriate that Mr. Jacobson be awarded attorney's fees personally for the legal services he provided while in the employment of the UMWA. Recovery of attorney's fees and expenses will therefore be allowed only for those services rendered and expenses incurred by Mr. Jacobson while he represented Munsey in the capacity of a private practitioner.

Respondent argued that attorney's fees had been disallowed in the recommended decision herein, issued June 25, 1976, and that the Board of Mine Operations Appeals had overruled Applicant's exception to the disallowance in its decision of June 30, 1977 (Glenn Munsey v. Smitty Baker Coal Company, et al., 8 IBMA 43 (1977)). The Board found that "Munsey failed to meet his prima facie burden consistent with the requirement of section 110(b)" and denied "all exceptions not dealt with specifically." The Court of Appeals affirmed the Board in part, reversed it in part, and remanded for consideration of specific issues. Glenn Munsey v. Federal Mine Safety and Health Review Commission, 595 F.2d 735 (D.C. 1978). The Court did not specifically affirm or reverse the Board's denial of Applicant's exception to the disallowance of attorney's fees.

The Board did not offer an explanation for its denial of Respondent's exception. It is entirely possible that the Board denied the exception because recovery of expenses pursuant to section 110 was premised on Applicant's prevailing in his claim of discrimination. The Court of Appeal's reversal in part on substantive grounds undermines the Board's denial of the exception.

The basis for disallowing attorney's fees was not made on substantive grounds but, rather, was based on the failure of Applicant to submit evidence to establish the existence of such expenses. If the disallowance of fees to that point in time stands, it would affect provision of attorney's fees accrued through June 25, 1976. As noted above, recovery of fees prior to that time is denied on other grounds. As a result, Respondent's argument is moot.

The starting point for computation of fees is achieved by multiplying a reasonable hourly rate by the number of hours reasonably expended on the

lawsuit. 18/ This starting figure has been termed the "lodestar." The lodestar fee is then adjusted to reflect a variety of other factors.

Counsel for Applicant submitted the following information with respect to the hours spent representing Mr. Munsey from 1977 through the present. This information was contained in Applicant's Exhibit No. 6 which was accepted into evidence subject to the filing of available supporting materials:

Preparation of petition for D.C. Circuit review	.50
Preparation of D.C. Circuit brief and joint appendix	88.50
	89.00

1977 - 89.00 hours at $70/hr. = $6,230.00

Preparation of opposition to briefing extension	1.75
Preparation of motion to substitute parties and reply to opposition thereto	9.00
Preparation of reply brief	53.75
Preparation of motion for expedited oral argument	6.00
Preparation of letter to Court	1.75
Preparation for and attendance at D.C. Circuit argument	27.50
Preparation of opposition to motion to vacate award of costs	3.75
Preparation of materials for Commission on remand	39.75
	143.25

1978-79 - 143.25 hours at $80/hr. = $11,460.00

Preparation of July 1980 letter to Commission, telphone calls from Commission staff re documents	5.75
Preparation for and attendance at 1981 hearing and preparation of requests for supplemental documents	46.00
Preparation of materials on remand	27.50
	79.25

1980-81 - 79.25 hours at $110/hr. = $8,772.50

Counsel for Applicant supplemented Exhibit No. 6 with an affidavit attached to the posthearing brief filed herein on June 25, 1981. He stated

18/ The method utilized in setting the attorney's fees due herein has been gleaned in large part from Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980) (hereinafter, Copeland).

that Exhibit No. 6 reflected the "various tasks I have performed in connection with this case, and the hours I spent in performance." Counsel did not state whether the hours claimed were established by daily records, by reconstruction through close examination of the record of the case or by mere estimation.

The submissions of counsel for Applicant, though perfunctory, were sufficient to permit a determination of reasonableness to be made. It is found that counsel for Applicant reasonably expended 89 hours 19/ in 1977, 143.25 hours in 1978-1979, and 79.25 hours in 1980-1981.

In an affidavit submitted with the posthearing reply brief, Mr. Jacobson offered the following information. Mr. Jacobson is a member of the California, District of Columbia and Illinois Bars. He graduated from Harvard Law School in 1973. From 1973 to 1977, he was a staff attorney for the UMWA with responsibility for mine safety litigation; since 1977, he has been in private practice. He has argued "numerous precedent-setting cases" in the mine safety and health area.

Mr. Jacobson stated that his billing rate was $70 per hour in 1977, $80 per hour in 1978 and 1979, and $110 per hour in 1980 and 1981. It is found that these are reasonable rates in the community for similar work. It is also found that these dollar amounts accurately reflect the value of Mr. Jacobson's time, given his background and, particularly, his expertise in matters of this sort. 20/

The number of hours reasonably expended by Mr. Jacobson multiplied by reasonable hourly rates result in a lodestar figure of $26,462.50. The burden of justifying any deviation from this figure rests with the party proposing the deviation. Copeland at 892.

Counsel for Applicant argued that the lodestar amount should be doubled in view of the contingent nature of the litigation and the quality and value of the work performed. This request is denied. The hourly rate underlying the lodestar figure reflects an allowance for the contingent nature of Mr. Jacobson's compensation. In addition, much of counsel's work was performed after the U.S. Court of Appeals had made it clear that Munsey was to

19/ Respondent objected to 88.5 hours claimed to have been expended in the preparation of the second brief to the D.C. Court of Appeals because "as to most of the issues presented by that appeal and brief, he lost." Each of these issues was closely related to the cause upon which Applicant has ultimately prevailed. Under such circumstances, the failure to prevail on specific issues is not a proper basis for denying recovery for time spent thereon.

20/ See Meisel v. Kremens, 80 FRD 419 (E.D. Pa. 1978), citing Lindy Brothers Builders, Inc. v. American Radiator and Standard Sanitary Corporation, 487 F.2d 161 (3d Cir. 1973).

prevail at least in part. An adjustment on the basis of quality and value of the representation is appropriate only when the representation is "unusually good or bad, taking into account the level of skill normally expected of an attorney commanding the hourly rate used to compute" the lodestar figure. Copeland at 893. No adjustment for the quality and value of the representation is warranted herein.

The interests at issue and the results obtained are factors to be considered in determining whether a fee is reasonable. The back pay recoverd by Munsey is far exceeded by the attorney's fees awarded herein. In succeeding on the merits, however, Applicant vindicated not only his personal right but the rights of all miners as a class to be free of unlawful, safety-related discrimination. A reduction in attorney's fees because the fees exceed Mr. Munsey's back pay recovery is not warranted.

Applicant also claimed compensable expenses in this proceeding as follows:

Duplicating	$200.00
Transcript of 1981 hearing	135.16

In view of the extensiveness of this proceeding, the claim for duplicating expenses seems reasonable and will be allowed. Applicant is clearly entitled to recover his expenses for a transcript of the 1981 hearings. Accordingly, expenses in the total amount of $335.16 are awarded herein.

In view of the fact that Munsey incurred no formal obligation for attorney's fees or expenses, either to the UMWA or Mr. Jacobson, the order entered herein will require that payment of the awarded fees be made directly. Miller v. Amusement Enterprises, Inc., 426 F.2d 534, 539 (5th Cir. 1970); Brandenburger v. Thompson, 494 F.2d 885, 889 (9th Cir. 1974).

ORDER

In its decision remanding this case for proceedings necessary to further determine the additional amount of lost wages and interest due Munsey, the Commission ordered Ralph Baker, Smitty Baker Coal Company, and P & P Coal Company, jointly and severally to pay, the amount of $2,013.26 plus interest to Munsey. It is further ordered that these Respondents, jointly and severally, pay the additional amount of $845.00, which makes a total amount of $2,858.26, plus interest within 30 days of the date of this order. Interest is to be computed on the total amount at a rate of 8 percent until the date of payment.

It is further ORDERED that the Respondents, jointly and severally, pay attorney's fees in the amount of $26,462.50 and expenses in the amount of $335.16 to Steven Jacobson, Esq., within 30 days of the date of this decision.

Forrest E. Stewart
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SEP 3 1981

CANTERBURY COAL COMPANY, Applicant	:	Applications for Review
	:	Docket No. PITT 78-127
v.	:	Order No. 1AM
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. PITT 78-128
	:	Order No. 1DEM
	:	David No. 5 Mine
UNITED MINE WORKERS OF AMERICA, Respondent	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceedings
	:	Docket No. PITT 78-301-P
	:	A/O No. 36-00813-02012V
v.	:	Docket No. PITT 78-302-P
	:	A/O No. 36-00813-02014
CANTERBURY COAL COMPANY, Respondent	:	David No. 5 Mine

DECISION APPROVING SETTLEMENT

The Secretary of Labor has filed a motion for an order approving the case disposition and settlement agreement in the above-captioned proceedings.

1/ Sections 110(i) and (k) of the Federal Mine Safety and Health Act of 1977 (hereinafter the Act), 30 U.S.C. §§ 801-960, provide:

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

(k) No proposed penalty which has been contested before the Commission under section 105(a) shall be compromised, mitigated, or settled except with the approval of the Commission. No penalty which has become a final order of the Commission shall be compromised, mitigated, or settled except with the approval of the Court."

Editor's Note:
Case on Remand, See
1 FMSHRC 1311 (1979)

On July 30, 1981, Petitioner filed its motion for an order approving settlements, scheduling time for payment, and dismissing applications for review. The settlement agreements were entered into between counsel for Canterbury Coal Company (Canterbury) and MSHA on June 4, 1981, as follows:

> §104(c)(1) Notice of Violation No. 1 DEM/AM (7-65), issued on September 23, 1977, citing 30 CFR 75.200. The proposed penalty is $800.00 and the proposed settlement is $500.00. PITT 78-301-P
>
> §104(c)(1) Order of Withdrawal No. 1 DEM (7-78), issued on December 2, 1977, citing 30 CFR 75.200. The proposed penalty is $1,500.00 and the proposed settlement is $500.00. PITT 78-302-P

MSHA also moved that a time be set by the Administrative Law Judge upon approval of the settlements for payment of the total amount of $1,000.00. The parties have also agreed that the above-captioned applications for review be dismissed as part of the settlement. Respondent United Mine Workers of America did not object to this disposition.

The reasons given by MSHA for the Motion are in substance as follows:

1. Size: The Order of Assessment, dated January 10, 1978 (PITT 78-301-P), indicated that the Mining Enforcement and Safety Administration (MESA) records on that day showed that the David No. 5 Mine and Canterbury Coal Company both produced 486,584 tons of coal in the year preceding January 10, 1978. The Order of Assessment, dated February 23, 1978 (PITT 78-302-P) indicated that MESA records show the mine produced the same (486,584) tonnage for the year preceding the latter date but the parent company, Aquitaine Incorporated, produced 1,132,587 tons annually for the year. A narrative statement concerning the above-mentioned order of withdrawal was attached to the motion and the Assessor's finding therein was the annual company production was 1,132,587 tons during 1976. The mine is of upper middle range size for assessment purposes. The Company is of lower middle range size.

2. Prior History: A certified computer printout showing only paid violations assessed against Respondent indicates that there were 161 violations of all standards during that period for that mine.

3. NOTICE OF VIOLATION NO. 1 DEM/AM (7-65): If a hearing were to be held, two Federal Inspectors would testify that each of them saw the substandard mine roof described in the notice of violation. The inspectors observed four locations where the mine roof in the same area has fallen between the roof bolts, indicating that the mine strata had shifted and was less stable than at the time the roof was bolted (Tr. 224). The area had pot holes or cavities indicating that additional support was required (Tr. 250). Safety Precaution No. 1 of the approved roof control plan required additional roof supports where conditions indicated a need (Tr. 231). In the notice of violation the Inspectors cited that part of the plan as not being complied

with. Safety Precaution No. 12 of the plan identifies additional supports (Tr. 234) to be longer roof bolts, posts, cribs, or crossbars (Tr. 230). The existence of the cutter in the area is further evidence that the mine roof was deteriorating. Whether anyone observed the roof condition before the Inspectors saw it or not, a violation of 30 CFR 75.200 occurred because the Mine Operator should have known of the condition (Tr. 217) if adequate examinations in a working place had been made (Tr. 221-222). The Office of the Solicitor recognizes that Respondent's witnesses, at a hearing, would not agree with all of the foregoing summarization of MSHA's position, but the Office of the Solicitor's position is that a violation occurred and can be proven.

a. Gravity: In the Inspector's Statement, the Inspector stated he was of the opinion that there would be a hazard to one miner. The Inspector was of the opinion that the condition was not serious when he observed it because no one was in the area (Tr. 259), but it is a travel area (Tr. 260). The Office of the Solicitor respectfully suggests that the violation was serious in that death or serious injury to someone could reasonably be expected as a result of the condition.

b. Negligence: The Inspector observed coal dust on the rock dust on a rock where the cutter had opened. This caused the Inspector to believe that the cutter occurred before the coal was mined in this area two shifts previously (Tr. 191-197, 249). The Mine Operator would have witnesses testify that the preshift examiner did not see the cutter and the type of ventilation system used leaves almost no coal dust. The parties agree that a cutter can occur anytime without warning. Accordingly, the Office of the Solicitor will agree that the violation was not the result of an unwarrantable failure in view of the conflicting testimony and the unimportance of this issue since the unwarrantable chain was long ago broken by a clean inspection. This was a travel area (Tr. 259) and the roof should have been examined before the adverse conditions became so prevalent. The section foreman told the Inspector he saw the cavities in the mine roof, but did not consider the roof such as to need additional roof supports (Tr. 263). The Office of the Solicitor suggests that ordinary negligence is shown and has taken such into consideration in arriving at the $500.00 proposed settlement.

c. Good Faith: The Inspector's Statement shows that the Mine Operator assigned extra persons to correct the condition. Although the Inspector had to allow more time than was originally determined needed, a normal degree of good faith is demonstrated. The area was "dangered off" until the condition was abated, and attention given to the problem until abatement was obtained (Tr. 278). The Mine Operator demonstrated good faith.

d. Prior Violations: On page one of the certified computer printout mentioned in paragraph 2 above, it is shown that there were 17 paid 30 CFR 75.200 violations which occurred in this mine prior to September 23, 1977 (the date the notice of violation issued).

e. The narrative statement prepared by MESA's Office of Assessments shows that the Assessor elected to waive the formula provided at 30 CFR Part 100.3 and, instead, found special facts by which he suggested a proposed penalty of $800.000 for the violation. At the time the proposed assessment was made, the Office of Assessments had a policy that unwarrantable violations would be routinely assessed specially. This policy was discontinued because excessive proposed penalties sometimes resulted.

f. The Office of the Solicitor has proposed a settlement of $500.00 instead of the proposed penalty of $800.00 primarily because the degree of negligence was less than that found by the Assessor.

4. ORDER OF WITHDRAWAL NO. 1 DEM (7-78): At a hearing the Federal Inspector would testify that the Mine Operator had failed to follow the required sequence for pillar removal and had mined the fender of a pillar so the fender no longer provided the required protection. The roof support was not provided as required by the roof control plan in that breaker posts had not been installed after the pillar had been mined through, there were only two breaker posts on the right side, and the roadway was wider than the allowed 14 feet but no timbers had been set to narrow it. Canterbury witnesses would argue that the area described by the Inspector in the order of withdrawal was an abandoned area. Thus, the proceeding would revolve around the question of whether the area was active or abandoned, with Inspector Dalton and the Canterbury witnesses both adamant as to their respective positions.

a. Gravity: In the Inspector's Statement, he states that, in his opinion, a hazard was posed to up to four miners who could be disabled (but he would not expect a fatal accident). If Canterbury is correct in its assertion that the area had been abandoned, no hazard was posed. The violation of the roof control plan was serious, but no miner should have been in abandoned area. MSHA does not accept the argument that the area was not active, and suggests the violation was serious, but not as serious as found by the Assessor.

b. Negligence: The Office of the Solicitor will agree that the violation was not unwarrantable in view of the uncertainty as to whether the area was active or abandoned. If abandoned there would still be a question as to whether, when active, it had been mined according to the roof control plan, or whether the timbers and breaker posts had been removed. Canterbury would urge that the plan does not require the sequence the Inspector states is required. Mr. Dalton, however, is a roof expert of many years experience and certainly can read a roof control plan. The Office of the Solicitor suggests that the violation was the result of ordinary negligence.

c. Good Faith: As the Inspector noted in his statement, there was no time provided for abatement since an order of withdrawal issued. The order of withdrawal was terminated in less than two hours after issuance. Good faith was demonstrated since there were several problems to be resolved.

d. Prior Violations: The certified computer printout lists 18 prior paid 30 CFR 75.200 violations. The September 23rd violation previously discussed would bring the total to 19 prior violations of 30 CFR 75.200.

e. The narrative statement prepared by MESA's Office of Assessments shows that the Assessor elected to waive the formula provided at 30 CFR 100.3 and made special findings pursuant to the policy then in effect which is mentioned in paragraph 2-e above.

f. The Office of the Solicitor deems the proposed penalty of $1,500.00 to be excessive considering the conflicting testimony which might reduce the gravity and negligence, and the fact that credit was not allowed for the rapid abatement. The parties have agreed upon a proposed settlement of $500.00 and the Office of the Solicitor deems it reasonable.

5. The Office of the Solicitor asserts that a civil penalty of $500.00 for each of the two violations would be reasonable and the best interest of the public would be served by the approval of the same.

6. Thirty days after approval is a reasonable time to allow in which to pay the $1,000.00.

Based on the information furnished and an independent review and evaluation of the circumstances, I find the settlement proposed is in accord with the provisions of the Act.

ORDER

The settlement negotiated by the parties in the above-captioned proceedings is APPROVED.

The above-captioned Applications for Review are hereby DISMISSED.

Respondent is ORDERED to pay 2/ the amount of $1,000 within 30 days of the date of this order.

Forrest E. Stewart
Administrative Law Judge

2/ Section 110(j) of the Act provides as follows:
"(j) Civil penalties owed under this Act shall be paid to the Secretary for deposit into the Treasury of the United States and shall accrue to the United States and may be recovered in a civil action in the name of the United States brought in the United States district court for the district where the violation occurred or where the operator has its principal office. Interest at the rate of 8 percent per annum shall be charged against a person on any final order of the Commission, or the court. Interest shall begin to accrue 30 days after the issuance of such order."

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SEP 3 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceedings
	:	Docket No. SE 79-126-M
	:	A.C. No. 31-00582-05004
v.	:	
	:	Docket No. SE 80-38-M
IDEAL BASIC INDUSTRIES, INC., CEMENT DIVISION, Respondent	:	A.C. No. 31-00582-05006
	:	Docket No. SE 80-57-M
	:	A.C. No. 31-00582-05007
	:	
	:	Docket No. SE 80-64-M
	:	A.C. No. 31-00582-05008
	:	
	:	Castle Hayne Plant and Quarry

DECISION

Appearances: Darryl A. Stewart, Esq., Assistant Solicitor, Office of the Solicitor, Mine Safety and Health Administration, U.S. Department of Labor, Nashville, Tennessee, for Petitioner;
Karl McGhee, Esq., Robert A. O'Quinn, Esq., Ideal Basic Industries, Inc., Wilmington, North Carolina, for Respondent.

Before: Judge Lasher

This proceeding arose under section 110(a) of the Federal Mine Safety and Health Act of 1977. A hearing on the merits was held on July 1, 1981. After considering evidence submitted by both parties and proposed findings of fact and conclusions of law proffered by counsel during closing argument, I entered an opinion with respect to Citation No. 103822 on the record. 1/ My bench decision containing findings, conclusions and rationale appears below as it appears in the record, aside from minor corrections.

1/ Tr. 85-88. Citation No. 103822 was one of three citations involved in Docket No. SE 79-126-M. The two remaining citations in Docket No. SE 79-126-M, together with the five citations involved in the other three dockets were resolved by either withdrawal by the Secretary, or the settlement reached by the parties at the hearing (Tr. 89-103).

Docket No. SE 79-126-M

Citation No. 103822

This matter, which arises upon the filing of a petition for penalty assessment by the Secretary of Labor, which was filed on October 17, 1979, was heard in Wilmington, North Carolina, on July 1, 1981. Both parties were represented by counsel and evidence was received consisting of the testimony of one witness for each side and documentary evidence as well.

The Government seeks that a penalty be assessed for an alleged violation of 30 C.F.R. § 56.16-4 as described in Citation No. 103822, which was issued by inspector Edwin Juso on July 25, 1978, which citation charges that bumper blocks for the overhead crane used at the marl storage area were not properly maintained. Portions of the bumper blocks were missing, causing a twisting effect when contacted by the crane. The inspector testified that part of the bumper was missing at a point designated as "Y" on Exhibit R-2. The bumper that was missing was a unit, consisting of a spring with a telescoping cylinder on the inside thereof which was, in effect, a shock absorber attached to the bumper block.

The inspector testified that had the crane contacted the bumper (sometimes referred to in the record as a crane stop and bumper block) that the natural tendency would have been for the crane to twist, which could have caused the operator of the crane to lose his balance. Other evidence in the record, primarily from the inspector's notes, which are reflected in Exhibit P-2, indicatesthat only minor injuries would have been sustained had such an occurrence happened.

The essential issues were posed as a result of the testimony of Robert W. Pyles, Respondent's plant administrator, whose testimony was considerably more detailed than that of the inspector, and who had the benefit of diagrams of the area and equipment in question as reflected in Exhibits R-1 and R-2. Mr. Pyles indicated that in normal conditions the crane would not impact with the bumpers which are set in concrete at either end of the track upon which the crane operates. Significantly, he pointed out that the purpose of the shock-absorbing device on the bumper was primarily to protect electronic devices on the crane. His evidence indicated that the retraction distance of the shock-absorbing device from the plate and to the front at which point impact would occur and the point of maximum contraction was 8 inches and that if such an impact was received, the deflection of the operator's seat

as a result of such impact would be only 1.65 inches as indicated by his computation. Mr. Pyles also indicated that the shock-absorbing device would have been fabricated by a private company upon the design and specifications of Respondent's, based upon the characteristics of the crane, and that Respondent has at its operation other bumpers which do not have such shock absorbers. This testimony was not rebutted in a substantial way and I fully credit Mr. Pyles' testimony in those respects.

Mr. Pyles described the bumper which was in place on July 25, 1978, at point "Y" on Exhibit R-2, i.e., the place where the inspector found a violation of the cited safety standard and I likewise find, based upon this unrebutted testimony, that there was a bumper in place at that point, albeit devoid of the shock-absorbing device.

There were no critical conflicts of testimony between Petitioner's and Respondent's witnesses which require resolution, although I do find that the disparity between the inspector's testimony that he did not observe any "twisting effect on the crane" and the language of the citation which indicates "portions of the bumper blocks were missing causing a twisting effect when contacted by the crane", would represent a significant question of credibility were such a resolution to be necessary. The testimony of Mr. Pyles in the respect noted is fully accepted and I must conclude therefrom that a bumper was in place at the end of the rail in question on July 25, 1978, within the meaning of 30 C.F.R. § 56.16-14 2/ and that accordingly no violation occurred. It follows that Citation No. 103822 must be vacated and it is so ordered.

Following rendition of the above bench decision, the parties conferred and reached an amicable agreement settling the issues remaining in these proceedings.

Upon motion of counsel for the Secretary (MSHA), Citation No. 111606 (Docket No. SE 79-126-M) and Citation Nos. 110011 and 110014 (Docket No. SE 80-59-M) were withdrawn and ordered vacated at the hearing (Tr. 93, 94, 96). With respect to the four remaining citations, No. 105248 (Docket No. SE 79-126-M), No. 110015 (Docket No. SE 80-38-M), No. 110012 (Docket No. SE 80-57-M), and No. 110013 (Docket No. SE 80-64), as part of the settlement agreement, Respondent admitted the occurrence of the violations alleged and the parties deferred the assessment of appropriate penalties to the undersigned (Tr. 89, 90, 94).

After considering the parties' stipulations and argument (Tr. 90-102) with respect to the statutory penalty assessment factors, penalties were assessed as reflected in the summary below.

2/ 30 CFR 56.16-14 in pertinent part provides that "Operator-carrying overhead cranes shall be provided with: (a) Bumpers at each end of each rail..."

SUMMARY OF DECISION

Docket Number	Citation/Order Number	Original Assessment	Decision
SE 79-126-M	103822	$ 52	Heard and ordered vacated
	105248	170	$150
	111606	90	Withdrawn by MSHA and vacated
	3	$312	$150
SE 80-38-M	110015	$160	$25
SE 80-57-M	110011	$ 84	Withdrawn by MSHA and vacated
	110012	84	$84
	110014	150	Withdrawn by MSHA and vacated
	3	$318	$84
SE 80-64	110013	$ 90	$ 75
	8	$880	$334

ORDER

The Respondent is ORDERED to pay to the Secretary of Labor penalties in the total sum of $334 within 30 days from the date of the issuance of this decision.

Michael A. Lasher, Jr., Judge

Distribution:

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SEP 3 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Civil Penalty Proceeding
	:	Docket No. HOPE 79-221-P
Petitioner	:	A/O No. 46-05643-03001
v.	:	
	:	Whitco No. 1 Mine
ALEXANDER BROTHERS, INC.,	:	
Respondent	:	

DECISION

Appearances: John H. O'Donnell, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;
Donald D. Saxton, Esq., Washington, Pennsylvania, for Respondent.

Before: Judge Stewart

This is a proceeding filed by the Secretary of Labor, Mine Safety and Health Administration (MSHA), under section 109(a) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1970) (hereinafter the Act), 1/ to assess civil penalties against Alexander Brothers, Inc. At

1/ Section 109(a) of the Act reads in pertinent part as follows:
"(a)(1) The operator of a coal mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, except the provisions of title 4, shall be assessed a civil penalty by the Secretary under paragraph (3) of this subsection which penalty shall not be more than $10,000 for each such violation. Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense. In determining the amount of the penalty, the Secretary shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation.
* * * * * * *

the hearing held on January 8, 1981, in Charleston, West Virginia, the parties agreed that the hearing would be limited to one contested issue--whether Respondent was subject to the Act.

After completing the presentation of their cases as to the jurisdictional issue, the parties proposed a settlement of the remaining issues. The citations in this case and the settlement are as follows:

Number	Date	30 C.F.R. Standard	Assessment	Disposition Settlement
7-0012	11/15/77	77.1707	$ 30	$ 30
7-0014	11/15/77	77.1103(d)	18	18
7-0015	11/15/77	77.505	20	20
7-0016	11/15/77	77.505	20	20
7-0017	11/15/77	77.904	24	24
7-0018	11/15/77	77.505	18	18
7-0019	11/15/77	77.504	26	26
7-0020	11/15/77	77.506	24	24
7-0021	11/15/77	77.506	16	16
7-0022	11/15/77	77.505	20	20
7-0023	11/15/77	77.508	28	28
		Total	$244	$244

In support of its motion to approve the settlement, Petitioner asserted, in substance, as follows:

> The assessment before me has no prior history of payments, so we have no prior history to show. We will so stipulate.
>
> We will stipulate that anything in the record that is relevant to any of the criteria will, of course, be considered by Your Honor, in determining and approving the settlement.

---

fn. 1 (continued)

"(3) A civil penalty shall be assessed by the Secretary only after the person charged with a violation under this Act has been given an opportunity for a public hearing and the Secretary has determined, by decision incorporating his findings of fact therein, that a violation did occur, and the amount of the penalty which is warranted, and incorporating, when appropriate, an order therein requiring that the penalty be paid. Where appropriate, the Secretary shall consolidate such hearings with other proceedings under section 105 of this title. Any hearing under this section shall be of record and shall be subject to section 554 of title 5 of the United States Code."

* * * * * * *

Section 105, section 110(i) and the transfer provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (Supp. II 1978), conferred jurisdiction over these proceedings to the Federal Mine Safety and Health Review Commission.

We would agree that the operator is a small operator. The inspectors have testified that he always demonstrated good faith in abating alleged violations and so, we would agree that you can find "good faith" for each of them.

We agreed, at the beginning of the hearing, that he would be able to pay the sum of two hundred and forty-four dollars ($244.00) without adverse effect on his ability to remain in business. So, that leaves us with negligence and gravity.

Referring to the first one, Government's Exhibit No. 1 (Notice No. 6 RRW, Nov. 15, 1977), we feel taken into consideration would be the fact that the operator either didn't know before or didn't believe that he was under the Act and therefore, had not familiarized himself with such things as what first-aid equipment he needed on there as required by the regulations. Upon being informed, of course, he promptly got it, so we would say that there is just ordinary negligence there.

As to gravity, of course, once the equipment is needed, it is very serious if it is not present. However, Mr. Alexander has testified that his home was nearby and we assume that he could get much of the equipment there, if he needed it in a hurry.

The proposed assessment of that alleged violation is thirty dollars ($30.00) which is the largest one for any of the eleven that are in issue and it's the opinion of the Solicitor, that considering the unique facts involved in this case -- considering it did occur back in 1977 and inflation has changed matters somewhat -- all of these, I might say were issued on November 15, 1977, so they are all old. And therefore, we believe that it is in the best interest of the public that the settlement be approved.

Again, we have covered everything as to all of these except negligence and gravity. This one (Notice No. 1 GLS, Nov. 15, 1977) involves a citation alleging that the area around the transformer was not kept free from grass and dry weeds. There would be a danger of possible fire as a result of this. Of course, the transformer must malfunction before that would occur. And we feel that, although there is a certain risk or hazard to the miners, that it is not too great, because nobody ordinarily works close to the transformer.

As to negligence, we would suggest an ordinary degree of negligence. The proposed assessment for that is eighteen dollars ($18.00), which ordinarily would be quite

small and unacceptable but in view of the confusion as to whether this is or is not under the Act, we feel that we are justified in proposing such a settlement.

We have four 77.505 alleged violations. The first one, Government Exhibit No. 5 (Notice No. 2 GLS, Nov. 15, 1977), is that the power cables entering the fuse box did not have the required fittings. The insulation around the power cable was adequate, so the danger there would be that possible vibration could impair the insulation. We would say that there is a potential hazard, but no present hazard until the cable was penetrated. For that one, the proposed penalty is twenty dollars ($20.00) and we consider that to be reasonable.

The next one, which is Government's Exhibit No. 7 (Notice No. 3 GLS, Nov. 15, 1977), is another 77.505, because the cable entering the breaker compartment did not have the proper fitting. My statement would be the same to that, with a proposed penalty of twenty dollars ($20.00).

The next proposed one is Government No. 9 (Notice No. 4 GLS, Nov. 15, 1977), which concerns a 77.904 violation that the circuit breaker located in the tipple did not show what circuits they controlled. For that one, there was a proposed penalty of twenty-four dollars ($24.00). The circuit breaker should be labeled and so, we consider that there is a hazard to the miners by not having it so. The circuit breaker, of course, is back-up protection and that would lessen the gravity to some extent.

We still consider that to be serious and consider it to be ordinary negligence, in view of the fact that the operator was unaware that he was under the provisions of the Act.

The next one, Government's Exhibit No. 11 (Notice No. 5 GLS, Nov. 15, 1977), is 30 CFR 77.505. Because the power cable on a transformer did not have the proper fittings, my statement would be the same and the proposed assessment for this one is eighteen dollars ($18.00) instead of the twenty (20) as it was previously, but we feel it is reasonable, in view of the facts.

The next one is Government's Exhibit No. 13 (Notice No. 6 GLS, Nov. 15, 1977). It is a 30 CFR 77.504 violation and the proposed penalty is twenty-six dollars ($26.00). It is for a splice which was not adequately insulated.

Of course, whether a splice is insulated or not or adequately insulated and calls for a judgment call, however, Mr. Smith is an electrical inspector, and I think, he has

sufficient experience that he would spot it, so we do consider there was a hazard there, and so it is serious and is a result of ordinary negligence.

The next one, Government's Proposed Exhibit No. 15 (Notice No. 7 GLS, Nov. 15, 1977), is an alleged violation of 30 CFR 77.506, because the circuit protection was not provided with number eight cable, supplying power to a water pump. There is a proposed penalty of twenty-four dollars ($24.00) for that. We consider that, in order for there to be a hazard there, there must be a malfunction but we do consider it serious and the result of ordinary negligence.

Considering the next one, Government's Exhibit No. 17 (Notice No. 8 GLS, Nov. 15, 1977), the proposed penalty is sixteen dollars ($16.00) and it is an alleged violation of 30 CFR 77.506, because short circuit overload protection was not provided for a cable supplying power to a pump. What we said on the previous one would be true on this one, also, except that, again, here you'd have to have a malfunction before you would have a hazard, and so, we consider sixteen dollars ($16.00) is acceptable and in view of the reasons we have stated, although it is very low.

The next one, Government's Exhibit No. 19 (Notice No. 9 GLS, Nov. 15, 1977) is a violation of 30 CFR 77.505, because of a power cable entering the compartment of a dryer was not with the proper fitting. What we've said previously would be true with that. We have proposed the same penalty of twenty dollars ($20.00).

The final one, Government's Exhibit No. 21 (Notice No. 10 GLS, Nov. 15, 1977) is a 77.508, because lightning arresters were not provided for the exposed power conductors and there is a proposed penalty of twenty-eight dollars ($28.00) for that alleged violation. We consider that it is serious since it was high and it is a result of ordinary negligence.

At the conclusion of the hearing, the settlement agreement was approved, contingent on resolution of the jurisdictional issue. In its effort to establish that Respondent's operation was a "coal mine" within the meaning of the Act, MSHA called four witnesses: Raymond Webb, former MSHA inspector now employed by W and C Coal Company; Conrad Spangler, MSHA subdistrict manager; John McGann, MSHA inspector; and Frank Alexander, president, Alexander Brothers, Inc. Frank Alexander was called as a witness by Respondent.

Jurisdiction

The refuse pile from which Respondent took its raw material was comprised of the waste material which the Pond Creek Coal Company (later part

of the Island Creek Coal Company) disposed of in the course of mining at its Bartley No. 1 Underground Coal Mine from the 1930's until 1967. The Bartley No. 1 Mine had been sealed prior to the initiation of Respondent's operation.

After the cessation of operations at the Bartley No. 1 Mine, the property on which the refuse pile was located was leased from its owner, Mr. Henry Warden, by the Whitco and Recco Coal Corporation (Recco). Recco engaged in the reclamation of coal from the refuse pile, but did not do so profitably. Respondent purchased Recco's equipment 2/ and acquired rights to the lease in late 1972 or early 1973.

The refuse pile from which Respondent took its raw material covered a large area on the side of a mountain. It consisted of coarse and fine coal, rock dust, garbage, rock, timbers, wood, steel, dirt, tin cans, bottles, metal, and general debris.

Respondent's operation was divided into two "phases." 3/ In the first phase, waste material was taken from the refuse pile, loaded into trucks and transported to the site at which the initial, rough screening processes were carried out. At the site, the material was dumped into a bin and then subjected to a number of separation and sizing processes. The phase 1 processes included the following operations: The waste material was separated by size and the larger size material was passed through a hammer mill. A magnet was used to remove scrap metal and "pickers" removed rock and other obvious waste from the material. When enough material had been accumulated for further processing, the end product of the phase 1 processing was loaded into trucks and hauled to the cleaning plant where phase 2 processing was carried out.

At the cleaning plant, the material was loaded into a bin; it was then fed from the bin by a belt conveyor into a tank where it was fixed with water. After the material passed into a "jig" where non-coal was removed. The larger pieces were again separated out, passed through a crusher and broken down to 1 inch in size. The crushed coarse was again screened to remove larger pieces. These larger pieces were passed to Respondent's heavy media washer for further ash-control treatment. The fine material was separated into coal and non-coal by a cyclone-washing process. The cleaned coarse and fine coal was remixed and loaded into railroad cars for shipment.

The percentage of coal to waste in the material taken by Respondent from the refuse pile varied. At the time of the hearing, Frank Alexander estimated

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2/ Respondent never used the Recco equipment in its operation.

3/ At the hearing, Frank Alexander referred to a third phase--a cyclone separator. The use of the cylone separation process was included by Mr. Alexander in his description of phase 2 of his operation. Subesequent testimony established that cylone separators were also considered to be part of phase 3. Respondent's description of its operation in its posthearing brief includes reference to the use of a cyclone in phase 2.

that the percentage of coal was 20 to 25 percent. In traditional preparation facilities, the raw material processed is run-of-mine and, therefore, contains a much higher percentage of coal than did the refuse processed in the Alexander Brothers' operation. As a consequence, traditional facilities do not resort to some of the techniques employed by Alexander Brothers for separation of coal and waste, however, in both types of operation, the preparation process involved "breaking, crushing, sizing, cleaning, washing, drying, mixing, storing, and loading" of coal. Despite the differences in the volume of production, the composition of the raw material, and the percentage of coal in the raw material fed to the plants, preparation facilities associated with ordinary large mines do substantially what Respondent did. Such preparation plants operated by the owner of the mine have consistently been inspected by MSHA and its predecessors, the Bureau of Mines and the Mining Enforcement and Safety Administration (hereinafter collectively referred to as MSHA).

Section 4 of the Act designates those mines subject thereto as follows: "Each coal mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this Act."

The parties stipulated that the products of Respondent's operation entered commerce. The determinative issue, therefore, is whether Respondent's operation might be categorized as a "coal mine" within the meaning of the Act, thereby subjecting Respondent to the coverage of the Act.

The term "coal mine" was defined in section 3(h) as follows:

> "[C]oal mine" means an area of land and all structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations, and other property, real or personal, placed upon, under, or above the surface of such land by any person, used in, or to be used in, or resulting from, the work of extracting in such area bituminous coal, lignite, or anthracite from its natural deposits in the earth by any means or method, and the work of preparing the coal so extracted, and includes custom coal preparation facilities. [Emphasis added.]

At the outset, it is to be noted that the Act was a remedial and safety statute, the primary purpose of which was to protect the health and safety of the Nation's coal miners. 4/ It is proper to construe the Act liberally so as to most fully effectuate the purposes enunciated by Congress. 5/

4/ See section 2(a) of the Act, 30 U.S.C. § 801.
5/ See Magma Copper Company v. Secretary of Labor, , , citing Whirlpool Corporation v. Marshall, 445 U.S. 1, 13, 100 S. Ct. 883, 891, 63 L.Ed.2d 154 (1980).

With this premise in mind, three of the phrases of section 3(h) must be examined to determine whether Respondent's operation was a "coal mine" within the meaning of the Act. The argument could be made that jurisdiction exists because (1) the land and property which was the basis of Respondent's operation resulted from earlier coal mining and retained the status of a coal mine, (2) that Respondent performed "the work of preparing the coal so extracted," or (3) that Respondent operated a "custom coal preparation facility."

The refuse pile from which Respondent obtained its raw material was an area of land or property "resulting from" the work of extracting coal from its natural deposit in the earth. It remained a coal mine within the meaning of the Act despite its having been abandoned by the original operator, Pond Creek Coal Company. An operator remains responsible for such abandoned refuse piles and must comply with the requirements of the Act, including the extinguishing of fires in the pile. Kessler Coals, Inc. v. Mining Enforcement and Safety Administration and United Mine Workers of America, Docket No. HOPE 76-235 (March 18, 1975). In that case the site had been abandoned as a depository for the by-products from mining; Kessler Coals, Inc. did not dispose of debris from its preparation plant on the refuse pile which had been created by the predecessor, Glogora Coal Company.

Thus, at least some of the property on which Alexander Brothers operated retained the status of a "coal mine" under the Act. While Respondent's operation might be held subject to the Act on this a basis alone, it has been clearly enunciated in cases, which will be discussed later, by a U.S. Court of Appeals and a U.S. District Court that such operations are subject to the Act on a different theory. Respondent's operation was a "coal mine", subject to the Act, because Respondent engaged in the work of preparing coal. In construing the phrase "and the work of preparing the coal so extracted," the pivotal question herein is whether coverage of the 1969 Act may extend to a person 6/ engaged in the preparation of coal which was previously extracted from its natural deposit in the earth by a different person.

While recourse to legislative history of the Act is unhelpful for the most part, 7/ the intent of Congress with respect to section 3(h) can be

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6/ Section 3(f) of the Act provides that "'person' means any individual, partnership, association, firm, subsidiary of a corporation, or other organization."

7/ The legislative history does not contain an express explanation of the congressional intent in enacting sections 3(h) or 3(i).

In its report on the 1977 Act, the Senate Committee on Human Resources stated the following regarding the amendment to section 3(h):

"(The 1977 Act) enlarges the definition of "mine" in section 3(h) to include those mines previously covered by the Federal Metal and Non-Metallic, Mine Safety Act. This definition is also expended [sic] to include facilities for the preparation of coal, except that the Secretary is to give due consideration to the convenience of giving one Assistant Secretary all authority

gleaned from a reading of the language of the section in light of the purposes of the Act. On the surface, the language of section 3(h) is broad enough to encompass persons who engage in the work of preparing coal previously extracted from its natural deposit by another person. Furthermore, nowhere in the Act is there any indication that Congress intended to exclude such persons from the coverage of the Act.

Respondent clearly engaged in the "work of preparing the coal" as defined in the Act. Donovan v. Tacoma Fuel Company, Civil Action No. 77-0104D (D.W. Va., June 29, 1981). 8/ The "work of preparing the coal" is defined in section 3(i) as follows: "'[W]ork of preparing the coal' means the breaking, crushing, sizing, cleaning, washing, drying, mixing, storing, and loading of bituminous coal, lignite, or anthracite, and such other work of preparing such coal as is usually done by the operator of the coal mine." Each of these processes was carried out in some fashion in Respondent's operation. The concluding phrase of section 3(i) does not restrict "the work of preparing the coal" to processing undertaken by the person who extracted the coal from its natural deposit in the earth. This broad, descriptive phrase is a clear expression of congressional intent that the processes specifically listed in the definition are not exclusive. In so finding, Respondent's argument that section 3(i) restricts the scope of "the work of preparing the coal" to persons who extract coal from its natural deposit is expressly rejected.

There is no basis for Respondent's argument that it processed refuse rather than coal. Respondent's raw material was comprised of up to 25 percent coal. The fact that run-of-mine is of a much higher percentage of coal

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fn. 7 (continued)
with respect to health and safety of miners employed at one physical establishment." Report of the Senate Committee on Human Resources No. 95-181, May 16, 1977, p. 59.

Respondent's argument that this passage was an expression by Congress of its understanding that the 1969 Act did not extend to facilities for the preparation of coal where such facilities were not located "at the site of a coal mine" is without foundation. The passage addresses the expansion of MSHA's jurisdiction over coal preparation facilities under the 1977 Act but was not intended to convey and does not convey any clue to congressional understanding of the scope of the jurisdiction conveyed to MSHA by the 1969 Act. Rather, the passage addresses the vehicle for intra-agency resolution of the problems presented by partially coextensive statutes.

8/ The court in Tacoma found that the crushing and mixing operation carried out by Tacoma Fuel Company was the "work of preparing the coal" as defined in section 3(h) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., despite the fact that Tacoma Fuel Company did not engage in the extraction of coal from the ground but merely purchased coal from various miners of coal f.o.b. its plant. The definition of the "work of preparing the coal" contained in the 1977 Act is identical to that contained in the 1969 Act.

is of no consequence. The purpose of Respondent's operation was the separation of the marketable coal from previously deposited waste. The useless waste material was then discarded. Only in the most roundabout sense could it be said that it was the refuse rather than coal that was prepared. It was clearly coal that was prepared throughout Respondent's operation.

A memorandum from the Assistant Solicitor of MSHA's predecessor dated March 31, 1972 (the Geisler Memorandum), improperly interpreted the Act by expressing the opinion that the Geisler Coal Company which prepared coal purchased from other operators was not subject to the Act. This interpretation was subsequently corrected when in October, 1976, the Assistant Solicitor issued a memorandum (hereinafter, the 1976 memorandum) expressly rescinding that conclusion of the Geisler Memorandum. In the 1976 memorandum, the Assistant Solicitor stated that he was of the opinion that the person who performs the "work of preparing the coal so extracted" need not be the same person who "extracts the coal from its natural deposits in the earth." Although such policy memoranda by MSHA and its predecessor are not binding on this Commission or the courts, a U.S. District Court, in Tacoma, further discussed below, approved the view of the Assistant Solicitor expressed in the 1976 memorandum. 9/

It has recently been held that operations similar to those of Respondent are subject to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (hereinafter, the 1977 Act). In pertinent part, a coal mine is defined in that Act to be "an area of land * * * or other property * * * used in, or to be used in, or resulting from, * * * the work of preparing coal." 10/ As noted above in footnote 8/, the section

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9/ Petitioner acknowledged that such policy memoranda did not have the "force and effect of a legal decision." The 1976 memorandum was followed by MSHA even though Conrad Spangler, an MSHA subdistrict manager, testified that, without regard to the 1976 memorandum, it was his opinion that the Alexander Brothers' operation was not a coal mine. Mr. Spangler did not explain the basis for his opinion but he believed that the processing of refuse piles was a valuable cleanup operation. It is clear that the administrative law judge is not bound by the opinion of MSHA personnel as to matters of law, especially when they were actually following the 1976 memorandum by inspecting reclamation operations and issuing citations for violations of the Act.

10/ Section 3(h) of the 1977 Act reads as follows:

"(h)(1) "coal or other mine" means (A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation

3(i) definition of "the work of preparing the coal" is the same under both the 1969 Act and the 1977 Act. Two relevant cases have upheld the authority of MSHA to inspect coal preparation facilities even though the person processing the coal is not the same person who extracted the coal from its natural deposit sometime in the past. In Marshall v. Stoudt's Ferry Preparation Company, 602 F.2d 589 (3d Cir. 1979), cert. denied, 444 U.S. 1015 (1980) (hereinafter, Stoudt's Ferry), it was held that the word "mine" 11/ as used in the 1977 Act included the Stoudt Ferry Preparation Company's preparation plant which separated a low-grade fuel from sand and gravel dredged from a riverbed. The court found that "the work of preparing coal * * * is included within the 1977 Act whether or not extraction is also being performed by the operator." Id. at 592.

In Tacoma, the court found that "the work of preparing coal is, by itself, sufficient to place Tacoma Fuel Company's operation within the section 3(h) definition of a 'coal mine'." Tacoma Fuel Company neither owned nor operated mines. The company purchased coal from various miners of coal f.o.b. its plant. It then mixed and crushed the coal and sold it to various customers. The jurisdiction asserted by MSHA in following its 1976 memorandum was expressly upheld.

With regard to the relevant facts upon which the finding of jurisdiction rests, the instant case cannot be distinguished from Stoudt's Ferry and Tacoma. Respondent's operation constitutes the work of preparing coal and, as such, would be subject to the provisions of the 1977 Act even though Respondent does not extract coal from its natural deposit in the earth.

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fn. 10 (continued)
facilities. In making a determination of what constitutes mineral milling for purposes of this Act, the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment;

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

11/ The court in Stoudt's Ferry noted that "[a]lthough it might seem incongruous to apply the label "mine" to the kind of plant operated by Stoudt's Ferry the statute makes clear that the concept that was to be conveyed by the word is much more encompassing than the usual meanings attributed to it--the word means what the statute says it means." Stoudt's Ferry at p. 592. The point is equally well taken in the instant case.

There is no difference material herein between the language used in the 1969 Act relating to coal preparation and that used in the 1977 Act. 12/ The definition in the 1969 Act includes "the work of extracting * * * coal * * * from its natural deposits in the earth by any means or method, and the work of preparing the coal so extracted." The definition in the 1977 Act includes "the work of extracting (coal) from (its) natural deposits * * * or the work of preparing coal." 13/ The breadth of the language in the 1969 Act indicates that such language was intended to be descriptive rather than limiting. In drafting and adopting section 3(h) of the 1969 Act, Congress left no doubt that the Act was to apply to the entire coal mining industry. There is nothing in section 3(h) which would permit the exclusion of Respondent from the coverage of the Act. That is, there is no language therein which would permit the categorical exclusion of a person who does not extract the coal from its natural deposit but performs the work of preparing coal; nor is there language which would categorically exclude a person performing the work of preparing coal unless such preparation was performed contemporaneously with the extraction of the coal from its natural deposits.

12/ A case can be made that Congress intended that even the specifically enumerated impoundments, retention dams, and tailings ponds were covered by this definition of "mine" in the Coal Act. This legislative history of the 1977 Act states:

"Title I of S. 717 contains amendments to the definitions in the Coal Act, which reflect both the broader jurisdiction of that Act, and makes refinements which nearly seven years of experience with the administration and enforcement of the Act have indicated are necessary.

"Thus, for example, the definition of "mine" is clarified to include the areas, both underground and on the surface, from which minerals are extracted (except minerals extracted in liquid form underground), and also, all private roads and areas appurtenant thereto. Also included in the definition of "mine" are lands, excavations, shafts, slopes, and other property, including impoundments, retention dams, and tailings ponds. These latter were not specifically enumerated in the definition of mine under the Coal Act. It has always been the Committee's express intention that these facilities be included in the definition of mine and subject to regulation under the Act, and the Committee here expressly enumerates these facilities within the definition of mine in order to clarify its intent. The collapse of an unstable dam at Buffalo Creek, West Virginia, in February of 1972 resulted in a large number of deaths, and untold hardship to downstream residents, and the Committee is greatly concerned that at that time, the scope of the authority of the Bureau of Mines to regulate such structures under the Coal Act was questioned. Finally, the structures on the surface or underground, which are used or are to be used in or resulting from the preparation of the extracted minerals are included in the definition of "mine."" Senate Report No. 95-181.

13/ In both Acts, the phrases are clearly stated in the alternative. In context, no material distinction attaches to the use of the words "and" in the 1969 Act and "or" in the 1977 Act.

In its brief, Petitioner asserted that Respondent's operation constituted a "custom coal preparation facility" within the meaning of the Act and argued that the pertinent language of section 3(h) was properly interpreted by MSHA in its 1976 memorandum in which the Assistant Solicitor stated:

> We are of the view that Congress did not intend the word "custom" to be used in a restrictive sense but in a broad sense. Thus, a coal preparation plant operator who pursues a common course of action or practice of preparing coal to meet the customary requirements of the electric utility market or the coal coking market, directly or indirectly, without a "personal order or specifcation" but which meets the customary requirements or specifications of the purchasers and users of the coal, also falls within the term "custom coal preparation plant." [Emphasis added.]

In section 3(h), "custom" is used as an adjective modifying the phrase "custom coal preparation facilities." It is accepted that Congress intended "custom" to be interpreted in a broad sense but the interpretation urged by MSHA is at odds with the traditional definition of the word. There is no need herein to resolve the meaning of "custom" or to determine the scope of the phrase "custom coal preparation facilities" given the alternate basis for jurisdiction enunciated above.

Respondent also argued that section 3(h) of the 1969 Act was void for vagueness because it was not "definite and certain enough to enable every person, by reading the law, to know what his rights and obligations are and how the law will operate when put into execution * * * and it did not "provide clearly ascertainable and well defined standards to guide the ministerial officers charged by law with its implementation and administration" (citing Weissinger v. Boswell, 330 F. Supp. 615 (M.D. Ala. 1971)).

The due process clause of the Fifth Admendment to the United States Consitution requires that a statute be of a reasonable degree of certainty and definiteness. A statute which is non-criminal and does not impinge upon a fundamental right is unconstitutionally vague only if it is written so that "men of common intelligence must necessarily guess at its meaning." See 16A Am. Jur. 2d Consitutional Law § 818 n. 20. Section 3(h) passes constitutional muster under this standard. Respondent's perplexity is undoubtedly due to the broadness of the Act; not its vagueness. It is clear that Respondent's operation is subject to the Act.

Respondent also argued that the notices and orders at issue herein are "void and of no effect and should be rescinded" because MSHA violated its internal procedures by failing to give Alexander notice and a warning that it had reconsidered its position and changed its opinion with respect to inspecting Respondent's operation. The internal procedures to which Respondent referred were instructions contained a memorandum dated

December 1, 1976, from Petitioner's Assistant Solicitor-Regulations and Procedures-to MSHA District Manager's requiring notification be given to operators prior to the first inspection conducted pursuant to the 1976 memorandum. Respondent admitted in its final posthearing brief that it had received such notice on October 12, 1977. At that time, a notice of violation was issued to Respondent. No opinion is expressed as to the validity of the notice of violation issued on October 12, 1977. The notices of violation at issue herein were dated November 15, 1977, more than a month after MSHA's first exercise of jurisdiction. At least with regard to the notices at issue herein, MSHA complied with the internal procedures required of its personnel in the memorandum dated December 1, 1976.

Proposed findings of fact and conclusions of law in the briefs filed by the parties which are immaterial to the issues presented or inconsistent with this decision are rejected.

ORDER

The approved settlement negotiated by the parties in the above-captioned proceeding is AFFIRMED.

Respondent is ORDERED to pay the amount of $244 within 30 days of the date of this order.

Forrest E. Stewart
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SEP 3 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. YORK 81-8-M A/O No. 30-00006-05012
v.	:	Ravena Quarry & Plant
ATLANTIC CEMENT COMPANY, INC., Respondent	:	

DECISION

The above-captioned case is a civil penalty proceeding pursuant to Section 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., (hereinafter, the Act). The case was submitted by the parties for decision on a stipulated record.

The following facts were stipulated by the parties regarding the citation at issue herein, Citation No. 204374:

> Respondent, Atlantic Cement Co., operates a quarry and cement manufacturing facility in Ravena, New York. At the times relevant herein the size of the facility for the purposes of the act were slightly over seven hundred thousand man hours per year. On August 6, 1980, MSHA inspector Hopkins, on a routine inspection of Respondent's facility, issued a citation to Respondent for a violation of §56.15-5 because Hopkins observed an employee of Respondent working on top of the number two kiln and descending the side of the kiln to a ladder without the use of a safety belt and line. The top of the kiln was approximately twenty-two feet from the floor. A safety belt and line had been provided but it was not being worn by the employee. The department in which the employee was working holds, and at that time held, short safety meetings at the start and end of each shift where the use of safety belts and lines was repeatedly discussed. Because of said safety meetings, the mine inspector concluded the Respondent could not have known or predicted that the employee would not have been wearing a safety belt. The top of the kiln is a fairly smooth surface and a person would have to slip, fall or trip before an accident could occur. At the time of the alleged violation the kiln was wet due to a slight rain shower. Employees are rarely on top of the kiln.
>
> The citation was terminated by Respondent and the inspector explaining to the employee the importance of wearing a safety belt and line. Respondent gave the

employee a three-day disciplinary suspension, which was subsequently reduced to one day. Respondent has a well established past practice of enforcing its safety rules through disciplinary measures.

Citation No. 204374 was issued pursuant to Section 104(a) of the Act by Inspector Hopkins upon his observation of the following condition or practice:

> An employee was observed working on top of #2 Kiln and descended the side of the kiln to a ladder, which gave him access to the floor. The top of the kiln was elevated approx(imately) (22) twenty-two feet from the floor. A safety belt and line (were) provided but not being worn by the workman.

The citation was terminated within 15 minutes after the "hazard of not wearing a safety belt and line was explained to the employer."

The inspector cited 30 CFR §56.15-5 which requires in pertinent part that "Safety belts and lines shall be worn when men work where there is a danger of falling." The parties' stipulation of facts clearly establishes the occurrence of a violation of the mandatory standard as alleged. The employee failed to wear safety belt or lines while working on the curved surface of a kiln, 22 feet "from the floor" -- a location where there was a danger of falling.

Respondent argues that it cannot be held to have violated section 56.15-5 because the failure of the employee to wear a safety belt and line was in violation of the company's regularly enforced safety rules. Respondent contended that the imposition on it of liability for the employee's failure was improper where the safety equipment had been provided, the employee had been instructed regularly in the need to wear the equipment, the employee had acted in direct contravention of Respondent's rules without Respondent's knowledge, and Respondent regularly enforced its safety rules through the use of disciplinary measures. Respondent contended, in short, that it had done everything within its power to provide for the safety of its employees in this regard.

The question whether an operator can be held liable for a violation of a mandatory standard regardless of fault has already been answered in the affirmative by the Commission. Secretary of Labor v. El Paso Rock Quarries, Inc., 2 MSHC 1132 (1981) (hereinafter, El Paso). In El Paso, the administrative law judge had vacated a citation alleging violation of 30 CFR §56.9-87 (failure to provide automatic reverse signal alarm on heavy duty mobile equipment) because the Secretary of Labor failed to establish that the mine operator knew or should have known of the condition. The Commission reversed, holding that, unless the standard itself so requires, an operator's negligence has no bearing on the issue of whether a violation

occurred. The Commission noted that it had previously rendered this holding in U.S. Steel Corporation v. Secretary of Labor, 1 MSCH 2151 (1979) (hereinafter, U.S. Steel) with respect to the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §801 et seq. (1976) (amended 1977). The factual situation in U.S. Steel is closely analogous to the one at hand. Notices of violation were issued to U.S. Steel on two separate occasions after Federal inspectors observed a total of 3 employees of U.S. Steel neither wearing nor carrying a self-rescue device as required by §75.1714-2(a). U.S. Steel advanced the argument that it had complied with the standard by "establishing a program designed to assure that self-rescue devices are available to all employees, by training employees in the use of the devices, and by enforcing its program with due diligence." The Commission rejected the argument on the grounds that an operator is liable for violations without regard to fault.

It is found, therefore, that Respondent may be held liable in the instant case as a matter of law for the failure of its employees to wear safety belt and line where there was a danger of falling.

In issuing citation no. 204374, Inspector Hopkins found that the violation was "significant and substantial" within the meaning of the Act. Respondent contends that this finding is improper in light of the test enunciated by the Commission in Secretary of Labor v. Cement Division, National Gypsum Company, 3 FMSHC 822, (1981) (hereinafter, National Gypsum) The Commission held therein that a violation is of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. The Commission stated further that: "(A) violation 'significantly and substantially' contributes to the cause and effect of a hazard if the violation could be a major cause of a danger to safety and health . . .. Our interpretation of the significant and substantial language as applying to violations where there exists a reasonable likelihood of an injury or illness of a reasonably serious nature occurs falls between these two extremes -- mere existence of a violation, and existence of an imminent danger." It was Respondent's contention that the violation herein did not "present a reasonable likelihood of causing an injury or illness which will be of a reasonably serious nature."

Respondent asserted that the inspector found that the occurrence of an accident was improbable "because the surface on which the employee was working was smooth and slightly rounded." This assertion is not supported by the record. The alleged finding by the inspector was not included in the stipulation by the parties nor was it in the text of the citation which charged a significant and substantial violation. The stipulated record establishes that the violation was significant and substantial. Even if it had been established in the record that MSHA's proposed assessment, results of initial review, or the background material used in the preparation of those documents used the word "improbable" in referring to the likelihood of occurrence of an accident, said word would not be determinative

of the issue in this proceeding. Hearings before the Commission are de novo. The conclusions of the inspector or those of Petitioner's Office of Assessments are not binding herein.

It is found that, on the facts of this case, there existed a reasonable likelihood that a fall resulting in injury would occur because of the failure to wear belt and line. As is readily apparent from the photographs of the kiln, designated exhibits "A" and "B", the kiln at its highest point was 22 feet above the "floor" and curved downward at an increasing contour. The kiln was exposed. Its surface was fairly smooth and slightly wet. Each of these factors increased the likelihood that an accident and injury would occur.

Respondent argued that an injury expected to result in lost work days or restricted duty could not be considered of a reasonably serious nature. Again this argument is rejected since the allegations are not supported by the record. Even a fall on the smooth wet surface of the kiln could cause serious injury. A fall of 22 feet under the conditions established by the record would very likely result in an injury of such magnitude as to be clearly one of a reasonable serious nature.

Respondent's argument that the failure to wear a safety belt and line could not be the cause of an injury is completely meritless. The failure to wear belt and line increased the likelihood that the injury suffered as a result of a fall would be serious. Said failure could be a major cause of an injury suffered in a fall.

In view of the above, the violation is found to have been of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety hazard.

Assessment:

Section 110(a) of the Act requires that the operator of a mine in which a violation occurs shall be assessed a civil penalty. Findings of fact pertinent to each of the six statutory criteria follow.

The gravity of the violation is determined to be moderate. As noted above in the discussion regarding the ruling that the inspector properly found the violation to be significant and substantial, the surface of the kiln was curved, fairly smooth and slightly wet. If the employee had fallen, he undoubtably would have suffered serious injury. Even though a serious injury would have occurred, the overall gravity of the situation was reduced to moderate because employees rarely had occasion to be on top of the kiln and the violation was an instance of isolated misconduct on the part of Respondent's employee.

The employee had been provided with belt and line, and had been instructed to use them. Respondent had no knowledge, actual or constructive, of the employee's failure to use the belt and line. It is found that Respondent was not negligent.

The violation was abated immediately. The employee was reinstructed on the need to use belt and line. He was also given a suspension.

Slightly over 700,000 man hours per year were worked at the Ravena Quarry and Plant. Respondent had a good history of prior violations. In the absence of evidence to the contrary, it is found that the penalty assessed herein will not adversely affect Respondent's ability to remain in business.

In view of the above, Respondent is assessed a penalty of $100.00.

ORDER

It is ORDERED that Respondent pay the sum of $100,00 within 30 days of the date of this decision.

Forrest E. Stewart
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SEP 9 1981

JAMES L. REITER, Complainant	:	Complaint of Discharge
v.	:	Docket No. PENN 80-171-DM
NEW JERSEY ZINC COMPANY, Respondent	:	

DECISION

Appearances: James L. Reiter, Summitt Hills, Pennsylvania, pro se at the hearing; and Charles W. Elliott, Esq., Thomas and Hair, Allentown, Pennsylvania on the Brief for Complainant. Robert W. Frantz, Esq., and Brian C. Murchison, Esq., Hamel, Park, McCabe & Sanders, Washington, D.C., for Respondent.

Before: Judge James A. Laurenson

JURISDICTION AND PROCEDURAL HISTORY

This proceeding was commenced by James L. Reiter (hereinafter "Complainant") against New Jersey Zinc Company (hereinafter "New Jersey Zinc") by an allegation that Complainant was discharged from his employment at New Jersey Zinc on October 1, 1979, because of activity protected under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c) (hereinafter "the Act"). On November 13, 1979, Complainant filed a discrimination complaint with the Secretary of Labor, Mine Safety and Health Administration (hereinafter "MSHA"). On January 25, 1980, MSHA notified Complainant that it determined that no violation of section 105(c) had occurred but that Complainant had 30 days to file his own action with the Federal Mine Safety and Health Review Commission (hereinafter "the Commission"). This action was filed on February 15, 1980. Complainant was represented by counsel from September 24, 1980 until May 11, 1981, the day prior to the date of the hearing. On May 11, 1981, Complainant discharged his counsel and elected to represent himself at the hearing. After the hearing, he again retained counsel to prepare his brief.

Upon completion of prehearing requirements, a hearing was held in Philadelphia, Pennsylvania on May 12-13, 1981. At the hearing, testimony was received from the following witnesses: Gerald L. Beam, Michael Trobetsky, Wilson G. Dunlap, Jr., James L. Reiter, Charles W. McNeal, William Smith, Kenneth R. Cox, Donald Habersberger, Milton Gould, Steven Trimper, and Walter Toepfer. After the hearing, both parties filed briefs in support of their positions.

OBJECTIONS TO THE TRANSCRIPT

On August 13, 1981, counsel for New Jersey Zinc raised a contention that the following three errors existed in the transcript:

> Review of the transcript in this case reveals that it contains some errors, which I bring to your attention:
>
> Volume I, page 35, line 9: "and confined me . . ."
> Should read: "and come find me . . ."
>
> Volume I, page 136, line 16: "I wouldn't say . . ."
> Should read: "I would say . . ."
>
> Volume I, page 149, line 13: "Yes."
> Should read: "No."

On August 17, 1981, counsel for Complainant, who was not present at the hearing, objected to the last two alleged errors.

While none of these alleged errors is material to the outcome of this case, I agree with counsel for New Jersey Zinc that the transcript of the hearing is in error and it will be corrected.

ISSUES

Whether New Jersey Zinc violated section 105(c) of the Act in discharging Complainant and, if so, what relief shall be awarded to Complainant.

APPLICABLE LAW

Section 105(c) of the Act, 30 U.S.C. § 815(c) provides in pertinent part as follows:

> (1) No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for

employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

(2) Any miner or applicant for employment or representative of miners who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate. Such investigation shall commence within 15 days of the Secretary's receipt of the complaint, and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint.

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

the person committing such violation. Proceedings under this paragraph shall be subject to judicial review in accordance with section 106. Violations by any person of paragraph (1) shall be subject to the provisions of sections 108 and 110(a).

STIPULATIONS

The parties stipulated the following:

1. At all times relevant to this proceeding, New Jersey Zinc operated the Friedensville Mine in Center Valley, Pennsylvania.

2. The Friedensville Mine is subject to the jurisdiction of the Act.

3. The Administrative Law Judge has jurisdiction over this proceeding pursuant to Section 105(c) of the Act.

4. Complainant, James L. Reiter, was last employed by the New Jersey Zinc Company from July 22, 1976, up to October 1, 1979.

5. Mr. Reiter received his license as a blaster by the Commonwealth of Pennsylvania in August, 1977 pursuant to regulatory requirements of the Commonwealth of Pennsylvania, Department of Environmental Resources (Title 25, Rules and Regulations, Part I, Subpart D, Article IV, Sections 207.33, 210.5, 211.31, 211.51).

6. The New Jersey Zinc Company provided Mr. Reiter the necessary training to obtain a blaster's license. The Company paid the State all fees associated with applying for, obtaining, and twice renewing Mr. Reiter's license.

7. On September 24, 1979, the Company was notified by the Office of Deep Mines of the Department of Environmental Resources, Commonwealth of Pennsylvania, that Mr. Reiter and another employee, Mr. Wilson Dunlap, had returned their blaster's licenses to the Department.

8. On September 25 and 27, 1979, Mr. Reiter, acting in his capacity as miner's representative, accompanied an inspector from MSHA on a general inspection of the mine. No citations were issued by MSHA as a result of this inspection.

9. On September 28, 1979, Mr. Walter Toepfer, Mine Superintendent of the Company, had several discussions with Mr. Reiter and Mr. Dunlap, on the subject of the blaster's licenses.

10. The Complainant was engaged in activities protected under the Act in his attendance at safety meetings between Company representatives and employees in his capacity as miner's representative, in his accompanying MSHA mine inspector, John D'Augustine, in an inspection of the mine on September 25 and 27, 1979; and in his participation in a safety meeting as described aforesaid, on September 28, 1979.

11. The Complainant was trained for, able to perform, and had performed the following tasks as part of his job classification of miner which do not require a blaster's license under the laws of the Commonwealth of Pennsylvania; lead scaler, roof bolter, grout operator, jack leg, and service truck operator.

12. At no time was the Complainant or any other miner with the Complainant's job classification required to detonate explosives.

13. It is the policy of New Jersey Zinc Company that only supervisory personnel are authorized to detonate explosives.

14. On October 1, 1979, Wilson Dunlap informed Mr. Toepfer that he would request the return of his license from the Department of Environmental Resources. Mr. Dunlap subsequently requested and obtained his license from the Department.

15. On October 1, 1979, Mr. Reiter informed Mr. Toepfer that he would not request the return of his blaster's license. On October 1, 1979, Mr. Reiter was discharged from his job.

16. At the time of the Complainant's discharge, Wilson Dunlap, who was a licensed blaster, was working on the blasting crew that the Complainant was working with.

17. On November 13, 1979, Mr. Reiter filed a Complaint with the Mine Safety and Health Administration, alleging that he was discharged for his safety-related activities in violation of Section 105(c) of the Act.

18. Following investigation of the Complaint, the Mine Safety and Health Administration determined that a violation of Section 105(c) did not occur, and so informed Mr. Reiter by letter on January 25, 1980.

19. On February 15, 1980, Mr. Reiter filed with the Federal Mine Safety and Health Review Commission a Complaint of discrimination under Section 105(c) of the Act.

20. On August 5, 1980, the Company filed with the Federal Mine Safety and Health Review Commission an answer denying Mr. Reiter's allegations.

FINDINGS OF FACT

I find that the evidence of record establishes the following facts:

1. New Jersey Zinc is the operator of the Friedensville Mine, an underground mine located in Center Valley, Pennsylvania.

2. Complainant was first hired by New Jersey Zinc in 1972 as an underground laborer. He quit this job on June 5, 1973, but was rehired on August 22, 1973. He again quit this job on February 7, 1974, but was rehired on April 2, 1974. On June 10, 1974, he was promoted to "mine utility" but again quit this job on August 31, 1974. His final period of employment at New Jersey Zinc began on July 22, 1976, when he was rehired as an underground laborer. He was promoted to "mine utility" on January 10, 1977, and promoted to "miner" on May 1, 1978. He was discharged on October 1, 1979. Complainant's duties as a "miner" included, among other things, leading in the loading of explosives.

3. Pennsylvania law requires that a blaster's license is necessary for distributing, charging or blasting explosives underground.

4. In 1977, Complainant applied to the Office of Deep Mine Safety, Pennsylvania Department of Environmental Resources to take the examination for a blaster's license. Complainant passed the examination and received a blaster's license.

5. In August, 1978, Complainant's blaster's license was renewed by the State of Pennsylvania without objection by Complainant.

6. On August 14, 1978, Complainant sustained an inguinal hernia. He filed a claim for workmen's compensation with the State of Pennsylvania. New Jersey Zinc opposed this claim, but on June 12, 1979, the Pennsylvania Bureau of Occcupational Injury and Disease Compensation ordered New Jersey Zinc to pay Complainant $2,169.43 less 20 percent attorney's fee. Complainant was unhappy that New Jersey Zinc was not ordered to pay his attorney's fee in the workmen's compensation case.

7. In early August, 1979, New Jersey Zinc mailed the application to renew blaster's licenses for 28 employees, including Complainant and Wilson Dunlap, to the Pennsylvania Office of Deep Mine Safety together with a check for the cost of the renewal fees. The State processed the applications and sent new license cards to each of the 28 employees.

8. On August 31, 1979, Milton Gould, a foreman and shift boss at New Jersey Zinc, asked Complainant to bring in his new blaster's license since the old license expired on August 31, 1979. Complainant said he would do so.

9. On September 1, 1979, Complainant sent a letter to the State enclosing his new blaster's license and stating: "I did not send for this blaster's license and I do not wish to have one. Please refund the money forwarded by the New Jersey Zinc Company." At approximately the same time, Wilson Dunlap, one of the three license blaster's on Complainant's shift, also returned his blaster's license to the State.

10. Complainant was on vacation and did not work during the first 2 weeks of September, 1979.

11. After Complainant returned to work in mid-September, 1979, he was asked by foreman Gould why he had not produced his blaster's license. Complainant responded that he had returned the license to the State. Complainant further stated that he would request the return of his license if New Jersey Zinc would reimburse him for the $400 attorney fees in his workmen's compensation claim. Complainant also agreed to get his license back if New Jersey Zinc would buy him a new pair of boots.

12. On September 24, 1979, the State advised New Jersey Zinc that Complainant and Dunlap had returned their blaster's licenses. New Jersey Zinc then attempted to get a determination from the State whether Complainant and Dunlap could continue to work as licensed blasters.

13. On September 25, 1979 and September 27, 1979, MSHA Inspector John D'Augustine conducted a regular inspection of the mine and New Jersey Zinc selected Complainant, a miner's representative for United Steelworkers of America, Local 5485 (hereinafter "USWA"), out of four possible men to be the union walkaround on this inspection. The operator's representative during this inspection was Donald Habersberger, the mine's safety and industrial engineer. During this inspection, Complainant complained to the inspector about the following conditions or practices: failure to scale loose ground in active workings; drilling into bootleg holes; and inexperienced employees performing complex jobs. Complainant also asked the inspector to check out a miner complaint concerning a "giraffe" or aerial platform. No crew was present in the area and permission was not obtained to operate the equipment so that it could be checked. No citations or orders were issued by the MSHA inspector during this inspection of the mine. However, the MSHA inspector recommended that New Jersey Zinc improve its maintenance of ribs and scaling of loose material.

14. On September 27, 1979, State Inspector William Smith visited the mine and advised mine management that he would issue a closure order for the mine and prosecute mine management if it used lead blaster's who did not have current State blaster's licenses.

15. On Friday, September 28, 1979, Complainant and Wilson Dunlap were called to a meeting in Mine Superintendent Walter Toepfer's office. At that time, Complainant and Dunlap stated that they had returned their blaster's licenses to the State. Toepfer advised them of the consequences if either of them worked as a lead blaster without a blaster's licenses. Although

Complainant initially agreed to seek the return of his blaster's license, he subsequently stated that he had changed his mind and would not request the return of his license because the license was a violation of his personal rights and he did not need the license. Superintendent Toepfer told Complainant and Dunlap that they had until the close of business on Monday, October 1, 1979, to get their blaster's licenses back or there would be no further work for them.

16. On October 1, 1979, Wilson Dunlap signed a letter to the State requesting the return of his license. Dunlap was not disciplined for this incident and is still employed at New Jersey Zinc.

17. On October 1, 1979, Complainant advised Superintendent Toepfer that he would not request the return of his blaster's license. Complainant was advised that this action would result in his discharge. Complainant alleged that New Jersey Zinc was discriminating against him because the license was not needed to perform his job. Complainant was discharged on October 1, 1979, for his refusal to request the return of his blaster's license.

18. For approximately 8 months prior to his discharge, Complainant was a member of the USWA safety committee and, in that capacity, filed safety complaints with New Jersey Zinc. Complainant's safety complaints included problems with loose ground and drilling through bootleg holes.

19. At no time prior to his discharge, did Complainant notify New Jersey Zinc that his refusal to renew his blaster's license was motivated by a concern about safety.

20. Complainant's grievance concerning his discharge was denied by New Jersey Zinc. The USWA did not request arbitration.

21. Complainant's claim for unemployment benefits was denied.

22. Complainant earned $6.97 per hour at the time of his discharge by New Jersey Zinc. Since the date of his discharge on October 1, 1979, Complainant's income has been as follows: 1979 - wages $252.92; 1980 - wages $5,204.36 and unemployment benefits $2,949.00; and 1981 to May - wages $2,126.13 and unemployment benefits $1,935.00.

23. From September 19, 1980 to May 11, 1981, and from June 29, 1981, to date, Attorney Charles W. Elliott represented Complainant and spent 80-1/2 hours on this matter. Attorney Elliott requests approval of attorney's fees of $60 per hour for a total of $4,830.

DISCUSSION

During the course of the hearing and in his posthearing brief, Complainant asserted several different claims concerning his allegation that he was discharged in violation of section 105(c) of the Act. He alleged the following claims: (1) he made safety complaints concerning loose ground and drilling into bootleg holes; (2) he complained to the MSHA inspector about

insufficient safety training and other safety problems; and (3) his refusal to renew his blaster's license was a refusal to work under unsafe conditions.

In Secretary of Labor on behalf of David Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (October 14, 1980) (hereinafter Pasula), the Commission analyzed section 105(c) of the Act, the legislative history of that section, and similar anti-retaliation issues arising under other Federal statutes. The Commission held as follows:

> We hold that the complainant has established a prima facie case of a violation of Section 105(c)(1) if a preponderance of the evidence proves (1) that he engaged in a protected activity, and (2) that the adverse action was motivated in any part by the protected activity. On these issues the complainant must bear the ultimate burden of persuasion. The employer may affirmatively defend, however, by proving by a preponderance of all the evidence that, although part of his motive was unlawful, (1) he was also motivated by the miner's unprotected activities, and (2) that he would have taken adverse action against the miner in any event for the unprotected activities alone. On these issues, the employer must bear the ultimate burden of persuasion. It is not sufficient for the employer to show that the miner deserved to have been fired for engaging in the unprotected activity; if the unprotected conduct did not originally concern the employer enough to have resulted in the same adverse action, we will not consider it. The employer must show that he did in fact consider the employee deserving of discipline for engaging in the unprotected activity alone and that he would have disciplined him in any event. Id. at 2799-2800.

In Pasula, supra, the Commission held that the miner's refusal to work was protected under the Act. The evidence in Pasula established that the miner refused to perform work he believed to be unhealthful after contacting management to obtain corrective action and requesting an MSHA inspection. The Commission further found that the miner's "good faith belief was reasonable, and was directed to a hazard that we consider sufficiently severe . . . ." Id. at 2793.

A. Safety Complaints to New Jersey Zinc

As a member of the USWA safety committee, Complainant filed written safety recommendations with management on February 17, 1979 and August 16, 1979. The former dealt with scaling loose ground and the latter dealt with drilling through bootleg holes. While both of these complaints constitute protected activity under section 105(c) of the Act, Complainant has failed to produce any evidence that the determination to discharge him was motivated in any part by the safety complaints. Moreover, in light of the other evidence discussed infra, no inference can be drawn which would satisfy Complainant's burden under Pasula.

B. Safety Complaints to MSHA inspector

On September 25, 1979 and September 27, 1979, Complainant served as the miner's representative during the MSHA regular inspection of this mine. In that capacity, Complainant told the inspector of conditions and practices which he believed to be in violation of the law. The fact that the MSHA inspector did not issue any citations or orders is irrelevant to this issue. If Complainant's complaints to the MSHA inspector played any part in the operator's decision to discharge him, then he has established a prima facie case under Pasula, supra. Even though there is no direct evidence to connect these protected activities with the subsequent discharge, such a connection may be established by inference. While these protected activities occurred during the week prior to discharge, a consideration of all the evidence shows that Complainant's discharge was based solely upon his refusal to request the return of his blaster's license. Thus, his activities during the MSHA inspection played no part in the determination to discharge him.

C. Refusal to Request Return of Blaster's License

Pennsylvania law requires that at least one licensed blaster be present when explosives are distributed or charged underground. Complainant first obtained his blaster's license from the State in 1977. At the hearing, he alleged that one of his incorrect answers was erased by the person giving the examination and that he was given another opportunity to answer that question. This assertion, even if true, is irrelevant to the instant proceeding. Complainant did not protest or object to the renewal of his license in August, 1978. In fact, when Complainant returned his renewed blaster's license for 1979-80 to the State on September 1, 1979, he did not complain to the State or New Jersey Zinc about any safety concerns. The evidence clearly establishes that at no time prior to his discharge on October 1, 1979, did Complainant ever allege that he returned his blaster's license for safety reasons. Rather, it was Complainant's position that he had the personal right to refuse such a license and that his job did not require such a license. The issue of whether a blaster's license was required to perform the job classification of "miner" on October 1, 1979 is not a health or safety matter protected under section 105(c) of the Act, but is a contractual matter over which I have no jurisdiction. The issue before me is whether Complainant's refusal to request the return of his blaster's license is a refusal to work under unsafe conditions which constitutes protected activity under section 105(c) of the Act. On this issue, Complainant also fails. At no time did Complainant refuse to work. In fact, he insisted that he was, at all times, ready and able to work as a "miner".

While it might be possible that a good faith, reasonable refusal to request the return of a blaster's license could constitute protected activity under section 105(c), such a refusal would have to be preceded by specific complaints to the mine operator or governmental authorities concerning the safety hazards faced by the licensee. Moreover, such a refusal must be reasonable and made in good faith. In the instant case, Complainant fails on each of the above criteria. He never made any specific safety complaint to

New Jersey Zinc concerning the hazards he faced because of his blaster's license. His apparent willingness to be employed without a blaster's license belies his safety claim. Likewise, he made no such complaint to the State or MSHA. I find that his refusal to seek the return of his blaster's license was not made in good faith because he admitted that he would have requested the return of his license if New Jersey Zinc would have bought him a new pair of boots. Moreover, there was other credible testimony that Complainant offered to request the return of his blaster's license if New Jersey Zinc would have reimbursed him for the $400 attorney fee paid in connection with his earlier workmen's compensation claim. These facts indicate that despite his protestations of safety matters, Complainant was attempting to use the blaster's license for an additional pecuniary gain. Thus, Complainant's refusal to seek the return of his blaster's license was not a good faith refusal to work under unsafe conditions.

The evidence establishes that Complainant was discharged by New Jersey Zinc solely for his refusal to request the return of his blaster's license. Complainant's assertion that he would have been discharged because of his safety activities, even if he had requested the return of his license, is based on speculation and conjecture and is entitled to no weight. Complainant failed to establish that New Jersey Zinc violated section 105(c) of the Act in connection with his discharge.

CONCLUSIONS OF LAW

1. At all times relevant to this decision, Complainant and New Jersey Zinc were subject to the Act.

2. This Administrative Law Judge has jurisdiction over the parties and subject matter of this proceeding.

3. Prior to October 1, 1979, Complainant engaged in the following activities which constitute protected activities under section 105(c) of the Act: (1) Safety complaints to New Jersey Zinc management concerning scaling loose ground and drilling into bootleg holes; and (2) service as a safety commiteeman for the USWA and as miner's representative during the MSHA inspection of September 25, 1979 and September 27, 1979.

4. Complainant's return of his blaster's license to the State and his refusal to request a return of his blaster's license from the State are unprotected activities under section 105(c) of the Act.

5. Complainant failed to establish that his discharge by New Jersey Zinc was motivated in any part by his protected activities.

6. New Jersey Zinc established that it discharged Complainant solely for his refusal to request a return of his blaster's license.

7. New Jersey Zinc did not violate section 105(c) of the Act in discharging Complainant.

8. Complainant's Complaint of Discharge is dismissed.

ORDER

WHEREFORE, IT IS ORDERED that Complainant's Complaint of Discharge is DISMISSED.

James A. Laurenson, Judge

Distribution Certified Mail:

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Charles W. Elliott, Esq., Thomas and Hair, Suite 101, 123 North Fifth Street, Allentown, PA 18102

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Special Investigations, MSHA, U.S. Department of Labor, 4015 Wilson Blvd., Arlington, VA 22203

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

SEP 9 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	)	CIVIL PENALTY PROCEEDING
Petitioner,	)	DOCKET NO. WEST 80-69-M
v.	)	A/C No. 02-01915-05003
SUN LANDSCAPING AND SUPPLY COMPANY,	)	MINE: White Marble
Respondent.	)	

DECISION

Appearances:

Marshall P. Salzman, Esq.
Office of the Solicitor
United States Department of Labor
450 Golden Gate Avenue, Box 36017
San Francisco, California 94102
For the Petitioner

W. T. Elsing, Esq.
34 West Monroe, Suite 202
Phoenix, Arizona 85003
For the Respondent

Before: Judge Jon D. Boltz

STATEMENT OF THE CASE

The Petitioner filed a petition for assessment of proposed civil penalties against the Respondent for alleged violations on April 4, 1979, of regulations promulgated by authority of the Federal Mine Safety and Health Act of 1977 (hereinafter "the Act"). The Respondent denied that the White Marble Mine operation was subject to the jurisdiction of the Act and alleged that the operation was terminated before it ever got into production.

FINDINGS OF FACT

1. Respondent's business is a small operation.

2. The imposition of the proposed penalties would not affect respondent's ability to remain in business.

3. Respondent has no history of prior violations.

4. The two citations at issue were duly served on April 4, 1979, by an MSHA inspector who was an authorized representative of the Secretary of Labor.

5. Respondent's operation consisted of blasting white marble in the pit area and hauling the material to the main highway in order to transport it to the crusher and screening plant. There, the material was processed and laid in stock piles awaiting shipment to Phoenix by truck.

6. On the date of the inspection, April 4, 1979, the MSHA inspector observed crushed white marble material in piles of up to 15 tons each.

7. Sometime after the inspection on April 4, 1979, the Respondent moved its operation to a different location in Arizona.

8. Some of the equipment purchased by the Respondent for use in its business operation was manufactured outside the State of Arizona. Specifically, the Caterpillar loader, drill and compressor were produced or manufactured in Illinois.

JURISDICTION

The act of setting up Respondent's business, including the processing of the marble into stock piles for sale, and the purchase of the equipment as described in the Findings of Fact, affects commerce. It has previously been held in a case involving this same Respondent that the setting up of mining facilities with the intent to mine marble, crush it, and sell it in the future affects commerce and, thus, places the operator under jurisdiction of the Act. Secretary of Labor, Mine Safety and Health Administration (MSHA) v. Sun Landscaping and Supply Company, 2 FMSHRC 975 (1980).

In the instant case, there were no facts presented by the Respondent upon which a different conclusion could be reached. Accordingly, I find that Respondent's mining operation was subject to the jurisdiction of the Act.

CITATION NO. 381381

Petitioner alleges that the operator of the Caterpillar bulldozer was exposed to 206% of the permissible noise level and that feasible engineering or administrative controls were not being used to reduce this level in order to eliminate the need for hearing protection, in violation of 30 C.F.R. 55.5-50(b).[1]/ The bulldozer operator was wearing personal hearing protection.

1/ [Mandatory.] When employees' exposure exceeds that listed in the above table, feasible administrative or engineering controls shall be utilized. If such controls fail to reduce exposure to within permissible levels, personal protection equipment shall be provided and used to reduce sound levels to within levels of the table.

The evidence is undisputed that, during a sampling time of 360 minutes, the bulldozer operator was exposed to 206% of the permissible noise exposure or 97 dBA. The maximum permissible noise exposure for 360 minutes is 92 dBA, according to the cited regulation. Therefore, feasible administrative or engineering controls must be utilized to reduce the exposure to within permissible levels. If these controls fail to reduce the noise exposure to within permissible levels, personal protection equipment shall then be used.

The Petitioner introduced evidence as to feasible engineering or administrative controls. These controls included installation of a windshield at a cost of between $50.00 and $150.00. The MSHA inspector testified that the windshield alone would have been sufficient to reduce the noise exposure to within acceptable limits.

The burden of going forward with evidence showing that the utilization of feasible controls would not reduce the exposure to within permissible levels then shifted to the Respondent. The President of Respondent corporation testified that it would cost several thousand dollars to construct a frame for the windshield and that the glass alone would cost in excess of $400.00. In addition, the bulldozer would be out of operation two to four days for the installation, and the value of the dozer was $100.00 per hour. He concluded that "by adhering to the regulation [the cost] would have been in the thousands of dollars, not hundreds."

I find the evidence of the Petitioner to be more credible and convincing than that of the Respondent in regard to evidence concerning feasible controls. On rebuttable, the MSHA inspector testified that it had been his experience that the windshield could have been installed for $150.00. Even if the installation were to cost three times that amount, it was a feasible control and a long way from "thousands of dollars."

I therefore conclude that the citation should be affirmed.

CITATION NO. 381382

Again, alleging a violation of 30 C.F.R. 55.5-50(b), the Petitioner states that the drill operator was exposed to 332% of the permissible noise exposure and that feasible engineering or administrative controls were not being utilized to reduce this level in order to eliminate the need for personal hearing protection.

The evidence is undisputed as to the noise exposure recorded by the dosimeter during the 360 minute sampling period. According to the chart received into evidence, this exposure amounted to 100 dBA. 92 dBA is the maximum permissible noise exposure level. Therefore, the issue is whether or not feasible administrative or engineering controls were being utilized to reduce the exposure to within permissible levels. The drill operator was wearing personal hearing protection.

The Petitioner introduced evidence that a muffler system could have been utilized. The manufactured cost would be $550.00 and a "prefab" one would cost $150.00 to $350.00. At the time of the inspection, an MSHA inspector discussed with Respondent's employee both sound proofing with shields and a "homemade" muffler system.

The Respondent failed to go forward with any evidence that feasible controls had been utilized or that such controls would not reduce exposure to within permissible noise levels. The only testimony offered was hearsay evidence that the earplugs and earmuffs were approved by a State mine inspector and were also recommended to the President of Respondent corporation by his "eye, ear, and nose doctor" as being sanitary and helpful. Under these circumstances, the Petitioner has proven his case to a preponderance of the evidence and is entitled to a favorable decision on his petition. Accordingly, the citation should be affirmed.

Considering the factors set forth in section 110(i) of the Act in regard to both citations, I find that the amount of penalty assessed should be the amount prayed for in the petition.

CONCLUSIONS OF LAW

1. The undersigned Administrative Law Judge has jurisdiction over the parties and subject matter of these proceedings.

2. The Petitioner has proven, by preponderance of the evidence, two violations of 30 C.F.R. 55.5-50(b), as alleged in Citation Nos. 381381 and 381382.

ORDER

Citation Nos. 381381 and 381382 are affirmed and the penalties assessed are $28.00 each. Respondent is ordered to pay total civil penalties in the sum of $56.00 within 30 days of the date of this Decision.

Jon D. Boltz
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SEP 11 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF JACK HATTER, Complainants	:	Complaint of Discrimination
	:	Docket No. WEVA 81-318-D
	:	Lick Branch No. 1 Mine
v.	:	
EL-BOW MINING, INC., Respondent	:	

DECISION AND ORDER APPROVING SETTLEMENT

Statement of the Case

This is a discrimination proceeding filed by the complainant against the respondent pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, for an alleged act of discrimination which purportedly occurred sometime in November, 1980. The matter was scheduled for hearing on September 16, 1981 in Bluefield, West Virginia, but the hearing was continued at the request of the parties so that a proposed settlement could be submitted for my consideration.

By joint motion filed August 18, 1981, complainant filed a motion to withdraw its complaint and the parties submitted their proposed settlement disposition, the terms of which are as follows:

1. Upon execution of this agreement, respondent will post immediately on the mine bulletin board, or in a conspicuous place where notices to employees are customarily posted and maintain for a period of 14 consecutive days from the date of posting, the Notice attached hereto and made a part hereof. Said Notice is to be signed by a responsible official of the respondent and the date of actual posting is to be shown thereon.

2. Respondent will comply with the terms and provisions of said Notice.

3. Applicant will, upon respondent's execution and completion of performance of this agreement, withdraw El-Bow Mining Inc.'s complaint of discrimination filed with the Department of Labor.

Respondent agrees to pay a civil penalty in the amount of $200.

4. The execution of this settlement agreement by the respondent shall not be construed as an admission of violation of the Federal Mine Safety and Health Act of 1977.

Discussion

The parties are in agreement that the proposed settlement disposition of this matter is in their interest, and after review and consideration of all of the pleadings filed in this matter, including the terms of the settlement, I conclude that the settlement disposition is a reasonable and fair resolution of the dispute and that approval of same is in the public interest.

ORDER

In view of the foregoing the motion to withdraw is GRANTED and the proposed settlement is APPROVED, and upon full compliance and completion with the terms thereof as set forth above, this matter is DISMISSED.

George A. Koutras
Administrative Law Judge

Distribution:

David E. Street, Esq., U.S. Department of Labor, Office of the Solicitor, 3535 Market St., Philadelphia, PA 19104 (Certified Mail)

Thomas L. Woolwine, Labor Consultant, J.T. Associates, Box 4234, Bluefield, WV 24701 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

SEP 14 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. WASHINGTON CORPORATION, d/b/a WASHINGTON CONSTRUCTION COMPANY, Respondent.	CIVIL PENALTY PROCEEDING DOCKET NO. WEST 80-471-M ASSESSMENT CONTROL NO. 10-00556-05009 MINE: Dry Valley

BENCH DECISION AND ORDER

Appearances:

Robert A. Friel, Esq.
Office of the Solicitor
United States Department of Labor
8003 Federal Office Building
Seattle, Washington 98174

for the Petitioner

Mr. James A. Brouelette,
EEO/Safety Officer
Washington Corporations
P. O. Box 8989 - 500 Taylor
Missoula, Montana 59807

for the Respondent

Before: Judge Jon D. Boltz

This proceeding is brought by the petitioner, Secretary of Labor, on a petition for assessment of civil penalty against the respondent for an alleged violation of 30 C.F.R. 55.3-1. 1/ The cited regulation is promulgated by authority of the Federal Mine Safety and Health Act of 1977.

1/ Mandatory. Standards for the safe control of pit walls, including the overall slope of the pit wall, shall be established and followed by the operator. Such standards shall be consistent with prudent engineering design, the nature of the ground and the kind of material and mineral mined, and the ensuring of safe working conditions according to the degree of slope. Mining methods shall be selected which will ensure wall and bank stability, including benching as necessary to obtain a safe overall slope.

The petitioner specifically alleges in Citation No. 345076 that the regulation was violated in that the high wall in the respondent's mine was approximately 100 feet high and had an original vertical angle of approximately 3/4 to 1, that this high wall was developing an overhang approximately 20 feet down from the crest, and that there were also fractures visible in the cap rock.

At the conclusion of the hearing the parties waived the filing of post-hearing briefs and agreed that a bench decision could be rendered at this time.

I make the following findings of fact:

1. The respondent had no significant history of previous violations.

2. The respondent is a moderate sized operator.

3. The payment of proposed penalty will not affect the respondent's ability to continue in business.

4. The respondent demonstrated good faith in achieving rapid compliance after notification of the violation.

5. The MSHA inspector who issued and served the citation involved was a duly authorized representative of the Secretary.

6. The respondent's products enter commerce and the mine involved is subject to the jurisdiction of the Act.

It is undisputed that a bulldozer operator had been working near or under the overhang described in the citation. The MSHA inspector testified that he issued the citation because of loose overhanging material on the wall itself. He testified that the overhanging material protruded approximately three feet out from the wall and there must have been something wrong with the mining method or the overhang would not have developed. However, there is no evidence that the slope of the pit wall was not in conformity with prudent engineering design.

Respondent's exhibit R-2 is the mining plan followed by the Respondent and establishes standards for the safe control of the pit walls including the overall slope of the wall. The plan states that the high wall will be excavated at a slope of 60 degrees. It also states that no catch benches are specified in the design, but alterations for their addition, if required, will be made to conform to sound engineering and mining practices. There is no evidence that this was not a proper standard.

The question presented is whether there was a violation of the cited regulation because of the subsequent development of overhanging material which the respondent had not taken down. The MSHA inspector testified that in his opinion the bank was dangerous, and it has already been shown that miners had been working near or under the bank.

I find that the respondent had established standards for safe control of the pit wall, including the slope of the wall. The evidence of the petitioner shows that there may have been a violation of 30 C.F.R. 55.3-5, 2/ in that men were working near or under dangerous banks, but I do not find evidence that the respondent failed to adopt standards for safe control of pit walls including their overall slope. Accordingly, Citation No. 345076 is vacated.

ORDER

The foregoing bench decision is AFFIRMED.

Jon D. Boltz
Administrative Law Judge

Distribution:

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Office of the Solicitor
United States Department of Labor
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Seattle, Washington 98174

Mr. James A. Brouelette,
EEO/Safety Officer
Washington Corporations
P. O. Box 8989 - 500 Taylor
Missoula, Montana 59807

2/ Mandatory. Men shall not work near or under dangerous banks. Overhanging banks shall be taken down immediately and other unsafe ground conditions shall be corrected promptly, or the areas shall be barricaded and posted.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

SEP 14 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	)	CIVIL PENALTY PROCEEDING
Petitioner,	)	DOCKET NO. DENV 79-371-PM
v.	)	A/C No. 10-00634-05003
WASHINGTON CONSTRUCTION COMPANY,	)	MINE: Monsanto Quartzite Quarry
Respondent.	)	

BENCH DECISION AND ORDER

Appearances:

Robert A. Friel, Esq.
Office of the Solicitor
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For the Petitioner

James A. Brouellette
EEO/Safety Officer
Washington Corporations
500 Taylor
P.O. Box 8989
Missoula, Montana 59807
For the Respondent

Before: Judge Jon D. Boltz

This proceeding is brought by the Petitioner, Secretary of Labor, Mine Safety and Health Administration (MSHA), on a petition for assessment of civil penalties against the Respondent for alleged violations of a regulation promulgated by authority of the Federal Mine Safety and Health Act of 1977 (hereinafter "the Act").

At the conclusion of the hearing, the parties agreed to waive the filing of post hearing briefs and agreed that a Bench Decision could be issued.

I make the following findings of fact:

I. The Respondent has no significant history of previous violations.

2. The Respondent is a moderate sized operator.

3. The payment of the proposed penalties will not affect the Respondent's ability to continue in business.

4. The Respondent demonstrated good faith in achieving rapid compliance after notification of the violations.

5. The MSHA inspector who issued and served the citations involved was a duly authorized representative of the Secretary.

6. The Respondent's products enter commerce and the mine involved is subject to the jurisdiction of the Act.

The citations at issue, Nos. 345023, 345024, and 345025, were dated July 12, 1978, and were subsequently served on the Respondent. Each citation alleges a violation of 30 C.F.R. 56.5-5.[1]/ The Respondent contends that the citations should be dismissed because of the long time between their issuance and this hearing on August 6, 1981. The records in the file disclose that the Secretary filed a petition within the time prescribed by the regulations and, although it did take possibly an unusual length of time before a hearing could be scheduled, there is no showing that the Respondent's case was prejudiced. Mr. Brouelette stated during the course of the hearing that he had testified as to all of the facts that individuals who are no longer with the Respondent company would have testified to had they been present. Mr. Brouelette also stated that the Secretary had lost pleadings filed in response to the petition filed by the Petitioner. In this regard, I should point out that a procedural rule of the Commission requires that responsive pleadings be filed with the Commission and not with the Secretary. Accordingly, I find that there is no merit in Respondent's contention.

The evidence is undisputed that the results of the sampling of three miners in regard to airborne contaminants revealed that they were subjected to harmful exposure based upon threshold limit values duly adopted in accordance with the regulation. The employee referred to in Citation No. 345023 received approximately ten times the allowable amount. In Citation No. 345024, the employee received approximately six times the allowable amount. In Citation No. 345025, the employee received approximately three times the allowable amount. Thus, there was a violation of the regulation cited unless it is shown that the regulation would allow the use of respirators. It is undisputed that the miners involved were using respirators or that respondent issued respirators for their use.

1/ Mandatory. Control of employee exposure to harmful airborne contaminants shall be, insofar as feasible, by prevention of contamination, removal by exhaust ventilation, or by dilution with uncontaminated air. However, where excepted engineering control measures have not been developed ... employees may work for reasonable periods of time in concentration of airborne contaminants exceeding permissible levels if they are protected by appropriate respiratory protective equipment....

The Petitioner presented evidence that it would have been feasible to lower the amount of silica in the air by use of water-spraying nozzles installed on hoses. The Respondent claimed that it did not have sufficient water pressure for that purpose. However, after completion of its mining season, Respondent did in the Spring of 1979 dig its well 65 feet deeper and install a submersible pump and other equipment which ultimately reduced the airborne contaminants to an acceptable level. The evidence shows that accepted engineering control measures could have been applied in order to control the amount of airborne contaminants, thus, allowing the Respondent to be in compliance with the regulation without the use of respirators.

Respondent also contends that it was not convenient to shut down the operation to make the needed engineering changes until the completion of the mining season in October 1978. However, as long as there are accepted engineering control measures available which when utilized will alleviate the problem as shown in this case, a violation of the regulation is necessarily proven, and the Petitioner has established a prima facie case.

I find that the Petitioner has proven by a preponderance of the evidence that the three citations should be affirmed. The penalties are assessed in amounts of $30.00, $30.00 and $24.00 for Citation Nos. 345023, 345024 and 345025, respectively, as prayed for in the petition.

ORDER

The foregoing Bench Decision is affirmed and the Respondent is ordered to pay a total civil penalty of $84.00 within 30 days of the date of this Decision.

Jon D. Boltz
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE, SUITE 400
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SEP 14 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on BEHALF OF CALVIN M. BIGELOW,	COMPLAINT OF DISCHARGE, DISCRIMINATION OR INTERFERENCE
Complainant,	DOCKET NO. WEST 81-51-DM
v.	MINE: FMC Mine
CENTENNIAL DEVELOPMENT COMPANY	
Respondent.	

DECISION AND ORDER

On September 4, 1981, the parties to the proceeding filed with the Commission a Stipulation of Settlement, Consent and Motion seeking an agreed disposition of the case.

Under the terms of the stipulation, the parties agree that respondent shall compensate Calvin M. Bigelow in the amount of $8,000.00 in settlement of his claim against respondent resulting from this discharge and that respondent shall expunge the employment record of Calvin M. Bigelow of any adverse references relating to his discharge.

By joint motion, the parties seek an order providing: that respondent tender the agreed upon sum to Calvin M. Bigelow within 40 days and that respondent expunge from his employment record any adverse references relating to his discharge.

Given the complainant's consent to the terms of the settlement and finding that such settlement will effectuate the purpose of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., it is

ORDERED: that the settlement agreed to by the parties is hereby APPROVED, that the joint motion is hereby GRANTED in full, that the respondent tender to the complainant the sum of $8,000.00 within 40 days from August 19, 1981, the date he signed the stipulation, and that this case is hereby DISMISSED WITH PREJUDICE.

Virgil E. Vail

Virgil E. Vail
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE, SUITE 400
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SEP 14 1981

J. OTTO HORVATH, Complainant. v. GREEN ELECTRIC COMPANY, AND LIVELY CONSTRUCTION COMPANY, Respondent.	COMPLAINT OF DISCHARGE, DISCRIMINATION OR INTERFERENCE DOCKET NO. WEST 81-185-D MSHA CASE NO. DENV CD 81-3 MINE: Fork Union Coal Company

DECISION AND ORDER

Pursuant to a notice of hearing dated June 29, 1981, a hearing in the above-entitled proceeding was held in Gillette, Wyoming, on August 25, 1981.

At the hearing, counsel for the respondent presented a stipulation and release of claim signed by complainant. The release states that complainant agrees to a dismissal of the complaint he has filed against Green Electric Company and Lively Construction Company (Docket No. WEST 81-185-D) with prejudice and agrees not to bring any further complaint against either respondent arising out of his employment relationship with said parties.

Complainant's release of all claims made in this proceeding is based on a settlement agreement between him and the two respondents dated August 25, 1981. That agreement shows that respondent jointly agreed to pay complainant $4,000.00 in settlement of any and all claims, known or unknown, which complainant may have against the two respondents.

The complainant and counsel for both respondents appeared at the hearing and all stated for the record their agreement and satisfaction with the settlement.

Having received the complainant's consent to the terms of the settlement and finding that such settlement will effectuate the purposes of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., it is

ORDERED: That the settlement agreed to by the parties is hereby APPROVED and that as to both respondents, this case is hereby DISMISSED WITH PREJUDICE.

Virgil E. Vail

Virgil E. Vail
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE, SUITE 400
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SEP 15 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	)	CIVIL PENALTY PROCEEDING
Petitioner,	)	DOCKET NO. WEST 80-271-M
v.	)	A/O No. 04-01854-05004
MASSEY SAND AND ROCK COMPANY,	)	MINE: Indio Sand & Rock Pit
Respondent.	)	

DECISION

Appearances:

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For the Petitioner,

Mr. Jack Corkill, Compliance Officer, Massey Sand and Rock Company, 43850 Monroe Street, P.O. Box 1767, Indio, California 92201
For the Respondent

Before: Judge Virgil E. Vail

I. Procedural Background

The above-captioned civil penalty proceeding was brought pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a) [hereinafter referred to as "the Act"].

Pursuant to notice, a hearing on the merits was held at Indio, California on January 22, 1981. Cosme Gutierrez, federal mine inspector, appeared on behalf of the petitioner. Respondent offered the testimony of Richard P. Edens, David Holliday and Frank Pease. Neither party elected to file a post-hearing brief.

II. Findings of Fact

CITATION NO. 380866

1. On October 24, 1979, during an inspection, Coseme Gutierrez noticed that the Hough front-end loader was leaking hydraulic fluid. (Tr. 6).

2. While the front end loader was on a 4 to 5% incline, Gutierrez requested that the operator turn off the machine and test the emergency brake. The test was conducted and it was found that the brake would not hold the roll. (Tr. 6-7). Prior to the test the operator of the loader had told the inspector that the brake was not working.

3. The front end loader was approximately 16 to 19 feet high, 22 to 25 feet in length and 10 to 12 feet wide. (Tr. 6).

4. The loader had a ten yard bucket in front and was being used to load materials onto trucks or to stockpile materials. (Tr. 6 and 51).

CITATION NO. 380865

5. The respondent keeps a pile of material that is approximately 60 to 90 feet high. This material is continually being pushed into a hopper by rubber tired bulldozers. (Tr. 20).

6. The operator at the hopper sits on a work platform that is 12 feet high. (Tr. 21). His job is to use the backhoe to keep the large rocks out of the grid and to watch the plant. (Tr. 35-36).

7. Six to eight feet to the right-hand side of the operator's platform there is a control panel. (Tr. 21 and 40). The purpose of the control panel is so the operator can start and stop the conveyor belts and the feeder. (Tr. 38).

8. On October 24, 1979, the control panel had been disconnected because recent heavy rains had caused flooding. Since the control panel was in a low lying area, the wires were under water and the respondent had been forced to deenergize the control panel. (Tr. 23 and 37).

9. Since the control panel had been disconnected, the operation had to be started by another employee at the control shack, which was located approximately 1000 feet from the work platform. (Tr. 23).

10. The operator was unable to see the control shack, nor could the miner at the shack see the work platform where the operator was because there were materials stacked 30 to 50 feet high between the two locations. (Tr. 22 and 36).

11. There was a two-way radio provided so the operator and the miner at the control shack could communicate with one another. (Tr. 36).

III. Discussion and Conclusions

CITATION NO. 380866

Citation no. 380866[1]/ alleges a violation of mandatory safety standard 56.9-3 which provides that, "Powered mobile equipment shall be provided with adequate brakes."

It is uncontradicted that the emergency brake was not in good working condition. Frank Pease, the respondent's heavy equipment repair foreman, testified that after the citation was issued he was sent to work on the emergency brake. He found that the lining was off the brake shoes. (Tr. 50).

Respondent offered an operator's manual, pertaining to this piece of machinery, in order to prove that the emergency brake is only to be used to hold the machine in a stationary position after it has come to a stop. (Respondent's Exhibit 2). I do not disagree with respondent's argument, but it is of no value in deciding the issue now before us.

The test was conducted while the machine was stopped and in a stationary position. The fact is that the emergency brake was defective in that it would not stop the machine from rolling when it was in a stationary position.

Respondent's second argument is that the petitioner never proved that the hydraulic fluid leaking from the machine came from the brakes. The inspector testified that the leakage was the reason he conducted the test on the brakes, however the origin of the fluid is not an essential element in proving a violation.

Finally, respondent contends that standard 56.9-3 does not comport with due process requirements because it does not give fair warning as to what conduct is required or prohibited. Respondent raised this issue in its answer, however neither party chose to address it at the hearing.

This issue has already been addressed in the case of Secretary of Labor v. Concrete Materials, Inc. 2 FMSHRC 3105 (1980). In that case the operator challenged standard 56.9-3 as violating due process requirements because of vagueness. The Administrative Law Judge stated that:

> The question in this case is whether the operator knew that the operation of the cited trucks with the then existing brakes would be hazardous or whether a con-

---

1/ Citation no. 380866 states that: "The emergency brake on the #596 front end loader when set would not hold machine. This machine was also leaking a substantial amount of hydraulic fluid. These condition(s) could cause equipment operator to lose control and injury (sic) people in immediate area or the operator himself."

> scientious safety expert would have protected against the brake conditions because they presented a reasonably foreseeable hazard.

The judge went on to reject the due process argument.

In the present case the govenment proved that the defective emergency brake presented a safety hazard. Furthermore, a witness for the respondent testified that the brake was defective. Under such circumstances, I find it difficult to believe that respondent felt the loader was equipped with "adequate brakes."

For the reasons stated above, I conclude that the citation should be affirmed.

Penalty Assessment

The respondent has had only a small number of prior violations. Since there is nothing contrary contained in the record, I assume that the imposition of a penalty will not affect respondent's ability to remain in business.

I conclude that the respondent knew or should have known of the violation. It is a relatively easy procedure to test the emergency brake and if this had been done respondent would have discovered the defect.

The defect could have led to a serious injury for either the operator or anyone in the immediate vicinity. Also, the respondent did not abate the citation when he became aware of the defect. An order of withdrawal was issued on October 31, 1979 because the brakes had not yet been fixed. (Order no. 380860). For these reasons, I find that the gravity of the violation was severe and that respondent failed to act in good faith.

Under the circumstances, as they have been described above, I find that a penalty in the amount of $275.00 is appropriate.

CITATION NO. 380865

Citation no. 380865[2]/ states that:

> The control switches to the feed hopper, primary belt conveyor were inoperable. These switches did not work when belt operator was asked to start and shut off equipment. An employee could easily fall into moving equipment resulting in serious injury and no one in the immediate area would have control of shutting off equipment.

2/ Citation 380865 alleges a violation of mandatory safety standard 56.9-2 which provides that, "Equipment defects affecting safety shall be corrected before the equipment is used."

Respondent did not attempt to refute the allegation that the switches at the control panel were inoperative. Rather, respondent argued that this did not constitute a violation of the Act. Respondent points to 56.9-6 which provides that:

> When the entire length of a conveyor is visible from the starting switch, the operator shall visually check to make certain that all persons are in the clear before starting the conveyor. When the entire length of the conveyor is not visible from the starting switch, a positive audible or visual warning system shall be installed and operated to warn persons that the conveyor will be started.

The company had an audible warning system and therefore, the respondent contends it was in compliance.

I disagree. Safety standard 56.9-6 applies only to conveyors. In this case not only are we concerned with the conveyor belt system, but the hopper and the back hoe also. I agree with the inspector that since the operator had no way of stopping the equipment because the switches had been disconnected, this constituted a defect in the equipment.

Secondly, respondent argues that the second set of switches which were provided were sufficient for compliance. There were two switches, one for the feeder and one for the first conveyor. These switches were located 10 to 15 feet from where the operator sat. (Tr. 40).

I conclude that the presence of the second set of switches was insufficient to correct the equipment defect. First of all, in order for the operator to get to the switches he had to climb down a ladder. This would take up valuable time in case of an emergency. Most importantly though is the fact that the on-off switches were unreliable. Richard Edens, the electrician for the plant, testified that the switches were working on the day the citation was issued, but could not remember if they were actually tested to see if they were operable. (Tr. 40 and 44). Furthermore, he stated the presence of iron ore at the site sets up a magnetic field between the wires so that at times the switches will not stop the equipment. (Tr. 44).

There is no other logical conclusion but to find that Citation no. 380865 should be affirmed. Operating equipment of this nature from a point where the person who has control of starting and stopping the equipment cannot even see the operator clearly violates 56.9-3.

Penalty Assessment

The negligence of the respondent was slight since the switches at the control panel had to be disconnected because of the recent flooding and normally they would have been energized. However, the seriousness of this violation is such that I cannot approve a reduction of the proposed penalty assessment. If an employee were to slip and fall into the machine it would not be known immediately by other employees and when it was discovered it is unlikely that the equipment could be stopped before serious injury resulted. For these reasons, I assess a penalty of $75.00 for the violation.

ORDER

Respondent is hereby ORDERED to pay the amount of $350.00 within forty days of this decision.

Virgil E. Vail
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

SEP 17 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. SE 81-8-M
	:	A.O. No. 08-0075-05005F
v.	:	
	:	St. Catherine Quarry
ST. CATHERINE ROCK COMPANY, Respondent	:	

DECISION

Appearances: Ken W. Welsch, Attorney, U.S. Department of Labor, Atlanta, Georgia, for the petitioner;
David A. Davis, Esq., Bushnell, Florida, for the respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a proposal for assessment of civil penalty filed by the petitioner against the respondent on January 5, 1981, pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), charging the respondent with two alleged violations issued pursuant to the Act and the implementing mandatory safety and health standards. Respondent filed a timely answer in the proceedings and a hearing was held on July 7, 1981, in Tampa, Florida and the parties appeared and participated therein. The parties waived the filing of posthearing arguments, but were afforded the opportunity to make arguments on the record and those have been considered by me in the course of this decision.

Issues

The principal issues presented in these proceedings are (1) whether respondent violated the provisions of the Act and implementing regulations as alleged in the proposals for assessment of civil penalties filed in these proceedings, and, if so, (2) the appropriate civil penalties that should be assessed against the respondent for the alleged violations based upon the criteria set forth in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of this decision.

In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty

to the size of the business of the operator, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. § 801 et seq.

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

3. Commission Rules, 20 C.F.R. § 2700.1 et seq.

Stipulations

The parties stipulated as to jurisdiction, agreed that the respondent is a small crushed stone operator employing approximately seven employees, that the mine operates one daily 8-hour production shift 5 days a week, and that the respondent has no previous history of paid or assessed violations (Tr. 6-7).

Respondent's counsel raised an objection to proceeding with the hearing on the ground that respondent was not afforded an opportunity for a trial by jury. The objection was denied, and my ruling in this regard is herein reaffirmed. It seems clear to me that civil penalty proceedings pursuant to the Act are civil rather than criminal, and that the respondent has not been deprived of any Sixth Amendment right to a trial by jury in a criminal matter, or of any right conferred by the Seventh Amendment to a jury trial in a civil penalty assessment case. The rights to which respondent is entitled are those specifically provided for in the Act, namely an APA hearing before a Commission Judge, with the opportunity to participate fully therein, including the right to confront and cross-examine the inspectors who issued the citations.

In a case under the Occupational Safety and Health Act (OSHA), the Supreme Court, on March 23, 1977, ruled that the Seventh Amendment guarantee of a jury trial in suits at common law does not apply to hearings before the Occupational Safety and Health Review Commission in contested civil penalty proceedings. Atlas Roofing Co., and Frank Irey, Jr., Inc. v. Occupational Safety and Health Review Commission et. al., 1977-1978 OSHD, 21,615, affirming decisions of the third and Fifth Circuit Appeals Courts, reported at 1975-1976 OSHD 19,878 and 20,002. In Mohawk Excavating, Inc., the Second Circuit Court of Appeals ruled on February 8, 1977, that civil penalties under OSHA are civil rather than criminal because Congress characterized them as such, and the only consequence of a judgement is a money penalty, 1976-1977 OSHD, 21,537. Under the circumstances, I conclude that these precedents are applicable in civil penalty proceedings brought under the Mine Act and respondent is not entitled to a trial by jury.

Discussion

The citations which issued in this case were the result of an investigation conducted by MSHA into the causes of a fatality which occurred at the mine site on July 2, 1980, when a front-end loader operator (Henry Quarterman) was drowned after the loader he was driving jumped a berm and went into a body of water adjacent to a pit loading area. The citations which were issued are as follows:

Citation No. 091484, July 9, 1980, 30 C.F.R. § 56.9-2.

> A Michigan 175B front end loader serial No. 427B253 owned and operated by St. Catherine Rock Co. was not maintained in a safe condition in that; the transmission forward and reverse shift lever had been bent and would not stay engaged in forward gear, allowing the loader to become free wheeling. This loader was involved in a fatal accident on July 2, 1980.

Citation No. 091485, July 9, 1980, 30 C.F.R. § 56.9-3.

> A Michigan 175B front end loader serial No. 427B253 owned and operated by St. Catherine Rock Co. was being operated with defective brakes. Following a fatal accident that occurred on July 2, 1980, an inspection of the loader revealed the front master cylinder empty of brake fluid, the left braking caliper frozen, and the emergency air locks system inoperable.

Testimony and Evidence Adduced by Petitioner

Edward Booth, son of the owner of St. Catherine Rock Quarry, described the circumstances surrounding the fatal accident of July 2, 1980. He stated that at 4:00 p.m., the accident victim Henry Quarterman returned to the shop to add brake fluid to the end loader, and that Mr. Quarterman and Mr. J. D. Hadley also bled the brakes. Mr. Booth did not remember telling the inspector that they had also added brake fluid around 3:00 p.m, and he thought it unlikely that the brakes would have needed fluid after only 45 minutes since it was usually needed only every three to four months. He testified that on July 2, fluid was put in both front and back cylinders and he did not recall informing the inspector that brake fluid was put in only the rear cylinder.

Mr. Booth testified that the forward/reverse lever on the loader had been bent for almost a year due to a rock falling on it. He stated that he was not involved with the repair work and was not sure whether the lever had been repaired although he did remember telling the inspector that the machine had not been repaired. He admitted that the machine sometimes slipped into neutral but stated that it could easily be put back into forward without taking one's hands off the steering wheel. He indicated that sometime after 4 o'clock he watched Mr. Quarterman drive the loader down the pit ramp, stand up in the seat, and then go into the water. He did not know how fast the loader was going although he admitted having told the inspector that it was about 25-30 miles per hour. (Tr. 8-22).

On cross-examination, Mr. Booth testified that both he and Mr. Quarterman tested the machine after adding brake fluid, and that the brakes and the shift lever were working properly. After adding the fluid, Mr. Booth got into his truck and went down to the pit, which the parties stipulated was around 390 feet from the top of the ramp. J. D. Hadley was in his bulldozer, stripping overburden approximately 500 yards away and was unable to see Mr. Quarterman as he headed down the ramp. Mr. Booth saw Mr. Quarterman stand up as he came down the ramp and yelled for him to jump off, but he could not be heard over the noise of the motor. (Tr. 22-31).

In response to bench questioning, Mr. Booth stated that the water in the pit was 30 to 35 feet deep, and that the loader usually stopped near the stack of material located by the water. He believed that Mr. Quarterman could not stop the machine while he was standing up, but thought that he could have dropped the bucket to slow down or driven the loader into the bank. The machine was also equipped with a manually operated emergency brake. He noted that Mr. Quarterman had been employed with the company for over 20 years and was considered an experienced machine operator. (Tr. 33-42).

MSHA Inspector Harry Verdier, confirmed that he investigated the fatal accident on July 3, 1980, and testified that he had more than 20 years of experience operating pit trucks, front end loaders, and dozers, and had performed minor maintenance work on them.

Mr. Verdier stated that he inspected the front end loader after it had been retrieved from the water, and noticed that the forward/reverse lever was in neutral. Through his conversation with Edward Booth, he learned that there had been a problem with the selector lever causing it to slip out of forward gear, and Mr. Booth told him that a rock had fallen on the lever a year earlier and damaged it. The steering wheel, but not the lever, had been replaced. Mr. Booth told Mr. Verdier that when the lever flew out of gear during operation, he could reposition it by using his foot.

Mr. Verdier testified that in checking the brake system, he and George Long, a mechanic, unlocked the back seat, checked the rear master cylinder, and found it to be half full of brake fluid. They stuck their fingers in the front master cylinder and found no fluid. They could find no broken hoses. In speaking with Edward Booth, Mr. Verdier learned that brake fluid had been added at 3 o'clock and at 4 o'clock on the day of the accident. Mr. Booth told him that no fluid was put in the front because they had not had brakes in the front of the loader for some time. Mr. Verdier testified that on July 9, 1980, Edward Booth stated to his father, "come on dad, you knew those brakes were bad, they been bad for some time," and that his father had replied, "you're just young, you don't understand."

Mr. Verdier stated that when he inspected the loader he noticed that the back rear disc near the brake pad was rusty, and that the right rear one had some rust and some shiny spots. The rust proved that the pads were not rubbing against the disc properly. He also found a frozen left caliper, and observed that the air pressure gauge measured zero. This being the case, he

believed that the emergency air lock system should have come on automatically because the system activates when pressure goes below 60 pounds. He also noticed that the wheels on the loader were turning freely when it was pulled from the water, demonstrating to him that it had no brakes. (Tr. 42-53).

On cross-examination, Mr. Verdier explained that he checked the air pressure gauge on July 3 after the loader had been pulled from the water. He believed that even though it had been in the water, if it was perfectly air locked, pressure would not have leaked. He believed that the brakes did not lock because of a defective check valve. (Tr. 62-64).

In response to bench questioning, Mr. Verdier stated that if the gear lever switch was in neutral the loader would roll on an incline, but if it was in forward, it would tend to hold still. He thought that since Mr. Edward Booth had seen Mr. Quarterman half standing, trying to steer the machine, that possibly the engine had stalled. If the machine was not running, there would be no power steering thereby making it nearly impossible to steer. With the gear in neutral, the front master cylinder dry of brake fluid, and the left rear caliper frozen, the operator would be less able to control his equipment on an incline. Mr. Verdier conceded that he performed only visual testing and that the machine was not started because the engine was full of water and it would have been ruined. (Tr. 68-79).

On redirect examination, Mr. Verdier stated that the battery was missing when the machine was pulled out of the water, and he believed that the rear brakes were not adequate to stop the machine although he agreed with Mr. Edward Booth that an operator could push the lever from neutral to forward with his foot while in a seated position. (Tr. 82-88).

Testimony and Evidence Adduced by Respondent

J. D. Hadley, an employee at St. Catherine Rock Company for 11 years, testified that he worked with Mr. Quarterman nearly every day and that he was an excellent worker. On the day of the accident, Mr. Hadley was at the shop, where he assisted Mr. Quarterman and Mr. Edward Booth in bleeding the brakes and adding fluid. Mr. Hadley stated that all four brakes were bled and then were tested for their stopping efficiency. He then went down one ramp with his dozer while Mr. Quarterman went down another with the loader. Within 10 minutes, Mr. Edward Booth approached him, yelling that Mr. Quarterman and the loader had gone into the water. (Tr. 92-94).

On cross-examination, Mr. Hadley testified that Mr. Quarterman had complained that his brakes were going out, and to remedy the problem, Mr. Edward Booth bled the plugs and added fluid. Only the back cylinder needed fluid since the front one was half full, and Mr. Hadley could not recall anyone having mentioned that the cylinder had been filled earlier that day. (Tr. 95-97).

In response to bench questioning, Mr. Hadley stated that he had operated Mr. Quarterman's loader the day before the accident and had not had any

problems with it. He had heard Mr. Quarterman complain about the loader in the past because fluid would empty out and the lines would have to be bled, and he had no idea why the master cylinder emptied out while the loader was immersed in the water since he discovered no leaks in the system (Tr. 97-99).

Mr. George Bowman, a field mechanic for Lender Machinery Company for 23 years, testified that he delivered the loader in question to St. Catherine Rock Company, and had repaired the machine for the past 6 years and inspected it after the accident. The engine had been removed by the time he arrived to examine the machine, and he believed that the brake fluid could not have leaked out of the machine after leaving the shop unless there had been a massive rupture. He thought the fluid could have escaped through a hole in the reservoir cap while the loader was in the water.

Mr. Bowman testified that after inspecting the machine, he determined that the bent lever and brake calipers did not need to be replaced. Since the lever did not interfere with shifting, he though the gear problem was probably due to a weak spring or worn grooves. The only possible malfunction he saw was in the compensator valve which operates as a shock, easing the impact of the disc on the brake. He noticed water on the compensator indicating a possible leak, which would cause the fluid to run out onto the ground. He stated that the compensators were repaired after the accident because they could affect the safety of the machine.

Mr. Bowman testified that the reason the air pressure gauge read zero when Inspector Verdier looked at it was because it was electrical and no current was in the system while the battery was out of the machine. He stated that the emergency air system automatically activates when there is a loss of air pressure. In his opinion, even if only one half of the brakes were working, it would have been adequate to stop the machine. (Tr. 101-117).

On cross-examination, Mr. Bowman admitted that he is one of 13 field men who regularly repair this machine. He verified that one of his delivery men, a Mr. Long, had told him that there was no brake fluid in the front cylinder, but he did not know whether Mr. Long had only examined the reservoirs for fluid or had checked the entire brake system. Mr. Bowman explained that the emergency brake system is activated by a valve which releases air pressure when there is a loss of air, and if there was a massive air leak, there would be no air for the emergency system. He could find no holes in the hoses which would have caused such an air leak.

Mr. Bowman conceded that if the rear brake system had been operating properly, the disc would be shiny with no rust on it. Although he believed that the pistons and calipers were not frozen, he agreed that if they were, they would have kept the brakes from functioning, and indicated that this problem could have caused the rust on the rear disc. (Tr. 117-138).

In response to bench questioning, Mr. Bowman stated that the bent lever did not contribute to the gear problems. He also thought that the master cylinder could be dry even when there was brake fluid behind the piston.

This fluid would be enough to stop the machine, but he conceded that the fluid might not be adequate for a braking distance of 390 feet, the length of the incline from the shop to the water. Mr. Bowman stated further that the emergency brake system could be operated both manually and automatically, and after completing his repairs of the machine, the hand brake was working properly. (Tr. 140-154).

Inspector Verdier was recalled and admitted that he had not been aware that the system was electric and that the absence of power caused the gauge to measure zero. He still believed that the brakes were not functioning since the wheels turned freely when the machine was removed from the water and he disagreed with Mr. Bowman's conclusion that the amount of brake fluid behind the master cylinder would be sufficient to operate the brakes (Tr. 158-162).

Findings and Conclusions

Citation No. 091484

Fact of Violation

This citation alleges a violation of 30 C.F.R. § 56.9-2, which states that "equipment defects affecting safety shall be corrected before the equipment is used." The equipment defect discovered by the inspector was a bent lever on the forward and reverse transmission shift lever. The condition affecting safety was the fact that the lever would not stay engaged in forward gear and would slip into neutral causing the machine to become free wheeling.

The evidence presented at the hearing indicates that the respondent knew that the lever was bent and that there was a problem in keeping the lever in gear. The lever had been bent for nearly a year, the result of a rock having fallen on the steering wheel. While the steering wheel had been replaced, nothing had been done to repair the gear lever. Both Mr. Booth and Mr. Bowman testified, however, that the bent lever did not contribute to the gear slippage problem. Mr. Bowman concluded that the lever did not need to be replaced to abate the cited condition because its bent shape did not interfere with shifting. He testified that the gear slippage problem was more likely caused by a bad dent, a weak spring, or some worn parts, which were apparently not visible.

While I agree that the described cited equipment defect (bent lever) is not the defect affecting safety, I do find that the evidence establishes an unsafe condition. Mr. Booth admitted that the machine slipped into neutral causing it to become free wheeling. Inspector Verdier testified that just a slight tap caused the lever to disengage from its forward position. This indicates that even a small bump in the road would trigger the condition. Although Mr. Bowman felt that the lever could be easily slipped back into gear while the operator remained in a seated position by keeping his hands on the steering wheel and using his foot to move the lever, the sensitivity

of the lever demonstrates that the condition could arise suddenly and without the operator's knowledge. As the situation here illustrates, this could pose a danger if the machine was travelling on an incline.

Inspector Verdier testified that when the machine was pulled from the water, the forward/reverse lever was in neutral. If the loader had stalled, as he surmised, and the brakes had not worked properly, the machine would roll freely with the transmission in neutral. While the loader may not have stopped if the lever had been in forward, it may have slowed it sufficiently to have prevented the resulting accident.

In view of the foregoing, I conclude and find that petitioner has established a violation of section 56.9-2. The condition of the lever, which allowed it to slip from forward into neutral was a condition affecting safety. When a lever suddenly slips into neutral, it poses a danger to the unsuspecting operator who should be in full control of the vehicle, and respondent should have been alerted to the fact that this condition was abnormal. Even if the defective condition did not cause the accident, and even if the accident had not occurred, I would still find a violation of the cited safety standard. The question of whether a violation of a cited standard has occurred is not dependent on the occurrence or non-occurrence of an accident. Additionally, although the inspector cited the bent lever as the source of the problem, the unsafe condition was adequately described to apprise the respondent of the specific violation, and the respondent was not prejudiced. The citation states that the gear lever would not stay engaged in forward gear and allowed the loader to become free-wheeling, see Secretary of Labor v. Jim Walters Resources, Inc., 8 FMSHRC 1827, 1 BNA MSHA 2233 (1979). The citation is AFFIRMED.

Citation No. 091485

This citation alleges a violation of 30 C.F.R. § 56.9-3, which requires that powered mobile equipment be provided with adequate brakes. The inspector determined that the front end loader involved in the accident had defective brakes because his examination revealed that the front master cylinder was without brake fluid, the left braking caliper was frozen, and the emergency air lock system was inoperable.

The inspector testified that he found no brake fluid in the front master cylinder while the rear cylinder was only half full. Although a field mechanic thought that the amount of fluid in the back would be enough to stop the loader, he admitted that it might not be adequate if the operator continually had his foot on the brake for the entire length of the 390 foot incline. The inspector concluded that the amount of fluid was not sufficient to stop the loader.

Although Mr. Booth stated that some brake fluid was added to both the front and rear brake cylinders on the day of the accident, he also stated that one cylinder already had some and the inference is that he may not have added fluid to both cylinders on that day. (Tr. 11). This inference is

bolstered by the inspector's testimony that Mr. Booth told him that fluid was added to only the rear cylinder since the front brakes had been bad for some time, and Mr. Hadley stated that the front cylinder was half full and no brake fluid was added. When the inspector checked the machine after the accident, he found the front cylinder to be completely dry of fluid, and since no holes were found in the brake lines, consideration must be given to other evidence which might explain this dramatic loss of fluid in the front cylinder. According to Mr. Hadley, Mr. Quarterman had complained about the brakes in the past, and had indicated that the fluid would empty out of the system. Further, the inspector testified regarding Mr. Booth's statement to his father, acknowledging that they had known for some time that the brakes were bad. Evaluation of these facts leads me to conclude that the front brakes had not been working properly for some time, and that brake fluid had to be added periodically. Further, even though Mr. Hadley stated that he had operated the loader the day before the accident, the fact remains that he did not add more brake fluid to the front cylinder on the day of the accident and the cylinder was only half full.

Although Mr. Bowman determined that the brake calipers and pistons were not frozen, he agreed that the rusty discs indicated that the rear brake system was not operating properly. The inspector testified that the discs would be shiny if the brake pads were rubbing against the discs. Since they were rusty, he concluded that the calipers were not working properly and were frozen.

Although the inspector found the air pressure gauge measuring zero after the loader had been retrieved from the water, this does not indicate that the emergency air lock system was not operating. Further testimony revealed that the gauge was electrical, and since the battery had been removed from the loader, the inspector's reading was inaccurate. Although the inspector based his finding that the emergency air brake system was inoperable on the gauge reading of zero, and the fact that the wheels spun freely as the machine was lifted from the water, there is no conclusive evidence establishing whether the entire system was working properly on the day of the accident. However, I conclude that the preponderance of the evidence adduced establishes that the brakes were not working properly on the day of the accident and were therefore, not adequate. Accordingly, I find that petitioner has established a violation of section 56.9-3, and the citation is AFFIRMED.

Negligence

With regard to the forward/reverse lever, the evidence establishes that the respondent knew that the lever had a tendency to slip out of forward gear and into neutral. Mitigating the fact that the respondent knew it was using equipment with a defective part, is the respondent's argument that the driver could easily put the lever back in gear with his foot without taking his hands off the steering wheel. Although this technique may have worked adequately on level ground, it did not provide a viable method when the machine was running on an incline with poor brakes. The respondent knew where the

machine was operating and it knew that there were brake problems. I, therefore, find a high degree of negligence on the part of the respondent with regard to Citation No. 091484.

I also find that the respondent knew that there was a problem with the front brakes, and unjustifiably permitted the loader to be operated with reliance on the rear brakes to stop the vehicle. Mr. Hadley had heard Mr. Quarterman previously complain about the brakes in the past, and even so, on the day of the accident, brake fluid was put only in the rear master cylinder. William Booth's undisputed statement to his father shows knowledge of the bad brakes, and even though the senior Mr. Booth was present at the hearing, he did not testify or refute the statement. The testimony and evidence lead me to conclude that the front brakes were not working and this same testimony and evidence leads me to conclude that the respondent was fully aware of the problems with the brakes.

Respondent seems to argue that the rear brakes could have stopped the vehicle if the accident victim had lowered the bucket, pulled the manual emergency brake, or steered into the bank. Respondent apparently attempts to share some of the responsibility for the accident with the deceased, because Mr. Quarterman did not use these alternative methods of braking.

I cannot conclude that the evidence establishes that Mr. Quarterman was contributorly negligent in operating the loader. The loader was regularly operated on the incline between the shop and the pit, and respondent was aware of the defective brakes and knew or should have known that an emergency situation could have arisen. No evidence was offered showing that respondent instructed its loader operators on the use of emergency braking procedures. In addition, Mr. Quarterman was an experienced machine operator, having been employed with the company for over 20 years. This experience leads me to believe that he would have tried every feasible method of stopping the loader when the brakes went out, and the fact that he was seen standing suggests an attempt to steer the machine to safety. I, therefore, find that respondent was extremely negligent in permitting this loader to be operated when it was fully aware of the braking problems.

Gravity

In this case, the defective front-end loader resulted in the death of the operator, and I believe it is reasonable to conclude that both violations may have contributed to the accident. I therefore find that the violations were extremely serious.

Good Faith Compliance

The inspector issued a withdrawal order after making his post accident inspections. Petitioner states that the violations were abated in good faith and the evidence of record supports this conclusion (Tr. p. 176, Exh. G-5). As a matter of fact, the loader was practically overhauled, and I have considered this fact in assessing the penalties.

Size of Business and Effect of Civil Penalties on Respondent's Ability to Remain in Business

The parties stipulated that respondent is a small crushed stone operator employing approximately seven employees and that the mine operates one daily 8-hour production shift 5 days a week. The parties offered no evidence on the effect of a civil penalty on respondent's ability to remain in business. Accordingly, I cannot conclude that the civil penalties assessed will adversely affect the respondent's ability to remain in business.

History of Prior Violations

Respondent has no previous history of paid or assessed violations, and I have taken this into consideration in assessing the penalties for the citations which have been affirmed.

Penalty Assessment

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that the following civil penalties are reasonable and appropriate in the circumstances and they are imposed by me for each of the citations which have been affirmed.

Citation No.	Date	30 C.F.R. Section	Assessment
091484	07/09/80	56.9-2	$1,500
091485	07/09/80	56.9-3	2,500

ORDER

The respondent IS ORDERED to pay civil penalties in the amounts shown above, totalling $4,000 within thirty (30) days of the date of this decision and order, and upon receipt of the same by MSHA, this matter is DISMISSED.

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SEP 17 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Civil Penalty Proceeding
	:	Docket No. WEVA 81-186
Petitioner	:	A/O No. 46-05121-03038F
v.	:	
	:	Wayne Mine
MONTEREY COAL COMPANY,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT
AND
ORDERING PAYMENT OF CIVIL PENALTY

Appearances: Edward H. Fitch, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Petitioner;
Timothy M. Biddle, Esq., Crowell & Moring, Washington, D.C., for the Respondent.

Before: Judge Cook

On January 22, 1981, the Secretary of Labor (Petitioner) filed a petition for assessment of civil penalty in the above-captioned case pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (Supp. III 1979) (Act). The petition charges Monterey Coal Company (Respondent) with a violation of mandatory safety standard 30 C.F.R. §75.1726(b) in that:

> It was revealed during the investigation of a fatal accident, based upon sworn testimony and evidence observed at the scene of the accident that the victim and continuous miner operator were performing the work of evaluating damage sustained to the miner under the ripper head that was not blocked in the elevated position in the No. 2 entry, on the Intake Mains Section (001), being developed in the direction of the Intake Airshaft.

An answer was filed, the case was consolidated with the associated notice of contest proceeding in Docket No. WEVA 80-322-R, a prehearing order was issued, and the matter was scheduled for hearing. Various motions seeking approval of settlement were filed on May 8, 1981,

September 1, 1981, and September 8, 1981. The settlement proposed in the September 8, 1981, filing is identified as follows:

Order No.	Date	30 C.F.R. Standard	Assessment	Settlement
675312	3/19/80	75.1726(b)	$1,000	$1,000

Information as to the six statutory criteria contained in section 110 of the Act has been submitted. This information, found in Docket Nos. WEVA 80-322-R and WEVA 81-186, has provided a full disclosure of the nature of the settlement and the basis for the original determination. Thus, the parties have complied with the intent of the law that settlement be a matter of public record. The various filings submitted by the parties are set forth below.

On May 8, 1981, the Petitioner filed a motion requesting approval of a $500 settlement which stated, in part, as follows:

> This case involves one violation of 30 CFR 75.1726(b) which was originally assessed a penalty of $1,000. The Secretary has determined, based on the attached letter filed by counsel for Monterey, that a voluntary penalty payment of $500 is an appropriate resolution of the conflict involved in this matter.
>
> As a condition of the settlement Monterey has agreed to withdraw its notice of contest involving this citation in Docket No. WEVA 80-322-R.
>
> The violation involves the fatality of a maintenance foreman who, knowing repair work was being done on the hydraulic hose, failed to block a miner ripper head before reaching under the ripper head. The victim apparently did not believe the ripper head would fall when the hose was disconnected. Blocking material was present in the immediate area, and the victim, being a foreman, should have been the individual most responsible for complying at that instant with the standard cited in the citation involved in this proceeding.
>
> While the Secretary does not adopt the contents of counsel's letter, it is clear to the Secretary that the settlement is consistent with the remedial purposes of the Federal Mine Safety and Health Act of 1977, and is in the range of a penalty the Secretary would expect to be assessed if the case proceeded to a hearing on the merits.

The attached letter from counsel for the Respondent stated, in part, as follows:

The deceased, John Groves, was a maintenance foreman at Monterey's Wayne Mine in West Virginia. On March 19, 1980, at about 10:45 p.m., Groves and a miner operator named Wilbur were changing bits on the ripper head of a continuous mining machine which was de-energized and parked in an intersection. [1/] The ripper head was elevated approximately 3-4 feet as they performed that task. At the same time, two repairmen were preparing to change an O-ring at a fitting on a hose which was part of the hydraulic system for the right support jack of the ripper head. As they changed bits, Groves and Wilbur noticed some fluid leakage under the ripper head. Groves began to peer under the ripper head to figure out where the fluid was coming from.

According to the testimony given during the MSHA accident investigation, one of the repairmen, Robert Burress, walked around to the front of the miner prior to disconnecting a hydraulic hose to replace the O-ring and told Groves that he was going to have to take the hose off. He recalls specifically telling Groves that he was afraid the jack would let the ripper head down when he disconnected the hose. According to Burress, Groves told him to go ahead and disconnect the hose because a safety valve would hold the ripper head in an elevated position. Burress returned to the side of the machine and disconnected the hose. When he disconnected it, the ripper head fell on Groves who had inexplicably crawled part way under the ripper head, apparently to get a closer look at the fluid leak. It was clear from the testimony of the witnesses that Groves did not believe the ripper head would fall when Burress disconnected the hose. Unfortunately, Groves was wrong and paid for the mistake with his life.

Several factors suggest a lower penalty would be more appropriate than the $1,000 assessed. First, Groves was a maintenance foreman who had an impeccable safety record and who was characterized by the witnesses as being "safety conscious." Monterey has records to show that Groves was trained specifically in the requirement for blocking raised equipment. Groves signed a statement of company policy to that effect. Moreover, Groves himself had instructed miners in blocking procedures. Witnesses confirmed that Groves knew how to block equipment; in fact he had demonstrated this by using blocking procedures only three days prior to the accident. On the day of the accident, there was no impediment to blocking the elevated ripper head. Wooden blocks provided for that purpose were located near the scene of the accident.

1/ The fatal accident investigation report prepared by the Mine Safety and Health Administration states that the accident occurred on March 17, 1980.

The inspector who issued the Order following the investigation stated on MSHA Form 7000-4 (his "worksheet"):

> "It is relevant to note that the victim was a supervisor of equipment maintenance and was trained in hydraulics, block [sic] of equipment, etc. and has instructed miners in the aforementioned at this mine. Also, it was revealed during the investigation that the victim assisted other mechanics in blocking up the ripper head of the miner a few shifts prior to the accident, which indicated that he was knowledgeable of the related hazards. * * * The fatal act committed by the victim was strictly contrary to the company policy in effect, the instructions he had been given and instructions and/or training he had given the miners. * * * The management personnel and miners demonstrated an outstanding attitude and was [sic] very cooperative in helping to obtain all the surrounding facts of this fatal accident."

The circumstances of this tragic fatality indicate truly idiosyncratic conduct on the part of the foreman who was killed. I cannot discern anything Monterey could have done differently to prevent the accident. The accident occurred because of the inexplicable conduct of an experienced and safety conscious maintenance foreman who was trying to do his job and apparently believed he was doing it safely. While we recognize the Act mandates strict liability, under the peculiar circumstances of this accident no legitimate purpose would be served by penalizing the company with a penalty assessment of $1,000.

On July 23, 1981, an order was issued denying the Petitioner's May 8, 1981, motion for approval of settlement. The order stated, in part, that:

> [T]he information contained in the official case files in Docket No. WEVA 81-186 and Docket No. WEVA 80-322-R, the associated notice of contest case, presently indicates that the continuous miner operator was under the raised ripper head of the machine, and thereby exposed to danger, while under the direct supervision and control of the maintenance foreman shortly prior to the occurrence of the accident which claimed the maintenance foreman's life.

On September 1, 1981, the Respondent filed a motion for reconsideration of settlement denial stating, in part, as follows:

Respondent Monterey Coal Company respectfully submits this Motion to provide the presiding Judge with additional information about the actions of the continuous miner operator immediately prior to the accident.

As explained in the Solicitor's Motion to Approve Settlement, Monterey was cited for a violation of 30 C.F.R. § 75.1726(b) after the occurrence of an accident at Monterey's Wayne Mine which killed a maintenance foreman. The information provided herewith supplements the information provided in the Solicitor's Motion to Approve Settlement.

In an effort to provide the presiding Judge with complete information with respect to the activities of the miner operator, who was helping the deceased maintenance foreman determine the location of a fluid leak under the continuous mining machine, counsel for Monterey has reviewed Monterey's transcripts of the accident investigation interviews conducted by MSHA shortly after the accident, reviewed MSHA and State of West Virginia accident reports, studied Monterey's reports of the accident and, on August 28, 1981, interviewed the miner operator who witnessed the accident, Mr. David Wilbur.

Both the Order of Withdrawal and the MSHA Form 7000-4 (Inspectors Statement) reflect the issuing inspector's belief that Mr. Wilbur was under the ripper head (the ripper head was elevated approximately 40" off the mine floor before it fell) with the maintenance foreman immediately prior to the accident. The Order of Withdrawal reads, in part:

> It was revealed during the investigation of a fatal accident, based upon sworn testimony and evidence observed at the scene of the accident that the victim and continuous miner operator were performing the work of evaluating damage sustained to the miner under the ripper head that was not blocked in an elevated position. . . .

The inspector's statement reads, in part:

> It is worthy to note the miner operator was under the miner ripper head with the victim prior to the occurrence of the accident, in that the helper stepped out from under the head immediately prior to the accident.

Monterey believes the inspector who issued the order and who made the statement on Form 7000-4 concluded that the miner operator was under the ripper head based on the interviews

conducted of the miner operator shortly after the accident. Prior to interviewing Mr. Wilbur, the MSHA accident investigation team interviewed several other crew members who were present when the accident occurred. None of those crew members were located in a position to see what the deceased maintenance foreman and Mr. Wilbur were doing immediately prior to the accident. For instance, the repairman who disconnected a hose coupling which caused the head of the mining machine to fall testified as follows:

DAVIS [MSHA]: Q. Did you see [Mr. Groves, the maintenance foreman] at any time prior to the accident looking in that area where the hose coupling was to be disconnected?

BURRESS: A. No, sir. He was in front of the miner all the time that I was up there at the miner performing that work.

* * *

DAVIS: Q. Immediately prior to this accident did you verbally inform Mr. Groves and Mr. Wilbur who was working with him in front of the miner of what you intended to do in removing the hose coupling?

BURRESS: A. Yes, sir. I didn't speak directly to David Wilbur, I spoke directly to John Groves, but I spoke loud enough so David Wilbur should have heard it because he was standing close to John Groves and Lemasters heard what I said to him and he was back at the jack which is probably 12' . . . from it.

DAVIS: Q. What did you tell them exactly, do you remember?

BURRESS: A. Yes, sir, I said, "John, I tightened that fitting and the leak won't stop, the oil ring's broke, I'm going to have to take the hose off to replace the oil ring and I'm afraid the head might come down because we don't trust

those safety valves or anything in those heads." And John says, "O.K., it'll stay there." That's exactly what he said, "O.K., it'll stay there."

A few questions later, Burress made the following statement:

DAVIS: Q. You did not observe their location or work or whatever they were observing and so forth after you had looked up and seen Mr. Groves shining his light over top of the ripper head?

BURRESS: A. No, sir, I didn't. The only way I could have seen what, you know, they might have been doing was to have quit what I was doing and walked around the edge of the head there. As far as I knew they were through because they had set all the bits, they were through setting the bits and I guessed they observed that cut place in there and wanted to get a closer look at it. That's the only thing I could figure out, it was something that wasn't planned to do, you know, they just went ahead and done it, went ahead and looked at it.

When David Wilbur was interviewed, Investigator Davis read into the investigation record a written statement prepared by Mr. Wilbur following the accident. After reading into the record part of Mr. Wilbur's account of the events leading up to the accident, the following exchange took place:

DAVIS: [reading statement of David Wilbur]

*** 'I trammed the continuous miner down the number 2 entry to its present location, which is the accident scene. Me and John Groves started removing a broken bit holder and removed a broken bit.'

WILBUR: The holder wasn't broken, just had a broke bit in it. We took it out.

DAVIS: Thank you. We observe that it was a bit. Now let me stop just a minute.

As I am going through this [Wilbur's written statement], anything that should happen to come to your mind that you've forgotten or is different, you interrupt me would you?

[continuing to read Wilbur's statement] We observed that a bit had damaged the transmission gear case. Lemasters and Burress were working on the right side of the miner, that's the operator's side, replacing and [sic] "O" ring to the right head jack ("O" ring to the staplelok fitting".) John and I were up under the ripper head about one minute prior to the accident. I called out and then the head fell.'

WILBUR: No, I don't think we were all the way up under it. We were just. . . we were more or less leaning under. I don't know exactly how far we was up under, but we wasn't crawled up under. We more or less leaning there and kind of leaned down under it looking at it.

DAVIS: Q. But you were, were you positioned under the confines of the head itself, your body?

WILBUR: A. I guess we was, yeah, I guess we was, not all the way but we was under it.

DAVIS: Q. Partially?

[no response]

DAVIS: [continuing to read Wilbur's statement] 'I called out and then the head fell (at 10:50 p.m.).'

WILBUR: I don't know if I called out then or if I was behind it, I just ain't real clear about where, I don't know if I was exact behind him or maybe to the side of him, I don't know exactly what I seen, I remember turning and calling at him, reaching for him.

DAVIS: O.K., we will proceed. [continuing to read Wilbur's statement] 'John Groves

told me as he was leaning down under the head that it was going to have to be welded up. When I seen it fall I was located to the rear of him and about three feet from him.'

Later in the Wilbur interview, the following exchange took place:

DAVIS: Q. And, Mr. Wilbur, at the time that you were seated under the ripper head -- that was the ripper head?

WILBUR: A. I didn't crawl up under it all the way, I just more or less leaned up under it, I raised up and kind of looked up under it to see what needed to be fixed.

DAVIS: Q. Would that have been from the operator's side that you maybe have leaned under the ripper head?

WILBUR: A. Yes.

DAVIS: Q. How much did your body did you project under the head?

WILBUR: A. I don't know, I don't know exactly, I just more or less looked up under it to see if it was broke, the arm was broke or just needed a bolt or, you know, something like that.

DAVIS: Q. Did you position, do you recall [whether] you positioned your head or shoulder or any portion thereof up under it or just maybe your arm?

WILBUR: A. I don't know, I could have had my head under it or something, I don't know.

DAVIS: Q. You're not for sure though, are you?

WILBUR: A. No, I'm not.

Mr. Wilbur's oral statement given to undersigned counsel on August 28, 1981, and which presumably would reflect his testimony if this matter must go to trial, confirmed his statements during the accident investigation interview.

Mr. Wilbur said that shortly before the accident occurred, he and the maintenance foreman were bending down side by side trying to locate the source of a leak under the ripper head near the chassis of the machine. He described their position as "leaning up under" the ripper head. When asked to describe his exact position when they were "leaning up under" the ripper head, Mr. Wilbur said that he believed that his head might have moved slightly under the foremost part of the ripper head, but not his body. He said that at no time was his body under the ripper head. When asked whether he would have been killed or injured if the ripper head had fallen when he was in that position, Mr. Wilbur said that he wasn't sure but that it was possible that his head would have been grazed. Immediately prior to the accident, Mr. Wilbur moved back a short distance from the ripper head; Mr. Groves, the deceased, apparently decided to crawl up and get a closer look at the leaking transmission case when the head fell on him.

From the series of events which occurred immediately prior to the accident, it is clear that the maintenance foreman believed that the ripper head had a check valve which would prevent it from falling. No "work" in the usual sense of the word was being performed under the ripper head by the maintenance foreman or by Mr. Wilbur. Instead, the two of them were simply trying to figure out where a leak was coming from. The maintenance foreman apparently wanted a closer look, so he crawled under the ripper head to see better; Mr. Wilbur was standing close by awaiting his report. At that moment several feet away, Mr. Burress disconnected a hose on the mining machine which released enough hydraulic pressure to cause the ripper head to fall on Mr. Groves. Mr. Wilbur was not injured.

Monterey believes the facts set forth above are accurate. Monterey also believes that it would serve little purpose to assess a high civil penalty to deter it from future violations of this nature. As recognized by the MSHA investigation team (and stated specifically on the Inspector's statement), Monterey had a specific company rule which prohibited work on raised equipment unless it was blocked and had repeatedly instructed its maintenance personnel to that effect both orally and in writing. Material to block the ripper head was located nearby the scene of the accident. The deceased maintenance foreman was described by both crew members and the company as being highly skilled and safety conscious. He obviously believed that the ripper head had a check-valve which would not permit the ripper head to fall, and said so specifically to Mr. Burress, who was preparing to disconnect the hydraulic hose.

Given all these circumstances, Monterey believes there would be nothing gained by going to trial to explore the uncontested facts associated with this accident. In its view, the only issue in such a proceeding would be the amount of civil penalty that should be assessed based on the six statutory factors under § 110(i) of the Act. The two most important factors in this case are gravity and negligence. The gravity of the violation is clear: a fatality occurred. Negligence is the remaining factor and Monterey believes it is the sole factor for consideration in this case. The Congressionial purpose for requiring assessment of civil penalties on a strict liability basis is to deter future violations and to remind operators of the high degree of care owed the miners. Monterey is well aware of its obligation to the miners and the requirement of complying with the mandatory standards under the Act. No violation of this nature had occurred at the mine before, according to MSHA's computer records. Monterey had a specific and communicated rule prohibiting the activity which killed the maintenance foreman. The deceased foreman was experienced and had been thoroughly trained. He made a mistake and paid for it with his life.

Under these circumstances, Monterey believes that the amount agreed to by MSHA and by Monterey is appropriate and consistent with the public interest. It is the presiding Judge's duty to assure that a settlement was not reached for improper reasons violative of the Mine Safety Act's objectives. Davis Coal Co., 2 FMSHRC 619 (1980). Monterey believes the facts presented justify approval of the settlement as consistent with the objectives of the Act.

The foregoing statements did not materially change the foundation upon which the determination was made that the proposed $500 settlement could not be approved. Therefore, an order was issued on September 2, 1981, denying the Respondent's motion for reconsideration of settlement denial.

On September 8, 1981, the Petitioner filed a motion requesting approval of a $1,000 settlement. The motion states, in part, as follows:

Following the Administrative Law Judge's Order Denying Respondent's Motion for Reconsideration of Settlement Denial, issued on September 2, 1981, counsel for the parties discussed this matter anew on September 3, 1981.

The Respondent has now proposed that these matters be resolved by the full payment of the original assessment in this matter, and the voluntary withdrawal of their notice of contest proceeding (WEVA 80-322-R) upon approval of the resolution of the civil penalty proceeding.

As the terms of the proposed settlement have been changed, the Secretary now submits this new proposal for settlement.

The reasons given above by counsel for the parties have been reviewed in conjunction with the information submitted as to the six statutory criteria contained in section 110 of the Act. After according this information due consideration, it has been found to support the proposed $1,000 settlement. It therefore appears that a disposition approving the settlement will adequately protect the public interest.

ORDER

Accordingly, IT IS ORDERED that the proposed $1,000 settlement, as outlined above, be, and hereby is, APPROVED.

IT IS FURTHER ORDERED that the March 2, 1981, order consolidating the proceedings in Docket Nos. WEVA 80-322-R and WEVA 81-186 for hearing and decision be, and hereby is, DISSOLVED.

IT IS FURTHER ORDERED that the Respondent, within 30 days of the date of this decision, pay the agreed-upon penalty of $1,000 assessed in this proceeding.

John F. Cook
Administrative Law Judge

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Administrator for Metal and Nommetal Mine Safety and Health, U.S. Department of Labor

Administrator for Coal Mine Safety and Health, U.S. Department of Labor

Standard Distribution

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

SEP 18 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. BLACK RIVER QUARRY, INC., Respondent.	CIVIL PENALTY PROCEEDING DOCKET NO. WEST 81-78-M ASSESSMENT CONTROL NO. 45-00006-05006F MINE: Black River Quarry

DECISION

Appearances:

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for the Petitioner

James L. Hawk, President,
Black River Quarry, Inc.
6808 South One Hundred Fortieth, Seattle, Washington

for the Respondent

Before: Judge Virgil E. Vail

DECISION AND ORDER

STATEMENT OF THE CASE

This proceeding was brought by the Secretary of Labor pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq. (hereinafter the Act), for assessment of a civil penalty for an alleged violation of a mandatory safety standard. A hearing was held on April 29, 1981 at Seattle, Washington. The respondent was not represented by counsel, however, James L. Hawk, President of the respondent company, appeared on its behalf.

At the conclusion of all of the evidence, the parties agreed to waive the filing of post hearing briefs and argued their respective positions relative to this case.

STIPULATIONS

The parties stipulated as follows:

1. That a proposed assessment was issued to the respondent and that respondent received a copy thereof.

2. Respondent admits paragraphs I and II in the petition for assessment in this case, which relate to jurisdiction.

FINDINGS OF FACT

1. Respondent operates a rock quarry business involved in drilling and blasting rock, which is crushed and sold primarily for road use.

2. Citation No. 586066 was issued to the respondent subsequent to a fatal accident which occurred on October 1, 1980, involving Clyde Knerson, (hereinafter referred to as "Knerson").

3. At the time that the above citation was issued, respondent employed approximately 23 to 24 employees and produced approximately a quarter of a million tons of material per year. The gross sales from production was approximately $1,000,000 (Tr. 12).

4. Knerson was employed by the respondent in the capacity of a working foreman. He had worked for respondent for 30 years at various jobs including mechanic and crusher man (Tr. 26). Knerson also served as respondent's safety man (Tr. 35 and 45).

5. On October 1, 1980, Knerson was attempting to replace a defective right hydraulic cylinder on one of respondent's off-road trucks a 1963 Euclid, 16 cubic yard capacity, off-road, dump truck numbered 103 (Exhibits P-1 and R-A and Tr. 16).

6. The defective hydraulic cylinder was one of two which raises the box. To replace the cylinder, it is necessary to raise the box and remove the two pins from the respective ends of the cylinder (Tr. 22).

7. The box on the truck is counter-weighted so that when it is fully raised it is necessary to power it back down with the hydraulic cylinders (Tr. 20).

8. On the day of the fatal accident, Raymond Ballard drove the truck involved herein, to the respondent's yard to have the hydraulic cylinder repaired. He raised the box on the truck to its full height and left it that way to be repaired (Tr. 58).

9. Proper procedure for working on a truck with the box raised is to put a pin into a hole provided in the truck's frame and the box which prevents the box from falling (Tr. 20 and Exhibit R-C).

10. Knerson was assisted in the repair work on the truck by John Calistro, a truck driver for the respondent.

11. Knerson first removed the hydraulic fluid hoses to the cylinders and then assisted Calistro in removing the top pin on the defective cylinder.

12. Knerson then hooked a "come-along" from the frame of the truck to the raised box. When the "come-along" is operated, it pulls down the raised box and releases pressure on the cylinder so that the bottom pin can be removed (Tr. 33).

13. Knerson stood on the frame of the truck under the box, and operated the "come-along" while Calistro went underneath to remove the pin. When Knerson applied pressure with the "come-along" the box fell crushing him between the box and frame and causing his death (Tr. 34).

14. The pin had not been placed in the frame of the truck to prevent the box from falling (Tr. 34).

15. Knerson was considered a competent, conscientious and safe worker by fellow employees (Tr. 48 and 50).

ISSUES

Two basic issues are involved in the assessment of a civil penalty: (1) did a violation of a mandatory safety standard occur, and (2) what amount should be assessed as a penalty if a violation is found to have occurred.

In determining the amount of civil penalty that should be assessed for a violation, the law requires that six factors be considered: (1) history of previous violations; (2) appropriateness of the penalty to the size of the operator's business; (3) whether the operator was negligent; (4) effect of the penalty on the operator's ability to continue in business; (5) gravity of the violation; and (6) the operator's good faith in attempting rapid abatement of the violation.

DISCUSSION

Citation No. 586066 [1/] charges the respondent with having violated mandatory safety standard 56.14-30. The standard provides that:

> 56.14-30 Mandatory. Men shall not work on or from a piece of mobile equipment in a raised position until it has been blocked in place securely. This does not preclude the use of equipment specifically designed as elevated mobile work platforms.

1/ On October 1, 1980 about 12:45 p.m. an employee of Black River Quarry, Inc. was crushed to death while changing the right hydraulic cylinder on a 16 cubic yard capacity 1963 model TO-63 Euclid dump truck numbered 103. The victim was positioned between the raised, unblocked dump bed and the truck frame when the left hydraulic cylinder failed and the truck bed fell.

The facts in this case are undisputed. All of the evidence shows that Knerson worked under the raised truck box without putting the pin that is provided to prevent or block the box from falling in place. I find that Knerson's actions were in violation of mandatory safety standard 56.14-30.

Respondent argues that they should not be held responsible for the negligent actions of its employees when such actions are contrary to its safety training and instructions. Further, the deceased employee was respondent's safety instructor, had an excellent safety record during his past 30 years of employment with the respondent and never evidenced this type of aberrant and unpredictable action. Also, respondent argues that the government cannot expect businesses to have employees who are totally infallible.

A careful review of all of the evidence in this case shows that the respondent was not negligent in this case. The deceased employee had been furnished safety instructions through courses given by the Mine Safety and Health Administration and had reviewed fatalgrams with his supervisor pertaining to the exact type of accident involved herein (Exhibit R-E). He had been asked prior to the accident by both Ballard and Calistro about placing the pin in the truck box to keep it from falling (Tr. 33 and 58).

However, the fact that the evidence fails to establish any negligence on the part of the respondent in this case does not result in a lack of liability on respondent's part for the violation of mandatory safety standard 30 C.F.R. 56.14-30. The Federal Mine Safety and Health Review Commission has held that an operator is liable for violations of the mandatory safety standards without regard to fault. United States Steel v. Secretary of Labor, 1 BNA MSHC 2151 (1979) and Secretary of Labor v. Marshfield Sand and Gravel, 1 BNA MSHC 2475 (1980).

Further, I concur with the decision reached by Judge Cook in Secretary of Labor v. Ben M. Hogan Company, Inc., 3 FMSHRC 1121 (1981). Judge Cook considered a similar set of facts to the case here under consideration. An employee, while sitting on the tire of a loader was attempting to work on the engine with the transmission in gear and the bucket raised. The loader was not blocked or turned towards a bank and started ahead pulling the employee into the machine causing his death. Judge Cook found that the respondent demonstrated no negligence in that case. However, he found that this does not result in a lack of liability for the violation of a mandatory safety standard. He pointed out that it has consistently been held that a mine operator may be held liable for a violation of a mandatory safety standard regardless of fault. El Paso Rock Quarries, Inc., 3 FMSHRC 35, 2 BNA MSHC 1132 (1981), United States Steel Corporation, 1 FMSHRC 1306, 1 BNA MSHC 2151, 1979 CCH OSHD par. 23,863 (1979).

As to assessing a penalty in such a case as this where the respondent is found not to have been negligent, the Act has addressed the question in Section 110 which contains the Act's major penalty provisions. In mandatory terms, section 110(a) directs the Secretary, who has enforcement responsibility under the Act, initially to assess a penalty for each violation; section 110(i) similarly provides that the Commission, which has ajudicative responsibility, "shall have authority to assess all civil penalties in (the) Act." 2/

The language of the two sub-sections --- under the language of all of section 110 --- is plainly based on the premise that a penalty will be assessed for each violation at both the Secretarial and Commission levels. Secretary of Labor v. Tazeo, Inc. Docket No. VA 80-121 (1981). The Mine Act's legislative history shows that Congress intended a mandatory penalty structure. Congress consistently described penalties as mandatory. In general, see Senate Subcommittee on Labor, Comm. on Human Resources, 95th Cong. 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 85, 88, 375-376, 600-601, 629, 910, 1167, 1211-12, 1364-65 (1978) ("Leg. Hist."). The Review Commission stated in Tazeo, Inc., supra, that both the text and legislative history of section 110 make clear that the Commission and judges must assess some penalty for each violation found.

2/ Section 110(a) provides in relevant part:

The operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, shall be assessed a civil penalty by the Secretary which penalty shall not be more than $10,000 for each such violation ....

Section 110(i) provides:

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

Accordingly, the respondent is found to be liable for the violation of mandatory safety standard 30 C.F.R. § 56.14-30.

In determining the amount that should be assessed as a civil penalty, I find as follows:

A. History of Prior Violations

Although there was no direct proof as to the number of prior violations acquired by the respondent, there was testimony by its president that there were some payments made (Tr. 13). I conclude that the history of prior violations did not warrant any increased civil penalty assessment in this case.

B. Size of Business

The parties agreed that the mine in question employed 23 to 24 people at the time of the violation and had sales of a gross amount of $1,000,000. However, at the time of the hearing, the employees were reduced in numbers due to a depressed demand for its products from the construction industry. In 1980 the respondent's size in terms of production was a quarter of a million tons. I conclude that the respondent was a small to medium sized operator.

C. Good Faith Compliance

The respondent demonstrated good faith in this instance by immediately calling all employees together after this accident and instructing them on the proper method of blocking dump trucks before working on them.

D. Negligence

The record supports a finding that the respondent was not negligent in causing this accident. The MSHA inspector testified that he did not give them much for negligence because he was convinced it was respondent's policy to pin the raised truck beds before working on them (Tr. 47). However, as stated above, the lack of negligence on the respondent's part does not avoid the assessment of a penalty.

E. Gravity

In view of the fatal accident which resulted , it is found that the violation was extremely serious. Further, with the other employee, Calistro, working under the truck the possibility of his injury, or death existed.

F. Effect on Operator's Ability to Continue in Business

The respondent's president testified that paying a penalty would not affect their ability to continue in business (Tr. 13). I find that a penalty properly otherwise assessed in this proceeding will not impair the operator's ability to continue in business.

Penalty Assessed

Upon consideration of the entire record in this case, I find that assessment of a penalty of $400.00 is warranted.

ORDER

The respondent is ORDERED to pay a civil penalty of $400.00 within 30 days of the date of this decision.

Virgil E. Vail
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE, SUITE 400
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SEP 22 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	CIVIL PENALTY PROCEEDING
	DOCKET NO. WEST 81-134
v.	ASSESSMENT CONTROL NO. 05-00296-03055
C F & I STEEL CORPORATION, Respondent,	MINE: Allen Mine

DECISION

Appearances:

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For the Respondent

Before: John A. Carlson, Judge

This case, heard under provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq [the "Act"], arose out of an inspection of respondent's underground coal mine near Weston, Colorado. The Secretary of Labor seeks a $66.00 civil penalty for an alleged violation of a mandatory safety standard.1/

1/ At the outset of the hearing petitioner moved to withdraw a second citation, number 1014217, which was a part of this docket. The Secretary represented that he lacked sufficient evidence to establish violation. The motion was granted and the petition as to that citation was dismissed. The dismissal is reaffirmed here.

Specifically, the citation alleges that respondent failed to provide adequate protection to a trailing cable furnishing electrical power to a continuous mining machine.[2]/ The matter was tried in Denver, Colorado on July 23, 1981. The parties agreed to waive briefs and submitted the matter after closing arguments.

DISCUSSION

The Secretary's inspector issued the citation because he believed a piece of mobile equipment, a battery utility trailer (BUT car), had run over the trailing cable furnishing power to a continuous miner. He based this belief upon dust marks he observed on the cable as it lay in a haulage way.

Respondent concedes that the cited standard is violated where an operator permits equipment such as a BUT car to move across a cable. It denies, however, that the evidence shows that the cable was in fact run over.

The issue for decision here is whether the circumstantial evidence presented justifies a conclusion that the markings on the cable were left by the wheels of the car. For the reasons which follow, I hold that it does not.

Based upon the undisputed evidence, I find that the car in question weighs several tons. The 440 volt cable, which lay on the soft, moist floor of the haulage way is 2 1/2 inches in diameter and the top of its cover displayed at least one dust mark. I further find that the cable, beneath the mark, was imbedded in the floor a distance of about 1/3 of its diameter; and that subsequent examination disclosed that the cable was undamaged.

As to further particulars, most of the testimony is in conflict. The Secretary's inspector first spoke of a single mark which he believed was 8 or 10 inches wide but did not measure. He said he saw no others, but then revised his testimony to suggest that he saw "two sets of tire marks, one on each side." (Tr. 19-20.)

Respondent's own mine inspector, who was present during the government's inspection, insisted that he was shown but a single mark. He also maintained, contrary to the government's inspector, that the mark was solid with no distinctive tread pattern. In his view, the mark was left by the feet of miners who had simply stepped on the cable on their way to work stations.

Both witnesses, of course, rely wholly upon inferences drawn from a few observed facts. The respondent's inferences are more persuasive than those of the government. I must agree with respondent, for example, that

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2/ The standard involved is 30 CFR § 75.606 which provides: "Trailing cables shall be adequately protected to prevent damage by mobile equipment."

had the heavy BUT car actually crossed the cable, it would have pressed the cable more deeply into the soft floor. That the cable sustained no damage lends further credence to respondent's theory.

In short, the inspector's inferences are too speculative and fragmentary to serve as the basis for a finding of violation. I therefore conclude that no violation was proved.

ORDER

In accordance with the findings and conclusions embodied in the narrative portion of their decision, it is ORDERED that the Secretary's petition for assessment of penalty in connection with citation number 1014211 is vacated, and this present proceeding is dismissed.

It is further ORDERED, pursuant to the Secretary's withdrawal motion, that the petition filed in connection with citation number 1014217 is likewise vacated and that proceeding is dismissed.

John A. Carlson
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SEP 22 1981

SECRETARY OF LABOR,	:	Civil Penalty Proceeding
Petitioner	:	
v.	:	Docket No. PENN 79-142
	:	A.C. No. 36-06100-03004
SOLAR FUEL COMPANY,	:	
Respondent	:	Solar No. 9 Mine

DECISION

Appearances: Susan L. Olinger, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner; Charles E. Sliter, Esq., Hamel, Park, McCabe & Saunders, Washington, D.C., for Respondent.

Before: Judge James A. Laurenson

This is a proceeding filed by the Secretary of Labor, Mine Safety and Health Administration (hereinafter MSHA) under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a) (hereinafter the Act), to assess a civil penalty against Solar Fuel Company (hereinafter Solar) for two violations of a mandatory safety standard. Pursuant to cross motions filed by the parties, I issued a summary decision on July 3, 1980, in favor of Solar. Thereafter, on June 23, 1981, the Commission reversed my decision and remanded the case to me for disposition consistent with its decision.

On August 3, 1981, a hearing was held in Falls Church, Virginia on the above matter. In light of the Commission decision which held that 30 C.F.R. § 75.503 applies to equipment which is intended to be or is habitually taken or used inby the last open crosscut, the parties agreed to my entering summary decision on behalf of MSHA with regard to the fact of violation. On the issue of the amount of civil penalty which should be assessed, Inspector Earl L. Miller testified on behalf of MSHA. Both parties presented arguments and waived the filing of briefs.

APPLICABLE LAW

Section 110(i) of the Act, 30 U.S.C. § 820(i) provides in pertinent part:

> The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such

penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 C.F.R. § 75.503 provides as follows: "The operator of each coal mine shall maintain in permissible condition all electric face equipment required by §§ 75.500, 75.501, 75.502 to be permissible which is taken into or used inby the last open crosscut of any such mine."

STIPULATIONS

1. On May 3, 1979 and May 4, 1979, duly authorized representative of the Secretary of Labor, coal mine inspector Earl Miller, performed a regular quarterly inspection at the Solar Fuel Company's Solar No. 9 Mine.

2. During the course of his inspection on May 3, 1979, Inspector Miller observed that a Jeffrey mining machine located in an intake air course outby the last open crosscut, was not in permissible condition (see Citation No. 0617857, received in evidence as Exh. No. G-1). He also observed a roof bolting machine, in non-permissible condition in an intake air course outby the last open crosscut, on May 4, 1979, at the same mine in the same working section. (See Citation No. 0617859, attached hereto as Exh. No. G-2).

3. The section of the mine in question was being prepared for mining operations which were scheduled to begin shortly after the issuance of the subject citations. The operator intended to use both pieces of equipment inby the last open crosscut while performing these mining operations.

4. On May 3, 1979, mining activities at this section of the mine, during the shift in which Citation No. 0617857 was issued, produced 105 tons of coal after the citation was issued.

5. On May 4, 1979, mining activities at this section of the mine, during the shift in which Citation No. 0617859 was issued, produced 285 tons of coal after the citation was issued.

6. Solar Fuel Company is the owner and operator of the subject mine.

7. Solar Fuel Company and Solar No. 9 Mine are subject to the Federal Mine Safety and Health Act of 1977.

8. The Administrative Law Judge has jurisdiction over the parties in the subject matter of this proceeding.

9. Copies of the citations are authentic and were properly served upon the Respondent.

DISCUSSION

Solar stipulated that it intended to use the equipment, which was not in permissible condition, inby the last open crosscut. The Commission's Decision in this matter, therefore, mandates a finding of a violation of 30 C.F.R. § 75.503 in connection with both citations. Solar does not oppose MSHA's motion for partial summary decision.

The remaining issues concern the amount of civil penalties to be assessed for these violations. Citation No. 0617857 alleged that the Jeffrey Miner was not maintained in permissible condition in that the ballast box for the lighting system had an opening in excess of .005 of an inch. Citation No. 0617859 alleged that the roof bolting machine was not in permissible condition because a bolt was broken off the lid of the ballast box for the lighting system. Additionally, two conduits were cut off the packing glands on the roof bolts. MSHA Inspector Earl Miller testified that he did not consider either of these violations to be significant or substantial at the time the citations were written. He did not believe that Solar was aware of either violation. He stated that an accidental occurrence was improbable in each case. The inspector's statements were premised upon the fact that he found no methane reading on his methane detector and that the area was well rock dusted and damp. However, bottle samples of air were later analyzed to to show .01 to .02 percent methane. He conceded that this was a very low level of methane and did not present any danger to persons in the area. MSHA initially proposed civil penalties in the amounts of $38.00 and $40.00 for these two citations. At the hearing, counsel for MSHA requested "the assessment of a substantial penalty. . . ."

Solar attempted to show that a Draft Electrical Manual prepared by MSHA constituted MSHA's enforcement policy at the time these two citations were issued. Inspector Miller denied this fact and stated that he had not seen the Draft Electrical Manual until shortly before the hearing. Moreover, he testified that, to his knowledge, it had always been MSHA policy to cite permissibility violations found outby the last open crosscut where the equipment was intended to be used inby the last open crosscut. In any event, Solar never asserted or established that it relied on the Draft Electrical Manual at any time prior to the dates of these citations. Of course, any statement in the Draft Electrical Manual is not a rule of law binding upon the Commission. Old Ben Coal Co., 3 FMSHRC 2806, 2809 (1980). I find that this case is distinguishable from King Knob Coal Co., 3 FMSHRC 1417 (1981) where the Commission agreed that the operator was not negligent because the MSHA Manual caused confusion concerning the appropriate standard of care. There is no evidence herein of any confusion attributable to statements in the Draft Electrical Manual. Hence, I find that the statements in the Draft Electrical Manual are irrelevant to the criteria for assessment of a civil penalty pursuant to section 110(i) of the Act.

In assessing a civil penalty, the six criteria set forth in section 110(i) of the Act shall be considered. As pertinent here, Solar's prior history of 13 violations in the previous 2 years is noted. I also note that

5 of these 13 violations were for the same section in controversy here: 30 C.F.R. § 75.503. On the other hand, Solar received an MSHA safety award at this mine in 1979. In any event, the assessment of civil penalties herein will not affect the operator's ability to continue in business.

Contrary to the statements of the MSHA inspector, I find that Solar knew or should have known of these violations. This is so because a bolt was missing from the cover of a ballast box. This condition should have been apparent to Solar. The other cited violations should have been detected by Solar. I find Solar chargeable with ordinary negligence. The gravity of these conditions is slight. The almost nonexistent level of methane indicates that the possibility of an explosion was extremely remote. Both citations were abated in good faith.

Based upon all of the evidence of record and the criteria set forth in section 110(i) of the Act, I conclude that civil penalties should be imposed for the violations as follows:

Citation No. 0617857	$ 38.00
Citation No. 0617859	$ 40.00

It should be noted that Citation No. 0617858 was vacated by MSHA on February 8, 1980, because it was issued in error.

ORDER

WHEREFORE, IT IS ORDERED that Respondent Solar pay civil penalties within 30 days for the violations as follows:

Citation No.	Regulation	Civil Penalty
0617857	30 C.F.R. 75.503	$38.00
0617859	30 C.F.R. 75.503	40.00

James A. Laurenson, Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SEP 22 1981

CHESTER M. JENKINS,	:	Contest of Citation
Contestant	:	
v.	:	Docket No. WEST 81-348-RM
	:	
SECRETARY OF LABOR,	:	Citation No. 354435
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Republic Unit Mine
Respondent	:	
	:	

DECISION AND ORDER OF DISMISSAL

On July 15, 1981, Mr. Chester M. Jenkins, a miner employed at Day Mines, Inc., filed a notice of contest under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," 1/ seeking to contest the issuance to Day Mines, Inc., the mine operator, of Citation No. 354435, a citation issued under section 104(a) of the Act. The operator itself has not filed a notice of contest within the 30 days required by section 105(d) of the Act. On September 1, 1981, the Secretary filed a motion to dismiss the miner's contest on the grounds that the miner is "barred from challenging" the subject citation under section 105(d).

1/ Section 105(d) of the Act provides:

"If, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends to contest the issuance or modification of an order issued under section 104, or citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b) of this section, or the reasonableness of the length of abatement time fixed in a citation or modification thereof issued under section 104, or any miner or representative of miners notifies the Secretary of an intention to contest the issuance, modification, or termination of any order issued under section 104, or the reasonableness of the length of time set for abatement by a citation or modification thereof issued under section 104, * * * the Commission shall afford an opportunity for a hearing * * *." (Emphasis added.)

Under section 105(d), an operator may challenge the issuance or modification of citations and certain orders, the notification of a proposed assessment of penalty, and the reasonableness of the time set for abatement. Under the plain language of that section, the miner and representative of miners are given authority to challenge only the issuance, modification or termination of certain orders and the reasonableness of time set for abatement. Where the language of a statute is plain and admits of no more than one meaning, there is no need for interpretation and no need to resort to the rules of construction. Caminetti v. U.S., 242 U.S. 470 at 485, 61 L.Ed 442, 37 S. Ct. 192 (1916). Accordingly, I find that there is no authority under the provisions of section 105(d) of the Act for a miner to contest the issuance of a section 104(a) citation. 2/

The Secretary's motion to dismiss is therefore GRANTED and it is ORDERED that the captioned proceeding be DISMISSED. 3/

Gary Melick
Administrative Law Judge

Distribution:

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John H. O'Donnell, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified Mail)

2/ See United Mine Workers of America v. Secretary of Labor, CENT 81-223-R (August 28, 1981); Council of the Southern Mountains v. Donovan, No. 99-2982 (D.D.C. 1981), 2 BNA MSHC 1329, 1322, n. 8.

3/ If the operator should later contest the proposed assessment, the miner in question may nevertheless participate as a party to the civil penalty proceeding. 29 C.F.R. § 2700.4.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE, SUITE 400
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SEP 24 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of STEPHEN SMITH, DONALD HANSEN, THOMAS SMITH, AND PATRICIA ANDERSON, Complainants, v. STAFFORD CONSTRUCTION COMPANY, Respondent.	APPLICATION FOR REVIEW OF DISCRIMINATION DOCKET NOS. WEST 80-71-DM WEST 80-155-DM WEST 80-156-DM WEST 80-165-DM (Consolidated)

Appearances:

James H. Barkley, Esq., Office of Henry C. Mahlman, Associate Regional Solicitor, United States Department of Labor, Denver, Colorado 80294,
for Complainants

Richard D. Alaniz, Esq., Pate, Bruckner & Sipes, Attorneys at Law, Houston, Texas 77056,
for Respondent

Before: Judge John J. Morris

DECISION

STATEMENT OF THE CASE

The Secretary of Labor of the United States, the individual charged with the statutory duty of enforcing the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (the Act) brings this action on behalf of four complainants. He asserts the workers were illegally discharged from their employment by Stafford Construction Company (Stafford) in violation of § 815(c)(1) of the Act.

The statutory provision, now codified at § 30 U.S.C. 815(c)(1), provides as follows:

> § 105(c)(1) No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or

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

After notice to the parties, a hearing on the merits commenced in Canon City, Colorado in May 1980. The hearing was concluded in September, 1980. The parties filed extensive post trial briefs.

ISSUES

The issues are whether complainants were discharged as a result of engaging in a protected activity. Further, if the finding is affirmative, what relief, if any, should be granted. Additional issues arise from the affirmative defenses of respondent.

APPLICABLE CASE LAW

The Commission has ruled that to establish a prima facie case for a violation of § 105(c)(1) of the Act a complainant must show by a preponderance of the evidence that (1) he engaged in a protected activity and (2) that the adverse action was motivated in any part by the protected activity. The employer may affirmatively defend, however, by proving with a preponderance of all the evidence that, although part of his motive was unlawful, (1) he was also motivated by the miner's unprotected activities, and (2) that he would have taken adverse action against the miner in any event for the unprotected activities alone. Consolidation Coal Company, (David Pasula) 2 FMSHRC 2786 (1980), petition for review filed, No. 80-2600 (3d Cir. November 12, 1980).

The four cases herein were consolidated. The acts of alleged discrimination are essentially diverse and accordingly, each case is discussed separately and in the same order as presented at the hearing.

The four persons allegedly discriminated against were: Stephen Smith, a heavy equipment operator; Thomas Smith, the brother of Stephen Smith and a heavy equipment operator; Patricia Anderson, the Stafford office secretary, and Donald Hansen, at various times a heavy equipment operator, assistant project manager, and safety officer. All of the cases involve credibility determinations.

DOCKET NO. WEST 80-156-DM
STEPHEN SMITH

INTRODUCTION TO THE CASE

Stephen Smith claims he was discharged because he complained about unsafe conditions at the Cotter Mill site. After various oral complaints to Stafford officials he contacted MSHA on December 19 and filed a written complaint on December 20. He was not allowed to work on December 20 and he was terminated that evening.

Stafford asserts it did not discriminate against Smith. It's affirmative defense is that Smith was terminated because the company was reducing its work force in anticipation of a shut down.

FINDINGS OF FACT

The evidence is conflicting. I find the following facts to be credible:

1. Stephen Smith was hired by Stafford on July 7, 1978 and terminated December 20, 1978. Smith operated a pusher cat in breaking rock and cutting new roads (Tr. 17, 18).

2. Stafford was building a retention dam for Cotter Mill. Stafford's answers in two cases admit it is an operator and that its products enter or affect commerce, (Tr. 18, 68, Answer in WEST 80-156-DM and in WEST 80-71-DM).

3. During Smith's employment he complained verbally to Stafford officials concerning safety. His verbal complaints involved lighting in the dump and borrow areas as well as lighting and brakes on the machines. Whenever he felt something was unsafe he would speak to someone about it. He complained about 10 times from July to December (Tr. 19, 71-75, 79).

4. Smith asked for illumination because it was dark during half of his shift. (Tr. 19).

5. There were no brakes on Smith's #351 scraper. To stop the equipment it was necessary to drop the pan and drag it. This condition existed throughout a three week period when Smith operated the #351 (Tr. 79).

6. His safety complaints, which Smith considered serious, were directed to Rick Auten, Mark Jackson and Richard Schneider, respectively Stafford's superintendent, foreman and maintenance foreman. (Tr. 21, 80).

7. Other operators were complaining of safety conditions such as the condition of the tires on the equipment, lack of working lights, lack of back-up lights, no illumination on the cat itself, lack of seat belts and back-up alarms (Tr. 72-80).

8. In November, Smith told Auten and Jackson that he was going to request an MSHA inspection. Auten and Jackson did not reply. Prior to December 20, MSHA had been on the plant site quite a few times (Tr. 22, 241, 681-685). MSHA showed up about every month. When Hansen took over as safety engineer there were 20 to 30 MSHA citations on the board dated between September 1978 and January 1979. (Tr. 22, 241, 681-685).

9. Smith called the MSHA office on December 19, 1978, and he met with two MSHA inspectors the following morning. The morning of December 20, Smith presented a written complaint signed by himself and his brother, Thomas Smith. The written complaint had been made out by Smith and his brother at home. Smith took the complaint to work with him on December 20, had other operators sign it, and delivered it to MSHA after he was sent home. (Tr. 22, 23, 140-144, Exhibit P-1).

10. On December 20, Smith showed his handwritten complaint to Auten and Jackson on the jobsite at 12:30 p.m. The shift was to begin in 30 minutes. Smith wasn't allowed to work that day. Smith's failure to work came about in this manner: It was the custom to assemble the operators and then drive them to their respective equipment. Jackson, according to Smith, was a hot rodder with the truck; further, Smith previously had a bad experience while riding in the back of a pickup. He, accordingly, asked Jackson if he could ride in the front seat. Since the front seat was already occupied Jackson said he'd return to pick him up. When Jackson returned he told Smith he wasn't needed that day (Tr. 25, 31-34).

11. The equipment normally assigned to Smith was operated on this particular shift on December 20 ; no equipment was idle that was capable of running. (Tr. 34, 59).

12. Smith didn't work his shift on December 20. He next appeared on the jobsite at 9:30 p.m. on the same date to pick up his brother. At that time Mark Jackson gave Smith his paycheck and termination slip (Tr. 52, P-2). The pay slip showed the termination was due to a reduction in force. However, Smith had no knowledge of any such reduction, and Stafford was working two shifts per day (Tr. 57-58, Exhibit P-2).

13. On December 19, Patricia Anderson was asked to fill out a termination slip for Stephen Smith (Tr. 244, 249).

14. At the time of the MSHA investigation of the Stephen Smith discharge, Pat Anderson, the Stafford secretary, was directed by management to prepare a documentation from the personnel records showing that a reduction in force had occurred. Anderson could not prepare such a report because so many men had been hired. On December 20, 1978, Stafford was hiring new employees (Tr. 173, 183, 184).

15. Prior to December 20, Stephen Smith had never been suspended in any way by Stafford (Tr. 18).

16. Before December 20, Pat Anderson participated in and overheard conversations between Harold Stafford (President) and Richard Schneider (held various managerial positions), and others in management where they stated that they had determined it was Stephen Smith who was informing MSHA of the accidents and problems on the jobsite. They stated that Stephen Smith was to be fired (Tr. 189, 192-199, 208, 212-213, 305, 341).

17. On or about December 1, 1978, when Donald Hansen was promoted to assistant project manager, Hansen was involved in conversations with Poynter (project manager) and Harold Stafford about employees turning in complaints to MSHA. Stafford said if they found out who these individuals were they were to find a reason to terminate them immediately (Tr. 671-673)

18. On or about December 22, Poynter, in a conversation with Hansen, identified Smith as the one who'd been making the complaints to MSHA. He further stated that Harold Stafford had wanted him fired and for that reason he was terminated (Tr. 672-673).

19. Stafford officials were concerned about time constraints in their contract, and they planned on working through the winter if the weather permitted. (Tr. 425).

20. Harold Stafford, president of the company, planned on working through the winter if the weather permitted. (Tr. 173, 176, 183, 425).

21. The daily reports of foreman Mark Jackson indicate the weather was good for the most part from December 18 through December 28, (Exhibit P-5, R-13).

22. The job was shut down January 5, 1979 when the ground froze (Tr. 181).

DISCUSSION

The credible facts establish that Stephen Smith was engaged in a protected activity and he was terminated for engaging in such activity.

Stafford's defense seeks to establish that Stephen Smith was discharged due to a reduction in the working force. For the following reasons, I do not find Stafford's evidence to be persuasive.

Pat Anderson was in a position to know the facts concerning a reduction in force since she was in charge of issuing pay checks and termination notices. She testified that Stafford, on December 20, 1978 was operating two shifts per day and was not in the process of reducing its work force (Tr. 172-174, 182, 244). Stafford and Hansen had prior to December 20 stated to her that they would work through the winter. (Tr. 176-183). Anderson had been instructed to indicate "reduction in force" on all termination slips unless the worker quit or moved away (Tr. 322-326, R-4, R-5). As many men were hired as were fired in November and December (Tr. 302). Anderson had only prepared a list of those fired, not those workers hired (Tr. 391).

In December Stafford had approximately 160 employees (Tr. 252). Its asserted reduction in force as shown by its own evidence, consisted of the following terminations:

December 19 - Smith and Baun
December 21 - May
December 22 - Auten and Spier

A reduction of five, in these circumstances hardly constitutes a quantitative persuasion of a reduction in force.

Additionally, I do not find it credible that Stephen Smith was selected to be part of any anticipatory reduction in force due to his alleged tardiness and general incompetence as an operator. The exhibits show that Stephen Smith worked every week beginning with his initial employment in July 1978 (R-7). Prior to December 20, 1978 he had never been reprimanded for any alleged tardiness, absenteeism or incompetence.

Schneider, who held various managerial positions with Stafford, testified that the company planned to work through the winter. Further, he agreed that Stephen Smith's absenteeism wasn't greater than any other employee's. (Tr. 428 -430). Schneider concluded that a reduction in force caused Smith's termination. However, I find the reduction in force took place on January 5, 1979 when the job was shut down by the project engineers, Wahler and Associates, due to the weather. (Tr. 609).

One matter requiring discussion is the evidence that the termination slip was made out by Pat Anderson on December 19, 1978. Stafford argues that this establishes the fact that the decision to lay off Smith was made prior to Stafford's knowledge of Smith's written complaint to MSHA. Stafford's position then is that if the complaint to MSHA is the protected activity at issue, it played no part in the decision to terminate Smith.

Stafford's position overlooks several factors. The termination slip was not delivered to Smith until December 20, after Stafford was aware of Smith's complaints to MSHA. Further, prior to December 19, respondent had concluded that Smith was informing MSHA of accidents and safety problems on the job. As a result of this conclusion, Stafford decided to terminate Smith.

The evidence does not show that Smith had contacted MSHA prior to December 19, 1978. However, Smith's verbal safety complaints to management officials must have given rise to Stafford's suspicions and supported respondent's conclusion that Smith had been discussing safety matters with MSHA. Therefore, Smith's expressed concern for safety was the basis for his termination. Accordingly, I find that Stephen Smith was fired for engaging in protected activity, and, thus he was discriminated against in violation of the Act.

BACK WAGES

Stephen Smith's regular rate of pay was $11.50 per hour, and his overtime pay was $16.32. Overtime was paid after eight hours per day or 40 hours per week. (Tr. 59-61). Stephen Smith was discharged on December 20, 1978 and reinstated on May 16, 1978. During the above period the project was shut down due to weather from January 5, to early March (Tr. 838).

Between December 20 and January 5, Smith contends he missed 65 days of work. He asserts that his back wages are $8,101.60 ($124.64 x 65).

I find the Stafford records, because they are records, are more reliable than Smith's oral testimony on the back wage issue (Tr. 61, R-7). The wage summary indicates Stephen Smith did not work any overtime in December or November, 1978. An award including overtime would in this case be speculative because the record fails to offer any evidence that overtime was worked during the period Smith was laid off. Accordingly, any back wages would be calculated at $92.00 per day ($11.50 x 8).

Smith urges he is entitled to wages for 65 days, but I calculate that there are 66 days of lost wages involved. Accordingly, Stephen Smith's back wages are $6,072.00 ($92.00 x 66). Smith testified that between his termination and reinstatement he had gross income totaling $2,050.00 (Tr. 63, 64). This is to be deducted from the total back wages. Smith is due the amount of $4,022.00 in unpaid back wages, less amounts withheld pursuant to state and federal law.

DOCKET NO. WEST 80-165-DM
TOM SMITH

INTRODUCTION TO THE CASE

Tom Smith asserts he was fired because he and his brother Stephen filed a written complaint with MSHA.

Stafford denies it discriminated against him. It contends he was fired on January 5, 1979, because he negligently broke a lift arm; further, Stafford claims he could have prevented such damage.

FINDINGS OF FACT

The evidence is conflicting. I find the following facts to be credible.

1. Tom Smith, the brother of complainant Stephen Smith, was employed by Stafford between August 20, 1978 and January 3, 1979. Tom Smith operated dozers and pulled a disc (Tr. 745, 747).

2. Tom Smith made four or five oral complaints concerning safety to management representatives Auten, Jackson and Schneider during the months of September, October and November. Specifically, he complained about a lack of lights on his dozer and that a short stack was causing smoke to blow in his face (Tr. 746-747).

3. On December 20 Tom Smith and his brother, Stephen, filed a written complaint with MSHA concerning safety at the Stafford site (Tr. 745-747, Exhibit P-1).

4. On January 3, while operating a 16 motorgrader Smith struck a partially buried rock. The impact broke the lift arm on the blade. Usually when equipment is damaged in this manner the operator helps the welder or mechanic make the repairs and then goes back on the job as it takes about an hour to weld the break. On this date Smith was sent home. (Tr. 749).

5. On January 3, after the incident involving the grader Smith saw a D-8 dozer which he'd operated before pulled off to the side and shut down. He pointed this machine out to Schneider, but Schneider replied that his machine was broken. He was told to go home. (Tr. 779, 780).

6. Smith called in to work on January 4. He was told that his machine was still down. On January 5 he came in to pick up his payroll check. At this time Donald Hansen gave him his termination notice and two payroll checks. (Tr. 749, 750, 753).

7. The Stafford termination notice to Tom Smith contains three main headings, namely, "Lay off", "Discharge", and "Voluntary Quit". Under "Voluntary Quit" the box "Dissatisfied" had been scratched over. Under "Discharge" the box of "other" was marked. The explanation written on the slip was that "Subject operated a blade in a manner that broke a lift arm per witnesses costing company money". (Exhibit P-9).

8. Prior to this occurrence Tom Smith hadn't damaged any Stafford equipment (Tr. 743).

9. Operators who had damaged Stafford equipment and who were not terminated included: Larry Provost (motor blown up); Loren Pennington (broke an arm); Richard Gangler (broke a track); Gary Hust (broke a left arm); Steve Smith (not a relative of complainants), (rolled a scraper).

10. After December 20 and a few days before Smith's termination, Donald Hansen[1]/ was driving Harold Stafford across a field and upon seeing Smith, Stafford said "there is that SOB who is causing us a lot of -- whose brother is causing us a lot of problems, and if you get a chance, fire him." (Tr. 848).

11. Hansen fired Tom Smith because he broke a blade and because Harold Stafford wanted him fired. (Tr. 849, 851).

12. Hansen said Tom Smith was the only one ever fired for breaking a lift arm. (Tr. 852).

DISCUSSION

The credible facts establish that Tom Smith was engaged in a protected activity and he was terminated for engaging in that activity.

1/ Complainant in Docket No. WEST 80-71-DM

Stafford asserts Tom Smith was fired because he carelessly damaged company equipment. The company policy was that it would let a man go if through his negligence he broke company equipment, and it was obvious he could have prevented the damage. (Tr. 873).

Respondent's evidence shows that certain workers were terminated and respondent's reasons therefor were as follows:

Norman Coulter, discharged in September 1978, was let go because he was rough in handling equipment. (Tr. 876, 877).

Jack McCullough, was let go in October 1978. McCullough walked away from the oiling truck after turning the oil on. He was responsible for the loss of about 400 gallons of oil. (Tr. 878, 879).

John Smith, (not related to complainants), on November 1978, was instructed that the hydraulic was out on the disc and that as a result it could only turn one way. Smith ignored the instructions. This tore the disc up, and pulled the tongue off. (Tr. 880).

Bill Ryball, (November 1978), who claimed he was a top mechanic, broke each sprocket tooth when he installed a double flange roller rather than a single flange. (Tr. 882).

Randall K. Jones, (November 1978), fell asleep and as a result he was involved in a head-on collision with a 651 scraper. (Tr. 883).

Clarence Harding, (March 1979), was "terribly hard" on equipment. He'd go forward and "throw it" in reverse. He was warned but continued to abuse the equipment. (Tr. 884-886).

John Jones, (June 1979), was let go because he abused equipment. (Tr. 886).

Steve McGinnis, (June 1979), a grader operator, ignored instructions given to all operators to check their oil and water. The engine froze. (Tr. 886).

Ron Durham, (August 1979), was on the water wagon apparently involved in a head-on collision (Tr. 886).

Al Sanchez, (May 1979), was operating a scraper and he sideswiped a 641 water wagon. Sanchez had been warned several times about being careless. (Tr. 888, 948).

Stafford's evidence does not establish its defense. Rather, the facts indicate a worker will be terminated if his activity approaches a deliberate disregard of instructions or gross negligence rather than mere carelessness.

It is interesting to note that none of those terminated in the Stafford list (R-12), except for Tom Smith, were involved in the breaking of a lift arm. Additional positive evidence of the weakness of Stafford's argument is that Schneider confirms Hansen's testimony that he broke a lift arm but was not terminated. (Tr. 852).

Additional persuavise evidence against respondent's affirmative defense is that Schneider, after investigating the Smith accident did not recommend that Smith be fired. Schneider, as maintenance supervisor, normally would terminate an operator if he believed he was negligent in the operation of equipment. He testified at length concerning his reputation for this policy. The workers had also given him a nickname (unstated) in this regard. (Tr. 873, 874). With that background, Schneider investigated the Tom Smith accident, but he was not involved in the decision to terminate him. (Tr. 906, 921, 938). Based on the above, if credence is to be given to respondent's contentions, one would expect that Schneider would have recommended that Tom Smith be fired.

Smith contends he should have been treated like workers Provost, Pennington, Gangler (also called Gekler), Hust, and Steve Smith (not related). These workers damaged company equipment but were not terminated. (Finding of Fact, ¶ 9). Stafford seeks to destroy this evidence by showing that the workers were basically not at fault and for this reason they were not terminated. I am not persuaded. A careful analysis of that evidence establishes factual situations which are more akin to Tom Smith's accident than are those situations where the workers were terminated. Respondent's account of these incidents is as follows:

Respondent does not address the Provost accident.

Pennington had done slope work which caused the ball joints on the motor grader to snap off (Tr. 889-890). Probably 20 such ball joints were broken during the Cotter project. Pennington wasn't terminated because Schneider, then the maintenance manager, didn't feel he was abusing the equipment (Tr. 891).

Richard Geckler ran the tracks off of a push cat three times. They were trying to keep this particular equipment going until the track could be rebuilt. (Tr. 891-893).

Gary Hust damaged a #494 while working rocks. He had a rock go off his dozer and push in the radiator guard. (Tr. 893-894).

Steve Smith (not complainant) while operating a 651 scraper (#351) had a rock come out from under his left rear tire. This knocked the scraper

off of the embankment and caused it to roll. This happened to several scrapers. (Tr. 895-896).

A final issue to be addressed concerns the statement of Harold Stafford that Tom Smith should not have been in the area when the accident occurred. (Tr. 962-968). The evidence is uncontroverted that Smith was instructed by a supervisor to operate his blade in this area; further, he had been there about two hours when the accident occurred. I find from the credible uncontroverted evidence that Smith had been instructed to operate in the zone where he was located. (Tr. 753, 768, 770).

In summary, I conclude that Stafford has not established its affirmative defense.

I find Smith's termination arose from the "problems" created for Stafford by the submission of the safety complaints to MSHA on December 20, 1978 by Stephen and Tom Smith. Donald Hansen alone fired Smith. He testified that he terminated Smith because of the instructions from Harold Stafford to find an excuse to fire Smith because his brother had caused trouble for Stafford. I find from the record taken as a whole that the "trouble" attributable to Stephen Smith was the safety complaint.

The submission of the safety complaint was a protected activity. Therefore, I conclude that Tom Smith was discharged for engaging in a protected activity in violation of the Act.

BACK WAGES

Tom Smith was terminated January 3, 1979. His straight time rate of pay was $11.50 per hour, or $92.00 per day. (Tr. 760). The uncontroverted evidence shows the ground froze and the work stopped on January 5, 1979, and resumed in early March, 1979 (Tr. 838). Smith was reinstated on May 16, 1979. Smith's days of lost wages would be as follows:

January 1979	2 days
February	None
March	20 days
April	30 days
May	11 days
Total	63 days

Complainant calculates 56 lost working days, but he does not detail those calculations. Based on 63 working days at $92.00 per day, Tom Smith is entitled to a gross award of $5,796.00. Smith earned $348.00 while he was laid off. This amount is to be deducted from his gross award. Accordingly, he is due $5,448.00 in unpaid back wages, less amounts withheld pursuant to state and federal law.

CROSS EXAMINATION OF WITNESS HANSEN

Respondent refused to cross examine witness Donald Hansen in the Tom Smith case. The basis of respondent's objection is that MSHA had not pro-

vided them with a statement purportedly given by Hansen on January 31, 1979. An extensive inquiry was conducted on the record by the Judge to establish the whereabouts of the purported statement.

It is uncontroverted that Donald Hansen gave MSHA three statements all of which were transcribed and signed by Hansen. Two statements dealt with his own case and one related to Patricia Anderson's case. (Tr. 1219). The possibility of the existence of an additional Donald Hansen statement arises from the following events: a round table discussion between MSHA inspectors and Stafford officials occurred on the morning of January 31, 1979. On the same afternoon Harold Stafford, respondent's president and MSHA officials talked in private to Donald Hansen. Stafford and the MSHA official had recorders but the MSHA official inadvertently failed to turn on his recorder. (Tr. 1234). On discovering that MSHA had no transcription of the conversation with Hansen MSHA requested and received the tapes made by Harold Stafford. These tapes had only a buzzing background and no transcriptions could be made. (Tr. 1221). The Stafford tapes were returned to the Stafford attorneys. (Tr. 1221). No statements were available from Hansen in either of the Smith brothers' cases. (Tr. 1220). Copies of all available statements that were taken that day were provided to Stafford attorneys. (Tr. 1223).

On these facts I conclude that the motion to produce the Hansen statement in the Tom Smith case was improvidently granted. There was no statement of witness Donald Hansen that could have been transcribed for cross examination in the case. Therefore, I vacate my prior order to produce.

DOCKET NO. WEST 80-71-DM
DONALD HANSEN

INTRODUCTION TO THE CASE

There are several possible reasons for Stafford's decision to fire Donald Hansen. Among them are (1) he told Harold Stafford not to change witness statements; (2) he called a superintendent a son-of-a-bitch;(3) a combination of (1) and (2); then he was rehired and terminated a second time when Harold Stafford had a flare up of temper over Hansen's MSHA discrimination complaint; (4) he was not discharged at all but he quit. Hansen contends the evidence supporting the views that he quit and that he was initially fired for his comment regarding a superior is not credible.

Stafford denies it discriminated against Hansen. It's affirmative defense is that Hansen quit.

FINDINGS OF FACT

The facts are conflicting. I find the following facts to be credible.

1. Donald Hansen was employed by Stafford Construction Company on May 15, 1978. (Tr. 1039).

2. Hansen was originally hired as an equipment operator and later he was placed in charge of maintenance. In October 1978 he went back to operating a bulldozer. In December he was assistant project manager. (Tr. 1040).

3. Hansen was not involved in the discharge of Stephen Smith, but he supervised the discharge of Tom Smith. (Tr. 1040-1041).

4. When Jim Fritz was installed as superintendent in February 1979, Hansen assumed various other duties including that of safety engineer. Conflicts between Fritz and Hansen began at that time. (Tr. 1086-1087, 1193).

5. Hansen was in daily contact with Fritz. Hansen describes his relationship with Fritz as "one day good and the next day bad". (Tr. 1098).

6. Hansen and Fritz had several arguments concerning company activities. (Tr. 1099-1100).

7. One dispute began on March 6 when Hansen asked Fritz why the sand trucks weren't running. Fritz didn't answer then but on the following day, Fritz told Hansen it wasn't any of Hansen's business. [Hansen agreed it wasn't his business.] Hansen and Fritz swore at each other. Shortly thereafter, about 10:00 a.m., Hansen went to Harold Stafford's office. He told Stafford there was a problem between Fritz and himself. (Tr. 1101-1104).

8. While Hansen was in Stafford's office he observed Harold Stafford writing on MSHA statements. These statements had been taken from various supervisors involved in the discharge of Steve and Tom Smith. There were little pieces of yellow paper or tabs attached to the statements. Hansen only recognized foreman Mark Jackson's statement. Everett Poynter, who was present, was adding to his written statement because the recorder had not been working all of the time when the statement was taken. (Tr. 1103-1106, 1249-1255, Exhibits R-15, R-16).

9. Hansen questioned Harold Stafford about the statements. Stafford indicated he was going over the statements as he had been instructed to do by his attorney. The statements had yellow stickers advising him of changes to be made. (Tr. 1248, 1249, Exhibit R-15).

10. Hansen stated he didn't think it was right for Stafford to be changing the statements. He stated that any changes should be a matter for the person who wrote the statement. Harold Stafford told Hansen not to worry about it. (Tr. 1254-1255).

11. After 15 or 20 minutes Stafford and Hansen left the office together and made the six or seven minute drive to the job site. After leaving the office Hansen said "I am tired of Jim Fritz's shit and I don't want to work with him anymore, and I'm going to quit." Stafford then

stated that the problem between Hansen and Fritz involved a difference of opinion and a personality conflict. (Tr. 1104, 1109, 1110, 1258).

12. On the jobsite Stafford and Hansen immediately met with Fritz, who spoke first. He said, "Don, you got to keep your nose out of my business. You are going out there and talking to the foreman and accusing me and calling me a son-of-a bitch, and a dumb one, and I can't put up with that. You are under my authority and you are undermining my authority, and pretty soon nobody is going to listen to me. I just can't put up with it. I don't want you running down and sticking your nose in my business like you did with the sand and whatever." As the meeting concluded Stafford asked the two men to shake hands. This occurred on March 7. (Tr. 1112-1113, 1261).

13. On March 8 Fritz confronted Hansen about changes Hansen had made on a company organizational chart. Hansen had redrawn the chart to show that he was directly responsible to Harold Stafford rather than to Fritz. Hansen denies this was a "heated" argument, but he concedes that Fritz seemed "very irritated." (Tr. 1117, 1118, 1195).

14. On March 9 about 7:30 or 8:00 o'clock in the morning Hansen talked to foreman Potter about hauling rock. After a brief conversation Potter said (referring to Fritz) "Well, that dumb son-of-a-bitch doesn't know nothing." Hansen replied: "Well, he may be a son-of-a-bitch but the thing about it, you are going to have to talk to him, not to me." (Tr. 1120-1121).

15. At an undetermined time on March 9 Fritz terminated Hansen. He stated as his reason that the foreman said that Hansen had called him a son-of-a-bitch. (Tr. 1116).

16. On or about March 20 Hansen filed a discrimination complaint with MSHA. The basis for his complaint was that he had been fired for disagreeing with the actions of Harold Stafford in changing the MSHA statements. (Tr. 1050).

17. On March 29 Harold Stafford found out about the discrimination complaint. He called his attorney and was advised to rehire Hansen because there were too many other lawsuits going including Rippy's, the NLRB, and the trust suits. (Tr. 1267, 1268).

18. Fritz called Hansen on March 29 and said maybe they'd made a mistake in firing him. Hansen was offered his old job as blade operator. (Tr. 1125-1126).

19. On April 2, the following Monday, Hansen returned to the jobsite but didn't work. He spent the entire shift riding in the pickup with foreman Chuck Luther. Luther and Schneider told Hansen there was no available equipment for him to operate. (Tr. 1055, 1061).

20. On the same day Hansen asked Fritz about back pay and Fritz said he (Hansen) would have to talk to Harold Stafford about that. Hansen told

Fritz that his return to work was conditioned on his receiving his back pay, and he would talk to Stafford about the pay. Stafford was not present at the jobsite on April 2. (Tr. 1128, 1134).

21. On the night of April 2 Hansen went to Stafford's apartment. Fritz, Schneider, and Stafford were present. Hansen asked Stafford if he was going to pay him his back pay. Stafford picked up an envelope and said "This is a bunch of horseshit and lies you old son-of-a-bitch, and I'm not going to give one dam dime unless you work for it, and everyone else has the same treatment." Hansen renewed his request for back pay. Stafford replied "You quit, and that is not my fault." Hansen said "Well, Theisen said if I continued working, I could jeopardize my back pay." Stafford replied "Bullshit." (Tr. 1136, 1140, 1272-1273).

22. The next afternoon (April 3) at the jobsite, as Hansen was turning in his equipment, Stafford heard Aldrich, the office manager, arguing with Hansen. Fritz was also present. Aldrich said (referring to Hansen) "He is quitting. He is not coming back to work, and he wants a lay off slip." Stafford said "We are not going to give any lay off slips if you are going to quit and you are not coming back. Now, is there any problem with that? Hansen said "No, whatever." The termination slip was made out at that time. Hansen didn't receive his check that day because since he'd quit he could pick it up on Friday (Tr. 1268-1271).

DISCUSSION

Under the doctrine expressed in Consolidation Coal Company, (David Pasula), supra, complainant must show by a preponderance of the evidence that he was engaged in a protected activity and that the adverse action against him was motivated in part by the protected activity. In this case I do not find that Hansen was engaged in a protected activity. A careful weighing of the evidence leads to the foregoing voluminous findings of fact. The ultimate conclusion is that Hansen was fired by Fritz for reasons other than for any actions of Hansen that could be considered protected activity. He was subsequently offered back his old job as a blade operator. The offer was never accepted by Hansen because he could not resolve to his satisfaction payment of his back wages.

Complainant's post trial brief asserts there are several possible reasons for his discharge. These are (1) that Hansen told Stafford not to change the witness statements; (2) He was discharged for calling a superintendent an S.O.B; (3) He was discharged for the events in (1) and/or (2) then rehired and later terminated when Harold Stafford had a flare up of temper occasioned by Hansen filing an MSHA related complaint; (4) He was not discharged at all but quit. However, Complainant asserts the credible evidence does not support either the "quit" theory or the second reason above.

Only allegations (1) and (3) raise any question of the existence of protected activity. Complainant's initial possible reason focuses on the witness statements. Hansen concludes Harold Stafford was upset with his comment on changing the witness statements. Stafford was not his usual

"jolly go smiley" self in the six or seven minute drive to the worksite. (Tr. 1109-1110).

Hansen's conclusions are not credible. On the way to the jobsite Hansen said he'd rather quit than cause any problems. Stafford replied "Oh no, I need you, you can't quit" (Tr. 1110-1111). Stafford's statements and his willingness to drive to the jobsite and arrange a conference with Hansen and Fritz contradicts Hansen's conclusion.

The MSHA complaint later filed by Hansen, although not introduced in evidence, apparently asserts that he was fired for commenting on Stafford's activities in changing the witness statements. Inferentially complainant has charged Harold Stafford with tampering with MSHA statements, but such statements were never offered in evidence. The only statement containing a yellow tag was the statement of Adair Rippy (Exhibit R-15). The cover page of the six page typed statement contains a yellow tag with this writing appearing on it: "need to add information p. 4." On page four the following typed question and answer, among others, appear in the text of the statement:

> Q: To your knowledge that you know of no one that was discharged for breaking an arm?
>
> A: No. I don't know other than Tom Smith;

the following appears handwritten after the foregoing typed portion:

> "but we have fired approx 5 or 6 individuals for breaking or misuing (sic) equipment in a reckless manner"

Further down the page appears the following script on a yellow tag: "Here, the question was not asked whether he knew of any other equipment has been broken and if so, how".

The above changes in the MSHA witness statements are certainly innocuous and do not support Hansen's allegation that Harold Stafford was tampering with the statements.

I am unable to find any basis for Hansen's claim that he was fired because of his comments in connection with MSHA statements. There would hardly have been an effort by Harold Stafford to patch things up between Hansen and Fritz if Stafford intended to be retaliatory.

Complainant's second contention centers on the fact that Hansen could not have been fired by Fritz for merely calling him an S.O.B. Considering the record in this case, calling a foreman an S.O.B. by itself would not be

a basis for discharge of the employee. However, that fact when considered in combination with Hansen's other conflicts with Fritz supports Stafford's contention that the conflict between Hansen and Fritz was the reason for Hansen's discharge. Hansen's arguments and disputes with Fritz began virtually from the first day Fritz became superintendent, (Findings of Fact ¶ 4, 5, 7, 11, 12, 13, 14, 15). The evidence on these conflicts arises from Hansen's testimony. The Stafford evidence merely confirms it. Hansen cannot ignore his own evidence.

I conclude Hansen was lawfully discharged by Fritz on March 9, 1979. An employer may discharge an employee for abuse of authority or insubordination, provided these reasons are real and not pretextual. In re Spalding, Division of Questor Corporation, 225 NLRB 946 (1976). An employee was lawfully discharged for repeated arguments and outbursts against his supervisor in Butler-Johnson Corp v. NLRB, 608 F. 2d 1303, (9th Cir., 1979). Cf Manuel San Juan Co., Inc. 211 NLRB 812 (1974); Farah Mfg. Co., Inc. 202 NLRB 666, (1973); Cable Dairy Products Cooperative, Inc. 205 NLRB 160, 84 LRRM 1094 (1973). While the above cases deal with the National Labor Relations Act they give guidance here by analogy.

Complainant's third contention is that he was fired because of a combination of telling Stafford not to change the MSHA statements and because he called Fritz an S.O.B. Hansen maintains that he was then rehired and terminated a second time when Harold Stafford had a flare up of temper occasioned by Hansen filing an MSHA discrimination complaint.

After he was fired by Fritz, Hansen filed his MSHA complaint. He was thereupon offered back his old job. He went to the site the following Monday but always in issue was Hansen's claim for back pay (March 9 through April 2). Fritz could not resolve the matter and said only Harold Stafford could resolve the point. Hansen was on the jobsite all day but there was no opportunity to talk to Stafford. That night he went to Stafford's apartment where the back pay issue was raised. Stafford refused to pay him any back wages and that concluded the discussion.

I disagree with complainant's allegation that Harold Stafford's flare up of temper and accompanying statements on April 2 are indicative of retaliatory actions for Hansen filing an MSHA complaint. (Facts ¶ 21). I have previously concluded there was no basis for Hansen to file his MSHA complaint. Even if there had been a basis for Hansen to file such a complaint, an employer may legimately dispute those allegations.

Briefly stated, I find that Hansen had already been discharged by Fritz, and it was Hansen, and not Stafford, that placed conditions on his accepting reemployment with the company. Hansen cannot ignore his own testimony that he was not returning to work until the issue of back pay was resolved with Stafford. (Tr. 1133-1134).

I conclude that Hansen was not fired on April 3 in retaliation for having filed an MSHA complaint, but, in fact, Hansen never accepted Stafford's offer of reemployment.

Complainant attacks the credibility of the evidence that supports the view that he quit after the shift on April 2. In essence, complainant argues that Harold Stafford is not a credible witness because he says Hansen quit after he worked his shift on April 2, but the termination slip is dated April 3. (Exhibit P-14). I am not persuaded by complainant's argument for several reasons. Stafford at many times failed to display a dexterity with specific dates. I agree with complainant that Stafford testified Hansen quit at the close of the shift on April 2. However, the following events are very clear: first, Hansen went back to the jobsite on April 2; second, Hansen did not see Stafford on the site that day to resolve the back pay issue; third, Hansen went to Stafford's apartment that night; fourth, Hansen was asked to and did turn in his gear the next day; fifth, on April 3 Stafford directed the office manager to indicate on the termination slip that Hansen had quit and Hansen didn't argue with Stafford at that time. The fact that Stafford's testimony on this point was erroneous as to the date Hansen quit does not add greater credibility to Hansen's case. In summary, I conclude that Stafford could consider that Hansen's failure to accept the offer of reemployment constituted a showing that he had quit.

Two events in this case require comment. One event involves an alleged telephone call from Harold Stafford to Hansen. Hansen contends that when he answered the telephone the only "conversation" was the clicking of a revolver. The other event concerns Hansen's conclusion that he was severely pressured at Stafford's apartment the night of April 2. Complainant's post trial brief does not claim that these occurrences establish any particular point so it is not necessary to lengthen this decision with a further discussion of these factual situations.

For the foregoing reasons I conclude that Hansen was not engaged in a protected activity prior to his discharge on March 9, 1979 and without such protected activity no claim for discrimination can lie under the Act. I also conclude that Stafford did not discharge Hansen on April 3 in retaliation for Hansen's filing a discrimination complaint with MSHA. Hansen's complaint of discrimination should accordingly be dismissed.

DOCKET NO. WEST 80-155-DM
PATRICIA ANDERSON

INTRODUCTION TO THE CASE

Complainant's theory of the evidence is as follows: Mrs. Anderson, the Stafford secretary-bookkeeper was asked by Harold Stafford to help prepare documents that would show MSHA investigators that Stafford was undergoing a reduction in force. Mrs. Anderson reviewed the records but was unable to

find any support for Stafford's argument. Thereafter, Mrs. Anderson was asked to tell MSHA investigators that when Steve Smith was terminated Stafford was undergoing a reduction in force. Anderson told Stafford officials she would not lie to MSHA investigators. In retaliation for her refusal to cooperate in obstructing the Steve Smith investigation she was terminated.

Respondent denies any claim of discrimination and contends Patricia Anderson was terminated because of her inability to handle her bookkeeping job.

FINDINGS OF FACT

The evidence is conflicting. I find the following facts to be credible.

1. Patricia Anderson was employed as a bookkeeper and secretary for Stafford Construction from June 1978 to February 12, 1979. (Tr. 1308).

2. The night of January 30, 1979, Mrs. Anderson met with Stafford Company officials on two separate occasions. (Tr. 1345-1346, 1369).

3. The first meeting was held at the construction trailer and was with Schneider, Fritz, and Hansen. The purpose was to secure documents for the MSHA investigators who were to meet with Stafford officials the following day. They went through the employees files and made a list of dates and the indicated reasons for terminations. A majority of the termination slips indicated there had been a reduction in force. (Tr. 1346, 1370, 1375).

4. One of the most common terms on the termination slips was a "reduction in force." (Tr. 1394).

5. Mrs. Anderson was called to a second meeting at the Stafford office in downtown Canon City. Harold Stafford, Mrs. Stafford, Schneider, Poynter, Jackson, Hansen and Mrs. Anderson were present. The meeting lasted 1 1/2 to 2 hours. (Tr. 1346, 1371, 1373).

6. Anderson was asked to listen to the company attorney's tape. This tape was a conversation between Harold Stafford and the attorney on handling MSHA business. Anderson was also asked to listen to a tape by Mark Jackson. She was also requested to read Mark Jackson's statement so she could see the way that MSHA tricked people into making statements that weren't exactly right. Mrs. Anderson didn't read the Jackson statement. (Tr. 1348, 1372-1373).

7. The purpose of the meeting, according to Anderson, was also to instruct her as to what she was to testify to at the MSHA meeting. She was asked to testify that there had been, in the Steve Smith case, a reduction in force. (Tr. 1347).

8. Anderson said she couldn't lie; she couldn't testify that there had been a reduction in force. Harold Stafford finally said Mrs. Anderson could just say whatever she wanted to. (Tr. 1348, 1349).

9. Mrs. Anderson was asked to testify about the Stafford records. Harold Stafford told her that if she had any questions in her mind she was to write them on the blackboard. (Tr. 1373, 1392).

10. After this meeting Harold Stafford didn't talk to Anderson anymore and would come in and glare at her. (Tr. 1350).

11. Mrs. Stafford didn't speak to Anderson after the January 30 meeting, but Mrs. Stafford had started glaring at her two to three weeks before the January 30 meeting. (Tr. 1350, 1384).

12. Mrs. Anderson's last working day was February 8. She was given her termination slip on February 12. (Tr. 1350, 1351, 1355-1356).

DISCUSSION

The threshold issue to be addressed concerns respondent's contention that Patricia Anderson, as a clerical-secretary-bookkeeper employee, was not a "miner" under the Act. Respondent relies on the definitions of "miner"[1]/ and "coal or other mine"[2]/ as well as an interagency agreement between MSHA and OSHA. The agreement[3]/ specifically lists what MSHA considers to be mining operations.

In May 1979, the United States Court of Appeals for the Third Circuit considered the definitions of "miner" and "operator" in the 1977 Act. The Court ruled, in part, that nonproduction personnel (those not directly involved in the extraction process) logically fall within the statutory definition of miner, for the definition of "coal or other mine" includes not only the immediate area of mineral extraction, but all lands, means of access, excavations, and equipment ancillary to the extraction process. Persons working in these ancillary areas are persons working in coal or other mines, and, therefore, are miners even though they are unlikely to be immediately involved in the production or extraction process. National Industrial Sand Association v. Marshall., 601 F. 2d 689, (3rd Cir., 1979).

The agreement between MSHA and OSHA, cited by respondent, is not controlling. The agreement does not purport to include coverage by job classifications. It merely gives examples of the type of mining operations which MSHA and OSHA consider to be within the coverage of the Act.

Accordingly, I conclude that Patricia Anderson is a miner within the coverage of the Act.

1/ 30 U.S.C. 802(g)
2/ 30 U.S.C. 802(h)(1)
3/ CCH Health and Safety Law Reports ¶ 516.62 p. 9 370

MERITS OF ANDERSON CASE

The circumstances giving rise to the foregoing findings of fact must be put into perspective.

On January 30, 1979, the day before the MSHA investigators arrived to take statements in the Steve Smith case, Mrs. Anderson was instructed to review personnel records and list those employees who had been terminated because of a reduction in force (RIF). Later that night a meeting was held with various company officials.

Seven company officials were present at the later meeting. Stafford was preparing his defense that Steve Smith was terminated because of a reduction in force. At this point in time virtually all of the work force had been reduced due to the ground freeze on January 5th.

At the meeting, Anderson was asked to testify that there had been a RIF. She refused, saying she couldn't lie. However, Anderson admitted she was never asked to lie. (Tr. 1381). All of the testimony about anyone implying that she should lie was generated solely by Mrs. Anderson.

Certainly efforts to suborn perjury can be very subtle, but I conclude no such effort was made here. After Mrs. Anderson gratutiously stated "I can't lie" there was additional conversation. Mrs. Anderson credits Harold Stafford with "finally" stating "Just say whatever you want to." (Tr. 1349). Also, at the meeting, Harold Stafford commented that if Mrs. Anderson had a question in her mind she was to write out the question on the blackboard. (Tr. 1373).

The above activities in my view are not indicative of an effort to obstruct the investigation of the Stephen Smith case. Nor do they constitute discriminatory conduct since at this point no adverse action had been taken nor indicated against Mrs. Anderson. Mrs. Anderson claims she was made to feel unpopular and was threatened at the meeting. No threats or the exertion of pressure against Mrs. Anderson which would constitute discrimination appear in the record. The fact that Harold and Mrs. Stafford glared at her does not amount to a violation of § 105(c).

As previously noted, supra. page 5, Stafford's defense in the Stephen Smith case, although unsuccessful, has more than a scintilla of evidence to support it. To rule that Stafford's conduct during the January 30 meeting was in violation of the Act would essentially mean that an employer could never discuss with any employee what he considered his defense to be in an MSHA case.

The only possible protected activity in this case was the right of Mrs. Anderson to testify that there had not been a reduction in force. As stated above, Stafford did not interfere with this right prior to the MSHA investigation. Mrs. Anderson never did give a statement to the MSHA investigators. (Tr. 1381).

At the time her employment was terminated, nearly two weeks after the January 30 meeting, Mrs. Anderson was not preparing to testify nor had she previously testified adversly to Stafford's case. Accordingly, I conclude that Mrs. Anderson was not fired in retaliation for any protected activity. Therefore, Mrs. Anderson's complaint of discrimination should be dismissed.

REINSTATEMENT

At the time they filed their complaints the parties requested that they be reinstated to their former positions; however, at trial they waived that right.

CIVIL PENALTIES

In each of these cases the Secretary seeks a civil penalty of $4,000.00 against Stafford for the violation of Section 105(c) of the Act.

The credible evidence has been reviewed and the complaints of Stephen Smith and Thomas Smith are to be affirmed. The Act provides that any violation of the discrimination section shall "be subject to the provisions of section 108[4]/ and 110(a).[5]/ The statute authorizes the imposition of a penalty in an amount not to exceed $10,000. 30 U.S.C. 820(a). In assessing civil monetary penalties the Commission is to be guided by section 110(i)[6]/ of the Act.

Considering the pertinent statute and in view of the facts in the Stephen Smith and Tom Smith cases I deem a penalty of $2,000.00 to be an appropriate civil penalty in each case.

Based on the foregoing findings of fact and conclusions of law as stated above I enter the following:

ORDER

DOCKET NO. WEST 80-156-DM
STEPHEN SMITH

1. Complainant Stephen Smith was unlawfully discriminated against and discharged by Respondent for engaging in an activity protected under Section 105(c) of the Act, and his complaint of discrimination is sustained.

4/ 30 U.S.C. 818
5/ 30 U.S.C. 820(a)
6/ 30 U.S.C. 820(i)

2. Respondent is ordered to pay Stephen Smith the sum of $4,022.00 in back pay. Further, respondent is to pay interest on said back pay at the rate of 12 1/2% per annum. 7/

3. The employment record of Stephen Smith is to be completely expunged of all comments and references to the circumstances involved in his discharge.

4. A civil penalty of $2,000.00 is assessed against respondent for violating Section 105(c) of the Act.

DOCKET NO. WEST 80-165-DM
THOMAS SMITH

1. Complainant Thomas Smith was unlawfully discriminated against and discharged by respondent for engaging in an activity protected under Section 105(c) of the Act, and his complaint of discrimination is sustained.

2. Respondent is ordered to pay Thomas Smith the sum of $5,488.00 in back pay. Further, respondent is to pay interest on said back pay at the rate of 12 1/2% per annum.

3. The employment record of Thomas Smith is to be completely expunged of all comments and references to the circumstances involved in his discharge.

4. A civil penalty of $2,000.00 is assessed against respondent for violating Section 105(c) of the Act.

DOCKET NO. WEST 80-71-DM
DONALD HANSEN

The complaint of discrimination filed by Donald Hansen is dismissed.

7/ Interest rate used by Internal Revenue Service for underpayments and overpayments of tax, Rev Ruling 79-366 Cf. Cf. Florida Steel Corporation, 231 N.L.R.B. No. 117, 1977-78, CCH, N.L.R.B. Para 18,484; Bradley v. Belva Coal Company, WEVA 80-708-D April 1981.

DOCKET NO. WEST 80-155-DM
PATRICIA ANDERSON

The complaint of discrimination filed by Patricia Anderson is dismissed.

John J. Morris
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

SEP 24 1981

CONSOLIDATION COAL COMPANY, Contestant	:	Contest of Order
v.	:	Docket No. PENN 81-132-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Order No. 1043545 Laurel Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. PENN 81-156 A.C. No. 36-03298-03037
v.	:	Citation No. 1043455
CONSOLIDATION COAL COMPANY, Respondent	:	Laurel Mine

DECISION

Appearances: Jerry F. Palmer, Esq., Pittsburgh, Pennsylvania, for Consolidation Coal Company,
James P. Kilcoyne, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Secretary of Labor.

Before: Judge Melick

These consolidated cases are before me pursuant to sections 105(a) and 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," to contest an order of withdrawal issued to the Consolidation Coal Company (Consolidation) pursuant to section 104(b) of the Act (Order No. 1043545) and for review of a civil penalty proposed by the Mine Safety and Health Administration (MSHA) for that order and the section 104(a) citation underlying that order (Citation No. 1043455). 1/

1/ Section 104(a) of the Act provides as follows:
"If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this Act has violated this Act, or any mandatory health or safety standard,

An evidentiary hearing was held in Wheeling, West Virginia, on June 11, 1981.

The primary issue before me is whether Consolidation violated the regulatory standard at 30 C.F.R. § 75.403 as alleged in Citation No. 1043455, and, if so, whether that violation was abated within the period of time set forth in the citation. If it is found that the violation was not timely abated, a further issue is whether the period for abatement should have been extended. Finally, if it is found that there was a violation of the cited standard, a determination must be made as to the appropriate civil penalty to be assessed for that violation considering the criteria under section 110(i) of the Act.

The Citation

The citation at bar was issued by MSHA inspector Earl Miller to mine foreman Tom Hofrichter at 8:30 a.m. on March 19, 1981, and alleged as follows:

> Based on laboratory analysis by MSHA all four of the rock dust samples that were collected in a rock dust survey during a health and safety inspection on 2/4/81 in the south east mains section contain less than the required amount of incombustible materials. They were as follows, (1) D12+00 intake 24 percent, 1E1 intake 2+00 19 percent, 1F1 2+00 intake 20 percent, 1E1 intake 2+00 19 percent.

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fn. 1 (continued)
rule, order, or regulation promulgated pursuant to this Act, he shall with reasonable promptness, issue a citation to the operator. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation. The requirement for the issuance of a citation with reasonable promptness shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act."

Section 104(b) provides as follows:

"If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) a violation described in a citation issued pursuant to subsection (a) has not been totally abated within the period of time as originally fixed therein or subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, except those persons referred to in subsection (c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated."

The cited regulatory standard reads in relevant part as follows:

> Where rock dust is required to be applied, it shall be distributed upon the top, floor, and sides of all underground areas of a coal mine and maintained at such quantities that the incombustible content of the combined coal dust, rock dust, and other dust shall not be less than 65 percentum. * * *.

At hearing, MSHA inspector Charles Burk, Jr., testified concerning the regular inspection he performed at Consolidation's Laurel Mine on February 4, 1981, which eventually led to the issuance of the citation. During the course of that inspection, he performed a rock-dust survey in the Southeast Mains section. Following the MSHA band-sampling procedure, he collected four samples, one each from the No. 4 entry, the No. 5 entry, the No. 6 entry, and the No. 7 entry. Jeff Kozora, Consolidation's safety inspector for the Laurel Mine observed Burk collect these samples and offered no objection to the procedures followed.

There is no dispute that the areas cited were areas required to be rock dusted. Nor is there any dispute concerning the preservation of the samples collected by Burk, the chain of custody of those samples to the MSHA laboratory, or the laboratory procedures. The samples were found to have 24 percent, 19 percent, 20 percent, and 19 percent incombustible content, respectively. Accordingly, Citation No. 1043455 was issued for a violation of the standard at 30 C.F.R. § 75.403.

In its defense, Consolidation appeared to contend at hearing (but did not argue in its brief) that MSHA had failed to establish the reliability of its dust-sampling procedures. In particular, it alleged that Inspector Burk actually gathered a 1-3/4-inch sample of material from the mine floor, whereas MSHA procedures apparently call for a 1-inch sample. Since no actual measurements were taken by anyone when the samples were collected and since the operator's representative who was present when the samples were taken did not then object to the sampling, I find no factual basis for the contention. Even assuming that a 1-3/4-inch sample was indeed taken from the mine floor, Consolidation presented no evidence that the sample would have accordingly been tainted. Moreover, MSHA expert witness John Nagy testified without contradiction that even if a 1-3/4-inch sample had been collected that procedure would not have compromised the test objectives. Particularly because of Nagy's undisputed expertise, I accord his testimony great weight. Accordingly, I find that the testing procedures here followed were sufficiently reliable to have provided valid test results. I find that the incombustible content of the dust samples taken at the Nos. 4 through 7 entries was as reported in the MSHA laboratory analysis (MSHA Exh. 1), i.e., 24 percent, 19 percent, 20 percent, and 19 percent, respectively. Since this incombustible content is less than the 65 percentum required under the provisions of 30 C.F.R. § 75.403, I find that the violations have been proven as charged.

The Withdrawal Order

The section 104(b) withdrawal order issued by MSHA inspector Earl Miller on March 24, 1981, alleged as follows:

> The operator did not make a reasonable effort to rock dust the area in the south east mains section. Rock dust had been applied in the No. 4 and No. 5 entries; however, No. 6 and No. 7 entries had not been rock dusted. No men were observed dusting in the area at the time of the inspection.

Since Consolidation has admitted that at least 240 feet of the areas initially cited had not been rock dusted even as of March 24, 1981, when Inspector Miller issued the order at bar, it is clear that the violation had not been abated within the time specified in the citation, i.e., by 4 p.m. on March 20, 1980. The question before me then is whether the inspector acted reasonably in refusing to extend the time for abatement. The reasonableness of his actions must be determined on the basis of the facts confronting him at the time he issued the order. United States Steel Corporation, 7 IBMA 109 (1976). Thus, the facts confronting Inspector Miller at 10:15 a.m. on March 24, 1981, when he issued the order, must be examined.

In determining whether the period for abatement should have been extended by Inspector Miller at that time, the following factors should be considered: (1) the degree of danger that any extension would have caused to miners, (2) the diligence of the operator in attempting to meet the time originally set for abatement, and (3) the disruptive effect an extension would have had upon operating shifts. Consolidation Coal Company, BARB 76-143 (1976).

The overriding consideration in this regard is, of course, the degree of danger that any extension would have caused to miners. It is undisputed that previous testing had demonstrated that over one 24-hour period, 4,300 cubic feet of methane had been liberated from the Southeast Mains section and 9,700 cubic feet of methane had been liberated from the entire mine. In addition, at the time Miller issued the order at bar, at least seven miners were working in active sections not more than 200 feet from the cited area and where ignition sources admittedly existed. Miller also found serious violations which could have resulted in the accumulation of explosive hydrogen gases at the battery-charging station 250 feet from the cited area. It is not disputed that under the circumstances a fire or explosion in either of these active areas could have traveled to the No. 6 and No. 7 entries and could have been perpetuated and magnified by coal dust in these entries. Miller thus correctly concluded that a hazardous condition from the exposed coal dust existed as a result of Consolidation's failure to complete the rock dusting as required in the original citation and would have continued to expose at least seven miners working nearby to fatal injuries. Any extension of the abatement period would, therefore, have commensurately extended the miners' exposure to these hazards.

The second consideration is the diligence of the operator in attempting to meet the time originally set for abatement. It is undisputed that when the underlying citation was issued at 8:30 on the morning of March 19, 1981, mine foreman Tom Hofrichter agreed that the cited condition could be abated by 4 p.m. the following day, March 20, 1981, and, accordingly, Miller allowed that much time for abatement. It is further undisputed that the condition could have been abated by two men working one 8-hour shift. It was nevertheless established that Consolidation had failed to complete abatement nearly 5 days after the citation had been issued and was at that time doing nothing to further the abatement process. Moreover, at the time the order was issued, Consolidation could offer no extenuating circumstances or justification for its failure to have fully abated the condition. While the area which had not yet been rock dusted, was, according to the inspector, nearly half of the area originally cited, even assuming that the area only consisted of the 240 linear feet admitted by Consolidation, it was substantial in relation to the total area cited and is persuasive evidence that little effort was made to correct the condition. Accordingly, I conclude that Consolidation did not make a diligent effort to abate the condition within the time originally established.

A third factor to consider is the disruptive effect that an extension of abatement time would have upon operating shifts. Consolidation claims that work in the mine was indeed disrupted as a result of the order since the areas subject to the order served as a return for the left split of air and the section foreman was accordingly told not to set up for mining on that split of air. Presumably, however, the men were assigned to work elsewhere during the 4-1/4 hours needed to complete abatement. Consolidation also asserts that production was further disrupted because a few men from a working crew had to be diverted to complete abatement. While the argument is certainly entitled to credit for its audacity, I find no merit to a contention of disruption based on its own intentional or negligent failure to have completed abatement within the time required. Under the circumstances, I conclude that the issuance of the withdrawal order had only minimal effect on operating shifts. I observe moreover that termination of the order was further delayed by the fact that the operator's rock-dusting equipment in the cited section was admittedly not functioning and other equipment had to be brought in. In any event, I find that any adverse effect the order had is far outweighed by the other factors considered herein. I therefore conclude that Inspector Miller did not act unreasonably in not extending the time for abatement. Accordingly, Order of Withdrawal No. 1043545 was properly issued and is affirmed.

Appropriate Penalty

Under section 110(i) of the Act, the following criteria are to be considered in assessing a civil penalty: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator charged, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of

the operator in attempting to achieve rapid compliance after notification of the violation. The operator and the mine here at issue are large in size. There is no contention that any penalty that might be imposed would affect the operator's ability to continue in business. A computer printout summarizing the history of violations at the Laurel Mine indicates a significant number of violations over a recent 2-year period but only one previous violation of the standard cited in this case. I find that the operator is chargeable with simple negligence in failing to detect and correct a condition which it should have known existed in the cited entries. An area of a coal mine that has been rock dusted is plainly visible. I find, however, that the operator was grossly negligent in failing to abate the cited conditions within the time specified for abatement after it knew of the cited hazard and indeed failed to correct the condition for nearly 5 days. It is obvious within this framework that Consolidation failed to exercise good faith to achieve timely abatement and indeed did not achieve abatement until an order of withdrawal had been issued. The hazard of fire and explosion here was aggravated by the fact that it was allowed to continue to exist for such a long period of time. Based on the undisputed testimony of MSHA's expert witness, John Nagy, it is apparent that the conditions did pose a danger of serious injury or death to at least seven or eight miners. Considering all of these factors, I conclude that a penalty of $2,000 is appropriate.

ORDER

Citation No. 1043455 and Order No. 1043545 are hereby AFFIRMED. Consolidation Coal Company is ORDERED to pay a penalty of $2,000 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

CONSOLIDATION COAL COMPANY, Contestant	:	Contest of Citation
v.	:	Docket No. PENN 81-92-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Citation No. 845008
	:	Renton Mine

DECISION

Appearances: Jerry F. Palmer, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for Contestant;
David T. Bush, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Respondent.

Before: Judge Melick

This case is before me upon the notice of contest filed by the Consolidation Coal Company (Consol) under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," challenging the validity of a citation issued by the Mine Safety and Health Administration (MSHA) on February 2, 1981, under the provisions of section 104(d)(1) of the Act. 1/ In contesting the citation, Consol specifically alleges that: (1) there was no violation of the cited mandatory standard, and, even assuming that there was a violation, that, (2) the violation was not one that could significantly and substantially contribute to the cause and effect of a coal mine safety or health hazard, and (3) the violation was not due to the unwarrantable failure of the operator to comply with the standard. At the request of Consol, an evidentiary hearing was held in Pittsburgh, Pennsylvania.

1/ Section 104(d)(1) provides in relevant part as follows:
"If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation did not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act."

The citation at bar alleges a violation of the operator's ventilation plan under the mandatory standard at 30 C.F.R. § 75.316. That standard has been interpreted as requiring the operator to comply with the ventilation plan approved by the Secretary. Zeigler Coal Company, 4 IBMA 30 (1975), aff'd., 536 F.2d 398 (D.C. Cir. 1976). More specifically, the citation alleges as follows:

> The ventilation plan was not being complied with on the 6 East active working section in that a room located 101 feet directly inby station No. 9098 was driven in (mined) approximately 39 feet. No ventilation devices, mine curtain or tubing, was [sic] installed at the time of inspection to ventilate the face. Two sets of examination dates and initials was [sic] on the left rib: 1-31-81, J.K.; 02-01-81, D.F.

The operator's ventilation plan then in effect provided in part as follows: "Crosscut is normally provided at face before room or entry is abandoned. However, if crosscut is not or cannot be driven at face, line brattice will be installed." I find that these provisions of the ventilation plan have indeed been violated. 2/ The essential facts in this regard are not in dispute. At the time MSHA inspector Lloyd Swayne issued the subject citation at about 9:30 a.m. on February 2, 1981, the cited entry was approximately 39 feet deep. No crosscut had been cut at the face and no ventilation device was present in the entry. The face of the entry was admittedly not then a "working face" since all phases of the mining cycle had terminated there on January 30, 1981, during the 8 to 4 shift and no additional mining in that entry was contemplated for the immediate future. Section foreman Richard Walker explained that he had decided instead to cut through a crosscut adjacent to the mouth of the cited entry and to continue mining in another entry before returning to work in the cited entry. It is not disputed that brattice curtain had previously been installed in the cited entry as mining progressed and remained in place as late as 7 a.m. on the day the citation was issued. The brattice had subsequently been removed, however, by persons not identified.

Within this framework of undisputed evidence, it is clear that the cited entry had been temporarily abandoned on January 30, 1981, after having been penetrated to a depth of 39 feet but before a crosscut had been driven from its face. The section foreman decided to abandon that entry for a short time in favor of mining coal in an adjacent crosscut and nearby entry. It is also

2/ While MSHA alleges that Consol actually violated the provisions of Drawing No. 12 incorporated as part of that plan, I disagree. Drawing No. 12 is inapplicable on its face because it applies only when a double split of air is utilized. Here, it is admitted that only a single split of air was in effect. Moreover, I do not find that mining was progressing at the time the citation at bar was issued and I therefore do not find that the requirement set forth as part of Drawing No. 12 that "line brattice or tubing [be] advanced to 10 feet of face as mining progresses" is applicable hereto.

clear that under the cited provisions of the ventilation plan, line brattice was required under these circumstances to have been installed in the cited entry. Since brattice was admittedly not installed at the time the citation was issued, I find that the ventilation plan has been violated and that a violation of the cited standard has therefore been proven.

Whether that violation is "significant and substantial," however, depends on whether, based on the particular facts surrounding the violation, there existed a reasonable likelihood that the hazard contributed to would have resulted in an injury of a reasonably serious nature. Secretary of Labor v. Cement Division, National Gypsum Company, 3 FMSHRC 822 at 825 (1981). The test involves two considerations: the probability of resulting injury and the seriousness of the resulting injury. Inspector Swayne here concluded that the violation was "significant and substantial" because "it was evident that methane was accumulating" in the cited entry and because of the potential for nearby ignition sources. While Swayne had applied a different standard in reaching this conclusion, I find, based on a de novo analysis of the facts surrounding the violation, that it was nevertheless "significant and substantial" under the National Gypsum test.

In determining that "methane was accumulating," Inspector Swayne relied upon a methane test he performed in the cited entry at about 9:30 that morning showing a concentration of .3 percent methane and upon a determination that there was absolutely no movement of air in that entry. This evidence is not contradicted. The .3 percent methane then found was admittedly not of sufficient concentration to constitute an imminent danger of explosion or fire but, as Swayne pointed out, if that had accumulated to a concentration of 1 percent or more then an explosive concentration would have existed. While the records of daily inspections kept at the Renton Mine do show that with one exception no methane had been detected at the face of the subject entry from January 30, 1981, through 7:30 a.m. on February 2, 1981, the day the citation was issued, it is apparent from the testimony of Section Foreman Walker that during that same period line brattice was hung to within 15 feet of the face of that entry thereby providing ventilation to remove the methane from the face. When Swayne cited the condition at 9:20 on the morning of February 2, however, the brattice had been taken out leaving the entry without ventilation. Indeed, Swayne was unable to detect any movement of air at the face. The fact that Section Foreman Walker found more than the required ventilation at a point outby the cited entry is of little consequence since there was admittedly no ventilation in the entry itself where the methane was accumulating. Under the circumstances, I find that Swayne was correct in concluding that methane was accumulating in the cited entry.

Inspector Swayne further testified that before an explosion or fire could occur, in addition to an increase in the concentration of methane, an ignition source would also have to be present. He found that an energized roof-bolting machine working some 75 feet from the mouth of the cited entry was one such potential ignition source. He opined that the electrical cables to that machine could be severed by a roof fall or from the operation of the machine itself. He surmised that the bolting machine could also strike the ribs or tools on the

machine could jostle about, thereby creating sparks. This testimony is not disputed by the operator. Within this framework of evidence, I am convinced that when the citation at bar was issued there indeed existed a reasonable likelihood that the hazard contributed to would have resulted in an injury of a reasonably serious nature. Thus, the violation was "significant and substantial."

A determination must next be made as to whether the instant violation was the result of the "unwarrantable failure" of the operator to comply with the law. A violation is the result of "unwarrantable failure" if the violative condition is one which the operator knew or should have known existed or which the operator failed to correct through indifference or lack of reasonable care. Zeigler Coal Company, 7 IBMA 280 (1977). In this regard, I find first that the operator may be presumed to know the clear requirements of its own ventilation plan and that accordingly in this case it may be presumed that Consol knew that line brattice was required to have been maintained in the cited entry. This presumption is reinforced by the undisputed testimony that such brattice had existed in the cited entry in apparent compliance with the ventilation plan until at least 7:00 that morning when Foreman Walker made his onshift examination in the subject entry. This was only 2 and 1/2 hours before the citation was issued by Inspector Swayne. There is no evidence before me, however, regarding the circumstances under which that brattice came to be removed between 7 a.m. and 9:30 a.m. Foreman Walker testified that he did not authorize its removal and did not know who actually removed it. Under these circumstances, I cannot find that a responsible agent of the operator knew or should have known of the violative condition, i.e., the removal of the brattice. Accordingly, I find that the violation was not one which the operator knew of or should necessarily have known of and therefore the violation was not the result of the "unwarrantable failure" of the operator to comply with the law. The section 104(d)(1) citation at bar must be accordingly modified to a section 104(a) citation.

ORDER

Pursuant to section 105(d) of the Act, I hereby modify the Secretary's citation in the captioned case from one issued under section 104(d)(1) of the Act to a citation under section 104(a) of the Act and affirm the latter citation and the "significant and substantial" findings attendant therewith.

Gary Melick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 28, 1981

VICTOR McCOY,	:	COMPLAINT OF DISCHARGE,
Complainant	:	DISCRIMINATION, OR
v.	:	INTERFERENCE
	:	
CRESCENT COAL COMPANY,	:	Docket No. PIKE 77-71
Respondent	:	

DECISION

Appearances: Stephen A. Sanders, Esq. and Tony Oppegard, Esq., Appalachian Research and Defense Fund of Kentucky, Inc., Prestonsburg and Hazard, Kentucky, for Complainant;
Henry Stratton, Esq. and David Stratton, Esq., Stratton, May & Hays, Pikeville, Kentucky, for Respondent.

Before: Chief Administrative Law Judge Broderick

On May 10, 1977, Victor McCoy filed a Complaint of Discrimination against Crescent Coal Company under § 110(b) of the 1969 Coal Act, 30 U.S.C. § 820(b) (1976 and Supp. I 1977). McCoy claims he was discharged on April 22, 1977, for refusing to ride an unsafe belt line into Crescent's Mine 10C. According to Crescent, he voluntarily quit because of a general distaste for underground mining.

A hearing was held on April 21, 22, 24, and May 27, 1981, in Pikeville, Kentucky. 1/ Former miners at Mine 10C who testified for McCoy were Eddie Overstreet, Teddy Overstreet, Paul Bartley, Michael Church, Jesse Spears, William Ramey, and Victor McCoy, the Complainant. George Lowers, an inspector employed by the Mine Safety and Health Administration (MSHA) also testified for McCoy. Witnesses for Crescent were William Bevins, who was a foreman during part of McCoy's tenure and mine superintendent when he left, Dennis Ratliff, McCoy's last foreman, Jerry Anderson, mine mechanic, Herbert Mack Gibson, the purchasing agent, and miners Clifford Justice, Steve Hackney, Dale Ratliff, and Jeff Wright. Morris Scott, another miner, was called at my instance and was examined by both parties.

1/ This case has been assigned to three administrative law judges over the past four years. After it was assigned to me, Crescent's motion for a de novo hearing was granted on March 5, 1981. In this decision, I am considering only the evidence introduced since I took jurisdiction of the case.

Post-hearing briefs have been filed and, having considered them and the record as a whole, I make the following decision.

Statutory Provision

Section 110(b)(1) of the 1969 Coal Act reads,

> No person shall discharge or in any other way discriminate against or cause to be discharged or discriminated against any miner or any authorized representative of miners by reason of the fact that such miner or representative (A) has notified the Secretary or his authorized representative of any alleged violation or danger, (B) has filed, instituted, or caused to be filed or instituted any proceeding under this Act, or (C) has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this Act.

Findings of Fact

1. Crescent's Mine 10C was an underground coal mine located in Pike County, Kentucky. Coal was extracted from a low seam, the height of which varied from about 32 inches to about 40 inches.

2. The miners entered and left the mine in one of three ways. They rode to the face area in a battery-powered scoop, they walked 2/ along the belt line (miners rarely walked along the scoop entranceway), or they rode the belt line itself. Walking was very tiring and took 30 to 60 minutes, depending on a miner's size, physical fitness, and the mine conditions along the belt line. The belt line could carry a miner in a prone position into or out of the mine in less than 10 minutes. However, this was contrary to MSHA regulations. 30 C.F.R. § 75.1403-5. There were no lights along the belt line, miners riding it had no way to stop it and it passed through at least one area where the roof was only inches from the belt.

2/ The height of the coal of course made walking upright impossible. Crawling is probably a more accurate description of the locomotion involved.

3. Company policy at Crescent ostensibly prohibited miners from riding the belt line. Nevertheless, nearly all the miners, including supervisors, rode it on a regular basis, particularly when the scoop was inoperable, which was common. Company management knew or should have known this but never disciplined a miner for it nor threatened such discipline. In fact, management encouraged the miners to ride the belt. As a result, a miner who chose not to ride the belt line was at a disadvantage. He would enter and leave the mine later than his co-workers and considerably more exhausted from the walk.

4. McCoy, like the other miners, often rode the belt line at Mine 10C. But as time passed, he grew more apprehensive. On a number of occasions, he failed to jump properly from the moving belt and fell down. Once, he "froze" on the belt and had to be dragged off. He repeatedly told his foreman, William Bevins, that he was afraid to ride the belt line.

5. On April 22, 1977, shortly after the start of his shift, McCoy emerged from the mine to tell Dennis Ratliff, who had succeeded Bevins as his foremen, that he would not ride the belt line and that he would not walk in. Bevins, who had been promoted to mine superintendent, was summoned.

6. McCoy repeated to Bevins his refusal to ride or walk the belt line and asked him for another job. Bevins told McCoy that no other jobs were available. He did not insist that McCoy ride the belt line. Instead he told McCoy that he would either ride or walk in; it would make no difference since McCoy was paid on a portal-to-portal basis. McCoy then left the mine property.

Issues

1. Was McCoy discharged or in any other way discriminated against by Crescent?

2. If so, was it because of activity protected by § 110(b) of the 1969 Coal Act?

Discussion

Did McCoy Quit or was he Fired?

On April 22, 1977, Victor McCoy refused to ride the belt into Mine 10C and also refused to walk in via the belt-line. Exasperated, he asked William Bevins for another job. Bevins told him no other job was available and that he would have to either ride the belt or walk in. McCoy then left.

McCoy's quitting was equivalent to a discharge. Bevins testified that McCoy was automatically discharged when he refused to go to work. I find, therefore, that McCoy was actually discharged for refusing to work. Alternatively, for reasons which will appear below, I find that the evidence amply supports a finding that McCoy was constructively discharged.

Riding the Belt

There is no doubt that miners at Mine 10C rode the belt regularly, both into and out of the mine. Testimony to the contrary was simply not credible. Most of Crescent's witnesses admitted riding the belt, including William Bevins, who eventually became mine superintendent. If there was a company policy prohibiting it, it was not enforced. In fact, it was a policy kept in reserve to be followed when a mine inspector was present or expected.

The dangers of riding the belt are obvious. The belt line entranceway was unlighted and there were no reflectors to alert miners to their positions along the belt. The belt travelled through at least one location where the vertical clearance was barely sufficient for a miner to pass underneath. There were no accessible stop controls along the belt, so if a miner was unable to jump off, he would either be thrown into a crushing machine or off the end of the belt to a pile of coal about 70 feet below. It was not uncommon for miners to suffer various bruises and sprains in jumping from the belt. One miner was more seriously injured when his clothing became entangled in the rollers. It is clear and I find that miners who rode the belt were exposed to a real danger of serious injury.

For McCoy, riding the belt was particularly difficult. He was not as agile as the other miners and continually bruised himself jumping off the belt. He grew so apprehensive that one day he "froze" and had to be dragged from the belt or he would have dropped off the end.

Cases under § 110(b) of the Coal Act and the corresponding provision of the 1977 Mine Act have established the rule that a miner may not be fired for refusing to work under conditions he reasonably believes are unsafe or unhealthful. E.g., Phillips v. Interior Board, 500 F. 2d 772 (D.C. Cir. 1974); Secretary of Labor ex rel. Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (1980). Plainly, McCoy was entitled by statute to refuse to ride the belt.

Walking to the Face Area

McCoy's only practical alternative to riding the belt was to walk into and out of the mine, except on the infrequent occasions when the scoop was operable. He claims that walking the beltline was unsafe because of hazardous conditions, particularly near the entrance. Specifically, he states that there were areas of unsupported roof and electrical cables on the floor in wet areas. This aspect of his claim was not alluded to when McCoy filed his original claim (called an Application for Review of Discharge under the 1969 Coal Mine Act). Although the testimony is in conflict, I find that McCoy did not expressly complain to his supervisors of safety conditions related to the roof or floor of the beltline. I further find that he did not indicate to Respondent that he refused to walk the beltline because he thought it was unsafe. 3/

The crux of the matter, then, is whether McCoy was protected by the Act not only when he refused to ride the belt, but also when he refused to walk in. Ordinarily, a miner exercising the right to refuse to work must contemporaneously ground his refusal on a claim that he is exposed to hazardous conditions. Cf. Secretary of Labor ex rel. Duncan et al. v. T.K. Jessup, Inc., 3 FMSHRC 1880, 1883 (1981). In this case, however, McCoy's refusal to walk the beltline was protected because it was a grossly unreasonable alternative to riding the belt.

Substantially all the employees, including supervisors, regularly rode the belt in and out of the mine. Realistically, it was a condition of employment at Mine 10C. Although management did not specifically require the employees to ride the belt or specifically forbid them to walk, I find that it encouraged the former and discouraged the latter. For example, all the employees rode to and from the job site with the supervisor. On one occasion when McCoy walked from the mine outside, the truck had left the job site and he was required to get home on his own.

3/ A Federal inspector toured the mine on June 2, 1977, approximately six weeks after McCoy left. He issued notices and orders alleging various violations, including broken roof bolts and dislodged timber supports along the beltline, loose rock hanging down between bolts, and standing water on the beltline floor so that the bottom belt was running through water. There is evidence that the conditions found by the Inspector in June which resulted in closure orders were basically the same conditions which confronted McCoy in April.

It is not enough that the alternative work is safe. 4/ An unreasonable alternative is really no alternative at all. Cf. 29 C.F.R. § 1977.12(b)(2). The alternative which Crescent offered to riding the belt was so onerous and so disfavored by management that it was an unreasonable alternative to what I have found was a dangerous condition.

Conclusion

I find, therefore, that McCoy had a right under § 110(b) to refuse to ride the belt or walk into the mine on April 22, 1977.

I do not decide that a miner who properly exercises a right to refuse to work is entitled to other work equivalent or even comparable to the job he refuses. However, the miner is entitled to have management investigate and correct the problem so that he may resume his regular duties. Management may not simply ignore his concerns and permanently relegate him to less desirable tasks as a condition to honoring his refusal to perform hazardous work. The miner is protected by § 110(b) when he refuses to accept such an arrangement. Had I concluded that McCoy resigned rather than was fired, therefore, the resignation would amount to a constructive discharge under the facts presented in this case.

Conclusions of law

1. I have jurisdiction over the parties and subject matter of this proceeding. Respondent was subject at all times pertinent to this proceeding to the provisions of the Federal Coal Mine Safety Act of 1969, and Complainant was a miner protected under that Act.

2. Complainant Victor McCoy was discharged by Respondent on April 22, 1977, for refusing to work. The discharge violated § 110(b) of the Coal Mine Safety Act of 1969.

Order

1. Crescent Coal Company shall offer reinstatement to McCoy in the position from which he was discharged at the rate of pay fixed for that position on the date of reinstatement.

4/ I do not find it necessary to decide whether walking into the mine on April 22, 1977, was safe or unsafe.

2. Crescent Coal Company shall pay to McCoy back pay covering the period from April 22, 1977, until the day he is offered reinstatement. Back pay shall be computed on a quarterly basis and, for each calendar quarter, equals the gross pay McCoy would have received minus interim earnings. Crescent shall deduct from the back pay award the amounts required by state or Federal law. Interest on the net back pay award shall be computed at a rate of 7% for the period April 22, 1977, through January 31, 1978, 6% for the period February 1, 1978, through January 31, 1980, and 12% for the period thereafter. 5/

3. Crescent Coal Company shall pay a reasonable attorney's fee for services rendered by counsel for McCoy.

4. Upon being notified that the decision in this case has become a final order of the Commission, the Secretary of Labor shall institute proceedings to assess a civil penalty against Crescent Coal Company for the violation found herein.

5. Counsel for the parties shall advise me in writing by October 15, 1981, whether they have agreed on the amounts due under paragraphs 2 and 3 of this order. If so, they shall submit those amounts. If not, further proceedings will be necessary. For the purpose of determining the proper award, I will retain jurisdiction of this case.

James A. Broderick

James A. Broderick
Chief Administrative Law Judge

Distribution: Next page.

5/ These figures are based on the adjusted prime rates used by the Internal Revenue Service for underpayments and overpayments of tax. The NLRB also uses these figures to compute interest on back pay awards. Florida Steel Corp., 231 N.L.R.B. No. 117, 1977-78 CCH NLRB ¶ 18,484. Appropriate formulae for computation of interest payments are found at 3 NLRB CASEHANDLING MANUAL, § 10623, et seq. (1977).

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SEP 28 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. CENT 81-111-M A.O. No. 16-00246-05019F
v.	:	Belle Isle Mine
CARGILL, INCORPORATED, Respondent	:	

DECISION AND ORDER APPROVING SETTLEMENT

Statement of the Case

This is a civil penalty proceeding initiated by the petitioner against the respondent through the filing of a proposal for assessment of a civil penalty pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking a civil penalty assessment for 14 alleged violations of mandatory safety standards.

Respondent tiled a timely answer and the matter was scheduled for hearing in Franklin, Louisiana on October 6, 1981. However, by motion filed September 14, 1981, petitioner seeks approval of a proposed settlement negotiated by the parties. The citations, initial assessments, and the proposed settlement amounts are as follows:

Citation No.	Date	30 CFR Standard	Assessment	Settlement
082224	5/1/80	57.4-51	$ 6,000	$ 2,000
082226	5/1/80	57.20-30	8,000	3,000
0565746	5/1/80	57.5-2	8,000	8,000
0566594	5/1/80	57.12-3	2,500	2,500
0566596	5/1/80	57.12-3	5,000	5,000
0566597	5/1/80	57.12-3	5,000	3,000
0566598	5/1/80	57.12-3	6,500	3,000
0566599	5/1/80	57.12-3	5,500	3,000
0566600	5/1/80	57.12-3	6,000	3,000
0566601	5/1/80	57.12-18	6,000	2,000
0566605	5/1/80	57.12-3	5,500	3,000
0566606	5/1/80	57.12-30	5,000	5,000
0566607	5/1/80	57.12-8	300	300
0566609	5/1/80	57.12-30	8,000	8,000
			$ 77,300	$ 50,800

Discussion

The citations in this matter arise out of an investigation by MSHA of a mine explosion that occurred at the Belle Isle Mine operated by Cargill, Inc., near Franklin, St. Mary Parish, Louisiana, on June 8, 1979. At the time of the explosion, 22 persons were in the mine, seventeen of the miners were rescued and five died as a result of the explosion.

Pursuant to an investigation, the Secretary issued 90 citations together with its final report on May 1, 1980. Of these citations, 76 were settled at the conference level for a total of $29,233. Pursuant to settlement negotiations, respondent offered a $50,800 penalty payment for the remaining 14 citations. Petitioner's settlement proposal has taken this amount offered by respondent and allocated it among the various citations. Petitioner states that its allocations have been approved by the inspectors who issued the original citations.

Petitioner points out that seven citations were issued for a violation of 30 CFR § 57.12-3, and two of these citations have been settled for the full amount of the assessment. The remaining citations have been allocated penalties of $3,000 each. Petitioner points out that each violation involved a similar electrical condition, i.e., the cables were not protected against overcurrents caused by short-circuits or overloads. The gravity is extremely high because as petitioner asserts, each violation could have been the ignition source which caused the explosion. The reduced penalty reflects respondent's argument that overload protection was provided for the trailing cables while confirming MSHA's authority to issue a citation for each occurrence of a violation.

Citation 082224 alleged that a fire alram system was not provided to warn all underground employees. Petitioner asserts that an assessment of $2,000 is appropriate for this citation because of the respondent's exceptional good faith abatement. By installing an extensive audio and visual system, respondent has substantially improved the safety conditions which existed prior to the disaster.

Citation No. 082226 was issued because the inspector found that on June 8, 1979, the men had not been removed from the area where blasting was taking place even though on numerous occasions dangerous accumulations of flammable gas had been encountered through the mine. Petitioner asserts that since primary and bench blasting is now done with miners out of the mine, a $3,000 settlement is appropriate.

Citation No. 0566601 alleged that certain circuit equipment was not appropriately labeled to indicate the location of the circuits they were supplying. Petitioner states that a $2,000 penalty is appropriate since this condition did not contribute to the explosion.

The remaining four citations were allocated an amount equal to their original assessment. In further support of its settlement motion, petitioner has submitted respondent's history of prior violations and asserts that the proposed settlement is a reasonable and adequate resolution of the citations and penalties in issue.

Conclusion

After careful review and consideration of the pleadings, arguments and information of record in support of the motion to approve the proposed settlement, I conclude and find that is reasonable and in the public interest. Accordingly, pursuant to 29 C.F.R. 2700.30, the motion is GRANTED and the settlement is APPROVED.

ORDER

Respondent IS ORDERED to pay civil penalties in the settlement amounts above in satisfaction of the citations in question within thirty (30) days of the date of this decision and order, and upon receipt of payment by the petitioner, this proceeding is DISMISSED.

George A. Koutras
Administrative Law Judge

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SEP 28 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. LAKE 81-27-M
	:	A.C. No. 20-00418-05010F
v.	:	
	:	Empire Mine
CLEVELAND CLIFFS IRON COMPANY, Respondent	:	
UNITED STEELWORKERS OF AMERICA, Intervenor	:	

DECISION

Appearances: Gerald A. Hudson, Esq., Office of the Solicitor, U.S. Department of Labor, Detroit, Michigan, for the Petitioner;
Ronald E. Greenlee, Esq., Clancey, Hansen, Chilman, Graybill & Greenlee, P.C., Ishpeming, Michigan, for the Respondent;
Ernest Ronn, Marquette, Michigan, for the Intervenor.

Before: Judge Melick

This case is before me upon a petition for assessment of civil penalty under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act." The Secretary proposes a penalty for an alleged violation of the mandatory safety standard at 30 C.F.R. § 55.9-54, charging that the Cleveland Cliffs Iron Company (Cleveland Cliffs) failed to provide an adequate berm to prevent the overtravel and overturning of a haulage truck at the Empire Mine's south waste-rock dump. The general issues in this case are, of course, whether Cleveland Cliffs violated the cited standard and, if so, the appropriate civil penalty to be assessed for the violation. Hearings in this case were held in Marquette, Michigan, commencing June 30, 1981.

I. The Alleged Violation

The citation at bar specifically alleges as follows:

> The berm provided at the dumping location (south waste rock dump) site 25.5, was not adequate to prevent overtravel

of truck No. 3415. Berm heights measured on the day of the accident using a Stanley 6-foot tape measure were 18 to 40 inches. Mid-axel [sic] height of a similar model truck was measured with a 12-foot Lufkin steel tape, 48 inches. The berm shall be improved after removal of the truck at the toe of the dump slope and before resuming dumping operations.

The cited standard, 30 C.F.R. § 55.9-54, provides as follows: "Mandatory. Berms, bumper blocks, safety hooks, or similar means shall be provided to prevent overtravel and overturning at dumping locations."

The essential facts are not in dispute. On January 22, 1980, the deceased, Michael Bianchi, had been assigned as a temporary driver on an 85-ton WABCO haulage truck at the Empire open pit iron mine. Bianchi was killed when he jumped to escape from his truck as it flipped over and slid to the bottom of a 200-foot slope at the Empire Mine south waste dump. According to the undisputed evidence, the incident occurred at around 10:10 that morning as Bianchi was backing a truckload of waste rock in preparation for dumping at the slope. In spite of efforts by a nearby bulldozer operator to signal Bianchi to stop, the truck rode up onto the berm adjacent to the slope. The berm gave way and the truck flipped over and slid to the bottom of the slope. The berm adjacent to where the truck passed through was variously estimated to have been from about 12 to 30 inches high on the right (facing the slope) and from 34 to 42 inches on the left. It was constructed of boulders up to 2 and 1/2 feet in diameter, sand and crushed stone.

Since Cleveland Cliffs concedes that the berm provided at the south waste-rock dumping location at its Empire Mine was indeed not adequate to have prevented the overtravel and overturning of the subject haulage truck (and since no bumper blocks, safety hooks, or other similar means were here utilized to prevent overtravel and overturning), it is apparent that the violation is proven as charged.

By way of attempted defense, Cleveland Cliffs presents a variety of specious arguments. It first suggests that the standard does not apply to vehicles under power. In other words, the berm need only be sufficient to prevent the overtravel and overturning of parked or coasting vehicles. There is absolutely no basis for reading such an exclusion into the plain language of the standard and it is accordingly rejected. The operator next contends that the phrase "to prevent overtravel and overturning," as used in the cited standard, should be deemed essentially superfluous since the real purpose of berms and other restraining devices is not to prevent overtravel or overturning per se but only to warn drivers of the need to apply their brakes. It is a cardinal rule of construction, however, that a statute or regulation should be construed to give effect to all its provisions, so that no part will be inoperative or superfluous. Zeigler Coal Company v. Kleppe, 536 F.2d 398 (D.C. Cir. 1976). Within the framework of this rule, I find that I must give operative effect to the phrase "to prevent overtravel and overturning" as used in the cited standard. Respondent's argument is accordingly rejected.

Cleveland Cliffs next argues that even assuming the cited berm was deficient under the standard, it was nevertheless in "substantial compliance" with MSHA's "guidelines." MSHA's enforcement guidelines for the standard at bar, which were apparently furnished to the operator sometime before the citation herein, read as follows:

> APPLICATION: Use axle height as a guideline if the truck is able to dump. A somewhat lower berm or block will be acceptable if it is needed to clear tail lights, etc.

The operator argues that it was in substantial compliance with these guidelines, and that MSHA should accordingly be estopped from enforcing the more stringent language of the standard itself. However, following Supreme Court precedent, the Commission held in Secretary v. King Knob Coal Company, Inc., 3 FMSHRC (1981), that the doctrine of "equitable estoppel," such as the operator is attempting to invoke herein, cannot be applied against the Federal Government, i.e., MSHA. The Commission further noted in that decision that MSHA's guidelines do not have any binding effect.

In any event, I do not find on the facts of this case that Cleveland Cliffs complied in any way with even MSHA's less stringent "guideline" that the berm need only be axle height. On the same morning as the fatal accident, MSHA supervisory engineer William Carlson measured the height of the berm adjacent to where the subject truck had passed through. He estimated it to be 18 inches high on the right side (facing the slope) at a horizontal distance of 8 inches from the tire tracks and 40 inches high at a corresponding position to the left of the tire tracks. Carlson opined that his measurements could even have been overestimated by as much as 6 inches. I find these conservative measurements to have been the most reliable since they were made in close time proximity to the accident, were made with a tape measure, and were made in the presence of Cleveland Cliffs officials who voiced no objection to the measurement procedures. I observe, moreover, that company safety coordinator, James Tonkin, estimated without taking any measurement that the berm to the right of the tire tracks was only 30 inches high and that mine superintendent Roger Solberg admitted that the berm on the left side was only 42 inches high. Within this framework of evidence, it is clear that, even assuming the axle height of the truck at issue was only 46 inches as represented by the operator, the subject berm was in any case not of sufficient height to meet even MSHA's more liberal "guideline." I note, moreover, that Tonkin testified that larger 120-ton trucks having an even greater axle height were also using the dump at issue, therefore also in clear violation of the "guidelines." The operator's third argument is for these additional reasons clearly unsupportable.

Respondent next argues that the use of a bulldozer operator signalling from inside his closed cab was equivalent to using a "spotter" to direct the trucks backing at the dump site and constituted a means "similar" to berms, bumper blocks, and safety hooks within the meaning of the cited standard. Under the rule of ejusdem generis, however, general language in a regulation which follows a specific designation of a particular class of items is to be

given a meaning restricted by that specific designation and will include only things of the same kind, class, character, or nature to those specifically enumerated. Association of Bituminous Contractors, Inc. v. Andrus, 581 F.2d 853 (D.C. Cir. 1978); General Electric Company v. OSHRC, 583 F.2d 66 (2d. Cir. 1978). Applying this rule of construction, it is clear that a person designated as a "spotter" is not of the same nature or character as physical restraints such as berms, bumper blocks, and safety hooks and therefore does not come within the general language "or other similar means" as used in the cited standard. The operator's argument herein is accordingly rejected. Inasmuch as the use of the so-called spotter herein did not prevent the subject truck from overtraveling and overturning, it is clear that a violation of the cited standard would in any event have existed. Indeed, there was obvious confusion over the proper signal to be used to stop a backing truck. One witness thought the bulldozer operator signalled by raising his blade and backing up while another thought it was by shaking the head or waving the hand.

Finally, Cleveland Cliffs appears to argue that the cited standard is so vague that it denies constitutional due process of law. When the contention is analyzed, however, it is apparent that the challenged vagueness is directed not to the regulatory standard itself but only to the MSHA "guidelines" and to MSHA's enforcement practices. Inasmuch as I am not here called upon to determine whether an MSHA guideline or enforcement practice has been violated, the argument is, of course, without any relevance.

II. The Amount of Penalty

In determining the amount of civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) the effect on the operator's ability to continue in business, (4) whether the operator was negligent, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

The operator here is large in size but appears to have had only a moderate history of violations. However, in the year preceding this incident, the Empire Mine had been twice cited for insufficient berms. This factor is particularly significant in finding the operator negligent in this case for in spite of this past history, the bulldozer operator in charge of constructing berms at the south waste-rock dump on the day of this fatal accident had received no management instruction regarding the sufficiency of the berms. Indeed, the undisputed evidence shows that he had been relying on the advice of another employee that berms only 3 feet in height were sufficient--a height which did not even meet the criteria, allegedly relied upon by the operator, under MSHA's more liberal enforcement guidelines. Its negligence is further highlighted by the existence of the obvious hazard presented by the 200-foot drop-off at the south waste-rock dump. Under the circumstances,

I find that Cleveland Cliffs was indeed negligent in failing to maintain an adequate berm. The high gravity of the violation is obvious in that it resulted in the tragic death of truck driver Michael Bianchi. Abatement was achieved in this case by the construction of an 84-inch berm. There is no dispute that the operator did demonstrate good faith in achieving rapid abatement. There is no evidence that the penalty here imposed would have any effect on the operator's ability to continue in business. Considering these factors, I find that a penalty of $8,000 is appropriate.

ORDER

The Cleveland Cliffs Iron Company is ORDERED to pay a penalty of $8,000 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge

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SEP 28 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. SE 81-24-M A.O. No. 09-00265-05005
v.	:	Junction City Mine
BROWN BROTHERS SAND COMPANY, Respondent	:	

DECISION

Appearances: Ken Welsch, Trial Attorney, U.S. Department of Labor, Atlanta, Georgia, for the petitioner; Carl W. Brown and Steven Brown, pro se, for the respondent.

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding initiated by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking a civil penalty assessment for one alleged violation of the mandatory safety standard 30 CFR 56.12-23. Respondent filed a timely answer and notice of contest, and a hearing was convened in Columbus, Georgia, on August 31, 1981. The parties appeared and participated fully therein, and they waived the filing of posthearing proposed findings and conclusions. However, I have considered the arguments advanced by the parties in support of their respective cases during the course of the hearing in this matter.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. § 801 et seq.

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

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

Discussion

Citation No. 090842, November 5, 1980, cites a violation of 30 CFR 56.12-23, and states as follows:

> The connections to the slip rings of the dredge pump drive motor were not guarded. The guard had been left off and the energized components were readily accessable (sic) to the dredge operator.

Testimony and Evidence Adduced by the Petitioner

The citation in question in this case was issued by MSHA Inspector Thomas W. Hubbard, after inspection of the subject mine on November 5, 1980. Mr. Hubbard has since been permanently transferred to California, and to preclude the expense and logistical costs incurred in bringing him to the hearing, petitioner's counsel file a motion pursuant to the Commissions Rules, and the appropriate provisions of the Federal Rules of Civil Procedure, to permit the telephone deposition of Mr. Hubbard and for leave to introduce the deposition at the hearing in lieu of his "live" testimony. The motion was granted, and by Order issued by me on August 6, 1981, petitioner was permitted to take the inspector's deposition. Respondent was afforded a full opportunity to participate in the taking of the deposition, including the right to question and cross-examine the inspector. As a matter of fact, petitioner's counsel arranged for a conference call which would have permitted the respondent to participate in the taking of the deposition without the necessity of his leaving his own mine office and at no travel or other expense to him. However, respondent refused to participate or otherwise cooperate in the taking of the deposition and insisted that MSHA produce the inspector.

Mr. Hubbard's sworn deposition was produced and offered in evidence by the petitioner at the hearing and it was received in evidence and is a part of the record (Tr. 13). Respondent refused to make any comments regarding the deposition, and although given a copy and a full opportunity to refute the testimony, he refused to do so.

In addition to the deposition of Mr. Hubbard, petitioner presented testimony by Supervisory Inspector Reino Mattson and Electrical Inspector Russell Morris. Although Mr. Mattson was not with Inspector Hubbard when he inspected the mine site on November 5, 1980, he has inspected the mine on previous occasions and is familiar with the respondent's operations, and has some knowledge of the cited dredge pump motor. Although Mr. Morris is from another MSHA subdistrict office, he is a qualified electrical inspector and testified as to motors which are similar to the one which was cited.

Corrections to Deposition

At page 7 of Inspector Hubbard's deposition, the respondent Carl Brown is identified as Paul Brown. This is an obvious typographical

error made at the time the deposition was transcribed and the parties obviously recognized it as such.

Respondent's Testimony and Evidence

Although given a full opportunity to present testimony and evidence in his defense, respondent refused to testify or to cross-examine Mr. Mattson or Mr. Morris. He also refused to offer any statements to refute the matters testified to by Inspector Hubbard in his sworn deposition. However, respondent did offer four photographs of the cited dredge pump motor (exhibits R-1 through R-4).

Respondent conceded that the motor in question was unguarded on November 5, 1980, when the citation was issued by Inspector Hubbard. However, he contended that since the motor had been operated for some 30 years with no one being injured, the fact that the protective screen guard had been removed on November 5th did not render it hazardous. Respondent did concede that the motor was initially guarded with a heavy wire mesh guard which had been fabricated at the mine and installed sometime prior to the inspection of November 5th. The guard had been installed at the insistence of another MSHA inspector who advised him that it was required. Since the respondent complied no guarding citation was issued during this previous inspection.

Findings and Conclusions

Fact of Violation

Respondent does not dispute the fact that the cited dredge motor was in fact unguarded on November 5, 1980. Nor does he dispute the fact that the wire mesh screen which served to guard the motor in question had been removed from the motor and not replaced at the time Inspector Hubbard observed the condition cited (Tr. 61-62). Aside from the fact that respondent does not believe that the unguarded motor posed any hazard, his sole defense to the citation is his belief that the inspector was "nit picking", and unwarranted and ill-advised personal attacks as to the inspector's motives. As far as I am concerned, respondent Carl Brown has been treated more than fairly and objectively by the inspectors. He obviously is not too enchanted with any attempts to regulate his mining activity and this fact is attested to by the voluminous letters he has written over the past year or so expressing his views concerning mine safety and health enforcement.

Mandatory safety standard 56.12-23, provides as follows:

> Electrical connections and resistor grids that are difficult or impractical to insulate shall be guarded, unless protection is provided by location.

On the facts and evidence presented in this case, I conclude and find that the exposed motor area cited by Inspector Hubbard was required to be guarded. The question as to the degree of hazard involved when it is not guarded is a matter which goes to the gravity of the violation and may not serve as an absolute defense to the citation, unless the respondent can show that the motor was "protected by location". On the facts presented in this case, I cannot conclude that the respondent has established that the motor was guarded by location. The evidence adduced reflects that the motor was in an area where at least one workman was present on the dredge, and that it was in close proximity to several walkways. Further, since the respondent previously fabricated a guard and installed it on the motor, an inference may be drawn that he agreed that the motor required some protective device such as a wire mesh guard. Only after respondent was cited by Inspector Hubbard, which exposed him to an assessment of a civil monetary fine, did respondent assert that the requirements for a guard was "nit-picking".

I conclude and find that petitioner has established the fact of violation by a preponderance of the evidence adduced in this case, and the citation issued by Inspector Hubbard is AFFIRMED.

Negligence

I conclude that the conditions cited in the citation issued in this case resulted from the respondent's failure to exercise reasonable care and that this constitutes ordinary negligence.

Gravity

I find that the citation in question is serious. Although the possibility of someone coming into contact with the unprotected electrical motor parts was somewhat remote, the proximity of the unguarded motor to an area where a person could readily pass by and come in contact with the motor posed a potential hazard.

Good faith compliance

Compliance was achieved by fabricating another guard and installing it on the exposed motor the same day the citation issued (pg. 10, Hubbard deposition). I find that respondent exercised rapid compliance in achieving abatement of the cited condition, and this is reflected in the penalty assessment.

History of prior violations

Petitioner's counsel offered a computer print-out listing two prior citations of section 30 CFR 56.12-8; issued on May 1, 1979, for which civil penalties in the amount of $168 were paid. However, the computer print-out is obviously erroneous since it shows Engelhard Minerals and Chemicals Corporation at the mine "controller", and the "Junction City Mine"

as the mine for which the citations are charged. Under the circumstances, I rejected the offered computer print-out as evidence of the respondent's history of prior violations (Tr. 5-6). However, I will take official notice of my prior decision in MSHA v. Brown Brothers Sand Co., Docket SE 80-124-M, May 1, 1980, where I assessed a civil penalty for a previous violation issued on June 26, 1980, as well as decisions rendered by Judge Cook where he assessed civil penalties against this same respondent for three citations issued November 20, 1978, May 1, 1979, and November 27, 1979, (Dockets BARB 79-312-M, SE 79-90-M, and SE 80-58-M, March 30, 1981).

Respondent's history of prior citations, as reflected in the aforementioned prior decisions, is not such as to warrant any additional increases in the civil penalty assessed by for the citation which I have affirmed in this case.

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

Petitioner concedes that the respondent is a small family owned mining operation and I conclude and find that this is the case. With regard to the effect of the civil penalty assessed in this case on the respondent's ability to continue in business, there is no evidence that respondent is adversely affected by the payment of the penalty in question. I conclude that payment of the penalty will not cause the respondent to cease his mining business.

ORDER

In view of the foregoing findings and conclusions, including consideration of the requirements of section 110(i) of the Act, I conclude that a civil penalty in the amount of fifty-dollars ($50) is reasonable for the citation issued in this case, No. 090842, November 5, 1980, 30 CFR 56.12-23, and Respondent IS ORDERED to pay the penalty assessed within thirty (30) days of the date of this decision and order, and upon receipt of payment by the petitioner, this proceeding is DISMISSED.

George A. Koutras
Administrative Law Judge

Distribution:

Carl W. Brown, Brown Brothers Sand Co., Box 32, Howard, GA 31039 (Certified Mail)

Ken Welsch, Esq., U.S. Department of Labor, Office of the Solicitor, 1371 Peachtree St., NE, Rm. 339, Atlanta, GA 30367 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SEP 28 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of RICHARD A. FLEMING, Complainant	:	Complaint of Discharge, Discrimination, or Interference
	:	Docket No. VA 81-16-D
	:	No. 1 Mine
v.	:	
D & J COAL COMPANY, INC., Respondent	:	

DECISION

Appearances: Barbara Krause Kaufmann, Attorney, Office of the Solicitor, U.S. Department of Labor, for Complainant;
James E. Arrington, Jr., Esq., and Gregory R. Herrell, Esq., Browning, Morefield, Schelin, and Arrington, P.C., Lebanon, Virginia, for Respondent.

Before: Administrative Law Judge Steffey

Pursuant to an order issued March 4, 1981, a hearing in the above-entitled proceeding was held on April 28, 1981, in Richlands, Virginia, under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2).

Completion of Record

At the conclusion of the hearing, counsel for both complainant and respondent stated that they had intended to present one additional witness in support of their respective cases, but were unable to do so because the two witnesses had failed to appear at the hearing (Tr. 259). Counsel stated that they would like to have the record remain open until such time as they could determine whether they would like to present the testimony of the two remaining witnesses in the form of depositions. It was agreed that counsel would notify me by May 15, 1981, as to whether they would depose the two witnesses. Counsel for complainant filed a letter on May 8, 1981, in which she stated that depositions would not be taken by counsel for either party.

I indicated at the hearing that my decision would show whether the record had been expanded by receipt of the depositions. Inasmuch as the parties decided not to take the depositions, the record in this proceeding is closed and consists of the three exhibits received in evidence at the hearing and the 266 pages of transcript comprising the testimony of the witnesses presented at the hearing on April 28, 1981.

Counsel for complainant filed her brief on July 7, 1981, and counsel for respondent filed their reply brief on July 24, 1981.

Issues

Although complainant's brief and respondent's reply brief express their statements of the issues in somewhat different language, the two main issues in this proceeding may be expressed as set forth on page 2 of complainant's brief:

1. Was complainant, Richard Fleming, engaged in protected activities within the meaning of the Act?

2. Was complainant discharged by respondent because he engaged in protected activities?

Complainant's brief (p. 3) also raises a third issue, that is, the amount of civil penalty which should be assessed, assuming that a violation of section 105(c)(1) of the Act is found to have occurred. Since my decision finds that no violation of section 105(c)(1) was proven, it is not necessary for me to consider the issues with respect to assessment of a civil penalty.

Findings of Fact

My decision in this proceeding will be based on the findings of fact set forth below. My findings include all the facts proposed by the parties in their briefs to the extent that the proposed findings are correct. There are some rather egregious errors in complainant's proposed findings of fact. Those errors will hereinafter be discussed in this decision under the heading of "Consideration of the Parties' Arguments".

1. D & J Coal Company, Inc., the respondent in this proceeding, operated its No. 1 Mine for a period of about 3-1/2 years before the mine was closed on March 24, 1981. The mine was closed after respondent encountered large amounts of rock which made production of coal uneconomic. During the last 3 months of active mining from January 1981 through March 24, 1981 the mine suffered operating losses totaling $59,433 (Exh. A; Tr. 240).

2. D & J Coal Company on June 27, 1980, at the time the unlawful discharge alleged in this proceeding occurred, was owned by three individuals named Carmel Deel, O'Dell Deel, and Verlin Deel, each of whom owned a one-third interest. Some time after June 27, 1980, O'Dell Deel and Carmel Deel, who are brothers, purchased the one-third interest owned by Verlin Deel. Therefore, at the time the No. 1 Mine was closed, Carmel Deel and O'Dell Deel each owned a one-half interest in the corporation (Tr. 238-239). Verlin Deel is not related to either O'Dell or Carmel Deel (Tr. 152; 173).

3. At the time of the hearing held on April 28, 1981, Carmel and O'Dell Deel were trying to find a location where a new mine could be opened, but none had been found at that time. They are not planning to open the new mine under the name of D & J Coal Company and they do not plan to reopen the No. 1 Mine. They estimate that their liabilities are equal to their assets, but they still owe for equipment and have been able to obtain an extension on their obligation to make payments while they are seeking to find a location

for a new mine. No one is drawing a salary or wages at the present time (Tr. 242). During the last 3 months of the company's operations, the two owners received a salary of $75 per day and the mine foreman, Charles Quinley, received a salary of $115 per day (Tr. 256).

4. Respondent's profit and loss statement shows that it also owes civil penalties in the amount of $2,319 which it is unable to pay at the present time (Tr. 257). Respondent has asked MSHA for an extension of time within which to pay the civil penalties and Carmel Deel testified at the hearing that if an adverse ruling should be made against respondent in this proceeding, that he would have to ask for permission to postpone payment of any back wages awarded to complainant until such time as a new mine can be opened so as to produce a business which would have an income from which back wages could be paid (Tr. 253).

5. The complainant in this proceeding, Richard A. Fleming, began working at respondent's No. 1 Mine in November 1979 as helper for the operator of the roof-bolting machine. After about a week, a new employee was hired and was given the position of helper for the operator of the roof-bolting machine. At that time, complainant was assigned to the position of general inside laborer whose job consisted primarily of hanging ventilation curtains and applying rock dust to the mine floor and ribs. Complainant stated that he was told that he would be allowed to rotate as helper for the operator of the roof-bolting machine until the new employee and complainant had each learned to operate the roof-bolting machine. Complainant alleges, however, that he was thereafter permitted to perform only the duties of a general inside laborer and was given no opportunity to learn to operate the roof-bolting machine(Tr. 9).

6. During the portion of complainant's employment beginning in November 1979 and extending to the end of December 1979, complainant took 2 days off after calling respondent's management to report that he would not be at work on those days. In January 1980 respondent took off a third day to attend to some personal business and failed to call respondent's management in advance. Respondent's management called complainant's aunt and advised her that complainant had been discharged for not reporting to work. When complainant learned from his aunt that he had been discharged, he called one of respondent's owners, O'Dell Deel, and explained why he had not reported for work. O'Dell told complainant to report to work the next day and explain the reason for his absence from work on the previous day to the mine foreman, Charles Quinley, and another of the owners, Verlin Deel, who worked at the mine as a scoop operator. O'Dell said that if those two men were willing to reinstate complainant, it was satisfactory with him. Complainant reported for work and Charles Quinley and Verlin agreed to allow complainant to continue working at the No. 1 Mine (Tr. 9-10; 57; 97; 114; 144; 245).

7. Complainant continued to work, after the first reinstatement, as a general inside laborer. The helper to the operator of the roof-bolting machine left and another person was hired to take his place. Complainant asked management to let him become the helper the next time that position became available. Soon thereafter, the helper's position again became open and in February 1980 complainant was allowed to assume the position of helper

to the operator of the roof-bolting machine. Subsequently, the operator of the roof-bolting machine resigned and complainant was permitted to become the operator of the roof-bolting machine in early March 1980 (Tr. 10-12).

8. Complainant does not allege that he discussed any health or safety matters with respondent's management prior to January 1980 (Tr. 11). While complainant worked as a helper to the operator of the roof-bolting machine, he did not use temporary supports, as required by respondent's roof-control plan, because the operator of the roof-bolting machine did not want him to bother with erecting temporary supports prior to installation of roof bolts (Tr. 62; 76). After complainant became the operator of the roof-bolting machine in early March 1980, he stated that he installed roof bolts without using temporary supports because both the mine foreman, Charles Quinley, and part-owner, Verlin Deel, saw him installing roof bolts without using temporary supports and at no time did they ever instruct him to use temporary supports or ever explain to him any provisions of the roof-control plan (Tr. 16; 63; 76; 79).

9. A copy of the roof-control plan was at all times hanging in the mine office during complainant's entire employment by respondent, but at no time did complainant ever read the roof-control plan or examine it (Tr. 68-69). Complainant carried in his lunch box a copy of the Union contract and was able to explain its terms in considerable detail when any disputes arose as to his rights under the contract (Tr. 59-60; 97).

10. When complainant became the operator of the roof-bolting machine in early March 1980, he was an inexperienced operator. After about a week of operating the roof-bolting machine, complainant testified that his skill increased to the extent that he could install bolts in from 8 to 10 headings a day. The largest number of places which complainant ever bolted during a single shift was 10, whereas the operator who ran the roof-bolting machine prior to complainant's obtaining the job was able to install roof bolts in about 14 or 15 headings per shift and the operator who succeeded complainant as operator of the roof-bolting machine could install bolts in from 14 to 15 headings per shift (Tr. 66; 81; 76; 116). Complainant contended that he could operate the roof-bolting machine as fast and as skillfully as the other operators and that the only reason he failed to install as many roof bolts as the other operators did was that he was installing temporary supports, whereas they were not. Complainant argued that if the other operators had used temporary supports, they would not have been able to bolt any more places during a shift than he bolted (Tr. 77).

11. As stated in Finding No. 8 above, complainant did not at first use temporary supports after he became the operator of the roof-bolting machine. On May 20, 1980, however, an event occurred which caused complainant to begin using temporary supports. That event was the arrival at respondent's mine of an MSHA inspector named N. K. Rasnick. Inspector Rasnick, with respondent's permission, called the miners together and read the roof-control plan to them. Inspector Rasnick explained to them that it was equivalent to committing suicide for them to install roof bolts without using temporary supports (Tr. 17-18). Complainant was so impressed with the inspector's lecture, that he claims that he told respondent's mine foreman, Charles Quinley, that he

wanted to use temporary supports and asked Quinley to provide him with the necessary timbers or with metal jacks which would work. Complainant contends that he daily asked for timbers because the jacks could not be adjusted to fit the varying heights which he was encountering in the mine. Complainant alleges that management never did supply him with either workable jacks or sufficient timbers to use in all entries (Tr. 19-20).

12. Complainant stated in his direct testimony that seven entries were being mined and that the entries were lower on the left side of the mine than on the right. Complainant said that the mining height varied from a low of 40 inches on the extreme left or entry No. 1, to a high of 5-1/2 feet on the extreme right, or entry No. 7 (Tr. 20). Complainant later testified that the mining height varied from a low of 48 inches in the No. 1 entry to a high of 6 feet in the No. 7 entry (Tr. 91). Complainant stated that there were timbers on the roof-bolting machine which measured 5 feet in length, but he claimed that he could not use them because of the varying heights in the mine (Tr. 20). Complainant testified that the lack of a sufficient supply of timbers prevented him from being able to use temporary supports at all in the No. 1 and No. 7 entries because his timbers were not long enough to reach the 6-foot mining height in the No. 7 entry, and that if he cut off his limited supply of timbers short enough to be used in the No. 1 entry, he would then not have timbers of the right length to use in the other entries (Tr. 20; 92-93).

13. Complainant testified that about June 1, 1980, respondent began to engage in retreat mining or the pulling of pillars (93-94). At that time, management brought in a plentiful supply of timbers to be used in the retreat-mining process. Although the timbers were not brought into the mine for use as temporary supports, complainant testified that he began to use the timbers for temporary supports (Tr. 95). He was able to use them in all entries because he had timbers to use in the 6-foot No. 7 entry as well as timbers that he could cut off for use in the 40 to 48-inch No. 1 entry (Tr. 94-95). Management at no time objected to complainant's use of temporary supports (Tr. 200).

14. Complainant testified that on June 4, 1980, Verlin Deel, one of the mine's owners, who also operated a scoop, watched complainant while he was installing roof bolts and remarked to complainant, as he had several times before, that complainant was not installing roof bolts fast enough to keep ahead of the miners who were drilling and shooting coal, and that unless he could increase his operating speed, management would have to replace him as the operator of the roof-bolting machine. After complainant came out of the mine on June 4, 1980, Verlin Deel informed complainant that he would not be allowed to operate the roof-bolting machine the next day. Complainant and Verlin engaged in a heated argument during which complainant stated that Verlin could not, under the Union contract, replace him as operator of the roof-bolting machine. Complainant then filed a grievance with the Union. Respondent refused to sign the grievance because respondent's management contended that complainant had quit in a rage, whereas complainant argued that he had been discharged (Tr. 13; 25-26; 115; 147; 175). The grievance was never officially decided because respondent's management agreed to reinstate complainant after a Union representative advised management that miners had won similar grievances in the past (Tr. 59-60; 246).

15. After the second discharge on June 4, 1980, complainant returned to work on June 11, 1980, but he agreed to relinquish his job as operator of the roof-bolting machine and resume the position of general inside laborer in return for management's offer to pay him the wages of an operator of a roof-bolting machine for doing the work of a general inside laborer (Tr. 27; 65).

16. Complainant testified that his reinstatement on June 11 was marked by an atmosphere of strained relations between him and respondent's management (Tr. 28). His primary duties as a general inside laborer were to hang curtains, construct brattices, and apply rock dust. Complainant said that the mine foreman followed him around constantly to see that he performed his assignments promptly. If he were rock dusting, he would be told to go hang a curtain. If he were hanging a curtain, he would be told to go and hang a different curtain which had been torn down. He was told several times each day that he would have to improve the way he was doing his job or he would be discharged. Complainant stated that management would interrupt his lunch period by telling him to do some sort of job. Complainant explained that under the Union contract, if a person's lunch period is interrupted, he is entitled, after doing the assigned work, to resume his lunch period and take the full 30 minutes which he had a right to take in the first instance. Complainant said that his lunch period was interrupted two or three times and then he was reprimanded for having taken a 45-minute lunch period. Complainant testified that he did not let management's constant harassment bother him because he knew that management was looking for an excuse to discharge him and he was making every effort to prevent them from having a reason to discharge him (Tr. 28-32).

17. On June 26, 1980, when complainant was in the mine office at the end of his shift, Verlin Deel told complainant that the other miners were complaining to Verlin because they were having to do the work which complainant was supposed to be doing. Both Verlin's and complainant's descriptions of the incident show that the discussion was quite heated (Tr. 32; 177). After leaving the mine on June 26, complainant called the MSHA office and reported to Inspector N. K. Rasnick that temporary supports were not being installed in respondent's mine prior to installation of roof bolts. The inspector advised complainant that since the next day, June 27, 1980, would be the last day of work prior to the commencement of vacation, it was unlikely that anyone would be able to come to respondent's mine to investigate the complaint on June 27, but that some action would be taken (Tr. 34).

18. Complainant testified that he overslept on the morning of June 27 and arrived at the mine about a half hour late after the other miners had already gone into the mine to work. While complainant was preparing to go underground, the phone in the office rang and complainant answered it because no one else was in the office. The call was from an MSHA supervisor of inspectors named E. C. Rines. Complainant asked Rines if he was calling in reference to a complaint about failure to use temporary supports and Rines said that he was. Complainant explained to Rines that he was the one who had called Inspector Rasnick the preceding day. Rines told complainant that complainant's name would not be used. Then Rines asked complainant to have the mine foreman to call him (Tr. 33-34; 104).

19. Complainant testified that he thereafter went underground and told Quinley, the mine foreman, that Quinley had been asked to return an important phone call, but complainant stated that he did not tell Quinley what the subject matter of the phone call had been (Tr. 35; 71). Quinley testified that complainant gave him the name of the man whose call was to be returned (Tr. 119; 148). Verlin Deel said that if complainant gave Quinley a name, Verlin did not recall hearing it, but Verlin did tell Quinley to find out what the call was about (Tr. 177). Verlin stated that complainant told Quinley the number to be called was on the desk (Tr. 178). Greg Deel is the son of Carmel Deel, one of the owners of respondent's mine (Tr. 209). Greg is unrelated to Verlin Deel (Tr. 173). Greg is the "surface man" and was in the mine office when Quinley came out to make the phone call. Greg testified that when Quinley told him he had received a message to call E. C. Rines, that Greg recognized the name to be that of an MSHA employee. Greg testified that there was no message on the desk of any kind and that the only way they were able to return the call was that Greg had written in the back of the phone book the number of the MSHA office in Norton (Tr. 214-215). The supervisory inspector, E. C. Rines, testified that he only gave complainant his name and place of employment (Tr. 104).

20. Greg testified that he and Quinley both tried to call Rines, but they could not get a dial tone on the phone (Tr. 210-211). They walked to an adjacent mine, located about 150 feet from their mine, and were unable to get a dial tone on that phone either. They returned to respondent's mine office. After about an hour, Quinley went back into the mine with the understanding that Greg would keep trying to get Rines on the phone and that Greg would let Quinley know what Rines wanted when Greg succeeded in talking to Rines (Tr. 159-160; 177-178).

21. Complainant's testimony as to the events which occurred after he entered the mine on June 27, 1980, the day of his discharge, is generally lacking in credibility for reasons which will hereinafter be noted. Complainant testified that after he had given Quinley the message about calling E. C. Rines, he was told to perform his regular duties which primarily consisted of hanging curtains and applying rock dust (Tr. 71). Complainant was at first very doubtful about what he had done on the morning of June 27 (Tr. 35-36), but he knew that some fly curtains had been pulled down by the scoop and that he had to go "hunt up some" (Tr. 37). Complainant also knew for certain that he had applied rock dust in the No. 7 entry because of some unspecified peculiarities that he recalled (Tr. 39). Complainant also said that he recalled speaking to Ronnie Lester in the No. 7 entry because someone borrowed some tools from him in the No. 7 entry (Tr. 39). Complainant said that he was not 100 percent certain that he spoke to Ronnie Lester in the No. 7 entry, but complainant said he then went into the No. 6 entry and learned that the miners who had borrowed his tools were using them to repair the coal drill (Tr. 39). Complainant then, without any reservations as to certainty, stated unequivocally that he saw Ronnie Lester and John Carpenter working on the coal drill in the No. 6 entry (Tr. 41).

22. Complainant explained that he had had some training as a repairman when he previously worked for Clinchfield Coal Company and that he knew more about repairing equipement than anyone at respondent's mine (Tr. 80; 84). Complainant, therefore, said that he checked on the status of the repairs being

performed on the coal drill and first said that the men working on the drill had "everything under control" and that there "wasn't anything there for me to do" (Tr. 40). Complainant later testified that when he went into the No. 6 entry, he gave the miners some suggestions on how to repair the drill (Tr. 80). Subsequently, complainant testified that one of the miners who was working on the coal drill came and borrowed his hammer and, that since he could not hang curtains without his hammer, he had to return to the No. 6 entry and ask when they would be finished with his hammer. Shortly after he arrived in the No. 6 entry to ask about the hammer, the miners finished repairing the coal drill and returned his hammer to him along with the other tools which they had borrowed from him on June 27 (Tr. 42).

23. As indicated in Finding No. 16 above, complainant first testified that Quinley followed him around to make sure he was working all the time and that Quinley would constantly send him to do a different job before he could finish the one he was then doing. Complainant later stated that he had an option, when told to hang a given curtain, of either going to hang it right then or of hanging the curtain in due course if his duties, within a reasonable period of time, would take him to the area where the curtain needed to be hung (Tr. 42). Complainant first stated that Quinley only gave him general instructions on June 27, but later he stated that Quinley specifically told him to hang a curtain in the No. 1 entry. Then complainant recalled having applied rock dust in each heading (Tr. 44-45), although he had previously been certain about having applied rock dust only in the No. 7 entry (Tr. 39).

24. Complainant also claimed that Quinley watched him closely all morning on June 27, but simultaneously testified that Quinley and Verlin Deel both went outside to return the phone call at 10:00 a.m. and that Quinley did not come back into the mine until 11 or 11:30 a.m. (Tr. 45). Also Quinley is said by complainant to have gone outside and obtained a load of rock dust at some time during the morning of June 27 (Tr. 46). Even though complainant stated that Quinley was outside until about 11 or 11:30 a.m., complainant then testified that he saw Quinley at the coal drill about 11 or 11:30 a.m. after Quinley had come back from trying to return the phone call (Tr. 43). If Quinley had followed complainant as constantly and as continuously as complainant alleged, he would only have needed to look up at any given moment and Quinley would have been 20 or 30 feet from complainant (Tr. 44).

25. After hanging the curtain in the No. 1 entry mentioned in Finding No. 23 above, complainant testified that he then went to the No. 3 heading where the roof-bolting machine was being used. While complainant was applying rock dust in the No. 3 heading, the miners completed that phase of their roof bolting and started backing the roof-bolting machine out of the No. 3 entry. In order to get out of the path of the moving roof-bolting machine, complainant said that he went into the break outby the No. 3 entry and sat down against the rib so that the roof-bolting machine could be taken to another entry. Complainant alleges that Quinley was also sitting against the rib outby the No. 3 entry. Therefore, complainant said that he sat down beside Quinley and talked to him about the weather and such things for about 2 minutes while the roof-bolting machine was passing. Complainant then testified that he picked up his rock-dusting bag and started back to the place where he had been rock dusting. At that point, complainant alleges that Quinley told him

to get into the scoop as Quinley was taking him outside. After complainant had gotten into the scoop with Quinley, complainant asked why they were going outside and complainant alleges that Quinley replied that he was going to fire complainant for sitting down on the job (Tr. 45-48). Complainant then alleges that he asked Quinley if Quinley was firing him for sitting down for 30 seconds and that Quinley said "That's right" (Tr. 48).

26. Complainant said that he and Quinley then rode outside on the scoop and that both of them went into the mine office where they talked to Verlin Deel, owner of a one-third interest in the mine, and Greg Deel, the "outside man". Quinley told Greg to write out a discharge slip stating that complainant was being suspended for 5 days with intent to fire him for sitting down on the job. Quinley signed the discharge slip after Greg had written it. Complainant contends that the discharge slip had already been written before he and Quinley entered the mine office because Greg handed the discharge slip to Quinley without writing anything (Tr. 50-52). Verlin Deel is alleged to have said that he had found out from the Union how to discharge complainant this time and do it right. Complainant explained that the Union contract requires that a miner be suspended for 5 days before a discharge becomes effective so that the miner may file a grievance with the Union while still in an employed status (Tr. 51-52).

27. The testimony of complainant and the testimony of Verlin Deel, Charles Quinley, and Greg Deel concerning the details of the events which occurred on Friday, June 27, 1980, the day of complainant's discharge, vary in some details, but there is no dispute between complainant and the other three men about the fact that complainant was allegedly discharged for sitting down on the job (Tr. 126; 151; 179; 213). Quinley, Verlin Deel, and Carmel Deel all additionally testified that complainant was discharged for failing to perform the tasks which he was assigned to do. They stated that complainant would be assigned a job such as hanging curtains or rock dusting. They could check on the assignments at a later time and the work would not have been done. They would then find complainant talking with one or more of the other miners instead of doing the work he had been given to do (Tr. 115; 175; 247).

28. Among the details which cast doubt upon complainant's credibility are those pertaining to the time intervals between certain occurrences on June 27. As indicated in Finding No. 24 above, complainant stated that he knows for certain that Quinley went out of the mine to make the phone call at 10:00 a.m. Quinley, the mine foreman, on the other hand, did not purport to know exactly when he went outside to make the phone call, but agreed on cross-examination, that complainant came in about a half hour late at 7:30 a.m. Quinley and Verlin Deel both said that they went outside to make the call immediately after complainant had told them about it. Quinley stated that it takes about 10 minutes to go from the underground working section to the outside and that he would estimate that he was in the mine office to return the call by about 7:45 a.m. (Tr. 129). Quinley said that Greg tried to make the call and could not get a dial tone in either respondent's mine office or in an adjacent mine office of another operator whose mine office was about 150 feet from respondent's mine office. Quinley further stated that he was not outside for more than an hour and that he would estimate that he was back on the working section by 9:00 a.m. (Tr. 130).

29. Quinley stated that when he returned underground after going out to make the phone call, he saw complainant sitting against the rib. He said complainant had not done any new rock dusting and had failed to hang the curtain which Quinley had told him to hang (Tr. 149-150). Quinley testified that he did not even get off the scoop and told complainant to get in the scoop so that they could go outside. Quinley estimates that they were back outside by 9:15 a.m. Quinley said that Verlin Deel and complainant argued for a while before complainant left the mine office after being discharged. Quinley stated that after he gave complainant the discharge slip, Verlin told him that the phone call had pertained to an allegation that management had not been using temporary supports in respondent's mine (Tr. 126; 134). Verlin Deel and Greg Deel also testified that Quinley had brought complainant out of the mine to discharge him before Quinley was ever told that a complaint had been made to MSHA about an alleged failure to use temporary supports (Tr. 180; 212). Greg testified that he was able to return Rines' call between 9:00 and 9:30 a.m. (Tr. 211). The supervisory inspector testified that he thought the call was returned between 9:30 and 10:00 a.m., but that he did not think the call could have been returned later than 10:00 a.m. (Tr. 104). The preponderance of the evidence, therefore, supports a finding that the phone call was returned no later than 10:00 a.m. Since it takes at least 10 minutes to get to the surface, Quinley could not have left the mine at 10:00 a.m., as stated by complainant, and still have succeeded in returning the call by 10:00 a.m. (Tr. 129).

30. One aspect of complainant's testimony about the events of June 27 was proven to be completely false. That was his statement, as indicated in Finding No. 21 above, that he had seen Ronnie Lester in the mine during the morning of June 27 when, as a matter of fact, Ronnie Lester was absent on June 27 (Tr. 229). Complainant's own testimony shows that he knew that Ronnie Lester was the operator of the coal drill (Tr. 83; 99). Complainant also testified that John Carpenter, who normally operated the roof-bolting machine (Tr. 100), was running the coal drill on June 27, and that Genco, who normally helped operate the roof-bolting machine, was actually operating the roof-bolting machine on June 27 (Tr. 55). Those facts should have alerted complainant to the fact that Ronnie Lester, the normal operator of the coal drill, was absent, but complainant was tripped up on that aspect of his allegations so that he falsely testified that he saw Ronnie Lester during the morning of June 27.

31. Complainant's felicity for devising answers was illustrated at pages 63 and 65 of the transcript. On page 63, he stated that he did not bring timbers into the mine for use as temporary supports when he was the operator of the roof-bolting machine because that was not one of his duties as operator of the roof-bolting machine. He said that bringing in timbers from the outside was a duty of the general inside laborer, the supply man, or the scoop operator. After complainant had agreed to resume the duties of a general inside laborer in return for complainant's offer to pay him the wages of the operator of a roof-bolting machine, complainant stated that although he hauled timbers when instructed to do so by the foreman, hauling timbers was not a duty of a general inside laborer (Tr. 65).

32. Verlin Deel, Jr., was the helper to the operator of the roof-bolting machine on the morning of June 27 (Tr. 224; 231). He testified that he installed four metal jacks as temporary supports and that the metal jacks were carried on the roof-bolting machine (Tr. 232). He stated that it takes about 2 or 3 minutes to install four metal jacks as temporary supports. Deel, Jr., stated that the regular operator of the roof-bolting machine was John Carpenter who could install roof bolts in one working place within a period of 15 minutes, but Carpenter was running the coal drill on June 27 and Bryan Genco, the regular helper to the operator of the roof-bolting machine, was actually operating the roof-bolting machine. Carpenter was running the coal drill because the normal operator of the coal drill, Ronnie Lester, was absent (Tr. 229). Because Genco was not the regular operator, it took Genco from 20 to 30 minutes to install roof bolts in a single working place (Tr. 225). Deel, Jr., had only worked in the mine since June 1980 and had never seen complainant do any work other than that of a general inside laborer (Tr. 233). Deel, Jr.'s testimony about the use of temporary supports was not part of his direct testimony and he discussed his use of temporary supports only after I happened to ask him about his duties as helper to the operator of the roof-bolting machine.

Consideration of Parties' Arguments

Anyone who first reads the 31 findings of fact set forth above and then reads the proposed findings of fact given on pages three to eight of complainant's brief, will think that complainant's counsel was using a different transcript from the one used by me because very few of the facts given in complainant's brief agree with those given in my 31 findings of fact. Therefore, before I can begin to consider the arguments given on pages eight to 24 of complinant's brief, I must explain why the facts alleged on pages three to eight of complainant's brief must be rejected for being either erroneous or incomplete or misleading.

Complainant's brief states on page three that I shall have to make credibility resolutions in order to decide the issues in this proceeding. Respondent's reply brief (p. 4) agrees that "[p]art of this case hinges on the credibility of the witnesses". I agree wholeheartedly with that much of the briefs submitted by both parties. In determining credibility, a person's total testimony must be considered because, as the Commission noted in Thomas Robinette v. United Castle Coal Co., 3 FMSHRC 803, 813 (1981), a lack of credibility by a witness with respect to one point does not mean that his testimony must be rejected as to all things if his testimony is corroborated by other evidence as to other matters. Additionally, it is important to consider all of a person's traits and characteristics in determining credibility. The way that a witness expresses his thoughts and describes events is also important. Even though one witness may answer a question with a rather complete exposition which sounds convincing, he may be expounding upon a complete fabrication. Another witness may answer questions in such a brief way, that he sounds unconvincing even though he is telling exactly what happened to the best of his ability to describe a given event.

Complainant's First Discharge

Complainant's brief (p. 3) states that complainant was discharged in January 1980 for missing one day of work. That sort of incomplete description fails to reflect complainant's unsatisfactory performance which led to his discharge. Finding No. 6, supra, shows that complainant had taken 2 days off prior to the third absence in January which resulted in his first discharge. Complainant stated during the hearing that, under the Union contract, a miner can be discharged for missing 3 days at work during a 30-day period and defended his absences by stating that he had taken 3 days off within a 45-day period (Tr. 97). Complainant conceded that in a small mine like respondent's, which employs only eight miners, the operator is greatly inconvenienced when a single person unexpectedly takes a day off because of management's limited ability to shift workers so as to cover for the work which will not be done by the person who is absent (Tr. 98). The fact that the mine foreman, Charles Quinley, and a one-third owner, Verlin Deel, agreed to reinstate complainant on the following day after his first discharge shows that respondent's management was willing to give an employee a chance to redeem himself. Moreover, it should be noted that complainant was reinstated after his first discharge without any pressure by the Union to get complainant reinstated (Tr. 144).

Complainant's Position as Operator of the Roof-Bolting Machine (March to June 4)

Complainant's brief (p. 3) incorrectly states that complainant was promoted in March to the position of helper to the operator of the roof-bolting machine. Finding No. 7, supra, shows that complainant became a helper to the operator of the roof-bolting machine in February 1980, not March 1980, as stated in complainant's brief. As reflected in Finding No. 8, supra, complainant did not erect any temporary supports while he held the position as helper to the operator of the roof-bolting machine.

Complainant's brief (p. 3) incorrectly states that complainant began to use temporary supports on March 20, 1980, after an MSHA inspector explained the roof-control plan to the miners in respondent's mine. Finding No. 10, supra, correctly states that complainant became the operator of the roof-bolting machine in early March 1980 and Finding No. 11, supra, correctly states that complainant did not use temporary supports between early March and May 20, 1980, when the inspector explained the roof-control plan to the miners at respondent's mine (Tr. 17). Assuming that early March is about March 10, 1980, and recognizing that complainant actually began to use temporary supports after the inspector's visit on May 20, 1980, it is clear that complainant bolted without temporary supports for a period of about 52 days before he ever gave any thought to the fact that he ought to be using them.

As shown by Finding No. 14, supra, complainant was either discharged or quit on June 4, 1980, after having an argument with Verlin Deel, a one-third owner of respondent's mine. Finding No. 15, supra, reflects the fact that although complainant was reinstated as a miner at respondent's mine, he was reinstated as a general inside laborer who was to receive the pay of an operator of a roof-bolting machine. Therefore, complainant actually used temporary supports only for the period from May 20, 1980, to June 4, 1980, or a period of 11 days. Even during those 11 days, complainant did not use temporary supports when installing bolts in the Nos. 1 and 7 entries because

he claimed that he did not have timbers high enough to support the roof in the 6-foot No. 7 entry and that he wouldn't cut off the timbers he did have for use in the 40-to-48-inch No. 1 entry. Complainant said that he was not supplied with timbers of sufficient height for the No. 7 entry until respondent began pillaring operations about 2 to 4 days before complainant's second discharge on June 4, 1980. The evidence shows, therefore, that complainant actually used timbers or temporary supports in all entries for from 2 to 4 days out of the entire time that he held the position of operator of the roof-bolting machine (Finding Nos. 12 and 13, supra).

Complainant's brief (p. 4) incorrectly states that, after the inspector's visit to the mine, complainant "insisted on using temporary supports, in the form of either timbers or jacks, before adding permanent roof support". Complainant stated unequivocally at transcript page 20 that he was never supplied with metal jacks. Complainant's brief (p. 4) ignores complainant's testimony as to the height of respondent's mine and adopts a height given by Verlin Deel, one of the mine's owners. When complainant is justifying his difficulties in securing timbers, he should be held to the mining heights which he claimed existed in the mine rather than permit him to refer to a mining height given by Verlin Deel whose testimony complainant considers to be highly unreliable. As shown by Finding No. 12, supra, complainant at first stated that the height of the mine varied from 40 inches to 5-1/2 feet; he thereafter increased the height from 48 inches to 6 feet.

For a number of reasons, it was necessary for complainant to take the position that the metal jacks supplied by respondent were unworkable. First, he knew that if he admitted that they would work at all, he would have to agree that the jacks could be erected as temporary supports in a matter of 3 or 4 minutes and that complainant's inability to install roof bolts in more than 10 places per shift, as opposed to 15 by other roof bolters, would require him to acknowledge his lack of skill as an operator of a roof-bolting machine, rather than shore up his argument that the only reason he could not install roof bolts as fast as the other miners was that he had insisted on installing temporary supports, whereas they did not use temporary supports. This point is of vital importance in this case because, as I have explained above, complainant installed roof bolts for 52 days without using temporary supports and yet he unequivocally admitted that he never succeeded at any time in installing bolts in more than 10 working places per shift, even when he was not using temporary supports, although both his predecessor and succesor as operator of the roof-bolting machine could install bolts in from 14 to 15 places per shift (Finding No. 10. supra).

Another reason that complainant had to take the position that the jacks would not work is that he claimed that he only carried four timbers 5 feet long on the roof-bolting machine and that he could not use those timbers because the height varied from 40 inches to 6 feet (Finding No. 12, supra). Anyone knows that if the roof height varies from 40 inches to 6 feet, there has to be some roof height which is 5 feet, or 60 inches high, when one is bolting an area which ranges between 40 inches and 72 inches in height. Therefore, complainant necessarily could have used the 60-inch timbers at least once in a while as temporary supports.

A further reason that complainant had to take the position that the jacks would not work is that they had an adjustment of 18 inches. Complainant had this fact ever in mind because when he first gave a variable height in the mine he gave a low of 40 inches and a high of 5-1/2 feet, or a variable height of 26 inches which was a variation of more than 18 inches. When complainant next gave different heights for the mine, he raised the low to 48 inches, but he found it necessary to increase the height of the mine to 6 feet, or 72 inches, because he knew that if he raised the minimum to 48 inches and left the maximum at 5-1/2 feet, or 66 inches, he would be supplying heights with an 18-inch variation which was exactly the range of adjustment of the jacks which had been supplied by respondent.

Complainant's brief concedes in footnote 4 on page 4 that a question exists as to whether metal jacks were ever made available, but complainant states that I do not need to resolve that question. Complainant cites some of Verlin Deel's testimony to the effect that he was not sure of the extent of the adjustments which could be made in the jacks. Complainant also cites Quinlty's testimony in which he took the position that the jacks were there if the miners wanted to use them.

Among complainant's other oversights in the argument in footnote 4 on page 4, is his failure to take into consideration Quinley's testimony on pages 157 and 158 where Quinley stated that he had actually tested the jacks and knew that they worked. He further stated that the height of the mine did not vary more than 18 inches at the time complainant was roof bolter, but that the height did vary more than that after complainant was discharged. Quinley stated that the increased height was allowed for by management's supplying long jacks which were laid on the high side of the mine and picked up by the roof bolters when they were bolting on the high side.

The other very significant testimony which complainant chooses to ignore in the footnote on page 4 is that Verlin Deel, Jr., testified that he was the helper to the operator of the roof-bolting machine on June 27, 1980, when complainant was discharged. He stated that he personally used metal jacks as temporary supports, that they were adjustable, and that they were kept on the roof-bolting machine. He further testified that it takes only 2 or 3 minutes to set the metal jacks as temporary supports (Finding No. 32, supra).

Now that complainant has been reminded of the fact that a miner on June 27, 1980, was installing temporary supports, I am sure that his argument will be that I should not give any credibility to the testimony of Verlin Deel, Jr., because his father was a one-third owner of the mine. I might have been inclined to agree with that sort of argument if I had not examined the testimony closely. It turns out that respondent's counsel did not ask Verlin Deel, Jr., a single question about temporary supports or the time it takes to set them at the time respondent's counsel presented Verlin Deel, Jr.'s direct testimony. If respondent's management had intended to coach Verlin Deel, Jr., as to the kind of testimony he should provide for this proceeding, I cannot imagine that management would have failed to make certain that Verlin Deel, Jr., testified on direct as to his having been using metal jacks as temporary supports on June 27, 1980. Such testimony not only shows that the metal jacks

would work and were being used, but it also refutes complainant's contention that temporary supports were not being used in the mine on the day of his discharge (Tr. 74). Other reasons for giving Verlin Deel, Jr., a high credibility rating was his fairness in dealing with questions about complainant. For example, while Verlin Deel, Jr., stated that he had observed complainant sitting down in the mine, he also stated that everyone sits down once in a while (Tr. 234). Even though Verlin Deel, Jr., did not know whether the coal drill was being repaired on June 27, 1980, he supported complainant's testimony to that effect by stating that the coal drill broke down almost every day and that he would assume that sometime during the day on June 27, 1980, it would need to be repaired since that was a daily occurrence (Tr. 235).

For the reasons given above, Verlin Deel, Jr.'s testimony should be given a high credibility rating and is sufficient support for a finding that metal jacks were supplied by management, that they worked, and that they were being used on June 27, 1980, the day of complainant's discharge.

Complainant's brief (p. 5), for no apparent reason, relies on Verlin Deel's description of where timbers were stored to explain how hard it was for complainant to obtain timbers for use in making temporary supports. The brief states that complainant had to go beyond the last open crosscut to find timbers and a saw for the purpose of cutting timbers to use for temporary supports, but complainant cites Verlin Deel's testimony at page 200 in support of that statement, whereas complainant himself stated at page 94 that he and his helper had to go three breaks and carry 6-foot long timbers to the area and cut them and set them. It should be borne in mind, however, that complainant said he only had timbers of sufficient length for the No. 7 entry for 4 days at most (Tr. 94). Thus, while he claims that his roof-bolting speed was reduced greatly when he began to bolt during retreat mining, he was only engaged in very slow timber cutting for 4 out of the total of 63 days during which he was employed as operator of the roof-bolting machine.

Complainant's brief (p. 5) refers to the fact that Verlin Deal and Charles Quinley criticized complainant's inability to install roof bolts fast enough to keep ahead of the other miners who were drilling, shooting, and scooping up coal. The brief defends complainant's inability to install roof bolts rapidly by contending that the only reason complainant was slow was that he insisted on setting temporary supports. As I have explained above, and as my findings of fact show (Nos. 10 through 13, supra), complainant admitted that he was slow and that he never succeeded in bolting more than 10 places per shift for the 52 days during which he worked without using temporary supports. Moreover, complainant did not use temporary supports in all entries except for the last 2 to 4 days of the time he was employed as the operator of the roof-bolting machine. The evidence simply does not support complainant's contention that his lack of speed as a roof bolter was caused by his insistence that temporary supports be erected prior to installation of roof bolts. A company which tolerates a slow roof bolter for 52 days certainly has a right to complain about his lack of speed after he has done the work that long without showing any improvement in the speed at which he was able to install roof bolts. Even complainant stated that he was inexperienced when he started operating the roof-bolting machine and that his speed increased during the first week to the point that he was able to install roof bolts in about

10 places during a single shift. The trouble was that complainant never did get above a speed of installing bolts in 10 places per shift even though he held that position for 52 days before he ever began to use temporary supports.

Complainant's brief (p. 5) gives an erroneous description of complainant's second discharge by saying that "[u]ltimately, Fleming was discharged for "slow production" on June 4 (Tr. 116)". No one used the term "slow production" on page 116. Moreover, the witness carefully explained on page 116 that complainant was not an experienced operator when he was given, at complainant's request, the opportunity to be the operator of the roof-bolting machine. Complainant was told at the time he became the operator that he could retain the position only if he showed that he could handle the job (Tr. 175). Complainant's own testimony shows without any equivocation that he could not install roof bolts in more than 10 working places per shift regardless of whether he used temporary supports or not. After respondent's management had given complainant a period of 52 days without using temporary supports, 7 days with partial temporary supports, and 4 days with temporary supports in all entries, a total trial period of 63 days (March 10 to June 4), Verlin Deel, a one-third owner, told complainant that he would have to relieve him of the job of operator of the roof-bolting machine. Complainant took the position that, under the Union contract, Verlin Deel could not make him give up the job of operating the roof-bolting machine.

Complainant's brief (p. 5) further makes a misleading statement of the facts by stating that "[t]his discharge [of June 4] was brought to the union's attention and resolved in the grievance procedure." As I have explained in Finding No. 14, supra, the grievance filed by complainant with respect to his alleged discharge on June 4 was never officially decided. Respondent's management simply agreed to allow complainant to continue working at respondent's mine after respondent's management was advised by a Union representative that miners had won similar cases. It is significant that when complainant returned to work on June 11, he agreed to accept the position of a general inside laborer after management agreed to pay him the salary of an operator of a roof-bolting machine.

Complainant's Position as General Inside Laborer (June 11 to June 27)

The discharge which is the subject of the complaint in this proceeding occurred on June 27, or the 13th day after complainant had returned to work on June 11 and had agreed to do the work of a general inside laborer while getting paid the wages of an operator of a roof-bolting machine. Complainant's brief (p. 5) states that management did not complain during this period about the way complainant was performing his job. Complainant's own testimony, as indicated in Finding No. 16, supra, shows that management told complainant several times a day that his work was unsatisfactory. To use complainant's own words (Tr. 28):

> A. I could not sit down to eat my lunch without being ordered to go take care of something which meant that I had to interrupt my lunch. I was continuously told that I had to do better; I had to do more; I was not doing good enough. If I didn't improve I wouldn't be around much longer.

Q. When were things such as that said to you?

A. At various times throughout the day, whenever someone had something for me to do. If I were rock dusting and Charles Quinley had a curtain that needed to be hung, he would come and inform me of it and then add on top of the instructions, you will have to start doing better.

Q. Was this statement, you will have to start doing better, said to you at times you were performing other job duties?

A. Absolutely.

Complainant completely contradicted his statement above when he was describing his work on the 13th and last day of his employment as a general inside laborer. At that time, he testified (Tr. 42):

Q. Had you seen Mr. Quinley between the time you told him about the phone call and this time?

A. Yes.

Q. Had you had any discussions with him?

A. Only the normal discussions whereas he would inform me of anything that needed to be done. And it was his practice that in his tour of the face area, if he found a curtain down he would come to me and inform me of it, at which time I would have the option to either hang it immediately or if I, in my regular course of my duties were going to take me in that direction in the near future, I would just work down towards it.

The same supervisor, Charles Quinley, who was previously depicted as having been harassing complainant, is described above as having a "practice" of reporting curtains to complainant and giving him an option to hang them immediately or do them in due course. Despite complainant's many contradictory statements, as illustrated above and as set out in my Findings of Fact Nos. 23, 24, 29, 30, and 31, supra, complainant's brief (pp. 14-15) praises his own demeanor as a witness, claims that his recollections were largely uncontradicted, and urges that I rank him as a much more credible witness than Charles Quinley, the foreman who discharged complainant.

Complainant's brief (p. 6) refers to the fact that on June 26, after complainant had worked as a general inside laborer for 12 days, Verlin Deel, a one-third owner of the mine, engaged in a conversation with complainant. Complainant emphasizes that Verlin told him on June 26 that he would get 8 hours of work out of complainant one way or another and make it so hard on complainant that he would leave. Both men agreed that it was a heated conversation. It is a fact, however, that even though complainant reported for work a half hour late the next morning, June 27, no one treated him harshly in any way. Complainant gave his supervisor, Charles Quinley, a message about returning a phone call. Verlin Deel was present and did not give complainant any orders. Instead, complainant states that, "after delivering the message to Mr. Quinley, I went on about my duties hanging curtains and rock dusting" (Tr. 35).

When complainant described the heated conversation of June 26, he stated as follows (Tr. 32):

> A. I do not recall what started the conversation, but it ended in a discussion of Union rights and contract obligations and it ended in a rather heated discussion between Mr. Deel and myself about my duties that were going to be assigned to me the next day. * * *

The part of the heated conversation which complainant could not remember was recalled by Verlin Deel who testified as follows about the heated conversation of June 26 (Tr. 176-177):

> Q. The day before the firing of Mr. Fleming did you have occasion to engage in any discussion with him?
>
> A. Yeah, I called him in the office the evening before and I told him that some of the men had made a complaint that he wasn't keeping up his job; they was having to do his job. And I told him, I said, you are going to have to do your job if you stay here. And so he kindly had a few words to say, you know, kindly talked smart, and I guess I talked smart to him, too. * * *

The reason that the above-described testimony is important is that it shows beyond any doubt that complainant was warned on the day before his discharge that his work as a general inside laborer was unsatisfactory and it also shows that complainant only argued his rights under the Union contract. Nothing whatsoever was said about complainant's alleged insistence on using temporary supports when he was the operator of the roof-bolting machine.

In footnote 5 on page 6 of complainant's brief, it is stated that Quinley alleged that he was constantly having to speak to complainant about his inadequate job performance. The footnote then states that Quinley could not give a single specific incident of poor job performance. There are many statements in the record about complainant's failure to do his job. It should be borne in mind that hanging curtains and rock dusting across seven entries is not the sort of work which creates specific incidents of poor job performance. As Quinley stated, it was obvious across the section when curtains were not hung and rock dust was not applied (Tr. 146). Quinley stated that he warned complainant daily about inadequate job performance (Tr. 123) and, as indicated above, complainant himself said he was "continuously told" he would have "to do better" (Tr. 28). Additionally, as also noted above, Verlin Deel certainly warned complainant about inadequate job performance on June 26, the day before he was discharged for sitting down on the job.

There is no record support whatsoever for the claim in complainant's brief (p. 6) to the effect that complainant "went to the number six or number seven heading where he met Charles Quinley (Tr. 35)". Complainant's brief (footnote 6, p. 6) then alleges that respondent's witnesses presented contradictory testimony as to where complainant first entered the working section on June 27. The brief claims that Quinley testified it was the No. 3 entry (Tr. 149), whereas Verlin Deel testified it was the No. 5 entry (Tr. 182).

As to the claim in complainant's brief that complainant met Charles Quinley in the No. 6 or No. 7 entry, complainant did not specify any entry as the meeting place between him and Quinley (Tr. 35). Moreover, he stated that he did not recall exactly where he started hanging curtains that morning, but he said he might have started in the No. 6 or No. 7 entry (Tr. 35). The only witness who really professed to know where Quinley and complainant met on the morning of June 27 was Verlin Deel who stated at transcript page 203 that he first saw complainant in the last open crosscut near entry No. 5. Verlin said that Quinley "came walking up through there" and one must assume that Quinley and complainant met at entry No. 5 since complainant did not say where they met. As for complainant's claim in footnote 6 that Quinley testified that they met in entry No. 3, Quinley did not say where they first met on the morning of June 27. Complainant's brief cites transcript page 149 as the basis for claiming that Quinley said they met at entry No. 3. On page 149, however, Quinley is describing the place where complainant was sitting at the time Quinley decided to discharge him on June 27 and the only entries mentioned there are Nos. 1 and 2. Quinley finally decided that the site of complainant's discharge was outby the No. 3 entry, but Quinley decided that only after being shown a map of the mine prepared by complainant for the purpose of showing the site of his discharge (Tr. 46; 171; Exh. 2). Quinley also stated that he found complainant sitting where he had left him (Tr. 171). The testimony, therefore, shows that neither Quinley nor complainant ever specifically designated the place where they met on June 27 to discuss the phone call, so any finding as to their exact place of meeting rests on the statement of Verlin Deel that complainant and Quinley met in the vicinity of the No. 5 entry.

Complainant's brief (p. 7) alleges that complainant installed a total of four or five curtains on the morning of June 27. Complainant cites transcript page 35 in support of his claim that he hung four or five curtains, but when complainant was asked if he knew where he began hanging curtains, he answered "No, not exactly" and stated that he generally began in the No. 7 or No. 6 entry, but he didn't say that he did hang curtains in either the No. 7 or No. 6 entry. When complainant was asked by his own counsel if he could recall how many curtains he hung, he answered "[n]ot exactly" (Tr. 36). On page 37 complainant spoke of generalities about fly curtains and said that some curtains had been pulled down by the scoop and he said that if you follow the scoop you "usually" find them, but he did not testify that he found any by following the scoop on June 27. In fact, the only curtain which complainant specifically claimed to have hung on June 27 was the curtain in the No. 1 entry (Tr. 44).

Complainant's brief (p. 7) tries to establish a sequence of events for June 27 based on an amalgamation of the contradictory testimony of complainant and Quinley. Complainant acknowledges in footnote 7 on page 7 that the witnesses contradicted each other, but complainant states that it is unnecessary to resolve the credibility questions about the events of June 27 because of certain credibility arguments which are made in complainant's brief on pages 8 to 15. Those arguments will next be considered.

The Credibility of Charles Quinley, the Mine Foreman

Complainant's brief (p. 8) acknowledges that he must prove that he was discharged for engaging in a protected activity. He alleges that his testimony supports a conclusion that he was discharged for engaging in a protected activity and argues that all I have to do before reaching that desired conclusion is to find that his testimony is credible, while I find that the testimony of Charles Quinley, the mine foreman who discharged him, is incredible. Complainant argues that Quinley's testimony shows that he was an evasive witness with a selective memory. Several examples of Quinley's evasive testimony are given. It is first noted that Quinley was responsible for all activities on the working section, yet when he was asked by his counsel on direct examination if the miners were using safety jacks in their roof-bolting procedures, he answered the question with the words "Safety jacks (Tr. 123)", instead of saying "Yes" or "No".

As I explained in the second paragraph of this decision under the heading of "Consideration of Parties' Arguments", supra, the mere fact that a witness answers a question briefly, or in a way which might be considered evasive, does not mean that his credibility is necessarily impaired. Quinley had a characteristic of giving monosyllabic answers. For example, he answered another of his counsel's questions as follows (Tr. 142-143):

Q. Is it unusual for bolts to be out in the mine?

A. No.

Q. That's a common occurrence in all mines?

A. Common.

Quinley later answered one of my questions as follows (Tr. 145):

Q. He would come to work, but he wouldn't work after he got there?

A. After he got there.

On another occasion, the following exchange between me and Quinley occurred (Tr. 158):

Q. You should have brought one [metal jack] in here and demonstrated.

A. Should have.

Notwithstanding the alleged evasiveness of Quinley in answering questions in as few words as possible, he conceded unequivocally that the miners were not using jacks or temporary supports when questioned about that subject by complainant's counsel during cross-examination (Tr. 140):

Q. And it is your testimony that those [metal jacks] were installed in every place before bolting?

A. They were supposed to have been.

Q. But is it your testimony that they were installed?

A. I can't say that they were.

Complainant's brief (p. 9) alleges that Quinley testified that there were not enough jacks on the section. Complainant cites Quinley's testimony on page 125 in support of that allegation. The actual testimony is as follows (Tr. 125):

Q. Did you have enough jacks for the job?

A. Yes sir.

Complainant may have been referring to the fact that on page 125 Quinley first stated that timbers were not needed for use as temporary supports because four metal jacks with an 18-inch variable adjustment were carried on the roof-bolting machine for use as temporary supports. Quinley conceded, after saying that they had enough jacks, that there might have been times when the jacks wouldn't fit and he also conceded that it would have been necessary for them to use timbers in such circumstances. Inasmuch as Quinley said that the height of the mine varied from 46 inches to 50 inches (Tr. 137), it would have been a rare situation when jacks with an 18-inch adjustment would fail to fit. As indicated in Finding No. 12, supra, complainant was very uncertain about the heights he encountered in the mine, so Quinley can hardly be discredited as a witness just because he gave different estimates as to the mine's variable heights from the ones given by complainant. Moreover, as I have already pointed out under the heading of "Complainant's Position as Operator of the Roof-Bolting Machine", supra, complainant relied in his brief (p. 4) on variable mine heights given by Verlin Deel and those variable heights are different from the ones given by complainant.

Complainant's brief (pp. 10-11) next challenges Quinley's credibility because it is claimed that he gave different and inconsistent answers when he was asked, on three different occasions, about the amount of time which it takes to install temporary supports. Complainant alleges that the first time Quinley discussed the use of temporary supports, he stated that it takes about the same amount of time to support a roof with temporary and permanent supports as it does to bolt a roof with only permanent supports (Tr. 138). Complainant says that the second time Quinley discussed temporary supports, he stated that it takes about 10 minutes more to cut and set four timbers than it would to install only permanent supports (Tr. 142). The third time he addressed the question of temporary supports, complainant alleges that he said it would take approximately 3 or 4 minutes extra to put up temporary supports before installation of permanent roof bolts (Tr. 158). Complainant's brief (p. 10) concludes that Quinley's inconsistent and self-serving replies speak for themselves and show that his testimony lacks credibility.

There are several errors in complainant's arguments about Quinley's inconsistent answers to questions about the length of time required for setting temporary supports. In the first place, although Quinley was asked about the length of time it takes to set temporary supports on three different occasions, his answers were consistent each time. In the second place, complainant incorrectly refers to two occasions which really constituted a single time (Tr. 138 and 142). Finally, complainant chose to ignore the first time (Tr. 125).

To set the record straight as to the number of times Quinley was asked about the length of time it takes to set temporary supports, the first time was when his own counsel asked him (Tr. 125), the second time was when complainant's counsel asked him (Tr. 138-142), and the third time was when I asked him (Tr. 158).

Complainant's contention that Quinley inconsistently answered questions about the length of time it takes to set temporary supports is achieved by ignoring the fact that he insisted each time he was asked about temporary supports that the miners were furnished with metal jacks which could be installed in almost no additional time as compared with the miners' having to use timbers which he conceded might require as much as 10 minutes of additional time. To show that his answers were consistent, it is necessary to examine the testimony in each instance. Quinley first distinguished between use of metal jacks and timbers when questioned by his own counsel (Tr. 125):

> Q. But you didn't have timbers in there [on the roof-bolting machine] because you used safety jacks?
>
> A. That's right. Our height varied up and down and to use the timbers like that on the pinner, you would have had to cut all the time, haul them in these cuts, stand them up. Where you take the jack, they have got an eighteen inch variation to them. Use them, no worry.

When Quinley was asked about the period of time it takes to set temporary supports by complainant's counsel, he answered her questions as follows (Tr. 138-142):

> Q. How long does it take to put roof bolts in a section of this mine without setting temporary supports.
>
> A. How long? It's according to who does it.
>
> Q. Give me an average.
>
> A. A good operator, fifteen to twenty minutes.
>
> Q. And how much longer does it take if you do set temporary supports?
>
> A. Takes about the same time, because you have a helper to help you set the jacks.
>
> * * * * *
>
> Q. And how long does it take to set temporary supports?
>
> A. Just as long as you can spin a jack stand, [fraction] or five to ten seconds to a stand.
>
> * * * * *

Q. At the time when timbers had to be cut before they were set as temporary supports, did this cause the bolting operation to take longer.

A. Yes.

Q. How much longer?

A. Well, it's according to how hard they worked at it.

Q. Well, let's assume that somebody is working at the average speed, how long does it take to cut and set a timber?

A. I would say ten minutes more.

Q. Ten minutes more?

A. For four timbers.

The third time Quinley was asked about how long it takes to set temporary supports was when he answered my questions as follows (Tr. 158):

Q. How much extra time did you say it took to set the four temporary supports?

A. I wouldn't say any time.

Q. It has to take some time.

A. Maybe some, not that much to amount--maybe two or three minutes.

Q. If you had a man that wasn't using roof bolts or jacks at all and another man who did use them, you would say that the time they would bolt a place wouldn't vary more than how many minutes between the two men?

A. Couldn't be over three.

Q. Three or four minutes?

A. Something like that. All you have to do is stand them up and put a stand on them, that's all.

The testimony reviewed above shows that Quinley preferred to take the position that an experienced operator and helper should be able to install roof bolts while using metal jacks as temporary supports without allowing any additional time for the setting of the jacks, as compared to bolting without use of any temporary supports at all. Quinley, on one occasion, stated that he had done nothing but install roof bolts for 7 years before he became a section foreman and that "[i]f anybody knows [about roof bolting], I ought to" (Tr. 117). Despite his reluctance to agree that it takes any additional time at all to install jacks, he consistently, when pressed on the subject, reluctantly conceded that it might take from 2 to 4 minutes to install jacks as temporary supports. He also conceded, when he was asked about installing temporary supports, that if metal jacks weren't available,

it would require extra time up to about 10 minutes to cut timbers and install them. The foregoing extensive review of Quinley's testimony about the period of time it takes to install temporary supports shows that Quinley cannot be discredited as a witness on the basis of an allegation that his testimony was inconsistent as to the amount of time it takes to install temporary supports.

Complainant's brief (pp. 10-11) next argues that Quinley's testimony should be discredited because of his inconsistency in answering questions about the duties to which complainant had been assigned on the morning of June 27. Complainant first notes that Quinley stated, as his basis for concluding that complainant had done no work on the morning of June 27, that "[t]he curtain at the mouth of the place he [complainant] was sitting in wasn't hung. And that's the one I left him definitely to set and rock dust the place" (Tr. 149). Complainant then points out that Quinley, on cross-examination, had stated in answer to a question about whether he had given complainant any specific instructions that he had "[j]ust [told complainant to] rock dust and ventilate" (Tr. 138). Complainant argues that Quinley can't have it both ways because Quinley either did give specific instructions or he did not. Complainant's brief (p. 11) further contends that respondent has completely failed to submit any evidence to substantiate its primary defense that complainant was discharged for sitting down on the job and failing to engage in productive work on June 27.

Complainant's arguments in the preceding paragraph overlook a considerable amount of evidence which supports the respondent's position in this proceeding much more than it does the complainant's contentions. Quinley's direct testimony shows that he spent some time and gave some specific thought to the work which he assigned complainant to do on the morning of June 27. Quinley stated that he had a miner by the name of Perry Ramey assisting complainant in the performance of complaiant's duties of hanging curtains and rock dusting (Tr. 118). On June 27, after complainant had told Quinley about the need for Quinley to return a phone call, Quinley instructed complainant to take care of all ventilation and rock dusting on that day because Perry Ramey was going to help "shoot" (Tr. 119). Quinley recalled that while he was giving complainant instructions as to his duties for the day, another miner came up and asked to borrow some of complainant's tools which complainant normally carried with him (Tr. 164). Quinley testified that he did not stay around to watch complainant work because he had to go outside, after assigning complainant's duties, for the purpose of returning the phone call (Tr. 160). Quinley came back into the mine about 9:00 a.m. and found complainant sitting against the rib outside the No. 3 entry. Quinley noted that the curtain in the No. 3 entry had not been hung and that no new rock dusting had been done. Quinley was riding in the scoop and he stated that he did not even get out of the scoop. He had had trouble in getting complainant to do his work of hanging curtains and rock dusting ever since complainant was reinstated on June 11. At that moment, Quinley decided that he had had enough of complainant's failure to work and just told complainant to get in the scoop as he was taking him outside for the purpose of discharging him (Tr. 123; 145-146; 150-151).

Complainant's brief (p. 11) also contends that Quinley's testimony should be discredited because he admitted, after much evasion, that he did not know whether curtains had been hung by complainant in any entry other than the No. 3

outside of which complainant had been found sitting. It is true that Quinley reluctantly admitted that he did not know which entries had curtains, but that admission is more damaging to complainant's credibility as to his description of the events which occurred on June 27 than it is to Quinley's credibility. The reason for reaching the foregoing conclusion is that complainant contends that Quinley continuously followed complainant around on the morning of June 27 and watched everything that complainant did, except for the hour when Quinley went outside to return the phone call (Tr. 42; 44).

Quinley's testimony is much more credible as to the events which happened on the morning of June 27 than complainant's testimony because it was Quinley's failure to watch complainant and Quinley's having been outside up to the time he fired complainant that forced Quinley to have to admit that he did not know whether curtains had been hung in any of the headings other than No. 3--and possibly No. 4 (Tr. 170-172). If Quinley had been in the mine on the morning of June 27 long enough to have followed complainant around, as complainant contended, Quinley would have been able to state that, while he could not see into any of the headings except No. 3 and No. 4 at the time he discharged complainant, he knew that the curtains did or did not exist in the other headings by virtue of the fact that he had been following complainant that morning and knew the curtains were up or were not up.

Complainant at no time denied that he had failed to hang a curtain in the No. 3 heading. He claimed that he went into the No. 3 heading to apply rock dust and that when he went into the No. 3 entry, the roof-bolting machine was being operated (Tr. 44-47). Complainant's own testimony also shows that he understood that his duties on the morning of June 27 consisted of hanging curtains and applying rock dust (Tr. 35). Complainant's failure to install a curtain in the No. 3 heading was in violation of 30 C.F.R. § 75.302(a) which provides in pertinent part:

> (a) Properly installed and adequately maintained line brattice or other approved devices shall be continuously used from the last open crosscut of an entry or room of each working section to provide adequate ventilation to the working faces for the miners and to remove flammable, explosive, and noxious gases, dust, and explosive fumes * * *

Therefore, Quinley was justified in being upset with complainant's failure to hang a curtain in the No. 3 heading because complainant's having allowed roof bolting to be done in the No. 3 heading without installing a line brattice was a violation of the safety regulations as well as a failure to perform the duties which he had been assigned to do on the morning of June 27.

Complainant's brief (p. 12) next attacks Quinley's credibility by citing testimony in which Quinley had stated that he could make decisions about discharging personnel, but preferred not to make such decisions on his own initiative (Tr. 135). It is then argued that it is "unbelievable" that Quinley could thereafter have claimed, as he did, that he had made the decision to discharge complainant without consulting higher management (Tr. 126). The foregoing argument misapplies the testimony cited in the argument and overlooks other testimony. Quinley explained that he was able to make the decision

to discharge complainant because the mine owners knew what he had been putting up with and they had already told Quinley to "get rid" of complainant if Quinley couldn't get him to do his job (Tr. 152). A careful reading of the testimony cited by complainant and the testimony cited in the preceding sentence shows that Quinley made the decision to discharge complainant on June 27 after having had plenty of prior authorization by respondent's management to discharge him.

Complainant's brief (pp. 13-14) states that the final aspect of Quinley's testimony which shows that he is not a credible witness was his repeated assertion that he did not know he was going out of the mine on June 27 to return a call from MSHA. Complainant cites the testimony of Greg Deel, the outside man, for the purpose of showing that Quinley himself tried to dial the number as well as Greg. It is said that the testimony of both Quinley and Greg shows that they both knew they were trying to call someone who worked for MSHA (Tr. 119-120; 148; 215). In Finding of Fact Nos. 19 and 20, supra, I have compiled the testimony of all witnesses about the manner in which Quinley was told about the phone call from E. C. Rines, the MSHA supervisory inspector, and the steps that were taken by Quinley and Greg Deel to return the call. The preponderance of the evidence shows beyond any doubt that Quinley, Greg Deel, and Verlin Deel all knew that they had been asked to return a call from an MSHA employee before they ever succeeded in talking to him. That, however, does not mean that they knew before Quinley had brought complainant out of the mine to discharge him that complainant had reported to MSHA that temporary supports were not being used in respondent's mine. E. C. Rines testified in this proceeding that, in addition to the four complete inspections which are made of underground mines each year, there are about 30 types of policy inspections (Tr. 106; 109). Consequently, the mere fact that a person is asked to return a call made by an MSHA inspector does not provide an operator of a coal mine with any reason to believe that one of his employees has reported him to MSHA for a violation of a mandatory health or safety standard.

The Credibility of Richard A. Fleming, the Complainant

Complainant's brief (pp. 14-15) states that his testimony, as compared with that of Charles Quinley, was imminently credible and well reasoned. It is said that complainant's demeanor on the witness stand was commendable, that he recalled the events of June 27 clearly, and that he did not hesitate to answer any question on cross-examination. It is contended that complainant's attention to detail on the witness stand may be assumed to be characteristic of his attention to detail inside the mine. Complainant, however, does concede that his testimony was contradicted as to some allegations. For example, complainant acknowledges that he testified that he came out of the No. 3 heading on the morning of June 27 and sat down beside Quinley who was already sitting there, whereas Quinley testified that he did not sit down at all and that complainant certainly did not sit down beside him on June 27. Complainant urges me, however, to discredit Quinley's testimony and accept complainant's as to this contradicted occurrence because Verlin Deel, Jr., confirmed in his testimony that complainant had to sit down next to the coal rib to allow the "drill" to pass.

Complainant inadvertently referred to a "drill" on page 15. All witnesses, without exception, have referred only to a roof-bolting machine in the No. 3 heading on June 27 in connection with complainant's allegation that he had to sit down against the rib to permit the roof-bolting machine to pass. Complainant's brief (p. 15) does not give a transcript reference in support of the claim that Verlin Deel, Jr.'s testimony corroborates complainant's allegation that he had to sit down against the rib to get out of the path of the roof-bolting machine and I have searched Verlin Deel, Jr.'s testimony in vain for any statement showing that he agreed that complainant had to sit down against the rib on June 27 to allow the roof-bolting machine to pass. Verlin Deel, Jr., stated that he heard Quinley tell complainant to hang a curtain or curtains before Deel went into an undesignated entry to assist the operator of the roof-bolting machine. Deel, Jr., testified that complainant was in the crosscut outside the entry when he went in to assist in roof bolting and that complainant was still in the crosscut outby the entry when the roof-bolting machine was brought out of the entry. There is no indication in Deel, Jr.'s testimony that complainant was ever in the entry applying rock dust while they were roof bolting. Deel, Jr., did say that he was pulling up the trailing cable on the roof-bolting machine at the time Quinley came back into the mine and took complainant outside (Tr. 224-225; 228; 234). Therefore, Deel, Jr.'s testimony corroborates Quinley's version of what happened on June 27 more than it corroborates complainant's account of the events.

As I have indicated in Finding of Fact Nos. 23, 29, 30, 31, supra, and in my discussion under the heading of "Complainant's Position as Operator of the Roof-Bolting Machine", supra, complainant's testimony is filled with contradictions which support a conclusion that he relied on his knowledge of the duties which should be done by a general inside laborer to fabricate a plausible account of what he actually did on the morning of June 27. Therefore, I must reject all of the arguments in complainant's brief to the effect that complainant's testimony is entitled to a high credibility rating.

Complainant's Protected Activity

Complainant's brief (p. 15) states that complainant was engaged in a protected activity under the Act and alleges that "[t]hroughout the time [complainant] was a roof bolter he insisted on setting temporary supports". As I have already explained in great detail under the heading of "Complainant's Position as Operator of the Roof-Bolting Machine", supra, complainant operated the roof-bolting machine for about 52 days before he used any temporary supports at all. He then used partial temporary supports from May 20 to about June 1 and finally used temporary supports in all entries for from 2 to 4 days before he either walked off the job or was discharged on June 4. The discharge which is before me in this proceeding occurred on June 27--not June 4--and the alleged protected activity involved complainant's calling MSHA to report that respondent was not using temporary supports, but complainant was not employed as a roof bolter at the time he made the call to MSHA and had not been a roof bolter for 16 working days before he made the call.

Complainant's brief (p. 16) relies on the Commission's decision in Thomas Robinette v. United Castle Coal Co., 3 FMSHRC 803 (1981), in support of a claim that an employee is entitled to use "self-help" in order to protect himself

from a hazardous condition. Complainant's reliance on the Robinette case is misplaced. In that case, the Commission held that a person may use affirmative action to lessen a hazard after exercising his right to refuse to work where hazards exist.

The arguments in complainant's brief (p. 16) about complainant's having to use self-help to protect himself from hazardous conditions are contrary to the facts and are completely unrelated to the issues in this proceeding. Complainant's own testimony in this proceeding shows that at no time did management suggest that he should install roof bolts without using temporary supports. While it is true that complainant contended that it was difficult for him to obtain timbers for use as temporary supports, he did continue to operate the roof-bolting machine in the Nos. 1 and 7 entries without temporary supports from May 20 to about June 1. Therefore, at no time did complainant ever refuse to work under an allegedly hazardous condition and at no time did he ever use affirmative action by refusing to install roof bolts until management supplied timbers which were short enough for the No. 1 entry and long enough for the No. 7 entry. When complainant did begin to use temporary supports in all entries on or about June 1, he used timbers which had been provided by management. Although he claims that the timbers became available only because management brought the timbers in to use in pulling pillars, the fact remains that complainant never at any time engaged in any activities which justify reliance by complainant on the Commission's holding in the Robinette case, supra, especially since complainant's discharge on June 27 had nothing to do with his use of temporary supports while he held the position of roof bolter.

Complainant's brief (p. 17) refers to complainant's having called MSHA on the evening of June 26 to report the allegation that temporary supports were not being used at respondent's mine. Complainant's brief (p. 17) then quotes from section 105(c)(1) of the Act and correctly argues that an operator may not discharge or otherwise discriminate against a miner who makes a complaint about a safety hazard to MSHA. If the evidence in this proceeding showed that respondent had discharged complainant because he reported respondent's failure to use temporary supports to MSHA, I would have no difficulty in finding that respondent had violated section 105(c)(1). The evidence, however, does not show that complainant was discharged for reporting the failure to use temporary supports to MSHA. On the contrary, he was discharged for failing to do the work which had been assigned to him, that is, hanging curtains and applying rock dust.

Complainant's brief (p. 17) continues trying to claim that complainant's insistence on using temporary supports was a protected activity which is somehow related to complainant's discharge on June 27. Complainant was not a roof bolter at the time he was discharged on June 27 and had not been a roof bolter since June 4. Complainant's failure to do his work as a general inside laborer did not in any way slow down the installation of roof bolts. John Carpenter, who became operator of the roof-bolting machine after June 4, was able to install roof bolts in 15 working places per shift as compared to complainant's ability to bolt only 10 places. Therefore, respondent had no reason whatsoever for discharging complainant on June 27 because he had, while performing his duties as a roof bolter between May 20 and June 4 followed the requirements of respondent's roof-control plan by using temporary supports before installing roof bolts.

Alleged Illegal Discharge

Complainant's brief (p. 18) alleges that "[o]wner Verlin Deel admitted that Fleming [complainant] was the only miner who ever set temporary supports". During cross-examination by complainant's counsel, Verlin Deel testified as follows (Tr. 206):

> Q. Now, other than Mr. Fleming did any other miner, as a practice, use temporary supports?
>
> A. Yes, John [Carpenter] and Genco, they went to using them later on, and when they started using them -- that was Bryan Genco.
>
> Q. In other words, they used them sometimes?
>
> A. Yeah, sometimes.
>
> Q. But not all the time?
>
> A. Not all the time.

As I have already pointed out under the heading "Complainant's Protected Activity", supra, the fact that complainant used temporary supports for 11 of the 63 days he was a roof bolter has nothing to do with his discharge. The alleged illegal discharge must stand or fall on the question of whether complainant was discharged because he reported to MSHA on June 26 [not June 27, as stated on page 18 of complainant's brief] that respondent's miners were not using temporary supports.

Complainant's brief (p. 18), after having argued extensively that Quinley's testimony should be totally discredited (Br., p. 8), chooses to adopt Quinley's statement that complainant told Quinley on June 27 to call E. C. Rines, the MSHA supervisory inspector in Norton, whereas complainant testified that he only told Quinley that there was a message on the desk for him about an important phone call Quinley was to return (Tr. 35; 71). As indicated in Finding of Fact No. 19, supra, every witness (Complainant, Quinley, Verlin Deel, and Greg Deel) who had anything to do with the phone call gave somewhat conflicting accounts of it. From a credibility standpoint, it would have made a slightly better case for complainant if he had told Quinley on the morning of June 27 that E. C. Rines, a supervisory MSHA inspector in Norton had called and had asked that Quinley return his call. Complainant, however, testified that he had been instructed by Rines not to use Rines' name and to tell Quinley to return a phone call (Tr. 35). Rines testified that he gave complainant only his name and the fact that he worked for MSHA. Therefore, unless complainant wrote Rines' name on the message he claims he left on the desk (Tr. 71), there would have been no possible way for Quinley or Greg Deel to have determined whose phone call Quinley had been asked to return.

Greg testified that there was no message on the desk and that the only way he knew what number to call was that he knew when Quinley gave him Rines' name that Rines worked for MSHA. Greg stated that he had written MSHA's number down in the back of the phone book and that he knew what number to call by obtaining MSHA's number from the phone book. I can't see how it

could possibly have enhanced Greg's credibility or respondent's position in this proceeding for Greg to have claimed that he had to look up MSHA's number if the number had been written by complainant on a message and left on the desk in the office. Moreover, since Rines himself testified that he gave complainant only his name and the fact that he worked for MSHA, I conclude that Quinley must have known Rines' name when he came into the office and that Quinley must have obtained Rines' name from complainant despite complainant's testimony to the effect that he did not give Rines' name to Quinley.

Aside from the credibility determinations involved in the preceding discussion, it makes no difference how Greg and Quinley found out that they were supposed to call Rines in Norton. The significant aspect of the effort to call Rines on the morning of June 27 is that the evidence conclusively supports a finding that Quinley and Greg knew that they were supposed to return a call which had come from an MSHA employee. Of course, as indicated in Finding of Fact Nos. 20 and 29, supra, Quinley decided to discharge complainant before he ever learned that complainant had reported respondent's failure to install temporary supports to MSHA.

Complainant's brief (pp. 19-20) quotes some testimony by Quinley in which he stated that he thought when complainant told him to call Rines that Rines was a Union man who might be calling in connection with "* * * trouble we might have had with him [complainant] before and hired him back (Tr. 148)". Complainant then argues that regardless of whether I find that Quinley knew that complainant had made a complaint to MSHA before complainant was discharged, that Quinley's belief that complainant was again giving respondent "trouble" shows that Quinley wanted to discharge complainant for engaging in protected activities because the only prior trouble complainant had which involved the Union concerned complainant's setting of temporary supports, a protected activity.

There are several defects in the foregoing argument. First, although Quinley thought the call might involve the Union when he got on the scoop to go outside, he was advised by Greg Deel as soon as he gave Greg the name of the person to be called that they were supposed to call an MSHA employee--not a Union employee. Therefore, Quinley had no reason to associate complainant with any "trouble" pertaining to a call to MSHA because complainant had never made any complaints to MSHA about conditions at respondent's mine prior to June 26 and Quinley did not have knowledge of the subject matter of the call of June 26 until after he had discharged complainant.

A second defect in the argument is that complainant's use of temporary supports and "trouble" with the Union are not synonymous, interchangeable, or even interrelated matters. One of the important aspects of this case is that complainant, up to June 26, had never thought of going to MSHA to obtain redress for any of his alleged grievances. As indicated in Finding of Fact No. 9, supra, complainant at no time ever read or examined respondent's roof-control plan, but he did carry around with him a copy of the Union contract. He was an expert in expounding upon his rights under the Union contract. When complainant filed his grievance with the Union on June 4 (Tr. 25-26), he filed it immediately after he was asked to relinquish his position as operator of the roof-bolting machine to another employee who could bolt faster than complainant (Tr. 25; 60; 175). The record does not contain

a detailed description of the grounds of the grievance filed with the Union, but the evidence in the record about the grievance shows that complainant's grievance dealt with complainant's rights under the Union contract rather than his insistence on installing temporary supports. Consequently, the record doesn't support complainant's contention that "trouble" with the Union is tantamount to complainant's insistence upon the use of temporary supports.

A third defect in the argument is that the events which occurred on June 26 prior to complainant's discharge on June 27 do not support complainant's argument that "trouble" with the Union automatically caused respondent's management to conclude that complainant should be discharged for having engaged in a protected activity. It must be borne in mind that when complainant was reinstated on June 11, he took the position of general inside laborer. On June 26, Verlin Deel talked to complainant in the mine office and told him that management had received complaints from the other miners about complainant's failure to do his work. Complainant described the conversation as follows (Tr. 32):

> A. I do not recall what started the conversation, but it ended in a discussion of Union rights and contract obligations and it ended in a rather heated discussion between Mr. Deel and myself about my duties that were going to be assigned to me the next day. * * * 1/

The foregoing testimony shows that complainant, on the evening preceding his discharge on June 27, had argued Union contract rights with respondent's management. Since complainant had filed a grievance with the Union after the heated argument complainant had had with management on June 4, the evening of the preceding discharge, there is no reason for me to find that respondent's management would equate "trouble" with the Union as being synonymous with a complaint to MSHA about safety matters or any sort of protected activity.

Complainant's brief (p. 21) notes that Greg Deel testified that Quinley used the underground paging phone to announce that he was coming outside with complainant (Tr. 212). Then complainant argues that since complainant stated in his direct testimony that Quinley did not stop to use the phone when they went out together on the scoop (Tr. 49), that it must be concluded that Greg had called underground to advise Quinley of the subject matter of the phone call from MSHA. Therefore, it is argued that Quinley must have known about complainant's having reported the failure of respondent to use temporary supports prior to the time that Quinley discharged complainant.

The preceding argument would be convincing except for at least three defects in it. First, as I have hereinbefore explained in considerable detail, complainant's credibility in this proceeding is very poor. Therefore, the mere fact that he said Quinley did not call outside does not mean that Quinley failed to announce that he was coming out with complainant. Second, Greg Deel

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1/ Although complainant alleged that Verlin had threatened to assign him all sorts of jobs for the purpose of forcing him to resign, complainant's testimony shows that he was given no burdensome duties when he reported for work the next day despite the fact that he came in a half hour late (Finding of Fact No. 23, supra.)

stated that a paging telephone was used by Quinley. A paging telephone can be heard for several breaks in a coal mine. It is highly improbable that Greg himself would have called underground to announce over a loudspeaker that someone had reported respondent to MSHA for failing to use temporary supports and that Greg thought that complainant was probably the one who had called MSHA. Third, Greg voluntarily brought out in his direct testimony that Quinley had "hollered" outside to notify Greg that he was coming outside with complainant on the scoop. Greg stated that he did not tell Quinley about the complaint made to MSHA until after Quinley had arrived in the mine office. Consequently, I disagree with the contention in complainant's brief (p. 20) that I "must find" on the basis of the record that Quinley knew complainant had called MSHA and that complainant's call was the actual reason complainant was discharged.

Complainant's brief (p. 22) seeks to establish an "animus" by respondent's management toward complainant by noting that Verlin Deel threatened to fire complainant in the heated discussion between complainant and Verlin which occurred on June 26 before complainant's discharge on June 27 (Tr. 32; 177). There is no doubt but that respondent's management was upset with respondent's failure to do his work. Both complainant and Verlin agree that their conversation was "heated". The mere fact, however, that complainant's relationship with his employer was discordant does not mean that their argument had anything to do with a protected activity for which respondent had decided to discharge complainant.

Complainant's brief (p. 22) also argues that there were many opportunities for the discharge of complainant, but they did not occur until after complainant reported the failure to use temporary supports to MSHA. It is contended that the occurrence of the discharge on the very next day following complainant's call to MSHA shows that the discharge was illegally motivated. Complainant also denies that respondent regularly criticized complainant's work. That argument is defective for at least two reasons. First, it ignores complainant's own testimony that he was daily told that his work was unsatisfactory (Tr. 28) and it overlooks the fact that Verlin Deel himself answered my questions about complainant's failure to perform his work as follows (Tr. 193):

> Q. If you were a part owner of the mine didn't it bother you to see him [complainant] doing nothing?
>
> A. Yeah, it did.
>
> Q. And you didn't say anything to him, though?
>
> A. Sure, I said a lot to him.
>
> Q. You did?
>
> A. Yeah.
>
> Q. On June 27th?

A. No, before that. What time he worked for me, I tried to get him to do his job. I talked to him several times and tried to get him to do his job. And actually, I didn't want to get rid of him. I wanted him to work.

Complainant's brief (p. 23) argues that Quinley did not know what complainant had done on June 27 and therefore Quinley had no basis for discharging him for failure to perform his duties. It is said that complainant's version of the events of June 27 should be credited as compared to Quinley's and it is contended that complainant's statement that he sat down beside Quinley, who was already sitting down, should be credited over Quinley's claim that he did not sit down at all. Finally, it is argued that complainant's account is supported by the equipment operator. I have already dealt with all of the foregoing arguments at least once in this decision. I have already shown why complainant's testimony is to be given less credit than Quinley's and it is incorrect that the Verlin Deel, Jr.'s testimony supports complainant's testimony. Verlin Deel, Jr., said that he saw complainant sitting down and that he heard Quinley tell him to hang a curtain. Deel, Jr., stated that he later saw complainant and that the curtain had not been hung (224-225). Deel, Jr., also said that he heard Quinley tell complainant that they were going outside and that Quinley and complainant were about 12 to 15 feet apart. Deel, Jr., did not state that he saw Quinley seated against the rib (Tr. 228-229). I don't see how it can be correctly contended that Deel, Jr.'s testimony supports complainant's version of the events which occurred on June 27.

Complainant's brief (p. 24) takes the narrow position that firing a person for sitting down on the job contains no other ramifications and argues that only one other person had ever been discharged for sitting down on the job and that that discharge occurred under circumstances highly distinguishable from the events which led to complainant's discharge. The other person who was discharged was fired because he refused to perform some work which Quinley asked him to do (Tr. 142). Complainant was also fired for refusing to do work which he was assigned to do (Tr. 146; 149). Also Quinley explained that he did not object to a miner's taking a break when he was caught up on his work and that he wouldn't have been upset by the fact that complainant was sitting down on June 27 if complainant had done the work which he had been assigned to do (Tr. 161).

Complainant's brief (p. 24) completes its extended argument with the unfounded conclusion that complainant has proven a violation of section 105(c)(1) if the principles of the Commission's decision in David Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (1980), are applied to the facts in this proceeding. It is contended that complainant was engaged in a protected activity both because he insisted on setting temporary supports and because he had called MSHA to report respondent's failure to use temporary supports. Complainant argues that even if one assumes, without admitting, that any part of respondent's motivation for discharging complainant was for an unprotected activity, it cannot be found that complainant would have been discharged for his unprotected activities alone.

In the Pasula case, the Commission held that a miner has shown a prima facie case of discrimination or discharge if he has proven that he engaged in a protected act and that the adverse action or discharge was motivated in any part by the protected activity. If the miner succeeds in establishing his prima facie case, respondent has the burden of showing by a preponderance of the evidence that, although it was motivated by the protected activity, in part, the adverse action would have been taken in any event for the unprotected activity alone. The Pasula case is not applicable to this proceeding because complainant failed to present a prima facie case showing that his discharge by respondent was motivated by complainant's protected activity of calling MSHA to report respondent's failure to use temporary supports, or by his alleged protected activity of having used temporary supports for about 11 days while he was employed as a roof bolter.

Respondent's Reply Brief

My consideration of the parties' arguments above has dealt only with the arguments in complainant's brief. I have carefully read respondent's six-page reply brief. My decision shows that I am in substantial agreement with the arguments made in respondent's reply brief. Therefore, I shall not further lengthen this decision by discussing arguments with which I am in general agreement.

Civil Penalty Issues

My order of March 4, 1981, consolidated for hearing in this proceeding all civil penalty issues which might be raised if a violation of section 105(c)(1) of the Act had been proven. Inasmuch as no violation of section 105(c)(1) was proven, the civil penalty issues are moot and no action on that aspect of the proceeding is required.

WHEREFORE, it is ordered:

(A) The Complaint of Discharge, Discrimination, or Interference filed in Docket No. VA 81-16-D is denied for failure to prove that a violation of section 105(c)(1) of the Federal Mine Safety and Health Act of 1977 occurred.

(B) All civil penalty issues are severed from this proceeding and dismissed as moot.

Richard C. Steffey

Richard C. Steffey
Administrative Law Judge
(Phone: 703-756-6225)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Civil Penalty Proceeding
Petitioner	:	Docket No. WEVA 80-415
v.	:	A.C. No.
	:	Beckley Mine
BECKLEY COAL MINING COMPANY, Respondent	:	
and	:	
BECKLEY COAL MINING COMPANY, Applicant	:	Contest of Citation
v.	:	Docket No. WEVA 79-465-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Citation No. 646219 September 7, 1979
Respondent	:	Beckley Mine

DECISION

Appearances: John H. O'Donnell, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner; Harold S. Albertson, Esq., for Respondent.

Before: Administrative Law Judge William Fauver

These proceedings involve the same citation. In WEVA 80-415 the Secretary seeks a civil penalty under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. In WEVA 79-465-R, the company seeks review and vacation of the citation under section 105(d) of the Act. The cases were consolidated and heard at Charleston, West Virginia. The parties were represented by counsel, who have submitted their proposed findings, conclusions, and briefs following receipt of the transcript.

Having considered the contentions of the parties and the record as a whole, I find that the preponderance of the reliable, probative, and substantial evidence establishes the following:

FINDINGS OF FACT

1. At all pertinent times, Respondent, Beckley Coal Mining Company, operated a coal mine known as the Beckley Mine in Raleigh County, West Virginia, which produced coal for sales in or substantially affecting interstate commerce.

2. In the Second Northeast Section of the Beckley Mine, the return escapeway often alternated between the No. 1 and No. 2 entries to avoid adverse roof conditions or water accumulations.

3. The intake escapeway was through the track-haulage entry (No. 4), which ran parallel to Entries 1, 2 and 3, the belt entry.

4. Under Respondent's approved plan, escapeways had to be at least 6 feet wide, as high as the coal seam, and marked with one-fourth-inch life-lines with reflective material every 25 feet.

5. On August 22, 1979, federal inspector Chester D. Pennington, accompanied by Respondent's Safety Director, Ronald D. Scaggs, traveled the return escapeway on foot. At the No. 20 crosscut, the inspector observed 12 to 15 inches of water that prevented passage. The water extended from rib to rib for about 200 feet, or as far as the inspector could see with his cap lamp. As a custom and practice, if water was above "boot level" (about 12 inches), the escapeway was to be rerouted because passage in case of an emergency would be difficult or dangerous.

7. Mr. Scaggs suggested rerouting part of the escapeway into the belt haulage entry (No. 3), which was in a neutral air course between the return and intake entries. The inspector traveled to the belthead with Mr. Scaggs and waited there while Mr. Scaggs rerouted the escapeway. Mr. Scaggs cut the lifeline at the No. 25 break, crouched through a 30-inch square door into the belt entry, traveled to the No. 15 break, and cut the line there also. He then returned to the No. 25 break, pulled the piece of cut line through the water accumulation, tied it to the original line and took it through the door and down the belt entry until he reached the No. 15 break. He also marked the door at the No. 25 break with chalk to show that the escapeway passed through it and marked the cribs in the belt entry with chalk. He spent about 45 minutes rerouting the escapeway.

8. As rerouted, the return escapeway began in the No. 1 entry near the next to last crosscut. At the No. 35 break, it passed into the No. 2 entry, ran to the No. 28 break, and passed back to the No. 1 entry. At the No. 25 break, it passed through the 30-inch square steel door into the belt entry (No. 3). From there, it ran down to the No. 15 break and back into the return air course (Nos. 1 and 2 entries).

9. Inspector Pennington told Mr. Scaggs that he would first have to check with his supervisor about the rerouting plan, and that he doubted that

the supervisor would approve it because clearance in the belt entry was not as great as in the original escapeway. In the belt entry, timbers were set near the left rib; the width between the timbers and the right rib ranged from 3-1/2 to 5 feet. He did not issue a citation that day for the accumulation of water in the escapeway.

10. Mr. Scaggs told the evening and day shift company safety inspectors, and the section foreman, that the escapeway had been rerouted. He also posted the change on the chalkboard in the foremen's room.

11. That evening, Mr. Scaggs directed an employee to inspect the No. 1 entry from the No. 15 break to the No. 1 break to see if there were any more water accumulations. More water accumulations were discovered at the No. 12 break and other breaks further down the return escapeway. On the next shift, the escapeway was rerouted into the belt entry all the way to the No. 1 break. Inspector Pennington was not aware of this further change in the rerouted escapeway.

12. Emergency travel in the beltway would be difficult because of its narrow width where timbered and because of overcasts and beltheads. At various places, a stretcher-bearer would have to crouch beneath overcasts, lift the stretcher over a belthead, or stoop to pass under a belthead.

13. The inspector's supervisor, George S. Vargo, refused to approve the alternative route, on the grounds that clearance in the belt entry was insufficient and passage through the steel door was too narrow.

14. The inspector did not inform Mr. Scaggs of Mr. Vargo's decision. On September 7, the inspector returned to the mine and met Danny Miller, a safety inspector for Respondent. They traveled the return escapeway, and found that the accumulation of water was still present at the No. 20 crosscut. The inspector found that there had been no efforts to pump out the water. He observed chalk marks indicating that the escapeway had been rerouted. He did not ask Mr. Miller about a lifeline or travel the rerouted section to observe whether a lifeline had been installed. Based on the conditions he observed, Inspector Pennington issued Citation No. 646219 for a violation of 30 C.F.R. § 75.1704. The citation reads in part: "Water approximately 15 inches deep was allowed to accumulate in the No. 1 and No. 2 entries at No. 20 crosscut in 2 northeast mains escapeway." This condition was abated on September 17 by pumping the water out of the escapeway.

DISCUSSION WITH FURTHER FINDINGS

Based on the citation issued September 7, 1979, Respondent is charged with a violation of 30 C.F.R. § 75.1704, which provides:

> Except as provided in §§ 75.1705 and 75.1706, at least two separate and distinct travelable passageways which are

> maintained to insure passage at all times of any person, including disabled persons, and which are to be designated as escapeways, at least one of which is ventilated with intake air, shall be provided from each working section continuous to the surface escape drift opening, or continuous to the escape shaft or slope facilities to the surface, as appropriate, and shall be maintained in safe condition and properly marked. Mine openings shall be adequately protected to prevent the entrance into the underground area of the mine of surface fires, fumes, smoke, and floodwater. Escape facilities approved by the Secretary or his authorized representative, properly maintained and frequently tested, shall be present at or in each escape shaft or slope to allow all persons, including disabled persons, to escape quickly to the surface in the event of an emergency.

Respondent contends, first, that the Secretary is estopped from bringing this action. It argues that Mr. Scaggs, Respondent's Safety Director, justifiably relied on Inspector Pennington's representation that he would first discuss the proposed alternative escapeway with the MSHA District Manager to find out whether the proposed route would be permitted, and then notify Mr. Scaggs of the District Manager's decision, before issuing a citation. The inspector returned to the mine about 2 weeks after the August 22 inspection and, without speaking with Mr. Scaggs, issued a citation. Respondent requests that the Commission accept the estoppel argument because the Government's conduct "threatens to work a serious injustice against Beckley Coal Mining Company" and because, although the Supreme Court has held that equitable estoppel generally does not apply against the federal government, opinions in lower federal courts have permitted estoppel in some circumstances. Respondent urges the Commission to follow the trend in the lower federal courts.

The Secretary argues that: Under the Act, an inspector is required to issue a citation upon observing a violation of a mandatory safety standard; on August 22 the water accumulation in the designated escapeway was a clear violation; and the inspector's discussions with Respondent's Safety Director amounted to determining an acceptable means of abatement. The Secretary argues that the inspector's failure to issue a citation on August 22 did not prevent him from issuing a citation for this violation at a later date or estop the Government from bringing this case. The Secretary also argues that anyone entering into an agreement with an agent of the Government assumes the risk that the agent has exceeded his authority and that the inspector exceeded his authority by agreeing not to issue the citation immediately.

The Secretary proposes a penalty of $500.

I conclude that the Secretary is not estopped from bringing this action. Secretary of Labor v. King Knob Coal Company, Inc., 2 FMSHRC 1417 (June 29, 1981), involved a defense of estoppel based on the company's reliance on an MSHA inspector's manual. The Commission rejected this defense, stating:

> Absent the Supreme Court's expressed approval of that decisional trend, we think that fidelity to precedent requires us to deal conservatively with this area of the law. This restrained approach is buttressed by the consideration that approving an estoppel defense would be inconsistent with the liability without fault structure of the 1977 Mine Act. * * * Such a defense is really a claim that although a violation occurred, the operator was not to blame for it. Furthermore, under the 1977 Mine Act, an equitable consideration, such as the confusion engendered by conflicting MSHA pronouncements, can be appropriately weighed in determining the appropriate penalty * * *.

King Knob Coal Company, Inc., 2 FMSHRC at 1421-1422.

Since Respondent is charged with maintaining an unsafe escapeway as of September 7, 1979, rather than the date of the earlier inspection (August 22), the remaining issue is whether the Secretary has proved a violation as of September 7.

The cited standard (section 75.1704 of the regulations) requires that escapeways be safe, suitably marked, and adequate for persons, including disabled persons, to escape quickly to the surface. Escapeways must be approved by the Secretary or his authorized representative (i.e., the District Manager). The criteria for approval are in sections 75.1704-1 and 75.1704-2. Section 75.1704-1 provides that, where the height of the coal seam is at least 5 feet, "the travelway in such escapeway should be maintained at a width of at least 6 feet." Escapeways that do not meet the criteria may be approved provided "the operator can satisfy the District Manager that such escapeways and facilities will enable miners to escape quickly to the surface in the event of an emergency."

In approving Respondent's original escapeway plan, the District Manager applied the criteria in section 75.1704-1, including the criterion of a 6-foot width. The District Manager rejected the alternative plan, principally on the grounds of the narrow width in the belt entry and the 30-inch door leading from the original escapeway into the belt entry. I conclude that his decision conforms to the criteria in section 75.1704-1 of the regulations.

Because the alternative route was rejected, on grounds consistent with the regulation guidelines, the original escapeway had to be maintained in compliance with section 75.1704. However, it was not in compliance on September 7 because of the water accumulation, which I find was excessive and rendered the escapeway unsuitable under the requirements of section 75.1704. Even if it were found that the alternative escapeway should be considered despite the District Manager's decision, I conclude that the alternative escapeway did not meet the requirements of section 75.1704; the grounds for this conclusion include the narrow beltway width (a range of only 3-1/2 to 5 feet), the overcasts and beltheads, and the 30-inch door.

I conclude that Respondent's negligence was minimal, considering Respondent's discussion with the inspector on August 22 and the facts that: Respondent believed in good faith that the alternative route was safe and was pending approval by the District Manager; it adequately marked the alternative route with a lifeline and reflective markers; and it notified its employees of the changes in the escape route.

CONCLUSIONS OF LAW

1. The undersigned judge has jurisdiction over the parties and subject matter of these proceedings.

2. Respondent violated 30 C.F.R. § 75.1704 on September 7, 1979, by failing to maintain the return escapeway in safe condition at its Beckley Mine, as alleged in Citation No. 646219.

3. Based upon the statutory criteria for civil penalties, Respondent is assessed a penalty of $25 for this violation.

ORDER

WHEREFORE IT IS ORDERED that:

1. The above-mentioned citation is AFFIRMED and the notice of contest is DISMISSED.

2. Respondent shall pay the Secretary of Labor the above-assessed civil penalty, in the amount of $25, within 30 days from the date of this decision.

William Fauver

WILLIAM FAUVER, JUDGE

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