

September 1982

Commissions Decisions

9-01-82	William A. Haro v. Magma Copper Co.	WEST 80-482-DM	Pg. 1619
9-30-82	MSHA & UMWA ex rel. Howard Mullins	HOPE 75-680	Pg. 1622

Administrative Law Judge Decisions

8-06-82	FMC Corp.	WEST 82-72-RM	Pg. 1628
9-01-82	Consolidation Coal Co.	WEVA 80-516	Pg. 1634
9-03-82	Mettiki Coal Corp.	YORK 81-12	Pg. 1635
9-07-82	Great Western Electric Co.	WEST 81-213-RM	Pg. 1645
9-09-82	Lehman Gilliam v. Blue Diamond Mining, Inc.	KENT 80-288-D	Pg. 1651
9-10-82	Charles H. Bundy v. Benham Coal, Inc.	KENT 82-35-D	Pg. 1691
9-14-82	Lime Products Corp.	YORK 81-28-M	Pg. 1699
9-15-82	Davis Coal Co.	WEVA 82-111	Pg. 1707
9-15-82	Roger E. Sammons v. Mine Services Co.	SE 82-15-D	Pg. 1713
9-16-82	Old Ben Coal Co.	LAKE 81-46	Pg. 1735
9-23-82	The New River Co.	WEVA 82-93-R	Pg. 1741
9-23-82	Thompson Brothers Coal Co.	PENN 81-171	Pg. 1763
9-23-82	Little Bill Coal Co., Inc.	KENT 81-102	Pg. 1766
9-24-82	C F & I Steel Corp.	WEST 81-93	Pg. 1777

Commission Decisions

SEPTEMBER

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

Secretary of Labor, MSHA on behalf of George Roy Logan v. Bright Coal Company, Inc., and Jack Collins, Docket No. KENT 81-162-D. (Judge Moore, July 23, 1982)

Secretary of Labor, MSHA v. Sellersburg Stone Company, Docket Nos. LAKE 80-363-M, LAKE 80-364-M. (Judge Fauver, July 26, 1982)

Secretary of Labor, MSHA v. A. H. Smith, Docket No. YORK 81-67-M. (Judge Melick, July 28, 1982)

Secretary of Labor, MSHA v. Emergy Mining Corporation, Docket Nos. WEST 82-48, WEST 82-80, WEST 81-400-R. (Judge Moore, July 30, 1982)

Joseph W. Herman v. Imco Services, Docket No. WEST 81-109-DM. (Judge Morris, August 9, 1982)

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

Secretary of Labor, MSHA v. Miller Mining Co., Inc., Docket No. WEST 81-267-M. (Judge Koutras, August 4, 1982)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 1, 1982

WILLIAM A. HARO

v.

MAGMA COPPER COMPANY

:
:
:
:
:
:

Docket No. WEST 80-482-DM

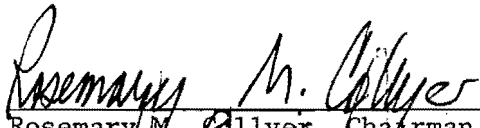
ORDER

William A. Haro has petitioned for discretionary review of a decision of an administrative law judge issued on July 23, 1982. Magma Copper has filed a motion requesting that the petition be dismissed as untimely. For the reasons that follow, the petition is dismissed as untimely.

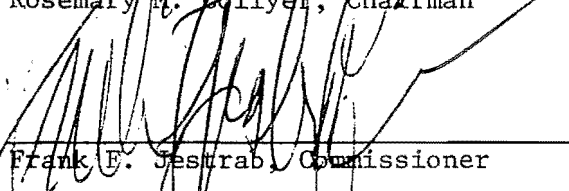
The Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., provides that "any person adversely affected or aggrieved by a decision of an administrative law judge, may file and serve a petition for discretionary review by the Commission of such decision within 30 days after the issuance of such decision." 30 U.S.C. § 823 (d) (2)(A)(i) (emphasis added). Further, Rules 5(d) and 70(a) of the Commission's rules of procedure expressly provide that "filing of a petition for discretionary review is effective only upon receipt." 29 C.F.R. §§ 2700.5(d), 70(a).

The administrative law judge's decision in this case was issued on July 23, 1982. The thirtieth day following the issuance of the judge's decision was August 22, 1982. Counsel did not mail the petition for discretionary review until August 27, 1982. It was not received, and therefore filed, at the Commission until August 30, 1982, the thirty-

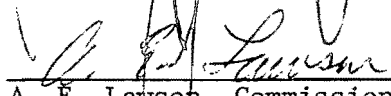
eighth day after the issuance of the judge's decision. Accordingly, under the statute and the Commission's rules the petition was untimely filed. Valley Rock and Sand Corp., 2 BNA MSHC 1673 (Docket No. WEST 80-3-M, March 29, 1982)(Order denying motion for reconsideration); Sunbeam Coal Corp., 2 FMSHRC 775 (1980).



Rosemary M. Collyer, Chairman



Frank E. Jastrab, Commissioner



A. E. Lawson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 30, 1982

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. HOPE 75-680
and	:	
	:	IBMA 75-39, 75-40
UNITED MINE WORKERS OF AMERICA	:	
on behalf of Howard Mullins	:	
	:	
v.	:	
	:	
CONSOLIDATION COAL COMPANY,	:	
Successor to Pocahontas Fuel	:	
Company	:	

ORDER

This case arose under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq., (1976). On the effective date of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (1976 and Supp. IV 1980), an appeal from a December 20, 1976, decision of the Department of Interior's Board of Mine Operations Appeals was pending in the United States Court of Appeals for the District of Columbia Circuit. On December 31, 1980, the Court issued its decision reversing the decision of the Board and remanding for further administrative proceedings. Mullins and UMWA v. Andrus, Secretary of Interior, 664 F.2d 297 (D.C. Cir. 1980). ^{1/} In its decision the Court observed that in light of the enactment of the 1977 Mine Act "while our remand is technically to the Secretary [of Interior], further proceedings to comply with this opinion will automatically take place before the [Federal Mine Safety and Health Review] Commission." 664 F.2d at 310 n. 116.

Shortly after the issuance of the Court's mandate, the Commission issued an order remanding the case to the administrative law judge for "further appropriate proceedings" in light of the Court's decision. 3 FMSHRC 2043 (Sept. 1981). Less than two weeks after this remand, and apparently without briefing or argument from the parties, the judge issued his decision. 3 FMSHRC 2308 (Oct. 1981)(ALJ). On November 13, 1981, we granted the petition for discretionary review of the judge's decision filed on behalf of Howard Mullins by the United Mine Workers of America. 30 U.S.C. § 813(d)(2).

^{1/} The Court's mandate was not issued, however, until August 21, 1981.

That petition requested review of "a single question" presented by the judge's decision. The petitioners asserted that "the administrative law judge did not comply with the Court of Appeals' instruction to compute the amount due and payable to Mr. Mullins." The petition also stated that because of the manner in which the judge proceeded on remand, "petitioners' counsel has had no opportunity to file an application for whatever costs and attorneys' fees may be due Mr. Mullins and/or the UMWA, and no such costs or fees were awarded," and requested a summary remand to the judge to "'compute the amount due Mullins' as required by the Court of Appeals." The petition concluded by framing the question presented:

Did the ALJ err, and fail to comply with the Court of Appeals' remand order, by failing to compute any amounts due Mr. Mullins, and instead leaving computation of said amounts to agreement of the parties?

On review Mullins and the UMWA submitted a two-sentence brief incorporating the petition for review as their brief and noting "that the Court of Appeals went to great length to have this case decided without issuance of a closure order." Consolidation Coal Company (Consol) submitted a brief as the successor to Pocahontas Fuel. It opposes the request for a remand to the judge. In Consol's view the adjudicative process, triggered by its application for review of the notice of violation, has been brought to an end by the Court's finding that the alleged violation in fact occurred. Consol submits that because the abatement period was suspended pending final administrative action on the question of violation, the appropriate course at the present time is for the Secretary to determine the rate of pay he believes is appropriate and to set a new period in which abatement must be accomplished. Thereafter, if abatement is not accomplished by paying Mullins the amount he is due, Consol suggests that a failure to abate withdrawal order would be appropriate. Consol dismisses Mullins' request for further proceedings to determine costs and attorneys fees, stating that such an award is not authorized in this proceeding.

In a two-page brief the Secretary of Labor submits that "it is clear that the D.C. Circuit instructed this Commission to compute the amount that Mullins should receive from Consol. Administrative law judges of this Commission routinely determine amounts of back pay and interest due to complainants after both complainants and respondents have briefed the issues relating to such awards."

The Court of Appeals has determined that compensation at the lower rate was impermissible, and although Mullins was officially "classified" as a laborer at the time of his transfer, based on the stipulations of fact in the record, the "regular rate of pay" that Mullins received "immediately prior" to his transfer, in fact exceeded the laborer's classification rate. The Court did not determine, however, what the "regular rate of pay" received by Mullins "immediately prior to his transfer" actually was, i.e., the Court did not establish a precise dollar figure at which Mullins should have been compensated after his transfer. The Court observed that the appropriate rate was at least greater than the \$42.75 per shift rate due a laborer, but not necessarily the \$47.25 per shift rate due a roof bolter. The Court left the precise rate due Mullins to be resolved as an "administrative function."

We have carefully reviewed the Court's decision, the judge's decision, and the arguments of the parties concerning the appropriate forum and method of resolving the question remaining in this case. For the reasons that follow, we reject the judge's rationale and the operator's argument that the Commission has no present role to play in the further administrative proceedings ordered by the Court. In the joint "Stipulation of Issues" submitted to the administrative law judge at the outset of this litigation the parties framed the issues to be decided in the administrative adjudicative proceeding as follows:

- (1) What is the meaning of the phrase "regular rate of pay received by him immediately prior to his transfer" as used in section 203(b)(3) of the Act?
- (2) Given the meaning accorded the phrase of section 203(b)(3) set forth above and based on the facts stipulated by the parties, is Pocahontas in violation of section 203(b)(3) of the Act?

The Court of Appeals has resolved the second question: Pocahontas violated the Act by paying Mullins at the general inside laborer's rate after his transfer. The parties have also been given a partial answer to their first stipulated issue: "'The regular rate of pay' is the dollar rate - the rate at which the miner was actually remunerated for the work he did - irrespective of his job classification" (664 F.2d at 299); "Mullins' entitlement was the rate of compensation actually and regularly received immediately prior to his transfer, and not the lower rate of a general inside laborer" (664 F.2d at 307); "the phrase 'regular rate of pay' in the pay-maintenance section means the rate at which the transferring miner was actually and regularly compensated when the transfer occurred" (664 F.2d at 310); and "Mullins became legally entitled to compensation for his post-transfer work at not less than the rate at which he was actually and regularly paid immediately prior to transfer" (*Id.*). 2/

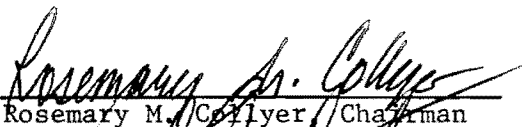
Two "interstices in the statutory formula" identified by the Court (664 F.2d at 310 n. 117) remain to be filled: (1) what period of time constitutes the time "immediately prior" to Mullins' transfer, and (2) what was the "regular rate of pay" received by Mullins during this period?

Following resolution of these two questions, a precise dollar amount must be awarded to Mullins before this administrative adjudication is completed. Absent a specific monetary award based on Mullins' "regular rate of pay" "immediately prior to" his transfer, little relief will have been afforded the affected miner after eight years of litigation. The Court specifically ordered computation of the amount due Mullins. This should be done on the remand herein ordered.


2/ The questions and issues resolved by the Court are now the law of the case.

Although the Court observed that "[t]he occasion for remand is not a need for additional evidence or fact-finding" (664 F.2d at 310 n. 117), this dictum statement made in passing cannot be read as a bar to further proceedings if such, in fact, are necessary to finally resolve this dispute. Because the parties heretofore have not focused on the precise questions remaining, we are of the view that opportunities for further briefing from the parties on the meaning of the phrase "regular rate of pay ... immediately prior to transfer", and its application to the facts of this case, should be had before a fully adequate decision can be made by the judge. In light of the significant passage of time since this litigation began, further evidence, perhaps stipulated, as to the amounts that Mullins had actually received and the amounts due will be necessary before a final award can be made.

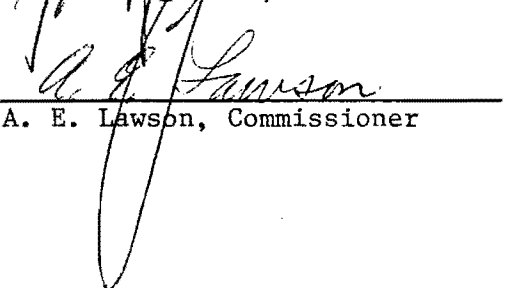
The case is remanded to the administrative law judge for further proceedings consistent with this decision. Specifically, if the parties find that further litigation, rather than an appropriate settlement of this case, is necessary, further briefs from all parties on the meaning of the phrase "regular rate of pay ... immediately prior to his transfer" and its application to the facts of this case shall be submitted, and a specific determination of the amount due Mullins must be made. We further order that the proceedings on remand be expedited. 3/



Rosemary M. Collyer, Chairman



Frank F. Deshrab, Commissioner



A. E. Lawson, Commissioner

3/ Commissioner Backley took no part in the consideration or disposition of this case.

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Administrative Law Judge Decisions

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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AUG 6 1982

FMC CORPORATION,
Petitioner

v

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

: Application for Review and
: Notice of Contest Proceeding

:
: Docket No: WEST 82-72-RM
: Citation No: 578862

:
: Docket No: WEST 82-73-RM
: Citation No: 578863

:
: Docket No: WEST 82-75-RM
: Citation No: 578865

:
: Docket No: WEST 82-76-RM
: Citation No: 573980

:
: Docket No: WEST 82-77-RM
: Citation No: 573981

:
: Docket No: WEST 82-78-RM
: Citation No: 573982

:
: Docket No: WEST 82-79-RM
: Citation No: 573983

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

v.

: Civil Penalty Proceedings

:
: Docket No: WEST 82-134-M 1/
: A.O. No: 48-00152-05056

:
: Docket No: WEST 82-135-M
: A.O. No: 48-00152-05059 H

:
: Docket No: WEST 82-172-M
: A.O. No: 48-00152-05061

FMC CORPORATION,
Respondent

:
: Docket No: WEST 82-183-M
: A.O. No: 48-00152-05012

:
: FMC Mine

1/ There are three citations involved in this docket. Only citation number 573981 is included in this decision.

Appearances: John A. Snow, Esq., VanCott, Bagley, Cornwall & McCarthy,
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for Respondent and Stephen Kramer, Esq., Office of the
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Arlington, Virginia.

Before: Judge Moore

DECISION

The following "Statement of Facts " is adopted from Respondent's brief.

"FMC owns and operates 9 mobile cranes in conjunction with the operation and maintenance of its surface facilities at its mine in Westvaco, Wyoming. Periodically, the mobile cranes were used to lift men from the ground to elevated positions where they could perform repair and maintenance tasks. (Trial Transcript, hereinafter "Tr." 153, 154). This practice was conducted by all of the mine operators in the trona basin. (Tr. 7).

In March or April, 1981, Merrill Wolford, an inspector for the Mine Safety and Health Administration ("MSHA"), became concerned about the practice of lifting men with mobile cranes. (Tr. 7, 55). Wolford discussed the situation with his supervisor and his district manager, and a decision was made to apply the man-hoisting standards embodied in 30 C.F.R. §57.19 to the practice of lifting men on the surface with mobile cranes. Tr. 7, 8, 55, 56). This decision represented a departure from past MSHA policy where inspectors were "basically directed not to issue citations" on this practice. (Tr. 56)

In accordance with this decision, Wolford informed FMC that MSHA was going to begin applying the §57.19 Man-Hoisting standards to surface crane operations beginning July 1, 1981, and until that date, FMC was required to use "spotters" whenever men were lifted with mobile cranes. (Tr. 8, 9, 35, 36). In response, Julius Jones, safety manager for FMC, on June 4, 1981, informed Melvin Jacobsen, MSHA's supervisor of mine inspectors, that FMC felt that the §57.19 Man-Hoisting standards applied only to underground or shaft operations utilizing hoists and not to surface repair and maintenance operations utilizing mobile cranes. (Tr. 9, 10).

FMC continued using mobile cranes on the surface to lift men. MSHA inspectors continued to visit the FMC mine, and, even past the July 1, 1981 deadline, citations were not issued to FMC for their practice of lifting men with mobile cranes.

On approximately November 25, 1981, Wolford visited the FMC mine and made inquiries concerning FMC's practice of using mobile cranes on the surface to lift men. (Tr. 11). He issued no citations. Wolford returned to the mine on December 8, 1981, with Paul Talley, another MSHA Inspector

and issued the Order and Citations at issue herein. (Tr. 12). FMC filed an Application for Review and Notices of Contest on December 21, 1981, and a hearing was held in Green River, Wyoming, on April 13, 1982."

Also it was stipulated that although the civil penalty cases associated with the review proceedings had not yet been filed, evidence pertaining to those penalty cases would be received so that they could be decided, based upon the record already made. The civil penalty cases listed in the caption above were assigned to me after the trial.

The order and all of the citations allege violations of various subsections of 30 C.F.R. §57.19. That section has the heading "Man-hoisting". The preamble under the heading states as follows:

The hoisting standards in this section apply to those hoists and appurtenances used for hoisting persons. However, where persons may be endangered by hoists and appurtenances used solely for handling ore, rock, and materials, the appropriate standards should be applied.

Emergency hoisting facilities should conform to the extent possible to safety requirements for other hoists, and should be adequate to remove the persons from the mine with a minimum of delay.

The first paragraph quoted is a prime example of studied ambiguity. The first sentence says the standards apply to hoists "used for hoisting persons." The second sentence says the standards apply to other hoists. If the drafter of this preamble had the desire to foster litigation, I am confident that the desire will be fulfilled. Fortunately, in this case, I do not have to make a decision as to whether hoists that are not used for man-hoisting are covered by the standards. While the Solicitor's brief makes the argument that such non-manhoists are covered, MSHA has not taken that position in this case because the only cranes cited were those the inspector thought had been used for man-hoisting.

It is obvious that a mobile crane is a hoist in the sense that it lifts things. It can hoist men and materials from one elevation to another. The terminology used for various parts of the mobile crane (See Gov. Exh. 1), include a point sheave for the gib-boom hoist, a point sheave for the main hoist, and a main hoist rope. But if any device which is used to hoist material is a "hoist" within the meaning of 30 C.F.R. §57.19 it raises the question of why it took the inspector almost 8 months after he learned that men were being hoisted with the mobile cranes before issuing the withdrawal order and citations. At the trial I tried unsuccessfully to determine when and why MSHA changed its position regarding the applicability of the standard in question to mobile cranes. 2/.

2/ JUDGE MOORE: Was there some reason why at one point MSHA thought it was not required on these particular cranes; the various standards you are talking about?

MSHA's hesitancy becomes more understandable upon reading the definition of hoists in 30 C.F.R. 57.2. That definition says that hoist "means a power-driven windlass or drum used for raising ore, rock, or other material from a mine, and for lowering and raising men and material." The clear implication is that the men, material rock and ore are to be lowered into an underground mine and raised from it by means of a hoist. Nothing in this

fn. 2 (continued)

MR. WOLFORD: No, sir. I don't believe so. I became interested in it after hearing about some of the accidents and seeing an accident in Salt Lake City where a person was killed.

JUDGE MOORE: All right. The other thing is a question that Mr. Snow brought up. Why wasn't there an imminent danger when you first found it? Why did it become an imminent danger on December 8?

MR. WOLFORD: Well, at the time I found it and observed it, as I said, I contacted my supervisor, identified the people----

JUDGE MOORE: Well, why did you contact him?

MR. WOLFORD: Because I wanted some instruction on whether or not we could apply the hoisting standards to these cranes. We didn't have any other standards that would really apply.

JUDGE MOORE: Well, that's what I meant a while ago. Was there some reason why you didn't think they applied at one time.

MR. WOLFORD: I haven't been an inspector that long and I have been--my self and Mr. Talley have asked for, over the last three years, have asked for direction?

MR. WOLFORD: Yes, sir.

JUDGE MOORE: Now, was it--did you ask for the direction because of the imminent danger part of it rather than just the citation.

MR. WOLFORD: No. I felt it was a hazard and had been for some time. And really it had been basically directed not to issue citations on it and--I haven't personally seen anyone being hoisted and I had a conflict there. And I had told my supervisor that if I found it, I would issue the appropriate citation on it. And he started checking. I haven't personally observed anyone being hoisted until the one time at another mine. And these people used spotters from that point on until they got the devices installed on the cranes. In fact, all of the other operators here did it with the exception of FMC.

JUDGE MOORE: Well, if FMC had been, on December 8, hauling men and you went out there and using a spotter, would you have still said it was an imminent danger?

MR. WOLFORD: No, sir. I think if they were using the new safe guidelines that we had laid out earlier----

JUDGE MOORE: That would be the difference between imminent and non-imminent danger?

MR. WOLFORD: Yes.

MR. SNOW: In fact, they are still using the crane without the two-blocking device--anti two-blocking device?

MR. WOLFORD: I don't know.

MR. SNOW: You don't know if FMC is still using that?

MR. WOLFORD: Not officially.

definition would seem to include a crane which raises men on the surface up to various structures for the purpose of making repairs and adjustments. Likewise, the definition contained in A Dictionary of Mining, Mineral, and Related Terms published by the Bureau of Mines in 1968 makes no mention of mobile cranes in the definition of hoist. 3/ The only way a mobile crane can fit into these definitions would be if it were positioned over a shaft and used to lower and raise men and materials in the shaft.

Some of the mandatory standards under 30 C.F.R. §57.19 are inconsistent with the idea of a mobile crane that is used to lift men from the surface to elevated structures coming within the meaning of the word "hoist" in those standards. For example §57.194 says that "any hoist.... shall be equipped with a brake....capable of holding its fully loaded cage.... at any point in the shaft." §57.19.2 states "hoists shall be anchored securely." Mobile cranes are not anchored. §57.19.95 provides for signaling devices on the shaft bottom or lower deck of the sinking platform.

fn. 2 (continued)

MR. SNOW: Well, you do know that from your supervisor telling you that FMC is still using the crane, don't you?

MR. WOLFORD: He has mentioned that he has allowed FMC to use the crane.

MR. SNOW: And they're still using it as far as you know based on what your supervisor told you?

MR. WOLFORD: I don't know.

JUDGE MOORE: What was your answer? I didn't hear.

MR. WOLFORD: Not that I know of.

JUDGE MOORE: You don't know whether they're still using it or not?

MR. WOLFORD: No. I received a call from FMC, from Mr. Bob May-- I don't know--two to three weeks ago telling me they had a job and they wanted to hoist some people. And I told him I would have to talk to my supervisor about it. But as far as I was concerned I would not allow it.

MR. SNOW: But you know your supervisor has permitted it?

MR. WOLFORD: Yes. I think he has.

3/ hoist. a. A drum on which hoisting rope is wound in the engine house, as the cage or skip is raised in the hoisting shaft. Pryor, 3. b. An engine with a drum, used for winding up a load from a shaft. See also winding engine. C.T.D. c. The windlass mechanism incorporated as an integral part of a power-driven drilling machine used to handle, hoist, and lower drill-string equipment,, casing, pipe, etc., while drilling, or to snake the drill from place to place. Long. d. The act or process of lifting drill-string, casing, pipe, etc., while drilling, or to snake the drill from place to place. Long. d. The act or process of lifting drill string, casing, or pipe out of a borehole. Long. e. A power-driven windlass for raising ore, rock, or other material from a mine and for lowering or raising men and material. Long. Also called hoister. Fay. f. The mechanism by which a bucket or blade is lifted, or the process of lifting it. Nichols. g. The amount of ore, coal, etc., hoisted during a shift. Fay. h. See draw works. B.S. 3618, 1963, Sec. 3.

After full consideration of the definitions referred to above and all of the standards contained in 30 C.F.R. §57.19 I am convinced that those standards were intended to apply only to lifting devices used to raise or lower men and material from or to an underground mine site. It follows that the citations were improperly issued and they are accordingly vacated.

As to the imminent danger order, an imminent danger can exist even if there is no violation of a health or safety standard. If the inspector in this case had gone to the mine and learned that men were being hoisted without two-blocking devices, etc., and believed that that in itself constituted an imminent danger, he could have properly issued a closure order. In this case it appears that he waited approximately 8 months to issue such an order because he was doubtful as to the applicability of the standards in question to mobile cranes. As indicated by the opinion herein I think his doubts were well founded. But an imminent danger was not created when the decision was made to apply hoisting standards to mobile cranes. If an imminent danger existed it existed in March or April of 1981 and an order should have been issued at that time.

Estopple can play no valid part in a matter involving health and safety. Therefore the fact that the inspector did not issue the order in March or April does not stop him from doing so at a later date. Also, an inspector is entitled to change his mind as to whether or not an imminent danger exists. In this case, however, it does not appear there was any change of mind. The inspector issued the imminent danger order when he decided to issue the citations as though he thought there was a necessary connection between the violation of a standard and an imminent danger. These circumstances, together with the fact that the inspector's supervisor still allows men to be lifted by the same mobile cranes, convince me that the existence of an imminent danger has not been established. The withdrawal order is accordingly vacated.

Charles C. Moore, Jr.

Charles C. Moore, Jr.,
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

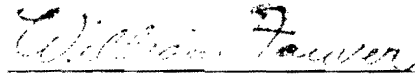
OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

September 1, 1982

SECRETARY OF LABOR,	:	Civil Penalty Proceedings
Petitioner	:	
	:	Docket No. WEVA 80-516
	:	AC No. 46-01436-03094
v.	:	
	:	Docket No. WEVA 80-517
	:	AC No. 46-01436-03095
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	

AMENDMENT TO DECISION

The Decision entered on August 25, 1982, is AMENDED by changing the "Distribution" to read as follows:


WILLIAM FAUVER, JUDGE

"Distribution:"

Robert Cohen, Esq., US Department of Labor, Office of the Solicitor,
4015 Wilson Boulevard, Arlington, VA 22203

HJM Little John, Consolidation Coal Company, 1800 Washington Road,
Pittsburgh, PA 15241

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SEP 3 1982

SECRETARY OF LABOR,	:	Civil Penalty Proceedings
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket Nos. YORK 81-12
Petitioner	:	YORK 81-18
v.	:	YORK 81-24
	:	YORK 81-25
METTIKI COAL CORPORATION,	:	
Respondent	:	Gobbler's Knob Mine
	:	
METTIKI COAL CORPORATIONN,	:	Contests of Citations and Order
Applicant	:	
	:	Docket Nos. YORK 80-107-R
v.	:	YORK 80-109-R
	:	YORK 80-110-R
	:	YORK 80-113-R
SECRETARY OF LABOR,	:	YORK 80-114-R
MINE SAFETY AND HEALTH	:	YORK 80-115-R
ADMINISTRATION (MSHA),	:	YORK 80-116-R
Respondent	:	
	:	Gobbler's Knob Mine

DECISION

Appearances: Michael Bolden, Esq., John H. O'Donnell, Esq., and
Leo J. McGinn, Esq., Office of the Solicitor,
U. S. Department of Labor
Ralph M. Burnett, for Mettiki Coal Corporation

Before: Judge William Fauver

These civil penalty and review proceedings were consolidated and heard under sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. Both parties were represented by counsel and have submitted proposed findings, conclusions, and briefs.

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, Mettiki Coal Corporation, operated the Gobbler's Knob Mine in Garrett County, Maryland, which produced coal for sales or use in or substantially affecting interstate commerce.

Docket Nos. YORK 80-107-R, 80-109-R, and 81-18

Order of Withdrawal No. 632705 and Citation No. 632707

2. At the time of an inspection on June 5, 1980, Mettiki was constructing an overcast in the track haulage supply entry. The overcast was to split the air so the belt entry would be isolated. A cavity had been blasted with explosives and two walls were under construction on either side of the cavity. The cavity was about 20 feet in diagonal, with brows, including overhangs averaging 3 to 6 feet, and it extended 6 to 8 feet above the coal seam. The haulage ways were frequently used and miners traveled this area on foot. There was no wire screen mesh installed over the cavity. Mettiki's plan was, at some point, to cover the cavity with a canopy of concrete block. A canopy is routinely placed in such an overcast construction. At the time of the inspection the cavity was not canopied and it was not actually in the process of being canopied (although plans called for a canopy later), and the cavity had so existed for up to 10 days with miners passing under it. Installing the wire mesh would not have interfered with the later installation of the canopy or the completion of the overcast.

Paragraph 23, page 11, of Mettiki's approved roof control plan provided:

Where falls occur and roof is to be supported by roof bolting, wire screen will be bolted to the entire cavity in a mobile haulage entry (track, belt, supply and active shuttle-car entries). Wire screen will not be required in the fall cavity top when the top is massive sandstone, however, wire screen shall be bolted to the fall cavity sides. The use of wire screen is not necessary if the cavity is canopied.

3. Inspector Evanoff was inspecting the cavity 10 days after the blast. Inspector Evanoff did not prod the overhang brows for fear of causing a fall. He observed that the sides of the cavity were not supported with wire mesh screen and that the brows were not adequately supported. The arch of the cavity ceiling was bolted and plated on 4-foot centers.

4. He then issued a Withdrawal Order No. 632705 for a violation of 30 CFR § 75.200. 1/ The order reads in part:

The approved roof control plan is not being complied at the 39th break of the No. 5 entry over the slope track haulage. A cavity was created over the track haulway that is approximately 6 to 8 feet above the coal seam, and overhanging brows that are not adequately supported are protruding out towards the center of the cavity, at a distance of approximately 3 to 6 feet and they extend around the complete cavity. Wire screen was required to be bolted to the cavity areas and wire screen was not installed. This track haulage was examined by a preshift examiner.

5. The condition was abated by June 18, 1980, by installing additional supporting roof bolts and installing a wire screen at the top of the cavity and bringing it around the overhanging brows.

6. On June 5, 1980, the inspector also issued Citation No. 632707, citing 30 CFR 75.303, 2/ because the area had been preshifted a number of times but the condition in the cavity with the overhanging brows had never been described

1/ Section 75.200 provides:

"Each operator shall undertake to carry out on a continuing basis a program to improve the roof control system of each coal mine and the means and measures to accomplish such system. The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs. A roof control plan and revisions thereof suitable to the roof conditions and mining system of each coal mine and approved by the Secretary shall be adopted and set out in printed form on or before May 29, 1970. The plan shall show the type of support and spacing approved by the Secretary. Such plan shall be reviewed periodically, at least every 6 months by the Secretary, taking into consideration any falls of roof or ribs or inadequacy of support of roof or ribs. No person shall be proceed beyond the last permanent support unless adequate temporary support is provided or unless such temporary support is not required under the approved roof control plan and the absence of such support will not pose a hazard to the miners. A copy of the plan shall be furnished to the Secretary or his authorized representative and shall be available to the miners and their representatives."

2/ Section 75.303 provides, in part:

"Within 3 hours immediately preceding the beginning of any shift, and before any miner in such shift enters the active workings of a coal mine, certified persons designated by the operator of the mine shall examine such workings and any other underground area of the mine designated by the Secretary or his authorized representative."

in a preshift report. The parties, at the hearing, stipulated that if a violation of 30 CFR § 75.200 was proven as stated in Order of Withdrawal No. 0632705, then there is a violation of 30 CFR § 75.303 for not reporting the condition in the preshift report; otherwise both the order of withdrawal and the citation must fall together.

7. About two months after the order and citation, at the direction of MSHA, the roof-control plan was revised to require wire screening over overcasts created by shooting or blasting. The new paragraph provided:

When an overcast is being developed over a track, belt or supply entry; planks or straps will be used with bolts for roof support if the overcast is cut with a continuous miner; wire screen will be used if the overcast is created by shooting.

YORK 80-113-R and 81-25
Withdrawal Order No. 629316

YORK 80-114-R and 81-12
Citation No. 629317

8. At 8 p.m. on June 5, 1980, Inspector Hunt observed coal and dust spillage estimated to be 35 to 50 tons, around the feeder in the No. 5 Entry, No. 52 Break. The accumulations of loose coal and coal dust were about 5 feet deep and 10 feet long. In the shuttle car roadway outby the feeder, he observed accumulations of loose coal in drifts 4 inches to 3 feet deep for a distance of about 30 feet. Over the entire 16-foot width in the No. 7 and No. 8 Entries between the Nos. 53 and 44 crosscuts, he observed accumulations of loose coal and coal dust 2 inches deep extending for about 800 feet. He also observed accumulations of loose coal and coal dust up to 6 inches deep at various locations.

9. The inspector issued Order of Withdrawal No. 629316, citing the accumulations observed as a violation of 30 CFR § 75.400, which provides:

Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein.

10. When he later inspected the preshift books, he found no entries concerning coal spillage around the feeder or in the entries. He then issued Citation No. 629317 alleging a violation of 30 CFR § 75.303 (see footnote 2). This citation reads in part:

An inadequate preshift examination was performed of the right mains section because of the conditions stated on Order No. 629316 dated 6-5-80 were not reported or recorded. The last examination was made by Michael Fulmer between 1:45 p.m. and 2:30 p.m. on 6-5-80.

11. A witness for Mettiki testified that a layer of coal, about 2 or 2 1/2 feet, is used as the mine floor in the Gobbler's Knob Mine because the underlying material is "fireclay" which is slippery when wet. The vehicles' tires grind up the coal and create accumulations that may appear to be spillage. Respondent also presented evidence that design defects in the feeder in the Right Mains Section produce a considerable amount of spillage. The ramp operator is charged with cleaning up the spillage around the feeder at the end of his shift. On June 5, 1980, 2:15 p.m., the preshift examiner for the afternoon shift helped scoop up the accumulations around the feeder after it had processed 488 tons of coal. After inspecting the feeder area, he walked the shuttle car roadway, found no accumulations of coal and reported no accumulations or spillage in the preshift book. This was the last entry the inspector found in this area.

YORK 80-115-R and 81-12
Citation No. 629318

12. The inspection was resumed on June 9, 1980, when Inspector Hunt observed a miner repairing a scoop with a hand-held drill. The drill was equipped with a locking device that allowed the drill to be operated without constant hand or finger pressure. The miner had not activated the locking device and was using constant finger pressure to operate the drill.

13. Locking devices had been removed or deactivated on all of Mettikis' other hand-held drills, but not this one.

14. Inspector Hunt issued Citation No. 629318 for a violation of 30 CFR § 77.402. The citation reads in part: "The three-eighths-inch, hand-held electric drill being operated on the surface in front of the bathhouse was not equipped with controls requiring constant hand or finger pressure. There was a locking device on the control." 3/ The cited condition was abated by removing the automatic locking device from the drill.

YORK 80-110-R and 81-24
Withdrawal Order No. 632708

15. On June 9, 1980, Inspector Evanoff observed, and reported in Withdrawal Order No. 632708, unstable roof conditions in the slope track haulage "at a point beginning approximately 21 inby the No. 20 break and extending inby for approximately 20 feet." The roof was severely cracked on the left side of the entry and cracks extended to the center of the entry. Wooden crossbars installed there were bowed down from overhead pressure and the uncracked part of the roof was "drummy" when tested (meaning that the roof was under heavy pressure). This roof area had been reported in the preshift examination book (6:00 a.m. -- 6:40 a.m.) with a notation that a barset was needed. At the time of inspection, 1:30 p.m., no work had been performed to correct the roof condition and this area had not been dangered off. Personnel were subject to walk under the cited roof area. The foreman had a list of preshift-reported conditions and planned to correct the various conditions as he came to them.

3/ Section 77.402 provides:

"Hand-held power tools shall be equipped with controls requiring constant hand or finger pressure to operate the tools or shall be equipped with friction or other equivalent safety devices."

Docket No. YORK 81-24
Withdrawal Order No. 805331

16. On June 1, 1980, about 3:00 p.m., Inspector Spencer Shriver observed, and reported in Withdrawal Order No. 805331, that the daily examination book did not record unsafe conditions of the hoisting equipment, i.e., spots of wear, corrosion, lack of lubrication, accumulation of dirt and conditions stated in Order No. 629278, which had been issued on May 29, 1980.

17. Mettiki does not deny the violation charged in Order No. 629278, but defends the charge in Order No. 805331 on the grounds that:

1. The hoist was shut down, except for necessary repair personnel, by Order No. 629278, and had not been reopened.
2. Order No. 805331 included the same conditions already covered by Order No. 629278.
3. Metticki has paid the penalty assessed for Order No. 629278, and should not be subject to another penalty for the same conduct.

DISCUSSION WITH FURTHER FINDINGS

Order of Withdrawal No. 632705 and Citation No. 632707

In charging a violation of Mettiki's roof-control plan, the Secretary contends that the provision "where falls occur * * * wire screen will be bolted to the entire cavity" applies to both intentional and unintentional roof falls. He argues that the effects of an intentional fall are even more dangerous than those of an unintentional fall, because intentional falls loosen rock that would not otherwise be loosened, so that wire screening is all the more necessary in intentional falls. He also argues that the addition of a new paragraph to Mettiki's revised roofcontrol plan, Paragraph 24, shows that MSHA never accepted Mettiki's interpretation of the screening requirement. The Secretary proposes a penalty of \$2,000.

The parties stipulated that, if a violation of the roof-control plan is found, Respondent would admit a violation of the preshift examination standard. The Secretary proposes a penalty of \$240 for that citation.

Mettiki argues that it had been its practice since 1977 not to use wire screen over cavities where canopies were under construction and that previous inspectors had not taken exception to this practice. It contends that the term "falls" in its original roof-control plan was an ambiguity apparent to MSHA in the past and that Mettiki should not be held liable for reliance on one interpretation of an ambiguous term. Finally, it argues that the brows and cavity extensions were not hazardous.

I find, based upon the inspector's testimony, that the condition of the cavity was dangerous. He observed that the overhangs were loose, cracked, and just short of being an imminent danger. Additional support should have been provided.

I find that the words "where falls occur" in Paragraph 23 of the roof-control plan reasonably mean intentional falls as well as unintentional falls. The cavity was therefore required to be supported by wire screening. The fact that Mettiki had not screened cavities on four prior occasions without being cited for a roof-control plan violation reduces, but does not eliminate, its negligence. There was an unwarrantable failure to comply. Based upon the parties' stipulation, Respondent is also deemed to have violated 30 CFR § 75.303.

Withdrawal Order No. 629316

Metticki admits a violation of 30 CFR § 75.400 as to the accumulation of coal and coal dust observed along the sides of the feeder, but contends that other accumulations, observed in the entries and crosscuts, were not violations. Its argument includes the following main points:

1. Because of a wet, fire-clay underlayment, MSHA permitted Mettiki to leave a coal base for roadways. Wheeled equipment running on the coal base would create a "fine powder" of 2 to 6 inches during a normal shift. MSHA was aware of and approved Mettiki's clean-up program, which called for cleaning and rockdusting the face area at the end of each shift and to clean and dust outby areas once each week.

2. Beginning at No. 53 break and extending to No. 44 break, there was a coal base of about 2 inches in the entries, but this area was not being used by the mine and "was not effectively part of the mine workings." Mettiki also contends, "MSHA recognizes and it is the clear standard of practice that these entries would not be part of MSHA inspections," Mettiki Br. (July 9, 1982), p. 3.

As to Point 1, MSHA did not present contrary evidence, and the proof does not preponderate to establish a violation as to the accumulations in the shuttle car roadway outby the feeder.

As to Point 2, the evidence shows that the 800-foot area between crosscuts 44 and 53, described in the inspector's order, was being used to haul timber. This support's the inspector's contention that the area was an active working subject to 30 CFR 75.400.

The facts as to the accumulation around the feeder establish a most serious violation, allowing an accumulation of 35 to 50 tons of coal and coal dust in a single shift. Operating with a known defective feeder and allowing such large accumulations constituted gross negligence. It also created a serious hazard of propagating a mine fire or explosion. There was an unwarrantable failure to comply.

Citation No. 629317

The parties have stipulated that the inspector observed impermissible accumulations of coal in violation of 30 CFR § 75.400 when he issued this citation, which was for an improper preshift examination. Mettiki argues that the spillage observed by the inspector had accumulated after the 2:15 p.m. preshift examination and that the preshift report book was accurate. It offers several explanations for the volume of spillage observed by the inspector.

First, the feeder processed 488 tons of coal per shift, making extensive accumulations possible. Second, the feeder was broken and operating slower than normal so that when man cars dumped their loads of coal quickly, as they usually did, more than the normal amount of spillage resulted. This condition is characterized by Mettiki as a "design defect." Third, the other accumulations observed by the inspector were simply part of the haulage road surface covering the fireclay. Mettiki moved for summary judgment at the hearing with respect to this citation based on these arguments, stating that the Secretary had failed to establish a prima facie violation.

I deny the motion. The pure volume of spillage in this case raises a significant question of fact as to how long the accumulations had existed. However, Mettiki presented the testimony of the preshift examiner, who testified that there were no accumulations of coal and coal dust when he made the preshift examination, and this testimony was undisputed. The testimony of the government's sole witness on this charge establishes only that the coal accumulations existed 6-1/2 hours after the preshift examination. When asked, "how long this accumulation had lasted before [he] got there," the government inspector responded, "I'm not exactly sure." The government did not meet its burden of proving that violative accumulations existed when the preshift examination was conducted.

Citation No. 629318

A Mettiki employee was repairing a scoop in front of the bathhouse, using a 3/8th inch hand-held drill that had a locking device that would permit the drill to operate without constant finger pressure. The drill operator did not have the locking device on at the time of the inspection, but the locking device could be pushed into position accidentally or deliberately so that constant finger pressure would no longer be required to keep the drill running.

Mettiki's Foreman stated that management knew of the requirement and had removed the locking device from other drills on the mine property. For some unexplained reason, Mettiki had failed to remove the locking device from the drill in question.

The locking device is a violation of the safety standard in 30 CFR § 77.402. This is a serious violation. If a drill in a locked position goes out of control it could injure the operator or sever the electric cord and cause an electric shock or fire hazard.

Withdrawal Order No. 632708

A violation of 30 CFR § 75.200 occurred as alleged. The roof was not adequately supported to protect miners from falls of roof or ribs. The area cited, for a distance of 20 feet, was severely cracked in parts and drummy and the wooden crossbars were bowed from overhead pressure. Mettiki showed gross negligence in failing either to correct this condition or to danger off the area promptly after the preshift report. There was an unwarrantable failure to comply.

Withdrawal Order No. 805331

This violation was proved. The order involves a different standard (daily examinations) from the standard involved in Order No. 629708 (preshift examinations), and does not constitute a double charge for the same condition.

However, considering that there was a previous order on the hoisting equipment when Order No. 805331 was issued, the failure to report unsafe conditions as to the hoisting equipment was not a serious violation.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and subject matter of these proceedings.

2. Mettiki violated 30 CFR § 75.200 as charged in Withdrawal Order No. 632705. Based on the statutory criteria for assessing penalties, Mettiki is assessed a penalty of \$500 for this violation.

3. Mettiki violated 30 CFR § 75.303 as charged in Citation No. 632707. Based on the statutory criteria for assessing civil penalties, Mettiki is assessed a penalty of \$60 for this violation.

4. Mettiki violated 30 CFR § 75.400 as charged in Withdrawal Order No. 629316 with the exception of the allegation of accumulations in the shuttle car roadway outby the feeder. Based on the statutory criteria for assessing penalties, Mettiki is assessed a penalty of \$1,500 for this violation.

5. The government failed to meet its burden of proving a violation as charged in Citation No. 639317.

6. Mettiki violated 30 CFR § 77.402 as charged in Citation No. 629318. Based on the statutory criteria for assessing penalties, Mettiki is assessed a penalty of \$300 for this violation.

7. Mettiki violated 30 CFR § 75.200 as charged in Withdrawal Order No. 632708. Based on the statutory criteria for assessing penalties, Mettiki is assessed a penalty of \$1,200 for this violation.

8. Mettiki violated 30 CFR § 75.1400-3(f) as charged in Withdrawal Order No. 805331. Based on the statutory criteria for assessing penalties, Mettiki is assessed a penalty of \$25 for this violation.

Proposed findings and conclusions inconsistent with the above are rejected.

ORDER

WHEREFORE IT IS ORDERED:

1. Mettiki shall pay the Secretary the above penalties, in the total amount of \$3,585.00, within 30 days from the date of this Decision.

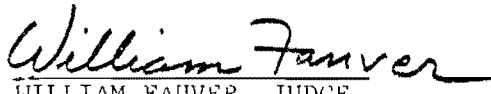
2. The withdrawal orders and citations cited in the Conclusions of Law, above, are AFFIRMED with the following exceptions:

a. Withdrawal Order No. 629316 is MODIFIED to delete, from the description of "Condition or Practice," the allegation of accumulations of coal and coal dust in the shuttle car roads. As MODIFIED, it is hereby AFFIRMED.

b. Citation No. 639317 is VACATED.

3. In accordance with the Order Granting Motion to Withdraw Notice of Contest in Docket Nos. 80-112-R, 80-117-R, and 80-111-R, concerning Citations Nos. 0632761, 0629320, and 0632709, respectively, the charges based upon those citations in Docket No. 81-12 are hereby DISMISSED.

4. On motion of the parties at the hearing (Tr. 227, April 26, 1982), Docket No. 80-116-R is DISMISSED on the ground that the proposed penalty has been paid.


WILLIAM FAUVER, JUDGE

Distribution Certified Mail:

U.S. Department of Labor, Office of the Solicitor, 4015 Wilson Boulevard,
Arlington, VA 22203

Ralph M. Burnett, Esq., Burnett, Eiswert & Crawford, P.A., 5000 Thayer
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

SEP 7 1982

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GREAT WESTERN ELECTRIC COMPANY,)	CONTEST OF CITATION PROCEEDINGS
)	
Contestant,)	DOCKET NO. WEST 81-213-RM
v.)	
)	Mine: FMC
SECRETARY OF LABOR, MINE SAFETY)	
AND HEALTH ADMINISTRATION (MSHA),)	
Respondent,)	
<hr/>)	
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SECRETARY OF LABOR, MINE SAFETY)	CIVIL PENALTY PROCEEDINGS
AND HEALTH ADMINISTRATION (MSHA),)	
Petitioner,)	DOCKET NO. WEST 81-258-M
)	
v.)	Mine: FMC
)	
GREAT WESTERN ELECTRIC COMPANY;)	
Respondent.)	
<hr/>)	

Appearances:

John A. Snow, Esq.
VanCott, Bagley, Cornwall & McCarthy
Salt Lake City, Utah
For Great Western Electric Company

Robert J. Lesnick, Esq., Office of Henry C. Mahlman,
Regional Solicitor, Unites States Department of Labor
Denver, Colorado
For the Secretary of Labor

Before: Judge John J. Morris

DECISION

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, (MSHA), charges Great Western Electric Company (Great Western), with violating Title 30, Code of Federal Regulations, Section 57.15-5, 1/ a safety regulation adopted under the Federal Mine Safety and Health Act, 30 U.S.C. 801 et seq.

1/ The cited regulation provides as follows:

57.15-5 Mandatory. Safety belts and lines shall be worn when men work where there is danger of falling; a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered.

After notice to the parties a hearing was held in Green River, Wyoming on September 1, 1981.

Great Western filed a post trial brief.

ISSUES

The issues are whether Great Western violated the regulation, and, if so, what penalty is appropriate.

STIPULATION

At the hearing the parties stipulated as follows:

1. An employee of Great Western was on a ladder twelve feet above the ground. This is at the FMC Mine.
2. The employee was not wearing safety belts and/or lines.
3. The employee was a construction worker.
4. The body of the employee was not totally within the rails of the ladder; specifically, his shoulders were not within the rails of the ladder. There are three exhibits that have been marked Great Western 1, 2, and 3, which are submitted as showing approximately the position of the employee on the ladder. The arms were outstretched towards a light fixture. Both hands of the worker were involved with installing the light fixture.
5. The employee was skilled and experienced in connection with the use of a ladder. He uses a ladder everyday. The employee uses the ladder as many as twenty different times in a day. The employee does a significant amount of his daily work on a ladder.
6. The employee could have been tied off on the ladder.
7. The ladder was tied off top and bottom.

DISCUSSION

The pivotal issue is whether there was a danger of the workman falling. I conclude such a danger existed.

The scenario is this: the worker, while he was standing on the round rung of the ladder without a safety belt, used both hands to install a light fixture. During this time the shoulders of the worker were outside of the rails of the ladder. In these circumstances it appears that the sole factor preventing the worker from falling would be his skill in balancing his body while standing on the rungs of the ladder.

CONTENTIONS

Great Western contends that the regulation is vague, ambiguous, and unenforceable. Further, that any enforcement of the regulation must be in a reasonable fashion. Finally, Great Western declares that even if the regulation is valid it was unreasonably applied in this case.

Is 30 C.F.R. 57.15-5 constitutionally vague and therefore invalid?

A statute that either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of the law. Connally v. General Construction Co., 269 U.S. 385, 391 (1925). This principle of law extends to industrial and commercial safety regulations that can result in the imposition of civil penalties for their violation. Brennan v. OSHRC, 505 F. 2d 869, 872 (10th Cir. 1974); Diebold, Inc. v. Marshall, 585 F. 2d 1327, 1335-1336, (6th Cir. 1978).

In deciding whether a safety regulation satisfies the principle of due process, the regulation must be examined in the light of the conduct to which it is applied. Ray Evers Welding Co. v. OSHRC 625 F. 2d 726, 732 (6th Cir. 1980); United States v. National Dairy Products Corp. 372 U.S. 29, 33, (1963).

In Kerr-McGee Corporation, 3 FMSHRC 2496, the Commission construed the general meaning of Section 57.15-5. The Commission noted that this section, as contrasted with more detailed regulations, is the kind made simple and brief in order to be broadly adaptable to the myriad activities of a miner. From an operator's standpoint, one benefit of this flexible approach is that it affords considerable leeway in adopting safety requirements to the variable and unique conditions encountered in mines.

Various appellate court decisions support the Review Commission's construction of this regulation. Such appellate decisions arise under the Occupational Safety and Health Act, (OSHA), 29 U.S.C. 651 et seq.

A line of cases dealing with personal equipment regulations have applied an objective "reasonable" test. That is, whether a reasonably prudent person familiar with the circumstances of the industry would have protected against the hazard. American Airlines, Inc., v. Secretary of Labor, 578 F. 2d 38, (2nd Cir. 1978); Voegelé Co., v. OSHRC 625 F. 2d 1075, 1079 (3rd Cir. 1980); Bristol Steel & Iron Works, Inc., v. OSHRC, 601 F. 2d 717, 723 (4th Cir. 1979) Ray Evers Welding Co. v. OSHRC, supra, 625 F. 2d at 731-732; Arkansas Best Freight's System Inc. v. OSHRC, 529 F. 2d 649, 655 (8th Cir. 1976; Brennan v. Smoke Craft, Inc., 530 F. 2d 843, 845 (9th Cir. 1976). In General Dynamics v. OSHRC, 599 F. 2d 543, 464 the First Circuit explained that "knowledge of the existence of a

hazardous situation must be determined in light of the common experience of an industry, but that the extent of precautions to take against a known hazard is that which a conscientious safety expert would take."

I conclude that on the facts presented here that a conscientious safety expert would require that the Great Western worker should tie off while in this situation.

Great Western argues that a worker could fall if he slipped on some substance left on the floor, or he could fall while conducting an activity on the brink of a deep mine, or he could fall while on a step ladder two feet off the ground. Therefore, Great Western declares that safety belts should be worn in almost every mining activity which is obviously not the real world.

As indicated the test is one of reasonableness and I am unwilling to consider in this decision Great Western's various hypothetical situations.

Great Western's additional argument is that the enforcement of Section 57.15-5 must be in a reasonable fashion. As previously indicated reasonableness is a factor considered in determining this case. The worker here was 12 feet, not 2 feet, off of the ground.

Great Western cites appellate court decisions for the proposition that the test of liability should rely solely on whether a reasonably prudent employer familiar with the custom and practice of the industry would have protected against the hazard. It is correct that industry standards and customs have been held determinative of what constitutes reasonableness. This point was suggested in Ryder Truck Lines, Inc. v. Brennan, 497 F. 2d 230 (5th Cir. 1974) and B & B Insulation, Inc. v. OSHRC, 583 F. 2d 1364 (5th Cir. 1978).

But the First and Third Circuits have not followed the Fifth Circuit in limiting the reasonableness test to the custom and practice of the industry because as the First Circuit explained such a ruling "would allow an entire industry to avoid liability by maintaining inadequate safety training" General Dynamics, supra, at 464; accord Voegele Co., supra, at 1078.

Ray Evers Welding Company, supra, relied on by Great Western, is not persuasive authority for its position. The case deals with an OSHA regulation, (29 C.F.R. 1926, 28(a)), totally different from the regulation here. In Ray Evers the court overruled the claim of vagueness asserted there but held that there was a lack of substantive proof in the case.

Great Western's argument is further denied on the grounds that the Mine Safety Act seeks to promote safety and health in the mining industry. Great Western's position runs counter to that mandate. Title 30, Code of Federal Regulations describes the purpose of the Part 57 regulations as "the protection of life, the promotion of health and safety, and the prevention of accidents ..." Consistent with that general aim, the specific purpose of section 57.15-5 is the prevention of dangerous falls, Kerr McGee Corporation, supra,

at 2497. A dangerous fall may well be at hand if Great Western's employee continues this approach in replacing light fixtures.

Great Western hypothetically assumes that Section 57.15-5 is valid but that it was unreasonably applied in this case. Great Western urges there was no danger of the worker falling because the worker was stationary and not moving about. Further, there was no danger of falling because the worker had one arm extended through the rails and between the upper two rungs of the ladder (Exhibits 1, 2, and 3).

I am not persuaded by Great Western's argument or by its cited authorities. Merely being stationary with an arm extended as claimed might not prevent a fall. It is common knowledge that the mechanics of a fall generally defy set patterns. Further, if the light fixture was to be installed, the worker could not remain stationary.

The authorities cited in its brief do not support Great Western's position: In Brown v. McKee, 8 OSHC 1247, workers had access to an unsecured ladder. The citation was affirmed. In Bristol Steel and Iron Works Inc., 7 OSHC 1462 (601 F. 2d 717), the appellate court held that the general safety standard, 29 C.F.R. 1928.28(a), was not applicable to the erection of skeleton steel. In Hurlock Roofing Company, 7 OSHC 1867 (1979), the Occupational Safety and Health Review Commission (OSHRC) affirmed a citation requiring fall protection for workers performing roofing work on a flat roof. In Voegelé Company, Inc., 7 OSHC 1713, OSHRC affirmed a violation of 29 C.F.R. 1926.28(a) because a worker was standing in an 18 inch gutter near the edge of the roof. In Power Plant Division, Brown & Root, Inc., 7 OSHC 1713, an OSHRC Judge affirmed a violation of 29 C.F.R. 1926.28(a) because a reasonable person would have recognized that workers 50 feet above metal forms and rebars should have used fall protection.

Great Western also declares that its worker was skilled in the use of a ladder therefore that element is a necessary factor in determining whether a danger of falling existed.

I disagree. The skill of a worker could be a factor in assessing a penalty as it would relate to the operator's negligence. But, since the Act provides for the imposition of liability without regard to fault, the skill of a worker would not constitute a defense to a violation of the regulation. Kerr McGee Corporation, supra.

I reject Great Western's additional argument that no violation occurred because the ladder itself was secured and constructed in a substantial manner (30 C.F.R. § 57.11-3, 57.11-4). The most secured and most substantial ladder would not prevent this worker from falling if he lost his balance.

Great Western also asserts that requiring the use of a safety belt in these circumstances is unreasonable. Great Western's final argument merely restates its prior views which have already been discussed.

For the reasons stated and on the stipulated facts I conclude the worker could have sustained a dangerous fall from his position twelve feet above the floor while balancing himself on the rungs of the ladder.

The citation should be affirmed.

CIVIL PENALTIES

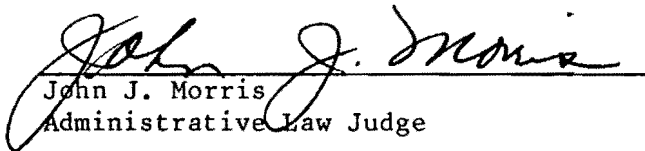
The parties stipulated that the amount of the proposed penalty was not an issue. Further, the parties accepted the recommendation of the Secretary's assessment office.

Considering the statutory criteria in Section 110(i) of the Act, [30 U.S.C. 820(i)], I deem that the proposed civil penalty is appropriate.

Based on the foregoing findings of fact and conclusions of law I enter the following:

ORDER

Citation 576985 and the proposed penalty therefor are affirmed.


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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SEP 9 1982

LEHMAN GILLIAM, : Complaint of Discharge,
Complainant : Discrimination, or Interference

v. : Docket No. KENT 80-288-D

BLUE DIAMOND MINING, INC., :
Respondent : Leatherwood Mine

DECISION

Appearances: Tony Oppegard, Esq., Appalachian Research and Defense Fund of Kentucky, Inc., Hazard, Kentucky, for Complainant; Stephen A. Sanders, Esq., Appalachian Research and Defense Fund of Kentucky, Inc., Prestonsburg, Kentucky, for Complainant; Randall May, Esq., Craft, Barret & Haynes, Hazard, Kentucky, for Respondent.

Before: Administrative Law Judge Steffey

Pursuant to a notice of hearing issued October 3, 1980, as amended October 15, 1980, March 19, 1981, and May 13, 1981, a hearing in the above-entitled proceeding was held on June 24, 25, 26, 27, and 29, 1981, in Hazard, Kentucky, under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(3).

After the parties had completed their presentations of evidence, I rendered the bench decision which is reproduced below: 1/

This proceeding involves a complaint of discharge, discrimination or interference filed in Docket No. KENT 80-288-D on July 21, 1980, as amended February 17, 1981, pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977. The complaint was filed under section 105(c)(3) after complainant received a letter from the Mine Safety and Health Administration which indicated that MSHA would not file a complaint on complainant's behalf under section 105(c)(2) of the Act.

The amended complaint alleges that complainant was discharged for engaging in activities protected under section 105(c)(1) of the Act, namely, (1) complainant's refusal to

1/ Although the hearing was held in June of 1981, none of the transcript was received from the reporter until June 1, 1982, and all of the transcript was not received until September 1, 1982. My decision appears in the record as a separate volume of transcript and bears the title "Finding of Facts and Ruling."

alter canopy legs on a loading machine in the manner requested by respondent's chief electrician because complainant believed compliance with the chief electrician's instructions would render the canopy unsafe, (2) respondent's belief that complainant had notified MSHA of a suspected safety violation, and (3) complainant's report to respondent's management on April 23, 1980, of numerous safety violations. At the hearing I granted respondent's request to strike the third reason given in support of the complaint after counsel for complainant stated that he was not going to pursue the third ground because complainant's report of safety violations had been made so close to the time of discharge as to make it difficult, if not impossible, to prove that those alleged safety violations had any bearing upon complainant's discharge.

I shall first make some findings of fact on which my decision will be based. They are lengthy, but are as concise as I can summarize five days of testimony.

(1) Lehman Gilliam, the complainant in this proceeding, began working for respondent, Blue Diamond Mining, Inc., on June 14, 1972, at respondent's No. 11 Main Mine. He worked as a union employee until August 1, 1977, when he became a salaried employee as a maintenance foreman on the second shift which began at 3:00 p.m. and ended at 11:00 p.m.. In April 1979 Gilliam was transferred to the third shift which began at 11:00 p.m. and ended at 7:00 a.m.. His supervisor on the third shift was Marion Shepherd for the first 2 months, followed by Emmet Farmer for the next 6 months, and by Marion Shepherd again for the last 6 months of his employment. His duties as maintenance foreman on the third shift consisted of obtaining parts for repair of equipment and supervising the work to make sure it was done. Gilliam supervised three mechanics who were assigned to work on the third shift. Their names were Dorsey Hall, Denton Gross, and Jerry Lewis.

(2) When Gilliam was supervised by Emmet Farmer, it was Farmer's preference to report for work at the respondent's main supply house. Farmer would obtain the supplies and parts needed on the third shift and bring them to the No. 11 Mine. When Gilliam was supervised by Marion Shepherd who worked on the day shift, Gilliam reported for work at the supply house for the purpose of obtaining parts. Sometimes Gilliam would first go to the Jim Polly Mine before reporting at the supply house. A conveyor belt transports coal from the No. 11 Mine to the Jim Polly Mine and Gilliam could call underground to ask men working at the face in the No. 11 Mine what parts were needed for his shift. Then Gilliam would proceed to the supply house from the Jim Polly Mine. Gilliam normally arrived at the supply house between 10:45 and 11:00 p.m.. If Gilliam did go to work by way

of the Jim Polly Mine, he would leave home 10 or 15 minutes earlier than he did when he proceeded directly to the supply house or to the No. 11 Mine from his home. Even though Gilliam could call the second shift from Jim Polly Mine, he could not determine what repair work might have been reported by the day shift. Therefore, Gilliam would call the No. 11 Mine Office from the supply house and ask his crewmen, who were still on the surface, what kinds of repair work, if any, remained to be done as a result of problems encountered by the miners working on the day shift.

(3) Gilliam used his own pickup truck to haul supplies to the No. 11 Mine, which was about 13 miles from the supply house. At the end of each month, Gilliam submitted a claim for mileage driven for respondent's benefit for which he was reimbursed at the rate of 22 cents per mile.

(4) Gilliam was discharged by his supervisor, Marion Shepherd, at the end of Gilliam's shift on the morning of April 21, 1980. Gilliam had reported for work on the preceding Sunday, April 20, 1980, at the supply house between 10:45 and 11:00 p.m.. Gilliam called the No. 11 Mine from the supply house and one of his crewmen, Jerry Lewis, read the maintenance report to him. He found that three different pieces of equipment needed repairs. Specifically, a traction motor had to be installed on the loading machine, the lights had to be repaired on the roof-bolting machine, and a clutch had to be installed on the B-23 shuttle car.

(5) Lewis told Gilliam that, in addition to the three aforementioned repairs, Marion Shepherd had given Lewis oral instructions to the effect that the back legs of the canopy on the loading machine should be raised 3 inches by welding chain links to the canopy legs. Gilliam alleges that he told Lewis not to start work on the canopy legs until Gilliam arrived at the mine. While Gilliam was at the supply house, he discussed the raising of the canopy with Wallace Cornett, who was maintenance foreman at respondent's Owens Branch Mine. It was Cornett's view that cutting the canopy legs and welding chain links to them would weaken them.

(6) Gilliam traveled to the No. 11 Mine, arriving there between 12:00 midnight and 12:15 a.m.. Gilliam alleges that he tried to get a member of his crew to come out of the mine with a vehicle to take Gilliam into the mine, but Gilliam couldn't get anyone to answer the paging phone. Gilliam waited on the surface until about 1:45 a.m. before Lewis came out of the mine to provide Gilliam with a means of transportation into the mine. While waiting for transportation into the mine, Gilliam talked to Franklin Mayhew, who is foreman over a clean-up crew on the third shift.

(7) When Gilliam first went underground at 2:00 or 2:15 a.m. on April 21, 1980, he stated that Dorsey Hall and Denton Gross were completing work on installation of a traction motor on the loading machine. The loading machine was stuck in mud and water and the repairmen tried to get it out of the mud but could not. Gilliam claims that the three men finished installing the traction motor after Gilliam came underground. Gilliam and the three men on his crew discussed the raising of the canopy on the loading machine. Since the front legs of the canopy were about 4 inches longer than the back legs, they decided to cut all four legs from the canopy so that the front legs could be welded to the back of the canopy and the back legs could be welded to the front of the canopy. While Lewis cut off the legs of the canopy with a cutting torch, Hall repaired the lights on the roof-bolting machine. Hall subsequently installed a new clutch in the shuttle car. Hall found that the trouble with the shuttle car was not caused by a defective clutch, but by a stripped pinion or shaft on the pump motor. Hall went to Gilliam about 5:30 a.m. and reported that a new pump motor was needed to restore the shuttle car to an operative condition. By 6:00 a.m., Lewis and Gross had finished rewelding all four legs on the canopy, but their failure to cut off the back legs at an angle and failure to reweld the back legs to the front of the canopy at an angle prevented the legs from fitting into the holders on the loading machine. At the finish of their shift, the repairmen had been able to bolt the back legs into their holders, but they never did get the front legs to fit into their holders even though they tried to force them into their holders by using jacks. Gilliam asked his crewmen to work overtime to finish the bolting of the canopy, but all of them refused to do so.

(8) The operator of the loading machine on the day shift ran the loading machine with the front legs of the canopy unbolted and out of the holders, but the operator on the second shift refused to do so. The canopy was ultimately raised by the cutting of new legs which were used to replace the legs whose position had been reversed by the third shift.

(9) When Gilliam left the section on April 21, he reported to Shepherd, his supervisor, that they had installed a clutch in the shuttle car but that the shuttle car couldn't be operated because it needed a new pump motor which he had not yet ordered from the supply house. Gilliam also alleges that he told Shepherd that the traction motor had been installed on the loading machine but that the canopy's front legs were unsecured. Gilliam also claims that he told Shepherd it would have been in violation of the mining laws for him to weld pieces to the canopy's legs. Shepherd indicated his dissatisfaction with the condition of the equipment and Gilliam said he might have to quit if his work wasn't considered to be satisfactory, to which Shepherd

replied that as far as he was concerned Gilliam had already quit and that Gilliam did not work for Blue Diamond any longer.

(10) After his discharge on the morning of April 21, Gilliam drove to the mine office at Leatherwood and spoke to Everett Kelly, respondent's general superintendent. Gilliam allegedly told Kelly that Shepherd had fired him because he had refused to repair a canopy in a manner which Gilliam felt was unsafe. Kelly told Gilliam that he should do the work assigned to him by Shepherd. Gilliam returned to the office again the same day about 3:00 or 4:00 p.m. and talked to both Kelly and Richard Combs, another superintendent, and asked that Shepherd's discharge be reversed by top management. Kelly told Gilliam that he would check into the situation and let Gilliam know what his ultimate decision was. During his second trip to the mine office, Gilliam alleges that Kelly asked Gilliam if he was the person who had called MSHA after the motor in a roof-bolting machine burned up during the third shift while miners were working in the main intake airway. Richard Combs was not present when Kelly allegedly asked that question. Combs called Gilliam on April 23, 1980, about 7:30 a.m., to say that he was upholding Shepherd's discharge of Gilliam. When Gilliam went to the mine later in the day about 8:30 a.m. to turn in his self-rescuer, he tried to talk to Combs again, but Combs declined to talk to Gilliam any more.

(11) Marion Shepherd asked Gilliam if he had called the MSHA inspectors after the motor in the roof-bolting machine burned up and Gilliam denied having done so. Shepherd told Gilliam that he would fire Gilliam if he found out that Gilliam had called MSHA. Gilliam told Shepherd if Shepherd fired him in connection with the phone call to MSHA, he, Gilliam, would take Shepherd with him. During Shepherd's and Gilliam's conversation about calling the inspector, Shepherd told Gilliam to stop portalling, or reporting for work, at the supply house. Gilliam alleges that for one shift he reported for work at the No. 11 Mine, instead of at the supply house, and went into the mine with his three crewmen, but he says about one shift later, Shepherd told him to resume reporting to work at the supply house because Shepherd was going to be away for several days to take his wife to the hospital in Lexington, Kentucky, and that he wanted Gilliam to install canopies on three pieces of equipment by April 18, 1980, that being the date which MSHA had set for the abatement period for some citations written by MSHA inspectors on April 11, 1980, when they came to the No. 11 Mine following the phone call regarding the burning of lead wires to the motor on a roof-bolting machine.

(12) Gilliam stated in his direct testimony that he had been caught asleep at the mine during his regular working shift on four different occasions. The first time was in

April 1979 when Gilliam was caught by a night watchman named Caudill when Gilliam fell asleep in his truck in which he was installing a CB radio. The second time was when Dana Eldridge caught him asleep on top of the power center at a time when the mine fan had been turned off. The third and fourth times were when Gilliam had gone outside the mine to provide a means of transportation for Dana Eldridge to come into the mine to make a preshift examination. While waiting for Eldridge to appear, Gilliam fell asleep and was found to be asleep by Eldridge.

(13) Marion Shepherd, the chief electrician and person who discharged Gilliam, was told about Gilliam's having been seen asleep at the mine during Gilliam's normal working hours. Shepherd says he had been told by Stidhams, the chief night watchman, and Dana Eldridge that they had seen Gilliam asleep. Additionally, Shepherd was told by Pearl Campbell, Bill Pennington, Kenneth Colwell, and Johnny Joseph of having seen Gilliam asleep at the mine. Campbell and Pennington based their report on a single instance when they arrived on the section at the end of the track and saw Gilliam sitting in a railrunner. Pennington's testimony expressed great doubt that Gilliam was asleep at that time because Gilliam was about 60 feet from him and Campbell. Pennington testified that he could not say for certain that Gilliam was asleep.

(14) Paul Watson and Ray Williams are duly authorized representatives of the Secretary of Labor. They went to the No. 11 Mine on April 11, 1980, in response to an anonymous telephone complaint to MSHA to the effect that the mine was not being properly ventilated at the time a motor on a roof-bolting machine burned up. They arrived at the mine about 5:30 a.m. and interviewed Frank Mayhew, a third-shift foreman in charge of a clean-up crew, and other personnel. The inspectors found that the main fan was operating at that time and they wrote no citations in connection with an electric motor which had burned out in a roof-bolting machine or use of an auxiliary fan instead of the large main fan. While they were at the mine, however, they wrote seven citations, three of which alleged violations of permissibility standard 75.503, three of which alleged violations of canopy standard 75.1710, and one of which alleged a violation of ventilation standard 75.316 requiring installation of permanent stoppings outby the last open crosscut. The citations required that the three alleged violations of section 75.1710 be abated or corrected by April 18, 1980, and that the remaining four be abated by April 14, 1980. The termination sheets show that all violations had been abated by April 23, 1980, when the termination sheets were written, except for installation of a canopy on the E-90 roof-bolting machine which was removed from the mine in order to achieve abatement. The termination sheet on the E-90 roof-bolting machine was written on May 12,

1980. All of the termination sheets were written by an inspector other than the one who wrote the original citation.

(15) Willie Bill Pennington was an employee who checked water pumps each day. His working hours were from 7:00 a.m. to 3:00 p.m.. On April 21, 1980, the day of Gilliam's discharge, Pennington was at the mine office about 7:00 a.m. and heard Shepherd ask Gilliam about a canopy on a loading machine but does not know what was said, except that Gilliam told Shepherd he would quit if his work wasn't satisfactory to which Shepherd replied that "as of this time, you no longer work for Blue Diamond Coal Company".

(16) Roger Jones is a repairman who worked on the third shift under the supervision of Frank Mayhew who was assigned to preparing for opening of a new section in the No. 11 Mine. He testified that all the men were brought out of the mine one morning when the motor on a roof-bolting machine burned. Smoke was said to be headed toward the working face. Someone called the inspectors about the incident and Shepherd asked him if he had called the inspectors. Jones stated that Shepherd was upset over it because it cost Shepherd seven violations. The seven violations have been described in paragraph 14 above.

(17) Ricky Baker on April 21, 1980, the day of Gilliam's discharge, was a supply clerk at the supply house. On the evening of April 20, 1980, Gilliam reported to the supply house about 10:45 p.m.. Baker was about 10 feet from Gilliam and Wallace Cornett when they were discussing something about putting a canopy on or taking one off of a piece of equipment. Baker didn't recall for certain when Gilliam left the supply house on April 20, 1980. Baker thinks during Gilliam's employment as a maintenance foreman, Gilliam came for parts about three or four times in the middle of a shift. Baker also testified that Gilliam once said he had been sleeping in his truck and would continue to do so, that Gilliam at least once got to the supply house at 1:00 a.m. because he had been watching a game played by the University of Kentucky. Baker recalled that the game started at 11:30 p.m. and said that he remembered the incident well because he wanted to watch the game but could not because he had to go to work. Baker also testified that Gilliam said it helped his expenses to claim mileage for making trips to the supply house for parts.

(18) One of the three repairmen on Gilliam's crew was Dorsey Hall. He testified that another repairman, Jerry Lewis, talked to both Shepherd and Gilliam on the phone before they went underground on April 20, 1980. They either took parts in or parts were already in the mine. He claims the new traction motor for the loader had not yet been put in place. All three of them worked on the traction motor and had finished installing it when Gilliam got inside the mine. Hall said Lewis and Gross, the third repairman, worked on the canopy while Hall repaired

lights on the roof-bolting machine and replaced the clutch on a shuttle car. By 5:30 a.m. Hall had found the clutch was not the cause of the shuttle car's problem and that a stripped pinion on the pump motor was the cause of the problem. Hall went to the power box at 5:30 a.m., where Gilliam was sitting, and told Gilliam he needed a pump motor. About 6 a.m. Hall started helping the other two repairmen and Gilliam on the canopy, but they couldn't get the front legs to fit into the holders. Hall testified that Gilliam stayed at the power box most of the time and often lay down on top of the box, but Hall said he could find Gilliam if he needed him. Hall said that Gilliam reported at the No. 11 Mine and went in the mine with his three crewmen for about 1 week. On the morning of April 21, 1980, Hall and Gross went down to the track when they heard Gilliam and Lewis come in. They discussed the canopy at that time and Gilliam left it up to Lewis to determine how the canopy should be raised. Hall said they left equipment down or unable to be used at the beginning of the day shift about once each month or less often. Hall rated Gilliam as an average foreman. Hall said Shepherd asked him if he had called the inspectors after the motor on the roof bolter burned and that Shepherd said whoever called was a dirty low down blankety blank. Hall told Shepherd in a joking way that it might have been Gilliam or Hall, himself, who had called the inspectors.

(19) Jerry Lewis, who was another of the three repairmen who worked under Gilliam's supervision on the third shift, stated that Shepherd called the No. 11 Mine Office about 11:00 p.m. on Sunday, April 20, 1980, before he and the other two repairmen went underground. Shepherd instructed him to raise the canopy on the loading machine about 3 inches and to repair a shuttle car on which a clutch was to be installed. Lewis stated that Shepherd told him to use a coupling link which measured about 8 inches in width and 16 to 18 inches in length and which was leaning against a pole near the 7,200-volt power box outside the mine. Lewis also said the width of the coupling bar was 6 inches at a later time. Lewis claims that he saw the piece of metal but can't recall whether he took it inside the mine or left it outside. Lewis stated that the three crewmen went underground about 11:30 p.m. and that all three repairmen went to the loading machine and completed the installation of the traction motor. Lewis said that the new motor was sitting in the loader but had not been bolted into position or connected to the power wires. He said he had to crawl under the loader to pull enough slack from the power wire to complete installation of the motor. Lewis claims that Gilliam left it up to the repairmen as to how they wanted to repair the canopy and that Gilliam did not say raising the canopy, as Shepherd had instructed, would be unsafe, nor did Gilliam tell him to install it differently from the way Shepherd had instructed him to do it. Lewis said he cut all four legs off the canopy and welded the front legs on the back of the canopy and the back legs on the front of the canopy because the front legs were longer than

the rear legs and putting the front legs at the rear raised the canopy on the end where the operator of the loading machine sits. Lewis said that the front holders for the canopy legs were slanted but that he welded the legs back on in a straight position. Therefore, they were never able to force the front legs into the holders and at the end of their shift they left the loader with the front canopy legs unbolted and out of the holders. Lewis recalled that Gilliam was told by Shepherd to stop portal-ling, or reporting for work, at the supply house and Lewis said that Gilliam portalled at the No. 11 Mine and went into the mine with them for about a week. Lewis said that Gilliam had told him about watching University of Kentucky ball games on TV, that there were times when Gilliam did not come into the mine at all, that Gilliam did not tell Lewis about checking any traps, that Gilliam did tell Lewis about checking for pokeberries on company time, that Gilliam spent most of his time on the power box, at times with his hard hat and light belt off, and that he would rate Gilliam as a poor foreman. Lewis stated that he went to see Everett Kelly, the General Mine Superintendent, after work on April 21, 1980, the day of Gilliam's discharge, about a diesel job and saw Gilliam already talking to Kelly. Lewis said that he voluntarily told Kelly that he had not called the MSHA inspectors after the lead wires to the motor burned out on a roof-bolting machine. Lewis said he normally went outside the mine about 1:00 a.m. to provide Gilliam with a means of transportation into the mine, but his time of going out varied somewhat so that, for example, on the morning of April 21, 1980, he did not go out for Gilliam until 2:00 a.m.. Lewis said he did not like to be a rat and had declined to tell Shepherd whether Gilliam was sleeping in the mine on top of the power box.

(20) Denton Gross was also one of the three repairmen on Gilliam's third-shift maintenance crew. He testified that Shepherd called the No. 11 Mine Office on April 20, 1980, and talked to Lewis. Shepherd instructed Lewis to cut the canopy legs and splice in a piece of metal so as to raise the canopy a few inches. The metal was supposed to be lying by the trolley track but he and Hall were unable to find it. A day or two after April 20, Dean Whitaker, a car driver on the second shift, showed Gross a piece of metal about 1-1/4 inch thick, 4 inches wide, and 14 to 18 inches long and stated that it was the metal which was supposed to have been used on the canopy. They went into the mine about 11:30 p.m. on April 20 and all three repairmen worked on replacing the traction motor on the loading machine. Gross stated that they had to remove the old motor and install the new one and that the band which holds the motor in place was bent and warped. Lewis went out and brought Gilliam in about 2:00 a.m.. Gross said that they all discussed the raising of the canopy top, but that it was Gilliam's decision that the legs in front be moved to the back. Gross stated that none of them could weld in a horizontal or vertical position well enough to do the job without taking the

canopy off. Gross said that they took the canopy off, cut all four legs off, and rewelded them so that the front legs were on the back and the back legs were on the front of the canopy, but they were unable to get the front legs into the holders on the loading machine and left the underground section about 6:45 a.m. without attaching the front legs to the holders. Gilliam asked them to stay late but they refused because they were too tired to continue working. Gross claimed they only left equipment down twice at the end of their shift, once when the feeder was not operable and again when the head drive in the conveyor belt was inoperable. Gross said that he saw Gilliam stretched out on the power box about twice each week, that he complained to Shepherd once about Gilliam's failure to obtain repair parts which were needed, that Shepherd had asked him if Gilliam was sleeping in the mine, that Gilliam spent most of his time at the power box and that he would rate Gilliam as a fair to good supervisor. Gross claims that all three of them lifted the canopy off the loading machine and that Lewis then worked on the canopy alone while Gross and Hall replaced the clutch in the shuttle car and discovered eventually that the problem was a stripped pinion on the pump motor. Gross said that he and Hall then helped Lewis with the canopy until the end of the shift at about 6:45 a.m..

(21) Marion Shepherd was Chief Electrician at the No. 11 Mine on April 21, 1980, when Gilliam was discharged. Shepherd is 55 years old and has been repairing equipment for 30 years, but has only a fifth-grade education. Gilliam worked directly under Shepherd's supervision, but Shepherd worked on the first or day shift, from 7:00 a.m. until 3:00 p.m., whereas Gilliam worked on the third shift which began at 11:00 p.m. and ended at 7:00 a.m.. Shepherd, therefore, had to communicate with Gilliam by telephone about repairs which had to be done on the third shift. Gilliam resented receiving telephone calls at his home from Shepherd at nine or ten o'clock at night before Gilliam left for work and asked Shepherd to stop calling him at his home. On the night before he discharged Gilliam, Shepherd called the No. 11 Mine Office about 10:55 p.m. and Gilliam had not arrived. Shepherd called again about 11:10 p.m. and Gilliam had still not arrived. Therefore, it was necessary for Shepherd to give his instructions about raising the canopy height, installing a traction motor on a loading machine, and replacing the clutch in a shuttle car to Jerry Lewis, one of the three men on Gilliam's maintenance crew. Shepherd was advised by Lewis that Gilliam might be at the supply house and Shepherd claims he called the supply house but got a busy signal and did not call again. Although Shepherd had been told not to call Gilliam at his home, Shepherd stated that he also called Gilliam's home and got a busy signal there also. Consequently, all instructions which Gilliam received on the night of April 20, 1980, were relayed to Gilliam by Jerry Lewis.

(22) Although Jerry Lewis knew that Shepherd had instructed the repairmen to use a coupling link about 1-1/4 inch thick, from

4 inches to 8 inches wide and about 18 inches long as the stock to be welded onto the canopy legs to raise the canopy 3 inches, Lewis used the term "chain link" in passing Shepherd's instructions on to Gilliam. Gilliam discussed the raising of the canopy legs with Wallace Cornett, now deceased, but whose deposition is Exhibit 11 in this proceeding, and Cornett expressed an opinion to Gilliam that use of chain links to extend the canopy height would weaken it and Cornett said he wouldn't carry out Shepherd's instructions because welding a chain link to the legs would weaken them. Cornett stated that Gilliam expressed no opinion that carrying out Shepherd's instructions would be unsafe.

(23) Marion Shepherd stated during his direct examination that he had instructed Lewis to weld a piece of coupling bar measuring 1-1/4 inch in thickness to the bottom of the canopy's legs so as to raise it 3 inches. Shepherd claims that welding a piece to the bottom of the legs would not have weakened them because the joining welds would be down in the sleeves that hold the legs on the loading machine. He conceded during cross-examination that the holes in the bottom of the canopy's legs and in the top of the canopy's holders were situated so close to the top of the holders that the welds would necessarily be outside the holders. Shepherd also expressed the opinion that the repairmen had simply turned the canopy around so as to place the front legs, which were about 4 inches longer than the rear legs, in the rear where the increased height was needed. Shepherd was unaware that the canopy was wider in the rear than it was in front and that the front legs would not fit into the rear holders nor the rear legs into the front holders if the canopy were simply turned around. Although he conceded that the repairmen would have had to cut all four legs off in order to reverse the position of the front and rear legs, he nevertheless insisted that the repairmen had plenty of time within which to raise the canopy's height. He found it inexcusable for the repairmen to have rewelded the front legs on straight when they knew while they were welding them that they would have to fit into holders which projected at an angle. Shepherd said the repairmen could easily have set the canopy on the loader and could have spot welded the canopy with the legs in proper position and could thereafter have taken the canopy off again so that they could have welded the legs or extensions to the legs in a flat position in view of the repairmen's claim that they were inept at performing welding while the parts to be joined were situated in a horizontal or vertical position.

(24) Shepherd was also critical of the repairmen for having waited until about 3:00 a.m. to begin installing the clutch in the shuttle car. Shepherd said he had gone into the mine on Saturday and had removed the traction motor from the loading machine and had put a new motor in the loader and that the only work remaining to be done was to connect the wires and bolt a metal band around the motor to hold it in position. He said that no more than 1

hour, at most, would have been required to finish that work. He also said that Hall should not have repaired the lights on a bolting machine until the shuttle car had been restored to operating condition because he had given Lewis strict instructions to give repair of the loading machine and shuttle car first priority. Shepherd said that even if Gilliam and his men could justify not having found until 5:30 a.m. that a pump motor, instead of a new clutch, was needed for the shuttle car, that Gilliam, at the very least, should have called the supply house and ordered the pump motor. Shepherd claimed that Gilliam could have ordered the pump motor without leaving the section by having called the watchman on the surface and asked him to order the motor. As things turned out, Shepherd had to order the motor himself on the day shift and help install it in order to get the shuttle car working again. Shepherd did not personally examine the canopy on the loading machine, but said that since Gilliam had told him that the canopy had been left off the loading machine, he assumed the loader was used by the day shift without any canopy on it, or that another stand-by loader, not equipped with a canopy, had been used. Shepherd was upset about the repairmen's failure to get the shuttle car fixed because the other two shuttle cars on the section were old and unreliable.

(25) Shepherd stated that he discharged Gilliam for six reasons: (1) Gilliam for a period of about 1 year would fail to have equipment in an operable condition at 7:00 a.m., that is, at the end of Gilliam's shift; (2) Gilliam did not go into the mine early enough or follow on the work closely enough to know whether equipment was operable at the end of his shift; (3) Gilliam admitted to Shepherd that he had checked his traps during company time to see if he had caught foxes or other wild game, and other people, such as Ken Colwell and Lonzo Shepherd, told Shepherd about seeing Gilliam hunting at night on company time; (4) Gilliam admitted to Shepherd that he had slept on company time and Shepherd had been told at least once by Pearl Campbell, Bill Pennington, Dana Eldridge, Ken Colwell, and Johnny Joseph that they had seen Gilliam asleep; (5) Gilliam went into the mine so late that he was not present to supervise his men when they encountered difficult wiring problems which required electrical knowledge which they admittedly did not have; and (6) Gilliam disobeyed Shepherd's orders to stop portalling, or reporting for work, at the supply house, instead of reporting for work at the No. 11 Mine Office so as to be at the mine where he could go in each night with his three-man crew. Instead, Gilliam continued to portal at the supply house so that on April 21, 1980, the day of his discharge, Gilliam did not get to the underground working section where his men were repairing equipment until 2:00 or 2:15 a.m., whereas his men had been there since 11:30 p.m., April 20. Shepherd stated that Gilliam's favorite sleeping place was on top of the power center which handles 7200 volts of electrical current. Shepherd stated that it is

against company policy for miners to eat their lunch at the power center or otherwise gather in close proximity to it, much less to lie down on top of it and go to sleep.

(26) Although Shepherd conceded that he had permitted Gilliam to report for work at the supply house so as to bring needed parts to the mine after the start of the third shift, Shepherd said he ordered Gilliam to stop portalling at the supply house when Shepherd became aware that Gilliam was using the practice of portalling at the supply house as an excuse for not going into the mine until 3:00 or 4:00 a.m.. Shepherd says he ordered Gilliam to stop portalling at the supply house about 2 weeks before Gilliam's discharge and that he had not changed that order so as to allow Gilliam to resume portalling at the supply house. Shepherd specifically denied Gilliam's claim that he had ever asked Gilliam to have canopies installed on all equipment by April 18, 1980, and in connection with that work, had told Gilliam to report to the supply house as often as necessary to get the parts needed to install the canopies. Gilliam claimed that one reason for the alleged reversal of Shepherd's order about portalling at the supply house was that Shepherd was going to be away from work about a week so that he could take his wife, who was suffering from a serious illness, to the hospital. Shepherd said he doesn't think he took his wife to the hospital at all during the week of April 18, 1980, that he never had been off for more than 1 day to take his wife to the hospital in Lexington, Kentucky, and that his wife was not suffering from a serious illness.

(27) Shepherd agreed that he had asked Gilliam if he had called MSHA inspectors after the power leads to the motor on the roof-bolting machine burned out in early April 1980 during Gilliam's third shift. Shepherd also stated that he had asked some of the men on Shepherd's crew if they had called the MSHA inspectors. The time that Shepherd asked the repairmen about calling the inspectors occurred one morning when Gilliam and his crew were about to get in their trucks to leave and were kidding each other about calling the inspectors. Shepherd's description of the kidding episode was supported by Dorsey Hall, one of the crewmen who testified that he had in a kidding manner told Shepherd one day that Gilliam might have called the inspectors. Shepherd denied that he had threatened to fire anyone who called an inspector if he should find out who did it. Shepherd also denied that the visit by the inspectors after receipt of the complaint about the roof-bolting machine had anything to do with Shepherd's discharging Gilliam.

(28) Dana Eldridge was a belt foreman on the day shift at the time of Gilliam's discharge on April 21, 1980. Eldridge also was the preshift examiner and reported at the mine from 4:30 to 5:00 a.m. in order to perform preshift examinations.

Eldridge would see Gilliam stretched out on the power box about twice a week and often Gilliam would be asleep. Shepherd asked Eldridge several times whether he had seen Gilliam asleep in the mine or not and Eldridge would give an evasive reply to the effect that Shepherd would have to find that out by going into the mine himself. Eldridge said he liked Gilliam and did not want to tell anyone about the fact that Gilliam was sleeping in the mine. Eldridge said, however, that Shepherd had asked him about Gilliam's sleeping approximately 6 months before Gilliam was discharged. On one occasion, the mine fan was turned off and Eldridge was unable to get anyone to answer on the paging phone. Eldridge went into the mine to get the miners out and found Gilliam snoring on top of the power box. Eldridge went on to the face area and got Gilliam's men out of the mine until it was safe for them to return to work. Eldridge also stated that Gilliam had once asked Eldridge if he had reported him to anyone for sleeping in the mine and Eldridge said he had not at that time. On the morning that Gilliam was discharged, Eldridge heard Gilliam and Shepherd discussing the equipment and heard Shepherd tell Gilliam that they could not go on like this. Although Denton Gross, one of the repairmen on Gilliam's crew, stated that he had heard Shepherd say to Eldridge that Shepherd would fire anyone who called the MSHA inspectors, Eldridge denied that he had ever heard Shepherd make such a statement.

(29) Richard Combs was Superintendent of the No. 11 Mine on April 21, 1980, when Gilliam was discharged. His office is about 9 miles from the No. 11 Mine. Combs made a routine call to the No. 11 Mine Office on the morning of April 21, and Shepherd told him that he had discharged Gilliam. Later in the day Shepherd told Combs that he had discharged Gilliam for leaving equipment down or in an inoperable condition. Combs talked to Gilliam on April 22, at which time he told Gilliam he would investigate the discharge and let Gilliam know the outcome of his investigation. Combs then talked to Shepherd and Eldridge and decided, along with Combs' supervisor, that Gilliam's discharge should be upheld. Combs called Gilliam on April 23 and advised him that the discharge was being upheld. Combs stated that Gilliam did not discuss the canopy with him. The first time Combs became aware of Gilliam's allegations about the canopy was when an MSHA investigator named Edward Morgan mentioned it to him.

(30) Everett Kelly, who is Combs' supervisor and General Mine Superintendent, became aware that Shepherd had discharged Gilliam on April 21, 1980, when he received a brief phone call from Shepherd advising Kelly of that fact. A short time later, Gilliam came by in person and told him that he and Shepherd had had words and that Shepherd had discharged him. Kelly denies that Gilliam at that time, April 21, mentioned the canopy, or a hazard to the miners, or anything about calling an MSHA inspector.

Kelly assigned Combs to investigate the discharge and he and Combs decided to uphold the discharge after Combs had talked to Shepherd and Eldridge and had been told that Gilliam left the loader and shuttle car inoperable on April 21 and had not gone into the mine until 2:00 a.m.. Kelly was told by Gilliam about the allegedly unsafe raising of the canopy and other claimed violations on April 29, 1980, when Gilliam came to Kelly's office and provided additional allegations, including Gilliam's claiming that he had told Shepherd that if Shepherd discharged Gilliam, Gilliam would take Shepherd with him. Kelly denies that he ever asked Gilliam whether he had called the MSHA inspectors. Kelly remembered that a watchman named Caudill had called him at home one night to report that Gilliam was sleeping in his truck. Kelly told Caudill to call the Chief Watchman named Stidhams, which Caudill did. By the time Stidhams arrived at the mine, Gilliam was awake.

(31) Frank Durbin is respondent's Safety Director and was employed by MSHA, MESA and the Bureau of Mines for 10 years before becoming Safety Director. It was his opinion that adding a piece of steel to the legs as recommended by Shepherd would not have prevented the canopy from passing the stress test of 18,000 pounds or 15 pounds per square inch required by 30 C.F.R. § 75.1710-1(d).

(32) Dale Junior Colwell is a cutting machine operator at the No. 11 Mine and was such an operator on April 21, 1980, when Gilliam was discharged. He testified that his cutting machine was inoperable only on one occasion that he can recall and that on that occasion, Gilliam remained at the mine and worked on the day shift long enough to repair his cutting machine. He believes that Gilliam and his crew did very good work in keeping equipment in operable condition. Colwell was a rebuttal witness, but he did not controvert Shepherd's testimony to the effect that on one occasion the repairmen on Gilliam's crew had improperly hooked some wires on the cutting machine so that the cutting machine would not run. On that occasion, Shepherd had to rewire the equipment himself. It was Shepherd's contention that Gilliam could have wired the cutting machine properly if he had just gone into the mine that morning and checked out the cause for the cutting machine's failure to operate.

(33) Robert Begley has been a shuttle car alternate driver and general laborer at the No. 11 Mine. He testified that the equipment now being used is not maintained as well at the present time as it was when Gilliam was maintenance foreman. He finds the shuttle car frequently inoperable now and seldom, if ever, saw them inoperable when Gilliam was maintenance foreman. He said the mine made 10 cuts a day when Gilliam was maintenance foreman, whereas now the mine only

runs from three to five cuts. Begley conceded that the coal height is only 47 inches now as compared to 60 or 80 inches at the time Gilliam was maintenance foreman. He also stated that the shuttle cars now being used are different from the ones that were being used when Gilliam was maintenance foreman. Begley was presented as a rebuttal witness but his testimony only tends to confirm Shepherd's contention that the reason he was so upset when Gilliam failed to repair the B-23 shuttle car on the day of Gilliam's discharge was that the B-23 was the only really good shuttle car they had and that the other two were very unreliable and frequently were out of order. The B-23 car is not in the section where Begley works.

In C.C.C.-Pompey Coal Co., Inc., 2 FMSHRC 1195 (1980), and in Council of Southern Mountains v. Martin County Coal Corp., 2 FMSHRC 3216 (1980), the Commission held that a judge's bench decision is not a final decision until it has been issued by the Commission's Executive Director pursuant to 29 C.F.R. § 2700.65(b). In the Pompey case, the Commission held that it is error for a judge to issue a bench decision in final form without considering any applicable decisions which have been issued by the Commission between the time the bench decision was rendered and the time the decision is issued in final form under section 2700.65(b).

The above findings of fact have been reproduced, with minor changes, as they were given at the hearing which ended on June 29, 1981, but the complete transcript in this proceeding did not become available until September 1, 1982, which was 1 year and 2 months after the bench decision was rendered. In the long interim between the rendering of the bench decision and the issuance of this decision in final form, the Commission has decided several cases which should now be considered in the substantive portion of my decision which gives the reasons for my conclusions that complainant failed to prove that his discharge was a violation of section 105(c)(1) of the Act. In order to give proper consideration to all interim decisions which have been issued since the bench decision was rendered, I am hereby vacating everything in the bench decision following the 33 findings of fact set forth above and am inserting the rationale which is hereinafter given.

The outcome of this revised decision is the same as the result reached in the bench decision, but the revised decision considers the Commission's holdings in Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508 (1981), and Elias Moses v. Whitley Development Corp., 4 FMSHRC _____, Docket No. KENT 79-366-D, decided August 31, 1982, and follows the specific guidelines which were given by the Commission in decisions issued after I rendered the bench decision. In Dunmire and Estle v. Northern Coal Co., 4 FMSHRC 126 (1982), the Commission explained why it believes that the court's decision in Consolidation Coal Co. v. Ray Marshall, 663 F.2d 1211 (3rd Cir. 1981), reversing the results reached by the Commission in Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (1980), did not change the Commission's analysis of the parties' burdens of proof which were formulated by the Commission in its Pasula decision.

Therefore, even though the results reached by the Commission in the Pasula case were reversed by the Third Circuit in Consolidation Coal, the Commission still expects its judges to apply the Commission's Pasula holding set forth below (2 FMSHRC at 2799-2800):

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. [Emphasis in original.]

The complaint in this proceeding alleges two violations of section 105(c)(1) of the Act which provides, in pertinent part, as follows:

No person shall discharge or in any manner discriminate against 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 of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

The First Alleged Violation of Section 105(c)(1)

The first question to be considered is whether complainant was discharged because he made a complaint about safety to the operator's agent. The safety complaint which complainant claims to have made is based on the allegation that complainant had stated to Shepherd, complainant's supervisor, prior to his discharge, that increasing the height of the canopy on

respondent's loading machine by welding pieces of metal to the canopy's two rear legs, as Shepherd had suggested, would be unsafe and in violation of the State and Federal regulations pertaining to installation of canopies on self-propelled electric face equipment (Finding Nos. 5, 8, 15, and 20, supra).

Respondent claims that complainant was primarily discharged for failing to have equipment in an operable condition by 7 a.m. which was the time complainant's shift ended and the time the day shift began. The two pieces of equipment which were inoperable on the morning of April 21, 1980, the date of complainant's discharge, were the loading machine and the B-23 shuttle car. Respondent contends that complainant never mentioned, prior to his discharge, that raising the canopy on the loading machine, in the manner Shepherd had suggested, would adversely have affected the safety of the operator of the loading machine (Finding Nos. 18, 19, 22, 29, and 30, supra).

The last shift complainant worked prior to his discharge began at 11 p.m. on Sunday, April 20, 1980. Shepherd had called the No. 11 Mine before and after 11 p.m. and had been unable to talk to complainant. Therefore, he gave his instructions about the repair of equipment to Lewis who was one of the three repairmen who worked under complainant's supervision. Shepherd asked Lewis to tell complainant that the traction motor in the loader needed to be replaced and that the canopy on the loader needed to be raised about 3 inches. Shepherd suggested that the back legs of the canopy be raised by welding to them pieces of metal which could be obtained from a coupling link which Shepherd had left outside the mine office near the 7,200-volt power box. Shepherd also told Lewis that a new clutch would have to be installed in the B-23 shuttle car (6/26, Tr. 6-7; 167-168). 2/

It is undisputed that Lewis passed on to complainant the instructions which he had received from Shepherd, except that Lewis seems to have referred to the kind of metal which Shepherd had mentioned for use in raising the canopy as a "chain" link, instead of a "coupling" link (6/24, Tr. 23; 189; 6/25, Tr. 9; 41; 64; 86; 105; 141-144; 159-160). Lewis claims to have found the coupling link prior to going into the mine and said that it was a flat piece of metal about 1-1/2 inch thick, 6 to 8 inches wide,

2/ There were 5 different days of hearing in this proceeding. A reporter would normally have made a separate volume of transcript for each day's hearing, but the page numbers would have run consecutively through all five volumes. The reporter in this proceeding made a separate volume of transcript for each day, but began renumbering the pages of each day of transcript with the figure "1". Therefore, it is necessary to prefix each reference to a transcript page with the date shown on the front of the volume in which that transcript page may be found. To find a reference such as "6/26, Tr. 6-7", one would find the volume having the date of June 26, 1981, on it and turn to pages 6 and 7 of that volume of transcript.

and 14 to 18 inches long (6/25, Tr. 86; 143). Lewis testified that even if complainant had initially misunderstood what kind of metal Shepherd had intended for the repairmen to use in raising the canopy, no confusion about a chain link verses a coupling link should have existed after complainant and his three repairmen had discussed the raising of the canopy when complainant finally reached the working section about 2:15 a.m. on Monday, April 21, 1980 (6/25, Tr. 144; 6/24, Tr. 28).

Complainant testified that he told Lewis not to do any work on the canopy until he had arrived underground to discuss the canopy with Lewis (6/24, Tr. 22). Although Lewis fails to recall that complainant gave him any such instructions (6/25, Tr. 112), one of the repairmen, Gross, testified that Lewis told them that complainant did not want any work done on the canopy until complainant had arrived on the section (6/25; Tr. 162). Complainant did not arrive on the section until Lewis brought him in on a rail car about 2:15 a.m. (6/24; Tr. 28). Shortly thereafter all four men discussed the method which should be used to raise the canopy and, although complainant and Gross claim that it was complainant's decision (6/24, Tr. 34; 6/25, Tr. 168), while the other two repairmen, Lewis and Hall, say that complainant left the decision up to the repairmen (6/25, Tr. 48; 91; 112; 135), the men unanimously concluded that the best way to raise the canopy was to swap the position of the canopy's legs by moving the front legs to the rear and the rear legs to the front because the front legs were longer than the rear legs (6/24, Tr. 34; 6/25, Tr. 90). One reason that the repairmen decided to switch the legs' position was that they had put the canopy on in the first place and had incorrectly installed the canopy with the shortest legs in front (6/24, Tr. 53; 6/25, Tr. 145). Therefore, they concluded that the canopy would probably meet Shepherd's approval if they simply reinstalled the canopy in the manner it should have been installed in the first instance.

Since the canopy was wider in the rear than it was in front (6/24, Tr. 54), and since the holders for the canopy's front legs protruded upward from the loading machine at an angle (6/24, Tr. 56; 6/25, Tr. 90), the canopy could not be raised in the rear simply by taking it off and turning it around. Therefore, Lewis cut off all four of the canopy's legs with a cutting torch. When Lewis rewelded the legs to the canopy, he forgot to allow for the angle of the holders for the front legs and rewelded all four legs to the canopy in a straight position (6/25, Tr. 90). The result was that the rear legs went into the rear holders, but the front legs would not go into the front holders. Consequently, all three repairmen and complainant worked from about 6 a.m. to quitting time at 6:45 a.m. ^{3/} in an effort to get the front legs into their holders, but they never did succeed in doing so (6/24, Tr. 46-47; 6/25, Tr. 19; 170).

^{3/} Although the actual quitting time was 7 a.m., the miners left the underground working section at 6:45 a.m. so as to be outside the mine and ready to go home by 7 a.m.

Complainant's repairmen also failed to have the B-23 shuttle car ready to operate at the time their shift ended on April 21, 1980 (6/24, Tr. 40; 62). Shepherd had instructed the repairmen to replace the clutch on the shuttle car. None of the repairmen began to work on the shuttle car until about 3 a.m. when Hall started working on it (6/24, Tr. 24; 35; 6/25, Tr. 17; 44). Hall found, after replacing the clutch, that the shuttle car still would not operate. He then removed the pump motor and found that it had a stripped pinion (6/24, Tr. 39; 6/25, Tr. 17).

He reported the need for a new pump motor to complainant about 5:30 a.m., but complainant concluded that it would not be possible to obtain a new motor from the supply house for the shuttle car in time for the pump motor to be installed during complainant's shift, so complainant did not order a pump motor so that one could be delivered from the supply house to the No. 11 Mine for subsequent installation by other repairmen on the day shift. Complainant excused his failure to order the pump motor by claiming that he would have had to go outside the mine to order the motor which would have taken 20 minutes and then he would have had to return underground which would have taken another 20 minutes. Since he did not know the motor was needed until 5:30 a.m., he would not have been back into the mine until about 6 a.m.. He claims that he needed to help his men reinstall the canopy and that he believed the canopy work was more important than ordering the pump motor for the shuttle car (6/24, Tr. 43).

Shepherd's testimony at the hearing contained very convincing reasons to support his dissatisfaction with the way complainant had performed his duties on the morning of April 21, 1980 (6/27, Tr. 103-104). Shepherd was a supervisor who actually did repair work and who knew exactly how long it should take for work to be done. No one controverted Shepherd's testimony to the effect that he had gone into the mine and worked on the loading machine on Saturday, April 19, 1980 (6/26, Tr. 5; 21; 157). Shepherd and another repairman not on complainant's crew had removed the old motor on the loading machine and had placed the new motor on the loader, but Shepherd ran out of time and did not install the packing gland on the new motor, or reattach the power wires, or reinstall a band which holds the motor in a secure position (6/26, Tr. 21; 147; 201; 6/27, Tr. 104).

In Shepherd's opinion, no more than one of the repairmen was needed to finish installation of the motor and he believed that 1 hour would have been ample time for completing that work (6/27, Tr. 101-102). In the meantime, Shepherd said that another repairman could have been working on replacing the clutch in the shuttle car (6/27, Tr. 103). Since the repairmen arrived on the section at 11:30 p.m. on April 20, 1980, there is reason to believe that they could easily have completed installing the motor on the loading machine by 2 a.m., could also have replaced the clutch in the shuttle car by 2 a.m., and could easily have found by 3:00 a.m. that a pump motor was needed for the shuttle car (6/27, Tr. 97-99).

Shepherd's belief that complainant and his men had failed to do their jobs properly on the morning of April 21, 1980, is thoroughly supported by the repairmen's own testimony. All of the repairmen gave different testi-

mony about some details of what happened on their shift on April 21, but they all agreed that all three of them worked on installation of the motor in the loading machine until about 2 a.m. at which time Lewis went out in a rail car to provide complainant with a means of transportation into the mine. All of them agree that installation of the motor on the loading machine was not completed until after complainant had arrived underground on the section at about 2:15 a.m. (6/24, Tr. 29; 6/25, Tr. 12; 88-89; 110-111; 149; 163-164). None of them did any work on anything but the loading machine until about 2:30 a.m. when Hall went to the roof-bolting machine and replaced a light (6/25, Tr. 13). Then about 3 a.m. Hall began working on the installation of the clutch in the B-23 shuttle car (6/24, Tr. 35; 6/25, Tr. 17). By 5:30 a.m. he had reported to complainant that he needed a pump motor (6/24, Tr. 42).

It is obvious, therefore, that Hall had installed the clutch and discovered that he needed a pump motor within 2-1/2 hours after he began working on the shuttle car. If Hall had started working on the shuttle car as soon as he went underground, as Shepherd believed he should have done, Hall would have known by 3:00 a.m., at the latest, that he needed a pump motor for the shuttle car. Ricky Baker, the supply clerk, testified that he could have had a pump motor delivered to the No. 11 Mine within 30 to 45 minutes after receiving a request for one (6/24, Tr. 281). If complainant had made a request for the pump motor by 3 a.m., it could have been delivered to the No. 11 Mine and could easily have been installed before the end of the shift at 6:45 a.m..

Shepherd also rejected complainant's excuse for not having at least ordered the pump motor at 5:30 a.m. when he was told by Hall that it was needed. Shepherd testified that complainant would not have had to use a half hour to go in and out of the mine to order the pump motor because, according to Shepherd, all complainant would have had to do to order the motor would have been to call outside and have the night watchman, Caudill, order the pump motor from the supply house (6/27, Tr. 121). Moreover, even complainant's excuse for not ordering the motor is defective because he could have gone out and ordered the motor at 5:30 a.m., when he knew the motor was needed, and could have been back into the mine by 6:10 a.m., after personally ordering the motor. Inasmuch as complainant's own testimony shows that he did not do a single thing to help raise the canopy until 6 a.m., he could have gone out and ordered the motor and still have been back in the mine in time to begin working on the canopy at approximately the same time he actually did begin to work on it.

As indicated above, the primary reason given by Shepherd for discharging complainant was that complainant had been leaving equipment "down", or inoperable, at the end of his shift. Complainant's counsel sought to discount Shepherd's testimony as to inoperable equipment by arguing that Shepherd's testimony is less credible than complainant's testimony. While it is true that Shepherd was unable during cross-examination to give the exact dates on which complainant had left equipment inoperable, it is an undisputed fact that two pieces of equipment,

the loading machine ^{4/} and the B-23 shuttle car, were left in an inoperable condition at the end of complainant's shift on April 21, 1980, the day complainant was discharged for failure to perform his job. It was also uncontroverted that complainant's repairmen failed to wire a cutting machine properly a few weeks before his discharge (6/26, Tr. 18-19). It was necessary for Shepherd to rewire the cutting machine on the day shift while 14 to 16 miners were paid to wait while the machine was rewired. Shepherd testified that complainant was competent in electrical matters and that he knew that if complainant had been with his men that morning, he could have made certain that the cutting machine was properly wired (6/26, Tr. 19; 61; 109; 156). Although the miners were exceedingly unwilling to say anything at the hearing which was in any way critical of any other miner, at least two miners indicated that there was a hostile relationship between Shepherd and complainant (6/24, Tr. 236; 6/25, Tr. 152) and one of the repairmen testified that he did not like to talk to Shepherd and avoided doing so when possible (6/25, Tr. 81).

Moreover, it is significant that two of the repairmen, Hall and Lewis, testified that Pearl Campbell, the section foreman on the day shift, reported them for leaving equipment in an inoperable condition when, in their opinion, it was not their fault (6/25, Tr. 39-41; 60; 127). Hall claimed that Campbell would report equipment as being inoperable to excuse his failure to produce as much coal as he thought was required of him (6/25, Tr. 62). Shepherd testified that complainant would report that all equipment was operable, but he would receive calls from underground that equipment was not operable (6/26, Tr. 54; 161-162; 6/27, Tr. 59). Since Shepherd personally went underground every day and frequently repaired equipment himself, there is hardly any way that Campbell could have falsely claimed that equipment was inoperable just to conceal his own deficiencies as a foreman (6/26, Tr. 164). The testimony discussed above supports my conclusion that Shepherd's testimony about complainant's leaving equipment in an inoperable condition is more credible than complainant's denial that he frequently left equipment inoperable.

Another aspect of the repairmen's testimony which requires some discussion is that they were definitely on the defensive throughout their testimony. They realized that they had not performed well on the morning of April 21, 1980. In all probability, they had done almost nothing between the time they went underground and the time complainant came into the mine about 2:15 a.m.. That would explain why all of them had to claim that they were working on installation of the motor on the loading machine until 2:30 a.m. (6/24, Tr. 24-33; 6/25, Tr. 9-13; 88-89; 162-166). Gross was so ill at ease about the amount of work he had done that night that he testified that he had helped Hall install the clutch on the

^{4/} Since the repairmen had finished installing a motor in the loading machine, the only defect in the loading machine was that the front canopy legs were not secured in their holders. The day-shift operator ran the loader in that condition, but the second-shift operator refused to do so (6/26, Tr. 180; 183; 6/25, Tr. 72; 76; 146).

shuttle car and had helped remove the pump motor from the shuttle car (6/25, Tr. 171; 182-183). Gross is almost certainly wrong in so claiming because complainant and Hall both testified that only Hall worked on the shuttle car at any time during the morning of April 21 and that Gross worked at no place other than at the loading machine where he helped Lewis cut off the legs on the loading machine's canopy and helped in re-welding the legs (6/24, Tr. 32; 35; 42; 6/25, Tr. 13-14; 17). Gross' credibility was further eroded when he testified that "we" held the legs while Lewis welded them (6/25, Tr. 201). If Gross had been working with Hall at the shuttle car, no one would have been available at the loading machine to hold the legs while Lewis welded them.

It should be noted that Lewis did nothing from 2:30 a.m. until 6 a.m. other than cut off the canopy's legs and reweld them (6/24, Tr. 32; 44; 6/25, Tr. 14; 90-91). Each canopy leg was 1-1/4 inch thick and 4 inches wide. Shepherd correctly stated that no more than 10 minutes, at most, would have been required to cut each of the legs off with a cutting torch (6/27, Tr. 91). That means that Lewis should have had the legs cut off by 3:40 a.m., assuming he began cutting on them at 3 a.m.. It is incredible to think that it took Lewis and Gross about 2-1/2 hours to reweld the four 4-inch legs to the canopy's top. Yet that is all that Lewis claims to have done between 3 and 6 a.m.. As indicated above, Gross was so ill at ease about his role between 3 and 6 a.m. that he testified that he had assisted Hall in installing the clutch and removing the pump motor on the shuttle car. Gross was so confused about what he did that morning that he even testified at one point that he had installed a pump motor on the shuttle car (6/25, Tr. 182-183). Yet he later testified correctly that the shuttle car wouldn't run at the end of the shift because it needed a pump motor (6/25, Tr. 188). Finally, Gross contradicted himself so much about the time that events were alleged to have occurred on the morning of April 21, that complainant's counsel, who had called Gross as a witness, had to have Gross explain on redirect that he was confused about the times when events occurred during the morning of April 21 (6/25, Tr. 195).

It is true that complainant, Gross, and Hall testified that they spent about an hour trying to get the loading machine unstuck but never were able to do so (6/24, Tr. 32; 6/25, Tr. 13; 165). Even if they did spend an hour trying to get the loading machine unstuck, they still did not explain satisfactorily how they spent their time during their shift on April 21. Also, their statements as to the depth of the mud are so inconsistent that it is not possible to form any sound conclusions as to how much actual trouble they had with mud and water. Complainant, for example, gave three different depths for the mud and water. He first said that the mud and water were 2 or 3 feet deep (6/24, Tr. 31). He then reduced the depth of the mud and water to 8 to 10 inches (6/24, Tr. 34). He finally increased the depth of the mud and water to 12 to 14 inches (6/24, Tr. 183). Complainant contended that the repairmen had to put down header boards to work on in order to stay out of the mud and water (6/24, Tr. 33).

Lewis is the repairman who had to crawl under the loader to obtain slack wire for rewiring the new motor, yet he said that the mud was over-

come by laying down brattice cloth (6/25, Tr. 150). It is uncontroverted that Lewis is the one who crawled under the loader to get the wire, so he undoubtedly knew better than anyone else how much mud and water were on the mine floor. It is certain that brattice cloth could not keep a person out of mud and water if it had been as deep as complainant testified that it was.

A discussion is also required as to the merits 5/ of complainant's contention that it was unsafe to raise the height of the canopy by welding pieces of metal to the bottoms of the canopy's two rear legs (6/26, Tr. 7). The only safety question which complainant allegedly raised with respect to Shepherd's suggested method of raising the canopy was whether the repairmen could achieve a high quality of weld when they added pieces to the canopy's rear legs (6/24, Tr. 60; 129). Although the repairmen believed that it would have been unsafe to raise the canopy by welding pieces to the legs, they also said that the safety aspects of adding metal pieces to the legs related to the quality of the welds made to attach the metal pieces to the legs (6/25, Tr. 15; 112; 145; 202).

Only one of the repairmen, Gross, claimed to have heard complainant say that it would have been unsafe to weld pieces to the canopy's legs (6/25, Tr. 185) and his testimony is filled with inconsistent statements and is less credible than the testimony of the other two repairmen. Hall testified that complainant left it up to Lewis to raise the canopy the way Lewis thought was safest (6/25, Tr. 51). Lewis specifically testified that complainant did not express a belief that welding pieces to the canopy's legs would be unsafe (6/25, Tr. 92). The repairmen said that the reason they doubted their ability to achieve a high quality of weld was that none of them had the expertise to weld in the horizontal or vertical position 6/ which would have been required to weld pieces to the

5/ I recognize that if a miner, in good faith, erroneously raises a question about safety and is discharged because he mistakenly raised a safety issue, it would be a violation of section 105(c)(1) for his employer to discharge him for raising a false question of safety if he sincerely believed the safety question was valid when he raised it. In this proceeding, however, complainant's act of sitting down at the power center for 3 hours out of sight of the work being done on the canopy shows that complainant was not really concerned about the quality of the welding being done on the canopy. Complainant's obvious indifference to the actual welding process casts a great deal of doubt on complainant's contention that he raised a safety issue about the canopy at the time he was discharged on April 21, 1980.

6/ The repairmen would have been using an electric welding machine which welds by fusing metal from an electrode into two pieces of metal as the electrode is passed along the crack between the two pieces of metal which are being joined. A puddle or pool of liquid metal is formed at the tip of the melting welding rod. When welding is done in a flat position, the liquid pool remains steady, but when the two pieces of metal are raised to a horizontal or vertical position, the liquid pool will run off the

legs while the canopy remained in an upright position on the loading machine (6/25, Tr. 145; 168; 201).

I was inclined to agree with the repairmen that there was no way for them to weld the legs so as to obtain a thorough fusion of the metal (6/27, Tr. 90), until Shepherd explained in his testimony that all the repairmen would have had to do in order to weld pieces to the legs, while using a flat welding position, would have been to have placed the canopy on the loading machine just long enough to spot weld the legs sufficiently to know where they would have to be attached (6/27, Tr. 93). Then the canopy and legs could have been taken off and welded with the legs situated in a flat position. Shepherd's suggestion becomes quite feasible and logical for nonexpert welders to use when one considers that the longest legs were only 24 inches long and the shortest legs were only 20-3/4 inches long (6/24, Tr. 49). Such short legs could easily have been held in place for spot welding.

Complainant conceded during his testimony that there was no essential difference between the method suggested by Shepherd for raising the legs and the method which he had recommended because, regardless of which method they used, it was necessary to cut off the legs and reweld them (6/24, Tr. 189). The competency of the welders came into play just as much in switching the legs from the front to the back as it would if they had merely welded pieces to the bottoms of the legs as Shepherd had suggested. Actually, Shepherd's method was superior to the one allegedly recommended by complainant because, if they had followed Shepherd's suggestion, only two welds on the two rear legs would have been required, whereas, under complainant's method, it was necessary to make one weld on each of the four legs, or a total of four welds.

It should also be pointed out that Lewis must have been able to make very thorough welds because the repairmen used two sets of jacks in trying to force the two front legs into their holders after Lewis had welded the front legs in a straight position (6/24, Tr. 46; 6/25, Tr. 170). The testimony shows that Lewis' welds did not crack or break under the stress of jacks applied to the sides of the legs. Therefore, the welds which were made undoubtedly achieved an excellent fusion and there is no reason to believe that there would have been anything unsafe about welding a couple of pieces of metal to the bottoms of the two rear legs, as Shepherd had suggested.

Complainant's attorneys argue that Kelly's and Combs' testimony is not credible insofar as they deny that complainant mentioned any safety

fn 6, continued

metal, instead of fusing into the metal, until the welder has learned to keep his welding rod sufficiently in advance of the liquid pool to allow just enough cooling to prevent the pool from running off the pieces being welded. An experienced welder can make a thorough fusion in a horizontal or a vertical position. See, e.g., J. Giachino, and W. Weeks, Welding Skills and Practices, American Technical Society, Chicago, IL 60637, 1976, Chapter 4, pages 42-53.

aspects of raising the canopy when he went to them in person to ask that they reverse Shepherd's action of discharging him. When that allegation is examined in light of the facts revealed by the preponderance of the evidence, I find that Kelly's and Combs' testimony is more credible than complainant's.

The testimony of complainant and all three of his crewmen shows that complainant sat down at the power box from about 3 a.m. until 6 a.m. without attempting in any way to supervise the work which Lewis and Gross were doing on the canopy (6/24, Tr. 28; 32; 44-46; 6/25, Tr. 12, 19, 48; 52; 170; 184). The only basis complainant had for claiming that Shepherd's suggestion for raising the canopy was unsafe was that satisfactory welds might not have been achievable. Yet complainant made no effort whatsoever to supervise the canopy work until he went to the loading machine about 6 a.m. and found that the welding had been completed but that the front legs would not go into their holders. I believe complainant's actions during his shift support the statements of respondent's supervisory witnesses who say that complainant did not raise any safety claims about Shepherd's suggestions for raising the canopy until after Shepherd had discharged complainant for leaving equipment in an inoperable condition on the morning of April 21 and until after Kelly had advised complainant that Shepherd's discharge was being upheld.

Shepherd and complainant disagree as to what each of them said on the morning of April 21 when complainant was discharged. Shepherd claims that complainant approached Shepherd at the end of complainant's shift just as if he were Shepherd's boss, by telling Shepherd that Shepherd had better get his light and go into the mine to repair a loading machine and a shuttle car which were "down", or inoperable. Shepherd claims that when he asked complainant what was wrong with them, complainant said that the canopy was off the loader and the shuttle car needed a pump motor. Shepherd claims that he asked complainant if he had ordered a new pump motor to which complainant answered "No". Shepherd states that when he pointed out to complainant that the B-23 shuttle car was the only reliable car they had, complainant became angry and stated that if his work was not satisfactory, he would just have to quit. Shepherd then says that he told complainant that as of that time, complainant no longer worked for respondent (6/26, Tr. 8-9; 30; 32; 192).

Complainant's version of the events leading up to the discharge is that he told Shepherd that the canopy work had not been finished and that the shuttle car required a pump motor. Complainant also states that he told Shepherd it would have been unsafe and in violation of the mining laws for him to have raised the canopy by welding pieces to its legs as Shepherd had suggested. Complainant agrees that he stated that if his work was not satisfactory, he would quit and that Shepherd told him that as of that time complainant no longer worked for respondent (6/24, Tr. 61-62).

A part of complainant's version of the discharge conversation was corroborated at the hearing by the testimony of Willie Pennington, a pump

man, who claims that he heard Shepherd ask complainant about the canopy but doesn't know what else was said other than that he did hear complainant suggest that he might have to quit and Shepherd's statement to the effect that complainant was no longer working there as of that time (6/24, Tr. 230). It is difficult to understand how Pennington can be so certain as to some things and not know what was said as to other aspects of the conversation. Inasmuch as Pennington has known complainant for 10 years and was obviously trying to testify in complainant's favor, it is more probable than not that complainant did not mention the safety aspects of raising the canopy and that Pennington preferred to forget certain parts of the conversation rather than to testify unfavorably on complainant's behalf (6/24, Tr. 231).

In view of the fact that Shepherd had obtained a piece of metal on Saturday for welding to the canopy's legs and had left it outside the mine for use in raising the canopy (6/26, Tr. 5; 167), and in view of the fact that Shepherd had made a call to the mine on Sunday night to suggest how the canopy should be raised (6/26, Tr. 6), it is unlikely that Shepherd failed to ask complainant some questions about the canopy. On the other hand, there is nothing in the record to corroborate complainant's contention that he discussed with Shepherd the fact that the canopy could not be safely raised in the manner suggested by Shepherd. The evidence also shows that complainant and Shepherd could not have had a detailed discussion about the canopy because Shepherd did not realize that the canopy was wider in the back than it was in front and Shepherd thought the repairmen had tried to raise the canopy's height by merely turning it around so that the front legs were in the rear where the increased height was desired (6/26, Tr. 22; 180; 205; 6/27, Tr. 89). Any detailed discussion by complainant of the way they had tried to raise the canopy would certainly have made Shepherd aware of the kind of work which had been done on the canopy.

After he had discharged complainant, Shepherd ordered a new pump motor for the shuttle car and went underground and helped install it (6/26, Tr. 157). Afterwards Shepherd had to do some work on the conveyor belt and did not personally examine the canopy on the loading machine (6/26, Tr. 178-179). Although the loading machine was used by the first shift with the front legs out of the holders just as complainant had left it (6/26, Tr. 183), Shepherd assumed that the loader had been operated on the first shift either with the canopy removed or that the first shift had used a stand-by loading machine which did not have a canopy on it (6/26, Tr. 194; 197; 203). The operator of the loading machine on the second shift refused to run the loader with the front legs unattached and new legs were obtained and completely installed by the repairmen on the second shift, except for a slight amount of welding which was completed by the third-shift repairmen on April 22, 1980 (6/25, Tr. 72; 76; 146; 6/26, Tr. 180).

Since Shepherd stated that he had discharged complainant for leaving two pieces of equipment in an inoperable condition, it must be concluded that part of the reason for complainant's discharge was complainant's failure to have the canopy in an operable condition. The foregoing con-

clusion is necessarily true because the repairmen on complainant's crew had finished replacing the traction motor on the loading machine. Therefore, the only reason that complainant had for telling Shepherd that the loading machine was "down", or inoperable, was the fact that the front legs of the canopy had not been secured properly. Nevertheless, there is a vast difference between discharging a foreman for failure to have equipment operable and discharging him for stating that the equipment was left in an inoperable condition because it would have been unsafe to have raised the canopy in the manner suggested by his supervisor, especially when, as has been shown above, the method adopted by complainant to raise the canopy was just as defective from a safety standpoint as the method suggested by Shepherd, that is, both methods were equally safe or unsafe, as the case may have been, because both methods depended on the thoroughness or quality of the welding done on the legs by the repairmen.

I believe that the foregoing discussion shows beyond any doubt that complainant completely failed to satisfy the first test set forth by the Commission in Pasula, supra. Specifically, complainant failed to establish by the preponderance of the evidence that he engaged in a protected activity with respect to refusing to raise the canopy in what he believed to be an unsafe manner. The preponderance of the evidence shows that complainant was actually discharged for failing to have equipment in an operable condition, rather than for stating that the canopy had not been raised because it would have been unsafe to raise it by welding pieces to the rear legs of the canopy as suggested by Shepherd. Complainant conceded during his testimony that Shepherd may have mentioned that he was upset about complainant's leaving equipment in an inoperable condition (6/24; Tr. 162). There must also have been some discussion about the quality of complainant's work or complainant himself would not have stated that if his work was not satisfactory, he would have to quit. Therefore, I find that complainant's first claim that he was engaged in a protected activity when he failed to have the loader ready to operate on April 21 must be rejected as not having been proven under the test laid down by the Commission in Pasula.

The Second Alleged Violation of Section 105(c)(1)

The second and final reason given by complainant for his contention that he was discharged in violation of section 105(c)(1) is that respondent believed complainant was the person who requested MSHA to send inspectors to respondent's No. 11 Mine to investigate the circumstances associated with the burning of wires on a roof-bolting machine (Finding Nos. 10, 11, 16, 18, 27, 28, and 30, supra). Shepherd testified that he had asked complainant if complainant had called the inspectors. Shepherd also testified that one morning when the repairmen on complainant's crew were getting into their cars to go home, they were kidding each other about having called the inspectors and that he joined in the kidding and asked if they had called the inspectors, but Shepherd denied that his interest in finding out who called the inspectors had anything to do with his discharging complainant (Finding No. 27, supra).

Roger Jones was a repairman on Franklin Mayhew's clean-up crew which worked on the third shift. Jones was working on the morning that the lead wires to the motor on the roof-bolting machine burned and he testified that Shepherd had asked him if he had called the inspectors. He claimed that Shepherd was upset about the fact that while the inspectors were at the mine in response to the phone call, they wrote seven citations concerning matters other than the subject of the phone call (Finding Nos. 14 and 16, supra).

Dorsey Hall, one of the repairmen on complainant's crew, testified that Shepherd had asked him if he had called the inspectors. While he supported Shepherd's claim to the effect that Shepherd had made the inquiry when they were kidding about the identity of the person who had called the inspectors, Hall also testified that Shepherd stated that whoever did call the inspectors was a dirty low down blankety blank (Finding No. 18, supra).

Complainant also testified that when he returned a second time on the day of his discharge, April 21, 1980, to ask Kelly, respondent's general superintendent, to reverse Shepherd's action of discharging him, he talked to both Kelly and Richard Combs, another superintendent, outside the mine office. Complainant stated that, after Combs had left, Kelly asked him whether he was the one who had called the inspectors (Finding No. 10, supra). On the other hand, when Kelly testified, he denied that he had asked complainant about whether he had called the inspectors (Finding No. 30, supra).

I believe that Kelly's denial of having asked complainant about calling MSHA is more credible than complainant's contention that Kelly asked him whether he had called the inspectors. Shepherd had called Kelly very shortly after discharging complainant to advise Kelly that he had discharged complainant. Therefore, if discharge of the person who had called MSHA to request a special inspection had been an important consideration in Kelly's mind for upholding complainant's discharge, it is highly likely that he would have raised that issue when complainant first went to see him very soon after Shepherd had discharged complainant. Complainant does not contend that he and Shepherd discussed the question of whether complainant had called the inspectors during the argument which culminated in complainant's discharge. For that reason, it is not likely that Shepherd would have discussed complainant's suspected role in calling MSHA about the roof-bolting machine at the time Shepherd reported his discharge of complainant to Kelly.

The credibility of complainant's testimony about Kelly's having asked him if he had called MSHA is further eroded by the fact that complainant made it a part of his direct testimony to note that he had started his conversation with both Kelly and Combs in front of the office and that Kelly had waited until Combs had left before asking complainant if he had called the inspectors. Complainant's laying of a foundation for Kelly's question about calling the inspectors as a matter which occurred when no one but him and Kelly were present shows a predisposition on the part of

complainant to establish an allegation whose credibility would have to be determined without existence of anyone else's presence to corroborate either his or Kelly's testimony as to whether Kelly asked complainant about calling the inspectors.

The only remaining testimony pertaining to Shepherd's concern about ascertaining the identity of the person who had called MSHA is the statement of Gross, one of the repairmen on complainant's crew, to the effect that Gross had heard Shepherd say to Dana Eldridge that he would fire anyone who called the inspectors (6/25, Tr. 193). When Eldridge testified, however, he denied that he had ever heard Shepherd make such a remark (Finding No. 28, supra). In this instance, I believe that Eldridge's testimony of denial is more credible than Gross' allegation as to what Shepherd may have said to Eldridge. Gross' testimony about the events which occurred on his own shift on the morning of April 21, the day of complainant's discharge, are very inconsistent and show a lack of certainty as to the time that events occurred and disagreed with all the other repairmen on complainant's crew as to the type of work which Gross performed during his shift (Cf. Finding No. 20 with Finding Nos. 10 and 18, supra).

Although I have found that some of the complainant's testimony introduced in support of complainant's contention that he was discharged because of respondent's belief that he had called MSHA to request an investigation of the burning of the leads to the motor on the roof-bolting machine is incredible, the preponderance of the evidence shows that Shepherd did make an effort to establish the identity of the person who called MSHA. Even though Shepherd admits that he tried to find out who called MSHA, he denies that his effort to determine who had called MSHA had anything whatsoever to do with his discharge of complainant (Finding No. 27, supra).

Nevertheless, there is no reason to doubt complainant's testimony to the effect that he and Shepherd had a rather intense discussion about whether complainant had called MSHA and there is no reason to doubt Jones' testimony to the effect that Shepherd appeared to be very upset about the calling of the inspectors because their coming had resulted in the writing of seven citations about matters other than the smoke which came from the roof-bolting machine (Finding Nos. 11 and 16, supra). Additionally, Hall testified that Shepherd asked him whether he had called the inspectors and stated that whoever did call them was a dirty low down blankety blank. Moreover, Hall testified that he had, in a joking manner, said to Shepherd that complainant might have been the one who called the inspectors (Finding No. 18, supra).

The testimony discussed above is sufficient to show that Shepherd would probably have taken some sort of disciplinary action against the person who called the inspectors if he could have determined for certain the identity of the person who did so. I believe that the testimony supports a finding that part of Shepherd's motivation in discharging complainant was his suspicion that complainant may have been the miner who

had called MSHA about ventilation problems and the burning of the leads to the motor on the roof-bolting machine. It should be noted that complainant does not assert that he called MSHA about the roof-bolting machine (Finding No. 11, supra) and the inspector testified that the call to MSHA about the roof-bolting machine had been placed anonymously (Finding No. 14, supra). Therefore, any finding that respondent violated section 105(c)(1) when it discharged complainant must rest on a conclusion that a discriminatory act occurs if an employer tries to ascertain whether an employee has exercised his right under section 103(g)(1) to request that a special inspection be made concerning an alleged violation of the Act or of a mandatory health or safety standard.

In Elias Moses v. Whitley Development Corp., 4 FMSHRC _____, Docket No. KENT 79-366-D, decided August 31, 1982, the Commission held that the respondent in that case had violated section 105(c)(1) by discharging a miner because it suspected him of having reported an accident to MSHA. The facts in the Moses case showed beyond any doubt that Moses had not called MSHA to report an accident, but the Commission concluded that respondent had violated section 105(c)(1) because it had discharged Moses for the reason that respondent thought Moses had reported an accident to MSHA. The facts in the Moses case are very similar to the facts in this proceeding because in the Moses case, as in this case, the employer tried to find out who had called MSHA to request a special inspection pursuant to the provisions of section 103(g)(1) of the Act. Section 103(g)(1) requires MSHA to reduce to writing a request for a special inspection. The written request should be shown by MSHA to the operator, but MSHA is forbidden to provide the operator with the name of the person who made the request for a special inspection.

The discussion above shows that complainant successfully established a prima facie case under the Pasula test by showing that his discharge was motivated in part by a protected activity, that is, the right to request MSHA to make an inspection under section 103(g)(1) of the Act without respondent's supervisory personnel making an effort to determine whether he did, in fact, request such an inspection. Respondent's evidence, however, has successfully shown that even if a part of its motivation may have been attributable to complainant's having been suspected of requesting MSHA to make a special inspection, respondent would, in any event, have discharged complainant for his unprotected activities alone.

Between the time I wrote my bench decision and the time that the record in this case became available, the Commission issued its decision in Johnny N. Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508 (1981), pet. for review filed, No. 81-2300, D.C. Cir., December 11, 1981, in which it stated (3 FMSHRC at 2516-2517):

* * * Once it appears that a proffered business justification is not plainly incredible or implausible, a finding of pretext is inappropriate. We and our judges should not substitute for the operator's business judgment our views on "good" business

practice or on whether a particular adverse action was "just" or "wise". Cf. NLRB v. Eastern Smelting & Refining Corp., 598 F.2d 666, 671 (1st Cir. 1979). The proper focus, pursuant to Pasula, is on whether a credible justification figured into motivation and, if it did, whether it would have led to the adverse action apart from the miner's protected activities. If a proffered justification survives pretext analysis and meets the first part of the Pasula affirmative defense test, then a limited examination of its substantiality becomes appropriate. The question, however, is not whether such justification comports with a judge's or our sense of fairness or enlightened business practice. Rather, the narrow statutory question is whether the reason was enough to have legitimately moved that operator to have disciplined that miner. * * *

In the bench decision I had referred to the fact that it was my opinion that complainant's sleeping in the mine on the power box carrying 7,200 volts was a sufficient reason for discharging complainant even if all the other reasons given by respondent for discharging complainant were ignored. That expression of my personal opinion was improper under the Commission's Chacon decision because I should have restricted my evaluation of respondent's evidence to a determination of whether respondent's reason for discharging complainant was "not plainly incredible or implausible" and whether respondent's asserted reason for the discharge was enough "to have legitimately moved that operator to have disciplined that miner".

It is clear from both complainant's and respondent's evidence that the basis for complainant's discharge arose from a heated discussion which occurred after Shepherd had criticized complainant for leaving the loading machine and B-23 shuttle car in an inoperable condition. It is undisputed that Shepherd had called the No. 11 Mine Office about 11 p.m. on April 20, 1980, (Sunday) to give specific instructions that the traction motor be installed on the loading machine, that the canopy on the loading machine be raised 3 or 4 inches, and that a clutch be installed in the B-23 shuttle car.

Shepherd had gone into the mine on the previous day (Saturday) in an effort to replace the traction motor on the loading machine. He knew how much work remained to be done on the loading machine and knew that three repairmen and one foreman (complainant) would be present on the shift beginning at 11 p.m. on Sunday to perform the repairs. Shepherd fully explained, under questioning by me, how the repairs should have been made and how the repairmen should have allocated their time for the purpose of accomplishing those repairs (6/27, Tr. 86-93; 99; 101-104). He explained, for example, in response to the repairmen's claim that they did not have the expertise to weld in a horizontal or vertical position, that they could have replaced the canopy on the loading machine, after they had cut off its legs, and could have spot welded the legs while they were on the machine. Then the canopy could have been removed for the purpose of firmly rewelding the legs in a flat position (6/27, Tr. 93).

Shepherd also convincingly pointed out that all three of the repairmen were not needed to install the traction motor on the loading machine and that at least one of the repairmen should have gone to the B-23 shuttle car so that work on installing the clutch could have been started immediately after the miners arrived underground at about 11:30 p.m.. If one repairman had started working on the B-23 shuttle car immediately after going underground, he would have had plenty of time during his shift to have determined that replacement of the clutch was not the cause of the shuttle car's trouble and he could have removed the pump motor, could have ordered a new one from the supply house, could have had it delivered to the No. 11 Mine during the third shift, and could have installed it before the shift ended at 6:45 a.m. (6/27, Tr. 100-103).

The repairmen agreed that the first-shift section foreman often complained about their leaving equipment in an inoperable condition (6/25, Tr. 60; 127). Although they claimed that they rarely left equipment in an inoperable condition (6/25, Tr. 27; 173), they agreed that they were often blamed for the failure of equipment to be ready to operate on the day shift (6/25, Tr. 39-41). Therefore, regardless of the fact that Shepherd could not give many specific instances, other than the failure of complainant and his men to wire a cutting machine properly (6/26, Tr. 18-19; 109; 156), when a certain type of equipment was left inoperable by complainant's crew, the evidence clearly supports Shepherd's contention that the primary reason for his discharge of complainant was the fact that complainant had left both the loading machine and the B-23 shuttle car inoperable on the morning of April 21, 1980, when Shepherd discharged complainant.

Shepherd's claim that he discharged complainant for leaving equipment in an inoperable condition is "not plainly incredible or implausible" under the rationale given by the Commission in the Chacon case, supra, and the discussion above shows that complainant's failure to have the equipment ready to operate would have been "enough to have legitimately moved" Shepherd to take the discharge action which he took at the time complainant reported that the loading machine and B-23 shuttle car were inoperable.

Although Shepherd testified that he discharged complainant for the six reasons which are listed in Finding No. 25, supra, complainant's counsel objected to my giving consideration to any of those reasons other than Shepherd's expressed dissatisfaction with the condition of the equipment. Complainant's counsel supports his contention by referring to the following statement by the Commission in Pasula (2 FMSHRC at 2800):

* * * 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. [Emphasis in original.]

Complainant's counsel argues that Shepherd did not discuss anything but the inoperable equipment at the time complainant was discharged and that the other five reasons given by respondent for complainant's discharge merely constitute conduct which may have irritated Shepherd but would not have caused complainant to be discharged if complainant had not allegedly engaged in the protected activity of telling Shepherd that raising the canopy as Shepherd had suggested would be unsafe. Complainant agreed that Shepherd discussed the condition of the equipment (6/24, Tr. 162), and complainant's statement that he would just quit if his work was not satisfactory (6/24, Tr. 62), support Shepherd's claim that the primary reason for complainant's discharge was the fact that complainant had left two major pieces of equipment in an inoperable condition (6/26, Tr. 30).

There is an inconsistency about complainant's argument to the effect that the Commission's Pasula decision prohibits me from considering five of the six reasons given by respondent for discharging complainant because only one of those reasons, that is, leaving equipment in an inoperable condition, was discussed by Shepherd at the time the discharge took place. The inconsistency of the argument lies in the fact that, on the one hand, complainant is contending that it is improper for me to consider any discharge reasons not raised by Shepherd on April 21, the day of the discharge, while, on the other hand, complainant is asking me to consider an alleged protected activity, that is, Shepherd's belief that complainant had called MSHA to request a special inspection, even though that particular activity was not discussed by either Shepherd or complainant on April 21, the day of the discharge.

Despite the inconsistency of arguing that complainant should be allowed to raise any claim of protected activity at any time subsequent to discharge, while respondent should be limited to only such reasons for discharge as were mentioned on the day of discharge, I have hereinbefore considered complainant's contention, that Shepherd's suspicion that complainant may have called MSHA to request a special investigation, was a contributing factor in respondent's having discharged complainant, and I have hereinbefore found that Shepherd's suspicion of complainant's having called MSHA was a contributing factor in complainant's discharge.

Even though the Commission stated in Pasula, supra, that it would not consider an unprotected activity which did not concern the employer enough to discharge an employee when the unprotected activity was originally encountered, it seems to me that I am still required to examine the unprotected activities given by respondent as reasons for the discharge in order to show that respondent's discharge reasons have not been summarily ignored as being unworthy of any consideration. Therefore, I shall hereinafter examine the reasons given by respondent for discharging complainant to determine whether those reasons would have caused complainant's discharge if complainant had not been suspected of engaging in the protected activity of calling MSHA to request a special inspection.

As to respondent's claim that Shepherd discharged complainant for having slept on company time, and especially for having slept on the power box several times each week, the evidence shows that Shepherd made many inquiries in an effort to determine whether complainant was consistently sleeping in the mine (6/26, Tr. 15-17; 68-73; 109; 6/27, Tr. 11). Complainant conceded during his testimony that he was warned twice that he would be discharged if he were caught sleeping again (6/24, Tr. 160). All three repairmen on complainant's crew testified that complainant remained at the power box during most of the shift on April 21 (6/25, Tr. 53; 96; 188; 200), but none of the repairmen testified that complainant was asleep on the shift ending at 7 a.m. on April 21. Since Shepherd did not see complainant asleep on April 21 and did not know whether he had been sleeping on that shift, there would have been no reason for Shepherd to have discharged complainant on April 21 for sleeping during working hours. Therefore, respondent failed to prove, under the test set forth by the Commission in Pasula, that it would have discharged complainant for the unprotected activity of sleeping in the mine if complainant had not also engaged in the unprotected activity of leaving equipment in an inoperable condition.

As to Shepherd's claim that he discharged complainant for hunting for game on company time, neither Shepherd nor complainant contended that hunting had any bearing on complainant's failure to get the equipment in an operable condition. Therefore, I find that respondent failed to show that complainant's acts of checking his traps or engaging in other hunting activities actually caused complainant to be discharged on April 21.

Another reason which Shepherd gave for discharging complainant was that complainant would often tell Shepherd that equipment was operable when, in fact, it was not. On April 21, both complainant and Shepherd agree that complainant reported that the loading machine and B-23 shuttle car were inoperable. Consequently, even though complainant may have given erroneous reports about the equipment's operability on some days, on April 21 complainant did correctly report that two major pieces of equipment were inoperable, so I find that complainant's alleged incorrect reporting of equipment as operable was not shown to have contributed to complainant's discharge on April 21.

Two other reasons given by Shepherd for complainant's discharge have merit under the Pasula rationale. Shepherd testified that the maintenance foremen, including complainant, had a practice of reporting for work, or "portalling", at the supply house, rather than reporting for work at the mine where they worked (6/26, Tr. 9; 20; 130). The reason that the maintenance foremen were permitted to report for work at the supply house was that they would pick up any parts needed to repair equipment and take the parts directly to the mine where the parts could be used in the repair of equipment (6/24, Tr. 15). The record shows that complainant generally went into the mine at 1 a.m., after having first gone to the supply house, because that was the agreed time when Lewis would come out in a rail car to provide complainant with transportation into the mine (6/24, Tr. 24; 6/25, Tr. 93; 103).

Shepherd testified, without contradiction, that one morning the cutting machine was improperly wired so that Shepherd had to rewire it on the day shift with the result that commencement of production was delayed. On that occasion, Shepherd testified that he criticized complainant for failing to wire the machine properly. Shepherd said that he knew that complainant understood how to wire the machine and that its being incorrectly wired showed that complainant had not stayed with his repairmen to give them proper supervision or assist them in wiring problems in which they were inexperienced. Complainant, according to Shepherd, stated that he did not get into the mine that night until about 4 a.m., whereupon Shepherd stated that he forbade complainant to continue reporting at the supply house because complainant was using the practice of reporting to the supply house as an excuse to report underground at an unreasonably late hour (6/26, Tr. 19-20).

Complainant does not dispute that Shepherd ordered him to stop reporting for work at the supply house, but he claims that after he had reported at the No. 11 Mine Office, so as to go underground at the beginning of the shift with his crew, for about one shift, Shepherd countermanded his prior order and told complainant to resume reporting to work at the supply house because canopies had to be installed on three pieces of equipment by April 18, 1980, and that Shepherd wanted complainant to be sure he obtained the parts for installing the canopies by that date (6/24, Tr. 80; 142). Complainant also alleged that Shepherd told him that his wife was seriously ill and that Shepherd would have to be away for several days to take his wife to a hospital in Lexington, Kentucky (6/24, Tr. 97-99).

Shepherd denied that he had reversed his order about complainant's being allowed to resume reporting to work at the supply house. Shepherd denied that he had asked complainant to install the canopies by April 18. Shepherd further denied that his wife was seriously ill or that it had ever taken him more than 1 day to take her to a doctor in Lexington (6/26, Tr. 200-201; 6/27, Tr. 114).

I do not believe that it is necessary for me to make a credibility finding as to whether Shepherd did revoke his order requiring complainant to report to the No. 11 Mine, instead of to the supply house, since both complainant and Shepherd agree that Shepherd had ordered complainant to stop reporting for work at the supply house. The fact that Shepherd ordered complainant to stop reporting for work at the supply house for any period of time shows beyond any doubt that Shepherd had become upset about complainant's tardiness in getting into the mine.

The test given in the Commission's Chacon decision, supra, is not whether a judge or the Commission thinks a given unprotected activity is grounds for disciplinary action, but "* * * whether the reason was enough to have legitimately moved that operator to have disciplined that miner" (3 FMSHRC at 2517). Shepherd did not think that complainant had given adequate reasons to justify his getting into the mine at 2:00 or 2:15 a.m. and Shepherd believed that the equipment was left inoperable because complainant had not performed his supervisory job in a satisfactory manner (6/26, Tr. 23; 66; 136; 6/27, Tr. 93; 103).

Even if one accepts complainant's version of the facts in their entirety, Shepherd was justified in his belief that complainant's performance of his duties on April 21 was unsatisfactory. Complainant testified that on April 20, 1980, he reported to the supply house at about 10:45 p.m. and Ricky Baker, the supply clerk, agrees that complainant arrived at the supply house well before 11 p.m. when complainant's shift was scheduled to begin (6/24, Tr. 18; 261). Complainant stated that Lewis told him over the phone that Shepherd wanted the canopy on the loading machine raised 3 or 4 inches by welding pieces to the canopy's rear legs (6/24, Tr. 20).

After talking to Lewis on the phone, complainant stated that he left the supply house about 11:45 p.m. and arrived at the No. 11 Mine about 12 midnight or 12:15 a.m. (6/24, Tr. 24). Complainant testified that he then tried to call Lewis on the mine's paging system, but that he could not get anyone to answer. He stated that he did not know whether the repairmen on his crew were too far away to hear the phone or whether the phone was operable, but he said he did not check to determine whether the phone was out of order (6/24, Tr. 27). Complainant stated that he talked to another foreman, Franklin Mayhew, in the mine office until Lewis came out to get him in a rail car about 1:45 a.m. and that he finally arrived on the section where his repairmen were working about 2:00 or 2:15 a.m. (6/24, Tr. 28). Complainant also testified that the only parts needed for the repairs which Shepherd had instructed them to perform on April 21, that is, a motor for the loading machine and a clutch for the B-23 shuttle car, had already been taken to the mine on a prior shift (6/24, Tr. 30; 36). Complainant can't recall what parts, if any, he took to the mine on April 21 (6/24, Tr. 194).

Shepherd's displeasure with complainant's performance has considerable merit. Complainant did not justify his reason for remaining at the supply house from 11 p.m., when his shift began, to 11:45 p.m. before starting to the No. 11 Mine when it is realized that he did not have to obtain any parts which were needed for the work they had been instructed by Shepherd to do on April 21. Lewis testified that he and complainant had an agreement under which Lewis was supposed to come out in the rail car each morning to get complainant about 1:00 a.m. and Lewis denied that complainant tried to call underground on April 21 (6/25, Tr. 93; 116; 140). Gross testified that they were not close enough to the phone to hear it when complainant called (6/25, Tr. 197-199). Hall testified that they didn't hear any phone on April 21 and that Lewis normally knew before going underground when complainant wanted Lewis to come outside for complainant (6/25, Tr. 44). Regardless of whether complainant tried to call and couldn't get any answer, or whether the phone failed to function, Shepherd was justified in being displeased with complainant's complacency in talking to another foreman for 1-1/2 hours while complainant waited for Lewis to come out in the rail car to take complainant inside.

One of the mandatory safety standards, namely, 30 C.F.R. § 75.1600-2(e), provides as follows:

Telephones or equivalent two-way communication facilities shall be maintained in good operating condition at all times. In the event of any failure in the system that results in loss of communication, repairs shall be started immediately, and the system restored to operating condition as soon as possible.

Other provisions of section 75.1600-2 provide that the communication system is not to be more than 500 feet outby the last open crosscut. Complainant testified that the phone was located underground about four or five breaks outby the face and that the breaks were on 60-foot centers (6/24, Tr. 27; 38). Therefore, the phone should have been audible to his repairmen underground at the place where they were working and, in any event, it was a violation of section 75.1600-2(e) for complainant to have gone underground, as he subsequently did, and to have worked the remainder of the night without making sure that the communication system was operable.

Complainant's repairmen and complainant himself all agree that he did not get into the mine until 2:00 or 2:15 a.m. on the morning of his discharge (6/24, Tr. 28; 6/25, Tr. 44-45; 165; 199). The repairmen and complainant also agree that when they left the mine on April 21, neither the loading machine nor the B-23 shuttle car was in operable condition (6/24, Tr. 42; 62; 6/25, Tr. 17-19; 188). Shepherd was justified in believing that complainant's failure to get the equipment repaired was, at least in part, the result of complainant's failure to get into the mine in time to start supervising his repairmen. Complainant contended that he had instructed Lewis, when they talked on the phone about 11 p.m. on April 20, not to do any work on the raising of the canopy until complainant arrived at the mine (6/24, Tr. 22). Lewis testified that complainant normally advised him, at the beginning of the shift while they were discussing the types of repairs that were to be done, what time Lewis should come out to get complainant (6/25, Tr. 93; 116; 140). If complainant did not want any work done on the canopy until he arrived at the mine to supervise that particular assignment, it is hard to understand why he would have failed to advise Lewis while they were discussing the canopy that Lewis should be certain to come out for him sooner than 1 a.m. so that they could promptly decide how to raise the canopy.

I believe that the discussion above supports a finding, and I so find, that respondent properly based its action of discharging complainant on his failure to get into the mine in time to perform his work satisfactorily. It cannot be reasonably argued that a supervisor who is confronted by the failure of a foreman to repair two major pieces of equipment would fail to be motivated in discharging him by the fact that the foreman had not managed to get into the mine to work until 2:00 or 2:15 a.m. on Monday, as compared with the repairmen on his crew who had arrived on the working section at 11:30 p.m. on Sunday.

I am still of the opinion, as I stated at the hearing, that when a supervisor discharges a person, all of the reasons for being dissatisfied with that person's performance have a cumulative effect in the supervisor's

mind when he decides that the time has arrived for discharging the employee whose work has been growing progressively unsatisfactory. Nevertheless, to give complainant every benefit of any argument which his counsel can make under the Commission's Pasula decision, I have interpreted the Commission's decision as complainant's counsel has asked that it be interpreted, that is, I have rejected all of the reasons given by respondent for complainant's discharge, even if those reasons did show that complainant "deserved" to be discharged, and I have accepted as meritorious only those discharge reasons which involve unprotected activities which alone would have caused respondent to discharge complainant even if complainant had not been suspected of having engaged in the protected activity of requesting that MSHA make a special inspection. I still find, however, that under the Commission's holding in the Chacon case, supra, respondent has very convincingly shown that its reasons for discharging complainant are "* * * not plainly incredible or implausible". The reasons found to be acceptable under the Commission's Pasula decision would have legitimately moved respondent to discharge complainant on the morning of April 21 notwithstanding the fact that respondent might also have been motivated in part by a suspicion that complainant may have been the person who requested that MSHA conduct a special inspection of respondent's mine.

Inasmuch as respondent has been shown to have satisfied the tests given by the Commission in Pasula and in Chacon, I find that complainant has failed to prove that he would have been discharged for allegedly claiming that it was unsafe to raise the height of the canopy on a loading machine by 3 or 4 inches by welding pieces to the rear legs of the canopy, or for having been suspected of calling MSHA to request a special inspection, if complainant had not left the loading machine and B-23 shuttle car inoperable and had not gone into the mine at 2:00 or 2:15 a.m. on the morning when the equipment was left inoperable.

WHEREFORE, it is ordered:

The complaint filed in Docket No. KENT 80-288-D is denied for failure of complainant to prove that he would have been discharged for an activity protected under section 105(c)(1) of the Federal Mine Safety and Health Act of 1977 if he had not engaged in other unprotected activities which, alone, would have caused his discharge.

Richard C. Steffey

Richard C. Steffey
Administrative Law Judge
(Phone: 703-756-6225)

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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 10 1982

CHARLES H. BUNDY, : Complaint of Discharge,
Complainant : Discrimination, or Interference

v. : Docket No. KENT 82-35-D

BENHAM COAL, INC., :
Respondent :

DECISION

Appearances: Joseph E. Wolfe, Esq., Wolfe, Farmer and Kern, Norton,
Virginia, for Complainant;
Grover C. Potts, Jr., Esq., Wyatt, Tarrant and Combs,
Louisville, Kentucky, for Respondent.

Before: Administrative Law Judge Steffey

Pursuant to a notice of hearing issued July 21, 1982, a hearing in the above-entitled proceeding was held on July 29, 1982, in Norton, Virginia, under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(3).

After the parties had completed their presentations of evidence and had made oral arguments in support of their respective positions, I rendered the bench decision which is reproduced below (Tr. 191-205):

This proceeding involves a complaint of discharge, discrimination or interference which was filed by Charles H. Bundy against Benham Coal Inc. in Docket No. KENT 82-35-D, on December 24, 1981, pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977.

I shall make some findings of fact on which my decision will be based and the findings will be set forth in enumerated paragraphs.

1. Charles H. Bundy began working for Benham Coal Inc. on February 16, 1971, as an inside laborer. He worked at other positions until, in 1974, he received a letter from what was then MESA in the Department of the Interior advising him that he had indications of pneumoconiosis which gave him the right to transfer to a less dusty area under section 203(b) of the Federal Coal

Mine Health and Safety Act of 1969. ^{1/} He made the election to transfer to a less dusty area and on July 8, 1974, was transferred to a position known as outside laborer.

2. He thereafter made a bid for the underground position of shuttle car operator on March 24, 1975, and subsequently became a roof bolter, thereby waiving his right of transfer to a less dusty area. He remained underground until March 3, 1976, when he again asked to be transferred to a less dusty area and on July 19, 1976, he was transferred to the coal preparation plant as an outside laborer. On April 10, 1978, he bid on the job of other machinery repairman. Then, on July 31, 1978, he exercised a job bid for the position of coal preparation plant electrician and mechanic and he held that position when Benham Coal Inc. had an extensive layoff of employees in June of 1980.

3. The company began to recall its employees in September 1980 on a seniority basis. When the 10-year seniority of Mr. Bundy, at that time, became applicable, he was told he could not be recalled at that time because the only position then open was one for a roof bolter and that was not a position in a less dusty area where a miner who had exercised his right to transfer under section 203(b) should be permitted to work. Mr. Bundy advised the company's manager of industrial relations, Mr. Charles Estep, that he would like to have the position of roof bolter despite the fact that it was not a position in a less dusty area in conformance with the right he had exercised to transfer under section 203(b). The company refused to allow him to go underground and he was unable to get a position until December 8, 1980, when the company did have an opening for the position of coal preparation plant electrician and mechanic, which was the position that he had held at the time he had been laid off.

4. Mr. Bundy's complaint in this case asks that he be paid the salary of a roof bolter for the period from September 24, 1980, to December 8, 1980, which he would have been paid if the company had allowed him to go back to work in a relatively dusty area underground at the time his seniority status would have qualified him to return to work as a roof bolter if it had not been for his previous election to take a position in a less dusty area of the mine.

^{1/} Section 203(b) of the 1969 Act has been superseded by section 101 of the 1977 Act and by Part 90 of the Code of Federal Regulations which implements section 101 of the Act. The term "less dusty area" is used because miners who have exercised their right to transfer under Part 90 are entitled to work in a mine atmosphere maintained at or below 1.0 milligrams of respirable dust per cubic meter of air. Part 70 requires working areas to be maintained at or below 2.0 milligrams per cubic meter of air. Since Mr. Bundy was transferred from an area which had to be maintained at 2.0 milligrams to an area having no more than 1.0 milligrams, he was transferred to a "less dusty area".

5. At the time Mr. Bundy was not permitted to return underground to the position of roof bolter, Mr. Estep asked Mr. Bundy to procure a doctor's statement indicating that it was permissible for him to be sent underground. Mr. Bundy, at that time, went to see the company's physician, Dr. Weir, who first told Mr. Bundy that the company should take him back and, when Mr. Bundy checked back with him, Dr. Weir said that in the meantime he had talked to Mr. Estep and that he believed that Mr. Bundy should not be sent back underground because of his first stage condition of pneumoconiosis.

6. Mr. Bundy thereafter went to other doctors, one by the name of M. F. Saydjari, who provided Mr. Bundy with a statement that, in his opinion, Mr. Bundy was physically able to work in a coal mine. That statement has been made Exhibit B in this proceeding. Mr. Bundy also got a statement from Dr. W. E. Bowers, Jr., to the effect that Mr. Bundy could work in a coal mine, but he added that if Mr. Bundy developed breathing difficulties, he would suggest that blood gas and ventilation studies be made. That statement is Exhibit C in this proceeding.

7. The company declined to accept either doctor's recommendation because Dr. Saydjari's statement was not enforced by any kind of X-ray. Although Dr. Bowers' statement was based on X-rays, they had been made in connection with Mr. Bundy's hospitalization for ailments other than pneumoconiosis. Therefore, the company suggested that Mr. Bundy have an additional X-ray made. One was made and was interpreted by Dr. Wells. Through Dr. Wells' interpretation, Dr. Weir again came up with a finding that Mr. Bundy had first stage pneumoconiosis and that the company preferred not to allow him to go back underground.

8. Mr. Bundy's first election to transfer to a less dusty area under section 203(b) of the Act was made after the government had sent him a statement that he did have preliminary indications of pneumoconiosis. In this proceeding, Mr. Bundy introduced as Exhibit 1, a statement from the Department of Health and Human Services based on an X-ray taken September 15, 1981, stating that the interpretation of the X-ray by a physician qualified under the Act indicates that there is no definite evidence of coal worker's pneumoconiosis. That most recent X-ray, of course, was not available either to Mr. Bundy or to the company on September 24, 1980, when Mr. Bundy elected to go back underground by waiving his right to transfer to a less dusty area.

Those are the primary findings of fact upon which my decision will be based.

Counsel for Mr. Bundy has argued that the company's refusal to allow Mr. Bundy to go back underground in September of 1980 was a violation of section 105(c)(1) of the Act.

In pertinent part, section 105(c)(1) reads as follows:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner * * * is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 * * * 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.

Mr. Bundy's attorney recognizes that Mr. Bundy has elected to transfer out and then has waived his transfer rights and gone back in and worked in an area of the mine which is above one milligram per cubic meter of respirable dust and then has made a second election to transfer out. Mr. Bundy's counsel emphasizes that Mr. Bundy was allowed to make those changes because, in the first instance, Mr. Bundy went out because he had a letter saying he had the indications of pneumoconiosis and that he should go to a less dusty area. There is no provision in the Act authorizing Mr. Bundy to go back underground to take the position of roof bolter. That decision was based on Mr. Bundy's apparent belief that the roof-bolting position would pay more money than his position at the preparation plant.

After Mr. Bundy had done the work of a roof bolter for a while, he decided to transfer back to a less dusty area again and his reason for doing so the second time was that he was not aware that the roof-bolting position was as dusty as it apparently proved to be. During his testimony, Mr. Bundy indicated that he did not ask to go back into the mine until after the reduction in force in September 1980 because he was satisfied with the work he was doing outside the mine and had no reason to want to change his working position.

The company's attorney argues that I should look at the purpose and intent of the Act when I am trying to interpret or determine whether there was a violation of section 105(c)(1) here. He emphasizes a statement in section 2(a) of the 1969 Act which, of course, is still a part of the 1977 Act. Specifically, section 2(a) provides that "the first priority and concern of all in the coal mining industry must be the health and safety of its most precious resource--the miner."

The company's attorney thus emphasizes that, in this case, I'm confronted with a situation in which I'm being asked to use the Act as the basis for a miner to impair his health, or at least run the risk of further impairment of his health, by requiring the company to let him go back into the mine by taking a waiver of his right to transfer out of a dusty atmosphere. Counsel for the company points out that the election Mr. Bundy first took in 1974, and again elected to take in 1976, was based on section 203(b) of the 1969 Act which does not contain any provisions for waiver. There is no provision for waiver in Part 90 of the regulations which promulgated section 203(b) of the 1969 Act.

Counsel for the company also points out that Part 90 in the existing regulations became effective on March 31, 1981, after Mr. Bundy sought to be reemployed as a roof bolter in September 1980. While the provisions of the current Part 90 state that a miner may waive his rights to transfer, counsel for the company argues that once the miner has waived his right to transfer, he is not under the protection of the Act or the Regulations and that the contract between the miners and the company, which has been introduced as Exhibit A in this proceeding, then controls what occurs.

No one argues that when there has been a reduction in force, that the recall of miners should be governed by any principle other than seniority. Therefore neither Mr. Bundy nor the company argues that when the recall of miners occurred in 1980, Mr. Bundy was entitled to a job until such time as people with his number of years of employment had been reached.

But the company does argue that a provision of the contract, or Exhibit A in this proceeding, controls Mr. Bundy's right to bid for jobs underground. Specifically, Article 5, Section 12 of Exhibit A is relied upon by the company. Section 12 provides in pertinent part, "* * * [o]nce the employee has exercised the option to transfer to a 'less dusty area' he may not bid to an area of higher dust concentration."

Mr. Bundy testified that, in his opinion, he was not bound by that provision so as to keep him from asking the company to reinstate him or rehire him in the position of roof bolter because he was not bidding for a job. He was, he contends, simply asking to be put back to work in the only available position to which he could have been recalled on September 24, 1980, when his seniority permitted him to be recalled.

I do not purport to be an authority on interpreting the labor contract. Since it is unnecessary for me to interpret the contract in order for me to decide the discrimination issues in this

case, I shall not express any opinion in this final decision as to the merits of Mr. Bundy's or the company's arguments based on the contractual provisions of the Labor Agreement.

Another reason the company gives for refusing to let Mr. Bundy go underground is that it did not want to see him run the risk of having his health further impaired by working in a dusty area. Also the company argues that its exposure to having to pay black lung benefits would be greater if it allowed Mr. Bundy to go back underground where he might become subject to greater lung damage and, therefore, some day might file a black lung claim for pneumoconiosis which would not have been filed if Mr. Bundy had continued working as a Part 90 miner.

Mr. Bundy's attorney argues that the company's possible exposure to paying a black lung claim is such a speculative argument that I ought not to entertain it. I suspect that Mr. Bundy's attorney is correct in that contention because I do not believe that the company's possible exposure to paying a black lung claim is a valid basis for deciding the issues in this case.

On the other hand, I am greatly concerned about the company's other argument, which is that both the 1977 Act and 1969 Act were promulgated for the purpose of protecting miners' health and safety. Here, as the company points out, we have a situation in which the complainant is asking the Commission to use the Act for the purpose of forcing the company to allow him to work in a position which could have very definite adverse effects on his health if he continues to work underground where the concentration of respirable dust, according to Mr. Williams' and Mr. Estep's testimony, is never below one milligram per cubic meter of air, except perhaps for a single day for a short time, and where there is no concentration of respirable dust below one milligram at any time on an average basis.

In other words, the company's evidence shows beyond any doubt that the only place the company could place Mr. Bundy at the present time without exposing him to more than one milligram of dust would be on the outside of the mine or in a position that would require him to go only 50 feet in by the portal. The company has not monitored any positions which show that a miner could go more than 50 feet underground without violating the one milligram requirement in connection with a Part 90 miner.

The legislative history pertaining to section 105(c)(3) is contained in the Legislative History of Federal Mine Safety and Health Act of 1977 prepared for the Sub-committee on Labor on the Committee of Human Resources, U. S. Senate, July, 1978. I would like to quote from page 623 of the Legislative History or page 35 of Senate Report No. 95-181, 95th Congress, First Session, May 16, 1977, as follows:

The legislation protects a miner from discrimination because he "is the subject of medical evaluation and potential transfer under a standard published pursuant to Section 10[1]". Under Section 10[1], standards promulgated by the Secretary must provide; as appropriate, that where it is determined as a result of a physical examination that a miner may suffer material impairment of health or functional capacity by reason of his exposure to a hazard covered by a standard, the miner shall be removed from such exposure and reassigned; and that the miner transferred shall continue to receive compensation for his work at no less than the regular rate of pay for miners in the classification the miner held prior to transfer. The Committee intends Section 10[5](c) to bar, as discriminatory, the termination or laying-off of a miner in such circumstances, or his transfer to another position with compensation at less than the regular rate of pay for the classification held by the miner prior to transfer. The relief provided under Section 10[5](c) is in addition to that provided under sections 10[4](a) and (b) and 10[5] for violations of standards.

The legislative history, in that same section, goes on to point out that the purpose of section 105(c)(1) is to bring about a safer work place for miners and a healthier work place for miners, and that discriminations must be rigorously prosecuted in order to protect the miner's rights to complain about health and safety matters in a mine.

The problem that I have with the complainant's claim in this case is that I am asked to interpret section 105(c)(1) to find that Mr. Bundy was discriminated against when the company refused to call him back to a position which was not in a less dusty area. The purpose of that section, and the legislative history shows the purpose of it is to enable Mr. Bundy to be able to find a position in a less dusty area for which he will not be compensated at a lower rate of pay than if he had continued to work in the dusty area.

It's true that Part 90, as it now reads, provides that a miner may waive his right to work in a healthier environment, but as counsel for the company has pointed out, once he waives that right to transfer to a less dusty area, then, he is outside the Act because the Act does not articulate what shall happen to him when he waives his right to transfer to a less dusty area.

In short, when Mr. Bundy waived his right to transfer, he was restored to the status of a healthy miner and, as such, he was required to bid for any job he wanted under the provisions of the union contract in the same manner as any other miner who had not elected to transfer to a less dusty area under Part 90. The moment that Mr. Bundy told Mr. Estep in September 1980 that he no longer wanted to take advantage of his right to be in a less dusty area, Mr. Bundy took himself outside the protective provisions of the Act.

I do not see how I can find that the company discriminated against him at that time since the whole purpose of the Act is to improve his health and safety. Consequently, I cannot find that there has been a violation of section 105(c)(1) in the factual circumstances that we have in this proceeding.

WHEREFORE, it is ordered:

The complaint of discrimination, discharge, or interference filed on December 24, 1981, in Docket No. KENT 82-35-D is denied for failure of complainant to prove that a violation of section 105(c)(1) of the Federal Mine Safety and Health Act of 1977 occurred.

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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SEP 14 1982

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)
Petitioner : Docket No. YORK 81-28-M
v. : A. C. No. 17-00431-05006I
LIME PRODUCTS CORPORATION, : Warren Aggregate Plant
Respondent : and Quarry

DECISION

Appearances: David A. Snyder, Esq., Office of the Solicitor, U. S. Department of Labor, Boston, Massachusetts, for Petitioner; George S. Isaacson, Esq., Brann & Isaacson, Lewiston, Maine, for Respondent.

PROCEDURAL BACKGROUND AND STATEMENT OF THE CASE

This is a civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (Supp. III 1979), 1/ herein "the Act."

Following an accident which occurred at Respondent's Aggregate Plant and Quarry located at Warren, Maine, on December 18, 1979, duly authorized representatives of the Petitioner conducted an inspection. On January 2, 1980, Citation and Withdrawal Order No. 201378, alleging a violation of 30 C.F.R. § 56.9-2, and Citation No. 201379, alleging a violation of 30 C.F.R. § 56.9-37 were issued. On both documents, the inspector checked a box indicating that each violation "significantly and substantially contributed to the cause and effect of a . . . mine safety or health hazard" as provided in Section 104(d)(1) of the Act.

Citation and Order No. 201378 alleges that:

A front-end loader operator was seriously injured on December 18, 1979, when the Model 38-B Bucyrus Erie shovel, with crane boom attached, rolled backwards down a grade and overturned. The boom striking the cab of the front-end loader. Previous to the accident, two attempts were made to move the shovel up the grade but failed due to the propel clutch slipping. The shovel shall not be placed back into operation until it has been certified safe to operate by a competent person acceptable to MSHA. 1958 Bucyrus Erie 380, with boom attached, shovel, Serial # 2298.

1/ The formal hearing in this matter was presided over by Administrative Law Judge John Cook who since has transferred to another agency. This case has been transferred to me for decision.

30 C.F.R., § 56.9-2 provides: "Mandatory. Equipment defects affecting safety shall be corrected before the equipment is used."

Citation No. 201379 alleges that:

A front-end loader operator was seriously injured on December 13, 1979, when the Model 33-B Bucyrus Erie Shovel, with crane boom attached, rolled backward down a grade and overturned. The boom striking the cab of the front-end loader. The crane was parked, on a grade, without being blocked to prevent movement. The shovel operator left the controls unattended.

30 C.F.R. § 56.9-37 provides: "Mandatory. Mobile equipment shall not be left unattended unless the brakes are set. Mobile equipment with wheels or tracks, when parked on a grade, shall be either blocked or turned into a bank or rib; and the bucket or blade lowered to the ground to prevent movement."

PRELIMINARY FINDINGS

On December 18, 1979, Respondent's employees, under the direction of foreman Ray Roderick, were attempting to move a Bucyrus Erie crane up a grade (Tr. 32) at Respondent's Warren location.

Earl Young, a shovel operator, was using a 50-ton Bucyrus Erie crane to dig out a settling pond (Tr. 11, 31, 250). At approximately 3:00 p.m., it was decided to move the crane up a grade out of the pit area to the top of a hill (Tr. 32). An initial problem occurred in moving the crane because the machine was front heavy due to the weight of the clamshell on the front end of the boom (Tr. 13, 29). The weight of the clamshell caused the crane to tip forward when being moved. After two attempts to ascend the grade (Tr. 33) the problem was resolved by backing the crane down the hill and taking off the clamshell (Tr. 33). After the clamshell was removed the crane proceeded up the hill with full traction (Tr. 29, 34, 49), and no problems with moving the crane occurred until it reached the point where the accident in question occurred (Tr. 30), approximately two-thirds the way up the grade (Tr. 35).

To ascend the hill, it was necessary for the crane to make two turns on the roadbed (Tr. 48). The crane has no steering column and wheels as do cars or trucks. Instead, being a tracked vehicle, turns are made by using a lever to lock one track while the other track remains free to move. The resulting effect is that the crane pivots on the locked track and thereby changes direction, viz., to turn right, the right track is locked by a lever and the left track is put in forward motion (Tr. 46, 47, 71-75). Another separate lever can be used to totally lock both tracks when, for example, the crane is on a grade (Tr. 71-75).

The crane in question had been up the same hill before (Tr. 48) and could ascend almost any grade (Tr. 48, 99). The crane successfully negotiated the first turn required to ascend the grade. At the point of the

second turn on the hill, the crane was stopped in order to be repositioned. It was necessary to straighten the direction of the boom relative to the road so that the crane could proceed up the hill without the boom getting caught in the trees adjacent to the roadbed (Tr. 19). The location of this second turn, as previously indicated, was approximately two-thirds of the way up the hill (Tr. 35).

After straightening the crane, it was necessary to remove the track locks from their locked position in order to proceed the rest of the way up the hill. Earl Young was unable, however, to get the track locks out of their locked position (Tr. 35). The apparent reason why the track or travel locks were difficult to remove was because of the backward pressure exerted on the locks by the weight of the machine on the incline (Tr. 103).

At this point, Mr. Young motioned to David McKellar, who was at the top of the hill, to come down the hill in a 25-ton Michigan Loader (a wheeled vehicle) to assist him (Tr. 35, 52, 250), and to keep the crane from sliding (Tr. 84). Young was on the catwalk when he motioned to McKellar (Tr. 19). The purpose of so positioning the Michigan Loader, which is a large wheeled vehicle with a shovel blade on the front, was to relieve the pressure of the crane's weight on the lock, so that the travel lock could be lifted out of its locked position (Tr. 56, 76). Before Mr. McKellar positioned the Michigan Loader behind the Bucyrus Erie crane, Earl Young applied the lever to lock both tracks (Tr. 75). Earl Young again attempted to release the travel lock, but was not able to do so (Tr. 35). When McKellar got behind the crane with the loader, the boom on the crane was 20 feet in the air, the tracks were not blocked (Tr. 28-29, 89) and the tracks had not been turned into a bank or a rib (Tr. 23, 37, 38). At that point, Mr. Young thought that he had placed the digging locks back in their locked position and "got out" of the cab onto the catwalk in order to instruct Mr. McKellar to reposition the loader more directly behind the crane (Id. 79). Young told McKellar to "hold" him so he could release the lever that locked both tracks (Tr. 76). Young then released the lever which had been locking up both tracks and began moving the lever which locks one track at a time so as to get the crane to move. After trying this unsuccessfully, Young then pulled the other lever to attempt to lock up the machine again (Tr. 75-79) and got out on the catwalk (Tr. 36, 41, 68-69, 75-86).

Although Mr. Young believed that the "digging locks"--which are engaged by the single lever which locks both tracks--had been set in their locked position, they were not properly engaged. When the digging locks are properly engaged, it is not possible for the machine to roll backwards (Tr. 109). Since the digging locks were not properly engaged, the crane started to roll backwards out of control. Mr. Young jumped from the catwalk (Tr. 23) to safety (Tr. 86-88). The crane toppled over and the boom struck Mr. McKellar who had remained seated on the Michigan Loader (Tr. 21-24, 87-88).

Mr. McKellar is paralyzed as a result of neck injuries received at this time (Tr. 25). The precise injuries sustained by Mr. McKellar and the extent to which he is paralyzed was not shown.

On December 26, 1979, after the crane had been righted and pulled to the top of the hill, it was examined by Edward T. Wells, a supervisory Metal and Nonmetal Mine Inspector for MSHA. The digging locks were tested and it was found that they worked properly when placed in the locked position. The swing and propel clutch (which are the same) were examined visually and appeared to be in good condition with no visible wear showing on the bands. There was some lubrication around the bands which could have caused the clutch to slip, but because the engine was damaged during the accident, the crane could not be moved to determine if the clutch would slip or was out of adjustment (Exhibit R-2).

Prior to the time the accident occurred, Mr. Young had experienced no trouble with the crane (Tr. 70).

The fraction clutch on a crane, as distinguished from an automobile clutch, is designed to slip (Tr. 71, 101, 104,).

DISCUSSION AND ULTIMATE FINDINGS AND CONCLUSIONS

MSHA's first contention, that the clutch on the crane was defective, was not established in the evidence. This theory of violation was first enunciated by Inspector Edward T. Wells in a memorandum to Subdistrict Manager Edward J. Podgorski dated January 29, 1980, in which Wells stated:

"The facts show that three attempts were made to work the crane up the hill and the clutch slipped each time. This should have shown the operator and Raymond Roderick, Foreman, who was in charge of the operation that the clutch was defective and before any further attempts were made to climb the hill the reason for the clutch slipping should have been determined and corrective adjustments made."

The question, however, arises whether the mere fact that the clutch slipped was an indication that it was defective. Petitioner primarily relies on the testimony of the crane (shovel) operator, Earl Young, that the clutch slipped and urges that it be inferred therefrom that the clutch was defective.

But Mr. Young also testified that the clutch was designed to slip:

"Q. And are the clutches -- there are several clutches that are involved in a machine like this. Are those the same as the clutch on an automobile?

A. Not likely. No. They're friction clutches.

Q. Now, a friction clutch, as compared to an automobile clutch, that they're designed to slip; the very way they work is by limited friction against them. They slip as they turn?

A. That's right.

Q. 'So that if you have your vehicle in a track lock position, it's in a track lock position and you propel the vehicle forward, you're going to have a certain amount of -- and you can't remove the track lock -- you're going to have a certain amount of clutch slippage as you work against that lock; is that correct?

A. That's right. Yes." (Tr. 71).

Mr. Young's explanation was fully supported by the testimony of Aldevard M. Robbins, a mechanic/welding operator who supervised the maintenance on the crane and whose testimony I find to be both probative and persuasive. He testified:

A. Well, this shovel is also propelled by a series of fractions. They're not called clutches as we've been calling them all morning, they're friction, and they're designed to slip. If you lock it in gear, you couldn't control it. It would be so quick and break your neck. They're designed to slip. You slip them all day long when it moves. That's the design of the rig. (Tr. 101).

In view of the persuasive testimony quoted, drawing the inference urged by Petitioner is not warranted. It is concluded that there was no violation of 30 C.F.R. § 56.9-2 as charged in Citation and Order No. 201378.

Turning to the standard allegedly violated in Citation No. 201379, 30 C.F.R. 56.9-37, it is noted that it consists of two parts, the first specifying a procedure when mobile equipment is "left unattended" and the second part providing procedures applicable when mobile equipment is "parked on a grade."

Based on the findings set forth above, it is concluded that Earl Young, the crane operator, did leave the crane unattended. The task in which Young was involved immediately prior to and at the time the accident occurred was to use the loader (which is half the weight of the crane) operated by David McKellar to hold or block the crane from slipping or sliding down the hill. Considering the hazard inherently posed to the loader and its operator by this maneuver, Young's action in leaving the controls and stepping onto the catwalk for all practical purposes left the crane unattended. Thus, he removed himself from being in a position to take prompt action should the crane start to move or slide. It is well-established in mine safety law that safety legislation is to be liberally construed to effect Congressional purpose, Magma Copper Company v. Secretary of Labor, 645 F.2d 694 (1981).

I also infer from the facts that the crane operator, Earl Young:

1. tried to engage the digging locks on the crane, and
2. left the cab to go onto the catwalk,

that he intended to brake the crane while he was on the catwalk and the loader was being positioned behind the crane. His attempt to brake the crane is evidence of his recognition that the circumstances obliged him to do so.

It is thus found that Mr. Young left the crane, a piece of mobile equipment, unattended when the brakes (digging locks) were not set. This constitutes a violation of the first provision of 30 C.F.R. 56.9-37.

It is also found that to accomplish the task of positioning Mr. McKellar's front end loader, Mr. Young intended to park the crane on a grade as evidenced by his effort to use the lever to engage the digging locks so as to "lock-up" or brake the entire crane. Young then exited the cab of the crane (where the controls are located) and was either partially or entirely on the catwalk of the crane when the crane started to move downhill. Since the tracks were not blocked, the crane was not turned into a bank or rib, and the boom was not lowered to the ground to prevent movement, a violation of the second provision of 30 C.F.R. 56.9-37 occurred. I specifically note in this connection the conclusion of supervisory Mine Inspector Edward T. Wells that blocking should have been placed behind the crane before the operator left the controls (Exhibit R-2).

To prove a violation of this standard, as with most standards, "non-compliance with the standard's terms need only be shown... "Eastern Associated Coal Corporation v. Secretary, 4 FMSHRC 835, 840 (May 3, 1982). The mere occurrence of the infraction of the safety standard constitutes a violation since liability is imposed on the mine operator without regard to fault. El Paso Rock Quarries, 3 FMSHRC 35, 38-39 (1981). The failure of the crane operator to properly set the brakes on the crane when he left it unattended resulted in the crane's moving downhill and colliding with the loader. Likewise, the fact that the crane was not blocked or turned into a bank when it was parked on the grade was an independent cause of the accident. Thus, the negligence of the crane operator to take any of the precautionary actions required by 30 C.F.R. 56.9-37 caused the accident in question and the resultant injury to the loader operator, David McKellar. It also should be noted that in its post-hearing brief, Respondent did concede that the crane operator "had not properly engaged the locks during operation." In Heldenfels Bros. v. Marshall, 636 F.2d 312 (5th Cir. 1981) (unpublished opinion), involving an accident which also resulted solely from fault on the part of an equipment operator, the Court reaffirmed the principle of both strict liability and vicarious liability peculiar to mine safety law:

"Heldenfels claims they were denied due process by the imposition of a civil penalty for this alleged violation. Underlying this due process argument is Heldenfel's assertion that there was nothing they could have done to prevent the accident in question. The Secretary responds by pointing out the fact that the Act imposes strict liability on operators for violations of regulations. This argument misses the mark.

Heldenfels is not claiming that it should not be held liable since it was not negligent; Heldenfels argues that it should not be held liable because it did not cause the violation of the regulation. However, Section 110(a)(1) of the Act, 30 U.S.C. § 820(a)(1), authorizes assessment of a civil penalty against the operator of a mine when a violation of a mandatory regulation occurs at the mine. Thus, Congress has provided for a sort of vicarious liability to accompany the provision for strict liability." (emphasis added)

It is concluded that Respondent is liable for the violation of the mandatory safety standard committed by its employee.

Assessment of Penalty

Within the context of the evidentiary record submitted here, the amount of penalty must relate to the degree of the Respondent mine operator's culpability in terms of wilfulness or negligence, the seriousness of the violation, the business size of the Respondent, the number of violations previously discovered at the mine involved, and the Respondent's good faith in abating violative conditions. Respondent made no contention that it's ability to continue in business would be adversely affected by assessment of penalties at some particular monetary level.

Based on the parties' stipulations (Tr. 3) I find that Respondent is a small mine operator (Exhibit M-3) with a moderate history of previous violations (21 in the preceding 24-month period). Since according to the Inspector's notes, the violative condition was corrected within the time fixed for abatement (Exhibit M-2), and since the machinery involved was not returned to service until inspected by an expert approved by MSHA (Tr. 3), I conclude that Respondent exercised ordinary good faith in abating the violative condition after notification thereof. These factors militate for a lessening of the penalty. I have previously found, however, that the negligence of the crane operator caused the accident which resulted in the serious injury of another of Respondent's employees. The mine operator is responsible for a violation committed by one of its employees and the negligence of the employee in committing the violation is imputed to it. The Valley Camp Coal Company, 1 IBMA 196 (IBMA 72-22, September 29, 1972); Ace Drilling Coal Company, Inc., 2 FMSHRC 790 (1980). Since the violation also resulted in a grievous injury to one of Respondent's employees, the violation is found to be very serious.

A penalty of \$1,000.00 is assessed.

ORDER

All proposed findings of fact and conclusions of law submitted by the parties not incorporated herein are rejected.

Citation and Order No. 201378 dated January 2, 1980, is vacated.

Respondent is ordered to pay the Secretary of Labor the sum of \$1,000.00 as a civil penalty for the violation of 30 C.F.R. 56.9-37 found to exist as charged in Citation No. 201379 dated January 2, 1980.

Michael A. Lasher Jr.
Michael A. Lasher, Jr. Judge

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SEP 15 1982

SECRETARY OF LABOR,	:	Civil Penalty Proceedings
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 82-111
Petitioner	:	A.O. No. 46-02208-030069V
	:	
v.	:	Docket No. WEVA 82-112
	:	A.O. No. 46-02200-03070
DAVIS COAL COMPANY,	:	
Respondent	:	Docket No. WEVA 82-206
	:	A.O. No. 46-02208-03072
	:	
	:	Docket No. WEVA 82-207
	:	A.O. No. 46-02208-03073
	:	
	:	Docket No. WEVA 82-231
	:	A.O. No. 46-03308-03074
	:	
	:	Marie No. 1 Mine

DECISIONS

Appearances: Covette Rooney, Attorney, U.S. Department of Labor,
Philadelphia, Pennsylvania, for the petitioner;
Paul E. Pinson, Esquire, Williamson, West Virginia,
for the respondent.

Before: Judge Koutras

Statement of the Proceedings

By agreement of the parties, these cases have been consolidated and submitted to me for decisions on the basis of certain stipulations and agreements concerning the fact of violations, and all of the statutory criteria found in Section 110(i) of the Federal Mine Safety and Health Act of 1977, except for the question of the effect of the proposed civil penalties on the respondent's ability to remain in business. In connection with this issue, the parties request that I incorporate by reference the testimony and evidence adduced during the hearing held in Charleston, West Virginia, May 19, 1982, in the previous civil penalty proceedings involving these parties. My decisions in the previous civil penalty proceedings was issued on June 25, 1982; see MSHA v. Davis Coal Company, Dockets WEVA 80-565, etc.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, P.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 CFR 2700.1 et seq.

Issues

The issues presented in these proceedings are (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the proposals for assessment of civil penalty filed, and, if so, (2) the appropriate civil penalty that should be assessed against the respondent for each alleged violation based upon the criteria set forth in section 110(i) of the Act. In these proceedings, the crucial question presented is whether or not the assessment of civil penalties against the respondent for the violations in question will have an adverse impact on its ability to remain in business.

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.

Stipulations

The parties stipulated to the following:

1. Davis Coal Company owns and operates the Marie No. 1 Mine and both are subject to the Federal Coal Mine Safety and Health Act of 1977, Public Law 91-173, as amended by Public Law 95-164 (Act).
2. The Administrative Law Judge has jurisdiction over this proceeding pursuant to Section 105 of the 1977 Act.
3. Davis Coal Company is a small company producing 87,251 production tons annually, when the Marie No. 1 Mine is operating.
4. Marie No. 1 Mine is the only mine owned by Davis Coal Company, and the mine is not currently producing.
5. All of the citations and terminations thereof were properly served on the respondent by duly authorized representatives of the Secretary.

Findings and Conclusions

WEVA 82-111

Fact of Violation

The section 104(d)(1) order no. 876571, was issued on December 10, 1980, and charged the respondent with a violation of mandatory safety standard 30 CFR 77.506 because proper overload and short circuit protection was not provided for the No. 12, 4 conductor cable, because the fuses were bridged out. Respondent does not dispute the violation and the citation is AFFIRMED.

The parties stipulated that the violation resulted from ordinary negligence, that the gravity was moderate, and that the respondent demonstrated ordinary good faith in abating the citation. The parties also agreed that the respondent had a history of three prior violations of section 77.506.

WEVA 82-112

Fact of Violations

The parties stipulated that Citation No. 9915472 was issued because the respondent violated 30 CFR 70.207(a) on September 11, 1981, by failing to submit a required respirable dust sample during the July-August 1981 cycle for a mechanized mining unit. They also stipulated that Citation Nos. 9915534, 9915535, and 9915577 were issued because the operator violated 30 CFR 70.208(a) on October 13, 1981, by failing to submit three required respirable dust samples during the July-August, 1981 bi-monthly sampling cycle for three designated areas.

Respondent does not dispute the fact that the citations issued constituted violations of the cited safety standards. Accordingly, all of the citations are AFFIRMED.

The parties stipulated that the respondent demonstrated ordinary negligence with respect to each of the aforementioned citations, that the gravity of the violations was null in that there was no probability of any injury occurring as a result of said citations, and that no action was required to abate the citations because bi-monthly sampling requirements can only be satisfied during the established bi-monthly period. They also stipulated that the respondent has a history of 2 violations of 30 CFR 70.207(a) and 9 violations of 30 CFR 70.208(a).

WEVA 82-206

Fact of Violations

The parties stipulated that Citation No. 9915251 was issued because the respondent violated 30 CFR 70.508 on April 8, 1981, because a

periodic noise level survey had not been taken for the period October 1, 1980 to December 1, 1980. The parties also stipulated that Citations Nos. 9915683, 9915684, and 9915685 were issued because the respondent violated 30 CFR 70.208(a) on December 9, 1981, because of a failure to submit respirable dust samples for three employees during the October-November 1981, bi-monthly sampling cycle. The citations are all AFFIRMED.

With regard to Citation No. 9915251, the parties stipulated that the respondent demonstrated ordinary negligence, that the gravity of this violation was null in that there was no probability of any injury occurring to any miner as a result of this violation, and that the respondent demonstrated ordinary good faith in abating this violation. They also stipulated that the respondent has a history of no violations of 30 CFR 70.508.

With regard to the remaining citations, the parties stipulated that the respondent demonstrated ordinary negligence, and that the gravity was null in that it was improbable that any injury would have occurred. They also agreed that the respondent did not have to abate the violations because of the bi-monthly sampling cycle. Twelve previous citations were issued.

The parties stipulated that the respondent demonstrated ordinary negligence with respect to the citation, that the gravity of the violation was null in that it was improbable that any injury would have occurred as a result of this violation, and that no action was required to abate this citation because bi-monthly sampling requirements can only be satisfied during the established bi-monthly period. They also stipulated that the respondent had a history of 4 violations of 30 CFR 70.208(a).

WEVA 82-231

Fact of Violations

The parties stipulated that Citation No. 914357 was issued when the respondent violated 30 CFR 77.509(c) on December 14, 1981, because the fence surrounding the transformers was not at least six feet high in places, and was not at least 3 feet from high voltage energized parts. Citation No. 914359 was issued when the respondent violated 30 CFR 77.1103(d) on December 14, 1981, because the area surrounding the transformers located near the mine portal was not kept free of dry grass and weeds. All of the citations are AFFIRMED.

The parties stipulated that the respondent demonstrated low negligence with respect to citation no. 914357 in that a lock had been placed on the gate but someone had it removed. They also stipulated that the gravity of the violation was low in that while it was probable that one miner could enter the station, no injuries of any type were expected as a result of this violation, that the respondent demonstrated extraordinary good faith efforts in abating the violation, and that the respondent had a history of no violations of 30 CFR 77.509(c).

With regard to Citation No. 914358, the parties stipulated that the negligence was low, that the gravity of the violation was null in that it was improbable that the one miner in the area would suffer any type of injury as a result of this condition, that the respondent demonstrated extraordinary good faith in abating the violation, and that the respondent had a history of no violations of 30 CFR 77.509(a).

With regard to Citation No. 914359, the parties stipulated that the respondent demonstrated ordinary negligence, that the gravity was low in that no injuries of any type were expected to affect the one miner in the area, that the respondent demonstrated extraordinary efforts in abating the violation, and that the respondent had a history of no violations of 30 CFR 77.1103(d).

The Effect of Civil Penalties on the Respondent's Ability to Remain in Business. (Applicable to all dockets).

In the previous Davis cases, evidence and testimony was adduced concerning the respondent's current financial condition; See: pgs. 23-25, of my previous decisions of June 25, 1982. As noted in that decision, respondent filed a petition in bankruptcy on June 16, 1982, and I concluded that payment of the full penalty assessments in the previous dockets would adversely impact on respondent's ability to remain in business. I incorporate by reference in the instant proceedings all of the previous testimony and evidence concerning respondent's financial condition, included my previous findings and conclusions concerning this issue.

Penalty Assessments

In view of the foregoing findings and conclusions, respondent is assessed civil penalties for the violations which have been established as follows:

Docket No. WEVA 82-111

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Standard</u>	<u>Assessment</u>
876571	12/10/80	77.506	\$ 100

Docket No. WEVA 82-112

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Standard</u>	<u>Assessment</u>
9915472	9/11/81	70.207(a)	\$ 25
9915534	10/13/81	70.208(a)	25
9915535	10/13/81	70.208(a)	25
9915577	10/13/81	70.208(a)	25

Docket No. WEVA 82-206

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Standard</u>	<u>Assessment</u>
9915251	4/8/81	70.508	\$ 25
9915683	12/9/81	70.208(a)	30
9915684	12/9/81	70.208(a)	30
9915685	12/9/81	70.208(a)	30

Docket No. WEVA 82-207

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Standard</u>	<u>Assessment</u>
9915748	1/13/82	70.207(a)	\$ 35

Docket No. WEVA 82-231

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Standard</u>	<u>Assessment</u>
914357	12/14/81	77.509(c)	\$ 20
914358	12/14/81	77.509(a)	20
914359	12/14/81	77.1103(d)	30

ORDER

Respondent IS ORDERED to pay the civil penalties assessed by me in these dockets, in the amounts shown above, within thirty (30) days of the date of these decisions, and upon receipt of payment by the petitioner, these proceedings are DISMISSED.


George D. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SEP 15 1982

ROGER E. SAMMONS,	:	Complaint of Discrimination
Complainant	:	
v.	:	Docket No. SE 82-15-D
	:	
MINE SERVICES CO., a wholly	:	Short Creek Project
owned subsidiary of DRUMMOND	:	
COAL COMPANY, */	:	
Respondent	:	

DECISION

Appearances: George C. Longshore, Esquire, Birmingham, Alabama, for the complainant; Peyton Lacy, Jr., Esquire, Birmingham, Alabama, for the respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a complaint of discrimination filed by the complainant against the respondent pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977. The complaint was filed with the Commission on November 12, 1981, after the complainant was advised by the U.S. Department of Labor's Mine Safety and Health Administration (MSHA), on November 5, 1981, that upon investigation of his complaint, MSHA determined that a violation of section 105(c) had not occurred.

In his complaint, Mr. Sammons states that on September 21, 1981, he and a fellow employee (Billy Canada) were relieved of their duties as Ironworkers (connectors) under Article 16, Section (H) of the UMWA-ABC contract. He states further that grievances were filed, and on September 24, 1981, he and Mr. Canada also filed complaints with MSHA pursuant to section 105(c) of the Act. According to Mr. Sammons his grievance was withdrawn without his consent and Mr. Canada was put back to work with full back pay.

Mr. Sammons' complaint of alleged discrimination is stated as follows in his complaint filed with the Commission:

While employed with Mine Services, Inc., at the Short Creek project there were no complaints made to me about my work. I feel therefore that the only reason for me being relieved of my duties

*/ At the hearing, respondent's counsel advised that Mine Services Company, a wholly owned subsidiary of Drummond Coal Company, is the proper respondent in this case, and he was permitted to amend his pleadings accordingly.

was the complaints which I made about getting safe operators, safety belts, building cages and getting tag lines to be used on the larger pieces of steel.

By letter dated December 4, 1981, and filed with the Commission on December 7, 1981, the respondent took the position that Mr. Sammons was unqualified to perform his job responsibilities and was relieved of his duties as allowed under the provisions of the existing Labor Agreement.

A hearing was conducted in this matter in Birmingham, Alabama, on May 6, 1982, and the parties appeared and participated fully therein. The parties filed post-hearing briefs, and the arguments presented therein have been considered by me in the course of this decision.

Issues

The principal issue in this case is whether or not Mr. Sammons has been discriminated against by the respondent because of protected safety and health activities. Additional issues raised by the parties are identified and discussed in the course of this decision.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 301 et seq.
2. Sections 105(c)(1), (2) and (3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815(c)(1), (2) and (3).
3. Commission Rules, 20 CFR 2700.1 et seq.

Testimony and Evidence Adduced by the Complainant

George M. Ellis testified that he is the Director of Personnel for Drummond Coal Coal Company, that he holds similar duties with Mine Services, Inc., and that Mine Services is a wholly owned subsidiary of Drummond Coal Company. Mine Services performs construction work at coal mines and coal preparation facilities and is a signatory to the National Coal Mine Construction Agreement. Mine Services hires some of its personnel from the UMW local construction Panel, and some "from the street". Mine Services currently has 130 active employees and almost that many on layoff status due to the completion of some of its construction projects. In August or September of 1981, Mine Services had approximately 200 to 210 classified employees on its payroll. Employment from the UMW Panel varies depending on the projects and staffing requirements, and he estimated that in the course of any given year less than 100 employees would be hired from the Panel (Tr. 18-23).

Mr. Ellis confirmed that since 1976, two employees were referred back to the Panel for unsatisfactory work, namely Mr. Sammons and Michael Ashby. Mr. Ashby was a carpenter referred back in 1977, and during this same

period of time he estimated that hundreds of names have been referred to Mine Services from the UMW District Panel, and on many occasions the Panel has been exhausted for particular job classifications. By "referred back" he means individuals referred back during the first 30-days of their probationary work period. Anyone accused of misconduct, drinking, or insubordination would be discharged, rather than referred back to the Panel (Tr. 23-24).

Henry E. Bates testified that he has worked for the Mine Services Division of Drummond Coal Company since 1976 in construction and engineering. He confirmed that Mr. Sammons was hired as an ironworker sometime in August of 1981 and that he worked on the "sample house". He also recalled granting Mr. Sammons a half a day off to campaign for a union office, that he recalled a conversation with Mr. Sammons regarding his interest in bidding for the job of boom truck operator, and he also recalled Mr. Sammons commenting about some safety belts which did not fit properly and Mr. Sammons' desire to use his own personal belt. He also recalled granting him permission to use his own belt, and Mr. Sammons' complaint that the men on the boom trucks were not qualified. However, Mr. Bates indicated that he believed the men were qualified, and so informed Mr. Sammons (Tr. 24-29).

Mr. Bates indicated that Mr. Sammons was one of a crew of men assigned to work on the sample house sometime during the first two weeks of September. The sample house was partially constructed at the time and Mr. Bates visited it on occasion and a new foreman was supervising the job. The crew was later moved to work on the refuse bin and a new foreman was assigned to that job. He identified a copy of a memorandum concerning a meeting on September 16, 1981, with Mr. Sammons and certain union and company representatives concerning the progress made on the construction of the refuse bin, and he indicated that the memorandum was typed up from notes made at that meeting (Exh. R-2; Tr. 30-33). Mr. Bates indicated that seven men were hired as connectors, including Mr. Sammons, and after he and Billy Canada were initially assigned work at the sample house, they were transferred to do work on the refuse bin during the third week of September (Tr. 37). He identified photographs of the sample house and refuse bin which were under construction (Exhs. C-1 through C-3).

Mr. Bates described the work being performed by Mr. Sammons and Mr. Canada on the refuse bin during the time he observed them from the ground, and based on his observations of their work he concluded that they did not know how to use their tools properly in making certain steel beam connections, that they experienced other difficulties in removing a choker line which had been disconnected from a crane and was attached to one of the beams, and that neither man would climb up the beam to remove the choker or to make the required connection. Although he indicated that he never worked as an ironworker, Mr. Bates stated a prudent ironworker would be expected to, and would be willing to, climb up the diagonal beam and make the upper connection. Although the upper end of the beam in question was not bolted to the building frame, Mr. Bates indicated that it was held firmly in place over a "gusset plate in the web of the column", and the lower end of the beam was securely bolted in place

(Tr. 40-53)., Mr. Bates also indicated that there was no way the beam in question could have fallen out of place and he saw nothing wrong in expecting the men to climb up and make the necessary connection (Tr. 58).

Referring to a memorandum he prepared regarding the aforesaid event at the construction bin (Exh. R-1), Mr. Bates confirmed that he stopped Mr. Sammons and Mr. Canada from using a basket connected to a crane to go up and attempt to make the beam connection, and that he asked another workman (Smith) whether he needed the basket. Smith replied "no", and after securing the bottom end of the beam with a second bolt and satisfying himself that the beam would not come out at the top, Mr. Smith climbed up the beam and attempted to make the connection. After discovering that the hole in the beam would not fit and would have to be "burned", Smith came back down. Mr. Bates indicated that while he did not ask Mr. Sammons and Mr. Canada why they wanted to use the basket, he assumed that they showed a lack of confidence in their ability or some fright in climbing up the steel beam (Tr. 60). He confirmed that the connection was finally made by two men who went up to the upper end of the beam in a basket with a torch (Tr. 61).

Mr. Bates stated that he previously referred one man back to the UMW Panel, but he could not recall the details. He confirmed that he was not consulted at the time the grievances filed by Mr. Sammons and Mr. Canada were settled and Mr. Canada was allowed to return to employment. Although there were some problems with the steel connections fitting properly on the refuse bin, he did not believe that the slow productivity was caused by those problems. He did not believe there were any safety problems with the construction work on the building in question, and he believed that Mr. Canada and Mr. Sammons were fearful of climbing the steel because of their inexperience (Tr. 67). He could not recall who eventually made the connection at the lower and upper ends of the steel beam, and he believed that both connections could have been made by someone climbing up the beam. He also stated that he had no reason to ask Mr. Sammons or Mr. Canada why they did not not climb up the beam to make the upper connection because "I felt I shouldn't have to ask them; that a connector would have went on up there to it" (Tr. 68). He also confirmed his belief that there was no way anyone could simply look up the beam and determined that the connection could not be made (Tr. 68).

Mr. Bates stated that of the seven connectors hired off the panel for the jobs in question, only Mr. Sammons and Mr. Canada were referred back to the Panel. Another individual, Mr. Gravlee, was not referred back, but bid on another job of lower classification after admitting that he was afraid to climb heights. Also, except for one man who has been sick, all of the other men referred from the Panel have been working (Tr. 69).

Mr. Bates indicated that as a general rule an ironworker climbing a diagonal beam would take his safety belt with him and put it around the piece he was climbing. He could not recall whether Mr. Smith had his safety belt around him when he climbed up the beam, but he did know that he "tied off" when he got to the top. However, he also indicated that a safety belt is always around an ironworker and that he uses a lanyard to tie off once he reaches the location where he is to work. Although he was not sure, he did indicate that a lanyard was not used in climbing the beam since it's difficult to use it while climbing (Tr. 70-71).

On cross-examination, Mr. Bates stated that Mr. Sammons' complaints about the boom trucks was that he wanted those jobs posted so that they could be bid on. He advised Mr. Sammons that he had temporarily assigned two conscientious men to the boom trucks and that Mr. Sammons filed no grievances regarding this incident (Tr. 72). Mr. Bates described the various duties of a "bolt-up" ironworker and a "connector" ironworker, described how connections are normally made, and he indicated that bolt-up work sometimes requires the use of a basket by the men performing the work, but that connection work is not done out of a basket (Tr. 74).

Mr. Bates testified that at the time he observed Mr. Sammons and Mr. Canada working on the refuse bin, they said nothing to him about any difficulties they were having in making the beam connections. They made no complaints to him about the conditions under which they were required to work, did not ask him whether they could get the basket, did not ask for a torch, and made no mention of any MSHA or OSHA safety regulations. While there are provisions in the labor-management contract for raising safety complaints, Mr. Sammons exercised none of his rights in this regard and made no complaints during the three and half weeks of his employment. He had no knowledge of any complaints that the beam holes were not matching up until the third step of their grievance, and at the time they were referred back to the panel he had no knowledge of any OSHA and MSHA violations (Tr. 80).

Mr. Bates confirmed that he brought all of the recently hired connectors to the refuse bin construction site on September 18 for the purpose of observing their performance. Although they were given examinations, he personally never observed them doing any work and he wanted to determine how each man performed his job. As a result of the work performed on the refuse bin, he rated each man's performance. Two connectors (Hogland and Smith), were rated "very good"; two others (Gann and Harliss), were rated as "capable" but not as good as Hogland and Smith; and two were rated "not capable". He reported his observations and ratings to his supervisor Jerry Corvin in the memorandum of September 18, 1981 (Exh. R-1), and after further discussion with Mr. Corvin, the decision was made to refer Mr. Sammons and Mr. Canada back to the Panel for "unsatisfactory work" as connectors and the basis for that decision was that they were not "competent" connectors (Tr. 81-82). The previous work done by Mr. Sammons during his first two weeks on the job at the sample house had nothing to do with his decision to send him back to the Panel and his decision in this regard was based on what he observed during the work at the refuse bin (Tr. 84).

Regarding Mr. Sammons' complaint about the boom trucks and any other complaints, Mr. Bates testified as follows (Tr. 87-89):

Q. Well, I gather the answer to my question is you don't recall Roger -- the reasons why he wanted you to post the job. Did he mention qualifications?

A. Yes. He mentioned qualifications in his opening statement to me; something of that nature, about wanting qualified people. And I responded to him that I had qualified people when I placed the two people, qualified and competent people, on there.

Q. Now, he complained about, and wanted you to post the bids for, the boom trucks because of what he felt to be a lack of qualified operators. Now, he also complained about the safety belts that the company had furnished him. Do you remember that?

A. Yes.

Q. And in your meeting on the 16th of September, he said that you need another crane, and you vetoed that. Just one crane is all you need. He said you need a basket.

A. And I vetoed that.

Q. Well, wasn't there a basket on the scene by Friday?

A. There was a basket there, but I would not allow any connector to make a connection out of a basket. It's not done. There could have been twenty baskets there; I wouldn't have allowed them to use them to make a normal connection.

Q. Well, all right, but the point is it occasionally becomes necessary to make abnormal connections, such as Mr. Smith made, isn't that correct, out of a basket?

A. Right. And we have three or four baskets.

Q. Do you recall that Roger was saying that we need a basket, meaning there wasn't a basket available to him right there? Do you recall that?

A. I didn't take it that way.

Q. And he said -- I gather Roger -- at least his notes reflect -- that he said that the going was slow -- in other words, he agreed with you that the production was somewhat slow -- because mainly of a safety situation. Now, he made that statement to you.

A. That was his opinion, yes.

Q. And then one of the last things Roger said to you was, "I won't do anything unsafe. If that means working slow, then that's the way I'll do it." There was no place to climb except on the outside of the steel; there was only one crane. That statement was made to you on Wednesday the 16th.

A. That's probably a true statement. But my contention was that a connector would have climbed it. A connector would have had no problem with this.

Q. You concluded that Billy Canada and Roger Sammons both were incompetent.

A. I did.

Mr. Bates explained that a "basket" is a structure with posts and handrails around it and that it is hooked to a crane and hoisted up so as to enable a man to stand in a safe and secure area to work. In order to use such a basket in connection work, a second crane is required. One crane lifts the basket and the men, and the second crane hoists the steel beam up to the location where it is to be connected. In the case at hand, his decision was not to furnish a second crane to facilitate the use of a basket by the connectors. Mr. Bates also testified as to the delays and lack of production progress on the refuse bin and the foreman told him it was due to "the people" he had to do the job, and that it had prompted him to go to the refuse bin construction site to personally observe the work (Tr. 91).

In response to questions from the bench, Mr. Bates confirmed that "on paper" Mr. Sammons was qualified as an ironworker connector and that during his initial work which involved the cutting of steel and construction of the sample house he received no complaints about his work. The complaints he received were connected with the fact that some of the structural steel parts for the sample house did not fit, and this resulted in a slowdown of the work. However, this was not true of the construction at the refuse bin. The only complaint he received from Mr. Sammons related to his contention that the company furnished safety belt was too big, and he permitted Mr. Sammons to use his own personal belt (Tr. 95). He confirmed that his judgment that Mr. Sammons was not a competent connector was based on his observations of his work on the refuse bin (Tr. 96), and he summed up his observations as follows (Tr. 98-99):

A. I had observed Mr. Canada and Roger Sammons in the manner in which they climbed the steel and in the manner in which they used their tools, and I had a big job here to put together, and I needed competent, good connectors; that when a piece of steel went up there, they slapped a spud wrench in each end of it and "zap" over to the other end and get it in, and then get another piece.

Two good connectors, on a simple structure, can erect 50 or 100 pieces of steel a day, depending on what it is. I was getting two and three pieces of steel a day put in place. When I watched all the connectors, they just weren't connectors. They just weren't connectors. Now, carpenters or some other qualifications, I don't know. But I know they weren't connectors.

Q. Were they serving some kind of a probationary period during this on-the-job testing situation, or what?

A. By contract you've got 30 days to observe a man to see that he can perform the work that he was hired to perform. And if he cannot perform the work that he was hired to perform, you have the right to refer them back to the panel.

Mr. Bates testified that the height of the first horizontal beam on the refuse bin was some 18 or 20 feet above ground, and that the highest point a man would be expected to climb to make the upper diagonal beam connection was 30 to 32 feet. He confirmed that Mr. Sammons had never filed any formal complaints about safety belts, and as far as he knew the safety committee or union never filed any safety grievances or complaints concerning safety practices. He also indicated that regular safety meetings are held and he has always advised his men to report any safety matters to him (Tr. 101). He also confirmed that the safety committee could exercise their right and file a grievance if they believe that the use of a basket is required while doing steel connecting work, and he indicated that "they do have the option, if there is an unsafe practice, to even walk off from it" (Tr. 102).

Mr. Bates confirmed that Mr. Sammons and Mr. Canada were hired and referred back to the Panel under Article XVI, Section (h) of the National Coal Mine Construction Agreement (Exh. J-1; Tr. 106). He conceded both were working "at heights", and that a cage would afford them a means of protection from falling, but he indicated that there are times when a man has no other alternative than to climb (Tr. 111).

Roger E. Sammons testified that prior to working for the respondent he had experience in working at heights, climbing structural steel, and that he passed a test as an ironworker. He indicated that when he was first hired by the respondent at the sample house project he was elected to serve as the grievance committeeman by the workers at that project. The work there included the use of boom trucks to lift and load steel onto a flatbed truck and several of the employees on this project asked him to "confront management about the bidding of the boom trucks" (Tr. 131). He discussed the matter with Mr. Bates who told him it was none of his business, and when he discussed the matter of his safety belt with Mr. Bates, Mr. Sammons claims that Mr. Bates never answered him (Tr. 133).

Mr. Sammons indicated that he and Mr. Canada worked at the sample house during the first two weeks of their employment and no one complained about the quality of his work. He then went to work on the refuse bin project and immediately experienced problems because the holes in the steel beams would not align and fit when they attempted to construct the structure, and he testified as to the work performed on that project during Monday through Wednesday of the week they started that project. After Mr. Bates expressed some disappointment in the rate of production at the project, he called a meeting at which he (Sammons) mentioned the need for another crane, and since two boom trucks were idle, Mr. Sammons believed that one of those trucks could have been used to hoist a cage. Mr. Sammons believed that one of those trucks could have been used to hoist a cage. Mr. Sammons stated that he also mentioned belts that would fit and taglines (Tr. 140-141). He confirmed that Mr. Bates agreed with "the safety part of the job" but disagreed that "extra equipment" such as cranes, baskets, or safety belts were required to do the job (Tr. 143). When asked whether Mr. Bates actually made the statement that no extra equipment would be provided, Mr. Sammons replied "that's my interpretation of what he meant" (Tr. 143). When asked whether Mr. Bates specifically addressed safety belts, Mr. Sammons replied "Not specific. It was talked in general except for the crane and the basket". As for the use of the basket, Mr. Sammons testified as follows (Tr. 143-144):

A. He made it plain and clear on Thursday when they was building the basket that nobody was to use that basket except the bolt-up men. As I said, there was no access to the inside of the building, and it was a flat surface, vertical, and there was no way to station yourself there.

Mr. Sammons confirmed that Mr. Gravlee bid off the connectors job, and he believed he did so because he was afraid of climbing the steel (Tr. 146). Mr. Sammons also confirmed the fact that the steel was wet from dew until about 9:45 a.m., on the day they were assigned to the bin structure, but he conceded that other work was performed while waiting for it to dry out (Tr. 148). Mr. Sammons also indicated that he discussed the matter of safety belts and a lanyard with Mr. Bates and advised him that they were needed to secure themselves to the outside of the structure, but Mr. Bates denied it. However, he stated that he was provided with a safety belt and lanyard but that they were too big, and he had to use his own belt (Tr. 151).

Mr. Sammons described the work he performed on September 18, and indicated that he and Mr. Canada were working together on the steel structure, but that he made the upper connection at the "X" where the two beams crossed and then went to assist Mr. Canada make the lower one. Mr. Canada was experiencing a problem with alignment of the holes and it eventually had to be "burned". In his opinion, the holes could not be lined up sufficient enough to put a bolt through without being "burned" (Tr. 156-160). Mr. Sammons stated that he was tied off at the "X" location while making that connection (Tr. 161). He described the diagonal

beam in question as a six-inch I-beam, ten feet long, and he indicated that from where he was positioned he could see that it would not fit at the upper diagonal end and disagreed with Mr. Bates' opinion that he could not see whether a connection could be made (Tr. 162).

Mr. Sammons indicated that it had always been his practice in working "in the building trades" and "around the construction industry" that "you don't go up a piece of steel". He explained that he thought the upper end of the beam would fall off the gusset and he felt that he needed a basket to go up because there was no place for him to fasten himself on and felt that once he got there there would be no room for him to work. Both he and Mr. Canada agreed that the connection could not be made, and while they were in the process of securing a basket, they were instructed to climb down off the structure. Mr. Bates did not ask them why they did not climb up the diagonal, nor did he ask for an explanation as to why they needed a basket. Mr. Smith went up to look. He did so after unhooking his belt, and while at the top of the diagonal he was not tied to anything. Once there, Mr. Smith discovered that the connection would not fit and Mr. Canada and Mr. Hoagland eventually went up in the basket and made the connection (Tr. 166). Mr. Bates did not discuss the matter further, and the next Monday he was told that he would be referred back to the Panel. After the grievance was filed, Mr. Canada was reinstated, and although Mr. Sammons indicated that his grievance was withdrawn, he stated that it was done without his approval and that he filed charges against the union person who withdrew it. He identified this person as Gene Hyche, and he indicated that he campaigned against Mr. Hyche for election to union office (Tr. 168).

On cross-examination, Mr. Sammons testified as to his prior experience for a year as an ironworker during 1977 to 1978, and he indicated that he did some work as a connector during this time for approximately two or three days a week. However, he indicated that at that time he was classified as a lead carpenter, but often worked out of that job classification. His connector work at that time was during the construction of a warehouse and hoist house, and it entailed the same time of steel connection work as in the instant case. He also testified as to some prior work in 1973 and 1974 in construction where he "assisted" as a connector, and he explained by stating that he did the work but was not paid the connector's wage scale (Tr. 168-181).

Mr. Sammons indicated that he had previously served as a union grievance committeeman and safety committeeman, indicated that he was aware of the fact that he could have filed a safety grievance on safety issues, but that he did not file any safety grievance concerning any "safety problems" connected with the refuse bin construction project in this case. He also conceded that he had a right to complain to OSHA, but did not (Tr. 184). With regard to the job for which Mr. Gravlee bid after he opted not to work as a connector anymore, Mr. Sammons conceded that he was aware of the fact that the posting for that job was in effect for three days, but that he (Sammons) did not consider bidding for it. Mr. Sammons also claimed that Mr. Canada told him that Mike Rigsby stated that Mr. Bates was going to get "rid of him", and that Mr. Rigsby stated this on the Thursday preceding the "test", but he admitted that he never heard Mr. Rigsby make the statement (Tr. 185).

In response to questions from the bench, Mr. Sammons conceded that the fact that someone passes a written examination given for ironworker-connectors does not necessarily mean that such a person can actually perform such work. While he was confident that he could perform the duties, he did not believe it was unreasonable for a project supervisor to conclude that someone who was afraid to climb could not (Tr. 191).

With regard to the respondent's furnishing of safety belts, Mr. Sammons first testified that they were not furnished to the men and that he had to supply his own. He stated that he had his own belt when he first reported to the project, but that the company stated that tools and safety equipment would be supplied to him by the company. He then testified that he was supplied a belt but it was a "large size", and he conceded that the operator supplied belts for the men (Tr. 192-193). He also testified that the company provided six-foot safety lines and lanyards (Tr. 193), and that at the time he worked on the refuse bin project he was tied off to the steel beam where he was working with a six-foot lanyard (Tr. 199). Mr. Sammons indicated that to his knowledge the respondent had never been cited by MSHA for safety belt or safety line infractions (Tr. 206). He also confirmed that when he was on the steel "diagonal" during the construction of the refuse bin he had a safety belt with him, and he conceded that Mr. Bates' opinion that he could not perform as well as Mr. Bates would like had nothing to do with the safety belt (Tr. 206).

With regard to the boom trucks, Mr. Sammons confirmed that while he could have filed a grievance in his capacity as safety committeeman, he did not do so because he was not an "aggravated party". He explained that he did not want to bid on a boom truck operator's job, and even though he may have believed that there was something unsafe in the manner in which the boom trucks were being operated, he still did not file any grievance. He stated that he did not like to file grievances because it is time consuming and he also indicated that he did not consider contacting MSHA to observe the manner in which the boom trucks were being operated because "I don't believe he would have caught him in the act" (Tr. 198).

Billy W. Canada, testified that he was hired by the respondent as an ironworker-connector along with Mr. Sammons and several others, and worked on the sample house and refuse bin. He confirmed that Mr. Gravlee was "a little afraid of the steel" and admitted as much to Mr. Bates. Mr. Canada believed that Mr. Sammons was capable of performing connector's work, and indicated that he was confident in working with him at heights. Mr. Canada confirmed the fact that the work production on the refuse bin was slow and he attributed this to "mainly, the safety factor, I would think" (Tr. 230). He explained that he requested a Mr. Mike Rigsby to put tag lines on two panels being installed on the bin, but the company had no rope. However, rope was furnished the next day. In addition, Mr. Canada referred to the fact that the steel was wet in the morning, and that even though a basket was not supplied, it could not be used with the panels. The panels were hoisted up with a boom, and while a basket may have speeded up production on the bin, such a basket could not have been used to install the panels (Tr. 233).

Mr. Canada explained how he and Mr. Sammons connected the steel on the day Mr. Bates had them under observation. He indicated that the bottom part of the diagonal had to be "burned" because the holes did not match up. After the lower end was connected, Mr. Sammons was standing at the "X" location and from that vantage point Mr. Canada stated that he could tell that the upper portion of the diagonal steel holes would not line up and that a torch would be required (Tr. 238). He and Mr. Sammons then removed the "choker line" off the crane which was holding the diagonal brace and came down to obtain a basket. Mr. Smith then climbed up the diagonal and attempted to attach the brace with a wrench, but he couldn't make the connection (Tr. 230). In his opinion, neither he nor Mr. Sammons did anything which would indicate a lack of confidence as a connector (Tr. 240). He indicated that Mr. Smith's decision to climb up the diagonal with the choker removed was his own decision, and he too would have climbed it if he thought he could make the connection, but he would not have done so unless the choker were attached to the steel with some tension on it (Tr. 241).

With regard to safety belts, Mr. Canada stated that he was furnished one that fit him. As for the boom trucks, he stated Mr. Bates took the position that he could hire operators during the 60-day period without posting the jobs, and as the temporary safety committeeman, Mr. Canada believed that qualified people had to be hired to operate the trucks (Tr. 242-243).

On cross-examination, Mr. Canada testified that during his employment with the respondent no safety job grievances were filed, and no safety complaints were ever lodged with MSHA, other than the discrimination complaint filed by Mr. Sammons (Tr. 245). He could not recall what Mr. Sammons said to Mr. Bates when he informed him that the boom truck jobs should be posted. He did recall that Mr. Bates "was hostile", and stated that he had sixty days to post the jobs. Mr. Canada acknowledged that he said nothing to Mr. Bates about safety at the time of this incident, even though he was the safety committeeman (Tr. 249). As for the use of baskets while installing the steel at the refuse bin, Mr. Canada acknowledged that as a general practice it would not speed production while erecting the entire diagonal structure unless two cranes were provided, and that it would not be possible to connect the sheets of steel with the use of a basket. However, in the instant case, the basket was at the site and it would be a simple matter to use it to burn the upper diagonal (Tr. 249-250).

In response to questions from the bench, Mr. Canada stated that he did not dispute the fact that Mr. Bates was free to choose anyone he desired as a boom truck operator during the initial 60-days. He also acknowledged that the two men he selected were capable and did the job, and that he and Mr. Bates simply had a difference of opinion as to whether other people should have been given an opportunity to bid on the jobs (Tr. 253). During the time the two men selected by Mr. Bates operated the trucks, no incidents occurred which placed any miners in jeopardy, and at no time during his employment did he file any safety complaints with state or federal inspectors (Tr. 253).

In response to questions concerning safety belts, tag lines, and the operation of the boom trucks, Mr. Canada responded as follows:

Q. How about the question of whether or not -- am I to understand that the first time you and Mr. Sammons were working on the sample house where you didn't have any rope and the wind was blowing 20 knots or something, that slowed you down a little bit?

A. That was on the refuse bin.

Q. On this?

A. Yes, sir.

Q. Am I to understand that you went up there without a rope?

A. We had our safety rope, but we didn't have a tagline, no, sir. Yes, sir, we did go up.

Q. What was required? What was your understanding at that time as to what was required under the mandatory safety standards? Did you need both, or did one do?

A. You needed both.

Q. But they had no rope?

A. No.

Q. But you went up anyway?

A. Yes, sir.

Q. And the rope was provided the next day?

A. Yes, sir.

Q. Were you aware of the fact that you weren't required to go up there without a rope?

A. Yes, sir.

Q. But you went anyway?

A. Yes, sir.

Q. Can you explain that to me as a Safety Committeeman?

A. Insanity, I guess.

Q. Have you since regained your senses?

A. I guess I was just trying to, as the saying goes, make a few brownie points. (Tr. 253-254).

And, at pages 256-257:

Q. Well, do you think Mr. Bates' hostility -- I mean, did Mr. Sammons say anything to provoke him; "pull his chain" a little bit, so to speak?

A. No, I didn't think so.

Q. He just went up to him and said: "I think you ought to bid the jobs," and all of a sudden Mr. Bates blew up and became hostile and said: "I'll do what I want to do?"

A. That was my opinion.

Q. Did you ever have any encounters with Mr. Bates prior to this, prior to your employment with -- I take it this is your first job with this company?

A. No, I didn't think so.

Q. He just went up to him and said: "I think you ought to bid the jobs," and all of a sudden Mr. Bates blew up and became hostile and said: "I'll do what I want to do?"

A. That was my opinion.

Q. Did you ever have any encounters with Mr. Bates prior to this, prior to your employment with -- I take it this is your first job with this company?

A. No, sir; I never met him before.

Q. Why did you file your complaint with MSHA at the time you were referred back to the panel? What was the reasons that you had for filing that complaint?

A. Well, because I felt like they had used -- had discriminated against me because of safety reasons. Because we had requested to post the boom truck and because we had requested safety lines and asked for things that other people out there, nobody else had asked for. They had more or less just done what they were told to do.

Q. And the first time someone asked Mr. Bates to post the boom truck operators, you feel he got his nose out of joint over that, and that was one of the reasons why he referred you back?

A. Yes, sir.

Q. And you asked him for a safety belt for Mr. Sammons and he got a little aggravated at you over that, too, did he?

A. Yes, sir.

Q.' But you had a belt?

A. Yes, sir.

Discussion

The facts in this case show that in late August 1981, the respondent had a need for the services of several ironworker connectors to work on the construction of a sample house and a refuse bin at its Short Creek Project. Mr. Sammons was hired by the respondent together with six other connectors on August 24, 1981, from a multi-employer UMWA district panel maintained by the UMWA local. The panel is a "hiring hall" from which mine companies can obtain UMWA member workers with various construction skills, and complainant's hiring and employment was governed by the terms and conditions of the UMWA-ABC collective bargaining agreement. After passing a written test and a physical, Mr. Sammons reported for work on August 27, 1981. After working several days at an area known as "Flat top", loading and unloading steel beams, Mr. Sammons, with Mr. Canada and Mr. Gravlee, were assigned to steel erection work at the sample house and worked on this project for approximately the first two weeks in September without incident and without complaint by mine management.

On or about Monday, September 14, after the construction work on the sample house had been completed, project superintendent Edward Bates assigned Mr. Sammons, Mr. Canada, and Mr. Gravlee to work on the construction of the refuse bin. Mr. Bates became dissatisfied over the slow progress being made on the construction of the bin, and after receiving a report from the project foreman, Mr. Bates had a meeting with Mr. Sammons, Mr. Canada, and Mr. Gravlee on Wednesday, September 16. At that meeting, Mr. Bates voiced his displeasure over the slow progress made on the bin construction. According to Mr. Sammons, he and Mr. Canada defended their slow progress on the ground that they were not given an additional crane and basket, and were not furnished tag lines or safety belts. Mr. Sammons also mentioned the fact that the "wet steel" slowed their progress and he indicated that "the going was slow because of a safety situation."

Subsequent to the meeting, on Friday, September 18, Mr. Bates summoned all seven connectors to the refuse bin construction site, and he stated that he did so for the purpose of "testing" them to determine their competence as connectors by having them demonstrate their abilities as connectors. Mr. Bates outlined his observations and conclusions regarding the competence of the connectors as demonstrated to him during the "test" and he rated two of them "very good", two "average", and he concluded that Mr. Sammons and Mr. Canada lacked the ability to perform as connectors. Mr. Gravlee admitted that he was afraid to climb the steel and he was allowed to bid on another job and was retained in another job capacity. Mr. Sammons and Mr. Canada were referred back to the panel. Both of them filed grievances, and Mr. Canada's case was "settled" when the respondent agreed to take him back. Mr. Sammons' grievance was withdrawn by his union representative, and Mr. Sammons claims this was done without his permission and he stated that he has filed a complaint against this union official, an individual against whom he ran for election to a union office.

In his post-hearing brief the complainant argues that he was discharged because he made several complaints "on behalf of himself or others" with respect to unsafe practices at the mine, and that these complaints concerned a poorly fitting safety belt, lack of tag lines, and unqualified boom truck operators. Further, complainant asserts that he made himself unpopular with the mine superintendent when he and his co-workers insisted on strict adherence to safe work rules when climbing steel. Complainant concludes that the so-called "test" of September 18, at which time Mr. Bates observed the work being performed by Mr. Sammons and Mr. Canada, was used as a pretext to terminate him, and that the actual reasons for his termination were his safety complaints and his insistence on observing safe work practices. In short, contestant maintains that his case is one involving retaliation rather than a refusal to perform work because of any safety considerations. Even assuming that the latter is present, contestant maintains that any such work refusal was protected because it was made in good faith and in the reasonable belief that the work exposed him to a hazard.

Findings and Conclusions

The crucial issue in this case is whether Mr. Sammons was referred back to the panel because project superintendent Bates believed him to be an incompetent connector or because Mr. Bates retaliated against him because Mr. Sammons had complained to him about safety hazards. Complainant's position is that his case is one of retaliation rather than work refusal (Pgs. 9-10, post-hearing brief). His contention is that the respondent, through Mr. Bates, retaliated against him because of the "many complaints he voiced concerning the lack of safety equipment". However, it should be noted at the outset that the record in this case establishes that aside from the instant discrimination complaint, neither Mr. Sammons nor Mr. Canada, both of whom served as safety or grievance committeeman during their employment tenure with the respondent, ever filed prior safety grievances through the union grievance procedure. Further, the record also established that no safety complaints were ever filed by these individuals with MSHA or with any State or local mining enforcement inspector or agency.

The UMWA-ABC Contract, Joint Exhibit 1, at pgs. 16-17, specifically covers safety procedures to be followed when an employee is required to work at heights. Article IV, Section 0(11)(a), provides for certain safety devices, but does not mention safety baskets. Subsection (b) provides that "no employee will work at heights such as on steel in hazardous weather conditions". Although Mr. Sammons testified that at times the "going was slow" due to early morning dampness and dew which made the steel slippery, or that windy conditions hampered production, there is no evidence that these conditions prevailed during the time periods in question in this case or that mine management required or expected the crew to work under those conditions. Further, Section P of the contract provides for specific procedures to be followed in matters concerning

health and safety disputes, and there is no evidence that Mr. Sammons ever filed any safety grievance or complaint addressing any of the so-called "safety complaints" which he now brings into issue in these proceedings. A discussion of these complaints follows.

The "boom truck" driver jobs

I cannot conclude from the evidence and testimony adduced in this case that Mr. Sammons' complaints concerning the boom truck drivers had anything to do with an actual complaint concerning safety. I conclude that the so-called "safety complaint" was in fact a dispute or difference of opinion between Mr. Sammons and Mr. Bates over the posting of those jobs for bids. Mr. Sammons does not dispute the fact that under the contract Mr. Bates had the right to initially assign personnel to those jobs. Mr. Bates confirmed that the dispute resulted from Mr. Sammons' insistence that the jobs be posted for bid, and Mr. Bates testimony that he assigned two conscientious drivers to those jobs was confirmed by Mr. Canada. Mr. Canada also candidly conceded that the dispute was in reality a difference of opinion as to whether someone other than those men selected by Mr. Bates should have been given an opportunity to bid on the jobs. Further, Mr. Canada conceded that the men selected by Mr. Bates were capable, that they performed their job tasks, and that no incidents occurred during their performance which may have placed any miners in jeopardy. Finally, no MSHA, State, or union safety grievances or complaints were filed in connection with the "boom trucks". Accordingly, complainants' assertion that his "complaint" concerning these trucks was based on any safety considerations is rejected.

Safety belts and taglines

There is no evidence in this case that the respondent failed or refused to supply its personnel with safety belts or tag lines. While it is true that Mr. Sammons was initially given one which was too large for him, he was permitted to use his own. In addition, Mr. Sammons conceded that the company supplied the men with belts, that they also provided safety lines and lanyards, and that when he worked on the refuse bin he was tied off with a six-foot lanyard and had a safety belt. He also conceded that Mr. Bates' opinion concerning his work performance had nothing to do with the safety belt question.

Mr. Canada testified that he was supplied with a safety belt that fitted him. As for the tag lines, he stated that he requested a Mr. Rigsby to install tag lines on two steel panels which were being installed on the refuse bin but that the company had none available. They were provided the next day, and there is no evidence that Mr. Sammons or Mr. Canada were required to perform work without the use of such taglines. To the contrary, the evidence in this case reflects that tag lines and belts were used by both men during the refuse bin construction project. With regard to the earlier work performed on the sample house, Mr. Bates testified that most of the work was conducted from the interior steps of that structure and there is no evidence establishing that respondent

refused requests for the use of safety belts or tags lines, or that the men were required to work without them. As a matter of fact, Mr. Canada admitted that even though he had a safety rope and no tag line, he climbed the steel anyway even though he realized he was not required to do so.

The use of "baskets"

There is no evidence in this case that the use of a "basket" while making steel beam connections is mandated by any mandatory MSHA or State safety standard. I conclude and find that the issue concerning the use of a basket while making the steel connections in question is unrelated to any safety factors. Mr. Bates testified that baskets are not normally used to make such connections, and his decision not to use them on the refuse bin was dictated by his concern over slow production on that project and the fact that the use of a basket would have required another crane to be brought to the project site. Even so, he conceded that anyone may "walk away" from any situation if they believed it was unsafe to perform a particular job task, and he recognized this right on the part of any employee. He also indicated that the safety committee could have filed a safety grievance or complaint if they believed that a basket was required while making connections on a steel structure, but that this was never done.

Mr. Canada acknowledged and agreed that the use of a basket to connect certain panels to the steel refuse structure was not feasible. In addition, his testimony that a basket was at the project site and readily available for use had Mr. Bates authorized its use contradicts the complainant's assertion at page 12 of his post-hearing brief that the crew had to fabricate a basket "on their own" for use on the refuse bin. As a matter of fact, the transcript pages referred to by the complainant to support the assertion that the crew had to fabricate their own basket contain absolutely no information in this regard. Mr. Sammons' testimony is that Mr. Bates would only permit the use of a basket for "bolt-up" work, and that Mr. Bates would not permit the use of "extra equipment". Mr. Sammons alluded to the fact that Mr. Bates told him that he would not allow the use of a second extra crane, and that the interpretation placed on the statement "no extra equipment" by Mr. Sammons was that no safety belts or safety baskets would be permitted. Considering all of the testimony in this case, and taking that statement in context, I reject any interpretation that Mr. Bates' concern about the use of any "extra equipment" translates into a complete disregard for the safety of the crew on the project in question. I conclude that Mr. Bates' decision concerning the use of a basket was based on his honest belief that baskets are not feasible when making such connections, that there are times when a competent connector must "climb the steel", that the routine use of baskets in such work require the use of an additional crane which must be transported to the project site, and that the upper portion of the diagonal in question was firmly in place even though the connection had not been made.

I conclude that Mr. Sammons' concern about the use of the basket stemmed from the fact that he believed he would not be able to stand erect while making the steel connection at the upper diagonal, and that he may have had to walk along a beam and hold on while reaching the connecting point. It seems to me that in this type of work a safety lanyard or rope, coupled with the use of a safety belt, would permit a connector to make the connection in a safe manner. Safety belts and lanyard ropes were provided and made available to the crew working on the refuse bin, and no one directed or instructed either Mr. Canada or Mr. Sammons to do any work without being tied off. As a matter of fact, Mr. Sammons conceded that he was tied off when he made the lower connection. Since he came to the conclusion through visual observation from his vantage point at the lower end of the diagonal that the upper portion would not fit, he opted not to climb up. At that point in time, Mr. Bates instructed him to come down, and another man climbed up and confirmed that the connection could not be made.

In view of the foregoing, I cannot conclude that Mr. Sammons made any "safety complaints" to Mr. Bates concerning the use of a basket. Although Mr. Sammons may have felt more secure riding up in a basket to take a look at the upper steel diagonal, at this particular point in time no one directed him to climb up and his decision not to was his own.

The retention of Mr. Gravlee and the reinstatement of Mr. Canada

In his post-hearing brief contestant asserts that assuming that his case falls into the category of a "mixed motive" case, the respondent has not shown that Mr. Sammons would have been terminated in any event. In support of this argument, contestant points to the fact that Mr. Canada was reinstated and that this was accomplished in exchange for the dropping of Mr. Sammons grievance. In addition, contestant points out that Mr. Gravlee is still employed with the respondent.

The record adduced in this case reflects that Mr. Gravlee was assigned to another job after he voluntarily relinquished the position of connector, and he did so after expressing his fear and reluctance to climb to heights or to otherwise perform the job of a connector. Mine management apparently agreed to permit him to bid on another position, and I see nothing out of the ordinary in this decision. Contestant's suggestion that the decision to keep Mr. Gravlee on in another job classification is an indication of unequal treatment is simply not supported by the record and is rejected. In my view, the facts and circumstances surrounding Mr. Gravlee are different from those presented in Mr. Sammons' case, and I fail to understand how contestant can argue that they are related.

With regard to Mr. Canada's reinstatement, he declined to give any testimony concerning the rationale for his reinstatement and stated that his reasons in this regard were "personal ones" (Tr. 260-261). In rebuttal, respondent's personnel director Ellis testified that the decision to take Mr. Canada back was a management compromise decision made after the third-step grievance hearing in his case. The decision was dictated by the fact that management believed Mr. Canada could establish "on paper" that he had

better qualifying experience as a connector than did Mr. Sammons, and that the union agreed to settle both grievances through the reinstatement of Mr. Canada and the withdrawal of Mr. Sammons' complaint (Tr. 268-275).

I see nothing sinister in the decision by mine management to reinstate Mr. Canada and not Mr. Sammons. Both grievances were adjudicated under the union contract procedures and I do not believe that proceedings under section 105(c) of the Act should undercut those established practices where there is no showing of a violation of the anti-discrimination provisions of the Federal Mine Act. If this were permitted, any employee who is dissatisfied with the outcome of any grievance filed in his behalf by his union could cry "discrimination" and have his grievance case re-adjudicated a second time in a second forum. I do not believe that Congress ever intended the Mine Act to be used as a "mini-NLRB" to air union grievances or politics.

The so-called "test" of September 18th

The manner in which an employer sees fit to determine the competence of its work force is a question that I prefer to leave to the employer and the work force. As indicated earlier, the parties are in agreement that any employee hired from the union panel may be referred back to the panel by the employer within thirty days if the employer is not satisfied with his work (See Section (h), Article XVI, p. 54, Joint Exhibit 1). Referring an employee back to a panel for "union activity" is "discrimination" under Article XXIII of the contract and it is a grievable offense.

Mr. Sammons' union grievance (exhibit R-6), was based on his assertion that he was qualified to do the work of a connector and that he was discriminated against because of his union activities. Although the grievance states that management failed to provide him with sufficient safety equipment that "somewhat hindered" his productivity, I take note of the fact that the grievance was a regular grievance filed pursuant to Article XXI of the contract, rather than one based on safety or health considerations.

Complainant's assertion at page 16 of his post hearing brief that the principal reason for referring him back to the panel was his refusal to climb the diagonal is rejected. Further, his suggestion that his refusal to climb the diagonal is a "protected refusal to work" is rejected. Complainant's counsel conceded that this case does not involve the typical "refusal to work" because of any safety considerations (Tr. 125). Counsel also agreed that the thrust of Mr. Sammons' complaint is the assertion that after he and mine management (Mr. Bates) had a difference of opinion regarding the slow progress being made on the refuse bin construction, and coupled with the fact that Mr. Bates and Mr. Sammons had a previous "discussion" concerning the posting and bidding of certain boom truck operator jobs, Mr. Bates was prejudiced towards Mr. Sammons and found a convenient way to get rid of him by returning him to the Panel (Tr. 126, 129). The issue here is one of "retaliation" for making safety complaints, not a refusal to perform work because of safety considerations. The record

in this case does not support any conclusion that Mr. Sammons was required or directed to perform work which was unsafe, that he refused to comply, or that he was discharged for that refusal. Under the circumstances, complainant's alternative theory of his case is rejected.

Complainant asserts that the failure by the foremen who supervised his work to testify in these proceedings seriously undercuts the claim that he was incompetent. However, the burden of proof here is on the complainant, and if he believed that this testimony was critical to his case he should have subpoenaed them to testify or at least taken their depositions. He did neither. The fact that the respondent chose to rely on the testimony of the project superintendent on this issue does not dilute the weight to be given to his testimony, particularly when the complainant has had a full and fair opportunity to cross-examine him.

In the final analysis, I believe that Mr. Sammons' discrimination complaint was motivated in large measure by his disagreement with Mr. Bates conclusion that he could not perform his connector duties to his liking. Mr. Sammons admitted as much when he stated as follows (Tr. 203-204):

Q. What if they provided you with the belt, provided you with the cage, provided you with the lifeline, and still during the 30-day period mine management was of the view that you weren't fast enough and they referred you back to the panel? Then where would you be?

A. I would have a case before the National Labor Relations Board at this time.

Q. You would?

A. Yes, sir.

Q. On what ground?

A. Discrimination. Because I don't think I'm not competent. It's just like you think you're competent, and I know that I'm competent, and you know it yourself that you're competent. And it's just in human nature. I mean I'm just stating facts that I believe. And I resent anybody saying that I'm incompetent, and I want them to show me that I'm incompetent. It takes a smart person to stick a wrench in a hole.

After careful reivew and consideration of all of the testimony and evidence adduced in this case, I conclude and find that Mr. Bates' referral of Mr. Sammons back to the UMWA Panel was motivated by his belief that Mr. Sammons could not perform the duties of a connector in a manner which conformed with Mr. Bates expectations. As the project superintendent, Mr. Bates was authorized to supervise the work and to make those management

judgments which were necessary to insure timely completion of the projects. As a matter of fact, there does not appear to be any dispute that under the contract Mr. Bates had the right to send anyone back to the panel within the initial 30 days of their employment if he was not satisfied with their performance.

Although the record here suggests that Mr. Sammons and Mr. Bates may have had some disagreements concerning their respective authority and jurisdiction, having viewed them on the stand during their testimony I conclude that their "encounters" and "confrontations" resulted from their rather headstrong and firm personalities. In short, I believe that Mr. Sammons, in his eagerness to assert his leadership abilities and potential for advancement in his local union, found a ready opportunity to pursue his talents by his confrontations with Mr. Bates. By the same token, Mr. Bates reacted by letting Mr. Sammons know that he and not Mr. Sammons was the project superintendent.

Although complainant's post hearing arguments suggest that Mr. Bates found a convenient way to get rid of Mr. Sammons by simply sending him back to the panel, having viewed Mr. Bates on the stand during the hearing, he impressed me as an honest and straight-forward witness. I conclude and find that his motivation in referring Mr. Sammons back to the panel was based on his honest belief that Mr. Sammons could not perform the duties of connector, and that his decision was not based on any safety complaints made by Mr. Sammons.

Conclusion and Order

In view of the foregoing findings and conclusions, I conclude and find that the respondent's referral of Mr. Sammons back to the panel was not motivated in any part by any protected activity on his part. I further conclude and find that the record adduced in this proceeding does not establish that respondent has otherwise discriminated against the complainant by virtue of his mine safety activities. Accordingly, the complaint filed in this matter is DISMISSED, and the requested relief is DENIED.


George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SEP 16 1982

SECRETARY OF LABOR, : Civil Penalty Proceeding
Petitioner :
v. : Docket No. LAKE 81-46
AC No. 11-02544-03040
: No. 27 Mine
OLD BEN COAL COMPANY, :
Respondent :

DECISION

Appearances: Miguel J. Carmona, Esq., Office of the Solicitor,
U.S. Department of Labor, for Petitioner

Robert J. Araujo, Esq., and Derwood H. Rusher II, Esq.,
for Respondent

Before: Judge Fauver

This proceeding was brought by the Secretary of Labor under section 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., for assessment of civil penalties for alleged violations of a mandatory safety standard.

On August 22, 1980, an MSHA inspector issued a citation/withdrawal order at Respondent's Mine No. 27, charging two violations of 30 CFR § 75.507 because of power connection points alleged to be in return air. The fundamental issue is whether they were in return air or intake air. If they were in return air, the charges must be sustained, with civil penalties. If the power connection points were in intake air, the charges must be dismissed.

The case was heard at Evansville, Indiana.

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, Old Ben operated an underground coal mine, known as Mine No. 27, in Franklin County, Illinois, which produced coal for sale or use in or substantially affecting interstate commerce.

2. The mine included a longwall unit that mechanically mined large blocks of coal.

3. No. 4 Entry South was used as a return air course. "Return air" is air that has circulated through the mine's workings and is directed toward the mine fan to be evacuated from the mine.

4. The entry immediately to the west of 4 Entry South was 5 Entry South. A nonpermissible 1/ 7200 volt A.C. transformer was located in the fourth crosscut 2/ outby the longwall face, between 4 and 5 Entries South.

5. About two crosscuts inby the transformer in 5 Entry South, there was a nonpermissible trailing cable coupling that fed electrical power from the transformer to a permissible Fletcher roof bolter, located off 5 Entry two crosscuts outby the longwall face.

6. At the time of an inspection on August 22, 1980, the transformer was energized and the trailing cable to the roof bolter was not energized.

7. Nonpermissible electrical equipment can generate electrical arcs when circuits are opened and closed. An electric arc can serve as an ignition source to cause methane gas or float coal dust to explode. This mine liberated methane gas.

8. Nos. 4 and 5 Entries South were separated by stoppings; however, two stoppings were knocked out and two contained open regulators. The stoppings in the first and second outby crosscuts were knocked out so that equipment could be moved between the entries. The stopping in the third crosscut was intact. Air normally did not flow from 4 Entry, a return entry, into 5 and 6 Entries, which were intake entries, because air tends to flow from high-pressure points to low-pressure points, and the mouth area of 4 Entry South was the lowest pressure point. The stopping in the fourth crosscut was intact except for a regulator, about two feet square, and the stopping in the fifth crosscut was intact except for a regulator, about 2 1/2 feet square. At the time of the inspection on August 22, 1980, both these regulators were open, by the removal of concrete blocks, and drew air from 5 Entry into 4 Entry South.

9. Prior to the inspection on August 22, 1980, Old Ben management had been monitoring the direction of air flow in 5 Entry South to ensure that only intake air was passing over the nonpermissible power connection points. The mine superintendent, Mr. Cavinder, had been checking the

1/ "Nonpermissible" refers to an electrical connection that has not been certified and approved by MSHA because it is not enclosed in an explosion-proof housing.

2/ Old Ben's Exhibit No. 1, a mine map, designates the first crosscut outby the longwall face as 0, and the rest 1, 2, 3, etc. However, for clarity in following the testimony, the crosscuts are numbered beginning with No. 1 (instead of 0) in this decision.

flow of air in 5 Entry South three or four times a week for four or five weeks before this inspection. He personally took smoke tube readings to ensure that only intake air was passing over the nonpermissible electrical equipment and in each test found that this was the case.

10. In certain areas in 5 Entry South, use of a smoke tube was required to test the direction of the air flow because of the air's slow and almost imperceptible movement. In such areas, motion of the human body could create sufficient air turbulence to cause an erroneous appearance of the air direction. For this reason, the smoke-tube test had to be performed carefully and slowly so as not to disturb the natural flow of air.

11. On August 21, 1980, MSHA Inspector Joe Tennant conducted a ventilation inspection at Mine No. 27, in the areas in which the transformer and roof bolter trailing cable coupling were located. Mr. Tennant had no criticism of the manner in which the air was coursing over these connection points.

12. On August 22, 1980, Inspector Lonnie D. Conner conducted a ventilation inspection at Mine No. 27. He was accompanied by Old Ben's Safety Inspector, Jim Clark, and UMW's Safety Representative, Gordon De Grave.

13. In 5 Entry South, Mr. Conner observed the nonpermissible transformer and the nonpermissible trailing cable coupling. He believed that these were in return air, constituted violations of 30 CFR § 75.507, and constituted an imminent danger. Based on these findings, he issued a citation/withdrawal order, which reads in pertinent part:

Two pieces of nonpermissible electrical equipment were observed in the return air coursing from the #1 longwall section. A nonpermissible 7200 volts A.C. transformer was located at the 1200 foot mark between the 4th and 5th south entries, and a nonpermissible trailing cable coupling to a roof bolting machine was located approximately 200 ft. inby the transformer; the transformer was energized.

14. At the return end of the longwall, air was traveling about 250 feet per minute. Most of the air was drawn by a fan down 4 Entry South to a slidinghood regulator. A turbulence at the end of the longwall face caused return air to circulate between 4 and 5 Entries South before being drawn finally into 4 Entry South. Return air mixed in this turbulence and entering 5 Entry South re-entered 4 Entry South in the first two outby crosscuts. Inby the trailing cable coupling at issue in 5 Entry South and extending near the next inby crosscut, the air was stale, i.e., there was barely any movement. The air passing over the coupling at issue was intake air moving inby to mix with the air moving from 5 Entry South into 4 Entry South at the next inby crosscut, which had no stopping. The preponderance of the evidence establishes the ventilation pattern and direction of air flow as shown in Old Ben's Exhibit No. 1 and by the testimony of Old Ben's witnesses explaining such exhibit.

DISCUSSION WITH FURTHER FINDINGS

Based on the citation/withdrawal order, the Secretary charges two violations of 30 CFR § 75.507, which states:

Except where permissible power connection units are used, all power connection points outby the last open crosscut shall be in intake air.

It is the Secretary's main contention that the transformer and trailing cable coupling were in return air and thus in violation of § 75.507. The Secretary proposes a civil penalty of \$1200 for each alleged violation.

The inspector testified that, in 4 Entry South, about 350 feet outby the longwall, he heard the longwall machine operating and saw dust moving from 4 Entry South into 5 Entry South through an open crosscut. He stated that he traced this air flow down 5 Entry South and observed its exit in the open regulator in the crosscut in which the transformer was located. He did not use a smoke tube or any other instrument to determine the air flow, but stated that, "If you have enough movement there, it's very easy to put dust in suspension and see which way the air is blowing" (Tr. 38). He made two "tests" to determine the air flow, one at the transformer and one at the roof bolter, by patting his clothing to cause dust to be suspended in the air.

I find, based on a demonstration of using a smoke tube, which was conducted in the hearing room, and the testimony of the witnesses who make smoke-tube tests at the transformer, roof bolter, and trailing cable coupling sites, that the inspector's method of visual observation and patting his clothes to send dust in the air was not an accurate or adequate method in the circumstances. The air flow at these sites was too slow to warrant this approach, and required a smoke tube test for a reasonable and accurate determination of the direction of the air.

About one and a half hours after Inspector Conner issued the citation/withdrawal order, members of mine management, including Mr. Wagner, mine manager, and Mr. Young, general mine superintendent, questioned his finding as to the air direction at the sites and requested Mr. Conner to go with them to the cited areas to perform smoke-tube tests. Mr. Conner refused. After these discussions, Mr. Wagner and Mr. Young went to 5 Entry South and conducted a number of smoke-tube tests. These tests, which I find were properly performed, revealed that both of the nonpermissible power connection points were in intake, and not return air.

Although Inspector Conner testified that the UMWA safety representative, Mr. De Grave, confirmed his opinion that return air was passing over the nonpermissible connections, Mr. De Grave's testimony did not agree with the inspector's account but supported the testimony of Messrs. Cavinder, Wagner, and Young. Mr. De Grave stated he was a neutral observer during the MSHA inspection, and that he did not feel it was his role to question the inspector's method of investigation or in any other way interfere with the investigation. He also testified that, "When Mr. Conner refused Mr. Wagner to go back into the section, it put a little spark into my conscience that I thought Mr. Conner might have had a doubt of his own on the air" (T.150), so the next day Mr. De Grave returned to 5 Entry South and made his own smoke-tube tests. In front of the transformer, he found "Very slight movement intake of air." His other tests, totaling six, confirmed that the air passing over the transformer and the trailing cable coupling was intake and not return.

There is no evidence suggesting a change in the air flow conditions in the cited areas from the time of Mr. Conner's inspection until the time smoke-tube tests were made by mine management or by Mr. De Grave. I find that the tests made with a smoke tube establish, by a preponderance of the evidence, the air flow direction in the cited areas as of the time of Mr. Conner's inspection. In addition to the greater weight of the testimony, this finding is supported by the careful demonstration of the smoke-tube test in the hearing room, where one's senses could not reasonably determine the direction of air current but the smoke tube test could do this. The demonstration also showed convincingly that movement of the body or arms can affect air flow and cause an erroneous impression of the actual direction of air flow.

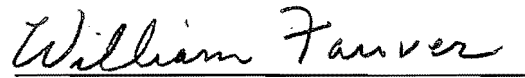
While acting in a good faith belief as to the direction of air flow he observed, the inspector relied upon a method of determining air flow that was not reasonably reliable in the mine atmosphere existing in this case.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and subject matter of this proceeding.
2. The Secretary did not meet his burden of proving the violations charged in the citation/withdrawal order.

ORDER

WHEREFORE IT IS ORDERED that this proceeding is DISMISSED.


WILLIAM FAUVER, JUDGE

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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SEP 23 1982

THE NEW RIVER COMPANY,	:	Contest of Citations and Order
Contestant-Respondent	:	
	:	Docket Nos. WEVA 82-93-R
v.	:	WEVA 82-94-R
	:	WEVA 82-95-R
SECRETARY OF LABOR,	:	WEVA 82-96-R
MINE SAFETY AND HEALTH	:	WEVA 82-97-R
ADMINISTRATION (MSHA),	:	WEVA 82-98-R
Respondent-Petitioner	:	WEVA 82-99-R
	:	
	:	Civil Penalty Proceeding
	:	
	:	Docket No. WEVA 82-173
	:	A.O. No. 46-01297-03059
	:	
	:	Siltix Mine

DECISIONS

Appearances: C. Elton Byron, Jr., Esquire, Beckley, West Virginia,
for the contestant; Aaron M. Smith, Attorney, U.S. Department
of Labor, Philadelphia, Pennsylvania, for the respondent.

Before: Judge Koutras

Statement of the Case

These consolidated proceedings concern contests filed by the contestant challenging the propriety and legality of the captioned citations and order issued to the contestant pursuant to Sections 104(a) and 104(b) of the Federal Mine Safety and Health Act of 1977. The civil penalty case concerns a proposal filed by MSHA seeking civil penalty assessments for the alleged violations in question. Hearings were held in Charleston, West Virginia, and the parties appeared and participated fully therein.

Issues Presented

The issues presented in these proceedings include the question of whether the violations in fact occurred, whether the times fixed for abatement were reasonable, whether the inspector abused his discretion in issuing the withdrawal order in question, whether the back-dating of the citations was proper, and the appropriate civil penalties which should be imposed for the violations which have been affirmed. Additional issues raised by the parties are identified and disposed of in the course of these decisions.

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.

Stipulations

The parties stipulated to the following (Tr. 6-7):

1. The new River Company is the owner and operator of the Siltix Mine, and the mine is subject to the Act.
2. The presiding Administrative Law Judge has jurisdiction to hear and decide these cases.
3. The inspector who issued the citations and order which are the subject of these proceedings is a designated authorized representative of the Secretary of Labor.
4. True and correct copies of the citations and order were served upon the operator.
5. The copies of the citations and order (exhibits G-1 through G-6) are authentic copies and may be admitted as such, but not for the truth or relevance of the statements made therein.
6. Contestant-respondent's history of prior violations for the 24-month period preceding the issuance of the citations in these cases consists of 176 violations. Eight of these violations are violations of mandatory standard section 75.1722(a), 30 are for violations of section 75.400, and 22 are for violations of section 75.503.
7. Payment of the penalties assessed in these proceedings will have no effect on the operator's ability to continue in business.
8. The Siltix mine had an annual coal production of 175,000 tons, and the mine employs approximately 135 individuals.

The parties are in agreement that citation no. 888867, October 29, 1981, citing a violation of section 75.400, is no longer in issue in these proceedings because the contestant did not contest the civil penalty

assessment made by MSHA and has paid the assessment. Contestant's counsel agreed that Docket No. WEVA 82-99-R, may be dismissed since contestant no longer contests the citation in question.

The parties were also in agreement that none of the citations which were issued by the inspector in these proceedings (exhibits G-1 through G-5) are "significant or substantial" violations under the Act.

Contestant's counsel asserted that except for the section 104(b) order of withdrawal (exhibit G-6), contestant does not contest the fact of violation with respect to the remaining citations issued by the inspector in these proceedings. That is, contestant does not dispute the fact that the conditions or practices described by the inspector on the face of the citations which he issued constitute violations of the cited mandatory safety standards (Tr. 13).

MSHA's testimony and evidence

MSHA Inspector William R. Stevens testified that he has been employed as a mine inspector in the Mt. Hope, West Virginia, office since August 1977, and that prior to that time he was an inspector trainee and engineering technician at that office from May 1974 to August 1977. During his employment he has participated in a number of inspector training programs, including attendance at the Mine Safety Academy at Beckley, West Virginia. During his tenure as an MSHA inspector he has conducted approximately 700 to 800 mine inspections.

Mr. Stevens confirmed that he conducted an inspection at the mine in question on October 28, 1981, as part of a regular inspection of the mine which began on October 14. He arrived at the mine at approximately 7:30 a.m., and after checking the preshift examination books he proceeded underground to conduct his inspection, and he was accompanied by a union representative as well as the company's safety inspector Michael Hess. They entered the mine through the slope-bottom (incline drift) and proceeded up the number 2 belt entry toward the Number 3 left working section.

Mr. Stevens identified exhibit G-1 as citation No. 888861 which he issued for a violation of section 75.1722(a), after he observed that a guard for the No. 2 conveyor belt tail roller had been removed from the equipment and was lying nearby. Mr. Hess could not explain why the guard had been removed, but he immediately replaced it and fastened it in place with a piece of wire. Mr. Stevens advised Mr. Hess that the temporary fastening of the guard would suffice temporarily but that "it would have to be done better" at a later time. He asked Mr. Hess as to how much time was needed to properly correct the condition, but Mr. Hess did not know, Mr. Stevens then fixed the abatement time as November 3, 1981, after he had gone back to the mine and confirmed that the condition cited had been corrected. At the time he observed the condition no one was in the area (Tr. 15-24).

Mr. Stevens confirmed that he issued citation No. 888862 (exhibit G-2) after observing that a piece of rubber conveyor tail roller guarding had been turned up, thereby exposing the roller. The rubber guard had been fastened to the structure with one bolt and Mr. Hess merely turned it down, thereby guarding the roller. Mr. Stevens conceded that he advised Mr. Hess that he would accept the rubber guarding as abatement of the citation at that time, but he also indicated that he advised Mr. Hess that a metal guard was needed to replace the rubber one and that it could be constructed at a later time.

Mr. Stevens stated that at the time he observed the second guarding condition no one was in the area, and the area is not one where miners have to travel through to get to their work stations. In addition, normal operating procedure calls for the belts to be shut down when they are cleaned, and in these circumstances he believed the likelihood of any injury resulting from the violation to be remote. He also believed that the operator should have been aware of the guarding condition through the preshift inspection process which is required (Tr. 24-27).

Mr. Stevens confirmed that he issued citation No. 888862 (exhibit G-3) after discovering the presence of float coal dust along the No. 7 belt conveyor for a distance of some 20 feet. He discussed the condition with Mr. Hess, and while Mr. Stevens did not believe that float coal dust per se was hazardous, he believed it would be if it were placed in suspension and ignited by a spark. This could result in a possible fire or explosion. However, since nearby electrical cables were properly insulated, and he detected no stuck belt rollers, he believed that the possibility of an accident or an "occurrence" to be remote.

Mr. Stevens stated that he advised Mr. Hess that a citation would be issued for the float coal dust condition, and that he also advised him that the area cited should be rock-dusted. Since no rock dust was readily available and needed to be brought in to the area, he fixed the abatement time for the next day, October 29th. He terminated the citation on that day at 9:00 a.m. when he confirmed that the area had been rock-dusted, and he believed that the operator exhibited very good faith compliance in correcting the conditions within the time fixed for abatement. He also believed that the operator should have been aware of the presence of the cited float coal dust through a preshift examination (Tr. 27-31).

Mr. Stevens confirmed that he issued citation No. 888864 (exhibit G-4) after observing an accumulation of loose coal and coal dust 3 to 18 inches deep along the sides and under the conveyor belt in the 3rd left section in an area where a roof fall had occurred. The remaining roof had been timbered and supported and the conveyor belt was installed to run over the fall and under the newly supported roof. The accumulations extended for a distance of approximately 100 feet.

Mr. Stevens stated that he discussed the accumulations condition with Mr. Hess and advised him that the area needed to be cleaned up. He asked Mr. Hess how much time he required for abatement, and Mr. Hess informed him that he did not know and that he would have to first discuss the matter with mine management, but that the conditions could probably be taken care of "in the morning".

Mr. Stevens stated that while the accumulations conditions he cited presented a possible fire hazard, he considered this occurrence to be remote because all electrical cables in the area were properly insulated and he detected no stuck conveyor rollers. Mr. Stevens stated that he fixed the abatement time as 8:30 a.m. the next morning, October 29, and he believed that this was a reasonable time because the area where the accumulations were present was not that extensive and he believed that one man working one shift could have cleaned up the area and achieved abatement (Tr. 31-34).

Mr. Stevens confirmed that he issued citation No. 888865 (exhibit G-5) after finding a permissibility violation in the 3 left section. He found that there was an opening present on a continuous mining machine contactor panel in excess of .004 inches, and he detected this by means of a feeler guage which he inserted into the opening. He discussed this condition with Mr. Hess, and an electrician was immediately summoned to the area. The electrician closed the opening, and after inserting his guage and determining that it could not penetrate the panel area, Mr. Stevens was satisfied that abatement had been achieved. Mr. Stevens stated that the operator achieved rapid compliance, and since he detected no methane present in the area he determined that any hazard resulting from the violation was improbable.

Although Mr. Stevens stated that weekly permissibility examinations are required, he conceded that the condition he cited may have occurred during the intervening weekly inspections and that the operator may not have known about the excess opening (.005 inches) in the equipment panel in question.

Mr. Stevens stated that after the completion of his inspection during which he observed all of the conditions which resulted in the issuance of all of the five citations in question, he came out of the mine and proceeded to write all of the conditions down on paper from notes which he had made during his inspection. He discussed all of the conditions with Mr. Hess, and he was satisfied that Mr. Hess was aware of the conditions which he found and what was needed to achieve compliance. However, upon discovering that he did not have a supply of citation forms with him, he advised Mr. Hess that he could return to his office to obtain some, simply write them down on paper, or return the next day and issue them in writing on the citation forms. Mr. Stevens stated that Mr. Hess agreed with this procedure, and that mine Superintendent Bays voiced no objections.

Mr. Stevens testified as follows concerning the conversation with Mr. Hess and Mr. Bays (Tr. 37-38):

Q. Well, how did the inspection -- after you issued this citation, how did the inspection proceed from that point?

A. Well, after we finished that, we -- I can't exactly remember what we did after that, but we came outside and I wrote out my citations on my paper, and when I got ready to transfer them to my citation forms, I discovered that I had run out. So I discussed this with Mike.

Mr. Bays wasn't in the room at the time, but I talked to Mike and told him, I said, "I've run out of forms". I said, "now, would it be all right if I issue these tomorrow and backdate them for today?" Mike said, "Well, I'll have to check with Van", and we talked to Mr. Bays, and he came in, and we discussed it, and I told him about them. He said, "Well, is Mike aware of the violation, he knows where they are?" I said, "Yes, sir."

And he said, "Well, it's okay with me." And I told him, I said, "If you want, I will go back to the office and get the forms, and do them now." He said, "That's all right." I said, "Well, if you want me, I will write them down on a piece of paper and hand them to you that way." I said, "Would that be sufficient?" He said, "No, that's all right, just so Mike knows where they are, so everything is understood." And then we agreed on abatement times and everything, sitting there in the mine office, outside.

* * *

Q. Both agreed that that procedure would be fine?

A. Yes, sir.

Mr. Stevens testified that he returned to the mine on October 29th, and checked the areas which he had inspected the previous day. He determined the float coal citation had been abated by rock-dusting the affected area. The permissibility citation had already been abated on October 28, and the guarding citation for the No. 7 belt tail roller had also been abated to his satisfaction that same day. The other guarding citation for the No. 2 belt tail roller still had until November 2, to be abated and he did not check it out on October 29, although he subsequently terminated the citation on November 3, after confirming that the condition had been corrected (Tr. 34-40).

With regard to the coal accumulations citation No. 888864, Mr. Stevens testified that when he went back to the area on October 29, he found that no work had been done to clean up the cited accumulations. He discussed the matter with Mr. Hess, and was informed by Mr. Hess that the shift foreman had advised him that the accumulations condition had been taken care of. Since Mr. Stevens saw no evidence of any clean-up or rock-dusting efforts regarding the accumulations, he orally advised Mr. Hess that a section 104(b) withdrawal order was on the 3rd left belt conveyor section, and he did so at 9:22 a.m. Mr. Stevens then continued his inspection, and after coming out of the mine that same evening he reduced all of the citations, including the section 104(b) withdrawal order and the terminations for the abated citations, to writing on the MSHA citation forms, and gave them to Mr. Hess. Mr. Stevens conceded that prior to this time, none of the citations were reduced to writing and none were served on the operator in writing, and but that he verbally advised Mr. Hess when they were underground on October 28th, that citations for the violations would be issued.

With regard to the accumulations citation No. 888864, Mr. Stevens stated that while they were "not that bad" when he returned to the mine on October 29th, he was concerned that if the conditions were permitted to continue, any resulting additional accumulations would eventually pile up against the belt and pose a hazard. He issued the 104(b) closure order because he found this action necessary to insure the safety of miners in the section. As for the abatement time to correct the conditions initially cited in the underlying citation No. 888864, Mr. Stevens maintained that he did not fix the time for abatement as 8:30 a.m., October 29th, but that Mr. Hess told him the conditions would be corrected on October 29th. The subsequent abatement and clean up after the order issued took approximately an hour and 15 minutes.

Mr. Stevens could not recall when he came out of the mine on October 29, since he conducted a noise survey and other inspection chores. He also stated that at the time he reduced all of the citations and the order to writing, Mr. Hess said nothing to him. Mr. Stevens also confirmed that on past inspections of other mines, he has had occasion to serve citations by certified mail, but that in these instances the mine operator was not on the premises when those inspections were conducted (Tr. 40-45).

On cross-examination, Inspector Stevens testified that the citations in question are the first ones that he has issued orally to the New River Company and then back-dated, and he confirmed that he has never mailed any citations to the company. He also confirmed that he issued the modifications to the citations on November 2, 1981, to reflect that they were initially issued verbally and then reduced to writing and that he did so on instructions from his supervisors in MSHA's district office.

With regard to the guarding citation (888861), which he terminated on November 3, 1981, he confirmed that it was possible that the condition

was corrected earlier, but November 3 was the next opportunity to confirm that abatement had been achieved. As for citation 888862, the guarding citation for the No. 7 conveyor tail roller, he confirmed that Mr. Hess immediately corrected the condition and that he (Stevens) told Mr. Hess that he would accept that correction or repair as abatement of the citation. Mr. Stevens also stated that the Union normally conducts the preshift examination on the section and he had no reason to believe that the examination was not made.

Mr. Stevens stated that at the time he observed the float coal dust condition (citation 888863), he informed Mr. Hess that a citation would be issued, but that he did not specifically inform him that he was issuing a verbal citation while underground at the location of the infraction. He also confirmed that he had no evidence that the required preshift examination had not been made. With regard to the permissibility citation (888865), Mr. Stevens acknowledged that he did not consider this to be a serious violation because the condition could have occurred between the weekly required inspections, and he had no evidence that such inspections were not made. He also confirmed that Mr. Hess took immediate action to correct the cited condition.

With regard to four of the citations which he issued, namely the two guarding citations, the float coal citation, and the permissibility citation, Mr. Stevens acknowledged that they were all timely abated in good faith by the operator and that the likelihood of any injury or occurrence as to all of these citations was remote.

With regard to the accumulations citation which he issued (888864), Mr. Stevens indicated that there may have been some confusion because the written citation which he subsequently issued on October 29, does give the impression that the accumulations at the roof fall area extended for a total of 125 feet. However, he maintained that while underground on October 28, he did show Mr. Hess where the accumulations were present around the fall area, and going inby toward the face from the fall for an approximate distance of 100 feet. He left no written notation of this condition with Mr. Hess on the day of the inspection, but did advise him that a citation would be issued (Tr. 46-59).

Mr. Stevens testified that when he returned to the mine on October 29, and went underground to the location of the accumulations which he had observed the previous day, he found no evidence that any clean-up had taken place. He found no evidence of any partial abatement, and maintained that nothing had been done to correct the conditions in question. He remained in the area while the accumulations were cleaned up to abate the citation, and abatement was achieved by the first shift crew and he terminated the citation at 10:38 a.m., that same day.

Mr. Stevens confirmed that he discussed the conditions he observed on October 28 with Mr. Hess as well as with mine superintendent Bays. He informed them that he did not have a supply of citation forms with

him, but that he could return to his office in Mt. Hope, some five miles from the mine, to obtain some. Mr. Bays said "no problem", but he also may have said "handle it any way you want", but he was not certain about these statements. Mr. Stevens stated that MSHA policy is that an inspector does not take the "citation book" of forms underground during the inspection and that they are "verbally" issued underground and then reduced to writing on the surface from notes made while underground, and copies are given to the operator or his representative. Mr. Stevens stated that when he discussed the cited conditions with Mr. Hess after the inspection on the surface, he was left with the impression that Mr. Hess knew precisely what he had cited and what needed to be done to abate the conditions in question. He also stated that he advised Mr. Hess that he would return to the mine the next day, October 29, and would serve the written citations to him at that time (Tr. 60-77).

Testimony and evidence adduced by the contestant-respondent

Michael Hess, safety inspector, testified that this was the first time that an inspector had issued verbal citations and then reduced them to writing the day after the inspection. He confirmed that he accompanied Mr. Stevens during his underground inspection of October 28, and that they were underground approximately 4 to 6 hours. He and Mr. Stevens discussed the conditions which were observed underground after they came to the surface at approximately 2:30 or 3:00 p.m., and that Mr. Stevens had pointed out to him the areas of the mine which he found objectionable. Mr. Bays was present during the discussions on the surface after the inspection, and Mr. Stevens advised them that he did not have a supply of citation forms with him. Mr. Hess confirmed that the mine "had five citations", but that Mr. Bays advised Mr. Stevens that "we do not accept verbal citations". When Mr. Stevens asked Mr. Bays what he wanted him to do, Mr. Bays replied "I am not your supervisor and cannot tell you what to do".

Mr. Hess stated that the MSHA district office is approximately 2-1/2 miles from the mine site, and that when Mr. Stevens returned the next day, October 29, he first went underground, and then came to the surface later that day and wrote out all of the citations, and back dated them to show they were issued on October 28. Mr. Bays was present when this occurred, and he commented to Mr. Stevens "we will beat" or "we will win this one" because the citations were back dated. Mr. Hess stated that the instant case is the first time in his seven or years experience in the mines that an inspector has issued verbal citations, and then back-dated them.

With regard to the guarding citation for the No. 2 belt conveyor tail roller (888861), Mr. Hess stated that the condition was corrected by the evening shift on October 28, and the required repairs were "not that involved". Therefore, in his view, the conditions were corrected before the written citation was issued on October 29.

With regard to the accumulations citation (888864), Mr. Hess testified that it was his understanding that on October 28th Mr. Stevens was concerned about coal accumulations which were present for a distance of approximately 100 feet, starting at the roof fall location, and going inby towards the working face. He recalled that he and Mr. Stevens walked over the fall and when they reached the inby area, Mr. Stevens verbally advised him that this was the area that needed to be cleaned up. Mr. Hess stated that after this conversation, he advised the evening shift foreman on October 28th that the area inby the fall needed to be cleaned up in order to abate the conditions which Mr. Stevens brought to his attention. When Mr. Stevens returned the next day, October 29, the inby side of the fall had been cleaned up for a distance of 75 to 100 feet, but that the outby side of the fall had not. When Mr. Stevens observed that the outby area of the fall had not been cleaned, he advised Mr. Hess that he was issuing a section 104(b) closure order, and that the affected area would include the outby and inby side of the fall. Additional people were brought to the area to clean-up at both locations, and after they came to the surface, Mr. Stevens wrote the order and abatement at approximately 2:00 p.m. on October, and served it on Mr. Hess (Tr. 77-90).

On cross-examination, Mr. Hess conceded that during the October 28th inspection and observations of the conditions which were subsequently reduced to writing, Mr. Stevens did advise him that the company would be cited for the violations in question. Mr. Hess also conceded that he understood exactly what he was being charged with, and that he also agreed with the abatement times discussed with Mr. Stevens. However, with regard to the accumulations citation, Mr. Hess stated that he did not return to that location until he accompanied Mr. Stevens back underground on October 29. Seven to ten men were assigned to clean up the area outby the fall on October 29, and it took approximately one hour to clean up accumulations on top of the fall, as well as on either side of the fall. He conceded that he understood why the order was being issued, but maintained that the normal practice was to issue a written citation after coming out of the mine, and that the issuance of verbal withdrawal orders was not the normal practice. He also confirmed that all of the citations, except for one belt guarding citation, which had several days yet to run for abatement, were terminated by Mr. Stevens on October 29 (Tr. 90-100).

Van Bays, mine superintendent, testified that he was aware of the fact that Mr. Stevens conducted an inspection at the mine on October 28, 1981, and acknowledged that Mr. Stevens informed him that the mine would be cited for certain violations. He also confirmed that Mr. Stevens advised him that he had no citation forms with him and that he would issue them verbally. When Mr. Stevens volunteered to go to his office to get his form book, Mr. Bays indicated that "I wasn't his boss, that I couldn't tell him what to do" (Tr. 103).

Mr. Bays stated that he never told Mr. Stevens that he would accept the written citations the next day, and he denied acknowledging to Mr. Stevens that he would not object to the citations being written

the next day and backdated. He also denied that he agreed to any abatement periods on October 28, and no one in his presence accepted the verbal citations on behalf of the company, nor did anyone agree to any abatement periods.

Mr. Bays stated that he had never previously been served with oral citations and this was his first such experience since he has been a mine superintendent. After his conversation with Mr. Stevens, Mr. Stevens told him that he discussed the cited conditions with Mr. Hess, advised him what had to be done, and left the mine. He returned the next day, and issued the written citations, to Mr. Hess (Tr. 103-104).

On cross-examination Mr. Bays acknowledged that on October 28 he knew that the mine had been inspected by Mr. Stevens, and he confirmed that the mine had been cited by Mr. Stevens. He also confirmed that he has never refused acceptance of written citations. He conceded that the violations found by Mr. Stevens on October 28 were discussed with Mr. Hess and were discussed with him. He also stated that this was normal procedure. He also indicated that at times he or the mine foreman routinely agreed to abatement times. In this case he was not in the mine with Mr. Stevens and did not know whether the mine foreman was there. Since Mr. Hess does not direct the mine force he has no jurisdiction to agree to any abatement times (Tr. 106).

Mr. Bays indicated that when Mr. Stevens returned to the mine on October 29, and handed the written citations to Mr. Hess he (Bays) protested and objected and told him "I'm going to beat you on these" (Tr. 107). He told Mr. Stevens that they were improperly issued (Tr. 108).

In response to bench questions, Mr. Bays stated that he complained to Company safety director Pennock. He also indicated that any judgment as to when a violation can be abated is usually made by the mine foreman, but anything dealing with "instant compliance" is left to Mr. Hess. He would expect Mr. Hess to advise him when abatement requires "lengthy time or more people" (Tr. 110-111).

Emmett Pennock, safety director, testified that he first learned about the citations on October 29, when general manager Buzz Basham advised him that Mr. Stevens had backdated the citations. Upon learning this he called MSHA's subdistrict manager on October 30, and discussed the matter with Mr. Stevens' supervisors (Tr. 114-116).

Inspector Stevens was recalled, and he testified that when he returned to the mine on October 29, all of the citations, except for the accumulations order and one roller guarding citation, had been abated (Tr. 124). With regard to the accumulations citation, Mr. Stevens conceded that his description of the condition indicating that the accumulations began "25 feet outby the fall and extending in for approximately 100 feet" would probably give one the impression that the accumulations extended for a distance of 125 feet (Tr. 127). He confirmed that the starting point of his measurement was the fall itself where the belt was constructed.

He indicated that it was possible that for a short distance on either side of the fall, there was an accumulation that was not cleaned up when he went back to the area on October 29 (Tr. 129).

Mr. Stevens confirmed that his notes reflect that the accumulations which had not been cleaned up extended inby for 75 feet beginning at the fall, and outby for 25 feet, for a total distance of 100 feet (Tr. 133). He also confirmed that his intent was not to cite the respondent for accumulations extending over a distance of 125 feet, and he conceded that any interpretation adding an additional 25 feet resulted from a misunderstanding or confusion (Tr. 134). However, he insisted that when he returned to the area on October 29, he saw no evidence that any clean-up had been done (Tr. 134-135).

Discussion

The section 104(a) citations issued in these proceedings, and the conditions or practices cited by the inspector are as follows:

Docket No. WEVA 82-93-R

Citation No. 888861, October 28, 1981, 8:55 a.m., cites an alleged violation of 30 CFR 75.1722(a), and the condition cited it as follows (Exhibit G-1):

The tail roller for the No. 2 belt conveyor was not guarded to prevent a person from coming in contact with the moving parts.

The time for abatement is shown as 8:00 a.m., November 2, 1981.

Docket No. WEVA 82-94-R

Citation No. 888862, October 28, 1981, 9:45 a.m., cites an alleged violation of 30 CFR 75.1722(a), and the condition cited it as follows (Exhibit G-2):

The tail roller for the No. 7 belt conveyor was not guarded to prevent a person from coming in contact with the moving parts.

The time for abatement is shown as 10:30 a.m., October 28, 1981, and the citation form contains a notation "abated 10-28-81, 10:30 a.m., tail roller for the No. 7 belt conveyor has been replaced".

Docket No. WEVA 82-95-R

Citation No. 888863, October 28, 1981, 9:47 a.m., cites an alleged violation of 30 CFR 75.400, and the condition cited it as follows (Exhibit G-3):

Float coal dust was present on the surface along the No. 7 belt conveyor beginning from the tail roller and extending inby for approximately 20 feet from rib to rib.

The abatement time is shown as 8:00 a.m., October 29, 1981.

Docket No. WEVA 82-96-R

Citation No. 888864, October 28, 1981, 10:15 a.m., cites an alleged violation of 30 CFR 75.400, and the condition cited is as follows (Exhibit G-4):

Loose coal and coal dust 3 to 18 inches in depth were present along the 3rd left section belt conveyor beginning 25 feet outby the 2nd fall and extending inby for approximately 100 feet.

The abatement time is shown as 8:30 a.m., October 29, 1981.

Docket No. WEVA 82-97-R

Citation No. 888865, October 28, 1981, 11:40 a.m., cites an alleged violation of 30 CFR 75.503, and the conditions cited are as follows (Exhibit G-5):

The electrical face equipment 32.Lee Norse continuous mining machine serial no. 3686 approval no. 2F1769A-2 in the 3rd left section (018-0) was not being maintained in permissible condition in that an opening in excess of .004 inches (.005 inches) was present in the phone flange joint of the main contactor panel.

The abatement time is shown as 11:45 a.m., October 28, 1981, and the citation form contains a notation "Repairs were made to the electrical face equipment returning it to permissible condition. 10/28/81, 11:45."

Docket No. WEVA 82-99-R

Citation No. 888867, October 28, 1981, 11:30 a.m., cites an alleged violation of 30 CFR 75.400, and the condition cited is as follows (see copy of citation attached to the pleadings):

Float coal dust was present on the surfaces of the No. 7 entry return aircourse of 3rd left section beginning at survey station No. 8430 and extending outby for approximately 800 feet. This includes the connecting crosscuts.

The abatement time is shown as 8:10 a.m., November 2, 1981.

Section 104(a) of the Act states in pertinent part 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, 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 (emphasis supplied).

Although the parties were afforded an opportunity to file post-hearing proposed findings, conclusions, and supporting briefs, they declined to do so. However, counsel were afforded an opportunity to present arguments in support of their respective positions during the course of the hearing and their arguments in this regard have been fully considered by me in the course of these decisions. It should be noted that New River's counsel candidly conceded that the critical issue in these proceedings concerns the propriety of an inspector issuing verbal citations which can subsequently be converted to withdrawal orders. Counsel argued that the Act requires that all citations be issued in writing with reasonable promptness. In these proceedings, he contends that the effect of the inspector's withdrawal order was to close the mine down before the underlying citation was actually reduced in writing and served on mine management. Counsel argued that before a withdrawal order can issue an operator must be given a reasonable time to abate the conditions or practices cited by the inspector as violations. Here, counsel asserts that the withdrawal order was written and issued at the same time the underlying citation was issued (Tr. 145-147).

New River's counsel argues further that there is no evidence that the inspector ever communicated the abatement time for correcting the alleged accumulations violation to mine management, and that even if he did, there is nothing to suggest that mine management agreed or conceded that the time given to abate the conditions cited was reasonable or that mine management understood precisely what the inspector had alleged in terms of any alleged violation (Tr. 148). Conceding that Inspector Stevens may have assumed that Mr. Hess accepted 8:30 a.m., October 29th, as the time fixed for abatement, counsel argues that it is also reasonable to assume from the record that Mr. Hess also assumed that only the area inby the roof fall location needed to be cleaned, and that the confusion on the part of Mr. Hess and Inspector Stevens obviously resulted from the fact that nothing was immediately reduced to writing on October 28, when Mr. Stevens initially observed the alleged accumulations which he cited as a violation (Tr. 149).

MSHA's counsel argued that since the inspector ultimately issued the citations in writing to a representative of the mine operator within 24-hours of his observations of the conditions and practices which he believed constituted violations of the cited mandatory standards, he complied with the statutory mandate that they be issued with reasonable promptness. Further, counsel argued that the mine operator in this case was not ignorant or oblivious of the conditions which the inspector found during his inspection, nor was he ignorant of the fact that the inspector would return to the mine the next day and issue the citations in writing. Since most the conditions cited as violations by the inspector were immediately abated, counsel asserts further that the operator knew precisely what the inspector had in mind. In support of this conclusion, counsel points to the fact that four out of the five citations were abated the same day the inspector observed the conditions (Tr. 11-12).

During the course of the hearing, New River's counsel conceded that he was not concerned over the amount of the civil penalties initially assessed against the respondent for the citations, and that the company's concern is with the principle of an inspector issuing oral citations and then later reducing them to writing (Tr. 145). He does not assert that the penalties are unreasonable (Tr. 159). Counsel further asserted that the respondent is chiefly concerned over the withdrawal order being issued orally by the inspector, and he contended that the inspector's failure to reduce the underlying citation, as well as the order, immediately to writing has led to the confusion as to precisely what was charged as a violation and what had to be done to accomplish abatement within a reasonable time so as to preclude any unreasonable shutting down of mine production (Tr. 150).

New River's counsel candidly conceded during the course of the hearing that insofar as citations 888861, 888862, 888863, and 888865 are concerned, the respondent does not contest the fact that the conditions or practices observed by the inspector as stated on the face of the citations in question in fact existed (Tr. 13, 158). Counsel candidly admitted that the thrust of the contests, aside from the argument that the citations were not reduced to writing with reasonable promptness, focuses on the withdrawal order and the underlying citation which preceded it (Tr. 13).

Findings and Conclusions

Dockets WEVA 82-93-R, 82-94-R, 82-95-R, 82-97-R, and WEVA 82-173

With regard to the issue concerning the failure of the inspector to reduce citations 888861, 888862, 888863, and 888865 to writing immediately after he observed the conditions on October 28, 1981, I conclude and find that on the facts of these proceedings the inspector did not act illegally or unreasonably. He simply forgot his citation forms and verbally advised mine management's representative of his findings, specifically advised him that citations were in fact issued but would be reduced to writing the next day when he returned to the mine. Under these

circumstances, I conclude and find that the inspector acted with "reasonable promptness" as required by section 104(a) of the Act. Further, from the record adduced in this case I cannot conclude that mine management was prejudiced or otherwise aggrieved by the inspector's failure to issue written citations on the afternoon of October 28 before he left the mine site. Even though mine superintendent Bays indicated that he specifically told the inspector that he would not accept oral citations, both he and Mr. Hess candidly acknowledged that the inspector discussed the conditions and practices cited in the aforementioned four citations with Mr. Hess and that Mr. Hess knew precisely what he was being charged with and what had to be done to accomplish abatement. Mr. Hess accompanied the inspector during his inspection rounds, was with him when the inspector pointed out the infractions, and Mr. Bays conceded that he was present in the mine office when the inspector discussed the conditions cited with Mr. Hess after they came to the surface.

I conclude and find that MSHA has established the fact of violations with respect to citations 888861, 888862, 888863, and 888865 by a preponderance of the credible evidence adduced in these proceedings. In addition, on the facts presented here with regard to each of those citations I further conclude and find that abatement was achieved almost instantaneously with respect to citations 888862 and 888865. Accordingly, I cannot conclude that the time fixed for abatement was unreasonable as to those citations. With regard to citation 888861 the inspector testified that the No. 2 belt conveyor tail roller condition was corrected when he returned to the section on November 3 and terminated that citation. He also indicated that the condition may have been corrected earlier, but that November 3 was the next opportunity he had to confirm the abatement. In these circumstances, New River has not established that the time fixed was unreasonable and I find that it was not. As a matter of fact, Mr. Hess conceded that the roller repairs were "not that involved" and that they were completed by the evening shift of October 28.

With regard to the float coal dust citation 888863, Inspector Stevens testified that when he returned to the mine on October 29, the area which he had cited had been rock-dusted and he terminated the citation that same day. New River has advanced no argument that the time fixed to abate these conditions were unreasonable and I conclude and find that it was not.

In view of the foregoing findings and conclusions, citations 888861, 888862, 888863, and 888865 are all AFFIRMED, both as to the fact of violations and the reasonableness of the times fixed for abatement. In addition, New River's contentions that these citations were illegally issued because they were not reduced to writing and served on the operator on October 28, before the inspector left the mine site are REJECTED.

Dockets WEVA 82-96-R and 82-98-R

The question here is whether the failure by the inspector to reduce the underlying citation to writing on the day of the inspection has resulted in prejudice to the respondent. Since the citation served

as the basis for the subsequent withdrawal order for failure to timely abate the conditions cited, the circumstances surrounding the issuance of both documents becomes critical. Citation No. 888864 (Exhibit G-4), describes the "conditions or practices" as follows:

Loose coal and coal dust 3 to 18 inches in depth were present along the 3rd left section belt conveyor beginning 25 feet outby the 2nd fall and extending inby for approximately 100 feet.

The subsequent section 104(b) withdrawal order, No. 888866 (Exhibit G-6), states in pertinent part as follows:

No effort was made to remove the loose coal and coal dust from under and along the 3rd left section belt conveyor.

The conditions observed by the inspector while underground on October 28, resulted in the subsequent issuance of a section 104(a) citation charging the respondent with a violation of section 75.400 for failure to clean up certain accumulations of loose coal and coal dust. The inspector orally advised Mr. Hess on October 28 that he had cited the violation, but stated that he would reduce it to writing when he returned to the mine the next day. Upon his return the next day, the inspector returned to the location where he had previously observed the accumulations, and after concluding that no work had been done to clean them up he advised Mr. Hess that he was issuing a section 104(b) closure order. The written citation and withdrawal order were subsequently served after the inspector came out of the mine on October 29, and after the conditions were abated. In short, the inspector reduced the underlying citation, the withdrawal order, and the terminations all to writing simultaneously on October 29, but he back-dated it to show October 28, as the date of its issuance.

In support of his citation, the inspector testified that while underground with Mr. Hess on October 28, he pointed out to Mr. Hess the area where the accumulations were located. The inspector's testimony is that the accumulations were present "around the fall area, and going inby toward the face from the fall for an approximate distance of 100 feet". When the inspector reduced the citation to writing on October 29, he described the location of the accumulations as "beginning 25 feet outby the 2nd fall and extending inby for approximately 100 feet". Thus, I conclude that it is reasonable to infer that the inspector was concerned about coal accumulations extending over an area of approximately 100 feet, and that the basis for his belief that a violation of section 75.400 occurred was the fact that he saw coal accumulations present over that distance.

Mr. Hess testified that when the inspector pointed out the accumulations to him, it was his understanding that the accumulations were present for a distance of 100 feet, starting at the roof fall location and going inby

towards the working face. Thus, at this point in time while both men were together underground on October 28, it would appear that there was a meeting of the minds. That is, both of them apparently conceded the presence of coal accumulations for a total distance of approximately 100 feet, starting somewhere around the fall area and proceeding inby toward the working face. Mr. Hess testified that while underground on October 28, he and the inspector walked over the fall, and after reaching the inby side of the fall location the inspector advised him that this was the area that needed to be cleaned up. Mr. Hess testified further that he advised the evening shift foreman that same day that the area inby the fall needed to be cleaned, and Mr. Hess assumed that this had been done by the time the inspector returned the next day.

The starting point of the location of the accumulations is most critical to any determination as to whether the respondent made any reasonable efforts to achieve compliance. It is also most critical to the question as to whether or not the inspector communicated to the respondent precisely what had to be done to achieve abatement. As previously noted, a reasonable inference to be drawn from the testimony of both Mr. Hess and the inspector is that when they were both underground on October 28, they agreed that coal accumulations were present at or near the location of the roof fall. However, the written description of the conditions cited by the inspector on the face of the citation when he finally reduced it to writing on October 29, gives the impression that the inspector started at a point outby the fall for some 25 feet and then added an additional 100 feet, thereby giving the impression that the affected area encompassed a total of 125 feet. As a matter of fact, during the hearing the inspector candidly conceded that this was the case. He also conceded that his written citation, made after the time he initially verbally discussed the matter with Mr. Hess, caused some confusion. What transpired after the inspector returned to the mine on October 29, supports a conclusion that there was some confusion and a discussion of this follows.

When the inspector returned to the mine on October 29, he went underground to re-examine the area where he originally discovered the accumulations. He maintains that no work had been done to clean up the accumulations. Mr. Hess maintains that the area inby the fall had been cleaned up but that the inspector was disturbed because the area outby the fall had not been cleaned, and that this is what prompted him to issue the withdrawal order. Significantly, Mr. Hess indicated that the order was terminated after the outby area, as well as the area on top of the fall, as well as the area on either side of the fall, was cleaned up. In short, Mr. Hess contended that the area which the inspector expected to be cleaned up on October 29, was not the same area that he had in mind when he verbally discussed it with him the day before. Mr. Hess indicated that the area which had been cleaned up encompassed 75 to 100 feet, and he obviously believed that abatement was achieved. On the other hand, if the inspector had an additional 25 feet in mind, as well as the area immediately on top of the fall and to either side, then there obviously has not been a meeting of the minds as to precisely what was required to achieve abatement.

On direct examination, Inspector Stevens first testified that he fixed the abatement time for the clean-up of the accumulations as 8:30 a.m., October 29. He stated that he believed this time to be reasonable because the accumulations were "not that extensive" and that one man working one shift could have cleaned them up within the time allowed. He later testified that he did not personally fix that time for abatement but that Mr. Hess indicated to him on October 28th while they both were underground that the accumulations would be taken care of the next day (October 29). The inspector's "narrative statement" (Exhibit G-6), states that "A 104(a) citation had been issued the day before, and the operator said the condition would be corrected but no effort was made to correct it", and Mr. Stevens testified that when he asked Mr. Hess how long he needed to abate the conditions, Mr. Hess advised him that he did not know and that he had to check with mine management first, but that Mr. Hess assured him the conditions would be taken care of "in the morning".

Inspector Stevens testified that when he went back to the mine on October 29, to check on the accumulations which he had cited he found that they were "not that bad", and that after his withdrawal order issued it took approximately an hour and 15 minutes to clean up and abate the order. Mr. Hess testified that in order to abate the order seven to ten men were assigned to clean up the area outby the fall, and that it took an hour to clean up the accumulations on top of the fall, as well as to either side of that location. Given these circumstances, I can only conclude that the presence of coal accumulations at the fall location progressed from a situation which the inspector first considered was "not that extensive", to "not that bad", to a major clean-up operation requiring a crew of seven to ten men shoveling coal for approximately an hour or more both inby and outby the fall, as well as on top of the fall and to either side.

I conclude and find that the preponderance of the evidence establishes the existence of coal accumulations amounting to a violation of section 75.400. I cannot conclude that MSHA has established that the inspector fixed a reasonable time for the abatement of the cited conditions, nor can I conclude that he communicated this time to mine management. I further find and conclude that the failure by the inspector to reduce the section 104(a) citation to writing before he left the mine on October 28, at the conclusion of his inspection, prejudiced the respondent in that it resulted in a withdrawal order based on certain alleged conditions which were never fully communicated to mine representative Hess. I accept Mr. Hess's testimony that the area inby the fall location had been cleaned up and reject the inspector's assertion that the respondent made no effort to clean up the cited accumulations. Had the initial accumulation condition been reduced to writing by the inspector before he left the mine on October 28, even on a blank sheet of paper, he would have had a better case to plead. His failure to do so has prejudiced the respondent here since it subjected it to a withdrawal order for certain conditions which it reasonably believed had been taken care of.

Although I have concluded that the failure to reduce the section 104(a) citation has prejudiced the respondent's ability to make any rational efforts at abatement and compliance, my finding in this regard is limited to that issue. Insofar as any violation of section 75.400 is concerned, I cannot conclude that the respondent was totally oblivious to the fact that a violation had occurred. As a matter of fact, respondent does not dispute the existence of accumulations of coal and the record establishes that it abated what it believed to be the violative conditions. Accordingly, I find that MSHA has established a violation of section 75.400, and to that extent the section 104(a) citation no. 888864 IS AFFIRMED.

In view of my findings and conclusions concerning the issuance of the withdrawal order, the section 104(b) withdrawal order, no. 888866 IS VACATED.

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

The parties have stipulated that the Siltix Mine employed approximately 135 miners and had an annual coal production of 175,000 tons at the time of the issuance of the citations in question. I conclude that this was a medium sized mining operation, and I adopt the further stipulation that the penalties assessed for the citations which have been affirmed will not adversely affect the respondent's ability to continue in business as my finding on this issue.

Gravity

With regard to the two guarding citations (888861 and 888862), Inspector Stevens testified that no one was in the area at the time he observed the conditions, the area is not one which is heavily traveled, and that normal operating procedures call for the belts to be shut down when they are cleaned or serviced. In these circumstances, he believed that the possibility of any injury occurring was remote, and I conclude and find that the citations are non-serious.

With regard to the float coal dust citation (888863), while the inspector did not believe that the mere presence of such dust presented a hazard, if it were placed in suspension and ignited by a spark it could present a hazard. However, he indicated that nearby cables were properly insulated and he detected no stuck rollers. Under these conditions, he concluded that the possibility of any accident was remote. Since the affected area was not extensive, and taking into account the inspector's testimony, I find that the citation is non-serious.

Citation 888865 is a permissibility violation concerning an opening in a continuous miner contactor panel in excess of the required .004 inches. The opening was .005 inches, but the inspector detected no methane in the area, the machine was apparently shut down and an electrician summoned immediately to close the gap to the required measurement. Inspector Stevens states that any hazard resulting from the condition cited was improbable and I find that this citation is non-serious.

With regard to the coal accumulations citation (888864), Inspector Stevens testified that when he first observed the conditions no one was in the area, all of the electrical cables in the area were properly insulated, and he observed no stuck conveyor rollers. In addition, the area where the roof fall had occurred had been timbered and supported, and he considered the possibility of any fire to be remote. Under these circumstances and conditions, I find that this citation is non-serious.

Negligence

I conclude and find that the respondent should have been aware of the two guarding conditions, as well as the presence of float coal dust, and coal accumulations. These conditions should have been detected during the preshift examination and the respondent's failure to exercise reasonable care in this regard constitutes ordinary negligence as to citations 888861, 888862, and 888863, and 888864.

With regard to the permissibility citation (888865), Inspector Stevens testified that the respondent may not have known about the condition since it could have occurred during the intervening required weekly inspections of the electrical component in question. Under the circumstances, I cannot conclude that the respondent was negligent in this instance.

Good Faith Compliance

Respondent exhibited extraordinary good faith compliance by immediately correcting the belt roller guarding conditions and the excess gap in the miner contactor panel. Abatement of the float coal dust condition was achieved the same day the citation issued, and the accumulations were cleaned up the next day. I have taken this in consideration in assessing civil penalties for the aforementioned citations.

History of Prior Violations

The parties stipulated that for the 24-month period preceding the issuance of the citations in question in these proceedings the respondent had a history of 176 violations, eight of which were violations of section 75.1722(a), 30 for violations of section 75.400, and 22 for violations of section 75.503.

For an operation of the size and scope of the respondent I do not consider the overall history of prior violations to be particularly bad. However, it does indicate that respondent needs to give more attention to coal accumulations and to the permissibility requirements concerning electrical face equipment, and I have taken the history concerning prior citations for section 75.400 and 75.503 into account in assessing and increasing the civil penalties for the citations which have been affirmed in these proceedings.

As pointed out earlier in these decisions, the parties agreed that the citation issued in this case, No. 888867, is no longer in issue since the respondent-contestant paid the civil penalty initially assessed by MSHA. The parties also agreed that the contest may be dismissed as moot. Accordingly, this contest IS DISMISSED.

Penalty Assessments

In view of the foregoing findings and conclusions, respondent is assessed civil penalties for the violations which have been established as follows:

Docket No. WEVA 82-173

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Section</u>	<u>Assessment</u>
888861	10/28/81	75.1722(a)	\$ 85
888862	10/28/81	75.1722(a)	80
888863	10/28/81	75.400	75
888864	10/28/81	75.400	250
888865	10/28/81	75.503	50
			<u>\$ 540</u>

ORDER

Respondent IS ORDERED to pay the civil penalties assessed by me in the civil penalty case, in the amounts shown above, within thirty (30) days of the date of these decisions, and upon receipt of payment by the petitioner, the case is dismissed.

IT IS FURTHER ORDERED:

1. By consent of the parties, Contested Docket WEVA 82-99-R, IS DISMISSED.
2. Section 104(b) Order of Withdrawal No. 888866, October 28, 1981, IS VACATED.
3. Section 104(a) citation nos. 888861, 888862, 888863, and 888865 are all AFFIRMED, and Contested Dockets WEVA 82-93-R, 83-94-R, 83-95-R, and 82-97-R, are all DISMISSED.


George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SEP 23 1982

SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 81-171
Petitioner	:	A/O No. 36-06658-03003
v.	:	
	:	Thompson Brothers Coal
THOMPSON BROTHERS COAL COMPANY,	:	Company, Inc.
Respondent	:	

DECISION

Appearances: David T. Bush, Esq., Office of the Solicitor, U.S.
Department of Labor, Philadelphia, Pennsylvania, for
Petitioner;
Allan MacLeod, Esq., Pittsburgh, Pennsylvania, for
Respondent.

Before: Administrative Law Judge Broderick

STATEMENT OF THE CASE

The Secretary seeks civil penalties for 2 alleged violations of the mandatory standard requiring guards for mechanical equipment. Pursuant to notice the case was heard on the merits in Hollidaysburg, Pennsylvania, on August 31, 1982. Harry Reichenbach, a Federal coal mine inspector, testified on behalf of Petitioner. Leroy Thompson, Harold Snarrs, Patrick Dickson, and Terry Rothrock testified on behalf of Respondent. Both parties waived the filing of posthearing briefs but each made closing arguments on the record. Based on the entire record and considering the contentions of the parties, I make the following decision.

REGULATION

30 C.F.R. § 77.400(a) provides as follows:

Gears; sprockets; chains; drive, head, tail, and
takeup pulleys; flywheels; couplings; shafts; sawblades;
fan inlets; and similar exposed moving machine parts
which may be contacted by persons, and which may cause
injury to persons shall be guarded.

FINDINGS OF FACT

1. At all times pertinent to this decision, Respondent was the operator of a surface mine in Clearfield County, Pennsylvania, the products of which mine entered interstate commerce.
2. On January 12, 1981, Harry Reichenbach, a duly authorized Representative of the Secretary of Labor, issued citations alleging violations of 30 C.F.R. § 77.400(a), because of the absence of guards on the cooling fan blade and the air compressor belts and pulleys on 2 Euclid R-50 end dump trucks.
3. On January 12, 1981, there were no guards on the fan or on the belts and pulleys described in Finding of Fact No. 2.
4. The fan and belts and pulleys in the vehicle were moving machine parts and were similar to those listed in 30 C.F.R. § 77.400(a).
5. The fan and belts and pulleys described above were accessible and might be contacted by persons examining or working on the vehicles.

DISCUSSION

Respondent attempted to show that it was virtually impossible for a person not suicidally inclined to contact the parts in question while moving. On this issue, I accept the testimony of the inspector, and conclude that a person working around the engine or inspecting it while the engine was running, could inadvertently come in contact with one of the moving parts.

6. Should a person come in contact with one of the moving parts described above, it might cause an injury to that person.

DISCUSSION

Much of Respondent's testimony is to the effect that an injury caused in this fashion would not be serious. I conclude that a serious injury occurring in the manner described is remote, but an injury, however slight, could occur.

CONCLUSIONS OF LAW

1. Respondent is subject to the provisions of the Federal Mine Safety Act in the operation of its mine.
2. The undersigned Administrative Law Judge has jurisdiction over the parties and subject matter of this proceeding.

3. On January 12, 1981, Respondent was in violation of 30 C.F.R. § 77.400(a) because it failed to provide guards for the cooling fans, and the air compressor belts and pulleys on 2 Euclid R-50 end dump trucks which it operated at the subject mine.

4. The violation was not serious, because the likelihood of injury was minimal. Nevertheless, the risk of injury existed. The violation was not of such nature as could significantly and substantially contribute to the cause and effect of a mine safety hazard.

5. Respondent was aware of the conditions cited. However, it was not aware that this condition violated the standard in question. Therefore, I conclude that its negligence was slight.

6. Respondent is a medium sized operator and had no history of prior violations for the 24 months preceeding the citations in question.

7. Respondent abated the conditions cited promptly and in good faith.

8. I conclude that an appropriate penalty for each of the violations cited is \$35.

ORDER

Based on the above findings of fact and conclusion of law, Respondent is ORDERED to pay the sum of \$70 within 30 days of the date of this order for the two violations of mandatory safety standards found herein to have occurred.


James A. Broderick
Administrative Law Judge

Distribution: By certified mail

David T. Bush, Esq., Office of the Solicitor, U.S. Department of Labor,
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Allan MacLeod, Esq., 220 Grant Street, Pittsburgh, PA 15219

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SEP 23 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding	
	:	<u>Docket Nos.</u>	<u>Assessment Control Nos.</u>
v.	:	KENT 81-102	15-11645-03016
	:	KENT 81-103	15-11645-03017
	:	No. 4 Mine	
LITTLE BILL COAL COMPANY, INC., Respondent	:	KENT 81-104	15-11838-03009
	:	KENT 81-105	15-11838-03010
	:	No. 5 Mine	

DECISION

Appearances: George Drumming, Jr., Esq., Office of the Solicitor, U. S. Department of Labor, for Petitioner;
Herman W. Lester, Esq., Combs & Lester, Pikeville, Kentucky, for Respondent.

Before: Administrative Law Judge Steffey

Pursuant to a notice of rescheduling of hearing dated March 29, 1982, a hearing in the above-entitled consolidated proceeding was held on April 22 and 23, 1982, in Prestonsburg, Kentucky, under section 105(d), 30 U.S.C. § 815(d), of the Federal Mine Safety and Health Act of 1977.

The issues considered at the hearing were whether respondent had violated any mandatory health and safety standards and, if so, what civil penalties should be assessed, based on the six criteria set forth in section 110(i) of the Act. At the hearing, respondent used one of the six criteria, namely, whether payment of penalties would cause it to discontinue in business, as its primary defense against payment of the civil penalties which had been proposed by the Assessment Office.

The Defense of Inability to Pay Penalties

Respondent presented two witnesses in support of its claim that being required to pay the total penalties of \$5,565 proposed by the Assessment Office in this consolidated proceeding would require it to file a petition in bankruptcy (Tr. 34). The first witness was Mr. John H. McGuire who is one of respondent's co-owners. Mr. McGuire testified that respondent was operating one mine, the No. 5 Mine, at the time of the hearing held in April 1982. Mr. McGuire stated that he had had to close two other mines within the 3-month period preceding the hearing and that the reason he had had to close the other mines was that he could not find a buyer for the

coal he was producing. Mr. McGuire states that he was producing a rock seam about 57 inches thick along with a coal seam approximately 58 inches thick. The result was that the purchaser of his coal, Utility Coal Company, rejected about 50 percent of the material delivered to it. Although Mr. McGuire was paid \$18 per ton for clean coal, the rejection of 50 percent of the total amount delivered meant that he was actually receiving \$9 for each ton of material delivered to the purchaser (Tr. 20; 40-41).

Mr. McGuire is under contract to sell all the coal he produces to Utility Coal Company. Although Utility, at the time of the hearing, was paying respondent \$18 per ton for clean coal, Mr. McGuire has been notified that the price was going to be reduced by \$2 to only \$16 per ton. Mr. McGuire said that he was steadily losing money at the rate of \$18 and that the further reduction in the price he was receiving for coal would almost certainly force him to discontinue in business. Respondent now owes about \$450,000 in debts, of which an amount of about \$300,000 is owed to the First National Bank of Pikeville and the remainder to companies for supplies and equipment (Tr. 21-22). Mr. McGuire further stated that he would sell everything respondent owns to anyone who would be willing to assume the debts which respondent currently owes (Tr. 22).

The No. 5 Mine, which was in operation at the time the hearing was held in April 1982, produces about 250 tons of coal per day and has 17 employees, including the two co-owners who work in the mine along with their employees. Respondent has to pay its miners about \$450 per week and the two co-owners pay themselves \$500 per week when there are sufficient funds for them to do so; they do not pay themselves at all if funds are not available (Tr. 39). The No. 4 Mine, which was closed in January 1982, produced only 100 tons per day when it was in operation (Tr. 36).

In addition to the generalized testimony given by Mr. McGuire, respondent also presented some detailed financial exhibits which were prepared by a certified public accountant named Fred G. Roark and which were explained at the hearing by an accountant named Gregory A. Reynolds who worked for Mr. Roark's accounting firm at the time the hearing was held in April 1982. Mr. Reynolds introduced as Exhibit A a balance sheet and statement of income for the 5-month period ending February 28, 1982. Mr. Reynolds also supplied a copy of respondent's 1980 Federal income tax return which was received in evidence as Exhibit B. The income tax return shows that respondent made no profit in 1980 and paid no taxes.

Exhibit A shows that respondent has assets of \$321,971.00 and liabilities of \$466,572.53 (Tr. 115). Since respondent's assets are considerably less than its liabilities, the only way respondent's balance sheet could be prepared was to use \$195,326 in negative stockholders' equity to offset the amount by which respondent's liabilities exceeded its assets. The ironic aspect of respondent's financial presentation was that Exhibit A happens to show that respondent operated at a profit of \$48,833.97 for

the 5-month period ending February 28, 1982 (Tr. 118-119). Although a profit of \$48,833.97 was reflected by Exhibit A, that figure did not reflect depreciation for the 5-month period of \$16,352.04 which, when properly subtracted from the \$48,833.97 in profit, showed a reduced profit of \$32,481.93 (Tr. 120).

Even though Exhibit A shows a profit for the period from September 1981 through February 1982, the exhibit quite clearly shows that the profit was used to reduce the negative stockholders' equity shown on the balance sheet. If the profit had not been so used, the balance sheet would have had to reflect a negative stockholder's equity of \$193,434, instead of the negative amount of \$144,601.53 which the balance sheet does show (Tr. 144). Moreover, any profit which respondent might make would have to be applied to a reduction of respondent's indebtedness of \$466,572.53 (Tr. 145). Perhaps the most impressive statement about respondent's true financial condition was made by Mr. Reynolds when he pointed out that respondent has a debt ratio of 145 percent. In other words, respondent not only owes 100 percent of its total assets to its creditors, but owes an additional 45 percent in assets which it does not even have (Tr. 117).

Although Exhibit A reflects a profit of \$32,481.93 for the 5-month period ending February 28, 1982, the exhibit also shows that for the month of February respondent operated at a loss of \$29,978.99 which is consistent with Mr. McGuire's testimony that he cannot presently find a market for his coal and that he was losing money at the rate he was being paid for the diminished amount of coal which he was producing in April 1982 (Tr. 19; 22-23; 141). According to Mr. Reynolds, there was a very poor market for coal throughout the industry in April 1982 and Mr. Reynolds stated that the 5-month profit was entirely the result of respondent's operations in the latter months of 1981 because the price for coal and the market for coal had dropped considerably after January 1982 (Tr. 147; 152).

I find, on the basis of the evidence discussed above, that respondent has clearly shown that payment of large penalties would have an adverse effect on its ability to continue in business.

Failure of Respondent To Provide Supplemental Data

The true significance of respondent's financial data was not fully comprehended by me until I had spent a complete day in reviewing the transcript and the exhibits. At the hearing, therefore, it appeared to me that respondent should present some additional data showing such things as a monthly breakdown of sales and operating expenses as well as a schedule indicating the monthly amounts respondent is required to pay on its indebtedness (Tr. 153). Mr. Reynolds and respondent's counsel agreed at the hearing that such data would be supplied for the record (Tr. 162). After the transcript of the hearing had been received, I wrote a letter on June 7, 1982, to respondent's counsel requesting that he provide me with the supplemental data at his earliest convenience. When I did not receive any

reply to the letter of June 7, I issued a show-cause order on July 23, 1982, requiring respondent's counsel to submit the supplemental information by August 23, 1982. Respondent's counsel filed on August 23, 1982, a reply to the show-cause order. The response stated that Mr. Reynolds, the witness who had agreed to prepare the supplemental data, no longer works for the accounting firm of Fred G. Roark and that respondent's counsel did not know when the supplemental information could be compiled or submitted.

At the time I received the response to the show-cause order, I had not performed as thorough a review of respondent's Exhibit A and supporting testimony as I have now made. In view of respondent's failure to submit the supplemental data, it appeared to me that the Secretary's counsel might wish to withdraw the settlement agreement which he had submitted at the hearing (Tr. 157-161). Therefore, I called the Secretary's counsel and asked him to state whether his position with respect to settlement had changed as a result of respondent's failure to submit the supplemental data. The Secretary's counsel stated that he believed he had given sufficient reasons to justify the settlement despite respondent's failure to submit the supplemental data and that he did not intend to withdraw the settlement agreement or change it in any way.

I also called respondent's counsel and asked him if he could give me any information about his failure to furnish the supplemental data which he had not included in his response to the show-cause order. I concluded from the remarks of respondent's counsel that the wife of one of the co-owners is now performing some bookkeeping with respect to respondent's operations and that her records are not sufficiently maintained to enable respondent's counsel, or the accounting firm of Fred G. Roark, to provide any accurate financial information beyond that which was presented at the hearing.

I have hereinbefore discussed respondent's financial exhibits and testimony presented in support of the exhibits and I have found that the existing evidence in the record is ample to support a finding that payment of large penalties would cause respondent to discontinue in business, if it has not already done so. Therefore, I find that it is unnecessary for respondent's counsel to submit any of the supplemental data which Mr. Reynolds agreed to provide at the hearing (Tr. 153).

CONTESTED VIOLATIONS IN DOCKET NO. KENT 81-102

Testimony was presented by counsel for the Secretary and counsel for respondent with respect to four violations prior to the time when the parties entered into a settlement agreement. I made findings of fact and assessed penalties at the hearing with respect to those four violations. I stated at that time that penalties would be assessed on the basis of five of the six criteria and that the penalties assessed at the hearing would be further reduced if the financial data, to be submitted by respondent on the next day,

proved that the penalties should be reduced under the sixth criterion of whether payment of penalties would cause respondent to discontinue in business (Tr. 47).

Citation No. 734427 10/31/80 § 75.1704-2(c)(2) (Exhibit 2)

Findings. Section 75.1704-2(c)(2), among other things, requires the person who makes weekly examinations of escapeways to record the results of such examinations in an approved book. The inspection was made on October 31, 1980, and the last entry regarding the examinations had been made on October 9, 1980. Respondent's witness did not controvert the inspector's testimony to the effect that the results of the examinations had not been recorded. Therefore, the violation occurred. The inspector's testimony shows that the violation was nonserious because the escapeway was the intake used by the miners to go in and out of the mine and the escapeway was passable. There was a high degree of negligence because the mine foreman admitted that he had not kept the books up to date because he had been preoccupied by the breakdown of equipment (Tr. 48).

Conclusions. As to other criteria, the parties stipulated that respondent operates a small business and that respondent demonstrated a good-faith effort to achieve compliance. Exhibit 1 in this proceeding was a computer printout listing previous violations which have occurred at respondent's mine. That exhibit does not reflect that respondent has previously violated section 75.1704-2(c)(2). A penalty of \$15 was assessed at the hearing on the basis of the foregoing findings of fact (Tr. 50). Since I have hereinbefore found that payment of penalties will have an adverse effect on respondent's ability to continue in business, the penalty will be reduced by \$5 to \$10 for the violation of section 75.1704-2(c)(2).

Citation No. 734428 10/31/80 § 75.305 (Exhibit 4)

Findings. Section 75.305 requires, among other things, that the results of weekly examinations for methane and hazardous conditions be recorded in an approved book. The evidence showed that a violation occurred because the inspection was made on October 31, 1980, and respondent's witness did not controvert the inspector's testimony that no entry had been made in the book since October 6, 1980. The violation was moderately serious because the inspector observed water accumulations in one entry and the section foreman, if he had been making the proper inspections, would presumably have had the water pumped from the entry. There was a high degree of negligence (Tr. 69).

Conclusions. In view of the fact that a small operator is involved, that a good-faith effort to achieve compliance was made, and that respondent has not previously violated section 75.305, a penalty of \$20 was assessed at the hearing. The penalty will be reduced by \$5 to \$15 under the criterion that payment of large penalties will cause respondent to discontinue in business.

Citation No. 734429 10/31/80 § 75.512 (Exhibit 6)

Findings. Section 75.512 requires that a weekly examination of electrical equipment be made and that the results of the examinations be recorded in an approved book. A violation occurred because the inspection was made on October 31, 1980, and no record of the results of weekly electrical examinations had been made since October 9, 1980. The violation must be considered nonserious because the inspector did not know whether any of the electrical equipment was defective and there is insufficient evidence to show that the examinations were not being made. There was a high degree of negligence (Tr. 82).

Conclusions. Since a small operator is involved, a good-faith effort was made to achieve compliance, and no history of previous violations of section 75.512 had been shown, a penalty of \$15 was assessed at the hearing (Tr. 83). Because I have hereinbefore found that payment of penalties will have an adverse effect on respondent's ability to continue in business, the penalty will be reduced by \$5 to \$10.

Citation No. 734430 11/3/80 § 75.326 (Exhibit 8)

Findings. Section 75.326 requires, among other things, that belt haulage entries be separated from intake and return air courses. A violation occurred because respondent's witness did not controvert the inspector's statement that a hole existed in the stopping between the intake and belt entries. The violation was nonserious because the inspector observed water in the belt entry and did not believe that a fire would be likely to occur so as to allow smoke to enter the intake and be transported to the working face. There was ordinary negligence because the hole in the stopping was about 1200 feet from the working face and even the inspector had not observed the hole when he had traveled the belt entry a few days prior to his traveling the intake entry. There is no history of a previous violation of section 75.326. The violation was abated in good faith (Tr. 101).

Conclusions. Based on the findings above and the operator's small size, I assessed a penalty of \$15 at the hearing, but since I have hereinbefore found that payment of penalties will have an adverse effect on respondent's ability to continue in business, the penalty will be reduced by \$5 to \$10.

SETTLEMENT

After testimony had been presented by counsel for both parties with respect to the four citations considered above, and counsel for respondent had presented detailed facts regarding respondent's financial condition, the parties presented an oral motion for approval of settlement with respect to the remaining 41 alleged violations involved in this proceeding. Inasmuch as I had already heard evidence with respect to four of the citations, it was agreed that the penalties I had assessed would be paid as to

those violations and that respondent would additionally pay a total of \$1,000 for the remaining 41 alleged violations, instead of the penalties of \$5,287 which had been proposed by the Assessment Office for those 41 alleged violations. The motion for approval of settlement was made after an evaluation of the types of violations which had been alleged in the remaining 39 citations and two orders and counsel for the Secretary stated that he did not believe that the negligence and gravity associated with the remaining 41 violations were sufficiently great to warrant penalties greater than those agreed upon by the parties in their settlement negotiations. The Secretary's counsel thought the settlement penalties were additionally justified by the fact that respondent is a small operator whose financial condition is very critical (Tr. 157).

Docket No. KENT 81-102

The most serious violations involved in this proceeding were alleged in the citations and orders which were the subject of the proposal for assessment of civil penalty filed in Docket No. KENT 81-102. The other three cases involved in this consolidated proceeding seek assessment of civil penalties for relatively minor violations alleged in citations, whereas the proposal for assessment of civil penalty filed in Docket No. KENT 81-102 seeks assessment of penalties with respect to violations alleged in two orders issued under section 107(a), or the imminent-danger provisions of the Act. Specifically Order No. 734435 was issued on November 11, 1980, and alleged seven different violations of the mandatory health and safety standards, the most serious one being for a violation of section 75.1725 which alleged that the No. 1 underground conveyor belt contained 37 bottom stuck rollers that would not turn when the belt was in operation. Another serious alleged violation was that the roof was in bad condition near Spad No. 2516. In view of the gravity of the violations alleged in Order No. 734435, the parties agreed that penalties of \$360 should be paid for the violations alleged in Order No. 734435.

A penalty of \$100 was also agreed upon by the parties with respect to Order No. 734563 which alleged a violation of section 75.517 because of the existence of an exposed power conductor in the trailing cable for the Wilcox continuous mining machine. The parties also agreed upon the payment of a penalty of \$55 for the violation of section 75.301-4 cited in Citation No. 734561 which pertained to an alleged violation for failure to provide the required velocity of air for the No. 2 entry at a time when the Wilcox mining machine was cutting coal. The primary reason for the relatively high penalty agreed upon in this instance is that the inspector had issued a withdrawal order under section 104(b) in the belief that respondent had failed to make a good-faith effort to abate the violation within the time provided for in the inspector's citation.

The remaining violations alleged in Docket No. KENT 81-102 are of a much less serious nature than those discussed above and I find that the parties, with respect to the remaining alleged violations, have agreed upon

settlement penalties which are consistent with the facts when evaluated in light of the six criteria.

Docket No. KENT 81-103

Eleven violations are alleged by the proposal for assessment of civil penalty filed in Docket No. KENT 81-103. Most of them pertain to electrical matters, such as the failure to use a proper shield at one place on a high-voltage cable, failure to maintain a permanent splice so that it would exclude moisture, failure to maintain a deenergization device in an operable condition, and failure to maintain a ground check monitor circuit in an operable condition. Some nonelectrical violations pertained to failure to guard a tail roller properly and failure to maintain a slippage switch in an operable condition. The Assessment Office had proposed penalties of \$1,000 for the 11 violations involved in this docket, whereas the parties have agreed to settle for payment of reduced penalties of \$160.

When it is realized that the co-owners of the mine also work in it and are generally able to testify rather extensively in support of their invariable opinions that no violation is ever serious for a multitude of reasons, it is unlikely that penalties greater than the settlement amounts would have been assessed by me if testimony had been received from both parties with respect to the 11 violations alleged in this docket. Therefore, I find that the settlement agreement should be accepted, especially in light of respondent's evidence showing that payment of large penalties would cause it to discontinue in business.

Docket No. KENT 81-104

The proposal for assessment of civil penalty filed in Docket No. KENT 81-104 alleges five violations of the mandatory health and safety standards. The Assessment Office proposed penalties totaling \$356 for the five alleged violations, whereas respondent has agreed to pay penalties totaling \$55. The violations were all relatively nonserious in that they involved such matters as an inoperative methane monitor in a mine in which no methane has been detected, an inadequately guarded tail roller, lack of a sufficient number of outlets for hoses on the water line, inadequate insulation on the cable reel on the roof-bolting machine, and failure of the fire sensor to identify the conveyor flights properly. I find that the settlement penalties agreed upon are acceptable in view of respondent's small size and the fact that payment of large penalties will have an adverse effect on its ability to continue in business.

Docket No. KENT 81-105

The proposal for assessment of civil penalty filed in Docket No. KENT 81-105 alleges nine violations for which the Assessment Office proposed a total of \$852 in civil penalties, whereas respondent has agreed to pay penalties totaling \$155. Several of the alleged violations were nonserious in

nature, such as failure to record results of examinations of electrical equipment in an approved book and lack of permissibility on some equipment in a mine in which no methane has been detected. In another instance, a miner was not wearing his self-rescue device because he had forgotten it and left it in his car when he drove to work. Some of the alleged violations, however, were for serious matters such as allowing accumulations of coal and float coal dust to exist in some areas of the mine. Despite the seriousness of some of the alleged violations, I believe that the reduced settlement penalties of \$155 are justified in light of respondent's evidence showing that it cannot continue in business if it has to pay large civil penalties.

In addition to asking that the reduced penalties agreed upon by the parties be accepted, respondent has requested that it be given a period of 60 days within which to pay the penalties resulting from this proceeding. I find that the extended payment period has been justified.

WHEREFORE, it is ordered:

(A) Respondent, within 60 days from the date of this decision, shall pay civil penalties totaling \$45.00 which are allocated as follows to the violations alleged in the four citations listed below:

Docket No. KENT 81-102

Citation No. 734427 10/31/80 § 75.1704-2(c)(2)	\$ 10.00
Citation No. 734428 10/31/80 § 75.305	15.00
Citation No. 734429 10/31/80 § 75.512	10.00
Citation No. 734430 11/3/80 § 75.326	<u>10.00</u>

Total Penalties Assessed After Evidentiary Presentations . \$ 45.00

(B) The oral motion for approval of settlement made at the hearing is granted and the settlement agreement is approved.

(C) Pursuant to the parties' settlement agreement, respondent, within 60 days from the date of this decision, shall pay civil penalties totaling \$1,000.00 which are allocated to the respective alleged violations as follows:

Docket No. KENT 81-102

Citation No. 734431 11/3/80 § 75.1704-2(d)	\$ 20.00
Citation No. 734432 11/3/80 § 75.400	15.00
Citation No. 734433 11/3/80 § 75.1100-2	20.00
Citation No. 734434 11/3/80 § 75.807	10.00
Order No. 734435 11/4/80 § 75.1725	160.00
Order No. 734435 11/4/80 § 75.400	25.00
Order No. 734435 11/4/80 § 75.517	15.00
Order No. 734435 11/4/80 § 75.1103-4	20.00

Order No. 734435 11/4/80 § 75.316	\$ 25.00
Order No. 734435 11/4/80 § 75.200	100.00
Order No. 734435 11/4/80 § 75.326	15.00
Order No. 734437 11/6/80 § 75.523-2	15.00
Citation No. 734438 11/6/80 § 75.316	20.00
Citation No. 734561 11/7/80 § 75.301-4	55.00
Order No. 734563 11/7/80 § 75.517	100.00
Citation No. 734508 11/13/80 § 75.1100-3	<u>15.00</u>

Total Settlement Penalties in Docket No. KENT 81-102 \$630.00

Docket No. KENT 81-103

Citation No. 734509 11/13/80 § 75.804(a)	\$ 15.00
Citation No. 734510 11/13/80 § 75.313	10.00
Citation No. 734511 11/13/80 § 75.503	10.00
Citation No. 734512 11/13/80 § 75.902	15.00
Citation No. 734564 11/13/80 § 75.1100-2(b)	20.00
Citation No. 734565 11/13/80 § 75.1722	15.00
Citation No. 734566 11/13/80 § 75.400	20.00
Citation No. 734567 11/18/80 § 75.603	15.00
Citation No. 734568 11/18/80 § 75.1722	15.00
Citation No. 734569 11/18/80 § 75.1102	15.00
Citation No. 734570 11/18/80 § 75.604	<u>10.00</u>

Total Settlement Penalties in Docket No. KENT 81-103 \$160.00

Docket No. KENT 81-104

Citation No. 734751 12/11/80 § 75.313	\$ 10.00
Citation No. 734754 12/12/80 § 75.1722	15.00
Citation No. 734755 12/12/80 § 75.1100-2	10.00
Citation No. 734756 12/12/80 § 75.503	10.00
Citation No. 734757 12/12/80 § 75.1102-4	<u>10.00</u>

Total Settlement Penalties in Docket No. KENT 81-104 \$ 55.00

Docket No. KENT 81-105

Citation No. 734744 12/11/80 § 75.512	\$ 5.00
Citation No. 734745 12/11/80 § 75.316	25.00
Citation No. 734746 12/11/80 § 75.1100-3	5.00
Citation No. 734747 12/11/80 § 75.1714-2	10.00
Citation No. 734748 12/11/80 § 75.400	25.00
Citation No. 734749 12/11/80 § 75.403	20.00
Citation No. 734750 12/11/80 § 75.503	15.00
Citation No. 734752 12/11/80 § 75.400	25.00
Citation No. 734753 12/12/80 § 75.400	<u>25.00</u>

Total Settlement Penalties in Docket No. KENT 81-105 \$155.00

Total Settlement Penalties in This Proceeding \$1,000.00

(D) Respondent is excused from having to submit the supplemental financial data which was requested at the hearing (Tr. 153; 162).

Richard C. Steffey

Richard C. Steffey
Administrative Law Judge
(Phone: 703-756-6225)

Distribution:

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Herman W. Lester, Esq., Attorney for Little Bill Coal Company, Inc., Combs and Lester, P.S.C., 207 Caroline Avenue, Pikeville, KY 41501-0551 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

SEP 24 1982

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

Petitioner,

v.

C F & I STEEL CORPORATION,

Respondent.

CIVIL PENALTY PROCEEDING

DOCKET NO. WEST 81-93

Assessment Control No.
05-00296-03054 V

MINE: Allen

Appearances:

Katherine Vigil, Esq.
Office of the Solicitor
United States Department of Labor
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1961 Stout Street
Denver, Colorado 80294
For the Petitioner,

Phillip D. Barber, Esq.
Welborn, Dufford, Cook & Brown
1100 United Bank Center
Denver, Colorado 80290
For the Respondent

Before: Judge John A. Carlson

DECISION

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 from an inspection of respondent's underground coal mine. On September 11, 1980 one of the Secretary of Labor's inspectors issued a withdrawal order under section 104(d)(2) of the Act alleging that CF&I had failed unwarrantably to support the roof in the No. 4 entry 7 panel east section in the mine. Specifically, he cited a violation of that part of 30 C.F.R. § 75.200 which provides:

The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs.

The order also alleges that the violation was "significant and substantial." On September 15, 1980, the inspector modified his order to amplify his description of the roof's condition and to note that an unplanned roof fall had occurred on that day in the No. 4 entry. The order was terminated on September 18, 1980.

In this present proceeding the Secretary seeks a civil penalty of \$5,000. CF&I duly contested the proposed assessment, and a full hearing on the merits was held. No jurisdictional issues were raised. Both parties filed post-hearing briefs.

REVIEW OF THE EVIDENCE AND DISCUSSION

I

Undisputed portions of the record show that at the time of issuance of the 104(d)(2) withdrawal order, prior citations had created a proper predicate under the Act. On April 2, 1980, respondent was issued a 104(d)(1) citation alleging a violation of the same standard cited here. On April 3, 1980, respondent was issued a 104(d)(1) withdrawal order based upon coal dust accumulations. There were no intervening "clean" inspections before September 11, the date of the present order. The prior citations were not contested and the proposed penalties were paid.

Inspector Donald Jordan, who issued the order upon which the present proposed penalty is based, insisted that miners be withdrawn from the No. 4 belt entry because of inadequate roof support. Specifically, the inspector testified that he observed cracks and fissures in the roof and evidence of rolling ribs. He also testified that roof beams were sagging and twisted and that he observed cracked and broken timbers. (Tr. 21-24). These conditions, he contended, showed that the roof was inadequately supported and was "extremely hazardous." The condition of the roof, in his opinion, could lead to an unintended roof fall, entrapping as many as twelve miners and causing possible fatalities (Tr. 32).

The inspector believed that his September 12 determinations were substantiated by a roof fall which occurred between the time of that inspection and his followup visit on September 15. This fall occurred primarily in an intersecting cross-cut, but extended into the No. 4 entry, with debris reaching to the belt in the center of the entry, a distance of 12 to 15 feet.

Witnesses for CF&I did not seriously dispute the inspector's observations of the physical condition of the No. 4 entry (Tr. 107), but disagreed with most of his conclusions.

Witnesses for both parties agreed that the approved roof control plan, which called for epoxy-resin roof bolts on four foot centers, was not

adequate in entry No. 4. Respondent's witnesses insisted, however, that at and before the time of inspection, its miners were carrying out an ambitious program of additional shoring, which was sufficient to support the roof.

Jack W. Snow, the mine superintendent, testified that he recognized that "we had undue pressures, both roof and floor" (Tr. 74). In a general way, he also agreed with the inspector that the 7 Panel East Section (entries 4, 5, and 6) had experienced a number of unplanned roof falls prior to the inspection (Tr. 36, 114). He insisted, however, that the addition of supplemental wooden props, spot beams, and matting had kept the roof safe. At one point he put it this way: "At the time I felt that the area was sufficiently supported and probably to the best of our ability for the conditions that we had" (Tr. 77). Snow also showed that 280 props had been set in the No. 4 entry between July 17 and September 11, 1980. Addition of too much support, he testified, could be counter-productive because the floor tended to heave upwards. This phenomenon causes upright supports, (timbers in this instance) to push upwards against the roof or cross beams, resulting in distortion or breakage and an actual weakening of the roof.

Ike Gonzales, an inspector from CF&I's safety department and Edward Griego, assistant foreman for 7 Panel East, gave testimony which tended to support that of Snow.

Witnesses for the parties also differed over another matter: how much of the part of the No. 4 entry that the inspector regarded as dangerous was actually used by miners. By the end of the hearing it was clear that the inspector's concern did not extend to the entire length of the entry. He acknowledged that the "worst part" was from a heavily timbered section near the beginning of the entry at the belt head to a point 200 feet outby the face (Tr. 57). According to Jordan this "worst" area had some spot beams and timbers, as well as the bolts called for in the basic plan, but it was clearly unsafe (Tr. 21, 57-58, 65). The first 100 feet outby the face he felt to be in better condition because it had had less time to deteriorate. Respondent's witnesses did not deny that the installation of supplemental supports had proceeded generally outby to inby, but they nevertheless maintained that all areas were adequately supported.

Inspector Jordan was particularly concerned that during his September 11 inspection he saw miners inby the "worst part" of the roof. He maintained that they could not have passed through the No. 5 entry because it was blocked by a previous fall. (Entries 5 and 6 parallel No. 4.) He also maintained that the No. 4 entry provided the only means of entry and exit because No. 6 entry was also blocked, and that No. 4 was the only designated escapeway. Respondent's witness countered these assertions through testimony that CF&I had properly designated entry No. 6 as an

escapeway despite the presence of a roof fall. Specifically, Gonzales testified that by September the fall area in the no. 6 entry had been made easily passable by timbering and installation of steps over the debris (Tr. 123, 126-127).

Additionally, foreman Griego testified that his four crewman who were inby the cave-in in the no. 5 entry had not travelled there through the full length of no. 4. They had walked there, he asserted, through the no. 5 entry, detouring the length of only two crosscuts (about 130 feet) through no. 4 entry.

Respondent's witnesses did not suggest, however, that miners, except for those installing supports, were forbidden to travel or work in no. 4 beltway entry while it was in the condition observed by the inspector. It was acknowledged, for example, that work would be done on the belt itself whenever necessary (Tr. 118-119). Also, Mr. Griego indicated that before his crew began work on September 11, the graveyard shift had intended to work on a 200 foot extension of the belt, but instead had spent most of their time knocking out a stop in a crosscut to improve air flows to the face (Tr. 138-139).

II

Roof control citations alleging non-compliance with approved plans can usually be proved or disproved by evidence of the simplest sort -- measurement of roof widths and support spacings. Where, as here, however, the parties agree that the general plan is insufficient, and 29 C.F.R. § 75.200, demanding "adequate" control comes into play, determinations become more difficult. Wholly objective criteria are necessarily supplanted in some measure by judgmental determinations.

Respondent's officials believed that the additional supports in the no. 4 beltway entry were sufficient; Inspector Jordan believed that they were not. Having considered all the evidence, I must agree with the inspector. I do so for several reasons. The inspector had a lengthy familiarity with the Allen Mine and the particular formation through which the no. 4 entry and the entire 7 panel East section had been cut. His judgment that major segments of the entry in question remained dangerous despite continuing installation of spot supports is lent credence by the undisputed history of roof falls in that section, and the post-inspection cave-in which partly involved entry 4. In addition, the inspector's certainty that spot installation of additional props and beams was not keeping up with the rate of roof deterioration was unshakeable throughout the trial. Respondent's witnesses, on the other hand, occasionally tended to hedge on their certainty of adequate support. Mr. Greigo, for example, in explaining why he did not express disagreement when the inspector told him the roof was bad, replied:

Well, it didn't look that bad to me, but I always obey what they say,

the federal [sic] usually is supposed
to know a little bit more what they do.
So we take their word quite a bit. (Tr. 139).

He and Superintendent Snow both acknowledged that the September 15 fall which extended in the no. 4 entry would not have occurred with adequate support (Tr. 119, 143).

Accordingly, I find that substantial portions of the roof in the no. 4 entry were inadequately supported in violation of the cited standard. In making this finding I am not unmindful of respondent's contention that the inspector's sole concern with the roof in entry 4 was based upon a mistaken belief that the entire length of that entry was a designated escapeway (respondent's brief at 7). I agree that this was a major concern of the inspector, and that the inspector's belief in that regard was not borne out by the record. Respondent's evidence that two adequate escapeways existed, and that these routes included only a short section of the no. 4 entry, is persuasive. This finding, however, goes only to the gravity of the violation. The record clearly discloses that the cited entry was open to use by miners, and that work on the belt could have proceeded at any time.

I have also considered the contention that placement of additional timbers on a heaving floor may further weaken a roof. The argument lacks substantial merit in that witnesses for both parties noted that props may be "pencilled" or sharpened to minimize this effect. Beyond that, I must endorse the inspector's view that if addition of timbers proved infeasible, respondent was obliged to turn to more elaborate and expensive means of protection, such as steel arches.

III

We now consider the question of penalty. Section 110(i) of the Act requires the Commission, in penalty assessments, to consider the size, negligence, prior history and good faith of the operator, and its ability to continue in business.

The parties stipulated to respondent's large size, (507 employees and 500,000 tons of annual coal production); and that the imposition of the proposed penalty would not impair the mine's ability to remain in business (Tr. 4).

From the evidence I must conclude that the operator was guilty of some degree of fault. Its officials were aware of the conditions upon which the inspector based his conclusion that the roof was dangerous. Since his conclusion was found valid, it follows that respondent should have known of the hazard and violation. It was therefore negligent. On balance, I find the degree of negligence to be moderate.

No specific evidence of respondent's prior history of violation was adduced beyond the two prior orders or citations upon which the present withdrawal order was based. Given the mine's considerable size, its prior history cannot be said to warrant heavy penalty consideration.

The same may be said of respondent's abatement efforts. Although the inspector made clear that little was done on the weekend following his Friday inspection, there is no convincing evidence as to whether anyone was present in the no. 4 entry over the weekend. Abatement followed with good speed after that.

The ultimate evidence shows that the gravity of the violation was less severe than the inspector believed. This is so because, during the times material to his order, the number of miners exposed to the inadequately supported roof was substantially fewer than he envisioned. Also, he was heavily influenced by a belief, which I have determined to be ill-founded, that the no. 4 entry was a necessary escape route from 7 panel east section.

Finally, credit must be given to the respondent for its continuing efforts to shore up the cited roof before the inspection. Although its diligence was not sufficient to meet the threat posed by the deteriorating roof, respondent's efforts showed it was scarcely indifferent to the hazard.

On balance, I find the penalty proposed by the Secretary to be excessive. I conclude that a civil penalty of \$1,800 is appropriate.

IV

In his opening remarks, the Secretary announced his intent to prove that the violation here was "significant and substantial" and was the result of an "unwarrantable failure" to comply with the standard (Tr. 4-5). Respondent, in its post-hearing brief, argued that the facts failed to show unwarrantability. Such special findings are significant because they may lead to a sequence or "chain" of withdrawal orders under section 104 of the Act.

Although both parties approached the hearing with the belief that the validity of special findings was in issue, I am obliged to consider whether I have the power to make such a determination under the statutes. The present case, it must be remembered, did not arise from a contest by respondent of the validity of the 104(d)(2) withdrawal order itself. Respondent had a right to file a timely challenge to the order, but it did not exercise that right. 1/

1/ Section 105(d) of the Act allows 30 days to contest a withdrawal order issued under section 104.

The issue, then, is this: May an operator who fails to contest a 104(d)(2) withdrawal order nevertheless challenge the validity of accompanying special findings in a subsequent penalty proceeding arising from the same violation?

The statutory scheme under which withdrawal order sequences develop is fairly complex. Section 104(d)(1) is the mainspring. It requires the inspector to record on any citation his finding that a 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." It likewise requires him to record any finding that such violation was "caused by an unwarrantable failure" of the operator to comply with a mandatory standard. Should the same inspection, or another inspection within the next 90 days, disclose another unwarrantable failure to comply with a mandatory standard, the inspector must then issue a withdrawal order, requiring closure of the affected mine area. The order remains in effect until the violation is corrected.

Section 104(d)(2) comes into play only when a withdrawal order has issued under Section 104(d)(1). Where a "similar" violation is cited before an interviewing "clean" inspection, the inspecting official must issue another withdrawal order. ^{2/}

Section 104(e)(1) and (2) provide that where an operator has a pattern of "significant and substantial" violations of mandatory standards "he shall be given written notice that such pattern exists." Then, should an inspector find another significant and substantial violation within 90 days from the issuance of the notice, he must issue a withdrawal order for the affected mine area. ^{3/} Under section 104(e)(3), a clean inspection of the mine terminates any pattern of violation which has resulted in the issuance of a 90 day notice.

^{2/} Under the 1969 Coal Act, which used the same language, a "similar" violation was held to mean one arising from an unwarrantable failure to comply. The concept does not require that it bear substantive similarity to the former violation, nor does it require any showing that the violation was "significant and substantial." Ziegler Coal Company, 6 IBMA 182 (1976); Old Ben Coal Company, 1 FMSHRC 1954 (1979).

^{3/} Section 104(e)(4) requires that the Secretary of Labor promulgate regulations establishing criteria for determining when a pattern of violations exists. To date, he has not done so.

Where the Secretary charges an operator with an ordinary violation under section 104(a) of the 1977 Act, and accompanies that charge with special findings, the Commission's position is now clear: The validity of the special findings is fully in issue in a subsequent penalty proceeding. Cement Division, National Gypsum Company, 3 FMSHRC 822 (1981). This should not be surprising, since it has long been accepted doctrine that the existence of the underlying violation may be tested in an operator's challenge to a later-filed penalty proceeding. 4/

Where special findings are attached to a withdrawal order under 104(d)(1) or 104(d)(2), however, the results are not so clear. One line of cases arising under the 1969 Coal Act holds that the validity of a withdrawal order is never in issue in a penalty proceeding based upon the occurrence which gave rise to the order. The present Commission in Wolf Creek Collieries Co., March 26, 1979, Docket No. PIKE 78-70-P, in following the holdings of its predecessor, the Interior Board of Mine Operations Appeals, put it this way:

The Board consistently held that the validity of a withdrawal order is not an issue in a penalty proceeding under section 109 and that it is error to vacate an order in such a penalty proceeding. 5/

To my knowledge neither the old Board nor the present Commission has dealt squarely with the question of how this principle affects possible rights to question special findings in a penalty proceeding.

Relying on these cases, however, at least one judge has held that under the Coal Act where an operator failed to ask for review of withdrawal order, any special findings made in connection with that order become final with the order. Consequently, their validity could not be considered in a penalty proceeding. Clinchfield Coal Company, 2 FMSHRC 290, 292 (1980), Judge Moore.

Although the 1977 Act is indisputably a cognate of the 1969 Act, the enforcement provisions of the two differ in several significant particulars. Most prominent among these is section 104(e) of the new Act which provides for withdrawal orders arising from a "pattern" of significant and substantial violations. This provision had no counterpart under the 1969 statutes. Thus, assuming that challenges to special findings could not be made under the Coal Act in a penalty proceeding subsequent to an unreviewed withdrawal order, it does not necessarily follow that the same would hold true under the present Act.

4/ The Commission has also made it clear that under the 1977 Act an operator may, if he wishes, file an immediate contest of a simple 104(a) citation without waiting for issuance of the Secretary's penalty proposal. This is so whether or not the citation is accompanied by special findings. Energy Fuels Corporation, 1 FMSHRC 299 (1979); Helvetia Coal Company, 1 FMSHRC 321 (1979).

5/ Prominent Coal Board cases which defined this doctrine include Ziegler Coal Company, 2 IBMA 216, 223-224 (1973), Plateau Mining Company, 2 IBMA 303 (1973), and North American Coal Corporation, 3 IBMA 93 (1974).

For the reasons which follow, I am convinced that under the 1977 Act the validity of special findings may be litigated in a penalty proceeding. First, one must note that the Commission in Wolf Creek Collieries, supra, went out of its way to declare that the case presented no issues under the 1977 Act. (See note 1 in that decision.)

My conclusion is chiefly based upon those Commission cases which hold that whenever an inspector finds a violation of a mandatory standard, the allegation of that violation stands on its own feet, even if it results in the issuance of a withdrawal order. Hence, if the withdrawal order is somehow defective, the judge is without authority to vacate the "underlying" violation and the charges survive as a simple 104(a) matter. In Island Creek Coal Company 2 FMSHRC 279 (1980) the principle was set forth as follows:

The Act mandates assessment of a penalty for any violation of a mandatory safety standard, such as 30 CFR § 75.400, whether that violation is alleged in a citation issued under section 104(a), or in a withdrawal order issued under section 104(d) or other sections of the Act. Whether a withdrawal order was properly issued or not (rather than a citation alone) does not affect the fact that a violation of a mandatory safety standard was alleged in that order. That allegation, unless itself properly vacated, survives a vacation of the order it is contained in, and, if proven, the assessment of a penalty under section 110 is required. Thus, whether the October 6, 1978 withdrawal order was properly issued under section 104(d)(1) is not relevant to the assessment of a penalty under section 110 for an alleged violation of a safety standard cited in that order. Therefore, the judge erred in granting the motion to dismiss.

Van Mulvehill Coal Co., Inc. 2 FMSHRC 283, also decided under the present Act, reaches an identical result. A much similar sort of reasoning was applied by the present Commission and by the Coal Board to the 1969 Act. See, respectively, Old Ben Coal Company, 2 FMSHRC 1187 (1980), and Eastern Associated Coal Corp., 1 IBMA 233 (1972).

Island Creek and similar cases can only be read to say that every withdrawal order based upon violation of a mandatory standard contains a 104(a) citation within it, whether that citation is spelled out or not. As to "spelling out," the practice of the Secretary's inspectors has shown little consistency. Often they will issue a "combined citation and withdrawal order," as described by the Commission in Van Mulvehill, supra. At other times, as in the case at bar (and apparently in Island Creek, supra), only the withdrawal order is issued, along with a notation of the mandatory standard allegedly violated. The printed forms used for all these actions are the same, and only the whim of the inspector appears to dictate whether he also checks the box marked "citation" when he checks the one marked "order." Similarly, no set consideration of either law or

policy appears to dictate whether the space on the standard form designated "type of action" is completed only to show, for example "104(d)(2)," as in the present case, or to show "104(d)(2) and 104(a)," as in others which I have seen.

In any event, the thrust of the Commission's holdings appears to be that any withdrawal order founded upon violation of a mandatory standard holds within it a simple 104(a) citation, whether expressed or not.

If that be so, it follows that an operator who forgoes a challenge to the withdrawal order itself, should not be foreclosed from challenging the "underlying" 104(a) citation in the subsequent penalty proceeding. Put another way, if the simple citation survives the Secretary's vacation of the withdrawal order, rationality and consistency dictate that it likewise survive as an issue in the subsequent penalty proceeding. Otherwise, the survival principle espoused by the Commission would be a one way street -- open for Secretary to travel should his withdrawal order be found somehow deficient, but closed to the operator who wishes to dispute the question of violation in his penalty proceeding. I cannot believe that the Commission or Congress intended such an anomalous result. Credence is lent this belief by the Commission's holding in Pontiki Coal Co., 1 FMSHRC 1476 (1979). This case, arising under the Coal Act, involved the propriety of the judge's vacation of a withdrawal order in the later penalty proceeding arising from the unreviewed order. As in the cases cited earlier in this decision, the Commission held that the vacation of the order was improper in the penalty proceeding. It further held, however, that the existence of violation was in issue, and affirmed the violation.

Once we accept the notion that an operator may attempt to disprove violation in a penalty contest arising from an unreviewed withdrawal order, it follows that he should likewise be able to dispute the validity of special findings. I take this view because special findings are clearly incidents of the violation, not the withdrawal order. Section 104(d)(1) of the Act dictates that the inspector shall record such findings where the violation is "significant and substantial" and where it results from an "unwarrantable failure" to comply with a standard. Sections 104(d)(2) and 104(e) also treat these findings as qualities or circumstances of the violation. As for Commission holdings, the decision in National Gypsum, supra, is consistent with the idea that special findings are an adjunct to violation.

I therefore conclude that the parties properly considered the validity of the special findings an issue in this civil penalty case. In so concluding, I do not mean to suggest that the validity of the withdrawal order itself could have been tried in a penalty proceeding. That issue was not presented here, and for purposes of this decision it is assumed that the Commission will adhere to those Coal Board precedents which hold that an order is final unless separately challenged by timely contest or application for review. I simply hold that the scope of those precedents is narrow, giving finality only to the order itself and not the underlying allegation of violation, nor the special findings which are auxiliary to that allegation.

The concept of finality is justifiable and likely necessary because of the summary character of a closure order. If the order could be vacated in a later penalty proceeding, such action could raise troublesome uncertainties about consequences of a closure -- uncertainties which ought to be resolved quickly through a prompt attack on the order itself, by way of a petition for review in an imminent danger case, or by a contest of the order in one arising under 104(d) or 104(e). Such a vacation, for example, could cloud the standing of miners who seek compensation under section 111 of the Act for lost pay because of a withdrawal.

One might argue, of course, that the special finding which is overturned in a penalty case may have served as the very foundation of the withdrawal order. Consequently, to allow litigation of the special finding in a penalty proceeding, while treating the order which rests upon it as final and binding, is contradictory. Such results occur frequently under regulatory statutes, however, and need not be a matter of concern. The same argument could be raised about the examination of the underlying violation in a penalty case following an unreviewed withdrawal order such as was involved in Pontiki, supra. Had the Commission not affirmed the judge's finding of violation in that case, presumably the withdrawal order would have remained valid even though the violative conduct upon which it was based was found not to exist.

The Occupational Safety and Health Review Commission, which adjudicates disputes arising under the Occupational Safety and Health Act of 1970 (29 U.S.C. § 651 et seq.), faced similar arguments in cases involving "failure to abate" citations under that Act. In the typical OSHA abatement case a prior citation for violation of a safety standard has become final by operation of law when an inspector, on subsequent inspection, concludes that the violative condition was not corrected. He then issues another citation charging a failure to abate, a separate offense under the statutes. The Commission, in such cases, holds that the employer, despite the finality of the prior order, may show that no violation existed in the first instance. In York Metal Finishing Company, OSAHR Docket No. 245, [1 BNA OSHC 1655 (1974)], for example, the Commission rejected arguments of res judicata and collateral estoppel based upon the finality of the prior citation, although it did concede that the first citation was indeed final and could not be vacated. Those doctrines were inapplicable, it held, because there had never been an adjudication on the merits. The same may be said under the present mine act.

In the instant case one could also argue that special findings should not be at issue in penalty proceedings because the Secretary should be able to regard those findings as fully established links in the chain possibly leading to additional withdrawal orders. It is likely true, to cite one example, that a finding of "significant and substantial" violation made in connection with a withdrawal order could trigger a 90 day notice under section 104(e) of the Act well before the penalty case arising from the original order reached the hearing stage. This sort of infirmity, however, did not concern the Commission in National Gypsum, supra. Under that case the special findings accompanying the citation plainly resided in some degree of doubt until their validity was decided in the penalty proceeding. In the several months which may pass between the issuance of the citation and the hearing on penalty, such findings might well be used to trigger a 104(d) or 104(e) withdrawal.

One more matter requires attention before I rule on the special findings in this case. Under the 1969 Act, a withdrawal order under 104(c)(2) [104(d)(2) under the present Act] need not be predicated upon a "significant and substantial" finding. The violation giving rise to the closure need only be shown to have been the product of an "unwarrantable failure" to comply. Ziegler Coal Co., 6 IBMA 182(1976). This principle was expressly upheld by the present Commission in a case arising under the 1969 law. Old Ben Coal Co., supra

In this case, however, the question is not whether a finding of "significant and substantial" was essential to the issuance of the withdrawal order (it clearly was not); but whether it was proper to list it as a possible predicate to future orders. May the Secretary's inspector, in other words, properly record a violation as "significant and substantial" despite the fact that he intends to issue a 104(d)(2) order which only requires a finding of "unwarrantable failure"? I hold that he may. Section 104(d)(1) commands inspectors in "any" inspection of a mine to make special findings a part of the citation whenever the elements necessary for such findings are present. If I am correct that every order involving violation of a mandatory standard embodies an underlying citation, it follows that a "significant and substantial" allegation was proper, even though not necessary for the issuance of the 104(d)(2) withdrawal order. This view is in harmony with the entire scheme of sanctions under the Act. Nothing in the Act or legislative history suggests that if a violation qualifies as both "significant and substantial" and "unwarrantable" the Secretary must, depending upon what link in the chain is involved, ignore one or the other. If anything, the legislative history, to the extent it speaks to the matter, implies quite the opposite: that a sequence of "unwarrantable failure" violations and one of "significant and substantial" violations are intended to run parallel to one another. S. Rep. 95-181, 1st Sess., 33 (1977); reprinted in Legislative History of the Federal Mine Safety and Health Act of 1977 at 622 (1978) (Legis. Hist.) The Senate Committee put it this way:

It is the Committee's intention that the Secretary or his authorized representative may have both enforcement tools available, and that they can be used simultaneously if the situation warrants. For example, where an operator has been given a Section 105(c) [104(d) in the final enactment] citation and a 105(d) [now 104(e)] notice, and thereafter an inspection discloses a violation of a "significant and substantial" nature and which is also "unwarranted," the operator will be issued both an order under Section 105(c) and an order under 105(d). The requirements to break a sequence in Sections 105(c) and 105(d) differ, and are intended to be satisfied individually.

The evidence in the case before me shows that the violation was the product of an "unwarrantable failure" to comply with the cited standard. "Unwarranted failure" occurs where the violative condition is one of which the operator had knowledge or should have had knowledge, or which the operator failed to correct through indifference or lack of reasonable care. Ziegler Coal Company, 7 IBMA 280 (1977). Here it is apparent that the operator knew of the conditions of the roof, but believed its abatement efforts sufficient. I have found them insufficient, however, and the failure to comply was therefore "unwarrantable." The previous determination of negligence made with regard to penalty was based upon the same findings as those which constitute an "unwarrantable failure."

I further conclude that the violation was "significant and substantial." In such a violation "... there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." National Gypsum, *supra*. The unstable and inadequately supported roof described earlier in this decision made a collapse or fall reasonably likely. Had that occurred, serious injury for any miners under the fall was almost inevitable.


CONCLUSIONS OF LAW

Based upon the entire record in this case, and consistent with the findings embodied in the narrative portions of this decision, the following conclusions of law are made:

- (1) The Commission has jurisdiction to hear and decide this matter.
- (2) Respondent, C F & I Steel Corporation, violated 30 C.F.R. § 75.200 as alleged in the withdrawal order.
- (3) The violation was "significant and substantial," and was the result of an "unwarrantable failure" to comply with the cited standard.
- (4) The appropriate civil penalty for the violation is \$1,800.

ORDER

Accordingly, the allegation of violation is ORDERED affirmed; the special findings that such violation was "significant and substantial," and the product of an "unwarranted failure" to comply are ORDERED affirmed; and respondent is ORDERED to pay a civil penalty of \$1,800 within 30 days of the date of this decision.


John A. Carlson
Administrative Law Judge

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