

SEPTEMBER 1984

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	Trucking Company, Inc.		

SEPTEMBER 1984

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

Z. B. Houser v. Northwestern Resources Company, Docket No. WEST 83-101-D.
(Judge Vail, July 26, 1984)

Secretary of Labor, MSHA v. Jim Walter Resources, Inc., Docket No. SE 84-23.
(Judge Merlin, July 30, 1984)

Secretary of Labor, MSHA v. Carbon County Coal Company, Docket No. WEST 82-106.
(Judge Moore, Interlocutory Review of July 2, 1984 Order)

Secretary of Labor, MSHA v. Kennecott Minerals Company, Docket Nos.
WEST 82-155-M, WEST 83-60-M. (Judge Morris, August 21, 1984)

Gary Goff v. Youghiogeny & Ohio Coal Company, Docket No. LAKE 84-86-D.
(Judge Melick, August 24, 1984)

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

Secretary of Labor on behalf of John Cooley v. Ottawa Silica Company, Docket
No. LAKE 81-163-DM. (Judge Koutras, August 15, 1984)

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

September 24, 1984

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 :
v. : Docket No. KENT 84-151
 :
PYRO MINING COMPANY :

DECISION

This civil penalty case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982). On August 24, 1984, we directed review of this case, sua sponte, to consider "the question of whether the judge erred in determining an appropriate civil penalty for [order] # 2338185 based on criteria not included in section 110(i) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(i)." We conclude that the judge erred in lowering the penalty amount because of his belief that this Commission's action in lowering certain penalty amounts the same judge had assessed in an unrelated case reflected a general dissatisfaction with his penalty assessments. We conclude further that in the present case a higher penalty is warranted for the violation cited in order No. 2338185, and we assess a penalty totalling \$1,500 for that violation. 1/

The main features of the factual background and procedural history in this proceeding may be summarized briefly. On January 24, 1984, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA"), inspecting Pyro Mining Company's No. 9 Slope underground coal mine, issued two withdrawal orders to Pyro pursuant to section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1). The orders alleged that Pyro had failed to comply with its roof control plan in violation of 30 C.F.R. § 75.200, a mandatory safety standard requiring operators, inter alia, to follow their approved roof control plans, and that the violations were significant and substantial and caused by the operator's unwarrantable failure to comply with the cited standard. The withdrawal order that is the subject of the matter before us (order No. 2338185) stated:

1/ In our direction for review of this case, we stayed the briefing schedule. As discussed in the text, the focus of our concern with the judge's decision is narrow and involves considerations of our own judicial administration. Under these circumstances, we do not deem it necessary to order the submission of briefs by the parties. Accordingly, we have proceeded to decide this case on an expedited basis.

The approved roof control plan ... was not being followed on the No. 5 Unit, ID No. 005, in that the last open crosscut between Nos. 5 and 4 entries (100 feet inby spad No. 1380, #5 entry) was unsupported for an area of approximately 15 ft. long by 20 ft. wide and the area had not been dangered off, so as to warn persons that the area was unsupported.

Pyro filed notices of contest concerning both orders, and an expedited hearing on these contests was held before a Commission administrative law judge on February 28, 1984. At the time of the hearing, the Secretary of Labor had not filed a proposal for the assessment of penalties with respect to the two violations, but the judge consolidated penalty issues with the contests. At the hearing, Pyro stipulated that the two orders properly alleged violations of section 75.200 and that the violations were significant and substantial. The operator limited its contest to a challenge of the inspector's special findings that the violations were caused by an unwarrantable failure to comply with the standard. Following a bench decision rendered at the conclusion of the hearing, the judge issued a written decision on May 15, 1984. 6 FMSHRC 1319 (May 1984) (ALJ).

In his decision, the judge sustained the unwarrantable failure finding in order No. 2338185. However, he vacated the unwarrantable finding in the other order and modified that order to a citation under section 104(a) of the Mine Act, 30 U.S.C. § 814(a), with associated significant and substantial findings. Although the judge had taken evidence at the hearing relevant to penalties, he severed all penalty issues involving the two violations because of his determination that the operator had not had the opportunity to participate in the Secretary's procedures for review of citations and orders set forth at 30 C.F.R. § 100.6. 6 FMSHRC at 1328-32. Neither party sought review of the judge's decision with this Commission.

After the hearing, the Secretary filed his proposal for assessment of penalties and the severed civil penalty case was assigned to the same judge on June 27, 1984. The Secretary proposed the assessment of a \$1,000 penalty for each of the two violations. In a decision issued on July 26, 1984, the judge assessed a penalty of \$1,000 for the violation cited in order No. 2338185, and a penalty of \$25 for the other violation. 6 FMSHRC 1789 (July 1984) (ALJ). ^{2/} We subsequently directed review, sua sponte, limited to the subject of the penalty assessed for the violation cited in order No. 2338185.

^{2/} The Secretary's proposal for assessment of penalties also included a penalty proposal for a third violation not tried in the original hearing involving the contest of the two orders issued on January 24, 1984. The judge severed that matter (6 FMSHRC at 1789-90), and in a separate decision issued September 12, 1984, approved the parties' agreed penalty and settlement of that aspect of this proceeding.

In assessing a \$1,000 penalty for order No. 2338185, the judge reviewed the evidence developed at the hearing relevant to penalty issues and the six penalty criteria contained in section 110(i) of the Mine Act. 30 U.S.C. § 820(i). Concerning the criterion of gravity of the violation, the judge concluded:

The testimony of the inspector and two of Pyro's witnesses shows that the roof was very hazardous in the crosscut where Pyro's section foreman had failed to have the warning devices installed. In view of the evidence showing that the violation was very serious, I believe that a penalty of \$1,000 should be assessed under the criterion of gravity. Since, however, the Commission majority in [United States Steel Corporation, 6 FMSHRC 1423 (June 1984)] ..., have indicated that they think my assessment of civil penalties is excessive, I shall reduce that amount to \$500.

Inasmuch as a large operator is involved, a total penalty of \$1,000 does not appear to be excessive, bearing in mind that an amount of \$500 is being assigned under the criterion of negligence and an additional amount of \$500 is being assigned under the criterion of gravity.

6 FMSHRC at 1794 (emphasis added). We are not troubled by the judge's findings and conclusions with regard to the other five statutory criteria, but we find his discussion of the penalty assessed for the gravity of the violation troublesome and plainly erroneous.

Under the Mine Act, this Commission and its administrative law judges exercise a primary and de novo role at each stage of an adjudicative proceeding involving the assessment of civil penalties. We have described that role recently in Sellersburg Stone Co., 5 FMSHRC 287, 290-94 (March 1983), aff'd, 736 F.2d 1147 (7th Cir. 1984). When a judge's penalty assessment is put in issue on review, we must determine whether it is supported by substantial evidence and whether it is consistent with the statutory penalty criteria. As we held recently, "While a judge's assessment of a penalty is an exercise of discretion, assessments lacking record support, infected by plain error, or otherwise constituting an abuse of discretion are not immune from reversal by this Commission." United States Steel Corp., 6 FMSHRC 1423, 1432 (June 1984).

In discussing the gravity of the violation in this case, the judge indicated that he believed an assessment of \$1,000 under that criterion was appropriate. The only basis offered by the judge for not assessing that amount, and for assessing \$500 instead, was his observation that, "[T]he Commission majority in the U.S. Steel case [supra], have indicated that they think my assessment of civil penalties is excessive...." 6 FMSHRC at 1794. There is no statutory basis for this proffered reason.

It must be emphasized that our judges and we are obliged to decide each case on its own merits. In the U.S. Steel case, we affirmed this judge's conclusions on all substantive issues pertaining to liability and on most penalty issues. We reduced two penalties because of our determination that the evidence and statutory penalty criteria did not support the judge's findings with regard to two of the penalty criteria. 6 FMSHRC at 1431-32, 1434. We did not state, nor did we imply, that the judge's assessment of civil penalties was, in general, "excessive."

Our decision in U.S. Steel was based on the facts of that case, just as the judge's decision in this proceeding should be based on the facts of this case. A judge's dissatisfaction or disagreement with this Commission's decision of a case on review is not a statutory criterion for declining to assess an appropriate penalty in another case.

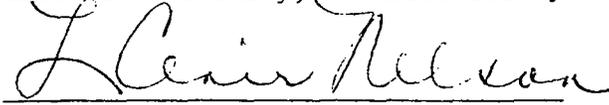
We have reviewed the record and the judge's findings here. The roof control violation cited in order No. 2338185 involved a failure to danger off an area of unsupported roof containing abnormal formations which posed a danger of falling. We find that this violation was of a serious nature and could have exposed miners to serious injury. We conclude that, as the judge himself tentatively opined, \$1,000 is an appropriate amount to be assessed under the criterion of gravity for this violation. We have also reviewed the judge's other findings with respect to the penalty criteria and find them supported by the record and consistent with those criteria. Accordingly, we increase the penalty amount assessed under gravity from \$500 to \$1,000, and assess a penalty totalling \$1,500 for this violation. As modified herein, the judge's decision is affirmed. 3/



Rosemary A. Collyer, Chairman



Richard V. Backley, Commissioner



L. Clair Nelson, Commissioner

3/ The terms of office of our former colleagues, Commissioners Frank F. Jestrab and A. E. Lawson, expired at the end of day on August 30, 1984. Pursuant to section 113(c) of the Mine Act, 30 U.S.C. § 823(c), we have designated ourselves as a panel of three members to exercise "all of the powers of the Commission," including the issuance of orders and decisions in proceedings before this Commission.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 24, 1984

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

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v.

Docket No. PENN 81-171

THOMPSON BROTHERS COAL COMPANY,
INC.

DECISION

This civil penalty case arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982), involves the interpretation and application of 30 C.F.R. § 77.400(a), a mandatory safety standard dealing with the guarding of machine parts. 1/ A Commission administrative law judge concluded that Thompson Brothers Coal Company, Inc. ("Thompson"), violated section 77.400(a) by failing to guard the cooling fan blades and air compressor belts and pulleys on two dump trucks. 4 FMSHRC 1763 (September 1982)(ALJ). On the bases explained below, we affirm the judge's decision.

Thompson operates a surface coal mine located in Clearfield County, Pennsylvania. On January 12, 1981, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") issued citations to Thompson stating that guards were not provided for the cooling fan blades and air compressor belts and pulleys in the engine compartments of two Euclid R-50 dump trucks. 2/ These large trucks are used to haul earth and rock ("spoil") at the mine. Each truck is 14 feet wide, 30 feet long, and 13 feet high. Each is capable of hauling up to 50 tons of spoil. The tires on the trucks are 6 feet in diameter, and the engine compartment areas are approximately 5 feet wide.

1/ 30 C.F.R. § 77.400(a) provides:

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

2/ The citations originally stated that the alternator belts and pulleys were not guarded. The citations were modified subsequently to refer to the air compressor belts and pulleys.

The cooling fan and the air compressor belts and pulleys at issue are part of each truck's engine assembly, and are located in the center of the engine compartment in front of the engine. The engine compartment is accessible from either side of the truck. To gain access to the engine, a miner walks through a 2½-foot space between a front tire and the front end of the truck. To contact the fan blades or the air compressor belts and pulleys, a miner must reach over the truck frame, which is approximately 2½ feet high, and extend his arm a distance of approximately 2½ to 3 feet. The fan and the air compressor belts and pulleys turn only when the engine is running. It is undisputed that there were no guards on the fan blades or air compressor belts and pulleys at the time of the citations. At the hearing before the Commission's administrative law judge, the inspector who issued the citations testified that a miner checking or repairing the engine, while the truck was stationary and the engine was idling, could contact these unguarded moving parts and sustain an injury.

In his decision, the judge found that the cited fan blades and air compressor belts and pulleys were exposed moving machine parts similar to those listed in section 77.400(a). He further found that the fan blades and belts and pulleys were accessible and unguarded. With regard to the possibility of contact, the judge credited the testimony of the inspector over the contrary testimony of Thompson's witnesses. The judge found:

[Thompson] 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.

4 FMSHRC at 1764. Finally, the judge found that such contact with one of these unguarded moving parts could cause an injury. The judge accordingly concluded that Thompson violated the standard, and assessed a civil penalty of \$35 for each violation. We granted Thompson's petition for discretionary review. 3/

On review Thompson's major contentions center around the question of whether the cited machine parts "may be contacted by persons" and "may cause injury." Thompson argues that the proper test for determining the possibility of contact and injury is whether an unguarded machine part subject to the

3/ Before the judge, the Secretary of Labor contended that the violations were significant and substantial within the meaning of the section 104(d) of the Mine Act. 30 U.S.C. § 814(d). The judge found that the violations were not significant and substantial and the Secretary has not sought review of this aspect of the judge's decision.

standard is "reasonably likely to cause harm to the average man." Petition for Discretionary Review 1. Attacking the judge's evidentiary findings in light of this test, Thompson contends that contact with the cited fan blades, pulleys, and belts was extremely unlikely. In its petition for discretionary review Thompson also asserts that the machine parts in question were not the kind to which the standard applies, but Thompson does not further develop this issue in its supporting brief. We conclude that section 77.400(a) contemplates guarding of machine parts subject to the standard where there is a reasonable possibility of contact and injury. We also conclude, however, that the judge's findings are not inconsistent with this test and are supported by substantial evidence. We therefore affirm.

In order to establish a prima facie case of a violation under this standard, the Secretary of Labor must prove: (1) that the cited machine part is one specifically listed in the standard or is "similar" to those listed; (2) that the part was not guarded; and (3) that the unguarded part "may be contacted by persons" and "may cause injury to persons." 30 C.F.R. § 77.400(a). As explained below, we construe this latter requirement to contemplate a showing of a reasonable possibility of contact and injury.

There is no question that the cooling fan blades and air compressor belts and pulleys were not guarded when the citations were issued. We also find that these machine parts were the types of machine parts to which the standard applies.

In Mathies Coal Co., 5 FMSHRC 300 (March 1983), aff'd sub nom. United Mine Workers of America v. FMSHRC, 725 F.2d 126 (D.C. Cir. 1984) (table), we held that 30 C.F.R. § 75.1722(a), the identical standard applicable to underground coal mines, "applies to the specific machine parts listed plus other exposed moving machine parts similar to those listed." 5 FMSHRC at 302. Although cooling fan blades and air compressor belts and pulleys are not specifically listed in section 77.400(a), they are sufficiently "similar" to the parts that are listed to come within the scope of the standard. As in Mathies (see 5 FMSHRC at 302), we apply the ordinary dictionary definition of "similar":

1: having characteristics in common: very much alike ... 2: alike in substance or essentials ... 3a: having the same shape: differing only in size and position

Webster's Third New International Dictionary (Unabridged) 2120 (1971) ("Webster's"). "Fan inlets" are mentioned in the standard and refer to the openings across the front of fans. ("Inlet" is broadly defined as "a place of entrance." Webster's 1165.) The citations in this case were directed to the outlet side of the cooling fans. However, the fan outlet is in this case similar to the fan inlet in that it provides an accessible "place of entrance" to the fan blades. The compressor pulleys and belts are also similar in shape and function to certain specified equipment parts. "Drive, head, or takeup pulleys" are cylinders or

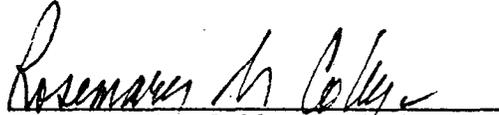
wheels which "change the direction ... of belt travel." U.S. Department of the Interior, Bureau of Mines, A Dictionary of Mining, Mineral, and Related Terms 875 (1968). The air compressor pulleys, on which the compressor belts move, perform the same function. Thus, we affirm the judge's conclusion that section 77.400(a) applies to the cited machine parts. The pivotal inquiry is the possibility of contact with these parts and resultant injury.

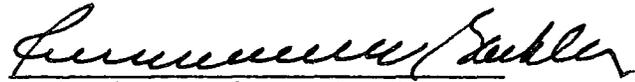
The standard requires the guarding of machine parts only when they "may be contacted" and "may cause injury." Use of the word "may" in these key phrases introduces considerations of the likelihood of the contact and injury, and requires us to give meaning to the nature of the possibility intended. We find that the most logical construction of the standard is that it imports the concepts of reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness. In related contexts, we have emphasized that the constructions of mandatory safety standards involving miners' behavior cannot ignore the vagaries of human conduct. See, e.g., Great Western Electric, 5 FMSHRC 840, 842 (May 1983); Lone Star Industries, Inc., 3 FMSHRC 2526, 2531 (November 1981). Applying this test requires taking into consideration all relevant exposure and injury variables, e.g., accessibility of the machine parts, work areas, ingress and egress, work duties, and as noted, the vagaries of human conduct. Under this approach, citations for inadequate guarding will be resolved on a case-by-basis.

In analyzing the evidence, the judge did not expressly apply a "reasonable possibility" test, but his findings are not inconsistent with that test. There is no dispute that the engines on these trucks were physically accessible and that on occasion mechanics could be called on to examine or work on the engines while the engines were idling. The judge specifically credited the testimony of the inspector that a miner checking or working on the engine while the engine was running could come into contact with any of the cited machine parts. Thompson's witnesses all agreed that contact was possible even though they regarded it as unlikely. At a minimum, contact could result from such causes as a sudden movement, stumbling, or momentary distraction or inattention. We find no basis for overturning the judge's resolution of conflicting testimony regarding the possibility of contact. The judge also found that the possibility of such contact was "minimal." 4 FMSHRC at 1765. On the facts of this case, we construe a "minimal" possibility of contact to be within the realm of reasonable possibility. Given the physical accessibility of the engine compartment, the fact that mechanics could check and work on running engines, and that contact with the cited machine parts could occur, we conclude that a reasonable possibility of contact existed.

The judge also credited the inspector's testimony that contact with the fan blades or the air compressor belts and pulleys could result in injury, although such an injury would probably not be serious. We see no reason to overturn this finding.

For the foregoing reasons, and on the foregoing bases, we affirm the judge's decision. 4/


Rosemary M. Collyer, Chairman


Richard V. Backley, Commissioner


L. Clair Nelson, Commissioner

4/ The terms of office of our former colleagues, Commissioners Frank F. Jestrab and A. E. Lawson, expired at the end of day on August 30, 1984. Pursuant to section 113(c) of the Mine Act, 30 U.S.C. § 823(c), we have designated ourselves as a panel of three members to exercise "all of the powers of the Commission," including the issuance of orders and decisions in proceedings before this Commission.

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
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SEP 4 1984

HARRISON WESTERN CORPORATION, : APPLICATION FOR REVIEW
Applicant :
v. : Docket No. CENT 81-249-RM
: Withdrawal Order No. 151337
: Dated June 15, 1981
SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH : Mt. Taylor Mine
ADMINISTRATION (MSHA), :
Respondent :

SUMMARY DECISION

Before: Judge Carlson

This case comes on for decision upon cross motions for summary decision filed by both parties under Commission Rule 2700.64. ^{1/} All facts are submitted by joint stipulation.

The case arose out of a withdrawal order issued by the Department of Labor's Mine Safety and Health Administration

1/ 29 C.F.R. § 2700.64 states in part:

(a) Filing of motion for summary decision. At any time after commencement of a proceeding and before the scheduling of a hearing on the merits, a party to the proceeding may move the Judge to render summary decision disposing of all or part of the proceeding.

(b) Grounds. A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits shows:
(1) That there is no genuine issue as to any material fact; and
(2) that the moving party is entitled to summary decision as a matter of law.

(MSHA) on October 3, 1979.^{2/} The order was issued under provisions of section 107(a) of the Federal Mine Safety and Health Act of 1977 (the "Act").^{3/} The case reaches me upon the petition for review filed by the Harrison Western Company (Harrison Western). Both parties submitted extensive briefs in support of their respective motions for summary decision.

I conclude that no material facts are in dispute and the case is ripe for summary decision.

ISSUE

The crucial issue to be decided is whether the issuance of the 107(a) withdrawal order challenged by Harrison Western may be sustained in light of the prior issuance of 103(k) ^{4/} withdrawal order covering the same area of the mine.

^{2/} A second order dated June 15, 1981 appears in the file for reasons fully explained in the stipulation. The second is but a substitution for the first. For the purposes of this decision the two are properly treated as one.

^{3/} As pertinent here, that section provides:

"Sec. 107(a) If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section 104(c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist. The issuance of an order under this subsection shall not preclude the issuance of a citation under section 104 or the proposing of a penalty under section 110.

^{4/} Section 103(k) of the Act provides:

In the event of any accident occurring in a coal or other mine, an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the coal or other mine, and the operator of such mine shall obtain the approval of such representative, in consultation with appropriate State representatives, when feasible, of any plan to recover any person in such mine or to recover the coal or other mine or return affected areas of such mine to normal.

THE FACTS

The stipulation of facts filed by the parties clearly sets forth all material happenings surrounding the issuance of the challenged order. I therefore approve it and adopt it as a part of this decision. All exhibits mentioned in the stipulation are appended to this decision. The stipulation, omitting caption and signatures, is as follows:

I. Statement of the Case

This proceeding was commenced by Harrison Western Corporation ("Harrison"), pursuant to Section 107 of the Federal Mine Safety and Health Act of 1977 (the "Act"), for review of Section 107(a) Withdrawal Order No. 151337 dated June 15, 1981 (Exhibit "A" attached hereto), issued to it with regard to the Mt. Taylor Project ("Project") by the Secretary's authorized representative, Glenn C. Johnston. Harrison's Application for Review was timely filed on or about July 15, 1981 and the Secretary's Answer was timely filed on or about July 31, 1981.

Withdrawal Order No. 151337 replaced Section 107(a) Withdrawal Order No. 151295 (Exhibit "B") issued at 2:00 p.m. on October 3, 1979, also by Inspector Johnston. The original Order named "Gulf Mineral Resources (Harrison Western, Inc.)" as operator and was sought to be enforced by the Secretary against Gulf Mineral Resources Company ("Gulf") alone in Docket No. CENT 80-309-M. While that case was pending, the Secretary revised his policy and regulations under the Act to provide for issuance of citations and orders to production-operators and/or independent contractors. 30 CFR, Part 45; 45 F.R. 44494, July 1, 1980. As a result of this policy change and an agreement between the Secretary and Harrison, Withdrawal Order No. 151337 was issued to Harrison on June 15, 1981, on the basis that Harrison would have access to all applicable formal and informal review procedures. Thereafter, motions to vacate Withdrawal Order No. 151295 and to dismiss Docket No. CENT 80-309-M were granted by the Administrative Law Judge assigned to that proceeding.

Since Order No. 151337 replaced Order No. 151295, they are virtually identical in all material respects, except only that Harrison is named alone as the operator in Order No. 151337. The facts which underly and determine the validity of Order No. 151295 are likewise the facts which underly and determine the validity of Order No. 151337 at issue in this case.

II. Description of the Project

A. General.

On the day material to this proceeding, October 3, 1979, the Project was a uranium mine in the construction stage. Gulf was the owner of the Project. Harrison was the primary contractor for the shaft sinking portion of the construction. The Project was located approximately one mile north of San Mateo, Valencia County, New Mexico, and was subject to the Act.

The shaft sinking operation consisted of excavating two parallel, vertical shafts, one twenty-four feet in diameter and the other fourteen feet in diameter. The two shafts were horizontally separated by a distance of about 400 feet and were connected by horizontal tunnels located at depths of approximately 700 feet, 1,600 feet, 2,600 feet, 3,100 feet and 3,200 feet. The planned, total depth of both shafts was 3,300 feet. The primary elements of the shaft sinking operation included excavation, pouring a concrete liner around the circumference of each shaft, installation of air, water and power lines, installation of hoist and other transportation systems, and construction of operating stations in the horizontal connecting tunnels with installation of associated equipment to be used in the mining process.

B. 24-Foot Shaft.

On October 3, 1979, the 24-foot shaft had been sunk to a depth of approximately 3,240 feet. A 220-foot high headframe was located above the shaft on the surface and contained the hoist equipment and control room. A main collar was installed at the surface which completely covered the shaft when its retractable, horizontal doors were shut. The doors were opened only to allow passage of men and materials by way of the hoisting mechanisms. Two subcollars of a similar nature were located in the shaft a short distance below the main collar.

The lower deck of a three-deck Galloway was located at the 3,200-foot level near the bottom of the shaft on October 3, 1979. The Galloway was the working platform from which excavation, muck removal and concrete liner pouring was performed. It was suspended by four 1-3/8 wire ropes from the hoisting mechanism located in the headframe on the surface.

Two 75-cubic foot capacity buckets were used in the shaft for hoisting and lowering men, material, muck and concrete. Each was suspended by a 1-7/8-inch non-rotating wire rope from the hoist mechanism in the headframe. Each was guided by a crosshead which travelled vertically along one pair of the wire ropes suspending the Galloway. In this manner, one bucket travelled along the east side of the shaft (No. 1) and the other travelled along the west side (No. 2). The wire rope suspending each bucket was attached to the bucket by a shackle assembly which was detachable.

A two-deck "chippy cage" travelled along wooden guides attached to the concrete perimeter liner on the north-east side of the shaft. This cage was similar to a small, rectangular elevator enclosed by a combination of welded steel plates and heavy wire mesh. It was suspended from the headframe on the surface by a 1-3/8 inch nonrotating wire rope, and was used for transporting men and performing repairs along the shaft perimeter.

A "basket" had been fabricated at the site for use in hoisting and lowering material and performing repair work in the shaft. It was made of 1/2-inch steel plate and was 4-feet square with sides 42 inches high. At the surface, it could be attached to the shackle assembly of either bucket hoisting cable by four 1-inch wire ropes, each 10 feet long. The other end of these four ropes would be attached to the top corners of the basket by shackles. When the basket was attached in this manner in place of one of the buckets, and with the crosshead chaired in the headframe, the basket could be swung the short distance to the perimeter of the shaft for repair work. When the basket was attached in this manner and suspended freely without being swung to the perimeter, the horizontal distance between it and the "chippy cage" was 17 feet.

An 8-inch diameter "slickline" pipe was installed vertically in the shaft at the perimeter adjacent to the "chippy cage." Directly opposite from the "slickline," a 12-inch compressed air line was installed vertically at the perimeter of the shaft. Both of these lines extended from the surface to virtually the bottom of the shaft.

III. Events of October 3, 1979, Up To and Including the Accident

The crew assigned to work in the 24-foot shaft on October 3, 1979 was under the general supervision of Wayne Thomas, whose title was "walker." This position was equivalent to that of general foreman for the underground shaft sinking operation. Stanley Henry was the "shaft leader" of the crew, which is a position equivalent to foreman. The crew working at Henry's direction in the shaft on that day consisted of Bob Hales, Orlando Castillo, Jack Mathieu, David Stovall and Michael Borody. These five men held the designation of either shaft miner or operator, which were roughly equivalent positions with small wage differentials. All were Harrison employees.

This group met in the construction trailer on the surface to receive directions for the day's work at the start of the shift (approximately 7:30 a.m.) on October 3, 1979. Thomas directed Henry to have four men work on aligning the "slickline" starting at about the 2400-foot level of the shaft, using the "chippy cage" as a work platform. Henry directed Castillo, Mathieu, Stovall and Borody to perform this work in pairs. Because of the strenuous nature of the work and the limited area on the "chippy cage" platform, each pair was to work in alternating two-hour shifts, with the off pair resting at the 2600-level station. Thomas' initial assignment for Henry and Hales was to remove muck from the bottom of the shaft.

Henry and his shaft crew commenced the work as assigned shortly after 8:00 a.m. Later that morning, Thomas came to the bottom of the shaft where Henry and Hales were working to change their assignment. He directed them to install several valves at various points along the length of the 12-inch air line. After shutting off the air supply to the line and opening a valve to bleed the pressure from it, Thomas, Henry and Hales came to the surface in the No. 2 bucket. While Thomas attended to other matters, Henry and Hales gathered together the tools and materials needed to install the valves. With the assistance of the toplanders (Harrison employees assigned to work on the surface), the No. 2 bucket was removed, its crosshead was chaired in the headframe, and the basket was attached to the No. 2 wire rope in place of the bucket. Henry and Hales loaded their tools and materials into the basket, climbed in, and began descending toward the bottom of the shaft through the

collar doors, which were closed behind them. At about the 2400-foot level, they passed Castillo and Mathieu who were working on the top deck of the "chippy cage" aligning the "slickline." As they passed, the two groups waived [sic] their lights and shouted to each other.

Henry and Hales had their backs to each other as the basket descended through about the 2900-foot level at approximately 11:25 a.m. At that point, Hales heard a dull thump and turned to see Henry falling into the corner of the basket. Hales signalled to the hoistman on the surface to stop their descent. He then checked Henry for life signs and found none. He then signalled to the hoistman to bring them to the surface. When they reached the surface, Henry was examined by one of the toplanders who was a paramedic. No vital signs were detected. Henry was taken by ambulance to a nearby hospital in Grants, New Mexico, and pronounced dead on arrival at 12:04 p.m.

IV. Accident Investigation and Order at Issue in this Proceeding

The federal and state mine safety agencies were notified of the accident immediately after the basket reached the surface and Hales was able to inform surface personnel of what had happened. Notification to MSHA was received by the Albuquerque field office at 11:40 a.m. At 11:45 a.m., Inspector Johnston issued Withdrawal Order No. 151293 under Section 103(k) of the Act (Exhibit "C") "to prevent the destruction of any evidence that may be of assistance in investigating the accident and to assure safety of all persons in or near the accident area until the investigation is complete," The area to which that Order applied was described as:

24 ft. diam. shaft, approximately on 2950 foot level in #2 bucket position ...

This Order was not modified in any manner until 8:35 p.m. that evening.

Upon learning of the accident and the Section 103(k) Order, Harrison's safety engineer, David Wolfe, directed all concerned not to disturb any evidence related to the accident and to remove the remaining men from the 24-foot shaft. Accordingly, Castillo, Mathieu, Stovall and Borody, came to the surface by means of the "chippy cage."

MSHA and New Mexico mine safety officials arrived at the Project thereafter from their offices in Albuquerque to commence an investigation of the accident. After examining the collar, basket and "chippy cage" on the surface, they descended into the 24-foot shaft by means of the "chippy cage." They found a 4 1/2-pound steel wedge on the top deck of the Galloway, which was about 36 feet above the bottom deck. They also found Henry's hard hat with a hole in it at the bottom of the shaft below the Galloway. It was determined that Castillo and Mathieu had been using the wedge at the 2400-foot level to hold the "slickline" away from the concrete liner of the shaft. The safety rope which was tied by a double knot through a 3/4-inch nut welded to the wedge had been broken. Castillo and Mathieu had discovered the wedge missing at about the time of the accident when they pulled on the safety rope and found only the frayed ends.

It was, therefore, concluded from the investigation that Henry had been struck by the wedge at approximately the 2950-foot level when it became detached in an unknown manner and fell from the 2400-foot level. It was further determined that neither the "chippy cage" nor the basket was provided with a bonnet or other overhead protection at the time of the accident.

In the early stages of the on-site accident investigation, Inspector Johnston issued Section 107(a) Withdrawal Order No. 151295 at 2:00 p.m. on October 3, 1979 (Exhibit "B") on the basis of his determination that an imminent danger under the Act existed. Inspector Johnston described the area to which the Order was applicable as "24 ft. shaft, #2 bucket position approx. 2950 feet below collar of shaft." The "condition or practice" recited in the Order was as follows:

At approximately 1125 hours on 10-3-79, a fatal accident occurred in the 24-foot diameter shaft. The victim and his partner were being lowered in a conveyance that did not have a protective bonnet installed. An object from above struck the victim on the head at a point 2950 ft. (approx.) below the collar of shaft. A two-man crew was working approximately 500 ft. (about the 2400-foot level) above the unprotected conveyance of the victim and his partner, mentioned above.

Safe shaft work practices shall be implemented, published to employees, and followed.

DISCUSSION

Harrison Western insists that the Secretary's 107(a) withdrawal order is invalid because the essential element of an "imminent danger" was absent at the time the order was issued. This was so, according to the applicant, because all miners who possibly would have been harmed had already been removed from the hazardous area. Also, the basket and the "chippy cage," which were inherent parts of the hazard, had been moved to the surface. Consequently, the argument proceeds, no imminent danger "existed" within the meaning of section 107(a). Moreover, the miners were already afforded protection by virtue of a previously issued 103(k) order.

Before going further we must examine the concept of an "imminent danger." Section 3(j) of the Act defines the term as

... the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated.

Cases dealing directly with the notion of "imminence" are in general agreement that the danger must be one which can cause serious physical harm at any time, but not necessarily immediately.^{5/}

In its opening brief Harrison Western urges that since its men, the basket and the cage were all on the surface when the inspector arrived, we are presented with "... a typical case in which the inspector issued a withdrawal order based on prior circumstances which he claimed had constituted an imminent danger, but which no longer existed."^{6/} It is true that imminent danger withdrawals may not be issued for past dangers. Neither the Commission nor its predecessor, the Interior Board of Mine Operations Appeals, however, has ever suggested that an imminent danger vanishes simply because miners are moved elsewhere or mobile equipment is moved. The danger remains a proper subject of an order until the underlying condition giving rise to the danger is corrected. In Eastern Associated Coal Corp. v. Interior Board of Mine Operations Appeals, 491 F. 2d 277 (4th Cir. 1974), where miners were voluntarily withdrawn from a dangerous area before a withdrawal order was issued under section

^{5/} See, e.g. Old Ben Coal Corporation v. Interior Board of Mine Operation's Appeals, 523 F. 2d 25 (7th Cir. 1975).

^{6/} Applicant's opening brief at 9.

104(a) of the 1969 Coal Act, ^{7/} the Court held that an imminent danger nevertheless exists where a condition could reasonably be expected to cause death or serious physical harm to a miner "if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated." The reasoning behind such a principle is clear. Where miners are voluntarily withdrawn by an operator they may just as easily be ordered back before abatement is complete. An order by an authorized representative of the Secretary of Labor, on the other hand, has a legal force which forbids return of a workforce before the underlying hazard is eliminated.

Harrison Western, in its excellent briefs, speaks repeatedly to the fact that the fatality in the present case took place at about 11:25 a.m. but the inspector did not issue his imminent danger withdrawal order until 2:00 p.m., a time after the miners were out of the shaft and the cage and basket were at the surface. To the extent that applicant thus appears to suggest that this alone vitiated the 107(a) order because the imminent danger no longer "existed," the suggestion is wholly without merit. If "normal mining" (in this case shaft construction) were to resume it must be inferred that miners would continue to work atop the hoist conveyances which were not equipped with protective bonnets overhead. ^{8/}

In sum, Harrison Western has simply taken too parochial a view of the concept of a hazard or "danger" as embodied in 107(a). The applicant stresses the inspector's highly literal description of the circumstances leading to the accident and then suggests that since none of those circumstances existed at 2:00 p.m., the hazard had been "eliminated." On the contrary, the danger lay in the very nature of the work to be done and the fact that miners were doing that work without protection from falling objects. Such a danger does not cease within the contemplation of section 107(a) merely because miners come to the surface or go home for the night.

^{7/} Section 104(a) of the 1969 Act is in all significant respects identical to section 107(a) of the 1977 Act.

^{8/} The record shows that a protective bonnet was installed on the day following the accident. (See stipulated exhibits).

By far the most effective argument advanced by Harrison Western concerns the effect of the previous 103(k) order. Where an inspector has withdrawn miners for an accident investigation under 103(k), may he legitimately superimpose a 107(a) imminent danger withdrawal order? Put another way, can there be an "imminent danger" where miners already have been ordered out, not voluntarily by a mine operator, but by a representative of the Secretary of Labor acting under the authority of the Act?

In such a case it cannot be said, as with a wholly voluntary withdrawal, that exposure of the miners could reoccur at the whim of the employing operator or contractor. Thus, one can construct an argument that a subsequent 107(a) order issued while a 103(k) order remains in effect is invalid because the prior 103(k) order nullifies any realistic possibility of injury to miners and thus, any "imminent danger."

This argument, too, must be rejected. To understand why, one merely need look to how 103(k) and 107(a) fit into the statutory enforcement scheme. Their purposes differ. Section 103(k) confers broad emergency powers upon the Secretary to take charge of an accident scene and, in the words of the statute, to "... issue such orders as he deems appropriate to insure the safety of any person" See Roscoe Page v. Valley Camp Coal Co., 6 IBMA 1 (1976).

A 107(a) order, on the other hand, is more limited and more closely focused. It may issue only upon a specific determination of an "imminent danger" and, once issued, remains in effect to protect miners until the conditions constituting the danger are corrected. When a 103(k) order is issued the cause of the accident is often unknown until the Secretary's investigation discovers it. Moreover, investigation may not disclose an imminent danger at every accident scene. It is wholly proper, however, for inspectors to proceed to issue a 107(a) order when an imminently dangerous condition is found, even though a 103(k) order may already be in effect. Itmann Coal Company, 1 FMSHRC 1573 (1979). This is so, if for no other reason, because the accident investigation may be completed and all rescue and other accident exigencies dealt with long before the conditions constituting an imminent danger are corrected. In that event, a 103(k) order would likely be ripe for termination while a 107(a) order should remain effective to accomplish its narrower and more specific aims. Thus, once the Secretary properly determines that

the elements of an imminent danger persist after an accident, a 107(a) order is appropriate and valid. That is so whether a 103(k) order is in effect or not.

In the present case I conclude that the facts disclose the existence of an imminent danger. The issuance of the 107(a) withdrawal order was therefore proper. Consequently, the respondent Secretary's motion for summary decision will be granted, and Harrison Western's motion for the same relief will be denied.

ORDER

In accordance with the foregoing, the applicant's motion for summary decision is DENIED, respondent's motion for summary decision is GRANTED and the withdrawal order issued by the respondent under section 107(a) of the Act is ORDERED AFFIRMED.


John A. Carlson
Administrative Law Judge

Distribution:

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/blc

UNITED STATES DEPARTMENT OF LABOR - MINE SAFETY AND HEALTH ADMINISTRATION

No. 151337

(SEE REVERSE) ORDER OF WITHDRAWAL (SEE REVERSE) DATE 06/15/81 TIME 0800 (24 HR CLOCK)

SERVED TO Guy Mills OPERATOR Harrison-Western Corporation

MINE Mt. Taylor Mine MINE I.D. 29-01375-J35 (CONTRACTOR)

TYPE OF ACTION 107 VIOLATION OF SECTION _____ OF THE ACT OR

(SEE REVERSE) OF TITLE 30 CODE OF FEDERAL REGULATIONS.

PART AND SECTION 57-619

TYPE OF INSPECTION 030 SIGNIFICANT AND SUBSTANTIAL (SEE REVERSE)

CONDITION OR PRACTICE On Oct 9 1979 at 11:00 hours it was observed that at approxi-
 mately 11:00 hours a fatal accident occurred in the 24-foot diameter shaft. The vic-
 tim and his partner were being lowered in a conveyance that did not have a protective
 basket installed. An object from above struck the victim on the head at a point
 3950 feet (approx) below the collar of the shaft. A two-man crew was working
 approximately 500 ft (about the 2700-foot level) above the unprotected conveyance.
 AREA OR EQUIPMENT 24 ft shaft #2 bucket position approx 3950 feet below collar
 shaft.

INITIAL ACTION NOTICE CITATION ORDER NO. _____ DATED 11/1/79

TERMINATION DUE DATE 1/1/81 TIME _____ SIGNATURE _____

ACTION TO TERMINATE Condition no longer exists. Order No. 151295 was terminated 10-29-79 at
 1531 hours. Basket installed. Work practices published and implemented.

DATE 06/15/81 TIME 0800 SIGNATURE _____ SEE SUBSEQUENT ACTION SHEET

UNITED STATES DEPARTMENT OF LABOR - MINE SAFETY AND HEALTH ADMINISTRATION

No. 151337 - DATED 06/15/81

SUBSEQUENT ACTION CONTINUATION CITATION ORDER DATE 06/15/81 TIME 0800 (24 HR CLOCK)

SERVED TO Guy Mills OPERATOR Harrison-Western Corporation

MINE Mt. Taylor Mine MINE I.D. 29-01375-J35 (CONTRACTOR)

JUSTIFICATION FOR ACTION CHECKED BELOW

The victim and his partner mentioned above,
 work
 Safe shaft practices should be implemented, published to em-
 ployees and

EXTENDED TO: DATE 7/1/81 TIME _____ VACATED DATE 1/1/81 TIME _____ (24 HR CLOCK)

TERMINATED MODIFIED SEE SUBSEQUENT ACTION SHEET

TYPE OF INSPECTION 030 SIGNATURE _____ 244 AR

CITATION (SEE REVERSE) ORDER OF WITHDRAWAL (SEE REVERSE) DATE 10/03/79 TIME 1400
MO DA YR (24 HR CLOCK)
 SERVED TO Dave Wolfe OPERATOR Gulf Mineral Resources (Kerrison-Watson, Inc.)
 MINE Mount Taylor Project MINE I.D. 29-01375 (CONTRACTOR)
 TYPE OF ACTION 107-2 VIOLATION OF SECTION _____ OF THE ACT OR
(SEE REVERSE)
 PART AND SECTION 57-19-45 OF TITLE 30 CODE OF FEDERAL REGULATIONS.
 TYPE OF INSPECTION 30 SIGNIFICANT AND SUBSTANTIAL (SEE REVERSE)

CONDITION OR PRACTICE At approximately 11:25 hours on 10-2-79, a fatal accident occurred in the 24-foot diameter shaft. The victim and his partner were being lowered in a surveyance that did not have a protective bonnet installed. An object from above struck the victim on the head at a point 295 ft. (approx.) below the collar of shaft.
 AREA OR EQUIPMENT 24 ft. shaft #2 bucket position approx 295 feet below collar of shaft.

INITIAL ACTION NOTICE CITATION ORDER NO. _____ DATED _____
MO. DA YR
 TERMINATION DUE DATE _____ TIME _____ SIGNATURE William Johnston
MO. DA YR (24 HR CLOCK) AT
 ACTION TO TERMINATE _____

DATE _____ TIME _____ SIGNATURE _____
MO. DA YR (24 HR CLOCK) SEE SUBSEQUENT ACTION SHEET

EXHIBIT "B"
 2113

No. 151295- DATED 10/03/79
MO DA YR

SUBSEQUENT ACTION CONTINUATION CITATION ORDER DATE 10/03/79 TIME 1400
MO DA YR (24 HR CLOCK)

SERVED TO Dave Wolfe OPERATOR Gulf Mineral Resources (Harrison-Watson)

MINE Mount Taylor Project MINE I.D. 29-01375- (CONTRACTOR)

JUSTIFICATION FOR ACTION CHECKED BELOW

two-man crew was working approximately 450 FT (about the 2nd floor level) above the un-protected conveyance of the victim and his partner mentioned above.

Safe shaft work practices shall be implemented, published to employees, and followed

EXTENDED TO: DATE / / YR TIME (24 HR CLOCK) VACATED DATE / / YR TIME (24 HR CLOCK)

TERMINATED MODIFIED SEE SUBSEQUENT ACTION SHEET

TYPE OF INSPECTION AIC

SIGNATURE Glenn Johnston 0242
AR

No. 151295- DATED 10/03/79
MO DA YR

SUBSEQUENT ACTION CONTINUATION CITATION ORDER DATE 10/29/79 TIME 1531
MO DA YR (24 HR CLOCK)

SERVED TO Dave Wolfe OPERATOR Gulf Mineral Resources (Harrison-Watson) ^{Corp.}

MINE Mount Taylor Project MINE I.D. 29-01375- (CONTRACTOR)

JUSTIFICATION FOR ACTION CHECKED BELOW

A protective harness was installed on the basket on 10-4-79 at 1230 hrs. shaft work practices were published and implemented to all employees.

EXTENDED TO: DATE / / YR TIME (24 HR CLOCK) VACATED DATE / / YR TIME (24 HR CLOCK)

TERMINATED MODIFIED SEE SUBSEQUENT ACTION SHEET

TYPE OF INSPECTION O30

SIGNATURE Gay C Hayton 0634
AR

No. 151295-2 DATED 10/03/79
MO DA YR

SUBSEQUENT ACTION CONTINUATION CITATION

ORDER DATE 11/02/79 TIME 1309
MO DA YR (24 HR CLOCK)

SERVED TO Dave Wolfe OPERATOR Gulf Mineral Resources Corporation Western Corp
MINE Mount Taylor Project MINE I.D. 29-01375 (CONTRACTOR)

JUSTIFICATION FOR ACTION CHECKED BELOW

The Termination to the above numbered order is hereby modified to show an X in the Order box and not the Citation Box

EXTENDED TO: DATE ___/___/___ TIME ___:___:___ (24 HR CLOCK)

VACATED DATE ___/___/___ TIME ___:___:___ (24 HR CLOCK)

TERMINATED MODIFIED

SEE SUBSEQUENT ACTION SHEET

TYPE OF INSPECTION 030

SIGNATURE Julian Kennedy 61
AR

No. 151295 DATED 10/03/79
MO DA YR

SUBSEQUENT ACTION CONTINUATION CITATION

ORDER DATE 11/26/79 TIME 0900
MO DA YR (24 HR CLOCK)

SERVED TO Dave Wolfe OPERATOR Gulf Mineral Resources Corporation Western Corp
MINE Mount Taylor Project MINE I.D. 29-01375 (CONTRACTOR)

JUSTIFICATION FOR ACTION CHECKED BELOW

This is to modify the modification of the abatement of order #151295 (modification was dated 11-02-79 @ 1309 hrs).
The modification was to modify the abatement of the order and not the order.
To mark the order block instead of citation block on the abatement and to change type of inspection from 030 to 001 because the abatement was made on a regular inspection.

EXTENDED TO: DATE ___/___/___ TIME ___:___:___ (24 HR CLOCK)

VACATED DATE ___/___/___ TIME ___:___:___ (24 HR CLOCK)

TERMINATED MODIFIED

SEE SUBSEQUENT ACTION SHEET

TYPE OF INSPECTION 001

SIGNATURE Shawn Johnston 0244
AR

No. 151295 DATED 10/03/79
MO DA YR

SUBSEQUENT ACTION

CONTINUATION

CITATION

ORDER

DATE 05/04/81
MO DA YR

TIME 1330
(24 HR CLOCK)

SERVED TO Guy Mills

OPERATOR Harrison-Western Corporation

MINE Mount Taylor Project

MINE I.D. 29-01375-J35 (CONTRACT)

JUSTIFICATION FOR ACTION CHECKED BELOW

This is to change the name of the operator to Harrison Western Corporation and to add the contractor number (J35)

EXTENDED TO: DATE / / YR TIME (24 HR CLOCK)

TERMINATED MODIFIED

TYPE OF INSPECTION 030

VACATED

DATE / / YR

TIME (24 HR CLOCK)

SEE SUBSEQUENT ACTION SHEET

SIGNATURE

Glenn C. Johnston

24
AR

No. 151295 DATED 10/03/79
MO DA YR

SUBSEQUENT ACTION

CONTINUATION

CITATION

ORDER

DATE 06/15/81
MO DA YR

TIME 0800
(24 HR CLOCK)

SERVED TO Guy Mills

OPERATOR Harrison-Western Corporation

MINE Mt. Taylor Mine

MINE I.D. 29-01375-J35 (CONTRACT)

JUSTIFICATION FOR ACTION CHECKED BELOW

Order No. 151295, issued to Guy's Mineral Resources on October 3, 1979, is vacated and replaced by order No. 151337 issued to Harrison-Western Corporation, I.D. No. 29-01375-J35

EXTENDED TO: DATE / / YR TIME (24 HR CLOCK)

TERMINATED MODIFIED

TYPE OF INSPECTION 030

VACATED

DATE 06/15/81
MO DA YR

TIME 0800
(24 HR CLOCK)

SEE SUBSEQUENT ACTION SHEET

SIGNATURE

Glenn C. Johnston

244
AR

CITATION (SEE REVERSE) ORDER OF WITHDRAWAL (SEE REVERSE) DATE 10/03/79 TIME 1145
 MO DA YR (24 HR CLOCK)

SERVED TO Tina Manzanares OPERATOR Gulf Mineral Resources
 MINE Mount Taylor Project MINE I.D. 29-01375 (CONTRACTORY)
 TYPE OF ACTION 105-K VIOLATION OF SECTION _____ OF THE ACT OR
 (SEE REVERSE) OF TITLE 30 CODE OF FEDERAL REGULATIONS.

PART AND SECTION _____
 TYPE OF INSPECTION 230 SIGNIFICANT AND SUBSTANTIAL (SEE REVERSE)

CONDITION OR PRACTICE Approximately 4 1/2 ft falls on 10/03/79 at a total acci-
dent occurred in the 24 foot shaft. This order is issued to prevent the
destruction of any evidence that may be of assistance in investigat-
ing the accident and to assure safety of all persons in and at
the accident area until the investigation is complete, and
the cause of the accident has been determined.

AREA OR EQUIPMENT 24 ft diam shaft, approximately on 2950 foot level
in #2 bucket position. Victim was a Harrison Western employee

INITIAL ACTION NOTICE CITATION ORDER NO. _____ DATED MO/DA/YR
 MO/DA/YR (24 HR CLOCK) SIGNATURE Glenn Johnston 10/03/79
 ACTION TO TERMINATE _____

DATE MO/DA/YR TIME (24 HR CLOCK) SIGNATURE _____
 AR SEE SUBSEQUENT ACTION SHEET

SUBSEQUENT ACTION CONTINUATION CITATION ORDER DATE 10/03/79 TIME 2035
 MO DA YR (24 HR CLOCK)

SERVED TO Tina Manzanares OPERATOR Gulf Mineral Resources
 MINE Mount Taylor Project MINE I.D. 29-01375 (CONTRACTORY)

JUSTIFICATION FOR ACTION CHECKED BELOW This modifies order # 151293 as
follows: The chippy edge and hoist shall not be used, except
except in a safety emergency. The gallery may be raised up to
90 feet, but not used or worked on. The double drum hoist
and buckets may be used to hoist & lower men and to
make repairs on 16, 26 and 31 shaft stations. No work
shall be done within the 24 foot shaft on pipe lines
or slick line. Men may be hoisted from the shaft
bottom

EXTENDED TO: DATE MO/DA/YR TIME (24 HR CLOCK) VACATED DATE MO/DA/YR TIME (24 HR CLOCK)
 TERMINATED MODIFIED SEE SUBSEQUENT ACTION SHEET
 TYPE OF INSPECTION 230 SIGNATURE Glenn Johnston 10/03/79
 AR

EXHIBIT "C"
2117

No. 151293-2 DATED 10/10/79
MO DA YR

SUBSEQUENT ACTION CONTINUATION CITATION ORDER DATE 10/04/79 TIME 1440
MO DA YR (24 HR CLOCK) IR

SERVED TO Dave Wolfe OPERATOR Gulf Mineral Resources (Harrison-Weste)
MINE Mount Taylor Project MINE I.D. 29-01375 (CONTRACTOR)

JUSTIFICATION FOR ACTION CHECKED BELOW This is to modify order #151293
and the first modification of order #151293, as follows:

Served to Dave Wolfe
Operator Gulf Mineral Resources (Harrison-Western, Inc.)

This also modifies order #151293 as follows: The Chippy
Cage and hoist may be used for man transportation and small
materials, but no maintenance or repair may be done affit

EXTENDED TO: DATE / / YR TIME (24 HR CLOCK) VACATED DATE / / YR TIME (24 HR CLOCK)
 TERMINATED MODIFIED SEE SUBSEQUENT ACTION SHEET
TYPE OF INSPECTION Q30 SIGNATURE [Signature] 0244
AR

No. 0151293-- DATED 10/03/79
MO DA YR

SUBSEQUENT ACTION CONTINUATION CITATION ORDER DATE 10/10/79 TIME 1030
MO DA YR (24 HR CLOCK)

SERVED TO Dave Wolfe OPERATOR Gulf Mineral Resources (Harrison Weste)
MINE Mount Taylor Project MINE I.D. 29-01375 (CONTRACTOR)

JUSTIFICATION FOR ACTION CHECKED BELOW THE INVESTIGATION OF THE FATAL ACCIDENT IS
COMPLETE.

EXTENDED TO: DATE / / YR TIME (24 HR CLOCK) VACATED DATE / / YR TIME (24 HR CLOCK)
 TERMINATED MODIFIED SEE SUBSEQUENT ACTION SHEET
TYPE OF INSPECTION Q30 SIGNATURE [Signature] 0634
AR

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

2 SKYLINE, 10th FLOOR

5203 LEESBURG PIKE

FALLS CHURCH, VIRGINIA 22041

SEP 6 1984

ROBIN D. MULLEN, : DISCRIMINATION PROCEEDING
Complainant :
: Docket No. SE 82-57-D
: :
: CD 82-30
JIM WALTER RESOURCES, INC., :
Respondent :

DECISION

Appearances: Larry Moorer, Esq., Birmingham, Alabama,
for the Complainant.
Fournier J. Gale, III, Esq., Birmingham,
Alabama, for the Respondent.

Before: Judge Fauver

On June 11, 1982, Robin D. Mullen, Complainant, filed a discrimination complaint with the Mine Safety and Health Administration (MSHA), United States Department of Labor, against Jim Walter Resources, Inc., Respondent, under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq. Complainant alleged that she was the subject of certain discriminatory actions on August 15, 1980, February 11, 1982, and April 23, 1982. Complainant alleged that she had been discriminated against "by pay, job placement, I've been harassed by being accused of reporting to work in an unfit manner . . . by foremans [sic] coming to my work area with their lights out and sexual harrassed [sic]." MSHA investigated her complaint and found there was no violation of section 105(c) of the Act. Thereafter, Complainant filed the Complaint in this proceeding. After the Complaint was filed, Complainant alleged that another discriminatory act occurred on December 7, 1982.

A hearing on her Complaint was held in Birmingham, Alabama, on November 14 and 15, 1983. Both parties were represented by counsel. Complainant called eight witnesses and introduced six exhibits, all of which were received in evidence. Respondent called three witnesses and introduced eight exhibits, all of which were received in evidence. In addition, at the direction of the Judge, a posthearing expert opinion was obtained from a pathologist, in answer to certain hypothetical questions about Complainant's likely condition as to blood alcohol content on February 11, 1982.

Based on the testimony, the exhibits, and the record as a whole, I find that a preponderance of the reliable, probative, and substantial evidence establishes the following:

FINDINGS OF FACT

1. Complainant, at the time of hearing, November 14-15, 1983, had been employed by Respondent at Number Four Mine for about 4-1/2 years. Number Four Mine, at all times relevant, produced coal for sale or use in or affecting interstate commerce.

2. In late 1981 and early 1982, on at least three occasions, Complainant observed or experienced conditions in the mine which she considered to be unsafe and reported those conditions to her supervisor. In each instance Complainant was relieved from exposure to the condition which she considered unsafe. I do not find discrimination in the way Respondent handled any of these safety complaints.

3. On February 11, 1982, Complainant reported to work at about 3:00 p.m. in a condition indicating by speech, appearance, and mannerisms, that she was under the influence of alcohol or some other drug. Her supervisors advised her, for her own safety and the safety of others, that she did not appear fit for duty and would not be allowed to work that day unless she submitted to an examination at the Brookwood Medical Clinic (a nearby facility where Respondent regularly had medical services performed) and the doctors there found her to be fit for duty. She was also told that if she was found fit for duty she would be paid for her entire shift that day. Complainant refused to go to the Brookwood Clinic for examination, but much later that day went to her private physician for a blood test for alcohol which was conducted about 6:30 to 7:00 p.m. That test showed Complainant's blood alcohol level to be .03 percent. Because of Complainant's apparent unfit condition and her refusal to submit to an examination at Brookwood Clinic, Respondent suspended Complainant for two days without pay.

4. At the direction of the Judge, a pathologist's opinion was obtained after the hearing, with opportunity for both parties to comment on the opinion. The pathologist, Thomas J. Alford, M.D., answered a hypothetical question based on the testimony in this case, finding it probable that Complainant's blood alcohol concentration at 3:00 p.m., on February 11, 1982, was 0.11 (110 mgm. percent) and that she would therefore be legally considered under the influence of alcohol at that time.

5. Based on all the evidence, including Complainant's testimony and that of her witnesses and witnesses of Respondent, and the pathologist's opinion, I find that on February 11, 1982, about 3:00 p.m., Complainant reported for work while appearing to be, and in fact being, under the influence of alcohol. In her condition, it was reasonable for Respondent to require her to submit to a blood alcohol test at Brookwood Clinic at Respondent's expense and, because of her failure to do so, to suspend her two days for reporting for work in an unfit condition and failing to submit to such a test. By delaying a blood alcohol test until 6:30 or 7:00 p.m., Respondent caused a lower showing of blood alcohol content than would have been shown had she been tested around 3:00 p.m. I find nothing discriminatory in Respondent's treatment of Complainant on February 11, 1982.

6. Complainant filed a grievance under Article XXIII, Section (b)(2) of the National Bituminous Coal Wage Agreement of 1981, concerning Respondent's discipline of her for the February 11, 1982, incident. The grievance went to arbitration. After an arbitration hearing the arbitrator found the facts against Complainant.

7. In April 1982, Complainant bid on a vacancy for a motorman position. The job was awarded under the procedures of the collective bargaining agreement to a miner who was senior to Complainant and who had better experience and qualifications for the motorman job than Complainant. Complainant filed a grievance over this matter, but withdrew her grievance at the third step in the grievance procedure. I find no discriminatory intent or action in Respondent's decision in filling the motorman vacancy.

8. On December 7, 1982, Complainant was disqualified from the position of motorman. I find that she was disqualified from that position because the company in good faith determined that she could not perform all of the required duties of the motorman job, and that this decision by the company was nondiscriminatory and supported by ample facts. Complainant filed a grievance over this disqualification, and the grievance went to arbitration. After an arbitration hearing, the arbitrator found the facts against Complainant.

DISCUSSION WITH FURTHER FINDINGS

Complainant alleges in her Complaint that she was discriminated against on August 16, 1980. However, there was no evidence of this alleged act of discrimination. This charge will be dismissed for lack of proof. Also, this allegation is time-barred by section 105(c)(2) of the Act, which will be discussed later.

Complainant also alleges that she was discriminated against on February 11, 1982, by being suspended for 2 days. I have found that Respondent acted in good faith and in a nondiscriminatory manner concerning the February 11, 1982, incident.

I also find that Complainant's allegations as to this incident and the August 16, 1980, incident, are barred by the 60-day requirement of section 105(c)(2).

Section 105(c)(2) of the Act states:

Any miner or applicant for employment or representative of miners who believes that he has been discharged, interfered with or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination.

In the June 11, 1982 complaint filed with MSHA Complainant alleged that she was discriminated against on August 16, 1980, February 11, 1982 and April 23, 1982.

The claims for alleged acts of discrimination occurring on August 16, 1980, and February 11, 1982, are barred by section 105(c)(2) unless Complainant can show that the filing was delayed under justifiable circumstances. Joseph W. Herman v. IMCO Services, 4 FMSHRC 2135 (1982), and David Hollis v. Consolidation Coal Company, 6 FMSHRC 21 (1984). Complainant admitted being aware of her MSHA rights in February or March of 1982, but failed to file her complaint for at least three months after having this actual knowledge. I find that Complainant has not shown justifiable circumstances for untimely filing, and on that independent ground her allegations of discrimination on August 16, 1980, and February 11, 1982, should be dismissed.

Thus, I find against Complainant as to the merits and independently under the limitations period as to her allegations of discrimination on August 16, 1980, and February 11, 1982.

As stated in the Findings, I find no showing of discrimination as to Respondent's award of the motorman vacancy on April 23, 1982. I have noted also that Complainant withdrew her grievance at the third step as to this matter.

Similarly, the disqualification of Complainant for the motorman job on December 7, 1982, has not been shown to be discriminatory. As shown by the thorough arbitration decision in that matter, there was ample evidence for Respondent's decision to disqualify Complainant from the motorman job.

Although the arbitration decisions are not binding in this proceeding, I find that the arbitration decisions denying Complainant's claims as to the February 11, 1982, incident and the December 7, 1982, incident are thorough, well-reasoned, and are entitled to substantial weight in this proceeding.

Complainant has shown no connection between her safety complaints or other protected activity and Respondent's actions on February 11, 1982, April 23, 1982, and December 7, 1982. The evidence overwhelmingly shows that she was disciplined on February 11, 1982, because she violated the collective bargaining agreement by reporting to work in an unfit condition and that the actions by Respondent on April 23, 1982, and December 7, 1982, were taken pursuant to the provisions of the collective bargaining agreement and were in no part motivated by protected activity by Complainant.

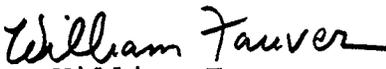
CONCLUSIONS OF LAW

1. The Judge has jurisdiction over this proceeding.
2. Complainant has failed to meet her burden of proving a violation of section 105(c) of the Act with respect to any matter raised in her complaint or at the hearing.
3. On an independent ground, Complainant's allegations of discrimination on August 16, 1980, and February 11, 1982, are barred by the 60-day limitation of section 105(c)(2) of the Act.

All proposed findings and conclusions inconsistent with the above are rejected.

ORDER

WHEREFORE IT IS ORDERED that this proceeding is DISMISSED.


William Fauver
Administrative Law Judge

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/slk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

SEP 7 1984

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. CENT 84-5
Petitioner : A.C. No. 34-01357-03504
v. :
TURNER BROTHERS, INC., : Docket No. CENT 84-16
Respondent : A.C. No. 34-01357-03505
: Welch Mine No. 1
: Docket No. CENT 84-27
: A.C. No. 34-01317-03509
: Docket No. CENT 84-44
: A.C. No. 34-01317-03511
: Heavener No. 1 Mine

DECISIONS

Appearances: Richard L. Collier, Esq., Office of the
Solicitor, U.S. Department of Labor, Dallas,
Texas, for the Petitioner;
Robert J. Petrick, Esq., Muskogee, Oklahoma,
for the Respondent.

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern civil penalty proposals filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking civil penalty assessments for four alleged violations of certain mandatory safety and health standards found in Parts 71 and 77, Title 30, Code of Federal Regulations.

Respondent filed answers contesting the proposed penalties, and hearings were held in Muskogee, Oklahoma, on July 10, 1984. The parties waived the filing of post-hearing proposed findings and conclusions. However, all oral arguments made by counsel on the record during the course of the hearings have been considered by me in the adjudication of these cases.

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 C.F.R. § 2700.1 et seq.

ISSUES

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

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 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 that the respondent's surface stripping coal operations affect interstate commerce, and that the mining operations are subject to the Act. The parties also stipulated that the respondent is a small-to-medium sized mine operator and that the assessment of reasonable civil penalty assessments will not adversely affect its ability to continue in business.

Discussion

During the course of the hearings in these cases, the parties advised me that they proposed to settle the following dockets:

CENT 84-5

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Section</u>	<u>Assessment</u>	<u>Settlement</u>
2076417	8/23/84	77.1605 (b)	\$46	\$30

CENT 84-16

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Section</u>	<u>Assessment</u>	<u>Settlement</u>
2076418	8/23/83	71.400	\$20	\$20

CENT 84-27

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Section</u>	<u>Assessment</u>	<u>Settlement</u>
2077340	11/22/83	77.1710(d)	\$147	\$147

The parties presented arguments on the record in support of their proposed settlements. Citation No. 2076417, was issued after the inspector found that a scraper being used to spread topsoil for reclamation purposes had brakes which were not adequate enough to hold the machine on a five percent grade. Petitioner's counsel stated that after further consultation with the inspector who was present in the hearing room, petitioner cannot support the "S&S" finding, and that the inspector has modified the citation to delete this finding. In support of this action, counsel asserted that the cited scraper was operating in an area where no miners were on foot exposed to any hazard, and that the brake condition was corrected within an hour after it was discovered.

Citation No. 2076418, was issued when the inspector found that a waiver which the respondent had obtained concerning the providing of bathing facilities, clothing change rooms, and flush toilets at its surface worksite, had expired. Petitioner's counsel stated that upon further consultation with the inspector, it has now been confirmed that upon application by the respondent pursuant to the applicable procedures found in section 71.403, the waiver concerning the application of cited section 71.400, has been further extended until September 27, 1984, and the citation has been terminated. Counsel confirmed that MSHA has in fact issued the waiver. Counsel also pointed out that the surface mining facility in question is located approximately 10 miles out of town and is isolated from ready sources of water.

Respondent's counsel confirmed that the respondent has provided "Porta-John" toilet facilities for the miners at the site in question, and that the miners working at the facility are in agreement with, and do not oppose, the waiver which has been granted for the facility. Counsel also stated that upon the expiration of the current waiver, the respondent will file for another extension.

Findings and Conclusions

After careful consideration of all of the arguments presented by the parties in support of the proposed settlement of Citation Nos. 2076417 and 2076418, I concluded and found that the proposed settlements were reasonable and in the public interest. Accordingly, pursuant to Commission Rule 29 CFR 2700.30, the settlements were approved from the bench. My decision in this regard is hereby re-affirmed.

Citation No. 2077340, was issued after the inspector observed that two mechanics who were performing maintenance repair work on an end loader parked at the base of a highwall were not wearing hard hats or caps. Petitioner's counsel asserted that the parties proposed to settle this violation by the respondent agreeing to pay a reduced civil penalty in the amount of \$74. Counsel stated that it was his understanding that the two mechanics had removed their hard hats in order to crawl under the loader to perform some repairs. Counsel also asserted that while MSHA's district manager is in agreement with the proposed settlement reduction, the inspector who issued the citation would not agree to modify and delete his "S&S" finding, and that he disagreed with the factual basis for the proposed settlement. Under the circumstances, the inspector was called as the Court's witness to testify as to circumstances which prompted him to issue the contested citation.

MSHA Inspector Lester Coleman confirmed that he issued the citation in question after observing that the two mechanics, who he identified by name, were not wearing hard hats or caps while performing maintenance on an end loader which had been parked at the base of the highwall in the active pit area. Mr. Coleman stated that the two mechanics had been dispatched to the area to perform some repair work needed to correct a condition which had been previously cited on the loader, and that their work was the work required to abate that particular violation.

Inspector Coleman testified that he observed no hard hats or caps in the area or on the loader, and that the two mechanics had in fact admitted to him that they had no hard hats or caps with them. Inspector Coleman confirmed that in order to abate the citation, one hard hat had to be obtained from the mine office, and that the respondent had to either go to town to purchase a second hard hat, or obtained one from one of its other mining operations in the area.

Inspector Coleman stated that while he observed no rocks falling off the highwall, since the mechanics were close to the base of the wall, had a rock fallen, it would have struck them. He confirmed that he was aware of incidents at other mines where rocks had fallen from highwalls

and struck miners on the head, and in the instant case it was his view that the two mechanics were exposed to a hazard from falling rocks. For this reason, he believes the violation is a "significant and substantial" one.

Although respondent's counsel cross-examined Inspector Coleman, the respondent presented no testimony or evidence in defense of the citation or of the inspector's findings. Further, the respondent did not rebut Inspector Coleman's testimony regarding the absence of hard hats, and its defense is that the mechanics "were in a hurry" to complete their abatement work or another violation.

After full consideration of the testimony and arguments concerning this violation, the proposed civil penalty reduction and settlement was rejected from the bench. Respondent then proposed to pay the full amount of the initial civil penalty of \$147, and that was approved. I hereby re-affirm these bench findings, and the citation IS AFFIRMED as issued, including the inspector's "S&S" finding.

CENT 84-44

This case concerns a section 104(d)(1) unwarrantable failure order issued by MSHA Inspector Lester Coleman, on January 24, 1984, with special "S&S" findings, charging the respondent with a violation of mandatory safety standard section 30 CFR 77.1605(b). The order, No. 2077410, describes the "condition or practice" cited by Inspector Coleman as follows:

The 992 C caterpillar end loader operating in the 001 pit was not provided an adequate parking brake in that the one provided was inoperative and would not hold the machine against movement (rolling) on a small percentage grade (approx. 5%). There was (2) workmen on foot cleaning coal down grade in front of where the loader was working.

Procedural Rulings.

I take note of the fact that respondent's answer to the petition for assessment of civil penalty asserts that the Act does not require the mandatory assessment of civil penalties. In support of this contention, respondent asserted that while the citation concerned a "technical" violation of the Act, the law does not require that every violation, technical or otherwise, be assessed a civil penalty.

Respondent's contention IS REJECTED.. It seems clear to me, that upon a finding of a violation of any mandatory safety standard, a civil penalty must be imposed by the presiding judge, but only after all full consideration of all of the statutory civil penalty criteria found in section 110(i) of the Act.

During the course of the hearing, counsel for both parties expressed the view that the validity of the unwarrantable failure order, including the question as to whether there has been an "unwarrantable failure" to comply with the law, is in issue in a civil penalty proceeding. This notion IS REJECTED. It seems clear to me that any such challenge must be made within thirty (30) days of the service of any order on an operator, and that since the petitioner here did not preserve his appeal rights by filing an independent notice of contest on this issue, it is precluded from raising it in this proceeding (Tr. 33-36).

Respondent's counsel stated that his intent was to challenge the special "S&S" findings made by the inspector in this case, as well as the "special assessment" levied by MSHA's Office of Assessments for the alleged violation of section 77.1605(b) (Tr. 38). The parties were informed that the matter of "S&S" may be pursued in this case, but that the "unwarrantable failure" finding and the validity of the order per se is not an issue, and counsel for the parties agreed with my ruling in this regard (Tr. 36, 40). The parties were also informed that I am not bound by any "special assessment" made by MSHA, and that the Secretary's Part 100 regulations concerning initial civil penalty assessments are not binding on the presiding judge (Tr. 40-41).

MSHA's Testimony and Evidence.

MSHA Inspector Lester Coleman testified as to his background and experience, including ten years service as an MSHA inspector and prior work in the mining industry as a mine foreman. Mr. Coleman described the mine in question as a surface coal mining stripping operation employing approximately 40 to 50 miners working 12-hour shifts, four days a week.

Mr. Coleman confirmed that he issued the order in question on January 24, 1984, during the course of his inspection of the mine. He stated that he observed the loader in question digging coal, and that two men on foot were working "downgrade from the machine" cleaning coal pits with shovels. He also observed another end loader which was "working in conjunction" with the cited machine, and that the second loader would be at different locations in the course of doing its work (Tr. 47). The respondent stipulated that the cited loader in question weighed approximately 188,000 pounds (Tr. 49).

Mr. Coleman stated that while he personally did not test the parking brake in question, the machine operator informed him that it did not work. When Mr. Coleman asked the operator to demonstrate the brake, the operator set the brakes and raised the machine bucket, and the machine rolled (Tr. 47). When asked why he believed the failure to have an adequate parking brake on the machine posed a hazard, Mr. Coleman replied as follows (Tr. 49):

A. They can park the machine on the grade down there, get out and leave it unattended or something or other, and it could roll off, probably roll into the other piece of equipment or possibly roll over one of the work hands or just roll out in front of the other machine and not contact it but cause the guy to run around it and run over one of the other guys or something.

On cross-examination, Mr. Coleman confirmed that the regular brakes used to control and stop the end loader in question when it was operating in forward and in reverse were operable, and that as long as the operator was in the machine he saw no problem and did not believe that there was any hazard or likelihood of an accident. His only concern was over the fact that if the machine were left unattended, the inadequate parking brake would present a hazard.

Mr. Coleman stated that while he never observed the particular cited machine left unattended he has observed other equipment unattended when the operator parks it in the pit area and then goes for a drink of water or to the bathroom (Tr. 55). However, he conceded that when an operator leaves his machine in these circumstances, he will stop it, set the brakes, and then drop the bucket to the ground. The bucket is dropped in order to comply with mandatory safety standard section 77.1607(p), which requires that all machine movable parts be secured or lowered to the ground when the machine is not in use (Tr. 55). If the machine were parked with the bucket facing downhill, the machine would stop. However, he believed that the area where the end loader was stripping coal had a rock bottom, and that the stripped grade was from one to three percent and it was possible for the machine to slide across the hard surface (Tr. 56).

Mr. Coleman stated that when he first arrived at the pit area the loader in question was located somewhere else. The foreman sent someone to bring the loader to the pit area without informing him of the parking brake condition, and when it was brought to the pit, the brake was checked (Tr. 57). Mr. Coleman conceded that the area where the machine was operating was less than a 5% grade, and that while it was "flat," he conceded that "it wasn't very much of a grade" (Tr. 58). He also conceded that the machine operators were "usually pretty good" about lowering the bucket to the ground when their machines are parked (Tr. 58). He stated that he has never observed a situation where a machine operator has alighted from his machine without lowering his bucket or ripper down (Tr. 62).

Mr. Coleman indicated that during any working day there are three or four times when a machine operator normally has occasion to use his parking brake. One is in the morning when

the machine is parked and before it is started up, a second time is at noon during lunch, a third time is when the machine is parked at night, and a fourth time is when the operator alights to get a drink or water or go to the bathroom (Tr. 60) However, since the mine has different grades, and since a foreman may stop a machine operator on a grade to speak with him, he was concerned about the inadequate brake (Tr. 61).

Mr. Coleman confirmed that he has inspected the mine on four or five previous occasions, and that he has never issued any citations for violations of section 77.1607(p) (Tr. 63). He also confirmed that he never observed the two coal cleaners around or near the machine while it was being parked, and he conceded that his belief that a fatality would occur stemmed from his assumption that the machine operator might decide to get off the machine while it is parked on a grade with the bucket up (Tr. 64).

Mr. Coleman stated that the foreman told him that he knew about the parking brake condition on January 23, and that to his knowledge the foreman had not ordered the parts to make the repairs. Mr. Coleman confirmed that the brake was repaired the next day (Tr. 66).

Mr. Coleman stated that the area where the loader was cleaning coal was approximately 150 feet square, and that it was operating in a seam approximately 16 to 18 inches thick. The two men in question were working away from the seam, and he conceded that if the machine happened to roll with its bucket up in the air, it should catch on the 18 inch seam before reaching the area where the men were working. However, since there was a ramp along the edge of the coal seam, he believed that the machine could go up the ramp. Even so, he conceded that it would roll back and away from the two men (Tr. 68).

In response to questions from the bench, Mr. Coleman indicated that the loader in question was parked in another area of the mine. However, the foreman wanted to use it to break up the coal in the pit and he sent a workman to bring the machine to the pit (Tr. 70). Once it was driven to the pit area, Mr. Coleman decided to inspect it because an employee had informed him that the parking brake did not work and that is why the machine was parked. Upon checking the machine and finding the parking brake inadequate, Mr. Coleman cited it and had it taken out of service immediately (Tr. 71). He further explained as follows (Tr. 71-72):

Q. So it actually was not doing any loading at the time you observed it?

A. No, he was going to use it to break out.

Q. But it was not being used to break out coal?

A. No.

Q. You took it out of service to assure that it wouldn't be put in service, is that the idea?

A. Yes.

Q. So you didn't just happen to walk in this pit area and see this loader out there breaking coal and the two guys over there shoveling and then have it tested and then take it out of service?

A. No, I didn't.

Q. So you acted based on what somebody else told you, and when the loader was brought over there you tested it and found the parking brakes were inoperative and you wanted it taken out of service?

A. Yes.

Q. So it actually never began breaking and doing all the things that Mr. Petrick suggested it was doing while you were there; is that right?

A. That's correct.

Mr. Coleman stated that when the loader parking brake was tested the bucket was in a raised position, and that the brake was never tested with the bucket lowered. Had he tested it with the bucket down, and found that the machine would not roll, he would still have issued the violation because "the law that I cited him under requires that he has a parking brake" (Tr. 73). When asked whether he would also have made an "S&S" finding had the machine not rolled with the bucket down, he replied "yes," and he explained as follows (Tr. 73-74):

A. Because of the importance of the thing. And the machine is there parked on several different grades. And, granted, usually it's more level than, you know, it's two, three, five percent or something like that. And the law requires that they have it and that the -- to me the significant reason, a lot of times they get out and they will park the machine with it still running. A machine that big vibrates and it would start to roll.

Q. So your concern when you made an S and S finding in this case is that during the normal operation with this inoperative parking brake sometime during the shift or whatever something could conceivably happen that would cause the loader to get away and if it did it could likely strike somebody and if it did that it would likely kill them; is that it in a nutshell?

A. Or another machine, haulage trucks. They have haulage trucks that haul in the area, too.

Q. So you were trying to cover all bets, more or less?

A. Yes.

Q. Is that your understanding on how you go about making an S and S, significant and substantial finding?

A. Well, if it was significant or substantially contribute to or cause an accident or something, that's kind of the way I looked at it.

Findings and Conclusions

Fact of Violation

Respondent is charged with a violation of section 77.1605(b), for having an inadequate parking brake on a rubber-tired end loader. Respondent presented no witnesses in defense of the citation, and simply relied on the cross-examination of Inspector Coleman to establish that the violation was not significant and substantial.

Mandatory safety standard section 77.1605(b), requires that mobile equipment be equipped with adequate brakes, and that all front-end loaders also be equipped with parking brakes. Although the standard does not specifically require that such parking brakes be adequate, I read this into the language of the standard as a logical requirement. Here, once the parking brakes was tested, it was found to be inadequate since it did not prevent the end loader from rolling. The respondent has not rebutted MSHA's prima facie case of a violation of section 77.1605(b), and the violation IS AFFIRMED.

Significant and Substantial

After listening to the inspector's direct testimony, I had the initial impression that when he arrived at the pit area, he observed the end loader in question digging coal and operating in the proximity of two men who were working "downgrade" cleaning coal. Given the inspector's asserted concern that if left unattended, with the engine running, the machine could have rolled and struck the two men, my first inclination was to find that the violation was significant and substantial. However, for the reasons which follow, I cannot conclude that this is the case.

On cross-examination, and in response to further bench questions, the inspector admitted that when he first arrived at the pit area, the end loader was in fact parked in another area, and was not in operation or breaking or loading coal. He indicated that someone had informed him that the machine had an inadequate parking brake, and when it was brought to the pit, the inspector had the brake tested, and after finding that it would not hold the machine, he ordered the machine taken out of service until the parking brake could be repaired the next day. In short, the machine was never used, and the petitioner has not established otherwise.

The testimony and evidence in this case establishes that the pit area where the end loader in question would normally be operating was flat, and with very little grade. Further, the inspector conceded that during prior inspections of the mine site he never observed the machine left unattended, and in fact he conceded that in his experience, when an operator has to leave the machine to go to the bathroom or take lunch, the machine is always stopped, the front bucket is lowered to the ground, and the operational brakes are set. He also conceded that he has never cited the respondent for a violation of mandatory standard 77.1607(p), which requires that machine buckets be lowered to the ground when not in use, and petitioner advanced no evidence to show that the respondent has ever been cited for such infractions.

The inspector confirmed that the regular brakes used to stop the end loader when it operated forward and in reverse were adequate and operational, and no hazard was presented while the machine was in operation. Although the inspector stated on the face of the violation notice which he issued that the inadequate parking brake would not hold the machine against movement on a grade of "approximately 5%," he conceded during his testimony that it was less than 5%.

The facts here also show that the pit area where the machine in question would normally have operated was excavated to a seam depth of some 16 to 18 inches, and the inspector conceded that the two men he claimed he observed working "downgrade" were in fact out of the pit area. The inspector also conceded that in the event the machine had rolled, it would have come to rest at the edge of the pit, and absent any credible showing that a 188,000 machine can jump up and out of the pit, I cannot conclude that this was reasonably likely to happen. Although the inspector indicated that there was a ramp constructed in the pit to facilitate the machine moving in and out, his "theory" that the machine could have rolled up the ramp, out of the pit, and then rolled down and struck the two men is rejected. There is absolutely no credible facts to establish that this was reasonably likely to occur.

The inspector conceded that when he tested the parking brake, he did so with the bucket up, and not down as it is normally left when the operator leaves the machine. Further, there is no evidence that the inspector ever observed the machine parked in the pit, and he confirmed that he never observed anyone around the machine while parked. Since the parties failed to call the two men in question to testify, I have no basis for determining where they were positioned in relation to the machine, or where they would normally be positioned once the loader was in operation. These are critical facts to any determination as to the likelihood of an accident.

Based on all of the evidence and testimony here presented it seems clear to me that the inspector made his "S&S" finding on an assumption that when and if the machine were placed in service, the operator would park the machine with the bucket up, in violation of section 77.1607(p), and that he would not follow the normal operational procedures for securing the machine when it is left unattended. Given the fact that the inspector conceded that to his knowledge, end-loader operators always follow those procedures, and given the fact that the inspector offered no credible evidence to the contrary, his assumptions are simply unsupported. I am convinced that the inspector made his "S&S" finding in order to cover every conceivable set or circumstances which may have triggered an accident once the machine was placed in service. Such a theory of "S&S" would require an inspector to find any violation to be "S&S."

In my view, the only fact presented by the petitioner to conceivably support an "S&S" finding in this case is his testimony that the pit foreman admitted that he knew the

parking brake was inadequate, and that the foreman had the machine driven to the pit area and intended to put the machine in service without telling the operator about the brake condition. However, the inspector also confirmed that the same employee who advised him of the inadequate brake also advised him that this reason why the machine had been parked in an area away from the pit where it would normally be operating.

The respondent failed to call the pit foreman to rebut the inspector's testimony, and also failed to rebut the inspector's testimony during cross-examination. By the same token, the petitioner failed to subpoena the pit foreman, and since the inspector marked the "negligence" portion of his citation to indicate a "reckless disregard" of the requirements of the cited standard, I can only speculate that he did so on the basis of the pit foreman's purported admission. Even so, based on all of the circumstances discussed above, including the fact that the inspector immediately took the loader out of service before it was operated in the pit, the totality of the circumstances presented do not establish that an accident was reasonably likely to occur. Even if the machine were placed in service with an inadequate parking brake, I am of the view that the possibility of an accident was remote and not reasonably likely to occur. Accordingly, the inspector's "S&S" finding IS VACATED.

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

The parties stipulated that the respondent is a small-to-medium sized mine operator and that the assessment of a reasonable penalty will not adversely affect its ability to continue in business. I adopt these stipulations as my findings and conclusions on these issues.

History of Prior Violations

Exhibit G-1 is a copy of a computer print-out summarizing the number of violations assessed and paid by the respondent for the period November 1, 1981, to October 31, 1983, for the Heavner No. 1 Mine. That information reflects a total of eleven paid violations, three of which are for prior violations of section 77.1605(b). However, since the petitioner did not submit copies of these prior section 104(a) citations, I have no way of knowing whether or not they were issued for end loaders. However, I do note that two of the citations were issued in November 1982, and are "single penalty" assessments for \$20 each, and the other one was issued in June 1983, and was assessed at \$50.

Good Faith Abatement

The inspector confirmed that the violation was issued at 12:00 noon on January 24, 1984, and that the conditions were corrected and the violation abated the next day (Tr. 66). Accordingly, I find that the violation was promptly abated in good faith by the respondent.

Negligence

The inspector's un rebutted testimony in this case strongly suggests that the foreman or pit superintendent, had prior knowledge of the inadequate parking brake, but nonetheless had the machine brought to the pit area in that condition, fully intending to use it. The inspector's testimony is as follows:

A. No, sir, the machine was in another area when I arrived, and the foreman, Superintendent Jim Payne sent another workman to get the loader. And he didn't inform this guy about the condition, so the guy went to another area and brought the loader into this pit area. And when he was bringing it down we checked it (Tr. 57).

And, at Tr. 76-77:

Q. Okay. Was Mr. Payne there when the machine was brought to the area?

A. Yes.

Q. He's the fellow that asked them to bring it?

A. Yes.

Q. Now, why would Mr. Payne do something like that if he knew that the parking brake was inoperative? Does that make sense, particularly with a federal inspector there. I don't know Mr. Payne, I assume he has got better sense than that, but maybe not, I don't know. Mr. Payne, if you're here, I apologize for that, sir, but I couldn't resist.

A. I can't answer that.

Q. I can't see the pit foreman -- is Mr. Payne a foreman of some kind?

A. Superintendent, I think is the way they have him listed.

Q. And there you are, a federal inspector there, and you're telling me that Mr. Payne knew this piece of equipment had defective parking brakes and he tells the fellow to bring it over there and put it in operation.

A. Mr. Payne told me that he knew himself.

On the basis of the foregoing, I conclude and find that the violation here resulted from the respondent's failure to exercise the slightest degree of care to insure that the inadequate brake condition was attended to before bringing the cited machine to the pit area, fully intending to put it into operation. Although I have considered the possibility that the respondent had the machine parked because it intended to repair the inadequate parking brake, absent any mitigating testimony by the respondent, I can only conclude that had the inspector not removed the machine from service, Mr. Payne would have allowed it to be put in service with the inadequate brake condition. Under the circumstances, I conclude and find that the violation resulted from gross negligence on the part of the respondent, and this is reflected in the civil penalty assessed by me for the violation.

Gravity

Although I have concluded that the violation here is not significant and substantial, I cannot conclude that it was nonserious. While it is true that there was no reasonable likelihood that an accident would occur, it seems to me that given the fact that Mr. Payne apparently knew about the condition, and was willing to take a chance and put the machine with an inadequate parking brake, there was a possibility, albeit unlikely, that an accident could occur. Accordingly, I conclude and find that the violation was serious.

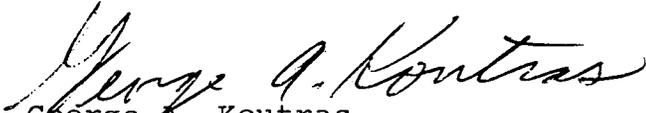
Penalty Assessment

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that a civil penalty in the amount of \$300 is appropriate for the cited violation.

ORDER

The respondent IS ORDERED to pay a civil penalty in the amount of \$300 for a violation of mandatory standard

section 77.1605(b), as stated in violation number 2077410, issued by MSHA Inspector Lester Coleman on January 24, 1984, and payment is to be made to MSHA within thirty (30) days of the date of this decision and order. Upon receipt of payment, this proceeding is dismissed.


George A. Koutras
Administrative Law Judge

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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 12 1984

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 82-1
Petitioner	:	A.C. No. 29-00096-03011
	:	
v.	:	Docket No. CENT 82-2
	:	A.C. No. 29-00096-03012
PITTSBURG & MIDWAY COAL	:	
MINING COMPANY,	:	McKinley Strip Mine
Respondent	:	

DECISION

Appearances: Jordana W. Wilson, Esq., Office of the Solicitor,
U.S. Department of Labor, Dallas, Texas,
for Petitioner;
John A. Bachmann, Esq., The Gulf Companies,
Denver, Colorado,
for Respondent.

Before: Judge Morris

These cases, heard under the provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (the "Act"), arose as a result of an inspection of respondent's coal mine. The Secretary of Labor seeks to impose civil penalties because respondent allegedly violated safety regulations promulgated under the Act.

Respondent denies any liability under the Act.

After notice to the parties, a hearing on the merits was held in Gallup, New Mexico on October 19, 1983.

The parties waived the right to file post trial briefs.

Issues

The issues are whether respondent violated the regulations; if so, what penalties are appropriate.

CENT 82-1
Citation 826733

This citation alleges a violation of Title 30, Code of Federal Regulations, Section 77.1302 J, which provides as follows:

§ 77.1302 Vehicles used to transport explosives.
(j) When vehicles containing explosives or detonators are parked, the brakes shall be set, the motive power shut off, and the vehicles shall be blocked securely against rolling.

MSHA's evidence shows that on July 7, 1981 Federal Inspector Lawrence Rivera issued this citation when he observed a parked truck; it lacked chocks to prevent it from rolling. The truck, which carried explosives, was located in the pit area (Transcript at pages 12, 13; Exhibit P3). The truck would have to be moved that day (Tr. 14-15).

Two miners were affected by this hazard which could cause a fatality. The possibility of an accident was remote as the truck was parked in a small dip in a coal seam (Tr. 13, 14, 52-53). Chocks were brought in and placed to secure the vehicle (Tr. 15).

Discussion

The facts establish a violation of the regulation. Respondent's witness Gary D. Cope agreed that the vehicle did not have chocks (Tr. 136, 137).

The evidence shows the truck was parked in a dip. Accordingly, it was not likely to move in any event. The foregoing evidence relates to issues of gravity and negligence. These are factors to be considered in assessing a civil penalty.

Citation 826734

This citation alleges respondent violated 30 C.F.R. § 77.1110, a performance standard. It provides:

§ 77.1110 Examination and maintenance of firefighting equipment.
Firefighting equipment shall be continuously maintained in a usable and operative condition. Fire extinguishers shall be examined at least once every 6 months and the date of such examination shall be recorded on a permanent tag attached to the extinguisher.

Inspector Rivera issued this citation when he observed that the hose and nozzle were missing on a fire extinguisher (Tr. 16, 17; P4). One worker was exposed to the hazard caused by this condition on the company's pickup truck (Tr. 18).

The condition was abated by installing usable equipment (Tr. 19).

Respondent's witness Cope produced photographs of the 5BC Chemical type fire extinguishers installed on the company's pickup trucks (Tr. 104, 105; Exhibit D4). Respondent's photographs also show the performance of the extinguisher. It is suitable for the use intended (Tr. 110-116; D4 thru D7).

The manufacturer's specifications do not provide a hose for this particular extinguisher. The hand operated unit directs the flow of its contents through a short one inch nozzle at the discharge point.

Discussion

The cited regulation requires that firefighting equipment shall be maintained in a usable and operative condition. Many extinguishers are equipped with a hose together with an attached nozzle. However, even though these extinguishers were not so equipped, they are, nevertheless, in a usable and operative mode. Hence, respondent did not violate the regulation.

For these reasons this citation should be vacated.

Citation 826737

This citation alleges a violation of 30 C.F.R. § 77.1110, cited in the previous citation.

The inspector issued this citation because the hose and nozzle were missing on the extinguisher. The equipment was on truck number 121. The cited vehicle was different from the one previously cited. Respondent abated the citation by installing usable equipment (Tr. 20, 21; P5).

Respondent's evidence indicates that the same type of equipment existed as discussed in connection with the prior citation (Tr. 104-105, 109, 113-114).

Discussion

This citation should be vacated for the same reasons discussed in connection with Citation 826734.

Citation 826741

This citation alleges a violation of 30 C.F.R. § 77.1109(c)(1) which provides:

(c)(1) Mobile equipment, including trucks, front-end loaders, bulldozers, portable welding units, and augers, shall be equipped with at least one portable fire extinguisher.

Inspector Rivera issued this citation when he observed a forklift without a fire extinguisher (Tr. 22, 23; P6). The forklift was observed when it was approaching the shop. At that point it was about 600 feet away from the shop (Tr. 23-24; P10).

One or two miners were affected by the hazard arising from the lack of a fire extinguisher (Tr. 25-26). An extinguisher was installed to abate this condition (Tr. 26-27).

Respondent's evidence indicates its forklift remains in the area of a single structure which consists of the shop, warehouse and office building (Tr. 139). The forklift normally will go 75 feet to the open air storage. Then it will travel about 50 feet to the fuel dock. In addition, it will encompass 100 feet to the other end of the oil dock (Tr. 139). These areas all have firefighting equipment (Tr. 139, 140).

Discussion

Respondent considers the forklifts are used in connection with warehouse and open air storage. Therefore, they constitute "auxiliary equipment" (Tr. 103, 104). Section 77.1109(c)(3) refers to auxiliary equipment in the following terms:

(3) Auxiliary equipment such as portable drills, sweepers, and scrapers, when operated more than 600 feet from equipment required to have portable fire extinguishers, shall be equipped with at least one fire extinguisher.

A single credibility issue arises in connection with this citation. Inspector Rivera indicated that he observed the forklift when it was about 600 feet from the shop (Tr. 23-24). On the other hand, respondent's witness Cope testified as to the general area. He indicated it would not have been possible for

the forklift to have been 600 feet from the shop and still remain on a paved area (Tr. 101-102).

I credit respondent's evidence. Witness Cope would be more familiar with the area where the forklift operates. In addition, it is apparent from his testimony that Inspector Rivera was unsure of the location of the forklift in relation to the shop area when he observed it (Tr. 23, 24).

The principal issue then evolves into whether a forklift is "mobile" or "auxiliary" equipment. If the latter no fire extinguisher is required.

I conclude that a forklift constitutes mobile equipment. This conclusion rests on several facts. First of all, a forklift is "capable of moving" and it thus meets the definition of being "mobile", Webster's New Collegiate Dictionary, 732, (1979). In addition, Section 77.1109(c)(1) describes certain types of mobile equipment whereas Section 77.1109(c)(3) describes certain types of auxiliary equipment. I find that a forklift is more akin to the equipment the standard describes as "mobile" than to the equipment described as "auxiliary".

The citation should be affirmed.

Citation 826744

This citation alleges a violation of 30 C.F.R. § 77.604 which provides:

§ 77.604 Protection of trailing cables.

Trailing cables shall be adequately protected to prevent damage by mobile equipment.

Inspector Rivera wrote this citation when he recognized eight tire marks (crossing and returning), on a 23,900 volt cable (Tr. 28; P7). The cable, in an obvious location alongside the roadway, supplied power to a dragline (Tr. 28, 29).

A rupture of the cable could shock a person. In addition, an explosion could occur. Severe burns, electrical shock and possibly a fatality could result from this condition (Tr. 28-30). The condition was abated when the miners were instructed to avoid the cable (Tr. 31).

Respondent's witness agreed there were eight tire marks on the cable (Tr. 122). The top soil had not been removed; the soil was sandy and soft (Tr. 123).

The cables themselves are protected with GFI ground fault interrupters. This safeguard causes the power to trip out if a cable failure occurs (Tr. 126).

The company did not know who had run over these cables. In the past, the company has disciplined two or three employees for driving over its cables (Tr. 134-135).

Discussion

This regulation requires that trailing cables shall be adequately protected to prevent damage. In the instant case it is unrefuted that the cable was lying on the ground and it had been run over by mobile equipment (Tr. 75). Adequate protection would include barricading the area, burying the cables or suspending the cables overhead (Tr. 87).

In his closing argument respondent's counsel relies on C.F.&I. Steel Corporation, 3 FMSHRC 2168, (1981). In the cited case Judge John A. Carlson vacated a citation involving an alleged violation of the same standard. Judge Carlson ruled in his case that he was more persuaded by respondent's inferences than those urged by the government, 3 FMSHRC at 2169.

The case relied on by respondent is not controlling. On the contrary, in this case, I am persuaded by Inspector Rivera's testimony. An explosion could be caused by the sharp material under the surface of the cable. It had obviously been run over by a vehicle (Tr. 28-29). In addition, Inspector Rivera has a considerable background as an MSHA coal mine inspector. This experience causes me to accept his opinion of the hazard involved (Tr. 7, 8; P2).

The citation should be affirmed.

Citation 826745

This citation alleges a violation of 30 C.F.R. § 77.204 which provides:

§ 77.204 Openings in surface installations; safeguards. Openings in surface installations through which men or material may fall shall be protected by railings, barriers, or covers or other protective devices.

Inspector Rivera issued Citation 826745 because the operator failed to provide a railing at the opening of a loading dock.

The dock, adjacent to the warehouse, is 20 feet long and 4 feet deep (Tr. 33, 34; P6, P11). A worker or equipment could fall to the concrete below (Tr. 34).

One worker was affected by this hazard (Tr. 37).

The condition was abated when a broken hook was replaced by welding it at one side (Tr. 38). The operator of the forklift requested some type of protection here for this condition (Tr. 67).

In Inspector Rivera's opinion the opening here is in a vertical surface. It is similar to a door opening (Tr. 69-70).

Discussion

In support of its motion to dismiss respondent relies on State ex. rel. City Iron Works v. Ind. Com., 368 N.E. 2d 291, (1977).

In the cited case a worker fell from the edge of a roof. The Appellate Court decision construes three sections of the Ohio Code of Specific Safety. The requirements of the Ohio Code are considerably narrower than the scope of 30 C.F.R. Section 77. Accordingly, City Iron Works is not controlling.

In this case the Secretary's regulation, 30 C.F.R. § 77.200, defines the scope of surface installations. It requires an operator to maintain all mine structures, enclosures or other facilities in good repair to prevent accidents and injuries. The general description of a surface installation in Section 77.200 is sufficiently broad to include respondent's loading dock. On the facts here it is established that miners could fall from the dock if a protective chain was not used to provide a warning or prevent a fall. In addition, a chain had been furnished across this opening before this citation was issued. Inspector Rivera observed that a hook on one side had broken off. The condition was abated by rewelding the hook (Tr. 35, 38).

The citation should be affirmed.

CENT 82-2 Citation 826746

This citation alleges a violation of 30 C.F.R. § 77.604, relating to protecting trailing cables, cited, supra.

Inspector Rivera wrote this citation when he saw tire marks from where a pickup had run over a cable. The pickup, adjacent to the cable, had identical tire treads (Tr. 40). This was at a different location than the previous citation (Tr. 39, 40).

The cable, carrying 23,900 volts, involves an electrical shock hazard (Tr. 41). Men in the pickup as well as men moving the cable would be affected by such a hazard (Tr. 41).

The condition was obvious because it was adjacent to the road. The hazard was abated by installing a berm between the road and the cable (Tr. 43). According to the inspector, the mine superintendent knew the condition existed (Tr. 44-45).

Discussion

The uncontroverted facts establish a violation of the regulation. The citation should be affirmed.

CIVIL PENALTIES

The six criteria for assessing a civil penalty are set forth in 30 U.S.C. § 820(i).

In considering the statutory criteria I find that the operator has a minimal adverse history. Five violations were assessed between August 8, 1979 and January 10, 1980 (Exhibit P1). The penalties, as proposed, are appropriate in relation to the large size of the operator (Tr. 9). In those citations where I find a violation I also find that the operator was negligent because the violative conditions were open and obvious. As previously discussed the gravity and negligence concerning Citation 826733 are overstated and the penalty should be reduced. The gravity of the remaining citations is apparent on the facts. In favor of the operator is its good faith in rapidly abating the defective conditions.

On balance, I deem the following penalties to be appropriate:

CENT 82-1

<u>Citation</u>	<u>Proposed Assessment</u>	<u>Disposition</u>
826733	\$170	\$ 85
826734	66	Vacate
826737	72	Vacate
826741	84	84
826744	180	180
826745	122	122

CENT 82-2

<u>Citation</u>	<u>Proposed Assessment</u>	<u>Disposition</u>
826746	\$78	\$78

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

ORDER

In CENT 82-1

1. The following citations are affirmed and a civil penalty is assessed as indicated:

<u>Citation</u>	<u>Penalty</u>
826733	\$ 85.00
826741	84.00
826744	180.00
826745	122.00

In CENT 82-2

826746	\$ 78.00
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2. The following citations and all penalties therefor are vacated.

In CENT 82-1

Citation 826734
Citation 826737


John J. Morris
Administrative Law Judge

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/blc

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SEP 12 1984

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 84-151
Petitioner : A. C. No. 15-13881-03520
: :
v. : Pyro No. 9 Slope
: William Station
PYRO MINING COMPANY, :
Respondent :

DECISION APPROVING SETTLEMENT

Before: Judge Steffey

Counsel for the Secretary of Labor filed on August 30, 1984, a motion for approval of settlement in the above-entitled proceeding. Under the parties' settlement agreement, respondent would pay a reduced penalty of \$450 for a single alleged violation of 30 C.F.R. § 75.200 in lieu of the penalty of \$800 proposed by MSHA.

The alleged violation here at issue is one which could not be disposed of in my decision issued July 26, 1984, in this proceeding because it was not a part of the record resulting from the hearing held in Docket Nos. KENT 84-87-R and KENT 84-88-R which was the basis for the decision issued on July 26, 1984. Although the Commission issued a "Direction for Review" of that decision on August 24, 1984, the issues to be considered by the Commission do not pertain to the remaining issues in this proceeding which have been settled by the parties.

Section 110(i) of the Federal Mine Safety and Health Act of 1977 lists six criteria which are required to be used in determining civil penalties. The motion for approval of settlement discusses those criteria. The mine here involved produces about 1,600,000 tons of coal annually and respondent's production on a company-wide basis is approximately 3 million tons per year. Those figures support a finding that respondent is a large operator and that penalties in an upper range of magnitude should be assessed to the extent that they are determined under the criterion of the size of the operator's business.

The motion for approval of settlement states that respondent paid penalties for 40 previous violations during the period from December 1982 to December 1983, whereas the proposed assessment sheet in the official file indicates that

respondent paid penalties for 25 alleged violations during 125 inspection days for the 24-month period from January 1982 to January 1984. MSHA's proposed penalty of \$800 is based on the history of previous violations given in the proposed assessment sheet. When 25 violations occurring during 125 inspection days are evaluated under the provisions of MSHA's assessment formula in 30 C.F.R. § 100.3(c), the violations per inspection day are so few that no part of the penalty proposed by MSHA could have been assigned under the criterion of history of previous violations. Since I am dealing with a motion to approve settlement of MSHA's proposed penalty, it is appropriate for me to consider the information given in the proposed assessment sheet, rather than the somewhat inconsistent figure of 40 previous violations given in the motion for approval of settlement.

Additionally, it should be noted that a single number of previous violations is hardly suitable for evaluating a respondent's history of previous violations because it cannot be applied under section 100.3(c) of the assessment formula unless the number is also associated with the number of inspection days which occurred during the time that the violations were accumulated. In most cases which go to hearing, the Secretary's counsel provides a computer printout which lists previous violations along with the dates on which they were cited. That kind of information enables a judge to determine whether the violations occurred many months prior to the violation under consideration or immediately prior to the violation under consideration. Violations of the same standard occurring immediately prior to the violation under consideration show that respondent's history is not favorable, whereas violations which have occurred a year or more prior to the violation under consideration show a trend toward an improvement in safety. Unless a judge has the kind of information described above, it is difficult to evaluate the criterion of history of previous violations. As indicated above, however, I am relying upon the information given in the proposed assessment sheet in this proceeding and that shows that no part of MSHA's proposed penalty was assigned under the criterion of history of previous violations.

The motion for approval of settlement states that respondent abated the violation within the time provided and MSHA's narrative findings indicate that the violation was abated "within a reasonable period of time", but neither the motion for approval of settlement nor MSHA's narrative findings indicate whether any portion of the penalty was assigned under the criterion of the operator's good-faith effort to achieve rapid compliance. My practice has always been to increase a penalty only if there is information available to show that respondent did not make a good-faith effort to comply, and to decrease the penalty only if there is evidence to show that the operator made an outstanding effort to comply. If the operator achieves compliance within the time given by the inspector, I consider that to

be a normal good-faith effort which requires neither an increase nor decrease in the penalty. That appears to be the treatment given to the criterion of good-faith abatement by MSHA and I find that it was appropriate for no portion of the penalty to be assigned under the criterion of good-faith abatement.

The motion for approval of settlement states that payment of the penalty will not have an adverse effect on the ability of respondent to continue in business. Therefore, MSHA appropriately did not reduce the penalty under the criterion that payment of large penalties would cause respondent to discontinue in business.

Consideration of the remaining two criteria of negligence and gravity requires a brief discussion of the nature of the alleged violation. The inspector alleged that a violation of section 75.200 had occurred because respondent had failed to install 6 timbers at each crosscut along the supply entry to within 240 feet of the tailpiece of the conveyor belt, as required by the roof-control plan. Out of 11 crosscuts, four had the timbers set, four of them had timbers set on one side, and three did not have timbers set at all. The motion for approval of settlement agrees that the inspector properly considered the violation to have been associated with a high degree of negligence so that no reduction in the penalty should be made under the criterion of negligence.

Since the parties have not based a reduction of MSHA's proposed penalty on any of the five criteria discussed above, it is obvious that all of the reduction has to be made under the criterion of gravity. The motion for approval of settlement bases the reduced penalty primarily on the fact that the inspector had evaluated the criterion of gravity by checking item 21C on his citation to show that nine persons could have been expected to be exposed to injury if a roof fall had occurred. The motion states that all of the crosscuts at issue were a long distance from the face area and that it would be highly unlikely that a roof fall in the supply entry would affect all nine persons working on the section which was served by the supply entry.

The fact that less than nine persons would be affected by a roof fall, if one had occurred, is a reason to reduce the penalty, but some additional discussion may be helpful in showing why the parties' settlement agreement should be granted. It should be noted that MSHA's proposed penalty of \$800 is based on narrative findings which state that the inspector's evaluation of the alleged violation has been considered. The narrative findings do not indicate, however, how much of the penalty was assigned under the criterion of gravity as opposed to the criterion of negligence. Therefore, it is not possible to know

how much should be deducted from the proposed penalty just because the inspector may have assumed incorrectly that nine persons would have been affected by any roof fall that might have occurred in the supply entry.

On the other hand, the narrative findings do state that the six timbers were required to be set at crosscuts to within 240 feet of the face, whereas the inspector's citation stated that they had to be set within 240 feet of the tailpiece of the conveyor belt. Therefore, the person who prepared the narrative findings may have considered the violation to be more serious than it really was because he or she may have been evaluating the lack of timbers as a matter which was a rather constant threat during actual production operations, rather than a danger which would only have affected a person traveling in the supply entry at a considerable distance from the working section.

Any time that penalties are determined on the basis of subjective judgments, as occurred in this instance, it is difficult to say that a penalty should be precisely \$800 as proposed by MSHA or \$450 as agreed upon by the parties for purpose of settlement. I believe that the discussion above shows that a penalty of \$450 is reasonable in this instance and I find that the parties' settlement agreement should be approved.

WHEREFORE, it is ordered:

(A) The motion for approval of settlement is granted and the parties' settlement agreement is approved.

(B) Pursuant to the parties' settlement agreement, Pyro Mining Company, within 30 days from the date of this decision, shall pay a civil penalty of \$450 for the violation of section 75.200 alleged in Citation No. 2074793 dated January 14, 1984.

Richard C. Steffey
Richard C. Steffey
Administrative Law Judge

Distribution:

Darryl A. Stewart, Esq., Office of the Solicitor, U. S. Department of Labor, Room 280, U. S. Courthouse, 801 Broadway, Nashville, TN 37203 (Certified Mail)

William M. Craft, Assistant Director of Safety, Pyro Mining Company, P. O. Box 267, Sturgis, KY 42459 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

SEP 19 1984

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

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 82-58-M
Petitioner	:	A.C. No. 45-02582-05002
	:	
v.	:	Pole Road Pit No. 1 Mine
	:	
FERNDALDE READY MIX & GRAVEL,	:	
INC.,	:	
Respondent	:	

DECISION

Appearances: Ernest Scott, Jr., Esq., Office of the Solicitor, U.S. Department of Labor, Seattle, Washington, for Petitioner;
Mr. William A. VanWerven, President, Ferndale Ready Mix & Gravel, Inc., Ferndale, Washington, appearing Pro Se.

Before: Judge Morris

This case, heard under the 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 surface sand and gravel operation. The Secretary of Labor seeks to impose civil penalties because respondent allegedly violated various safety regulations promulgated under the Act.

After notice to the parties, a hearing on the merits was held in Bellingham, Washington on January 9, 1984.

The parties did not file post trial briefs.

Issues

The threshold issue is whether a Congressional funding resolution prevents MSHA from proceeding with this case.

The secondary issues are whether respondent violated the various regulations; if so, what penalties are appropriate.

Stipulation

At the commencement of the hearing the parties stipulated as follows:

1. Respondent, Ferndale Ready Mix & Gravel, Inc., a corporation, is the owner and operator of the Pole Road Pit No. 1 Mine, a sand and gravel operation located at Everson, Whatcom County, Washington.
2. Respondent was the owner and operator of Pole Road Pit No. 1 Mine, at all times material to this case.
3. Respondent's business affects commerce, and the Mine Safety and Health Review Commission has jurisdiction to hear this case.
4. Respondent admits paragraph III, of the petition filed in WEST 82-58-M.
5. As a result of an inspection of the Pole Road Pit No. 1 Mine, Everson, Washington, by Federal Mine Safety and Health Inspector James Broome on July 28, 1981, Citations Nos. 588681, 588682, 588683, 588715, 588716, 588717, 588718, 588719, and 588720, were issued to Respondent.
6. Copies of the aforesaid citations are contained in Exhibit "A" to the Petition for Assessment of Penalty filed in this case by petitioner, and may be admitted into evidence for the sole purpose of showing they were issued.
7. Orders of Withdrawal Nos. 587071, 587058, 587059, 587060, 587141, 587142, 587143, 587144, and 587145, copies of which are contained in Exhibit "A" to the petition for assessment of penalty filed in this case, were issued to respondent on September 2, 1981, by Federal Mine Safety and Health Inspector David Estrada.
8. Copies of the aforesaid Orders of Withdrawal may be admitted into evidence for the sole purpose of showing they were issued.
9. As of the date (September 2, 1981) Inspector David Estrada issued the aforesaid Orders of Withdrawal, respondent had not yet corrected the conditions identified in the citations referred to in numbered paragraph No. 5 above.
10. Respondent corrected the conditions referred to in numbered paragraph No. 5, herein above and came into compliance with the Federal Mine Safety and Health Act of 1977, and applicable regulations on or about September 10, 1981.
11. During the two year period ending July 28, 1981, respondent did not have any history of violations under the Act.
12. Payment of the proposed penalties (\$613) will not affect respondent's ability to continue in business.

13. The Pole Road Pit No. 1 mine produced 15-20 thousand tons of wash materials during 1980.

14. The Pole Road Pit No. 2 mine produced 9-10 thousand tons of wash materials during 1981.

15. Respondent's annual dollar volume of business done or sales made during 1980, 1981, and 1982 are set forth below:

1980 - \$60,000

1981 - \$40,000

1982 - \$50,000

16. Respondent had approximately the following number of production employees during the following years:

1980 - One part time

1981 - One part time

1982 - One part time

17. At the commencement of the hearing it was further stipulated that Mr. VanWerven and his son do not contest the factual allegations contained in the nine citations issued by James Broome (Transcript at pages 5 and 6).

MSHA's fiscal authority

A threshold issue concerns MSHA's authority to expend funds in this case. The evidence on this issue is uncontroverted.

MSHA inspected this sand and gravel operation and issued citations on July 28, 1981. Orders of withdrawal were issued on September 2, 1981. On December 18, 1981 respondent filed its notice of contest.

On December 15, 1981 President Reagan signed H.R.J. Res. 370, Pub. L. No. 91-92, § 131, 95 Stat. 1183, 1199 (1981). The foregoing Congressional funding resolution prohibits MSHA from enforcing the Mine Safety Act provisions with respect to various operations including sand or gravel activities (Exhibit J-1).

On January 4, 1982 MSHA wrote to respondent and indicated that the foregoing funding resolution restricted the agency from enforcing the Act. MSHA's letter further indicated that

respondent's case would "not be referred to the Federal Mine Safety and Health Review Commission and no further action will be taken at this time" (Exhibit R-1).

The above prohibition which arose from the funding resolution did not continue in effect. Jurisdiction over sand and gravel was returned to MSHA when President Reagan signed the fiscal 1982 supplemental appropriations bill on July 18, 1982 (Exhibit J-1).

On this record it does not appear that MSHA expended any funds on this case during the time the funding prohibition was in effect. Once jurisdiction was returned to MSHA, in July 1982, the agency could legally proceed with the prosecution of this action. The case was not presented until January 1984, long after the funding prohibition had been dissolved.

On a related case deciding jurisdiction in relation to the same Congressional funding resolution see the Commission decision of Secretary on behalf of Cooley v. Ottawa Silica Company, 6 FMSHRC 516, 525 (1984).

MSHA is not in violation of the funding resolution, accordingly, the agency complied with the law in presenting its evidence in this case.

Citation 588681

This citation proposes a civil penalty of \$34. Respondent does not contest the factual allegations in the citation. These allegations are, in part, as follows:

The elevated walkway around the wash screen was not kept clear of rocks and dirt on the drive side of the screen. The buildup presented a tripping hazard to person walking on the walkway.

(Exhibit E-1).

The citation allegedly violated is contained in Title 30, Code of Federal Regulations, Section 56.11-2, which provides as follows:

56.11-2 Mandatory. Crossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction provided with handrails, and maintained in good condition. Where necessary, toeboards shall be provided.

MSHA Inspector James B. Broome indicated that he inspected respondent's mine on July 28, 1981. (Tr. 7, 9).

The walkway cited by the inspector was eight to nine feet above ground (Tr. 11). The wash screen was in operation and one person was exposed to the loose rocks on the walkway. Injuries that could be sustained would range from a minimal injury to a fatality (Tr. 11, 12; Exhibit E10). The inspector concluded that management was not aware of this condition (Tr. 10-11).

Respondent presented no evidence concerning this citation.

Discussion

The Commission previously affirmed a violation of this regulation in a factual setting where there were tools, hooks, wire rope and rocks lying near the edge of the elevated walkway. In addition, there was no toeboards around the edge of the platform to prevent the loose material from falling over the edge and striking employees below. El Paso Rock Quarries, Inc., 3 FMSHRC 35, 39. The writer is bound by the above Commission precedent.

For these reasons Citation 588681 should be affirmed.

Citation 588682

This citation proposes a penalty of \$72 and it reads, in part:

The V-belt drive for the lead pulley of the wash screen feed conveyor was not guarded. It was about 5 1/2 feet above the level of its wash screen walkway and readily accessible to a person on the walkway.
(Exhibit E-2).

The citation allegedly violated, 30 C.F.R. 56.14-1, provides:

Guards

56.14-1 Mandatory. 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.

Inspector Broome, supplementing the factual allegations in the citation, testified that this violative condition was in plain sight. It should have been known to respondent. In addition, the inspector had previously advised the company that it was not in compliance concerning the V-belt. No citation had been previously issued for this condition because the plant was not then operating (Tr. 12-14).

The same wash screen appears in this citation as in the previous citation (Tr. 13-14). The V-belt drive is 5 1/2 feet from the walkway; the pulley itself is directly in the center of the walkway (Tr. 15; Exhibit E-11).

This condition could cause injuries ranging from bruised fingers to the loss of a hand (Tr. 14-15).

Respondent's witness Larry William VanWerven testified that inspectors on previous occasions had not required guards for the conditions cited here (Tr. 35-38).

Discussion

The facts establish a violation of Section 56.14-1. On the facts of the case see the Commission decision of Missouri Gravel Company, 3 FMSHRC 2470 (1981).

Respondent's defense is generally asserted as to all the guarding citations. It is in the nature of a collateral estoppel against MSHA because the inspectors did not previously issue citations for these same violative conditions.

The fact that citations were not previously issued for violations of the guarding standard does not invoke the doctrine of collateral estoppel. The inspectors have different areas of expertise and it may well be that for some particular reason a violative condition is (or is not) brought to an inspector's attention. The doctrine cannot be invoked here to deny miners the protection of the Mine Safety Act. I have previously refused to apply the doctrine in similar circumstances. Servtex Materials Company, 5 FMSHRC 1359 (1983); Kennecott Minerals Company, WEST 82-155-M (August 1984); see also the Commission decision in King Knob Coal Company, Inc., 3 FMSHRC 1417 (1981).

Respondent generally raised this issue and this ruling applies to Citation 588716, 588717, 588718, infra.

The citation should be affirmed.

Citation 588683

This citation proposes a penalty of \$36 and it reads, in part:

The plant operator did not have a method of communication to summon help in case of an emergency.
(Exhibit E-3).

The citation alleges respondent violated 30 C.F.R. 56.18-13 which provides:

56.18-13 Mandatory. A suitable communication system shall be provided at the mine to obtain assistance in the event of an emergency.

In addition to the factual allegations in the citation, Inspector Broome testified there was no means to summon help if a worker was injured. But no employee was exposed to this hazard since this was a one man operation (Tr. 16-17).

Larry VanWerven testified that there was a private business located about 750 feet from the walkway. The business was open six days a week from 9 a.m. to 5 p.m. (Tr. 34, 35).

Discussion

The facts establish a violation of the regulation. The availability of a business telephone 750 feet from the walkway is not a "suitable" communication system. It is both too remote and under the control of another.

Citation 588715

This citation proposes a penalty of \$195 and it reads, in part:

The 966 Cat front end loader, which was feeding the plant and loading customer trucks did not have the automatic backup warning alarm in working order. The large muffler prevented the operator from having a clear view to the rear.

(Exhibit E-4)

The citation alleges respondent violated 30 C.F.R. 56.9-2. The correct standard would be 30 C.F.R. 56.9-87. Inasmuch as respondent does not dispute the factual allegations in the citation, pursuant to the Federal Rules of Civil Procedure, the

citation is amended to read 30 C.F.R. 56.9-87. Fed. R. Civ. P, Rule 15(b), Usery v. Marquette Cement Manufacturing Company, 568 F. 2d 902 1977 (2nd Cir).

30 C.F.R. 56.9-87 provides as follows:

56.9-87 Mandatory. Heavy duty mobile equipment shall be provided with audible warning devices. When the operator of such equipment has an obstructed view to the rear, the equipment shall have either an automatic reverse signal alarm which is audible above the surrounding noise level or an observer to signal when it is safe to back up.

Witness Broome observed that at the time of his inspection only one worker was present. Hence, there was no exposure to employees. But customers who were loading at the time were exposed to this hazard (Tr. 16-18).

Mr. VanWerven told the inspector that he didn't know the truck lacked a backup alarm (Tr. 18).

Respondent offered no evidence in connection with this violation.

The facts establish a violation. The citation should be affirmed since the lack of knowledge of this defect does not constitute a defense.

Citation 588716

This citation proposes a penalty of \$60 and it reads, in part:

The tail pulley of the pea gravel conveyor did not have a guard to prevent someone from getting caught in the moving machinery.

(Exhibit E-5)

The standard allegedly violated regarding guards, 30 C.F.R. 56.14-1, is set forth, supra.

The MSHA inspector testified that he had informally advised Mr. VanWerven 2 to 6 months before the inspection that the conveyor, which was in plain sight, needed a guard (Tr. 19).

The operator of the conveyor was the only worker exposed (Tr. 19).

Discussion

The facts establish a violation of the regulation. The defense of collateral estoppel has been previously discussed and it is without merit.

Citation 588717

This citation proposes a penalty of \$60 and it reads, in part:

The tail pulley of the 7/8" rock conveyor did not have a guard over the pinch points to prevent a person from getting caught in the moving machinery.

(Exhibit E-6)

The standard allegedly violated, 30 C.F.R. 56.14-1, is set forth, supra.

Inspector Broome indicated he had notified Mr. VanWerven about this condition. One worker was exposed to the violative condition which could cause injuries ranging from fractured hands to a fatality (Tr. 19-21).

This tail pulley, about knee high, was near a footing at the exit end of the screen (Tr. 21).

Respondent's evidence generally indicated that other inspectors failed to require guards (Tr. 35-36).

Discussion

The testimony and the photographs (Exhibit E-13) establish a violation of the standard. Respondent's defense has been previously discussed and found to be wanting.

The citation should be affirmed.

Citation 588718

This citation proposes a penalty of \$60 and it reads, in part:

The tail pulley of the 1 1/2" rock conveyor did not have a guard to prevent someone from getting caught in the pinch points of the moving machinery.

(Exhibit E-7)

The standard allegedly violated, relating to guards, 30 C.F.R. § 56.14-1, is set forth, supra.

Inspector Broome testified that one worker was exposed to this hazard. The frequency of his exposure would depend on the number of times it would be necessary to shovel out the debris at the tail pulley.

The same type of an accident could occur as with other unguarded tail pulleys. An accident could range from a bruised hand to the loss of an arm to a fatality (Tr. 23).

The tail pulley was in plain sight. In addition, the inspector had informally advised the company about this condition (Tr. 22-23).

Discussion

The facts establish a violation of the standard. The same ruling applies to the defense of collateral estoppel.

Citation 588719

This citation proposes a penalty of \$44 and it reads, in part:

The walkway around the wash screen had an opening on the sand screw end through which a man could fall or step into the worm of the sand screw.

(Exhibit E-8)

The standard allegedly violated, 30 C.F.R. 56.11-12, provides:

56.11-12 Mandatory. Openings above, below, or near travelways through which men or materials may fall shall be protected by railings, barriers, or covers. Where it is impractical to install such protective devices, adequate warning signals shall be installed.

The inspector saw one employee exposed to this condition. Each time the employee walked around the walkway he had to step over the hole in the screen. The hole, about two feet by two feet was in plain sight (Tr. 24). A person could fall 2 1/2 to 3 feet if he fell through the hole (Tr. 25).

Discussion

The facts and the photograph (E-14) clearly establish a violation of the regulation. Respondent's defense has been previously discussed. It is again denied.

Citation 588720

This citation proposes a penalty of \$52 and it reads, in part:

The handrail on the drive side of the wash screen was incomplete. A section of walkway about 8-10 foot long did not have a handrail and a chain that would have blocked off the walkway was down the walkway was elevated about 8' off the ground.

(Exhibit E-9)

The standard allegedly violated, 30 C.F.R. 56.11-2, was cited in connection with the first citation in this decision.

The inspector testified that a 42 inch handrail encompassed the walkway; except there was no handrail for 8 to 10 feet along the walkway. In addition, a chain was not hooked to block off access at the end of the walkway (Tr. 26, 27).

One worker was exposed to this condition. If he fell backwards off of the eight foot high walkway his injuries could range from minimal to fatal (Tr. 26-27).

The inspector had previously notified the operator of this condition (Tr. 25).

Discussion

The facts establish a violation of the regulation. The handrail on the elevated walkway was not of a "substantial construction" since a portion of the guard rail was missing.

Respondent's defense has been previously discussed and denied.

The citation should be affirmed.

CIVIL PENALTIES

Section 110(i) of the Act, now 30 U.S.C. 820(i), sets forth the criteria to be considered in assessing civil penalties.

Respondent has no adverse prior history relating to the issuance of any citations. The business, as noted in the stipulation, is quite small. The respondent was highly negligent in that these conditions were open and obvious. In addition, before these citations were issued, respondent had been informally advised by Inspector Broome of the conditions existing in Citations 588716, 588717, 588718 and 588720. The parties stipulated that the imposition of the proposed penalties will not

affect respondent's ability to continue in business. The gravity of each violation is severe and such gravity is apparent on the record.

A keystone of the Act is good faith compliance. In this case respondent did not demonstrate any statutory good faith because the violative conditions cited by Inspector Broome were not abated until withdrawal orders were issued by MSHA Inspector David Estrada on September 2, 1981 (Stipulation, paragraph 9).

Considering the statutory criteria, and based on the entire record, I am unwilling to disturb the penalties proposed for these citations.

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

ORDER

The following citations and the proposed penalties therefor are affirmed:

<u>Citation</u>	<u>Penalty</u>
588681	\$ 34
588682	72
588683	36
588715	195
588716	60
588717	60
588718	60
588719	44
588720	52

Respondent is ordered to pay to the Mine Safety and Health Administration the total sum of \$613 within 40 days of the date of this decision.


John J. Morris
Administrative Law Judge

Distribution:

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(Certified Mail)

Mr. William A. VanWerven, President, Ferndale Ready Mix & Gravel,
Inc., 5271 Creighton Road, Ferndale, Washington 98248 (Certified
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/blc

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SEP 20 1984

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. PENN 84-142
Petitioner : A.C. No. 36-01965-03502
: :
v. : Buck Run P045A Strip Mine
: :
READING ANTHRACITE COMPANY, :
Respondent :

DECISION APPROVING SETTLEMENT

Before: Judge Koutras

Statement of the Case

This proceeding concerns a civil penalty proposal filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking a civil penalty assessment in the amount of \$10,000, for a violation of mandatory safety standard 30 C.F.R. § 77.704-1(b). The section 104(a) citation no. 2100028, was issued by an MSHA inspector on September 22, 1983, during the course of an investigation of a fatal electrical accident in which a miner was electrocuted when he inadvertently came into contact with an energized component at the mine power substation. The victim was part of an electrical crew performing work at the substation at the time of the accident.

Respondent filed a timely answer contesting the citation, and the case was scheduled for a hearing. However, the parties have filed a joint motion pursuant to Commission Rule 30, 29 C.F.R. § 2700.30, seeking my approval of a proposed settlement whereby the respondent agrees to pay a civil penalty in the amount of \$5,000, in settlement of the violation.

Discussion

The initial civil penalty assessment recommendation of \$10,000, for the violation in question, was made through MSHA's "special assessment" procedures pursuant to 30 C.F.R. § 100.5, and it was based on information then available to the Office of Assessments. Petitioner now submits that facts have been disclosed which warrant reassessment of the civil penalty amount to \$5,000.

In support of the proposed settlement disposition of this case, petitioner's counsel has submitted a full discussion of the six statutory criteria contained in section 110(i) of the Act. Counsel has also submitted a detailed discussion and full disclosure as to the facts and circumstances surrounding the accident, as well as a complete explanation and justification for the proposed reduction in the initial proposed civil penalty assessment. Included as part of the arguments in support of the motion, are copies of (1) MSHA's official accident report of investigation; (2) a report prepared by the Westinghouse Electric Corporation concerning certain testing conducted in an attempt to assist in determining the location of the electrical discharge involved in the accident; (3) a sketch of the substation prepared during the course of the investigation; (4) a transcript of interviews and statements made by two of the electrical crew members who were working at the substation at the time of the accident; and, (5) an accident report prepared by a State of Pennsylvania Mine Electrical Inspector.

Petitioner asserts that the electrical crew performing the work at the substation in question were part of a qualified crew consisting of a chief electrician, the accident victim, and two qualified electricians. The accident victim was a qualified electrician with six years experience in surface and underground electrical low, medium, and high voltage. The victim had suffered electrical burns to both his hands and in the center of his spine, but no one observed him contact live electrical parts, nor could anyone determine what electrical parts he had contacted. Although the spare electrical circuit at which the victim and another crew member performed their work was deenergized, the main power substation structure also supported incoming power lines of 66,000 volts and a stepped down power line of 4160 volts which remained energized while the pair worked on the substation roof. The power lines and components were located at heights of approximately 4 1/2 to 15 feet and 30 feet above the roof level. The components closest to where the victim and his fellow crew member were working carried 4160 volts and were located 4 1/2 feet above the substation roof.

Petitioner points out that immediately prior to starting the work, the victim and his fellow crew member discussed the presence of the hot lines and that the victim stated "as long as we are careful, we're all right . . . well, we're not going to get near that" (Transcript, 9/27/83, interview with crew member, p. 14). Petitioner concludes that it was the judgment of the experienced electrical crew (and of the victim in particular) that the job tasks they were performing

could be safely performed. Petitioner concludes further that the negligence here was moderate, considering the fact that an experienced crew of electrical workers set up a job which involved their own personal safety, and that the evidence suggests that these qualified electricians considered themselves to be safe as long as they worked carefully.

The information provided by the petitioner reflects that the respondent is a medium sized operator producing 336,116 production tons of coal annually as of April 1984, and 31, 942 tons annually at its Buck Run P-45A strip mine at the same time.

During the two year period from 9/22/81 to 9/21/83, respondent received only one violation from MSHA, a § 104(a) citation citing 30 C.F.R. § 48.28(a) and a civil penalty in the sum of \$32.

The information provided by the petitioner also establishes that good faith was demonstrated promptly by the respondent holding a meeting with electricians at which time proper switching and grounding procedures in accordance with the regulations were established.

Conclusion

After careful review and consideration of the pleadings, arguments, and submissions in support of the motion to approve the proposed settlement of this case, I conclude and find that it is reasonable and in the public interest. Accordingly, pursuant to 29 C.F.R. § 2700.30, the motion IS GRANTED, and the settlement IS APPROVED.

ORDER

Respondent IS ORDERED to pay a civil penalty in the amount of \$5,000, in settlement of the citation in question, and payment is to be made to the petitioner within thirty (30) days of the date of this decision and order. Upon receipt of payment, this proceeding is dismissed.


George A. Koutras
Administrative Law Judge

Distribution:

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/slk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 20, 1984

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 84-31-M
Petitioner	:	A.C. No. 04-00196-05502
v.	:	
	:	Docket No. WEST 84-35-M
MONOLITH PORTLAND CEMENT CO.,	:	A.C. No. 04-00196-05504
Respondent	:	
	:	Docket No. WEST 84-56-M
	:	A.C. No. 04-00196-05505
	:	
	:	Monolith Cement Plant

DECISION

Appearances: Herbert Jay Klein, Esq., Office of the Solicitor, U.S. Department of Labor, Los Angeles, California, for Petitioner; Jim Day, Safety and Training Supervisor, Monolith Portland Cement Company, Monolith, California, for Respondent.

Before: Judge Merlin

These cases are petitions for the assessment of civil penalties filed under section 110(a) of the Act by the Secretary of Labor against Monolith Portland Cement Company for alleged violations of the mandatory safety standards.

Stipulations

At the hearing, the parties agreed to the following stipulations (Tr. 4):

1. The operator is the owner and operator of the subject mine.
2. The operator and the mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.
3. The administrative law judge has jurisdiction of these cases.
4. The inspectors who issued the subject citations were duly authorized representatives of the Secretary.

5. True and correct copies of the subject citations were properly served upon the operator.
6. Imposition of any penalty will not affect the operator's ability to continue in business.
7. The alleged violations were abated in good faith.
8. The operator has a small history of prior violations.
9. The operator is moderately large in size.

WEST 84-31-M

Citation No. 2365907 sets forth the violative conditions or practices as follows:

The area where employees eat lunch was not kept clean and orderly in the Lab building. Several employees eating there were exposed to a fire hazard as well as a health hazard as the floor appeared unkempt.

30 C.F.R. § 56.20-3(a) provides as follows:

At all mining operations: (a) Workplaces, passageways, storerooms, and service rooms shall be kept clean and orderly.

The parties stipulated to the facts set forth in the citation (Tr. 6). An over-filled trash bin presented a definite fire hazard. However the Solicitor advised that it was now the Secretary's position that the operator was guilty of moderate negligence rather than recklessness (Tr. 6-7). The operator agreed that the occurrence of a fire was reasonably likely because employees smoked in the area (Tr. 7). The violation was serious and the operator was negligent. A penalty of \$150 is assessed.

WEST 84-35-M

Citation No. 2086560 provides as follows:

The passageway and working area of the 2 pier at the kiln had poor housekeeping and was not kept clean of tools and other materials. Employees assigned tasks in this area could trip, slip, or fall. These areas (piers) are traveled often.

30 C.F.R. § 56.20-3(a) is the same mandatory standard as involved in the prior docket number.

In this instance also the parties stipulated with respect to the facts set forth in the petition (Tr. 10-11). The area in question was between two walkways where there is occasional traffic at the end of each shift. The presence of some tools presented a tripping hazard (Tr. 10). The type of accident which would occur would probably result in a lost work day (Tr. 11). The violation was serious and the operator was negligent. A penalty of \$200 is assessed.

WEST 84-56-M

The Solicitor moved to vacate the one citation involved in this matter (Tr. 14). The Solicitor adequately explained the basis for vacating this citation and as I have held previously in other cases, vacation of a citation and withdrawal of penalty petition with respect to it is within the Solicitor's discretion.

ORDER

It is Ordered that the operator pay \$375 within 30 days of the date of this decision.

A handwritten signature in black ink, appearing to read "Paul Merlin". The signature is fluid and cursive, with a large initial "P" and "M".

Paul Merlin
Chief Administrative Law Judge

Distribution:

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Mr. J. F. Day, Safety Director, Monolith Portland Cement
Company, Monolith, CA 93548 (Certified Mail)

/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

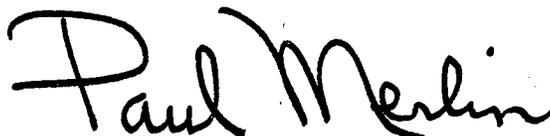
1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

September 21, 1984

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 84-31-M
Petitioner	:	A.C. No. 04-00196-05502
v.	:	
	:	
MONOLITH PORTLAND CEMENT CO.,	:	Docket No. WEST 84-35-M
Respondent	:	A.C. No. 04-00196-05504
	:	
	:	Docket No. WEST 84-56-M
	:	A.C. No. 04-00196-05505
	:	
	:	Monolith Cement Plant

AMENDED ORDER

The Order in the above-captioned case is amended to read "It is Ordered that the operator pay \$350 within 30 days of the date of this decision."



Paul Merlin
Chief Administrative Law Judge

Distribution:

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Mr. J. F. Day, Safety Director, Monolith Portland Cement
Company, Monolith, CA 93548 (Certified Mail)

/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SEP 21 1984

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. LAKE 83-95-M
Petitioner : A.C. No. 21-00282-05508
v. :
 : Minntac Mine
UNITED STATES STEEL :
CORPORATION, : Docket No. LAKE 83-100-M
Respondent : A.C. No. 21-00797-05501
 :
 : Minntac Warehouse
 :
 : Docket No. LAKE 84-5-M
 : A.C. No. 21-00819-05502
 :
 : Docket No. LAKE 84-11-M
 : A.C. No. 21-00819-05503
 :
 : Maintenance Department

DECISION

Appearances: Miguel J. Carmona, Esq., Office of the
Solicitor, U.S. Department of Labor,
Chicago, Illinois, for Petitioner;
Louise Q. Symons, Esq., U.S. Steel
Corporation, Pittsburgh, Pennsylvania,
for Respondent.

Before: Judge Melick

These consolidated cases are before me upon the petitions for assessment of civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act", for violations of regulatory standards. The general issue before me is whether the United States Steel Corporation (U.S. Steel) has violated the regulations as alleged, and, if so, what is the appropriate penalty to be assessed in accordance with section 110(i) of the Act.

The Secretary moved to vacate Citation Nos. 2089195, 2089196, 2089198, 2089369, and 2089370 for the reason that all of the equipment cited for insufficient grounding or other protection was in fact "U.L." (Underwriters Laboratory) approved. This approval was deemed sufficient to meet the requirements of the cited standard and accordingly the citations were dismissed at hearing. That determination is now affirmed.

The remaining citations in these cases (Nos. 2089362, 2089367, 2089192, 2089223, and 2089227) allege violations of the regulatory standard at 30 C.F.R. § 55.12-30. That standard provides that when a potentially dangerous condition is found, it shall be corrected before equipment or wiring is energized. The facts surrounding the violations (with the exception of the violation charged in Citation No. 2089193) all relate to the improper wiring of electrical receptacles in that the "hot and neutral" wires had been interchanged.

According to MSHA Inspector Thomas Wasley, the condition was dangerous because of the existent shock hazard. He indicated for example that if a polarized plug was used in any of the improperly wired sockets and the equipment used had a defect such as a broken wire, it could become "hot" and its user would be subject to burns or even electrocution from the 110 volt circuit.

According to MSHA electrical engineer Terrence Dinkel, the wiring described by Inspector Wasley was in violation of the National Electrical Code, the industry standard throughout the United States. Dinkel pointed out an additional hazard if, for example, a power drill with a three prong electrical cord had a wiring fault with the black wire faulted to the frame, then the drill motor would automatically be in the "on" position exposing an unsuspecting user to abrasions, cuts, and punctures from the operating drill. Dinkel also opined that the reverse polarity of the improperly wired outlets was "one step out of two" for causing a fatality.

U.S. Steel does not deny the existence of the violations but maintains that they were of low gravity. According to Frank Ergevec, general foreman for the central shops, there was no significant hazard because it is unlikely that an appliance would be defective. While he also observed that U.S. Steel had a program for testing electrical recepta-

cles, those tests were admittedly limited to newly installed outlets and would not therefore have led to the discovery of the defectively wired outlets in the cases at bar.

In determining the seriousness of the hazard, I give the greater weight to the highly qualified MSHA expert, electrical engineer Terrence Dinkel. Based on this testimony, corroborated by MSHA inspector Wasley, I find that serious hazards of electrical shock, burns, and electrocution could result from the cited conditions and that those hazards were not remote given the circumstances. I further find that a significant hazard existed from the possibility of the automatic startup of equipment such as drills and handsaws that might be plugged into one of the defectively wired outlets.

Negligence is difficult to assess in these cases since the cited outlets had been wired many years ago by the outside contractor who built the premises. U.S. Steel had presumably relied upon that contractor to comply with the electrical standards. There is no dispute that the cited conditions were corrected in a timely manner.

Citation No. 2089193 also alleges a violation of the standard at 30 C.F.R. § 55.12-30 but presented a different hazard. The citation alleges that the 220 volt heater located under the seat in the changing room did not have a guard over the heating fins. According to Inspector Wasley, this presented a burn hazard to persons coming into contact with the heater while sitting on the bench. Wasley conceded that it was unlikely that the heater would have been used for several months until colder weather set in.

According to Ronald Rantella the Minntac mine safety engineer, the thermostat on the heater was in the "off" position at the time of the citation. In addition, Rantella opined that the heater located beneath the bench was not in a position to contact anybody. Rantella also observed that it was the policy each fall to "usually" check heaters.

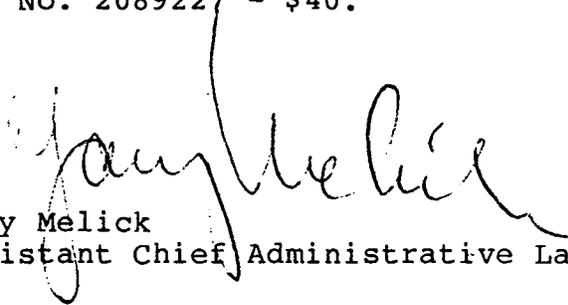
Within this framework of evidence, I conclude that a violation of the cited standard did in fact occur, but that the hazard described by Inspector Wasley was not as imminent as described. Negligence is also difficult to assess in this case, because the cited heater was clearly not being used at the time of the citation and had been turned off. The violation was promptly abated by the removal of the

heater.

Considering the size of the operator, its prior history of violations, and the criteria above discussed, I find the following civil penalties to be appropriate. Citation No. 2089362 - \$40; Citation No. 2089367 - \$40; Citation No. 2089192 - \$40; Citation No. 2089193 - \$30; Citation No. 2089223 - \$40; Citation No. 2089227 - \$40.

ORDER

Citation Nos. 2089369, 2089370, 2089195, 2089196 and 2089198 are vacated and dismissed. The U.S. Steel Corporation is hereby ordered to pay the following civil penalties within 30 days of the date of this decision: Citation No. 2089362 - \$40; Citation No. 2089367 - \$40; Citation No. 2089192 - \$40; Citation No. 2089193 - \$30; Citation No. 2089223 - \$40; Citation No. 2089227 - \$40.


Gary Melick
Assistant Chief Administrative Law Judge

Distribution:

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Louise Q. Symons, Esq., U.S. Steel Corporation, 600 Grant Street, Room 1580, Pittsburgh, PA 15230 (Certified Mail)

/nw

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

SEP 24 1984

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. VA 84-23
Petitioner : A. C. No. 44-05920-03520
: :
v. : No. 5A Mine
: :
CROCKETT COAL COMPANY, INC., :
Respondent :

DEFAULT DECISION

Before: Judge Steffey

A show-cause order was issued on August 20, 1984, in the above-entitled proceeding requesting that respondent explain in writing by September 7, 1984, why its request for a hearing should not be considered as having been waived for its failure to comply with the Commission's rules and with the requests made in the prehearing order issued June 21, 1984. The return receipt in the official file shows that respondent received the show-cause order on August 24, 1984, but I have received no reply to the show-cause order.

Respondent's answer to the Secretary of Labor's petition for assessment of civil penalty was deficient because it failed to comply with section 2700.28, 29 C.F.R. § 2700.28, of the Commission's rules by giving any "reasons why each of the violations cited" were being contested. The answer, however, stated that "[i]f you need any further information, please notify our office by mail or phone". In the prehearing order issued June 21, 1984, I explained in great detail the nature of the violations for which penalties were proposed by MSHA and pointed out that respondent's answer was deficient in failing to explain the reasons it was requesting a hearing. The prehearing order, nevertheless, requested respondent only to advise me as to the number of witnesses it expected to present, to give an estimate of the amount of time which it thought its evidence would take to present, and to list all facts as to which respondent was willing to stipulate.

Respondent's answer to the prehearing order, however, only repeated that it would attend a hearing in the Wise County Courthouse or the City of Norton's courtroom and asked to be advised of the location for the hearing.

It has been my experience in prior cases that when respondents represent themselves at hearings, they raise many issues which the Secretary's counsel cannot anticipate, such as arguments concerning the area which was being mined at a

given time. That type of dispute can be settled in most instances only by having the mine map produced which shows the dates on which mining had advanced to specific locations. I have had to recess hearings so that the Secretary's counsel could call additional witnesses or obtain maps or other information which the Secretary's counsel would not normally be expected to bring to a hearing room if the operator is only contesting the amount of the proposed penalties or some technicality in the wording of the inspectors' citations or orders.

The show-cause order issued in this proceeding on August 20, 1984, explained in detail why it is necessary for a respondent to explain its reasons for requesting a hearing, provide the judge and the Secretary's counsel with some indication of the amount of time which is likely to be required for the hearing, and indicate whether respondent is willing to stipulate or agree to any facts. Respondent's answer to the petition for assessment of civil penalty had stated that if "further information" was needed, it would be supplied. The show-cause order, in actuality, only requested respondent to supply the "further information" which it had offered to provide.

Respondent's refusal to reply in any way to the show-cause order leaves me with no choice but to conclude that respondent would prefer to waive its request for a hearing and pay the proposed penalties than to provide the small amount of information requested in the show-cause order. Consequently, I find respondent in default for failure to comply with the Commission's rules and my orders of June 21, 1984, and August 20, 1984. Section 2700.63(b) of the Commission's rules provides that "[w]hen the Judge finds the respondent in default in a civil penalty proceeding, the Judge shall also enter a summary order assessing the proposed penalties as final, and directing that such penalties be paid."

WHEREFORE, it is ordered:

Respondent, having been found in default, is ordered, within 30 days from the date of this decision, to pay civil penalties totaling \$846.00 which are allocated to the respective alleged violations as follows:

Citation No. 2149676	8/2/83	§ 75.1710	.....	\$ 160.00
Citation No. 2149677	8/2/83	§ 75.1710	.....	160.00
Citation No. 2149678	8/2/83	§ 75.1710	.....	160.00
Citation No. 2149679	8/2/83	§ 75.1710	.....	160.00
Citation No. 9971203	2/14/84	§ 70.100(a)	.....	<u>206.00</u>

Total Penalties Proposed in the Petition for
Assessment of Civil Penalty Filed in Docket
No. VA 84-23 \$ 846.00

Richard C. Steffey
Richard C. Steffey
Administrative Law Judge

Distribution:

Leo J. McGinn, Esq., Office of the Solicitor, U. S. Department
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Dennis M. Turner, President, Crockett Coal Co., Inc., P. O. Box
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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 24 1984

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 83-70-M
Petitioner : A.C. No. 04-04492-05501 NYO
v. :
INDUSTRIAL CONSTRUCTORS CORP., : Grey Eagle Mine
Respondent :

DECISION

Before: Judge Morris

In this case Petitioner filed a proposal for assessment of a civil penalty under the provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (the "Act"). The Secretary of Labor seeks to impose a civil penalty which arose from an inspection of the Grey Eagle Mine on November 18, 1982. It is alleged respondent violated a safety regulation promulgated under the Act.

After notice to the parties, a hearing on the merits was scheduled in Missoula, Montana for April 17, 1984. Prior to the hearing the parties submitted the case on stipulated facts.

The parties filed briefs in support of their positions.

Issues

The initial issue is whether the Secretary forfeited his right to collect a civil penalty by reason of his delay in proposing a penalty.

A secondary issue is whether the proposed penalty is proper.

Stipulation

The parties stipulated as follows:

- (1) That respondent does not defend the issued citation 2086224 alleging a violation of standard 30 C.F.R. § 55.9-40(c) 1/, on the merits;

1/ The standard provides:

55.9-40 Mandatory.

Men shall not be transported:

- (c) Outside the cabs and beds of mobile equipment, except trains.

(2) That respondent's defense is based on its contention that petitioner forfeited its right to collect a penalty by unduly delaying notification of respondent of the assessment of penalty herein;

(3) That the inspection herein was conducted on November 18, 1982;

(4) That the notice of proposed assessment was sent by petitioner to respondent on March 30, 1983;

(5) That the inspector's statement, attached as Exhibit 1, is admissible for the purpose of establishing the basis of the proposed assessment.

Discussion

The Act, in Section 105(a), provides that if the Secretary issues a citation under Section 104 he shall "within a reasonable time after the termination of such inspection notify the operator... of the civil penalty proposed to be assessed...."

The stipulated facts indicate the inspection took place on November 18, 1982, but the notice of proposed assessment was not sent to respondent until March 30, 1983.

The issue, then, is whether the time span of 132 days constitutes a "reasonable time" for the Secretary to notify the operator of the proposed penalty.

While a citation under Section 104(a) must be issued "with reasonable promptness," a civil penalty notification appears less demanding. Under Section 105(a) the notice of penalty must be issued "within a reasonable time."

The Act itself does not articulate the meaning of a "reasonable time." In construing the legislative intent in these circumstances it is proper to look to the legislative history. In reviewing the enforcement procedures of the Act, the Senate Committee on Human Resources in its report stated on this subject as follows:

The Committee notes, however, that there may be circumstances, although rare, when prompt proposal of a penalty may not be possible, and the Committee does not expect that the failure to propose a penalty with promptness shall vitiate any proposed penalty proceeding. Senate Report No. 95-181, 95th Cong. 1st Session (1977) reprinted in Legislative History of the Federal Mine Safety and Health Act of 1977, 95th Congress, 2nd Session at 618, July 1978.

In this case respondent does not claim it was prejudiced by the delay and it admits the violation of the standard.

In support of its position respondent cites Northern Aggregates, Inc., 2 FMSHRC 1062 (1980), and J.P. Burroughs and Son, Inc., 3 FMSHRC 854 (1981). In the initial case Commission Judge Gary Melick dismissed a notice of contest filed 2-1/2 months after the required 30 days. In the second case the Commission considered whether an operator's notice of contest had to be received by the Secretary, or mailed by the operator, within 30 days after the operator received the notice.

The cited cases are not controlling. The Act requires an operator to file its notice of contest within 30 days. On the other hand, the Secretary is not limited to a specific number of days. As indicated, he is only required to notify the operator of a proposed penalty "within a reasonable time."

Respondent's brief refers to a period of 45 days within which the Secretary must notify respondent of a penalty. I believe respondent has mistakenly relied on Commission Rule 27, 29 C.F.R. § 2700.27. The foregoing rule requires the Secretary to file a proposal for penalty with the Commission within 45 days after he receives a notice of contest from a respondent. The most pertinent rule is Commission Rule 25, 29 C.F.R. § 2700.25. It mandates the action the Secretary is required to take in connection with notifying an operator of a penalty. But that rule does not impose any time restraints on the Secretary.

The Act is remedial in nature and it seeks to assure, to the extent possible, the safety and health of the nation's miners. In view of these factors and in view of the expressed legislative intent, I am unwilling to impose the ultimate sanction of dismissal because the Secretary did not notify the operator of the proposed penalty until 132 days after the inspection.

For the above reasons respondent's contentions are denied and the citation is affirmed.

Civil Penalty

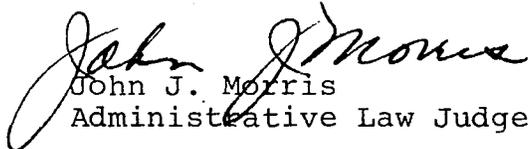
The statutory criteria for assessment of a civil penalty is set forth in 30 U.S.C. § 820(i).

The parties stipulated the inspector's statement is admissible to establish the proposed assessment. The exhibit addresses the issues of negligence, gravity and abatement. Based on the stipulation of the parties and the statutory criteria, I consider the proposed penalty of \$68 to be proper.

Based on the foregoing stipulation and the conclusions of law herein, I enter the following:

Order

Citation 2086224 and the proposed penalty of \$68 are affirmed.


John J. Morris
Administrative Law Judge

Distribution:

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/ot

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

SEP 24 1984

DONALD F. WIGGINS, : DISCRIMINATION PROCEEDINGS
Complainant :
 : Docket No. WEST 83-117-D
v. : MSHA Case No. DENV CD 83-20
 : Docket No. WEST 84-133-D
COLOWYO COAL COMPANY, : MSHA Case No. DENV CD 84-6
Respondent :

DECISION APPROVING SETTLEMENT

Before: Judge Carlson

The parties have submitted a settlement agreement in this consolidated discrimination case. In view of the settlement of all issues, the complainant, joined by the respondent, moves for dismissal of the proceeding, with prejudice.

Under the terms of the agreement, respondent agrees to pay to the complainant the sum of \$15,000 to cover the costs of moving his family and further agrees to pay all wages and accrued but unused vacation pay through September 17, 1984. Respondent admits no violation of the Mine Safety and Health Act of 1977 or any regulation promulgated thereunder.

Complainant, on the other hand, resigns his employment with respondent effective September 17, 1984, waives and releases all claims arising out of his employment with respondent, and agrees to other conditions which need not be recited here.

Having reviewed the file and considered the circumstances, I conclude that the settlement should be approved in its entirety. Accordingly, respondent's motion is granted, the settlement is approved, and Dockets WEST 83-117-D and WEST 84-133-D are dismissed with prejudice.

SO ORDERED.


John A. Carlson
Administrative Law Judge

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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 24 1984

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 84-15-M
Petitioner	:	A.C. No. 42-01755-05501 NYO
v.	:	
	:	Mercur Mine
INDUSTRIAL CONSTRUCTORS	:	
CORPORATION,	:	
Respondent	:	

DECISION

Appearances: Margaret A. Miller, Esq., and James H. Barkley, Esq.,
Office of the Solicitor, U.S. Department of Labor,
Denver, Colorado,
for Petitioner;
James A. Brouelette, EEO/Safety Officer, Industrial
Constructors Corporation, Missoula, Montana, pro se.

Before: Judge Morris

This case, heard under the 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 the Mercur Mine at Mercur, Utah on August 10, 1983. The Secretary of Labor seeks to impose a civil penalty because respondent allegedly violated a regulation promulgated under the Act.

Respondent denies any liability for the violation.

After notice to the parties, hearing on the merits was held in Missoula, Montana on April 17, 1984.

Issues

The issues are whether respondent violated Title 30, Code of Federal Regulations, Section 55.9-40(c). 1/ If respondent violated the regulation then the appropriateness of a penalty must be considered.

1/ 55.9-40 Mandatory. Men shall not be transported:

- (c) Outside the cabs and beds of mobile equipment, except trains.

Stipulation

During the hearing the parties stipulated that respondent can pay the proposed penalty herein. Further, the actions by the worker discussed here constituted a violation of the regulation. In addition, Arlen Hanson, the project manager, had authority to abate the citation (Tr. 37, 38).

Summary of the Evidence

MSHA Inspector Richard White inspected the Mercur Mine in Mercur, Utah on August 10, 1983 (Tr. 7).

The operator, Getty Mining Company, employed 209 workers at this open pit gold ore mine. Industrial Constructors Corporation, (ICC), had 20 workers on the site (Tr. 8).

During the inspection Zeke McCurdy, a Getty representative, accompanied Mr. White. The inspector indicated he wanted to check the work site of the contractor who was building the tailings pond (Tr. 8, 9).

After an inquiry, an ICC secretary referred the inspector to Arlen Hanson, project engineer as well as an ICC employee (Tr. 9, 28). Hanson declined to accompany the inspection party but he stated that any citations should be issued to him (Tr. 10).

At approximately 3:15 p.m., the inspector observed a dump truck 2/ eastbound on the haul road. The truck was moving up the arm of the dam at about 20 miles per hour. A person was riding on the outside of the truck (Tr. 12). Zeke said the person on the truck was not a Getty employee (Tr. 12).

There was a place for a rider inside the truck cab but he was standing on the driver's side, more or less on a step indented into the gas tank. He was hanging onto the truck's mirror or door (Tr. 13).

The 20 foot wide haul road was rough with rocks scattered on it. It would give an empty truck a bumpy ride (Tr. 13, 14; Exhibit P 1). The road had a 20 inch berm (Tr. 14).

The inspector followed the truck and ascertained that Paul Farley was the offending person. Farley stated he "knew better". In view of that statement the inspector concluded it was a situation of employee misconduct (Tr. 20, 21).

2/ A GMC 8-ton dual tandem vehicle, License No. Utah NV 2080 (Tr. 13).

Farley told the inspector that Hanson, his immediate supervisor, was in charge (Tr. 30). Hanson abated the violation by instructing the employee, in the presence of the inspector, regarding his activity. Hanson expressed no disagreement about receiving the citation (Tr. 29, 30, 32).

The hazard here is that the person on the side of the truck could fall off and be crushed under the rear tandem tires (Tr. 15).

There were two legal IDs on the property. The main ID was issued to Getty Mining Company. The additional ID was issued to ICC (Tr. 18).

The side on the truck Farley was riding had a sign reading "Western Excavating" (Tr. 20). The inspector had been told this company was a subcontractor for ICC (Tr. 20). But at the prehearing conferences no one claimed there were any other contractors on the site except Getty and ICC (Tr. 27).

ICC's work practices were generally good and ICC had a safety program (Tr. 19, 20, 33). ICC has no adverse history (Tr. 29).

Respondent presented no evidence.

Discussion

Respondent contends that the inspector failed to ascertain the identity of the employer of Paul Farley. Further, respondent cites Phillips Uranium Company, 4 FMSHRC 549 (April 1982), in support of its view that the citation should have been issued against the subcontractor, Western Excavating, and not ICC.

It is true that the inspector did not learn the name of Farley's employer. But the evidence abounds with circumstantial evidence that ICC was Farley's employer. There is no persuasive credible evidence to the contrary.

Respondent relies on Phillips, supra, to support its position that the citation should be against Western Excavating. I disagree. Even if we assume Farley was not an employee of ICC, the Commission decision in Phillips predated the Secretary's guidelines relating to independent contractors. These guidelines now provide:

Enforcement action against production-operators for violations involving independent contractors is ordinarily appropriate in those situations where the production-operator has contributed to the existence of a violation, or the production-operator's miners are exposed to the hazard, or the production-operator has control over the existence of the hazard. Accordingly, as a general rule, a production-operator may be properly cited for a violation involving an

independent contractor: (1) when the production-operator has contributed by either an act or omission to the occurrence of a violation in the course of an independent contractor's work, or (2) when the production-operator has contributed by either an act or omission to the continued existence of a violation committed by an independent contractor, or (3) when the production-operator's miners are exposed to the hazard, or (4) when the production-operator has control over the condition that needs abatement. 44 Fed Reg. 44497 (July 1980).

The Commission has recently approved these guidelines. Cathedral Bluffs Shale Oil Company, WEST 81-186-M (August 29, 1984).

In sum, respondent here would be liable under the Secretary's guidelines even if Farley was not ICC's employee. On this record ICC's employee, Arlen Hanson, was the project manager. He claimed to be in charge and, in fact, he abated the violation. The elements necessary in paragraph 4 of the guidelines are established.

The citation should be affirmed.

Civil Penalty

The statutory criteria for assessing a civil penalty are set forth in 30 U.S.C. § 820(a).

Considering these guidelines, I find that respondent has no adverse history (Tr. 29). The size of the penalty does not appear excessive in relation to the size of respondent. The operator was minimally negligent since Farley "knew better." It was further indicated that this activity was against company rules (Tr. 29, 31). For this reason, I conclude that the proposed penalty is excessive as it relates to the operator's negligence.

The parties have stipulated that the penalty will not affect the operator's ability to continue in business. The gravity of Paul Farley's actions was exceedingly high. To respondent's credit is its good faith in rapidly abating this condition.

On balance, I deem that a civil penalty of \$150 is appropriate for this violation.

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

Order

1. Citation 2083731 is affirmed.
2. A civil penalty of \$150 is assessed.
3. Respondent is ordered to pay the sum of \$150 to the Secretary within 40 days of the date of this decision.


John J. Morris
Administrative Law Judge

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/ot

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SEP 24 1984

LOCAL UNION 1889, DISTRICT : COMPENSATION PROCEEDING
17, UNITED MINE WORKERS :
OF AMERICA (UMWA), : Docket No. WEVA 81-256-C
Complainant :
v. : Ferrell No. 17 Mine
WESTMORELAND COAL COMPANY, :
Respondent :

SECOND SUMMARY DECISION

Before: Judge Steffey

Counsel for United Mine Workers of America (UMWA) filed on August 10, 1984, a "Second Motion for Partial Summary Decision" in the above-entitled proceeding. Counsel for Westmoreland Coal Company filed on August 23, 1984, a pleading entitled "Westmoreland Opposition to UMWA Second Motion for Partial Summary Decision and Cross-Motion for Summary Decision." This decision grants Westmoreland's cross-motion for summary decision because the rulings herein deny the relief requested by UMWA.

Procedural History

The original complaint in this proceeding was filed on February 5, 1981, under section 111 1/ of the Federal Mine

1/ The first three sentences of section 111 provide as follows: If a coal or other mine or area of such mine is closed by an order issued under section 103, section 104, or section 107, all miners working during the shift when such order was issued who are idled by such order shall be entitled, regardless of the result of any review of such order, to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than the balance of such shift. If such order is not terminated prior to the next working shift, all miners on that shift who are idled by such order shall be entitled to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than four hours of such shift. If a coal or other mine or area of such mine is closed by an order issued under section 104 or section 107 of this title for a failure of the operator to comply with any mandatory health or safety standards, all miners who are idled due to such order shall be fully compensated after all interested parties are given an opportunity for a public hearing, which shall be expedited in such cases, and after such order is final, by the operator for lost time at their regular rates of pay for such time as the miners are idled by such closing, or for one week, whichever is the lesser.

Safety and Health Act of 1977. An amended complaint was filed on November 9, 1981. The amended complaint first requested that the miners at respondent's Ferrell No. 17 Mine be paid for 1 week of compensation under section 111 of the Act because of the issuance on November 7, 1980, of Order No. 668338 under section 107(a) 2/ of the Act, even though that order did not allege a violation of any mandatory health or safety standard. Alternatively, the amended complaint requested that the miners scheduled to work on both the day shift and the afternoon shift of November 7, 1980, be paid compensation because of the issuance on November 7, 1980, of Order Nos. 668337 and 668338 under sections 103(j) 3/ and 107(a), respectively.

I issued a summary decision on April 28, 1982, 4 FMSHRC 773, in which I held that the miners were entitled to compensation for the remainder of the shift on which the section 103(j) order was issued and for 4 hours of the next working shift irrespective of whether Westmoreland was obligated to pay the miners 4 hours of compensation under the provisions of the Wage Agreement. My decision denied UMWA's request for 1 week's compensation based on the section 107(a) order because the order did not allege a violation of a mandatory health or safety standard. I also denied UMWA's request that I retain jurisdiction of the case until MSHA had completed its investigation of the explosion which had occurred on November 7, 1980. 4 FMSHRC at 789-790.

2/ Section 107(a) provides as follows:

If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section 104(c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist. The issuance of an order under this subsection shall not preclude the issuance of a citation under section 104 or the proposing of a penalty under section 110.

3/ Section 103(j) provides as follows:

In the event of any accident occurring in any coal or other mine, the operator shall notify the Secretary thereof and shall take appropriate measures to prevent the destruction of any evidence which would assist in investigating the cause or causes thereof. In the event of any accident occurring in a coal or other mine, where rescue and recovery work is necessary, the Secretary or an authorized representative of the Secretary shall take whatever action he deems appropriate to protect the life of any person, and he may, if he deems it appropriate, supervise and direct the rescue and recovery activities in such mine.

The Commission thereafter granted UMWA's petition for discretionary review and issued a decision on August 12, 1983, which held as follows:

For the reasons discussed above, [we] vacate his order dismissing without prejudice the Union's claim for a week's compensation. The case is remanded to the judge with instructions to hold the record open as to the Union's claim for a week's compensation. The parties are free to submit any appropriate motions or showings. If the Union fails to make appropriate showings upon the completion of MSHA's investigation, Westmoreland may file an application for a show cause order to determine if the claim should be dismissed. The judge's resolutions of the Union's other claims are final, since no review was taken as to those aspects of his decision.

5 FMSHRC at 1413.

Summary of Pertinent Facts

My first summary decision contained 18 stipulations of fact agreed upon by the parties. 4 FMSHRC at 774-775. Some of those stipulations are not particularly pertinent to the issues raised in the current motions for summary decision, but, since both UMWA's and Westmoreland's motions refer to some of the original stipulations, it is desirable that I repeat all of the stipulations for the convenience of the parties.

1. The Ferrell No. 17 Mine is owned and operated by the Westmoreland Coal Company.
2. The Ferrell No. 17 Mine is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.
3. The Administrative Law Judge has jurisdiction over these proceedings.
4. At all times relevant herein, Westmoreland Coal Company, at its Ferrell No. 17 Mine, and Local Union 1889, UMWA, were bound by the terms of the National Bituminous Coal Wage Agreement of 1978. A copy of the Contract is submitted with these stipulations as Exhibit A.
5. In the early morning hours of November 7, 1980, an explosion occurred inside the Ferrell No. 17 Mine.
6. At 7:30 a.m. on November 7, 1980, MSHA Inspector Eddie White issued Withdrawal Order No. 668337 pursuant to section 103(j) of the Act. The order applied to all areas of the mine.

7. Order No. 668337 provided in full as follows:

An ignition has occurred in 2 South off 1 East. This was established by a power failure at 3:30 a.m. and while searching for the cause of the power failure, smoke was encountered in the 2-South section. Five employees in the mine could not be accounted for.

[The area or equipment involved is] the entire mine. The following persons are permitted to enter the mine: Federal coal mine inspectors, West Virginia Department of Mines coal mine inspectors, responsible company officials, and United Mine Workers of America miner's representatives.

8. At 8:00 a.m. on November 7, 1980, MSHA Inspector Eddie White issued Order No. 668338 to the Westmoreland Coal Company pursuant to section 107(a) of the Act. The order applied to all areas of the mine.

9. Order No. 668338 did not allege a violation of any mandatory health or safety standards. It stated that the following condition existed:

All evidence indicates that an ignition of unknown sources has occurred and five employees cannot be accounted for.

10. Subsequent to the issuance of the above withdrawal orders, the 2 South area of the mine was sealed off.

11. Miners who were working on the 12:01 to 8:00 a.m. shift on November 7, 1980, were withdrawn from the mine when Westmoreland management became aware that an explosion had occurred.

12. The miners who were withdrawn from the mine during the 12:01 to 8:00 a.m. shift on November 7, 1980, were paid for their entire shift.

13. Exhibit B is a list of the miners who were scheduled to work the day shift (8:00 a.m. to 4:00 p.m.) on November 7, 1980. Exhibit B also identifies each such miner's daily wage rate and the amount of compensation received by such miner for the day shift on November 7, 1980. Each such miner received at least four hours of pay.

14. Westmoreland management did not contact any of the miners scheduled to work on the 8:00 a.m. to 4:00 p.m. shift (day shift) of November 7, 1980, in order to notify them not to report to work.

15. On December 10, 1980, Order No. 668337 and Order No. 668338 were modified to show the affected area of the mine was limited to the seals and the area inby such seals.

16. Order Nos. 668337 and 668338, as modified, have not been terminated and remain in effect. [As hereinafter indicated, Order No. 668338 was terminated on November 15, 1983.]

17. Westmoreland has not contested the issuance of Order No. 668337 by initiating a proceeding under section 105(d) of the Act.

18. Westmoreland has not filed an Application for Review of Order No. 668338 under section 107(e) of the Act.

UMWA's motion relies upon certain events which have occurred since the parties agreed upon the 18 stipulations which are given above. I shall update the facts given in the parties' stipulations by adding some uncontested facts based on events which occurred after I issued my first summary decision in this proceeding on April 28, 1982.

19. As indicated in stipulation No. 10 above, the 2 South Section of the mine was sealed off. Production was allowed to continue in other areas of the mine, but the 2 South Section has not been reopened and it is doubtful if it ever will be reopened.

20. Since MSHA could not complete its investigation of the cause of the explosion by actual examination of conditions in the 2 South area of the mine, an MSHA inspector in Arlington, Virginia, examined the statements given in December 1980 to MSHA's investigators shortly after the explosion occurred. On the basis of that examination, the inspector issued 13 withdrawal orders (Nos. 2002585 through 2002597) on July 15, 1982, pursuant to section 104(d)(2) of the Act. Westmoreland filed 13 notices of contest challenging the validity of the orders and those cases were assigned Docket Nos. WEVA 82-340-R through WEVA 82-352-R.

21. Subsequently, counsel for the Secretary of Labor filed two petitions for assessment of civil penalty in Docket Nos. WEVA 83-73 and WEVA 83-143 proposing a total of \$55,040 in civil penalties. The issues raised in the two civil penalty cases were consolidated with the issues raised in the 13 notices of contest.

22. In an order issued on May 4, 1983, in Docket Nos. WEVA 82-340-R, et al., I granted in part Westmoreland's motion for summary decision and vacated all 13 of the withdrawal orders as having been issued in error under section 104(d) of the Act. My order noted that the violations alleged in the 13 orders survived vacation of the orders so that the violations would have to be considered on their merits in the civil penalty cases. Island Creek Coal Co., 2 FMSHRC 279 (1980), and Van Mulvehill Coal Co., Inc., 2 FMSHRC 283 (1980).

23. Thereafter the parties filed a motion for approval of settlement which I approved in a decision issued May 11, 1984, 6 FMSHRC 1267. Under the settlement agreement, Westmoreland paid reduced penalties totaling \$38,000 in lieu of the penalties totaling \$55,040 proposed by MSHA.

24. On November 15, 1983, MSHA issued a subsequent action sheet terminating Order No. 668338 issued under section 107(a) of the Act and described in stipulation No. 9 above. The termination sheet stated as follows:

The area in 2 South has been sealed in the 1 East Mains at a location 1 pillar outby the 2 South junction. A 103[(j)] order cover[s] the area original[ly] covered in the 107(a) order. Therefore the 107(a) order is terminated.

25. As indicated in stipulation No. 9 above, Order No. 668338 did not allege a violation of any mandatory health or safety standard. None of the 13 withdrawal orders citing violations on the basis of sworn testimony obtained by MSHA can be characterized as having alleged a violation as a part of section 107(a) Order No. 668338 because all of them were issued under section 104(d) 4/ of the Act which requires a finding that "the conditions created by such violation[s] do not cause imminent danger".

4/ The pertinent part of section 104(d) provides as follows: If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated. [Emphasis supplied.]

Consideration of Parties' Contentions

UMWA's Arguments that the Section 107(a) Order Should Be Interpreted To Allege a Failure by Westmoreland To Comply with a Mandatory Health or Safety Standard

The relief which UMWA is requesting in its second motion for summary decision is that the miners who were working on November 7, 1980, when the explosion occurred be given up to a week's compensation under the third sentence of section 111 of the Act which, as shown in footnote 1 above, provides in pertinent part as follows:

If a coal or other mine or area of such mine is closed by an order issued under section 104 or section 107 of this title for a failure of the operator to comply with any mandatory health or safety standards, all miners who are idled due to such order shall be fully compensated . . . by the operator for lost time at their regular rates of pay for such time as the miners are idled by such closing, or for one week, whichever is the lesser.

In order for the miners to be compensated for up to 1 week, they must be idled by an order issued under section 104 or section 107 "for a failure of the operator to comply with any mandatory health or safety standards". As indicated in stipulation No. 9 above, Order No. 668338, under which UMWA seeks to obtain 1 week of compensation, was issued under section 107(a) of the Act, but it did not cite a violation of "any mandatory health or safety standards".

UMWA's motion recognizes that it cannot recover up to a week's compensation under the third sentence of section 111 unless it can be shown that Order No. 668338 withdrew miners for a failure of Westmoreland to comply with a mandatory health or safety standard. UMWA also recognizes that the inspector did not cite a violation as a part of Order No. 668338 when he issued it, but UMWA argues that the 13 withdrawal orders, issued on the basis of the sworn statements given to MSHA's investigators, may be used for the purpose of showing that the imminent danger order was issued for a violation of a mandatory health or safety standard (finding No. 20 above). While it is true that several of those orders cite Westmoreland for violations which may have contributed to the explosion, particularly, Nos. 2002586 and 2002593 which allege violations of 30 C.F.R. §§ 75.316 and 75.303, respectively, for failure to ventilate properly and inspect for methane accumulations, the fact remains that UMWA's right to compensation under section 111 is based entirely upon the enforcement actions of MSHA, and MSHA has never at any time modified section 107(a) Order No. 668338

to allege a violation of any mandatory health or safety standard. Moreover, as indicated in finding No. 25 above, all citations of violations made by MSHA on the basis of its investigation of the explosion were issued in the form of 13 unwarrantable-failure section 104(d) orders which require an express finding that "the conditions created by such violation[s] do not cause imminent danger." The fact that MSHA terminated Order No. 668338 on November 15, 1983, without ever modifying the order in any way to indicate that the order had been issued for failure of Westmoreland to comply with any mandatory health or safety standard, as indicated in finding Nos. 24 and 25 above, precludes me from accepting UMWA's argument that I should rely upon the fact that 13 withdrawal orders were issued to make a finding that the imminent-danger order was actually issued for failure of Westmoreland to comply with a mandatory health or safety standard.

It is true, as UMWA argues, that MSHA probably did not know when the imminent-danger order was issued on November 7, 1980, that Westmoreland had violated various mandatory health and safety standards. It is also true that MSHA had the authority under section 107(a) to issue citations as a part of the order or in conjunction with the order. I have had several cases before me in which the inspector did cite a violation under section 104(a) as a part of his imminent-danger order. I also have had cases in which the inspector issued separate citations at the time he issued an imminent-danger order, but in such cases, the inspectors' citations stated that they were being issued as a part of an imminent-danger order, or in conjunction with an imminent-danger order.

It is additionally true, as UMWA argues, that the Act is intended to be liberally construed so as to provide the miners with all the relief they are entitled to receive under the Act, but UMWA has not cited any legislative history which persuades me that Congress intended for one of the Commission's judges to modify an imminent-danger order so as to allege one or more violations which were not observed or cited by an MSHA inspector in conjunction with that order.

Westmoreland's cross motion (pp. 10-11) for summary decision contains a paragraph which cogently argues that the Commission has ruled against agreement with the type of arguments made by UMWA in this proceeding:

The Commission has made it abundantly clear that it will not usurp Congress's function by legislating new remedies into the Act. It has done so, moreover, in precisely the context which this case involves -- an attempt by the UMWA to question MSHA's enforcement discretion and substitute itself as a private prosecutor by urging the Commission to make

findings or take actions which are reserved to MSHA. UMWA v. Secretary of Labor, MSHA, 5 FMSHRC 1519 (1983) (Act does not permit UMWA to challenge MSHA's decision to vacate a withdrawal order); UMWA v. Secretary of Labor, MSHA, 5 FMSHRC 807 (1983), aff'd, 2 MSHA (BNA) 1137 (D.C. Cir. 1983) (Act does not permit UMWA to assert that a citation should have been an order of withdrawal); UMWA, Local 1197 v. Bethlehem Mines Corp., 5 FMSHRC 2093 (ALJ 1983) (Act does not permit UMWA to enforce mandatory dust control standards through discrimination complaint). These cases are consistent with the long-established principle that only MSHA has the authority to make findings of violations. E.g., Freeman Coal Mining Corp., 2 IBMA 197 (1973), aff'd, 504 F.2d 741 (7th Cir. 1974).

UMWA's motion (p. 7) refers to the fact that two of Westmoreland's supervisory personnel were indicted and convicted for several violations of the Act in connection with the explosion which occurred on November 7, 1980. I do not see how those convictions change any of the provisions of section 111. Miners cannot recover compensation under section 111 unless MSHA issues certain enumerated types of orders. UMWA concedes in its motion (p. 21, n. 15) that the Act gives the miners limited compensation. The third sentence of section 111 permits UMWA to recover up to a week of compensation only when a 104 or 107 order is issued for failure of an operator to comply with a mandatory health or safety standard. MSHA did not issue 107(a) Order No. 668338 for a failure of Westmoreland to comply with a mandatory health or safety standard. MSHA had a period of over 3 years within which to modify the order to cite a violation of a mandatory health or safety standard before the order was terminated, but MSHA did not do so.

As UMWA argues (motion, p. 17), it may be preferable, from the miners' viewpoint, to interpret section 111 so as to permit them to recover up to a week's compensation when there is extrinsic evidence showing that an imminent-danger order ought to have cited a violation of a mandatory health or safety standard, but Congress did not write the third sentence of section 111 to permit that interpretation to be given to that sentence. Therefore, I do not believe that section 111 can be interpreted to provide UMWA with the relief which it seeks in this proceeding.

Westmoreland's Contention that No Miners Were Idled by Section 107(a) Order No. 668338

Westmoreland's cross motion for summary decision correctly argues that my first summary decision issued in this proceeding held that the miners were idled by the section 103(j) order issued at 7:30 a.m. on the midnight-to-8 a.m. shift. The miners

working on the shift during which the 103(j) order was issued were paid for that entire shift and the miners on the next working shift were awarded 4 hours of pay for the time they were idled by the section 103(j) order which was still in effect. 4 FMSHRC at 783.

The section 107(a) order on which UMWA bases its present claim for 1 week of compensation was not issued until 8 a.m. on November 7, 1980, and did not idle any miners because the miners had already been idled by the 103(j) order. That 103(j) order not only withdrew miners on the midnight shift on November 7, 1980, but has kept the miners withdrawn from the 2 South area up to and including the present time. Stipulation Nos. 6 through 9 and finding No. 23 above. Moreover, as indicated in finding No. 24 above, the outstanding effectiveness of the 103(j) order served as the basis for MSHA's termination of the 107(a) order which has never been modified to allege a violation of any mandatory health or safety standard.

Westmoreland correctly notes that my ruling, to the effect that the miners are entitled to compensation only under the section 103(j) order, was not contested by UMWA when its petition for discretionary review of my first summary decision was granted by the Commission. The Commission's decision remanding this case with directions for me to consider UMWA's claims under the third sentence of section 111 specifically stated that my decision was final as to all issues except UMWA's claim for 1 week of compensation under the section 107(a) order. 5 FMSHRC at 1413.

Westmoreland's cross motion for summary decision (p. 5) correctly concludes that since UMWA has not and cannot establish the first requirement of the third sentence of section 111, namely, that miners be withdrawn and idled by section 107(a) Order No. 668338, that UMWA's second motion for summary decision must be denied for that reason alone, regardless of the issues which have already been discussed and decided in favor of Westmoreland.

Conclusions

As pointed out above, UMWA's second motion for summary decision must be denied for its failure to show that any miners were withdrawn or idled by section 107(a) Order No. 668338. No miners were withdrawn under section 107(a) Order No. 668338 because 103(j) Order No. 668337 was still in effect when the miners reported for work on the next working shift. The 107(a) order has been terminated, but the 103(j) order is still in effect and miners are still prohibited from entering the 2 South area by the outstanding 103(j) order. Therefore, UMWA cannot satisfy the first prerequisite under the third sentence of section 111 which requires a showing that miners were withdrawn and idled by the 107(a) order. Eastern Associated Coal Corp., 3 FMSHRC 1175, 1176-1179 (1981).

Assuming that UMWA could show that miners were withdrawn by the section 107(a) order, MSHA has terminated the 107(a) order without modifying it in any way to reflect that the imminent danger occurred because of Westmoreland's failure to comply with any mandatory health and safety standards. Although MSHA's investigation resulted in the issuance of 13 withdrawal orders pursuant to section 104(d) of the Act, citing alleged violations of the mandatory health and safety standards, those orders cannot be said to allege violations as part of an imminent-danger order because they could not have been issued in the first instance without a finding that the violations cited in the orders did not cause an imminent danger.

For the reasons given above, I find that UMWA has failed to establish any basis for the grant of its second motion for summary decision. The same reasons support the grant of Westmoreland's cross motion for summary decision.

WHEREFORE, it is ordered:

(A) UMWA's second motion for summary decision is denied and the claim for up to 1 week of compensation under section 107(a) Order No. 668338 is denied.

(B) Westmoreland's cross motion for summary decision is granted and this proceeding is terminated.

Richard C. Steffey
Richard C. Steffey
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SEP 24 1984

SECRETARY OF LABOR, : DISCRIMINATION PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No: WEVA 84-4-D
ON BEHALF OF, :
ROBERT RIBEL, JOHN KANOSKY, : MSHA Case No. MORG CD 83-16
JR., & DANNY WELLS, :
Complainants : Docket No. WEVA 84-33-D

v. : MSHA Case No. MORG CD 83-18
: Docket No. WEVA 84-66-D
:
EASTERN ASSOCIATED COAL : MSHA Case No. MORG CD 83-19
CORP., :
Respondent : Federal No. 2 Mine

DECISIONS

Appearances: Covette Rooney, Esq., Office of the
Solicitor, U.S. Department of Labor,
Philadelphia, Pennsylvania, for the
Complainants;
Barbara J. Fleischauer, Esq., Morgantown,
West Virginia, for Complainant Robert
Ribel.
Ronald S. Cusano and Anthony J. Polito,
Esqs., Corcoran, Hardesty, Ewart, Whyte,
and Polito, Pittsburgh, Pennsylvania,
for Respondent;
Sally Rock, Associate General Counsel,
Eastern Associated Coal Corp., Pittsburgh,
Pennsylvania, for Respondent.

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern discrimination complaints filed by the Secretary of Labor on behalf of the named complainants pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, charging the respondent with certain alleged acts of discrimination against the complainants because of their asserted exercise of certain protected safety rights under the Act.

Docket No. WEVA 84-4-D concerns a complaint filed by MSHA on behalf of complainants Ribel, Kanosky, and Wells, on or about October 17, 1983. That complaint is based on

a written complaint filed by these individuals with MSHA on May 31, 1983, in which they make the following allegations:

On or about May 18, 1983, during the shift we were approached by Jack Hawkins in regards to double cutting on the longwall face. He gave us two options in regards to double cutting on the face, which were:

(1) If we agreed to double cut we would receive benefits that included overtime opportunities and favorable job assignments.

(2) Should we not agree to double cut, we would not receive overtime opportunities and would be assigned work in a manner that would cause us to either bid from our present jobs or quit our employment with Eastern.

Being our belief that the foreman's request that we perform work inby was unsafe and violative of the Act, we refused to accede to his request.

As a result of exercising our rights under the Act, we have been discriminated against by our foreman and Eastern Associated Coal Corporation by being assigned job duties that have not been customarily a part of our regular job and, in addition, we have been denied overtime opportunities and other benefits afforded other employees on the crew.

Docket No. WEVA 84-33-D, concerns a complaint filed by MSHA on or about December 5, 1983, on behalf of Mr. Ribel, challenging Mr. Ribel's suspension on August 5, 1983, with intent to discharge, for his allegedly having engaged in the destruction, or alleged "sabotage", of a company telephone on the 7-Right longwall section of respondent's Federal No. 2 Mine. Mr. Ribel filed a grievance on this discharge, and on August 22, 1983, an arbitrator denied his grievance and upheld the discharge.

As a result of MSHA's complaint on Mr. Ribel's behalf, Chief Judge Merlin ordered his temporary reinstatement on November 14, 1983, and after a hearing held by me on November 28, 1983, the parties agreed and stipulated that Mr. Ribel would be "economically reinstated". The respondent agreed to continue paying Mr. Ribel his regular rate of pay, as well as other benefits flowing from his employment with the respondent, without actually returning him to work at the mine.

Docket No. WEVA 84-66-D, concerns a complaint filed by MSHA on behalf of Mr. Wells on or about December 15, 1983, and this complaint is based on an August 8, 1983, complaint filed by Mr. Wells with MSHA claiming that his supervisor, Jack E. Hawkins, issued him a "safety slip" for an alleged safety violation, and that he did so out of retaliation for his prior safety complaint filed with MSHA and the Commission.

Issues Presented

Docket No. WEVA 84-4-D

1. Whether the complainants, Ribel, Kanosky and Wells were engaged in protected activity on or about May 18, 1983, when they refused to double-cut on the 7-Right longwall section of the respondent's Federal No. 2 Mine.

2. Whether the respondent, by and through its agent, section foreman Jack E. Hawkins, retaliated or discriminated against the complainants during the period May 18, 1983 until approximately June 1, 1983, by withholding certain employee benefits.

Docket No. WEVA 84-33-D

Whether the respondent violated the Act on or about August 5, 1983, when it suspended with intent to discharge the complainant Robert Ribel for allegedly destroying or "sabotaging" a company telephone.

Docket No. WEVA 84-66-D

Whether the respondent, by and through its agent, section foreman Jack E. Hawkins, retaliated or discriminated against the complainant Danny Wells by issuing him a "safety slip" for an asserted safety violation.

DOCKET NO. WEVA 84-4-D AND 84-33-D.
MSHA's TESTIMONY AND EVIDENCE

Complainant Robert A. Ribel testified that he has been unemployed since August 5, 1983, and that prior to this date he was employed by the respondent as a chock setter and had been in that position for approximately six years. He confirmed that he worked on the midnight shift, and he confirmed that his duties included moving the

longwall hydraulic roof supports as the shift cuts the coal, and pulling the shields as the longwall advances. He indicated that in addition to himself, two other chock setters would normally work with him during the shift, and on May 17, 1983, chock setters John Kanosky and Danny Wells were working with him. Mr. Ribel identified his supervisor as section foreman Jack Hawkins, and he indicated that Mr. Hawkins had been so employed for two or three months (Tr. 13-15).

Mr. Ribel identified exhibit G-1, as a complaint which he and Mr. Kanosky and Mr. Wells signed and filed with MSHA on May 31, 1983, and he explained the circumstances which led to the complaint. He stated that approximately two or three weeks prior to May 18, 1983, he, Mr. Kanosky, and Mr. Wells informed Mr. Hawkins that they were not going to "double cut" coal any more. A meeting was held with the union safety committee and mine management, and Mr. Hawkins' supervisors advised the complainants that they did not have to double cut (Tr. 17).

Mr. Ribel stated that the complainants did not double cut after the meeting was held, but that on or about May 15, 1983, Mr. Hawkins summoned them to the dinner hole and informed them as follows (Tr. 18):

* * * * *

[W]hen Jack Hawkins called myself, Danny Wells, and John Kanosky into the dinner hole, sat us down, and told us that he was going to make it twice as hard on us, to single cut, as it was to double cut, and he read us our options, and he said among the options, if we refuse to double cut, we wouldn't be granted the opportunity to work through dinner, as we had in the past, we wouldn't be allowed to stay in between shifts, and there would only be two of us on the face, instead of three, one of us would be doing dead work all the time, we would alternate which one of us that was, and he said, he would make it so tough on us, we would either bid off, or he would find a way of getting rid of us.

That was about the extent of the conversation. Danny asked him for a copy of the two options, he just laughed and put them in his pocket.

Mr. Ribel explained that in "double cutting", the coal cutting shearer would move from the tailpiece to the head along the longwall face, and then would repeat

the process, moving back from the head to the tailpiece, making a second cut of coal. He confirmed that while he had been involved in double cutting for a period of six years while assigned to the longwall section, he did not like it because he believed that it was not safe because when he is inby the shearer the dust would impair his vision, and he would be exposed to the dusty conditions generated by the shearer. He was not sure whether double cutting was legal, and while it "seemed dangerous to me all along", until the time that he "got together" with Mr. Wells and Mr. Kanosky to refuse to continue double cutting, he did nothing about it because he could not find others who openly shared the same views (Tr. 19).

Mr. Ribel stated that during double cutting he had to work behind the shearer, and the dust would get into his lungs and eyes, and this would impair his vision. Further, in the event of a shearer fire, the smoke could come in his direction because the air is flowing from the head, down the face, out the tail, and down the return. He would experience no such problems during single cutting. (Tr. 21-24).

Mr. Ribel stated that the first time the complainants approached management about double cutting was when they had the meeting in early May. He confirmed that during his early training, he was instructed that it was illegal to work inby any piece of moving equipment, but that during his six years on the longwall he did not follow this procedure, and he, as well as others, worked inby the longwall shearer. He did so to "just kind of go with the flow", and that "I just kept my mouth shut and did what everyone else did" (Tr. 25)

Mr. Ribel explained that he believed that working "inby the shears" is the same as double cutting, and that the only reason a chock setter would be inby the shearer would be while he was double cutting (Tr. 28). He confirmed that during the May meeting, mine management told him that he did not have to work inby the shearer and he took it for granted that this meant that he did not have to double cut. (Tr. 29-31).

Mr. Ribel stated that prior to May 18, he was allowed to work through his dinner period of a half-an-hour, and that he would be paid time and a half for this. After May 18, Mr. Hawkins would assign the crew a specific time to take dinner, and he did not work during this time. However, sometime after June 1, after the complaint was filed, Mr. Hawkins "seemed like he got a little nicer", and asked him if he wanted to work through his dinner

period. Further, subsequent to June 1, he assumed he was free to work through dinner if he wanted to (Tr. 36).

Mr. Ribel stated that prior to May 18, he and the other chock setters always had the opportunity to stay and work between shifts, for once or twice a week, but that between May 18 and June 1, they were not asked. After June 1, he believed that he was again asked to stay and work between shifts (Tr. 37). He also indicated that after the complaint was filed, three chock setters were again permitted to work together, and this made it easier for them to do their jobs properly (Tr. 38).

Mr. Ribel stated that prior to May 18, the chock setters did "dead work" at the beginning of the shift before production started. However, after this time, and until June 1, the chock setters "did almost all the dead work that was done", and the utility man who previously did it while the chock setters were running coal "stayed at the headgate" (Tr. 40).

Mr. Ribel stated that after June 1, he was single cutting and was not doing as much "dead work" as he had done previously (Tr. 42). He also confirmed that between May 18 and June, other members of his crew were allowed to work through dinner and were given the opportunity to work between shifts. (Tr. 43).

Mr. Ribel testified that while he never filed a written safety complaint with the mine safety committee about the practice of double cutting, he "talked to" several committee members about it (Tr. 52). He indicated that he spoke to them before May 18, and that he discussed whether or not he had to work in by the shearers and they indicated that he did not (Tr. 54)

Mr. Ribel confirmed that he never personally approached any Federal or state inspector about double cutting because he had not taken the time to do so, and because he wanted to wait until he was working with two other people who felt the way that he did about it. (Tr. 54). He also confirmed that he never brought up the subject at any safety meetings or discussions held with mine management (Tr. 55), and that he had never previously filed any safety complaints with mine management over conditions which he believed were hazardous (Tr. 57, 59).

Mr. Ribel identified exhibit G-2, as the complaint he filed with MSHA after he was discharged by the respondent on August 5, 1983 (Tr. 60). He explained the circumstances concerning his discharge, and what transpired

at the time Mr. Toth accused him of sabotaging the phone (Tr. 60-76). Mr. Ribel confirmed that this was the first disciplinary action ever taken against him by the respondent (Tr. 76).

On cross-examination, Mr. Ribel confirmed that during the entire six-year period that he worked on the longwall section as a chock setter, he never complained to any Federal or state inspectors about double cutting, and he never formally complained to his safety committee. Although he did discuss the matter with certain members of the safety committee, they advised him that as long as the day shift and afternoon shift continued to double cut, nothing could be done about the midnight shifts' complaint (Tr. 80).

Mr. Ribel testified that compared with other bosses he has worked with, Mr. Hawkins was "better than some, and worse than others", and that he "was harder than some, but he was easier than others." He also confirmed that the mine had several lay-offs, one of which occurred in mid-March of 1983, when Mr. Hawkins was assigned as his boss (Tr. 81). He also confirmed that these lay-offs resulted in long-time members of his crew being laid off, less people available for work, and more work for him to do. (Tr. 82).

Mr. Ribel conceded that at no time during the six years that he worked on the longwall did anyone, prior to the May incident with Mr. Hawkins, ever ask him to double cut, and no one ever told him where he was to stand or work while he was double cutting (Tr. 84). He confirmed that during double cutting, he could either work in by the shearer, or stand between the drums and the shearer (Tr. 84-85).

Mr. Ribel explained the ventilation system across the longwall, and he confirmed that water sprays are used to control the dust, and that respirators are provided for those miners who choose to use them (Tr. 90-92). He explained where the drum operator would be positioned, and he confirmed that the reasons he first complained in May was that he was working with two other chock setters who concurred in his concerns about double cutting (Tr. 97).

Mr. Ribel confirmed that the respondent changed the cutting bits on the longwall over the years, and that this probably increased or created more water spray to help dilute the dust, and if they work properly, "they do put out quite a bit of water" (Tr. 99). He confirmed that at no time during the six years that he worked as a chock setter during double cutting was there ever a fire on the

shearer (Tr. 101). He confirmed that air hats containing a dust filter system were made available to the crew, but that he found them to be bulky (Tr. 101). He also confirmed that the shearer operators were exposed to more dust than the chock setters, and that they wore the air hat (Tr. 102).

When asked to explain why his vision would be impaired more when he was double cutting, Mr. Ribel responded as follows: (Tr. 104-105):

A. Because when you are double cutting, you are setting up the shields, on the inby side, the down wind side of the shears, and you get a whole lot more dust down there, than you do, when you are on the upwind side of it, the upwind side of it, the only dust that you get is just the dust from the shield, that you are letting down, and moving.

Q. What about --

A. And sometimes not even that.

Q. What about if you work inby, in between the shear operators, that's between these two drums, that we have shown on the sketch, which you have indicated you have done in the past, would you get the same dust exposure, that the shear operators would?

A. I would say probably about much, if you are working there right beside them, yes.

Q. If anything less than they?

A. Yes.

Q. And you have done that in the past?

A. Yes.

Q. Would your vision be any more impaired or less impaired than the shear operators?

A. I wouldn't think that there would be much difference, no.

In response to certain questions concerning the meeting with mine management with respect to the question of double cutting, Mr. Ribel responded as follows (Tr. 106-107):

Q. Now, let's talk about this meeting with Mr. Hawkins, you indicated that you told Mr. Hawkins that you had decided, I guess you, and Mr. Kanosky, and Mr. Wells, had decided that you weren't going to double cut any more, after six years of doing it, is that pretty much what you told Mr. Hawkins?

A. That's right.

Q. And this was in May of 1983, early May?

A. Early May.

Q. When you told Mr. Hawkins that, did he threaten to fire you then?

A. No.

Q. In fact he suggested that you get a safety committeeman to come in, and discuss the situation?

A. Yes.

Q. And rather than doing that on shift, and causing a loss of production, it was agreed between the three of you and Mr. Hawkins, that you would have a meeting with whoever you wanted to meet with, the following morning after your shift was completed?

A. That's right.

Q. And you did in fact have such a meeting?

A. Yes, we did.

* * * * *

Q. And isn't it correct that what Mr. Dennison told you, was that you and the other chock setters, did not have to work inby the shears?

A. I don't recall if he said, we don't have to work inby or double cut, I think he said we don't have to work inby the shears, but I'm not sure.

And, at (Tr. 109-114):

Q. Mr. Ribel, isn't it true that you assumed from what Mr. Dennison told you, that you didn't have to double cut?

A. Yes, that was what I assumed, yes.

Q. Isn't it correct, Mr. Ribel that after this meeting with Mr. Dennison, and the others, that you were never ordered or required to double cut at Federal Number 2 Mine, up until the time that you were discharged?

A. No, that's not true. I was never ordered to, but I was given a list of options, that led me to believe it would be bad for me, if I didn't.

Q. But isn't it true that Mr. Hawkins, neither Mr. Hawkins, or anybody else, ever said, either specifically or directly ordered you to double cut, after the meeting with Mr. Dennison?

A. That's true, I was never ordered to after that meeting.

Q. In fact you never did double cut after that meeting with Mr. Dennison, is that true?

A. That's true.

* * * * *

Q. Now, let's talk about these things, I think you mentioned that he said, that he was going to ask you to do other work. Isn't what Mr. Hawkins told you that, he was only going to use two shear operators, to move the shields, and use the third shear operator, to do the dead work?

A. What do you mean, chock setters, not shield operators.

Q. Chock setters, I'm sorry.

A. I understood what you meant.

Q. Yes, thank you. At this point in time, up until May, you had been using three chock setters, to move these shields?

A. That's correct.

Q. And isn't what Mr. Hawkins told you, that he was going to use two chock setters, to move the shields, and use the third chock setter to do general work?

A. He said that there will be one of you at all time, doing dead work.

Q. And didn't he indicate that he was going to rotate who that person was, I mean it wouldn't be the same--

A. Oh, he said that it would be a difference one of us every day, yes.

* * * * *

Q. What Mr. Hawkins was telling you in mid-May, when this conversation took place, I think you have indicated was either the 17th or 18th of May, is that he was only going to use two chock setters, to move the shields, and he was going to put the other one to work doing other things?

A. Yes.

Q. In fact that's what he did?

A. That's what he did.

Q. And the type of work, he was alternating the three of you, the third person out, would be the person doing this called dead work?

A. That's right.

Q. Isn't it true that you had done those other jobs before, whatever Mr. Hawkins assigned you to do?

A. Not during production; during production, the chock setters were always on the face, and the utility man did the dead work.

Q. Now, when you say during production, you mean while the shear was operating.

A. That's right.

Q. Okay, now, he's taken one of you out of the cycle?

A. Um hmm.

Q. Now, the jobs that you were performing out of cycle, are the same types of jobs that you were

performing before, but you just hadn't done as much before, would that be true?

A. There were jobs, when we were down, everybody did maintenance, or dead work, when we were down. When we ran coal, it was never -- the chock setters were always on the face when we were running coal, doing jobs pertaining to production, not dragging cables, or overhead netting, carrying cribs, or rock dust.

Q. Would it be fair to state that Mr. Hawkins didn't ask you to do anything, during this two week period, that you hadn't done before?

A. That's right.

Q. Now, you were doing more of it?

A. Yeah, doing the utility man's job.

With regard to the question of working through his dinner hour, Mr. Ribel testified as follows: (Tr. 118-122):

Q. Mr. Ribel, you also mentioned that one of the three things that Mr. Hawkins talked to you about, one was the assignment on the work, and we discussed that already, and I think the other was about working through the dinner hour. Am I correct, that the practice at the mine is that the dinner hour, or dinner half an hour, we'll call it, is normally, has to be taken between the third the the fifth hour?

A. Yes, if you take it between the third and fifth hour, I don't know if they have changed their rule or not, but that was the policy.

Q. And if it was not taken, say if it is taken the sixth hour, the company has to pay you, whether you take it, or don't take it?

A. I believe so, yes.

Q. And the pay you had received for working through dinner hour, would be overtime pay, time and a half, isn't that correct?

A. Yes.

Q. Are you aware of anything in the contract, the National Bituminous Coal Wage Agreement which gives any miner, or yourself the right to claim that overtime pay?

A. No, just that it was past practice.

Q. Would you agree with, that's a management prerogative, right, mine manager's prerogative, as to whether he is going to work you, on an overtime basis, between shifts, or during the lunch hour?

A. That's correct.

Q. You are saying that Mr. Hawkins discontinued that, discontinued giving you the opportunity to work, for some short period around May 18th to May 31, if I understood you correctly?

A. That's right.

* * * * *

Q. Let me go back, the company can, in accordance with the contract, stagger, the lunch period?

A. Yes, sir, that's correct.

Q. Okay, now, if you are going to be involved in single cutting, you take your lunch break, well, whether single or double, you take your lunch break between the third and fifth hour?

A. That's correct.

Q. He could stagger each one of the three of you, so that no more than one of you, would be missing at one time, taking your lunch break?

A. Yeah, that's right.

* * * * *

Q. In fact, during the time, during that two week period, while you were taking your lunch break, and not working through it, this did not in any way affect production, I mean it could be done, Mr. Hawkins didn't have to shut down the shear, or do anything to interrupt production, and still give you fellows your lunch break?

A. That's right.

Q. Without paying any overtime for that period?

A. That's correct.

Q. Did you file any grievance with the mine committee, or anyone protesting the fact that you were not offered the opportunity to work through your lunch hour?

A. I didn't know anybody to go to, after we had already gone to his superiors, and worked things out, after that, when he gave us those options, I just figured there wasn't any sense in saying anything to anybody, until I couldn't stand it any more.

Q. Was the answer to my question, no, that you did not file any grievance?

A. No, I never filed any grievance with anyone, until the first one you have.

Q. And that was the grievance with MSHA, and not the mine committee?

A. That is correct.

With regard to the question of working between shifts, Mr. Ribel confirmed that this is something that management gives him an opportunity to do as the need arises, and that he has "no right" to work between shifts (Tr. 123). Mr. Ribel identified copies of certain work reports for the period April 18 through June 17, 1983, indicating the amount of overtime pay he received on his midnight shift (exhibits G-4A, 4B, 4C Tr. 123-124). He conceded that the records reflect that he never worked between shifts during these periods, and he stated that "I very seldom stayed in between shifts, but that since he always asked in the past, I felt that, whether I was going to or not, it was nice if he asked everybody else on the crew, he would ask me." (Tr. 125). He again confirmed that "I very seldom stayed between shifts" (Tr. 126).

In response to further questions concerning working through lunch, Mr. Ribel stated as follows (Tr. 130-132):

Q. Mr. Ribel, would you agree with me, that after May 31, 1983, you had no more problems, no problems or confrontations, anything, with Mr. Hawkins?

A. I didn't personally have any problems with him after that time, no.

Q. You suggested here this morning, your testimony was because you filed this complaint with the Government, which is shown as the statement that you signed on May 31, and that it was because of that that Mr. Hawkins changed his attitude towards you, is that your testimony?

A. Yeah, I believe that.

Q. I ask you to look at Government exhibit 4B, ask you if you would confirm the fact that you started, well, you yourself were off on June 1, 1983, is that correct, at least that's what this document shows?

A. That's quite possible, yes.

Q. You don't have any reason to disagree with that?

A. No, I don't, no.

Q. And it shows that you started receiving .50 hours, or lunch time, again, on June 2?

A. That's correct.

Q. Did you yourself, tell Mr. Hawkins on June 2, or between May 31 and June 2, that you had gone to MSHA, and signed this statement, which has been identified as Government exhibit 1.

A. No, I've never told him to this day.

Q. Okay, did you have any reason to believe that Mr. Hawkins was, or could have been aware that you and Mr. Kanosky, and Mr. Wells, had gone to the MSHA office, and signed this statement?

A. Yeah, I do have reason to believe that.

Q. And prior to June 2, 1983?

A. No, starting June 2, when he started allowing me to work through dinner, that was reason for me to believe that he heard something about it, in some way.

Q. Well, do you know how he heard about it?

A. No, sir, I have no idea.

Q. You, yourself didn't tell him?

A. No, I didn't.

Q. Did either Mr. Wells or Mr. Kanosky tell him in your presence, that they had filed this?

A. Not that I recall.

With regard to his discharge, Mr. Ribel confirmed that the longwall phones are required to be operative before mining can proceed, and he also confirmed that starting in mid or late July, 1983, there were more reports on inoperative phones on his section than in the past (Tr. 132-136).

Mr. Ribel testified as to the events on the August 5, 1983, midnight shift, and he described the movements of Mr. Toth, Mr. Toothman, and himself, and how they went about checking the longwall telephones (Tr. 137-146). He confirmed that Mr. Toth was the person who informed him that he was being suspended with intent to discharge (Tr. 147). When asked whether Mr. Toth was in any way involved with the prior May incidents concerning double cutting, Mr. Ribel answered that he had heard comments from other foreman that Mr. Toth becomes upset with his foremen when they do not have good production (Tr. 148). However, he conceded that it was Mr. Toth's job to be concerned about production, and he admitted that prior to his discharge he had no problems or confrontations with Mr. Toth (Tr. 148). He also admitted that at no time did Mr. Toth say or indicate to him that he was trying to "set him up" (Tr. 150).

When asked to explain why Mr. Toth would want to "set him up", Mr. Ribel responded as follows (Tr. 151):

THE WITNESS: One, I think that if he found a way of getting rid of myself or Danny Wells, that everybody else would have just done things the way he wanted them done, and would have been afraid to say anything about it, even though they felt it was unsafe, and that's one reason, I believe.

Mr. Ribel testified as to the meeting called by Mr. Toth on the midnight shift of August 5, (Tr. 156-166). Mr. Ribel confirmed that he lost his arbitration discharge

case (Tr. 167), and he explained the reasons why he carried a hawk-bill knife. (Tr. 169-170).

Mr. Ribel stated that he had no reason to believe that Mr. Wells, Mr. Toth, or Mr. Hawkins would be involved in any "set ups" to discharge him (Tr. 174). He believed that Mr. Toth was the one individual "who engineered" his discharge by accusing him of cutting the telephone wire (Tr. 174). Mr. Ribel confirmed that he worked for Mr. Hawkins prior to his discharge, and that he did not know him prior to this time (Tr. 174).

Danny Wells confirmed that he is one of the complainants in this case, and he confirmed that he filed his complaint on May 31, 1983, with Mr. Ribel and Mr. Kanosky. He also confirmed that he has been employed by the respondent as a tippie boom operator since October 17, 1983, and that prior to this time he was employed as a longwall chock setter for approximately 2-1/2 to 3 years. His total employment with the respondent consists of 8 years, and he has worked the midnight shift. He stated that he initially bid off the afternoon shift to the midnight shift, and then bid on his current job. (Tr. 176-178).

Mr. Wells testified that he has worked with Mr. Kanosky and Mr. Ribel on the longwall in question, and he indicated that when he was first assigned to the longwall it was standard procedure for everyone to double cut coal (Tr. 179). He later refused to double cut because he felt it was too dangerous because of the dusty conditions which presented breathing and vision problems. He indicated that he expressed those concerns to his fellow miners, to the mine safety committee, and to respondent's safety department. He could not supply any specific dates or names of persons with whom he spoke, but he did state that he made contact with the respondent's safety department prior to May, 1983 (Tr. 181).

Mr. Wells stated that approximately two or three weeks prior to the filing of the complaint he discussed the question of double cutting with Mr. Ribel and Mr. Kanosky, and a meeting was held with the safety department. After they were told they did not have to double cut, Mr. Hawkins asked them to double cut, but when they refused Mr. Hawkins became hard to get along with (Tr. 185).

Mr. Wells stated that on a prior occasion when he complained to Mr. Hawkins about some coal spillage on the walkway, Mr. Hawkins assigned him to other work after refusing to call in a safety committeeman (Tr. 187).

Mr. Wells confirmed that the respondent had advised him of his right to remove himself from hazardous work, but he also indicated that he believed he was branded as a "trouble-maker" because of this (Tr. 189).

Mr. Wells stated that after the meeting with mine management about double cutting, Mr. Hawkins met with him, Mr. Ribel, and Mr. Kanosky on May 18, 1983, in the dinner hole, and his testimony as to what transpired is as follows (Tr. 191):

A. Mr. Hawkins, the foreman, approached us, and took us to the dinner hole, the three chock setters and his self and went to the dinner hole, and he told us that he had two options for us, one was for double cutting, and one was for single cutting.

He said if you 'uns want to double cut, I will leave three chock setters on the face, you 'uns can work through dinner, you 'uns can have the option to stay in between the shifts, and one of you come in, a' not feeling good, I will let the other two cover for you, you know, and you just take it easy.

But if we didn't, we couldn't work through dinner, we douln't stay in between shifts, he was going to take one of the chock setters off of the face, and he was going to make things so rough for us, that we would either bid off of our job, or quit our job completely.

After advising Mr. Hawkins that he would not double cut, Mr. Wells claimed that Mr. Hawkins assigned him to do work tasks that he would normally assign to other miners, or to at least more than one man (Tr. 192-194). Mr. Wells also indicated that after the meeting of May 18, he was no longer permitted to work through his dinner hour, and that prior to this he worked through dinner with pay approximately every day while on production (Tr. 195). Mr. Wells also indicated that during the period May 18 to June 1, 1983, other members of the crew worked through dinner, and that Mr. Hawkins did not present his "options" to anyone but the chock setters (Tr. 196).

Mr. Wells testified that after June 1, 1983, he and the crew were single cutting, and that Mr. Hawkins "had changed" and permitted him to work through dinner with pay and that Mr. Hawkins "let us do our job" (Tr. 197). Mr. Wells testified as to the meeting which occurred on the midnight shift of August 5, 1983, and he confirmed that Mr. Hawkins asked him to assist in conducting the

fire boss examination. He also confirmed that Mr. Toth was present during the meeting, and Mr. Wells claims that Mr. Toth told him that he "was next" because of his prior discrimination complaint. Mr. Wells stated that he did not know what Mr. Toth meant by this remark since it was made before Mr. Ribel was taken out of the section (Tr. 199-200).

Mr. Wells stated that he became a "boom man" on October 17, 1983, and that sometime between June and October of 1983, he sustained an injury while dragging some cable with Mr. Kanosky. Mr. Hawkins assigned them to that task, and as a result of his injury, Mr. Wells stated that he missed a month's work (Tr. 201). After returning to work, he was assigned to another foreman for two shifts. He then was re-assigned as a chock setter, and he stated that Mr. Hawkins told him that "it was Mr. Mick Toth's doing" (Tr. 203). Mr. Wells also indicated that Mr. Hawkins told him that "just between you and me, Mick is out to get you". Mr. Wells stated that he then bid off the longwall "in order to protect my job" (Tr. 203). He confirmed that this was a voluntary act on his part, and while the boom job is less strenuous, it pays less money. He also confirmed that his prior injury did not prevent him from doing the chock setter's work (Tr. 204).

On cross-examination, Mr. Wells confirmed that he engaged in double cutting during the 2-1/2 to 3 years he was on the longwall. Although respirators and air helmets were provided and available for the chock setters, he could not wear a respirator because he had difficulty breathing with it. He conceded that the respirator exposed him to less dust (Tr. 216).

Mr. Wells denied that during the time he was double cutting, he never had an occasion to work between the shearer drums while installing the shields. With regard to his safety complaints to respondent's safety department, Mr. Wells stated that while he spoke with a Mr. Cumberlich, a member of the safety department, about general safety matters, he did not specifically mention double cutting to him (Tr. 218).

Mr. Wells confirmed that he spoke with his mine safety committee about double cutting, but that they could not do anything unless "they were caught double cutting" (Tr. 219). Mr. Wells conceded that no one from mine management ever threatened or advised him that action would be taken against him if he made safety complaints to Federal or state inspectors. The only incident he is aware of is when Mr. Toth purportedly told him that he

"was next" (Tr. 221). He further explained as follows (Tr. 221-222):

Q. So these indications that you have or these feelings that you have, that you were afraid to take a stand, because you would be singled out, it's an assumption, a belief you have, just a belief that you have, I mean is that fair to state?

A. I don't understand what you are saying?

Q. Well, is it -- it's not based upon any statement that anybody from mine management, at the Federal Number 2 Mine, or Eastern has ever said to you.?

A. No, they don't have to. You can get the picture just by their actions towards you.

Q. Well, their actions towards you, have they ever done anything to you, which leads you to believe that if you complained to a Federal or State inspector you would be disciplined in some way, or treated differently than the other employees?

A. Well, like I said, in light of the incident of August the 5th, Mick Toth sat there and made the statement, this little trivial bullshit, that you 'uns have turned in to the safety department is going to make you end up losing your job, he's getting tired of it, and he wants it stopped.

Q. Anything other than this incident on August 5, with Mr. Toth talking?

A. Other than the people at the coalmines, union brothers, in the same union, would tell me, I mean this is where a lot of this stuff from the longwall, you guys on the longwall is nuts, you are going to be old before your time, eating all that dirt. This one, this one, well, you know, it's a part of your job, but you don't make a stand by yourself.

Mr. Wells stated that when mine management decided that he and other chock setters did not have to double cut, there was nothing wrong in management deciding to use one of the chock setters, on a rotating basis, to do other work such as carrying rock dust bags, shovelling coal, or dragging cables. Mr. Wells stated that he did not complain about this until Mr. Hawkins began using a utility man to do the work of one of the rotating chock setters (Tr. 225-226).

Mr. Wells stated that there have been occasions in the past that utility men would be called upon to replace chock setters. His complaint is that he (Wells) should be utilized as a chock setter, and the utility man should be left in that capacity to do his own work (Tr. 233). Mr. Wells confirmed that he believed that he was being worked out of classification, and that he has filed grievances over this issue, including one concerning Mr. Hawkins' doing the work of a chock setter (Tr. 234-236).

Mr. Wells confirmed that he did not confront Mr. Toth concerning Mr. Hawkins' assertion that he was out to get him, nor did he file any complaint over this incident. He confirmed that he voluntarily bid to the boom man's job and that no one from management suggested that he do this (Tr. 242).

John Kanosky testified that he is employed by the respondent as a chock setter and has been so employed for six years. He confirmed that he worked with Mr. Ribel and Mr. Wells on the longwall, and he confirmed that he joined with them in filing the discrimination complaint against the respondent. He also confirmed that he engaged in double cutting for as long as he worked on the longwall and that he was trained to do this. (Tr. 268-272). He also indicated that "in the back of his mind" he has always been concerned about the dust which is generated by double cutting, but has never filed any complaints about it until the instant discrimination complaint. He confirmed that about three weeks before the filing of the complaint, he spoke to mine management about double cutting, and when asked why he had not complained earlier, he stated as follows (Tr. 273-275):

Q. Why is it that you never talked to anyone in management about the dust?

A. Well, usually, by myself, you know, if I would go out there, they would cause me to be a trouble maker, you know, make me do dead work for, you know, building cribs, or someplace else, not doing my job, you know, as chock setter.

Q. Have you ever made any other safety complaints, have you ever -- other than the double cutting, have you ever talked to anyone in management about any other safety problems?

A. No, not safety problems, no.

Q. Have you ever been tagged as a trouble maker?

A. No, as far as I know I wasn't, I don't know what they say.

Q. What led you to talk to management in the beginning of May about this?

A. Well, me and Rob and Danny got together and just talked about it, and we all felt the same way about it, so that's why that we filed this.

Q. Do you recall that discussion, what was said during that discussion?

A. Well, we just went over it, you know, discussed about different things and that, and they finally talked about double cutting, and different things.

Q. Did you discuss the dust during that discussion?

A. Yeah, that was part of it.

Q. And do you recall what it was that was said about the dust?

A. Probably was hazardous to your health, and all that, and you can't see for one thing, when you go behind that shear, and that.

Q. Did you feel that way, or were you agreeing with what they were saying?

A. I felt that way, yeah, and they felt, they give me the impression that they felt the same way.

Mr. Kanosky testified that after a May, 1983, meeting with mine management, he, Mr. Ribel and Mr. Wells were informed that they no longer had to double cut. Later, on May 18, Mr. Hawkins met with them, and Mr. Kanosky testified as follows with respect to that meeting (Tr. 278-279):

A. Well, he told us that, give us two options, you know, single cut, and then double cut, one was for the double cutting, you don't get no overtime benefits -- no, that's for single cutting, I'm sorry, you don't get no overtime benefits, you don't get paid through dinner, none of that, you don't get, and double cutting will do that, so that's what happened.

Q. And what did you decide at that time?

A. Well, we all decided to single cut, we always did decide single cut, before that, we did that before.

Q. Were you allowed, or did you work through dinner before May 18, 1983?

A. Yes, I did.

Q. Did you work every day through dinner?

A. Well, maybe some days we was broke down or something, we didn't work through dinner, but when we was running coal, we would get paid through dinner.

Q. And what happened after May 18th?

A. That dinner and overtime stopped.

Q. Were you told that you could not work the overtime, or what happened to make you realize you were not working through dinner any more?

A. Well he told us, we weren't going to work through dinner, and we would get no more overtime benefits, if we don't double cut.

Q. Were there any other benefits denied you?

A. Overtime, double cutting, I can't recall right now.

Q. Okay, what happened after June 1st, 1983, with reference to the overtime?

A. Well, they started to paying us through dinner again, you know, three chock setters on the face, and while we come up towards the head, we had to dead work and that, pull cables, and carry cribs, and build cribs, whatever, until they cut out the head, and then we would go back and set shields again.

With regard to the August 5, 1983, meeting at the mine with Mr. Toth, Mr. Kanosky stated that double cutting was not mentioned. During the meeting the question of his (Kanosky) installing some curtains was brought up by Mr. Toth, and that Mr. Wells began giggling. Mr. Toth stated that "he (Wells) would be next on the list, for all this stuff that's going on right now" (Tr. 286). When asked to explain, Mr. Kanosky stated "he said you would be

either fired or something like, that's what he meant" (Tr. 286). Mr. Kanosky stated that Mr. Toth was referring to a complaint that he (Kanosky) had filed with the safety committee about installing the curtain in bad roof, and Mr. Toth brought this up during the August 5 meeting (Tr. 289).

On cross-examination, Mr. Kanosky confirmed that at the time he complained to the safety committee about the ventilation curtain, a Federal inspector was present in the safety office, but he could not recall his name. Mr. Kanosky stated that the inspector simply told him and Mr. Ribel "not to do it anymore" (Tr. 299).

In response to further questions, Mr. Kanosky stated that during the August 5, 1983, meeting with Mr. Toth, Mr. Toth stated that "if you do all this stuff right here, that one of us is going to get fired" (Tr. 304).

Joseph Norwich MSHA Morgantown District office, testified that he is an inspector, and that for the past seven years has been a ventilation specialist. He testified as to his experience and background in the mining industry, and he confirmed that his present duties include the review of mine ventilation and dust plans, and the making of recommendations for approval or disapproval of those plans.

Mr. Norwich confirmed that he was involved in the review and approval of the respondent's longwall dust plan at the Federal No. 2 Mine, and he identified exhibit G-3 as a page from that plan which was in effect in May, 1983 (Tr. 304-311).

Referring to Item #2, on the dust plan labeled "dust parameters", and in particular the sentence which reads "No employee permitted inby shearer machine, during mining", Mr. Norwich explained that no one should be inby the machine when it is mining coal, and the term "inby" was explained as the area from the "tailgate" to the edge of the machine (Tr. 312). He explained that no one should be there because the chocks are moved up "to catch the bad roof," and he indicated that "I don't know of any other reason" (Tr. 312). When asked whether he would issue a citation if he found a miner inby the shearer, Mr. Norwich replied as follows (Tr. 313-314).

Q. Let's say you were on a section, as an inspector conducting an inspection, if you saw an employee or a miner, working from the tailgate, up to the tail drum of the shear, as you pointed out, would that be a violation of the plan, while the machine was mining coal?

A. If his need back there was only because of the productive oriented situation, I would say that it would be a violation.

Q. And what would be a productive oriented situation?

A. Well, I mean if he was back there only to increase productivity, in that sense, I would find that --

JUDGE KOUTRAS: Let's get a little more specific now. Let's take this machine, that's on its way to the headgate.

THE WITNESS: To the headgate.

JUDGE KOUTRAS: And it is mining, the question is, is the tail, right?

MS. ROONEY: Right.

JUDGE KOUTRAS: And he said only in certain exceptions if it were needed for maintenance, or to do the roof?

MS. ROONEY. Right.

JUDGE KOUTRAS: Okay.

BY MS. ROONEY:

Q. And if you observed someone other than in those two circumstances, would that be a violation of the plan?

A. Yes, we would ask him to come out of there, and I guess, the people that I've cautioned, they had a need back in there, for some reason, you know, it would always be presented, there was a reason, why he was back in there, and then I would accept that.

When asked to explain the term "double cutting",
Mr. Norwich stated as follows: (Tr. 314-317):

Q. Are you familiar with the term double cutting?

A. I've heard that.

BY MS. ROONEY:

Q. Now, what is that term -- how are you familiar with that term?

A. It is taking a full cut, when it would be started at the headgate, make a complete cut, off to the back, and then on the back, pick up a full face, on the way back, so actually, you are cutting with both passes, from the headgate, or from the intake to the return, or the headgate to the tailgate, and then from the tailgate, back to the headgate.

Q. Is there anything illegal about double cutting?

A. Well, personally, I think there would be, I don't think you could stay in compliance with the dust control. I've never been exposed to a plan double cutting was permitted, I'm not saying it is not done.

We feel, we question anyone submitting a plan that has double cutting, under the normal dust control measures, we have. We may ask them to come up with a plan, to show more sprays, I would have to say, if I was on that section, and they were double cutting, I would probably give them a violation.

Q. And why would you do that?

A. If I found people inby.

JUDGE KOUTRAS: Now wait a minute, you just added two caveats, you would issue them a violation if you found people inby, and if you found dust, right?

THE WITNESS: Well, double cutting, usually, the way I interpret double cutting --

JUDGE KOUTRAS: No, the question is, is double cutting per se, a violation of any standard, per se, in and of itself?

THE WITNESS: Okay, no, I would say no.

JUDGE KOUTRAS: Okay, now.

BY MS. ROONEY:

Q. Are there any problems that you are aware of, that are associated with double cutting, with reference to dust?

A. I don't think we have ever evaluated a longwall with double cutting, so I wouldn't know.

Q. Okay.

If during the course of double cutting, a person had to work inby the shear machine, would that be a violation of the plan?

A. It would be.

Mr. Norwich stated that he has no knowledge that double cutting was being done at the mine. He indicated that dust would be the principal hazard associated with working inby the shearer machine during longwall mining (Tr. 318). He also stated that "longwalls historically have a bad record of compliance within the two milligram standards" (Tr. 319). During the review of the respondent's dust plan, he assumed they were single cutting and using a single clean up run. He also alluded to a "half cut", which he could not explain. (Tr. 320). He confirmed that during the four years of reviewing the mine ventilation plan, he has never observed any double cutting, and no one ever reported it to him. Although he has heard some "talk" among his fellow inspectors about double cutting, he could not remember whether it pertained to the mine here in question (Tr. 321).

On cross-examination Mr. Norwich confirmed that the mine ventilation plan contains no specific prohibition against double cutting, and when asked why he assumed the respondent was only single cutting at the mine, he responded as follows (Tr. 322):

Q. Why did you assume that they were only single cutting?

A. Maybe I'm not that well acquainted with long wall systems, I'm assuming, they are doing everything that I see done at other mines that I inspect, and I didn't know that anyone was double cutting.

Q. You are not familiar with any mine that is now double cutting on the long wall?

A. I am not.

Mr. Norwich stated that if a chock setter positioned himself between the two shearer drums while moving the shields, he would not be considered to be "inby the shearer" (Tr. 322). He confirmed that the ventilation on

the longwall is pulled across the front of the face from the headgate, and then down the face of the longwall and into the rear return, and he described the three locations on the longwall where the ventilation is checked (Tr. 323). He confirmed that he personally is not aware that the respondent was not complying with the ventilation requirements in the 7 right longwall section (Tr. 324)

With regard to paragraph 7 of the dust plan (exhibit P-3), Mr. Norwich offered the following explanation concerning the positioning of the shearer operators (Tr. 324-325):

Q. You have already read paragraph number 2 in, and then there's paragraph number 7, which says both shear operators, will stay outby the machine as much as possible, can you explain to us what is meant by that.

A. It's hard to regulate any type of a control, if you don't try to get in something, and I think the intent of this one was, is when they cut headgate side, it was not required for both of them to be at the machine, because one of them would have to get over on the intake side.

I know sometimes it takes two people to run the shear, they need it for the back drum, and forward drum, and there could be times, and this was a heavy generating source of dust, at the head gate, because all the velocity comes in this way, but there probably wouldn't be the two people there, so as much as possible, we like to see, the people that are not required to be in the dust, to get away from it, stay on fresh air. That was the intent.

Mr. Norwich confirmed that he visited the longwall section in question, and he described the dust control measures which were being used. He also confirmed that he had no reason to believe that the respondent was out of compliance with the required dust control measures during May, 1983, and he indicated that the plan in use at that time had been in effect for some 4 years (Tr. 328).

Mr. Norwich stated that the dust plan was revised as of October, 1983 (Exhibit G-3-A), and during the review process he confirmed that he recommended that the change be adopted, and it was approved. He explained the change as follows (Tr. 329-331):

Q. What is the current language that may be comparable to it, if at all?

A. The new one?

Q. Yes, sir.

A. We asked, we said no employee permitted inby the shear machine during mining. Eastern approached us, and they said that there was times, they needed an employee, inby the shear, when it is mining coal or cutting, to take care of the shields, when they are into bad top, they had two or three instances, where it was necessary, to have someone inby these machines.

And we said, all right, or the district manager approved in that way, our thinking was, if you have to have people in that area, and we understand that there's times in mining, where you would have to have someone inby, inby the drums, or the longwall machine.

So we would have to give them some little bit of leeway in here, bad top is one thing, you want to get the chocks pulled up, or the shields pulled up, so it might be necessary to have a man back there, so they said it was necessary, to make gas tests, or for what reason.

* * * * *

Read paragraph number 1 in here, which says,

"No employee is permitted inby the tail drum of the shear, exception, when wearing a Racal, R-a-c-a-l air stream type of air helmet, or approved filter type respirator, or B, when inspecting areas inby for brief periods, of time, "did I read that correctly?"

A. You did.

Q. And is this a part of the ventilation plan that you approved, as well as your district manager?

A. That's right, I recommended it for approval.

In response to further questions, Mr. Norwich confirmed that as long as the provisions of the new dust plan are followed, it makes no difference whether the respondent single cuts or double cuts. Although he indicated that he was under the impression that the respondent was single cutting, he also confirmed that he

has never specifically approved a plan involving double cutting in his District No. 3. (Tr.337).

Mr. Norwich stated that if an inspector reported to the mine manager that an operator was engaged in double cutting, MSHA would evaluate the dust atmosphere on the tailgate side to determine whether the dust exceeded the two milligram standard (Tr. 338-339). He confirmed that if the respondent could stay in compliance with the two milligram dust standard while double cutting, MSHA could do nothing about it (Tr. 339).

During further testimony, it was confirmed that the new dust plan provision recommended by Mr. Norwich was finally approved on December 20, 1983, and that the UMWA had contested that plan approval and is in the process of attempting to obtain a restraining order in court (Tr. 340-341).

When asked about the respondent's dust compliance record on the longwall section in question during its operation, Mr. Norwich stated "I don't know" (Tr. 345). He then indicated that "I think it is a big improvement now, I would say, than when they first started" (Tr. 346). When asked whether he knew what the instant proceedings were all about, Mr. Norwich replied "No, I don't, sir" (Tr. 348).

Russell Toothman, testified that he has been employed by the respondent at the Federal No. 2 Mine for nine years on the midnight shift. He has been a longwall mechanic for the past nine months, and prior to that he was a certified electrician for four years. Mr. Toothman confirmed that part of his duties including the checking of the longwall mine telephones, and he indicated that he usually carries tools such as screwdrivers, crescent wrenches and a hawk bill knife (Tr. 366).

Mr. Toothman confirmed that he was at work on August 5, 1983, and that Mr. Toth conducted a meeting. After the section boss and Mr. Wells firebossed the face, Mr. Toothman instructed to turn on the power and to check the phones, and he believed that Mr. Toth asked him to do this (Tr. 367). Mr. Toothman indicated that he proceeded to the headgate where he encountered Mr. Ribel. Mr. Ribel told him that he was going down the face to check the phones. Mr. Ribel then started down the pan line across the longwall face, and Mr. Toothman explained how this was done by paging each other over the phones which Mr. Ribel was checking (Tr. 369-372).

Mr. Toothman stated that the telephones are about 100 feet apart, and he assumed that Mr. Ribel called him from each of the phones as he walked past them (Tr. 372). Mr. Ribel advised him that the #52 phone and the #89 phones were weak, and he then called him at the tail to advise him again that the two phones were not working properly and that he had been instructed to wait for the pan line to start (Tr. 373-374).

Mr. Toothman stated that after he received the calls from Mr. Ribel, he proceeded to grease the shearer head drum, and while he was doing this somewhere between the No. 14 and 20 shields, Mr. Toth approached him and asked him if there were any trouble with the phones (Tr. 375). Mr. Toothman reported what Mr. Ribel had told him about the #52 and #89 phones, and Mr. Toth proceeded to the head gate and called Mr. Ribel who was positioned at the tail (Tr. 376). Mr. Toothman and Mr. Toth then proceeded together down the pan line checking the phones. They stopped at the #51 phone and called Mr. Ribel at the tail, and the phone sounded weak. They then stopped at the #89 phone, and Mr. Toth wanted him to call the headgate to test the phone, but no one was there to answer. Mr. Ribel then approached him and indicated that he would go to the headgate so that the phone could be tested, and Mr. Toothman observed Mr. Ribel walk towards the headgate, but after reaching the area around the #69 or #70 phone, Mr. Toothman was diverted because he was checking for loose wires on the #89 phone. He then called Mr. Ribel at the headgate on that phone, and it was weak (Tr. 377).

Mr. Toothman confirmed that while he and Mr. Toth were at the #89 phone, he discussed the fact that he (Toothman) repaired the #89 phone the previous evening and he showed Mr. Toth where a wire had corroded off. Mr. Ribel had left before that conversation took place, and Mr. Toothman estimated that it would have taken Mr. Ribel 5 or 6 minutes to reach the headgate from the #89 phone (Tr. 380).

Mr. Toothman stated that after speaking with Mr. Ribel over the #89 phone, Mr. Toth instructed him to proceed toward the tail to check out the other phones. Mr. Toth proceeded towards the head, and Mr. Toothman observed him walk up the longwall towards the head for a distance of approximately 20 shields, but was distracted by a phone call and lost sight of him (Tr. 378).

Mr. Toothman stated that as he proceeded to the #52 phone to check it, he heard Mr. Toth calling him to come to the head. When he arrived there, Mr. Toth and another mechanic were there, and the mechanic was preparing to

take the wires off the #32 phone to check it. Mr. Toth instructed Mr. Toothman to take the face off the phone, and when Mr. Toothman unscrewed it and lifted up the lid he found an orange speaker wire hanging down. The #32 phone was one which was checked earlier by Mr. Ribel, and Mr. Toothman received no report that it was not working. As soon as Mr. Toth observed the loose wire, he summoned Mr. Ribel to the phone, and Mr. Toothman stated that the following conversation took place (Tr. 382-383):

Q. What occurred, when Mr. Ribel came down?

A. Mick said, do you see that, and he said, what, that wire, and Mick said yes.

Q. Did anything else occur?

A. Rob said I didn't cut it, and then they went to the head.

Mr. Toothman testified that a wire in the #32 phone appeared to have been cut, and he confirmed that he had a hawk bill knife with him that evening, that he always carried one, and that he used it to change and reconnect electrical wires (Tr. 383).

On cross-examination, Mr. Toothman stated that the wire on the #89 phone which he repaired did not appear to have been intentionally pulled off, and he denied that he told Mr. Toth that this was the case (Tr. 384).

Mr. Toothman confirmed that during the two or three week period prior to August 5, 1983, there were problems with the longwall phones due to dampness and water, and he detected no difference in the number of phones that required repairs in the weeks prior to August 5, than there had been on other occasions. He confirmed that the phone problems he encountered were caused by wet phone receivers and bad batteries (Tr. 385).

Mr. Toothman stated that no special qualifications were required for Mr. Ribel to check the telephones in question, and he confirmed that when Mr. Ribel walked away from the #89 phone to the headgate he could not observe him as he passed the #32 phone and no one else was on the face at that time (Tr. 386). Mr. Toothman confirmed that Mr. Ribel had not previously reported that the #32 phone was not operating properly. He also confirmed that he and Mr. Toth walked down the face in response to Mr. Ribel's report of two inoperative phones, and neither Mr. Toth nor Mr. Toothman touched the #32 phone as they passed it together.

Mr. Toothman stated that after Mr. Ribel left the #89 phone to proceed to the head, he would have walked the face for the second time by himself. After this, Mr. Toothman and Mr. Toth proceeded down the face from the tailgate to the headgate to check the phones, and when they stopped at the #70 shield, Mr. Toothman stopped to check it and Mr. Toth continued to walk ahead of him, and before that time Mr. Toth would have been about 100 feet ahead of him as they walked the face checking the phones (Tr. 390-391). Mr. Toothman confirmed that he never saw Mr. Toth doing anything to, or even being around, the #32 phone (Tr. 393). He also estimated that it took him about a minute to unscrew the cover from the phone which he checked, and that someone could have cut the wire in a matter of seconds (Tr. 395).

Steve R. Reese testified that he has been employed at the Federal No. 2 Mine for 8 years as a longwall shearer operator. He confirmed that he was at work on the midnight shift on August 5, 1983, and was present during the meeting conducted by Mr. Toth. Mr. Reese believed that the meeting was called to settle "some of the disputes that was going on at this time" (Tr. 404). He stated that the "disputes" involved "this double cutting, being in by the shearer", and he also indicated that there was a morale problem and arguments over double cutting in the dust while the machine as running (Tr. 404).

Mr. Reese testified that at the meeting, Mr. Toth discussed the matter of a ventilation curtain being installed by Mr. Kanosky in an area where the top was bad. Mr. Kanosky was upset, and Mr. Wells began giggling. Mr. Toth became upset with Mr. Wells, and when he asked him why he was giggling, Mr. Wells replied "none of your business" (Tr. 405). Mr. Reese then stated that Mr. Toth made the remark that "if you think it's funny * * * all this petty stuff that has been going out to the safety department, every day, and every day, is going to stop, or you will be next" (Tr. 406). Mr. Reese also claimed that Mr. Toth made the statement that he was tired of Mr. Kanosky complaining to the safety department every day (Tr. 412-413).

Mr. Reese stated that after the meeting, he proceeded to work on the face shield, and that he wore an air hat while doing that work. The shearer was at the #9 shield, and he was at the #11 shield (Tr. 409). While there, he observed Mr. Toth coming in his direction, and when he first saw him, he was between the #32 and #18 phones, and there was enough illumination for him to see Mr. Toth clearly (Tr. 410). Mr. Toth asked him whether

the #9 phone was paging in, and Mr. Reeseaman replied that it was. Mr. Toth then proceeded to the #32 phone, picked it up, and asked him, if it was paging in, and Mr. Toothman replied that it was not. Mr. Toth then asked for a mechanic to take the phone apart to see what was wrong with it. Mr. Reeseaman then told the mechanic trainee, Jim Fowley, to take a screwdriver and to proceed to the #32 phone in response to Mr. Toth's request for a mechanic. Mr. Fowley left, and Mr. Reeseaman "went on about my business, checking the shearer", and he did not observe the #32 phone being opened (Tr. 412).

On cross-examination, Mr. Reeseaman confirmed that at the time Mr. Toth made the statement about Mr. Kanosky, Mr. Ribel and Mr. Toothman were not present. When asked whether he was certain that double cutting was discussed by Mr. Toth at the August 5, meeting, Mr. Reeseaman replied "it's been so long, I don't really remember" and he indicated that he was not certain (Tr. 413). Mr. Reeseaman was asked about his prior testimony during the arbitration hearing in Mr. Ribel's case, and in particular his testimony that what was discussed at the meeting was "the firebossing and the gas checks, and this little penny-ante stuff" (Tr. 415).

Mr. Reeseaman confirmed that he did not see Mr. Toth alone at the #32 phone, and that he was between the #32 and #18 phones when he observed him (Tr. 415). In response to further questions concerning the purported arguments among the men over double cutting, Mr. Reeseaman indicated that the chock setters and shearer operators "would be the only ones inby the shearers, and the dust at the time" (Tr.416). He confirmed that the shift before his was a maintenance shift, and that the one after it was production. He believed that shift was double cutting, but he never observed it (Tr. 417).

Larry Hayes, testified that he has been employed by the respondent at the mine in question as a longwall mechanic for approximately seven years. He was laid off from March 12 through July 12, 1983, and he confirmed that he was working on August 5, 1983, when the meeting at the mine was held by Mr. Toth. Mr. Hayes stated that he had just returned to work after his lay off. He recalled a discussion about Mr. Kanosky refusing to go under bad top to install a curtain. Mr. Wells laughed about this, and this made Mr. Toth angry. When Mr. Toth asked Mr. Wells what he was laughing about, Mr. Wells told him it was none of his business.

Mr. Hayes stated that the subject of double cutting was not discussed at the August 5 meeting. He confirmed

that during his employment at the mine he has observed double cutting "off and on". He has observed Mr. Wells, Mr. Kanosky, and Mr. Ribel double cutting, and he stated that they would be working inby the shearer as it moved from the tailgate to the headgate (Tr. 421-422). He has never discussed double cutting with Mr. Ribel, Mr. Kanosky, or Mr. Wells, and he indicated that "it had been discussed among different members, * * * some say they didn't mind, and others say they did mind" (Tr. 422).

Mr. Hayes stated that he has checked the phones on the longwall face in question and that he found problems such as mashed cables, and broken receivers which had fallen into the gob (Tr. 422). Although he has opened phones to check the batteries, since he is not a phone mechanic, he could not state whether any phone wires have been cut. He indicated that it is much easier to "change out" a phone rather than to repair it (Tr. 423).

On cross-examination, Mr. Hayes confirmed that during the August 5, meeting, Mr. Toth did mention the fact that he was concerned over "problems" with the phones, but that he did not elaborate further (Tr. 424). Mr. Hayes also confirmed that he had not previously worked under Mr. Hawkins' supervision, and Mr. Hawkins would not likely know about his prior job classifications (Tr. 425).

With regard to the purported statement made by Mr. Toth concerning Mr. Kanosky, Mr. Hayes stated as follows (Tr. 426-426):

Q. You were talking about Mr. Toth's comments to Mr. Kanosky, and if I understood you, you were saying that he said something to Mr. Kanosky about if you were wrong, you would suffer some consequences?

A. Yes.

Q. If I understand this incident about the curtain, hanging the curtain that Mr. Kanosky had refused to do the job, is that pretty much what it was?

A. He didn't really refuse, he had questioned about being bad top, going under the bad top, to get the curtain and bring it outby.

And, at Tr. 427:

A. [W]hat he was really trying to say to him, I don't know, like I said, this meeting did not really pertain to me. I hadn't been out there before, I

wasn't involved in any of the disputes that had been going on. So other than hearing him say that, and what he meant by it, I have no idea.

James Merchant testified that he has been employed at the Federal No. 2 Mine since October 19, 1968, and that he is presently employed as a shuttle car operator. He confirmed that he has served on the UMWA mine safety committee for eleven years, and until three years ago he served as the committee chairman (Tr. 429).

Mr. Merchant testified that the complainants "approached him" about double cutting, and a meeting was called sometime in May, 1983, with mine management. Prior to this time, meetings were held with the longwall coordinator, Mick Toth. Present at these meetings were representatives of the International UMWA, and the issue of double cutting was only one of the many issues under discussion (Tr. 432). Mr. Merchant confirmed that discussions were also held with MSHA "several years ago" over the question of double cutting, and he indicated that MSHA's position was that nothing could be done about it unless the respondent was caught in the act of double cutting (Tr. 433). Mr. Merchant claimed that at that time, an MSHA inspector named "Phillips" advised him that double cutting was illegal, but that when they went to the longwall to observe the process, single cutting was taking place (Tr. 434).

Mr. Merchant stated that his normal mine duties do not entail work on the longwall, and he indicated that safety complaints which he has passed on to mine management have met with mixed results (Tr. 435).

On cross-examination, Mr. Merchant stated that while the safety committee may inspect any area of the mine without prior notice, they still have to notify the dispatcher so that arrangements may be made to take them to the particular section which they may wish to examine (Tr. 437). Mr. Merchant expressed an opinion that he is not too enchanted with Mr. Hawkins as a foreman, but he conceded that he has not formally complained to mine management about Mr. Hawkins (Tr. 440). He could not recall when he met with Mr. Toth about the subject of double cutting. In response to further bench questions, Mr. Merchant stated as follows (Tr. 444-450).

JUDGE KOUTRAS: What's a violation of law, in your opinion?

THE WITNESS: Double cutting, number one, is.

JUDGE KOUTRAS: What does it violate? Sir. I'm going to hand you Title 30, Code of Federal Regulations, and I defy you to find in there, any standard that says that double cutting is illegal. You haven't been here all day, hearing all the testimony. What law do you think double cutting violates?

THE WITNESS: Number one, it violates the man's health hazards, breathing that dust.

JUDGE KOUTRAS: Well, now, I don't want to get you upset, but what I want to ask you, is you made a statement that double cutting violates the law. In your opinion, what law does it violate, the procedure, double cutting, in and of itself?

THE WITNESS: The flow of air, when you double cutting, that man is behind, he is eating all -- that air is shoving all that dust, coal dust, right down his throat, face, his vision, his ears, and everything, you are eating all that dust.

JUDGE KOUTRAS: What does that violate?

THE WITNESS: That violates, what we are fighting for now, black lung, which I have it real bad, out of thirty-seven years in the coal mine.

JUDGE KOUTRAS: Well, now, if you have got six miners telling you that they are double cutting, why does it take someone to actually be there to see them, before anything is done, before MSHA is called to come to the mine, to conduct an investigation, and to issue citations, because of the double cutting. if it is illegal, why hasn't there been the first citation issued, at this mine?

You have people who come to you, who work right in it, that's first hand evidence, why do you have to have somebody there observing the process?

THE WITNESS: You don't, we have people that's afraid to come forward, and they tell us, they say we don't want to be involved, whether they are threatened, I can't prove that.

JUDGE KOUTRAS: Do you realize that under this law, you have an absolute right to call an MSHA inspector, and ask for an inspection right on the spot?

THE WITNESS: True.

JUDGE KOUTRAS: Has that ever been done on double cutting.

THE WITNESS: No.

JUDGE KOUTRAS: Why?

THE WITNESS: Because they can't catch them.

JUDGE KOUTRAS: Have you ever called an inspector to come to the mine, to interview any miners who worked in double cutting, and have been exposed to all this dust?

THE WITNESS: No, I haven't.

JUDGE KOUTRAS: Why?

THE WITNESS: Because I know that you can't catch them.

JUDGE KOUTRAS: The point is, I don't think that you have to catch them, do you, do you feel that you actually have to see them double cutting, and inby this machine, before you can say that they are doing it? I can't believe that Eastern Associated, with all these people in there, can double cut in secret?

THE WITNESS: They are not double cutting in secret. When we are there, they are single cutting, and the minute, which I'm told, I'm not there, when I leave, what happens when I leave. But as soon as the men get on the outside, they way, before you all call for the right of way to come outside, they went back to double cutting.

JUDGE KOUTRAS: Well, let me ask you this, has a Federal inspector ever been called, and has a Federal inspector ever come to that mine, and confronted the mine superintendent, and said to him, number one, are you double cutting, and if the answer to that is in the affirmative, then double cutting I understand -- has that ever happened?

THE WITNESS: Because it is impossible to catch them.

* * * * *

JUDGE KOUTRAS: Do you know what Eastern Associated

Federal 2 Mine's track record is, with regard to the two milligram respirable dust standard?

THE WITNESS: Not right off, I don't.

JUDGE KOUTRAS: Do you know whether they have a dust problem?

THE WITNESS: They used to, they used to have a bad dust problem.

JUDGE KOUTRAS: You don't know whether the longwall dust situation at that mine is such that would -- if they are double cutting, then theoretically they should be out of compliance, shouldn't they?

THE WITNESS: They used to be out of compliance all the time.

JUDGE KOUTRAS: Well, how long ago was that?

THE WITNESS: Well, dates I don't have them, because I didn't --

JUDGE KOUTRAS: I don't need dates, give me years?

THE WITNESS: Oh, it hasn't been a little over a year ago, I don't know the standards now, I could bring my records and show you.

Respondent's Testimony and Evidence

Jack E. Hawkins, testified that he is employed by the the respondent at the subject mine as a longwall foreman. He testified as to his background and experience, including his foreman's duties, and he confirmed that he has been a longwall foreman for two years, but held other foreman positions prior to this time. He holds a B.S. degree in wood science from West Virginia University, and he identified exhibit RX-1 as a sketch of the longwall face as it existed on the 7 right longwall section at the relevant times in question (Tr. 463-467).

Mr. Hawkins explained the operation of the longwall shearer, and he identified exhibit RX-6 as a photograph of the "Dowty four legged shields" used to support the roof during longwall mining. He also identified photographic exhibits RX-6-a and RX-6-b, which depict the shields and the coal conveyor used to transport the mined coal from the longwall face.

Mr. Hawkins explained that the face ventilation comes up the longwall headgate, sweeps across the face, and then

down towards the tailgate. He characterized the mine ventilation system as an "exhaust system", and he explained that air is exhausted from the mine. He indicated that the air ventilation is checked with an anemometer during each shift, and he explained the methods to diffuse the dust created during longwall mining, including the use of ventilation check curtains, dust deflectors located on the shearer and shield, watersprays on the shearer cutting drums, and standard respirators and air hats which are available for all employees (Tr. 467-477).

Mr. Hawkins testified that over the past two years the amount of dust on the longwall has decreased significantly and he attributed this to the aforementioned dust control devices, and the installation of a new Sager Shearer which permits a better dispersion of the dust. He stated that all of this equipment was in use on the 7 right longwall in May, 1983, and that it had been in use for approximately ten months prior to that time (Tr. 479).

Mr. Hawkins confirmed that layoffs occurred at the mine in January and March, 1983, and that 120 miners were laid off as a result of the March reduction. He also confirmed that the layoffs resulted in a realignment of the workforce and that he was changed from afternoon foreman to midnight shift foreman. In Mid-March, 1983, he became the longwall foreman for the crew which included the three complainants (Tr. 481).

Mr. Hawkins stated that in single cutting of the longwall face the shearer would cut the coal starting from the tail entry toward the head, and would then simply then back toward the tail without cutting coal in a "clean-up" mode. In double cutting, the shearer would actually cut the coal a second time while proceeding from the head back to the head (Tr. 482).

Mr. Hawkins admitted that after becoming longwall foreman on the 7 right face, he frequently talked to his crew about double cutting, and that this was "an ongoing thing" between mid-March and April, 1983. He indicated that the crew was not double cutting at that time, and that they did not agree to double cut. He confirmed that he spoke to Mr. Ribel, Mr. Kanosky, and Mr. Wells on 10 to 15 occasions, but they refused to double cut because "they felt that double cutting involved more work, and that it would increase production and jeopardize the union brothers called back that had been laid off." Mr. Hawkins denied that the complainants ever indicated any safety concerns in double cutting and that "safety wasn't really an issue." (Tr. 483).

Mr. Hawkins confirmed that he spoke to his crew about double cutting because production on his shift was so far below that of the other shifts, and he was trying to increase production. He also confirmed that the complainants expressed no interest in double cutting, that he again spoke with them on approximately May 18, 1983, and he explained what he told them. Mr. Hawkins stated that at no time did he ever direct or order the complainants to double cut (Tr. 486).

Mr. Hawkins stated that when he spoke to the complainants about double cutting, he explained certain "benefits" which would result, and he explained what he said as follows (Tr. 486-487; 492):

Q. What were those benefits, and what did you tell these three men?

A. First of all, our production being as low as it was, we weren't allowed to have any overtime, between shift type work. At that time, there had been several members of the crew that were interested in working between shifts. The other shifts were working between shifts, and we weren't allowed to because our production didn't warrant it. I told them that if our production increased that we would be allowed to stay in between shifts. Of course, they really didn't--. They weren't interested in staying in. So, it didn't affect them--

BY MR. POLITO:

Q. Did they tell you that, or, how do you know that?

A. Just from past experience. They didn't stay in. Especially, Rob and Danny had never --, Mr. Wells and Ribel had never stayed in much between shifts. John Kanosky had frequently stayed in.

* * * * *

Q. Had you assigned some, or all, of these duties that you just described, these tasks, to the chock setters, prior to May 18, 1983?

A. Yes, they'd done them all before, I'm sure.

Q. Now, you started to testify about what you told them about their opportunities to work through their

dinner hour or not, depending on whether or not they single cut or double cut. Now, just explain the relationship between the two and what you told the men?

A. Well, obviously, if they were standing at the headgate, without anything to do for a half hour, I was going to put them on dinner during that half hour until they were needed again. If they were single cutting, they were going to be there for that half hour. If they were double cutting, they'd be setting the shields up as the shearer came to the headgate, and they wouldn't be idle, obviously. It would be to my advantage, then, and the Company's advantage, to work them through their dinner, and they'd get the benefit of the extra money; I'd get the benefit of the extra production.

Q. If they were not double cutting, you say that you would have an opportunity to stagger them through their lunch breaks?

A. Right. One or two of them at the end of the time that the shields were pulled in and the shearer was at the tailgate, ready to come back to the head, I could, at that time, send one or two of them to dinner. They could have their dinner over with by the time they were needed again to set the shields.

Mr. Hawkins stated that the day after the May 18 meeting with the complainants', he asked them "to set the shields up beside the shearer", and they refused and advised him that they wanted to invoke their individual safety rights. However, they agreed to continue the shift single-cutting, and he advised them that a meeting would be held after the shift. Pending the meeting, he asked the complainant's to work between the two cutting drums on the shearer, an area of some 30 feet (Tr. 494-495). As a result of the meeting with the mine safety committee, the company safety department, and division longwall coordinator Cliff Dennison, it was decided by Mr. Dennison that the crew would not be made to double cut beside the shearer. Mr. Hawkins never again asked, ordered, or directed the complainants to double cut, and as far as he was concerned, that was the end of the matter. (Tr. 496).

Mr. Hawkins denied that he subsequently met with the complainants and gave them certain "options" about double cutting versus single cutting (Tr. 496). With regard to the question as to why the complainants did not work through their dinner hour and get paid overtime. Mr. Hawkins explained as follows (Tr. 498-501):

Q. There were a couple of days in there, though, between the 18th and 31st, that he did not work through the dinner hour?

A. Right.

Q. And, with respect to Mr. Wells, I believe it shows that he did not work through the dinner hour from May 19 until June 1.

A. Right.

Q. Okay? Then, with respect to Mr. Ribel, the next man, it shows that he did not work over the lunch hour from May 19 through May 31, and also shows that he was off on May 24. Is that correct?

A. Right. May 24 and 31.

Q. Well, actually, it was June 1, wasn't it, that he was off?

A. Yes, it would be.

Q. Can you explain for us, please, why these three chock setters did not receive overtime, why they didn't work through and get paid overtime for the dinner hour during those periods?

A. Sure. The first couple of times after I had met with them and told them I was going to make them double cut, they had come up to me and insisted that they take their dinner -- . We have a district agreement that says I have to offer the men dinner between the third and the fifth hour-of the shift. So, what was happening here was, these three guys were coming up, -- well, two of them, normally, sometimes three, -- were coming up and saying, "We want to take our dinner -- ".

Q. Are these men you're talking about, Kanosky, Wells and Ribel?

A. Yes, sir. The three Complainants.

They were insisting on taking their dinner four and a half hours into the shift Well, if they want to take it, I have to offer it to them. At that point, I had to give them, all three, their dinner at the same time. I didn't have the opportunity to

float them out through dinner, one at a time. This happened twice, that I remember, in which they insisted on taking their dinner, and it was late enough in the shift that I had to give them dinner all at the same time. At that time --

Q. Why would you have to give it to them, if they came to you four and a half hours into the shift and said, "We want to take our dinner. We don't want to work through our dinner." Why did you have to give it to them in that half hour?

A. As I said, by district agreement, they have to be offered dinner between the third and the fifth hour of the shift.

Q. What if they are not? What are the consequences?

A. If they're not, they have to be given their dinner and paid through it also.

Q. Oh, they would be paid whether they took it or didn't.

A. Right. They'd take their dinner and still get paid for it. So, after that happened a couple of times, I started sending them to dinner for several days without asking them. I just -- . The third hour came. I'd sent one of them to dinner. A half hour later, I'd send another one, until I had all three in. That way, I could operate the face and still have two chock setters up there and one on dinner, at that time.

That didn't continue for very long until I realized that I wasn't giving them the same opportunity as I was the rest of the crew. Basically, the rest of the crew had the opportunity to work through dinner. I wasn't asking them to do it. So, I started asking them, again, every day, if they wanted to work through dinner, and, normally, they refused to work. They wanted to take their dinner instead of working through it.

Q. Was there a period of time, from the period May 19 through May 31, that you asked them to let you know at the beginning of the shift whether they wanted to work through or take their lunch break?

A. Well, the first day that they all came at one

time and wanted to take their dinner, I asked them to let me know. They wouldn't do it though. They'd let me know four and a half hours into the shift that they wanted to take it.

Q. So, there was a period of time then, when you were just telling them that you wanted them to take their dinner break, and didn't want them to work through their dinner break.

A. For a few days, I didn't give them the option, no, sir.

Q. Okay. And why was that, Mr. Hawkins?

A. Well, I just sent them to dinner instead of letting them wait until four and a half hours into the shift and insisting on taking it.

Q. And, by sending them, you were able to stagger them?

A. Right. I was able to send them one at a time so that I could still have two chock setters to operate the shields.

Q. You were avoiding the situation where all three of them would have to take it during the same half an hour, and you would be without chock setters?

A. Right.

Mr. Hawkins denied that he ever refused to let the complainants work through their dinner hour in retaliation for their refusal to double cut. With reference to the question of working between shifts, Mr. Hawkins explained as follows (Tr. 503-504):

Q. Do those records show that, with one or two minor exceptions, no employees worked overtime between shifts from approximately April 18, through May 18?

A. Right. They -- . In that time, we didn't work any amount of over.

Q. I think there is one exception in there, if I recall, that an employee had worked.

A. There may be if we had been broken down at the end of the shift that somebody would have stayed to

repair the equipment to get ready for the next shift or something.

Q. Okay. Now you say, at that point in time, that is, April and May, were you or were you not authorized to permit employees to work between shifts and collect overtime pay?

A. No, I wasn't authorized to do it.

* * * * *

Q. On these occasions when overtime between shifts was available, after June 2, do the records reflect whether Mr. Ribel worked overtime?

A. Not according to the time we have listed here, down through June 17th.

Q. I believe you have already testified there were occasions prior to May 18, prior to this incident on May 18th that he refused opportunities for overtime between shifts on this one?

A. Yes, sir.

With regard to reassigning one of the chock setters away from his normal classified work, Mr. Hawkins explained as follows (Tr, 504-507; 508):

Q. Now, there was testimony yesterday, Mr. Hawkins, that, between May 18th, or May 19th and May 31, you took one of the chock setters away from his normal classified work of chock setting and assigned him other work. Is that true?

A. For a very few days, yes, sir.

Q. Explain what you did, and why you did it.

A. At this time, we had quite a high amount of absenteeism. We normally have 15 men and a Foreman in each crew, on a longwall crew. We were experiencing anywhere from two to five people being off every day, and that left us short in some areas of-- as far as manpower goes, particularly what we term the utility man, the man who's responsible for watching the stage loader and tailpiece area, keeping the spillage cleaned up, keeping the cables drug. We didn't have a utility man. To the best of my memory, the utility man at that time, was Tom Walls,

and he was operating the headgate while the headgate man operated the shearer. And so, the utility job was not filled and someone had to pick up that work that he normally did. One of the chock setters normally did that while two chock setters did their normal job.

* * * * *

Q. You started to explain and I interrupted you, why you assigned the one chock setter to perform these duties.

A. They had to be done. Spillage and so forth has to be cleaned up out of the walkway to avoid a violation on that. The cables, of course, had to be drug. If they're not drug down, the machine basically, would pass them up. Of course, the rockdusting is common mining practice. The area has to be rockdusted and kept that way. It's work that has to be done by someone, and the classified man that normally did it was performing another job then.

Q. Did you feel that you could operate a single cutting method with just two chock setters?

A. Yes, sir.

Q. Were you, during that period, those few days that you said you did it this way, able, efficiently, to operate with just two chock setters?

A. Yes, we had no problem in doing that.

Q. Did you, at some point in time then, change again, and go back from two chock setters to three chock setters?

A. Yes, I did.

Q. And why was that?

A. Basically, they staged a slowdown so that the chock setters were not operating fast enough to keep up with the shearer as it idled back to the tail.

And, at Tr.(509-512):

Q. Was your assignment of the two men -- , your assignment of one chock setter each shift for these several days to do general work, or utility work, in

retaliation for the fact that they had refused to double cut for you?

A. No, sir.

Q. Then what was the reason for it?

A. As I stated, we were short people. Someone had to do the outby work. At that time, it was beneficial for the man that was, basically, idle, to do that. Whenever I had to put three chock setters back on the face, then the mechanics had to do the outby work that they had been doing.

Q. The work that you had assigned the third chock setter to do, the general work, was there any type of work you assigned them to do during these several days that they had not done before?

A. No, sir. They had done it before. Really every member of the crew had done most every job up there.

Q. Was that work assigned to other members of the crew besides the chock setters?

A. Yes, sir. It had to be done. When they didn't do it, some other member had to do it.

Q. There was testimony yesterday that, while you were using just two chock setters to move the shields and assigned the third chock setter to do general setters work. Do you agree with that?

A. No sir. In reviewing the time sheets for that period, there was never a utility man paid chock setter rate, if he did perform --

JUDGE KOUTRAS: That wasn't the question. Forget reviewing. Was a man actually doing it?

THE WITNESS: No, sir. The chock -- , or, the utility man did not perform chock setter duty.

* * * * *

Q. Did you have any confrontations, or problems of any kind with Mr. Ribel after June 1, or after May 31, 1983?

A. Nothing to speak of. There were a lot things that came up, safety disputes that they thought

were --, that I was doing something wrong. They would take it outside; bring the commiteeman in, or sometimes, involve the State or Federal Inspector. In every case, I can't -- . In every case there wasn't anything came of it.

Q. Did you, at any time, threaten Mr. Ribel, after June 1, or any time, before or after June 1, to discharge him or take any other adverse action against him for refusing to double cut or filing his complaint with MSHA?

A. No, sir.

Q. The records show that the affidavit, or the statement, was signed by Mr. Ribel, Mr. Wells, and Mr. Kanosky on May 31, that is, the first complaint they made to MSHA. Do you know when you became aware of the fact that they had even filed that complaint with MSHA?

A. I'm not positive. I would say about a week later.

Q. Would they have told you about a week later?

A. No, they didn't tell me.

Q. You received a copy of the Complaint in the mail. Is that correct?

A. Yes, sir.

Mr. Hawkins confirmed that Mr. Wells was injured on the job. However, he denied that he ever refused Mr. Wells any help in pulling the cables, and he indicated that Mr. Kanosky was helping Mr. Wells with the cable at the time of the injury. When Mr. Wells fell, Mr. Kanosky summoned Mr. Hawkins to the scene, and Mr. Hawkins stated that he filled out the accident report and listed Mr. Kanosky as a witness to the incident. (Tr. 513).

Mr. Hawkins stated that in August, 1983, an unusual number of problems existed with the telephones used along the 7 right longwall faces. He explained that the phones were being intentionally damaged, and he demonstrated how this was done (Tr. 514-517). He also explained that inoperative or damaged phones were replaced (Tr. 519). He also confirmed that production delays resulted from inoperative or damaged phones (Tr. 521).

With regard to the events on the midnight shift on August 5, 1983, when Mr. Ribel was discharged, Mr. Hawkins stated that longwall coordinator Toth went into the section with the crew to meet with them at the request of a State inspector to resolve a union-management conflict. Mr. Hawkins took Mr. Wells with him to fireboss the section, and when they returned, Mr. Toth asked him to send two men to check the face phones. Mr. Hawkins sent Mr. Ribel and Mr. Toothman to check the phones, and he explained why he did this (Tr. 526-530).

Mr. Hawkins stated that after the meeting was over, he went to the face area, and Mr. Toth, Mr. Ribel, and Mr. Toothman were in the process of checking the telephones along the longwall face. Mr. Hawkins confirmed that he was present when the #32 telephone was opened, and he identified the telephone produced at the hearing as the same telephone in question. (Tr. 534). Upon examination of the inside of the phone, he confirmed that the orange wire in question is "separated" (Tr. 537).

Mr. Hawkins stated that the hawkbill knife which Mr. Ribel had on his person on the evening of August 5, was not necessary for him to use while performing any of his normal duties as a chock setter (Tr. 540). Mr. Hawkins also stated that Mr. Toth did not consult with him when he suspended Mr. Ribel with intent to discharge him, nor did he ever suggest to Mr. Toth prior to that time that Mr. Ribel be terminated (Tr. 540-541).

Mr. Hawkins denied that he ever told Mr. Wells that Mr. Toth was "out to get him", and he also denied that Mr. Toth had ever made such a statement to him (Tr. 542). Mr. Hawkins indicated that after Mr. Wells bid off the chock setters' job, a vacancy was created, and Mr. Wells attempted to bid back on that job a week later. However, the vacancy had been filled by someone senior to Mr. Wells (Tr. 542).

With regard to the "safety slips" which he issued to Mr. Wells in August, Mr. Hawkins confirmed that he relied on what Mr. Wells had told him, and that this served as the basis for the slip. (Tr. 543).

On cross-examination, Mr. Hawkins confirmed that the new longwall shearers were obtained in early 1982, and they were used on the 7 right panel in early 1983 when longwall mining began (Tr. 544). He was sure that dust samples were taken by the respondent, but he does not know the results, and he confirmed that he would be made aware of any dust non-compliance, and that it was possible that the panel may have been out of compliance from early 1983 until May, 1983, but he was not sure (Tr. 545).

Mr. Hawkins confirmed that 20 dust air hats were available for use by his crew, and that the two shearer operators usually wore them (Tr. 546). He also explained the procedures for cleaning the shearers, changing the bits, and he confirmed that with the new longwall system it would take approximately a half an hour to complete a double cutting cycle (Tr. 549).

Mr. Hawkins confirmed that as soon as he took over the shift, he asked the complainants to double cut and they refused. When he asked them why, he stated as follows (Tr. 550).

A. Well, they didn't want -- . There were various responses. They didn't want to work beside the shearer operators because there were too many people working in a limited area. They didn't feel that that was safe. They didn't want to increase the production. They felt that double cutting would increase the production. They felt that they were required to do more work whenever they were double cutting, as opposed to single cutting when they had basically, time off to loaf.

Q. Did anyone ever express any concern to you about working inby the shearer because of the dust?

A. No, not to my recollection.

Q. When was the first time that you ever heard about that concern?

A. Whenever I received the complaint and talked to Mr. Cross.

Mr. Hawkins stated that no one ever expressed any concern to him about working inby the shearer because of the dust, and he first became aware of this when he received the complaint (exhibit G-1, Tr. 551). He confirmed that during his tenure on the afternoon shift it was a common practice to double cut, and that single cutting took place occasionally "when the crew was teed off about something" (Tr. 551). When the complainants' refused to double cut Mr. Hawkins stated that he looked more closely at the mine dust control plan and spoke to his supervisor to find out why his midnight crew was the only crew which was not double cutting, particularly when the day shift had never had a complaint about double cutting, and the section was inspected by State and Federal inspectors (Tr. 552).

Mr. Hawkins explained the ventilation along the face of the longwall, and he confirmed that when he discussed the double cutting with the mine safety department it was his understanding that as long as a miner stood beside the shearer machine, and was not inby the machine, this would not be illegal and it would not violate the ventilation plan (Tr. 563).

Mr. Hawkins explained his concern about production on his section and he also explained the reasons why he wanted to stagger the dinner hours for his crew (Tr. 576-578). He also explained that during single cutting, there was less work to be done by the chock setters, and that this prompted him to allocate the time among the crew (Tr. 581-584).

With regard to the telephones on the longwall, Mr. Hawkins confirmed that there were problems during the months of July through August, and these problems included water in the phones, loose electrical connections, and the like, and he confirmed the repair work that was done on the phones (Tr. 586-588). Mr. Hawkins testified as to the events of August 5th, the evening that Mr. Ribel was discharged, including his movements that evening (Tr. 589-596).

Michael Toth, longwall coordinator, testified as to his background and experience, and he stated that he was not involved in any discussions between Mr. Hawkins and his crew with regard to the question of double cutting on the longwall. He explained that under the applicable mine plan in effect in May, 1983, it was legal for miners to work between the cutting drums of the longwall shearing machine, and in his view, working in that position would not place a miner "inby the shearer" (Tr. 635). He confirmed that he has been present on the operating sections of the mine where double cutting was taking place with miners working between the shearer drums, and that Federal and state inspectors were present (Tr. 636). He explained that this was an every-day occurrence, and he named several MSHA inspectors who would have been present when this was going on (Tr. 636-638). Although he indicated that the respondent was cited by an MSHA inspector for a miner being inby the shearer, no citations were ever issued because miners were working between the drums (Tr. 638).

Mr. Toth stated that none of the complainants in this case had ever come to him to complain about the manner in which double cutting was taking place (Tr. 638). In his view, any dust problems which may have existed on the

7 right longwall section have decreased during the two-year period of 1982-1983, and he attributed this improvement to the installation of deflectors, water sprays, and the use of air helmets (Tr. 640).

Mr. Toth stated that problems with the longwall phones increased sometime after the vacation period in July, 1983, and he explained these problems in some detail (Tr. 641-644). With regard to the evening of August 5, 1983, Mr. Toth stated that he went to the mine for a meeting with the midnight crew about the manner in which Mr. Hawkins was fire-bossing the section, and he explained his movements that evening (Tr. 645-650). He stated that the subject of double cutting was not discussed at the meeting, and he denied that he ever made a statement to Mr. Kanosky that he was going to be fired (Tr. 650). Mr. Toth stated that he had no knowledge that Mr. Kanosky had complained to a state inspector about the manner in which a ventilation curtain had been installed (Tr. 651), and he detailed the manner in which he inspected the phones on the longwall the evening of August 5 (Tr. 653-663). He denied that he cut the wires on the #32 telephone, and denied that he had a knife or cutting tools with him that evening (Tr. 664). When asked why he decided to suspend Mr. Ribel, with intent to discharge him, Mr. Toth responded as follows (Tr. 664-667):

Q. Could you tell us specifically the reason why you decided to suspend Mr. Ribel with intent to discharge that evening?

A. The reasoning behind it was the fact I couldn't place anybody else by that particular phone by himself. You know, he was the only one. I didn't see him do it. I told him I didn't see him do it. But I assumed that he did it because I couldn't put nobody else by it by their self. And --

Q. Would you state whether or not your decision to terminate him or suspend him with intent to discharge was based in any way on the fact that he and other members of his crew had refused to double cut in May, or at any time in the year 1983?

A. None whatsoever, no.

Q. Would you state whether or not your decision to suspend him with intent to discharge was based in any way on the fact that he and Mr. Kanosky and Mr. Wells had filed a Complaint with MSHA on May 31, 1983?

A. You know that had nothing to do with me. I was aware of it, but I had nothing in it, you know.

Q. What effect, if any, did those two situations, refusal to double cut or the filing of the MSHA Complaint have on you?

A. None. I didn't want them to double cut. It wasn't a forced issue. Uh, the discrimination charge, you know, I was aware of it. I was real -- real aware of the problems that they was having. Jack and everybody at the mine was. But, you know, I had nothing in it, you know. It didn't affect me. I didn't feel that the double cutting had anything to do with the production being low. And, you know, as far as what problems they had with Jack, it didn't -- I'd like to see them got along a lot better, but that had nothing to do with it.

Q. One of your reasons for being there that evening was to discuss and, if possible, try to resolve some of the problems that had existed between Mr. Hawkins and his crew. Isn't that true?

A. Yes, sir.

Q. Did you discuss your decision to suspend Mr. Ribel with intent to discharge with Mr. Hawkins before you made the decision?

A. No.

Q. He didn't play any part in the decision?

A. No, he didn't.

Q. Had he ever suggested to you in any way, or, anybody ever suggested to you that you should try to fire or terminate or dismiss, in any way, Mr. Ribel?

A. No, things -- . It just don't work like that. Nobody's -- . I never discussed it with anybody. Never had it on my mind or nothing. It just wasn't that way.

Q. There has been a suggestion made, or an inference made at this hearing before you testified, that Mr. Ribel was set up by mine management, including you.

A. Well, it wasn't no setup. I've heard a lot about setups and entrapments and stuff. It wasn't that way.

Q. Have you learned anything since August 5 that would indicate to you that anybody else, other than Mr. Ribel, was walking by himself past the 32 phone during the midnight shift on August 5, prior to the time that you and Mr. Reesman and Mr. Toothman opened the phone?

A. No.

Q. Were all of you there when the phone was opened, together?

A. When the phone was opened, Rob wasn't there. I was there, and Foley, and Russell Toothman, and Steve Reesman, and I think Roy McCormick was there. You know, I -- . There was several people there, I can't --

JUDGE KOUTRAS: Where was Mr. Ribel at that time, when it was opened?

THE WITNESS: He was at the headgate at that time.

BY MR. POLITO:

Q. Have you ever told Mr. Hawkins, or anybody else, that you were out to get or were going to get Mr. Wells next?

A. No, I never did say that.

Frank Peduti testified that he is employed by the respondent as a division electrical engineer and that the Federal No. 2 Mine is under his area of jurisdiction and has been for the past two years. Mr. Peduti stated that he has been employed by the respondent for 14 years, and he testified as to his background and experience. He stated further that he holds a B.S. degree in electrical engineering from the University of West Virginia and that he is a registered professional engineer (Tr. 709-710).

Mr. Peduti examined the mine telephone in question, exhibit R-7, and he confirmed that he had previously examined it after Mr. Ribel's discharge and that he testified on behalf of the respondent at the arbitration hearing held in Mr. Ribel's case. Mr. Peduti stated that based on his experience, education, and background, it was

his professional opinion that the telephone wire, which is orange in color, and which is used on the telephone speaker, was cut with a sharp instrument or a knife, including possibly a hawkbill knife. He explained the basis for his opinion, which included an examination of the condition of the wire at the time of his examinations, including the teflon protective outer cover of the wire. In his opinion, the separated condition of the wire was not caused by normal wear and tear or corrosion, but by the wire being cut (Tr. 710-715).

On cross-examination, Mr. Peduti reiterated his beliefs and opinions, based on his practical experience, as to why he believed the phone wire in question appeared to have been cut (Tr. 715-718).

Joseph Luketic, respondents Employee Relations Officer testified as to the procedures followed in the adjudication of Mr. Ribel's grievance filed under the applicable National Bituminous Coal Wage Agreement, exhibit R-8, and he identified exhibit R-3 as the standard grievance complaint filed by Ribel, exhibit R-4 as a Western Union mailgram from the arbitrator who heard Mr. Ribel's case advising Mr. Luketic as to his decision denying the grievance, and exhibit R-5 as the arbitration decision issued by the arbitrator, Lewis R. Amis, on August 22, 1983 (Tr. 722-728).

Mr. Luketic explained the procedures followed to select an arbitrator to hear Mr. Ribel's case, and he confirmed that Mr. Amis was selected from a panel of available trained arbitrators, and that his selection as the arbitrator was agreed to by Mr. Ribel's UMWA District 31 representative Fred Kelly. Mr. Luketic stated that Mr. Amis was not an attorney and he indicated that he was a part-time teacher at the University of Pittsburgh (Tr. 729-731).

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In this case, the parties entered into certain stipulations concerning jurisdiction, and agreed that while the issue here is whether or not the safety slip issued to Mr. Wells by Mr. Hawkins was out of retaliation for Mr. Wells' prior safety complaints, all of the testimony and evidence adduced in the prior hearings on January 11 and 15, may be incorporated by reference in this proceeding (Tr. 6).

MSHA's Testimony and Evidence

Mr. Wells confirmed that he filed his complaint in this case on August 8, 1983, and he did so because of a safety slip given to him by Mr. Hawkins on July 29, 1983 (Tr. 20). Mr. Wells explained that while working as a chock setter on that day he reached over the longwall pan line chain to retrieve some roof cribs. The chain was not running. After he had taken the cribs off the spill tray, the chain started up and it had not been cleared over the longwall face telephones. Mr. Wells then went to the longwall head area and asked Mr. Hawkins why the chain had been started without first being cleared over the telephone. Mr. Wells stated that Mr. Hawkins inquired as to why Mr. Wells was concerned, and that he (Wells) informed him that the chain started while he was taking crib blocks off. Mr. Hawkins then asked him if he wanted him to give Mr. Wells a safety slip for being on the chain without first having it locked out. Mr. Wells then informed Mr. Hawkins "if you feel that's what you have to do" (Tr. 21). Later, Mr. Hawkins gave him a safety slip for being on the chain, and Mr. Wells denied that he was on the chain, and he stated that he tried to explain this to Mr. Hawkins and to Mr. Toth, "but they didn't want to hear"(Tr. 21).

Referring to a diagram (exhibit RX-1), Mr. Wells explained that he was at the tail end of the longwall, somewhere between the No. 9 and 10 shields, and he stated that he was standing on the shield legs when he reached over the chain to remove the cribs, and that it was proper for him to stand on the legs. He had removed at least five cribs, and the chain began moving as he removed the last crib. The proper procedure is for the pan line to be "cleared" by announcing it three times over the phones. After it was "cleared", the headgate attendant may then start the chain (Tr.25).

Mr. Wells stated that he did not feel that he was exposed to any hazard or danger when the chain started, and he indicated that had he crossed over the pan line to do some work, he would have locked it out. He stated that he was familiar with the lock out procedures, and that he had previously locked out the pan line while performing work on the face side of the line. He confirmed that the pan line should be locked out any time anyone needs to cross over the spill tray to perform any work (Tr. 27). Mr. Wells stated that had the chain been moving, he would not have reached over and picked the cribs off (Tr. 29).

Mr. Wells asserted that to safely perform his work of pulling the shields, it was important for him to be able to hear the pan line clearance. He then stated that on the day in question, the clearance procedure was not

necessary to his work, but that he was simply concerned that the pan line was not cleared over the phone before it was started. He stated that he had a safety concern and made a safety complaint (Tr. 29).

Mr. Wells stated that he never received any prior safety slips, had never previously been disciplined for safety related reasons, and had never received any type of verbal warnings. He believed that Mr. Hawkins was aware of the fact that he had filed a discrimination complaint on June 1, 1983, and he asserted that Mr. Hawkins confronted him "to the fact that he was going to get even with me for the complaints that I filed" (Tr. 29).

On cross-examination, Mr. Wells explained that the procedures for "clearing" the pan line begins with the headgate attendant personally picking up the phone at the headgate and calling or announcing a "warning" that he is about to start the chain by stating "clear the chain" three times. The phones along the longwall face are approximately 100 feet apart, and if they are working properly, the attendant's warning should be heard by those persons working around each of the phones (Tr. 31). Mr. Wells confirmed that he was some 500 feet from the headgate on the day in question, and could not have observed the headgate attendant give any signal. However, he insisted that he was not accusing the attendant of not doing his job, but simply wanted Mr. Hawkins to know that no warning was sounded over the phone in his work area before the chain started up. Mr. Wells asserted that his concern was over the fact that a safety procedure had not been followed in that he heard no warning (Tr. 33).

Mr. Wells confirmed that a lock-out device was available at the phone near where he was working, and that such devices are located by each longwall phone. Once the device is depressed, the face chain will not move. The lock-out device is a back-up safety precaution to the phone pager system (Tr. 35). Mr. Wells conceded that he did not lock-out the chain before removing the crib blocks in question (Tr. 38).

Mr. Wells confirmed that the safety procedures for miners working along the longwall are included as part of the roof control plan, and that an instruction for the use of the lock-out switch is part of these instructions. He confirmed that Mr. Hawkins usually goes over a part of the plan with the work crew every night, and that he has covered the lock-out procedures. Mr. Wells could not specifically state whether Mr. Hawkins discussed the plan on the evening of July 29, 1983, but he recalled that he has explained the plan on other occasions, including the

use of the lock-out device while working on the face (Tr. 41).

Mr. Wells reiterated that while pulling a shield, crib blocks fell down on the chain, and he was removing them. He explained where he was positioned, and in response to further questions, he detailed his work movements and how he reached over the chain to retrieve the cribs (Tr. 44-53). He described the dimensions of the crib block as 36 inches long, six inches wide, and eight inches high, but had no idea how much they weigh. He confirmed that the blocks which fell were stacked up to support the roof in the tailgate entry. He marked exhibit RX-1 with an "A" to show where he reached over to the spill tray to retrieve the blocks, and he described the area as the "head side of the tail motor" (Tr.55). He denied that the cribs had fallen eight feet from where he claimed he reached over the spill tray, and he asserted that they were within easy reaching distance (Tr. 59).

Mr. Wells confirmed that he was aware that there were problems with the longwall phones. When asked to explain when Mr. Hawkins made the statement that he was "going to get back at him for having filed the 105(c) complaint," Mr. Wells asserted tht "it had occurred on more than one incident, like for instance, I would be pulling cables, or doing something other than my job" (Tr. 60). Mr. Wells could not specify when Mr. Hawkins made the statement. However, he stated that he kept notes on such incidents, but did not have them with him since he keeps them in his clothes basket at the mine (Tr. 61).

Mr. Wells stated that he had no idea what a "contact and observance" is. However, when counsel corrected himself, and indicated that the term is "contact and observation", Mr. Wells stated that he was familiar with that term (Tr. 64). He explained that this is a procedure authorizing a supervisor to give a miner a warning if the supervisor observes a safety regulation infraction (Tr. 65). Mr. Wells denied ever being warned about not following safety procedures. When shown a copy of a document with his name on it (exhibit RX-1), dated January 5,1983, indicating that Mr. Larry Henderson talked to him about crossing the pan line while it was running, Mr. Wells denied denied any knowledge of the matter. He denied that his signature was on the slip, and he denied ever receiving it (Tr. 66-68). He did acknowledge that the document is a "contact and observation" (Tr. 67).

In response to bench questions, Mr. Wells indicated that the work of retrieving the roof cribs required his reaching over the pan line spill tray, and while that

concerned him, he did not lock it out (Tr. 75). He stated that it was his understanding that simply reaching over the pan line did not require him to lock it out (Tr. 76). Mr. Wells conceded that had he locked the pan line out, he probably would not have received a safety slip (Tr. 79), and he conceded that when Mr. Hawkins gave him the safety slip on July 29, he made no statement that he was doing it out of retaliation (Tr. 83).

Mr. Wells stated that he filed a grievance regarding the safety slip in question, and when asked about the disposition of this action on his part, he replied "in the negligence of our district, nothing came of it" (Tr. 84). He then stated that his union did not take the matter any further (Tr. 86).

John Kanosky, Jr., confirmed that on July 29, 1983, he was working on the longwall as a chock setter with Mr. Wells at the tail of the longwall. He confirmed that the shift started at midnight, and he confirmed that he observed Mr. Wells picking up cribs from the pan line, and when asked whether the pan line was moving, Mr. Kanosky replied "at first no, when he first went over, not at first" (Tr. 92). He confirmed that he heard no "clearance" when the chain started moving. He stated that he asked Mr. Hawkins why the chain hadn't been "cleared", but he could not recall his response (Tr. 94).

On cross-examination, Mr. Kanosky confirmed that he was assisting Mr. Wells in pulling the longwall shields, and he confirmed that the chain was not locked out when Mr. Wells reached over the spill tray to retrieve the crib blocks (Tr. 98). He also confirmed that he and Mr. Wells did not lock out the pan line, and that when it started up, Mr. Wells "pulled away from it" and that no one ever stopped it (Tr. 100).

Mr. Kanosky stated that he did not go with Mr. Wells to seek out Mr. Hawkins after the pan line started up, and that when he later spoke with Mr. Hawkins, he advised him that the phones were out, and he could not recall Mr. Hawkins' reply (Tr. 101). Mr. Kanosky "guessed" that his conversation with Mr. Hawkins was a "safety complaint" (Tr. 102). Mr. Kanosky stated that while helping Mr. Wells, he (Kanosky) did not reach over the spill tray, and he confirmed that after he advised Mr. Hawkins that the phones were not working, Mr. Hawkins did not issue him a safety slip, even though Mr. Hawkins knew that he had filed a previous discrimination complaint (Tr. 105).

Mr. Kanosky stated that while normal procedure calls for the locking out of the pan line when one has to cross

the chain to do some work, if he simply has to reach across the chain, he does not lock it out (Tr. 110). When asked why the distinction, he replied "I don't know" (Tr. 111). He did not believe that simply reaching over the chain while it is moving is unsafe, and he conceded that it was possible that one could get his arm caught in the moving chain while reaching over (Tr. 112-113).

James L. Foley testified that he worked on the midnight shift on the longwall on July 29, 1983, and that he was "setting shields towards the tail" (Tr. 116). Mr. Foley stated that the normal procedure calls for the "clearing" of the chain before it starts moving, and on the evening in question he did not hear the chain "cleared" before it began moving. He stated that he asked Mr. Hawkins about it, and Mr. Hawkins told him that "apparently the phone was not working" (Tr. 118).

Mr. Foley stated that any time anyone crossed over the spill tray, the lock-out procedures were to be used, and when asked why anyone would cross the spill tray, he replied "to shovel the pan line, to set bits, in my case, to grease, service, anything you had to do across the spill tray" (Tr. 118).

On cross-examination, Mr. Foley confirmed that after speaking with Mr. Hawkins about the fact that the phone pager did not work, he did not contact the mine safety committee about the matter (Tr. 119).

Respondent's Testimony and Evidence

Jack Hawkins, longwall foreman, testified as to the formal grievance procedures in effect at the mine in question with respect to employee discipline involving safety matters (Tr. 130-133). He confirmed that he issued a safety slip to Mr. Wells on July 29, 1983, and when asked why, he replied as follows (Tr. 133):

A. He had taken cribs off the pan line at the tailgate, without having locked out, and the conveyor started, and he put himself in a position to be injured, by his own negligence; by not locking it out.

Mr. Hawkins identified exhibit R-1. as the safety slip which he issued to Mr. Wells, and when asked to explain the circumstances under which he issued the slip, he replied as follows (Tr. 134-137):

Q. Okay, and what was the basis for your decision

to issue Mr. Wells, that slip?

A. The only thing that I knew about this, is exactly what he told me. And like he related the matter, when he came to discuss it with me.

Q. Well, would you explain to the Court, exactly what happened, to cause you to issue the slip, on that evening?

A. Mr. Wells, first of all, Mr. Ribel come to the head gate, from setting shields down the face, and told me that the phones hadn't been working properly.

What he asked me, was why the pan line started without being cleared, because I was standing right beside the man, whenever he cleared it.

So he said, well the phone must not be working, and I asked him where he was, he said that he was down around 89 shield, whenever the chain started, so my electrician at that time, was working on the shear, I went down the pan line myself, and checked the phones, calling the head gate, from the tail. And I would reach the head gate on the phones down to 51, but I couldn't reach the tail.

When I got to 70, of course, each phone, I would check and make sure that everything visibly was right with it. When I got to 70, I called the head gate, called the tail, and couldn't reach the tail, and I moved the wires, where they connected into the phone, and called the tail, and I could reach the tail, so I assumed that that's where the problem was, with the phone system.

At that point, I would call the tail, and would call the head, and I knew that the communication was complete along the face, and I went back to the head gate, and it wasn't very long after that, several minutes later, Mr. Wells came to the head gate, and he was pretty mad, and asked me why the chain had been started without being cleared, and I tried to explain to him, that the chain had been cleared, and he said that he was down there, taking cribs blocks off that pan line, and he got two or three fingers torn off, if John Kanosky hadn't been there to turn the chain off.

Of course, I knew that that was right, because the chain having started, had immediately been turned

off, and then later it had started back up.

But I tried to explain to him, that the trouble was in the phone, and the phones were not working down past 70, but he wouldn't listen to it, and he was wanting to blame the head gate man, because he was nearly injured, and I tried to explain to him, that it was his own fault, for not locking the pan line out, it didn't make any difference whether the head gate man, had given the warning over the phone, if he would have had the pan line locked out, he wouldn't have been nearly injured.

Q. Mr. Hawkins, did you ask Mr. Wells, if he had in fact locked out the pan line, before the chain started?

A. I didn't ask him that directly, what I said was, I believe, you mean to tell me you were up on that chain, without having locked out?

He didn't answer the question, he didn't say yes, no, what he said was, to the best that I remember is, they are supposed to clear that chain before they start it.

Then I said, it sounds to me, like you are trying to talk yourself into an unsafe work slip, he said, well, do whatever you think is right. That pretty much was the end of our conversation.

Q. What was your understanding of the position that Mr. Wells was in, when he was removing crib blocks from the chain, based on your conversation?

A. Based on our conversation, he led me to believe that he was up on top of the conveyor, removing crib blocks?

Q. And that's when you -- what do you mean, when you say he was on top of the conveyor, removing crib blocks?

A. That he had crossed over the spill tray, and was standing on the conveyor chain, throwing the crib blocks off.

Mr. Hawkins testified as to the location where he believed the crib blocks had fallen, and based on his conversation with Mr. Wells, he believed that Mr. Wells was standing in front of the spill tray reaching across to retrieve the blocks, but was actually standing on the

conveyor itself. Mr. Hawkins again stated that when he asked Mr. Wells whether he was on the chain, Mr. Wells again did not reply but simply stated that the pan line had to be cleared before it was started up (Tr. 142-143).

Mr. Hawkins explained the lock out procedures, and he stated that simply pushing the lock out button located at the person's work area will prevent the chain from moving, and it cannot be started again until that person does it. He also indicated that the lock out procedures are part of company policy as well as the roof control plan. These procedures are part of the miner's training and they are discussed at daily roof control meetings (Tr. 147). While conceding that lock out procedures may not be discussed daily, he stated that they were "probably" discussed every second or third day, and that he did cover the roof control plan provisions on the midnight shift of July 29, 1983, and that Mr. Wells was present (Tr. 148).

Mr. Hawkins admitted that two days after the Wells incident he (Hawkins) had removed a crib block from the moving pan line without locking it out. He stated that he was standing in the walkway beside the spill tray and simply reached over the spill tray and removed the block from the top of the coal as it passed by. He did not believe this to be unsafe since he simply bent over and picked the block off and there was no way he could have been injured (Tr. 150).

Mr. Hawkins stated that when he issued the safety slip to Mr. Wells he was aware that he had filed a safety complaint in June, but he denied that this influenced him in any way. He stated that other employees had complained about inoperative phones, but they were not issued any safety slips (Tr. 152).

On cross-examination, Mr. Hawkins conceded that on July 29, 1983, he did not view the crib blocks in question, nor did he go to the area to investigate the incident (Tr. 154). Mr. Hawkins stated that he made no inquiries as to how far the cribs had fallen over on the chain, and he asserted that Mr. Wells did initially claim he was standing beside the spill tray, and the first time he (Hawkins) heard that contention is when he received a copy of Mr. Wells' discrimination complaint (Tr. 156).

Mr. Hawkins stated that the roof control plan is posted at the mine and that the safety committees have copies (Tr. 162). He explained the safety slip warning procedure, and he confirmed that while Mr. Wells did not receive a copy of the notice that he issued, the safety committeeman did, and the slip was addressed to him (Tr.

164; 166-167). With regard to an asserted previous warning given by Henderson to Mr. Wells, Mr. Hawkins stated that he was not previously aware of this, and did not know whether Mr. Henderson had in fact given it to Mr. Wells (Tr. 166).

In response to further questions, Mr. Henderson stated that apart from his understanding that Mr. Wells was standing on the conveyor when he removed the cribs, from his experience and past observations, he knows that operators lock out the pan line and then get up on the chain and remove the cribs. He also reiterated that when he asked Mr. Wells whether he was on the chain, Mr. Wells did not deny it (Tr. 168-169).

Mr. Hawkins stated that while he decided to recommend the issuance of the safety slip to Mr. Wells on July 29, before doing so he had to get approval. He spoke with the shift foreman and Mick Toth, the longwall coordinator, and they concurred in his decision. The following Monday, August 1, 1983, he asked Mr. Wells to bring his safety committeeman with him to discuss the safety slip, but due to the unavailability of the committeeman, the meeting was delayed until the next day. After meeting with the safety committee, the slip was issued on August 2, 1983 (Tr. 171). Mr. Hawkins believed that the union has not pursued the issuance of the slip any further, and he is unaware of any grievance being filed (Tr. 178).

Gary M. Hartsog, respondent's safety division inspector, testified as to his background and training, and he stated that he holds a B.S. degree in mining engineering from West Virginia University, and will receive his Master's in mining in May. His duties include supervision of safety programs at the three mines under his division's jurisdiction (Tr. 196).

Mr. Hartsog confirmed that he is familiar with the longwall safety practices and procedures at the Federal No. 2 Mine, and he explained the lock out procedures for the longwall. He confirmed that the lock device, once engaged, electrically locks out the pan line and it will not start (Tr. 197). Mr. Hartsog stated that if one were to position himself on the conveyor itself, this would be a violation of company safety practices. He identified a section of the West Virginia Mining Law, page 299, which states "no person shall perform work on the pan line or on the face side of the pan line unless such equipment is de-energized and locked out". In his view, anyone working on the pan line has to first lock out the line (Tr. 200).

Mr. Hartsog believed that reaching over a pan line to remove crib blocks would be an unsafe act, regardless of whether it violates company policy, and this is because "anything can happen". When asked whether Mr. Hawkins' act of removing a crib from a moving pan line was unsafe, Mr. Hartsog stated "no, because there was coal in the pan and this was laying on top of the coal". However, he would still not recommend doing what Mr. Hawkins did (Tr. 203). Based on his knowledge of the safety slip given to Mr. Wells, he believed it was justified (Tr. 204).

On cross-examination, Mr. Hartsog confirmed that he was not present at the August 2 meeting when the safety slip was issued, and he learned about it later that day (Tr. 205). He also confirmed that employees are made aware of company safety policies and procedures (Tr. 206). In response to further questions, Mr. Hartsog identified copies of previous "safety observations" issued to other employees including Mr. Wells, by Mr. Hawkins and other supervisors, and he testified as to what these were all about (Tr. 210-212).

MSHA's Rebuttal

Mr. Wells was called in rebuttal, and he confirmed that he received the safety slip in question on August 2, 1983, during a meeting in the mine foreman's trailer with his safety committeeman and Mr. Hawkins and Mr. Toth. Mr. Wells stated that there was a discussion over the fact that the slip indicated that he was standing on the chain, when in fact he was not (Tr. 232). He then acknowledged that the slip does not indicate that he was on the chain, and he stated that he explained to Mr. Toth and Mr. Hawkins that he simply reached over it (Tr. 233).

On cross-examination, Mr. Wells stated that he understood that he was being issued a safety slip because he was allegedly working in the face area without locking out the pan line (Tr. 236). He then conceded that he had no notes of the meeting or the incident in question (Tr. 237). He conceded that simply picking some cribs off the top of coal on a moving pan line is not as serious as standing on a pan line without having it locked out (Tr. 247).

Respondent's Rebuttal

Mr. Toth was recalled, and he testified that it was his understanding that the safety slip was issued because Mr. Wells "was in the pan line while taking cribs out". Mr. Toth stated that during the meeting of August 2, 1983, Mr. Wells did not deny that this was the case, and that

his excuse centered around his belief that Mr. Hawkins had removed cribs from a moving pan line, and that this was unsafe (Tr. 253).

On cross-examination, Mr. Toth stated that a State investigation was conducted over the safety slip incident, and it focused on Mr. Wells' assertion that Mr. Hawkins had performed an unsafe act by removing cribs from a moving pan line. He stated that the committeemen initiated the inquiry a few days after August 2, 1983, and no State findings of any violations by Mr. Hawkins were ever made (Tr. 256-262).

Mr. Kanosky was recalled as the Court's witness, and he explained where Mr. Wells was standing when he removed the cribs in question. Mr. Kanosky stated that at no time did he see Mr. Wells standing on the pan line or crossing over it (Tr. 264).

Mr. Hawkins was recalled as the Court's witness, and he confirmed that Mr. Wells did not specifically inform him that he was standing on the pan line when he removed the cribs, and that when asked about it, Mr. Wells did not deny it (Tr. 267). Mr. Hawkins also confirmed that from past experience, he knew where the cribs would have fallen, and that when they are knocked out, one cannot reach them by simply reaching across the pan line to remove them (Tr. 268). He reiterated the conversation with Mr. Wells as follows (Tr. 269):

THE WITNESS: If I could remember a quote that he said. First he asked me why the pan line started without, or who cleared the, who was the s.o.b. that cleared the pan line without, or started the pan line without clearing it? I told him it had been cleared. He said, "I was taking the crib blocks off of that tail and I almost got several fingers torn off if John Kanosky hadn't been there to turn it off." And, that's when I asked him, "You mean you were up on that tail without having locked it out?"

Then his next statement was, "But, they're supposed to clear that chain before they start it." And, I said, "Danny, it sounds to me like you're trying to talk yourself into an unsafe work slip?" He then said, "Well, you do whatever you think is right." And, that was about the end of the conversation.

In his deposition of March 14, 1984, Larry Henderson testified that he is employed by the respondent as a longwall section foreman at the Federal No.2 Mine.

He explained the procedures used by mine management to insure that the men comply with all safety rules and regulations, and these include on the job task training, and safety contacts and observations.

Mr. Henderson stated that on January 5, 1983, he was the longwall section foreman on the midnight shift, and that Mr. Wells was a member of his crew on that shift. Mr. Henderson stated that during the course of the shift he made out an employee safety observation of Mr. Wells and he identified exhibit RX-3 as a copy of the record he made of that safety observation. He confirmed that he made this observation notation after observing Mr. Wells crossing the panline while the face conveyor was still running and not locked out.

When asked whether he informed Mr. Wells about what he had done, Mr. Henderson replied as follows (Tr. 10-11):

Yes, but I'm not -- maybe I didn't say it in a way that he could remember. I hollered at him, and told him, you don't cross a panline while it's running, but other than that -- that's about it I'd say.

Mr. Henderson believed that he stopped Mr. Wells and told him about crossing the panline, and he explained that had he not stopped him he would not have written "o.k" on the observation slip. He also confirmed that the slip is given to the safety department where it is kept on file.

Mr. Henderson identified exhibit -1, as the respondent's safety policies, rules and practices, and he confirmed that section 11, item 8, prohibits crossing over the face conveyor chain without locking it out. He believed that Mr. Wells violated this rule when he crossed the moving panline on January 5, 1983.

Mr. Henderson identified exhibit -2, as a copy of a portion of the West Virginia mining regulations, and he indicated that section 7.06, prohibits anyone from working on the face side of the panline unless it is deenergized and locked out. He believed that Mr. Wells also violated this provision by crossing over the panline into the face area.

Mr. Henderson stated that it was his understanding that Mr. Hawkins issued Mr. Wells the safety slip in question because Mr. Wells was standing on a moving chain removing crib blocks without locking it out. Mr. Henderson stated that had he observed Mr. Wells standing on a moving panline he would probably issue him a safety slip because it is dangerous.

On cross-examination, Mr. Henderson confirmed that he did not observe Mr. Wells at the time Mr. Hawkins gave him a safety slip, but that he did discuss the matter with Mr. Hawkins. He did not discuss it with Mr. Wells.

Mr. Henderson stated that he has discussed the State and company rules and regulations with his men, and he indicated that all longwall personnel know that they are not to cross a moving panline without locking it out.

Mr. Henderson confirmed that employment safety observation records such as the one filled out for Mr. Wells are not given to the employee or to the safety committee, and they are not notified that such a record has been made of the infraction.

Mr. Henderson stated that that when he observed Mr. Wells cross the moving panline, it was at the end of the shift, and he indicated that Mr. Wells was going to the dinner hole to get his bucket. He stated that he did not pick out Mr. Wells for observation, but simply observed him go up on the inside of the spill pan and jump to the face side of the conveyor panline, a distance of two to three feet. He also stated that he did not issue Mr. Wells a safety slip because "it was probably his first time and * * * he was just needing to be told that it was unsafe, and not to cross the panline" (Tr. 28).

Mr. Henderson could not remember Mr. Wells' response when he told him that it was unsafe to cross the panline. He stated that he "more or less probably hollered at him", and that since it was the end of the shift, Mr. Wells left the mine. He indicated that he was approximately 15 to 20 feet from Mr. Wells when he hollered at him, and that no one else was present.

Findings and Conclusions

Docket No. WEVA 84-4-D

In order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, a complaining miner bears the burden of production and proof to establish (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2768, (1980), rev'd on other grounds sub. nom. Consolidation Coal Co. v. Marshall, 663 F. 2d. 1211 (3d Cir. 1981); and Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803 (1981). The operator may rebut the prima facie case by showing

either that no protected activity occurred or that the adverse action was in no way motivated by protected activity. If an operator cannot rebut the prima facie case in this manner it may nevertheless affirmatively defend by proving that (1) it was also motivated by the miner's unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Co., 4 FMSHRC 1935 (1982). The ultimate burden of persuasion does not shift from the Complainant. Robinette, supra. See also Boich v. FMSHR, 719 F. 2d 194 (6th Cir. 1983); and Donovan v. Stafford Constr. Co., No. 83-1566, D.C. Cir. (April 20, 1984) (specifically-approving the Commission's Pasula-Robinette test). See also NLRB v. Transportation Management Corp., ___ U.S. ___, 76 L.Ed. 2d. 667 (1983).

Protected Activity

In this case, the critical issue presented is whether or not the refusal by the three complainants to perform the so-called "double cutting" on the 7-right longwall section because they believed it was not safe is protected by section 105(c) of the Act. The three complainants assert that their refusal to engage in double cutting prompted their section foreman, Jack E. Hawkins, to retaliate against them by allegedly withholding certain employee benefits and privileges from them. These benefits included (1) working through the usual lunch hour and being paid, and (2) opportunities to stay over between shifts to perform certain job tasks at overtime pay rates. Conversely, the complainants assert that Mr. Hawkins advised them that their refusal to agree to his purported demands to double cut would result in his assigning them work which would cause them to either request transfers to other jobs or quit their employment.

The first question for determination is whether or not the process of double cutting is safe or unsafe. Based on a preponderance of all of the credible testimony and evidence adduced in these proceedings, I cannot conclude that the complainants have established that the double cutting of coal along the 7-right longwall face is per se unsafe. MSHA has produced no credible testimony or evidence to establish that double cutting is either unsafe or violates any laws or mandatory safety standards. As a matter of fact, the record establishes that the respondent has engaged in the process of double cutting for at least six years, and no one, including the complainants and the mine safety committee, have ever complained to MSHA or challenged this method of mining coal. Further, MSHA has produced no evidence to establish that the process of double cutting violates any safety or health standards, and there is no evidence that the respondent has ever been cited for this practice.

The record in these proceedings suggests that the principal complaint by the complainants with regard to the issue of double cutting lies in their belief that requiring them to position themselves inby the longwall shearing machine exposed them to high levels of coal dust, which not only violated the applicable mandatory regulatory dust exposure levels, but also threatened their health and safety. In short, the complainants assert that the process of double cutting requires them to work inby the coal cutting shearer, thereby exposing them to dangerous levels of coal dust.

After careful scrutiny of the record, I cannot conclude that the complainants have established that the respondent required them to be inby the coal cutting shearers during the process of double cutting. The complainants have presented no credible evidence to establish that the respondent required anyone to stand inby the coal cutting shearers while performing their chock setter duties. To the contrary, respondent's evidence and testimony, including company policy and safety regulations, mandates that all miners who work on the longwall section position themselves between the shearer cutting drums so as to avoid exposure to any coal dust generated inby the cutting shearers. In addition, the respondent has established that its cutting methods include the use of water sprays and other dust suppression devices, and that it has provided appropriate personal dust protection devices such as respirators and dust helmets. Further, aside from a possible isolated citation for non-compliance with the dust standards, MSHA has produced no evidence that the respondent's 7-right longwall section has been out of compliance with the applicable coal dust regulations, nor has it produced any evidence of any citations being issued against the respondent for double cutting.

Having concluded that the process of double cutting coal is not a violation of any law or mandatory safety standard, the next question presented is whether or not the asserted refusal and reluctance by the complainants to double cut coal was reasonable and protected under the Act.

The record here establishes that the double cutting of coal has been engaged in for at least six years, and that at least two working shifts at the mine have engaged in this practice without complaint for at least that long. Absent any proof by the complainants that they were required to position themselves inby the shearers, thereby exposing them to coal dust, I cannot conclude that their complaints are justified or reasonable.

On the facts of this case, I conclude that the complainants may not rely on an unsupported conclusion that they were exposed to dangerous level of coal dust, without establishing through some credible evidence that respondent's double cutting process required them to be in by the coal cutting machine, thereby exposing them to coal dust. Further, the complainants have not rebutted the fact that the respondent's coal suppression measures, including the furnishing of respirators and air helmets, afforded ample protection to any miner required to work on the subject longwall. The complainants would have me believe that any miner who chooses not to wear these protective devices, or who chooses to ignore company policy and regulation by deliberately positioning himself in by the coal cutting shearer, thereby voluntarily exposing himself to dangerous dust levels, should somehow be permitted to avail himself of the protections afforded him under the Act, and to hold the mine operator accountable for these actions. I reject these arguments.

The record here further establishes that once the complainants made their double cutting objections known to mine management, they were not required to double cut. In fact, their particular shift was permitted to continue to single cut coal. While it is true that foreman Hawkins attempted to change their minds by meeting with them and discussing the personal advantages which would inure to them by agreeing to double cutting, taken in context, I find nothing intimidating or illegal in this. Foreman Hawkins' interests were to increase production, and absent any showing that his requests required the complainants to engage in job tasks which were illegal or unsafe, I cannot conclude that his meeting with the complainants and his so-called "options" were discriminatory.

On the facts of this case, I conclude and find that once the complainants declined foreman Hawkins' "options" for double cutting, and once single cutting was in place, Mr. Hawkins had the right to restructure his work force in a manner which he believed was most productive.

The complainants' assertion that Mr. Hawkins withheld certain overtime opportunities from them and that he reassigned them work that caused them to either bid off their jobs or quit their jobs is simply unsupported by any credible evidence or testimony. Respondent has established that once the system of single cutting was instituted on the complainant's shift, there was a legitimate business reason for reassigning certain work tasks, and the complainants' arguments to the contrary are rejected.

With regard to the question of permitting the complainants to continue to work through their lunch hour, with compensation, as they had previously been accustomed to when they were engaging in double cutting, I conclude and find that since mine management has the inherent right to regulate its work force, it could change its policy and require the complainants to take their lunch break and to conform to management's work requirements. This is particularly true in this case where there is absolutely no evidence that Mr. Hawkins' actions violated any labor-management agreement, or that the complainants instituted any grievances or otherwise complained about the issue. It is also true where the record here established that after a short period, Mr. Hawkins recanted his prior position, and permitted the complainants to adjust their lunch hours. Further, on the basis of the record, the complainants had not established that they were treated any differently from anyone else.

In view of the foregoing findings and conclusions, I find that the complainants have failed to establish a prima facie case of discrimination. Accordingly, their complaints are rejected and case Docket No. WEVA 84-4-D IS DISMISSED.

Findings and Conclusions

Docket No. WEVA 84-66-D

This case concerns a complaint by Mr. Wells that Mr. Hawkins discriminated against him by issuing him a safety slip after Mr. Wells complained that a panline chain had started up without prior warning. MSHA argues that when Mr. Wells confronted Mr. Hawkins about this incident, Mr. Wells was making a safety complaint and that Mr. Hawkins retaliated by issuing him the slip for assertedly violating company safety policy by standing on the panline or working at the face without first having locked it out. MSHA asserts that even though Mr. Wells did not personally feel that he was in any danger when the panline started up without warning, there could have been other crew members who were in unsafe positions when the chain started without warning.

MSHA argues that the issuance of the safety slip on August 2, 1983, was motivated by Mr. Wells' protected activity, which MSHA claims took place on June 1, 1983, when Mr. Wells filed a previous discrimination complaint, and again on July 29, 1983, when he confronted Mr. Hawkins about the panline starting up without prior warning. In support of its argument that Mr. Hawkins retaliated against Mr. Wells for his prior complaints, MSHA points to the asserted intimidating remarks by Mr. Hawkins to Mr. Wells

when Mr. Wells confronted Mr. Hawkins, the fact that Mr. Hawkins personally did not observe Mr. Wells standing on the panline, and the fact that Mr. Hawkins himself purportedly engaged in the same kind of unsafe activity when he picked some roof timbers off a moving panline without locking it out. MSHA concludes that the respondent has not rebutted its asserted prima facie case by showing that no protected activity occurred, and that the issuance of the safety slip was of a pretextual nature.

With regard to MSHA's first assertion that Mr. Wells did not feel that his safety was jeopardized, if this were in fact the case, then Mr. Wells' asserted "safety complaint" could be construed to be unfounded and unreasonable. In any event, the record in this case belies the assertion by MSHA that Mr. Wells did not believe that his safety was in jeopardy. The record here established that Mr. Wells and Mr. Kanosky claimed that they were "highly disturbed" that the belt had started without a prior audible warning, and I simply do not believe Mr. Wells' claim that he felt that he was safe. His testimony on this issue casts doubts in my mind as to his credibility and consistency. Having viewed Mr. Wells during the course of the hearings in these proceedings, I take particular note of the fact that he has consistently maintained that all of his complaints and confrontations with mine management have been prompted by his asserted fears for his safety.

It seems clear to me from the testimony of Mr. Wells and Mr. Kanosky that they were both disturbed over the fact that the panline had started up without their hearing any advance warning sounded over the mine telephone located at their work station. Mr. Hawkins explained that he heard the headgate operator call a warning over the longwall telephone, and there is no dispute that Mr. Wells and Mr. Kanosky did not hear it. Mr. Hawkins later determined that the telephone at the Wells and Kanosky work station was inoperative, and this fact remains unrebutted.

With regard to MSHA's second point concerning other miners being placed in jeopardy by the sudden starting of the panline chain, I note that MSHA called not one witness to support this conclusion. While Mr. Wells, Mr. Kanosky, and Mr. Foley expressed their safety concerns with regard to someone possibly catching their arms or clothing in a moving panline chain, they apparently were not too concerned about reaching over a moving panline chain without first locking it out.

Mr. Kanosky testified that he and Mr. Wells were working in close proximity to each other at the chain tail, and that Mr. Kanosky was helping Mr. Wells pull in some

shields, putting cribs under the shields, and cleaning up spillage. He admitted that neither he nor Mr. Wells had the chain locked out while performing this work (Tr. 99-100). Mr. Kanosky also admitted that when the chain started up, neither he nor Mr. Wells activated the lock out or stop switch to stop the chain (Tr. 100). When asked whether he too reached over the panline, Mr. Kanosky responded that "I don't know for sure whether I did" (Tr. 104).

In response to certain bench questions, Mr. Kanosky stated that if he had to cross over the chain to do some work at the face, he would lock out the chain. However, if he simply had to reach over the chain to retrieve some material, he would not. When asked whether anyone could get hurt by reaching over a chain without first locking it out, he replied "not the way he (Wells) did it." Based on Mr. Kanosky's concessions that someone could get hurt by reaching over an unsecured chain which suddenly started up without warning (Tr. 111-112), I frankly fail to comprehend the inconsistent distinctions drawn by Mr. Kanosky.

Mr. Kanosky's testimony reflects that both he and Mr. Wells were performing the same work at the panline, that they both failed to lock out the chain, that they both complained to Mr. Hawkins about the chain starting up without warning, and that Mr. Hawkins may have had knowledge of their prior complaints. Yet, on these facts, Mr. Kanosky was not issued a safety slip. It seems to me that had Mr. Hawkins' motivation in issuing the slip to Mr. Wells was to retaliate against him for prior complaints, he would also have issued one to Mr. Kanosky.

Mr. Hawkins' alleged "intimidating" remarks to the effect that "what f.....ing difference does it make," in response to the complaint by Mr. Wells that he did not hear the audible warning that the panline was starting up, must be taken in context. Mr. Hawkins testified that he heard the headgate operator make the audible announcement, and it seems reasonable to me that at that time that he assumed that everyone else along the panline heard it. Further, it also seems reasonable to me that Mr. Hawkins believed that all miners would comply with company policy and lock out the chain before performing work at or near the panline. I believe Mr. Hawkins' testimony concerning his version of this event, and taken in context, I cannot conclude that his asserted remark was intimidating. Given the circumstances and background concerning the confrontational work relationship which obviously existed between Mr. Hawkins and the complainants, I believe that the remarks attributed to Mr. Hawkins, which he denies, would be natural and expected.

A copy of the so-called "safety slip" is a matter of record in this case (Exhibit RX-1). It appears to be a company form captioned VERBAL NOTICE OF, with two options for checking by the person who issues it. The first option is labeled "Improper Action", and the second states "Safety Instruction". The document reflects that it was issued by Mr. Hawkins to Mr. Wells, and it states that Mr. Wells was given a verbal notice of a violation for "working in the face area without having the panline locked out electrically". The "explanation" portion of the form is filled and states the following:

On 7/29 at about 3:30 a.m., Danny Wells was removing crib blocks from around the tail drive when the conveyor was started. The man admitted not having the stop switch off as per company policy.

The testimony concerning the actual issuance of the safety slip in question is most confusing. Mr. Hawkins stated that he intended to issue such a slip on Friday, July 29, 1983, the day that Mr. Wells confronted him about the panline chain starting up. Mr. Hawkins then determined that he had to consult with his superiors before finalizing the issuance of the slip, and that after such consultation, and further contact with the union safety committee, the slip was issued on August 2, 1983. However, Mr. Hawkins stated that the slip was not given to Mr. Wells, but that he showed it to him (Tr. 166, 167). Mr. Hawkins also explained the slip was only a record of the verbal warning given to Mr. Wells (Tr. 166). When called in rebuttal, Mr. Wells confirmed that he received the slip during a meeting with union and management representatives present on August 2, 1983.

When asked whether he had filed a grievance over the issuance of the safety slip, Mr. Wells responded that "I went every step that there was, on this safety slip, and in the negligence of our district, nothing came of it" (Tr. 84). He then explained that his union met with mine management about the matter, and that while he spoke with his safety committee and the union's district office, he heard nothing further about the matter (Tr. 85). MSHA's counsel had no knowledge of the union grievance procedures in such matters, but was of the opinion that any appeal rights inuring to Mr. Wells concerning the issue had not been finalized (Tr. 86). Respondent's counsel disagreed, and he indicated that to his knowledge Mr. Wells has no pending grievance on the question of the issuance of the safety slip (Tr. 178). Mr. Hawkins stated that to his knowledge, the union has dropped the matter, and that he has never been asked for any input into any grievance by Mr. Wells (Tr. 178).

In my view, the fact that Mr. Hawkins did not actually see Mr. Wells standing on the panline when the chain was started is not particularly critical. It seems clear to me that Mr. Hawkins issued the safety slip on the assumption that Mr. Wells was standing on the panline without having activated the lock out switch. Mr. Hawkins' assumption was based on his testimony that Mr. Wells did not deny that he was standing on the panline when Mr. Hawkins asked him if this were in fact the case. In addition, Mr. Hawkins' assumption was based further on his prior knowledge and experience that miners do stand on such panlines when retrieving fallen roof cribs, as well as on his understanding as to the location of the fallen cribs, as well as Mr. Wells' explanation as to where he was located when he was performing the work.

Mr. Wells conceded that he did not lock out the panline before attempting to retrieve the cribs. Having viewed Mr. Hawkins during the course of the hearings, I find him to be a credible witness, and I believe his version surrounding the events in question. I believe that when Mr. Wells confronted Mr. Hawkins, he did so with the intent of provoking him into yet another confrontation over safety. While it may be true that Mr. Wells' complaint could be construed to be a safety complaint, one can conclude from the record in this case that any time Mr. Wells spoke with Mr. Hawkins, it could be construed to be a complaint. I believe Mr. Hawkins' assertion that when he asked Mr. Wells whether he had been standing on the panline when it suddenly started up without warning, Mr. Wells said nothing and did not deny it. Considering the fact that Mr. Wells did not impress me as an individual who would back away from any opportunity to confront Mr. Hawkins on a safety matter, it seems strange to me that Mr. Wells would not respond or deny that he was standing on the panline when he was removing the fallen cribs. Rather than denying it, which I believe any reasonable person would do, Mr. Wells simply exclaimed to Mr. Hawkins that he should "do what you have to do". Mr. Hawkins accommodated him by subsequently issuing him a safety slip, and Mr. Wells now belatedly cries "foul".

The critical question in this case is whether or not the record supports the respondent's contention that the safety slip issued to Mr. Wells was justified. MSHA's position is that it was not. Further, MSHA is of the view that the safety slip was issued to Mr. Wells in retaliation of prior safety and discrimination complaints. After careful review and scrutiny of the record here, I cannot conclude that the safety slip, or verbal warning, issued by Mr. Hawkins to Mr. Wells, was discriminatory or retaliatory. I conclude that Mr. Wells violated company policy by failing

to lock out the panline before performing work around the panline chain. In my view, the question of whether Mr. Wells was actually standing on the panline, or performing work in close proximity to the panline, is not critical. What is critical is the state of mind of Mr. Hawkins at the time he issued the verbal warning.

Having carefully considered MSHA's arguments in support of its theory of this case, I conclude that it is based on hindsight and inferences drawn from unsupported conclusions as to what may have motivated Mr. Hawkins in issuing the safety slip. Considering the on-going and continuous confrontations between the complainants in these proceedings and Mr. Hawkins with regard to the question of double cutting, it seems obvious to me that any decisions made by Mr. Hawkins were met with immediate claims that he was discriminating against the complainants.

Based on a preponderance of all of the credible testimony and evidence adduced in this case, I conclude and find that Mr. Hawkins had a reasonable belief that Mr. Wells exposed himself to possible injury and harm when he proceeded to remove the roof cribs in question without locking out the panline chain. I further conclude and find that while it is clear that Mr. Wells performed work on the panline without locking out the chain, Mr. Hawkins also believed that Mr. Wells was also standing on the panline when he performed the work, and that when Mr. Wells did not deny it, Mr. Hawkins was justified in issuing Mr. Wells a verbal warning. I further find and conclude that MSHA has failed to establish a prima facie case of discrimination. Accordingly, the complaint in Docket No. WEVA 84-66-D, IS DISMISSED.

Findings and Conclusions

Docket No. WEVA 84-33-D

This case concerns a complaint by Mr. Ribel that he was discriminated against when the respondent suspended him, with intent to discharge, for allegedly "sabotaging" mine property, namely, the No. 32 telephone located on the longwall section. MSHA argues that Mr. Ribel was "set up" by mine management, that he did not sabotage the phone, and that his suspension and subsequent discharge came about as a result of his prior discrimination and safety complaints. Conversely, the respondent argues that Mr. Ribel's discharge was bona fide

and totally unrelated to his prior complaints, and that after arbitration under the applicable management-labor agreement, his discharge was sustained by an arbitrator.

In the context of a discrimination proceeding adjudicated under section 105(c) of the Act, an arbitrator's finding that disciplinary action under the applicable 1981 Wage Agreement was warranted, is not binding on me in this proceeding. Once the complainant establishes a prima facie case of discrimination, the burden is then on the respondent to affirmatively defend that the alleged retaliatory action (suspension with intent to discharge), was also motivated by unprotected activity (intentionally cutting the phone wire), and that the action taken against the complainant would have been taken for the unprotected activity alone. The crucial question in this case is whether or not the respondent has carried its burden of proving by a preponderance of all of the credible testimony and evidence of record that Mr. Ribel did in fact cut the wire in question, and that by doing so he engaged in unprotected activity which warranted the action taken against him.

The instant discrimination case was heard de novo, and I am bound to render my decision in accordance with the facts and evidence adduced in the discrimination hearings before me. As correctly suggested by MSHA in its brief, the question of good cause for the discharge of a miner under the wage agreement may not be determined upon the same criteria which are in issue under the Mine Act.

In their post-hearing briefs, the parties recognize and concede that I may consider the weight to be given the arbitrator's decision in connection with Mr. Ribel's grievance under the wage agreement. That grievance concerned the respondent's suspension of Mr. Ribel, with intent to discharge him, for purportedly destroying or "sabotaging" the No. 32 telephone by allegedly cutting a wire a hawk-bill knife. The sole factual question before the arbitrator was whether or not the respondent established that Mr. Ribel had in fact cut the telephone wire in question, and if so, whether this act justified his discharge for cause. The arbitrator answered both questions in the affirmative and sustained the discharge.

Respondent states that with the exception of Mr. Norwich, the witnesses called to testify on behalf of Mr. Ribel at the arbitration hearing were the identical witnesses called to testify on Mr. Ribel's behalf in these proceedings (Ribel, Kanosky, Wells, Reeseman, Toothman, Hayes). Likewise, respondent states that with the exception of Mr. Luketic, who handled the arbitration case, the witnesses called on behalf of the respondent in these proceedings were also witnesses at the arbitration hearing (Hawkins, Toth, Peduti).

Respondent argues that since MSHA has presented no new pertinent evidence or testimony in these proceedings that was not before the arbitrator, the fact that Mr. Ribel lost his arbitration case is no basis upon which to urge me not to consider the arbitrator's findings. Respondent suggests that because of the arbitrator's "special expertise" regarding mining practices and the common law of the shop, the arbitrator's decision would be helpful to me in this matter, and that I should accord it great weight.

MSHA argues that the standards under which the arbitrator decided Mr. Ribel's grievance failed to take into account the applicable discrimination law under the Mine Act, and that issues such as the prior discrimination against Mr. Ribel for engaging in protected activity under the Mine Act, and the fact that he had filed complaints, were not addressed by the arbitrator. MSHA argues that facts developed in the instant proceeding (such as Mr. Toth's access to the damaged phone), were not addressed by the arbitrator, and that the arbitrator's reconstruction of the facts is deplete of a substantial amount of the evidence presented during the hearings before me.

MSHA concludes that the record in these proceedings does not contain sufficient evidence to affirmatively show that Mr. Ribel engaged in the unprotected activity (cutting the phone wire), which the respondent has asserted as its defense in this case. Additionally, MSHA maintains that the "chilling" atmosphere which mine management created on the midnight shift of August 5, 1983, refutes the respondent's affirmative defense.

I have reviewed the arbitration decision issued by the arbitrator, Lewis R. Amis on August 22, 1983 (exhibit RX-5). That decision reflects that the respondent took the position that its evidence conclusively proved that Mr. Ribel cut the phone wire in question, and that since this act constituted a willful destruction of company property, his discharge was warranted. Conversely, the Union argued that since no one actually witnessed Mr. Ribel actually cut the wire, there was sufficient doubt as to his guilt, and that this precluded any finding that he was responsible for cutting the wire.

In his decision rendered on August 22, 1983, the arbitrator affirmed a prior decision which he rendered on August 13, 1983, and which he served on the parties by a mailgram. In that decision, the arbitrator ruled as follows:

The evidence, though circumstantial, is clear and convincing. On C shift August 5, 1983 #32 telephone on Section 7 right longwall was sabotaged. The only person with the opportunity and the means to perform the act was the grievant. Sabotage is a dischargeable offense, and in this case the penalty is warranted. Hence, I must sustain the grievant's discharge. The grievance is denied.

In support of his conclusion that Mr. Ribel cut the wire in question, the arbitrator made the following findings and conclusions in his August 22, 1983, written decision:

1. The facts in this case lead to the inescapable conclusion that the grievant is guilty as charged. Very simply put, the wire in phone 32 was cut in a way that suggests that a knife was used; the grievant had a knife; and he was the only person on the section with an opportunity to cut the wire.
2. While Ribel and Toothman were checking the phones on the section, no one else was there, the rest of the crew and Toth being at the dinner hole. Then, when Toth arrived on the section, he was the only person there in addition to the other two. At all relevant times he was on the section, Toth was either in the presence of Toothman, Toothman and Ribel, or of the shearmen Reesman and McCormick as they approached the shear after leaving the meeting. On the other hand, on two occasions Ribel was alone at or near phone 32: first when he made the initial check with Toothman -- and reported that the phone was paging properly -- and next when Toth sent him from the tail of the

section back to the head to check the phones again. Either time he might have cut the wire in question. In any event, neither Toth nor Toothman had any such opportunity, and they are the only other possible candidates.

3. The time frame in this case is very narrow. According to the B shift foreman, phone 32 was operating at the end of his shift. According to Toothman and to Ribel the phone was still operating during their initial check. It was only from the time that Ribel first checked phone 32 until the time Toth discovered that it was not paging that anyone could have tampered with it. The only one with the opportunity was Ribel.

4. The Union also argues that because the evidence in this case is circumstantial, it is somehow lacking in validity. Circumstantial evidence, however, is sometimes the clearest and best guide to a discovery of the true facts of the matter at hand. In this case, a rational reconstruction of events leading back from the discovery of the cut wire in phone 32 and again up to that point leaves no reasonable doubt that the grievant cut the wire. Thus, the circumstantial evidence for his guilt can be said to be clear and convincing. To find otherwise would be to admit a belief that the wire severed itself, and that I am not prepared to do.

I take particular note of the fact that nowhere in the arbitrator's decision is the question of any prior safety complaints by Mr. Ribel mentioned. The decision is devoid of any consideration of the ongoing disputes which had taken place between Mr. Ribel and Mr. Hawkins over the issue of double cutting, and the decision is silent with respect to the prior discrimination complaints filed by Mr. Ribel. While it may be true that these prior complaints focused on a continuing confrontation between Mr. Ribel and Mr. Hawkins, the record supports a conclusion that Mr. Toth was not totally oblivious to these complaints. As a matter of fact, as the respondent's overall longwall coordinator responsible for production, including supervisory authority over Mr. Hawkins, Mr. Toth had a direct interest in these complaints since they obviously impacted on production, and ultimately resulted in the midnight shift being permitted to single cut, with a resulting diminishment of production.

Notwithstanding any denials to the contrary, I believe that Mr. Toth knew that Mr. Ribel was one of the individuals who were causing "problems" and filing complaints over safety

questions. Given this background, Mr. Toth's motivations and state of mind with respect to the incident which resulted in Mr. Ribel's discharge is a critical question not addressed by the arbitrator. While it may be argued that the safety issues were not pertinent to the arbitrator's decision concerning "good cause" for Mr. Ribel's discharge, they are critical and relevant to any determination made under the applicable discrimination criteria pursuant to section 105(c) of the Act.

Given the apparent jurisdiction of the arbitrator to consider only the "good cause" criteria under the wage agreement for determining whether mine management had reasonable grounds for discharging Mr. Ribel, the conclusion is inescapable that the safety complaints which preceded the discharge, and which obviously were "lurking in the background," were not addressed or considered by the arbitrator. His decision was based on a circumstantial case that Mr. Ribel cut the wires, with absolutely no consideration given to the alleged retaliatory aspects of the case, and no consideration was given to the past discrimination complaints made by Mr. Ribel which arguably may have supported his subsequent assertions that he was singled out and "set up" for the discharge. While it may be true that given all of these facts, the arbitrator may have reached the same conclusion, it is just as likely as not that the result may have been different. In these circumstances, I have given the arbitrator's findings and decision little weight, and will look to the evidence and testimony presented during the hearings before me in order to determine whether or not the respondent has established with any degree of reasonable certainty that Mr. Ribel did in fact sabotage the telephone in question.

The arbitrator found that at all times while on the section, Mr. Toth was in the presence of Toothman, Toothman and Ribel, or of the Shearmen Reeseman and McCormick. Mr. Toothman testified that at one point in time, after speaking with Mr. Ribel over the #89 telephone, Mr. Toth instructed him to proceed to the tail end of the longwall to check out the other phones and that Mr. Toth went in the opposite direction towards the headgate for a distance of some 20 shields, and that he was distracted and lost sight of him. Since Mr. Toothman and Mr. Toth were at the #89 telephone station when they proceeded in opposite directions, Mr. Toth would have been between the #32 and #70 telephones when Mr. Toothman lost sight of him. Thus, contrary to the arbitrator's findings, based on Mr. Toothman's testimony before me, I cannot conclude that Mr. Toth was at all times in the presence of one or more of the other individuals. As a matter of fact, Mr. Toothman testified that shortly after losing sight of Mr. Toth, and while on his way back towards the headgate, he was summoned to the #32 phone by Mr. Toth, and at that point in time Mr. Toth showed Mr. Toothman the wire which had been cut.

Although Mr. Toothman testified that he never observed Mr. Toth tamper with the #32 phone, and that Mr. Toth may have been 100 feet ahead of him while they both proceeded to the headgate at different intervals, Mr. Toothman also confirmed that it took him only a minute to remove the telephone cover once he arrived at the #32 phone station. Given the fact that Mr. Toothman lost sight of Mr. Toth after he passed the #70 telephone station, and given the fact that it was Mr. Toth who called Mr. Toothman to the #32 to open the phone cover, I conclude that Mr. Toth had ready access to the #32 telephone, unobserved by Mr. Toothman.

Insofar as Mr. Reeseman is concerned, he testified that when he first observed Mr. Toth on the longwall section, he (Reeseman), was standing at the #11 shield and that he observed Mr. Toth walking towards him, and that Mr. Toth was between the #18 and #32 telephones. At that point in time, Mr. Toth had already passed by the #32 telephone walking towards Mr. Reeseman. Mr. Reeseman testified that Mr. Toth then went to the #32 telephone, picked it up, and asked Reeseman whether it was paging. When Reeseman replied that it was not paging, Mr. Toth requested that a mechanic be dispatched to the phone to check it out. Mr. Reeseman then dispatched a trainee mechanic (Fowley) to the #32 phone station, and Reeseman went about his business and did not observe the #32 telephone being opened. Thus, contrary to the arbitrator's finding, on the basis of the record before me, it seems clear that Mr. Toth was not at all times within the presence of Mr. Reeseman.

Shearman McCormick and trainee mechanic Fowley did not testify in the hearings in these proceedings. Although Mr. Hayes testified, he apparently had no information concerning the circumstances surrounding the #32 telephone incident.

The arbitrator also found that while Ribel and Toothman were checking the phones on the section, no one else was there, and that the rest of the crew and Toth were in the dinner hole. This finding is contrary to the testimony before me. That testimony supports a conclusion that after the meeting in the dinner hole, Mr. Toth and Mr. Reeseman were on the section, and Mr. Hawkins confirmed that he too was there while Ribel and Toothman were checking the telephones.

Given the aforementioned findings and conclusions, I cannot accept the arbitrator's "inescapable conclusion" that the "clear and convincing circumstantial evidence" supports a conclusion that Mr. Ribel cut the telephone wire in question. While I conclude and find that the respondent has established through credible expert testimony that the wire

was cut, I cannot conclude that the respondent has established that Mr. Ribel is the guilty party. To the contrary, I conclude and find that at least one or more individuals (Toth, Hawkins, Reeseman) were on the section at the time of the incident in question, and that they had access to the telephone and had as much opportunity to cut the phone wire as did Mr. Ribel. In short, I reject the notion that strong circumstantial evidence points only to Mr. Ribel as the culprit, and I conclude that there is reasonable doubt as to his guilt.

Since I have concluded that the respondent has failed to establish that Mr. Ribel cut the telephone wire in question, the respondent's defense that Mr. Ribel was engaged in unprotected activity must necessarily fail. Further, since I have previously concluded that there was animus on the part of Mr. Hawkins and Mr. Toth towards Mr. Ribel because of his prior safety complaints, it is just as likely as not that Mr. Ribel's assertions that he "was set-up" has a ring of truth about it. Although it may be true that a strong circumstantial case may support a discharge of a miner for sabotaging company property, on the evidence and testimony before me I cannot conclude that the respondent has made out such a case. Under the circumstances, I conclude and find that respondent has not established any reason for Mr. Ribel's discharge, and that it has not rebutted Mr. Ribel's prima facie case.

In view of the foregoing findings and conclusions, I conclude that the respondent violated section 105(c)(1) when it discharged Mr. Ribel for purportedly damaging a longwall telephone. Accordingly, MSHA's complaint on behalf of Mr. Ribel IS SUSTAINED.

In compliance with a previously issued Order of Temporary Reinstatement, January 4, 1984, the respondent, with Mr. Ribel's concurrence, agreed to continue him on the payroll, with all employee benefits, without actually returning him to work, pending my adjudication of his discrimination complaint.

Although MSHA's initial complaints filed on behalf of the complainants in these proceedings requested an order assessing civil penalties against the respondent for its asserted violations of section 105(c) of the Act, I take note of the fact that the hearings in Mr. Ribel's case took place prior to the promulgation of the Commission's amended Rule 29 CFR 2700.42, which requires MSHA to follow certain procedures in seeking civil penalty assessments in cases of this kind, 49 Fed. Reg. 5751, February 15, 1984. I also take note of the fact that MSHA did not reassert its request for an assessment of any civil penalty in this case, and did not discuss the issue in its post-hearing submissions.

In view of the foregoing, I have no basis for assessing a civil penalty against the respondent at this time. However, MSHA is free to initiate a separate proceeding against the respondent in accordance with the applicable Commission rules.

ORDER

1. Respondent IS ORDERED to reinstate Mr. Ribel to his former or equivalent position at the mine in question, with all of his seniority rights and other benefits intact, at the current prevailing wages and fringe benefits.

2. Respondent IS ORDERED to pay Mr. Ribel all back pay, including any fringe benefits, during the time he was off the payroll, from the date of his discharge on August 5, 1983, to the date he was actually "economically reinstated" in compliance with the temporary reinstatement order of January 4, 1984, with interest computed in accordance with the Commission's decision and formula in Bailey v. Arkansas-Carbona Co. & Weller, 3 MSHC 1152 (Dec. 1983).

3. Respondent IS ORDERED to expunge any references to Mr. Ribel's discharge from its applicable personnel records concerning Mr. Ribel.

Full compliance with this Order is to be made within thirty (30) days of the date of this decision.


George A. Koutras
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

SEP 24 1984

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEVA 84-245
Petitioner : A.C. No. 46-05801-03524
v. :
W-P COAL COMPANY, : No. 21 Mine
Respondent :

DECISION APPROVING SETTLEMENT

Before: Judge Broderick

On September 10, 1984, the Secretary of Labor filed a motion for approval of a settlement reached by the parties in this case. The violations were originally assessed at \$8,000 and the parties propose to settle for \$7,000.

The motion states that although the violation was serious (it was allegedly the cause of an accident resulting in a fatal injury to one miner and serious injuries to four others), further investigation including pretrial discovery has persuaded the parties that the operator's negligence was not as great as originally believed. I accept the representations in the motion, and conclude that the settlement should be approved.

Accordingly, the settlement is APPROVED and Respondent is ORDERED TO PAY the sum of \$7,000 within 30 days of the date of this decision.


James A. Broderick
Administrative Law Judge

Distribution:

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SEP 28 1984

SECRETARY OF LABOR, : DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. SE 84-56-D
ON BEHALF OF :
JOHN CAMPBELL, : MSHA Case No. BARB CD-84-17
Complainant :
: No. 3-2 Mine
v. :
: :
U.S. COAL, INC., :
Respondent :

DECISION APPROVING SETTLEMENT

Appearances: Frederick W. Moncrief and Heidi Weintraub, Esqs.,
Office of the Solicitor, U.S. Department of Labor,
Arlington, Virginia, for Complainant;
R. Louis Crossley, Jr., Baker, Worthington,
Crossley, Stansberry & Wolf, Knoxville, Tennessee,
for Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a discrimination complaint filed by the complainant against the respondent pursuant to § 105(c) of the Federal Mine Safety and Health Act of 1977. Following a hearing held on June 5, 1984, with respect to MSHA's application for temporary reinstatement, I issued an order on July 9, 1984, ordering the complainant's temporary reinstatement pending adjudication of the merits of his complaint.

A hearing on the merits of the complaint was convened on August 8, 1984, and the parties appeared pursuant to notice. However, prior to the taking of any testimony or evidence on the merits, the parties advised me that they had reached a proposed settlement of the dispute and they were permitted to make a record concerning the terms of the settlement. Subsequently, the parties submitted their proposed settlement disposition of the matter, the terms of which are as follows:

1. Mr. Campbell agrees to direct the Secretary of Labor to execute any documents necessary in order to have dismissed the proceeding pending before the Federal Mine Safety and Health Review Commission, including the Secretary's request for a civil penalty, and Mr. Campbell agrees not to file any other complaints against the Company, or any of its employees concerning any event which took place prior to the date on which this Agreement is signed by Mr. Campbell.
2. Mr. Campbell also agrees to withdraw and not reassert the allegations which he made to the Equal Employment Opportunity Commission in which he alleged that the Company terminated his employment in violation of the Age Discrimination and Employment Act of 1967 and Title VII of the Civil Rights Act of 1964.
3. By signing this Agreement and a General Release which is included as part of this Agreement, Mr. Campbell acknowledges and agrees that he is giving up any right which he may have under federal law or the laws of any state to file charges, complaints, or lawsuits or to assert any claim against the Company or any of its employees with any court or administrative agency concerning any events which took place prior to the signing of this Agreement and the General Release by Mr. Campbell.
4. Mr. Campbell acknowledges and agrees that by signing this Agreement and the General Release that he is giving up any right which he may have had to be reinstated to employment with the Company.
5. Upon Mr. Campbell's signing of this Settlement Agreement and the General Release, the Company will issue its check to Mr. Campbell in an amount equal to Seven Thousand Dollars (\$7,000.00) less appropriate federal withholding taxes.
6. This Agreement is in full and final settlement of any and all claims which Mr. Campbell may have against the Company, its directors, its officers, agents, representatives and employees and against any parent, subsidiary or affiliate of the Company, and the directors, agents, employees, representatives and/or principals thereof.

7. Mr. Campbell by signing this Agreement and the General Release acknowledges that he has been afforded an opportunity to review this Agreement and the General Release with attorneys of his choice, that he has read and understands this Agreement and the General Release, and that he has signed this Agreement and General Release freely and voluntarily.

8. Nothing contained in this Agreement, nor the fact that the Company has signed this Agreement shall be considered an admission of any wrongdoing by the Company.

Discussion

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

ORDER

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


George A. Koutras
Administrative Law Judge

Distribution:

Frederick W. Moncrief and Heidi Weintraub, Esqs., U.S.
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SEP 26 1984

HERMAN WHALING,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEVA 83-238-D
v.	:	
	:	Keystone No. 1 Mine
EASTERN ASSOCIATED COAL	:	
CORP.,	:	
Respondent	:	

DECISION

Appearances: William B. Talty, Esq., Tazewell, Virginia
for the Complainant;
R. Henry Moore, Esq., Rose, Schmidt, Dixon
& Hasley, Pittsburgh, Pennsylvania and
Sally S. Rock, Esq., Pittsburgh, Pennsylvania
for Respondent.

Before: Judge Fauver

In his complaint, filed with the Commission on August 11, 1983, Complainant alleged that he was discriminated against by Respondent due to the fact that he was a "203-B letter carrier," i.e., that he had been diagnosed as having coal workers' pneumoconiosis, in violation of Section 105(c) (1) of the Federal Mine Safety and Health Act of 1977 ("1977 Act"), 30 U.S.C. § 815(c)(1). Respondent has moved to dismiss the complaint on the basis that the Commission and the Administrative Law Judge have no jurisdiction over this matter.

A hearing was held on the motion to dismiss on September 11, 1984. At that time an oral decision was rendered which may be summarized as set forth herein.

The Motion to Dismiss is grounded on the proposition that discrimination complaints of a miner, based on allegations that the miner suffers from pneumoconiosis, are required, under the statutes and case law of the Commission, to be brought under section 428 of the Black Lung Benefits Act, 30 U.S.C. § 938, rather than under the general anti-discrimination provisions of Section 105(c) of the 1977 Act.

The Commission ruled in Matala v. Consolidation Coal Company, 1 FMSHRC 1 (1979), that the discrimination complaint of a miner who suffers from pneumoconiosis should be resolved under the specific statutory provisions set forth in section 428 of the Black Lung Benefits Act, rather than the more general provisions of section 110(b) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 820(b).

While the anti-discrimination provisions of section 105(c) of the 1977 Act replace and enhance the provisions of section 110(b) of the 1969 Act, giving broader coverage, the rationale for having discrimination complaints, based on allegations that a miner suffers from pneumoconiosis, resolved under section 428, has continuing validity.

In a recent decision by a judge of this Commission, Goff v. Youghiogheny and Ohio Coal Company, Docket LAKE 84-86-D (August 24, 1984), Judge Melick followed the holding in Matala in dismissing a section 105(c) discrimination complaint filed before the Commission.

An examination of Part 90 of 30 C.F.R., the statutory scheme of the 1969 Act, the 1977 amendments thereto and the Black Lung Benefits Amendment, makes it clear that the Complaint, based on Complainant's status as a section 203(b) letter carrier, is properly a matter of jurisdiction for the Department of Labor, and not the Commission. For this reason, the Complaint should be dismissed.

In view of the 90-day limitation period set out in section 428 and concern for the equities with respect to the operation of that statutory limitation period, inquiry was made of Respondent's counsel on that specific point. Respondent has agreed and acknowledged that the 90-day statutory period for filing complaints set out in section 428 for discrimination matters brought in the Department of Labor is tolled from the time that Mr. Whaling filed his Complaint with MSHA, June 15, 1983, until the date of this Decision and Order.

ORDER

WHEREFORE IT IS ORDERED that the Motion to Dismiss is GRANTED and this proceeding is DISMISSED.

William Fauver
William Fauver
Administrative Law Judge

Distribution:

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SEP 27 1984

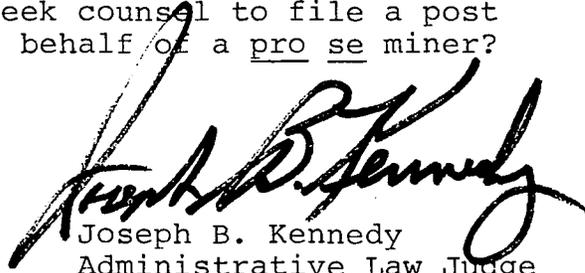
JEFFREY L. FANKHAUSER, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. LAKE 84-87-D
: :
GEX HARDY, INC., : MSHA Case No. VINC CD 84-06
Respondent :
: Holmes Strip Mine

ORDER OF REFERENCE

As the Commission is undoubtedly aware, a large percentage of the discrimination cases presently being filed are by miners acting pro se without legal representation of any kind.

Inasmuch as the Commission has never addressed the role of the trial judge in a discrimination proceeding where the miner is without legal representation, it is ORDERED that the captioned matter be, and hereby is, REFERRED to the Commission for its consideration and issuance of an order delienating the proper role of the trial judge in trying a pro se discrimination case. For example:

1. Is it the responsibility of the trial judge to require such discovery on behalf of the pro se miner as he deems necessary to a full and true disclosure of the facts?
2. Is it the responsibility of the trial judge to conduct the direct and cross-examination of witnesses where the miner is unable or incapable of doing so?
3. After trial, is it the responsibility of the trial judge to seek counsel to file a post hearing brief on behalf of a pro se miner?


Joseph B. Kennedy
Administrative Law Judge

Distribution:

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SEP 28 1984

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), :
Petitioner : Docket Nos. KENT 82-109
 : KENT 82-121
 : KENT 82-147
v. : A.C. Nos. 15-11652-03019
 : 15-11652-03020
 : 15-11652-03501
STERLING ENERGY, INC., :
Respondent : Ely Hollow Deep Mine

DECISION

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor,
U.S. Department of Labor, for Petitioner;
Respondent failed to appear at the hearing.

Before: Judge Fauver

On February 10, 1984, a Decision Approving Settlement in Part and Ordering More Information was entered. In response, the Secretary of Labor submitted further information as to the parts of the proposed settlement that were not approved.

After considering the additional information, I determined that the cases should go to hearing. Pursuant to notice of hearing, the cases were called for hearing at Knoxville, Tennessee on July 24, 1984. Counsel for the Secretary appeared, with his witnesses and documentary evidence. Respondent did not appear at the hearing. Accordingly, a default hearing was held. After considering the evidence and the statutory criteria for assessment of civil penalties, I entered a decision from the bench, assessing Respondent the following civil penalties:

<u>Citation</u>	<u>Civil Penalty</u>
988430	\$56
988431	56
988432	500
988433	200
988434	500
988435	32
1205543	32
1205544	160
1205545	98
1205546	56

1255547	240
1205548	48
1205549	180
1205551	210
1205552	32
1205553	32
1205554	32
1205559	240
988585	60
9934970	36
1205550	200
9936078	50
1205571	200
1205572	200
1205573	50
1205574	85
1206199	50
1206200	50
1209241	300
1209242	200
1209243	50
2005001	250
2005002	75
2005003	75
2005005	50

50
\$4685.00

This Decision incorporates the findings in the bench decision for each citation and the findings in the Decision entered on February 10, 1984.

ORDER

WHEREFORE IT IS ORDERED that Respondent shall pay the above civil penalties, in the total amount of \$4685.00, within 30 days from this date.

William Fauver
William Fauver
Administrative Law Judge

Distribution:

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Darryl Stewart, Esq., U.S. Department of Labor, Office of
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SEP 28 1984

LAYNE HAMILTON, : DISCRIMINATION PROCEEDING
Complainant :
 : Docket No. VA 83-46-D
v. :
 : MSHA Case No. NORT CD-83-7
STONE MOUNTAIN TRUCKING :
COMPANY, INC., :
Respondent :

DEFAULT DECISION

Before: Judge Steffey

A prehearing order was issued on July 2, 1984, in the above-entitled proceeding. That order thoroughly explained to complainant the procedures which are used to handle discrimination cases which are filed with the Commission after a complainant has received a letter from the Mine Safety and Health Administration advising him that its investigation of the complaint filed with that agency has resulted in a finding that no violation of section 105(c)(1) of the Federal Mine Safety and Health Act of 1977 has occurred. The prehearing order provided that complainant would be given until August 1, 1984, to advise me as to whether he had obtained an attorney to represent him in this proceeding. The order explained that complainant is not required to obtain an attorney to represent him, but that if he decided to do so, that decision would have to be made by August 1, 1984, so that the attorney would have time to prepare for a hearing to be held in October or November 1984.

Additionally, counsel for respondent served complainant on June 5, 1984, with some interrogatories which complainant has failed to answer. The prehearing order of July 2 explained discovery procedures to complainant and stated that he would be required to answer the questions asked by respondent's counsel by August 15, 1984, regardless of whether he had decided to obtain an attorney to represent him in this proceeding. Counsel for respondent filed on July 2, 1984, a motion requesting that I issue a show-cause order to complainant requiring him to show cause, pursuant to 29 C.F.R. § 2700.63(a), why his complaint should not be dismissed for failure to reply to respondent's interrogatories. I explained on page 6 of the prehearing order that a show-cause order would be issued if complainant failed to answer the interrogatories and that the complaint would be dismissed if complainant failed to provide a satisfactory reply to the show-cause order.

The dates of August 1 and August 15, 1984, passed without my receiving a reply from complainant as to whether he had obtained an attorney to represent him and without his submitting answers to respondent's interrogatories. Therefore, on September 5, 1984, a show-cause order was issued requiring complainant to explain in writing by September 24, 1984, why his complaint should not be dismissed for failure to provide the information requested in the prehearing order issued July 2, 1984. The return receipt in the official file shows that complainant received the show-cause order on September 11, 1984, but I have received no reply to the show-cause order. Consequently, pursuant to section 2700.63(a) of the Commission's rules of procedure, I find respondent to be in default and the complaint in this proceeding will be dismissed as hereinafter ordered.

Respondent's counsel filed on September 6, 1984, a motion requesting that the complaint be dismissed for failure of complainant to answer respondent's interrogatories by August 15, 1984, as required by the prehearing order of July 2, 1984. Inasmuch as the motion to dismiss is based upon the default provisions of section 2700.63(a), my finding of complainant in default and dismissing the complaint under section 2700.63(a) may be interpreted as granting respondent's motion to dismiss, as hereinafter provided.

WHEREFORE, it is ordered:

(A) The complaint filed in Docket No. VA 83-46-D is dismissed for the reason that complainant has been found to be in default for failure to reply to the show-cause order issued September 5, 1984, in this proceeding.

(B) Respondent's motion to dismiss filed September 6, 1984, is granted and all further proceedings in Docket No. VA 83-46-D are terminated.

Richard C. Steffey
Richard C. Steffey
Administrative Law Judge

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