

SEPTEMBER

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SEPTEMBER

The following cases were granted for review during the month of September:

Secretary of Labor v. Quinland Coals, Inc., Docket No. WEVA 85-169.  
(Judge Fauver, August 6, 1986)

Secretary of Labor v. Peabody Coal Company, Docket No. LAKE 83-73.  
(Judge Fauver, August 12, 1986 Settlement)

Secretary of Labor v. M. M. Sundt Construction Co., Docket No. CENT 86-6-M.  
(Judge Morris, July 11, 1986 Default)

Emery Mining Company v. Secretary of Labor, Docket Nos. WEST 82-126-R,  
WEST 86-131-R, WEST 86-140-R, WEST 86-141-R. (Judge Morris, August 7, 1986)

The following case was denied review during the month of September:

Secretary of Labor v. Brown Brothers Sand Co., Docket No. SE 86-12-M.  
(Judge Kennedy, August 21, 1986)



COMMISSION DECISIONS



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

September 15, 1986

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

v.

PEABODY COAL COMPANY

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Docket No. LAKE 83-73

BEFORE: Chairman Ford; Backley, Doyle, Lastowka and Nelson,  
Commissioners

ORDER

BY THE COMMISSION:

This matter comes before us as a result of Peabody Coal Company's response to the Secretary of Labor's Motion for Approval of Settlement. The Response was submitted to the presiding Commission Administrative Law Judge William Fauver after he issued his Decision Approving Settlement. For the following reasons, we vacate the order approving settlement and remand.

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982) (the "Mine Act"), the Secretary alleged two violations by Peabody of 30 C.F.R. § 75.200, the mandatory roof control standard for underground coal mines. Following the filing of the Secretary's penalty proposal and Peabody's contest of the proposal, the matter was assigned to Judge Fauver. Subsequently, the Secretary moved for and received numerous continuances on the grounds that there was pending against Peabody a criminal action brought under section 110(d) of the Mine Act, 30 U.S.C. § 820(d), and based upon incidents involving the alleged violations in this civil penalty proceeding.

On June 12, 1986, the Secretary advised Judge Fauver that the criminal case had been resolved by Peabody entering a guilty plea to two violations of section 110(d). The Secretary stated that the parties had agreed to settle the subject civil penalty proceeding.

On August 11, 1986, counsel for the Secretary filed with the judge his Motion For Approval of Settlement. Although counsel for Peabody did not formally join in or sign the motion, the motion stated that counsel for Peabody "authorized... the attorney for ... [the Secretary] to file [the motion]." The motion recited the facts pertaining to Peabody's guilty plea in the criminal proceeding. The motion also asserted facts relating to the alleged violations in the civil penalty proceeding and to the statutory civil penalty criteria. Finally, the motion specified civil penalties deemed appropriate for the violations. Under the Commission's procedural rules Peabody's response, if any, to the Secretary's motion was due by August 23, 1986. 29 C.F.R. § 2700.8 and 2700.10(b).

On August 12, 1986, the judge approved the settlement and dismissed the civil penalty proceeding. On August 20, 1986, counsel for Peabody submitted to the judge a response to the Secretary's motion. In the response counsel for Peabody took issue with portions of the Secretary's motion. Counsel asserted that the Secretary's motion referenced facts that had been stricken from the record of the criminal proceedings and counsel objected to language in the Secretary's motion bearing upon the gravity of the alleged violations and upon Peabody's negligence. Counsel stated, however, that aside from these objections, Peabody agreed with and adopted the Secretary's motion for approval of settlement. Counsel requested that the judge "approve the settlement... and make this Response and the objections herein a part of the record in this case."

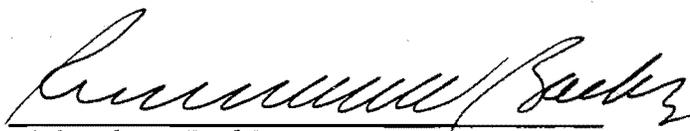
Although Peabody's response was directed to Judge Fauver his jurisdiction in the case had terminated upon issuance of his decision approving the settlement. 29 C.F.R. § 2700.65(c). Under the Mine Act and the Commission's procedural rules, once a judge's decision has issued, relief from the decision may be sought by filing with the Commission a petition for discretionary review within 30 days of the decision. 30 U.S.C. § 823(d)(2)(A)(i); 29 C.F.R. § 2700.70(a). Although Peabody's response to the Secretary's motion is not in the form of a petition for discretionary review, we will treat the response as an implied request for relief and remand the matter to the judge.

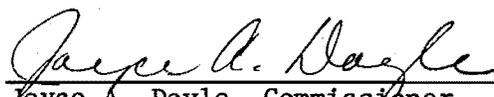
"Settlement of contested issues is an integral part of dispute resolution under the Mine Act." Pontiki Coal Corp., 8 FMSHRC 668, 674 (May 1986). Section 110(k) of the Mine Act provides that no contested proposed penalty "shall be compromised, mitigated, or settled except with the approval of the Commission." 30 U.S.C. § 820 (k); see also 29 C.F.R. § 2700.30(a). Approval of a settlement by a Commission administrative law judge must be based upon "principled reasons," Knox County Stone Co. Inc., 3 FMSHRC 2478, 2480 (November 1981), including consideration of the reasons for the proposed settlement and a weighing of the statutory penalty criteria. Davis Coal Co., 2 FMSHRC 619 (March 1980). Equally important, the record must reflect and the Commission must be assured that a motion for settlement, in fact, represents a genuine agreement between the parties, a true meeting of the minds as to its provisions.

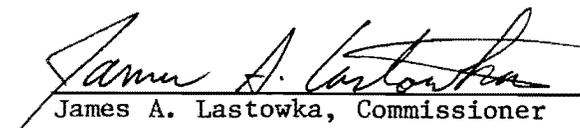
Here, Peabody's response raises questions regarding the parties' agreement as to the statutory penalty criteria of gravity and negligence. Despite Peabody's stated acquiescence in the ultimate approval of the Secretary's settlement motion, it is clear that there is some disagreement between the parties regarding the precise terms upon which the settlement is acceptable to each. Because Peabody was not a signatory to the "agreement" it now disputes in part, further proceedings are necessary. The questions raised by Peabody's response must be considered in the first instance by the judge.

Accordingly, we accept Peabody's response for filing. The judge's decision approving settlement is vacated. We remand this matter to be judged for consideration of the impact of Peabody's response upon the settlement process.

  
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Ford B. Ford, Chairman

  
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Richard V. Backley, Commissioner

  
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Joyce A. Doyle, Commissioner

  
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James A. Lastowka, Commissioner

  
\_\_\_\_\_  
L. Clair Nelson, Commissioner

Distribution

Michael A. Kafoury, Esq.  
Peabody Coal Company  
P.O. Box 373  
St. Louis, Missouri 63166

J. Philip Smith, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
4015 Wilson Blvd.  
Arlington, VA 22203

Administrative Law Judge William Fauver  
Federal Mine Safety & Health Review Commission  
5203 Leesburg Pike, Suite 1000  
Falls Church, Virginia 22041

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

September 15, 1986

SECRETARY OF LABOR, :  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA) :  
v. : Docket No. CENT 86-6-M  
M. M. SUNDT CONSTRUCTION :  
COMPANY :

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka, and Nelson,  
Commissioners

ORDER

BY THE COMMISSION:

In this civil penalty proceeding arising under Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982), Commission Administrative Law Judge John J. Morris issued an Order of Dismissal on July 11, 1986, finding respondent M.M. Sundt Construction Company ("Sundt") in default, dismissing Sundt's contest of the Secretary of Labor's proposal for a civil penalty, affirming the two citations in issue, and assessing a civil penalty of \$40. 8 FMSHRC 1099 (July 1986)(ALJ). After the judge's decision was issued, Sundt submitted to the judge a "Motion for Reinstatement" requesting the reopening of the proceeding. Ultimately, this motion was forwarded to the Commission itself after the judge's order had become a final decision of the Commission by operation of the statute. For the reasons explained below, we deem Sundt's motion to constitute a request for relief from a final Commission decision, vacate the judge's dismissal order, and remand for further proceedings.

The main points of the procedural history of this matter may be stated briefly. On December 2, 1985, the Secretary filed with the Commission a Complaint Proposing Penalty, based on citations issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") at Sundt's Arizona crusher operation alleging violations of 30 C.F.R. §§ 56.5001 & 56.5050 (1985) (control of exposure to airborne contaminants and control of exposure to noise, respectively). Sundt filed an answer contesting both alleged violations, and the case was assigned to Judge Morris of the Commission's Office of Administrative Law Judges in Denver, Colorado.

After scheduling a hearing in this matter for July 24, 1986, the judge issued a Prehearing Order on June 6, 1986, requiring the parties to file certain documents by June 24, 1986. Sundt did not respond to the Prehearing Order and on June 26, 1986, the judge issued an Order to Show Cause directing Sundt to demonstrate "good cause," within 10 days, for the failure to respond. Sundt again did not respond. On July 11, 1986, the judge issued the Order of Dismissal, based on Sundt's failure to respond to the Prehearing Order and the Order to Show Cause. (As noted, the judge found Sundt in default, dismissed its contest, affirmed the citations, and assessed a \$40 civil penalty.)

On July 15, 1986, a letter dated July 8, 1986, was received at the judge's office. The letter was signed by Brian H. Murphy, Sundt's "Loss Control Manager." The letter apologized for Sundt's failure to respond to the prehearing order and asserted that Sundt's "records do not indicate our company ever receiving that correspondence." The letter belatedly requested an extension of time for compliance with the prehearing order. By letter dated July 15, 1986, the judge replied that he could not grant the requested extension of time because his jurisdiction had terminated upon the issuance of his dismissal order on July 11, 1986.

By "Motion of Reinstatement" dated August 7, 1986, and received in the judge's Denver Office on August 11, 1986, Sundt requested a reopening of the proceeding. The motion alleged that there had been "a lack of communication between MSHA and ourselves for which we would, again, like to apologize." By letter dated August 19, 1986, the judge again explained that his jurisdiction had terminated. He forwarded a copy of the Motion for Reinstatement to the Commission's Docket Office in Washington, D.C., where it was received on August 21, 1986.

The judge correctly indicated that his jurisdiction in this matter terminated when his dismissal order was issued on July 11, 1986. 29 C.F.R. § 2700.65(c). Any potential relief available to Sundt lay with the Commission in the form of a petition for discretionary review, which must be filed with the Commission, not the trial judge, within 30 days of a judge's decision. 29 C.F.R. §§ 2700.5(b) and 2700.70(a). Sundt's Motion for Reinstatement was submitted improperly to the judge and was not filed with the Commission until August 21, 1986, one day after the judge's decision had become final by operation of law. 30 U.S.C. § 823(d)(1). Under the circumstances, Sundt's Motion for Reinstatement must be construed as a request for relief from a final Commission decision. 29 C.F.R. 2700.1(b) (Federal Rules of Civil Procedure apply in absence of applicable Commission rule); Fed. R. Civ. Pro. 60 (Relief From Judgment or Order). See generally Harry L. Wadding v. Tunnelton Mining Co., 8 FMSHRC \_\_\_, No. PENN 84-186-D, slip op. at 1 (August 20, 1986).

Two questions are presented: (1) Whether preliminary relief from a final order should be permitted by accepting Sundt's motion as a late-filed petition for discretionary review; and (2) whether the judge's default order should stand or Sundt's failure to timely respond to the

prehearing and show case orders should be excused and the proceeding on the merits reopened. We address the first question with reference to the standards set forth in Fed. R. Civ. P. 60(b)(1), which provides:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: ... mistake, inadvertence, surprise, or excusable neglect....

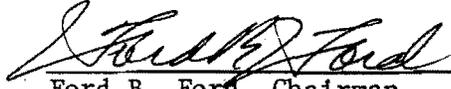
Sundt has proceeded without the benefit of counsel. Although Sundt's motion was not filed with the Commission's Docket Office until the 41st day after the judge's decision, it was submitted to the Commission's Denver Office within the required 30 days of the judge's decision. Therefore, we will treat the failure to file a timely petition as resulting from "mistake, inadvertence, ... or excusable neglect." Accordingly, we accept Sundt's submission as a late-filed petition for discretionary review. Cf. Gerald D. Boone v. Rebel Coal Co., 4 FMSHRC 1232, 1232-33 (July 1982).

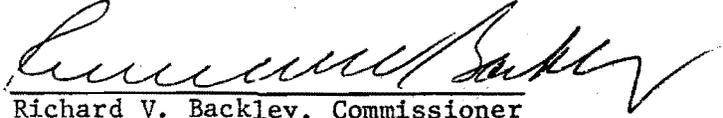
As to the substantive aspects of Sundt's motion, the Commission has observed repeatedly that default is a harsh remedy. See, e.g., Easton Constr. Co., 3 FMSHRC 314, 315 (February 1981). In general, if a defaulting party can make a showing of adequate or good cause for the failure to respond to an order, the failure may be excused and appropriate proceedings on the merits permitted. See Valley Camp Coal Co., 1 FMSHRC 791, 792 (July 1979) (default for failure to file a timely answer vacated upon showing of adequate cause for the failure). In assessing the existence of adequate cause, explanatory factors akin to those mentioned above in Fed. R. Civ. P. 60(b)(1) -- mistake, inadvertence, surprise, or excusable neglect -- may be relevant. Valley Camp, supra, 1 FMSHRC at 792 & n. 3. The absence of bad faith on the part of the defaulting party is also a relevant concern. Easton, supra. An attempt to comply at least partially with the order in question may be a mitigating factor as well. See, e.g., Sigler Mining Co., 3 FMSHRC 30 (January 1981). In one instance where an operator made a colorable showing of a failure in the service upon it of the relevant show cause order, the Commission vacated a default order and remanded for resolution of whether proper service had occurred. Pocahontas Constr. Co., 3 FMSHRC 1184, 1184-85 (May 1981).

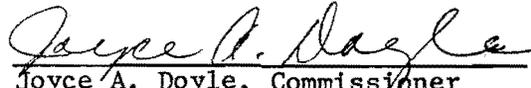
Sundt's July 8, 1986 letter to the judge and its Motion for Reinstatement, when read together, appear to allege that Sundt did not receive the prehearing order. We have examined the record and are unable to determine why Sundt did not receive the prehearing order. The existing record makes it difficult to evaluate at this point the merits of Sundt's motion, its reasons for delay, its good faith, and the equities involved. Accordingly, we are not yet prepared to summarily rule on the adequacy of Sundt's proffered reasons for its failure to timely respond. Cf. Pocahontas, supra, 3 FMSHRC at 1185. Sundt has raised the possibility of defects in service or communication and, as noted, has proceeded without counsel. In the interests of justice, Sundt should have the opportunity to explain its position to the judge.

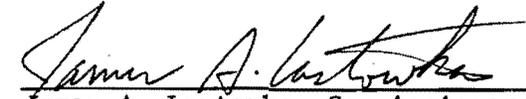
For the foregoing reasons, the judge's Order of Dismissal is vacated and the matter is remanded for proceedings consistent with this order.

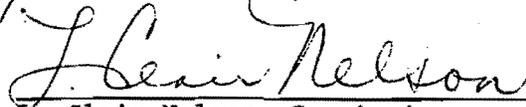
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Ford B. Ford, Chairman

  
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Richard V. Backley, Commissioner

  
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Joyce A. Doyle, Commissioner

  
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James A. Lastowka, Commissioner

  
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L. Clair Nelson, Commissioner

\*/ Sundt is reminded to serve the opposing party with copies of all its correspondence and other filings in this matter. 29 C.F.R. § 2700.7.

Distribution

Brian H. Murphy  
Sundt Corp.  
4101 E. Irvington Road  
P.O. Box 26685  
Tucson, Arizona 85726

Jack Ostrander, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
25 Griffin St., Suite 501  
Dallas, Texas 75202

Administrative Law Judge John Morris  
Federal Mine Safety & Health Review Commission  
333 West Colfax Avenue, Suite 400  
Denver, Colorado 80204

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

September 22, 1986

SECRETARY OF LABOR, :  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA) : Docket Nos. WEVA 83-82  
 : WEVA 83-95  
v. :  
 :  
U.S. STEEL MINING CO., INC. :

BEFORE: Backley, Doyle, Lastowka, and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This consolidated proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982) (the "Mine Act"), and presents the question of whether two violations of 30 C.F.R. § 70.101, the mandatory respirable dust standard when quartz is present, were of such nature as could significantly and substantially contribute to the cause and effect of a coal mine health hazard. 1/ Following a

1/ 30 C.F.R. § 70.101 provides:

Respirable dust standard when quartz is present. When the respirable dust in the mine atmosphere of the active workings contains more than 5 percent quartz, the operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active workings is exposed at or below a concentration of respirable dust, expressed in milligrams per cubic meter of air as measured with an approved sampling device and in terms of an equivalent concentration determined in accordance with § 70.206 (Approved sampling devices; equivalent concentrations), computed by dividing the percent of quartz into the number 10.

Example: The respirable dust associated with a mechanized mining unit or a designated area in a mine contains quartz in the amount of 20%. Therefore, the average concentration of respirable dust in the mine atmosphere associated with that mechanized mining unit or designated area shall be continuously maintained at or below 0.5 milligrams of respirable dust per cubic meter of air ( $10/20 = 0.5 \text{ mg/m}^3$ ).

hearing on the merits, former Commission Administrative Law Judge Richard C. Steffey concluded that the violations were properly designated significant and substantial and assessed civil penalties of \$125 for each violation. 6 FMSHRC 1071 (April 1984) (ALJ). U.S. Steel Mining Co., Inc. ("U.S. Steel") petitioned for discretionary review and, by order dated June 8, 1984, the Commission granted the petition as it related to the two citations charging violations of 30 C.F.R. § 70.101. <sup>2/</sup> For the reasons that follow, we conclude that the judge correctly found that the violations were significant and substantial and we affirm his findings in this regard.

The violations at issue are based upon designated occupation sampling results obtained pursuant to 30 C.F.R. § 70.207 from mechanized mining units ("MMU") in two different U.S. Steel mines. <sup>3/</sup> Citation No. 9917507, issued on September 1, 1982, alleged that the average concentration of respirable dust in the working environment of the designated occupation for MMU 024-0 at the Morton Mine was 1.9 milligrams per cubic meter of air. At the time, the unit was operating under a reduced respirable dust standard of 1.6 mg/m<sup>3</sup> based upon a previous quartz analysis showing that respirable dust in the mine atmosphere contained 6 percent quartz. The citation was terminated when five respirable dust samples of the working environment of the designated occupation revealed an average respirable dust concentration within 1.6 mg/m<sup>3</sup>.

Citation No. 9914583, issued on October 20, 1982, alleged that the average concentration of respirable dust in the working environment of the designated occupation for MMU 002-0 at the Shawnee Mine was 1.7 mg/m<sup>3</sup>. At the time, that unit was operating under a reduced respirable dust standard of 1.4 mg/m<sup>3</sup> based upon a previous quartz analysis showing that respirable dust in the mine atmosphere contained 7 percent quartz. The citation was terminated when five respirable dust samples of the working environment of the designated occupation revealed an average respirable dust concentration within 1.4 mg/m<sup>3</sup>.

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<sup>2/</sup> The Commission declined to review the judge's decision insofar as it related to Docket No. WEVA 82-390-R. Thus, although this docket number has been included in previous Commission orders relating to this case, our decision concerns only Docket Nos. WEVA 83-82 and WEVA 83-95.

<sup>3/</sup> 30 C.F.R. § 70.207 requires an operator to take valid respirable dust samples from the designated occupation in each mechanized mining unit on a bimonthly basis. 30 C.F.R. § 70.2(h) in part defines a "mechanized mining unit" as "a unit of mining equipment including hand loading equipment used for the production of material." On continuous miner units, such as those operated by U.S. Steel, the MMU normally consists of a continuous mining machine, two shuttle cars, and one or two roof bolting machines. Tr. 107. 30 C.F.R. § 70.2(f) defines "designated occupation" as "the occupation on a mechanized mining unit that has been determined by results of respirable dust samples to have the greatest respirable dust concentration." Here, both citations are based upon sample results taken from the continuous miner operator designated occupation.

At the hearing the Secretary presented medical evidence regarding the nature of the health hazard created by exposure to silica-bearing respirable dust. The medical testimony credited by the judge established that silicosis is a pulmonary disease caused by silica-bearing (quartz) dust retained by the lungs following respiration. <sup>4/</sup> The retained dust causes a scarring process, known as fibrosis. If the fibrosis occurs in the most distal portions of the lungs, the alveoli, nodes of scar tissue develop which compromise the air exchange capacity of the lungs. Damage caused by the scarring is irreversible and there is no known treatment for the disease. Silicosis can develop into a life-threatening respiratory condition known as progressive massive fibrosis. (Such a condition can develop also as the result of coal workers' pneumoconiosis.) Progressive massive fibrosis can develop long after an individual's exposure to quartz-bearing dust has ceased.

A dose-response relationship exists between exposure to quartz-bearing dust and the development of silicosis. The more silica dust an individual is exposed to, the greater the probability of developing silicosis. Based upon the data presently available, however, it is impossible to quantify the physiological effect of infrequent, low-level exposures to silica-bearing dust. However, it is known that there is, in any event, a cumulative dose-response effect from repeated exposures. An increased frequency of exposure and/or an increased concentration of dust increases the risk of developing silicosis.

The judge found that the Secretary had proved the violations of 30 C.F.R. § 70.101 alleged in the two citations and that the violations were significant and substantial. <sup>6</sup> FMSHRC at 1112-16. Concluding that the test for a significant and substantial violation enunciated by the Commission in Cement Division, National Gypsum Co., <sup>3</sup> FMSHRC 822 (April 1981), was applicable to violations of health standards as well as to violations of safety standards, the judge applied the four-phase analysis of the National Gypsum test followed by the Commission in Mathies Coal Co., <sup>6</sup> FMSHRC 1 (January 1984). <sup>5/</sup> First, he found that

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<sup>4/</sup> Quartz is a form of silica described as "A crystallized silicon dioxide." Bureau of Mines, U.S. Department of the Interior, Dictionary of Mining, Mineral, and Related Terms 884 (1968).

<sup>5/</sup> In National Gypsum, the Commission stated:

[A] violation is of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.

(footnote cont'd)

the Secretary proved violations of a mandatory health standard. 6 FMSHRC 1113-14. Second, he found that the violations contributed a measure of danger to a discrete health hazard because breathing excessive quantities of quartz-bearing respirable dust exposes miners to a risk of developing silicosis or pneumoconiosis. 6 FMSHRC at 1114. Third, he determined that there was a reasonable likelihood that the violations contributed to a hazard that would result in injury. Id. According to the judge, a preponderance of the evidence showed that each overexposure to quartz-bearing respirable dust adds to the scarring process associated with silicosis so as to produce the lesions associated with progressive massive fibrosis. Finally, he found that there was a reasonable likelihood that the injury in question would be of a reasonably serious nature. 6 FMSHRC at 1114-15. The judge found that the very nature of silicosis and pneumoconiosis defied specific proof of the exact injury that will result from an exposure to respirable dust in excess of the applicable standard. However, once overexposure occurs and the scarring process begins, each overexposure contributes to the cumulative effects until progressive massive fibrosis results. The judge stated that "Then, even if the miner stops working in a coal mine, the disease will continue to cause increasing inability for the lungs to perform their function of purifying the blood and the miner will die prematurely...." 6 FMSHRC at 1115. The judge concluded that the medical testimony at the hearing was scientifically based and that it supported a finding that the violations were significant and substantial.

On review, U.S. Steel challenges only the judge's findings that the violations were "significant and substantial." U.S. Steel maintains that the Secretary failed to establish that there was a reasonable likelihood that the hazard contributed to would result in an injury or illness because the Secretary did not ascribe a quantitative risk factor to the overexposures.

Although this case presents the first occasion for us to consider whether a violation of 30 C.F.R. § 70.101 is of such nature as could contribute significantly and substantially to the cause and effect of a mine health hazard, we previously have considered the significant and

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Footnote 5 end.

3 FMSHRC at 825.

In Mathies, the Commission stated:

In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum, the Secretary ... must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

6 FMSHRC at 3-4. (footnote omitted).

substantial nature of respirable dust violations under 30 C.F.R. § 70.100 (the general respirable dust standard for underground coal mines). In Consolidation Coal Co., 8 FMSHRC 890 (June 1986), appeal docketed, No. 86-1403 (D.C. Cir. July 11, 1986), the Commission concluded that the National Gypsum significant and substantial analysis, "with certain adaptations appropriate in the context of [an] exposure-related health standard," is applicable in determining whether a violation of 30 C.F.R. § 70.100 is significant and substantial. 8 FMSHRC at 891. The Commission there adapted the elements necessary to support a significant and substantial safety violation to cases involving violations of mandatory health standards and held that the Secretary must prove:

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

Consol, 8 FMSHRC at 897. Consol was decided after U.S. Steel's petition for discretionary review had been granted. In light of the decision in Consol, the Commission afforded the parties leave to file supplemental briefs. The Secretary filed a brief; U.S. Steel declined. The Secretary argues that the Commission's analysis for determining the significant and substantial nature of a violation of 30 C.F.R. § 70.100(a) is equally applicable for determining the significant and substantial nature of a violation of 30 C.F.R. § 70.101. We agree.

In Consol, the Commission noted that the statutory text of the Mine Act and its legislative history "reveal[] a clear congressional understanding of the unique nature of exposure-related health hazards of respirable dust and the control of those hazards." 8 FMSHRC at 895. Central to the Commission's decision was recognition that "prevention of pneumoconiosis and other occupational illnesses is a fundamental purpose underlying the Mine Act." Id. (emphasis in original).

Section 70.101, the respirable dust standard involved in this case, is taken directly from section 205 of the Mine Act, 30 U.S.C. § 845, which, in turn, was carried over without significant change from the 1969 Coal Act, 30 U.S.C. § 801 et seq. (1976) (amended 1977). 6/ These

6/ Section 205 of the Mine Act provides:

Dust standards in presence of quartz

In coal mining operations where the concentration of respirable dust in the mine atmosphere of any working place contains more than 5 per centum quartz, the Secretary of Health and Human Services shall prescribe an appropriate formula for determining the applicable respirable dust standard under this subchapter for such working place and the Secretary shall apply such formula in carrying out his duties under this chapter.

statutory sections set interim mandatory health standards, which the Secretary has adopted. Section 205 of the Mine Act is a more stringent cognate of section 202(b)(2), 30 U.S.C. § 842(b)(2), which requires operators to maintain the average concentration of respirable dust in the mine atmosphere in active workings at or below 2.0 mg/m<sup>3</sup>. In section 205, however, Congress determined that the increased hazard when more than 5 percent quartz is present in respirable dust requires a lower level of exposure.

Silicosis has been recognized for a long time as a disease associated with coal miners, and the inhalation of silica-bearing dust has been causally linked to the disease. See Coal Mine Health and Safety: Hearings Before the Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate, 91st Cong., 1st Sess., 764 (1969); Coal Mine Health and Safety: Hearings Before the Committee on Education and Labor, House of Representative, 91st Cong., 1st Sess., 119, 309, 310, 337 (1969). With cognizance of this hazard, section 102(a)(1) of the Senate bill which became the 1969 Coal Act required that the respirable dust standard be reduced when coal dust contains more than 5 percent quartz and that the applicable dust standard "be determined in accordance with a formula prescribed by the Surgeon General." <sup>7/</sup> The Senate Committee report stated, "Since high quartz content in coal dust ... presents a greater health hazard, the Surgeon General is directed to prescribe the formula to be used in arriving at a dust standard for dust containing more than 5 percent quartz which offers comparable protection to the statutory standards for dust containing 5 percent or less quartz." S. Rep. No. 410, 91st Cong., 1st Sess. 46 (1969) reprinted in Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st. Sess., Part I Legislative History of the Federal Coal Mine Health and Safety Act of 1969, at 172 (1975). It was in complying with this requirement of section 205 the 1969 Coal Act, that the Secretary of Health, Education, and Welfare prescribed, and the Secretary of the Interior adopted, the formula set forth in 30 C.F.R. § 70.101. The formula was developed by the National Institute for Occupational Safety and Health and was based upon Public Health Service studies evaluating the effects of free silica on respiratory health. See 36 Fed. Reg. 4981 (March 16, 1971); U.S. Steel Mining Co. Inc., 5 FMSHRC 46, 50-51 (January 1983) (ALJ).

When Congress delegated to the Secretary of Health, Education, and Welfare the authority to prescribe the applicable limit of respirable dust when the quartz content exceeds 5 percent, it intended that exposure level to be the maximum level allowed to achieve its stated goal of

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<sup>7/</sup> A companion bill introduced in the House of Representatives contained the same provision but required the Secretary of Health, Education, and Welfare to prescribe the formula. The House provision was adopted at Conference and carried over, without substantive change, to the Mine Act as section 205. Section 205 of the Mine Act was subsequently amended to transfer this function to the Secretary of Health and Human Services.

preventing disabling respiratory disease. Section 201(b), 30 U.S.C. § 841(b). Further, as stated in Consol, "Congress clearly intended the full use of the panoply of the Act's enforcement mechanisms to effectuate this Congressional goal, including the designation of a violation as a significant and substantial violation." 8 FMSHRC at 897. Against this background of Congress' clear intent to prevent respirable diseases induced by silica-bearing dust, we next address the four elements of the significant and substantial test as set forth in Consol.

The first element, the existence of the underlying violation, is not an issue in this case. The judge found that the violations alleged in the citations occurred, and U.S. Steel does not challenge the findings of violations. 6 FMSHRC at 1113-14.

The second element, a measure of danger to health posed by the violation, is established also. Here, in mine atmosphere containing more than 5 percent quartz, miners were exposed to excessive average concentrations of respirable dust. These exposures were at levels higher than those that Congress authorized be established to eliminate the possibility of miners contracting silica-bearing dust induced diseases. In Consol, we held that any exposure to respirable dust above the applicable limit was deemed to present a discrete health hazard. 8 FMSHRC at 898. The legislative and regulatory histories referred to above regarding overexposure to respirable dust when quartz is present compel the same conclusion. Therefore, we hold that any overexposure to respirable dust based upon designated occupation sampling results giving rise to a violation of 30 C.F.R. § 70.101 presents a discrete health hazard. By proving the violations at issue in the instant proceeding, the Secretary proved a discrete health hazard contributed to by the violations.

The third element in the formula for determining the significant and substantial nature of an exposure related health standard concerns the reasonable likelihood that the health hazard contributed to will result in an illness. In Consol, the Commission recognized the difficulty of predicting whether or when respiratory disease will develop. 8 FMSHRC at 898. At the same time, the Commission also recognized that Congress established the 2.0 mg/m<sup>3</sup> respirable dust standard as the best available means of preventing disabling respiratory diseases. Id. In light of these considerations, the Commission held:

[G]iven the nature of the health hazard at issue, the potentially devastating consequences for affected miners, and strong concern expressed by Congress for eliminating respiratory illnesses in miners, we hold that if the Secretary proves that an overexposure to respirable dust in violation of section 70.100(a), based upon designated occupation samples, has occurred, a presumption arises that the third element of the significant and substantial

test -- a reasonable likelihood that the health hazard contributed to will result in an illness -- has been established.

Consol, 8 FMSHRC at 899.

These same considerations are involved in the instant proceeding to prove a violation of section 70.101. Indeed, the nature of the health hazard posed by excessive concentrations of respirable dust containing quartz is in some respects greater than that posed by respirable dust without quartz. The fibrosis associated with silica-bearing dust is irreversible and may continue to develop after exposure has ended. Although the present state of scientific and medical knowledge does not make it possible to determine the precise point at which respirable diseases induced by silica-bearing dust will develop, it is clear that cumulative exposures to silica-bearing dust above the applicable exposure limit are an important risk factor. Accordingly, given the nature of the health hazards at issue, the potentially devastating consequences to affected miners, and the strong concern expressed by Congress for the elimination of occupation-related respiratory illnesses in miners, we hold that where the Secretary proves an overexposure to respirable dust in violation of section 70.101 based upon designated occupation samples, a presumption arises that the third element of the significant and substantial test -- a reasonable likelihood that the hazard contributed to will result in an illness -- is established.

The fourth element of the significant and substantial test, a reasonable likelihood that the illness in question will be of a reasonably serious nature is not disputed. Congress found overexposure to respirable dust containing quartz to be serious enough to require a mandatory maximum permissible level of exposure. The judge found that each exposure to excessive quantities of silica-bearing respirable dust can contribute to the cumulative effects of dust-induced fibrosis and lead to an increased inability of the lungs to perform their function of aerating the blood and to premature death. 6 FMSHRC at 1115. The evidence of record provides substantial support for the judge's findings.

In Consol the Commission further held that, because analysis of the four elements of the significant and substantial test would be essentially the same in each instance in which the Secretary proves a violation of 30 C.F.R. § 70.100(a), proof of a violation gives rise to a presumption that the violation is significant and substantial. 8 FMSHRC at 899. We conclude that a similar presumption is appropriate when the Secretary proves a violation of 30 C.F.R. § 70.101. We further hold that, as with a violation of section 70.100(a), the presumption can be rebutted by the operator by establishing that miners in the designated occupation in fact were not exposed to the excessive concentration of respirable dust, e.g., through the use of personal protective equipment. See 8 FMSHRC at 899. In the instant proceeding, there is no evidence that the miners placed at risk by the subject violations were not exposed to excessive levels of silica-bearing respirable dust.

Accordingly, we conclude that the administrative law judge's findings that U.S. Steel's violations of the mandatory respirable dust standard at issue were of such nature as could contribute significantly and substantially to the cause and effect of a mine health hazard are supported by substantial evidence of record.

Therefore, the judge's decision is affirmed. 8/

  
Richard V. Backley, Commissioner

  
Joyce A. Doyle, Commissioner

  
James A. Lastowka, Commissioner

  
L. Clair Nelson, Commissioner

8/ Chairman Ford did not participate in the consideration or disposition of this matter.

Distribution

Barry F. Wisor, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
4015 Wilson Blvd.  
Arlington, Virginia 22203

Billy M. Tennant, Esq.  
Louise Q. Symons, Esq.  
U.S. Steel Mining Co., Inc.  
600 Grant Street, Room 1580  
Pittsburgh, Pennsylvania 15230

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 25, 1986

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

v.

U.S. STEEL MINING COMPANY, INC.

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:  
:  
:  
:  
:  
:

Docket No. PENN 82-335

BEFORE: Backley, Doyle, Lastowka and Nelson, Commissioners

## DECISION

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the "Mine Act"), and involves one violation of 30 C.F.R. § 70.101, the mandatory respirable dust standard when quartz is present, 1/ and two violations of 30 C.F.R. § 75.503, a mandatory standard requiring that electric face equipment

1/ 30 C.F.R. § 70.101 provides:

Respirable dust standard when quartz is present. When the respirable dust in the mine atmosphere of the active workings contains more than 5 percent quartz, the operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active workings is exposed at or below a concentration of respirable dust, expressed in milligrams per cubic meter of air as measured with an approved sampling device and in terms of an equivalent concentration determined in accordance with 70.206 (Approved sampling devices; equivalent concentrations), computed by dividing the percent of quartz into the number 10.

Example: The respirable dust associated with a mechanized mining unit or a designated area in a mine contains quartz in the amount of 20%. Therefore, the average concentration of respirable dust in the mine atmosphere associated with that mechanized mining unit or designated area shall be continuously maintained at or below 0.5 milligrams of respirable dust per cubic meter of air ( $10/20 = 0.5 \text{ mg/m}^3$ ).

be maintained in permissible condition. 2/ In citing the violation of section 70.101 and one of the violations of section 75.503, inspectors of the Mine Safety and Health Administration ("MSHA") found that those violations were "significant and substantial" within the meaning of section 104(d)(1) of the Mine Act. 3/

At a hearing on the merits before Commission Administrative Law Judge James A. Broderick, U.S. Steel Mining Company, Inc. ("U.S. Steel") admitted the violations, but contested the Secretary's assertion that two of the violations contributed significantly and substantially to the cause and effect of a mine safety or health hazard. Also, U.S. Steel contested the civil penalties proposed by the Secretary for each of the violations. Judge Broderick determined that the violations occurred and that the findings of the significant and substantial nature of the

2/ 30 C.F.R. § 75.503 provides:

Permissible electrical face equipment; maintenance. The operator of each coal mine shall maintain in permissible condition all electric face equipment required by §§ 75.500, 75.501, 75.504 to be permissible which is taken into or used in by the last open crosscut of any such mine.

3/ Section 104(d)(1) of the Mine Act provides:

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 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 chapter. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) of this section 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.

30 U.S.C. § 814(d)(1) (emphasis added).

violations were proper. He assessed a civil penalty of \$200.00 for the respirable dust violation, section 70.101, and penalties of \$75.00 and \$200.00 for the permissibility violations, section 75.503.

The issues before us are whether the judge's findings that the violations are significant and substantial are proper and whether substantial evidence supports the judge's penalty assessments. On the bases discussed below, we affirm the judge's findings as to the significant and substantial nature of the violations and two of the judge's three penalty assessments. Because we find that the judge's negligence finding regarding the third violation is not supported by substantial evidence, we vacate the judge's penalty assessment for that violation and assess a penalty commensurate with the statutory penalty criteria.

#### I.

We first consider the question of whether the violation of section 70.101 (Citation No. 9901317) is significant and substantial, within the purview of the statute. The facts are not in dispute. U.S. Steel owns and operates the Maple Creek No. 1 Mine, an underground coal mine located in Washington County, Pennsylvania. The citation alleges that the average concentration of respirable dust in the working environment of the designated occupation on mechanized mining unit 010-0 was 1.8 milligrams per cubic meter of air ( $\text{mg}/\text{m}^3$ ).<sup>4/</sup> At the time, the unit was operating under a reduced respirable dust standard of  $1.4 \text{ mg}/\text{m}^3$  based upon a previous respirable dust analysis showing that the respirable dust in the mine atmosphere contained 7% quartz. The citation was terminated when five respirable dust samples of the working environment of the continuous miner operator revealed an average respirable dust concentration of less than  $1.4 \text{ mg}/\text{m}^3$ .

In upholding the inspector's finding that the violation was significant and substantial the judge, citing the Commission's decision in Cement Division, National Gypsum, 3 FMSHRC 822 (April 1981), concluded that the violation was reasonably likely to result in a reasonably

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<sup>4/</sup> 30 C.F.R. § 70.207 requires an operator to take valid respirable dust samples from the designated occupation in each mechanized mining unit on a bimonthly basis. 30 C.F.R. § 70.2(h), in pertinent part, defines a "mechanized mining unit" as "[a] unit of mining equipment including hand loading equipment used for the production of material." 30 C.F.R. § 70.2(f) defines "designated occupation" as "the occupation on a mechanized mining unit that has been determined by results of respirable dust samples to have the greatest respirable dust concentration." In the case of the subject citation, the designated occupation was that of the continuous mining machine operator.

serious illness. 5 FMSHRC at 1336. <sup>5/</sup> The judge found that exposure to excessive amounts of respirable dust with a quartz content in excess of 5% can contribute to silicosis and to coal workers' pneumoconiosis. 5 FMSHRC at 1336. The judge stated:

The quartz content in the dust can be a factor in the progression of simple coal workers pneumoconiosis. It can also cause silicosis, a progressive, serious disease of the lungs resulting from deposition of silica in the lung and the body's reaction to it.

Id. <sup>6/</sup> In summarizing his findings regarding the significant and substantial nature of the violation, the judge stated that although "[a]n exposure of 1.8 mg/m<sup>3</sup> of respirable dust which contains approximately seven percent quartz ... would not in itself cause silicosis ... [it] would contribute in a substantial way to the risk of acquiring silicosis." 5 FMSHRC at 1336.

In a recent decision the Commission addressed for the first time the question of whether a violation of section 70.101 could significantly and substantially contribute to the cause and the effect of a coal mine health hazard. U.S. Steel Mining Co., Inc., Docket No. WEVA 83-82, etc., 8 FMSHRC \_\_\_\_\_ (September 22, 1986). There the Commission concluded that, in order to support an allegation that a violation of section 70.101 is significant and substantial, the Secretary must prove:

(1) the underlying violation of ... [section 70.101]; (2) a discrete health hazard -- a measure of danger to health -- contributed to by the violation; (3) a reasonable likelihood that the health hazard contributed to will result in an illness; and (4) a reasonable likelihood that the illness in question will be of a reasonably serious nature.

U.S. Steel, slip op. at 6 (quoting from Consolidation Coal Co., 8 FMSHRC 890 (June 1986), appeal docketed, No. 86-1403 (D.C. Cir. July 11, 1986)).

<sup>5/</sup> In National Gypsum, the Commission stated:

[A] violation is of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard if, based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or an illness of a reasonably serious nature.

3 FMSHRC at 825.

<sup>6/</sup> Quartz is a form of silica described as "A crystallized silicon dioxide." Bureau of Mines, U.S. Department of the Interior, Dictionary of Mining, Mineral, and Related Terms 884 (1968).

We further concluded that because analysis of the four elements of the significant and substantial test would be essentially the same in each instance when the Secretary proved a violation of section 70.101, upon such proof a rebuttable presumption arises that the violation could significantly and substantially contribute to the cause and effect of a mine health hazard. U.S. Steel, slip op. at 8. We noted that this presumption can be rebutted if the operator establishes that the miners in the designated occupation were not, in fact, exposed to the excessive concentrations of respirable dust, e.g., through the use of personal protective equipment. Id.

In this proceeding the existence of the underlying violation is not at issue because U.S. Steel concedes that it violated section 70.101. Further, U.S. Steel offered no evidence that the miners in the cited designated occupation were not subject to exposure. We conclude that the judge's findings regarding the significant and substantial nature of the violation at issue are supported by substantial evidence and are consistent with the Commission's decisions in Consol and U.S. Steel, supra. Accordingly, the judge's finding that the violation of 30 C.F.R. § 70.101 is "significant and substantial" is affirmed.

## II.

We next address the issues raised regarding the first violation of 30 C.F.R. § 75.503 (Citation No. 1249541). This violation concerns a conduit on the packing gland of a shuttle car. 7/ During an inspection of the mine an MSHA inspector observed a shuttle car on which a conduit had pulled out of the packing gland. The shuttle car was transporting coal cut by a continuous mining machine and was being "used in by the last open crosscut." Section 75.503. The judge found that operation of the shuttle car with the defective packing gland violated section 75.503. 5 FMSHRC at 1337.

In considering the statutory penalty criteria, the judge found that U.S. Steel was negligent, noting the inspector's testimony that it "had been cited for the same condition 'quite a few times.'" 5 FMSHRC at 1337. U.S. Steel challenges this finding, arguing that the conduit frequently pulls out of the packing glands during normal operations "no matter what the operator does." U.S. Steel asserts that it performed required weekly permissibility examinations (30 C.F.R. § 75.512-2) and that its failure to discover the instant violation before the MSHA inspector did was not the result of its negligence.

7/ A conduit is described as a "tube ... for receiving and protecting electric wires." Dictionary of Mining and Related Terms 248. A packing gland is described as an "explosion-proof entrance for conductors through the wall of an explosion-proof enclosure, to provide compressed packing completely surrounding the wire or cable...." Id. at 787.

We conclude that the judge's finding of negligence in connection with this violation is supported by substantial evidence. Testimony by both the MSHA inspector and U.S. Steel's general maintenance foreman indicates that at the mine, conduits frequently pull out of packing glands, resulting in electric face equipment being in non-permissible condition. Tr. 267-278; 285-286. Given U.S. Steel's awareness of this particular, recurring problem (which it suggests, but does not establish, is attributable to a design defect), the assertion that performance of a weekly permissibility exam precludes a negligence finding must be rejected. Weekly exams are the minimum inspection requirements imposed by 30 C.F.R. § 75.512-2. In light of U.S. Steel's awareness of this specific and recurring permissibility problem, more than the minimum level of attention to the packing glands was called for but, insofar as this record indicates, was not provided before electric face equipment was used in coal production. Given the nature of permissibility violations in general and the specific facts of record surrounding this citation, the judge's negligence finding is affirmed. 8/

### III.

The second violation of 30 C.F.R. § 75.503 (Citation No. 125017) concerns a missing bolt on the control compartment of a shuttle car. During an inspection of the mine an MSHA inspector observed a shuttle car parked near the loading ramp. The car was energized but was not then being used; other shuttle cars were being used to load coal. Upon examining the car, the inspector observed that a bolt was missing on the cover plate of the control compartment. (The control compartment on the shuttle car contains electrical contactors. The cover plate of the control compartment isolates electrical arcing from the mine atmosphere.) The inspector cited U.S. Steel for a violation of 30 C.F.R. § 75.503 and found that the violation was "significant and substantial" within the meaning of 30 U.S.C. § 814(d)(1). See nn. 2 & 3, supra.

In upholding the violation, the judge found that the violation was properly designated significant and substantial and that U.S. Steel was negligent. 5 FMSHRC at 1337. On review, U.S. Steel concedes that the violation occurred but argues that the violation was not significant and substantial and that there is insufficient evidence of record to support the judge's negligence finding.

We conclude that substantial evidence supports the judge's finding that the violation significantly and substantially contributed to the cause and effect of a mine safety hazard. The inspector stated that with the bolt missing if methane entered the control compartment arcing could cause an ignition. An MSHA electrical inspector testified that

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8/ U.S. Steel's argument that \$20.00 is the only appropriate penalty for non-significant and substantial violations has previously been addressed and rejected. See, e.g., U.S. Steel Mining Co., Inc., 6 FMSHRC 1148 (May 1984).

the purpose of the control panel cover plate is to keep such an ignition confined. If methane should enter the compartment and ignite, the cover plate prevents the flame and heat of the ignition from reaching the outside atmosphere. When a bolt is missing, the integrity of the cover plate is weakened and its capacity to contain the explosion is diminished. An ignition may escape the compartment and propagate a larger ignition and explosion. This testimony by the two inspectors was not refuted by U.S. Steel.

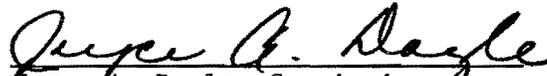
When the citation was issued, the shuttle car was energized. The Maple Creek No. 1 Mine liberates more than one million cubic feet of methane in a twenty-four hour period. The inspector stated, and the assistant mine foremen agreed, that there had been a methane ignition at the mine in the year preceding the hearing. We agree with the judge that under the particular facts and circumstances surrounding this violation the inspector properly determined that the violation was of a significant and substantial nature.

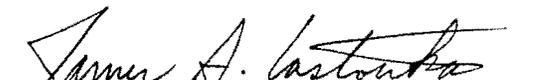
In assessing U.S. Steel's negligence for penalty purposes, the judge stated, without explication, that "the absence of the bolt should have been known to [U.S. Steel]" and that "the violation was the result of [U.S. Steel's] negligence." 5 FMSHRC at 1337. U.S. Steel argues that the record does not establish that it acted negligently in connection with this violation. We agree. The burden of establishing an operator's negligence under section 110(i), 30 U.S.C. § 820(i), rests on the Secretary. Unlike the permissibility violation discussed hereinabove, nothing in the record pertaining to this violation suggests that at the time of the issuance of the citation U.S. Steel knew or should have known that the bolt was missing. The shuttle car involved was not being operated and had not been used in production during the shift that was then ongoing. Tr. 330. In response to questions, the MSHA inspector indicated that he was unable to determine whether the operator was aware of the missing bolt (Tr. 296) and that various possible explanations for the missing bolt could include a "set up" of the violation (Tr. 305), a "jarring out" during previous use of the shuttle (Tr. 308), or a miner's removal of the cover plate and an inadvertent failure to replace this bolt. Id. In sum, the inspector revealed that he had no real basis for forming a firm belief as to why the bolt was missing or why U.S. Steel should be found negligent. We conclude that although the fact that the bolt was missing is sufficient to establish the violation, it does not constitute substantial evidence of U.S. Steel's negligence in connection with the violation. Accordingly, the judge's finding of negligence is vacated and the penalty assessment is reduced from \$200 to \$100.

IV.

For the foregoing reasons, the decision of the administrative law judge is affirmed in part and reversed in part. 9/

  
Richard V. Backley, Commissioner

  
Joyce A. Doyle, Commissioner

  
James A. Lastowka, Commissioner

  
L. Clair Nelson, Commissioner

9/ Chairman Ford did not participate in the consideration or disposition of this matter.

Distribution

Billy M. Tennant, Esq.  
U.S. Steel Mining Co., Inc.  
600 Grant Street, Room 1580  
Pittsburgh, Pennsylvania 15230

Barry F. Wisor, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
4015 Wilson Blvd.  
Arlington, Virginia 22203

Administrative Law Judge James A. Broderick  
Federal Mine Safety & Health Review Commission  
5203 Leesburg Pike, Suite 1000  
Falls Church, Virginia 22041

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

September 25, 1986

SECRETARY OF LABOR, :  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), :  
on behalf of RICHARD TRUEX :  
 :  
v. : Docket No. WEVA 85-151-D  
 :  
CONSOLIDATION COAL COMPANY :

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson,  
Commissioners

DECISION

BY THE COMMISSION:

This case involves a discrimination complaint brought by the Secretary of Labor on behalf of Richard Truex, pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (1982) (the "Mine Act" or "Act"). The complaint alleges that Consolidation Coal Company ("Consol") discriminated against Mr. Truex in violation of section 105(c)(1) of the Mine Act. 1/ The Secretary asserts that Consol violated section 105(c)(1)

1/ Section 105(c)(1) of the Mine Act provides:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this [Act] because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this [Act], including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section [101] of this [Act] or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this [Act] or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this [Act].

30 U.S.C. § 815(c)(1).

by denying Truex the opportunity to participate in a post-inspection conference pursuant to section 103(f) of the Act without a loss of pay. 2/ The case was submitted to Commission Administrative Law Judge Gary Melick on stipulated facts. Judge Melick found that Consol discriminated against Truex in violation of section 105(c)(1), and ordered Consol to pay Truex back wages with interest for the six and one-half hour period that Truex was found to have been unlawfully denied the opportunity to work. The judge also assessed Consol a civil penalty of \$600 for the violation. 7 FMSHRC 1401, 1404 (September 1985)(ALJ). The Commission granted Consol's petition for discretionary review. For the reasons that follow, we affirm the judge's decision.

The facts are not in dispute. Truex is a longwall mechanic at Consol's McElroy Mine located in Marshall County, West Virginia; he is a member of the United Mine Workers of America ("UMWA" or "Union"). At the time of the events herein he was a member of the Union safety committee at the mine. On August 27, 1984, Department of Labor, Mine Safety and Health Administration ("MSHA") Inspector, James Mackey, telephoned Consol's mine safety director, Tom Olzer, and informed Olzer that he would be at the mine at approximately 9:30 a.m. the next morning

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2/ Section 103(f) of the Act provides:

Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection (a) of this section, for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine. Where there is no authorized miner representative, the Secretary or his authorized representative shall consult with a reasonable number of miners concerning matters of health and safety in such mine. Such representative of miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection made under this subsection. To the extent that the Secretary or authorized representative of the Secretary determines that more than one representative from each party would further aid the inspection, he can permit each party to have an equal number of such additional representatives. However, only one such representative of miners who is an employee of the operator shall be entitled to suffer no loss of pay during the period of such participation under the provisions of this subsection. Compliance with this subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this [Act].

30 U.S.C. § 813(f).

to review a hearing conservation plan. Olzer notified Truex, who was familiar with the plan, of Inspector Mackey's intentions. Truex then told Richard Lipinski, president of the Union local, of Mackey's plans, and Lipinski designated Truex as the representative of miners for the meeting with Mackey.

The next day, August 28, 1984, Truex was scheduled to work the 8:00 a.m. to 4:00 p.m. shift. At 7:50 a.m., Truex informed Olzer that he was the representative of miners for the meeting with Inspector Mackey who had not yet arrived at the mine. Olzer told Truex he would have to go to work underground with his regular crew. Truex indicated his willingness to work with his regular crew but asked that he be notified when the MSHA inspector arrived so that he could attend the meeting. Olzer replied that a representative of miners would be notified and given an opportunity to attend the meeting with the inspector. It is undisputed that had Truex proceeded underground to work with his crew, it is unlikely that he would have been notified of the inspector's arrival or been available to attend the meeting. Truex then requested that he be given alternate work in an area that would allow him to be readily available for the meeting. Olzer denied this request and instructed Truex to go underground to work with his regular crew.

At this point, Truex declared himself to be on "union business" because he believed that otherwise he would not be able to attend the conference as the designated representative of miners. <sup>3/</sup> Truex waited at the mine for the inspector who arrived sometime between 9 a.m. and 9:45 a.m. Stipulation 20. Truex attended the one and one-half hour meeting on the hearing conservation plan with the inspector and Olzer. At the close of the meeting, Truex asked Olzer if any work was available for him. Olzer told Truex that, because he had declared himself to be on "union business," no work was available for him for the remainder of the shift. Truex then left the mine property.

On October 5, 1984, Consol received a citation from an MSHA inspector, alleging a violation of section 103(f) for refusing to pay Truex for the time during which he participated in the meeting concerning the hearing conservation plan. Consol abated this citation by paying Truex for the one and one-half hour period spent at the meeting.

Consol refused to pay Truex for the remaining six and one-half hours he was scheduled to work on August 28, 1984. Truex filed a complaint with MSHA alleging discrimination under section 105(c)(1) of the Mine Act. Following an investigation by MSHA, the Secretary filed with the Commission a discrimination complaint on behalf of Truex that is the subject of the present proceeding. The parties then filed briefs, submitted stipulated facts, and the judge subsequently issued his decision. 7 FMSHRC 1401.

<sup>3/</sup> "Union business" is an excused unpaid leave of absence to participate in union activities provided for in Article XVII of the National Bituminous Coal Wage Agreement of 1981 ("Contract"). See Stipulations of Fact, Exhibit A (July 22, 1985).

In concluding that Consol discriminated against Truex by denying him the six and one-half hours pay, the judge cited section 103(f)'s provision that "a representative authorized by his miners shall be given an opportunity to accompany the ... [inspector] during the physical inspection of any coal ... mine ... for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine." Noting that the parties did not dispute "that the post-inspection conference which ... Truex attended was a conference within the meaning of section 103(f) of the Act ...", the judge concluded that in light of the language of the statute, miners, not mine operators, were given the right to authorize or designate miner representatives for the purpose of participating in the section 103(f) conferences. 7 FMSHRC at 1403-04. Accordingly, the judge held that Consol's action "in denying [Truex] the statutory right to act as the 'authorized' representative of miners under section 103(f) without in effect compelling him to first declare himself to be on union business" was discriminatory. 7 FMSHRC at 1404. Further, the judge concluded that the effect of Consol's discriminatory action was to require Truex to lose six and one-half hours' pay for serving as the authorized representative of miners. 7 FMSHRC at 1404.

On review, Consol contends that the judge erred in finding that it violated section 103(f) and discriminated against Truex in violation of section 105(c)(1) of the Act. Consol raises a number of arguments in support of this contention. Consol argues that under the circumstances presented the Union could not insist on designating Truex as the miner representative and that Consol could comply with section 103(f) by offering to permit one of the other 130 hourly employees to participate in the conference as a representative of miners. Consol emphasizes that at the time Truex notified management that he was the representative, the MSHA inspector had not arrived and was not expected for about one and one-half hours. <sup>4/</sup> Consol asserts that its duty under section 103(f) does not arise until such time as the MSHA inspection activity begins and that Truex's request constituted an impermissible infringement on management's work assignment prerogatives. Consol also asserts that the Union failed to comply with the requirements of 30 C.F.R. Part 40 with respect to filing information identifying the representative of miners and that this failure entitled Consol to follow past practice and provide any one of the miners the opportunity to participate as the miner representative. Finally, Consol contends that once Truex elected to go on "union business" he was no longer under the direction and control of Consol, and therefore Consol had no obligation to assign work to him or to pay him for the remainder of the shift.

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<sup>4/</sup> Consol asserts that MSHA Inspector Mackey violated the provisions of section 110(e), 30 U.S.C. § 820(e), prohibiting advance notice of inspections, when he telephoned Olzer and informed Olzer that he would be at the mine the next morning to review the hearing conservation plan. Although Consol contends the judge erred in failing to consider this

(footnote continued)

In response, the Secretary argues that pursuant to section 103(f) it is the right of the miners to designate a representative to participate in inspections and conferences, with no loss of pay for an employee-representative. The Secretary notes that Olzer was informed that Truex was the representative of miners for the conference at issue. Therefore, the Secretary contends that Consol's assertion that any of the 130 miners could have served as the authorized representative of miners is erroneous. According to the Secretary, once Consol was notified that Truex was the miners' designated representative, Consol was required by the statute to afford him an opportunity to participate in the meeting without a loss in pay.

For the reasons that follow, we conclude that the judge correctly found that, in the circumstances of this case, Consol discriminated against Truex in violation of section 105(c)(1) of the Act.

Under the Mine Act, a complaining miner establishes a prima facie case of discrimination by proving he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds sub. nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-818 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was not motivated in any part by protected activity. Robinette, 3 FMSHRC at 818 n. 20. Thus, Truex must first show that his attempt to attend the conference with Inspector Mackey was protected under the Act. Therefore, we first consider the rights conferred upon miners by section 103(f). We emphasize at the outset, however, that the parties have stipulated that the meeting with Inspector Mackey was "the type of activity giving rise to [miner] participation rights under section 103(f) of the Act." Stipulation 31. We are constrained in this case by the parties' stipulations and our decision is restricted solely to the facts presented.

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Footnote 4 end.

argument, the issue was not raised before the judge. Consol advances it for the first time on review. Absent a showing of good cause, section 113(d)(2)(A)(iii) of the Mine Act precludes our review of questions of law and fact not presented to the judge. 30 U.S.C. § 823(d)(2)(A)(iii). Jones & Laughlin Steel Corp., 5 FMSHRC 1209, 1212 (July 1983). Such good cause has not been demonstrated. Consequently, the "advance notice" issue is not before us and will not be addressed.

Section 103(f) affords to both representatives of operators and to representatives of miners the right to accompany the MSHA inspector during his "physical inspection of [the]... mine" and to aid in pre- or post-inspection conferences. Further, participation by the representative of miners is compensable. Congress recognized the important function served by such rights. The Senate Report stated, "It is the Committee's view that [participation in inspections and pre- and post-inspection conferences] will enable miners to understand the safety and health requirements of the Act and will enhance mine safety and health awareness." S. Rep. No. 181, 95th Cong., 1st Sess. 28-29 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong. 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 616-17 (1978) ("Legis. Hist."). See also Magma Copper Co., 1 FMSHRC 1948, 1951-52 (December 1979), aff'd, Magma Copper Co. v. FMSHRC, 645 F.2d 694 (9th Cir. 1981), cert. denied, 454 U.S. 940 (1981).

The judge found that "it is the miners and not the mine operator, who authorize or designate a representative for the purpose of participating in ... a [post-inspection] conference. There is no statutory ambiguity on this point and the plain meaning must prevail." 7 FMSHRC at 1404. We agree. The language of section 103(f), providing that "a representative authorized by his miners shall be given an opportunity to accompany the Secretary", unambiguously provides that miners possess the right to choose their representative for section 103(f) inspections and pre- and post-inspection conferences. (Emphasis added). See also Leslie Coal Mining Co. v. Secretary of Labor, 1 FMSHRC 2022, 2027 (December 1979) (ALJ).

The undisputed record evidence establishes that Truex was selected by the miners to serve as their representative for the meeting at issue. The president of the Union local, Lipinski, assigned Truex to serve as the miners' representative at the meeting with Inspector Mackey. On the morning of the meeting, Truex informed Olzer that he had been designated as the miners' representative for the meeting with the inspector. Consol does not dispute that, for the purpose of the meeting, Truex was designated by the miners as their authorized representative. See Stipulation 34. The parties agree that had Truex proceeded to work with his regular crew, it is likely that he would not have been notified of the inspector's arrival nor have been available to attend the conference. Stipulation 17. Further, Consol does not dispute that Truex understood this to be the case and went on "union business" only to be able to act as the representative of miners at the meeting. Stipulation 33. Consequently, it is clear that Consol's refusal to either agree to notify Truex at his underground work station of the inspector's arrival and allow him to leave to attend the meeting or to reassign him work in an area from which he could have easily attended the meeting effectively denied miners their choice of representative at the conference. Furthermore, as explained below, the miners' choice of Truex as their representative rested on reasonable grounds and would have caused no unacceptable disruption in the work place.

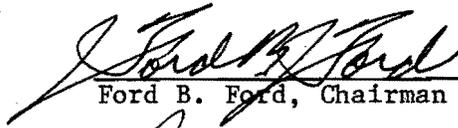
Consol's argument that the miners' section 103(f) rights, if any, arose when the inspector arrived on mine property is not well taken on this record. The purpose of section 103(f) is to enhance miner understanding and awareness of the health and safety requirements of the Act. The fact that section 103(f) protects the miner representative, who is also an employee of the operator, from a loss in pay in exercising his section 103(f) rights evidences Congressional recognition that an operator would be required to make modifications in work assignments to permit miner representatives to exercise section 103(f) rights. Here, Consol was aware that an MSHA inspector would be arriving for a meeting to review a hearing conservation plan. Consol was also aware that Truex was familiar with the plan and had been designated by the miners to participate as their representative in the review of the plan. Nevertheless, upon being notified that Truex was the representative of miners, Olzer directed Truex to proceed underground with his regular crew. Truex indicated his willingness to do so, but asked that he be notified when the inspector arrived. This request was refused. Olzer further refused Truex's request that he be permitted to work, until the inspector arrived, in an area that would have allowed him to be readily available for the meeting. Under these circumstances, Truex's requests rather than Olzer's responses reflected the reasonable work adjustments required under section 103(f) to fully effectuate that section's participation rights.

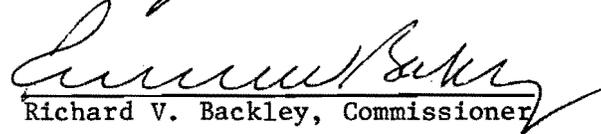
Olzer's violative refusal caused Truex, if he was to fulfill his statutory role as a representative of the miners, to declare himself on "union business". Accordingly, at the time that Truex invoked the Wage Contract right, Consol already had acted in violation of section 105(c)(1) interfering with Truex's section 103(f) rights. Thus, Consol's attempt to use the Contract as a defense is irrelevant and Consol is liable for payment of the six and one-half hours of wages Truex would have earned absent its violation.

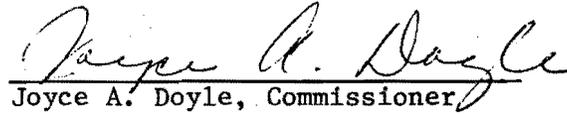
Finally, we are not persuaded that the Union's failure to file information required by 30 C.F.R. sections 40.2(a) and 40.3 regarding the identification of representatives of miners defeats Truex's claim here. In Consolidation Coal Co. v. Secretary of Labor and United Mine Workers of America, 3 FMSHRC 617 (March 1981), the Commission held that the failure to file as a representative of miners under Part 40 did not per se entitle an operator to deny an individual walkaround participation rights. 3 FMSHRC at 619. The Commission recognized that "In a particular situation, absent filing, an operator may in good faith lack a reasonable basis for believing that a person is in fact an authorized representative of miners." Id. Here, however, as the judge noted and as the stipulations establish, Consol did not question that Truex was, in fact, the designated representative of miners for the conference at issue. Whatever implications might result in some other context from a failure to file under Part 40 need not be resolved in this case.

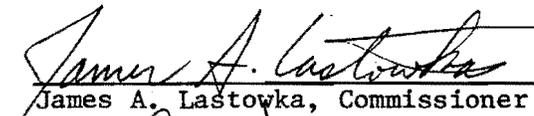
Consequently, we conclude that by preventing Truex from acting as a representative of miners without first declaring himself to be on "union business" and thus incurring a loss of pay, Consol denied Truex the opportunity to exercise his 103(f) rights and thereby discriminated against Truex in violation of section 105(c)(1).

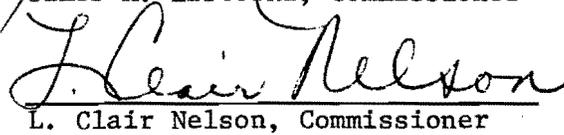
Accordingly, we affirm the decision of the judge.

  
Ford B. Ford, Chairman

  
Richard V. Backley, Commissioner

  
Joyce A. Doyle, Commissioner

  
James A. Lastowka, Commissioner

  
L. Clair Nelson, Commissioner

Distribution

Karl T. Skrypak, Esq.  
Consolidation Coal Company  
1800 Washington Road  
Consol Plaza  
Pittsburgh, Pennsylvania 15241

Mary Griffin, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
4015 Wilson Blvd.  
Arlington, Virginia 22203

Administrative Law Judge Gary Melick  
Federal Mine Safety & Health Review Commission  
5203 Leesburg Pike, Suite 1000  
Falls Church, Virginia 22041

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1730 K STREET NW, 6TH FLOOR  
WASHINGTON, D.C. 20006  
September 26, 1986

LOCAL UNION 1609, DISTRICT 2, :  
UNITED MINE WORKERS OF AMERICA :  
 :  
v. : Docket No. PENN 84-158-C  
 :  
GREENWICH COLLIERIES, DIVISION :  
OF PENNSYLVANIA MINES :  
CORPORATION :

BEFORE: Backley, Doyle, Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This compensation proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982), mirrors the issues raised in Loc. U. 1889, Dist. 17, UMWA v. Westmoreland Coal Co., Docket No. WEVA 81-256-C, decided this same date. At issue is whether miners idled following an underground explosion are entitled to one-week compensation under the provisions of the third sentence of section 111 of the Mine Act. 1/ Commission Administrative Law Judge George A. Koutras

1/ The first three sentences of section 111 of the Mine Act state:

[1] 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] of this [Act], 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. [2] 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. [3] 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 [Act] 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. ...

30 U.S.C. § 821 (sentence numbers and emphasis added).

dismissed the compensation claim of the United Mine Workers of America ("UMWA") on two grounds: (1) that the miners had been idled due to a section 103 order of withdrawal, not due to a subsequently issued section 107(a) imminent danger order of withdrawal; and (2) that the section 107(a) order failed to allege a violation of a mandatory standard. 6 FMSHRC 2465 (October 1984)(ALJ). For the reasons set forth in our decision in Westmoreland, supra, we reverse and remand.

The facts are not in dispute. An explosion occurred at about 5:00 a.m., February 16, 1984, in the No. 1 underground coal mine of Greenwich Collieries ("Greenwich") located in Indiana County, Pennsylvania. At 7:00 a.m. that same morning an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA"), Gary Raisbough, issued a section 103(j) withdrawal order, which covered the entire mine. 2/ The section 103(j) order stated:

A methane ignition and/or explosion has occurred at approximately 5:00 a.m. in and around the active D-5 (037) working section. Three miners who were working in the D-3 section are not accounted for. The following persons are permitted to enter or remain in the mine for the purpose of rescue operations: State and MSHA officials, company officials and UMWA personnel who are necessary to conduct the rescue operations.

2/ Section 103(j) of the Mine Act states:

Accident notifications rescue and recovery activities

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.

30 U.S.C. § 813(j)(emphasis added). Orders issued pursuant to section 103(j) or section 103(k) of the Mine Act, 30 U.S.C. § 813(k), are commonly known as "control orders" since they are the means by which the Secretary may assume initial control of a mine in the event of an accident in order to protect lives, initiate rescue and recovery operations, and preserve evidence.

At 10:15 a.m. that morning MSHA Inspector Michael Bondo issued a section 107(a) imminent danger withdrawal order, which also covered the entire mine. 3/ The section 107(a) order provided:

An underground mine explosion has occurred in this mine. This order is issued to assure the safety of any persons in the mine until an examination is made to determine if the entire mine is safe.

At 2:00 p.m. that afternoon the section 103(j) control order was modified to a section 103(k) control order. 4/

As a result of the mine explosion, three miners were killed and several others were injured. The section 107(a) order was not terminated until April 30, 1984. On February 25, 1984, while the mine was

3/ Section 107(a) of the Mine Act provides:

Procedures to counteract dangerous conditions

(a) Withdrawal order

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) of this [Act], 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] of this [Act] or the proposing of a penalty under section [110] of this [Act.]

30 U.S.C. § 817(a).

4/ Section 103(k) of the Mine Act states:

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.

30 U.S.C. § 813(k).

still closed, MSHA commenced the underground phase of its examination into the causes of the explosion. On March 20, 1984, MSHA also conducted in the mine a "saturation" inspection, which resulted in the issuance of 59 orders of withdrawal to Greenwich pursuant to section 104(d)(1) of the Mine Act. 30 U.S.C. § 814(d)(1). In May 1984, the UMWA filed two complaints with the Commission seeking one-week compensation for the miners' idlement: in Docket No. PENN 84-158-C, the case now pending on review, the UMWA based its claim on the section 107(a) imminent danger order; in Docket No. PENN 84-159-C, the claim was premised on the later section 104(d) orders of withdrawal. The complaints were assigned to and consolidated for hearing by Judge Koutras.

On October 18, 1984, Judge Koutras issued a summary decision dismissing both of the UMWA's compensation complaints. With respect to Docket No. PENN 84-159-C, he concluded that the UMWA could not show, as a necessary prerequisite to one-week compensation under section 111, that the miners had been idled "due to" the section 104(d) orders because the miners were idled already by the previous section 103 and section 107 orders. 6 FMSHRC at 2476-77. Concerning Docket No. PENN 84-158-C, the judge stated, "[T]he condition precedent for the awarding of a week's compensation in these circumstances is that the mine is idled by the issuance of a § 107(a) order which cites a violation." 6 FMSHRC at 2477. He found that the mine was closed by and the miners idled due to the section 103 order, not the subsequently issued section 107(a) imminent danger order, and noted that the latter order did not cite a violation of a standard on its face. 6 FMSHRC at 2477-78. The judge also denied the UMWA's request that he retain jurisdiction of the complaint pending the outcome of MSHA's investigation into the causes of the mine explosion. 6 FMSHRC at 2478. Based on these findings, the judge dismissed the complaint.

Subsequently, the UMWA petitioned for review only as to Docket No. PENN 84-158-C. The Commission directed review and heard consolidated oral argument in this matter and two other compensation cases decided this date, Westmoreland, supra, and loc. U. 2274, Dist. 28, UMWA v. Clinchfield Coal Co., Docket No. VA 83-55-C.

While this matter was pending on review, MSHA's investigation into the causes of the explosion continued. In view of our disposition of this proceeding, it is necessary to note briefly certain procedural developments relevant to MSHA's investigation. Between March 27 and April 27, 1984, MSHA had obtained from 66 persons sworn statements concerning the possible causes of the explosion. On March 29, 1985, MSHA issued Greenwich five section 104(d)(1) withdrawal orders citing violations of 30 C.F.R. §§ 75.301, 75.303(a), 75.316 and 75.322, mandatory safety standards dealing with ventilation and preshift examination requirements. Each order noted: "This [cited] condition was observed during the investigation of a multiple fatal mine explosion ... on February 16, 1984." The orders were terminated on the day that they were issued. Greenwich contested the five orders and proceedings before the Commission ensued. Docket Nos. PENN 85-188-R through PENN 85-192-R & PENN 86-33.

Subsequently, in connection with the present compensation proceeding, the UMWA transmitted to the Commission copies of the five section 104(d)(1) withdrawal orders, and requested a remand of the compensation proceeding to the judge to allow him to rule as to whether the allegations of violation contained in the section 104(d)(1) orders established the required nexus between the section 107(a) imminent danger order and underlying violations of mandatory standards. By order dated June 12, 1985, the Commission denied the motion for remand, observing that the judge had already "rejected the contention that subsequently issued 104 orders may serve as a basis for an award of compensation under the circumstances presented in this case."

On September 6, 1985, the Secretary issued his final Report of Investigation regarding the explosion. In essence, the report concluded that the explosion was caused by a dangerous accumulation of methane ignited by electrical arcing. The report also listed as "conditions and practices ... contribut[ing] to the explosion" the five violations cited in the section 104(d)(1) orders issued in March 1985. MSHA, U.S. Dept. of Labor, Report of Investigation, Underground Coal Mine Explosion, Greenwich Collieries No. 1 Mine, etc. 68-69 (1985). The Commission permitted the UMWA to submit a supplemental brief in the present compensation proceeding discussing the report's impact, if any, on the issues presented.

Meanwhile, Greenwich's separate contest of the five section 104(d) withdrawal orders had been assigned for hearing by Commission Administrative Law Judge Roy J. Maurer. On July 14, 1986, Judge Maurer issued an order granting Greenwich partial summary judgment. 8 FMSHRC 1105 (July 1986) (ALJ). The judge vacated the section 104(d)(1) orders "because they were not issued based on a finding by an MSHA inspector of an existing violation observed or detected during an inspection, but rather are based on an investigation of pre-existing, terminated violations...." 8 FMSHRC at 1107. The judge modified the orders to section 104(a) citations, 30 U.S.C. § 814(a), holding that "under the totality of the circumstances" they had been issued "'with reasonable promptness'" as required under that provision. 8 FMSHRC at 1107. The judge indicated that further proceedings on these modified citations would commence. On August 22, 1986, however, we granted petitions for interlocutory review filed by the Secretary and the UMWA and stayed further proceedings before Judge Maurer. The issues presented on interlocutory review concern only the judge's determination that the orders were not properly issued under section 104(d)(1).

In Westmoreland, issued this same date, we have addressed thoroughly the proper interpretation of section 111. The material issues presented here are identical to the issues addressed and resolved in Westmoreland and, accordingly, the rationale of the latter decision is controlling.

For the reasons stated in Westmoreland, slip op. at 7-11, the issuance of the initial section 103 control order did not preclude, for safety or compensation purposes, the subsequent issuance of the section 107 imminent danger order. The orders had concurrent operation and effect. For purposes of the third sentence of section 111, the mine was

closed by and the miners were idled due to the subsequent section 107(a) order, and that order may operate as a valid prerequisite to the UMWA's one-week compensation claim. We reverse the judge's findings to the contrary.

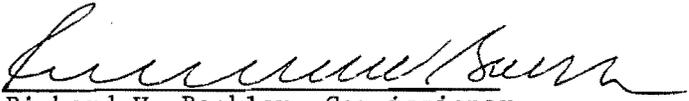
For the reasons stated in Westmoreland, slip op. at 11-12, we also reverse the judge's determination that in order to trigger entitlement to one-week compensation a section 107(a) order must itself allege a violation of a mandatory standard. As we concluded in Westmoreland, although an imminent danger order may allege or be modified later to allege a violation, allegations of violation subsequently cited by MSHA in section 104 citations or orders, once admitted or found, also may supply the necessary nexus between the imminent danger order and an underlying violation of a mandatory standard. Westmoreland, slip op. at 13-14.

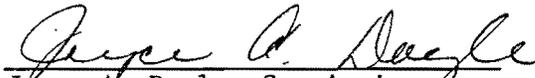
As discussed above, MSHA issued and Greenwich has contested five section 104(d)(1) orders alleging violations that, allegedly, contributed to the methane ignition and explosion. Docket Nos. PENN 85-188-R, etc. As noted, the presiding judge in that separate matter vacated those orders on procedural grounds and modified them to section 104(a) citations. The validity of the orders -- but not any allegation of violation contained in them -- is now pending before us in a separate proceeding on interlocutory review. In the present case, the UMWA contends that these alleged violations supply the required nexus with the imminent danger order for purposes of one-week compensation under the third sentence of section 111.

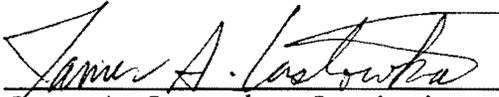
We held in Westmoreland that the precise form in which MSHA alleges a violation is not controlling for compensation purposes. Westmoreland, slip op. at 11-14. Therefore, the resolution of the procedural issue presented to the Commission on interlocutory review in Docket Nos. PENN 85-188-R, etc., will not directly affect the UMWA's claim in this compensation proceeding that the violations provide the required nexus. The UMWA's assertion of nexus, however, could be affected by the ultimate resolution of the merits of the violations themselves in Docket Nos. PENN 85-188-R, etc.

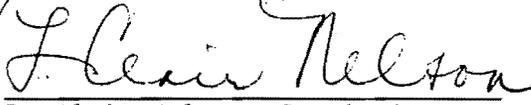
Thus, this compensation proceeding is remanded to Judge Koutras with instructions to hold the UMWA's complaint in abeyance pending final administrative resolution of the merits of the alleged violations in Docket Nos. PENN 85-188-R, etc. Cf. Loc. U. 1889, Dist. 17, UMWA v. Westmoreland Coal Co., 5 FMSHRC 1406, 1410-13 (August 1983). Upon final disposition with respect to the merits of the alleged violations, Judge Koutras shall then afford the parties the opportunity to litigate the question of the nexus, if any, between any violations and the issuance of the section 107(a) imminent danger order.

For the foregoing reasons, the judge's decision is reversed and this matter is remanded for further proceedings consistent with this opinion. 5/

  
Richard V. Backley, Commissioner

  
Joyce A. Doyle, Commission

  
James A. Lastowka, Commissioner

  
L. Clair Nelson, Commissioner

5/ Chairman Ford did not participate in the consideration or disposition of this matter.

Distribution

John T. Scott, Esq.  
Timothy Biddle, Esq.  
Crowell & Moring  
1100 Connecticut Ave., N.W.  
Washington, D.C. 20036

Earl R. Pfeffer, Esq.  
United Mine Workers of America  
900 15th St., N.W.  
Washington, D.C. 20005

Debra Feuer, Esq.  
Ann Rosenthal, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
4015 Wilson Blvd.  
Arlington, Virginia 22203

Administrative Law Judge George Koutras  
Federal Mine Safety & Health Review Commission  
5203 Leesburg Pike, Suite 1000  
Falls Church, Virginia 22041

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 26, 1986

LOCAL UNION 2274, DISTRICT 28, :  
UNITED MINE WORKERS OF AMERICA :  
: v. : Docket No. VA 83-55-C  
: CLINCHFIELD COAL COMPANY :

BEFORE: Backley, Doyle, Lastowka, and Nelson, Commissioners

## DECISION

BY THE COMMISSION:

In this compensation proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982), the issue presented is whether miners idled following an underground mine explosion are entitled to one-week compensation pursuant to the third sentence of section 111 of the Mine Act. 1/ Former Commission Administrative Law

1/ The first three sentences of section 111 provide:

### Entitlement of miners to full compensation

[1] 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] of this [Act], 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. [2] 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. [3] 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 [Act] 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. ...

30 U.S.C. § 821 (sentence numbers and emphasis added).

Judge Charles C. Moore, Jr., denied the compensation claim filed by the United Mine Workers of America ("UMWA"), holding that the section 107(a) order of withdrawal that he determined had idled the miners failed to allege, and was not modified to allege, a violation of a mandatory health or safety standard. 6 FMSHRC 1782 (July 1984)(ALJ). In light of our decision this date in Loc. U. 1889, Dist. 17, UMWA v. Westmoreland Coal Co., Docket No. WEVA 81-256-C, we reverse and remand.

The compensation claim at issue arose following an underground explosion that occurred at Clinchfield's McClure No. 1 underground coal mine in Dickenson County, Virginia, on June 21, 1983. On the morning of June 22, 1983, at 3:42 a.m., an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA"), Al Castenedo, issued a withdrawal order, pursuant to section 103(k) of the Mine Act, that affected the entire mine. <sup>2/</sup> The withdrawal order stated:

A fatal mine explosion has occurred in the 2 Left active section. This order is issued to assure the safety of any person in the coal mine until an examination or investigation is made to determine that the mine is safe to work. Only those persons selected from the company, state and miners representatives, officials and other persons who are deemed by MSHA to have information relevant to the investigation may enter or remain in the affected area.

At 4:00 a.m. the same morning, the inspector issued a second withdrawal order. This order, issued pursuant to section 107(a) of the Act, cited the existence of an imminent danger. It also covered the entire mine. The withdrawal order stated:

<sup>2/</sup> Section 103(k) states:

Safety orders; recovery plans

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.

30 U.S.C. § 813(k). Orders issued pursuant to section 103(k) or section 103(j), 30 U.S.C. § 813(j), are commonly referred to as "control orders" since they are the means by which the Secretary may assume initial control of a mine in the event of an accident, in order to protect lives, initiate rescue and recovery operations, and preserve evidence.

A fatal mine explosion has occurred in the 2 Left active section. This order shall remain in effect until all the conditions, practices and causes of the explosion have been corrected. [3/]

The section 107(a) imminent danger order was terminated on July 18, 1983, and on September 30, 1983, the UMWA filed its claim for one-week compensation based on the imminent danger withdrawal order and on alleged violations of mandatory standards found by MSHA inspectors during their subsequent investigation of the explosion.

In an unreported order issued on December 16, 1983, the administrative law judge denied Clinchfield's motion to dismiss the UMWA's compensation claim. The judge rejected Clinchfield's argument that the miners already had been idled by the initial section 103 "control" order and, therefore, could not have been idled by the section 107(a) imminent danger order as required under the third sentence of section 111. Noting that compensation under the third sentence of section 111 could be initiated only by an order issued pursuant to sections 104 or 107 of the Mine Act, the judge concluded that the section 103 order was irrelevant to the UMWA's claim under the third sentence of section 111. He reasoned that the subsequent section 107(a) order was like "a second padlock on the door," which prevented the miners from entering the mine just as the first order had withdrawn them initially. However, the judge concluded that, for purposes of the one-week compensation claim, the idlement must result from "an order which charges a violation of the health or safety standards." (Emphasis added.) The judge retained

3/ Section 107(a) provides:

Procedures to counteract dangerous conditions

(a) Withdrawal orders

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) of this [Act], 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 exists. The issuance of an order under this subsection shall not preclude the issuance of a citation under section [104] of this [Act] or the proposing of a penalty under section [110] of this [Act.]

30 U.S.C. § 817(a).

jurisdiction in order to determine "[w]hether MSHA, after completing its investigation can effectively modify the imminent danger order or take some other action which would allow the miners to prevail in this case." 4/

In a summary decision issued July 23, 1984, the judge denied the UMWA's compensation claim. Taking judicial notice of MSHA's official accident investigation report, and expressing surprise that MSHA apparently had given no thought to modifying the section 107(a) order to allege violations of mandatory standards, the judge concluded:

The mine was closed because an inspector thought an imminent danger existed not because he thought there was "a failure of the operator to comply with any mandatory health or safety standards." The fact that the explosion that led to the order was actually, in accordance with my assumptions, caused by the violations does not affect the fact that the inspector did not issue the order "for a failure of the operator to comply with ... safety standards."

6 FMSHRC at 1784.

We granted the UMWA's petition for discretionary review, permitted the Secretary of Labor to file an amicus curiae brief, and heard consolidated oral argument in this matter and two other compensation cases decided this date, Westmoreland, supra, and Loc. U. 1609, Dist. 2, UMWA v. Greenwich Collieries, Div. of Pennsylvania Mines Corp., Docket No. PENN 84-158-C. We now reverse.

In Westmoreland we examine thoroughly the language, structure, and purposes of section 111, and its third sentence in particular. The material issues presented in the instant matter are identical to issues resolved in Westmoreland and that decision, accordingly, controls our disposition here.

For the reasons stated in Westmoreland, slip op. at 7-11, we agree in result with the judge that the initial section 103(k) control order did not preclude, for safety or compensation purposes, the subsequent issuance of the section 107(a) imminent danger withdrawal order. The orders had concurrent operation and effect. For purposes of the third sentence of section 111, the mine was closed by and the miners were idled due to the subsequent section 107(a) order.

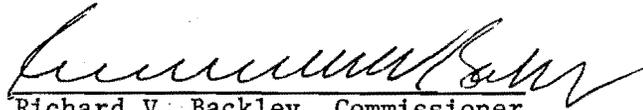
4/ On March 26, 1984, MSHA issued one section 104(d)(1) citation and four section 104(d)(1) withdrawal orders, three of which alleged that the cited violations had resulted in a methane ignition, which caused the explosion on June 21, 1983, at the McClure mine. Clinchfield did not contest the citation or orders and paid \$47,500 in civil penalties. (No issues are presented in this proceeding regarding the validity of the citation or orders.)

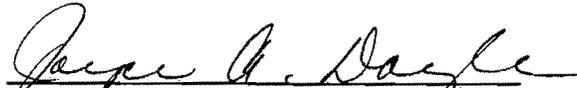
Further, for the reasons stated in Westmoreland, slip op. at 11-13, we reverse the judge's determination that a section 107(a) order, whether as issued or as subsequently modified, must itself allege a violation of a mandatory standard in order to trigger entitlement to one-week compensation. We conclude, in accordance with Westmoreland, that allegations of violation cited subsequently by MSHA may supply the required nexus under section 111 between the section 107(a) imminent danger order and an underlying violation of a mandatory standard. Westmoreland, slip op. at 13-14.

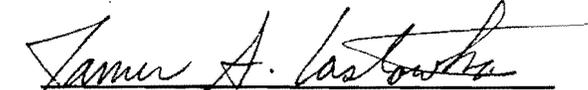
As noted above, Clinchfield did not contest the subsequently issued section 104(d)(1) citation and three section 104(d)(1) withdrawal orders. Instead, it paid the penalties proposed by the Secretary. Both the Secretary and the UMWA have asserted that those allegations of violation cited in the section 104(d) citation and orders supply the required causal nexus between the imminent danger order and an underlying violation for purposes of entitlement to one-week compensation. That question now remains to be determined in this matter.

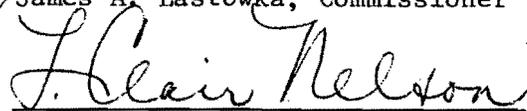
Accordingly, we remand this proceeding to the Chief Administrative Law Judge for assignment to himself or another Commission administrative law judge to determine whether the violations referenced above provide the required causal nexus between the section 107(a) imminent danger order and an underlying violation of a mandatory standard. If such a relationship is found, the presiding judge shall take appropriate action to identify affected miners and determine the amount of compensation due to each miner.

For the foregoing reasons, the judge's decision is reversed. This matter is remanded to the Chief Judge for further proceedings consistent with this decision. 5/

  
Richard V. Backley, Commissioner

  
Joyce A. Doyle, Commissioner

  
James A. Lastowka, Commissioner

  
L. Clair Nelson, Commissioner

5/ Commissioner Ford did not participate in the consideration or disposition of this case.

Distribution

John T. Scott, Esq.  
Timothy Biddle, Esq.  
Crowell & Moring  
1100 Connecticut Ave., N.W.  
Washington, D.C. 20036

Earl R. Pfeffer, Esq.  
United Mine Workers of America  
900 15th St., N.W.  
Washington, D.C. 20005

Debra Feuer, Esq.  
Ann Rosenthal, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
4015 Wilson Blvd.  
Arlington, Virginia 22203

Chief Administrative Law Judge Paul Merlin  
Federal Mine Safety & Health Review Commission  
1730 K Street, N.W., Suite 600  
Washington, D.C. 20006

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1730 K STREET NW, 6TH FLOOR  
WASHINGTON, D.C. 20006  
September 26, 1986

LOCAL UNION 1889, DISTRICT 17, :  
UNITED MINE WORKERS OF AMERICA :  
: :  
v. : Docket No. WEVA 81-256-C  
: :  
WESTMORELAND COAL COMPANY :

BEFORE: Backley, Doyle, Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This proceeding under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982), raises important issues concerning the compensation provisions of section 111 of the Mine Act. 30 U.S.C. § 821. 1/ The United Mine Workers of America ("UMWA" or "Union") seeks

1/ The first four sentences of section 111 provide:

Entitlement of miners to full compensation

[1] 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] of this [Act], 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. [2] 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. [3] 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 [Act] 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

(footnote 1 continued)

compensation from Westmoreland Coal Company ("Westmoreland") pursuant to the third sentence of section 111 for an idlement of miners that the Union seeks to link to an imminent danger withdrawal order issued following an explosion at one of Westmoreland's underground coal mines. Former Commission Administrative Law Judge Richard C. Steffey dismissed the UMWA's compensation complaint, holding that: (1) for purposes of determining entitlement to compensation, the miners in question were not idled by the imminent danger order issued pursuant to section 107(a) of the Act but by a withdrawal order previously issued pursuant to section 103(j); 2/

Footnote 1 end.

by such closing, or for one week, whichever is the lesser.

[4] Whenever an operator violates or fails or refuses to comply with any order issued under section [103] ..., section [104] ..., or section [107] of this [Act], all miners employed at the affected mine who would have been withdrawn from, or prevented from entering, such mine or area thereof as a result of such order shall be entitled to full compensation by the operator at their regular rates of pay, in addition to pay received for work performed after such order was issued, for the period beginning when such order was issued and ending when such order is complied with, vacated, or terminated. ...

30 U.S.C. § 821 (sentence numbers and emphasis added).

2/ Section 103(j) provides:

Accident notification; rescue and recovery activities

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.

30 U.S.C. § 813(j) (emphasis added). Orders issued pursuant to section 103(j) or section 103(k), 30 U.S.C. § 813(k), are commonly referred to as "control orders" since, as discussed infra, they are the means by which the Secretary may take initial control of a mine in the event of an accident in order to protect lives, initiate rescue and recovery operations, and preserve evidence.

Section 107(a) provides:

Procedures to counteract dangerous conditions

(footnote 2 continued)

(2) even if the miners were idled by the section 107(a) order, that order did not allege nor was it modified to allege a violation of a mandatory health or safety standard, which the judge found was required under the third sentence of section 111; and (3) the violations of mandatory standards alleged in 13 subsequently issued section 104(d)(2) withdrawal orders could not constitute a "nexus" between the section 107(a) order and the violation of a mandatory standard. 6 FMSHRC 2192 (September 1984) (ALJ). For the reasons explained below, we conclude that the judge erred in his resolution of each of these questions and reverse and remand.

I.

Facts and Procedural History

The facts were stipulated by the parties and are set forth in the judge's Second Summary Decision. 6 FMSHRC at 2194-96. Briefly, an explosion occurred at approximately 3:30 a.m. on November 7, 1980, in Westmoreland's Ferrell No. 17 underground coal mine located in West Virginia. At 7:30 a.m. on November 7, Inspector Eddie White of the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a section 103(j) withdrawal order that applied to the entire mine. The section 103(j) order provided:

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

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Footnote 2 end.

(a) Withdrawal orders

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) of this [Act], 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] of this [Act] or the proposing of a penalty under section [110] of this [Act.]

30 U.S.C. § 817(a).

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.

One half-hour later, at 8:00 a.m., Inspector White issued a section 107(a) imminent danger withdrawal order also covering the entire mine. The order, which did not allege a violation of any mandatory health or safety standard, stated:

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

The bodies of the five miners were recovered on November 8, 1980, and the 2-South area of the mine was sealed off. Both withdrawal orders were modified on December 10, 1980, to cover "the seals and areas inby the seals." On July 15, 1982, twenty months after the explosion, MSHA issued 13 section 104(d)(2) withdrawal orders citing violations of mandatory standards based on sworn statements taken during MSHA's investigation of the mine explosion. <sup>3/</sup> The section 107(a) order was not modified to allege violations of mandatory standards, and was terminated on November 15, 1983.

3/ Section 104(d) provides:

Findings of violations; withdrawal order

(1) If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this [Act]. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith

(footnote 3 continued)

The litigation of this matter has followed a complicated course. Some of this history is described in the Commission's previous decision (see infra), and will not be repeated in full here. On February 5, 1981, the UMWA filed a complaint under section 111 of the Mine Act seeking compensation for the miners' idlement, which the Union attributed to the withdrawal orders issued on November 7 in the aftermath of the mine explosion. The UMWA's complaint, as later amended, sought, among other things, the limited compensation available under the second sentence of section 111 ("shift compensation") for the miners idled on the November 7 day shift, and one week's compensation under the third sentence of section 111 ("one-week compensation") for all of the idled miners.

On April 28, 1982, the judge issued a Summary Decision, in relevant part granting shift compensation for the miners idled on the November 7 day shift but dismissing without prejudice the Union's claim for one-week compensation on the grounds that the section 107(a) order did not allege a violation of a mandatory standard. 4 FMSHRC 773, 776-79, 784-88 (April 1982) (ALJ). The judge noted that there was "nothing to prevent UMWA from filing a complaint for a week of compensation under the third sentence of section 111 if and when MSHA does modify [the] outstanding imminent-danger order ... to allege one or more violations of the mandatory health and safety standards by Westmoreland." 4 FMSHRC at 789. The judge denied the UMWA's request that he retain jurisdiction of the case and defer final decision pending completion of MSHA's investigation into the causes of the mine explosion. 4 FMSHRC at 788-89. The UMWA filed with the Commission a petition for discretionary review, which was granted on June 6, 1982.

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Footnote 3 end.

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) of this section 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.

(2) If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine.

30 U.S.C. § 814(d).

The major question presented on review was whether the judge had erred in not retaining jurisdiction over the one-week compensation claim. The Commission concluded that he had erred, and remanded the case to the judge with instructions to hold the record open to permit the parties to make any appropriate motions or showings upon the completion of MSHA's investigation. Loc. U. 1889, Dist. 17, UMWA v. Westmoreland Coal Co., 5 FMSHRC 1406, 1410-13 (August 1983). The Commission noted the issuance of the 13 section 104(d)(2) orders in July 1982, but expressed no view at that time as to "whether these thirteen 104(d)(2) orders or any later modification of the 107(a) Order ... may provide the basis for [one-week] compensation under the third sentence of section 111." 5 FMSHRC at 1413.

In the consolidated notice of contest and civil penalty proceeding involving review of the 13 section 104(d)(2) orders (Docket Nos. WEVA 82-340-R, etc.), Judge Steffey vacated the orders, concluding that they had been improperly issued under section 104(d), but he upheld the assertions of violation underlying the vacated orders. In a later order approving settlement, the judge approved Westmoreland's agreement to pay civil penalties totalling \$38,000 for the violations alleged in the 13 vacated section 104(d) orders. 6 FMSHRC 1267 (May 1984)(ALJ).

In his decision on remand from the Commission in the compensation proceeding, the judge again denied the UMWA's claim for one-week compensation. The judge determined that the miners had been withdrawn by the section 103(j) order, not by the section 107(a) order issued one half-hour later, and that "[t]herefore, 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." 6 FMSHRC at 2201. The judge further concluded that even if the miners had been withdrawn by the section 107(a) order, it neither alleged at the time of its issuance, nor had it been modified prior to its termination to allege, a violation of a mandatory standard, another prerequisite, in the judge's view, for one-week compensation under section 111. 6 FMSHRC at 2202. Despite Westmoreland's payment of civil penalties in settlement of the underlying allegations of violation contained in the 13 vacated section 104(d) orders (supra), the judge opined that the orders could not "be said to allege violations as part of an imminent danger order because [the section 104(d) orders] could not have been issued in the first instance without a finding that the violation cited in the order did not cause an imminent danger." Id.

We granted the petition for discretionary review filed by the UMWA, and heard consolidated oral argument in this matter and two other similar compensation cases also decided this date, Loc. U. No. 2274, Dist. 28, UMWA v. Clinchfield Coal Co., Docket No. VA 83-55-C, and Loc. U. 1609, Dist. 2, UMWA v. Greenwich Collieries, Div. of Pennsylvania Mines Corp., Docket No. PENN 84-158-C.

## II.

### Disposition of Questions Presented

This case presents three major issues: (1) whether the issuance of a section 103(j) order precludes a subsequently issued section 107(a) order from serving as a necessary prerequisite for entitlement to one-week compensation under the third sentence of section 111; (2) whether a section 107(a) order must allege, or be modified prior to its termination to allege, a violation of a mandatory health or safety standard in order to trigger entitlement to one-week compensation; and (3) whether a subsequent allegation by the Secretary of a violation of a mandatory standard in a separate citation or order may provide the nexus between the issuance of the 107(a) order and an underlying violation.

These questions center around the meaning of a few key words in the third sentence of section 111 (n.1 supra): What are the relationships intended by the statutory references to a mine being closed "by" a section 104 or 107 order, the miners being idled "due to" such an order, and the order itself having been issued "for" a violation of a standard? 30 U.S.C. § 821 (emphasis added throughout). In our view, the meaning of these words becomes clear when they are viewed in the proper context of section 111 as a purposive whole.

#### A. The sequence of withdrawal orders

We turn first to the judge's conclusion that the miners had already been idled officially as a result of the prior issuance of the section 103(j) "control" order and, therefore, for purposes of entitlement to one-week compensation, could not have been idled as a result of the subsequent section 107(a) order as required for such entitlement under the third sentence of section 111.

Section 111 is remedial in nature and was not intended by Congress to be interpreted and applied narrowly. The key Senate Report on the bill that was enacted as the Mine Act states:

#### Miners['] entitlement resulting from closure orders

As the Committee has consistently noted, the primary objective of this Act is to assure the maximum safety and health of miners. For this reason, the bill provides at Section 11[1] that miners who are withdrawn from a mine because of the issuance of a withdrawal order shall receive certain compensation during periods of their withdrawal. This provision, drawn from the Coal Act, is not intended to be punitive, but recognizes that miners should not lose pay because of the operator's violations, or because of an imminent danger which was totally outside their control.

It is therefore a remedial provision which also furnishes added incentive for the operator to comply with the law. This provision will also remove any possible inhibition on the inspector in the issuance of closure orders.

S. Rep. No. 181, 95th Cong., 1st Sess. 46-47 (1977) ("S. Rep."), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 634-35 (1978) ("Legis. Hist.") (emphasis added). As the Commission has stated previously, "Section 111 is designed to promote safety and protect lives...." Loc. U. No. 781, Dist. 17, UMWA v. Eastern Assoc. Coal Corp., 3 FSHRMC 1175, 1178 (May 1981). The judge's formalistic emphasis on the sequencing of relevant withdrawal orders and his imputation of preclusive effect to the order issued first in time cannot be squared with the language, structure, and purpose of section 111 and other pertinent provisions of the Mine Act.

We have no difficulty with the proposition that only the specific types of withdrawal orders listed in each of the first four sentences of section 111 may serve as prerequisites for entitlement to the forms of compensation mentioned respectively in those sentences. Nevertheless, the focus of section 111 as a whole is on the operator's conduct as it relates to conditions in the mine -- not the chronology of the Secretary's official actions in response to mine accidents or emergencies. Moreover, section 111 contemplates in furtherance of safety that section 103 control orders and other relevant withdrawal orders have concurrent, rather than mutually exclusive, operation and effect.

Section 111 creates a graduated scheme of compensation tying enlarged compensatory entitlement to increasingly serious operator conduct. Thus, upon a mine closure and idlement attributable to the issuance of a section 103, 104, or 107 order, the limited shift compensation described in the first sentences of section 111 is awardable "regardless of the result of any review of such order...." 30 U.S.C. § 821. If, however, the closure and idlement is attributable to a section 104 or 107 order "issued ... for a failure of the operator to comply with any mandatory ... standard," the entitlement under the third sentence of section 111 is to one-week compensation. Id. Finally, and most seriously, if an operator fails to comply with a section 103, 104, or 107 order, the miners who otherwise would have been withdrawn are to be paid the full compensation specified in the fourth sentence of section 111 in addition to their regular pay, until such time as the order is complied with, vacated, or terminated. The primary emphasis that we discern in this scheme is upon what the operator has done, not on any expressed concern over the particular sequencing of the issuance of various types of withdrawal orders by the Secretary.

The decisions of this Commission and the predecessor Interior Board of Mine Operations Appeals ("Board") evidence consistent precedent that a prior idlement of miners, whether occurring as a result of the issuance of an initial control order or, involuntarily, because of emergency conditions, does not bar miners' entitlement pursuant to a subsequently issued withdrawal order.

Under the analogous compensation provisions of section 110(a) of the 1969 Coal Act, 30 U.S.C. § 801 *et seq.* (1976) (amended 1977), shift compensation was awardable for an idlement attributed to an order issued under section 104 of that Act and one-week compensation was available if the idlement was attributed to a section 104(c) withdrawal order issued for an "unwarrantable failure" to comply with a mandatory standard. 30 U.S.C. § 820(a) (1976) (amended 1977). Sections 103(e) & (f) of the 1969 Coal Act, 30 U.S.C. §§ 813(e) & (f) (1976) (amended 1977), were the control order provisions analogous to sections 103(j) & (k) of the Mine Act. In interpreting the meaning and interplay of these 1969 Coal Act provisions, in circumstances analogous to the present case, the Board held:

The miners in the instant case were officially withdrawn by the 103(f) [control] order. However, they were also officially withdrawn by the [subsequent] section 104(c) [unwarrantable failure withdrawal] orders. The language in section 110(a) of the Act allows compensation to miners who are "idled" by a 104(c) order. There is nothing in the language of that section to indicate that compensation for miners will not lie when there are two different orders of withdrawal in effect concurrently. Additionally, that section does not require the 104 order to be the first official one. Sequence ... is not the essence of the applicability of section 110(a).

Roscoe Page v. Valley Camp Coal Co., 6 IBMA 1, 6 (1976) (emphasis added). In addressing similar issues under the 1969 Coal Act, the Commission also adopted the approach that initial control orders and other subsequent compensation-qualifying withdrawal orders operated "concurrently." Peabody Coal Co., etc., 1 FMSHRC 1785, 1790 (November 1979).

In Loc. U. No. 781, etc. v. Eastern, *supra*, a compensation case arising under the Mine Act, the Commission applied the concept of "nexus" to determine the causative relationship between the operation of withdrawal orders and idlements. The Commission stated, "[S]ection 111 compensation is awardable only if there is a nexus between a designated withdrawal order and the miners' idlement ..., or between the underlying reasons for the idlement ... and the reasons for the order." 3 FMSHRC at 1178. The Commission defined "nexus" in terms of a "significantly substantial relationship" between idlement and withdrawal order "to support a section 111 award." *Id.* Rather than establishing an inflexible nexus requirement the Commission specifically recognized the possibility of "more complicated sequences of events or concurrent operation of causative factors." *Id.* (Emphasis added.) The Commission held: "In such cases, we will examine the relationship between the underlying reasons for the withdrawal and for the order, and will give balanced consideration both to the ...

compensatory character of section 111 and to the overall safety purposes of the 1977 Mine Act and section 111 itself." Id. The foregoing principles are determinative of the present issue.

In the present case, the initial section 103(j) control order and the subsequent section 107(a) imminent danger withdrawal order each played a particular role with respect to the overall safety concerns of the Mine Act and section 111 and the compensatory character of section 111. From the standpoint of safety, the section 103 order gave the Secretary immediate control of the mine, under the emergency circumstances of the explosion, in order to take whatever actions he deemed necessary in protecting lives and directing rescue and recovery operations. From a compensatory standpoint, that order (as the judge correctly concluded in his first summary decision) initiated whatever compensation was available under the first two sentences of section 111. The section 107(a) order, issued one half-hour later upon a finding of imminent danger, required the operator, for safety reasons, to withdraw the miners from the affected area until the Secretary determined that the imminent danger and its causes no longer existed. For compensation purposes, the imminent danger order initiated the possibility of entitlement under the third sentence of section 111. We find nothing in the statute or in its legislative history to suggest that an existing section 103 order precludes the issuance of a valid and effective section 107(a) order either for purposes of mine safety or compensation entitlement under the third sentence of section 111. 4/

4/ In Roscoe Page, supra, the Board spoke to similar effect in resolving analogous issues under the 1969 Coal Act:

Section 103(f) [control orders] and 104(c) [withdrawal] orders are designed to achieve different ends. Clearly, by its own language, section 103(f) operates to provide the inspector with emergency powers in the exigencies of a situation wherein there is a mine accident for the purpose of protecting the health and safety of persons in the coal mine. A section 104(c) order, in addition to protecting the health and safety of miners, operates to provide a sanction for a recalcitrant operator's unwarrantable failure to comply with the mandatory standards found in the Act and regulations. Further, a 104(c) order in combination with section 110(a), operates to provide compensation for miners forced to lose work due to this unwarrantable failure. The sequence of 103(f) and 104 orders bears no relationship to the manner in which sections 104 and 110(a) operate together. ... [T]he issuance of a 104(c) order, for purposes of section 110(a) [,] has the effect of officially idling the miners even though, in fact ... they have first withdrawn in compliance with a 103(f) order. Ergo, the miners in this matter were officially "idled" for the purposes of section 110(a) by the 104(c) orders of withdrawal upon their issuance notwithstanding the prior withdrawal required by the 103(f) order.

6 IBMA at 6-7.

We therefore conclude that the chronological sequence in which the section 103 and 107(a) orders were issued is not determinative of the miners' right to compensation under the third sentence of section 111. In light of the graduated compensation scheme of section 111, imputation of preclusive effect to the initial section 103 control order would effectively frustrate the obvious intent of Congress to provide for expanded one-week compensation beyond the more limited shift compensation available under the first two sentences of the section. Stated otherwise, we believe that Congress did not intend section 103 control orders, usually issued first in time under exigent circumstances, to have compensation-precluding effects. The focus, as stated above, is upon the conduct of the operator and the conditions in the mine, not the sequencing of MSHA enforcement activity.

The record in this matter is clear that the section 107(a) order was issued as the result of a finding of imminent danger, which required that the miners remain withdrawn until the imminent danger and its causes were determined to no longer exist. We agree with the judge that, for compensation entitlement under the first two sentences of section 111, the mine was closed "by" and the miners officially were idled "due to" the section 103(j) order. We conclude, however, that for compensation purposes under the third sentence of section 111, the mine also was closed "by" and the miners also officially were idled "due to" the section 107(a) imminent danger order of withdrawal. In short, the section 103 and 107 orders operated concurrently. We reverse the judge's findings to the contrary.

#### B. The violation of a mandatory standard

We next address the question of whether, as the judge held, the section 107(a) order itself must allege, or be modified to allege, the violation of a mandatory standard.

The third sentence of section 111 provides that a claim for one-week compensation comes into play when a mine is closed 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." 30 U.S.C. § 821 (emphasis added). The judge adopted a restrictive interpretation of the term "for", holding that the section 107(a) order as issued, or as subsequently modified prior to its termination, must itself allege the violation of a mandatory standard. On review, the UMWA contends that the language and the legislative history of sections 104(a), 107(a) and 111 permit the necessary allegation of violation of a mandatory standard to be cited under section 104 of the Mine Act independently from, and subsequent to, the issuance of a section 107(a) order. We agree.

The last sentence of section 107(a) (n.2 supra) expressly states that the issuance of an order under that subsection "shall not preclude the issuance of a citation under section 104...." 30 U.S.C. § 817(a). The legislative history of section 104(a) recognizes that occasions may occur "where a citation will be delayed because of the complexity of

issues raised by the violations, because of a protracted accident investigation, or for other legitimate reasons." S. Rep. 30, reprinted in Legis. Hist. 618. We note also that, as the key Senate Report points out, the overriding purpose of an imminent danger order is the immediate withdrawal of miners, and that, due to the dangerous conditions giving rise to the order, inspection or investigation of the area to determine the existence of any underlying violations may be delayed necessarily until long after the order was issued or until the imminent danger no longer exists. S. Rep. 38, reprinted in Legis. Hist. 626.

Thus, neither the statute nor the pertinent legislative history requires that for the purpose of one-week compensation the violative conditions causing or underlying the issuance of the section 107(a) order be cited in the order itself or its modification. Although it would have been procedurally possible, once the imminent danger and its causes no longer existed, for the Secretary to have modified the order pursuant to section 107(d), 30 U.S.C. § 817(d), and, upon completion of further investigation, to have cited violations under that modified order, we find no basis to conclude that a separately issued allegation of violation under section 104 is fatally defective in establishing the nexus between the withdrawal order and the violation of a mandatory standard.

We emphasize that section 111 is premised upon a congressional intent to expand rather than contract the compensation that was available under section 110(a) of the 1969 Coal Act. As noted, under the 1969 Coal Act, one-week compensation was available only for an idlement attributable to an unwarrantable failure order. A broader range of orders may trigger the same entitlement under the Mine Act. Further, the Senate Conference report on the bill that became the Mine Act reflects a broad interpretation of the word "for" by describing one-week compensation as being available "in the event the withdrawal order was the result of a failure of the operator to comply with a mandatory health or safety standard...." Conf. Rep. No. 461, 95th Cong., 1st Sess. 59 (1977), reprinted in Legis. Hist. 1337 (emphasis added).

Congress could have chosen words restricting the one-week compensation entitlement in section 111 to a designated order of withdrawal that specifically alleged a violation of a mandatory standard, but there is no indication, in the legislative history or in the final language of the section, that it wished to do so. We reverse the judge's holding that violation of a mandatory standard must be alleged in a section 107(a) order or in a modification of such order prior to its termination in order to initiate compensation under the third sentence of section 111. 5/

5/ We find Westmoreland's reliance on Billy F. Hatfield v. Southern Ohio Coal Co., 4 IBMA 259 (1975), aff'd sub nom. District 6, UMWA v. IBMA, 562 F.2d 1260 (D.C. Cir. 1977), to be misplaced. In Hatfield, a

(footnote 5 continued)

C. Violations of standards cited in the section 104(d) orders

Finally, we turn to the question of whether the allegations of violation of mandatory standards contained in the section 104(d) orders issued to Westmoreland could constitute a nexus with the section 107(a) order for compensation purposes. Although conceding that "several of those orders cite Westmoreland for violations which may have contributed to the explosion" (6 FMSHRC at 2198), the judge nevertheless concluded that those allegations of violation could not be linked to the section 107(a) order.

The UMWA contends that it is irrelevant to the question of compensation that the violations of mandatory standards were cited in section 104(d) orders, because the issue here is not the validity of those orders but whether the alleged violations were related to the mine explosion that led to the issuance of the section 107(a) order. Westmoreland notes that all of the orders were vacated and that the underlying violations were resolved in a civil penalty settlement. Westmoreland argues that no causal relationship exists between those violations and the section 107(a) order for purposes of the present proceeding.

We conclude that form in which the violation of a mandatory standard is cited -- whether in a section 104(d) citation or order or in a section 104(a) citation -- is not controlling for compensation purposes. As the judge correctly recognized in his Decision Approving Settlement, the allegations of violation of mandatory standards cited in the orders survived his vacation of the orders themselves. 6 FMSHRC at 1270. As

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Footnote 5 end.

case involving a one-week compensation claim under the 1969 Coal Act, the mine had been closed by an imminent danger order of withdrawal issued pursuant to section 104(a) of that Act. 30 U.S.C. § 814(a)(1976) (amended 1977). As already noted, under that statute, only a section 104(c) order of withdrawal for unwarrantable failure could trigger one-week compensation. The UMWA attempted to show that the section 104(a) imminent danger order actually had been based on a condition or practice resulting from the operator's unwarrantable failure to comply with a standard. The court affirmed the decision of the Board that the statute specifically limited one-week compensation to idlements attributable to orders issued pursuant to section 104(c). 562 F.2d at 1263-68. In our view, an important fact distinguishing Hatfield from the present issue is that in Hatfield the UMWA was attempting to usurp the prosecutory responsibility of the Secretary of the Interior with respect to issuance of a section 104(c) order, by alleging and attempting to prove unwarrantable failure, which could trigger compensation if appropriate. In the present case, the Secretary of Labor, as enforcer of the Act, has issued the requisite section 107(a) order capable of initiating one-week compensation and also has issued the underlying necessary allegations of violation .

we have indicated, the essential question is one of causality, not procedural format: Was the imminent danger order issued because of underlying conditions involving a violation of mandatory standards? We conclude that the allegations of violation of mandatory standards cited in the vacated section 104(d) orders could provide the causal nexus with the section 107(a) withdrawal order as required for compensation under the third sentence of section 111. The judge's settlement decision states that the violations were alleged in 13 withdrawal orders all issued on July 15, 1982, by an MSHA inspector on the basis of his examination of sworn statements obtained by MSHA investigators in December 1980, and pertain to conditions that the inspector found contributed to the mine explosion of November 7, 1980. 6 FMSHRC at 1269, 1270. In the settlement agreement, Westmoreland paid in full the proposed penalty assessments for five violations, and agreed to pay reduced penalties for the other eight violations. 6 FMSHRC at 1270-1274. Westmoreland's payment of civil penalties for these alleged violations established, for purposes of any proceeding under the Mine Act, that those violations of the Act occurred. See Old Ben Coal Co., 7 FMSHRC 205, 209 (February 1985); Amax Lead Company, 4 FMSHRC 975, 977-80 (June 1982).

Left unresolved, however, is the specific question of whether any of these charges of violation of mandatory standards in fact provide the necessary relationship to the section 107(a) order so as to initiate compensation under the third sentence of section 111. The judge's decision concerning the civil penalty criteria for each of the subsequently alleged violations concludes only that several of the violations may have contributed directly to the mine explosion, while others probably would not have contributed to the cause of the explosion. 6 FMSHRC at 1270-1274.

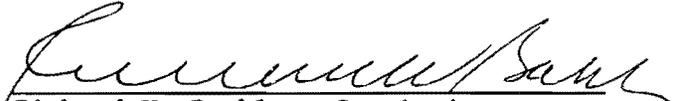
Because the relationship or nexus between the violations of mandatory standards and the imminent danger order is the critical issue on which statutory entitlement to one-week compensation hinges, we remand to the Commission's Chief Administrative Law Judge for further proceedings by him or by another judge. The assigned judge may reopen the record of this proceeding and take whatever further action is deemed necessary to determine whether any of the conditions involved in the violations of mandatory standards were sufficiently related to the mine explosion and the section 107(a) imminent danger order so as to constitute the required causal nexus. If such a relationship is determined, the judge shall take appropriate action to identify the affected miners and the amount of compensation due to each. 6/

6/ This case does not require us to resolve, and we intimate no views as to, issues concerning the technical requirements necessary for issuance of valid section 104(d) orders.

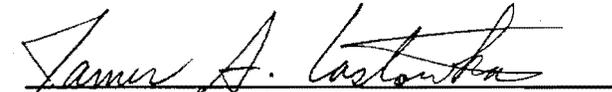
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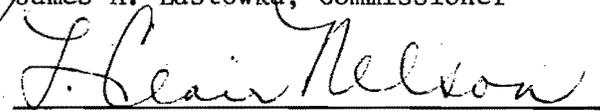
Conclusion

For the foregoing reasons, the judge's decision is reversed. This matter is remanded to the Chief Judge for proceedings consistent with this decision. 7/

  
Richard V. Backley, Commissioner

  
Joyce A. Doyle, Commissioner

  
James A. Lastowka, Commissioner

  
L. Clair Nelson, Commissioner

7/ Chairman Ford did not participate in the consideration or disposition of this case.

Distribution

John T. Scott, Esq.  
Timothy Biddle, Esq.  
Crowell & Moring  
1100 Connecticut Ave., N.W.  
Washington, D.C. 20036

Earl R. Pfeffer, Esq.  
United Mine Workers of America  
900 15th St., N.W.  
Washington, D.C. 20005

Debra Feuer, Esq.  
Ann Rosenthal, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
4015 Wilson Blvd.  
Arlington, Virginia 22203

Chief Administrative Law Judge Paul Merlin  
Federal Mine Safety & Health Review Commission  
1730 K Street, N.W., Suite 600  
Washington, D.C. 20006

ADMINISTRATIVE LAW JUDGE DECISIONS



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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2 SKYLINE, 10th FLOOR  
5203 LEESBURG PIKE  
FALLS CHURCH, VIRGINIA 22041

**SEP 9 1986**

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. CENT 86-49  
Petitioner : A.C. No. 03-01599-03501  
: :  
v. : No. 1 Mine  
: :  
R & S COAL COMPANY, :  
Respondent :

DECISION

Appearances: Max A. Wernick, Esq., Office of the Solicitor,  
U.S. Department of Labor, Dallas, Texas, for  
Petitioner; Coy J. Rush, Jr., Esq., Hixon,  
Cleveland & Rush, Paris, Arkansas, for Respondent

Before: Judge Broderick

STATEMENT OF THE CASE

The Secretary of Labor seeks civil penalties for six alleged violations of mandatory health and safety standards cited on October 28, 1985. Respondent contends that it was not subject to the Act at the time of the alleged violations, and denies that it violated the standards as alleged. Pursuant to notice, the case was heard on the merits on August 14, 1986 in Fort Smith, Arkansas. Lester Coleman testified on behalf of the Secretary. Ricky Brown testified on behalf of Respondent. Both parties waived their rights to file posthearing briefs. I have considered the entire record and the contentions of the parties, and make the following decision.

FINDINGS OF FACT

1. At all times pertinent to this proceeding, Respondent was the operator of a surface coal mine in Sebastian County, Arkansas, known as the No. 1 Mine.

2. The mine was opened and an MSHA ID Number was issued about October 10, 1985. Prior to that date, Respondent had operated a surface coal mine in Lamar, Arkansas. Coal was last removed from the Lamar mine in May or June 1985. Thereafter,

Respondent was engaged in reclamation work at the Lamar mine, and it began to move its mining equipment to the No. 1 Mine.

3. The R&S Mine at Lamar had approximately 5 to 6 employees. It had been inspected by MSHA since about 1980. It had first aid equipment at the mine, and had made arrangements for emergency medical and ambulance facilities at the mine. It had filed a copy of a ground control plan with MSHA, had sanitary toilet facilities and had been granted a waiver by MSHA for bathing facilities. A mine office was maintained at the Lamar Mine.

4. As of October 28, 1985, no coal had been removed from the No. 1 Mine. Some of the overburden covering the coal seam had been removed, namely part of the topsoil. Three employees were at the mine site on October 28, 1985 and were doing mechanical work on mining equipment. A caterpillar bulldozer and a Michigan Front End loader were on the mining property. The topsoil had been removed by the bulldozer, and no blasting had been performed as of October 28.

5. Respondent sells its entire output of coal to the Arkansas Charcoal Company in Paris, Arkansas. The Charcoal is sold in states other than Arkansas. The subject mine produced about 2000 tons of coal from October 1985 to March 30, 1986 and 4000 to 5000 tons from April to June 1986. Approximately 8000 tons had been produced between the date the mine was opened and the date of the hearing.

6. Equipment used in the mine include 1 D-8 and 1 D-9 Caterpillar bulldozer, a Michigan Frontend loader, a track loader and a John Deere Road digger. This equipment and the replacement parts for it were manufactured outside of the State of Arkansas.

7. Citations were issued for safety violations at the Lamar plant, but there is no evidence as to their number. There have been no lost time accidents at Respondent's mines in the past four years.

8. Prior to the time the No. 1 Mine was opened, MSHA inspector Lester Coleman informed the Superintendent that he had to get the required paper work into the MSHA office. The Inspector gave him a packet containing instructions and the necessary forms.

9. On October 28, 1985, Federal Mine Inspector Coleman issued Citation No. 2339807 charging a violation of 30 C.F.R. § 77.1707(a) because there was no first aid equipment at the mine site. The equipment was located at the Lamar mine and Respondent's Superintendent stated that he just had not had time to transfer it to the No. 1 Mine. The citation was terminated

October 30, 1985 when the first aid equipment was brought to the mine site.

10. On October 28, 1985, Inspector Coleman issued Order No. 2339810 charging a violation of 30 C.F.R. § 77.1702(a) because Respondent failed to make arrangements for 24-hour emergency medical assistance for any person injured at the mine. Such arrangements were effected on October 29, 1985, and the order was terminated on October 30.

11. The subject mine was located in a remote area, but there was a medical clinic located in a town 5 miles away, and another 15 miles away.

12. On October 28, 1985, Inspector Coleman issued order 2339811, charging a violation of 30 C.F.R. § 77.1702(b) because Respondent failed to make arrangements for ambulance service or otherwise provide for 24-hour emergency transportation. The order was terminated October 30, 1985, when Respondent made arrangements for 24-hour emergency transportation.

13. On October 28, 1985, Inspector Coleman issued citation 2339812 because Respondent did not file a copy of the ground control plan for the subject mine with MSHA. Respondent's superintendent stated that he was unaware of the requirement that the ground control plan be filed. The citation was terminated when the plan was filed on October 30, 1985.

14. On October 28, 1985, Inspector Coleman issued citations 2339813 and 2339814 because Respondent did not provide bathing facilities or sanitary toilets for the miners, and because it did not maintain a mine office at the mine site. These citations were terminated on October 29, 1985 when Respondent provided a sanitary toilet at the mine, and applied for a waiver of the bathing facilities requirement.

#### ISSUES

1. Whether Respondent is subject to the provisions of the Mine Safety Act in the operation of its No. 1 Mine?

2. Whether Respondent violated the safety standards as alleged, and if it did, what are the appropriate penalties for the violations.

#### CONCLUSIONS OF LAW

1. Respondent was at all times pertinent to this proceeding subject to the provisions of the Act, and I have jurisdiction over the parties and subject matter of this proceeding.

Section 4 of the Act provides that each mine, the products of which enter commerce, or the operations or products of which affect commerce is subject to the Act. The fact that Respondent's coal is sold entirely intrastate does not remove it from the Act's requirements. See Wickard v. Filburn, 317 U.S. 111 (1942); Marshall v. Bosak, 463 F. Supp. 800 (E.D. Pa. 1978); Secretary v. Valley Limestone Co., 4 FMSHRC 357 (1982) (ALJ). Respondent used substantial amounts of equipment which originated out of state. Its products, although originally sold intrastate, were ultimately used both intrastate and out of state. The evidence clearly establishes that its operations affect interstate commerce.

2. The violations cited are not seriously disputed. I conclude that the six violations involved in this proceeding occurred.

3. The failure to have the required first aid supplies and equipment at the mine site, the failure to make arrangements for emergency medical care and the failure to make arrangements for ambulance service are all moderately serious violations under the circumstances of this case. Each of these violations could have resulted in serious injuries to miners.

4. Each of the six violations involved herein resulted from Respondent's negligence. It knew or should have known of the requirements of the Act and the regulations, and failed because of carelessness to take the necessary steps to avoid the violations.

5. Respondent is a small operator, does not have a significant history of pervious violations, and promptly abated the violations after being cited.

ORDER

Based on the above findings of fact and conclusions of law, and considering the criteria in section 110(i) of the Act, I conclude that the following penalties are appropriate.

<u>CITATION/ORDER</u>	<u>PENALTY</u>
2339809	\$ 150
2339810	150
2339811	150
2339812	50
2339813	30
2339814	30
	\$ 560

ORDER

Respondent is ORDERED to pay within 30 days of the date of this decision \$560 as civil penalties for the violations found herein.

*James A Broderick*

James A. Broderick  
Administrative Law Judge

Distribution:

Max A. Wernick, Esq., U.S. Department of Labor, Office of the Solicitor, 525 Griffin Street, Suite 501, Dallas, TX 75202  
(Certified Mail)

Coy J. Rush, Jr., Esq., Hixson, Cleveland & Rush, P.O. Drawer 607, Paris, AR 72855 (Certified Mail)

slk

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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2 SKYLINE, 10th FLOOR  
5203 LEESBURG PIKE  
FALLS CHURCH, VIRGINIA 22041

**SEP 9 1986**

TED V. DALTON, ET AL., : COMPENSATION PROCEEDING  
Complainants :  
 :  
v. : Docket No. KENT 86-11-C  
 :  
PEABODY COAL COMPANY, : Camp No. 2 Mine  
Respondent :

ORDER OF DISMISSAL

Before: Judge Broderick

On September 4, 1986, the UMWA on behalf of the complainants filed a Motion to Withdraw the complaint for compensation on the ground that the complainants have been compensated each in the amount of \$21.69 for the loss of pay claimed on August 9, 1984.

Premises considered, the Motion is GRANTED, and this proceeding is DISMISSED.

  
James A. Broderick  
Administrative Law Judge

Distribution:

Joyce A. Hanula, Legal Assistant, United Mine Workers of America, 900 15th St., N.W., Washington, D.C. 20005 (Certified Mail)

Michael A. Kafoury, Esq., Peabody Coal Co., P.O. Box 373, St. Louis, MO 63166 (Certified Mail)

slk

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

**SEP 9 1986**

EMERY MINING CORPORATION,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. WEST 83-6-R
v.	:	Citation 9946565; 9/13/82
	:	
SECRETARY OF LABOR,	:	Docket No. WEST 83-7-R
MINE SAFETY AND HEALTH	:	Citation 9946569; 9/17/82
ADMINISTRATION (MSHA),	:	
Respondent	:	Docket No. WEST 83-8-R
	:	Citation 9946571; 9/21/82
	:	
	:	Deer Creek Mine
	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 83-33
Petitioner	:	A.C. No. 42-00080-03510
	:	
	:	Docket No. WEST 83-36
v.	:	A.C. No. 42-00080-03511
	:	
	:	Docket No. WEST 83-51
EMERY MINING CORPORATION,	:	A.C. No. 42-00080-03515
Respondent	:	
	:	Wilberg Mine
	:	
	:	Docket No. WEST 83-34
	:	A.C. No. 42-00121-03509
	:	
	:	Docket No. WEST 83-42
	:	A.C. No. 42-00121-03507
	:	
	:	Docket No. WEST 83-57
	:	A.C. No. 42-00121-03519
	:	
	:	Deer Creek Mine

DECISION APPROVING SETTLEMENT

Before: Judge Carlson

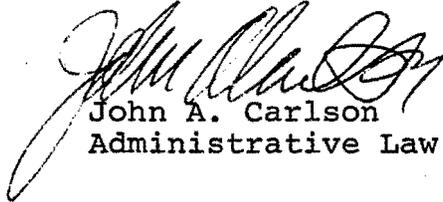
These consolidated cases have been on stay pending the issuance of a Commission decision bearing upon a principal issue in the cases. The Commission has now issued that decision, and the parties have submitted a joint motion to approve a settlement which will dispose of all matters.

Specifically, Emery Mining Corporation agrees to pay the entire civil penalty proposed by the Secretary in each of the penalty cases.

Further, conditioned upon the Commission's approval of that part of the settlement relating to the penalty cases, Emery also moves to withdraw its notices of contest in the three contest cases shown in the caption.

Based upon the representations of the parties and the contents of the files, I conclude that the settlement is appropriate and should be approved in all respects.

Accordingly the settlement agreement (including the withdrawals) is approved in all respects and the attendant motions are granted. Respondent shall therefore pay a total civil penalty of \$2,070.00 within 40 days of the date of this decision approving settlement. These proceedings are dismissed.

  
John A. Carlson  
Administrative Law Judge

Distribution:

Timothy M. Biddle, Esq., Crowell & Moring, 1100 Connecticut Ave., N.W., Washington, D.C. 20036 (Certified Mail)

James H. Barkley, Esq., Office of the Solicitor, U.S. Department of Labor, 1585 Federal Building, 1961 Stout Street, Denver, Colorado 80294 (Certified Mail)

/ot

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

**SEP 9 1986**

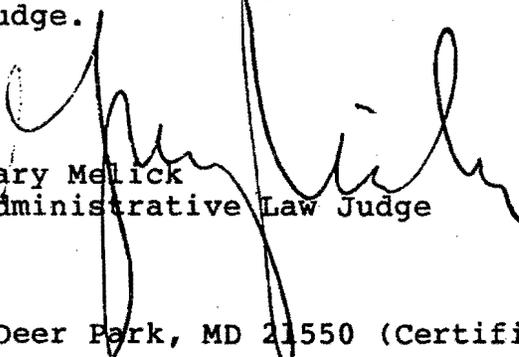
MARTHA PERANDO, : DISCRIMINATION PROCEEDING  
Complainant :  
v. : Docket No. YORK 85-12-D  
: MSHA Case No. MORG CD 85-17  
METTIKI COAL CORPORATION, :  
Respondent :

DECISION

Before: Judge Melick

Pursuant to the decision in these proceedings dated August 12, 1986, the parties have submitted stipulations of damages, costs and interest. Accordingly the Mettiki Coal Corporation is ordered to pay to Complainant Martha Perando the amount of \$2,351.30 in back pay within 30 days of the date of this decision plus interest to the date of payment computed in accordance with the formula set forth in Bailey v. Arkansas Carbona, Co., 5 FMSHRC 2042 (1983), plus costs of \$50.

This decision constitutes the final disposition of these proceedings before this judge.

  
Gary Melick  
Administrative Law Judge

Distribution:

Martha Perando, P.O. Box 3012, Deer Park, MD 21550 (Certified Mail)

Timothy Biddle, Esq., and Lisa B. Rovin, Esq., Crowell & Moring, 1100 Connecticut Avenue, N.W., Washington, DC 20036 (Certified Mail)

rbg

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FALLS CHURCH, VIRGINIA 22041

SEP 10 1986

SECRETARY OF LABOR, : DISCRIMINATION PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. WEVA 85-73-D  
ON BEHALF OF :  
RONNIE D. BEAVERS, : MORG CD 84-1  
DONALD L. BROWNING, :  
ROBERT L. CARPENTER, : Kitt No. 1 Mine  
EVERETT D. CURTIS, :  
LARRY L. EFAW, :  
ROGER LEON ERWIN, :  
CHARLES W. FOX, :  
LESTER D. FREEMAN, :  
LARRY F. HUFFMAN, :  
HARRY EDWIN HURST, :  
ROBERT HURST, :  
GARY C. KNIGHT, :  
LARRY LANTZ, :  
DAVID R. MARTIN, :  
MICHAEL L. MARRA, :  
WILFORD MARSH, JR., :  
DANNIE M. MAYLE, :  
CHARLES W. MCGEE, :  
CHARLES F. MURRAY, :  
WALTER F. MURRAY, :  
LARRY NORRIS, :  
CLARA Y. PHILLIPS, :  
KENNETH D. SHOCKEY, :  
RICHARD D. SNIDER, :  
JESSE L. WARD, :  
BEDFORD WILFONG, JR., :  
Complainants :  
v. :  
KITT ENERGY CORPORATION, :  
Respondent :  
and :  
UNITED MINE WORKERS OF :  
AMERICA, :  
Intervenor ;

## DECISION

Appearances: Frederick W. Moncrief, Esq., Office of the Solicitor, U. S. Department of Labor, Arlington, Virginia, for Complainants;  
B. K. Taoras, Esq., Kitt Energy Corporation, Meadow Lands, Pennsylvania, for Respondent;  
Mary Lu Jordan, Esq., United Mine Workers of America, Washington, D.C., for Intervenor.

Before: Judge Maurer

### STATEMENT OF THE CASE

This case is before me upon stipulated facts for a ruling on Cross Motions for Summary Decision, filed pursuant to 29 C.F.R. § 2700.64.

The issue presented is whether Kitt Energy Corporation (hereinafter referred to as "Kitt") violated section 105(c) of the Federal Mine Safety and Health Act of 1977, the "Act", 30 U.S.C. § 815(c), when it laid-off the complainants, who were surface miners, notwithstanding their seniority and technical ability to perform the remaining underground jobs available, solely because they required additional training under 30 C.F.R. Part 48 before they could perform those underground jobs for which they were otherwise qualified and entitled to.

At the time of the layoffs herein, Kitt was a party to the National Bituminous Coal Wage Agreement of 1981 (the "Agreement"). The Agreement provides in relevant part that in the case of a reduction in work force, "[e]mployees with the greatest seniority at the mine shall be retained provided that they have the ability to perform available work." However, section 115 of the Act, 30 U.S.C. § 825, and 30 C.F.R. Part 48 (the "Regulations") prescribe certain training which miners must receive before they can perform underground mining jobs.

Kitt took the position that although these complainants could have become qualified by receiving the appropriate training, the fact was that they did not have the qualifications to step in and perform the work at the time and, therefore, less senior employees who had the requisite training were given those positions. It is not disputed that had the terms of the Agreement been applied without regard to the federal training requirements, the complainants would not have been laid off.

The complainants contend that Kitt violated the Act when it discriminated among its employees on the basis of their need for statutorily mandated training. They contend that it was Kitt's responsibility to provide the training required by the Act and the Regulations and that by distinguishing between miners on the basis of their need to receive mandatory training thereby discriminated against those miners who were laid off solely as a result of the application of the training requirements.

#### STATUTORY AND REGULATORY PROVISIONS

Section 115(a) and (b) of the Act provide as follows:

(a) Each operator of a coal or other mine shall have a health and safety training program which shall be approved by the Secretary. The Secretary shall promulgate regulations with respect to such health and safety training program not more than 180 days after the effective date of the Federal Mine Safety and Health Amendments Act of 1977. Each training program approved by the Secretary shall provide as a minimum that--

(1) new miners having no underground mining experience shall receive no less than 40 hours of training if they are to work underground. Such training shall include instruction in the statutory rights of miners and their representatives under this Act, use of the self-rescue device and use of respiratory devices, hazard recognition, escapeways, walk around training, emergency procedures, basic ventilation, basic roof control, electrical hazards, first aid, and the health and safety aspects of the task to which he will be assigned;

(2) new miners having no surface mining experience shall receive no less than 24 hours of training if they are to work on the surface. Such training shall include instruction in the statutory rights of miners and their representatives under this Act, use of the self-rescue device where appropriate, hazard recognition, emergency procedures, electrical hazards, first aid, walk around training and the health and safety aspects of the task to which he will be assigned;

(3) all miners shall receive no less than eight hours of refresher training no less frequently than once each 12 months, except that miners already employed on the effective date

of the Federal Mine Safety and Health Amendments Act of 1977 shall receive this refresher training no more than 90 days after the date of approval of the training plan required by this section;

(4) any miner who is reassigned to a new task in which he has had no previous work experience shall receive training in accordance with a training plan approved by the Secretary under this subsection in the safety and health aspects specific to that task prior to performing that task;

(5) any training required by paragraphs (1), (2), or (4) shall include a period of training as closely related as is practicable to the work in which the miner is to be engaged.

(b) Any health and safety training provided under subsection (a) shall be provided during normal working hours. Miners shall be paid at their normal rate of compensation while they take such training, and new miners shall be paid at their starting wage rate when they take the new miner training. If such training shall be given at a location other than the normal place of work, miners shall also be compensated for the additional costs they may incur in attending such training sessions.

Section 3(g) of the Act provides:

For the purpose of this Act, the term--

\* \* \*

"miner" means any individual working in a coal or other mine....

30 C.F.R. § 48.2 provides in pertinent part:

§ 48.2 Definitions

For the purposes of this Subpart A--

\* \* \*

(b) "Experienced miner" means a person who is employed as an underground miner...on the effective date of these rules; or a person who has received training acceptable to MSHA from an appropriate State agency within the preceding 12

months; or a person who has had at least 12 months experience working in an underground mine during the preceding 3 years; or a person who has received the training for a new miner within the preceding 12 months as prescribed in §48.5 (Training of new miners) of this Sub part A.

(c) "New miner" means a miner who is not an experienced miner.

#### STIPULATIONS

I accept the following stipulations of the parties and find same as the facts upon which this decision is based.

1. Complainants were employed as surface or underground miners by Kitt Energy Corporation at the Kitt Mine until their layoffs on either August 29, 1983, or September 6, 1983, as indicated for each complainant in Exhibit "C".

2. Respondent, Kitt Energy Corporation, is the owner and operator of the Kitt Mine at Philippi, West Virginia, an underground coal mine having Federal Mine I.D. No. 46-04168.

3. The parties hereto and the Kitt Mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

4. The United Mine Workers of America (UMWA) is the collective bargaining representative for certain employees at the Kitt Mine and is a representative of miners for the complainants for purposes of the Federal Mine Safety and Health Act of 1977 and this proceeding.

5. At all times relevant to this proceeding, the UMWA and Kitt Energy Corporation were parties to the National Bituminous Coal Wage Agreement of 1981.

6. On or about August 25, 1983, Mr. Donald Jones of Kitt Energy Corporation contacted MSHA for information regarding when a miner is considered "experienced" under MSHA's training regulations, located at 30 C.F.R. § 48.1 et seq. He was advised that the designation of "experienced underground miner" or "experienced surface miner" could be obtained by working at least 12 of the preceding 36 months in underground or surface positions respectively, or by receiving the appropriate training under 30 C.F.R. § 48.1 et seq. The MSHA representative did not mention

nor was he asked specifically about the "grandfathering" provisions of the regulations. MSHA's definition of the term "experienced miner" for purposes of underground work, is found at 30 C.F.R. § 48.2(b). MSHA's definition of "experienced miner" for purposes of surface work, is found at 30 C.F.R. § 48.22(b).

7. On August 29, 1983, mine management invoked a reduction and realignment of the work force pursuant to Article XVII of the Wage Agreement. The work force was reduced from 565 to 210, resulting in the layoff of 355 persons. This caused a reduction in the number of surface positions from 91 to 59.

8. In determining which employees would be retained in the available jobs, mine management was bound by the Wage Agreement and the realignment procedure of Article XVII. A criterion applied by mine management to Article XVII to determine qualifications (ability to step in and perform the work of the job at the time) was that a miner have the appropriate experienced miner designation. For qualification purposes, only "experienced underground miners" were considered able to step in and perform the work of the underground positions at the time and only "experienced surface miners" were considered able to step in and perform the work of surface positions. The terms "experienced surface miners" and "experienced underground miners" were given the same meanings as defined in 30 C.F.R. § 48.22(b) and 48.2(b), respectively.

9. Management's use of the appropriate "experienced miner" designation as mentioned in paragraph 5 to determine job qualification at Kitt Mine was held not in violation of the Wage Agreement by Arbitrator Roger C. Williams in a decision dated February 24, 1984.

10. The following complainants were among those who were laid off on August 29, 1983:

Jesse L. Ward  
Robert Hurst  
Larry Norris

Harry Edwin Hurst  
Larry Lantz  
Charles McGee

11. Prior to and at the time of the August 29 reduction and realignment of the work force, complainants, J. Ward, L. Lantz, and C. McGee, were working at surface positions at the Kitt Mine and were "experienced surface miners" as defined in § 48.22(b). They were not "experienced underground miners" as that term is defined in § 48.2(b).

12. Prior to and at the time of the August 29 reduction and realignment of the work force, complainants H. Hurst, R. Hurst, and L. Norris were working at surface positions at the Kitt Mine and were experienced surface miners within the meaning of 30 C.F.R. § 48.22(b). They also happened to be experienced underground miners within the meaning of 30 C.F.R. § 48.2(b) because of the grandfathering aspect of the provision. Nevertheless, they were laid off because of a lack of knowledge of the grandfathering provision in the training regulations.

13. On September 6, 1983, a second realignment occurred. The work force was reduced from 210 to 167 classified employees. Surface positions were reduced from 59 to 15 positions.

14. The same criteria to determine qualification for job placement were used as for the August 29 realignment, however, the "grandfathering" misunderstanding had been resolved and those who were "grandfathered" were treated as experienced miners.

15. On September 6, 1983, the following complainants, who had been working at surface positions at the Kitt Mine and who were "experienced surface miners" as defined in § 48.22(b), were laid off because there was an insufficient number of job openings in surface occupations, and they did not have the ability to step in and perform underground work because they were not "experienced underground miners" within the meaning of 30 C.F.R. § 48.2(b):

Huffman	Marra	Fox
Wilfong	Erwin	Beavers
Shockey	Curtiss	Freeman
Marsh	Carpenter	Browning
Martin	Mayle	Snider
W. Murray	Efaw	Phillips
G. Knight	C. Murray	

16. Had management, on August 29, 1983, and September 6, 1983, applied the terms of the collective bargaining agreement, without regard to the application of 30 C.F.R. § 48, the complainants would not have been laid off and would have been placed in the remaining jobs according to Article XVII of the Wage Agreement.

17. The complainants had the technical ability to perform the jobs that were available at the Kitt Mine after the reduction and realignment of the work force that occurred on August 29 and September 6, 1983.

18. But for the complainants not being "experienced underground miners" as defined in § 48.2(b), they would not have been laid off on either August 29 or September 6, 1983.

19. Although the complainants were not considered "experienced underground miners" under MSHA's regulations, each complainant except Efaw had worked underground at the Kitt Mine prior to taking a surface job. Mr. Efaw had no underground employment with Kitt Energy prior to October 1983, but had underground experience elsewhere.

20. Exhibit "C" contains information pertinent to each complainant: name; employee number; seniority date and number; date laid off and the number of days of work missed; job title prior to layoff; recall date; job title upon recall and classification rate; amount of training received and experienced miner designation.

21. All the complainants would have been retained in jobs had they been experienced underground miners within the meaning of 30 C.F.R. § 48.2(b).

22. On or about September 7, 1983, MSHA advised Kitt that the layoff procedure conflicted with MSHA's training requirements and those employees who were laid off because of training would have to be recalled even if it meant "bumping" less senior employees who had been retained. No citations were issued. Mine management disagreed with MSHA's position; however, management did as MSHA requested in order to limit the exposure to potential penalties and damages.

23. On September 13, 1983, complainant, R. Beavers, was recalled to an outside position. He started work that day without any further training.

24. On September 14, 1983, Kitt recalled the complainants and gave them the training required to satisfy the "experienced" designation within the meaning of 30 C.F.R. § 48.2(b).

25. All training was provided by Kitt. All employees were paid for time spent in training at the rate for the job to which recalled.

#### DISCUSSION AND FINDINGS

The facts in this case are not in dispute. The law in this area, however, is just now evolving. Three cases, in particular, are important to an analysis of the issue herein.

The first of these is Secretary of Labor, on behalf of Bennett, et al. v. Emery Mining Corp., 5 FMSHRC 1391 (1983), enforcement denied sub nom. Emery Mining Corp. v. Secretary of Labor, 783 F.2d 155 (10th Cir. 1986). This case arose as a result of a change in the hiring policy at the Emery Mining Corporation. Under the new policy, effective January 1, 1980, Emery required completion of 32 of the 40 hours of safety training for underground miners mandated by section 115(a) of the Act as a pre-condition of employment. <sup>1/</sup> Furthermore, Emery did not reimburse those individuals who were eventually hired as miners either for the cost of the training or pay wages for the hours spent in obtaining it.

As a result, the Secretary filed a complaint of discrimination with the Commission against Emery on behalf of twelve Emery employees, each of whom had been hired after January 1, 1980, and each of whom had personally paid for their own training prior to being employed by Emery as a miner. The Commission administrative law judge found that Emery's policy of requiring job applicants to obtain the 32 hours of miner training at their own expense as a pre-condition for employment interfered with their right to receive such training because the Act places the responsibility for miner's training on the operator, and therefore discriminated against them in violation of section 105(c) of the Act. The Commission affirmed the judge's finding that Emery violated the Act by refusing to reimburse the complainants after they were hired for wages for the time spent in training and the cost of their training. However, the Commission disagreed with the judge's conclusion that Emery's policy of requiring the training as a pre-condition of employment violated the Act. In so holding, the Commission stated that although once hired, these complainants became new miners under the Act and entitled to the rights contained in sections 115(a) and (b), nothing in that section dictates whom an operator should hire. An employer has the right to choose its own employees.

On appeal from the order of the Commission, Emery contended that the Act requires compensation only for those individuals who receive training while they are miners and not those who receive that training prior to becoming miners. The United States Court of Appeals for the Tenth Circuit denied enforcement of the Commission's order holding that "because the complainants were not miners as defined by the Act, they are not entitled to compensation for the 32 hours of training they voluntarily undertook, 'lost wages,' and other expenses incurred in completing the training program." Emery, 783 F.2d at 158.

<sup>1/</sup> Emery supplied the 8 hours of mine-specific training required by section 115(a)(5) and 30 C.F.R. § 48.5.

The court also held that "the Commission properly found that Emery's pre-employment policy of requiring 32 hours of training did not violate the Act." Emery, 783 F.2d at 159.

The next cases concerning a similar issue to be decided by the Commission were both handed down on September 30, 1985, while their decision in Emery, supra, was still pending in the Tenth Circuit. United Mine Workers of America on behalf of Rowe, et al. v. Peabody Coal Co., 7 FMSHRC 1357 (1985), appeal docketed sub nom. UMWA on behalf of Rowe, et al. v. FMSHRC, Nos. 85-1714, et al. (D.C. Cir. Oct. 1985); and Secretary of Labor on behalf of Acton, et al. v. Jim Walter Resources, Inc., 7 FMSHRC 1348 (1985), appeal docketed sub nom. Secretary of Labor on behalf of Acton, et al. v. Jim Walter Resources, Inc. and FMSHRC, No. 86-1002 (D.C. Cir. Jan. 1986). In both of these cases, the issue presented for decision was whether an operator violated section 105(c) of the Act when it bypassed for rehire a laid-off individual because that person lacked the health and safety training specified in section 115 of the Act and 30 C.F.R. Part 48.

In the Peabody case, the Commission's chief administrative law judge found that laid-off miners were "miners" within the meaning of the Act and that therefore it was Peabody's responsibility to provide the training required by section 115 and Part 48 after rehire and that by denying recall because they were not trained, Peabody violated section 105(c)(1) of the Act. Because the Act does not specifically address the issue of the laid-off miner, the judge looked to the parties' collective bargaining agreement and concluded:

[T]he rights accorded a laid off miner under the collective bargaining agreement contain indicia of an ongoing employment relationship sufficient for him to be considered a miner within the purview of section 115 and 105(c) of the Act.

6 FMSHRC at 1648.

The Commission disagreed and reversed. Consistent with their holding in Emery, they stated that section 115 does not dictate to operators whom they must recall any more than it dictates whom they must hire. That it is upon being rehired that laid-off miners once again become "miners" within the meaning of the Act and at that point again become entitled to the rights granted by section 115. Therefore, since there was no statutory right to training

for those persons in a layoff status, Peabody's policy requiring them to obtain training prior to rehire does not violate section 105(c) of the Act.

In reaching this conclusion, the Commission went on to add that:

[T]he Mine Act is not an employment statute. The Act's concerns are the health and the safety of the nation's miners. Those individuals employed at a mine are to be trained before they begin work so that once they begin work accidents are less likely to occur.

7 FMSHRC at 1364.

The facts of the Jim Walter case are very similar to Peabody, i.e., the alleged discrimination occurred when the operator recalled laid-off miners who had terms of company service shorter than the complainants, but who, unlike the complainants, had completed the underground safety training required by section 115 of the Act. The administrative law judge in Jim Walter held that the operator did not violate section 105(c) of the Act by requiring laid-off individuals to obtain the training as a condition of recall, holding that it was "immaterial whether the affected applicants for employment are strangers to the industry and the employer, as in the Emery case, or are former employees awaiting... recall...." 6 FMSHRC at 2453.

The Commission, consistent with their decisions in Peabody and Emery, affirmed.

Turning now to apply the facts of the instant case, as stipulated herein, to the existing law, it seems to me that several issues are now well settled by the decisions and do not require further analysis. Among these are that section 115 of the Act and Part 48 of the Regulations set forth certain mandatory training requirements for "miners", and it is the operator's responsibility to provide and pay for that training. Furthermore, section 105(c) prohibits denial of, or interference with, these training rights granted to "miners" by section 115.

The complainants herein were "miners" who were laid-off from surface mining positions as a result of the operator reducing and realigning its work force. At the time of the layoffs, the Agreement provided that more senior employees whose positions were eliminated could bump less senior employees, if the more senior employee had the ability to step in and perform the work of that job at the

time. These complainants had a greater length of service with the company than some of the employees who were retained, but although they had each spent some time previously as underground miners, they had spent the last few years in surface mining positions. The remaining available jobs and those that are at issue in this case, however, were all underground jobs and thus these individuals would have had to be provided with the mandated safety and health training before they could perform those jobs, or have otherwise been designated "experienced underground miners" by the grandfathering provision of the Regulations.

The operator maintains that "the ability to step in and perform the job at the time" means that the miners in question in this case must have been "experienced underground miners" as defined in 30 C.F.R. § 48.2(b). As a practical matter, these complainants could have become qualified by receiving the appropriate training and therefore their layoff resulted solely from the fact that they lacked this training. In fact, three of the complainants herein, Harry Hurst, Robert Hurst, and Larry Norris, did not even require the new miner training as they were "experienced underground miners" by virtue of the grandfathering provision contained in 30 C.F.R. § 48.2(b), but were laid-off anyway because the operator mistakenly believed they did.

Complainants herein contend that their layoff violated section 105(c) of the Act because it interfered with their statutory right, under section 115, to be provided whatever safety and health training they needed at operator expense. They claim that the operator discriminated against them by distinguishing between its employees ("miners") on the basis of their need to receive mandatory training under the Act.

The operator relies on the Tenth Circuit decision in Emery and the Commission decisions in Peabody and Jim Walter for support for its interpretation of sections 115 and 105 of the Act. However, those cases involved applicants for employment, "strangers" to the industry and the employer (Emery), or laid-off employees (Peabody and Jim Walter). In my opinion the instant case is distinguishable from those because this case involves "miners" who were on "active duty" so to speak at the time the conduct complained of occurred. The complainants in the aforementioned cases were unemployed, at least initially, for reasons totally unrelated to the training requirements of the Act, albeit those requirements were the reason the operators did not hire or rehire them. Whereas, herein the lack of the required training was the precipitating cause of the complainants' unemployment.

The fact that all the employees of Kitt who were considered for the layoff were "miners" within the meaning of the Act at the time the operator picked and chose among them based on the federal training requirements is a critical distinction and is decisive in this case. As "miners", the complainants herein were entitled to be provided whatever training was required under section 115. By laying off these complainants rather than providing the required training, the operator interfered with their statutory right to training under section 115. The insistence of the complainants on their right to be provided this training by the operator of the mine where they work is activity protected by the Act. Therefore, I find that the operator discriminated against the complainants by violating their statutory rights regarding training, as alleged.

Kitt is apparently attempting to use the Agreement's definition of seniority <sup>2/</sup> to justify its actions against these complainants. While it is plainly not the function of this Commission to interpret that Agreement, I note that even if their interpretation of the contract is correct, if it conflicts with the statutory requirements of the Mine Safety Act, it is the Act that must prevail. The complainants possess rights which are accorded under section 115 of the Mine Act and which are protected under section 105(c) of that Act, irrespective and independently of any rights they may or may not have under the terms of their labor contract. The Agreement is only significant in this case to the extent that it is undisputed that by its terms, the complainants herein would not have been laid-off, but for their lack of health and safety training.

Finally with regard to the three miners, Harry Hurst, Robert Hurst, and Larry Norris, who were mistakenly treated as inexperienced miners and laid off, the operator urges that they have no claim at all under the Act. I disagree. Although unlike the other complainants herein, they did not in fact require new miner training, the operator laid them off based solely on the mistaken belief that they did. Therefore, I conclude that the operator discriminated against them on the basis of their perceived lack of federally mandated training and I find that likewise impermissible and a violation of section 105(c) of the Act. The fact that the operator was mistaken did not change the

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<sup>2/</sup> The collective bargaining agreement defines the term seniority as "length of time in service" and "the ability to step into and perform the work of the job at the time the job is awarded."

consequences suffered by the three miners. As the Commission has stated in an earlier discrimination case "[a]n equally important consideration is that an affected miner suffers as much by mistake as he would if he were discriminated against because he had actually engaged in protected activity. We conclude that discrimination based upon a suspicion or belief that a miner has engaged in protected activity, even though, in fact, he has not, is proscribed by section 105(c)(1)". Moses v. Whitley Development Corp., 4 FMSHRC 1475, 1480 (1982).

Having considered the arguments of all the parties herein on the stipulated facts, I conclude that an order should be entered in favor of all the complainants granting the relief they seek.

ORDER

It is ORDERED that the complaint of discrimination be ALLOWED.

It is FURTHER ORDERED that the parties, by counsel, communicate for the purpose of stipulating the amounts of monetary relief due each of the named complainants, as well as attorney fees that may be awarded to counsel for Intervenor and file such stipulation with me on or before October 20, 1986.

It is FURTHER ORDERED that if agreement cannot be reached on monetary relief or attorney fees, the parties notify me of the same on or before October 20, 1986.

Finally, I note that the Act provides that any violation of the discrimination section shall be subject to the provisions of section 108 and 110(a). Therefore, it is FURTHER ORDERED that on or before October 20, 1986, the respondent pay a civil penalty of \$1,000 for violating section 105(c) of the Act.

  
Roy J. Maurer  
Administrative Law Judge

Distribution:

Frederick W. Moncrief, Esq., Office of the Solicitor, U. S.  
Department of Labor, 4015 Wilson Blvd., Arlington, VA 22203  
(Certified Mail)

B. K. Taoras, Esq., 455 Race Track Road, Meadow Lands, PA  
15347 (Certified Mail)

Mary Lu Jordan, Esq., United Mine Workers of America, 900  
15th St., NW, Washington, DC 20005 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

SEP 11 1986

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 85-102-M
Petitioner	:	A.C. No. 47-02575-05501
	:	
v.	:	Pit No. 6 Mine
	:	
NELSON TRUCKING,	:	
Respondent	:	

DECISION

Appearances: Miguel J. Carmona, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for Petitioner;  
Mr. Kenneth M. Nelson, Nelson Trucking Company, Green Bay, Wisconsin, pro se.

Before: Judge Lasher

A hearing on the merits was held in Green Bay, Wisconsin, on August 13, 1986. After consideration of the evidence submitted and both parties agreeing, a decision on the record was entered at the conclusion of the hearing. This bench decision appears below as it appears in the official transcript aside from minor corrections.

This matter arose upon the filing of a petition for assessment of penalty by a document entitled, "Proposal for a Penalty" by the Secretary of Labor (herein Secretary) on October 21, 1985, pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a) (herein the Act). The Secretary charges the Respondent with violating 30 C.F.R. § 56.9087 which provides: "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."

For purposes of this proceeding, I accept the definition of "audible" contained in the Random House College Dictionary (1980 Revised Edition) as being both a reasonable, common sense, and commonly accepted indication of meaning: "actually heard or capable of being heard; loud enough to be heard." The concept of this definition will be incorporated into the regulation cited by the Secretary herein.

The Citation (Number 2374053) issued by MSHA Inspector Arnie Mattson on July 10, 1985, at Respondent's mine (Pit Number 6) charges that Respondent infringed the above-quoted regulation by engaging in the following condition or practice: "The 120 Hough International front-end loader has a back-up alarm, but it can't be heard above the surrounding noise. The loader was observed loading a truck with no foot traffic."

The matter, after being duly noticed, came on for hearing in Green Bay, Wisconsin, on August 13, 1986. The Secretary was represented by counsel, and the Respondent was represented by Mr. R. J. Bruno, a consultant who is not a lawyer. The Secretary presented Inspector Arnie Mattson as its only witness, and Respondent called two witnesses, Charlie Stauber, a crusher operator who was present on the mine premises at the time and place the alleged infraction occurred, and Perry Pautz, the owner of the pit.

Although not specifically raised by Respondent at the hearing, a preliminary matter should be dealt with which was raised by the Respondent in a letter dated February 21, 1986, which was signed by Kenneth M. Nelson. This letter indicates that:

"Previous to the start of operation last spring, we asked for and were given a complimentary inspection. At that time we were told everything was in order. Your inspector later penalized us for a back-up alarm that he claimed was not loud enough. We have corrected the problem areas and feel we should have been told if these items and such were a problem at the time of our complimentary inspection. That is why we requested it in the first place."

This letter raises the question which occasionally occurs in mine safety law concerning whether or not the Secretary, or more specifically MSHA, should be estopped from citing a violation for a condition which previously it had not cited during prior inspections. More precisely, does the legal effect of prior non-enforcement equitably estop a government agency from subsequently charging a mine operator with a violation for a condition which it believes contravenes the mandatory health and safety standards. In Secretary v. King Knob Coal Company, Inc., 3 FMSHRC 1417, 1421 (1981), the Commission rejected the doctrine of equitable estoppel in mine safety and health proceedings. It noted therein that the United States Supreme Court has held that equitable estoppel generally does not apply against the federal government. The Commission also noted that one reason for its declining to permit this concept is that it would be inconsistent with the so-called "liability

without fault" structure of the Act. The Commission reached the same result in Secretary v. Burgess Mining and Construction Corporation, 3 FMSHRC 296. Therefore, to the extent that the letter of Respondent in the file raises the question of equitable estoppel on the basis of the Secretary's failure to find and cite violations during the prior courtesy inspection or that the Secretary should be bound since it did not uncover such a situation during the courtesy inspection, such argument is rejected.

Turning now to the issue which is more directly involved in this proceeding, that is whether or not a violation of the subject regulation occurred, determination of this issue rests upon the resolution of a conflict in testimony between the Inspector and Mr. Charlie Stauber, a crusher operator, who testified on behalf of the Respondent.

The Inspector indicated that the back-up alarm, which was automatic and which was triggered when the front-end loader in question was put in reverse gear, could not be heard by a miner or other person who would be behind the loader and who would be exposed to the hazard of being run over by the loader. The Inspector indicated that the loader's operator, who sat in a cab on the loader which had a rear-view window, would have his vision obstructed by the presence of the loader's engine and that the operator's vision would be obstructed for varying distances, depending on the exact direction the operator would be directing his vision toward.

A direct conflict with the Inspector's determination as to the audibility of the automatic back-up alarm was created by Mr. Stauber's testimony to the effect that on July the 10th, 1985, he was operating a crusher in the vicinity of the loader and that he could hear the automatic back-up alarm clearly even while he was wearing ear plugs. Before resolving the conflict in this testimony, I first note that the testimony of Mr. Pautz is not deemed sufficiently specific or otherwise probative to be considered in the credibility resolution which follows.

In concluding that the testimony of Mr. Stauber must prevail over that of the Inspector in this particular instance, it cannot be avoided that in a determination which essence is that of audibility and where it appears that one person's hearing is impaired and the other's is not that a basic overpowering factor enters the equation on the side and in support of the opinion of the person whose hearing has not been shown to be reduced.

The burden in a case such as this is on the Secretary to establish that a violation occurred and to carry such burden by a preponderance of the evidence. In this matter the question comes down to which judgment, that of the Inspector or that of Mr. Stauber should be given the greatest weight. These are subjective judgments. They do involve the loudness of a horn. The Inspector in effect says it is not loud enough to be heard over the surrounding noise. The crusher operator says that he could hear it even with ear plugs on. The Secretary's burden of proof was not aided in this case by instruments or by the testimony of a corroborating witness. In this instance the Secretary is found to have not established that a violation occurred by a preponderance of the evidence.

Accordingly, it is ordered that Citation Number 2374053 is vacated.

*Michael A. Lasher, Jr.*  
Michael A. Lasher, Jr.  
Administrative Law Judge

Distribution:

Miguel J. Carmona, Esq., Office of the Solicitor, U.S. Department of Labor, 230 South Dearborn Street, 8th Floor, Chicago, Illinois 60604 (Certified Mail)

Mr. Kenneth M. Nelson, Nelson Trucking Company, 2898 Flintville, Green Bay, Wisconsin 54303 (Certified Mail)

/ot

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

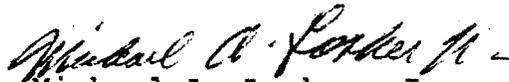
SEP 11 1986

THOMAS P. MARTINEZ, : DISCRIMINATION PROCEEDING  
Complainant :  
v. : Docket No. WEST 86-3-D  
TOWER RESOURCES, INC., :  
Respondent : DENV CD 85-22

DECISION AND ORDER OF DISMISSAL

Before: Judge Lasher

Complainant has failed to respond to my Prehearing Order issued January 14, 1986. Thereafter, Complainant has failed to respond to my Order to Show Cause dated July 21, 1986, and otherwise proceed with his complaint herein. Complainant is thus found to have abandoned the prosecution of this proceeding and this matter should be, and hereby is, DISMISSED.

  
Michael A. Lasher, Jr.  
Administrative Law Judge

Distribution:

David L. Grindstaff, Esq., Quintana & Grindstaff, 375 South  
600 East, Salt Lake City, Utah 84108 (Certified Mail)

Mr. Thomas P. Martinez, P.O. Box 423, Price, Utah 84501  
(Certified Mail)

H. Michael Keller, Esq., VanCott, Bagley, Cornwall & McCarthy,  
50 South Main Street, P.O. Box 45340, Salt Lake City, Utah 84144  
(Certified Mail)

/ot

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

SEP 15 1986

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 85-141-M
Petitioner	:	A.C. No. 42-00377-05502
	:	
v.	:	Fife Brigham Pit
	:	
FIFE ROCK PRODUCTS COMPANY,	:	
INC.,	:	
Respondent	:	

DECISION

Appearances: Margaret A. Miller, Esq., Office of the Solicitor,  
U.S. Department of Labor, Denver, Colorado,  
for Petitioner.

Before: Judge Morris

This is a civil penalty proceeding initiated by petitioner against respondent in accordance with the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. The civil penalty sought here is for the violation of 30 C.F.R. § 56.15-7, a mandatory standard promulgated pursuant to the Act.

After notice to the parties, a hearing was scheduled in Salt Lake City, Utah on August 12, 1986. The petitioner appeared but respondent failed to appear.

Pursuant to Commission Rule 63(b), 29 C.F.R. § 2700.63(b), respondent was found to be in default.

Accordingly, I enter the following:

ORDER

Citation 2360673 and the proposed civil penalty of \$600 are affirmed.

  
John J. Morris  
Administrative Law Judge

Distribution:

Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, 1585 Federal Building, 1961 Stout Street, Denver, Colorado 80294 (Certified Mail)

Mr. Clifford P. Woodland, General Manager, Fife Rock Products Company, Inc., P.O. Box 479, Brigham City, Utah 84302 (Certified Mail)

/ot

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

SEP 15 1986

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

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. WEST 86-26  
Petitioner : A.C. No. 48-00977-03507  
: :  
v. : Black Thunder Mine  
: :  
THUNDER BASIN COAL COMPANY, :  
Respondent :

DECISION

Appearances: James H. Barkley, Esq., Office of the Solicitor,  
U.S. Department of Labor, Denver, Colorado,  
for Petitioner;  
Thomas F. Linn, Esq., Denver, Colorado,  
for Respondent.

Before: Judge Morris

This is a civil penalty proceeding initiated by petitioner  
against respondent in accordance with the Federal Mine Safety  
and Health Act of 1977, 30 U.S.C. § 801 et seq. The civil penal-  
ties sought here are for the violation of mandatory standards  
promulgated pursuant to the Act.

After notice to the parties, a hearing on the merits com-  
menced in Gillette, Wyoming on August 6, 1986. After conferring  
the parties announced that they had reached an amicable settle-  
ment.

The citations, the standards allegedly violated, the original  
assessments and the proposed dispositions are as follows:

<u>Citation No.</u>	<u>Standard CFR Title 30</u>	<u>Assessment</u>	<u>Disposition</u>
2222770	§ 77.20 (b)	\$119	\$109
2222771	§ 77.1104	168	168

The proposed settlement further included striking the S & S  
designation for Citation 2222770.

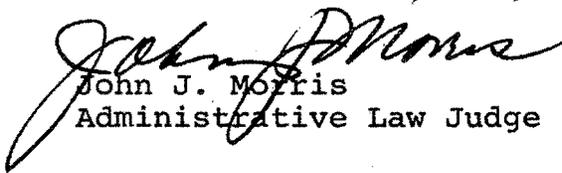
Discussion

I have reviewed the proposed settlement and I find that it is reasonable and in the public interest.

Accordingly, I enter the following:

ORDER

1. The settlement is approved.
2. Citation 2222770 is affirmed as a non-S & S violation and a penalty of \$109 is assessed.
3. Citation 2222771 and the proposed penalty of \$168 are affirmed.
4. Respondent is ordered to pay to petitioner the sum of \$277 within 40 days of the date of this Decision.

  
John J. Morris  
Administrative Law Judge

Distribution:

James H. Barkley, Esq., Office of the Solicitor, U.S. Department of Labor, 1585 Federal Building, 1961 Stout Street, Denver, Colorado 80294 (Certified Mail)

Thomas F. Linn, Esq., 555 Seventeenth Street, Denver, Colorado 80202 (Certified Mail)

/ot

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

SEP 15 1986

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 86-34
Petitioner	:	A.C. No. 48-00977-03508
	:	
v.	:	Black Thunder Mine
	:	
THUNDER BASIN COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: James H. Barkley, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner; Thomas F. Linn, Esq., Denver, Colorado, for Respondent.

Before: Judge Morris

This is a civil penalty proceeding initiated by petitioner against respondent in accordance with the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. The civil penalties sought here are for the violation of mandatory standards promulgated pursuant to the Act.

After notice to the parties, a hearing on the merits commenced in Gillette, Wyoming on August 6, 1986. After conferring the parties announced that they had reached an amicable settlement.

The citations, the standards allegedly violated, the original assessments and the proposed dispositions are as follows:

<u>Citation No.</u>	<u>Standard CFR Title 30</u>	<u>Assessment</u>	<u>Disposition</u>
2222714	§ 77.410	\$85	\$20
2222718	§ 77.1003	119	119

The proposed settlement further included striking the S & S designation for Citation 2222714 and amending Citation 2222718 to allege a violation of 30 C.F.R. § 77.1001 in lieu of its present designation.

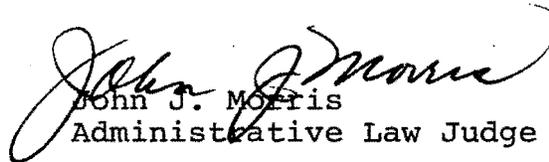
Discussion

I have reviewed the proposed settlement and I find that it is reasonable and in the public interest.

Accordingly, I enter the following:

ORDER

1. The settlement is approved.
2. Citation 2222714 is affirmed as a non-S & S violation and a penalty of \$20 is assessed.
3. Citation 2222718 for the violation of 30 C.F.R. § 77.1001 is affirmed and a penalty of \$119 is assessed.
4. Respondent is ordered to pay the sum of \$139 to the petitioner within 40 days of the date of this Decision.

  
John J. Morris  
Administrative Law Judge

Distribution:

James H. Barkley, Esq., Office of the Solicitor, U.S. Department of Labor, 1585 Federal Building, 1961 Stout Street, Denver, Colorado 80294 (Certified Mail)

Thomas F. Linn, Esq., 555 Seventeenth Street, Denver, Colorado 80202 (Certified Mail)

/ot

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

SEP 15 1986

EMERY MINING CORPORATION,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. WEST 86-106-R
v.	:	Order No. 2833668; 3/11/86
	:	
SECRETARY OF LABOR,	:	Little Dove Mine
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
Respondent	:	

DECISION

Appearances: Timothy M. Biddle, Esq. and Susan E. Chetlin, Esq.,  
Crowell & Moring, Washington, D.C.,  
for Contestant;  
Edward J. Fitch, IV, Esq., Office of the Solicitor,  
U.S. Department of Labor, Arlington, Virginia,  
for Respondent.

Before: Judge Morris

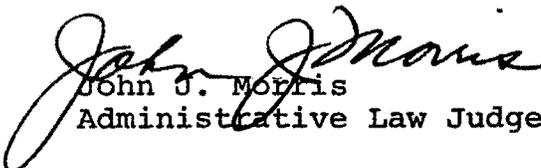
This is a contest proceeding initiated by contestant pursuant  
to § 105(d) of the Federal Mine Safety and Health Act of 1977,  
30 U.S.C. § 801 et seq., (the Act).

Emery contested MSHA Order No. 2833668 for a failure to abate  
Citation No. 2833666 issued March 10, 1986.

A hearing on the merits of this case and related cases com-  
menced in Denver, Colorado on July 29, 1986.

At the hearing the parties advised the judge that the Secretary  
intended to vacate his order. In due course the order was vacated  
and the contestant has, accordingly, moved to withdraw the notice  
of contest.

Pursuant to Commission Rule 11, 29 C.F.R. § 2700.11, con-  
testant's motion is granted and the contest filed by Emery Mining  
Corporation is dismissed.

  
John J. Morris  
Administrative Law Judge

**Distribution:**

Timothy M. Biddle, Esq. and Susan E. Chetlin, Esq., Crowell & Moring, 1100 Connecticut Avenue, N.W., Washington, D.C. 20030  
(Certified Mail)

Edward J. Fitch, IV, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, Virginia 22203  
(Certified Mail)

/ot

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 18, 1986

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 85-112
Petitioner	:	A.C. No. 15-10198-03506
	:	
v.	:	Brenda Faye Coal Tipple Mine
	:	
BRENDA FAYE COAL SALES CO.,	:	
INC.,	:	
Respondent	:	

## DECISION

Appearances: Charles Merz, Esq., Office of the Solicitor,  
U.S. Department of Labor, Nashville, TN, for  
Petitioner;  
Daniel E. Karst, Esq., Brenda Faye Coal Sales  
Company, Inc., Closplint, KY, for Respondent

Before: Judge Fauver

The Secretary seeks a civil penalty for an alleged violation of a mandatory safety standard under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq.

The charge was issued in connection with the investigation of an accident. Joseph Shuler, a contract coal hauler, was permanently disabled when a Michigan front-end loader operated by Respondent's employee struck Shuler and mashed his leg against the front of his coal truck.

Shuler's leg was amputated as a result of severe, multiple fractures and lacerations of his leg. The front-end loader had defective brakes at the time of the accident.

A hearing was held in Lexington, Kentucky. Having considered the testimony, arguments, and the record as a whole, I find that the preponderance of the reliable, probative, and substantial evidence establishes the following:

### FINDINGS OF FACT

1. Respondent operates a coal tipple in Harlan County, Kentucky, which is part of a business enterprise of corporations controlled by Edward Karst. The enterprise is a medium size business, producing 300,000 tons of coal annually. It was stipulated at the hearing that a penalty within the limits of the Act would not affect Respondent's ability to continue in business.

2. On January 11, 1985, a coal hauling truck with an attached tandem trailer was loaded with coal at the tipple, and ready to leave. Its exit was a 10-12% grade, dirt road. Because of slippery conditions, the truck was unable to climb the grade.

3. David Karst, an employee at the tipple, and son of Edward Karst, drove a Michigan 275B front-end loader toward the site where the truck was stuck. He intended to descend the road, stop near the front of the coal truck, have a tow chain attached and tow the truck up the exit road.

4. When Karst descended the road toward the truck, he saw the truck driver in front of the truck. The driver was there to hook up the tow chain. Karst tried to stop the front-end loader to avoid hitting the driver and the coal truck, but he was unable to stop the front-end loader because of defective brakes. The brakes were only 35-40% effective. The bucket of the front-end loader struck the driver and the coal truck. The driver's left leg was crushed against the truck. Multiple fractures and lacerations of the leg resulted in amputation of the leg at the hospital. The coal truck's front-end was severely damaged by the collision.

5. Extensive repairs of the brakes of the front-end loader were required to bring the braking capacity up to a normal, safe operating condition. The extent of the brake deterioration and the type of repairs needed to correct it showed that the brake defects had not suddenly occurred but were detectable for a considerable period before and up to the time of the accident.

6. The driver of the front-end loader did not test the brakes before he started downhill toward the coal truck. At the top of the incline, he saw the driver in peril, in front of the coal truck, and had sufficient time and distance if the brakes were normal to stop the front-end loader without hitting the driver or the coal truck. However, because the brakes were defective his vehicle collided with the driver and the truck.

#### DISCUSSION WITH FURTHER FINDINGS

I find that Respondent was grossly negligent in operating the Michigan front-end loader with defective brakes. The loader is a very large vehicle, with wheels over eight feet high. Moving the vehicle around other equipment and personnel with only 35-40% effective brakes was a highly hazardous practice. The federal inspector issued an imminent danger order on the front-end loader, forbidding its use until the brakes were repaired. Respondent should have taken the vehicle out of service for proper brake repairs before January 11, 1985, the day of the accident. The gravity of the violation was very high, and, with normal brakes, and by exercising reasonable care, the front-end loader driver could have avoided the accident. He could have stopped his vehicle and told Shuler to get out of the way before proceeding downhill toward the coal truck. The defective brake condition was a direct cause of the accident and permanent disabling injury of Joseph Shuler on January 11, 1985.

Respondent argues that Joseph Shuler should not have been standing in front of his coal truck and that his negligence contributed to the accident. However, with safe brakes, Karst would have been able to stop his vehicle and tell Shuler to stand aside before he proceeded down-hill. In addition, with safe brakes and by exercising reasonable care, Karst would not have struck the coal truck, which was substantially damaged by the collision. His collision with the coal truck was in no way caused by Shuler's presence in front of the truck.

Despite Respondent's arguments about an "unavoidable" accident, it is clear that, if there had been adequate brakes and reasonably prudent performance by the front-end loader driver, the front-end loader would not have struck Shuler and the coal truck.

Considering all of the criteria in section 110(i) for assessing a penalty, a civil penalty of \$2,000 is deemed appropriate for this violation.

#### CONCLUSIONS OF LAW

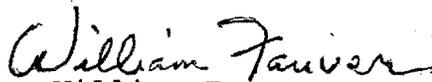
1. The Judge has jurisdiction over the subject matter of this proceeding.

2. Respondent violated the safety standard as charged in Citation No. 2476582.

3. Respondent is ASSESSED a civil penalty of \$2,000 for the above violation.

#### ORDER

Respondent shall pay the above assessed civil penalty of \$2,000 within 30 days from the date of this Decision.



William Fauver  
Administrative Law Judge

#### Distribution:

Charles F. Merz, Esq., Office of the Solicitor, U.S. Department of Labor, 280 U.S. Courthouse, 801 Broadway, Nashville, TN 37203 (Certified Mail)

Mr. Edward W. Karst, President, Brenda Faye Coal Sales Company, Inc., Box 493, Louellen, KY 40853 (Certified Mail)

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

**SEP 19 1986**

JOHN HATTER, JR., : DISCRIMINATION PROCEEDING  
Complainant :  
v. : Docket No. PENN 85-290-D  
: MSHA Case No. WILK CD 85-1  
FRANKLIN COAL COMPANY, :  
Respondent : Franklin Breaker Mine

DECISION

Appearances: Cyrus Palmer Dolbin, Esq., Pottsville,  
Pennsylvania, for the Complainant;  
Franklin I. Miller, President, Franklin Coal  
Company, Pinegrove, Pennsylvania, pro se.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a discrimination complaint filed by the complainant against the respondent pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. The complainant alleges that he was discharged by the respondent because he filed a claim for black lung benefits, and the respondent maintains that the complainant was laid off for certain economic reasons. The initial complaint was filed with the Secretary of Labor, Mine Safety and Health Administration (MSHA), and following an investigation of the complaint, MSHA advised the complainant that its investigation failed to disclose any violation of section 105(c). The complainant then filed his complaint with this Commission.

A hearing was held in this matter in Pottsville, Pennsylvania, and the parties appeared and participated fully in the hearing. The parties waived the filing of any post-hearing arguments, but I have considered the oral arguments made on the record during the hearing in the course of this decision.

### Issue

The critical issue in this case is whether Mr. Hatter's termination by the respondent was prompted in any way by his filing for black lung benefits, or whether it was the result of certain economic conditions or financial losses as claimed by the respondent.

### Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 301 et seq.
2. Sections 105(c)(1), (2) and (3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815(c)(1), (2) and (3).
3. Commission Rules, 29 C.F.R. § 2700.1, et seq.

### Discussion

#### Complainant's Testimony and Evidence

John Hatter, Jr., testified that he is presently working for the Sherman Coal Company, and that he previously worked for the respondent from April 10, 1970, to January 30, 1985. His duties included the loading of trucks, taking care of the fine coal plant, and loading trailers with a front-end loader.

Mr. Hatter stated that he filed for black lung benefits on November 28, 1984. On January 30, 1985, Company President Franklin Miller summoned him to his office and advised him that he had to be laid off "because he said coal sales were down and he was being audited" (Tr. 12). Mr. Hatter stated that he asked Mr. Miller why he couldn't lay someone else off, and Mr. Miller said "they could weld and I couldn't" (Tr. 12). Mr. Hatter confirmed that he left work that same day.

Mr. Hatter stated that during his employment with the respondent he had no disputes over his work, was always on time, had no arguments with management, and he considered himself to be a good employee (Tr. 13). He stated that Mr. Miller never complained about his work (Tr. 24). He identified employee Robert Hoffman as the only person with more seniority, and he identified five other employees who had less seniority with the company (Tr. 16-17). Mr. Hatter stated that after he was laid off, Mr. Hoffman was injured on the job and was in the hospital. The respondent hired no one to fill his vacancy, and Mr. Hoffman has since returned to

work. However, Mr. Miller hired Claire Zimmerman, his brother-in-law, after Mr. Hoffman was injured, even though he (Hatter) was second in seniority to Mr. Hoffman, and was available for work. Mr. Hatter stated that he received no further calls or communications from Mr. Miller to go back to work (Tr. 19). He confirmed that he was receiving unemployment benefits from the State of Pennsylvania, and that in order to receive those benefits he had to be ready, willing, and able to work (Tr. 20). He also confirmed that he could have done welding work (Tr. 20).

Mr. Hatter's counsel produced copies of payroll slips from July 6 to December 28, 1984, reflecting that Mr. Hatter earned an average of \$221.69 a week while employed with the respondent during this time period (Tr. 21, exhibit C-2). Mr. Hatter confirmed that he was unemployed from January 30, 1985 to September 14, 1985, the date that he went to work for the Sherman Coal Company, and that his unemployment benefits stopped in July, 1985 (Tr. 23). He stated that he received unemployment benefits from January 30 through July, 1985, and that they amounted to \$122 a week (Tr. 24).

Mr. Hatter's counsel produced a copy of a letter dated February 25, 1985, after Mr. Hatter's termination, from Mr. Miller to the Office of Coal Mine Workers' Compensation Programs, Wilkes-Barre, Pennsylvania, stating that Mr. Hatter was never absent from work due to illness and never complained that he was short of breath or wanted other work because of shortness of breath (exhibit C-3, Tr. 24-25). The letter also states: "Before we are liable and John Hatter is found eligible that he received Black Lung benefits, I want proof that he does have pneumoconiosis by a second opinion from doctors' examinations, x-rays, etc."

In response to further questions, Mr. Hatter confirmed that he did not inform Miller that he was going to file his black lung claim before he filed it and that he never discussed it with him (Tr. 26). Mr. Hatter stated that he filed the claim because "I was getting up in age. It takes 6 or 7 years to get it" (Tr. 26). He filed it to establish his eligibility and to protect whatever rights he had under any applicable law. Mr. Hatter also confirmed that he never contacted anyone from MSHA regarding his claim (Tr. 27).

Mr. Hatter stated that Mr. Miller employs seven people, and he described Mr. Miller's operation as a preparation plant which processes and cleans coal received from different sources. The coal is resold to different truckers and jobbers, and at one time it was shipped by rail. There is no

underground facility on the property, and no coal is actually mined there. Mr. Hatter could not state the volume of coal processed by the plant (Tr. 28-29).

Mr. Hatter confirmed that Mr. Miller's operation is non-union, and that when he was terminated, Mr. Miller told him that his coal sales were down and they did not discuss his black lung claim. Mr. Hatter reiterated that at no time prior to his termination did he ever discuss any black lung condition or claim with Mr. Miller, and he conceded that Mr. Miller had no reason to know about it, and never said anything to Mr. Hatter which would lead him to believe that he knew about the claim (Tr. 42-46). When asked why he believes he was terminated by Mr. Miller because he filed for black lung, Mr. Hatter responded "Well, it seems to figure. He got notice the 29th, and the 30th I got laid off" (Tr. 46).

Mr. Hatter's counsel confirmed that Mr. Hatter is waiting for a hearing date on his black lung claim, and that it usually takes 5 to 7 years for a hearing to determine his eligibility for benefits (Tr. 29). Counsel conceded that the black lung claim is different from any Part 90 Miner status under MSHA's regulations, and he stated that he was not familiar with those regulations and has not read them thoroughly (Tr. 30). He conceded that Mr. Hatter has never filed for Part 90 status under MSHA's regulations, and Mr. Hatter himself confirmed that he never filed for such status (Tr. 31-32, 38).

Mr. Hatter stated that he sought treatment or medical advice for his alleged black lung condition on one occasion, and his counsel confirmed that this was done in connection with the filing of his black lung eligibility claim, and that this was done after his termination by the respondent (Tr. 33). Copies of certain medical records introduced by Mr. Hatter's counsel include a chest radiographic diagnosis of "Pneumoconiosis with probable emphysema." Mr. Hatter's counsel conceded that prior to his termination by the respondent, he was not examined for black lung nor was that fact made known to Mr. Miller prior to the filing of his claim, but that it was made known immediately after the filing of the claim (Tr. 35).

Mr. Hatter's counsel pointed out that Mr. Hatter worked in a "watered down work area," and since he was in a dust-free environment, he probably would not have qualified for Part 90 miner status. Counsel proffered that Mr. Hatter did work

inside mines prior to 1970 before going to work for the respondent, and may have contracted black lung then (Tr. 39).

Mr. Hatter's counsel submitted that on January 29, 1985, the day before he was laid off, Mr. Hatter received notice from the U.S. Department of Labor that his black lung claim had been filed, and that the respondent also received a copy of that notice, (exhibit C-1, Tr. 14). Counsel asserted that this was the first notice that the respondent would have received of the filing of Mr. Hatter's claim, and that it was probably received by January 29-30, 1985, the date on which he was dismissed (Tr. 15).

#### Respondent's Testimony and Evidence

Franklin I. Miller, confirmed that he is the owner and operator of the Franklin Coal Company. He described his operation as a coal preparation plant, and he stated that he purchases coal from different suppliers and sells it to brokers or other domestic users. The average number of employees is four to five, and the number of days the plant is in operation varies. At the present time, the plant operates less than 5 days a week, and on some weeks it only operates for 2 days depending on the amount of coal processed. For the year 1985, the plant processed 10,884 tons of coal, and handled an additional 40 percent which is simply bought and resold without processing (Tr. 50-53).

Mr. Miller stated that his coal tonnages and sales for the past 10 years have diminished roughly 20 percent a year, and that at the time he laid off Mr. Hatter he had to employ less people because his sales did not warrant the number of people he employed. The December 1984 audit from his accountant reflected a loss of \$31,419.39 for that month (Exhibit R-2, Tr. 54). A statement of profit and losses for the entire year of 1984 reflect a net loss of \$70,563.88 (exhibit R-1, Tr. 54).

Mr. Miller stated that at the time he terminated Mr. Hatter he was still waiting for his final 1984 yearly audit of his financial position as reflected in exhibit R-1, but he knew that his financial position was such as to require some changes in his structure and operation. In any decision to lay off employees, he considers which employees are more important to his operation. In this case, Robert Hoffman was a welder and a supervisory foreman, and everyone else except Mr. Hatter were welders. Mr. Miller stated that he explained to Mr. Hatter that it was important for him to retain welders because he was rebuilding his steel coal

storage bins and needed them. Mr. Miller stated that any of these employees could do Mr. Hatter's work, including the man he had working in the office (Tr. 55).

On cross-examination, Mr. Miller stated that during past business slumps he did not lay off employees. Although he did not actually receive his final 1984 audit until after Mr. Hatter was terminated, he did receive monthly reports and "had an inkling" that he was operating at a loss. He stated that he explained this to Mr. Hatter when he laid him off (Tr. 57).

Mr. Miller confirmed that he received the notice dated January 28, 1985, concerning Mr. Hatter's black lung claim in the mail, and conceded that he may have received it on the 29th or 30th, but was not sure as to the exact date he received it (Tr. 57-59). He also stated that "I might have gotten this before, yes" (Tr. 59). He explained that he laid Mr. Hatter off on January 30, because it was the end of a weekly pay period, and the day following began a new pay period (Tr. 59). Although January 30 was a Wednesday, Thursday was the end of the pay period, and Mr. Hatter would have picked up his check on Friday, and it was decided to terminate him at the end of the week so as not to establish a new account for him (Tr. 60-61).

Mr. Miller stated that at the present time he has only three employees, including himself, on his payroll. He denied that Mr. Claire Zimmerman, his brother-in-law, is on his payroll, and he explained that he sold a car to Mr. Zimmerman and that he helped out to pay for the car. Mr. Miller also stated that he operates another business installing satellite dishes and that Mr. Zimmerman helps load them on the trucks to pay off the car, and that he is available as needed. Mr. Miller confirmed that Mr. Zimmerman at one time worked for his (Miller's) father as a loader, welder, and plant operator, and that he is married to his sister, who works as his part-time secretary (Tr. 64).

Mr. Miller stated that subsequent to Mr. Hatter's termination, Mr. Hatter's son was on his payroll, but was laid off in May, 1985. He also laid off employee Edward Wolfe at the same time he laid off Mr. Hatter, but did not advise Mr. Hatter of this fact because their discussion was very brief (Tr. 66). Although Mr. Hatter first came to work in 1970 when his (Miller's) father owned the business, Mr. Miller stated he took over the business from his father in 1975 (Tr. 66).

Mr. Miller stated that the losses reflected on his "unaudited financial reports" for 1984 are actual losses, and he reiterated that he retained the employees with welding skills because he needed them, and Mr. Hatter was not a welder (Tr. 66-67). Mr. Miller stated that his company has no formal seniority program, and since he is the boss "I pick and choose" (Tr. 68).

Mr. Miller stated that he has never discussed Mr. Hatter's discrimination complaint with him. He confirmed that his company provided Mr. Hatter with hospitalization benefits and that Mr. Hatter has received \$11,000 to \$12,000 as the beneficiary of a company retirement plan funded totally by the company (Tr. 69-70). When asked why he believed Mr. Hatter filed the complaint against him, Mr. Miller responded "to get out of the boss what you're going to get out of him" (Tr. 69).

Mr. Miller disagreed with Mr. Hatter's assessment of himself as an employee. Mr. Miller stated that his lay-off decision concerning Mr. Hatter did not come about "on the spur of the moment." He stated that for the past 5 years he has been dissatisfied with Mr. Hatter's work, and he gave several examples of what he considered to be poor performance, including complaints from customers and instances when Mr. Hatter put in for time worked when he actually did not work. On those occasions, Mr. Miller would deduct the time from Mr. Hatter's pay, without objection (Tr. 70-72).

Mr. Miller asserted that he probably should have fired Mr. Hatter earlier, but instead laid him off so that he could collect his unemployment for 26 weeks (Tr. 72). Mr. Miller conceded that he did not tell Mr. Hatter this, nor did he discuss his work with him at the time he laid him off, and he denied that Mr. Hatter was fired (Tr. 72). He further explained that he did not bring these matters up with Mr. Hatter when he laid him off because he did not wish to be subjected to any abuse from Mr. Hatter (Tr. 74). Mr. Miller also indicated that he was reluctant to bring up Mr. Hatter's work performance "for his sake" (Tr. 74). When asked why he did not fire Mr. Hatter earlier, Mr. Miller responded "Did you ever hear the expression that they say: Give a guy enough rope, he'll hang himself? Well, that's exactly what he did" (Tr. 75). Mr. Miller explained further at (Tr. 102):

JUDGE KOUTRAS: Well, you keep talking about the rope now. But, why didn't you put on the rope 4 years or 3 years? Why did you wait until this?

MR. MILLER: I made up my mind then that he was going to have to go at that time. The right occasion had to occur. And, my financial situation is what decided this. His black lung, I have no control over whether he gets black lung or he doesn't have any black lung. That's not my decision to make; that's the doctor's decision. We paid into the funds for him to get black lung, if he has it.

When asked why he did not bring up Mr. Hatter's poor work performance when he was contacted by an MSHA investigator during the investigation of his discrimination complaint, Mr. Miller responded " I didn't want to bring that up for his own benefit, and, I didn't want to bring it up here today. I don't like to treat men like that" (Tr. 103-104). In response to further questions, Mr. Miller stated as follows (Tr. 104-105):

JUDGE KOUTRAS: Why did you feel compelled to bring it up today?

MR. MILLER: Because you were asking me about my brother-in-law and about the car that he worked for. And, well, naturally I'd bring everything out. I mean, I don't like -- I'm not an individual who would go down there and rub mud in anybody's face, because I don't expect that of myself either.

JUDGE KOUTRAS: When he received unemployment compensation benefits what did you tell the state people your reason for terminating him; do you recall?

MR. MILLER: I laid him off because I needed welders and I had to cut down on the payroll. I had to make up some seven thousand dollars there some place. That's the first place. Besides taxes and -- you see, when you have five people on the payroll -- four instead of five, you're paying twenty percent less into Black Lung funds, twenty percent less hospitalization.

I had to get rid of men because of costs. I was the boss of the place. I worked out there like everybody else. So, I was in a

position to get rid of some of the people and do the work myself. That's only surviving.

JUDGE KOUTRAS: Do you pay your portion or share of Black Lung to this insurance carrier for all your employees?

MR. MILLER: Yes.

JUDGE KOUTRAS: Across the board?

MR. MILLER: Everyone, yes.

Mr. Miller confirmed that while he was familiar with MSHA, he was not familiar with the black lung program because he was never involved with it. He denied any knowledge of MSHA's "Part 90" program, and he stated that none of his employees have ever made application for that program, nor has MSHA ever advised him that any employee had to be reassigned to get them out of dusty environments. He stated that he has always been in compliance with MSHA's dust standards (Tr. 76).

Mr. Miller stated that he never discussed Mr. Hatter's black lung claim with him, and that he first learned about it through the notice letter of January 28. Mr. Miller stated that he had no basic familiarity with the claim and was not concerned that it might cost him money or cause problems (Tr. 77). He insisted that he laid Mr. Hatter off because of economic conditions, and that he has been patient with him for the past 5 years. He confirmed that Mr. Hatter's attendance record was good and that he was "always there on time" (Tr. 78). He also confirmed that he did not document Mr. Hatter's past poor work performance.

Mr. Miller stated that he has no control over Mr. Hatter's asserted black lung condition, and that he has paid into the Federal and state black lung fund for as long as he has been in business. He explained that the funds are paid into an insurance fund, and that the insurance company pays for black lung benefits and that he is not personally liable for any claim. If he were, it would be impossible for him to stay in business (Tr. 102-103).

Mr. Hatter was called in rebuttal, and denied that he ever threatened a strike or slowdown if he did not get a raise. He stated that he got along well with Mr. Miller, and denied that he caused any problems. With regard to the employment of Mr. Zimmerman, Mr. Hatter confirmed that he

simply assumed that he was on Mr. Miller's payroll and that he never discussed the matter with Mr. Zimmerman. Mr. Hatter confirmed that he received company paid hospitalization and retirement benefits, and that he never had any trouble or problems with Mr. Miller (Tr. 80-84). He confirmed that Mr. Miller did not discuss company finances with him at the time he was laid off, and that Mr. Miller simply told him that coal sales were down and he was being audited (Tr. 84).

Mr. Hatter stated that he filed his discrimination complaint with MSHA after a contact by someone from MSHA's Wilkes-Barre office. Someone from MSHA called him at home, and one of its representatives came to his house and took his complaint statement of May 12, 1985. Mr. Hatter's wife, who was present in the hearing room, confirmed that someone from MSHA contacted Mr. Hatter as a result of his black lung claim, and when that individual inquired as to whether Mr. Hatter was still employed, Mr. Hatter advised that he was laid off the day following the receipt of the notice of his black lung claim and that the MSHA person stated "no way" (Tr. 90). Someone from MSHA subsequently came to their home and had Mr. Hatter fill out the complaint papers (Tr. 91).

Mr. Miller stated that he was contacted by an MSHA representative during the investigation of Mr. Hatter's complaint. Mr. Miller stated that he informed the representative that he had also laid off Mr. Wolfe at the same time, and that the representative spoke with Mr. Wolfe. Mr. Miller was later notified that MSHA found no discrimination in this case (Tr. 92).

Mr. Hatter denied that Mr. Miller ever told him that he would take him back if economic conditions got better, and Mr. Hatter did not ask him about this. Mr. Hatter believed that Mr. Miller should have laid someone else off with less seniority (Tr. 96).

#### Findings and Conclusions

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 Company, 2 FMSHRC 2768, (1980), rev'd on other grounds sub. nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3d Cir. 1981); and Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981). Secretary on

behalf of Jenkins v. Hecla-Day Mines Cororation, 6 FMSHRC 1842 (1984). 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 matter 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 Company, 4 FMSHRC 1935 (1982). The ultimate burden of persuasion does not shift from the Complainant. Robinette, supra. See also Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983); and Donovan v. Stafford Construction Company, No. 83-1566, D.C. Cir. (April 20, 1984) (specifically-approving the Commission's Pasula-Robinette test). See also NLRB v. Transportation Management Corporation, \_\_\_\_\_ U.S. \_\_\_\_, 76 L.Ed.2d 667 (1983).

Section 105(c)(1) of the Mine Act provides in pertinent part as follows:

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

Section 101(a)(7), of the Mine Act provides in pertinent part as follows:

\* \* \* [W]here appropriate, any such mandatory standards shall prescribe the type and frequency of medical examinations or other tests which shall be made available, by the operator at his cost, to miners exposed to such hazards in order to most effectively determine whether the health of such miners is adversely affected by such exposure. Where appropriate, the mandatory standard shall provide that where a determination is made that a miner may suffer material impairment of health or functional capacity by reason of exposure to the hazard covered by such mandatory standard,

that miner shall be removed from such exposure and reassigned. Any miner transferred as a result of such exposure shall continue to receive compensation for such work at no less than the regular rate of pay for miners in the classification such miner held immediately prior to his transfer. In the event of the transfer of a miner pursuant to the preceding sentence, increases in wages of the transferred miner shall be based upon the new work classification.

The mandatory health standards authorized by section 101(a)(7) of the Mine Act, are found at 30 C.F.R. Part 90. Pursuant to those regulations a miner employed at an underground coal mine or at a surface area of an underground coal mine may be eligible to work in a low dust area of the mine where there has been a determination that he has evidence of pneumoconiosis. If there is evidence of pneumoconiosis, a miner may exercise his option to work in a mine area where the dust levels are below 1.0 milligrams per cubic meter of air.

In Gary Goff v. Youghiogheny & Ohio Coal Company, 7 FMSHRC 1776 (Nov. 1985), the Commission held that a miner may state a cause of action under section 105(c)(1) of the Act by alleging discrimination based on the miner's being "the subject of medical evaluations and potential transfer" under 30 C.F.R. Part 90. In this case, Mr. Hatter makes no such claim. He simply alleges that he was terminated one day after the respondent was advised that he had filed a claim for black lung benefits. Thus, the issue presented is whether Mr. Hatter's termination was in any way prompted by his filing of this claim.

The record in this case establishes that Mr. Hatter filed his black lung eligibility claim on November 28, 1984, and that Mr. Miller had no knowledge of that filing. Mr. Hatter concedes that at no time prior to the filing of his claim, did he discuss his claim or any asserted black lung condition with Mr. Miller, and there is no evidence that Mr. Miller knew about it. Further, there is no evidence in this case that Mr. Miller knew about Mr. Hatter's claim until the Department of Labor's Notice of Claim dated January 28, 1985. Mr. Hatter asserted that he received the notice on January 29, 1985, and he assumed that Mr. Miller also received it in that day (Tr. 47). Mr. Hatter further conceded that he and Mr. Miller have never discussed his claim or his asserted black lung condition. The only direct evidence of Mr. Miller's knowledge of

Mr. Hatter's claim is the letter of February 25, 1985, exhibit C-3, which Mr. Miller sent to the Labor Department's claims examiner after Mr. Hatter was terminated. Since the claim examiner is the same individual who signed the January 28, 1985, Notice of Claim sent to Mr. Miller, I assume that Mr. Miller's letter of February 25, 1985, was in response to that notice.

Mr. Hatter conceded that on the day of his termination, Mr. Miller said nothing which would lead him to believe that Mr. Miller had any knowledge that he had filed a claim for black lung benefits. Mr. Hatter's counsel conceded that he cannot establish that on the day of the termination Mr. Miller had already received notice of the claim. Since Mr. Hatter received his notification on January 29, the day before his termination, Mr. Hatter assumed that Mr. Miller also received his copy that day, and that on the day of the termination, January 30, Mr. Miller had knowledge that he filed his claim. Mr. Hatter's counsel asserted that since Mr. Miller and Mr. Hatter lived within the same 5-mile radius, there is a presumption that Mr. Miller received notice of the claim on January 29, the same day that Mr. Hatter received his. Counsel candidly conceded that the basis for the discrimination claim is an inference that Mr. Miller believed there was some legal ramification flowing from Mr. Hatter's black lung claim, and that Mr. Miller terminated him for that reason (Tr. 36).

I take note of the fact that Mr. Miller's response to the notification that Mr. Hatter had filed a black lung claim came almost a month later when he sent his response of February 25, 1985, to the Labor Department. It seems to me that had Mr. Miller been really concerned about his liability for any black lung benefits to Mr. Hatter, he would have responded earlier. Further, Mr. Miller explained that he has always contributed to the black lung benefits fund for as long as he has been in business, that any benefits are paid by the appropriate insurance carrier, and that he is not personally liable for these payments. Given these circumstances, I cannot conclude that at the time of the termination the respondent was in any way concerned or motivated by the fact that Mr. Hatter had filed a claim for black lung benefits.

On the facts of this case, it seems clear to me that Mr. Hatter has not established that he ever applied to MSHA for classification as a Part 90 Miner, and at no time prior to his termination was he ever "the subject of medical evaluation and potential transfer" within the meaning of section 105(c)(1) of the Act. As a matter of fact, the evidence

establishes that the only time Mr. Hatter sought treatment or medical advice for his alleged black lung condition was in connection with his filing of a black lung eligibility claim, and this was done after his termination by the respondent. Mr. Hatter filed his claim in order to preserve any future rights to black lung benefits and in recognition of the fact that any administrative determination of his claim may take years to adjudicate. Mr. Hatter's counsel conceded that his black lung claim is different from any Part 90 Miner status under MSHA's regulations, and he questioned Mr. Hatter's eligibility under those regulations because his work with the respondent was in a watered down dust-free environment. Under the circumstances presented in this case, I conclude and find that Mr. Hatter has failed to establish a prima facie claim that he was terminated because he was "the subject of medical evaluation and potential transfer" under Part 90, or because he had filed a claim for black lung benefits. Accordingly, his complaint IS DISMISSED.

  
George A. Koutras  
Administrative Law Judge

Distribution:

Cyrus Palmer Dolbin, Esq., Dolbin, Cori & Jones, P.O.  
Box 980, 501 West Market Street, Pottsville, PA 17901  
(Certified Mail)

Franklin I. Miller, Jr., Owner, Franklin Coal Company,  
Ravine, PA 17966 (Certified Mail)

/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SEP 19 1986

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. PENN 85-299  
Petitioner : A.C. No. 36-06172-03501  
: :  
v. : Blackhawk Mine  
: :  
YEANEY, SHIELDS, BRICK, :  
PARTNERS, :  
Respondent :

ORDER OF DEFAULT

Before: Judge Broderick

On August 25, 1986, I issued an order to Respondent to show cause on or before September 5, 1986 why it should not be held in default for failure to comply with my prehearing order issued on May 12, 1986. At the request of Respondent made in a telephone conversation on September 5, 1986, I extended the time to respond to the order to show cause to September 15, 1986. Respondent has not responded to the order to show cause.

Therefore, I find that Respondent is in DEFAULT. IT IS ORDERED that the penalties proposed in the Assessment Order attached as Exhibit A to the Petition in the total amount of \$82 are imposed as the final order of the Commission. IT IS FURTHER ORDERED that Respondent shall pay such penalties in the amount of \$82 within 30 days of the date of this order.

*James A. Broderick*

James A. Broderick  
Administrative Law Judge

Distribution:

Mark V. Swirsky, Esq., U.S. Department of Labor, Office of the  
Solicitor, 3535 Market Street, Philadelphia, PA 19104 (Certified  
Mail)

Mr. Gary E. Yeane, Partner, R.D. 2, Box 62A, Mayport, PA 16240  
(Certified Mail)

slk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SEP 19 1986

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. PENN 85-305  
Petitioner : A.C. No. 36-02405-03608  
v. :  
: Greenwich No. 1 Mine  
GREENWICH COLLIERIES, :  
DIVISION OF PENNSYLVANIA :  
MINES CORPORATION, :  
Respondent :  
: GREENWICH COLLIERIES, : CONTEST PROCEEDING  
DIVISION OF PENNSYLVANIA :  
MINES CORPORATION, : Docket No. PENN 84-90-R  
Contestant : Citation No. 2255016; 3/16/84  
v. :  
: Greenwich No. 1 Mine  
SECRETARY OF LABOR, :  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), :  
Respondent :

DECISIONS

Appearances: Linda M. Henry, Esq., Office of the Solicitor,  
U.S. Department of Labor, Philadelphia,  
Pennsylvania, for Petitioner/Respondent;  
Joseph T. Kosek, Jr., Esq., Ebensburg,  
Pennsylvania, for Respondent/Contestant.

Before: Judge Koutras

Statement of the Proceedings

These consolidated proceedings concern a civil penalty proceeding initiated by MSHA against the respondent pursuant

to section 110(a) of the Federal Mine Safety and Health Act of 1977, seeking a civil penalty assessment for an alleged violation of mandatory safety standard 30 C.F.R. § 75.329, as stated in a section 104(a) Citation No. 2255016, with special "significant and substantial" (S&S) findings, issued by an MSHA inspector on March 16, 1984. The contest was filed by the contestant to challenge the legality of the citation.

The cases were consolidated for hearing, and the parties appeared and participated fully therein. Greenwich filed a posthearing brief, but MSHA did not. However, the oral arguments presented at the hearing have been considered by me in the course of these decisions.

### Issues

The issues presented are whether or not the condition or practice cited by the inspector constitutes a violation of the cited mandatory safety standard, and whether the alleged violation was "significant and substantial." Additional issues raised by the parties are identified and disposed of in the course of these decisions.

### Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, P.L. 95-165, 30 U.S.C. § 801 et seq.
2. Commission Rules, 29 C.F.R. § 2700.1 et seq.

### Stipulations

The parties agreed to incorporate by reference the following agreed-upon stipulations from a consolidated proceeding (PENN 85-204 and PENN 85-114-R), heard the day prior to the hearing in the instant cases (Tr. 191):

1. The subject mine is owned and operated by the respondent/contestant Greenwich Collieries.
2. Greenwich Collieries and the subject mine are subject to the Act.
3. The presiding administrative law judge has jurisdiction to hear and decide these cases.

4. The subject citation issued in these proceedings was properly served on a representative of Greenwich Collieries and may be admitted to establish its issuance and service.

5. Payment of the assessed civil penalty will not adversely affect the respondent/contestant's ability to continue in business.

6. The respondent/contestant's annual coal production is approximately two million tons. Greenwich Collieries is a medium-to-large mine operator.

7. The respondent/contestant exhibited ordinary good faith in timely abating the cited condition or practice.

8. Respondent/contestant's history of prior paid civil penalty assessments consists of 245 paid assessments for the first 9 months of 1985, 214 in 1984, and 155 in 1983.

#### MSHA's Testimony and Evidence

MSHA Inspector William Sparvieri testified as to his background and experience, and he confirmed that he issued the section 104(a) citation in question on March 16, 1984 (exhibit G-1). He stated that he was dispatched to the mine to assist MSHA's ventilation technical support personnel who were conducting a ventilation survey at the mine. This survey was being conducted because approximately a month earlier, the mine had experienced a methane explosion which resulted in the death of three miners and injuries to several others. He confirmed that he cited a violation of section 75.329, after finding a 3.3 percent methane accumulation at bleeder evaluation point No. 14. He also confirmed that he collected one 50 cc vacuum bottle sample of the mine atmosphere at that location, and he identified exhibit G-2, as the results of the laboratory analysis made of the sample by MSHA's Mt. Hope, West Virginia laboratory. The report reflected .24 carbon dioxide, 19.85 oxygen, 3.26 methane, and zero carbon monoxide (Tr. 4-9).

Mr. Sparvieri stated that a company representative was with him when he took his bottle sample at the bleeder evaluation point, and he confirmed that the representative did not at that time protest the location where he took his sample (Tr. 9-11). He confirmed that the location was an approved bleeder evaluation point as shown on the mine ventilation plan, and that the company was required to make an examination at that location at least weekly on a 7-day cycle, and to record its findings in an approved book used for this purpose. He observed dates and initials at the bleeder point in question to substantiate the fact that the company had made examinations at that location (Tr. 12).

Mr. Sparvieri stated that his initial methane reading of 3.3 percent was made at a location where a sign was posted identifying it as Bleeder Evaluation Point 14. He proceeded 50 feet in by that location and detected methane in the 4.0 percent range with a hand-held methane detector. He decided not to go any further because he was unfamiliar with the mine ventilation as a whole, was aware of the previous methane explosion, was unsure as to how the gob was being ventilated, and was concerned that "questionable air may have been present" if he went any further (Tr. 13). He considered the methane reading which he took as extremely dangerous, and issued a section 107(a) imminent danger order as well as a citation for an excess of 2 percent methane at the bleeder evaluation point. The order was subsequently vacated and made a part of a previously issued imminent danger order and a section 103(k) order which restricted mine activity because of the prior methane explosion (exhibit G-3, Tr. 14).

Mr. Sparvieri confirmed that he could not determine whether the operator was aware of the cited condition, and he had no way of knowing how long the methane condition had existed. He was not sure whether a recent examination of the area had been made by the operator because the mine had been closed by the previously issued orders. He took this into account when he rated the negligence as "low," but he believed that the cited condition created an explosion hazard. The "possibility" or "potential" for an explosion was present, and he considered it reasonably likely that an explosion hazard was present since had he proceeded in by any further he could have encountered an explosive mixture of methane. Had an explosion occurred, the results would have been fatal, and 16 miners would have been in danger. He estimated this number after observing miners working along the track haulage and other outby areas as he left the area to find a telephone to

report his findings to his supervisor. He also observed rehabilitation work, rock dusting, timbering, and the movement of supplies along the track haulage (Tr. 17).

Mr. Sparvieri could not state whether or not the gob area in question had previously experienced any ventilation problems, but he was aware of the fact that an explosion had occurred and that the mine had a history of methane liberation in excess of 2 million cubic feet a day (Tr. 18).

On cross-examination, Mr. Sparvieri confirmed that at the time he issued the citation he was not a ventilation specialist, and that his duties did not normally entail the inspection of the No. 1 Mine. He stated that when he detected the methane in question, he tested the air movement in the vicinity of the bleeder evaluation point, but the air movement was so slight that it would not turn the blades on the anemometer. He then used a smoke tube and took approximately five or six readings over a 10-foot distance with chemical smoke and calculated an air reading of 1,311 cubic feet per minute as reflected on the Mt. Hope laboratory report. The smoke which he released during his test travelled out by in its proper direction (Tr. 19-20).

Mr. Sparvieri stated that during his MSHA training he has received instructions concerning MSHA's standard procedures for making tests in connection with regulatory section 75.329. He explained that once a determination is made as to location of the bleeder evaluation points as shown on the mine map, all air readings and methane examinations are made at these locations. When asked for his interpretation and application of section 75.329, Mr. Sparvieri responded as follows (Tr. 21-22):

Q. I would like to show you the Code of Federal Regulations 75.329, and I would like you to read the area that I have underlined, beginning with "Air" down to "split."

A. Underlined in black?

Q. Yes, sir.

A. Okay. "Air course through the underground areas from which pillars have been wholly or partially extracted and which enters another split of air shall not contain more than 2.0 volume percent of methane when

tested at a point it enters such other split."

Q. Okay. Could you interpret for me, in conjunction with what you read, the 2 percent volume of methane when tested at the point it enter such other split?

A. My interpretation of that is prior to it enters the other split, not after it enters the main return.

Q. But do you have any specific instructions as to prior to when it enters the other split, the distance involved?

A. Yes, sir.

Q. Could you tell us that?

A. Yes. For example, if the BE was down closer to where it enters that split, you would have to get inby the rib line of that entry, so that turbulence or swirling of air from the main return would not affect your reading in any way.

Mr. Sparvieri confirmed that he made his methane test at the bleeder location approximately 70 to 100 feet away from the split where the air from the bleeder joined the air from the return split (Tr. 30-31). He explained the procedure he followed for determining the air mixing point as follows (Tr. 31-33):

Q. In your MSHA training, were you ever told what procedure to use to determine the mixing point?

A. What procedure to determine the mixing point?

Q. Yes, sir.

A. Yes.

Q. Would you tell us what that procedure is?

A. To use chemical smoke and to get inby the turbulence and inby the swirling air, so that

you are getting a true and exact reading off the gob or off of whatever you are ventilating and evaluating with that particular location.

Q. Is that what you did here?

A. Yes, I used smoke in a twofold purpose. I used it primarily to determine direction of air flow and to maintain or to get an accurate air measurement of CFM. When the smoke was discharged, there was no effects of swirling or turbulence in that area. We were inby the main return far enough where there was no mixing.

Q. But isn't the procedure to go inby where the split is, release the smoke at that point, and follow the current and then go 1 foot inby that position and take your reading?

A. I am not familiar with that. My training is to evaluate gobs, abandoned areas, worked out and pillared areas either in their entirety, by walking the perimeter of these locations, or to examine these locations at specified points approved on the ventilation map in the form of IE's and BE's. Regardless if that IE or BE is 10 feet from the mixing point of 150 feet or 500 feet from the mixing point, MSHA instructions are to examine BE's at their approved location on the review map in effect at that mine, at that particular time, and that is what I did.

Q. That MSHA instruction, is that out of the Indiana field office?

A. I can't answer for all of MSHA, but as far as I know, that is everywhere.

Q. Where did you get your instruction on that specific point, was it from your field office?

A. It was from my field office, it was from the district in Pittsburgh, and whether that policy and that training was discussed in Beckley, I can't answer that.

Q. Do you know if that was discussed out of Hastings? Do you know what the position of the Hastings field office is?

A. I have no idea, sir.

Mr. Sparvieri stated that 2 percent methane is the limit permitted in by the air mixing point, and that the explosive quantity of methane ranges from 5 to 15 percent (Tr. 36). With regard to the existence of any ignition sources in the cited area, he stated that a possible roof fall could set off an explosive mixture of gas, but he could not state whether any electrical equipment was present in the air return (Tr. 37).

In response to further questions, Mr. Sparvieri confirmed that he contacted his supervisor James Biesinger prior to issuing the citation because he was unfamiliar with the mine ventilation, could not determine what areas of the mine could possibly be effected by the methane, and had no idea as to what areas of the mine he should close (Tr. 37-38). Although the mine had been closed by the prior orders, general mine maintenance was taking place, and this included water pumping, timbering, and rock dusting. No coal production was taking place, and the work being performed was permitted by certain modifications which were made to the orders (Tr. 39-40).

Mr. Sparvieri stated that the roof conditions in the cited area were "fairly good," but that the in by gob areas continuously had roof falls. Water pumps were in operation, but he did not know how close they were to the cited area, and he did not know how much methane would be forced into the main return (Tr. 40). He confirmed that the prior methane explosion occurred when a spark from a water pump ignited an accumulation of methane from a gob which was not adequately ventilated (Tr. 41).

Mr. Sparvieri stated that bleeder evaluation points are the designated locations for an operator to make methane checks for the purpose of compliance with section 75.329. He explained that an operator is required to travel and examine all mine areas on a weekly basis. However, in areas which are inaccessible, hazardous, or have had pillar falls, an operator may apply to the MSHA district manager for designated bleeder or intake evaluation points in lieu of walking the areas. In the instant case, the bleeder evaluation point in question was approved by the district manager, and the operator was relieved from walking and examining the entire perimeter of the gob area. However, during the weekly examination,

the operator was required to go to the bleeder evaluation point to test for oxygen deficiency, determine the proper direction of air flow, and to evaluate the gob to insure that the ventilation was properly working (Tr. 42).

Mr. Sparvieri stated that section 75.329 requires that a methane test be made at a point before the air enters the split. Assuming the test is made at a location 50 feet before the air enters a split, and that location is not a bleeder evaluation point, the test would not comply with section 75.329. He confirmed that this interpretation has been the way he has been instructed since he has been an inspector (Tr. 45).

John A. Kuzar, MSHA Ventilation Specialist and Hastings, Pennsylvania, Field Office Supervisor, confirmed that the No. 1 Mine is under his supervision. He stated that he participated in the recovery operations after the methane explosion and that he travelled all of the gobs and examined all of the bleeder evaluation points during February and March, 1984. He confirmed that prior to this time the mine was on a section 103(i) 5-day spot inspection cycle because of the amount of methane liberated in a 24-hour period. The mine had problems on numerous gobs, and 11 of the 30 gobs had problems concerning evaluations and direction of air flow (Tr. 62-64). He pointed out that ventilation was being established in some of these areas prior to reopening the mine, and some of the areas had high methane (Tr. 65).

Mr. Kuzar stated that he visited the mine a day after Mr. Sparvieri was there and issued a section 104(d) order on March 17, 1984 (exhibit G-4), because of a pressure drop in the air (Tr. 67). Mr. Kuzar agreed that in the instant case, the theory of MSHA's case is that when Mr. Sparvieri found 3.3 percent methane, this indicated that the ventilation system for the cited area was not maintained (Tr. 68).

Mr. Kuzar explained the purpose of section 75.329 as follows (Tr. 71-76):

A. The purpose of 329 is to insure that you have good positive pressure over a gob, that you are diluting and rendering harmless any noxious gases. You are shoving it to your return.

As to answering where you have checked to determine this, it can vary, you know, it depends. What it depends on is the point

where you get the flow off of the gob, and it is not influenced by another air split. You are concerned that it is being diluted, there is enough pressure across that gob through a drop -- you have an inlet side; you have an exhaust side. You are determining, at that evaluation point, if the gob cannot be traveled in its entirety around a parameter, and even when you do travel around a parameter, you are required to check your taps or your connectors for excess of methane.

Now, where we get into the point of going inby further than the approved point, if an inspector finds an excess of 2 percent, and that area is accessible for examination, in other words, it is safe, no one is going to be endangered by roof or what have you, he should be going inby to determine, because in a lot of cases, you maybe only have to go a couple feet inby that point and you have the explosive mixture. So, in reality, you have a gob with over 5 percent of methane.

Q. So what you are stating is that -- if I can sort of extract from this, and the purpose of 329 -- the 2 percent at this area would supposedly reflect an explosive range farther in? Is that what you are saying?

A. Not in all cases. What I am saying is that the 2 percent point -- management establishes that point through their vent plan, under 316, is an area that they go on a weekly basis to make an examination.

\* \* \* \* \*

Q. In your experience, Mr. Kuzar, when a company submits a bleeder evaluation point, what are they submitting that -- what is the purpose of that point?

A. The purpose of them submitting for a bleeder evaluation point is something has occurred in that bleeder system that they cannot travel it in its entirety. The purpose of bleeder evaluation points were

brought out for mines that were developed prior to the effective date of the law.

Older mines, most of them, you had to establish some way to evaluate a gob, because in those days, they did not have to make good bleeders and leave them open. They normally pillared from the solid to the solid.

Now, today, since '69, most vent plans, they require to leave a standing room, in other words, a bleeder system that goes around the entire perimeter of that gob. But there are cases where management uses all steps, everything that is available to them to maintain this entry safe for travel and weekly examination, but they just can't hold it up.

So then management establishes a point where they can get the best evaluation of that gob without it being influenced by another split of air. It is submitted to the district manager. The district manager reviews it, he grants either tentative approval or final approval. If it is tentative approval, what happens then is it is sent out to the field office, an inspector is sent in there to determine if this is an adequate evaluation point, or, you know, area to evaluate it, but they establish the point.

Q. And you have stated -- I just want to make this clear in my own mind -- that they establish the point. One of the reasons they establish the point is for the purpose of evaluating the air.

A. Yes, ma'am, because they can no longer travel -- something has occurred in that bleeder entry that they can't travel it in its entirety. Normally, what is established is an inlet on one side and an exhaust on the other. So you are showing a drop of pressure across that gob by your readings you have here, your reading on your return side, and that reasonably assures that there is an air flow across that gob.

Q. And they are also establishing that point for you to measure the air off the gob to make sure that it has not been influenced by the air coming down the main return?

A. Yes, ma'am. If I may, there is one other thing that I could add on these gobs. In a lot of instances, we use methane drainage holes from the surface. If, say, we can't get a good flow over the gob, they will drill a hole down into the gob from the surface. A lot of companies, they put pumps on. They pump the methane out, or else they leave it on free flow, because of a problem in a gob, due to caving type where you are not getting a good flow.

Mr. Kuzar stated that the required amount of air over a gob is whatever it takes to dilute any methane, and the limit at the bleeder evaluation point is 2 percent (Tr. 76). Mr. Kuzar was of the opinion that the 3.3 percent methane found by Mr. Sparvieri at the bleeder evaluation point, and the 4.0 percent he found inby that point, were not acceptable levels in those mine areas. He explained that there was an excess of 2 percent at the bleeder point, and as he proceeded inby it kept increasing, and he would have had an explosive level had he gone further (Tr. 78). Mr. Kuzar was of the opinion that the 3.3 and 4.0 percent methane indicated that the gob was not being properly ventilated (Tr. 81-82), and he explained as follows (Tr. 83-84):

THE WITNESS: The basis, what I have, is what they had to do to correct the condition to assure that the gob was properly ventilated. You had air going both ways on the gob, which, in turn, it was bottlenecked. The methane was bottlenecked in the gob. You didn't have the inlet entries. What they were required to do through the District, to assure that this gob was ventilated properly in the future, they drove entries and they had to cut into it to establish new inlet points to induce air over the gob.

JUDGE KOUTRAS: Is that what they had to do to terminate this particular citation?

THE WITNESS: Not Inspector Sparvieri's. The one I issued, they did.

JUDGE KOUTRAS: Was that a different problem?

THE WITNESS: Well, they weren't complying with 316. The gob wasn't ventilated, yes.

Q. Mr. Kuzar, I know this may be difficult, but even without your order of the next day, just assuming that all you knew about this area was that you had traveled it and that Mr. Kuzar had found 3.3 percent methane, and then found 4 percent methane as he went further on, would you consider that to be -- in your opinion, is that indicative of proper ventilation in the mine?

A. There wasn't proper ventilation there, or you wouldn't have had it. You wouldn't have had the methane.

Q. Why would you not have had the methane there had there been proper ventilation?

A. Because the amount of ventilation that would have coursed across the gobs, it would have diluted it at the E.P. point. By the time it reached the E.P. point, it would have been down at 2 or below.

Mr. Kuzar stated that MSHA's policy is that the bleeder evaluation point is where an operator checks for compliance with section 75.329, to insure that no more than 2 percent methane is present at the point the air enters another split. Checks may also be made at bleeder taps or connectors. However, if an inspector determines that the bleeder point is being influenced by another split of air, that bleeder location may be rejected, and another location is established where a true evaluation of the gob may be made of only the air coming over the gob (Tr. 88). He stated that MSHA has no fixed policy as to how close to the return one must be to make a methane check (Tr. 90). He explained MSHA's methods for determining whether an operator fixes his evaluation point too close to the main return air course as follows:

A. What the inspector would do, he would use a smoke cloud. Now, if that air was going in towards that gob off of that return, he would have to follow that smoke to the point where the smoke changed and started coming out, so

he could get a true evaluation. That is determining flow. If you don't have enough air to take a reading with an anemometer, you are going to use a smoke cloud to determine air direction.

Q. And that is what the inspectors do to determine whether or not the bleeder evaluation point is an accurate determination of the air coming off the gob?

A. That is what they do when they cannot use an anemometer due to low velocities.

On cross-examination, Mr. Kuzar confirmed that MSHA has no written policy or procedure concerning where to test for methane pursuant to section 75.329 (Tr. 92). Referring to the operator's exhibit O-1, and in response to several hypothetical questions, Mr. Kuzar marked the sketch to indicate where the air coming off the gob would meet with the air coming off the split on the right-hand side of exhibit (Tr. 96). Assuming a methane reading of 1.2 percent at that location, Mr. Kuzar stated that the operator would be in compliance with section 75.329, but not at the BE-14 location where 3.3 percent methane was detected. If the only test was made at the location where 1.2 percent methane was found, the operator would be in violation of section 75.316 for not testing at the approved BE-14 location (Tr. 99).

Mr. Kuzar stated that he did know as a fact that the ventilation plan for the No. 1 Mine required that all bleeder evaluation points have methane readings of 2 percent or less (Tr. 100).

In response to further questions regarding exhibit O-1, Mr. Kuzar stated that a true reading of the air coming off the gob could not be made at the location marked with a "X" because the air coming off the gob outby BE-14 is going out through the connector shown on the left-hand side of the sketch. The proper place to test would be inby the BE-14 location where the total uninfluenced air is coming off the gob and before it enters the other split (Tr. 101-102).

Mr. Kuzar stated that in District 2 there is an oral policy concerning the proper location to test for methane pursuant to section 75.329, that the policy is consistent throughout the district, and that he instructs his inspectors to proceed in the manner previously described (Tr. 102-103). Mr. Kuzar confirmed that District Manager Donald Huntley's

policy is to check the flow of air off a gob at a point where it is not influenced by another current. This policy was also followed by supervisor James E. Biesinger (Tr. 104).

#### Respondent's-Contestant's Testimony and Evidence

Mine Foreman Richard Endler identified exhibit O-2 as a portion of the mine map depicting the location of bleeder evaluation point BE-14. He stated that the BE point in question was probably established and approved in 1981, and he agreed that it is in an area which cannot be travelled because of hazards or roof conditions. The BE was located there so that mine management can establish air flow through this area of the mine (Tr. 109).

Mr. Endler identified exhibit O-3 as an enlarge diagram of the location of BE-14, and he explained his understanding of the proper procedure for checking methane at the mixing point (Tr. 110). He marked an "X" on the diagram as the location of the air mixing point in this case. He stated that he was instructed by MSHA supervisor James Biesinger and MSHA ventilation specialist Richard Schilling to use a chemical smoke tube at the midline of the entry to the right of the diagram where the air is coming off the main return, and to follow the smoke as it swirled to a point where it would proceed back out into the main return. He would then take one step inby that location and take his methane reading (Tr. 110). He stated that he instructed his foreman to make methane checks following this same procedure (Tr. 111).

Mr. Endler stated that assuming a methane reading of 1.3 percent methane at the location of the "X" on the diagram, there would be no violation of section 75.329. Assuming methane readings of 2.9 and 3.1 at the BE-14 location, he would still be in compliance with section 75.329, because Mr. Biesinger and Mr. Schilling instructed him that he was allowed up to 4.5 percent methane at bleeder connectors, but at 4.5 percent the mine had to be withdrawn. He was also instructed that where the bleeder connector was influenced by the main return, and that the location where methane had to be below 2 percent was where it dumped into the main return (Tr. 111-112).

On cross-examination, Mr. Endler confirmed that the methane percentage figures which appear on diagram exhibit O-3, were the readings obtained by the management representative who accompanied Inspector Sparvieri during his inspection (Tr. 113). Mr. Endler had no reason to dispute the 3.26 methane reading at BE-14 made by MSHA's Mt. Hope laboratory, even

though management's reading indicates a reading of 2.9 to 3.1 (Tr. 114).

Mr. Endler disagreed that the 1.3 methane reading at the "X" location on the diagram resulted from the air coming off BE-14 going down the crosscut immediately outby BE-14. He believed that the 1.3 reading resulted from the 1,311 CFM air current diluting the methane as it approached the main return (Tr. 114). He did not believe the air from the main return affected the 1.3 reading because it was taken "inby where the split dumps" (Tr. 115).

In response to further questions, Mr. Endler stated that he received his instructions from Mr. Biesinger and Mr. Schilling orally underground at the mine. He reiterated that he was instructed to break the smoke device to determine where swirling air stopped and ended, and to take a step inby, which would be 3 feet, and to test at that point (Tr. 116).

Mr. Endler confirmed that he was not with Mr. Sparvieri during his inspection. It was his understanding that Mr. Sparvieri made his methane reading at the BE-14 location for a distance of 10 feet as the air flowed down the entry rather than at the point where it dumped into the return (Tr. 117).

Mr. Endler stated that the distance from BE-14 to the "X" location on exhibit O-3, is approximately 70 feet. Assuming methane readings of 2.9 to 3.1 at location BE-14, decreasing to 1.3 at the "X" mixing point, and .4 in the return, it was his opinion that the bleeder was "doing what it was supposed to" in diluting, rendering harmless, and carrying away the methane in the area. In the outby area, the methane was only .4 percent and 27,000 CFM's of air was coming down the return (Tr. 119).

Mr. Endler stated that the MSHA instructions he received with regard to the procedure for testing for methane were received in approximately May, 1984, and he conceded that the individuals who instructed him were not in the area of BE-14 (Tr. 119).

Mr. Endler stated that the mine ventilation plan reflects approximately 60 bleeder evaluation points, but that the plan does not state that the methane level at those points has to be at 2 percent. However, he conceded that if an inspector finds 3.1 methane at any bleeder evaluation point he will issue a citation because it is over 2 percent. In his view, 3.1 percent methane at the BE point does not establish that

the ventilation is not adequate when the air reaches the main return (Tr. 124-125).

Mr. Endler stated that the crosscut immediately outby BE-14 as depicted on exhibit O-3, was not an open entry. He stated that all of the coal had been pillared out and extracted and the area was caved. The area had rock across it, it was not an opening that one could travel through, and the "cross hatches" on the diagram indicates a cave area which occurred in 1981, and no airflow would be going in that direction (Tr. 128-129). Mr. Endler indicated that the caved area extended to the corner of the rib of the crosscut shown on the diagram, but conceded that it was possible for some of the air to seep through the caved area since they are not air tight (Tr. 131-132).

Mr. Endler explained the effect of the air coming off the gob at BE-14, and the caved crosscut as follows (Tr. 135-138):

JUDGE KOUTRAS: Mr. Endler, you have heard all the argument now. What is the effect of the undiluted air theory in your mind? I mean have you heard about that you are only supposed to test air that is undiluted to determine whether or not the gob ventilation is doing its job?

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: Isn't this air being diluted if it goes down this --

THE WITNESS: No, sir, that is all gob. The main return is one crosscut away from there.

JUDGE KOUTRAS: Do you mean to tell me that the air coming down this entry, some of it is not going to escape down here?

THE WITNESS: It is all the same air.

JUDGE KOUTRAS: What do you mean it is all the same air?

THE WITNESS: It's all the same air that is coming through the gob. It is not being diluted by the return air. That air that is

coming through there is all trying to get out to the main return.

JUDGE KOUTRAS: It is trying to get out this way?

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: Does some of it go down this way?

THE WITNESS: Yes, but it is still trying to get out to the main return.

JUDGE KOUTRAS: I don't care whether it is trying to. Is some of it going down this way?

THE WITNESS: Possibly.

JUDGE KOUTRAS: And could theoretically some of the methane seep out down that way?

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: And would that be an accurate reading at this point?

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: Why would it be accurate at this point if some of it is escaping?

THE WITNESS: Because the majority of it would be going down that entry to get to the main return because it is an open entry. The rest of it -- there may be some -- I can't deny that there might be some filtering through the cave. But that is what your air is supposed to do. It is supposed to filter through all of the cave and dilute and render harmless all the methane in the entire cave, not just one specific area.

\* \* \* \* \*

Q. The language of 329 is, ". . . when tested at the point it enters such other split."  
-- referring to another split of air. If air

is going down here, is this another split of air?

A. No. No, it's not.

Q. Where is your other split of air?

A. It's the same split of air that is coming from that entire gob that is going through there. It is the same air.

Q. Where is the other split of air.

A. The other split of air is over here in the main return that this air is trying to filter into.

Mr. Endler conceded that a 3.26 percent methane reading at the BE-14 was not personally acceptable to him, and that he would not be satisfied with 3 percent methane at any BE location because he believes it is dangerous. Although MSHA representatives had advised him that up to 4.5 percent methane is acceptable for air coming off the bleeder connectors as a matter of law, Mr. Endler's personal opinion is that it is not acceptable (Tr. 139-140). He admitted that as a mine foreman, he would not be comfortable with 3 or 4 percent methane at the BE point because he would be concerned that the ventilation may not be adequate (Tr. 141, 143-144).

Larry Luther, testified that he has 17-1/2 years of mining experience and that he is employed by the respondent as a surveyor, and periodically performs duties as a mine examiner examining BE points and air courses. At the time the citation was issued in this case, he was performing these duties (Tr. 151).

Mr. Luther confirmed that he travelled with Inspector Sparvieri on March 16, 1984, and that six BE points were examined that day (Tr. 152). Referring to the diagram, exhibit O-3, Mr. Luther stated that he and Mr. Sparvieri walked up the return to the BE-14 location and he made a methane reading of 2.9 to 3.1 percent, and Mr. Sparvieri recorded 3.3 percent. Mr. Luther recorded 2.5 methane outby the BE-14 location, 1.3 further outby, and .4 further outby. Mr. Sparvieri believed it was safe, and they returned to the BE-14 location and inby. Mr. Luther recorded a reading higher than 2.9 inby the BE-14 location (Tr. 152-153).

Mr. Luther stated that after making the methane tests, he and Mr. Sparvieri continued to take air readings, but their anemometers would not turn. Mr. Sparvieri then released a puff of smoke from a smoke tube and it went to the roof and then returned outby. They then decided to make an air reading with smoke at 10 foot intervals and the smoke was released at the BE point. The air was timed at 1,311 cubic feet per minute as it returned out the entry toward the main return the way it was supposed to. He did not recall travelling down the entry immediately outby the BE point (Tr. 153-154).

On cross-examination, Mr. Luther confirmed that he took his methane readings with a hand held CSE methane detector, but that he did not test the air where he recorded 2.5, 1.3, and .4 percent methane (Tr. 154). After testing the air at the BE point, he and Mr. Sparvieri left because he wanted to use a telephone, and it took them 45 minutes to an hour to reach the surface. The citation was served on him approximately an hour and a half later (Tr. 156).

Mr. Luther stated that he had no difference of opinion with Mr. Sparvieri at the time he issued the citation and did not suggest that he was taking his air reading at the wrong place. He confirmed that he has tested for methane at designated BE points, as well as BE points which have to be moved because of lack of physical access. In these instances, he would have to move back 20 to 30 feet to make his tests (Tr. 156-157).

Mr. Luther agreed with the procedure for making air readings as explained by Mr. Endler, and confirmed that he has made tests in this manner. Mr. Luther stated that it was his understanding that 3.3 percent methane at a BE point was acceptable, but found out differently when the citation was issued. He did not ask Mr. Sparvieri why he was issuing the citation (Tr. 158).

#### MSHA's Rebuttal Testimony

John Kuzar testified that during the 11 years he has been in the district he has never known that 4.0 percent methane was permitted at a bleeder evaluation point (Tr. 160). He stated that during the hearing he telephoned his office and spoke with MSHA Inspector Sam Burnatti concerning the mine ventilation plan on file in his office. Mr. Burnatti reviewed the applicable plan which was in effect at the time the citation was issued. Plan review 25 or 24 was in effect, and Mr. Burnatti reported that the plan specifically stated that 2 percent methane was permitted at a BE point (Tr. 161).

Referring to exhibit O-3, Mr. Kuzar stated as follows  
(Tr. 161-164):

Q. Now, again with your knowledge of this area and trying to concentrate solely on March 16, the day before you issued your citation. We're talking about Mr. Sparvieri's citation. In your opinion, using this map which has been submitted as Operator's Exhibit 3, the area where it's listed as 1.3 methane, is it possible for you to tell from that map whether that would be an acceptable spot to measure under 329, the section that we have been talking about where the split enters the other split?

A. Prior to it entering? Yes, but for the purpose of a B.E. point where it was established, no.

Q. And I would draw your attention to this area which is cave which we have established goes down here. In your experience as a ventilation expert, would it still be possible for air to dilute through that crosscut as we have been talking about here today?

A. Yes, it's possible for air to go over that cave. It depends how tight it is, what have you, the amount, because it's trying to get to return.

Q. Do you consider this to be an adequate spot to measure the air coming off the gob under section 75.329? I am pointing to where it is 1.3 percent.

A. No.

Q. We have heard some suggestions that because the air would have diluted to 1.3 percent at this time the ventilation plan -- or the ventilation that was in effect would have been working, would have been effectively diluting the methane. Do you agree with that statement?

A. If they had 1.3 out here as indicated, yes it would be diluting.

Q. What if they had an area of 3.3 percent here, would that be diluted?

A. No, it's not diluted at this point, where the approved location is for them to evaluate.

Q. And how about where it is 2.5 in the cross-cut area? Is that diluted?

A. No, it's over 2.0.

Q. Are there circumstances which could explain the diminution of the percentage other than having proper ventilation in effect? Do you understand what I am asking?

A. That would have reduced it?

Q. Yes.

A. The only thing that could have reduced it -- distance would have a bearing on it. And if it was being influenced by this other split of air is the only two things that could have had any bearing on a reduction of the amount of methane from this point to this point. The distance -- it's being diluted as it is moving. You have distance here. The same thing down here.

And the reason also, there would probably be some of the methane as indicated here. There was 2.5 here through their readings. So some of this gas was going out this way. So in time if you were to evaluate here, you would not be getting all the methane off of this gob. You are getting it here, but you wouldn't be getting it here because some of the gas is being coursed up this direction. It shows 2.5. And it shows 1.3 here.

Q. So you are saying the fact that 2.5 is there proves that some of the gas is being coursed out?

A. Yes ma'am.

Q. And is that proper ventilation for this area, for the gas to be coursed out that way?

A. There would be nothing wrong with it. It has to be coursed to return. But the fact remains that they had over 3 percent at this bleeder evaluation point.

Q. So what you're saying is although it may course out that way, you still are not getting an accurate reading of what is off the gob?

A. Back here?

Q. Coming off here, back here, I'm sorry.

A. No. You are not getting it all. You are getting a portion, a portion of it here and portion of it that is going out through here. That is why the B.E. point is inby this corner. You are getting it all.

Mr. Kuzar stated that while he was aware of citations issued for violations of section 75.316 at the time, he was not aware of any other citations for violations of section 75.329 (Tr. 165). He confirmed that prior to the issuance of the citation in this case no one from mine management advised him that the BE point was not an accurate place to measure for air entering another split (Tr. 166).

Mr. Kuzar confirmed that it is MSHA's position that the air must be diluted to the point where there is 2 percent or lower methane by the time the air reaches any bleeder evaluation point in the mine, and that if it is above 2 percent when it reaches the BE point, the respondent would not be in compliance with sections 75.316 and 75.329 (Tr. 170). He confirmed that every approved BE point in the mine is at a location immediately before the air is split. Anywhere where there is a possibility that the air would be diluted or escapes after it passes a BE point is not a valid place for testing. The BE point would be established inby such a location so that there is a true evaluation off the gob area.

### Findings and Conclusions

#### Fact of Violation

The section 104(a) "S&S" Citation No. 2255016, issued in this case by Inspector Sparvieri on March 16, 1984, charges

the respondent with an alleged violation of mandatory safety standard 30 C.F.R. § 75.329, and the condition or practice is described as follows: "3.3% of methane was detected at bleeder evaluation point No. 14. Air sample bottle No. I 1059 (50 cc) was collected at this location. The 3.3% of methane was detected with a MSA M402 hand held methane detector."

30 C.F.R. § 75.329, provides in pertinent part as follows:

On or before December 30, 1970, all areas from which pillars have been wholly or partially extracted and abandoned areas, as determined by the Secretary or his authorized representative, shall be ventilated by bleeder entries or by bleeder systems or equivalent means, or be sealed, as determined by the Secretary or his authorized representative. When ventilation of such areas is required, such ventilation shall be maintained so as continuously to dilute, render harmless, and carry away methane and other explosive gases within such areas and to protect the active workings of the mine from the hazards of such methane and other explosive gases. Air coursed through underground areas from which pillars have been wholly or partially extracted which enters another split of air shall not contain more than 2.0 volume per centum of methane, when tested at the point it enters such other split. \* \* \* (Emphasis added.)

In Itmann Coal Company, 2 FMSHRC 1986, July 31, 1980, Commission review denied, September 2, 1980, final order September 9, 1980, 1 MSHC 2509, former Commission Judge James A. Laurenson affirmed a violation of section 75.329, based on an inspector's detection of 9 percent methane in an abandoned mine area at a point approximately 1/2 mile in by a point where two splits of air met. Itmann disputed MSHA's contention that section 75.329 requires that when a ventilation system is used in an abandoned area, a two-pronged test must be met: (1) the ventilation system must continuously dilute, render harmless, and carry away methane and other explosive gases; and (2) air from abandoned areas which enters another split of air shall not contain more than 2 percent methane. Itmann contended that section 75.329 should be read as a whole, requiring only one thing; that air from abandoned areas which enters another split of air shall not contain more than 2 percent methane. In rejecting Itmann's contention, Judge Laurenson stated as follows at 2 FMSHRC 2001 and 2003:

The legislative history of section 303(z)(2) of the 1969 Act (75.329) indicates that Congress intended for there to be a two-pronged test regarding ventilation of abandoned areas. \* \* \*

\* \* \* Just because the percentage of methane is below 2 percent does not mean that an operator has not violated this section of the Act. Even if the percentage of methane in the air from the abandoned (sic) areas which enters another split of air is below 2 percent, the operator violates this section if it has not maintained ventilation "so as continuously to dilute, render harmless, and carry away methane and other explosive gases" in the abandoned area. The legislative history states that this regulation means that "such ventilation will be adequate to insure that no explosive concentrations of methane or other gases will be in this area." Leg. Hist. 1969 Act at 1044.

In Christopher Coal Company, decided by former Commission Judge John Cook on October 18, 1976, affirmed by the Commission on October 25, 1978, 1 MSHC 1688, Judge Cook affirmed a violation of section 75.329, based on an inspector's finding 4 percent methane with a detector (5.38 percent bottle sample), at a cement block regulator in a bleeder entry. The inspector also measured the methane in the main return at a location outby the intersection in the bleeder entry such that it represented the content after the bleeder split of air had joined the main return split, and found 1.6 percent methane. The operator contended that section 75.329 does not require that the methane test be taken before the bleeder split of air enters the main return split. In rejecting this argument and affirming the violation, Judge Cook stated in pertinent part as follows:

A plain reading of the regulation makes it apparent that the air which is to be tested is the air which is "\* \* \* coursed through underground areas from which pillars have been wholly or partially extracted \* \* \*" not a mixture of such air with the main return air. And it is to be tested "\* \* \* at the point it enters such other split," not after it enters the other split.

It is clear that the test must be made before the bleeder air actually leaves the bleeder split of air and joins with the main return split of air. To interpret the regulation any other way would make it meaningless since the test, under the Operator's theory, would only indicate what the methane content was in the main return after a mixture took place. The regulation clearly was designed to ascertain what methane content would be entering the main return split of air.

With regard to the question as to whether the place the inspector performed his methane test satisfied the requirement found in section 75.329 that it be at the point it enters such other split, Judge Cook stated that "It is clear that the test of the bleeder split of air is to be made as close as is reasonably possible to the place where the two splits of air join but before the bleeder air enters the other split." On the facts presented, Judge Cook made the following additional findings:

MESA has proved that the inspector took the readings as close as is reasonably possible. As set forth above the inspector stated that he took the measurements and sample at the regulator because of the turbulence caused by the intersection of the main entry split of air with the bleeder split of air as well as by the regulator itself. He was of the opinion that he took the measurements at the location where they would be most accurate because of the turbulence between that location and the actual intersection of the two entries (Tr. 26-27, 31, 57-58, 65, 71-72). He stated that that measurement would show the methane content in the air current coming out of the bleeder entry (Tr. 30).

The Operator has not challenged the fact that such turbulence existed. In fact the General Superintendent of the Osage Number 3 Mine stated that there could be turbulence within the 13 south entry (the bleeder entry) (Tr. 128).

In support of the inspector, Mr. Elam, a ventilation specialist with MESA, stated that

the point at which the inspector made the methane measurement in this case is the same location that MESA's ventilation people would have been instructed to make the check (Tr. 90). He stated that within the area of the regulator, it is possible to get a fairly accurate volume and methane reading. He described swirls and eddys beyond the area where the measurement was taken, caused by the regulator and by the intersection of the two splits of air (Tr. 92-93).

It is therefore apparent that the inspector took his readings at a location as close as is reasonably possible to the place where the two splits of air join, but before the bleeder air entered the main entry. It does not appear that there are any factors affecting the bleeder air which could decrease its methane content between the place of measurement and the actual physical intersection of the two entries.

\* \* \* \* \*

In light of the mandate of the federal courts, a narrow, restrictive reading of the Act will not be made. Under the facts in our case, the operator has in effect asserted, among other things, that the tests for methane should have been made at the point where the bleeder entry and the main entry intersect. The problem, however, was that the turbulence in the Osage No. 3 Mine at that point would result in an inaccurate reading (Tr. 27, 31, 34, 55, 61, 62, 63, 65, 91, 93, 102, 108). The inspector made his measurements in what he considered was the "threshold of the splits" (Tr. 70). He made his test at a location which was the point nearest to the place where both splits joined, that he could obtain an accurate measurement (Tr. 26-27).

Consequently since it is apparent that the inspector performed the test of the bleeder split of air at a location which was as close as was reasonably possible to the point where the two splits of air joined, it is found and concluded that MESA has proved by

a preponderance of the evidence that the Operator violated 30 CFR 75.329 as alleged in the petition herein.

In its posthearing brief, Greenwich agrees that the Itmann Coal Company and Christopher Coal Company decisions are applicable precedents in the case at hand. Greenwich also cites a decision by Judge Melick in Beckley Coal Mining Company, 3 FMSHRC 2593, November 9, 1981, vacating a violation of section 75.329, because of the alleged failure by Beckley to reduce the methane concentration to below 2 percent in a bleeder system crosscut.

In the Beckley case, the inspector measured more than 3 percent methane in a panel from which pillars had been wholly or partially extracted and had been abandoned as a gob area. Four bottle samples were taken and the methane content was 2.71 percent, 2.67 percent, 2.74 percent, and 2.73 percent. The inspector further stated that the air movement was minimal; however, he did not use an anemometer or smoke tube to measure the air movement. The operator disagreed with the inspector's evaluation of the air movement, and the next day simulated the same conditions as the inspector found, then conducted a smoke tube test. The released smoke moved out of the crosscut and into the bleeder.

In dismissing the violation, Judge Melick stated that the question of whether a violation of section 75.329 exists depends on the adequacy of the ventilation system, and not solely upon the levels of methane found in any particular crosscut. The test applied by Judge Melick was whether the ventilation system is being "maintained so as to continuously dilute, render harmless and carry away methane." He concluded that the only evidence to suggest the inadequacy of the ventilation system was the one time series of methane readings showing a non-explosive 2 percent to 3 percent methane concentration and the inspector's opinion that there was no perceptible movement of air.

Greenwich submits that no violation of section 75.329 occurred based upon the methane levels detected on March 16, 1984. Greenwich asserts that it had a reading of 1.3 percent methane at the mixing point--less than the violative 2 percent -- and a reading of 3.3 percent at bleeder evaluation point No. 14 -- less than the violative 5 percent explosive range, and that MSHA has presented no credible evidence that Greenwich violated section 75.329 by failing to maintain its ventilation so as to "continuously dilute, render harmless and carry away methane and other explosive gases" and "to

protect the active workings of the mine from the hazards of such methane and other explosive gases."

Greenwich concludes that its testimony demonstrated that the ventilation in the vicinity of bleeder evaluation point No. 14 was acting properly and in compliance with section 75.329, and that the ventilation there was in fact diluting, rendering harmless and carrying away methane as evidence by the 1.3 percent reading at the mixing point.

MSHA did not file a posthearing brief in this case. However, during oral argument presented at the close of the testimony, MSHA's counsel agreed that the cases cited by Greenwich, including the two-prong test enunciated in those decisions, would apply in any determination as to whether Greenwich has violated section 75.329.

MSHA argues that the legislative intent of section 75.329, is to preclude the build-up of explosive range of methane in abandoned gob areas. MSHA also agrees that section 75.329 requires the mine ventilation to be maintained so as to continuously dilute, render harmless, and carry away methane and other explosive gases from such areas. MSHA also agrees that the 2 percent methane requirement found in section 75.329, is an additional precautionary provision to insure against methane above that level finding its way into another air split where the air coming off the gob enters that other split.

MSHA asserts that on the facts of this case, the bleeder evaluation point is the most accurate location for the taking of methane tests, and that Greenwich has offered no evidence to establish that its 1.3 percent methane reading at the mixing point was not affected by air turbulence from the main return. MSHA finds "a problem" with the crosscut immediately outby the bleeder evaluation point, and states that credible testimony from its witnesses reflects that the crosscut itself could have diluted the air directly off the gob. Citing the Christopher Coal Company case, MSHA agrees that the methane test should be made as close as reasonable possible to the point where the two splits of air joined in this case. Since accuracy is important, MSHA asserts that section 75.329, should be liberally construed to insure that any air coming off the gob was not a dangerous percentage. Since bleeder evaluation point 14 was located directly before the crosscut in question, MSHA believes that the evaluation point is the most accurate place to test for methane. Assuming that I find otherwise, MSHA argues in the alternative that the ventilation

was not maintained so as to continuously dilute the methane coming off the gob.

With regard to Greenwich's reliance on the Beckley Coal Mining Company case, MSHA asserts that it is distinguishable from the fact presented here, notwithstanding Greenwich's arguments that 3.26 percent and .4 percent methane readings are not in the "explosive range." MSHA points out that Greenwich conceded that 3 percent methane would cause them concern, and that the mine had experienced a prior explosion, and that it was "obviously" experiencing problems with methane and its ventilation.

Greenwich argues that the mixing point for bleeder evaluation No. 14 was at the point shown on exhibit O-3, as indicated by its 1.3 percent methane reading. MSHA's ventilation specialist Kuzar agreed that this was the location where the air coming off the gob would meet with the air coming off the split from the main return (Tr. 96, exhibit O-1). He also agreed that this location would be an acceptable spot to measure the methane pursuant to section 75.329 prior to the air entering the other split. Mr. Kuzar conceded that the 1.3 percent methane reading at that location would indicate that the ventilation was working effectively to dilute the methane. He also agreed that the 2.5 percent methane reading at the location immediately outby the 1.5 percent reading proves that the methane is being coursed out of the area to the return and he stated that "there would be nothing wrong" with doing it that way.

Mr. Kuzar's disagreement lies in the fact that he believes the proper location to test the air for methane before it reached the mixing point and entered the return split was at the established bleeder evaluation point No. 14, which in this case was located approximately 70 feet from the mixing point spot claimed by Greenwich where it found 1.3 percent methane, and inby the point where 2.5 percent methane was found. Since the methane found at the bleeder evaluation point was over 3.0 percent, Mr. Kuzar questioned the accuracy of Greenwich's readings with respect to the air coming off the gob because he believed that some of it was escaping down the crosscut immediately outby the evaluation point.

Mr. Kuzar confirmed that MSHA has no written policy or procedure concerning where to test for methane pursuant to section 75.329, and he did not know for a fact that Greenwich's ventilation plan required that all bleeder evaluation points have methane readings of 2 percent or less. Mr. Kuzar confirmed that MSHA's district No. 2 oral policy is

that the proper place to test for methane would be inby bleeder evaluation point No. 14 where the total air coming off the gob is not influenced by other air currents before it enters another split. Mr. Kuzar conceded that the 1.2 percent methane reading made by Greenwich at the locations shown on exhibits O-1 and O-3, would place it in compliance with section 75.329 at that location, but not at the bleeder evaluation point No. 14 where 3.3 percent methane was detected. Had Greenwich tested only at the location where it found 1.2 percent methane, Mr. Kuzar believed that it would be in violation of section 75.316 for not testing at the designated evaluation point.

In this case, MSHA has presented no credible evidence to establish that the air located at the mixing point as defined by Greenwich where it found 1.3 percent methane was influenced by air currents off the main return or by turbulence or swirling prior to it leaving the bleeder and joining with the return air. Inspector Sparvieri made his methane test at bleeder evaluation No. 14 which was approximately 70 to 100 feet inby the mixing point. He made a smoke tube test at the bleeder point to determine whether there was any turbulence or swirling at that location, but made no tests outby that location at or near the mixing point. It seems obvious to me that the inspector's failure to test the air at the mixing point was because he believed the bleeder location was the proper place to test. In fact, Mr. Sparvieri stated that even if the test had been made at a location 50 feet before the air entered the split, if the test location were not a bleeder evaluation point, the test would not comply with section 75.329. He also stated that he would not accept any test made at locations other than bleeder evaluation points as compliance even if the air mixing point were 150 to 500 feet outby the bleeder point. Mr. Sparvieri's arbitrary assumptions and conclusions that all of the air outby a bleeder evaluation point for purposes of accuracy and compliance with section 75.329, are rejected.

Inspector Sparvieri conceded that at the time he issued the citation he was not a ventilation specialist, was unfamiliar with the mine ventilation system, was not sure how the gob area was being ventilated, did not know whether the gob area had experienced prior ventilation problems, and that he could not determine what areas of the mine could be affected by the methane which he found. He conceded that the explosive range of methane is 5 percent to 15 percent, and there is no evidence that he detected those levels in this case. Although he indicated that the air movement at the vicinity of bleeder evaluation point 14 where he detected 3.3 percent methane was

"slight," he confirmed that a smoke test over a 10-foot distance in that area reflected air movement at 1,311 cubic feet a minute, and that the released smoke was travelling outby that area in the proper direction.

Inspector Sparvieri made his initial methane reading at bleeder evaluation point 14, and he detected 3.35 percent methane. Readings taken by Greenwich's representative detected methane between 2.9 percent and 3.18 percent. Inspector Sparvieri then proceeded inby the evaluation point for approximately 50 feet, and after 4 percent methane, he proceeded no further. Readings taken by Greenwich outby the evaluation point reflected 2.5 percent, 1.3 percent, and .4 percent. Inspector Sparvieri could not recall taking and readings outby the evaluation point.

Respondent's witness Endler testified that based on Greenwich's methane readings which indicated decreasing levels of methane outby the bleeder evaluation point up to and including the mixing point before the air entered the return split, the mine ventilation system was doing the job of diluting, rendering harmless, and carrying away any methane from the gob. He pointed out that the methane in the outby areas was only .4 percent and that 27,000 CFM's of air was coming down the main return.

Mr. Endler stated that the crosscut immediately outby bleeder evaluation point 14 was not an open entry, and that all of the coal had been pillared and extracted from the area and that it had caved. Rocks were across the entry and it could not be travelled. He conceded that the caved area was not "air tight" and that it was possible for some of the air to find its way into the area before reaching the mixing point. However, he indicated that the air is supposed to filter through the caved area to dilute any methane which may be present, but that the majority went to the return. He believed that the 1.3 percent methane reading at the mixing point resulted from the 1,311 CFM air current diluting the methane as it coursed its way to the main return, and that the air from the return did not affect that reading because it was made inby the split location where the air dumped into the return.

Mr. Endler also testified as to the procedures he had always followed in making his methane tests at air mixing points pursuant to section 75.329, and to insure against any possible inaccuracies caused by air turbulence or swirling. He indicated that he used the described procedure, and instructed his foremen to do the same, on the basis of oral

instructions received from MSHA supervisory and ventilation personnel. MSHA has not rebutted this testimony, and after viewing Mr. Endler on the stand during the course of the hearing, I find his testimony to be credible.

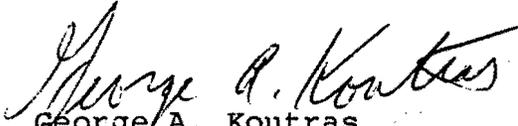
MSHA has not established by any credible evidence that the applicable mine ventilation plan requires that all bleeder evaluation points have methane readings below 2 percent, nor do I find any provision that mandates that bleeder evaluation points are the only acceptable locations for conducting methane tests to insure compliance with the requirement of section 75.329 that air leaving the gob and entering another split of air contain less than 2 percent methane.

After careful consideration of all of the evidence and testimony adduced in these proceedings, including the arguments advanced by the parties in support of their respective position, I conclude and find that Greenwich has the better part of the argument that it was in compliance with section 75.329, and that MSHA has failed to establish a violation by a preponderance of the evidence of record.

I conclude and find that Greenwich has established through the credible testimony of its witnesses that the air being coursed away from the gob area in its proper direction to the return and out of the mine was in fact decreasing the amount of non-explosive methane being ventilated through the gob area. I also conclude and find that MSHA has not established through any credible evidence that Greenwich's ventilation system was not being maintained so as to continuously dilute, render harmless and carry away explosive levels of methane and other explosive gases.

I conclude and find that Greenwich's methane test at the mixing point reflected in exhibits O-1 and O-3, where the methane was at a 1.3 percent level, was a reasonable and proper place to take the test to insure compliance with section 75.329, and that MSHA has not established through any credible evidence that the air was otherwise diluted or disturbed by a turbulence or swirling, or that Greenwich's methane test was unreliable or inaccurate. Since the test was at a point before the air off the bleeder joined with the air off the return, and indicated 1.3 percent methane, which is below the 2 percent mandated by section 75.329, I further conclude and find that Greenwich was in compliance with that standard.

In view of the foregoing findings and conclusions, Greenwich's Contest IS GRANTED, and the contested section 104(a) Citation No. 2255016, issued on March 16, 1984, IS VACATED, and MSHA's civil penalty proposal IS DISMISSED.

  
George A. Koutras  
Administrative Law Judge

Distribution:

Linda M. Henry, Esq., Office of the Solicitor, U.S.  
Department of Labor, Room 14480 Gateway Building, 3535 Market  
Street, Philadelphia, PA 19104 (Certified Mail)

Joseph T. Kosek, Jr., Esq., Greenwich Collieries, P.O.  
Box 367, Ebensburg, PA 15931 (Certified Mail)

/fb

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

## SEP 19 1986

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. SE 86-36  
Petitioner : A.C. No. 40-02831-03519  
v. :  
: No. 1 Mine  
G & G COAL COMPANY, INC., :  
Respondent :

### DECISION APPROVING SETTLEMENT

Before: Judge Melick

This case is before me upon a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). Petitioner has filed a motion to approve a settlement agreement and to dismiss the case. A reduction in penalties from \$6,800 to \$5,780 is proposed. In support of his motion the Petitioner states in part as follows:

The citations issued herein resulted from an inspection of a fatal accident at respondent's No. 1 Mine, occurring at approximately 8:30 p.m., July 9, 1985. The accident, involving the detonation of explosives, resulted in the death of miner Ricky Kilgore, age 28, a utility man with approximately eight years mining experience. The investigation disclosed that the accident occurred on the maintenance shift and that in addition to the deceased two other miners were physically present in the No. 1 Mine. Further the investigation disclosed that the deceased miner alone had drilled and charged, in sequence, the Nos. 5 and 6 working places in preparation for blasting from the solid. Immediately prior to the blast and resulting accident, the deceased miner called out his intention to set off charges to the two additional miners who were located approximately 180 feet out-by the No. 5 face. The blast of the No. 6 working face resulted in a simultaneous detonation of granulated powder explosives and electric detonators which had been stored upon the mobile coal drill which the deceased had placed in the last cross-cut between the Nos. 5 and 6 entries. The charges in the No. 5 face did not detonate. Subsequent to the blast, the victim was discovered, his body having been thrown by the

force of the blast against a rib. Due to destruction at the site resulting from the blast, the direct cause of detonation of the explosives could not be precisely determined; however, inspection of the scene resulted in the conclusion that the proximate cause of the fatality was the detonation of materials on the aforesaid mobile drill. Moreover, examination of the No. 6 working place did not reveal evidence of a blown out shot or other abnormality. Attached as Exhibit "A" is a "sketch of fatal explosives accident" which depicts the scene of the aforesaid accident.

As a result of the investigation of the aforesaid accident, the Secretary alleged violations of safety and health standards at respondent's No. 1 Mine as follows:

a. Citation No. 2193274, issued July 12, 1985, alleged a violation of the mandatory safety and health standard at 30 C.F.R. 75.1303.<sup>1/</sup> . . . Said condition . . . was observed during the investigation of the aforesaid fatal accident, the location of same being depicted in Exhibit "A". Because of the hazard associated with an open shot, the use of such a blasting cap as a leg wire is violative of 30 C.F.R. 75.1303.

The inspector deemed respondent's negligence to be low because of the unlikelihood that respondent knew or should have known that the deceased miner was using the blasting cap as a leg wire. Moreover, it appeared respondent provided suitable, permissible wire for use in blasting the face of the coal and that it was respondent's policy that said permissible wire be used. The condition created a danger that employees could be injured by an exploding blasting cap, which event was deemed reasonably likely to occur under the circumstances. Moreover, an injury resulting from such an event could reasonably be expected to result in lost work days or restricted duty for injured miners. The cited condition affected one miner at the time. The circumstances occurred on

<sup>1/</sup> 30 C.F.R. 75.1303 provides, in part, that ". . . in all underground areas of a coal mine only permissible explosives, electric detonators of proper strength, and permissible blasting devices shall be used and all explosives and blasting devices shall be used in a permissible manner . . ."

respondent's maintenance shift and the only two other miners in the mine were approximately 180 feet away.

Respondent exhibited its good faith by immediately abating the violation alleged in the citation.

The inspector deemed the violation to be of such a nature as to contribute significantly and substantially to a hazard, which citation was assessed at \$30 after giving respondent credit for its good faith. Respondent has agreed to pay this amount.

b. Citation No. 2193275 was issued July 12, 1985, alleging a violation of the mandatory safety and health standard at 30 C.F.R. 75.1307.<sup>2/</sup> . . . The cited standard, which requires the proper storage of explosives and detonators, was deemed to be violated by respondent, which violation resulted in a fatal injury to a miner. The inspection revealed that explosives being used by the deceased miner at the time of the aforesaid accident were stored upon the mobile coal drill depicted in Exhibit "A", not a separate, closed container. The coal drill was located less than 50 feet from No. 6 working place at the time the blast occurred. Although blast destruction prevented a determination of the direct cause of the detonation of the explosives on the drill, it occurred simultaneously with the detonation of No. 6 working face by the deceased. The inspector deemed respondent's negligence to be high in that the inspector determined that the violative method of storing the explosives had been observed previously. Said negligence is subject to some mitigation, however, in that the violative condition occurred on the maintenance shift when fewer miners were working; the deceased miner had alone prepared the Nos. 5 and 6 faces for blasting and the respondent had provided appropriate and proper storage facilities near the working sections which the deceased could have used.

The condition cited resulted in the occurrence of the event against which the cited standard was

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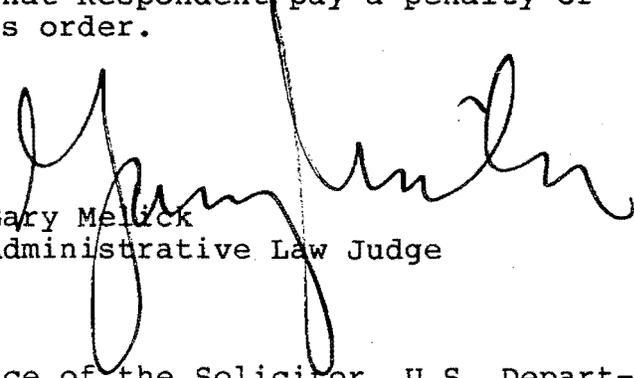
<sup>2/</sup> 30 C.F.R. 75.1307 provides, in part, that [e]xplosives and detonators stored in the working places shall be kept in separate closed containers which shall be located out of the line of blast and not less than 50 feet from the working face . . ."

directed and the resulting injury was fatal. Only the deceased miner was affected by the event although two additional miners were working approximately 800 feet out-by the working face. Respondent exhibited its good faith by immediately abating the violation alleged in the citation by requiring the storage of explosives in the section storage magazines.

The inspector deemed the violation to be of such a nature as to contribute significantly and substantially to a hazard which citation was specially assessed at \$6,500. The Secretary believes that because of the aforesaid mitigating factors related to respondent's negligence, a small reduction in the assessment is appropriate and, therefore, it is proposed a penalty of \$5,750 be assessed, which respondent agrees to pay.

I have considered the representations and documentation submitted in this case, and, while I do not necessarily agree with the rationale advanced, I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is GRANTED, and it is ORDERED that Respondent pay a penalty of \$5,780 within 30 days of this order.



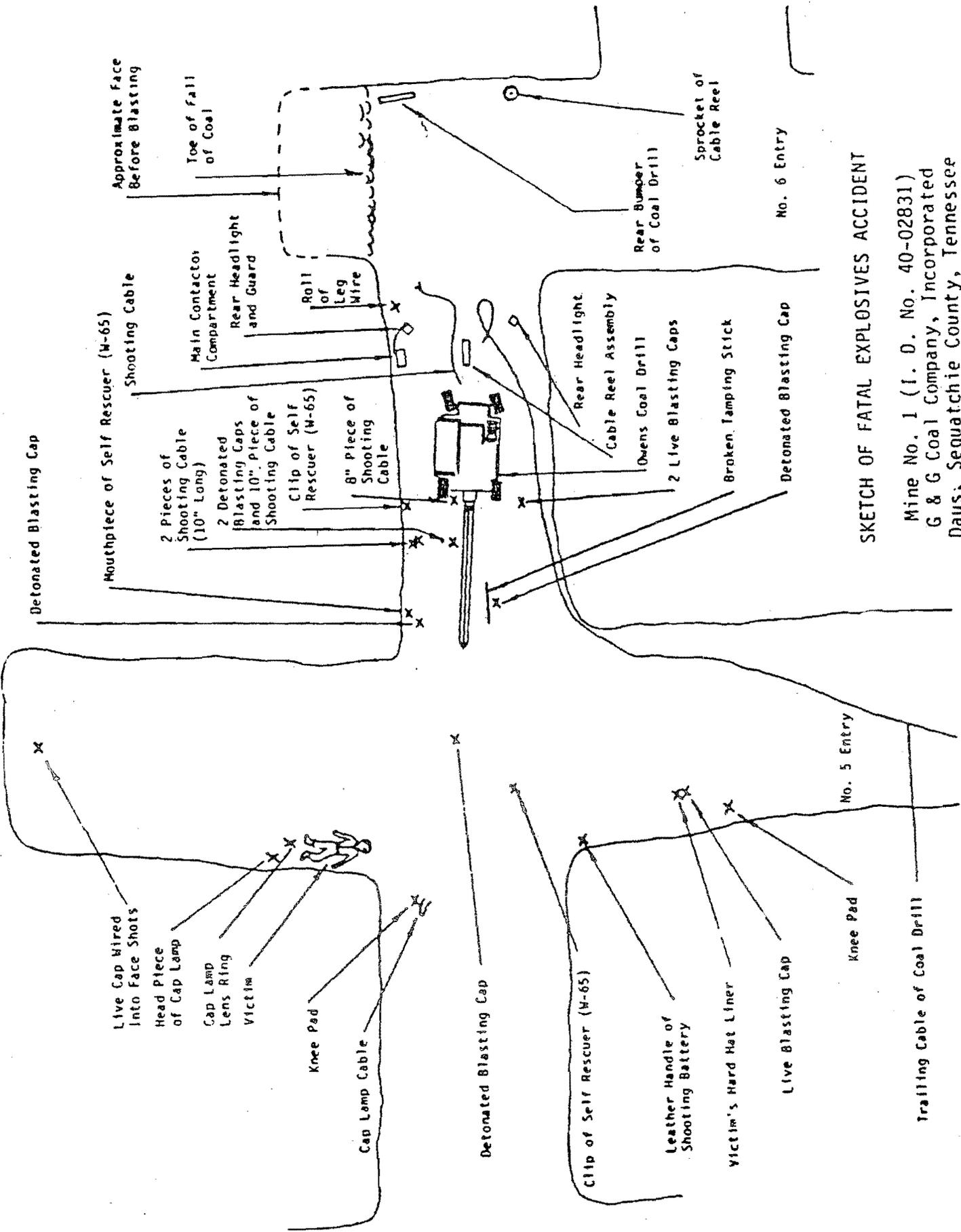
Gary Mellick  
Administrative Law Judge

Distribution:

Robert C. Haynes, Esq., Office of the Solicitor, U.S. Department of Labor, 280 U.S. Courthouse, 801 Broadway, Nashville, TN 37203 (Certified Mail)

Paul D. Kelly, Jr., Esq., Kelly & Kelly, P.C., P. O. Box 878, Jasper, TN 37347 (Certified Mail)

rbg



SKETCH OF FATAL EXPLOSIVES ACCIDENT  
 Mine No. 1 (I. D. No. 40-02831)  
 G & G Coal Company, Incorporated  
 Daus, Sequatchie County, Tennessee

July 9, 1985

0 10  
 Scale

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES

2 SKYLINE, 10th FLOOR

5203 LEESBURG PIKE

FALLS CHURCH, VIRGINIA 22041

**SEP 19 1986**

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 86-52-M
Petitioner	:	A.C. No. 01-00629-05509
	:	
v.	:	Roberta Cement Plant
	:	
BLUE CIRCLE INCORPORATED,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Broderick

On September 5 and September 11, 1986 the parties submitted a motion for approval of a settlement reached by the parties in this case. The violations were originally assessed at \$4000 and the parties propose to settle for \$1600.

Two violations are involved in this proceeding, both cited following an investigation of a fatal accident on October 8, 1985 when an employee was struck by a piece of liner plate which fell approximately 40 feet from a work platform. The operator was cited for failing to provide toe boards on the work platform (30 C.F.R. § 56.11027), and failing to keep the platform clean and orderly (30 C.F.R. § 56.20003(a)). The motion states that the Secretary cannot establish that the toeboards would have prevented the accident. The work being performed was performed on an infrequent basis, and toeboards had been installed in other areas of the plant. The motion states that the failure to install them on the work platform involved here was apparently an oversight. Respondent implements annual safety training for its employees, and the employees involved had received safety training. The accident resulted in part from employees not implementing Respondent's procedures and safety rules. The violations were promptly abated.

I have considered the motion in the light of the criteria in section 110(i) of the Act, and conclude that it should be approved.

Accordingly, the settlement is APPROVED and Respondent is ORDERED TO PAY the sum of \$1600 within 30 days of the date of this order.

*James A. Broderick*

James A. Broderick  
Administrative Law Judge

**Distribution:**

William Lawson, Esq., U.S. Department of Labor, Office of the Solicitor, 2015 2nd Ave. N., Birmingham, AL 35203 (Certified Mail)

Mark A. Lies, II, Esq., Seyfarth, Shaw, Fairweather & Geraldson, Suite 4200, 55 E. Monroe St., Chicago, IL 60603 (Certified Mail)

slk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SEP 23 1986

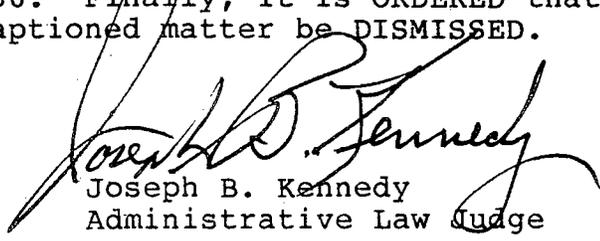
SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 86-98
Petitioner	:	A. C. No. 15-05209-03522
v.	:	
	:	No. E-4 Mine
MITCH COAL COMPANY, INC.,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT

This matter is before me on the parties' motion to approve a settlement reducing the amount of the penalties proposed by 50 percent due to the depressed state of the market for coal and its consequent impact on the operator's ability to continue in business.

Based on an independent evaluation and de novo review of the justification for the reduction, I find the same is in accord with the purposes and policy of the Act.

Accordingly, it is ORDERED that the motion be, and hereby is, GRANTED. It is FURTHER ORDERED that the operator pay the amount of the penalty agreed upon, \$500.00, in installments of \$250.00 each due on or before Monday, October 20, 1986 and Thursday, November 20, 1986. Finally, it is ORDERED that, subject to payment, the captioned matter be DISMISSED.



Joseph B. Kennedy  
Administrative Law Judge

Distribution:

Mary Sue Ray, Esq., Office of the Solicitor, U. S. Department of Labor, 280 U. S. Courthouse, 801 Broadway, Nashville, TN 37203 (Certified Mail)

Mr. Grover Samons, President, Mitch Coal Company, Inc., P. O. Box 12, Minnie, KY 41651 (Certified Mail)

dcp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SEP 23 1986

SECRETARY OF LABOR, : DISCRIMINATION PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. WEVA 85-299-D  
ON BEHALF OF : MSHA Case No. MORG CD 85-4  
DENNIS C. JONES, :  
Complainant : Martinka No. 1 Mine  
v. :  
: :  
SOUTHERN OHIO COAL CO., :  
Respondent :  
:

DECISION

Appearances: Howard Agran, Esq., Office of the Solicitor, U. S. Department of Labor, Philadelphia, Pennsylvania, for the Petitioner;  
Robert M. Steptoe, Jr., Esq., Steptoe and Johnson, Clarksburg, West Virginia, for the Respondent.

Before: Judge Kennedy

This discrimination case was brought on behalf of an employed miner to redress a loss of overtime pay for an alleged act of retaliation in reporting a roof control violation. The Secretary claims the transfer of Dennis Jones from the mine's super section to an equivalent job on another section without a loss of pay, seniority, or benefits other than eligibility for optional overtime pay violated section 105(c)(1) of the Mine Act. The operator defended on the ground the challenged transfer was justified because Jones and his partner on the twin-headed roof bolter engaged in a work slowdown that resulted in serious disharmony and dissension among the workforce assigned to the 2 East A Section (the super section) during August and September 1984.

Findings

Dennis Jones was and is an unregenerate safety activist when it comes to roof control violations. And with good reason. He is a roof bolter--and a very good one--when he wants to be. But because he is so good at his speciality he resented being assigned to do scut work or what is known in the mines as "dead work." These are the physically demanding but demeaning housekeeping chores so essential to the safe and efficient operation of a working section.

The Protected Activity.

For years Dennis Jones had been among the most "vocal" of the miners employed at the Martinka No. 1 Mine about safety hazards, and particularly violations of the roof-control plan. For approximately a year and a half prior to the incident that triggered this complaint Mr. Jones regularly complained to his foreman, the mine safety committee, various members of top management and MSHA about a violation of the roof-control plan that he considered especially egregious. The provision his complaint centered on read as follows:

Where resin bolts are used as primary roof support, the place shall not be left on temporary supports for more than 8 hours. Bolting the roof with resin as soon as practicable is critical for successful results. The only deviation from this procedure will be where there is a mechanical/electrical failure on the roof bolting machine or when a work stoppage occurs. (G-1, p.17, para. 6).

There was no dispute about the fact that working faces (places) were being left totally unsupported for periods of up to 48 hours, especially on the weekends, i.e., from midnight Friday night to midnight Sunday night. Since Mr. Jones worked the midnight to 8:00 a.m. shift, the first shift, it often fell his lot to be directed to bolt cuts at the working faces that had hung unsupported over Saturday and Sunday. He complained about this on his own behalf and on behalf of his fellow workers. Initially his complaints were supported by the mine safety committee. MSHA, however, refused to investigate or cite the condition, management refused to take any corrective action and the mine safety committee, while sympathetic, did not consider the practice sufficiently hazardous to justify a work stoppage for a hazardous or imminently dangerous practice. Nor did Mr. Jones or his coworkers ever invoke the individual safety rights provision of the collective bargain agreement to withdraw their services individually or collectively because of an abnormally hazardous practice or condition.

MSHA and management took the position that tests of the overlying roof strata showed the deflection in the roof over a 48-hour period was insufficient to warrant enforcement of an 8 hour limitation or 30 C.F.R. 75.200. They felt that the roof deflection tests when coupled with the provision for the use of Automated Temporary Roof Supports provided adequate protection for miners such as Jones who were called upon to bolt such faces or entries. In other words, MSHA and management agreed that, in effect, the provision of the roof-control plan cited by Mr. Jones had been rendered obsolete and unenforceable by a technological

innovation, namely the introduction and use of ATRS Systems on the operator's roof bolting machines.

Mr. Jones as well as the mine safety committee knew that, after introduction of the ATRS, neither management, MSHA nor the West Virginia Department of Mines considered the 48 hour practice unsafe.

Automated Temporary Roof Support (ATRS) Systems on roof bolters eliminate the need for temporary support posts and protect roof bolters from unintentional roof falls through hydraulically activated and supported steel canopies. 50 F.R. 41784, 41792-41794 (1985). Thus, the reference in the plan to "temporary supports" was rendered obsolete by the new technology. Indeed, the steel canopies provided greater protection for Mr. Jones and his partner than that provided under the temporary support procedure. Even so, Mr. Jones felt that the requirement that resin bolts be installed "as soon as practicable" and that only a "work stoppage" or machine failure justified a "deviation" from the 8 hour limitation mandated enforcement of that limitation. He believed the deflection or sag in the roof that would occur over a 48-hour period would, in the long run, seriously detract from the effectiveness of the resin bolt bond in the overlying roof structure. As noted, because test hole observations indicated the contrary, management, the state agency and MSHA did not agree that the amount of separation and deflection that could be expected to occur created any hazard to the long run stability of the resin bolt bond, once installed.

For these reasons, management paid little attention to Mr. Jones' complaints and, it seems clear, hardly looked upon them as a basis for disciplinary action.

The solicitor's suggestion that Jones' threat to carry his complaint to the resin bolt manufacturer created a fear that triggered his transfer is illogical, speculative and without persuasive support in the record. There is no evidence that the bolt manufacturer would have agreed with Jones or that MSHA or the West Virginia Department of Mines would have changed their positions in view of the testing that had been done and the request for modification of the 8 hour limitation that had been under discussion since January. This change was formally submitted to MSHA on July 24, 1984, approximately 2 weeks before Inspector Bowers declined to take action on Mr. Jones' complaint of August 8, 1984.

## II

The question then is whether in view of the fact that the two mine safety enforcement agencies and the operator had concluded that compliance with the 8 hour limitation was unnecessary Mr. Jones had a good faith reasonable belief on August 8, September 13, and October 1, 1984 (the dates of the alleged

actionable complaints) that the practice was hazardous and therefore protected. I think not.

I find that while Mr. Jones had an honest belief that a hazard existed his belief was not reasonable because the evidence, even when evaluated from his standpoint, shows that the practice--later sanctioned by a change in the approved roof-control plan--was not unsafe. Indeed, the record shows that on August 24, 1984, some 6 weeks prior to the complaint of October 1, 1984, the union safety committee had agreed to an extension of the 8 hour limitation to 24 hours. And shortly thereafter, on February 5, 1985, the provision in the roof-control plan relied on by Jones was changed to read as follows:

Where resin bolts are used as primary roof support, the place shall be bolted on the next production shift, or within 48 hours. The only deviation from this procedure will be where there is a mechanical and/or electrical failure on the roof bolting machine or when a work stoppage occurs. (GX-10).

While I have given Mr. Jones the benefit of the doubt in finding he had a good faith belief in a hazard, I also find the circumstantial evidence shows that Mr. Jones did not take his complaint to grievance; did not view the hazard as serious enough to justify an individual refusal to work; and that neither his coworkers, nor the safety committee considered it sufficiently dangerous to justify a legally sanctioned work stoppage. Because Mr. Jones knew or should have known that the ATRS System protected him from any immediate hazard and that the weight of the expert judgment was against him on the question of a long run hazard, I conclude Mr. Jones' belief that the practice in question was unsafe was not reasonable. His complaints were not therefore a protected activity. Having failed to make a prima facie case of discrimination for a protected activity, it follows that the complaint must be dismissed.

### III

#### The Unprotected Activity

At the time of the hearing complainant Jones had been employed by SOCCO for approximately 6 years. He had been classified as a roof bolter for the last 3 years. Sometime prior to July, 1984, Martinka Mine management decided to operate an experimental, continuous mining section designed to increase production and reduce labor costs. That section was officially denominated 2 East A but was referred to colloquially as the "super section." Operations commenced on July 23, 1984. The section consisted of eight 16 foot entries or headings mined by two Joy Continuous miners. Roof control was provided by two Fletcher dual-head ATRS roof bolters bolting on 4 foot centers. One continuous miner and roof bolter would normally work on the left side of the section,

headings one through four, and the other miner and roof bolter would operate on the right side of the section, headings five through eight. The continuous miners were not operated simultaneously. Instead, after one CM drove its four headings, the machine would be parked for servicing and the operator and helper would immediately go to the other continuous miner to cut coal in the other four headings. Management's concept was to operate two continuous miners with 10 classified or contract (UMWA) miners instead of the normal complement of 14. Thus, on the super section, management eliminated the need for one continuous miner operator, one continuous miner helper and two shuttle car operators. The one-third reduction in the workforce when coupled with the demand for a significant increase in production (the "do more with less" concept) created a working environment rife with a potential for labor discontent.

Unlike the two continuous mining machines, which were operated by the same miner, the roof bolting machines each had a separate crew of two miners. One machine and crew (Tom Cunningham and Frank Renick) was assigned to the left side of the section, headings one through four, and the other crew (Dennis Jones and Ed Hill) to the right side of the section, headings five through eight. When bolting operations were completed bolters were expected to work out of their classification and do needed "dead work." This somewhat derisive term was used to describe the housekeeping tasks so necessary to the safe and efficient operation of a section including the moving and servicing of the continuous mining machines, scooping, rock dusting, obtaining and delivering supplies to the face area, installing belt and trolley hangers, moving the ventilation and other chores routine to the maintenance and operation of a conventional continuous mining section.

The midnight shift foreman, James Kincell, working with the general mine foreman, John Metz, selected Jones and Hill as the pair of roof bolters to work the right side of the section. They were specifically told that they were part of an experimental operation, were expected to be self-motivated, and were to act with initiative at all times to make the operation a success. They knew that if they did not produce they could be replaced at any time. It was emphasized that the roof bolters would be expected to do work outside their classification as face men and to perform dead work on their own initiative.

The other bosses on the midnight shift were James Layman who was the section foreman generally responsible for production and James Huffman who was the section foreman generally responsible for construction. Both had responsibility, however, for the safe, efficient and productive operation of the super section as a whole. Kincell, Huffman, and Layman were well acquainted with Jones and Hill, knew them to be highly competent at their craft and also knew that they along with other members of the crew were

not hesitant about making safety complaints, especially on conditions affecting the roof. Jones, however, was the more insistent and "vocal" of the two. Jones kept up a stream of plausible safety complaints while Hill contributed a somewhat intimidating personal and physical presence that, at least in the case of Layman, allowed the pair to escape any direct confrontation over their work performance.

Jones admitted that while he had for years been making complaints similar if not identical to the ones claimed actionable in this case no adverse action had ever been taken against him either before or after this incident. And certainly this incident did not have a chilling effect on Jones' complaints which continued even after his transfer.

During the first 3 or 4 weeks all went well on the super section although production was not as high as targeted. Around the middle of August, however, things took a turn for the worse when Layman and Huffman began to receive complaints of friction between the left side bolters (Cunningham and Renick) and the right side bolters (Jones and Hill). The problem arose over the failure of Jones and Hill to complete roof bolting assignments on the right side of the section as quickly as everyone knew they could. This meant that an unfair portion of the dead work on both the left and right side of the section fell on Cunningham and Renick. Based on their own observations Layman and Huffman went to Kincell in late August or early September and accused Jones and Hill of "slowing down" on the roof bolting process in order to avoid doing the "dead work" after bolting was complete.

Jones and Hill contested this. They were supported by the continuous miner operator Morris and the two face men. Morris testified he was never delayed by Jones and Hill. This testimony, however, was not germane to management's complaint of a claimed stretchout of bolting assignments to avoid dead work. Neither of the face men, of course, were in a position to observe the claimed slowdown on the bolting assignments or to evaluate the two right side bolters' performance as well as their supervisors and the two left side bolters.

Five highly credible eyeball witnesses (Kincell, Huffman, Layman, Cunningham, and Renick) testified that from the middle of August to October 1, 1984, Jones and his partner Hill regularly, repeatedly and continuously, i.e., on 4 out of 5 days engaged in a planned common course of action to avoid the performance of dead work. This caused friction, conflict, disharmony, and dissension among the members of the super section crew.

For example, Cunningham and Renick early on complained that they would quit the section if Jones and Hill were not replaced or the situation corrected. Kincell tried at first to correct the situation through indirect methods such as letting Jones and Hill know he was timing their performance. Huffman the more

assertive of the three supervisors on several occasions let Jones and Hill know they were in jeopardy. Layman was inexperienced as a boss and somewhat fearful of provoking a fight or a feud among the crew members. Jones, apparently because of his safety complaints, and Hill, because of his truculence, felt secure. After all Kincell had personally selected them over Metz's misgivings. He naturally was reluctant to admit he had seriously misjudged them.

Jones and Hill as wiley, mine-wise contract miners also knew that management was trying to achieve a production breakthrough and thus could be expected to take a little dissension so long as the bolting assignments were done and the dead work did not fall intolerably far behind. Where they miscalculated was with their union brothers, Cunningham and Renick. They just would not take it and went so far as to make a scene and complaint over Jones and Hill's blatant work slowdown in front of the general mine supervisor, Mr. Metz. Things also turned against them when Kincell on more than one occasion observed them in what appeared to him to be a loafing or sleeping posture and after he made time studies that showed they could work twice as fast when they were being watched as they did when unsupervised. Cunningham and Renick kept up their stream of complaints and openly "ribbed" Jones and Hill for not helping out with the dead work.

Huffman testified he had confrontations with Jones and Hill on several occasions over their delay in installing trolley hangers in the track entry on Sundays. Another example of their obstructionist attitude he cited was their consistent refusal to tram the continuous miner from the five to the seven entry for servicing so that they could bolt the five entry. They repeatedly tried to outwait him in the expectation that he would send the mechanics to move the miner while they just stood or sat around and waited. Jones and Hill knew or should have known they were being watched and of the scene Cunningham and Renick created in front of Metz and Kincell. They also knew or should have known of the animosity they had engendered on the part of their brothers.

Layman was especially bitter over the way they treated him. They knew he was new at the supervisor's job. Yet they seemed to want to take advantage of him. They knew he and Huffman were reprimanded for the complaints Cunningham and Renick made to Metz. They also knew or should have known that when they took an hour to an hour and a half to do a job that Layman knew should have been done in 35 to 45 minutes they were treading on thin ice. Layman testified further that it was embarrassing to him to know that Jones and Hill would spend a whole shift doing three or four places that with their skill and speed should have been done in less than half that time. Vigorous cross-examination did not shake the sincerity of his conviction that Jones and Hill were "dogging" it. Time after time he unequivocally asserted that based on his personal observations of the amount of time Jones

and Hill were spending on bolting he was convinced they were stretching out the bolting assignments to avoid doing dead work. When counsel demanded he be more specific, Layman testified that his observation was that the slowdown occurred on 4 out of 5 days and he watched them every day.

Layman and Huffman as well as Cunningham and Renick complained loud and long to Kincell who finally, on the basis of his own observations, decided during the last week in September to transfer Jones off the section on October 1 and to put Layman on the day shift for further training as a supervisor. The excuse for not transferring Hill--namely that he was needed to fire boss--I find unpersuasive. Nevertheless, whatever disparate treatment was involved did not stem from any protected activity. By this time management was unimpressed with Jones' complaint over the 8 hour limitation. It was also not interested in disciplining or punishing him. It merely wanted to improve morale on the super section and quiet the complaints from Cunningham and Renick. This was accomplished by transferring Jones to a section where he was not expected to do dead work but also would not enjoy the option of the overtime he was regularly paid on the super section.

The actual transfer of Jones did not occur until Tuesday, October 2, 1984, due to a mistake or misunderstanding on the part of the assistant shift foreman. I find no persuasive basis for reading into this one day delay any sinister motive on the part of management. As I have found, Jones' complaint of Monday, October 1 was of a piece with those he voiced on most Mondays, namely the failure to bolt places on Saturday that left the roof unsupported over the weekend.

#### V

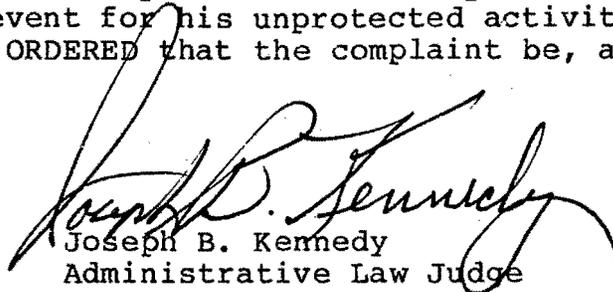
Based on a preponderance of the credible, fact specific evidence and the reasonable inferences to be drawn therefrom, I am constrained to find that the true motive or cause for Jones' transfer from the super section on October 2, 1984, was his participation with Hill in a stretchout or slowdown of classified work to avoid dead work during August and September 1984. There was therefore, no nexus between the claimed protected activity and the reason for Jones' transfer. The operator having carried its burden of showing Jones was transferred for engaging in an unprotected activity and that he would have been transferred for engaging in that activity alone, it follows that the complaint must be dismissed.

#### VI

#### Conclusion and Order

The premises considered, I conclude that as a matter of fact and law the transfer of Dennis Jones off the super section at

Martinka No. 1 Mine on October 2, 1984, did not constitute a violation of section 105(c)(1) of the Mine Act because the transfer was not based in whole or in part on any protected activity, was motivated solely by the miner's unprotected activity and would have been effected in any event for his unprotected activity alone. Accordingly, it is ORDERED that the complaint be, and hereby is, DISMISSED.



Joseph B. Kennedy  
Administrative Law Judge

Distribution:

Howard Agran, Esq., Office of the Solicitor, U. S. Department of Labor, 14480-Gateway Building, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

Robert M. Steptoe, Jr., Esq., Steptoe and Johnson, Sixth Floor, Union National Center East, P. O. Box 2190, Clarksburg, WV 26303-2190 (Certified Mail)

dcp

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

**SEP 25 1986**

DONALD E. RUNYON, : DISCRIMINATION PROCEEDING  
Complainant :  
v. : Docket No. KENT 86-58-D  
BIG HILL COAL COMPANY, :  
Respondent : PIKE CD 85-17  
: No. 4 Mine

DECISION

Appearances: Joe Friend, Esq., Pikeville, Kentucky,  
for Complainant;  
Charles E. Lowe, Esq., Pikeville, Kentucky,  
for Respondent.

Before: Judge Maurer

STATEMENT OF THE CASE

This proceeding concerns a discrimination complaint filed by the complainant, Donald E. Runyon, against the respondent, Big Hill Coal Company [hereinafter the "Company"], pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c) [hereinafter referred to as the "Act"]. Mr. Runyon initially filed his complaint with the Department of Labor's Mine Safety and Health Administration (MSHA) on September 20, 1985, alleging that he was discharged from the Company's No. 4 Mine on August 18, 1985, because he refused to work underground in the mine. He went on to state that he was hired as an "outside man" and thus when he was abruptly informed one morning that he was to work underground, he refused because he felt this mine was unsafe. At that point, he allegedly was told he was no longer needed. Following an investigation of his complaint, MSHA determined that a violation of section 105(c) had not occurred, and thereafter Mr. Runyon filed his complaint with the Commission, pro se. By his complaint, he sought reinstatement, back pay and recovery of "all losses and expenditures" incurred as a result of his discharge.

Pursuant to notice, this case was heard in Paintsville, Kentucky, on July 8, 1986. Donald E. Runyon testified on behalf of himself. Dean Francis, Curtis Francis, and Joe Tackett testified on behalf of the respondent.

I have carefully considered the entire record and the contentions of the parties, and make the following decision.

DISCUSSION AND FINDINGS

The complainant testified that he began his employment with the Company in February of 1984, and that he was a welder who worked primarily on the surface but who had gone underground when the job required it some ten times or so during the year and a half he worked there. His employment with the Company terminated on or about August 19, 1985.

He described the sequence of events which immediately led to the termination of his employment. That conversation with Mr. Dean Francis, Company supervisor, is reported at Tr. 63-64:

A. He said, "Get your hard hat and a light and go underground."

Q. And what did you tell him, if anything?

A. I told him I'd rather not go underground.

Q. Did you tell him why?

A. No, sir.

Q. And then what did he say, if anything?

A. He asked me was I refusing to do my job. I said, "No," I said, "I'd rather not go underground." He said, "Well, then, you're refusing to do your job," and I said, "No, I'm not refusing to do my job." He said, "Well, then, we don't need you." I said, "Well, does that mean I'm fired or what?" He said, "You just fired yourself."

Q. Did he at any time tell you that you were fired?

A. No. That was what he said. He said I fired myself.

Q. And what did you do then, if anything?

A. I just got my stuff together and left.

Q. Where did you go to?

A. I went home.

Complainant contends he refused to go underground on August 19, 1985, because: (1) the ventilation fan was vibrating and he was of the opinion that if it shut down the men, including himself, would not be withdrawn from the mine; and (2) there had been, in his opinion, two methane ignitions at this mine during the time he worked there, one in February or early March of 1985 and another on May 9, 1985.

Mr. Dean Francis testified for the respondent. His version of the August 19 conversation with the complainant is essentially corroborative (Tr. 88-89):

A. Mr. Runyon come in and I told him -- I said to get him a light and stuff; I had a job I wanted him to do. So, he said, "I'm not going underground." And I said, "Why not?" He said, "I'm just not going underground." I said, "Well, are you refusing to do your job?" But before he said he wasn't going underground, he said he didn't have a hard hat. I said, "I have a hard hat in my truck," which I do. I carry two all the time. Then, after that --

Q. He told you he hadn't brought his hard hat with him?

A. Right.

Q. And you told him that you had one in your truck?

A. Yes, sir.

Q. To go get it?

A. Right.

Q. Did he go get it?

A. No. He started to walk off, then he turned back around and he said, "I'm not going inside."

Q. And then what did he do, if anything?

A. Well, then, he turned around. He said -- I asked him -- I said, "Gene, are you refusing to do your job?" And he said, "I'm not going underground." Then, he turned around and said, "Are you firing me?" I said, "No, I'm not firing you." I said, "You're firing yourself. You're refusing to do the job you were hired for."

Mr. Francis did disagree, however, with the complainant's assertion that the May 1985 incident referred to above was a methane ignition. He maintains that it was a "blown out shot". He also generally disagreed that the mine was unsafe. He cited the fact that one miner breaking his leg was the only accident that occurred in the mine during Mr. Runyon's tenure there.

Mr. Curtis Francis, also a supervisor at the Company's mine, testified that the complainant never told him he was afraid of anything at the mine until two weeks prior to the hearing in this case. On the 26th of June 1986, he stated the complainant told him he wanted to settle the case and had said, "I'm just going to tell you the truth....I'm scared to go in the mines anymore" (Tr. 169).

Under the Act, a complaining miner establishes a prima facie case of prohibited discrimination by proving that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd. Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was not motivated in any part by protected activity. Robinette, 3 FMSHRC at 818 n.20. If an operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that (1) it was also motivated by the miner's unprotected activities, and (2) it would have taken the adverse action in any event for the unprotected activities alone. See also Donovan v. Stafford Construction Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission's Pasula-Robinette test). The Supreme Court has approved the National Labor Relations Board's virtually identical analysis for discrimination cases arising under the National Labor Relations Act. NLRB v. Transportation Management Corp., 462 U.S. 393, 397-403 (1983).

Further, it is well settled that the refusal by a miner to perform work is protected under section 105(c)(1) of the Act if it results from a good faith belief that the work involves safety hazards, and if the belief is a reasonable one. Secretary of Labor/Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2 BNA MSHC 1001 (1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd. Cir. 1981); Secretary of Labor/Robinette v.

United Castle Coal Co., 3 FMSHRC 803, 2 BNA MSHC 1213 (1981); Bradley v. Belva Coal Co., 4 FMSHRC 982 (1982). Secretary of Labor v. Metric Constructors, Inc., 6 FMSHRC 226 (Feb. 1984), aff'd sub nom. Brock v. Metric Constructors, Inc., 3 MSHC 1865 (11th Cir. 1985).

Therefore, the initial issue presented for decision is whether Runyon had valid safety concerns. For the reasons that follow, I conclude that he did not.

The complainant's concern about the ventilation fan vibrating on the morning of August 19, 1985, was unfounded for the simple reason that it had been fixed on August 16, 1985, and was no longer vibrating. However, it is true that Runyon might reasonably have believed that it was still vibrating. This was a new fan that had been installed some three weeks earlier and although it was operating, sucking air out of the mine, it was vibrating because of a cracked weld joint. Runyon's concern was that "anything vibrating like that can go down...and it could go down any time" (Tr. 48). He further speculated that if the fan shut down, and "if I was in there...I wouldn't be called out..." (Tr. 48). This series of speculations does not rise to the status of a good faith, reasonable belief that a safety hazard existed. I further note that complainant introduced no evidence as to the likelihood that such an equipment failure would occur in the first place, thereby giving rise to the feared sequence of events.

As to the two previous instances of methane ignitions (February and May of 1985), complainant has failed to connect them up with his refusal to go underground in August of 1985. The testimony was that the mine is adequately pre-shifted and fire-bossed every day and the complainant does not contest that. I therefore find that this contention likewise does not form a good faith, reasonable belief that a safety hazard existed on the morning of August 19, 1985.

In summary, there is no evidence in this record that the underground work requested of Mr. Runyon would have exposed him to any safety hazards.

I conclude from the totality of the evidence adduced at the hearing in this case that Mr. Runyon had a generalized fear of going underground into this or any other coal mine. His actual grievance in this case is that he believed that he had an outside job on the surface and was reluctant to work underground because of his fear. He wanted to perform only the work on the surface for which he thought he had been hired. Unfortunately, the Company required his services underground from time to time, including the morning in question.

CONCLUSION AND ORDER

In view of the foregoing findings and conclusions, and after careful consideration of all the evidence in this record, I cannot conclude that Mr. Runyon's refusal to perform his work assignment on August 19, 1985, was based on a reasonable good faith belief on his part that that work would expose him to any underground safety hazards. A miner's belief in a hazard must be reasonable. Unreasonable, irrational, or completely unfounded work refusals do not warrant statutory protection. Robinette, 3 FMSHRC at 811. Accordingly, the complaint IS DISMISSED, and the complainant's claims for relief ARE DENIED.

  
Roy J. Maurer  
Administrative Law Judge

Distribution:

Joe J. Friend, Esq., P. O. Box 512, Pikeville, KY 41501  
(Certified Mail)

Charles E. Lowe, Esq., P. O. Box 69, Pikeville, KY 41501  
(Certified Mail)

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

**SEP 25 1986**

CONSOLIDATION COAL COMPANY, : CONTEST PROCEEDING  
Contestant :  
v. : Docket No. WEVA 86-249-R  
: Order No. 2706369; 3/24/86  
SECRETARY OF LABOR, :  
MINE SAFETY AND HEALTH : Loveridge No. 22 Mine  
ADMINISTRATION (MSHA), :  
Respondent :  
SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. WEVA 86-359  
Petitioner : A.C. No. 46-01433-03713  
v. :  
: Loveridge No. 22 Mine  
CONSOLIDATION COAL COMPANY, :  
Respondent :

DECISIONS

Appearances: W. Henry Lawrence, Esq., Steptoe and Johnson,  
Clarksburg, West Virginia, for the Contestant;  
William T. Salzer, Esq., Office of the Solicitor,  
U.S. Department of Labor, Philadelphia,  
Pennsylvania, for the Respondent.

Before: Judge Koutras

Statement of the Proceeding

These proceedings concern a Notice of Contest filed by the contestant against the respondent pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d), challenging the legality of a section 104(d)(2) order issued to the contestant at its Loveridge No. 22 Mine on March 24, 1986. The civil penalty case concerns a proposal filed by MSHA for a civil penalty assessment in the amount of \$600 for the alleged violation in question.

The contest was heard in Morgantown, West Virginia, on July 29, 1986, and the parties presented testimony and evidence regarding the alleged violation. MSHA presented testimony from its inspectors, and Consolidation Coal relied on the testimony of the mine safety supervisor and preparation plant superintendent. The civil penalty case was assigned to me after the hearing and the closing of the record.

By motion filed with me on September 22, 1986, pursuant to Commission Rule 30, 29 C.F.R. § 2700.30, the parties seek approval of a proposed settlement of the civil penalty case. The proposed settlement reflects that MSHA has modified the contested order to a section 104(a) citation, with a corresponding reduction of the assessed degree of negligence from "high" to "moderate," and an amended proposed civil penalty of \$300 which Consolidation Coal agrees to pay.

#### Discussion

Consolidation Coal is charged with an alleged violation of mandatory safety standard 30 C.F.R. § 77.1104, and the condition or practice is described as follows: "Loose coal and coal dust had accumulated throughout the slope belt headhouse on the structures electrical motors and boxes, black in color, and loose coal has also been allowed to accumulate to where the trail roller and tripper belt are running in loose coal creating fire hazard."

In support of the proposed settlement of the civil penalty case, the parties state that they have discussed the six statutory criteria stated in section 110(i) of the Act, and I have reviewed the information supplied by MSHA as part of its pleadings and proposed civil penalty assessment with respect to these issues. In further support of the proposed settlement, Consolidation Coal asserts that it was unable to attend to the cited conditions due to the fact that under a prior order issued on February 8, 1986, access to the belt tail house was barricaded. This assertion is supported by the testimony at the hearing in defense of the alleged violation. MSHA acknowledges that certain access points to the slope belt headhouse were "chained off" as a result of repairs which had to be made to the tripper belt structure leading out of the slope belt headhouse. In view of these mitigating circumstances, MSHA modified the section 104(d)(2) order to a section 104(a) citation, and also modified the degree of negligence.

Conclusion

After careful review and consideration of the testimony and evidence adduced in these proceedings, including the submissions in support of the motion to approve the proposed settlement of the civil penalty case, I conclude and find that the proposed settlement disposition 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

Consolidation Coal Company IS ORDERED to pay a civil penalty assessment in the amount of \$300 for the violation in question, and payment is to be made to MSHA within thirty (30) days of the date of these decisions. Upon receipt of payment by MSHA, these proceedings are dismissed.

  
George A. Koutras  
Administrative Law Judge

Distribution:

Michael R. Peelish, Esq., Consolidation Coal Company,  
1800 Washington Road, Pittsburgh, PA 15241 (Certified Mail)

W. Henry Lawrence, Esq., Steptoe & Johnson, P.O. Box 2190,  
Clarksburg, WV 26301 (Certified Mail)

William T. Salzer, Esq., Office of the Solicitor, U.S.  
Department of Labor, Room 14480 Gateway Building, 3535 Market  
Street, Philadelphia, PA 19104 (Certified Mail)

/fb

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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FALLS CHURCH, VIRGINIA 22041

**SEP 25 1986**

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. YORK 86-1-M  
Petitioner : A.C. No. 30-00006-05512  
v. :  
ATLANTIC CEMENT CO., INC., : Blue Circle Atlantic, Inc.  
Respondent :

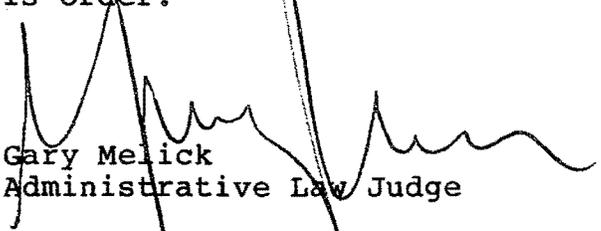
DECISION APPROVING SETTLEMENT

Appearances: James A. Magenheimer, Esq., Office of the  
Solicitor, U.S. Department of Labor, New York,  
New York, for Petitioner;  
Gary L. Vanniere, Director of Personnel, P.O.  
Box 3, Ravena, New York, for Respondent

Before: Judge Melick

This case is before me upon a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). The parties filed a joint motion to approve a settlement agreement and to dismiss the case. A reduction in penalty from \$5,311 to \$3,311 was proposed. I have considered the testimony and documentation submitted in this case at hearings held August 27, 1986, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is GRANTED, and it is ORDERED that Respondent pay a penalty of \$3,311 within 30 days of this order.

  
Gary Melick  
Administrative Law Judge

Distribution:

James A. Magenheimer, Esq., Office of the Solicitor, U.S.  
Department of Labor, 1515 Broadway, Room 3555, New York, NY  
10036 (Certified Mail)

Gary L. Vanniere, Director of Personnel, P.O. Box 3, Ravena,  
New York 12143-0003 (Certified Mail)

rbg

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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FALLS CHURCH, VIRGINIA 22041

**SEP 26 1986**

VICTOR L. TAYLOR, : DISCRIMINATION PROCEEDING  
Complainant :  
 :  
v. : Docket No. WEVA 86-266-D  
 :  
 : MORG CD 86-6  
PHOENIX RESOURCES, INC., :  
Respondent :

ORDER OF DISMISSAL

Appearances: Larry Leffel, Mine Superintendent, for Respondent.

Before: Judge Broderick

On September 5, 1986, I issued an order to Complainant to show cause on or before September 19, 1986 why his complaint should not be dismissed because of his failure to appear at the hearing in Elkins, West Virginia on September 4, 1986. Complainant has not responded to the order to show cause.

Therefore, the complaint and this proceeding are DISMISSED.

*James A. Broderick*  
James A. Broderick  
Administrative Law Judge

Distribution:

Victor L. Taylor, P.O. Box 497, Mill Creek, WV 26280 (Certified Mail)

Joseph W. R. Lawson, II, Southeastern Employers Service Corp., P.O. Box 1848, Bristol, TN 37621 (Certified Mail)

Raymond Parker, President, Phoenix Resources, Inc., P.O. Box 20, Mounterville, WV 26282 (Certified Mail)

slk

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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FALLS CHURCH, VIRGINIA 22041

**SEP 30 1986**

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. KENT 85-101  
Petitioner : A. C. No. 15-13086-03517  
: :  
v. : No. 2 Mine  
: :  
TAC & C ENERGY, INC., :  
Respondent :

DECISION

Appearances: Joseph B. Lockett, Esq., Office of the Solicitor,  
U.S. Department of Labor, Nashville, Tennessee,  
for Petitioner.

Before: Judge Maurer

Statement of the Case

This proceeding concerns a proposal for assessment of civil penalty 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 of \$420 for an alleged violation of 30 C.F.R. § 75.1701, because of the asserted failure by the respondent to drill bore holes in advance of the working faces while within 75 feet of an abandoned adjacent mine.

The respondent contested the violation and requested a hearing. Pursuant to notice, a hearing was convened in Prestonsburg, Kentucky, on August 7, 1986, and while the petitioner appeared, the respondent did not. In view of the respondent's failure to appear, the hearing proceeded without him. For reasons discussed later in this decision, respondent is held to be in default, and is deemed to have waived his opportunity to be further heard in this matter.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. § 801 et seq.
2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).
3. Commission Rules, 20 C.F.R. § 2700.1 et seq.

## Issue

The issue presented in this case is whether the petitioner has established a violation of section 30 C.F.R. § 75.1701, and, if so, the appropriate civil penalty that should be assessed for the violation.

### MSHA's Testimony and Evidence

The following MSHA exhibits were received in evidence in this proceeding:

1. A copy of the section 104(a) Citation No. 2463641, issued by Inspector Charles Slone on January 24, 1985.
2. A copy of the section 104(b) Order No. 2463648, issued by Inspector Charles Slone on January 29, 1985.
3. A copy of the Assessed Violation History Report for the respondent's No. 2 Mine from January 24, 1983, to January 23, 1985.

Inspector Slone testified that he conducted a routine spot inspection of the mine on January 24, 1985. When he reviewed the mine map he noticed that this mine had run parallel up beside an old, abandoned mine. After looking at the faces of entries one through six, he knew that entries five and six were mining close to this old adjacent mine. He estimated there was about 75 feet between the closest entry and the old works. Furthermore, while on the sections, he observed that there were no bore holes being drilled in advance of the working faces as 30 C.F.R. § 75.1701 requires.

After the inspector determined that the required bore holes were not being drilled, he informed Mr. Stanley, the mine foreman, that this would be one of the violations issued that day. Stanley reportedly said that he did not have the proper steel to drill the bore holes on hand so he said he would stop number 5 and 6 headings until the bore holes were drilled. The inspector thereupon issued Citation No. 2463641 and made the termination due the following day, January 25, 1985.

With regard to that citation, he marked negligence as "moderate" because this was the first time he had cited an instance like this at this particular mine. He marked gravity as "reasonably likely". The danger in this situation being that if they broke through with the ripper head of the continuous miner into the old adjacent mine, there could have been an onrush of water, or methane, or

blackdamp. 1/ The inspector testified that this occurrence could have led to the deaths of the nine people working in this area. For these reasons, the inspector also determined that this violation was a "significant and substantial" one.

On January 29, 1985, Inspector Slone returned to the mine. When he determined that coal was being mined with a continuous miner in both number 5 and 6 entries without the bore holes being drilled, he issued section 104(b) Order No. 2463648 for failure to comply with the previously issued section 104(a) citation in that the bore holes still hadn't been driven and the time for abatement had elapsed. Subsequently, bore holes were drilled and the section 104(b) order was terminated.

The Secretary contends that this operator has a medium-size operation and I note from the company's violation history report for the two (2) years prior to this violation that it had a relatively unremarkable violation history.

#### Respondent's Failure to Appear at the Hearing

The record in this case indicates that a Notice of Hearing dated June 26, 1986, setting this case down for hearing in Prestonsburg, Kentucky, on August 7, 1986, was received by the respondent on July 3, 1986. The postal service certified mail return receipt card was signed by Sonja Darlington. Further, a Notice of Hearing Site dated July 30, 1986, was received by the respondent on August 1, 1986. The green return receipt card was signed by Rhonda Darlington.

When the respondent failed to appear at the appointed time and place, the hearing proceeded in his absence. On August 25, 1986, pursuant to Commission Rules, 29 C.F.R. § 2700.63, I issued an Order to Show Cause to the respondent to show cause as to why it should not be defaulted for its failure to appear at the hearing. The respondent replied by

1/ The term "blackdamp" is defined in the Bureau of Mines, U. S. Department of Interior, A Dictionary of Mining, Mineral, and Related Terms (1968) at 108:

Generally applied to carbon dioxide. Strictly speaking a mixture of nitrogen and carbon dioxide. The average blackdamp contains 10 to 15 percent carbon dioxide and 85 to 90 percent nitrogen.... An atmosphere depleted of oxygen rather than containing an excess of carbon dioxide.... It extinguishes light and suffocates its victims.

letter dated September 4, 1986, received on September 11, 1986. That letter, in its entirety, states:

Mr. Roy J. Maurer:

The reason I was unable to attend Docket No. Kent 85-101 case on August 7, 1986 was because legal problems that I had to take care of at my other mines in Boone County, W.Va. This was all unexpected and I was not able to get in contact with anyone to ask for a delay. Thank you,

/Signature/  
Glenn H. Trent Jr.  
President

This is a totally unsatisfactory showing of good cause for failing to appear at the hearing, or sending someone else to represent the corporation, or at least giving some notice of inability to appear to either myself or counsel for the petitioner. Under the circumstances, I conclude and find that respondent has waived his right to be heard further in this matter and that he is in default.

#### Fact of Violation

I conclude and find that the petitioner has established a violation of 30 C.F.R. § 75.1701 by a preponderance of the evidence. The testimony of Inspector Slone fully supports the citation which he issued and it IS AFFIRMED. Furthermore, I conclude and find that the violation is significant and substantial and the inspector's finding in this regard is likewise AFFIRMED.

#### Civil Penalty Assessment

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that the proposed civil penalty assessment of \$420 is appropriate in this case.

#### ORDER

Respondent IS ORDERED to pay a civil penalty in the amount of \$420 within thirty (30) days of the date of this decision, and upon receipt of that payment by MSHA, these proceedings are dismissed.

  
Roy J. Maurer  
Administrative Law Judge

Distribution:

Joseph B. Lockett, Esq., Office of the Solicitor, U. S. Department of Labor, 801 Broadway, Rm. 280, Nashville, TN 37203  
(Certified Mail)

Glenn H. Trent, Jr., TAC & C Energy, Inc., Box 237, Gilbert, WV 25621 (Certified Mail)

**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 30 1986**

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. KENT 86-111  
Petitioner : A.C. No. 15-12672-03504  
v. :  
: River Dredge  
RIVCO DREDGING CORPORATION, :  
Respondent :

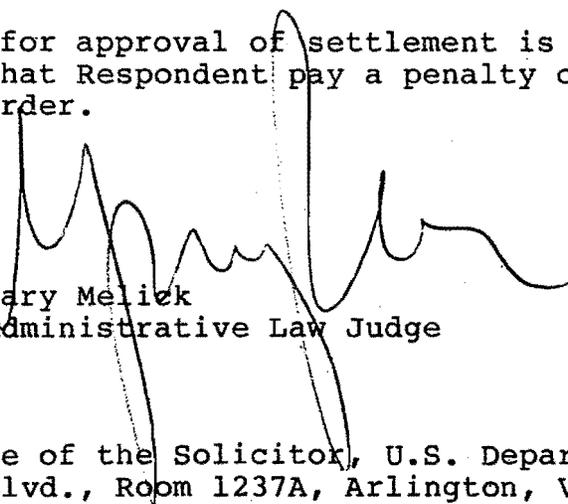
DECISION APPROVING SETTLEMENT

Appearances: Mary K. Spencer, Esq., Office of the Solicitor,  
U.S. Department of Labor, Arlington, Virginia,  
for Petitioner;  
Mr. Gene A. Wilson, President, Rivco Dredging  
Corporation, Louisa, Kentucky, for Respondent.

Before: Judge Melick

This case is before me upon a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). Petitioner has filed a motion to approve a settlement agreement and to dismiss the case. A reduction in penalty from \$92 to \$40 is proposed. I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is GRANTED, and it is ORDERED that Respondent pay a penalty of \$40 within 30 days of this order.



Gary Melick  
Administrative Law Judge

Distribution:

Mary K. Spencer, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Blvd., Room 1237A, Arlington, VA 22203 (Certified Mail)

Mr. Gene A. Wilson, President, Rivco Dredging Corp., P.O. Box 702, Louisa, KY 41230 (Certified Mail)

**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 30 1986**

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. LAKE 86-27  
Petitioner : A.C. No. 11-00611-03524  
 :  
v. : Fidelity Strip Mine  
 :  
FREEMAN UNITED COAL MINING :  
COMPANY, :  
Respondent :

DECISION APPROVING SETTLEMENT

Before: Judge Broderick

On September 29, 1986, 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 \$1000 and the parties propose to settle for \$475.

The case involves a single citation charging a violation of 30 C.F.R. § 77.1607(c) because scrapers were not being operated at prudent speeds resulting in a head-on collision and a serious injury. The motion states that the violation was serious but did not result from Respondent's negligence. It was caused by a scraper operator violating Respondent's published safety rules and passing a water truck when visibility was diminished because of road dust. (The water truck was keeping the road wet to allay the dust.) Respondent is a large operator and has a favorable history of prior violations. I have considered the motion in the light of the criteria in section 110(i) of the Act and conclude that it should be approved.

Accordingly, the settlement is APPROVED and Respondent is ORDERED TO PAY the sum of \$475 within 30 days of the date of this order.

  
James A. Broderick  
Administrative Law Judge

Distribution:

Miguel J. Carmona, Esq., U.S. Department of Labor, Office  
of the Solicitor, 230 S. Dearborn Street, 8th Floor, Chicago,  
IL 60604 (Certified Mail)

Harry M. Coven, Esq., Gould & Ratner, 300 W. Washington St.,  
Suite 1500, Chicago, IL 60606 (Certified Mail)

slk

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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**SEP 30 1986**

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. PENN 85-288  
Petitioner : A. C. No. 36-00921-03528  
: :  
v. : Penn Hill Mine  
: :  
STANFORD MINING COMPANY, :  
Respondent :

DECISION APPROVING SETTLEMENT

Before: Judge Maurer

On September 29, 1986, the Solicitor filed a stipulation and motion to approve settlement agreement in the above-captioned case. At issue are two section 104(a) citations originally assessed at \$10,000 each. Settlement is proposed at \$6,600 per violation.

Citation No. 2403809 was issued for a violation of 30 C.F.R. § 75.200 in conjunction with Order of Withdrawal No. 2403808 issued pursuant to section 107(a) when following a fatal roof fall investigation, it was determined that the roof of the active No. 4 entry of the 6 right 006 section had not been properly supported prior to continuing mining. The accident resulted in the death of section foreman Ernest E. Nichol as he attempted to install a roof bolt in this section. The accident investigation revealed that the No. 4 entry in violation of the mine's approved roof control plan had been mined approximately 12 feet in by the permanent roof supports and mining continued in the 1st open crosscut between the No. 3 and 4 entries holing and cutting back into the No. 4 entry. This resulted in an unsupported intersection approximately 30 feet long which condition led to the issuance of the imminent danger order, supra.

Citation No. 2403811 was issued in conjunction with 107(a) Order of Withdrawal No. 2403810 as a result of the same accident investigation. The investigation revealed that an imminent danger had been created when employees were proceeding in by permanent supports and the Automated Temporary Support System (ATRS) that was in use was not maintained tight against the roof after being placed. Citation 2403811 was issued for a violation of the approved roof control plan. Said plan requires, inter alia, that

the ATRS be placed firmly against the roof and shall remain pressurized unless crib blocks or other suitable blocking material are used. The accident investigation disclosed that the victim had proceeded in by the permanent supports to manually adjust roof mats, i.e., additional supports that were placed on the extreme left ring of the ATRS. To enable the victim to adjust the mat, the ATRS was depressurized, resulting in the roof fall and fatality.

The inspector determined that the violations were caused by the high negligence of the operator resulting in a fatal occurrence. The operator showed ordinary good faith in abating these practices.

The Solicitor further asserts that the operator is currently in an impaired financial condition and that there would be an adverse impact on the operator's ability to remain in business if the proposed assessment were imposed on it. For example, in fiscal year 1985, the last for which totals are available, the operator suffered a net loss of \$1,313,723.

The Solicitor represents that the proposed assessment, as amended, is still a substantial penalty and reflects due consideration of the gravity of the violations and the operator's negligence.

I accept the Solicitor's representations and approve the settlement.

ORDER

The operator is ordered to pay \$13,200 within 30 days of the date of this decision.



Roy J. Maurer  
Administrative Law Judge

Distribution:

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

R. Henry Moore, Esq., Rose, Schmidt, Chapman, Duff & Hasley, 900 Oliver Bldg., Pittsburgh, PA 15222 (Certified Mail)

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

**SEP 30 1986**

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. WEST 84-103-M  
Petitioner : A.C. No. 04-00030-05502  
 :  
v. : Brubaker-Mann  
 :  
BRUBAKER-MANN INCORPORATED, :  
Respondent :

DECISION

Appearances: Rochelle Ramsey, Esq., Office of the Solicitor,  
U.S. Department of Labor, Los Angeles, California,  
for Petitioner;  
Steve Pell, Esq., Ventura, California,  
for Respondent.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, (MSHA), charges respondent with violating safety regulations promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq., (the Act).

After notice to the parties a hearing on the merits commenced in Los Angeles, California on June 11, 1986.

The parties filed post-trial briefs.

Issues

Certain threshold issues were discussed and ruled contrary to respondent's contentions in WEST 84-96-M

Stipulation

The parties stipulated that respondent is a small operator. Further, respondent is subject to the Act unless MSHA's jurisdiction is pre-empted by the California Occupational Safety and Health Administration (Tr. 191, 249).

Citation 2246284

This citation charges respondent with violating 30 C.F.R. § 56.14-3 which provides as follows:

56.14-3 Mandatory. Guards at conveyor-drive, conveyor-head, and conveyor-tail pulleys shall extend a distance

sufficient to prevent a person from accidentally reaching behind the guard and becoming caught between the belt and the pulley.

#### Summary of the Evidence

MSHA inspector Ronald Ainge, a person experienced in mining, issued this citation January 18, 1984 when he observed a violation of 30 C.F.R. § 56.14-3 (Tr. 16, 17, 22-26, 132-133, 138-141; Ex. P1, P2, P3).

There was a possibility that a man could contact the chain drive behind this waist high guard particularly while lubricating or cleaning the equipment (Tr. 20, 21, 88, 90). The inspector did not observe anyone lubricating the machine while it was operating (Tr. 93).

The handrail and the chain drive are approximately 40 to 42 inches high (Tr. 263, 264).

There is a possibility that a person could accidentally reach behind the machine although it is guarded in front and over the top (Tr. 88, 89). An employee could gain access by reaching behind the guard and contacting the pinch point (Tr. 21).

By way of abatement the inspector required that the chain drive be enclosed from the back (Tr. 29).

Mr. Mann testified this machine has been in operation between 25 and 30 years (Tr. 231). Further, the guards had been previously approved by MSHA and Cal-OSHA inspectors (Tr. 231). The machine had a guard on the front and the top (Tr. 231). Further, no one would service this machine while it is operating (Tr. 231).

#### Evaluation of the Evidence

The evidence establishes that the chain drive was guarded. However, the inspector concluded that a worker could accidentally reach behind the guard and contact the pinch points.

The photographs do not support MSHA's theory that a violation existed here (Exhibits P1, P2, and P3). The pulley was guarded on the walkway side and a guard encircled the equipment. The conveyor itself blocked access to the unguarded side of the pulley. These factors cause me to conclude that no person could accidentally reach behind the guard and become caught between the belt and the pulley.

Citation 2246284 and all penalties therefor should be vacated.

#### Citation 2246286

This citation charges respondent with violating 30 C.F.R. § 56.14-6 which provides as follows:

56.14-6 Mandatory. Except when testing the machinery, guards shall be securely in place while machinery is being operated.

#### Summary of the Evidence

Inspector Ainge issued this citation because he observed that the chain drive was entirely exposed. It was about four and one half feet off of the ground, close to a walkway and easily accessible (Tr. 30, 31; Ex. P4).

A person cleaning or lubricating this equipment could contact the chain drive and incur an amputation (Tr. 31).

There were workers moving throughout the plant and they would be in area as needed (Tr. 32). In the inspector's opinion the company would service the equipment while it was running (Tr. 32). Except for lunchtime he had never noticed a shutdown of the equipment which was conveying material.

An injury was reasonably likely to happen due to this condition (Tr. 33).

Mr. Tafoya, the company's representative, told the inspector that they had taken the old guard off to change the pulleys. After the change, the old guard would no longer fit (Tr. 33, 94).

In abating the condition it was suggested that a guard cover the drive chain (Tr. 34).

Witness Mann, who testified for the company, indicated the machine is in a very remote area. In addition, there was a temporary cover over it, but he was not familiar with it (Tr. 266).

At the time of the inspection the machine was in the process of being tested and repaired (Tr. 232).

#### Evaluation of the Evidence

In connection with this citation I credit the inspector's testimony. He observed the violation over a period of time. His testimony is further confirmed by the statement of respondent's representative Tafoya. There was no indication the machinery was being tested and the inspector did not observe a shutdown of the equipment.

Since the chain guard was unguarded, Citation 2246286 should be affirmed.

Citation 2246287

This citation charges respondent with violating 30 C.F.R. § 56.14-1 which provides as follows:

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.

Summary of the Evidence

Inspector Ainge also issued this citation as a non-significant and substantial violation because the counter balance wheel on the simon shaker <sup>1/</sup> was unguarded (Tr. 35, 99).

The shaker generates considerable dust. A guard on the machine would preclude a possible broken bone (Tr. 100).

Mr. Mann testified this machine had been inspected for about 20 years. No one had required a guard on the back of the counter balance. Such a guard would not enhance the safety of the machine.

In addition, no one would service the machine while it is operating (Tr. 232, 233, 267).

Evaluation of the Evidence

Inspector Ainge testified as to facts that establish a violation of the regulation.

Mr. Mann does not deny that the condition exists but he asserts no guard had been required on the machine for 20 years. However, the mere fact a guard had not previously required does not constitute a defense. Further, I credit the inspector's expertise on whether a guard would enhance the safety of this machine.

Citation 2246287 should be affirmed.

Citation 2246289

This citation charges respondent with violating 30 C.F.R. § 56.14-3 cited, supra.

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<sup>1/</sup> A simon shaker is a screening deck that separates different sizes of material (Tr. 99).

### Summary of the Evidence

This citation involved the chain drive of the conveyor system above the three-eighths inch rock hopper. The drive went from a motor to a head pulley (Tr. 40, 41; Ex. P7, P8, P9, P10). The head pulley did not have a back on it and it was also unguarded. The area had to be serviced and lubricated. A man could reach behind the guard and contact the pinch points between the drive chain and the sprockets (Tr. 40, 43).

On the day of the inspection the inspector saw employees in the area. The employees would have to go behind the head pulley and down the other side to have access to other parts of the plant (Tr. 43).

At any time during cleanup or lubrication these areas would be accessible (Tr. 44). The plant operated the entire time, except during lunch or a breakdown (Tr. 45).

Abatement was achieved by placing a backguard on the chain drive and the tail pulley was enclosed with more screening material so as to restrict access (Tr. 45).

Mr. Mann indicated this machine had been inspected many times in the last 20 to 25 years (Tr. 235). Prior to the inspection the machine had a back guard. But such a guard serves no purpose nor does it make the machine any safer (Tr. 235-237). The top of the conveyor was about 36 inches above the ground (Tr. 275, 276). The pinch point was not accessible because a person would have to go around the guard (Tr. 274, 275; Ex. P10).

### Evaluation of the Evidence

The head pulley in this citation was unguarded. The factual situation accordingly differs from that in Citation 2246284, supra.

I further credit inspector Ainge's testimony as to the violation. Exhibit P10 particularly shows the ready access a worker would have to this hazard.

Citation 2246289 should be affirmed.

### Citation 2246292

This citation charges respondent with violating 30 C.F.R. § 56.9-7 which provides as follows:

56.9-7 Mandatory. Unguarded conveyors with walkways shall be equipped with emergency stop devices or cords along their full length.

### Summary of the Evidence

There was a walkway on both sides of the conveyor system. But there was no guarding or emergency stop cords to stop the conveyor (Tr. 49, 111, 112, 135; Ex. P13, P14)..

The hazard here involved the possibility of a maintenance man being pulled into the conveyor system due to the absence of guarding or stop cords (Tr. 50; Ex. P13, P14).

There were people working in the area on the day of the inspection (Tr. 50).

The conveyor, according to Mr. Tafoya, had been in operation for a year. The inspector believed it was highly likely that an accident could occur (Tr. 52, 53, 114).

Mr. Mann stated that they were testing a stream of the rock on this conveyor. They had worked on this equipment for over two years; whenever the weather was bad, or the rock was wet, or in between jobs (Tr. 239, 242). The only people in the area would be those working on it (Tr. 240).

### Evaluation of the Evidence

I credit inspector Ainge's testimony in connection with this citation.

It is clear that the conveyors were unguarded and not equipped with stop cords. Mr. Mann's testimony indicates that they were testing a stream of rock. I accept his explanation but the operation of the conveyor even in that manner would not excuse the use of stop cords.

Citation 2246292 should be affirmed.

### Citation 2246293

This citation charges respondent with violating 30 C.F.R. § 56.14-1, cited supra.

### Summary of the Evidence

On the same conveyor system as previously cited, the head pulley was unguarded and accessible from both sides. There were handrails on the outer side but no guarding on the inside (Tr. 53, 55; Ex. P15, 16).

Employees were working on the system the day the citations were written (Tr. 53).

A worker could contact the unguarded head pulley between the conveyor system and the top of the head pulley (Tr. 53). This could occur during service, lubrication or cleanup (Tr. 54).

An injury in these circumstances could range from one involving no loss time to a fatality (Tr. 55, 56).

Mr. Mann indicated this machinery was not in operation. Further, it would not be run without a head or tail pulley (Tr. 242).

#### Evaluation of the Evidence

I credit Inspector Ainge's testimony.

Mr. Mann's testimony is not persuasive. A conveyor is in operation although it is merely running a stream of rock for testing purposes. Further, the photographs show that the head pulley was unguarded (Ex. P15, P16).

The citation should be affirmed.

#### Civil Penalties

The statutory mandate to assess civil penalties is contained in section 110(i) of the Act, now codified at 30 U.S.C. § 820(i). Concerning prior history: the computer printout (Ex. P34) shows that respondent had no violations in the two year period ending March 5, 1985. The printout shows two violations before March 6, 1983. But, as the respondent contends, these would appear to be the two citations vacated in Brubaker-Mann, Inc., 2 FMSHRC 227 (1980). Accordingly, I conclude that the Secretary has failed to prove any adverse history on the part of respondent. The parties have stipulated that the operator is a small company. The penalties appear appropriate in relation to the small operator and they should not affect the ability of the company to continue in business. Concerning the negligence of the operator: the violations that are affirmed all involve the failure to provide guards or related safety devices. These conditions were open and obvious hence the operator must be considered to be negligent. The gravity for the violations is high since an amputation or fatality could result from these conditions. The operator is credited with good faith since the company abated the violative conditions.

The penalties proposed by the Secretary are as follows:

2246284	to be vacated
2246286	\$ 63
2246287	20
2246289	46
2246292	100
2246293	63

On balance, and in view of the statutory criteria, I consider that the more appropriate penalties are as set forth in the order of this decision.

Conclusions of Law

Based on the entire record and the factual findings made in the narrative portion of this decision, the following conclusions of law are entered:

1. The Commission has jurisdiction to decide this case.
2. Citation 2246284 should be vacated.
3. The following citations should be affirmed:

2246286  
2246287  
2246289  
2246292  
2246293

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

ORDER

1. Citation 2246284 and all penalties therefor are vacated.
2. The following citations are affirmed and the penalties as noted thereafter are assessed:

<u>Citation</u>	<u>Penalty</u>
2246286	\$52
2246287	15
2246289	36
2246292	50
2246293	42

  
John J. Morris  
Administrative Law Judge

Distribution:

Rochelle Ramsey, Esq., Office of the Solicitor, U.S. Department of Labor, 3247 Federal Building, 300 North Los Angeles Street, Los Angeles, CA 90012 (Certified Mail)

Steve Pell, Esq., 3200 Telegraph Road, Suite 207, Ventura, CA 93003 (Certified Mail)

/blc

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

SEP 30 1986

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. WEST 85-177-M  
Petitioner : A.C. No. 04-00030-05504  
: :  
v. :  
BRUBAKER-MANN, INC., : Brubaker-Mann  
Respondent :

DECISION

Appearances: Rochelle Ramsey, Esq.,, Office of the Solicitor,  
U.S. Department of Labor, Los Angeles, California,  
for Petitioner;  
Steve Pell, Esq., Ventura, California,  
for Respondent.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, (MSHA), charges respondent with violating a safety regulation promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. § 802 et seq., (the Act).

After notice to the parties a hearing on the merits commenced in Los Angeles, California on June 11, 1986.

The parties filed post-trial briefs.

Issues

Certain threshold issues were discussed and ruled contrary to respondent's contentions in WEST 84-96-M.

Stipulation

The parties stipulated that respondent is a small operator. Further, respondent is subject to the Act unless MSHA's jurisdiction is pre-empted by the California Occupational Safety and Health Administration (Tr. 191, 249).

Citation 2364577

This citation charges respondent with violating 30 C.F.R. § 56.9087 which provides as follows:

§ 56.9087 Audible warning devices and back up alarms.

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.

#### Summary of the Evidence

MSHA inspector Ronald Ainge issued this citation because a front-end loader, which was operating on the day of the inspection, did not have a functioning reverse alarm signal (Tr. 56, 119). There was a mill operator and a welder in the area but no spotter was available to tell the equipment driver when it was clear to back up (Tr. 56, 57, 120). The inspector was in the area for two days and he observed no person signaling the loader operator (Tr. 120, 121).

Mr. Mann testified that the Caterpillar was equipped with a reverse signal alarm (Tr. 242, 243, 282). However, the alarm was causing the men mental stress so they turned it down so it could not be heard (Tr. 243, 283). Also there is supposed to be a spotter in the area. No accidents have occurred from this condition (Tr. 243, 284). In addition, this equipment operates in a noisy part of the plant (Tr. 283).

#### Evaluation of the Evidence

The inspector's testimony establishes a violation of the regulation. Mr. Mann's evidence fails to establish a defense. The fact that the workmen turned off the reverse alarm only contributed to the possibility of an accident or fatality.

Citation 2364577 should be affirmed.

#### Civil Penalty

The statutory mandate to assess civil penalties is contained in section 110(i) of the Act, now codified 30 U.S.C. § 820(i). Concerning prior history: the computer printout (Ex. P34) shows that respondent had no violations in the two year period ending March 5, 1985. The printout shows two violations before March 6, 1983. But, as the respondent contends, these would appear to be the two citations vacated in Brubaker-Mann, 2 FMSHRC 227 (1980). Accordingly, I conclude that the Secretary has failed to prove any adverse history on the part of respondent. The parties have stipulated that the operator is a small company. The penalty appears appropriate in relation to a small operator and it should not affect the ability of the company to continue in business. Concerning the negligence of the operator: this citation involved a failure to use a back-up alarm. This condition was obvious and the operator must be considered as negligent. The gravity is high since a fatality could result from this defect. The operator is credited with good faith since the company abated the violative condition.

On balance, I consider that the proposed penalty of \$79 should be reduced to \$59.

Conclusions of Law

Based on the entire record and the factual findings made in the narrative portion of this decision, the following conclusions of law are entered:

1. The Commission has jurisdiction to decide this case.
2. Citation 2364577 should be affirmed and a penalty of \$59 should be assessed.

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

ORDER

1. Citation 2364577 is affirmed.
2. A civil penalty of \$59 is assessed.

  
John J. Morris  
Administrative Law Judge

Distribution:

Rochelle Ramsey, Esq., Office of the Solicitor, U.S. Department of Labor, 3247 Federal Building, 300 North Los Angeles Street, Los Angeles, CA 90012 (Certified Mail)

Steve Pell, Esq., 3200 Telegraph Road, Suite 207, Ventura, CA 93003 (Certified Mail)

/bls

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

SEP 30 1986

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

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 86-82-M
Petitioner	:	A.C. No. 04-00030-05505
	:	
v.	:	Brubaker-Mann
	:	
BRUBAKER-MANN, INC.,	:	
Respondent	:	

DECISION

Appearances: Rochelle Ramsey, Esq., Office of the Solicitor,  
U.S. Department of Labor, Los Angeles, California,  
for Petitioner;  
Steve Pell, Esq., Ventura, California,  
for Respondent.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, (MSHA), charges respondent with violating safety regulations promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq., (the Act).

After notice to the parties a hearing on the merits commenced in Los Angeles, California on June 11, 1986.

The parties filed post-trial briefs.

Issues

Certain threshold issues were discussed and ruled contrary to respondent's contentions in WEST 84-96-M.

Stipulation

The parties stipulated that respondent is a small operator. Further, respondent is subject to the Act unless MSHA's jurisdiction is pre-empted by the California Occupational Safety and Health Administration (Tr. 191, 249).

Citation 2669970

This citation charges respondent with violating 30 C.F.R. § 56.9088(a) which provides as follows:

§ 56.9088(a) Roll-over protective structures (ROPS)  
and seat belts.

(a) Excluding equipment that is operated by remote control, all self-propelled track-type (crawler mounted) or wheeled (rubber-tired) scrapers; front-end loaders; dozers; tractors, including industrial and agriculture tractors but not including over-the-road type tractors (the type that pull trailers or vans on highways); and motor graders; and wheeled prime movers (a tractor of the type and kind normally used as the mode of power for rubber-tired scrapers); as used in metal and non-metal mining operations, with or without attachments, shall be used such mining only when equipped with (1) roll-over protective structures (ROPS) in accordance with the requirements of paragraphs (b) through (g) of this standard, as applicable, and (2) seat belts meeting the requirements of the Society of Automotive Engineers (SAE), Motor Vehicle Seat Belts Assemblies-SAE J4v, approved November 1955, revised July 1965; Seat Belt Hardware Test Procedures-SAE J140a, approved April 1970, revised February 1973; Seat Belt Hardware Performance Requirements-SAE J141; Operator Protection for Wheel Type Agricultural and Industrial Tractors-SAE J333a, approved April 1968; revised July 1970, conforms to ASAE S305; and Seat Belts for Construction Equipment-SAE J386 approved March 1968; and, in accordance with paragraphs (b), (c), and (e) of this standard, as applicable.

#### Summary of the Evidence

MSHA inspector Ronald Barri issued this citation when he saw a driver climb out of a small Michigan front-end loader that was not equipped with seat belts (Tr. 151, 153). At the time the six or seven foot high loader was parked in front of the hopper at the crusher (Tr. 151, 153).

The lack of seat belts could cause the operator to be thrown from this equipment (Tr. 152). The inspector further considered it reasonably likely that this type of equipment would roll over (Tr. 152).

William Mann testified that the company had been informed that seat belts must be on the equipment but they do not have to be worn (Tr. 209).

Further, the vehicles involved in this citation and the following citation operate on a level slab (Tr. 209). But they must otherwise transverse grades of eight to ten percent in the area (Tr. 285).

#### Evaluation of the Evidence

The MSHA's inspector's testimony establishes a violation of the regulation.

Mr. Mann in his testimony asserts that the seat belts must be provided but need not be used. But in this case the loader was not equipped with a seat belt. Accordingly, a violation has been established and the citation should be affirmed.

Citation 2669971

This citation charges respondent with violating 30 C.F.R. § 56.9088(a), cited supra.

Summary of the Evidence

This citation was issued by MSHA inspector Barri when he observed that half of the seat belt in the 988 Caterpillar front-end loader was missing (Tr. 154).

The inspector observed the operator get out of the equipment (Tr. 154).

In the event of a rollover the operator could be thrown from the equipment and possibly crushed (Tr. 155).

Evaluation of the Evidence

The evidence establishes a violation of the regulation.

A portion of a seat belt is not in compliance with the regulation. The citation should be affirmed.

Citation 2669972

This citation charges respondent with violating 30 C.F.R. § 56.14007 which provides as follows:

§ 56.14007 Construction and maintenance.

Guards shall be of substantial construction and properly maintained.

Summary of the Evidence

This citation was issued when the MSHA inspector observed an 8 by 10 inch opening in the top screen of a V-belt drive. The top of the screen was 18 to 24 inches from the ground (Tr. 156-159; Ex. P17).

The hazard involved someone inadvertently getting their hand into the drive from the adjacent walkway (Tr. 158, 206). This exposure could cut or amputate a finger, hand or arm (Tr. 158).

In order to gain access to this area a worker would have to bend over but he would not have to get on his hands and knees (Tr. 205).

Evaluation of the Evidence

The evidence indicates the guard, with an eight by ten inch opening, was not properly maintained. The photograph (P17) confirms the credible testimony.

The citation should be affirmed.

Citation 2669974

This citation charges respondent with violating 30 C.F.R. § 56.11001 which provides as follows:

§ 56.11001 Safe access.

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

Summary of the Evidence

A section of mat, eight inches wide and ten feet long, was missing on the outside edge of the landing along a walkway adjacent to a conveyor (Tr. 163, 164).

Someone could step in this open hole and incur scratches, lacerations or a possible groin injury (Tr. 164, 166, Ex. P19, P20).

Witness Mann testified that this seldom used, almost obsolete non-working area, was in the older part of the plant (Tr. 216, 288). There is an area to the left of that shown in the photographs where people walk (Tr. 216, 217; Ex. P19, P20). One would have to walk around bars and sections to walk on the area with the 10 foot missing section (Tr. 217). This area was not completely blocked off (Tr. 289). Employees have strict instructions not to enter any of the remote parts of the plant (Tr. 289). But no area of the plant was signed to prohibit entry (Tr. 289).

Evaluation of the Evidence

The facts establish a violation of the regulation. Employees had access to the violative condition.

The defenses raised by Mr. Mann relate to the imposition of a civil penalty. Minimal access and instructions not to enter remote areas relate to gravity and negligence. The proposed civil penalty should be substantially reduced.

Citation 2669975

This citation charges respondent with violating 30 C.F.R. § 56.11002 which provides as follows:

§ 56.11002 Handrails and toeboards.

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.

### Summary of the Evidence

There were no handrails at the end of the elevated walkways of the fines conveyor. In lieu of handrails one side had a chain wired across it and the other had a piece of belting tied to it (Tr. 166, 167, 170; Ex. P21, P22, P23).

If the wire or belting broke a person could fall 20 feet to the ground (Tr. 168). Such a hazard could cause a fatality or a serious injury (Tr. 169, 170). The likelihood of an injury was reasonably likely (Tr. 170).

Witness Mann testified that no one has to go to this dead-end area of the plant except to repair a malfunction. If that occurred the plant would not be operating (Tr. 219, 220). Federal inspectors previously told the company to put a chain across this area (Tr. 219). After the company put a chain across, it was cited (Tr. 219).

### Evaluation of the Evidence

The facts establish a violation of the regulation. The hazard of the situation was somewhat increased by the substitution of chain and belting in lieu of a substantial handrail.

Mr. Mann's testimony goes to the company's negligence, an item to be considered in assessing a civil penalty. The citation should be affirmed.

### Citation 2669977

This citation charges respondent with violating 30 C.F.R. § 56.14001, which provides as follows:

§ 56.14001 Moving machine parts.

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.

### Summary of the Evidence

MSHA inspector Ronald Barri observed that the head pulley on the trumble conveyor lacked a guard. The pinch point was six inches from the walkway and 12 inches above it (Tr. 173, 174, 177; Ex. P25). There was a handrail alongside the walkway (Tr. 198). A person cleaning the equipment or lubricating it could become entangled in it (Tr. 174).

The walkway provided access but the access stopped at the belt (Tr. 175). The pinch point could cause a serious injury, such as possibly strangling a person or injuring an arm (Tr. 175, 176, 197).

The company abated the condition by installing a guard (Tr. 176, 177; Ex. P26, P27).

Mr. Mann testified that no injuries had ever occurred with this machine. Further, before abatement, it had been in the same condition for 33 years (Tr. 223). Any injury would have to be deliberate (Tr. 224).

#### Evaluation of the Evidence

The evidence, supported by the photographs, establish that moving machine parts could be contacted by workers.

Mr. Mann's testimony is not persuasive. The fact that no injury has ever occurred is most fortunate. But the purpose of such a safety regulation is to prevent the first accident.

The citation should be affirmed.

#### Citation 2669978

This citation alleges a violation of 30 C.F.R. § 56.14001, cited, supra.

#### Summary of the Evidence

The MSHA inspector testified that the oversized conveyor lacked a guard for the tail pulley (Tr. 179; Ex. P28).

If a person contacted the pinch point, which was 18 to 20 inches from the walkway, he could be pulled into it (Tr. 180-184). This could occur during cleanup, maintenance or lubrication (Tr. 180-182). Employees use this walkway (Tr. 182).

The hazard here could cause injury to an arm (Tr. 182).

The company abated by installing an expanded metal guard (Tr. 183, 184; Ex. P29), although the tail pulley had structural steel around it (Tr. 196). To gain access to the area a person would have to get down on his hands and knees (Tr. 196).

Mr. Mann indicated the tail pulley was located below a stairway (Tr. 224). It would be difficult as get close to the pinch points; in effect, it would require a deliberate act (Tr. 224, 225). It is not reasonably likely that someone could be injured in this area (Tr. 225).

### Evaluation of the Evidence

In connection with this citation I conclude it was not reasonably likely that a person could contact the pinch points. The inspector indicated a person would have to be on his hands and knees to make such a contact. Further, the structural steel around the pulley served as a guard.

Citation 2669978 should be vacated.

### Citation 2669979

This citation charges respondent with violating 30 C.F.R. § 56.12032 which provides as follows:

§ 56.12032 Inspection and cover plates.

Inspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs.

### Summary of the Evidence

The inspector observed that the junction box cover was missing from the drive motor on the number 3 conveyor (Tr. 184; Ex. P30).

The company abated by installing a cover (Tr. 185, 290; Ex. P31).

The absence of a cover could result in a short. The inspector believed that it was reasonably likely that this could occur. However, there was a "slim to no" chance of a resulting electrocution from touching the frame of conveyor (Tr. 186, 194). The equipment was grounded (Tr. 194).

Mr. Mann indicated an electrician was in the process of repairing this condition. He had returned to town for parts (Tr. 226). According to the company's electrician the condition proposed no danger to anyone (Tr. 226).

### Evaluation of the Evidence

The testimony and the photograph establish that a violation occurred. Mr. Mann's testimony relates to the imposition of a penalty. The citation should be affirmed but the penalty substantially reduced.

### Civil Penalties

The statutory mandate to assess civil penalties is contained in section 110(i) of the Act, now codified at 30 U.S.C. § 820(i). Concerning prior history: the computer printout (Ex. P34) shows that respondent had no violations in the two year period ending

March 5, 1985. The printout shows two violations before March 6, 1983. But, as the respondent contends, these would appear to be the two citations vacated in Brubaker-Mann, Inc., 2 FMSHRC 227 (1980). Accordingly, I conclude that the Secretary has failed to prove any adverse history on the part of respondent. The parties have stipulated that the operator is a small company. Concerning the negligence of the operator: all of the citations that are affirmed involve open and obvious conditions that should have been known to the operator. The negligence of the operator is established. Concerning gravity: In Citations 21669970 and 2669971 (missing seat belts) a severe injury or fatality could occur. In Citation 2669972 (unguarded V belt) an amputation could occur. In Citation 2669974 (outside edge of landing mat missing) the gravity of the violation is considerably over-estimated. Only a small strip of the mat was missing. In Citation 2669975 (wire and belting instead of handrail) the defenses raised by Mr. Mann minimize the gravity. In Citation 2669977 (unguarded head pulley) the condition could cause a serious injury. In Citation 2669979 (cover plate) the gravity is very minimal in view of the fact that the system was grounded. The operator is credited with statutory good faith since the company abated the violative conditions.

The Secretary's proposed penalties are set forth below. On balance, I consider the penalties assessed hereafter to be proper in view of all of the statutory criteria.

<u>Citation No.</u>	<u>Proposed Assessment</u>	<u>Assessed</u>
2669970	\$ 91	\$70
2669971	91	70
2669972	91	80
2669974	68	10
2669975	91	30
2669977	91	80
2669978	91	vacated
2669979	112	10

#### Conclusions of Law

Based on the entire record and the factual findings made in the narrative portion of this decision, the following conclusions of law are entered:

1. The Commission has jurisdiction to decide this case.
2. Citation 2669978 should be vacated.
3. The remaining citations should be affirmed and penalties assessed.

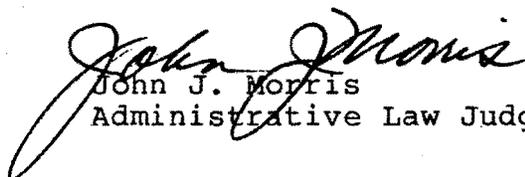
Based on the foregoing findings of fact and conclusions of law, I enter the following:

ORDER

1. The following citations are affirmed and penalties assessed as noted:

<u>Citation No.</u>	<u>Penalty</u>
2669970	\$70
2669971	70
2669972	80
2669974	10
2669975	30
2669977	80
2669979	10

2. Citation No. 2669978 and all penalties therefor are vacated.

  
John J. Morris  
Administrative Law Judge

Distribution:

Rochelle Ramsey, Esq., Office of the Solicitor, U.S. Department of Labor, 3247 Federal Building, 300 North Los Angeles Street, Los Angeles, CA 90012 (Certified Mail)

Steve Pell, Esq., 3200 Telegraph Road, Suite 207, Ventura, CA 93003 (Certified Mail)

/bls

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

SEP 30 1986

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

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. WEST 86-94-M  
Petitioner : A.C. No. 04-00030-05506  
: :  
v. : Brubaker-Mann  
: :  
BRUBAKER-MANN INCORPORATED, :  
Respondent :

DECISION

Appearances: Rochelle Ramsey, Esq., Office of the Solicitor,  
U.S. Department of Labor, Los Angeles, California,  
for Petitioner;  
Steve Pell, Esq., Ventura, California,  
for Respondent.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, (MSHA), charges respondent with violating safety regulations promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq., (the Act).

After notice to the parties a hearing on the merits commenced in Los Angeles, California on June 11, 1986.

The parties filed post-trial briefs.

Issues

Certain threshold issues were discussed and ruled contrary to respondent's contentions in WEST 84-96-M.

Stipulation

The parties stipulated that respondent is a small operator. Further, respondent is subject to the Act unless MSHA's jurisdiction is pre-empted by the California Occupational Safety and Health Administration (Tr. 191, 249).

Citation 2669973

This citation charges respondent with violating 30 C.F.R. § 56.20003(a) which provides as follows:

§ 56.20003(a) Housekeeping.

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

### Summary of the Evidence

This citation was issued by MSHA inspector Ronald Barri because of a buildup of powder-like fines about six feet long and two feet deep on a walkway alongside a conveyor. The material had a thin layer of mud on it. This could cause slipping and tripping (Tr. 160-162; Ex. P18)

If someone fell it would not result in a serious injury (Tr. 162).

Witness Mann indicated that no one goes to this area when it is wet (Tr. 212). A worker would not be in the area unless he was lubricating the conveyor and then it would be shut down (Tr. 213). In addition, witness Mann indicated the area was blocked off (Tr. 213).

Mr. Mann also stated that the area cited was located at the top and at the extreme end of the plant. No one would have occasion to be there except to clean up or lube the equipment (Tr. 287).

### Evaluation of the Evidence

I find the inspector's testimony to be credible. Mr. Mann concedes a worker would be in the area if he was maintaining the equipment. Such minimal use exposes that worker to the violative condition.

The citation should be affirmed.

### Citation 2669976

This citation charges respondent with violating 30 C.F.R. § 56.20003(a), cited supra.

### Summary of the Evidence

This citation resulted from a spill of fine material approximately 18 inches deep along the walkway on top of the super doles storage tank (Tr. 171). This created a slipping or tripping hazard but injuries would be minimal (Tr. 173).

The area, after abatement, was photographed (Tr. 172, Ex. P24). The desert, where this plant is located, by its very environment, causes a buildup of dust and sand (Tr. 200). But the inspector believed the buildup was caused by a leak in the conveyor because it was the same material that was in the bins (Tr. 202).

Mr. Mann indicated the fines are a continual buildup and they clean it continually. No one would be on top of the tank unless there was a breakdown (Tr. 222, 223).

### Evaluation of the Evidence

I credit the inspector's testimony. His evidence establishes a violation. The same hazard and exposure existed as was discussed in the preceding citation.

The citation should be affirmed.

### Citation 2669980

This citation charges respondent with violating 30 C.F.R. § 56.14001 which provides as follows:

§ 56.14001 Moving machine parts.  
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.

### Summary of the Evidence

There was no guard on the tail pulley of the two-inch rock conveyor to prevent a person from contacting a pinch point (Tr. 187; Ex. P32).

Employees have access to this area and a person could be caught and pulled into the tail pulley. A serious injury could result (Tr. 188, 189).

A workman could be injured in cleaning, lubricating or maintaining equipment in the area (Tr. 189).

The unguarded pinch point was 10 to 12 inches above and 18 to 20 inches from the walkway (Tr. 189).

The company installed a guard preventing access to the pinch point (Tr. 190; Ex. P33). In cross-examination the inspector agreed that the machine in question was under a stairway. Further, a person would have to squat and reach in to gain access to the pinch points (Tr. 194).

Mr. Mann indicated that previous MSHA inspectors had not cited the company for this condition (Tr. 222; Ex. R1).

### Evaluation of the Evidence

The inspector agreed that the violative condition was under a stairway. In addition, a person would have to squat and reach in to gain access to the pinch points. The evidence causes me to conclude that this condition did not involve exposed moving machine parts which could be contacted by a workman.

This citation should be vacated.

### Civil Penalties

The statutory mandate to assess civil penalties is contained in section 110(i) of the Act, now codified 30 U.S.C. § 820(i). Concerning prior history: the computer printout (Ex. P34) shows that respondent had no violations in the two year period ending March 5, 1985. The printout shows two violations before March 6, 1983. But, as the respondent contends, these would appear to be the two citations vacated in Brubaker-Mann, Inc., 2 FMSHRC 227 (1980). Accordingly, I conclude that the Secretary has failed to prove any adverse history on the part of respondent. The parties have stipulated that the operator is a small company. The proposed penalties of \$20 each for the housekeeping violations appear appropriate in relation to the size of the operator and they should not affect the ability of the company to continue in business particularly considering its annual approximate gross income of \$1,000,000 (Tr. 301). Concerning the negligence of the operator: the housekeeping conditions were obvious and involved a substantial buildup. The operator must be considered to be negligent. The gravity, as noted by the inspector, is minimal. The operator is credited with statutory good faith since the violative conditions were rapidly abated.

On balance, I consider that a civil penalty of \$10 is appropriate for each of the housekeeping violations.

### Conclusions of Law

Based on the entire record and the factual findings made in the narrative portion of this decision, the following conclusions of law are entered:

1. The Commission has jurisdiction to decide this case.
2. Respondent violated 30 C.F.R. § 56.20003(a) in two instances as alleged in Citations 2669973 and 2669976.
3. Respondent did not violate 30 C.F.R. § 56.14001 as alleged in Citation 2669980.

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

### ORDER

1. Citation 2669973 is affirmed and a penalty of \$10 is assessed.
2. Citation 2669976 is affirmed and a penalty of \$10 is assessed.
3. Citation 2669980 and all penalties therefor are vacated.

  
John J. Morris  
Administrative Law Judge

Distribution:

Rochelle Ramsey, Esq., Office of the Solicitor, U.S. Department of Labor, 3247 Federal Building, 300 North Los Angeles Street, Los Angeles, CA 90012 (Certified Mail)

Steve Pell, Esq., 3200 Telegraph Road, Suite 207, Ventura, CA 93003 (Certified Mail)

/bls

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

SEP 30 1986

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), :  
Petitioner : Docket No. WEST 84-96-M  
 : A.C. No. 04-00030-05501  
 :  
v. : Brubaker-Mann  
 :  
BRUBAKER-MANN INCORPORATED, :  
Respondent :

DECISION

Appearances: Rochelle Ramsey, Esq., Office of the Solicitor,  
U.S. Department of Labor, Los Angeles, California,  
for Petitioner;  
Steve Pell, Esq., Ventura, California,  
for Respondent.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, (MSHA), charges respondent with violating two safety regulations promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq., (the Act).

After notice to the parties a hearing on the merits commenced in Los Angeles, California on June 11, 1986.

The parties filed post-trial briefs.

Issues

The issues are whether the Secretary's acts in issuing his citations exceed the powers legislated by Congress since the State of California has a mine safety program equal or superior to MSHA; further, whether the Secretary's conduct was arbitrary and capricious in violation of the 5th Amendment; finally, whether respondent has a right not to be inspected by MSHA when California has a viable mine safety program.

The above threshold issues and the contentions raised by respondent require a review of certain uncontroverted evidence by witnesses Byron M. Ishkanian and William Mann.

Byron M. Ishkanian, testifying by deposition, identified himself as the principal engineer for mining and tunnelling for the State of California (D. 5, 6). He has 27 years experience in mine safety and for the last three years he has supervised 17

subordinates engaged in the California mine safety programs (D. 6, 7). Mines are defined by the state as activities involving the extraction of mineral resources (D. 7). Its inspectors are hired on the basis of formal training and experience (D. 19, 33).

Brubaker Mann has been inspected by the state at least once a year. The company has one of the best safety records in the state. It is one of 904 mining locations within California (D. 7-9, 13, 14). Inspections by California encompass mechanical guarding of head and tail pulleys, explosives, reverse alarms, seat belts and junction boxes on 220 volt drive motors (D. 10). If workers were exposed as alleged in the MSHA citations California could have issued citations (D. 13, 14).

Before 1977 there were no MSHA inspections and the State was the sole inspecting authority in California (D. 16).

The State has assisted in training MSHA and MESA inspectors. MESA also adopted some of California's regulations (D. 16, 17). MSHA's regulations are more general than California's and the MSHA inspector has a greater degree of discretion (D. 18).

Mr. Ishkanian has no jurisdiction over MSHA but he has received numerous complaints about the dual enforcement presence in the State (D. 20-22). An additional complaint is the lack of continuity in inspections because MSHA rotates its inspectors (D. 24).

The efforts at mine safety by the state of California and MSHA are duplicative (D. 13, 14).

The witness discussed duplicate efforts with federal officials William C. Frohan, Tom Shepuk and Ray Bernard (D. 28, 31). But their response was negative (D. 29). The witness had no input in the drafting of the Federal Act (D. 35, 36).

Norton Pickett, of the State of Nevada, has a job similar to that of the witness. Pickett has also complained about the duplication of safety efforts in Nevada. Pickett has worked for legislation in the U.S. Congress to correct this condition (D. 23, 24).

Mr. Ishkanian can see no need for the duplicative efforts in California. MSHA's efforts could be better used elsewhere. Twenty-three or twenty-five states have mine safety programs but some states do not (D. 27-32). Section 512(a) of the Federal Act says its purpose is to avoid duplication of effort (D. 31, 32).

The thrust of the federal act is towards mine safety. Title 8 of the California Administrative Code (attached to deposition as Exhibit A) deals with mine safety (D. 36, 37).

The testimony of witness William Mann outlined here is generally relevant to the threshold issues raised in the case. Additional testimony of the witness appears hereafter in relation to certain specific citations, infra.

Mr. Mann testified that he is the owner and operator of Brubaker-Mann, Inc. The company, engaged in rock crushing, has been in operation for 36 years. The company has worked hard for safety; in addition, there has never been a fatality or an overnight accident (Tr. 209, 210, 247).

The company's president also indicated that previous MSHA inspectors had not cited the company for the conditions now alleged in WEST 86-82-M and WEST 86-94-M (Tr. 227; Ex. R1). In fact, the company relied on previous MSHA inspections in 1980, 1981, and 1982 when the company was found not to be in violation of the regulations (Tr. 293, 294; Ex. R1). MSHA inspects the company two to four times a year (Tr. 213).

Mr. Mann stated that the inconsistent application of regulations and the duplication of efforts by MSHA and the State of California are a hardship on business (Tr. 295, 297). MSHA has different inspectors coming to the mine but the state uses the same inspector (Tr. 298). MSHA inspectors seems unfamiliar with milling (Tr. 299).

Generally, in relation to the machinery, Mr. Mann testified that the company's various machines are never maintained, lubricated or oiled while they are operating. In fact, the plant is closed for maintenance from 3:30 p.m. to 5 p.m. daily as well as from 7 a.m. to noon on Saturdays (Tr. 211). In the absence of a major breakdown, maintenance takes place only when the plant is shut down (Tr. 211). In any event, the company's workers would not put their hands into the machinery (Tr. 211).

Respondent's initial contention centers on the proposition that Congress intended that MSHA should not exercise jurisdiction in states having a mine safety and health program. In support of its argument respondent cites portions of the Act, namely 30 U.S.C. § 801(g) and § 959.

Section 801(g), in part, provides as follows:

(g) it is the purpose of this chapter (1) to establish interim mandatory health and safety standards and to direct the Secretary of Health and Human Services and the Secretary of Labor to develop and promulgate improved mandatory health or safety standards to protect the health and safety of the Nation's coal or other miners; ... (3) to cooperate with, and provide assistance to, the States in the development and enforcement of effective State coal or other mine health and safety programs; and (4) to improve and expand, in cooperation with the States and the coal or other mining in-

dustry, research and development and training programs aimed at preventing coal or other mine accidents and occupationally caused disease in the industry.

Section 959 provides as follows:

(a) The Secretary shall make a study to determine the best manner to coordinate Federal and State activities in the field of coal or other mine health and safety so as to achieve (1) maximum health and safety protection for miners, (2) an avoidance of duplication of effort, (3) maximum effectiveness, (4) a reduction of delay to a minimum, and (5) most effective use of Federal inspectors.

Respondent contends the Secretary not only failed to make his report 1/ but the evidence shows a duplication of effort by MSHA and the State of California; it further shows a lack of coordination of such mine safety activities, a lack of maximum effectiveness and a lack of effective use of federal inspectors.

Respondent's contentions lack merit. There is no indication in the federal Act that Congress intended MSHA to withdraw if a viable state program existed. To "cooperate" with a state is in no way legislatively equivalent to withdrawing MSHA's enforcement action.

The legislative history of the Act sets forth a view directly contrary to the position urged by respondent. The relevant legislative history states as follows:

#### Effect on State Laws

Under the Metal and Nonmetal Act States are encouraged to develop and enforce their own State plans meeting Federal requirements. Six States have State plans currently in effect. These are Arizona, Colorado, North Carolina, New Mexico, Utah, and Virginia. Under the Metal and Nonmetal Act the Secretary delegates his authority to States with approved plans to carry out his functions. Because State plans are not funded under the Metal and Nonmetal Act, but are entirely self-supported, Federal funds would not be removed from these plans with the repeal of the Metal and Nonmetal Act. As a result, these State plans would be expected to continue in conjunction with Federal enforcement under H.R. 4287. It would be a dual system which encourages State participation while at the same time not relinquishing Federal enforcement. However, the Federal law would supersede any State law in conflict with it. State laws providing more stringent standards than exist under the Federal law, however, would not be held in

1/ It was not established at the hearing whether the Secretary did or did not make such a report.

conflict with the act. (Emphasis added). House of Representatives, 95th Cong, 1st Sess (1977) reprinted in Legislative History of the Federal Mine Safety and Health Act of 1977, 95th Congress, 1st Session, 381 (May, 1977).

Stark v. Wickard 64 S. Ct 559, 321 U.S. 288 (1944) relied on by respondent, states a well established principle of law. But respondent's position is not supported by the terms of federal statute or its legislative history.

Respondent's argument that the Secretary was only to establish "interim" safety regulations is misdirected. The 1969 Act provided that such "interim" regulations were to be in effect until superseded in whole or in part by improved mandatory health standards promulgated by the Secretary ... § 201(a), Public Law 91-173, 83 Stat 760.

Respondent's further argument centers on the view that many of the citations in the instant cases involve conditions for which respondent was not previously cited. Further, respondent was cited for conditions that have existed for 20 years or more. Respondent also relies on witness Ishkanian's testimony regarding MSHA requiring a generator to be moved (D. 22).

Respondent's arguments and its cited cases are not persuasive. The evidence (Ex. R1) clearly supports the view that respondent was not cited for a number of years for conditions for which it is now cited. This is a basic estoppel argument. Generally, an operator's reliance on prior inspections and the lack of citations from such inspections does not estop the Secretary from issuing a citation at a subsequent inspection. Inspectors tend to have different expertise and it is certainly possible that one inspector may believe a violation existed but another may lack the expertise to make such a determination. On the doctrine of estoppel see the Commission decision of King Knob Coal Company, Inc., 3 FMSHRC 1417 (1981); also Midwest Minerals Inc. 3 FMSHRC 251 (1981); Missouri Gravel Co., 3 FMSHRC 1465 (1981); Servtex Materials Company, 5 FMSHRC 1359 (1983). In short, the mere fact that a violative condition existed for 20 years is not a defense. The Tapo road incident described by witness Ishkanian is not relevant here. It involved a mine operator other than this respondent (D. 22). In addition, witness Ishkanian's testimony about the lack of MSHA enforcement in Texas and Oklahoma is not relevant here.

In sum, the Secretary does not have to justify enforcement proceedings in other states to proceed with these penalty proceedings in California.

The contributions by the State of California to mine safety (D. 17, 27) are commendable. But such contributions do not require the Secretary to withdraw from the enforcement of the federal regulations in that State.

Respondent's final position is that it has a property interest in the right not to be inspected by MSHA. This is so because the State of California is adequately making health and safety inspections of open pit gravel mines and it was the Congressional intent that MSHA avoid duplicative efforts.

This is a restatement of the first argument. Even agreeing the state program is adequate, the federal Act is not open to the construction respondent urges.

In Leis v. Flynt, 439 U.S. 438, 99 S.Ct 698 (1979), cited by respondent, the Court ruled that the asserted right of an out of state lawyer to appear pro hoc vice in an Ohio Court did not fall among those interests protected by the due process clause of the 14th Amendment. The cited case is not controlling in this situation.

For the foregoing reasons respondent's threshold contentions are without merit and they are denied.

#### Stipulation

The parties stipulated that respondent is a small operator. Further, respondent is subject to the Act unless MSHA's jurisdiction is pre-empted by the California Occupational Safety and Health Administration (Tr. 191, 249).

#### Citation 2246288

This citation charges respondent with violating 30 C.F.R. § 56.14-1 which provides as follows:

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.

#### Summary of the Evidence

Ronald G. Ainge, a person experienced in mining, issued this citation on January 18, 1984 (Tr. 15-17, 36, 67).

The inspector observed that the conveyor was in use. Further, the head pulley and the tail pulley were unguarded. Both pulleys were accessible (Tr. 37, 40, 101, 108; Ex. P5, P6).

If a worker came in contact he could be pulled into the tail pulley (Tr. 38).

In the inspector's opinion it was highly likely that a worker could come in contact with the pulley with a resulting loss of limb (Tr. 39, 40). The inspector was told that the machine had just been moved to a new location to replace a chute. But it was in production (Tr. 101-103).

William Mann, owner of the respondent company, testified that this machine had been moved and was not ready for operation. The company was getting ready to test it. The photographs fail to indicate any dust or rock in the area (Tr. 234).

#### Evaluation of the Evidence

This case presents a basic credibility conflict as to whether the conveyor was in operation. In this regard I credit the testimony of William Mann. As the operator of the plant he should know whether the conveyor was in use or whether they were preparing to test it.

While the inspector indicated the equipment was in use he concedes that he was advised that it had been moved to this location. The photographs support respondent's version since they failed to show any dust or rock on the equipment (Ex. P5, P6).

Since I conclude the conveyor was not in use, it follows that the exposed moving parts could not be contacted by any workers.

For the foregoing reasons, citation 2246288 and all penalties therefor should be vacated.

#### Citation 2246291

This citation charges respondent with violating 30 C.F.R. § 56.20-3(a) which provides as follows:

56.20-3 Mandatory. At all mining operations; (a) Workplaces, passageways, storerooms, and service rooms shall be kept clean and orderly.

#### Summary of the Evidence

This citation was issued by MSHA inspector Ainge. The cited condition was hazardous because of the spillage of fine sandy like material. This was evidenced by the amount of the spillage and its angle of repose (Tr. 46, 85). The depth on one side was 18 to 24 inches and the angle of repose was straight up. It had filled the walkway including a four-inch kick plate on the outer edge. There was a 30-foot drop to the ground. The railings on the walkway conformed to existing requirements. But if a man tripped and slid underneath the bottom midrail (21 to 24 inches above the walking level) he could slip to the ground resulting in a possible fatality (Tr. 46, 47, 75, 76; Ex. P12).

The area was used several times a day to provide access to one section of the plant (Tr. 47, 87).

In the inspector's opinion on this slippery surface, it was more than likely that an accident could occur (Tr. 49, 71-73, 86). The potential for injury increases with any increased increment of time (Tr. 72). Abatement was achieved by blocking off access to the area and by providing an alternative route (Tr. 49).

Mr. Mann indicated the spillage was not a hazard. Each time the rock color is changed the area is cleaned (Tr. 237, 238). There are guard rails around the tank and no one has been injured by this condition (Tr. 238).

#### Evaluation of the Evidence

The factual setting establishes a violation of the regulation. I reject Mr. Mann's testimony that no hazard existed. This was a passageway that was obviously not clean within the meaning of the regulation. Mr. Mann does not deny the existence of the condition.

Citation 2246291 should be affirmed.

#### Civil Penalty

The mandate to assess civil penalties is contained in Section 110(i) now 30 U.S.C. 820(i) of the Act. It provides:

(i) The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

Concerning prior history: the computer printout (Ex. P34) shows that respondent had no violations in the two year period ending March 5, 1985. The printout shows two violations before March 6, 1983. But, as the respondent contends, these would appear to be the two citations vacated in Brubaker-Mann, Inc., 2 FMSHRC 227 (1980). Accordingly, I conclude that the Secretary has failed to prove any adverse history on the part of respondent. The size of the penalty appears appropriate in relations to the small size of the operator and the penalty is not likely to affect the ability of the company to continue in business since the company grosses approximately \$1,000,000 annually. The operator was negligent inasmuch as this accumulation most likely occurred over a period of time and it could have been observed. The gravity of the violation is low due to the fact that the walkway was equipped with standard guard rails. The respondent's good faith is apparent inasmuch as it rapidly abated the violative condition.

On balance, the Secretary's proposed penalty of \$74 is excessive. I deem that a penalty of \$24 is appropriate for the violation of 30 C.F.R. § 56.20-3(a).

### Briefs

The parties have filed excellent briefs <sup>2/</sup> which have been most helpful in analyzing the record and defining the issues. However, to the extent they are inconsistent with this decision, they are rejected.

### Conclusions of Law

Based on the entire record and the factual findings made in the narrative portion of this decision, the following conclusions of law are entered:

1. The Commission has jurisdiction to decide this case.
2. Respondent did not violate 30 C.F.R. § 56.14-1.
3. Respondent violated 30 C.F.R. § 56.20-3(a).

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

### ORDER

1. Citation 2246288 and all penalties therefor are vacated.
2. Citation 2246291 is affirmed and a penalty of \$24 is assessed.

  
John J. Morris  
Administrative Law Judge

### Distribution:

Rochelle Ramsey, Esq., Office of the Solicitor, U.S. Department of Labor, 3247 Federal Building, 300 North Los Angeles Street, Los Angeles, CA 90012 (Certified Mail)

Steve Pell, Esq., 3200 Telegraph Road, Suite 207, Ventura, CA 93003 (Certified Mail)

<sup>2/</sup> Companion cases filed simultaneously involving these parties are docketed as WEST 84-103-M; WEST 85-157-M; WEST 85-177-M; WEST 86-82-M and WEST 86-94-M.

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

**SEP 30 1986**

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. WEVA 85-201  
Petitioner : A.C. No. 46-06104-03518  
v. :  
: Raven Dock  
RAVEN HOCKING COAL CORP., :  
Respondent :

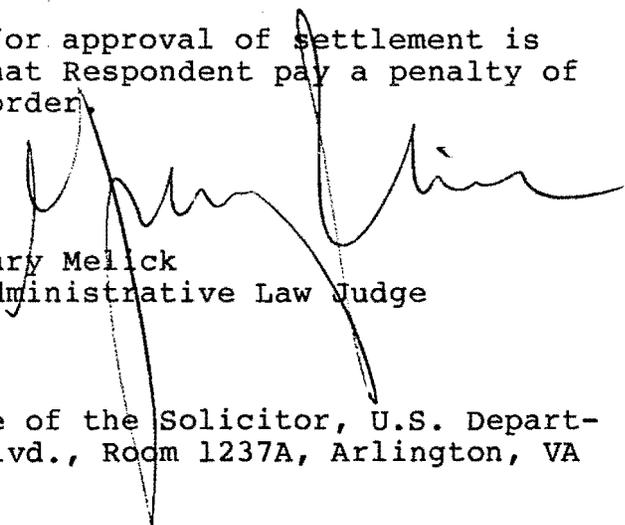
DECISION APPROVING SETTLEMENT

Appearances: Mary K. Spencer, Esq., Office of the Solicitor,  
U.S. Department of Labor, Arlington, Virginia,  
for Petitioner;  
Mr. William F. Zuspan, President, Raven Hocking  
Coal Corporation, Mason, West Virginia, for  
Respondent.

Before: Judge Melick

This case is before me upon a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). Petitioner has filed a motion to approve a settlement agreement and to dismiss the case. A reduction in penalty from \$620 to \$400 is proposed. I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is GRANTED, and it is ORDERED that Respondent pay a penalty of \$400 within 30 days of this order.



Gary Melick  
Administrative Law Judge

Distribution:

Mary K. Spencer, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Blvd., Room 1237A, Arlington, VA 22203 (Certified Mail)

Ms. Jo Ann Taylor, Secretary and Mr. William F. Zuspan, President, Raven Hocking Coal Corp., P.O. Box 108, Mason, WV 25260 (Certified Mail)

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

**SEP 30 1986**

CONSOLIDATION COAL COMPANY,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. WEVA 86-61-R
v.	:	Order No. 2711581; 10/23/85
	:	
SECRETARY OF LABOR,	:	Blacksville No. 1 Mine
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 86-115
Petitioner	:	A.C. No. 46-01867-03669
	:	
v.	:	Blacksville No. 1 Mine
	:	
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Linda M. Henry, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Secretary of Labor (Secretary); Michael R. Peelish, Esq., Pittsburgh, Pennsylvania for Consolidation Coal Co. (Consol).

Before: Judge Broderick

STATEMENT OF THE CASE

In the Contest proceeding, Consol challenges the propriety of Order No. 2711581 issued on October 23, 1985 pursuant to section 104(d)(2) of the Act. In the penalty proceeding, the Secretary seeks a civil penalty for the violation charged in the contested order. Pursuant to notice, the case was heard in Morgantown, West Virginia on September 3, 1986. Federal Mine Inspector Joseph Baniak and miner Clarence Shaffer testified on behalf of the Secretary. Robert W. Gross, John Weber, Willis Fansler and John Tharp, all supervisory Consol employees, testified on behalf of Consol. The parties waived their right to file post hearing briefs, but each argued its position on the record at the close of the hearing. I have considered the entire

record, and the contentions of the parties and make the following decision.

#### FINDINGS OF FACT

1. At all times pertinent to these proceedings, Consol was the owner and operator of an underground coal mine in Monongalia County, West Virginia, known as the Blacksville No. 1 Mine. The mine produces coal which enters interstate commerce and its operation affects interstate commerce.

2. Consol's annual production tonnage is approximately 41,000,000. The subject mine produces approximately 1,775,000 tons annually. Consol is a large operator.

3. Consol demonstrated good faith in abating the cited violation after the order involved herein was issued.

4. The imposition of a civil penalty in this proceeding will not affect Consol's ability to continue in business.

5. The subject mine was assessed a total of 645 violations in the 24 months immediately preceding the issuance of the order involved herein. Citations for absent fire sensors were issued to Consol on October 9, 1985 and October 17, 1985.

6. Order No. 2261971 was issued under section 104(d)(1) of the Act on March 6, 1984. There was no "clean inspection" of the mine between March 6, 1984 and October 23, 1985, the date of the order contested herein.

7. On October 23, 1985 at 12:01 p.m., automatic fire sensors were absent on the 3-South Mother belt conveyor from the tail piece extending approximately 700 feet outby. The belt services the P-1, P-2 and P-3 sections. It was operating at the time.

8. Inspector Baniak issued a § 104(d)(2) order because of the above described condition covering the entire 3-South Mother belt conveyor.

9. At the time the order was issued, a crew was working inby the area affected by the order. The air was ventilated to the return air course, but the ventilation was not completely effective, and up to 40% of the air was going to the working sections.

10. When Inspector Baniak began his inspection of the subject mine on October 3, 1985, he had a discussion with mine management concerning fire sensors because he heard from miners

that belt moves were being made without fire sensors being installed.

11. On October 17, 1985 Inspector Baniak met with management after the issuance of a citation for absent fire sensors on that day. Baniak suggested that one person be made responsible for seeing that fire sensors were properly installed. When Baniak was told that the mine did not keep sensors in the warehouse, but recovered them from the long wall section, he criticized this practice. Management representatives said they would order sensors.

12. Following the issuance of the citation for absent fire sensors on October 9, 1985, Consol's safety supervisor directed the safety escort Willis Fansler to inspect all the mine belts for sensors. He checked all the belts on P-1, P-2, P-3 and the 3-S Mother belt on October 14, 1985. All the fire sensors were in place.

13. The 3-S Mother belt was not advanced between October 14 and October 23, 1985.

14. Consol's section foreman John Tharp performed preshift examinations of the 3-S Mother belt on October 21, 22 and 23. Tharp's examinations showed that fire sensors were present on the 3-S belt on each of these days. He was aware of the citations which had been issued for absent fire sensors on October 9 and 17, 1985.

#### DISCUSSION

The inspector concluded that fire sensors had never been on the 3-S Mother belt in the area cited. He based this conclusion on the fact that there was no evidence of lubricant along the wire to which the sensors were to be attached, and no evidence that the wire had been pricked. Sensors have a thick lubricant and are attached to the wire by a clasp which cuts into the wire. I have carefully considered the Inspector's testimony, but am unable to disregard, and there is no reason to discredit, the positive testimony of Consol's witnesses that the sensors were in fact on the wire on the morning of October 23 and prior thereto.

#### REGULATION

30 C.F.R. § 75.1103-4(a) provides in part:

- (a) Automatic fire sensor and warning device systems shall provide identification of fire within each belt flight (each belt unit operated by a belt drive).
- (1) Where used, sensors responding to temperature rise

at a point (point-type sensors) shall be located at or above the elevation of the top belt, and installed at the beginning and end of each belt flight, at the belt drive, and in increments along each belt flight so that the maximum distance between sensors does not exceed 125 feet, except as provided in paragraph (a)(3). . . .

\* \* \*

(3) When the distance from the tailpiece at loading points to the first outby sensor reaches 125 feet when point-type sensors are used, such sensors shall be installed and put in operation within 24 production shift hours after the distance of 125 feet is reached.

\* \* \*

### ISSUES

1. Whether the evidence establishes a violation of 30 C.F.R. § 75.1103-4(a)(1)?
2. If so, whether the violation was significant and substantial?
3. If so, whether the violation resulted from Consol's unwarrantable failure to comply with the standard?

### CONCLUSIONS OF LAW

1. Consol is subject to the provisions of the Mine Safety Act in the operation of the subject mine. I have jurisdiction over the parties and subject matter of this proceeding.
2. The evidence shows a violation of 30 C.F.R. § 75.1103-4(a)(1). I have found (finding of fact 7) that there were no fire sensors on the 3-S Mother belt conveyor for a distance of 700 feet outby the tailpiece. This is a violation. The reason for the absence of the sensors is not relevant to the issue whether a violation occurred.
3. The violation was of such nature as could significantly and substantially contribute to the cause and effect of a mine safety hazard.

### Discussion

Fire sensors are designed to provide early warning of a fire to miners on the working section. I have found (finding of fact 9) that a crew was working inby the area affected by the order, and that some of the air from the belt was going to the

working sections. In the event of a fire the miners on the section would not receive timely warning so that they could get to the escapeway. Therefore I conclude that the violation contributed to "a measure of danger to safety" reasonably likely to result in serious injury to miners. See Secretary v. Mathies Coal Company, 6 FMSHRC 1 (1984). I therefore conclude that the violation was serious.

4. The violation was not the result of Consol's unwarrantable failure to comply with the standard violated.

#### Discussion

The Commission apparently construes the term unwarrantable failure to comply to refer to a violative condition which resulted from indifference, willful intent, or a serious lack of reasonable care. United States Steel Corporation, 6 FMSHRC 1423 (1984). This construction differs from that set out in Ziegler Coal Co., 7 IBMA 280 (1977), and imposes a greater burden on the Secretary than merely establishing the operator's negligence. In view of my findings that Consol examined all belts for fire sensors on October 14, 1985, and on the morning of October 23, 1985, and found them in place, I cannot conclude that the violation resulted from Consol's indifference, willful intent or a serious lack of reasonable care. There is no evidence of the cause of the missing sensors at the time of the inspection. Consol witnesses speculated that the condition resulted from employee sabotage, but it did not present any evidence of such sabotage. In view of the previous citations and the problems Consol has had with keeping sensors on the belts, greater than ordinary vigilance was required to see that the sensors were in place. I conclude that the violation resulted from ordinary negligence.

5. Based on the criteria in section 110(i) of the Act, and my findings and conclusions set out above, I conclude that an appropriate penalty for the violation is \$750.

#### ORDER

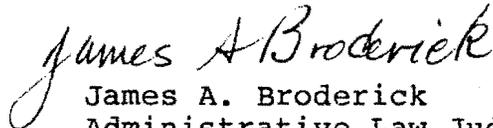
Based on the above findings of fact and conclusions of law, IT IS ORDERED:

1. The order contested in Docket No. WEVA 86-61-R properly charged a violation of 30 C.F.R. § 75.1103-4(a)(1), and properly found that the violation was significant and substantial.

2. The contested order improperly concluded that the violation resulted from Consol's unwarrantable failure to

comply with the safety standard involved. Therefore the violation was not properly cited in a section 104(d)(2) withdrawal order, see Old Ben Coal Company, 1 FMSHRC 1954 (1979); Itmann Coal Company v. Secretary, 2 FMSHRC 2193 (1980) (ALJ), since it was not a "similar violation" to that charged in the prior § 104(d)(1) order. Therefore, the order is MODIFIED to a § 104(a) citation.

3. Respondent shall pay a civil penalty of \$750 within 30 days of the date of this decision for the violation described in conclusion of law No. 2.

  
James A. Broderick  
Administrative Law Judge

Distribution:

Michael R. Peelish, Esq., Consolidation Coal Company, 1800 Washington Road, Pittsburgh, PA 15241 (Certified Mail)

Linda M. Henry, Esq., U.S. Department of Labor, Office of the Solicitor, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

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