SEPTEMBER 1994

COMMISSION ORDERS

ADMINISTRATIVE LAW JUDGE DECISIONS

ADMINISTRATIVE LAW JUDGE ORDERS

SEPTEMBER 1994

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

Secretary of Labor, MSHA v. Port Costa Materials, Inc., Docket No. WEST 93-353-M. (Judge Morris, July 28, 1994).

Jim Walter Resources, Inc. v. Secretary of Labor, MSHA, Docket No. SE 94-244-R. (Judge Melick, July 28, 1994).

Secretary of Labor, MSHA v. Manalapan Mining Inc., Docket No. KENT 93-614. (Judge Weisberger, August 8, 1994).

ASARCO, Incorporated v. Secretary of Labor, MSHA, Docket No. SE 94-362-RM. (Judge Maurer, August 8, 1994).

Secretary of Labor, MSHA v. Rocky Hollow Coal Company, Docket No. KENT 94-1051. (Request for relief from MSHA's final order).

Secretary of Labor, MSHA v. Madison Branch Management, Docket No. WEVA 93-218-R. (Judge Feldman, Interlocutory Review of September 8 and 16, 1994 Orders).

Secretary of Labor, MSHA v. D.H. Blattner & Sons, Docket No. WEST 93-123-M, etc. (Judge Morris, August 15, 1994)

Randall Patsy v. Big B Mining Company, Docket No. PENN 94-132-D. (Judge Feldman, August 16, 1994).

Secretary of Labor, MSHA v. Amax Coal Company, Docket No. LAKE 94-55. (Judge Feldman, August 19, 1994).

Review was denied in the following case during September:

Thunder Basin Coal Company v. Secretary of Labor, MSHA, Docket No. WEST 94-238-R. (Judge Amchan, August 28, 1994).

COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 1, 1994

SECRETARY OF LABOR, MINE SATETY AND HEALTH ADMINISTRATION (MSHA),	:	
	:	Docket Nos. WEST 93-353-M
v.	:	
PORT COSTA MATERIALS, INC.	:	

ORDER

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. (1988). On July 28, 1994, Administrative Law Judge John J. Morris issued a decision, in which he disposed of 73 citations issued against Port Costa Materials, Inc.

The Solicitor's Office of the Secretary of Labor, in a letter to the judge dated August 12, 1994, pointed out a discrepancy in the decision with regard to Citation No. 3636555. The letter stated that, on pages 45 and 46 of the judge's decision the citation was discussed and "affirmed," but that on page 66 of the decision, where the judge summarized the disposition of the citations in the proceeding, the citation was listed as "vacated." The letter requested that the "discrepancy ... be addressed/corrected." By letter dated August 15, 1994, the judge responded to the request by stating that he was limited by the Commission's Rules to correction of clerical errors and did not view the correction required as a "clerical error" within the meaning of the rules.

The judge's jurisdiction in this matter terminated when his Decision was issued on July 28, 1994. Commission Procedural Rule 69(b), 29 C.F.R. § 2700.69(b) (1993). Under the Mine Act and the Commission's Procedural Rules, relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). We deem the Solicitor's August 12 letter to be a timely filed Petion for Discretionary Review, which we grant.

See, e.g., Middle States Resources, Inc., 10 FMSHRC 1130 (September 1988).

In light of the apparent error in the judge's decision and the requested relief, we remand this matter to the judge for further appropriate proceedings.

Mary Lu Jordan, Chairman

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

Distribution

William W. Kates, Esq.
Office of the Solicitor
U.S. Department of Labor
1111 Third Avenue, Suite 945
Seattle, WA 98101

Mr. Ross Gephart, President
Port Costa Materials, Inc.
9000 Carquinez Scenic Drive
P.O. Box 223
Port Costa, CA 94569

Administrative Law Judge John J. Morris
Federal Mine Safety & Health Review Commission
1244 Speer Boulevard, Suite 280
Denver, Colorado 80204

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 16, 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. KENT 94-1051 A.C. # 15-17331-03510
ROCKY HOLLOW COAL COMPANY, INC.	:	

BEFORE: Jordan, Chairman; Doyle and Holen, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)("Mine Act" or "Act"). On August 1, 1994, the Commission received from Rocky Hollow Coal Company, Inc. ("Rocky Hollow") a request to reopen uncontested civil penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

Section 105(a) of the Mine Act requires the Secretary of Labor to notify the operator of "the civil penalty proposed to be assessed" after issuing a citation or order for an alleged violation. 30 U.S.C. § 815(a). Section 105(a) allows the operator 30 days to contest a proposed penalty and further provides that, if the operator fails to contest it, the assessment "shall be deemed a final order of the Commission and not subject to review by any court or agency." Id. Rocky Hollow states that it failed to file with the Department of Labor's Mine Safety and Health Administration ("MSHA") a "Green Card" notice of contest challenging MSHA's proposed civil penalties within the 30-day period set forth in section 105(a), due to "the press of business and management of other litigation" in which its counsel was involved, and the misplacement of its file by its counsel, which resulted in the matter not appearing on counsel's calendar. Rocky Hollow asks the Commission to reopen this matter so that it may file its notice of contest.

Rocky Hollow failed to contest the proposed assessments within 30 days and, accordingly, they have become final orders of the Commission. The Commission has held that in appropriate circumstances and pursuant to Fed. R. Civ. P. 60(b) ("Rule 60(b)"), it possesses jurisdiction to reopen uncontested assessments that have become final under section 105(a). Jim Walter Resources, Inc., 15 FMSHRC 782, 786-89 (May 1993); see also, Jim Walter Resources, Inc., 16 FMSHRC 1209, 1210 (June 1994). Rule 60(b) relief from a final order is available in circumstances such as a party's mistake, inadvertence, or excusable neglect.

On the basis of the present record, we are unable to evaluate the merits of Rocky Hollow's position. In the interest of justice, we reopen the matter and remand it for assignment to a judge to determine whether Rocky Hollow has met the criteria for relief under Rule 60(b). If the judge determines that relief under Rule 60(b) is appropriate and permits Rocky Hollow to file its notice of contest, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

For the foregoing reasons, Rocky Hollow's request is granted in part and this matter is remanded for assignment.

Mary Lu Jordan, Chairman

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

Distribution

Christopher Thomas Ratliff, Esq.
P.O. Box 1306
Pikeville, KY 41502

C. Bryan Don, Chief
Civil Penalty Processing Unit
Mine Safety & Health Administration
U.S. Department of Labor
4015 Wilson Blvd., Suite 900
Arlington, VA 22203

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

September 20, 1994

MADISON BRANCH MANAGEMENT	:	Contest Proceedings
	:	
v.	:	Docket Nos. WEVA 93-218-R
	:	WEVA 93-219-R
SECRETARY OF LABOR,	:	WEVA 93-220-R
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
	:	
SECRETARY OF LABOR,	:	Civil Penalty Proceedings
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket Nos. WEVA 93-373
	:	WEVA 93-412
v.	:	
	:	
MADISON BRANCH MANAGEMENT	:	
	:	
	:	
SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. WEVA 93-415
	:	
v.	:	
	:	
PROTECTIVE SECURITY SERVICES AND	:	
INVESTIGATIONS, INC.	:	

ORDER

Before us is a Petition for Interlocutory Review and Order Suspending Hearing filed by Madison Branch Management ("Madison"). The Secretary of Labor ("Secretary") supports Madison's petition. By orders dated September 8 and 16, 1994, Administrative Law Judge Jerold Feldman denied motions for certification to the Commission of his interlocutory rulings. See Commission Procedural Rule 76(a)(1)(ii), 29 C.F.R. § 2700.76(a)(1)(ii). A hearing in these proceedings is currently scheduled for September 22, 1994, before Judge Feldman.

The judge has issued a number of interlocutory orders, the thrust of which has been to deny motions by the Secretary to dispose of the above-captioned cases pursuant to a settlement agreement reached among the parties.[1] The judge based his determinations on concerns that additional abatement measures beyond those required by the Secretary may be necessary in order to remove the risk to safety posed by the violations at issue.[2] We view the instant petition as one seeking review of these interlocutory orders taken as a whole.[3]

The Commission concludes that the judge's interlocutory rulings involve a controlling question of law and that immediate review may materially advance the final disposition of the proceeding. See 29 C.F.R. § 2700.76(a). The Commission therefore grants Madison's petition, suspends briefing before the Commission, and stays the hearing set for September 22, 1994, and all other proceedings before Judge Feldman.

Mary Lu Jordan, Chairman

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

---

[1] These orders include an Order Denying Motions for Approval of Settlements, dated June 8, 1994, an Order Denying Joint Motion for Summary Decision, dated July 22, 1994, and an Order Denying the Secretary's Motion for Summary Judgment, dated August 29, 1994.

[2] See, e.g., Order Denying The Secretary's Motion for Summary Judgment at 2.

[3] Rule 76(b) states that "[a] copy of the Judge's interlocutory ruling sought to be reviewed and of the Judge's order denying the petitioner's motion for certification shall be attached to the petition." 29 C.F.R. § 2700.76(b). Here, the petitioner omitted a copy of the challenged interlocutory rulings from its petition. However, Madison's request for "immediate review of Judge Feldman's rulings" concerning "the respondents' good faith efforts to achieve rapid compliance in abating the citations involved in these proceedings," together with the underlying motions for certification, sufficiently identify the interlocutory rulings sought to be reviewed.

Distribution
(by fax & regular mail)

Christopher B. Power, Esq.
Robinson & McElwee
P.O. Box 1791
Charleston, WV 25326

Patrick L. DePace, Esq.
W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, VA 22203

James Walker, Esq.
White & Browning Building, Suite 201
P.O. Box 358
Logan, West Virginia 25601

Administrative Law Judge Jerold Feldman
Federal Mine Safety & Health Review Commission
5203 Leesburg Pike, Suite 1000
Falls Church, VA 22041

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 26, 1994

RANDALL PATSY	:	
	:	
	:	DISCRIMINATION PROCEEDING
	:	
v.	:	DOCKET NO. PENN 94-132-D
	:	
	:	
BIG "B" MINING COMPANY	:	
	:	
	:	
	:	

ORDER

For the second time, Complainant Randall Patsy appeals from Administrative Law Judge Jerold Feldman's dismissal of this discrimination proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. ("Mine Act"). Based on Patsy's apparent wish to pursue this case despite earlier statements suggesting the contrary, the Commission vacated the judge's initial dismissal of this matter, remanded the case, and ordered that the judge schedule it for hearing. 16 FMSHRC 1237, 1237-38 (June 1994). On remand, the judge issued an Order on Remand and Notice of Hearing, setting a hearing date of September 20, 1994. Following receipt of that order and review of a Commission decision transmitted to the parties by the judge, Patsy wrote to the judge and stated that he doubted that he could prove that he was a "miner" and requested the name of "some other agency I should contact." Thereafter, Patsy communicated with the judge's office twice by telephone and last stated, on August 5, 1994, that he was consulting with a lawyer and would let the judge know what the lawyer recommended. On August 16, 1994, the judge issued an Order Reinstating Dismissal, noting that he had not heard from Patsy nor had his attorney filed an appearance in the proceeding.

On August 19, 1994, Patsy wrote to the judge, stating that he was appealing the dismissal and that he felt he had a good chance of winning the case.

The judge's jurisdiction in this matter terminated when his decision was issued on August 16, 1994. Commission Procedural Rule 69(b), 29 C.F.R. § 2700.69(b) (1993). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance.

30 U.S.C. § 823(d)(2); 29 C.F.R. 2700.70(a). We deem Patsy's letter to be a timely filed Petition for Discretionary Review, which we grant. See, e.g., Middle States Resources, Inc., 10 FMSHRC 1130 (September 1988).

The Commission's procedural rules provide that a judge shall issue an order to show cause prior to entry of any order of dismissal unless a party fails to attend a scheduled hearing, in which case an order to show cause is not required. 29 C.F.R. § 2700.66(a) and (b)(1993). Although Patsy's equivocation has tried the patience of the judge and the Commission, the judge must nevertheless follow the Commission's rules. Accordingly, we remand this matter to the judge for disposition in accordance with the Commission's rules. In reopening this matter, we express no views on the merits of the case.

For the reasons set forth above, we vacate the judge's order reinstating dismissal and remand this matter for further appropriate proceedings.

Mary Lu Jordan, Chairman

Arlene Holen, Commissioner

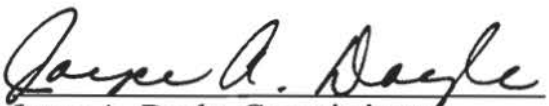
Commissioner Doyle, dissenting:

Although I joined in the Commission's earlier order remanding this case to the administrative law judge for further proceedings, I must respectfully dissent from my colleagues' decision to again remand the case.

In response to a complaint filed some eight months out of time, the Mine Safety and Health Administration ("MSHA") determined that Mr. Patsy had not been discriminated against under the Mine Act, based on the fact that he was "not a 'miner' at the time of the alleged discharge." MSHA Letter dated Dec.1, 1993. Mr. Patsy then filed his own complaint with the Commission, pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"). Following indecision by Mr. Patsy as to whether he wished to pursue the matter under the Mine Act, Judge Feldman scheduled a hearing but ordered Patsy to show cause why the matter should not be dismissed if he did not state unequivocally that he wished to pursue his complaint. Mr. Patsy responded by stating that he "would be better off to pursue this as a civil suit locally." Patsy Letter dated Apr. 18, 1994. The judge dismissed the matter.

Subsequently, Mr. Patsy petitioned for review and, on June 21, the Commission vacated the Order of Dismissal and remanded for a hearing on the merits because it "appear[ed] that Mr. Patsy now wishe[d] to pursue his complaint." 16 FMSHRC 1237, 1238 (1994). On July 11, Judge Feldman rescheduled the hearing for September 20 in Butler, Pennsylvania. As part of his pretrial order, the judge directed the parties' attention to Cyprus Empire Corp., 15 FMSHRC 10 (Jan. 1993), and the threshold issue of whether Patsy was a miner. In response to that order, Mr. Patsy advised the judge that he could "not prove that [he] was a miner at the time [he] was fired" and that his work had been "at a mobile home park." Patsy Letter dated July 20, 1994. Based on that letter, on Patsy's subsequent advice to Judge Feldman's secretary that "[he didn't] have a leg to stand on" (Order dated August 16, 1994), and on his failure to advise the judge of the outcome of a planned contact with an attorney on August 10, Judge Feldman reinstated his earlier order of dismissal.

Although it may have been better practice for the judge to hold off until the hearing date was closer before dismissing, I disagree that, under these facts, the judge was required to issue another order to show cause or travel to the hearing site and await Patsy's attendance (or nonattendance) before dismissing this case. If he wished to proceed with his complaint, Mr. Patsy has been given more than enough opportunities to make that intention clear.



Joyce A. Doyle, Commissioner

Distribution

Randall Patsy
R.D. #1, Box 290
East Brady, PA 16028

Ms. Susan Mackalica
Big B Mining Company, Inc.
R.D. #1
West Sunbury, PA 16061

Administrative Law Judge Jerold Feldman
Federal Mine Safety & Health Review Commission
5203 Leesburg Pike, Suite 1000
Falls Church, VA 22041

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SEP 12 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF WILLIAM KACZMARCZYK, Complainant	:	TEMPORARY REINSTATEMENT PROCEEDING
	:	Docket No. PENN 94-417-D
	:	WILK CD 94-01
	:	Ellangowan Refuse Bank No. 45
v.	:	
READING ANTHRACITE COMPANY, Respondent	:	

ORDER OF TEMPORARY REINSTATEMENT

Appearances: Stephen D. Turow, Esq., Office of the Solicitor, U. S. Department of Labor, Arlington, Virginia, for Complainant;
Martin J. Cerullo, Esq., Frumkin, Shralow & Cerullo, P. C., Pottsville, Pennsylvania, for Respondent.

Before: Judge Amchan

Factual Background

William Kaczmarczyk began working for Respondent, Reading Anthracite Company, in December 1976 (Tr. 21-22). He became an electrician with the company in 1985, working at the St. Nicholas Breaker and the Ellangowan Refuse Bank (Tr. 23-25). In October 1989, Kaczmarczyk injured his back while moving a 300-pound motor with a bar (Tr. 43). He was on workers' compensation from October 1989 to January 1992, except for a 4 1/2 week period in February 1991, when he unsuccessfully tried to return to work (Tr. 46-49). On January 8, 1992, after undergoing a cervical spinal fusion four months earlier, Kaczmarczyk returned to work on light duty (Tr. 49).

Complainant worked on light duty from January 8, 1992 until October 15, 1993, when he was placed back on workers' compensation status (Tr. 52-53). During this period, he had two

7-day absences due to recurrence of back pain in July and November 1992, and a number of shorter absences (Tr. 54-56, 133-34).

Kaczmarczyk is the treasurer of Local 7226 of the United Mine Workers of America (UMW or UMWA). He is also a mine committeeman and safetyman for his local, which represents Respondent's employees at the St. Nicholas Breaker (Tr. 33-35). Another UMWA local, # 807, represents employees at the Ellangowan refuse bank (Tr. 34). [1]

Complainant served as employee walkaround representative for an MSHA electrical inspection that was conducted on October 4, 12, and 14, 1993, at the Ellangowan Refuse Bank (Tr. 105-08). On the last day of the inspection, Respondent's safety director, David Wolfe, questioned the need for Mr. Kaczmarczyk's presence during the inspection since Michael Ploxa, President of Local 807, was also serving as a walkaround representative (Tr. 107-13, 268-69).

The next day, October 15, 1993, Complainant was informed that he was being put back on workers' compensation (Tr. 52-53, 122-23). He alleges that this was done in retaliation for his activities as walkaround representative during the October 1993 inspection, which resulted in nine citations being issued to Respondent (Exhibit B to the Secretary of Labor's Application for Temporary Reinstatement).

Respondent contends that Complainant's return to workers' compensation status was non-retaliatory. Safety Director, David Wolfe, testified that an October 12, 1993, telephone call from nurse Andrea Antolick, informing him that Complainant refused to perform the activities of a functional capacity evaluation (FCE) on September 30, 1993, precipitated a decision on October 14, to return Kaczmarczyk to compensation status (Tr. 254-55, 311-16) [2]. Respondent also contends that recurring reports from supervisors that Mr. Kaczmarczyk was not performing assigned duties led to this decision (Tr. 350).

---

[1] Complainant performed electrical work at Ellangowan (Tr. 27-28). Local 807 does not represent any electricians (Tr. 173).

[2] A later report, not in Respondent's possession on October 15, 1993, stated that Mr. Kaczmarczyk completed 2 hours of testing. He did not complete the evaluation because he requested that testing be terminated due to increased pain and blurred vision (Tr. 314-15, Exh. R-11).

Evaluation of the Evidence

Pursuant to the procedural rules of the Commission, 29 C.F.R.§ 2700.45(d), the issue in a temporary reinstatement hearing is limited to whether the miner's complaint was frivolously brought. The Secretary of Labor has the burden of proving that the complaint was not frivolous. Although section 105(c)(2) of the Statute and the Commission's rules indicate that it is frivolousness of the miner's complaint that is scrutinized in a temporary reinstatement proceeding, the legislative history of the Act and relevant case law indicates that it is the Secretary's decision to seek temporary reinstatement that is to be examined. Senate Report 95-181, 95th Cong., 1st Sess. (1977) at 36; Jim Walter Resources, Inc. v. Federal Mine Safety and Health Review Commission, 920 F.2d 738, 747 (11th Cir. 1990).

The legislative history of the Act provides that the Secretary shall seek temporary reinstatement "[u]pon determining that the complaint appears to have merit." The Eleventh Circuit in Jim Walter Resources, Inc. v. FMSHRC, supra, concluded that "not frivolously brought" is indistinguishable from the "reasonable cause to believe" standard under the whistleblower provisions of the Surface Transportation Assistance Act 920 F.2d 738, at 747. Further, that court equates "reasonable cause to believe" with a criteria of "not insubstantial or frivolous" and "not clearly without merit" 920 F.2d 738, at 747 and n. 9. I am ordering the temporary reinstatement of Mr. Kaczmarczyk because I conclude that the Secretary's decision is not frivolous and that it is possible, although far from certain, that the Secretary could prevail in a discrimination proceeding.

The timing of Mr. Kaczmarczyk's return to worker compensation status, one day after his protected activities as an employee walkaround representative does provide some basis for concluding that the two events are related. Donovan v. Stafford Construction Co., 732 F.2d 954, 960 (D. C. Cir. 1984); Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2511 (November 1981). However, the nexus between these two events is rather weak. Although the October 1993 MSHA electrical inspection was initiated by an employee complaint, Kaczmarczyk did not file the complaint (Tr. 97-98, 178). [3]

---

[3] Although Foreman Vince Devine asked Kaczmarczyk who made the complaint that led to the October inspection, Kaczmarczyk told Devine it was not him (Tr. 100-105). There is no reason to believe Devine suspected it was Kaczmarczyk who complained about the presence of water near electrical components in the steam genny house (Tr. 16-17, 178-79). Devine was present during the inspection in which this concern was raised and Kaczmarczyk was not (Tr. 97, Secretary's exhibit 2).

Additionally, there is nothing in this record to suggest that anything that Mr. Kaczmarczyk did as walkaround representative on October 4, 12, and 14, 1993, aroused Respondent's ire. Although Respondent received nine citations as a result of this inspection, there is no indication that Complainant's conduct as a walkaround representative was responsible for any of these citations or that his acts or omissions as an employee of Respondent were in any way contributing factors to the citations (Tr. 277, 301). In summary, there is virtually nothing in the record to indicate that Respondent would have any reason to retaliate against Complainant for his role in the October 1993 inspection.

Nevertheless, there is sufficient evidence suggesting generalized animus towards Kaczmarczyk's safety activities to meet the "not frivolous" standard in drawing a connection between these activities and his return to workers' compensation status. Mr. Wolfe was not happy to see Kaczmarczyk participating in the inspection on October 14, 1993, and challenged the necessity of his presence. In view of the fact that Michael Ploxa, President of UMWA Local 807, was also acting as employee walkaround representative, and the fact that other electricians were available, Wolfe considered Kaczmarczyk's participation unnecessary (Tr. 175-76, 308).

Moreover, despite Respondent's contention that the October 1993 citations gave it no reason to retaliate against Mr. Kaczmarczyk, the record does provide a basis for inferring that the cumulative effect of MSHA inspections at the mine did create a degree of animus towards Complainant, which was perhaps rekindled by the October 1993 citations. Respondent contends that MSHA inspections and citations are common occurrences at its mine and that the October 1993 inspection was nothing out of the ordinary (Tr. 258-260).

Nevertheless, something about Respondent's MSHA experience was clearly bothering Safety Director Wolfe when he participated in a grievance proceeding with Kaczmarczyk on October 18, 1993, concerning the latter's return to worker's compensation status. It is uncontroverted that Wolfe and Kaczmarczyk got into a heated argument over the reasons for this personnel action. It is also undisputed that during this argument Wolfe went into another room, obtained a stack of MSHA citations issued to Respondent and threw, or placed them on the table (Tr. 128-29, 191-93, 274-75, 283-93).

According to Kaczmarczyk and Jay Berger, the UMWA district representative at the grievance proceeding, Wolfe said something to the effect that these citations were another reason why Kaczmarczyk was being placed on compensation (Tr. 128-29, 191-93). Wolfe's testimony is that the citations he placed on the table were issued in August 1992 and were largely the fault of

Mr. Kaczmarczyk (Tr. 274-278). Wolfe testified that he put the citations on the table "out of frustration (Tr. 275)," and to emphasize that Respondent would not get as many citations as it was receiving if all its employees were capable of doing their jobs (Tr. 274-75) [4].

At a minimum, the record in this regard is inconsistent with Respondent's contention that it received the October 1993 citations with an air of equanimity [5]. The anger displayed at the October 18, 1993 grievance meeting with regard to MSHA activity, coupled with Mr. Wolfe's lack of enthusiasm for Mr. Kaczmarczyk's presence at the inspection of October 14, makes it impossible to reject out of hand the Secretary of Labor's assertions of safety-related animus towards Complainant.

Evidence tending to rebut retaliation

Given the evidence above, I find that it is conceivable that the Secretary of Labor could establish a prima facie case of retaliation in a discrimination proceeding. In such a proceeding the Secretary would have to establish 1) that Mr. Kaczmarczyk engaged in protected activity, and 2) that his return to workers' compensation was motivated in part by the protected activity. Sec. ex rel. Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981) [6].

A mine operator may rebut the prima facie case by showing that no protected activity occurred, or that the adverse action was in no part motivated by the protected activity. The operator

---

[4] If Wolfe said, as Kaczmarczyk and Berger testified, that citations were part of the reason Kaczmarczyk was returned to workers' compensation, it is difficult to understand how the August 1992 citations would have led Respondent to effectuate this transfer 14 months later. Even accepting Wolfe's version, it is hard to grasp how August 1992 citations would be in any way relevant to Kaczmarczyk's ability to perform light duty work in October 1993.

[5] The October 1993 inspection was apparently the first time Respondent received as many as nine citations from an MSHA electrical inspection (Tr. 186).

[6] Although Respondent may not be required to provide light duty work to its employees, and may be entitled to transfer its employees from light duty to workers' compensation for a variety of reasons, Section 105(c) of the Federal Mine Safety and Health Act prohibits such a transfer if it is done in retaliation for activities protected by the Act.

may also defend by proving that it would have taken the adverse action for the unprotected activities alone.

Respondent's position is that Mr. Kaczmarczyk's return to compensation status was the result of a non-discriminatory application of its light-duty program. The decision to return Complainant to compensation was made by General Manager Frank Derrick, in consultation with Safety Manager David Wolfe (Tr. 338, 344, 349-50).

While both Wolfe and Derrick point to a number of instances in which Kaczmarczyk was unable to do work assigned to him while on light duty, they are able to conclusively establish only one which occurred in the two and a half months prior to the decision to return him to compensation (Tr. 66-67, 75-76, 203, 238, 322). The record indicates that Complainant had been unable to do job assignments throughout his 21 months on light duty and does not conclusively establish non-retaliatory reasons for which the company made an issue of Kaczmarczyk's restricted abilities in October 1993. Indeed, the record indicates that Complainant was unable to do much more work in 1992 and during the previous winter than in the fall of 1993 (Tr. 222-23).

Safety Director Wolfe does explain the timing of Complainant's return to compensation status as being due to the receipt of information on October 12, 1993, that Kaczmarczyk refused to take a functional capacity examination (FCE) on September 30, 1993 (Tr. 253-55, Exh. R-10). This is an event that may ultimately provide a basis for concluding that the Respondent transferred complainant to compensation status for non-retaliatory reasons. However, I conclude that the evidence in this regard is not so overwhelming that it makes the Secretary's case "frivolous."

First of all, Mr. Derrick's testimony indicates that Kaczmarczyk's alleged refusal to take the FCE had little to do with Respondent's decision to put him back on workers' compensation (Tr. 349-50). Derrick characterized that information as "coincidental" to his decision (Tr. 350). Secondly, the Secretary has raised a legitimate issue regarding the extremely rapid response of Mr. Wolfe to this information (Tr. 311-316).

The record shows that Mr. Wolfe received a call from nurse Antolick on October 12, reporting that Kaczmarczyk had refused to take the test (Tr. 311). Although Wolfe knew that Antolick had no first hand information regarding the FCE on September 30, he took her account at face value without checking the facts with either Complainant or the persons who actually administered the test (Tr. 312-16). Similarly, although Antolick suggested a meeting with Mr. Wolfe, the safety director acted upon the October 12 phone call without such a meeting (Tr. 313).

Given the proximity in time to Complainant's protected activities, the Secretary's counsel's posed the following question which is not satisfactorily answered by Respondent. "What was the hurry after 21 months of him being on light-duty work? (Tr. 313)" The absence of a fully satisfactory answer contributes to my conclusion that the Secretary's decision to seek temporary reinstatement is "not frivolous."

Conclusion

Having concluded that the Secretary of Labor has met his burden of proving that his decision to seek temporary reinstatement is "not frivolous," I reiterate that the record at this point indicates that Complainant's discrimination case is not well-supported. The evidence of animus towards Complainant's protected activities, although present, is very weak. There is considerable support for the proposition that Respondent's light-duty program was administered in a non-discriminatory way in Kaczmarczyk's case (Tr. 246, 264-66, 336-37, 354-57).

Moreover, General Manager Derrick's testimony that Complainant was put back on compensation because he was doing less than he was capable of doing is corroborated by other evidence in this record (Tr. 346-47, Exhs. R-6, R-10, R-11). One issue that the Secretary must address in the discrimination proceeding on this complaint is the duration of Respondent's obligation to keep Mr. Kaczmarczyk on light duty, if I rule in his favor.

In light of the relative weakness of the Secretary's case, I order temporary reinstatement with the condition that the Secretary either file a discrimination complaint within 60 days of this decision or provide compelling evidence why it is unable to do so. Given the state of this record, it would be inequitable to require Respondent to temporarily reinstate Complainant for an indefinite period.

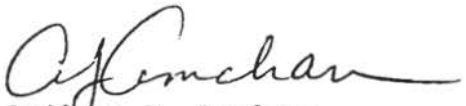
Finally, as the purpose of temporary reinstatement is to render the complainant financially secure during the pendency of his discrimination case, Respondent may satisfy this order through the means of "economic reinstatement," Senate Report 95-181, 95th Cong., 1st Sess. (1977) at 37, reprinted in the Legislative History of the Federal Mine Safety and Health Act of 1977, at page 625. Mr. Kaczmarczyk's position, including financial compensation and benefits, must be no worse than it would be had he not been placed on compensation status on October 18, 1993 [7].

---

[7] Respondent could not, for example, recall Complainant to work and require him to perform tasks which he is incapable of doing.

ORDER

I hereby ORDER Respondent to reinstate William Kaczmarczyk immediately. The Secretary of Labor is ordered to file a discrimination complaint within 60 days of this decision.



Arthur J. Amchan
Administrative Law Judge
703-756-6210

Distribution:

Martin J. Cerullo, Esq., Frumkin, Shralow & Cerullo, P. C., Second Street & Laurel Blvd., P. O. Box 500, Pottsville, PA 17901 (Certified Mail)

Stephen D. Turow, Esq., Office of the Solicitor, U. S. Department of Labor, 4015 Wilson Blvd., Suite 400, Arlington, VA 22203 (Certified Mail)

/jf

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SEP 15 1994

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 93-410
Petitioner	:	A. C. No. 15-14959-03548
v.	:	
	:	Docket No. KENT 93-550
BROKEN HILL MINING COMPANY, INC.,	:	A. C. No. 15-14959-03549
Respondent	:	
	:	Docket No. KENT 93-633
	:	A. C. No. 15-14959-03550
	:	
	:	Mine No. 3
	:	
	:	Docket No. KENT 93-634
	:	A. C. No. 15-15637-03547
	:	
	:	Mine No. 1

DECISION APPROVING SETTLEMENT

Before: Judge Weisberger

These cases are 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 Joint Motion to Approve a Settlement agreement and to dismiss the case. A reduction in penalty from $1659 to $1496 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 $1496 within 30 days of this Order.

Avram Weisberger
Administrative Law Judge

Distribution:

Mary Sue Taylor, Esq., Office of the Solicitor, U. S. Department of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 37215 (Certified Mail)

Mr. Hobart Anderson, President, Broken Hill Mining Company, P.O. Box 989, Ashland, KY 41105 (Certified Mail)

/efw

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SEP 16 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF DONALD L. GREGORY,	:	DISCRIMINATION PROCEEDINGS Docket No. WEST 92-279-D
LOY D. PETERS,	:	Docket No. WEST 92-280-D
LOY D. PETERS,	:	Docket No. WEST 93-204-D
LOY D. PETERS, DONALD L. GREGORY, AND DARRYL ANDERSON, Complainant, v.	:	Docket No. WEST 94-392-D
THUNDER BASIN COAL COMPANY, Respondent	:	Black Thunder Mine

DECISION APPROVING SETTLEMENT

The parties have filed a stipulation of settlement resolving all of the above-styled discrimination complaints filed under § 105(c) of the Act. I have reviewed the stipulation and conclude that it is consistent with the purposes of § 105(c). Therefore, it is ORDERED:

1) that within 20 days of this order Respondent tender to Loy Peters, Donald Gregory and Darryl Anderson all sums due under this agreement and the waiver and release executed by the complainants and the Respondent in accordance with the terms thereof;

2) Upon receipt of the sums noted above complainants waive permanent reinstatement and resign from their temporary positions;

3) Respondent shall expunge from the employment record of each complainant any adverse references to their

discharge or any matter surrounding the walkaround designation or the reduction in force at Thunder Basin Coal Company;

4) that within 30 days of this order Respondent shall pay a civil penalty to MSHA in the amount of $7,500.

Arthur J. Amchan
Administrative Law Judge
703-756-6210

Distribution:

Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 1600, Denver, CO 80202-5716 (Certified Mail)

Charles W. Newcom, Esq., SHERMAN & HOWARD, 633 17th St., Suite 3000, Denver, CO 80202 (Certified Mail)

Thomas F. Linn, Esq., Thunder Basin Coal Co., 555 17th St., Suite 2000, Denver, CO 80202 (Certified Mail)

/jf

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
(303) 844-5266/FAX (303) 844-5268

SEP 20 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 93-39-M A.C. No. 39-01377-05503
v.	:	North Pit
BOYER READY MIX SAND & ROCK, INCORPORATED, Respondent	:	

DECISION APPROVING SETTLEMENT AFTER REMAND

Before: Judge Cetti

On August 5, 1994, the Commission remanded the above penalty case to the undersigned to determine whether the Order of Default issued June 28, 1994, was warranted. Respondent in its request for reconsideration alleged there had been on-going settlement discussions with the attorneys representing the Secretary of Labor and that he inadvertently neglected to respond to the show cause order.

The parties now have completed their settlement discussions and have reached an amicable settlement of all issues. Petitioner on August 23, 1994, filed a motion to approve the settlement agreement pursuant to 29 C.F.R. § 2700.31 and to order payment of the amended proposed penalties in the sum of $2,938.00 within 40 days of the filing of an order approving settlement.

Under the proffered settlement there is a reduction of the initial proposed penalties as follows:

Citation No.	Initial Proposed Penalty	Amended Proposed Penalty
3909396	$ 252.00	$ 200.00
3909398	595.00	400.00
3909400	362.00	290.00
3909401	595.00	475.00
3909402	147.00	115.00
3909403	168.00	134.00
3909404	111.00	89.00
3909405	362.00	290.00
3909406	119.00	50.00

3909407	168.00	50.00
3909408	119.00	95.00
3909409	102.00	50.00
3909411	2,816.00	500.00
3909412	252.00	200.00
	TOTAL	$2,938.00

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 Respondent is **ORDERED TO PAY** to the Secretary of Labor the approved civil penalties in the sum of $2,938.00 within 40 days of this decision. Upon receipt of payment this case is **DISMISSED.**

August F. Cetti
Administrative Law Judge

Distribution:

Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 1600, Denver, CO 80202-5716

Bill B. Boyer, President, BOYER READY MIX SAND & ROCK, INC., Rural Route 2, Box 51A, Hawarden, IA 51023

sh

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 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. CENT 94-54-M
	:	A. C. No. 14-01467-05510
v.	:	
	:	Portable No. 1
WALKER STONE COMPANY, INC., Respondent	:	

DECISION

Appearances: Tambra Leonard, Esq., Office of the Solicitor, U. S. Department of Labor, Denver, Colorado, for the Secretary;
Keith R. Henry, Esq., Weary, Davis, Henry, Struebing & Troup, Junction City, Kansas, for Respondent.

Before: Judge Maurer

This proceeding concerns a proposal for assessment of a 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 civil penalty assessments for four alleged violations of certain mandatory safety standards found in Part 56 of Title 30, Code of Federal Regulations. An evidentiary hearing in these matters was held on June 2, 1994, in Topeka, Kansas. Subsequently, both parties filed proposed findings of fact and conclusions of law which I have considered in making this decision.

STIPULATIONS

The parties have agreed to the following stipulations, which I accept (Tr. 4-5):

1. Walker Stone Company, Inc., is engaged in mining and selling of stone in the United States, and its mining operations affect interstate commerce.

2. Walker Stone Company, Inc., is the owner and operator of the Portable No. 1 Mine, MSHA ID No. 14-01467.

3. Walker Stone Company, Inc., is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. sections 801 et seq. (the Act).

4. The administrative law judge has jurisdiction in this matter.

5. The subject citations were properly served by a duly authorized representative of the Secretary upon an agent of respondent on the dates and places stated therein and may be admitted into evidence for the purpose of establishing their issuance and not for the truthfulness or relevancy of any statements asserted therein.

6. The exhibits to be offered by respondent and the Secretary are stipulated to be authentic, but no stipulation is made as to the relevance or the truth of the matters asserted therein.

7. The proposed penalty will not affect respondent's ability to continue in business.

8. The operator demonstrated good faith in abating the violations.

9. Walker Stone Company, Inc., is a small mine operator with 94,437 hours worked in 1992.

FINDINGS AND CONCLUSIONS

Citation No. 4336867 was issued on June 21, 1993, by MSHA Inspector Dean Williams, pursuant to section 104(a) of the Mine Act and alleges a violation of the mandatory standard at 30 C.F.R. § 56.14132(b)(2)[1]:

> The homemade wheel mounted device on the Wabco haul truck, Company No. 359 AF, reportedly was utilized as a reverse signal alarm. However, the bell type device worked on both forward and reverse directions. The device was not audible above the surrounding noise level of the plant at the crusher and other areas to attract attention of a person that may be in the area when the truck was moving in a reverse direction. Routine backing is required at the crusher feeder and the pit loading area.

On this occasion, Inspector Williams, accompanied by an inspector trainee, Curtis Dement, observed a Wabco haul truck, which is a self-propelled piece of mobile equipment with an

---

[1]/ 30 C.F.R. § 56.14132(b)(2) provides as follows: Alarms shall be audible above the surrounding noise level.

obstructed view to the rear. A backup alarm is required for this vehicle and one was provided by the respondent.

One method of complying with 30 C.F.R. § 56.14132(b) is set out in subsection (b)(1)(ii) as follows: "a wheel-mounted bell alarm which sounds at least once for each three feet of reverse movement."

Inspector Williams found such a home-made alarm device mounted on one of the rear wheels of the truck. In fact, a similar device was also on the other rear wheel. It was constructed out of a hollow metal canister sealed on both ends and into which a metal ball had been placed. The sound is created when the metal ball rolls from end to end of the metal canister as the wheel rotates (forwards or backwards).

As a test, the inspector had the driver back the truck up so he could determine if the sound coming from the device could be heard above the surrounding noise level. Inspector Williams was unable to hear anything from the back of the truck. From the side, he could only hear the alarm faintly over the noise of the truck. However, the inspector admits he has some unquantified hearing loss. Inspector Dement, who at the time was a trainee, also testified. He stated that he was present with Williams when the truck was backed up for the test. He further testified that he could hear it, but, in his opinion, it was not loud enough.

Mr. David S. Walker, the owner/operator of the Walker Stone Company, also testified. He produced in court one of the backup alarms that was constructed locally and attached to the rear wheels of the truck as the inspector found it. These alarms were originally installed on the truck in 1979 to abate a previous citation. They have been on the truck since the summer of 1979, and have passed muster with every MSHA inspector including Inspector Williams until the citation at bar was issued in June of 1993. Mr. Walker also testified that he could hear the alarm over the surrounding noise and had done so numerous times over the years while standing in the quarry.

My observation in the courtroom was that the device was of substantial construction and quite loud. But of course I realize the difference between sounding an alarm inside a courtroom versus a noisy outside work environment, and therefore find little relevance in the courtroom demonstration.

The only issue involved in this citation is whether or not the alarm was audible above the surrounding noise level. It is a very subjective standard. No specific "loudness" is required.

Was it audible? Two of the three witnesses say that they could hear it, albeit Mr. Dement opined that it should have been louder. The third, Inspector Williams, although hearing impaired to some extent, could hear it from the side, but not the back. There is no specific standard beyond "audible above the surrounding noise level."

My interpretation is that if the alarm meets that standard, even if only "faintly," it still complies with the mandatory standard and there is no violation. Citation No. 4336867 will therefore be vacated herein.

Citation No. 4336871 was issued on June 21, 1993, by MSHA Inspector Dean Williams, pursuant to section 104(a) of the Mine Act and also alleges a violation of the mandatory standard found at 30 C.F.R. § 56.14132(b)(2) and charges as follows:

> The automatic reverse activated signal alarm provided on the Komatsu front-end loader was not audible above the surrounding noise level. The alarm could not be heard over the loader noise during loading operations and would not attract attention to persons that may be in the area when the loader was moving in a reverse direction. The loader had an obstructed view to the rear and routine backing was required while loading trucks at the quarry pit.

Inspector Williams and Dement also observed a Komatsu front-end loader loading dump trucks on this same date. The Komatsu front-end loader is a piece of mobile equipment that is self-propelled and the operator has an obstructed view to the rear. Approaching the vehicle they got to within 30 feet of it before they could hear the sound of the reverse alarm (an electrical type beeper) and then it was very weak. In their opinion, it was not sufficiently audible to be heard over the surrounding noise level by persons working in the area. However, they heard it.

As with the previous citation, there was a working backup alarm that they could hear; it just was not loud enough in the opinion of the inspectors. It is either audible or it is not audible above the surrounding noise level. If it is not, its a violation, if it is, it is not a violation because there is no specific standard on the books beyond that. It is basic hornbook law that the government must notify the operator what is required in order to enforce a regulation against it.

Accordingly, Citation No. 4336871 will be vacated herein.

Citation No. 4336873 was issued on June 22, 1993, by MSHA Inspector Dean Williams, pursuant to section 104(a) of the Mine Act and alleges a violation of the mandatory standard found at 30 C.F.R. §56.14132(a)[2] and charges as follows:

> The service horn on the Wabco end dump truck, Company No. 359 AF was not maintained in functional condition. The horn is a safety feature on mobile equipment to warn persons in the area when the truck starting motion and to attract attention of other equipment operators to help prevent a collision. The truck was observed hauling shotrock from the quarry pit to the primary crusher.

The inspector found the horn inoperable, not functional. Respondent stipulates that the said horn was not functional. The standard states that the horn "shall be maintained in functional condition." This clearly is a violation of the cited standard and it will be affirmed. The proposed penalty of $50 will be assessed.

With regard to its Wabco haul truck, respondent contends that Citation No. 4336873 (service horn) and Citation No. 4336867 (back-up alarm) along with three unspecified others that were issued in June of 1993, were multiplicative in nature. Respondent implies at least that MSHA is simply running up the citation count at his expense, when all that is actually involved is the serviceability of a single vehicle. I note, however, that the service horn and the back-up alarm are on the vehicle to address different hazards. The devices themselves are not duplicative and therefore separate civil penalties are appropriately assessed when both devices on one vehicle are not working. In this particular case, however, this has become somewhat of a moot point since I am going to vacate Citation No. 4336867 in this decision.

Citation No. 4336878 was issued on June 22, 1993, by MSHA Inspector Dean Williams, pursuant to section 104(a) of the Mine

---

[2]/ 30 C.F.R. § 56.14132(a) provides as follows: Manually-operated horns or other audible warning devices provided on self-propelled mobile equipment as a safety feature shall be maintained in functional condition.

Act and alleges a violation of the mandatory standard found at 30 C.F.R. § 56.9300[3] and charges as follows:

> The elevated truck weight scales was not equipped with a guard rail along the outer edge on the south side. The travelway across the scales was approximately 3 1/2 feet (1.1 meter) above ground level and 35 feet long by 12 feet wide.

Williams and Dement also inspected the scale house. There they observed the elevated truck weight scales. Trucks would drive up onto the scales to be weighed. They observed that there was no berm or guardrail on the south edge of the elevated scales as depicted in Exhibit No. P-3. The scale was approximately 12 feet wide and 35 feet long. The inspector determined that the types of vehicles that would drive onto the scales would generally range in width from 8 to 9 feet. Along the south edge, a 3.5 foot vertical drop-off existed along the edge of the scale. The inspector determined that the drop-off was of a sufficient depth so that a vehicle would overturn if it went over the south edge. There were concrete blocks bordering the scale, and although the scale might sink a few inches when a truck drove onto it, the distance between the scale and the concrete blocks would not have kept a truck from going over the side. There was also a hazard to a passenger of the truck alighting upon the narrow area of the scale at the side of the truck. The inspector determined that it was unlikely that the hazard would result in an injury. However, he determined that if an injury did result from the hazard, that the injury or illness that could be reasonably expected would be lost workdays or restricted duty.

Accordingly, I find the violation to be proven by a preponderance of the evidence in the record and the instant citation will be affirmed. Upon consideration of the various penalty assessment factors contained in section 110(i) of the Mine Act, I find a penalty of $50 is proper and reasonable and will be assessed herein.

---

[3]/ 30 C.F.R. § 56.9300 provides, in pertinent part, as follows: (a) Berms or guardrails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment.

ORDER

1. Citation Nos. 4336867 and 4336871 **ARE VACATED.**

2. Citation Nos. 4336873 and 4336878 **ARE AFFIRMED.**

3. Respondent **SHALL PAY** to the Secretary of Labor within 30 days from the date of issuance hereof the penalties hereinabove assessed in the total sum of $100.

Roy J. Maurer
Administrative Law Judge

Distribution:

Tambra Leonard, Esq., Office of the Solicitor, U. S. Department of Labor, 1585 Federal Office Building, 1961 Stout Street, Denver, CO 80294 (Certified Mail)

Keith R. Henry, Esq., Weary, Davis, Henry, Struebing & Troup, 819 Washington, P. O. Box 187, Junction City, KS 66441 (Certified Mail)

dcp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
(303) 844-5267/FAX (303) 844-5268

SEP 2 6 1994

FELIX T. CARRASCO, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. CENT 94-40-DM
v.	:	
	:	SC MD 93-05
EDDY POTASH, INCORPORATED, Respondent	:	Eddy Potash Mine

DECISION

Appearances: E. Justin Pennington, Esq., Albuquerque, New Mexico, for Complainant;

W. T. Martin, Jr., Esq., Carlsbad, New Mexico for Respondent.

Before: Judge Morris

This case is based on a discrimination complaint filed pursuant to Section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c), (the "Act").

After notice to the parties, a hearing commenced on August 9, 1994, in Carlsbad, New Mexico.

At the hearing the parties reached an amicable settlement.

Further, counsel recited the terms of the settlement and both parties requested that the transcript of the hearing be sealed and the case dismissed.

The Judge finds the settlement is in furtherance of the Mine Act.

Accordingly, the transcript of the proceedings is hereby sealed and the case is **DISMISSED.**

John J. Morris
Administrative Law Judge

Distribution:

E. Justin Pennington, Esq., 3700 Rio Grande Boulevard, NW, Suite 2, Albuquerque, NM 87107-3042 (Certified Mail)

W.T. Martin, Jr., Esq., 509 West Pierce Street, P.O. Box 2168, Carlsbad, NM 88221-2168 (Certified Mail)

sh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SEP 2 7 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	
	:	Docket No. KENT 94-136
v.	:	A. C. No. 15-16733-03555
	:	
	:	Docket No. KENT 94-146
MANALAPAN MINING COMPANY, Respondent	:	A. C. No. 15-16733-03556
	:	
	:	Mine No. 7
	:	
	:	Docket No. KENT 94-145
	:	A. C. No. 15-16318-03586
	:	
	:	Docket No. KENT 94-415
	:	A. C. No. 15-16318-03588
	:	
	:	Docket No. KENT 94-439
	:	A. C. No. 15-16318-03589
	:	
	:	Mine No. 6
	:	
	:	Docket No. KENT 94-338
	:	A. C. No. 15-05423-03746
	:	
	:	Mine No. 1

DECISION APPROVING SETTLEMENT

Appearances: Joseph B. Luckett, Esq., Office of the Solicitor, U. S. Department of Labor, Nashville, Tennessee, for the Secretary;
Susan C. Lawson, Esq., Buttermore, Turner, Lawson & Boggs, P.S.C., Harlan, Kentucky, for Respondent.

Before: Judge Maurer

These cases are 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). An evidentiary hearing in these matters was convened on July 26, 1994, in London, Kentucky. At that hearing, the parties filed a motion to approve a settlement agreement and to dismiss these cases.

The citations, initial assessments, and the proposed settlement amounts are as follows:

CITATION NO.	PROPOSED ASSESSMENT	PROPOSED SETTLEMENT
KENT 94-338		
4248498	$ 903	$ 903
4242272	903	50*
KENT 94-145		
9885316	2384	1962
4257751	690	690
4257752	690	50*
4257755	690	50*
4257756	690	50*
4257757	690	50*
4257758	690	50*
4039786	267	50
4039787	288	50
4039789	690	50*
4039790	690	50*
4039791	793	50*
KENT 94-415		
2793770	267	50
KENT 94-136		
4248460	309	309**
4248461	309	309**
4248463	506	506**
4248464	362	362**
4248465	362	362**
4248466	309	309**
KENT 94-146		
4248425	1100	1100
4040098	5800	3480
4248496	903	903
KENT 94-439		
3836067	8300	4150
TOTAL	$29,585	$15,945

* Citation modified to delete "S&S" special findings.
** Civil penalties already paid by respondent.

I have considered the representations and documentation submitted in these cases, 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 respondent having paid $2157 of the penalty, it is **ORDERED** that it pay the remaining sum of $13,788 within 30 days of this order.

Roy J. Maurer
Administrative Law Judge

Distribution:

Joseph B. Luckett, Esq., Office of the Solicitor, U. S. Department of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 37215

Richard D. Cohelia, Safety Director, Manalapan Mining Company, Inc., P. O. Box 311, Brookside, KY 40801-0311

Susan C. Lawson, Esq., Buttermore, Turner, Lawson & Boggs, P.S.C., 111 South First Street, P. O. Box 935, Harlan, KY 40831-0935

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 2 7 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. WEST 94-162-M
	:	A. C. No. 02-02108-05517
v.	:	
	:	Docket No. WEST 94-271-M
ELMER JAMES NICHOLSON, EMPLOYED BY A-ROCK INC., Respondent	:	A. C. No. 02-02108-05519 A
	:	Gray Mountain Pit

DECISION

Appearances: Susan Gillett, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California for Petitioner;
Gerald W. Nabours, Esq., Flagstaff, Arizona for Respondent.

Before: Judge Weisberger

Statement of the Case

These cases, consolidated for hearing, involve a Petition for Assessment of Civil Penalty seeking a civil penalty from Elmer James Nicholson pursuant to Section 110(c) of the Federal Mine Safety and Health Act of 1977 ("the Act"), and a Proposal for Assessment of Civil penalty alleging a violation by A-Rock Incorporated ("A-Rock") of 30 C.F.R. § 56.14101(a)(3). Also, alleged is a violation of Section 104(b) of the Act. Pursuant to notice, these cases were heard in Flagstaff, Arizona on August 15, 1994. Respondent filed a Post Trial Memorandum on September 16, 1994. On September 20, 1994, Petitioner filed a Post-Trial Brief.

Findings of Fact and Discussion

1. Whether A-Rock Incorporated is subject to the Act.

A-Rock Incorporated, operates the Gray Mountain Pit, a sand and gravel operation, located in Coconino County, Arizona. The material produced at the subject site is sold intrastate, primarily to customers within 100 miles of the site. Daryl Merick, A-Rock's general manager, indicated, in essence, that he is not aware of any out of state suppliers who compete with A-Rock. According to Merick, none of the materials purchased from A-Rock are used outside the state of Arizona. A-Rock argues, in essence, that it is not involved in interstate

commerce, and that its products and operations do not affect commerce.

Section 4 of the Act provides that each mine ". . . the operations or products of which affect commerce," shall be subject to the Act.

In **Jerry Ike Harless Towing, Inc., and Harless, Inc.**, (16 FMSHRC 683 (April 11, 1994)), the Commission analyzed the scope of the Commerce Clause of the Constitution as follows:

> The Commerce Clause of the Constitution has been broadly construed for over 50 years. Commercial activity that is purely intrastate in character may be regulated by Congress under the Commerce Clause, where the activity, combined with like conduct by others similarly situated, affects commerce among the states. Fry v. United States, 421 U.S. 542, 547 (1975); Wickard v. Filburn, 317 U.S. 111 (1942) (growing wheat solely for consumption on the farm on which it is grown affects interstate commerce). Congress intended to exercise its authority to regulate interstate commerce to the "maximum extent feasible" when it enacted Section 4 of the Mine Act. Marshall v. Kraynak, 604 F.2d 231, 232 (3d Cir. 1979), cert. denied 444 U.S. 1014 (1980); United States v. Lake, 985 F.2d 265, 267-69 (6th Cir. 1993). In Lake, the mine operator sold all its coal locally and purchased mining supplies from a local dealer. 985 F.2d at 269. Nevertheless, the court held that the operator was engaged in interstate commerce because "such small scale efforts, when combined with others, could influence interstate coal pricing and demand." Id. Harless, supra at 686.

The front-end loader at issue in these proceedings was built outside the state of Arizona. Also, A-Rock has purchased parts for its caterpillar equipment that have been produced outside the United States. Further, A-Rock's products were used by a customer in the construction of Highway No. 89 in Arizona. I take administrative notice of the fact that Highway No. 89 goes from Arizona to Montana. Based on these factors I find, under the broad principles enunciated by the Commission Harless Towing, supra, and based upon the authority of the Sixth Circuit in Lake, supra, that A-Rock's operations did affect interstate commerce.

2. Violation of 30 C.F.R. § 56.14101(a)(3)

On March 23, 1993, Pete Herrera, an MSHA inspector, inspected the subject site. He observed a 950-B front-end loader in the crushing area. Herrera asked the front-end loader operator, Jerry Semallie, whether the brakes were operational, and the latter said that they were not. Herrera asked Semallie

to operate the loader in a forward direction, and gave a sign for him to hit the brakes. According to Herrera, when the service brakes were applied, the loader continued forward and "never slowed down." (Tr. 32). Semallie testified that when the brakes are applied, initially there is some resistance, but the resistance fades away. Herrera issued a citation alleging a violation of 30 C.F.R. § 56.14101(a)(3) which provides that "All braking systems installed on the equipment shall be maintained in functional condition." The testimony of Herrera regarding his observation of the functioning of the service brakes on the front-end loader was not impeached or contradicted.[1] Accordingly, based upon his testimony I find that A-Rock did violate Section 56.14101(a)(3), supra.[2]

3. Significant and Substantial

In normal operations the front-end loader is driven to various areas on the site where it must come to a stop, and either load or unload materials. In this aspect of its operations, the loader must stop within dumping and loading distances of stock piles of gravel, a hopper, and haul trucks. Also, in normal operations, the loader travels down an incline to the washer. According to Herrera, in normal operations

---

[1] I also note that the violation was abated after the hydraulic cylinders were rebuilt, and all disc pads and the cylinders for the calipers were replaced.

[2] In essence, it appears to be A-Rock's position, inter alia, that it has not been established that a violation of Section 14103(a)(3) supra, occurred because Herrera did not (1) test the brakes pursuant to 30 C.F.R. § 56.14101(b)(1) or (2) give A-Rock the option, pursuant to Section 14101(b)(1) supra, of removing the equipment from service.

While it is true that Herrera did not test the brakes in spite of his conclusion that the service brake system did not function as required, A-Rock is not relieved of its responsibilities to comply with Section 56.14101(a) supra. (Conco-Western Stone Co., 13 FMSHRC 1908 (December 1991)) (Judge Maurer)). To hold, as apparently being argued by A-Rock, that Section 56.14101(a) is not violated in absence of proof that the vehicle in question had been tested or removed pursuant to Section 56.14101(b), would render meaningless the plain language of Section 56.14101(a) which provides that the truck in question "shall be equipped with a service brake system capable of stopping and holding the equipment with its typical load on the maximum grade of travel."

Ferlin Huskie, the foreman at the site, "walks the area." (Tr. 34). Also, other vehicles are driven in the area.

In Mathies Coal Co., 6 FMSHRC 1 (January, 1984), the Commission set forth the elements of a "significant and substantial" violation as follows:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor 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 reasonable serious nature. (6 FMSHRC, supra, at 3-4.)

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129 (August 1985), the Commission stated further as follows:

> We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984).

Considering the above guidelines set forth in U.S. Steel, supra, and the fact that in normal operations the front-end loader in issue operates on an incline, and must be able to stop so as not to collide with other vehicles and equipment, I conclude that the violation was significant and substantial.

4. Unwarrantable Failure

In essence, Semallie indicated that the brakes on the loader at issue had not been working for "probably" (Tr. 73) a few months prior to March 23, when the vehicle was cited. He indicated that he had told Ferlin Huskie, the foreman at the Gray Mountain Pit, that the brakes were not working. Huskie confirmed that Semallie had informed him about the condition of the brakes. He indicated that the brakes had been bad for almost a month prior to the time they were cited on March 23. Huskie indicated that he did not have any authority to get the brakes fixed. He indicated that approximately a month prior to the time the vehicle was cited, he had informed Elmer James Nicholson, the A-Rock superintendent, that the brakes were not in good condition.

In essence, Nicholson indicated that when the loader was cited, in March 1993, he was aware that the brakes were not working properly, and this had been a problem "for quite sometime." (Tr. 108). He indicated that there were problems with the brakes at various times over a period of months. He indicated that he was not sure when he was informed about the problems with the brakes. However, according to Nicholson, when he was informed about the problems with the brakes, he went to Brian Waghorn, the mechanic, "to do something about it." (Tr. 112). Nicholson said that on "numerous occasions", Waghorn worked on the cylinder that was leaking fuel, and the caliper. (Tr. 123). Nicholson indicated that he followed up with Waghorn who indicated that the brakes were working "at that time." (Tr. 113). Nicholson said that he thought the brakes were in good repair. He indicated, in response to questioning by A-Rock's counsel, that after he referred the matter to Waghorn, he did not "hear again that there were any problems with the brakes before March 23, 1993." (Tr. 119).

I find that A-Rock's agents knew, for about a month prior to March 23, 1993, that there were problems with the brakes on the loader. In spite of this knowledge, the loader was continued in operation. Nicholson indicated that he thought that the brakes were in good repair, as he had referred the matter to the mechanic, and followed up with him. However the mechanic, Waghorn, did not testify. Nor were any repair records proffered in evidence. It thus is not possible to make any findings regarding any specific repairs that had been made to the brakes, and when these repairs had been done. I find that the violation herein resulted from A-Rock's aggravated conduct, and thus was the result of its unwarrantable failure. (See, Emery Mining Corp., 9 FMSHRC 1997 (1987)).

5. Violation of Section 110(c) of the Act

In Kenny Richardson, 3 FMSHRC 8 (1981), aff'd 689 F.2d 632 (6th Cir. 1982), cert. den., 461 U.S. 928 (1984), the Commission reviewed the legislative history of the term "knowingly" as used in Section 109(c) of the Federal Mine Safety and Health Act of 1969, whose exact language was continued in Section 110(c) of the 1977 Act, and held that the term means "knowing or having reason to know," (Kenny Richardson, supra, at 16). Specifically, the Commission stated as follows: "If a person in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition, he has acted knowingly and in a manner contrary to the remedial nature of the statute." Kenny Richardson, supra, at 16.

I find that the record establishes that Huskie had informed Nicholson approximately a month prior to the date the loader was cited, regarding the problems with the brakes. I find Nicholson's testimony inadequate to establish that, after he became aware of the problems with the brakes, and prior to the time the brakes were cited, he took action to have the brakes repaired, and ensured that the brakes were repaired. Nor is there any other evidence of record to establish the same. Hence, I find that it has been established that Nicholson violated Section 110(c) of the Act.

6. Violation of Section 104(b) of the Act.

In the initial order issued to A-Rock, Herrera indicated that termination of the cited condition was due March 26, 1993. On August 26, 1993, MSHA inspector David F. Estrada, inspected the front-end loader at issue. He observed that the parking brake was defective, and could not hold the loader when stopped. He issued an order under Section 104(b) of the Act which, as pertinent, provides that if in a follow-up inspection it is found ". . . that a violation described in a citation issued pursuant to Subsection (a) has not been totally abated within the period of time as originally fixed there or subsequently extended, ... ", the inspector shall issue a withdrawal order.

The original order alleges that the "brakes" had not been maintained in functional condition. Specifically, it alleges as follows "the loader would not stop when tested on level ground." The record supports a conclusion that the service brakes are a different system from the parking brakes. The former are used to stop the vehicle, and the latter are used to hold a vehicle stationary once it has come to a stop. According to Nicholson, at some time subsequent to the issuance of the initial citation, the hydraulic cylinders where rebuilt, and the discs, cylinders for the calipers, and pads were all replaced. Estrada indicated that he found the service brakes to be functioning when he inspected the vehicle on August 26, 1993. Thus, I find that it has not been established that, on August 26, 1993, when inspected by Estrada, the violation described in the initial citation had not been totally abated. Thus, I conclude the Section 104(b) shall be dismissed.

7. Penalty

I find that a penalty of $5,000 is appropriate for the violation of 30 C.F.R. § 56.14101(a)(3), and that a penalty of $3,000 is appropriate for the violation by Nicholson of Section 110(c) of the Act.

ORDER

It is Ordered as follows:

1. Order No. 4124514 shall be dismissed.

2. A-Rock, Incorporated shall, within thirty (30) days of this decision, pay a civil penalty of $5,000 for the violation of 30 C.F.R. § 56.14101(a)(3).

3. Elmer James Nicholson shall pay a civil penalty of $3,000 within thirty (30) days of this decision.

Avram Weisberger
Administrative Law Judge

Distribution:

Susan Gillett, Esq., Office of the Solicitor, U.S. Department of Labor, 71 Stevenson Street, Suite 1110, San Francisco, CA 94105 (Certified Mail)

Gerald W. Nabours, Esq., 10 E. Dale Street, Flagstaff, AZ 86001 (Certified Mail)

/efw

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SEP 2 8 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. KENT 94-116
	:	A.C. No. 15-16927-03541
v.	:	
	:	No. 6 Mine
BOB & TOM COAL COMPANY, INC., Respondent	:	

DECISION

Appearances: Mary Sue Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner.

Before: Judge Barbour

In this proceeding the Secretary, on behalf of the Mine Safety and Health Administration (MSHA) and pursuant to Section 105 of the Federal Mine Safety and Health Act of 1977 (Mine Act or Act), filed a petition for assessment of civil penalties against Bob & Tom Coal Company, Inc. (Bob & Tom). The Secretary alleged that in eight instances the company violated mandatory safety standards for underground coal mines. (The standards are found in Title 30, Part 75 of the Code of Federal Regulations (C.F.R.).) The Secretary further alleged that the violations were significant and substantial (S&S) contributions to mine safety hazards and that they occurred at Bob & Tom's No. 6 Mine, an underground bituminous coal mine located in Harlan County, Kentucky.

Joe Hensley, President of Bob & Tom, filed a timely answer on the company's behalf in which the company challenged various aspects of the Secretary's petition as it related to each alleged violation. Following the issuance of a prehearing order and the parties' responses thereto, the matter was noticed for hearing on June 7, 1994, in Middlesboro, Kentucky.

The hearing was convened as scheduled and counsel for the Secretary entered her appearance. No person appeared on behalf of Bob & Tom. (The notice of hearing dated April 19, 1994, was served on Mr. Hensley by certified mail. The return receipt indicates that it was received on April 25, 1994.)

At my request, counsel for the Secretary described her contacts with the representatives of Bob & Tom. She stated that during the week prior to the hearing she twice called

Hensley and both times was told he was not in the office. She left messages for Hensley to call her, but her calls were not returned (Tr. 6-7).

The day prior to the hearing, counsel received a telephone call from David Williams, an engineer for Bob & Tom. Williams told counsel that the "meeting" on June 7 would have to be canceled. Counsel stated that she told Williams it was "probably too late," that he should appear at the hearing and that if he failed to appear the company could be defaulted (Tr. 7-8).

Noting that the notice of the specific site for the hearing had been sent by facsimile copy and by certified mail to the parties on June 2, 1994, I recessed the hearing while counsel attempted to telephone a representative of the company (Tr. 9). Forty five minutes later counsel reported that the person who answered the telephone told her that neither Hensley nor Williams would be at the mine office during the day. She also indicated that she had checked with her office and that no messages had been left for her there (Tr. 10-11). In addition, I too placed a telephone call to my office and was advised that no one from the company had called for me (Tr. 11).

I stated that the Commission and the Secretary had gone to considerable expense to prepare for the hearing and that a party's unexplained failure to appear at a duly noticed hearing indicated contempt for the Act in general and the Commission's hearing process in particular. I further stated my belief that such contumacious conduct undermined the ability of the Act to provide miners with more effective protection against hazardous conditions and practices. Finally, I requested that counsel present her case in full so that I might have the benefit of a complete record (Tr. 12-13).

THE NO. 6 MINE and BOB & TOM

Jim Langley, a coal mine inspector and accident investigator, testified that he conducted a regular inspection of the No. 6 Mine on August 11, 1993. According to Langley, the mine employed approximately 10 persons. Coal was mined with a continuous mining machine on one section. The height of the coal seam averaged 32 to 33 inches. The mine is located above the water table. Although Langley never detected methane at the mine, he believed others had (Tr. 17-18).

Counsel for the Secretary maintained that the company quit mining under the name Bob & Tom, but that mining effectively continued under the name of Day Branch Coal Company (Day Branch) and that Hensley controlled both operations (Tr. 102). According to counsel, the No. 6 Mine was renamed the Day Branch No. 10 Mine. It was one of several mines that Day Branch and Hensley operated. Id.

CITATION NO. 4040112

Citation No. 4040112, alleges a violation of 30 C.F.R. § 75.400, and states that "float coal dust has been allowed to accumulate inside the section power center. The dust was black in color and was present over the energized components of the power center" (Exh. P-1). The citation also contains a find that the alleged violation was S&S.

Langley stated that while inspecting the section power center on August 25, 1993, he observed float coal dust inside the power center and spread over the center's energized components (Tr. 19). He viewed the dust through the power center's windows, located on its sides. The dust was black, but he could not determine its depth due to the covers on the equipment (Tr. 20). The power center, which received 4160 volts of electricity, was located approximately four crosscuts outby the face. Id.

Langley considered the condition to be hazardous because electrical arcs were created inside the power center when the power to equipment was turned on or off. These arcs could have ignited the coal dust (Tr. 21).

Because there was an ignition source in close proximity to the coal dust, Langley believed it was reasonably likely a fire could have occurred. It was not unusual for miners to work at the power center and a fire would have exposed miners to the dangers of flame, smoke and carbon monoxide, any of which hazards could have resulted in serious injuries (Tr. 22-24).

The power center was examined weekly by mine management. Because of the color of the accumulation, Langley believed that the coal dust had been present on the power center for more than one week and that the company examiner had passed it by (Tr. 25).

THE VIOLATION

Section 75.400 prohibits the existence of accumulations of combustible materials. The Commission has held that a violative "accumulation" exists "where the quantity of combustible materials is such that, in the judgment of the authorized representative of the Secretary, it likely could cause a fire or explosion if an ignition source were present." Old Ben Coal Co., 2 FMSHRC 2806, 2808 (October 1980). In defining a prohibited "accumulation" for section 75.400 purposes, the Commission explained that "some spillage of combustible materials may be inevitable in mining operations. However, it is clear that those masses of combustible materials which could cause or propagate a fire or explosion are what Congress intended to proscribe." Old Ben Coal Co., 2 FMSHRC at 2808.

Langley's testimony was clear. I find that the float coal dust located on the electrical components in the interior of the power center was such that it could have caused or propagated a fire. In the judgement of the inspector, the quantity of the dust in the immediate vicinity of electric arcs presented the very real danger of an ignition as mining progressed on the section. I accept this view and find that the violation existed as charged.

S&S and GRAVITY

The test set forth by the Commission in Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1994) for determining whether a violation is S&S in nature is well known and need not be repeated here. I have concluded that a violation of the mandatory safety standard existed. Moreover, the evidence establishes a discrete safety hazard in that the existence of the accumulation in the vicinity of electric arcs subjected miners working at the power center to the possibility of an ignition and to burn and inhalation injuries arising therefrom. Fortunately, such injuries did not occur, but they were reasonably likely. An actual ignition source to ignite the coal dust was present and would have continued to be present as mining progressed and as power was turned on and off. Moreover, miners were required to work in the immediate vicinity of the power center. Finally, any such injuries would have been reasonably serious, if not fatal. I conclude therefore that the violation was S&S.

The concept of gravity involves analysis of both the potential hazard to miners and the probability of the hazard occurring. Here, the hazard was of burn injuries or of injury due to the inhalation of smoke or carbon monoxide. Given the conjunction of the accumulation and electrical arcing inside the power center, the probability of an ignition was high. This was a serious violation.

NEGLIGENCE

The accumulation was visually obvious. Langley could see its extent and color through the side windows of the power center. Further, I credit his belief that the accumulation existed for more than one week and consequently that it should have been observed and cleaned up. Bob & Tom's failure in this regard was a sign of its lack of due care. I therefore conclude the company was negligent.

CITATION NO. 4040113

Citation No. 4040113, alleges a violation of 30 C.F.R. § 75.1101, and states that "the section belt drive was not provided with a deluge water spray system" (Exh. P-2). The

citation also contains a finding that the alleged violation was S&S in nature.

Langley testified that during his inspection he observed that the section belt drive was not provided with a deluge water spray system. (However, there was a fire extinguisher at the belt head (Tr. 31).) The purpose of the spray system is to suppress belt fires. The sprays automatically turn on when the system's sensors are activated by heat (Tr. 27).

Langley further testified that there was no evidence such a system had ever been installed at the belt drive (Tr. 28). Langley believed the belt drive was set up on August 13, 1993 and that the violation existed from that date.

Langley also observed loose coal and coal dust under the belt and float coal dust on the belt. Indeed, the belt was running in the coal and coal dust and Langley believed the friction from the belt rubbing in the material could cause an ignition (Tr. 29-30). The belt itself was dry (Tr. 31).

In Langley's view, the combustible material in the presence of the ignition source, coupled with the lack of a deluge fire suppression system, made it reasonably likely an accident would have occurred, an accident that would have resulted in miners being exposed to smoke and carbon monoxide as well as to possible burn injuries (Tr. 35-36). Further, if the belt itself burned, additional toxic fumes would have been liberated. Id.

Langley observed the conditions at 2:40 p.m. (Exh. P-2). He cited the company for a violation of section 75.1101, and he gave Bob & Tom slightly more than two and one half hours to abate the violation. When Langley returned to the mine on August 26, the system had not been installed and no one was working to install it (Tr. 33). The only reason offered for the failure to install the spray system was that the section repairman had not gotten around to it (Tr. 33). Therefore, Langley issued an order of withdrawal closing the section belt (Exh. P-3, Tr. 33). Bob & Tom abated the condition by installing a deluge water spray system whose parts were taken from an old belt drive (Tr. 34).

THE VIOLATION

Section 75.1101, which reiterates section 311(f) of the Act, 30 U.S.C. § 871(f), states, in part, that "deluge-type water sprays ... or other no less effective means approved by the Secretary of controlling fire, shall be installed at main and secondary belt-conveyor drives." Here, where the belt-conveyor drive for the continuous haulage system did not have a deluge-type water spray or any other system approved by the Secretary, the violation existed as charged. See Tr. 40-41.

S&S and GRAVITY

As I have just found, there was a violation of the cited standard. There also was a discrete safety hazard in that the lack of a deluge-type fire suppression system at the belt drive, together with the fact that the belt was running in coal and coal dust and that there were accumulations of coal dust on the belt and around the belt drive, meant that an ignition at the belt drive was unlikely to be quickly extinguished. (Although it is true that a fire extinguisher was located in the vicinity of the belt drive, its immediate and therefore effective use could not be assured because a miner was not present always at the belt drive.) That a fire and injuries resulting therefrom were reasonably likely is established by the fact that all of the elements necessary for the potential hazard to come to fruition were in place at or near the belt drive -- an ignition source, combustible material, exposed miners and a lack an automatic means to extinguish an ignition. Moreover, and as Langley noted, any injuries resulting from an unextinguished ignition, whether in the form of burns or the inhalation of smoke or toxic gases, were likely to be of a reasonable serious nature. The violation was S&S.

The violation also was serious in that the potential hazard to miners was grave given the confluence of conditions at and around the belt drive.

NEGLIGENCE

Negligence is the failure to exercise the care required by the circumstances. Langley could see no evidence that a deluge-type water spray system ever was installed. He noted the condition on August 25. I accept his testimony that the spray system had been missing for 12 days, that is, since the belt drive had been set up (Tr. 28). The standard is clear as to what is required. Bob & Tom had materials on hand necessary for the spray system. Certainly, the operator knew the spray system was missing, and its failure to have had one installed signaled its failure to meet the required standard of care. Bob & Tom was negligent.

CITATION NO. 4040114

Citation No. 4040114, alleges a violation of 30 C.F.R. § 75.383(a), and states that "an up-to-date escapeway map was not provided for the mine 001 section" (Exh. P-4). The citation also contains a finding that the alleged violation was S&S in nature.

Langley testified that a map showing the escapeways was not present on the 001 Section (Tr. 41). The map is required

in order to illustrate for miners the way to the surface in the event of a fire or of an explosion.

In Langley's opinion, if a fire occurred, miners were likely to panic and forget the location of escapeways or become disoriented by smoke and loose their way (Tr. 42). Indeed, Langley discussed an accident where this very thing happened (Tr. 46).

The danger of miners being unable to find their way out of the mine was aggravated by the fact that all of the self rescuer devices required by the regulations were not present on the section (Tr. 43-45). Miners who became lost in the smoke could have perished because they could not have found their way out in time (Tr. 48).

Langley cited the violation on August 25. He believed the mine had been without a map since August 13, the date the direction of mining on the section changed (Tr. 42). Langley also noted that there were several ignition sources on the section, as well as loose coal in every entry and loose coal and float coal dust along the beltline (Tr. 49-50).

Langley testified that all eight persons who worked on the 001 section would have been affected by the lack of the escapeway map. Given the fact that the map was missing and given the combustible materials on the section, Langley believed it reasonably likely there would have been injuries or fatalities in the event of a fire (Tr. 51-52).

THE VIOLATION

Section 75.383(a) states in part, "A map shall be posed in each working section ... and shall show the designated escapeways from the working section." Clearly, such a map was not present on the 001 section, and I find the violation existed as charged.

S&S and GRAVITY

I also conclude the violation was S&S. Because I credit Langley's testimony regarding the presence of ignition sources and combustible coal and coal dust, I believe that a fire or explosion was reasonably likely to have occurred had mining continued on the section. Further, I believe that Langley was right when he stated that without a map miners were likely to panic and to lose their way in the smoke. Therefore, I find that it was reasonably likely miners on the 001 section would have suffered serious injury or death due to the failure of the operator to ensure the presence of the escapeways map on the working section.

I find the violation was serious. As I have noted, the map could have made the difference between life and death to miners working underground.

NEGLIGENCE

The map was management's responsibility. There was ample time to provide one. In failing to ensure its presence, management failed to meet the standard of care required. I therefore find the operator was negligent.

CITATION NO. 4040115

Citation No. 4040115, alleges a violation of 30 C.F.R. §75.503, and states that "the S&S 482 scoop used on the mmu-001 section was not maintained in permissible condition because an opening greater than .005 of an inch existed in the cover of the starting box lid" (Exh. P-5). The citation also contains a finding that the alleged violation was S&S in nature.

Langley explained that section 75.503 requires that electric equipment operated on the section be maintained in permissible condition, which means that "equipment is maintained in the condition to prevent an explosion or a fire" (Tr. 53). To do this the electrical components of the equipment must be kept relatively air tight so that methane does not seep into the components. Id.

Here, the bolts on the starting box of the scoop were loose and there was a resulting gap in the box through which methane could have entered. (Langley measured the gap with a feeler gauge.) Once inside, methane could have been ignited by the electric arcs in the starting box. Further, the scoop was used in face areas, returns and old works, areas where methane was likely to accumulate.

If methane had been ignited, Langley believed it was reasonable to expect that the scoop operator would have received first or second degree burns, or even have been killed (Tr. 56). Moreover, a methane ignition could have effected the entire mine in that an explosion could have been propagated by the dust put into suspension by the force of the ignition. The explosion would have traveled toward the surface, as the coal dust and float coal dust along the beltline was ignited (Tr. 56-57). The scoop was energized when it was observed by Langley (Tr. 57).

THE VIOLATION

Section 75.503 states, in part, that "the operator of each coal mine shall maintain in permissible condition all electric face equipment ... which is taken into or used inby the last open crosscut." There is no question that the starting box of

the scoop contained a gap in excess of .005 inches. Likewise, there is no dispute that such a gap was not permissible and was in violation of section 75.503. Therefore, I find that the violation existed as charged.

S&S and GRAVITY

This violation posed a likelihood of serious injury, even of death, to miners. As Langley explained, methane could have entered the scoop's starting compartment through the gap and could have been ignited by an arc or spark within the box (Tr. 53). That this likelihood was reasonable is established by Langley's testimony that the scoop was operated in areas where methane was likely to accumulate and that electric arcs occurred within the starting box (Tr. 54.) Given Langley's uncontroverted testimony, I conclude the violation was S&S.

The violation was serious. Not only did it pose the hazard of a methane ignition, but, as Langley explained, given the presence of the coal dust and float coal dust on the section and along the belt, the ignition could have triggered an explosion that could have effected the entire mine and all personnel in it, whether or not they worked on the 001 section (Tr. 56-57).

NEGLIGENCE

Electric face equipment, such as the scoop, is required to be maintained in permissible condition. It is the operator's responsibility. The record reveals no mitigating factors for management's obvious failure to meet this standard of care. Therefore, I conclude Bob & Tom was negligent.

CITATION NO. 4040116

Citation No. 4040116 alleges a violation of 30 C.F.R. § 75.1719-1(e)(6), and states that "lights were not provided for the 482 S & S Scoop used on mmu-001" (Exh. P-6). The citation also contains a finding that the alleged violation was S&S in nature.

Langley stated that, in addition to having a gap in excess of .005 inches in the starting box, the scoop lacked lights (Tr. 58). The only light the operator of the scoop had available was from his cap lamp (Tr. 59). There should have been four lights on the scoop, two on the front and two on the back. The front lights had been torn from the machine, and the rear lights were not working (Tr. 64). If the lights had been operating, they would have illuminated the periphery of the scoop. The cap lamp did not (Tr. 60).

The scoop was used in 32 inch coal, and miners had to crawl in the area. Because of the mining height, the scoop

operator could not lift his or her head high enough over the frame of the scoop to illuminate the area opposite the scoop operator (the off side) (Tr. 63). Lights would have provided the operator with visibility on the off side (Tr. 63). The section foreman traveled in the area, as did those miners whose job it was to hang ventilation curtain and take methane readings. Langley guessed that the scoop traveled at a speed of approximately six miles per hour (Tr. 60).

Given these factors, Langley believed that it was reasonably likely the scoop operator would strike another miner (Tr. 61). A factor making an accident even more likely given the lack of lights was the noise made by the continuous mining machine and the bridge conveyor. Langley stated that both created "a lot" of noise and, if the scoop was in use in an entry adjacent to one being mined, it would have been difficult for a miner working or traveling in the vicinity of the scoop to hear the scoop (Tr. 61-62). A miner hit by the scoop could have been crushed (Tr. 61).

THE VIOLATION

Section 75.1719-1(e)(6) states that unless the entire working place is illuminated by stationary lighting equipment, "luminaries shall be installed on each machine operated in a working place." These lights are required to illuminate areas both in front and in back of the machine. The testimony establishes that the two front lights were not present on the scoop and the two back lights were not working. Thus, front luminaries were not installed as required and the area in back of the machine was not illuminated as required. The violation existed as charged.

S&S and GRAVITY

As Langley explained, the lack of proper illumination contributed to the likelihood of a miner being struck by the scoop. That this was reasonably likely to have happened and could have resulted in an injury was made clear by the fact that the area where the scoop was being operated was the very area where the section foreman was required to travel and miners were required to work. The scoop operator had inadequate visibility, especially on the off side, to see the foreman and miners. In addition, the fact that the shuttle car was a massive piece of equipment and traveled at speeds of up to six miles per made it a virtual certainty that any person struck by the equipment would have been seriously injured, if not killed outright. Therefore, I conclude the violation was S&S.

The likelihood of an accident, coupled with the potential for serious injury or death, meant that this was a serious violation.

NEGLIGENCE

It was management's duty to assure mining machinery was maintained in safe operating condition. The violation was visually obvious. Management knew, or should have known, of its existence. Operating the scoop in a condition that was obviously hazardous to miners was indicative of management's failure to meet the required standard of care. The company was negligent.

CITATION NO. 4040118

Citation No. 4040118, alleges a violation of 30 C.F.R. § 75.1713-7(a)(1), and states that "adequate first-aid supplies were not maintained on the surface area of this underground mine" (Exh. P-7). The citation also contains a finding that the alleged violation was S&S in nature.

Langley stated that the company had three surface employees. One miner watched the belt and two drove coal haulage trucks (Tr. 65). In addition, all underground miners traveled on the surface to and from the mine. Langley stated that no first aid supplies were stored on the surface, not even a band-aid (Tr. 66). Langley agreed that the missing supplies could be described as "the basic stuff that keeps you going until the paramedics can get there" (Tr. 70). In the event of an injury requiring a tourniquet, none would have been present, and there were no splints for broken bones or blankets for shock victims (Tr. 66-67).

THE VIOLATION

Section 75. 1713-7(a)(1) requires each operator to keep specified first-aid equipment at the mine dispatcher's office or other appropriate work areas on the surface and in close proximity to the mine entry. As Langley indicated, among the equipment specified are tourniquets, blankets and splints. In addition, such basic things as bandages and compresses also are required. None of these items were present on the surface. The violation existed as alleged.

S&S and GRAVITY

The violation was both S&S and serious. If an injury had occurred, means for treating it until professional help arrived was lacking. Frequently, such stop-gap treatment is necessary to prevent the aggravation of an injury, or even to save a victim's life. If normal mining operations had continued, it is likely that sooner or later a miner would have been injured. When this happened, there was a reasonably likelihood that the hazard contributed to -- lack of prompt and effective emergency medical treatment -- would have compounded the injury. Given the

dangers inherent in mining, there is no doubt that the lack of first-aid equipment presented a serious hazard to miners.

NEGLIGENCE

In failing to provide the required first-aid equipment, Bob & Tom negligently failed to meet the standard of care required of an operator.

CITATION NO. 4248441

Citation No. 4248441 alleges a violation of 30 C.F.R. § 75.364(a)(1) and states that "the weekly examination of the worked out areas inby where 1st right has started mining off the mains has not been conducted weekly" (Exh. P-8). The citation also contains a finding that the alleged violation was S&S in nature.

Langley stated the citation was issued for the failure to examine on a weekly basis worked out areas of the mine. Langley explained that mining operations had driven straight ahead for approximately 6,000 feet when the decision was made to pull back about 2,000 feet and to mine in a new direction. Once mining was started in the new direction, the old works were not examined (Tr. 72-73). Langley was sure they were not examined because no dates, times or initials were recorded (Tr. 73-74). Also, Langley asked the section foreman if he had conducted the examinations and the foreman replied he "didn't have time" to do them (Tr. 76).

Failure to examine the worked out area could have lead to accumulations of methane or of air with low oxygen content (Tr. 74). Supplies had been left in the area -- an old belt structure and roof bolting supplies -- and Langley feared that a miner would take equipment into the old works to retrieve the supplies, that the equipment would malfunction electrically and accumulated methane would be ignited (Tr. 76). Indeed, Langley testified that he was aware of a recent explosion at another mine caused in just this way, an explosion that killed two miners (Tr. 77-78).

If there had been a explosion, the heat and flames could travel out of the old works and the accumulations of coal and coal dust along the belt line could have ignited. In this way, the effects of the explosion could have traveled to the surface (Tr. 79). Depending upon the extent of the explosion, one person could have been affected (the person who went to the old works for the supplies) or, all miners working underground could have been affected. Any of those involved could have suffered injuries ranging from first or second degree burns to smoke inhalation (Tr. 79).

THE VIOLATION

Section 75.364(a)(1) requires that at least once every seven days a certified person examine unsealed, worked-out areas measuring methane and oxygen concentrations. 30 C.F.R. §75.364(g) requires that such an examination be certified by the examiner posting his or her initials, the date, and the time of the examinations at enough locations to show the examination was made. Clearly, the required weekly examinations were not made. They were not certified as required and the section foreman stated he was not doing them. Therefore, I conclude the violation existed as charged.

S&S and GRAVITY

I agree with Langley that the violation was S&S. As he explained, methane is present in the seam being mined and without the required weekly examination there was no way to know if the methane was accumulating in the old works. The presence of the belt structure and the roof bolting materials meant that it was likely miners and equipment would return to the old works. Indeed, Langley testified that the day before the violation was cited the scoop had been driven into the old works to retrieve part of the deluge water system from the old belt structure (Tr. 76). I conclude therefore that there was a discrete safety hazard in that methane could have accumulated undetected in the old works. Further, the record establishes it was likely the scoop would have been taken into the unexamined areas to retrieve the supplies. (This was the same scoop that was not maintained in permissible condition.) I therefore find it reasonably likely that a potential ignition source would have been present in the unexamined areas. In my view, the lack of the required examination, the possibility of methane accumulating in the old works, coupled with the presence of a ready ignition source, made it reasonably likely an ignition would occur. Moreover, first or second degree burns are injuries of a reasonably serious nature, as is smoke inhalation. I find therefore that the violation was S&S.

Because of the likelihood of an accident and the injuries it could have engendered, the violation also was serious.

NEGLIGENCE

That the section foreman felt he did not have time to conduct the examinations is no excuse. If, in fact, he was too busy to examine the area, Bob & Tom was required to make sure another certified person did. Compliance is the operator's duty, and here the operator failed in that regard. The company was negligent.

CITATION NO. 4248555

Citation No. 4248555 alleges a violation of 30 C.F.R. § 75.400 and states that "loose coal had been allowed to accumulate in the Nos. 1, 2 & 3 rooms of 001 section in depths up to 6 inches for a distance of approximately 80 feet from the faces outby." The citation also contains a finding that the alleged violation was S&S in nature.

MSHA coal mine inspector Roger Pace testified that during an inspection of the No. 6 Mine he observed accumulated loose coal in three entries that had been driven to the face. According to Pace, the accumulated material extended outby for 80 feet. (Pace's inspection occurred nearly a month before Langley's.) Pace measured the depth of the accumulations with a ruler and found that the coal measured up to six inches deep (Tr. 85-87). There was coal dust as well, and it was dry and black (Tr. 87).

In Pace's opinion the accumulations were the result of spillage along the bridges of the continuous haulage system. Id. Given the extent of the coal and coal dust, Pace believed it had been accumulating for approximately three shifts (Tr. 88, 99). No one was working to clean up the accumulations when they were observed by Pace. Indeed, the section foreman told Pace that he only had seven miners working on the section and because he was short handed there was no one to spare for clean up duties. As Pace put it, "production comes first to them" (Tr. 98). Cleanup began only after Pace advised the section foeman that he, Pace, was issuing a citation for a violation of section 75.400 (Tr. 91-92).

With regard to the hazard presented by the accumulations, Pace believed it was likely they would catch fire. He noted the electrical equipment on the section and the fact that given the movement of the equipment and the wear and tear on the trailing cables, an exposed conductor in one of the cables could have resulted in an arc or spark, which, in turn, could have resulted in a fire (Tr. 89-90). Although Pace did not inspect the cables, he believed they tended to fray and to separate as they were pulled around corners.

THE VIOLATION

As noted, the Commission has stated that Congress intended to proscribe "those masses of combustible materials which could cause or propagate a fire or explosion." Old Ben Coal Co., 2 at 2808. Since accumulations are to some extent an inevitable result of the mining process, an operator is given a reasonable amount of time to clean up the by-product of the mining cycle. Thus, the length of time that combustible material is present is relevant in determining whether a particular accumulation

is prohibited. Utah Power & Light Co. v. Secretary of Labor, 951 F.2d 292, 295 (10th Cir. 1991) (n.11).

Pace's testimony was not challenged and I accept his assessment that the accumulation of coal and coal dust on the section could have been ignited. As he testified, the coal dust was black and it was dry. Moreover, the accumulations were lengthy in that they extended outby from the face areas for approximately 80 feet. I also accept his assessment that the accumulations had existed for approximately three shifts and were not cleaned up with "reasonable promptness." Certainly, it is no excuse that the section foreman found himself short handed. I therefore conclude the violation existed as charged.

S&S and GRAVITY

The Secretary has not established the violation was S&S. The Secretary's case founders on the third element of the Mathies test -- the requirement that the Secretary prove "a reasonable likelihood that the hazard contributed to will result in an injury." Mathies Coal Co., 6 FMSHRC at 3-4. Although Pace testified that trailing cables to electrical equipment could constitute a potential ignition source for the accumulation, he did not inspect any of the cables to determine whether they were defective or out of compliance and he was unable to testify that any other equipment on the section that was out of compliance.

For me to find that a fire or ignition of the accumulations was reasonably likely, I would have to agree with what seems to be the thrust of the Secretary's case -- that trailing cables invariably become defective during the course of continued normal mining operations. On the basis of this record I am reluctant to make such an assumption. Aside from testimony that the cables had no visible defects, nothing was put on the record relating to the condition of the specific cables involved; and I believe it would be unwarranted to assume that they would inexorably deteriorate to the point where they could ignite accumulations. If this were the case, one would assume the Secretary would require their replacement on a regular basis.

This said, I find that the potential hazard to the safety of miners was such that this was a serious violation. Pace was justifiably concerned about their fate if the accumulations ignited. The extent of the accumulations meant that any fire and smoke and fumes could have traveled up the entries and could have endangered not only the section crew of seven but any other persons in the mine. While this hazard was not reasonably likely to come to fruition, it could have happened and the potential for injury or death was great.

NEGLIGENCE

I accept Pace's opinion that the accumulations existed for up to three shifts. As I have noted, the fact that the section foreman did not have a full crew was no excuse for failing to clean up the accumulation with reasonable promptness. It is the operator's duty to act to eliminate accumulations resulting from the mining process. Bob & Tom negligently failed to do so.

OTHER CIVIL PENALTY CRITERIA

HISTORY OF PREVIOUS VIOLATIONS

With regard to the operator's history of previous violations, the Secretary submitted into evidence a computer printout listing all violations assessed at the Day Branch mines during the two years prior to the first violation in this case (Exh. P-10). Counsel argued that in considering the operator's history of previous violations I should take into account the assessed violations at all of the operator's mines, rather than those solely relating to Mine No. 6 (also known as Day Branch No. 10 Mine). Counsel stated she believed there was Commission precedent on this point and, at my request, indicated she would submit a letter setting forth the relevant case law (Tr. 105-106).

I did not receive further information from counsel, but I agree with her to the extent that I conclude, in this particular case, consideration of the previous history of all of the mines of Day Branch is warranted.

First, and since there is no evidence to the contrary, I accept counsel's assertion that although mining may have ceased under the name of Bob & Tom, the operator continued to mine the No. 6 Mine under the name of Day Branch (Tr. 5, 102). I further accept what appears to be the essence of the Secretary's contention, that Bobby Joe Hensley, President of Bob & Tom, is also significantly involved in the management of Day Branch and represents the operator both for Bob & Tom and Day Branch.

Consideration of the history of previous violations in civil penalty assessments is based upon a theory that attaches punitive consequences to noncompliance in an effort to encourage future compliance. In general, I believe that where more than one mine is governed by the same entity, and where that entity has management control and responsibility over the conditions of such mines, compliance is furthered by considering past assessed violations at all mines, rather than one. Of course, there may be times when limiting consideration of previous history to the specific mine in which the violations were cited better fosters compliance, but no reasons for invoking such an exception to the general rule are apparent in this record. Therefore, when I

consider the history of previous violations in this case, I will, as the Secretary requests, take account of violations cited and assessed at all Day Branch mines.

During the 24 months prior to the date of the first violation in this case, a total of 808 violations were assessed. This is a large history of previous violations. (I will analyze the previous violations of the particular standards here involved when I assess the individual civil penalties.)

Consideration of the operator's history of previous violations also requires that I examine one additional factor -- the operator's compliance history. Counsel stated, and the computer print out confirms, that while $396,953 has been assessed for violations occurring in the two years prior to the first violation in this case, $25,219 has been paid (Tr. 105, Exh. P-10). In response to my inquiry about the Secretary's collection efforts, Counsel further stated, "The Secretary at this time is talking to the Department of Justice about seeking collection action against Mr. Hensley" (Tr. 105).

There is nothing in the record to explain why the operator has ignored $371,734 in final civil penalty orders (i.e., penalties not litigated). I can only assume that its decision to play the scofflaw arises from that same contempt for the Mine Act and the Commission that lead to its failure to appear at the hearing. In any event, the operator has amassed an extreme number of delinquent civil penalties and a significantly large debt to the government. As set forth below, I conclude this warrants sizably higher penalties than would otherwise have been appropriate. See May Resources Incorporated, 16 FMSHRC 170 (January 1994) (ALJ Fauver).

SIZE OF BUSINESS OF THE OPERATOR

The Secretary's proposed assessment sheet, which is in the file and part of the record, indicates that the Secretary viewed the mine, as well as the controlling entity of which the mine is as part, as small in size (Proposed Assessment 2; Tr. 17-18). Other things being equal, assessed penalties would have been commensurate with this criterion. However, other things are not equal, especially the operator's significantly large history of previous violations and its exceedingly poor compliance history.

ABILITY TO CONTINUE IN BUSINESS

If an operator contends its ability to continue in business will be impaired by the size of any penalties assess, it bears the burden of proof. Here, the operator presented no proof with regard to this criterion. (Indeed, the operator presented no proof with regard to anything.) I conclude the penalties will not affect its continuation in business.

RAPID COMPLIANCE

In no instance did the operator exhibit unusual expedition in abating the violations, and in no instance, other than the failure to install deluge-type water sprays on the section belt drives, did the operator fail to comply in a timely fashion. Therefore, the penalties will be neither increased nor decreased because of this criterion, except for the violation of section 75.1101, where the operator's failure to timely abate will warrant an increase in the penalty that would otherwise have been assessed.

ASSESSMENT OF PENALTIES

CITATION NO.	DATE	30 C.F.R.§
4040112	8/25/93	75.400

The Secretary has proposed a penalty of $189. (The largest penalty previously assessed for a violation of section 75.400 was $2,500 (Exh. P-10).) Given the serious nature of the violation, the negligence of the operator, the operator's generally large history of previous violations, its significant number of prior violations of section 75.400 (66 in all) and, given its woeful compliance record, I conclude a penalty significantly higher than that proposed by the Secretary is warranted. Accordingly, I assess a civil penalty of $5,000.

CITATION NO.	DATE	30 C.F.R. §
4040113	8/25/93	75.1101

The Secretary has proposed a penalty of $851. (The largest penalty previously assessed for a violation of section 75.1101 is $569 (Exh. P-10).) Given the serious nature of the violation, which was augmented by the fact that the belt was running through accumulations of coal and coal dust, and by the fact that smoke and fumes from a fire would have traveled to the face, the negligence of the operator, the operator's large history of previous violations, the operator's compliance record and the operator's lack of effort to achieve timely compliance with the cited standard, I conclude a penalty significantly higher than that proposed by the Secretary is warranted. Accordingly, I assess a civil penalty of $5,500.

CITATION NO.	DATE	30 C.F.R. §
4040114	8/25/93	75.383(a)

The Secretary has proposed a penalty of $309. (There are no previously assessed violations of this standard.) Given the serious nature of the violation, which was augmented by the fact

that loose coal and coal dust and ignition sources were present on the section, the negligence of the operator and the operator's compliance record, I conclude a penalty significantly higher than that proposed by the Secretary is warranted. Accordingly, I assess a civil penalty of $3,500.

CITATION NO.	DATE	30 C.F.R. §
4040115	8/25/93	75.503

The Secretary has proposed a civil penalty of $189. (The largest penalty previously assessed for a violation of section 75.503 is $1,019 (Exh. P-10).) Given the serious nature of the violation, which was augmented by the presence of loose coal and coal dust on the section, the negligence of the operator, the fact that the operator's history of previous violations contains 40 assessed violations of section 75.503 and the operator's compliance record, I conclude a penalty significantly higher than that proposed by the Secretary is warranted. Accordingly, I assess a civil penalty of $4,000.

CITATION NO.	DATE	30 C.F.R. §
4040116	8/25/93	75.1719-1(e)(6)

The Secretary has proposed a civil penalty of $189. (The largest penalty previous assessed for a violation of section 75.1719-1 is $362.) Given the serious nature of the violation, the negligence of the operator and the operator's compliance record, I conclude a penalty significantly higher than that proposed by the Secretary is warranted. Accordingly, I assess a civil penalty of $4,000.

CITATION NO.	DATE	30 C.F.R. §
4040118	8/26/93	75.1713-7(a)(1)

The Secretary has proposed a civil penalty of $189. (There is one previous violation of section 75.1713-7 for which $20 is assessed (Exh. P-10).) Given the serious nature of the violation, the negligence of the operator and the operator's record of compliance, I conclude a penalty significantly higher than that proposed by the Secretary is warranted. Accordingly, I assess a civil penalty of $3,500.

CITATION NO.	DATE	30 C.F.R. §
4248441	8/26/93	75.364(a)(1)

The Secretary has proposed a civil penalty of $189. (There were no assessed previous violations of this standard (Exh. P-10.) Given the serious nature of this violation, the

negligence of the operator, which was particularly egregious in view of the section foreman's self-proclaimed lack of time to inspect the worked out areas, and given the operator's record of compliance, I conclude a penalty significantly higher than that proposed by the Secretary is warranted. Accordingly, I assess a civil penalty of $4,500.

CITATION NO.	DATE	30 C.F.R. §
4248555	7/27/93	75.400

The Secretary has proposed a penalty of $431. (The largest penalty previously assessed for a violation of section 75.400 is $2,500 (Exh. P-10).) The serious nature of the violation is mitigated, to some extent, by the lack of proof of a ready ignition source. Given the operator's negligence, the fact that the operator's relevant history of previous violations contains 66 assessed violations of section 75.400 and the operator's compliance record, I conclude a penalty significantly higher than that proposed by the Secretary is warranted. Accordingly, I assess a civil penalty of $4,000.

ORDER

Within 30 days of the date of this Decision, the operator shall pay civil penalties in the amount of $34,000. The Secretary shall modify Citation No. 4248555 by deleting the S&S designation.

David F. Barbour
Administration Law Judge

Distribution:

Mary Sue Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 37215-2862 (Certified Mail)

Bobby Joe Hensley, President, Bob & Tom Coal Company, Inc., P.O. Box 204, Cawood, KY 40815 (Certified Mail)

\lh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SEP 2 8 1994

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 94-520
Petitioner	:	A.C. No. 15-15455-03542
v.	:	
	:	Soladay Mine
CROCKETT COLLIERIES (KY) INC.,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT

Appearances: Joseph Luckett, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner;
Joshua E. Santana, Esq., Brown, Bucalos, Santana and Bratt, P.S.C., Lexington, Kentucky, for the 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). At hearings, Petitioner filed a motion to approve a settlement agreement and to dismiss the case. Vacation of Order No. 4245549, deletion of the "significant and substantial" findings from Order Nos. 3830240 and 4245405 and a reduction in penalty from $26,700 to $9,000 was proposed. I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is acceptable 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 $9,000 within 30 days of this order.

Gary Melick
Administrative Law Judge

1994

Distribution:

Joseph B. Luckett, Esq., Office of the Solicitor,
U.S. Department of Labor, 2002 Richard Jones Road,
Suite B-201, Nashville, TN 37215-2862 (Certified Mail)

Joshua E. Santana, Esq., Brown, Bucalos, Santana & Bratt,
P.S.C., 600 Lexington Building, 201 West Short St.,
Lexington, KY 40507 (Certified Mail)

/lh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SEP 2 8 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. SE 94-21-M
	:	A. C. No. 09-00265-05517
v.	:	
	:	Junction City Mine
BROWN BROTHERS SAND CO., Respondent	:	

DECISION

Appearances: Michael K. Hagan, Esq., Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia for Petitioner;
Mr. Steve Brown, Partner, Brown Brothers Sand Co., Howard, Georgia, *Pro Se*, for Respondent.

Before: Judge Hodgdon

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor against Brown Brothers Sand Company pursuant to Sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § § 815 and 820. The petition alleges nine violations of the Secretary's mandatory health and safety standards and seeks civil penalties in the amount of $597.00. For the reasons set forth below, I vacate one citation, affirm the rest, while increasing the degree of negligence on two of them, and assess penalties in the amount of $1,036.00.

A hearing was held in this case on May 26, 1994, in Butler, Georgia. Mine Safety and Health Administration (MSHA) inspectors Steve C. Manis and Harry L. Verdier testified for the petitioner. Messrs. Greg and Carl Brown testified on behalf of Brown Brothers. The parties were offered the opportunity to file briefs in this case; only the Secretary availed himself of the opportunity.[1] I have considered the Secretary's Brief in my disposition of this case.

---

[1] By letter dated September 9, 1994, Mr. Steve Brown stated, on behalf of the Respondent: "We do not know what you want in this brief. We stated everything that we wanted to during the hearing that you presided at. We do no have anything new to add. Therefore we stand on our testimony at time of hearing."

SUMMARY OF THE EVIDENCE

MSHA inspector Steve C. Manis conducted an inspection of Brown Brothers Sand Company on August 11, 1993. He was accompanied on the inspection by his supervisor, Harry L. Verdier.

Before going on the inspection, Inspector Manis had received a report from the MSHA Health and Safety Analysis Center that Brown Brothers had not filed its quarterly report, MSHA Form 7000-2, for the first quarter of 1993. Both he and Inspector Verdier had called "Denver" before August 11 to verify that the report had not been received. Therefore, when they arrived at the facility, Inspector Manis asked Greg Brown if a report had been filed and if the company had their copy of it. Mr. Brown indicated that he believed that one had been filed, but was unable to locate the company's copy of the form. As a result, Manis issued Citation No. 3604123 for a violation of Section 50.30(a) of the Secretary's Regulations, 30 C.F.R. § 50.30(a). (Pet. Ex. 3.) The violation was abated that afternoon when Mr. Brown filled out another MSHA Form 7000-2 and gave it to the inspector.

The inspectors next went to the shop where they found two compressed and liquid gas cylinders standing with hoses, regulators and torches attached to them. They were not chained to the wall or by the wall, and they were not in a stand. When this was discovered, Greg Brown placed them on their sides on the ground. Inspector Manis issued Citation No. 3604124 for a violation of Section 56.16005 of the Regulations, 30 C.F.R. § 56.16005. (Pet. Ex. 4.) The violation was abated later that day by placing the cylinders in a storage rack and chaining them.

On leaving the shop and walking through the plant, Inspector Manis observed that the cover for the electrical switch box for the tank conveyor belt was off and lying on the ground. He did not observe any repairs or testing being performed on the switch box or the conveyor belt, nor was he informed that such was the case. As a consequence, he issued Citation No. 3604125 alleging a violation of Section 56.12032, 30 C.F.R. § 56.12032. (Pet. Ex. 5.) The breach was abated when Greg Brown picked up the cover, knocked the sand out of it, and replaced it on the switch box.

The inspector believed that this situation was reasonably likely to result in a fatal injury to at least one person because "people do come in this area and they could contact the inner parts, electrical parts." (Tr. 32.) He stated there was "an electrocution hazard if a person did come into contact with the 480 volts." (Tr. 31.) Inspector Verdier added that "this particular box was mounted at about chest height on a piece of board directly in a line going from the shop to a tunnel." (Tr. 98.)

The inspection next proceeded to the concrete sand tunnel. Inspector Manis found that the conveyor belt, which was next to a walkway, did not have an emergency stop device and was not guarded by railings. The inspector considered this to be a violation of Section 56.14109, 30 C.F.R. § 56.14109, and issued Citation No. 3604126.[2] (Pet. Ex. 6.) Brown Brothers abated the violation by placing a wire rope along the walkway, the length of the conveyor belt.

Inspector Manis found the same deficiencies in the mortar sand tunnel. He issued Citation No. 3604127 for a violation of Section 56.14109.[3] (Pet. Ex. 7.) The violation was abated in the same manner as the previous one.

At the mortar sand belt conveyor, Inspector Manis discovered that the back section of the tail pulley guard had deteriorated or "rotted out" to the point that it no longer guarded the pulley. Consequently, the inspector issued Citation No. 3604128 for a violation of Section 56.14112(a)(1), 30 C.F.R. § 56.14112(a)(1). (Pet. Ex. 8.) The violation was abated by replacing the back section of the guard.

---

[2] The citation, as written by the inspector, charged a violation of Section 56.14109(a) and alleged that the violation was "significant and substantial." The citation was subsequently modified by the inspector to delete the "significant and substantial" designation. It was amended at hearing, without objection, to allege a violation of Section 56.14109. (Tr. 9-12.)

[3] This citation was also modified by the inspector and amended at hearing. See fn. 1, supra.

On the barge on the primary side of the pit, the inspector detected that the belts on the multi-V-belt drive for the sand pump were not guarded. The unguarded belts were at the foot of a stairway and to the left of the walkway. The belts were moving rapidly at the time he observed them. As a result, Inspector Manis issued Citation No. 3604129 for a violation of Section 56.14107(a), 30 C.F.R. § 56.14107(a). (Pet. Ex. 9.) The violation was later abated by placing a guard on the belts.

Inspector Manis considered that this violation was reasonably likely to result in a permanently disabling injury to at least one person. He came to this conclusion because:

> [f]rom time to time this is a wet area. From time to time because of the drive and lubrication there are slippery conditions from grease and oil there. A person could accidently, or he could back up into a belt or he could fall and accidently stick his arm. If he fell, his whole body could go into that drive.
>
> . . . .
>
> A fatal [*sic*] would occur there if he fell into it. But if he just . . . it's more like an arm or fingers could be dismembered there very easily.

(Tr. 55.)

The next citation was issued when the inspector was in the concrete sand tunnel. Near the middle of the tunnel he noticed that several light bulbs were out. He concluded that there was not sufficient illumination in the tunnel. Accordingly, he issued Citation No. 3604130 for a violation of Section 56.17001, 30 C.F.R. § 56.17001. (Pet. Ex. 10.) The citation was abated by replacing the light bulbs.

The final citation in this case was issued at the multi-V-belt drive. Inspector Manis determined that the front section of the belt drive motor had openings that were not guarded, exposing inside parts, armature, brushings and slip rings, to contact. He issued Citation No. 3604131 for a violation of Section 56.14107(a). (Pet. Ex. 11.) The violation was abated by placing a guard over the openings.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Citation No. 3604123

Section 50.30(a) requires that "[e]ach operator of a mine in which an individual worked during any day of a calendar quarter shall complete a MSHA Form 7000-2 . . . and submit the original to the MSHA Health and Safety Analysis Center . . . within 15 days after the end of each calendar quarter." It further requires that "[e]ach operator shall retain an operator's copy at the mine office nearest the mine for 5 years after the submission date."

It is undisputed that Brown Brothers MSHA Form 7000-2 for the first quarter of 1993 was not received by the MSHA Health and Safety Analysis Center within 15 days after the end of the calendar quarter. It is also undisputed that Greg Brown could not find the operator's copy of the report on the day of the inspection. Accordingly, I conclude that the Respondent did not file the form as required, and, thus, violated Section 50.30(a).[4]

Citation No. 3604124

Section 56.16005 requires that "[c]ompressed and liquid gas cylinders shall be secured in a safe manner." In this case, the evidence indicates that two cylinders were standing in the mine shop and not secured in any manner. No one was present in the shop at the time. While the inspectors believed that the cylinders were full, that is not necessary to establish a violation of this regulation. Laurel County Sand and Gravel, Inc., 15 FMSHRC 2380, 2383 (Judge Weisberger, November 1993); Tide Creek Rock Products, 4 FMSHRC 2241 (Judge Koutras, December 1982). Consequently, I conclude that it has been established that Brown Brothers violated the regulation as alleged.

---

[4] I give no weight to Greg Brown's testimony that he found the operator's copy during an inspection "a couple of month's" prior to the hearing because the "found" copy was not offered at the hearing and there is no way of knowing whether the copy found was one mailed in a timely manner or, for instance, the one prepared by Mr. Brown to abate the citation.

Citation No. 3604125

Section 56.12032 provides that "[i]nspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs." It is unchallenged that at the time of the inspection, the cover for the switch box for the tank belt conveyor was lying on the ground. There was no evidence of testing or repairs being performed on it, nor does the Respondent claim that such was the case. Therefore, I conclude that Brown Brothers violated Section 56.12032 of the Regulations.

Inspector Manis also concluded that this violation was "significant and substantial." A "significant and substantial" (S&S) violation is described in Section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." A violation is properly designated S&S "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." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum, the Secretary of Labor must prove: (1) the underlying violation of 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.

See also Austin Power, Inc. v. Secretary, 861 F.2d 99, 103-04 (5th Cir. 1988), aff'g, 9 FMSHRC 2015, 2021 (December 1987) (approving Mathies criteria).

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129 (August 1985), the Commission stated further as follows:

> We have explained further that the third element of the Mathies formula 'requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury.' U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

This evaluation is made in terms of "continued normal mining operations." U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. Texasgulf, Inc., 10 FMSHRC 498 (April 1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 1007 (December 1987).

As is frequently the case, the question of whether or not this citation is S&S turns on the third element of the Mathies test. I have already concluded that a violation occurred and there can be little doubt that by leaving the cover off of the switchbox there was a measure of danger to safety, in this instance the possibility of electrocution. Nor can there be any question that electrocution is reasonably likely to result in an injury of a reasonably serious nature. However, it is not as readily apparent that the hazard contributed to is reasonably likely to result in an injury.

The evidence indicates that the switchbox was located on a post which was in a direct line from the shop to a tunnel; a natural walkway between the two. The box was positioned about chest high on the post so that it would be easily accessible, intentionally or by accident, by anyone walking past. The leads coming into the box were always charged, and not completely insulated or shielded. Based on these facts, I conclude that there was a reasonable likelihood leaving the cover off of the switchbox would result in an injury, i.e. electrocution. Accordingly, I conclude that this violation was "significant and substantial."

Citation Nos. 3604126 and 3604127

Section 56.14109 provides that "[u]nguarded conveyors next to the travelways shall be equipped with" emergency stop devices or railings. It is uncontested that the unguarded belt conveyor next to the walkway in the concrete sand tunnel and the unguarded conveyor belt next to the walkway in the mortar sand tunnel had neither emergency stop devices nor railings. Hence, I conclude that these were violations of the regulation.

Citation No. 3604128

Section 56.14112(a)(1) states that: "(a) Guards shall be constructed and maintained to--(1) Withstand the vibration, shock, and wear to which they will be subjected during normal operation." It is undisputed that at the time of the inspection the back section of the tail pulley guard for the mortar sand belt conveyor was not in place. It apparently had been allowed to decay to such an extent that most of it either fell off or disintegrated. Clearly, it was not maintained sufficiently to keep it from wearing out. Thus, I conclude that this was a violation of the regulation.

Citation No. 3604129

Section 56.14107(a) requires that "[m]oving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury." Greg Brown admitted at the hearing that the multi-V-belt drive for the sand pump was not guarded at the time of the inspection. The belt was in operation at the time and was located at the foot of a stairway. Accordingly, I conclude that Brown Brothers violated this regulation.

Inspector Manis considered this violation to be "significant and substantial." Applying the Mathies criteria and taking into consideration that this was a large belt drive, located at the foot of a stairway and along an obvious walkway, in an area that could become slippery from water or lubrication, which operated at a high rate of speed, I agree with the inspector and conclude that the violation was "significant and substantial."

Citation No. 3604130

Section 56.17001 states that "[i]llumination sufficient to provide safe working conditions shall be provided in and on all structures, paths, walkways, stairways, switch panels, loading and dumping sites, and work areas." The regulation does not provide any insight as to how one determines whether the illumination is sufficient to provide safe working conditions. However, in a case concerning a predecessor of this regulation, 30 C.F.R. § 56.17-1, which was identically worded, the Commission said that "[r]esolution [of what constitutes sufficient illumination] requires a factual determination based on the working conditions in a cited area and the nature of the illumination provided." Capital Aggregates, Inc., 3 FMSHRC 1388 (June 1981).

Inspector Manis testified that "near the middle of the tunnel there were several light bulbs that were failing, that were either burned out or they were shorted, they were not burning" and that he did not believe that there was sufficient illumination in the tunnel. (Tr. 58.) He also testified that it was "[n]ot totally dark; no, sir. There were lights burning in different areas, but in just one area near the middle of the tunnel, there were several lights that were out, and I couldn't see that well myself passing through there," although he "could see the belt." (Tr. 91.) Inspector Verdier stated only "[i]n my opinion there was not sufficient illumination." (Tr. 103.) On the other hand, Greg Brown testified that, in his opinion, there was sufficient illumination "for me to work in it." (Tr. 131.)

There is not enough information to make a factual determination as to whether the illumination was sufficient or not. Consequently, I conclude that the Secretary has not sustained his burden of establishing a violation of this regulation and will vacate the citation.

Citation No. 3604131

This citation alleges another violation of Section 56.14107(a), the requirements of which are set out under Citation No. 3604129 above. It is undisputed that the multi-V-belt drive motor for the sand pump was not guarded. The Respondent knew that it was supposed to be guarded, and, if fact, had guarded it prior to moving it to a new location. Therefore, I find a violation of the regulation.

CIVIL PENALTY ASSESSMENTS

Section 110(i) of the Act, 30 U.S.C. § 820(i), sets out six criteria to be considered in determining an appropriate civil

penalty. It is the judge's independent responsibility to ascertain an appropriate penalty, based on these criteria, and he is not bound by the proposal of the Secretary. Sellersburg Stone Company v. Federal Mine Safety and Health Review Commission, 736 F.2d 1147, 1151-52 (7th Cir. 1984).

In connection with these criteria, the parties have stipulated that Brown Brothers is a small sand mine operator with nine to ten employees; that payment of the proposed civil penalty assessment will not adversely affect the Respondent's ability to continue in business; that Brown Brothers had received two prior citations during the period of February 11, 1989 through February 10, 1991; and that the citations in this proceeding were timely abated by the Respondent in good faith. (Tr. 4.)

In his brief, the Secretary has recommended that I impose a penalty of $250.00 for the violation in Citation No. 3604123 (failing to file MSHA Form 7000-2), rather than the $50.00 originally proposed by the Secretary, because Brown Brothers has received five prior citations for the same violation. While this may be a germane reason for increasing the penalty in some instances, it is not in this case.

Although Brown Brothers does indeed have five prior violations of Section 50.30(a), the most recent one, previous to this case, was on January 9, 1986. (Pet. Ex. 2.) There is no evidence in this case that Brown Brothers has reverted to its past practice of frequently failing to file the form or that this failure was anything other than an oversight. Accordingly, I concur with the inspector that this resulted from moderate negligence and assess a penalty of $50.00.

The Secretary has also recommended a penalty of $250.00 for the Respondent's failure to secure its compressed and liquid gas cylinders because Carl Brown testified at the hearing that the state in which the inspector found the cylinders was the way they used them. To back up his point, he submitted photographs of some cylinders, one of which clearly showed that the cylinders were unsecured. (Resp. Exs. 2 and 3.)

This argument is appealing, particularly in view of the fact that Brown Brothers' main defense is that they have been in business for 53 years and have never had an accident, therefore, they do not need government regulation. (Resp. Ex. 1.) However, I note that if Brown Brothers does always keep its cylinders unsecured, as indicated, they have been very lucky because they have never before been cited for this violation. (Pet. Ex. 2.) Consequently, I will concur with the Secretary's original assessment and order a penalty of $50.00 for this violation.

The Secretary suggests penalties of $250.00 each for the failure to have an emergency stop device or railings on the

conveyor belts in the sand tunnels. This proposal is based on the testimony of the inspector that he told Greg Brown on a previous inspection that such devices were required. Therefore, according to the Secretary, the failure to have installed them was at a minimum highly negligent. On the other hand, Greg Brown said that he had understood that installing an alarm which went off before the belt began moving took care of the problem.

There is nothing in the evidence to show that Mr. Brown deliberately misunderstood the inspector. Further, the fact that he did take some action, installing the alarm system, removes these violations from the high negligence category. Accordingly, I will impose a penalty of $50.00 for each of these violations.

The Secretary urges a penalty of $1110.00 for failing to guard the multi-V-belt drive on the barge because the drive had been guarded at its old location, the Respondent knew that it had to be guarded at its new location, and it had not been re-guarded because the Respondent thought that it was more important to meet customer demands. I agree with the Secretary's counsel that this indicates a greater degree of negligence than the moderate level assessed by the inspector.

However, I do not agree that this amounts to "reckless disregard" in view of the testimony that not only was the Respondent interested in providing sand for its customers, but it was also constantly having to change the pulleys and readjust the belts to get the pump operating properly in the new location. (Tr. 131, 149.) Therefore, I find the respondent to have been highly negligent, but not "reckless," in a situation that could reasonably have been expected to result in serious injury to an employee and assess a penalty of $500.00.

The Secretary requests a penalty of $500.00 for failing to guard the motor on the multi-V-belt drive on the grounds that the Respondent had guarded it in its old location and knew that it had to be guarded in its new location. The Secretary argues that this was the result of the Respondent's "reckless disregard." I do not concur. The evidence indicates that there was little likelihood of an injury occurring. Consequently, while I find that the Respondent was highly negligent in not guarding the motor, I do not find that the failure to immediately replace this guard amounted to "reckless disregard." I will assess a penalty of $150.00 for this violation.

The Secretary has not made any new recommendations with respect to Citation Nos. 3604125 and 3604128. Having considered the penalty criteria, I conclude that the $136.00 and $50.00 penalties, respectively, originally proposed by the Secretary are appropriate.

ORDER

Citation No. 3604130 is **VACATED** and **DISMISSED**. Citation Nos. 3604129 and 3604131 are **MODIFIED** by increasing the level of negligence from "moderate" to "high" and are **AFFIRMED** as modified. Citation Nos. 3604123, 3604124, 3604125, 3604126, 3604127 and 3604128 are **AFFIRMED**.

Brown Brothers Sand Company is **ORDERED** to pay, by single check or money order for the entire amount, civil penalties in the amount of $1,036.00 for these violations within 30 days of the date of this decision.[5] On receipt of payment as ordered, these proceedings are dismissed.

T. Todd Hodgdon
Administrative Law Judge

Distribution:

Michael K. Hagan, Esq., Office of the Solicitor, U.S. Department of Labor, 1371 Peachtree St., N.E., Room 339, Atlanta, GA 30367 (Certified Mail)

Mr. Steve Brown, Partner, Brown Brothers Sand Company, Highway 90, Box 82, Howard, GA 31039 (Certified Mail)

/lbk

---

[5] It appears that in a previous case heard by me [Brown Brothers Sand Company, 16 FMSHRC 452 (February 1994)], the Respondent paid the assessed penalty in loose coins. (Tr. 13-15.) If, by such actions, Brown Brothers intended to demonstrate its contempt for the Commission, as suggested by the Secretary, it is advised that continued gestures of this nature may well reflect adversely on any consideration of its good faith in future appearances before the Commission.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SEP 2 8 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. WEST 94-97-M
	:	A.C. No. 24-01958-05502
v.	:	
	:	Docket No. WEST 94-40-M
	:	A.C. No. 24-01958-05501
THE PIT, Respondent	:	

DECISION

Appearances: Kristi Floyd, Esq., Office of the Solicitor, U. S. Department of Labor, Denver, Colorado, for Petitioner;
Alfred J. Luciano, Eureka, Montana, Pro Se, for Respondent.

Overview

These cases arise out of two inspections by MSHA Representative Ronald Goldade, of a sand and gravel pit located on a ranch near Eureka, Montana, operated by Alfred Luciano and his family (Tr. 8, 197, 223-24). The first inspection occurred in September 1992 and the second in September 1993. At neither inspection did Inspector Goldade observe the production of sand and gravel or the production of crushed rock (Tr. 22-23, 31-32, 48, 62). However, based on his observations, Goldade issued Respondent six citations in 1992 and eight in 1993, most of which allege a failure to guard moving machine parts.

Respondent does not dispute the factual allegations contained in the citations (Jt. Exh. 1, Stipulation # 5). Its primary contention is that it was not subject to the Mine Act at the time of either inspection because it was engaged in setting up and adjusting its equipment rather than production (Tr. 9-10).

The company also contends that the 1993 citations were issued to the wrong business entity. In 1992 the site was operated by "The Pit", a business owned by Alfred Luciano's son, Dan, (Tr. 140-42, Exh. G-21). By 1993, Respondent contends the site was operated by the JFL trust, which was set up by

Alfred Luciano for his wife and children (Tr. 223). Dan Luciano had sold his equipment to the trust and worked for it at the time of the 1993 inspection (Tr. 142-43). [1]

Respondent also argues that, because it was not producing, it was not engaged in or affecting interstate commerce. However, since it was preparing for activities that clearly would affect commerce, I conclude that Respondent was subject to the commerce clause at the time of the inspections, See, e.g., Cyprus Industrial Minerals Co. v. FMSHRC, 664 F. 2d 1116 (9th Cir. 1981) [drilling of exploratory shaft in search of commercially exploitable deposits is subject to Act]; Godwin v. OSHRC, 540 F.2d 1013, 1015, (9th Cir. 1976).

Another factor leading me to the conclusion that Respondent's operations were subject to the commerce clause is the use of equipment and supplies by Respondent which originated outside the state of Montana (E.g. Jt. Exh-1, stipulation # 2). Moreover, Respondent advertised its product on a public highway only a few miles south of the Canadian border (Tr. 15, 33-35).

I also reject Respondent's primary contention that it was not subject to the Mine Act because it had not started production at the time of either inspection. Section 3(h)(1) of the Federal Mine Safety and Health Act, 30 U.S.C. § 802(h)(1), defines a "coal or other mine" as:

> (A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, **equipment, machines, tools, or other property**...on the surface or underground, used in, **or to be used in,** or resulting from the work of extracting such minerals from their natural deposits in nonliquid form...or used in, **or to be used in,** the milling of such minerals...(emphasis added).

The plain language of the Act, therefore, makes it clear that equipment that is located at a site where mining will take place, and will be used in the extraction of minerals, or the milling of minerals, is subject to MSHA jurisdiction--even if mining has not commenced. Cyprus Industrial Minerals, supra., S H M Coal Company, 11 FMSHRC 1154, 1173-74 (ALJ, June 1989). Moreover, semantics aside, it logically follows from the general

---

[1] Additional equipment, most notably a Cedar Rapids brand crusher, had been brought to the site by the trust in the period between the two inspections (Tr. 33-34).

scheme of Federal regulation of occupational safety and health, that the installation and adjustment of equipment at a mine site is subject to the Act prior to the commencement of production.

The Federal government regulates job safety and health primarily under two statutes, the Occupational Safety and Health Act for non-mining industries and the Mine Safety and Health Act for mining. The essential purpose of these statutes is to prevent occupational injuries and illnesses at all stages of economic activity, rather than simply those at which goods are actually produced, or services rendered. These statutes are intended to protect employees from injury whether they are setting up equipment or engaged in production.

Thus, I conclude that Congress intended that employees be protected so far as is possible, either by OSHA or MSHA in pre-production activities which may pose occupational hazards. Furthermore, the Mine Act clearly establishes MSHA jurisdiction over employees who are setting up equipment at a worksite at which mining is to take place in the future.

The last sentence of section 3(h) of the Mine Act provides:

> In making a determination of what constitutes mineral milling for purposes of this Act, the Secretary [of Labor] shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary [of Labor] of all authority with respect to the health and safety of miners employed at one physical establishment.

Thus, Congress did not intend that the working conditions of employees at a worksite be subject to OSHA during one phase of economic activity, and subject to MSHA at another. Even more importantly, it did not intend that employees or miners be unprotected from hazards during pre-production activities.

The Citations in both inspections were properly issued to "The Pit".

Prior to the September 1992 inspection, a legal identity report was filed with MSHA designating "The Pit" as the name of the operator of the sand and gravel mine on the Luciano ranch (Tr. 18-19, Exh. G-2). When Inspector Goldade returned to the mine in September 1993, no changes to the legal identity form had been filed with MSHA (Tr. 29-30). Goldade informed Alfred Luciano on September 2, 1993, that the legal identity form had to be updated if ownership of the mine had changed (Tr. 65). Mr. Luciano either told Goldade that he did not wish to update the ID form, or that the citations should be issued to "The Pit" in order not to confuse matters (Tr. 65-66).

MSHA's regulations at 30 C.F.R § 41.12 require an operator to notify the agency of any changes in the information contained in the legal identity form within 30 days. Given the fact that Respondent did not comply with the regulation and that Mr. Luciano represents that he told Inspector Goldade that the 1993 citations should be issued to "The Pit", I conclude that Respondent is estopped (legally precluded) from claiming that these citations were issued to the wrong entity.

The individual citations

The parties signed and introduced stipulations, which included the following paragraph, number 5:

> ...the citations are admitted into evidence for the truthfulness and relevancy of the facts and designations contained therein. The sole issue remaining with regard to the citations is whether or not the plant was in operation at or about the time of the inspections. This issue alone will determine whether the alleged violations occurred (Jt. Exh-1).

While the question of whether the plant was in operation has no relevance to the non-machine guarding citations, it is relevant to the 10 citations issued alleging a violation of 30 C.F.R § 56.14107(a). The standard provides that:

> Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury.

A related regulation at 30 C.F.R § 56.14112(b) states that:

> Guards shall be securely in place while machinery is being operated, except when testing or making adjustments which cannot be performed without removal of the guard.

During presentation of its case, Respondent elicited considerable evidence questioning whether it would have been able to guard the cited moving machine parts during the set-up, testing, and adjustment of its equipment. Contract Electrician John Dunster testified that it was, at times, impossible to take his strobe light readings with guards in place (Tr. 100). Contract Welder Carl Hammond testified that, to adjust Respondent's conveyor belts, the guards for those belts had to be removed in places (Tr. 125-26, 129-30).

On the other hand, Inspector Goldade, who had experience setting up similar equipment as a contract welder in the 1980s

contends that it can be set-up, adjusted and aligned with the guards in place (Tr. 93-94). Although the burden of proving that compliance with an MSHA regulation is impossible is on the operator, Climax Molybdenum Co., 2 FMSHRC 1884, 1886 (ALJ July 1980), the standard, in this instance, recognizes that guards cannot be kept in place in certain circumstances.

Given the fact that the testimony of Respondent's witnesses is more specific regarding the facts in this case regarding the feasibility of guarding the company's equipment, I credit those witnesses. Welder Carl Hammond testified that some areas could be guarded prior to the inspection and others could not (Tr. 125-30). Since Inspector Goldade's testimony that set-up and adjustment can be done with guards in place is not tied to the specific circumstances of the citations, I find that the preponderance of the evidence is that these areas could not have been guarded at the time of the inspections. The fact that Respondent did guard the cited areas after the inspection does not necessarily indicate that the company could have performed the set-up and adjustment work of September 1, 1993, or the testing of September 17, 1992, with guards in place. [2]

The preponderance of the evidence also supports Respondent's contention that its equipment was not run for purposes other than testing or making adjustments at the time of and prior to the inspections (Tr. 121, 153, 164-68). As the evidence thus fails to establish that guarding could have been maintained on these occasions, I vacate citations 4122660, 4122661, 4122662, 4122663, 4122664, 4331764, 4331765, 4331766, 4331767 and 4331768.

The issue of whether Respondent's plant was operating has no bearing on the validity of the remaining 4 citations. Thus, pursuant to the stipulation of the parties, these citations are affirmed.

Assessment of Civil Penalties

Section 110(i) of the Act provides that the Commission shall assess civil monetary penalties after giving consideration to the operator's history of previous violations, the size of the operator's business, the negligence of the operator, the gravity of the violations, the good faith of the operator in achieving rapid compliance after notification of the violation, and the

---

[2] For example, MSHA verified that guards had been installed on September 22, 1993, when conditions may have been very different than on September 1, 1993, see, e.g., Citation page 4331764-1, block 12.

effect of the penalty on the operator's ability to stay in business. The parties' stipulation addresses three of these factors.

The proposed penalties of $917 for the 14 violations will not affect Respondent's ability to stay in business (Jt. Exh.-1, paragraph # 7). Respondent demonstrated good faith in abating the violations (Jt. Exh.-1, paragraph 8), and is a small operator (paragraph 9).

Exhibit G-1 shows no citations issued to Respondent other than those at issue in these proceedings. Thus, the most critical factors to assess are the negligence of the operator and the gravity of the violations.

I assess a $25 penalty for citation 4122665, which alleges a violation of 30 C.F.R § 56.4101 in that the area of the mine site where diesel fuel and gasoline was stored, was not posted with an appropriate warning sign of no smoking and open flame on September 17, 1992. As there is no evidence as to smoking or open flames in this area, I view the gravity of the violation fairly low. There is no evidence in the record regarding negligence.

A $60 penalty is assessed for citation 4331760, which alleges a violation of 30 C.F.R § 56.9300(a) on September 1, 1993, in that no berm or guardrail was provided on the outside edge of an elevated ramp used by a front-end loader (Exh. G-2). The gravity of injuries that are likely to result, if such a violation produced an injury, warrants this amount. The record establishes that the cited ramp was used by a front-end loader in the construction of Respondent's equipment (Tr. 132-33).

A $100 penalty is assessed for citation 4331763. That citation alleged a violation of 30 C.F.R § 56.12025, in that a ground circuit was not provided for a 220-volt switch box. The record establishes that at least a temporary ground could have been maintained (Tr. 100-102). Therefore, Respondent's negligence warrants a civil penalty of this magnitude. Finally, I assess a $25 penalty for Respondent's failure to comply with section 56.18002(b) [no workplace examination by a competent person] as specified in citation 4331770.

ORDER

The citations herein are affirmed and Respondent [3] is ORDERED to pay the $210 in total penalties within 30 days of this decision.

Arthur J. Amchan
Administrative Law Judge
703-756-6210

Distribution:

Kristi Floyd, Esq., Office of the Solicitor, U. S. Department of Labor, 1999 Broadway, Suite # 1600, Denver, CO 80202-5716 (Certified Mail)

Ms. Faye Williams, Office Manager; Alfred J. Luciano, Trustee; JFLI TRUST dba The Pit, P. O. Box 1050, Eureka, MT 59917 (Certified Mail)

/jf

[3] Regardless, of whether "The Pit" still exists as a business entity, I expect that these penalties be paid, either by the JFL Trust, or by Alfred or Dan Luciano in some other capacity.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SEP 2 9 1994

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 94-427
Petitioner	:	A.C. No. 15-17071-03531
v.	:	
	:	Docket No. KENT 94-446
MAGIC COAL COMPANY,	:	A.C. No. 15-17071-03532
Respondent	:	
	:	Docket No. KENT 94-447
	:	A.C. No. 15-17071-03533
	:	
	:	Magic Mine

DECISIONS

Appearances: Brian W. Dougherty, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner;
William D. Donan, Esq., William R. Thomas, Esq., Madisonville, Kentucky, for the Respondent.

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern civil penalty proposals filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(c), seeking civil penalty assessments for eight (8), alleged violations of certain mandatory safety standards found in Parts 48, and 75, Title 30, Code of Federal Regulations. Hearings were held in Evansville, Indiana, and the parties appeared and participated fully therein. The parties informed me that they proposed to settle these matters, and their arguments in support of their proposals were made on the record.

Issues

The issues presented in these proceedings include the fact of violation, whether some of the violations were "significant and substantial", and the appropriate civil penalty assessments to be made for the violations. 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; 30 U.S.C. § 301 et seq.

2. Sections 110(a) and 110(i) of the Act.

3. Commission Rules, 29 C.F.R. § 2700.1 et seq.

Stipulations

The parties stipulated to the following (Tr. 5-8; Joint Exhibit 1):

1. Magic Coal Company is subject to the Mine Act.

2. Magic Coal Company and its Magic Mine have an affect upon interstate commerce within the meaning of the Mine Act.

3. Magic Coal Company and its Magic Mine are subject to the jurisdiction of the Commission, and the presiding judge has the authority to hear and decide these cases.

4. Reasonable penalty assessments in these cases will not affect the respondent's ability to remain in business.

The parties further stipulated to the admissibility of an MSHA computer printout reflecting the respondent's prior history of violations for the 24 months period prior to the issuance of the citations in these proceedings (Tr. 7-8; Exhibit G-1). After the review of the information presented, I conclude and find that the respondent's prior compliance record does to warrant any additional penalty increases in these proceedings.

The parties also agreed that the respondent is a small mine operator, and the petitioner's pleadings reflect an annual coal production of 76,032 tons (Tr. 10-11).

Upon review of all of the citations and the order issued in these cases, I conclude and find that the respondent demonstrated rapid good faith compliance in abating all of the cited conditions or practices in these proceedings.

KENT 94-427

Section 104(a) "S&S" citation No. 3859223, issued on November 29, 1993, cites an alleged violation of 30 C.F.R. § 75.503, and the cited condition or practice states as follows:

The 484 S&S scoop being used in the 4th South panel return air course was found to have an opening in excess of .004 inches in the main breaker (electrical) panel.

Section 104(a) non-"S&S" Citation No. 3859224, issued on November 30, 1993, cites an alleged violation of 30 C.F.R. § 75.1101-23(c), and the cited condition or practice states as follows:

A violation exists in that practice fire drills have not been conducted as required. According to the record book kept at the mine, drills were last conducted 8-30-93 making it 92 days from today's date of 11-30-93. Drills are required at least once every 90 days.

Section 104(a) non-"S&S" Citation No. 3859226, issued on November 30, 1993, cites an alleged violation of 30 C.F.R. § 75.807, and the cited condition or practice states as follows:

The 7200 high voltage cable provided to the power center which supplies power to the continuous miner on the #1 unit (MMU #001-0) was not guarded where men are required to pass under it so as to connect couplers from trailing cables which are connected to a second power center on the #1 unit.

Petitioner's counsel presented arguments on the record in support of the proposed settlement of these citations. He stated that the respondent has agreed to pay the full amount of the proposed penalty assessments, and the respondent's counsel confirmed that this was the case and agreed to the proposed settlement of the violations.

KENT 94-446

Section 104(a) non-"S&S" citation No. 3859237, issued on December 21, 1993, cites an alleged violation of 30 C.F.R. § 75.1702, and the cited condition or practice states as follows:

The approved smoking program is not being followed in that a record of the search is not recorded for the 2nd shift in the record book being kept at the mine. The approved plan page 1 item 4 requires the record of the smokers search be kept. The last recorded date for this crew is 12-13-93.

Section 104(a) "S&S" Citation No. 3859238, issued on December 21, 1993, cites an alleged violation of 30 C.F.R. § 75.606, and the cited condition or practice states as follows:

A violation was observed on the #1 unit in that the trailing cable of the Joy 21SC shuttle car S/N ET 12600, was not adequately protected to prevent damage by mobile equipment. The cable showed evidence of having been driven over. Tire tracks were observed over the cable and the trailing cable was recessed into the mine floor. This portion of the cable was located in the crosscut between the #4 and #5 return room, one crosscut inby the tailpiece.

Section 104(a) "S&S" Citation No. 3859239, issued on December 22, 1993, cites an alleged violation of 30 C.F.R. § 75.370(a)(1), and the cited condition or practice states as follows:

The velocity of air along the 4th South panel conveyor belt at spad #550 was found to be moving at a rate of 30 feet per minute when measured using mechanical smoke. The approved plan requires no less than 50 ft. per/min. A low-level carbon monoxide detection system is utilized as an early warning fire detection system along the belt line system for this mine.

Section 104(a) "S&S" citation No. 3859240, issued on December 22, 1993, cites an alleged violation of 30 C.F.R. § 75.370(a)(1), and the cited condition or practice states as follows:

When mechanical smoke was released no perceptible air movement was found along the 2nd West belt conveyor between the #46 crosscut and #47 crosscut, approx. 150 ft, inby the 2nd West head drive. The approved ventilation plan requires the air to move in an inby direction at a velocity of no less than 50 ft. per. min., or no greater than 300 ft. per. min., and have a definite and distinct movement.

Petitioner's counsel presented arguments on the record in support of the proposed settlement of these citations. He stated that the respondent has agreed to pay the full amount of the proposed penalty assessments, and the respondent's counsel confirmed that this was the case and agreed to the proposed settlement of the violations.

KENT 94-447

This case concerns a proposed civil penalty assessment of $2,600, for an alleged violation of mandatory training standard 30 C.F.R. § 48.8(a), as stated in withdrawal Order No. 3856665, issued by MSHA Inspector Robert H. Gary on October 18, 1993, pursuant to section 104(g)(1) of the Act. The order states as follows:

The following underground miners employed at the Magic Mine have not received the requisite safety training as stipulated in Section 115 of the Act:

1) Sam Atkins, Last received 9-11-92.

2) R.C. Coakley. 8-6-92.

3) Steve Parks. 1-28-92.

4) Willoughby C. Pryor. 9-11-92.

5) Hubert Hunt. 1-28-92.

6) Tony Lowe. 8-6-92.

7) Lowman Barnes. 1-28-92.

8) Donald Daniels. 1-10-92.

These miners have not received annual refresher training at any time during the last calendar month of the miner's annual refresher training cycle. In the absence of such training these miners are declared to be a hazard to themselves and others and are to be withdrawn immediately and/or not allowed to enter the mine until they have received the required training.

The order was terminated on October 25, 1993, after the cited miners received the requisite training, and the required MSHA Forms 5000-23, were issued and reviewed by the inspector.

Petitioner's counsel stated that the parties agreed to settle this matter, and that the respondent has agreed to pay a penalty assessment of $1,700. MSHA has agreed to modify the order from "S&S" to non-"S&S". In support of this proposal, MSHA's counsel stated that the cited miners were all experienced miners and that the evidence he developed in preparation for the trial would not support a finding of a reasonable likelihood of an injury.

The respondent's representative and mine owner, William Donan, confirmed that all of the cited miners were experienced miners who had received training under an approved State training plan, and were scheduled for retraining under that plan by the Kentucky State Bureau of Mines on the day the order was issued. Mr. Donan further stated that he was advised by the state mine inspectors that he was in compliance with state law regarding miner training and retraining.

After careful review of all of the pleadings and arguments presented by the parties in these proceedings, including the six

statutory penalty assessment criteria found in section 110(i) of the Act, I rendered bench decisions approving the settlement dispositions pursuant to Commission Rule 31, 29 C.F.R. § 2700.31. My bench decisions are herein reaffirmed, and I conclude and find that they are reasonable and in the public interest.

ORDER

In view of the foregoing, IT IS ORDERED that the following section 104(a) citations ARE AFFIRMED as issued, and the respondent IS ORDERED to pay the proposed penalty assessments in settlement and satisfaction of the violations.

Docket No. KENT 94-427

Citation No.	Date	30 C.F.R. Section	Assessment
3859223	11/29/93	75.503	$111
3859224	11/30/93	75.1101-23(c)	$50
3859226	11/30/93	75.807	$50

Docket No. KENT 94-446

Citation No.	Date	30 C.F.R. Section	Assessment
3859237	12/21/93	75.1702	$50
3859238	12/21/93	75.606	$50
3859239	12/22/93	75.370(a)(1)	$189
3859240	12/22/93	75.370(a)(1)	$189

Docket No. KENT 94-447

Order No.	Date	30 C.F.R. Section	Assessment
3856665	10/18/93	48.8(a)	$1,700

IT IS FURTHER ORDERED that section 104(g)(1) "S&S" Order No. 3856665, IS MODIFIED to a section 104(g)(1) non-"S&S" order, and as modified IT IS AFFIRMED.

The respondent shall pay the aforementioned civil penalty assessments to the petitioner (MSHA) within thirty (30) days of the date of these decisions and Order, and upon receipt by MSHA, these proceedings are dismissed.

George A. Koutras
Administrative Law Judge

Distribution:

Brian W. Dougherty, Esq., Office of the Solicitor,
U.S. Department of Labor, 2002 Richard Jones Road, Suite B-201,
Nashville, TN 37215-2862 (Certified Mail)

Mr. William D. Donan, Esq., Magic Coal Company, P.O. Box 1352,
Madisonville, KY 42431 (Certified Mail)

William R. Thomas, Esq., 33 East Broadway, Madisonville,
KY 42431 (Certified Mail)

/ml

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 30, 1994

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Petitioner	: : : :	CIVIL PENALTY PROCEEDING Docket No. WEST 92-318-M A. C. No. 45-00087-05531
v.	:	
	:	Sunset Quarry
EASTSIDE ROCK PRODUCTS, Respondent	: :	

ORDER OF DEFAULT

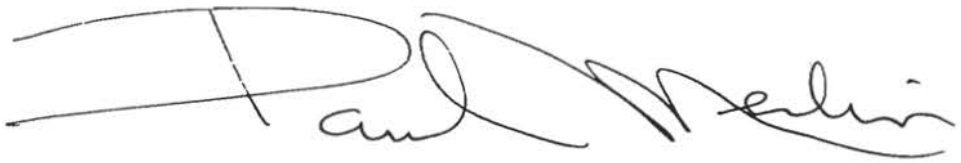
Before: Judge Merlin

This case is before me pursuant to Order of the Commission dated February 23, 1994.

On March 8, 1994, I issued an order vacating the order of dismissal previously entered and reinstating this case. Upon a motion from the Secretary I determined that this matter had been dismissed in error because the penalty assessment did not involve excessive history.

The March 8 order also directed the operator to file an answer to the penalty petition a copy of which was enclosed with the order. The operator had not submitted an answer at the time of the erroneous dismissal. The file contains the return receipt showing that the operator received the March 8 order on March 11, 1994. On June 3, 1994, a show cause order was issued directing the operator to file an answer. The operator was advised that failure to file an answer will result in the operator being placed in default. To date no answer has been received.

In light of the foregoing, it is **ORDERED** that the operator be held in **DEFAULT** and the operator is **ORDERED TO PAY** $406 immediately.



Paul Merlin
Chief Administrative Law Judge

Distribution: (Certified Mail)

Robert A. Friel, Associate Regional Solicitor, Rochelle Kleinberg, Esq., Office of the Solicitor, U. S. Department of Labor, 1111 Third Avenue, Suite 945, Seattle, WA 98101

Mr. Richard Schroeder, Owner, Eastside Rock Products, P. O. Box 1324, Issaquah, WA 98027

/gl

2024

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 31, 1994

IN RE: CONTEST OF RESPIRABLE DUST SAMPLE ALTERATION CITATIONS	:	Master Docket No. 91-1
KEYSTONE COAL MINING CORPORATION, Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket Nos. PENN 91-451-R through PENN 91-503-R
	:	Docket Nos. PENN 91-1176-R through PENN 91-1197-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. PENN 91-1264
v.	:	Docket No. PENN 91-1265
KEYSTONE COAL MINING CORPORATION,	:	Docket No. PENN 91-1266
and	:	Docket No. PENN 92-182
UNITED MINE WORKERS OF AMERICA, Respondents	:	Docket No. PENN 92-183

ORDER OF STAY

There is now before me the Secretary's motion to stay those cases in Master Docket No. 91-1 which are not presently on appeal to the Commission. The stay is requested until the Commission renders a decision in the specific dockets captioned above which are pending before it. The cases before the Commission and those in the master docket involve allegations by the Secretary that the operators intentionally tampered with respirable dust cassettes. The operators have filed briefs, some of which oppose a stay and some of which do not.

Upon consideration of the motions and briefs filed by the parties, I determine that in the interests of judicial economy the cases in the master docket not on appeal should be stayed. I am of the view that a decision by the Commission in the cases on appeal, particularly on the common issues, may well affect how the remaining cases are perceived and the manner in which they proceed.

Accordingly, it is **ORDERED** that the cases in Master Docket No. 91-1 be **STAYED** pending decision by the Commission in In Re: Contest of Respirable Dust Sample Alteration Citations, Master Docket No. 91-1 and Keystone Coal Mining Corp., Docket Nos. PENN 91-451-R, et al.

Paul Merlin
Chief Administrative Law Judge

Distribution: (Certified Mail)

Jerold S. Feingold, Esq., Stephen D. Turow, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Blvd., 4th Floor, Arlington, VA 22203

R. Henry Moore, Esq., Buchanan Ingersoll, USX Tower, 57th Floor, 600 Grant Tower, Pittsburgh, PA 15219

Barry A. Woodbrey, Jr., Esq., United Mine Workers of America, 900 15th St., N.W., Washington, D.C. 20005

Laura E. Beverage, Esq., Jackson & Kelly, 1660 Lincoln Street, Denver, Colorado 80264

Timothy M. Biddle, Esq., Crowell & Moring, 1001 Pennsylvania Ave., N.W., Washington, D.C. 20004

Michael T. Heenan, Esq., Smith, Heenan & Althen, 1110 Vermont Avenue, N.W., Washington, D.C. 20005

John Palmer, Esq., Robinson & McElwee, P.O. Box 1791, Charleston, WV 25326

H. Thomas Wells, Esq., Maynard, Cooper & Gale, 1901 6th Avenue, N.W., Suite 2400 AmSouth/Harbert Plaza, Birmingham, AL 35203

Robert B. Allen, Esq., John J. Polak, Esq., King, Betts and Allen, P.O. Box 3394, Charleston, WV 25333

Jack Alsop, Esq., 109 South Main Street, Webster Springs, WV 26288

Karl F. Anuta, Esq., Western Fuels-Utah, Inc., P.O. Box 1001, 1720 14th Street, Boulder, CO 80306

See Attached List