November 1981

Commission Decisions

Administrative Law Judge Decisions

Commission Decisions

OCTOBER

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

Secretary of Labor, MSHA v. Mathies Coal Company, PENN 80-260-R, 81-35; (Judge Merlin, August 26, 1981).

United Mine Workers of America v. Secretary of Labor, MSHA, CENT 81-223-R; (Judge Broderick, Dismissal on August 28, 1981)

Secretary of Labor, MSHA v. Alexander Brothers, Inc., HOPE 79-221-P; (Judge Stewart, September 3, 1981).

Secretary of Labor, MSHA v. Puerto Rican Cement Company, SE 81-25-M; (Judge Merlin, September 11, 1981).

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

Glen Munsey v. Smitty Baker Coal Company, NORT 71-96, IBMA 72-21; (Judge Stewart, September 3, 1981).

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 14, 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. HOPE 76-275-P IBMA 77-21
V and R COAL COMPANY	:	

DECISION

This penalty proceeding arose under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §801 et seq. (1976)(amended 1977) ["the 1969 Coal Act"]. The Mining Enforcement and Safety Administration's appeal was pending before the Interior Department Board of Mine Operations Appeals on March 8, 1978. Accordingly, it is before us for decision. 30 U.S.C. §961 (Supp. III 1979). The issue is whether the judge properly vacated a notice of violation alleging a failure to comply with 30 C.F.R. §70.246. 1/ We affirm the judge.

The Secretary's petition for penalty assessment, alleging several violations including a violation of §70.246, was served upon V and R Coal Company. V and R failed to answer and a default was entered. The judge then ordered MESA to show cause why the alleged violation of §70.246 should not be dismissed on the ground that MESA had failed to prove the availability of an approved sampling device of the required capability. The judge cited the holding of the Board in Eastern Associated Coal Corp., 7 IBMA 14 (Sept. 30, 1976), aff'd on reconsideration, 7 IBMA 133 (Dec. 20, 1976), as requiring such proof. 2/ After MESA responded that the violation was for failure to sample and that the Eastern decision did not relieve an operator of that duty, the judge rejected this argument and vacated the notice of violation.

1/ 30 C.F.R. §70.246 provides:

> During one production shift in every sampling cycle with respect to a working section, an approved sampling device shall be placed in the intake air course of that working section and a sample will be taken within 200 feet out by the working faces of such section.

2/ In the Eastern decision the Board held that the MRE instrument and the respirable dust sampling devices approved by the Secretary yielded results based upon dust particulates whose size exceeded that which the 1969 Coal Act, in section 318(k), defined as respirable.

We have thoroughly examined the record and find no error in the judge's decision. 3/ Accordingly, the decision of the judge is affirmed.

Richard V. Backley, Chairman

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

3/ We note that the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq. (Supp. III 1979), removed the statutory basis for the Board's Eastern decision by amending the statutory definition of "respirable dust." See Alabama By-Products Corp., 2 FMSHRC 2760 (1980). We note also that V & R Coal Company apparently is no longer in existence and has no assets. See V & R Coal Co., 3 FMSHRC 2019 (WEVA 81-188, etc., August 28, 1981)(ALJ decision). Therefore, no purpose would be served by further proceedings in this case.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 16, 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. YORK 80-140
v.	:	
METTIKI COAL CORPORATION	:	

DECISION

This case is before the Commission on grant of the Secretary of Labor's petition for interlocutory review. Oral argument was held on September 23, 1981. The relevant procedural history is set forth below.

This controversy arose when the Secretary filed a petition for assessment of civil penalties totalling $10,000 for seven alleged violations of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq. Mettiki Coal Corporation contested the proposed penalties and the case was assigned to an administrative law judge of the Commission. The parties subsequently agreed to a settlement of the case that included a reduction of the total penalty to $7,900. The judge denied the motion for approval of settlement.

Thereafter, the Secretary filed a motion to withdraw the petition for penalty assessment and to dismiss the case. The basis for the Secretary's motion was that Mettiki had advised the Secretary that it desired to withdraw its notice of contest and had tendered full payment of the $10,000 penalty originally proposed. The judge construed the Secretary's motion as one for approval of a settlement and denied the motion.

We hold that the judge erred in treating the Secretary's motion as a motion for approval of settlement. The Secretary sought withdrawal of his petition for penalty assessment and dismissal of the case. The fact that the motion was based upon acceptance by the operator of the amount proposed by the Secretary in full does not alter the pleading nor the Rule applicable thereto (29 CFR 2700.11). The posture and circumstances of this case dictate a finding that the judge abused his discretion in denying the motion to dismiss filed by the Secretary. We arrive at this conclusion on the basis of the record which indicates that full payment of the $10,000 penalty sought by the Secretary is a satisfactory and appropriate resolution of this controversy. This is not to say, however, that the Commission or its judges may not deny a party's motion to withdraw a pleading where the record discloses that resolution of the matter pending would best be served by the Commission's settlement procedures or by an evidentiary hearing. This situation is not presented in this case.

Accordingly, the Secretary's motion is granted and the case is dismissed.

Richard V. Backley, Chairman

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 16, 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEVA 79-123-R
MABEN ENERGY CORPORATION	:	

DECISION

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq. (Supp. III 1979). The administrative law judge vacated a citation issued to the Maben Energy Corporation (Maben) for failure to conduct an inspection of a dam. 1 FMSHRC 1942 (1979). For the reasons that follow, we reverse.

Maben was cited for a violation of 30 C.F.R. §77.216-3(a) which states:

> All water, sediment, or slurry impoundments which meet the requirements of §77.216(a) shall be examined by a qualified person designated by the person owning, operating or controlling the impounding structure at intervals not exceeding seven days for appearances of structural weakness and other hazardous conditions. All instruments shall be monitored at intervals not exceeding seven days by a qualified person designated by the person owning, operating, or controlling the impounding structure. (Emphasis added). 1/

The relevant inquiry in this case is whether Maben was "operating or controlling" the dam, within the meaning of the cited standard. The record reveals that Maben contracted with the Westmoreland Coal Corporation to mine coal on a designated tract of land. The coal mined by Maben was for delivery to Westmoreland. Under the contract Maben operated a drift mine, formerly mined by Westmoreland. In proximity to the drift mine, but not on the contract property, is the dam at issue. The dam was constructed in the early 1970's by the Whitesville A & S Coal Company in connection with a strip-mining operaton. It consists of a cross-valley earth and rock fill structure about 400 feet long, 20 feet high, 300 feet wide at the base and 40 feet wide at the crest. The impoundment upstream of the dam covers an area of about 2 acres.

1/ It is undisputed that the impoundment structure at issue falls within the purview of 30 CFR §§77.216(a) and 77.216-3(a).

When the drift mine operated by Maben was being mined by Westmoreland, the impoundment was used by Westmoreland as a source of water for its mining equipment, for firefighting, and for its bathhouse.

At the time that Maben was issued the involved citation, Maben was using water from the pond for its bathhouse. A haulage access road ran from the portal of the drift mine, across a portion of the dam, continued behind the dam, crossed the dam's spillway, and continued to the main mine access road. Maben maintained a gate with a lock at the entrance to the main road. This gate controls access to the dam, the mine portal and the mine's other facilities. Maben's miners, coal haulers and suppliers use this road to reach the mine. The primary function of the spillway that the road crossed was to control the water level in the pond by bypassing flood water down the spillway. Maben raised the road 2-1/2 to 3 feet above the spillway floor at its outlet, potentially affecting the water level behind the dam. That is, the road could act as a barrier possibly causing the water coming down the spillway to backup to some degree during a storm.

We find that these facts, considered together, provide a sufficient basis upon which to conclude that Maben operated or controlled the dam within the meaning of the standard. Maben controlled access to the impoundment, used water from the impoundment, affected the impoundment through modification of the spillway, and conducted active mining operations in the immediate area requiring travel over or near portions of the structure and the surrounding area.

Accordingly, the decision of the administrative law judge is reversed and the citation is reinstated.

Richard V. Backley, Chairman

Frank F. Oestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 19, 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. VINC 74-113
	:	IBMA No. 76-81
v.	:	
OLD BEN COAL COMPANY	:	

ORDER

The Secretary of Labor's unopposed motion for voluntary dismissal is granted.

Richard V. Backley, Chairman

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

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October 19, 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket Nos. VINC 74-114 VINC 74-115
v.	:	IBMA No. 76-84
OLD BEN COAL COMPANY	:	

ORDER

The Secretary of Labor's unopposed motion for voluntary dismissal is granted.

Richard V. Backley, Chairman

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

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October 19, 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. VINC 74-23
	:	IBMA No. 76-91
v.	:	
OLD BEN COAL COMPANY	:	

ORDER

The Secretary of Labor's unopposed motion for voluntary dismissal is granted.

Richard V. Backley, Chairman

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

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October 19, 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. VINC 74-31
	:	IBMA No. 76-92
v.	:	
OLD BEN COAL COMPANY	:	

ORDER

The Secretary of Labor's unopposed motion for voluntary dismissal is granted.

Richard V. Backley, Chairman

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

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1730 K STREET NW, 6TH FLOOR
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October 19, 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No.VINC 74-32
	:	IBMA No. 76-93
v.	:	
OLD BEN COAL COMPANY	:	

ORDER

The Secretary of Labor's unopposed motion for voluntary dismissal is granted.

Richard V. Backley, Chairman

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

81-10-16

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1730 K STREET NW, 6TH FLOOR
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October 19, 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. VINC 76-56
	:	IBMA No. 76-104
v.	:	
OLD BEN COAL COMPANY	:	

ORDER

The Secretary of Labor's unopposed motion for voluntary dismissal is granted.

Richard V. Backley, Chairman

Frank F. Jestrab, Commissioner

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Administrative Law Judge Decisions

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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OCT 1 1981

KAISER ALUMINUM AND CHEMICAL CORPORATION,		Contests of Citations
	Complainant	Docket No. CENT 81-95-RM
v.		Citation No. 157570
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),		Docket No. CENT 81-96-RM
	Respondent	Citation No. 157571
		Docket No. CENT 81-97-RM
		Citation No. 157572
		Gramercy Alumina Plant

DECISION

Appearances: Stephen H. Booth, Esq., Oakland, California, for Kaiser Aluminum and Chemical Corporation; Eloise V. Vellucci, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for the Secretary of Labor.

Before: Judge Melick

These cases are before me as a result of contests filed by the Kaiser Aluminum and Chemical Corporation (Kaiser) pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," to challenge three citations issued under section 104(a) of the Act. 1/ The general issue is limited to whether Kaiser has violated the cited mandatory safety standards. An evidentiary hearing in these cases was held in New Orleans, Louisiana, commencing March 24, 1981.

1/ The parties had initially requested the consolidation of these cases with corresponding civil penalty proceedings. However, counsel for the Secretary recently informed the undersigned that MSHA would not file such proceedings as to Citation No. 157572, until a decision is rendered in the corresponding contest case now before me. Accordingly, the motions for consolidation are denied.

Motion for Default Decision

At hearing, Kaiser moved for a default decision in all cases on the grounds that the Secretary failed to timely answer its notices of contest. 2/ It is undisputed that the Secretary's answers in these cases were indeed filed late. Kaiser mailed its notices of contest to the Secretary on December 29, 1980, and those notices were received by the Secretary at the MSHA subdistrict office in Dallas, Texas. For undisclosed reasons, the notices were not, however, forwarded to the Office of the Solicitor for the Secretary which represents the Secretary in these matters. The Solicitor's Office was, in any event, notified on January 9, 1981, by the office of Commission Chief Judge James Broderick that Kaiser had filed such notices of contest. The Solicitor's Office thereafter requested copies of the contests from the Commission and those copies were admittedly received by the Solicitor's Office on January 15, 1981. That office nevertheless did not file an answer to the contests until February 3, 1981, 32 days after the Secretary received the notices of contest, 25 days after the Solicitor received notice of its filing, and 19 days after the actual receipt by the Solicitor of the notices of contest.

An exception to the requirement for the timely filing of pleadings has been made where adequate cause has been shown for the belated filing. Secretary of Labor v. Valley Camp Coal Company, 1 FMSHRC 791 (1979). In that case, the mistake or neglect of an attorney and the breakdown of internal office procedures were found to be "adequate cause" justifying the late filing. In these cases since service of the notices of contest was apparently perfected as of December 29, 1980, when they were mailed to the Secretary at the MSHA subdistrict office, it is clear that the Secretary's answer should properly have been filed within 20 days of that date or on or before January 18, 1981. Commission Rules, 7, 8, and 20(d); footnote 2/, supra. The Assistant Solicitor assigned to these cases speculated that the notices were "probably" not forwarded by the MSHA office to the Solicitor's Office because MSHA employees "may not have understood that it was a legal document since it was written in letter form." She claimed that she did not file her answers within 15 days of January 15, 1981 (the date the Solicitor actually received a copy of the notice), "simply because of office procedure" and because she did not actually receive the notice on her desk until "3 days after it arrived in our office," i.e., on January 18. It is not explained why the answer was not even then filed until February 3, 1981.

2/ Commission Rule 20(d), 29 C.F.R. § 2700.20(d), provides as follows: "Answer. Within 15 days after service of a notice of contest, the Secretary shall file an answer responding to each allegation of the notice of contest." Under Commission Rule 7, 29 C.F.R. § 2700.7, a notice of contest of a citation "shall be served by personal delivery or by registered or certified mail, return receipt requested." Under that rule, service by mail is complete upon mailing. Under Commission Rule 8, 29 C.F.R. § 2700.8, when service of a document is by mail, 5 days may be added to the time otherwise allowed by the rules for the filing of a response.

Under the circumstances, it appears that the Secretary's late filing was due to his negligence and to the negligence of his Solicitor. There is no evidence that the Secretary or his Solicitor acted in bad faith in causing the delay and there is no evidence that Kaiser has been prejudiced by the delay. Under the circumstances, "adequate cause" within the framework of the Valley Camp decision appears to exist. See also Secretary of Labor v. Salt Lake County Road Department, 3 FMSHRC 1714 (1981). Accordingly, Kaiser's motion for default decision is denied.

Motion to Dismiss Citations for Lack of Jurisdiction

At hearing, Kaiser also alleged that the Gramercy Alumina Plant which is the subject of Citation Nos. 157570 and 157571 and the impoundments surrounding the drying beds or tailings ponds which are the subject of Citation No. 157572, are not subject to MSHA jurisdiction under section 3(h)(1) of the Act. In its posthearing brief, Kaiser conceded that the Gramercy Alumina Plant was indeed a "mine" within the scope of the Act, presumably as a mineral milling facility, 3/ but continued to dispute that the impoundments surrounding the drying beds or tailings ponds located about one-half mile from the alumina plant were within the Act's coverage. Section 3(h)(1) of the Act provides as follows:

> "Coal or other mine" means (A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways, and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds on the surface or underground, used in, or to be used, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities. In making a determination of what constitutes mineral milling for purposes of this Act, the Secretary shall give due consideration to the convenience

3/ In Aluminum Company of America v. Morton, Civil Action No. 74-1290, U.S. District Court for the District of Columbia, 3 OSHC 1624 (1975), the Bayer alumina refining process, the same process as used in the Gramercy Alumina Plant here at issue, was held to constitute "milling" as that term was used in the Federal Metal and Nonmetallic Mine Safety Act. That definition was also found to be consistent with the interpretation of the authority and responsibility of the former Mining Enforcement and Safety Administration (MSHA's predecessor) in a Memorandum of Understanding, 39 F.R. 27382 (July 26, 1974).

of administration resulting from the delegation to one assistant secretary of all authority with respect to health and safety of miners employed at one physical establishment.

The essential jurisdictional facts are not disputed. Citation No. 157572 alleges a violation in connection with elevated roadways located on the impoundments surrounding the two tailings ponds or drying beds. The tailings ponds are located about one-half mile from the Gramercy Alumina Plant at their closest point and are fed by pipes carrying a liquid residue from the processing of the bauxite ore at the plant. The ore processing begins with an initial mixing with a caustic liquor. High-pressure steam pumps then inject the mixture into high-pressure and high-temperature digesters. Preheated caustic liquor is then added and the alumina hydrate fraction of the bauxite is dissolved leaving behind a red mud residue. The residue is washed to recover as much of the caustic as possible and the insoluble matter is then pumped to the subject tailings ponds. The water eventually separates from the solids, is further neutralized and is then disposed of into the Mississippi River. The residue remaining in the ponds consists of a red mud. It is expected to have some future commercial value but is not yet marketed.

The precise jurisdictional question before me is whether the impoundments surrounding the tailings ponds at issue were "used in, or to be used in" the milling of or the work of preparing the bauxite ore, within the framework of section 3(h)(1) of the Act. The term "used" means "to put into service or employed for some purpose." The American Heritage Dictionary of the English Language, Houghton, Mifflin Company (1976). I find that this definition appropriately reflects the meaning of the term as used in section 3(h)(1) of the Act. Since the impoundments surrounding the tailings ponds at issue in these cases were employed for some purpose in the process of "milling" or "preparing" the bauxite ore, i.e., for the retention of the residual sludge from that process, I find that those impoundments were indeed "used in" and "to be used in" the process of "milling" or "preparing" the bauxite ore. While it is certainly an indirect usage in relation to the separation process here employed, nevertheless, the impoundments were admittedly put into service and employed for some purpose in the separation process and were intended to be so utilized in the future. Accordingly, I find that the impoundments come within the purview of the Act. Kaiser's motion to vacate the citations for lack of jurisdiction is therefore denied.

The Alleged Violations

Citation Nos. 157570 and 157571 allege violations of the standard at 30 C.F.R. § 55.20-3. The standard reads as follows:

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

(b) The floor of every workplace shall be maintained in a clean and, so far as possible, a dry condition. Where wet processes are used, drainage shall be maintained, and fast floors, platforms, mats, or other dry standing places shall be provided where practicable.

(c) Every floor, working place, and passageway shall be kept free from protruding nails, splinters, holes, or loose boards, as practicable.

Citation No. 157570 specifically charges as follows:

The floor and passageway of the No. 4 bauxite conveyor tunnel, yard materials area, is not being kept as clean and dry as possible. A buildup of bauxite with drainage not being maintained has created a muddy hazardous condition. Persons must use the passageway from one to 10 or more times daily, governed by quality of bauxite. Holes at drainage points are covered by mud creating a tripping hazard by persons using the passageway. This condition also increases the possibility of injury to maintenance personnel while performing work on the conveyor belt also.

The violation charged in Citation No. 157571 is virtually identical to the above except that it is directed to conditions in the No. 5 bauxite conveyor tunnel.

Kaiser first argues that the words "clean" and "orderly" and "so far as possible, dry," as they appear in the cited standard do not give reasonable notice of what is required and that therefore the standard is unenforceably vague (and presumably should therefore be vacated as a violation of due process under the Fifth Amendment to the United States Constitution). The language of the cited standard indeed does not afford any concrete guidance as to what is to be considered "clean and orderly" and "in a clean and, so far as possible, a dry condition." A regulation without ascertainable standards, like this one, does not provide constitutionally adequate warning to an operator unless read to penalize only conduct or conditions unacceptable in light of the common understanding and experience of those working in the industry. Cape and Vineyard Division of the New Bedford Gas and Edison Light Company v. OSHRC, 512 F.2d 1148 (1st Cir. 1975); United States v. National Dairy Corporation, 372 U.S. 29, 83 S. Ct. 594, 9 L.Ed.2d 561 (1963); United States v. Petrillo, 332 U.S. 1, 67 S. Ct. 1538, 91 L.Ed.2d 1877 (1947). Unless the operator has actual knowledge that a condition or practice is hazardous, the test is whether a reasonably prudent man familiar with the circumstances of the industry would have protected against the hazard. Cape and Vineyard, supra. The "reasonably prudent man" has been defined as a "conscientious safety expert seeking to prevent all hazards which are reasonably foreseeable." General Dynamics Corporation, Quincy Shipbuilding Division v. OSHRC, 599 F.2d 453 (1st Cir. 1979). The question before me then is whether Kaiser knew that the cited tunnels in the conditions then

existing were hazardous or whether a conscientious safety expert would have protected against the conditions existing therein because they presented a reasonably foreseeable hazard.

The bauxite conveyor tunnels are described as underground structures each about 300 feet long, 7 to 8 feet wide, and 12 feet high. Each contains a conveyor belt running about 45 to 50 inches from the floor and an adjacent passageway about 30 inches wide. The tunnels run adjacent to the Mississippi River, the level of which may rise to 13 feet above the tunnels. Water therefore seeps into the tunnels. The tunnels convey raw bauxite ore from ore boats on the Mississippi and reclaimed ore (from spillage and cleanup) to the processing plant. It is not disputed that when the conditions herein were cited, the steam-siphon system used to force the excess water out of the tunnels was not properly functioning. Water and spilled bauxite had therefore accumulated on the tunnel floor. According to the undisputed testimony of MSHA inspector Rembold, the wet bauxite mud created particularly slippery conditions on the passageways adjacent to the conveyors. In some places, the mud was more than ankle deep and concealed several 18-inch holes in the passageway floors.

Rembold described the hazards associated with the conditions he found. Maintenance personnel would travel the tunnels at least once a day checking for such problems as ore spillage. In addition, if there was a belt breakdown, maintenance employees would be required to carry heavy tools along the passageways. If persons would trip or fall as a result of the slippery conditions, they could come in contact with the rollers along the belt line, thereby causing serious injuries. The rollers were at least partly exposed. He observed that similar conditions elsewhere have resulted in torn limbs and even death. The concealed holes also posed an additional hazard of sprains and fractures. Rembold testified that over a period of several years before he issued the instant citations, there had been many safety meetings and negotiations between the union and Kaiser regarding what had commonly been known as a constant problem in the tunnels from a lack of drainage and a buildup of bauxite spillage.

Within this framework of essentially undisputed evidence, I find it indeed disingenous for Kaiser to contend that it did not know what was meant by the requirement to keep passageways and the floors of workplaces in a "clean and orderly" and "in a clean and, so far as possible, a dry condition" in the context of the cited violations. The types of conditions described by Inspector Rembold clearly had existed periodically for some time and presented such an obvious hazard that any "conscientious safety expert seeking to prevent all hazards which are reasonably foreseeable" would seek to abate them. General Dynamics, supra. I find, therefore, that under the circumstances of this case, Kaiser had adequate notice of the standard as it was applied.

I also observe that Kaiser has not challenged the language of paragraph (c) of the cited standard which relates to the existence of holes in floors, working places, and passageways. Thus, even assuming, arguendo,

that paragraphs (a) and (b) of the cited standard were unenforceably vague as alleged, sufficient allegations are set forth in the citations at bar to charge violations of the unchallenged paragraph (c). For this additional reason, Kaiser's motion to vacate the citions is denied. Since Inspector Rembold's undisputed testimony, noted above, also supports a finding that the violations alleged in Citation Nos. 157570 and 157571 did in fact occur, I find that the violations are proven as charged.

Citation No. 157572 charges a violation of the standard at 30 C.F.R. § 55.9-22. 4/ The standard appears under the subheading "Loading, hauling, dumping" and reads as follows: "Mandatory. Berms or guards shall be provided on the outer banks of elevated roadways." The citation specifically alleges as follows:

4/ As a result of testimony concerning this citation at hearing, the undersigned first requested, then issued, subpoenas for, "a copy of a letter from Mr. Sale [a Kaiser official] to the Federal Mine Safety and Health Administration in which, Inspector Rembold testified, there existed admissions against interest by Mr. Sale in reference to Citation No. 157572." The parties moved to quash the subpoenas on the grounds that the subject letter related to confidential settlement negotiations and presumably was therefore inadmissible as evidence under that part of Rule 408 of the Federal Rules of Evidence that excludes evidence of conduct or statements made in compromise negotiations. Even assuming, arguendo, the applicability of the Federal Rules of Evidence to Commission hearings (but see 29 C.F.R. §§ 2700.1 and 2700.60(a)), the Secretary has recognized in his brief that the rule does not provide for the exclusion of such evidence when it is offered for another purpose, such as proving the bias or prejudice of a witness or for other impeachment purposes. See 10 Moore's Federal Practice, §408; John McShain, Inc. v. Cessna Aircraft Company, 563 F.2d 632 (3d Cir. 1977). As a general rule, the need to evaluate a witness' credibility outweighs the policy of encouraging compromises. 2 Weinstein's Evidence, U.S. Rules, ¶ 408 [05].

The MSHA inspector in these cases testified regarding the existence in the subject letter of factual admissions by an agent for the operator, Mr. Sale. However, Sale denied in his testimony that he had made any such statements. The precise nature of the statement that was in fact made in the subject letter is therefore relevant to the credibility of these witnesses. Under the circumstances, the evidence is not inadmissible even under Federal Rule 408. In apparent recognition of this, the Secretary in his brief suggested that the judge should examine the subpoenaed document to determine its admissibility under this exception to the Rule--the same proposal suggested by the undersigned at hearing. The motions to quash are therefore denied. However, since MSHA has also unequivocally conceded that the testimony of its inspector about Sale's alleged admissions was in error, there is no longer any need for the document itself. There is accordingly no longer any need for the subpoenas issued in these cases and they are therefore withdrawn.

> Berms or guards are not provided on the outer banks of the elevated roadway along the mud lakes or surge ponds. The angle of repose is such that a vehicle would turn over and roll down the embankment if the wheels went off the edge of the road. The embankment is approximately 45 to 100 feet in some areas and is about a 3 to 1 slope. Pickup trucks, vans, and/or cars travel this roadway daily. The largest vehicle to travel the roadway has an axle height of approximately 24 inches.

Kaiser first argues that even though the cited roadways on the impoundments are in fact elevated above the surrounding area (the evidence indicating at a height of 25 to 30 feet), since the embankments were sloped down from the roadway at a 1 to 3 ratio, they were not "elevated roadways" within the meaning of the cited standard. Kaiser cites no authority for this proposition and since there is indeed no exception provided in the regulation where the slope from the elevated roadway is at a 1 to 3 ratio, I reject the argument. While the extent of the hazard presented is obviously reduced as the degree of slope is reduced, it is nevertheless at least a technical violation of the standard. Recognition of a reduced hazard may be made in any subsequent civil penalty proceeding. In any event, it is apparent that the premise to Kaiser's argument herein is not wholly supported by the evidence. Indeed, Kaiser's own witnesses conceded that sections of the slope had been washed out, thus creating a much greater hazard than presented by other sections of the slope.

Kaiser next claims that the cited elevated roadways were not used for "loading, hauling or dumping," an apparent prerequisite to the application of the standard. See Secretary v. Cleveland Cliffs Iron Company, Inc., 3 FMSHRC 291 (1981). While there is no dispute that parts for the pumps used in both tailings ponds were occasionally transported by pickup truck over the cited roadways on an irregular basis, usually not more than once a month (and presumably parts were loaded and unloaded at the ponds), that a "cherry picker" vehicle occasionally traversed the roadways for working on the pumps and that security vehicles patrolled the roadways on a daily basis, the essential question is whether these activities constituted "loading" or "hauling." In Secretary v. Cleveland Cliffs Iron Company, Inc., supra, the Commission held that the term "hauling" as used in the standard at 30 C.F.R. § 55.9-22, the standard at issue herein, "should be broadly construed, and includes conveying men, ore, supplies or materials along elevated roadways where the roadways are used in the normal mining routine." (Emphasis added.) The Commission also cited with apparent approval the definition of "haulage" applied by Chief Administrative Law Judge James Broderick in his decision in the same case (1 FMSHRC 1965), i.e., "the drawing or conveying in cars or otherwise, or movement of men, supplies, ore and waste both underground and on the surface." Dictionary of Mining at 531. While the pump parts in this case were indeed only occasionally loaded and hauled along the cited elevated roadways, I find that such activities even though occurring no more than once a month were clearly a part of the "normal mining routine" so as to be within the purview of the cited standard. The infrequency and irregularity of the

"loading" and "hauling" is not the significant factor so long as those activities are within the normal mining routine. Cleveland-Cliffs, supra. Accordingly, the evidence is sufficient to support a violation of the cited standard.

I do not find, however, that the daily patrolling of security vehicles on the cited roadway or the infrequent use of a "cherry picker" constitute "loading," "hauling," or "dumping" within the intended scope of the standard. No evidence exists to show that anyone other than the driver of the security vehicle performed the patrol functions or that the patrol vehicle was used to transport any particular tools or equipment. Similarly, credible evidence is lacking to demonstrate that the "cherry picker" was in any way used to load, haul or dump. While the superintendent for the processing plant admitted that some dry mud from the chemical plant had in the past been occasionally "dumped" at the ponds, it is also clear that such dumping had been forbidden for some time before the citation here at issue. There is no evidence that such "dumping" was continuing to occur on any regular basis as part of the "normal mining routine" and, accordingly, I cannot find that such activity was occurring here. The evidence that a green, white, and gray muddy substance had been found dumped at one of the impoundments sometime after the citation was issued is not sufficient to establish that it was part of the normal mining routine. Accordingly, I do not find that these particular activities constituted "loading," "hauling," or "dumping" within the meaning of the cited regulatory provisions.

Kaiser contends, finally, that even assuming that a violation existed here (1) the violation was de minimis, and in accordance with decisions of the Occupational Safety and Health Review Commission, was too trifling to warrant imposition of an abatement requirement or the assessment of a civil penalty, and (2) it would be economically infeasible to abate the condition by berming or guarding the elevated roadways here at issue. While these arguments could very well be relevant in a civil penalty proceeding under section 105(b) of the Act, it is clear that the contentions do not go to any issue relevant to this contest case under section 105(d) of the Act. While I would ordinarily have consolidated those issues and proceedings for a single disposition, the parties herein have sought to have a separate decision first on the issue of whether the violation has in fact occurred. See n. 1, supra. I note, moreover, that MSHA did not prescribe any particular mode of abatement in the citation at bar and that various alternative modes of abatement apparently exist at much less cost. Accordingly, I give the arguments no consideration in this case.

ORDER

Citation Nos. 157570, 157571 and 157572 are AFFIRMED and the contests of those citations are accordingly DISMISSED.

Gary Melick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE, SUITE 400
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OCT 1 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. T & W SAND AND GRAVEL COMPANY, Respondent.	CIVIL PENALTY PROCEEDING DOCKET NO. WEST 80-398-M A/O NO. 05-02331-05004 MINE: T & W Sand & Gravel

Appearances:

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for the Petitioner

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5601 South Broadway
Littleton, Colorado 80121

for the Respondent

DECISION

This case arose out of a severe arm injury suffered by an employee attempting to clean a moving conveyor at respondent's gravel pit. The Secretary charged in Citation No. 328732 that respondent violated a mandatory standard which forbids manual cleaning of pulleys on moving conveyors. In Citation No. 328733 he charged that respondent also violated a mandatory standard requiring indoctrination of new employees in safety rules and procedures. The Secretary proposed an $800 penalty for the first citation and $250 for the second. At trial, however, his counsel moved to increase these amounts to $1,500 for each citation.

That motion was taken under advisement pending the hearing of the evidence.

At the beginning of the third day of the hearing on the merits, the parties announced that a settlement had been reached. Specifically, petitioner would amend its penalty proposal for Citation No. 328732 to $500 and would accept the original $250 for Citation No. 328733. Respondent agrees to pay these amounts, and to withdraw its contest of the penalties.

Having heard most of the evidence, I am convinced that the settlement is well conceived and is consistent with the purposes of the Act. The Secretary's case for violation is strong, but is jeopardized by a pending motion for dismissal based upon his failure to file his penalty proposal until several months past the 45 day deadline prescribed in Commission Rule 17.

Under these circumstances it appears that each party had a sound reason for compromise.

Accordingly, the settlement agreement is approved. Respondent's contest of the penalties as amended by the settlement agreement is withdrawn, and an aggregate of $750 in penalties shall be paid to the Secretary of Labor within 30 days of the date of this present order.

SO ORDERED.

John A. Carlson
Administrative Law Judge

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POCAHONTAS FUEL COMPANY, Applicant	:	Application for Review
v.	:	Docket No. HOPE 75-680
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Notice of Violation 1 LAK December 31, 1974
and	:	Maitland Mine
UNITED MINE WORKERS OF AMERICA Respondent	:	

DECISION AFTER REMAND

The Notice of Violation in the above case was issued when the Company paid Mr. Mullins at the laborer's rate of pay rather than the roof bolter's rate after he transferred to a non-dusty area of the mine, pursuant to section 202 of the 1969 Act. The Act provides that after such a transfer, the miner shall be paid "at not less than the regular rate of pay" prior to the transfer. Just prior to the transfer Mr. Mullins had acted as and been paid at the rate of a temporary roof bolter during a substantial percentage of his working hours.

The Government contended at the trial that a roof bolter's rate of pay was appropriate and the Company contends that only a laborer's pay (Mullins was classified as a laborer under the Union contract) was his regular rate of pay before transfer. I agreed with the Company and vacated the notice. The Interior Board of Mine Operations Appeals agreed with me and affirmed my decision.

On December 31, 1980, the United States Court of Appeals for the District of Columbia Circuit reversed the Board (D.C. Cir. No. 77-1086). It held that the laborer's rate was not the correct rate, but it did not go so far as to say the full roof bolter rate was proper either. It indicated that the proper rate might be in between these rates.

The case was remanded to me on September 22, 1981.

Inasmuch as Pocahontas was paying the laborer's rate to Mr. Mullins and inasmuch as the court has said this was not the correct rate, it follows that the company was in violation and that the notice was properly issued.

The Notice of Violation is accordingly affirmed. It is assumed that the parties can agree to the proper pay rate during abatement proceedings. If not, I presume a closure order will be issued and further review will be sought.

Charles C. Moore, Jr.

Charles C. Moore, Jr.
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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OCT 6 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of JAMES F. MILLER, Complainant, v. MINE SHAFT & TUNNELL CORPORATION, a subsidiary of CENTENNIAL MINING CO., Respondent.	COMPLAINT OF DISCHARGE, DISCRIMINATION OR INTERFERENCE DOCKET NO. WEST 81-226-DM MD 80-169

ORDER APPROVING SETTLEMENT

On October 1, 1981, the parties in the above-captioned case filed a stipulation of settlement, consent and motion seeking an agreed disposition of the case.

The terms of the stipulation are as follows:

1. Respondent agrees to compensate the complainant, James F. Miller, in the amount of $5,000.00 for loss of back wages and other expenses resulting from his discharge.

2. James F. Miller's employment record will be expunged of any adverse references relating to his discharge, and

3. James F. Miller accepts the above stipulations as a full settlement of this case.

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

It is FURTHER ORDERED that respondent tender to the complainant the sum of $5,000.00 within 10 days from the date of this order and that the case is hereby DISMISSED WITH PREJUDICE.

Virgil E. Vail
Administrative Law Judge

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OCT 6 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of ROGER T. MAHONEY, Complainant, v. GILBERT CORPORATION OF DELAWARE, INC., Respondent.	COMPLAINT OF DISCHARGE, DISCRIMINATION OR INTERFERENCE DOCKET NO. WEST 81-170-DM MINE: C-b Oil Shale Tract

DECISION AND ORDER APPROVING SETTLEMENT AND DIRECTING PAYMENT

On October 1, 1981, a motion to approve settlement was filed with the Commission. All parties to the above-captioned proceeding agree to the settlement. By stipulation and motion, the parties propose to settle this proceeding without a formal hearing.

Upon due consideration, I conclude that the agreement is consistent with the purposes of the Act and should be approved.

Accordingly, it is ORDERED that within 40 days of the date of this Decision that Respondent shall tender to Roger T. Mahoney the sum of $500.00 for loss of back wages and expunge from his employment record any adverse references relating to his discharge.

Jon D. Boltz
Administrative Law Judge

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OCT 7 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Complaint of Discharge
	:	Docket No. CENT 81-13-D
On behalf of MILTON BAILEY,	:	Bradley - Stephen No. 1 Mine
Complainant	:	
v.	:	
ARKANSAS-CARBONA COMPANY,	:	
and	:	
MICHAEL W. WALKER,	:	
Respondents	:	

DECISION

Appearances: Eloise Vellucci, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas for Complainant.
R. David Lewis, Esq., Little Rock, Arkansas for Respondents.

Before: Judge James A. Laurenson

JURISDICTION AND PROCEDURAL HISTORY

This proceeding was commenced by the Secretary of Labor, Mine Safety and Health Administration (hereinafter "MSHA') on behalf of Milton Bailey (hereinafter "Complainant") against Arkansas-Carbona Co. and Michael W. Walker (hereinafter "Respondents") pursuant to Complainant's allegation that he was discharged from his employment by Respondents on June 27, 1980, because of activity protected under section 105(c) of the Federal Mine Safety and Health Act of 1977 (hereinafter "the Act"), 30 U.S.C. § 815(c). MSHA investigated the complaint, found it to be meritorious, and commenced this action on October 20, 1980.

Upon completion of prehearing requirements, a hearing was held in Little Rock, Arkansas, on July 7-8, 1981. At the hearing, testimony was received from the following witnesses: Complainant; David Nigus, formerly a mine safety and health consultant for the Arkansas Department of Labor; Loy McCarson, formerly superintendent at Bradley - Stephen No. 1 Mine; and Michael Walker, Respondent. Both parties filed posthearing briefs.

ISSUES

Whether Respondents violated section 105(c) of the Act in discharging Complainant and, if so, what relief shall be awarded to Complainant. MSHA's request for assessment of a civil penalty was severed and remanded to MSHA because of the failure to comply with applicable administrative procedures.

APPLICABLE LAW

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

> (1) No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.
>
> (2) Any miner or applicant for employment or representative of miners who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate. Such investigation shall commence within 15 days of the Secretary's receipt of the complaint, and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint.

STIPULATIONS

The parties stipulated the following:

1. Arkansas-Carbona Company ran and operated Bradley - Stephens No. 1 Mine at all times pertinent herein in Dardanelle, Arkansas.

2. Bradley - Stephen Mine produces coal, some or all of which is shipped out of the State of Arkansas.

3. David Nigus is a qualified mine consultant for the Department of Labor, State of Arkansas.

FINDINGS OF FACT

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

1. Arkansas-Carbona Company was the operator of a surface anthracite coal mine in Dardanelle, Arkansas at all times relevant herein.

2. Arkansas-Carbona Company was a joint venture composed of Aerth Development (70 percent) and Russell Mining (30 percent). Respondent Michael W. Walker was President and Chairman of the Board of Aerth Development at all times relevant herein.

3. Until May, 1980, Complainant, age 41, was a full time student enrolled at Arkansas Tech University majoring in geology. He attended college since he retired from the U.S. Navy in 1977. Prior to his employment by Respondents, Complainant was employed as a campus police officer at Arkansas Tech University and earned $600 per month and free tuition. Complainant also received a pension of $650 per month from the U.S. Navy and G.I. student benefits.

4. In April, 1980, Complainant was interviewed at college for employment by Respondents. In early May, 1980, Complainant was interviewed by Respondent Michael W. Walker. Although Complainant had no experience or training in coal mining or mine safety, he was hired by Respondents as an office manager and safety liasion with MSHA inspectors.

5. Complainant commenced full time employment for Respondents on May 13, 1980 at a salary of $800 per month. Complainant received on the job training in Dardanelle and Little Rock for approximately 2 weeks. At the time Complainant commenced employment for Respondents, Coy Kirshner was safety director at the mine and Loy McCarson was superintendant. Kirshner and McCarson trained Complainant at the mine and Respondent Michael W. Walker trained Complainant in Little Rock.

6. On May 28, 1980, MSHA Inspector Lester Coleman inspected the mine and advised Complainant that he would have to issue an order of withdrawal closing the entire mine because there was no evidence that the miners had been trained in accordance with the required plan. Complainant recommended

to Respondent Walker that the mine be voluntarily closed and that all miners be trained by Coy Kirshner and David Nigus, a mine safety consultant employed by the Arkansas Deparment of Labor. Walker agreed and the mine was voluntarily closed for 2 days while the required training took place. The MSHA inspector issued citations concerning the lack of training and records as well as a noise citation. No order of withdrawal was issued by MSHA. Coy Kirshner quit his job on or about May 29, 1980.

7. After the May 28, 1980 MSHA inspection, Complainant was summoned to the Little Rock office of Respondent Walker. He was informed that his salary would be increased to $1,000 per month and that, thereafter, he would be the safety director as well as office manager. He was told that he was to oversee the entire operation at the mine.

8. During the first 2 weeks of June, 1980, Complainant's new job as safety director at the mine included the following: establishing training files for each miner; building a water station for the miners; compiling a list of safety equipment needed at the mine; and noting the miners' need for safety shoes and hats. During this period of time, Respondent Walker remained in Little Rock while Complainant and Loy McCarson were at the mine in Dardanelle. During this period, approximately 7 miners were employed at the mine on one production shift and approximately 300 tons of coal was produced during the month of June, 1980.

9. On June 13, 1980, Respondent Walker moved his office to the mine site and took over active control of the mine. Walker brought his secretary with him. During the next 2 weeks, Complainant raised the following safety matters in conversations with Respondent Walker: the steep and unsafe slope of the highwall, the need for safety lines above the crusher, the need for a berm on the road around the sedimentation pond, and the need to train a crew of newly hired miners.

10. On June 27, 1980, Respondent Walker engaged in an argument with superintendent McCarson regarding the failure to complete work schedules. Thereafter, Complainant approached Respondent Walker to complain about the fact that the mine's first aid kit, containing bandages and splints, had been moved from the mine office to the screened porch. Complainant told Walker that the first aid kit should remain in the mine office where it would not be exposed to dust. Walker contended that the kit was in a dust proof container. Walker was upset that Complainant was arguing with him in the presence of other employees and told Complainant that "if he could not get along, for him to clock out, get his lunch box and go home." (Tr. 182). Thereafter, Walker went outside and also discharged Loy McCarson and ordered both men off the mine property.

11. After Complainant's discharge, he sent a letter to MSHA concerning numerous safety violations of the mine to wit: safety shoes; improper records concerning training and blasting; drinking water; backup alarms, and signs. On July 8, 1980, an MSHA inspector issued citations to Arkansas-Carbona for each of these alleged violations.

12. Complainant was employed by Respondents as a full time employee and such employment was to continue on a full time basis through the next school year.

13. From the time of Complainant's discharge on June 27, 1980 through June 4, 1981, Complainant earned wages as follows: 1980 - $1,515, 1981 - $2,291.

14. This action was commenced by MSHA on behalf of Complainant on October 20, 1980. The original complaint requested that Complainant be reinstated to his prior position. However, MSHA did not file an Application for Temporary Reinstatement. Thereafter, on January 22, 1981, Complainant moved to amend the complaint because "subsequent to his filing of the complaint the Secretary was informed by Complainant Bailey that he did not wish to be reinstated by Respondents and that in lieu of reinstatement he would accept tuition for 1 year of college plus an allowance for expenses."

DISCUSSION

This case presents the novel question of whether a safety director of a coal mine was discharged in violation of section 105(c) of the Act. Complainant contends that he was discharged for engaging in protected activity. Respondents assert that Complainant was discharged for inattention to duty, insubordination, misconduct and incompetence.

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

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

he did in fact consider the employee deserving of discipline for engaging in the unprotected activity alone and that he would have disciplined him in any event. Id. at 2799-2800.

A. Background

Respondent Michael W. Walker has had no formal training or education in mining. Prior to 1975 he had never operated or been employed at a mine. His company started exploration of the mine in December, 1975. The first equipment application of the mine was made in May, 1978. From that time until January, 1981, the mine proceeded on an experimental basis to determine whether it was economically feasible to mine coal. Thus, at all times relevant here, the mine was in an experimental stage, i.e., there were seven miners at the mine when Complainant began his employment and 14 miners at the time of his discharge; and only about 300 tons of coal was produced each month.

When Complainant was interviewed for a job with Respondents, he admitted that he had no mining or safety experience. Contrary to the assertion of Respondent Walker, I find that Complainant did not misrepresent himself in connection with his application for employment.

B. Violation of Section 105(c) of the Act.

1. Complainant's Burden of Persuasion

In Pasula, supra, the Commission held that a Complainant in a discharge case establishes a prima facie case if he proves the following: (1) that he engaged in a protected activity; and (2) that the adverse action was motivated in any part by the protected activity. As one would suspect, most of the work activity of Complainant, the mine's safety director, involved protected activity. Illustrative of this protected activity are the following: complaints concerning miner's failure to wear safety clothing; constructing and equipping a water station; requesting the purchase of safety equipment; complaints regarding failure to train new miners; and complaints about the slope of the highwall. While these protected activities may have set the stage for the final confrontation, I find that they are not directly relevant to the circumstances surrounding Respondents discharge of Complainant. It is also clear that Complainant's complaint to Respondent Walker on June 27, 1980, concerning the location of the first aid kit, was also protected activity pursuant to section 105(c) of the Act. Section 105(c)(1) provides in pertinent part as follows:

> No person shall discharge or in any manner discriminate against . . . any miner . . . because such miner . . . has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent . . . of an alleged danger or safety or health violation in a coal or other mine. . ."

30 C.F.R. § 77.1707(c) provides in pertinent part as follows: "All first aid supplies . . . shall be stored in suitable, sanitary, dust-right, moisture-proof containers, and such supplies shall be accessible to the miners." Thus, I find that Complainant's complaint to Respondent Walker on June 27, 1980, concerning the location of the first aid kit was action protected by section 105(c) of the Act and, therefore, Complainant has satisfied the first part of his burden under Pasula, supra.

The next issue is whether the evidence establishes that Complainant's discharge was motivated in any part by the protected activity. Complainant was discharged by Respondent Walker. Respondent Walker was the operator's agent. Respondent Walker testified as follows: "I'm saying that the main reason that I fired him was because he made the big spiel that morning because of the first aid kit being in the wrong place, and that is the main reason that this man was dismissed." (Tr. 200). Thus, Respondent Walker admitted that his decision to discharge Complainant was motivated primarily by the complaint about the first aid kit which I have found to be protected activity. Complainant has established that his discharge was motivated primarily by his protected activity. Therefore, pursuant to Pasula, supra, Complainant has established a prima facie case of discrimination.

2. Respondents' Burden of Persuasion

After Complainant establishes a prima facie case of discrimination, the operator may affirmatively defend by proving that (1) he was also motivated by Complainant's unprotected activities; and (2) that he would have taken adverse action against the miner for the unprotected activities alone. As noted at the outset, Respondent's Brief contends that Complainant's discharge was motivated by unprotected activities as follows: "inattention to duty, insubordination, misconduct and incompetence." Specifically, Respondents assert the following: (1) Complainant should never have been hired for the job as safety director because he was unqualified; (2) Complainant was unable to get along with the men or get them to comply with safety requirements; (3) Complainant displayed temper tantrums from time to time; (4) Complainant refused to prepare paper work; (5) Complainant acted improperly around female employees; and (6) Complainant's work activities were unsatisfactory in that he complained about safety matters but failed to correct the problems.

I have considered all of Respondents' contentions. Neither singularly nor in combination do Respondents' contentions establish that Respondents would have discharged Complainant for the reasons given. Specifically, it appears that Complainant was, in fact, unqualified and untrained for the job of safety director. However, there is no credible evidence that Complainant misrepresented his qualifications or training. Moreover, Respondents failed to refute Complainant's assertion that Respondents had agreed to train him for the position of safety director. Whether Complainant should have been hired as safety director is irrelevant to this proceeding. The fact is that Respondents freely hired him and assigned him the duties of safety director with full knowledge of his lack of training and experience. Respondents failed to establish that they would have fired him because he was unqualified.

Respondents failed to establish that Complainant was unable to get along with the miners or get them to comply with safety regulations. Likewise, Respondents failed to establish that Complainant displayed "temper tantrums" which would justify his dismissal. Other than the argument which immediately preceded Complainant's discharge, the only "temper tantrums' alleged by Respondent Walker involved slamming doors and throwing clip boards down. Complainant denied these allegations. Although these incidents occurred in the presence of other employees, Respondents did not call any witness except Michael W. Walker. I find that the "temper tantrum" allegation is relatively insignificant and that Respondents have not established this claim by a preponderance of the evidence.

The only example of Complainant's refusal to prepare paper work was the incident involving the preparation of work schedules. However, Respondents failed to establish that this was Complainant's duty. Complainant testified that he was unable to prepare the work schedule because he was unfamiliar with the abilities and experience of the 14 miners. In fact, Respondent Walker testified that the responsibility for scheduling the work belonged to Superintendent McCarson (Tr. 180). Respondents failed to establish that Complainant would have been fired for refusal to prepare paper work.

Respondents allege that Complainant acted improperly around female employees. This allegation is based upon hearsay evidence according to Respondent Walker. Neither of the female employees who allegedly participated in this conversation testified. Complainant and Superintendant McCarson denied the hearsay allegations of Respondent Walker. Respondent Walker did not mention this reason during his deposition and conceded at hearing that this allegation was not a major reason for discharging Complainant. Accordingly, Respondents failed to establish that Complainant would have been discharged because of his conduct around female employees.

Finally, Respondents assert that Complainant's work was unsatisfactory. This general allegation is insufficient to establish an affirmative defense. Many of the specific charges against Complainant have been examined and found wanting. Suffice it to say at this point that Respondents failed to establish their claim that Complainant was discharged because he was lazy or insubordinate. Complainant refuted the allegation that he gave only lip service to safety matters and failed to correct them. Complainant established that the uncorrected safety problems at the mine were the result of Respondent Arkansas-Carbona's financial condition or Respondent Walker's refusal to take action on Complainant's recommendations.

In conclusion, the testimony of Respondent Walker clearly establishes that the primary reason for discharging Complainant was the dispute over the location of the first aid kit. (Tr. 200, 221, 234, and 241). Thus, Respondents failed to establish that they were motivated by Complainant's unprotected activities and would have discharged him for those activities alone. Since Respondents failed to establish an affirmative defense, Complainant's complaint is sustained.

C. Award to Complainant

Section 105(c)(2) of the Act provides in pertinent part that if the charges are sustained, Complainant shall be granted such relief as is appropriate "including but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest." The evidence of record establishes that Complainant does not seek rehiring or reinstatement. The complaint filed with the Commission on October 20, 1980, requested rehiring and reinstatement. However, on January 22, 1981, Complainant moved to amend the complaint because "subsequent to the filing of the complaint the Secretary was informed by Complainant Bailey that he did not wish to be reinstated by Respondents and that in lieu of reinstatement he would accept tuition for one year of college plus an allowance for expenses."

The Commission has no procedural rule concerning amendment of pleadings. However, Commission Rule 1(b), 29 C.F.R. § 2700.1(b), provides as follows: "On any procedural question not regulated by the Act, these Procedural Rules, or the Administrative Procedural Act (particularly 5 U.S.C. §§ 554 and 556), the Commission or any Judge shall be guided so far as practicable by any pertinent provisions of the Federal Rules of Civil Procedure as appropriate." Rule 15(c) of the Federal Rule of Civil Procedure provides in pertinent part, "wherever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading." Application of the above principle to the instant case results in a finding that as of October 20, 1980, Complainant did not seek rehiring or reinstatement. Since MSHA was prosecuting this matter, Complainant had the right to an order of temporary reinstatement on October 20, 1980. See section 105(c)(2) of the Act. If he had pursued that right, he would have been reinstated, required to work regular hours, and received pay of $1,000 per month. The fact that Complainant elected not to be rehired or reinstated tolls the operator's backpay obligation. Since Complainant elected not to be rehired or reinstated on October 20, 1980, Respondents' obligation for backpay ends on that date. It would be unfair and improper to require a mine operator to pay a former employee backpay for a period of time when the employee has unequivocally stated that he does not want to return to his former employment. Moreover, any award for a period after Complainant elected not to return to work would be based on conjecture and speculation. Hence, in the instant case, Respondents are liable to Complainant for backpay at $1,000 per month commencing on June 27, 1980 and ending on October 19, 1980.

The evidence of record also establishes that after his discharge in 1980, Complainant had earnings from two other employers during that year. Complainant earned $1,515 in 1980 after his discharge. The evidence of record fails to establish the dates on which these sums were earned so they will be prorated over the 26-1/2 weeks after June 27, 1980. Based upon this formula, Complainant earned $57.17 a week or $245.83 per month during calendar year 1980 after his discharge by Respondents.

Thus, for the period of Complainant's entitlement, June 27 to October 19, 1980, Complainant would have earned $3,710 at the mine. In fact, he earned $913.03 from other employment. Complainant's earnings during this period must be deducted from his backpay. Heinrich Motors, Inc. v. N.L.R.B., 403 F.2d 145, 148 (2d Cir. 1968). Therefore, Complainant is entitled to an award of $2,796.97 for backpay.

Complainant requests that the backpay award should be payable at "nine percent interest per annum." Complainant cites no authority for the award of interest at nine percent per annum. To my knowledge, the Commission has never awarded a rate of interest higher than 6 percent per annum. See Peabody Coal Co., 1 FMSHRC 1785 at 1792 (1979). Therefore, Respondents are ordered to pay Complainant $2,796.97 as backpay and interest at the rate of 6 percent per annum from the dates such payments were due.

Complainant is also entitled to an order expunging all references to this matter from his employment records and a written confirmation from Respondents of his dates of employment and position. Complainant failed to establish any entitlement to an award of 1 year of college tuition plus $400 book and miscellaneous expense allowance. Likewise, Respondents failed to establish that the backpay award should be reduced due to veteran's benefits consisting of a pension and school allowance. These amounts are not based upon any work or activity of Complainant after his discharge by Respondents. In other words, if Complainant had remained in the employ of Respondents, he would have received both of these veterans benefits in addition to his regular salary at the mine.

CONCLUSIONS OF LAW

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

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

3. On June 27, 1980, Complainant engaged in activity which is protected under section 105(c)(1) of the Act as follows: complaint to Respondent Walker concerning the removal of the first aid kit from the mine office.

4. Complainant established a prima facie case of violation of section 105(c)(1) of the Act because he established by a preponderance of the evidence that he engaged in a protected activity and that his discharge was motivated by the protected activity.

5. Respondents failed to establish that they would have discharged Complainant for reasons other than his protected activity.

6. Complainant was discharged by Respondents in violation of section 105(c)(1) of the Act.

7. Effective October 20, 1980, Complainant elected not to be rehired or reinstated by Respondents and Respondents' obligation for backpay was tolled as of that date.

8. Complainant is entitled to an award of $2,796.97 as backpay plus interest at the rate of 6 percent per annum from the dates such payments were due to the date such payment is made.

9. Complainant is entitled to an order expunging all references to his discharge from his employment records and to a written confirmation of the dates of employment and his position.

10. Complainant is not entitled to backpay after October 20, 1980 due to his election not to be rehired or reinstated.

11. Respondents are not entitled to set off the Veterans benefits paid to Complainant against the award of backpay.

ORDER

WHEREFORE, IT IS ORDERED that Complainant's complaint of discharge is SUSTAINED.

IT IS FURTHER ORDERED that Respondents shall pay to Complainant the sum of $2,796.97 for backpay plus interest at 6 percent per annum from the dates such payments were due to the date such payment is made.

IT IS FURTHER ORDERED that Respondents shall expunge all references to Complainant's discharge from his employment records and shall furnish to Complainant written confirmation of his period of employment and position.

IT IS FURTHER ORDERED that MSHA's proposed assessment of a civil penalty is severed from this proceeding and remanded to MSHA for further proceedings pursuant to 29 C.F.R. § 2700.25.

James A. Laurenson, Judge

Distribution Certified Mail:

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Mr. R. David Lewis, Esq., 1109 Kavanaugh, Little Rock, AR 72205

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

OCT 8 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. LAKE 80-129-M
	:	A/O No. 20-01012-05003
v.	:	
	:	Empire Mine or Empire Mill
CLEVELAND CLIFFS IRON COMPANY, Respondent	:	
ERNEST RONN, SAFETY COORDINATOR, UNITED STEELWORKERS OF AMERICA, DISTRICT NO. 33, Intervenor	:	

DECISION

Appearances: Gerald A. Hudson, Esq., Office of the Solicitor, U.S. Department of Labor, Detroit, Michigan, for the Petitioner; Ronald E. Greenlee, Esq., Clancey, Hansen, Chilman, Graybill & Greenlee, Ishpeming, Michigan, for the Respondent; Paul Gravedoni, President, Local Union 4950, United Steelworkers of America, Negaunee, Michigan, and Ernest Ronn, Safety Coordinator, United Steelworkers of America, District No. 33, Marquette, Michigan, for the Intervenor.

Before: Judge Cook

I. Procedural Background

On January 10, 1980, the Secretary of Labor (Petitioner) filed a proposal for a penalty in the above-captioned case pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (Supp. III 1979) (1977 Mine Act). The proposal charges Cleveland Cliffs Iron Company (Respondent) with one violation of mandatory safety standard 30 C.F.R. § 55.12-16, as set forth in Citation No. 286902, which was issued pursuant to section 104(a) of the 1977 Mine Act. The Respondent filed an answer and an amended answer on February 1, 1980, and February 15, 1980, respectively. On October 6, 1980, Ernest Ronn, Safety Coordinator, United Steelworkers of America, District No. 33 (Intervenor), filed a written notice electing party status in the proceeding on behalf of the affected employees.

The Petitioner and the Respondent engaged in extensive prehearing discovery which entailed the filing and service of a request for production of documents, the filing and service of various sets of interrogatories, and the taking of several depositions.

Various notices of hearing were issued which ultimately scheduled the matter for hearing on the merits on November 18 and 19, 1980, in Marquette, Michigan. The hearing was held as scheduled with representatives of the three parties present and participating. The Petitioner interposed an objection to the receipt in evidence of Exhibit O-2, one of the Respondent's exhibits. The parties were instructed to argue the materiality of Exhibit O-2 in their posthearing briefs, and were informed that a ruling on its receipt in evidence would be made at the time of the writing of the decision. On April 3, 1981, the Petitioner informed the undersigned Administrative Law Judge, in writing, that it had withdrawn its objection to the receipt in evidence of Exhibit O-2. Accordingly, an order was issued on April 6, 1981, receiving Exhibit O-2 in evidence.

Following the presentation of the evidence on November 19, 1980, Mr. Ernest Ronn delivered a closing argument on the record in behalf of the Intervenor. In addition, a schedule was set for the filing of posthearing briefs and proposed findings of fact and conclusions of law. However, certain difficulties experienced by counsel for the Petitioner and counsel for the Respondent required revisions thereof. The Petitioner and the Respondent filed posthearing briefs on April 2, 1981, and April 3, 1981, respectively. The Intervenor did not file a posthearing brief. None of the three parties filed reply briefs.

Additionally, when the transcript of the hearing was received by the undersigned Administrative Law Judge on December 12, 1980, it was discovered that the court reporting company had failed to forward in conjunction therewith three of the exhibits referenced in the transcript, i.e., Exhibits G-1, G-2, and G-8. A study of the transcript revealed that Exhibits G-1 and G-2 were photographs, and that Exhibit G-8 was referenced in the transcript but that it was never identified or shown as a specific item. By letter dated January 13, 1981, the three parties were apprised of this development and were instructed to take appropriate action. 1/ A stipulation resolving the

1/ The letter of January 13, 1981, stated, in part, as follows:

"The matter of the missing exhibits must be resolved at this time. Specifically, Exhibits G-1 and G-2 must be located and forwarded to the undersigned for inclusion in the record, and must be accompanied by a stipulation signed by the representatives of all three parties stating that the exhibits forwarded to me are the same ones placed in evidence during the hearing. Additionally, you are requested to determine whether G-8 was an exhibit and, if it was, to submit either the original or a copy and a stipulation signed by the representatives of all three parties stating that it can be placed in the record either as the original or as a substitute for the original, whichever is applicable. If G-8 was not an exhibit, then please so state.

matter, and signed by the representatives of all three parties, was filed on February 23, 1981.

II. Violation Charged

Citation No.	Date	30 C.F.R. Standard
286902	May 21, 1979	55.12-16

III. Witnesses and Exhibits

A. Witnesses

The Petitioner called as its witnesses Thomas Allen Fay, an apprentice electrician at the Empire Mine; Steven Samuel Etelamaki, a field electrician apprentice at the Empire Mine; William Waldemar Carlson, a supervisory mining engineer employed by the Department of Labor's Mine Safety and Health Administration (MSHA); and Richard Dean Breazeal, an MSHA health, safety and electrical inspector.

The Respondent called as its witnesses James Philip Tonkin, the safety coordinator at the Empire Mine; Robert Douglas Kallatsa, Sr., a shift foreman in the electrical department on May 19, 1979, and a foreman in the electrical department as of the date of the hearing; and Dennis Roy Laituri, the electrical engineer in charge of the electrical department on May 19, 1979, and the operating engineer of the electrical department as of the date of the hearing.

The Intervenor did not call any witnesses.

B. Exhibits

1. The Petitioner introduced the following exhibits in evidence:

G-1 was a photograph of the ladder used by the apprentice electricians on May 19, 1979.

G-2 was a photograph of a light fixture similar to the one involved in the May 19, 1979, fatal accident.

G-3 is a diagram of a ballast and fixed hanger.

G-4 is a copy of Citation No. 286902, May 21, 1979, 30 C.F.R. § 55.12-16.

G-5 is a copy of section 103(k) Order No. 286901, issued on May 19, 1979, and a copy of the termination thereof.

G-6 is a copy of a page from the Code of Federal Regulations containing mandatory safety standard 30 C.F.R. § 55.12-16.

G-7 is a computer printout prepared by MSHA's Directorate of Assessments setting forth the history of violations at the Empire Mine or Empire Mill for which the Respondent had paid assessments, beginning September 1, 1977, and ending August 31, 1979.

2. The Respondent introduced the following exhibits in evidence: 2/

O-1 is a copy of a page from a manual used by Federal mine inspectors setting forth the text of mandatory safety standard 30 C.F.R. § 55.12-16 subsequent to the change published at 42 Fed. Reg. 57040 (October 31, 1977), and in effect on May 19, 1979; and setting forth an "application" of the standard used by Federal mine inspectors in enforcing such mandatory safety standard.

O-2 is a copy of a page from a manual used by Federal mine inspectors setting forth the text of mandatory safety standard 30 C.F.R. § 57.12-16 prior to the change published at 42 Fed. Reg. 57040 (October 31, 1977); and setting forth an "application" of the standard used by Federal mine inspectors in enforcing such mandatory safety standard.

O-3 is a copy of a safety orientation report dated February 6, 1978, and signed by Thomas Fay.

O-4 is a copy of a safety orientation report dated August 6, 1975, and signed by Steven S. Etelamaki.

O-5 is a copy of a safety orientation report dated January 30, 1978, and signed by John W. Parkkonen.

O-6 is a three-page document styled "Safety Orientation, Electrical Department."

O-7 is a copy of a document dated May 18, 1979, and styled "Employee's Safety Meeting Report."

O-8 is a copy of a document styled "Supervisor's Safety Contact and Observation Log."

O-9 is a copy of a document styled "Supervisor's Safety Contact and Observation Log."

O-10 is a copy of a document styled "Supervisor's Safety Contact and Observation Log."

2/ Exhibit O-13 is a copy of the narrative findings for a special assessment prepared by MSHA's Office of Assessments in connection with Citation No. 286902. The exhibit was ruled inadmissible during the hearing and, accordingly, has not been considered in deciding this case. However, in accordance with the ruling made during the hearing, the exhibit has been placed in a separate envelope in the official case file.

O-11 is a three-prong electrical plug.

O-12 is a copy of the inspector's statement, MSHA Form 7000-4, pertaining to G-4.

3. The Intervenor introduced the following exhibits in evidence:

U-1-A is a copy of the cover from the August 1, 1977, collective bargaining agreement between the Respondent and the United Steelworkers of America.

U-1-B is a copy of certain provisions from the August 1, 1977, collective bargaining agreement between the Respondent and the United Steelworkers of America.

U-2 is a copy of the Respondent's electrician (field) standard job classification and description.

U-3-A is a copy of the cover of the Respondent's safety rule book.

U-3-B is a copy of page 5 of the Respondent's safety rule book.

U-3-C is a copy of page 24 of the Respondent's safety rule book.

IV. Issues

Two basic issues are involved in this civil penalty proceeding: (1) did a violation of mandatory safety standard 30 C.F.R. § 55.12-16 occur, and (2) what amount should be assessed as a penalty if a violation is found to have occurred? In determining the amount of civil penalty that should be assessed for a violation, the law requires that six factors be considered: (1) history of previous violations; (2) appropriateness of the penalty to the size of the operator's business; (3) whether the operator was negligent; (4) effect of the penalty on the operator's ability to continue in business; (5) gravity of the violation; and (6) the operator's good faith in attempting rapid abatement of the violation.

V. Opinion and Findings of Fact

A. Stipulations

1. The parties entered into the following stipulations during the hearing:

(a) The Respondent is subject to the provisions of the 1977 Mine Act (Tr. 3-4).

(b) The Administrative Law Judge has jurisdiction over the Respondent in this proceeding (Tr. 3-4).

(c) Citation No. 286902 was issued to the Respondent; and such citation may be admitted into evidence, but not for any substantive purposes to prove the allegations contained therein (Tr. 3-4).

2. The parties filed the following stipulation on February 23, 1981:

> It is hereby stipulated and agreed by and between petitioner, Secretary of Labor, respondent Cleveland Cliffs Iron Company, and Local Union 4950 United Steelworkers of America, acting through their respective counsel or representative, the following:
>
> 1. The exhibits marked as G-1 and G-2 may be excluded from the record in this matter. Exhibits G-1 and G-2 have apparently been lost and negatives of the photographs are not available. The parties further stipulate that all testimony and references made in regard to the items depicted in the exhibits shall not be excluded and are part of the record.
>
> 2. Exhibit G-8 was introduced as an exhibit but was not offered into evidence by any of the parties. Therefore Exhibit G-8 is not part of the record in this matter.

B. Occurrence of Violation

On Saturday, May 19, 1979, a fatal electrical accident occurred at the Respondent's Empire Mine or Empire Mill while three of the Respondent's employees were relocating some previously installed 1,000-watt, high-pressure sodium "Halophane Prismpack" lights in the high bay of the mill. Federal supervisory mining engineer William W. Carlson and Federal mine inspector Richard D. Breazeal participated in the ensuing MSHA fatal accident investigation, which was conducted at the facility later that day. As a result of the investigation, Mr. Carlson issued Citation No. 286902 on May 21, 1979, charging the Respondent with a violation of mandatory safety standard 30 C.F.R. § 55.12-16 in connection with the accident. The citation alleges, in pertinent part, that "[a]pprentice electricians were assigned to relocate 1000 watt, high pressure sodium 'Halophane Prismpack' lights, powered by 480 volts alternating current, on the ceiling above the primary grinding section in the concentrator. The lighting equipment was energized during installation" (Exh. G-4). The cited mandatory safety standard provides as follows:

> Electrically powered equipment shall be deenergized before mechanical work is done on such equipment. Power switches shall be locked out or other measures taken which shall prevent the equipment from being energized without the knowledge of the individuals working on it. Suitable warning notices shall be posted at the power switch and

signed by the individuals who are to do the work. Such locks or preventive devices shall be removed only by the persons who installed them or by authorized personnel.

There is no substantial dispute amongst the parties as relates to the facts and circumstances surrounding the occurrence of the fatal accident. Rather, the dispute is principally confined to the following issues: (1) whether the light fixture involved in the accident was "electrically powered equipment" within the meaning of the regulation; and (2) whether the handling, hoisting, and hanging of the energized light fixture involved in the accident constituted "mechanical work" on electrically powered equipment within the meaning of the regulation. For the reasons set forth below, I answer both questions in the affirmative.

The evidence presented shows that on the morning of May 19, 1979, electrical apprentices Thomas Fay, Steven Etelamaki, and John Parkkonen reported for work at the Respondent's Empire Mine or Empire Mill on an overtime shift. The three men were assigned to the task of relocating previously installed 1,000-watt, high-pressure sodium "Halophane Prismpack" lights a distance of approximately 8 to 10 feet laterally from one support beam to another in the high bay of the mill.

In view of the location of the lights, the three men had to work approximately 80 to 100 feet above the floor of the mill. It was therefore necessary to use an overhead crane and trolley assembly as a work platform. It was also necessary to use a ladder in order to take down and to rehang the light fixtures, and in order to reach the electrical outlets.

While the men were still on the floor of the mill, Mr. Robert D. Kallatsa, Sr., the shift foreman in charge of the electrical crew, gave instructions as to where the lights were to be placed. Additionally, Mr. Kallatsa gave instructions to wear safety belts, to lock out the electrical power to the crane whenever anyone was on the ladder, and to secure the ladder. The three men acquired the necessary tools and equipment, and proceeded to the crane and trolley assembly.

It appears that each fully assembled light fixture consisted of at least a shade, a bulb, a ballast, a conduit, and a screw fitting. The screw fitting was shaped as an inverted "J" and was attached to the top of the conduit, a pipe-shaped stem. The screw fittings apparently served to suspend the fixtures from fixed hangers attached to the 6-inch "I" beams. It appears that the conduit and screw fitting assemblies were approximately 5 feet in length. The conduit, in turn, was attached to the ballast. Although the record is not entirely clear on this point, it appears that the bulbs and the shades were removed from the lights at all relevant times.

At some point in time prior to beginning the actual work, the three electrical apprentices conferred amongst themselves and determined the procedure to be used in relocating the lights. Basically, the steps employed, insofar as relevant to the issues presented, were as follows: On the first

light, the crane was moved into position under the electrical outlet, the ladder was put up so as to provide access to the plug, and the light was unplugged. Then, the ladder was taken down and turned around 180 degrees, and the crane trolley was moved to a location where the ladder could be put up to provide access to the light fixture. The light fixture was taken down, and its electrical cord was replaced with a longer one. The crane trolley was moved to a slightly different location, the ladder was put up, and the light fixture was rehung. Again, the ladder was taken down, turned around 180 degrees, and the crane trolley was moved back underneath the electrical outlet. The ladder was put up and the light fixture was plugged into the electrical outlet.

At this point, the three men conferred amongst themselves and decided to revise the procedure so as to eliminate one of the 180-degree ladder rotations. Under the new procedure, the light fixture remained plugged into the electrical outlet while being taken down and while being rehung. Basically, it entailed moving the trolley under the light fixture, putting up the ladder, and taking down the fixture. Then, the ladder was rotated, the trolley was moved to a location underneath the electrical outlet, the ladder was put up, and the fixture was unplugged. The fixture's electrical cord was replaced with a longer cord and the plug was reinserted into the outlet. The ladder was taken down and the trolley was moved to the location where the light was to be rehung. The ladder was put up and the light was placed in its new location. The second fixture was relocated in this manner without incident.

Following their coffee break, the three men began work on the third light fixture using the same procedure employed in relocating the second one. The fixture was taken down from its hanger and was then unplugged from the energized 480-volt electrical circuit. The fixture's electrical cord was then replaced with a longer one, and the Hubbell twist lock, three-prong electrical plug from the old cord was wired onto the new cord. Thereafter, the fixture was plugged into the energized 480-volt electrical circuit and then the three men began to rehang the fixture. Messrs. Fay and Etelamaki were standing on the work platform, hoisting or holding the ballast, conduit, and screw fitting assembly up to Mr. Parkkonen, who was standing on the aluminum ladder. Messrs. Fay and Etelamaki were wearing their leather work gloves, but Mr. Parkkonen was not wearing his. Mr. Parkkonen grabbed the stem and received a fatal electrical shock.

The evidence shows that Mr. Fay had miswired the three-prong plug by inadvertently wiring one of the electrical cord's phase conductors to the ground prong leg on the plug. When plugged into the energized electrical circuit, the miswiring caused the conduit, stem, and the outer casing on the ballast to energize to approximately 277 volts to ground, producing the attendant shock hazard which claimed Mr. Parkkonen's life. 3/

3/ The crane was grounded and the air was moist and humid. Placing the aluminum ladder against the structural steel made a solid continuity and provided a path for the current to flow to ground. The human body will restrain 277 volts to ground for approximately .86 to .87 of a second before the heart goes into fibrillation (Tr. 152, 211-212).

The record clearly reveals that the light fixture was energized when the accident occurred in that it was plugged into a live 480-volt electrical outlet. The citation alleges that the installation or relocation of energized light fixtures violates that portion of mandatory safety standard 30 C.F.R. § 55.12-16 which provides that "[e]lectrically powered equipment shall be deenergized before mechanical work is done on such equipment." 4/ The terms "electrically powered equipment" and "mechanical work" are not defined by any provision of Part 55 of Title 30 of the Code of Federal Regulations.

The Petitioner maintains that the electrical lights in question were "electrically powered equipment" within the meaning of the regulation because:

> [C]ommon usage of the terms supports a conclusion that the electrical light fixtures were such equipment. The evidence supports a finding that the electrical lights were high pressure sodium lights powered by 480 volts alternating current. It is uncontroverted that the light was electrically powered and the Secretary therefore submits that the ballast of the light fixture meets the definition of electrically powered equipment for purposes of the standard.

(Petitioner's Posthearing Brief, p. 5).

The Petitioner further maintains that:

> [The] record is clear that the apprentices handled, hoisted, and hung the light fixture in the performance of their work on May 19, 1979. In order to accomplish this task, the apprentices used various tools and aids in relocating the electrical lights to their new locations. It is the Secretary's position that the movement and installation of the light fixtures constituted mechanical work for the purposes of 30 CFR 55.12-16.

(Petitioner's Posthearing Brief, p. 5).

The Respondent disagrees, contending that mandatory safety standard 30 C.F.R. § 55.12-16 does not apply to electrical lights. The Respondent argues that the regulation applies only to electrically powered equipment which performs a mechanical function through the use of moving or actioning parts, and, in support of its position, points to definitions of the words "mechanical," "machine," and "mechanism" appearing in the 1966 unabridged

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4/ It appears from the testimony of Mr. Carlson and Mr. Breazeal that this portion of the regulation would have been complied with if the circuit breaker on the main control panel had been opened, or if the fixture had remained unplugged during the relocation operation (Tr. 162-163, 212).

edition of The Random House Dictionary of the English Language. The Respondent maintains that the regulation is directed solely toward the prevention of injuries caused by moving or actioning machine parts while the miners are performing mechanical work on electrically powered equipment, and appears to maintain that protection against the electrical shock hazards presented on the facts of this case is addressed exclusively by mandatory safety standard 30 C.F.R. § 55.12-17 (Respondent's Posthearing Brief, pp. 14-16). The latter regulation provides, in part, that "[p]ower circuits shall be deenergized before work is done on such circuits unless hot-line tools are used."

The Respondent also argues that the Petitioner's interpretation renders the 1977 amendments to the regulation meaningless (see 42 Fed. Reg. 57038, 57040 (October 31, 1977)), because the drafters of the amendments did not intend that the regulation, as amended, apply to all work performed on all electrical equipment. Significantly, however, the Respondent concedes that the cited condition would have been covered by the regulation in its preamendment form (Respondent's Posthearing Brief, pp. 18-20).

The initial question presented is whether mandatory safety standard 30 C.F.R. § 55.12-16 is directed, as the Respondent contends, solely toward the prevention of injuries caused by moving or actioning machine parts, or whether the regulation also provides protection against electrical shock hazards. The rules of statutory construction provide the governing principles for decision.

As a general proposition, the rules of statutory construction can be employed in the interpretation of administrative regulations. See C. D. Sands, 1A Sutherland on Statutory Construction, § 31.06, p. 362 (1972). According to 2 Am. Jur.2d, Administrative Law, § 307 (1962), "rules made in the exercise of a power delegated by statutue should be construed together with the statute to make, if possible, an effectual piece of legislation in harmony with common sense and sound reason." Remedial legislation directed toward securing safe and healthful work places must be interpreted in light of the express congressional purpose of providing a safe and healthful work environment, and the regulations promulgated pursuant to such legislation must be construed so as to effectuate Congress' goal of accident prevention. Brennen v. Occupational Safety and Health Review Commission, 491 F.2d 1340 (2d Cir. 1974). "[R]emedial legislation and its implementing regulations are to be construed liberally. Consolidation Coal Co., 1 FMSHRC 1300, 1309 [sic] (1979)," Cleveland Cliffs Iron Company, Inc., 3 FMSHRC 291, 294, 2 BNA MSHC 1138, 1981 CCH OSHD par. 25,163 (1981), and "[s]hould a conflict develop between a statutory interpretation that would promote safety and an interpretation that would serve another purpose at a possible compromise of safety, the first should be preferred." District 6, United Mine Workers of America v. Department of Interior Board of Mine Operations Appeals, 562 F.2d 1260 (D.C. Cir. 1972).

Applying these principles of construction, I conclude that mandatory safety standard 30 C.F.R. § 55.12-16 provides miners performing mechanical

work on electrically powered equipment with protection against injuries caused by moving or actioning machine parts or equipment, and with protection against electrical shock hazards. The Respondent's proffered interpretation would promote an objective at odds with mine safety and is therefore not to be preferred. There is no indication that the drafters of the regulation intended that it provide only the limited protection advocated by the Respondent. In fact, the plain wording of the regulation provides no support for the limitation advocated by the Respondent.

The Respondent's position that the electrical shock hazards presented on the facts of this case are addressed exclusively by mandatory safety standard 30 C.F.R. § 55.12-17 is without foundation. That regulation applies only when work is being performed on "power circuits," and is not directed toward the performance of "mechanical work" on "electrically powered equipment."

The second question presented is whether mandatory safety standard 30 C.F.R. § 55.12-16 provides the miners with protection against electrical shock hazards associated with the relocation of energized lighting fixtures of the type involved in this case, i.e., whether the handling, hoisting, and hanging of such energized light fixtures is "mechanical work" on "electrically powered equipment" within the meaning of the regulation. For the reasons set forth below, I answer this question in the affirmative.

As noted previously, the terms "electrically powered equipment" and "mechanical work" are not defined by any provision of Part 55 of Title 30 of the Code of Federal Regulations. The words are not used in a narrow, technical sense, and should therefore be given their common meaning in determining what the drafters of the regulation intended. C. D. Sands, 2A Sutherland on Statutory Construction, §§ 47.27 and 47.28 (1973). "It is axiomatic 'that words used in a statute are to be given their ordinary meaning in the absence of persuasive reasons to the contrary.' Burns v. Alcala, 420 U.S. 575, 95 S. Ct. 1180, 43 L.Ed.2d 469 (1975)." Chrobak v. Metropolitan Life Insurance Company, 517 F.2d 883, 886 (7th Cir. 1975). Additionally, the regulation must be interpreted liberally in view of its remedial purpose. Cleveland Cliffs Iron Company, Inc., 3 FMSHRC 291, 2 BNA MSHC 1138, 1981 CCH OSHD par. 25,163 (1981); Local Union No. 5429, United Mine Workers of America v. Consolidation Coal Company, 1 FMSHRC 1300, 1 BNA MSHC 2148, 1979 CCH OSHD par. 23,850 (1979). Also applicable is the principle previously cited from the District 6, UMWA case that if a conflict develops between an interpretation of the regulation that would promote mine safety and an interpretation that would serve another purpose at a possible compromise of mine safety, the first should be preferred.

As relates to whether light fixtures are electrically powered equipment, the evidence clearly shows that the light fixtures in question were 1,000-watt, high-pressure sodium lights powered by electricity rated at 480 volts. The adjective "power" is defined, amongst several definitions, as "operated by electricity, a fuel engine, etc." David B. Guralnik (ed.), Webster's New World Dictionary of the American Language (2nd College Edition)

(New York: The World Publishing Company) (1970) at pp. 1116-1117. The noun "equipment" is defined, amongst several definitions, as "the special things needed for some purpose; supplies, furnishings, apparatus, etc." David B. Guralnik (ed.), Webster's New World Dictionary of the American Language (2nd College Edition) (New York: The World Publishing Company (1970) at p. 473. A light fixture is an apparatus operated by electricity. Accordingly, I conclude that a light fixture is electrically powered equipment within the meaning of the regulation.

As relates to whether mechanical work was being performed on the light fixtures, the evidence shows that the May 19, 1979, relocation work entailed the handling, hoisting, and hanging of light fixtures. The word "mechanical," when used as an adjective, has a range of common meanings which includes the following: (1) "Pertaining to, produced by, or dominated by physical forces," and (2) "[o]f or pertaining to manual labor, its tools, and its skills." William Morris (ed.), The American Heritage Dictionary of the English Language (Boston: Houghton Mifflin Company) (1976) at p. 813. The relocation work involved the tools and skills of manual labor, and the work was dominated by the physical forces associated with the handling, hoisting, and hanging of light fixtures. Accordingly, the handling, hoisting, and hanging of light fixtures of the type involved in this case, during their relocation, is the performance of "mechanical work" on the fixtures within the meaning of the regulation.

The Respondent's position to the contrary is not well founded. As noted previously, the Respondent maintains that the regulation does not apply to electrical lights because, in the Respondent's view, the regulation applies only with respect to electrically powered equipment which performs a mechanical function through the use of moving or actioning parts. The strongest support in the record for this position is found in the testimony of Mr. Dennis R. Laituri, an electrical engineer employed by the Respondent. According to Mr. Laituri, the regulation applies only to electrically powered equipment which performs some type of mechanical work, a position which by definition excludes electrically powered lights from the regulation's coverage. He testified that no mechanical work is involved in changing a light fixture because a person cannot perform mechanical work on a device which has no mechanical function (Tr. 350). His testimony on this point is considered unpersuasive because he later admitted during cross-examination by the Intervenor that a person removing the shade and the light bulb would be performing mechanical work on the fixture (Tr. 371), a position which is inconsistent with his previous testimony. Removing the shade and the light bulb does not alter the fact that a light fixture performs no mechanical function.

Of even greater significance is the fact that the Respondent's position, if adopted, would amount to a rewriting of the regulation under the guise of interpreting it. Under the regulation as written, the adjective "mechanical" modifies the word "work." The Respondent's interpretation would have it modify the word "equipment," and thereby effectively rewrite the regulation to apply only to "electrically powered mechanical equipment."

The Respondent's reliance on the 1977 amendments to mandatory safety standard 30 C.F.R. § 55.12-16 in support of its position is misplaced. Prior to November 30, 1977, mandatory safety standards 30 C.F.R. §§ 55.12-16, 56.12-16, and 57.12-16, provided, in part, that "[e]lectrical equipment shall be deenergized before work is done on such equipment." Effective November 30, 1977, the regulations were revised so as to provide, in part, that "[e]lectrically powered equipment shall be deenergized before mechanical work is done on such equipment." 42 Fed. Reg. 57038-57044 (October 31, 1977). The supplementary information published in conjunction with the amended regulations commented on the change as follows:

> Mandatory standard 57.12-16 is revised by substituting 'Electrically powered equipment * * *' for 'Electrical equipment * * *,' and the words '* * * mechanical work * * *' for ' * * * work * * *' so as to clarify the intent and application of the standard in response to comments. Work on electrical circuits of such equipment is covered under mandatory standard 57.12-17.

42 Fed. Reg. 57038, 57039 (October 31, 1977). These comments are considered equally applicable to mandatory safety standards 30 C.F.R. §§ 55.12-16 and 56.12-16, as amended or revised.

It is therefore clear that the 1977 amendments simply revised mandatory safety standard 30 C.F.R. § 55.12-16 so as to clarify its intent and application as excluding from coverage work performed on the electrical circuits of electrically powered equipment. The amendments were not intended to change, and did not change, the scope of the regulation so as to exclude from coverage the type of activities involved in this case. It is therefore highly significant that the Respondent concedes, as noted above, that the cited condition was covered by the regulation in its pre-amendment form.

In view of the foregoing, I conclude that Citation No. 286902 properly charges a violation of mandatory safety standard 30 C.F.R. § 55.12-16. I further conclude that the violation charged has been established by a preponderance of the evidence.

C. Negligence of the Operator

The Respondent admits that it demonstrated negligence in connection with the violation, but maintains that its negligence was minimal (Respondent's Posthearing Brief, pp. 20-21).

The record contains no probative evidence which shows that Mr. Kallatsa, the shift foreman, had actual or constructive knowledge that the handling, hanging, or hoisting of the light fixtures was being performed while such fixtures were energized. Additionally, the record shows that the three

electrical apprentices were sufficiently qualified to perform the relatively simple job of relocating the light fixtures without a supervisor being present at all times. 5/ The three men received certain safety instructions from Mr. Kallatsa prior to beginning their work, as set forth previously in this decision.

Accordingly, the record supports a finding that the negligence demonstrated by the Respondent was of a minimal nature.

D. Gravity of the Violation

The violation, coupled with the accidental miswiring of the three-prong electrical plug, resulted in the occurrence of the fatal electrical accident which claimed Mr. Parkkonen's life. The violation was a substantial contributing cause of the fatal accident and was therefore extremely serious. Additionally, the Respondent concedes that the violation was serious (Respondent's Posthearing Brief, p. 21).

E. Good Faith in Attempting Rapid Abatement

Both Mr. Carlson and Inspector Breazeal testified that the Respondent demonstrated good faith in rapidly abating the violation. Accordingly, it is found that the Respondent demonstrated good faith in rapidly abating the violation.

F. Size of the Operator's Business

The Respondent concedes that it is a large operator (Respondent's Posthearing Brief, p. 20).

G. History of Previous Violations

Exhibit G-7 is a computer printout prepared by the Directorate of Assessments setting forth the history of violations for which assessments have been paid at the Respondent's Empire Mine or Empire Mill, beginning September 1, 1977, and ending August 31, 1977. The exhibit reveals that the Respondent has no history of previous violations prior to December 8, 1978. However, the Respondent had 23 violations of various provisions of the Code of Federal Regulations at the facility for which assessments have been paid, beginning December 8, 1978, and ending May 19, 1979. Of these, one was for a violation of mandatory safety standard 30 C.F.R. § 55.12-16.

H. Effect of a Civil Penalty on the Respondent's Ability to Remain in Business

In Hall Coal Company, 1 IBMA 175, 79 I.D. 668, 1 BNA MSHC 1037, 1971-1973 CCH OSHD par. 15,380 (1972), the Federal Mine Safety and Health Review

5/ The Intervenor took the position during the hearing that a standard electrician should have been assigned to work with the apprentices on May 19, 1979. No opinion is expressed on this subject.

Commission's predecessor, the Interior Board of Mine Operations Appeals, held that evidence relating to whether a civil penalty will affect the operator's ability to remain in business is within the operator's control, resulting in a rebuttable presumption that the operator's ability to continue in business will not be affected by the assessment of a civil penalty.

The Respondent asserts in its posthearing brief that the imposition of a reasonable penalty will not affect the ability of either the operator or the mine to continue in business, but maintains that "consideration should be given to the fact that the Empire Mine operation was shut down for three months last fall as was [the Respondent's] Republic Mine on the Marquette Iron Range which is still not back to full operation" (Respondent's Posthearing Brief, p. 20).

The evidence presented shows that the Respondent operates the Empire Mine, the Tilden Mine, the Republic Mine, and three of the larger taconite operations in the area (Tr. 142). The evidence further shows that no production occurred at the Empire Mine for 3 months during the summer of 1980; and that the Republic Mine ceased production at about the same time and that production had not resumed as of the date of the hearing. However, both facilities were shipping from their stockpiles, at least as of the date of the hearing (Tr. 153-154). The record contains no other evidence material to the issue as to whether the assessment of a civil penalty will affect the Respondent's ability to remain in business.

Business and tax records are the type of evidence necessary to establish a claim of financial impairment. Hall Coal Company, 1 IBMA 175, 180, 79 I.D. 668, 1 BNA MSHC 1037, 1971-1973 CCH OSHD par. 15,380 (1972) see also, Davis Coal Company, 2 FMSHRC 619, 1 BNA MSHC 2305, 1980 CCH OSHD par. 24,291 (1980) (Lawson, C., dissenting). The record does not contain such evidence. The evidence in the record is insufficient to rebut the aforementioned presumption. Accordingly, I find that a civil penalty otherwise properly assessed in this proceeding will not impair the Respondent's ability to remain in business.

VI. Conclusions of Law

1. Cleveland Cliffs Iron Company and its Empire Mine or Empire Mill have been subject to the provisions of the 1977 Mine Act at all times relevant to this proceeding.

2. Under the 1977 Mine Act, the Administrative Law Judge has jurisdiction over the subject matter of, and the parties to, this proceeding.

3. Federal supervisory mining engineer William W. Carlson was a duly authorized representative of the Secretary of Labor at all times relevant to the issuance of Citation No. 286902, May 21, 1979, 30 C.F.R. § 55.12-16.

4. The violation charged in Citation No. 286902, May 21, 1979, 30 C.F.R. § 55.12-16 is found to have occurred as alleged.

5. All of the conclusions of law set forth in Part V, supra, are reaffirmed and incorporated herein.

VII. Proposed Findings of Fact and Conclusions of Law

The Intervenor made a closing argument at the conclusion of the hearing on November 19, 1980. The Petitioner and the Respondent filed posthearing briefs on April 2, 1981, and April 3, 1981, respectively. Such closing argument and briefs, insofar as they can be considered to have contained proposed findings and conclusions, have been considered fully, and except to the extent that such findings and conclusions have been expressly or impliedly affirmed in this decision, they are rejected on the grounds that they are, in whole or in part, contrary to the facts and law or because they are immaterial to the decision in this case.

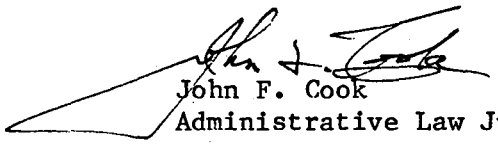
VIII. Penalty Assessed

Upon consideration of the entire record in this case and the foregoing findings of fact and conclusions of law, I find that the assessment of a civil penalty is warranted as follows:

Citation No.	Date	30 C.F.R. Standard	Penalty
286902	May 21, 1979	55.12-16	$3,000.00

ORDER

The Respondent is ORDERED to pay a civil penalty in the amount of $3,000 within 30 days of the date of this decision.



John F. Cook
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

OCT 9 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	)	CIVIL PENALTY PROCEEDING
Petitioner,	)	DOCKET NO. WEST 80-331-M
v.	)	A/C No. 45-01582-05007
BLACK RIVER SAND & GRAVEL INC.,	)	MINE: Black River Pit
Respondent.	)	

BENCH DECISION

Appearances:

Ernest Scott, Jr., Esq.
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United States Department of Labor
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For the Petitioner

James L. Hawk, President
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6808 South 140th
Seattle, Washington 98178
Pro Se

Before: Judge Jon D. Boltz

The Petitioner filed a petition for assessment of civil penalties against the Respondent for alleged violations of regulations promulgated pursuant to the Federal Mine Safety and Health Act of 1977. The evidence having been concluded, the parties have agreed to waive filing of post hearing briefs and also agree that a bench decision may be rendered at this time.

Based on statements and agreements of the parties, I make the following findings of fact:

1. Respondent has a moderate history of previous violations.

2. The size of Respondent's business is less than average for a sand and gravel operation in this area.

3. Assessment of proposed civil penalties will not affect Respondent's ability to continue in business.

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

5. The Act gives me jurisdiction over the parties and the subject matter of these proceedings.

6. The inspectors who issued the citations were duly authorized representatives of the Secretary of Labor.

CITATION NO. 586025

The Petitioner alleges that there was not a side guard on the self cleaning tail pulley on the left side of the #1 primary conveyor belt. The citation alleges a violation of 30 C.F.R. 56.14-7, which regulation states that guards shall be of substantial construction and properly maintained.

It is undisputed that part of the guard had been removed, and Respondent's evidence showed that this was done for clean up purposes. The equipment, however, was in operation at the time of the inspection and, thus, I find under these circumstances that there was a violation of the cited regulation. The ground area where the Respondent's plant was located was extremely wet and muddy at all times and employees did not clean up spillage around the tail pulley by shovel. This clean up was accomplished by use of a bucket on a front end loader. There was, therefore, not a great risk of injury to the employees.

The citation is affirmed and a penalty of $65.00 is assessed.

CITATION NO. 586026

Petitioner alleges that there was no back guard on the self cleaning tail pulley on the #2 conveyor which was operating in the pit, in violation of 30 C.F.R. 56.14-7.

It is undisputed that there was no back guard on the pulley and that the pulley was at ground level. Again, because of the ground conditions in this area of the operation, the potential for contact with the self cleaning tail pulley was somewhat remote, however, I am taking this into consideration for the purpose of assessing the penalty only. I find that there was a violation of the regulation and the citation is affirmed. The penalty assessed is $60.00.

CITATION NO. 586027

Petitioner alleges that there was no guard on the self cleaning tail pulley on the #4 up slope conveyor belt operating in the pit. The Petitioner also alleges that the tail pulley was exposed to persons in the area, in violation of 30 C.F.R. 56.14-1.

The cited regulation states, inter alia, that tail pulleys which may be contacted by persons, and which may cause injury to persons, shall be guarded. Again, the evidence is undisputed that there was no guard. Even though the conditions were muddy, evidence was presented that the pulley was operating near ground level approximately two feet from two employees. The guard had been removed for repairs and had not been replaced. Thus, the pulley might have been contacted by persons and it might have caused injury to them. Under these circumstances, the citation is affirmed and a penalty of $100.00 is assessed.

CITATION NO. 586028

Petitioner alleges that the V-belt drive pulley on the #3 conveyor belt was not provided with a guard. The Petitioner also alleges that it was within reach of persons in the area, all in violation of 30 C.F.R. 56.14-1.

The evidence was that the drive pulley was approximately five feet above ground level, and it was easily accessible by two employees who were seen working within approximately two feet of the exposed pulley. Thus, these persons in the area could have come into contact with the pulley and could have been injured. The citation is affirmed and a penalty of $75.00 is assessed.

CITATION NO. 586029

The Petitioner alleges there was no safe means of access to the plant pond pump, in violation of 30 C.F.R. 56.11-1. This regulation states that a safe means of access shall be provided and maintained to all working places.

A wooden walkway had been constructed horizontally over approximately a twelve foot stretch of water as the means of access to the pump. The rungs on the walkway were approximately six inches in width with a space in between the rungs. The walkway had a handrail. I find that access to the work area was not unsafe. The handrail provided adequate support as testified to by a witness for the Respondent, and this handrail, along with the walkway, I find allowed for safe access to the work area. This citation is vacated.

CITATION NO. 586030

Petitioner alleges that the berm had been washed away by drainage water on the elevated roadway leading to the electrical control shed, in violation of 30 C.F.R. 56.9-22, which states that berms or guards shall be provided on the outer banks of elevated roadways.

The berm was approximately eighteen inches above the roadway surface and approximately two feet wide. The evidence is undisputed that the berm was on the outer bank and that the roadway was elevated. Although the width of the wash out of the berm is disputed in that the MSHA inspector stated that it was 15 to 20 feet and the Respondent stated that it was just a few feet, there is, nevertheless, a violation of the cited regulation, since at least a portion of the berm was not in place at the time of the inspection. The evidence that the roadway was seldom travelled is a matter which I am taking into consideration in assessing a penalty. The citation is affirmed and the penalty assessed is $85.00.

CITATION NO. 586031

Petitioner alleges that there was no guard on the back section of the self cleaning tail pulley on the discharge belt under the jaw crusher, in violation of 56.14-7.

It is undisputed that there was no guard on the back section of the tail pulley. However, because the area around this particular pulley is always extremely muddy and cannot be contacted by individuals unless they wade through mud which was testified to as approximately waist deep, I find that the citation should be vacated. The spillage is cleaned up by loader as previously described in this Decision. Because of the remote location of the pulley and the fact that the employees do not come into contact with it, the citation is vacated.

CITATION NO. 352939

Petitioner alleges the floor area in front of the wash plant distribution center did not have a dry wooden platform or a dry insulating mat to protect personnel operating the switches from risk of electrical shock, in violation of 30 C.F.R. 56.12-20. The pertinent part of that regulation states that dry wooden platforms and insulating mats, or other electrical non-conductive materials shall be kept in place at all switchboards and power controlled switches where shock hazards exist.

It is undisputed that the floor area in the distribution center had sand and mud approximately 2 inches deep and that the area was wet. It is also undisputed that the center did have a board on which electrical switches were mounted. There was a wooden palet and mat which were buried under the sand and mud on the floor. The Respondent admitted that it had exercised poor housekeeping in that area. The Respondent had been previously cited for the same violation in the same area in November 1978. The citation is affirmed and the penalty assessed is $130.00.

ORDER

The foregoing Bench Decision is affirmed and the Respondent is ordered to pay total civil penalties in the sum of $515.00 within 30 days of the date of this Decision.

Jon D. Boltz
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 13, 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. CENT 81-2-M
	:	A.C. No. 16-00358-05017 F
v.	:	
	:	Cote Blanche Mine
DOMTAR INDUSTRIES, INC., Respondent	:	

DECISION

Appearances: Stephen P. Kramer, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner; Horace A. Thompson II, Esq., McCalla, Thompson, Pyburn & Ridley, New Orleans, Louisiana, for Respondent

Before: Chief Administrative Law Judge Broderick

On December 17, 1979, two miners at Domtar's Cote Blanche salt mine were killed when a nearby round of explosives was detonated as they were preparing another round for blasting. The Secretary of Labor, after investigating the accident, charged Domtar with a violation of 30 C.F.R. § 57-6-175 which reads, "Mandatory. Ample warning shall be given before the blasts are fired. All persons shall be cleared and removed from areas endangered by the blast. Clear access to exits shall be provided for personnel firing the rounds." In this proceeding, Domtar contests both the Secretary's finding of a violation and the proposed penalty based upon it.

A hearing was held, pursuant to notice, in Lafayette, Louisiana, on June 2, 1981. Witnesses for the Secretary were Jay Durfee and William Wilcox, officials of the Mine Safety and Health Administration (MSHA) who investigated the accident. Witnesses for Domtar were William Coughlan, Manager of the Cote Blanche mine, and Robert Marks, a production foreman who supervised the blasting crews on the day of the accident. Marks was the only witness with personal knowledge of the events preceding and immediately following the accident.

The parties have filed briefs stating their positions. At the hearing and in its brief, Respondent has objected vigorously to the evidence submitted by the Secretary on the ground that it was hearsay. I do not in this decision specifically address those arguments since, as I view the

case, the facts essential to a decision for the most part are not in dispute. See Respondent's Prehearing Statement submitted May 12, 1981, pages 9-13, and Tr. 37-47. Having considered the briefs and contentions of the parties, and the whole record, I make the following decision.

Findings of Fact

1. Domtar's Cote Blanche mine is an underground salt mine in St. Mary's Parish, Louisiana. Mining proceeds by the room and pillar method, with explosives being used to dislodge the salt.

2. Blasting is normally conducted at the end of the day shift. On December 17, 1979, Robert Marks assigned Herbert Allen and Flowers Hope to blast a "bench round" in Room 23 between O and N South headings. He also assigned Darsey Conner and David Washington to blast a "toe" or "floor trimming" round in N South heading between Rooms 23 and 22.

3. A "bench" is a portion of the mine which stands, in this case, 55 feet higher than the floor of the mine. A bench round consists of a number of explosives drilled down into the bench. When the round explodes, the bench cascades onto the floor, where it is removed for transportation to the surface.

4. A "toe" consists of the remnants of an incomplete bench round explosion. Occasionally, a bench round does not dislodge the entire section of bench which was blasted, leaving a portion intact near the floor of the mine. The object of a toe round is to blast this part of the bench so that the resulting debris can be removed for processing.

5. Marks instructed Conner, Washington, and Allen to use flashlight signals to communicate with each other as they prepared to blast the rounds. Once the two crews arrived at the blasting locations, Allen was to signal the toe round crew that the bench round crew was in place. The toe round crew would then flash back, signifying the same. When the toe round crew had lit their fuse, they were to signal the bench round crew that they were leaving. Upon seeing that, the bench round crew would ignite their fuse and depart.

6. As it happened, both crews apparently signalled to each other when they reached the blasting locations. But, according to Allen, the toe round crew subsequently left the area. He took this to mean that they had lit their fuse, although they had not signalled that they were leaving, as required by the signalling procedure. Consequently, the bench round crew lit their fuse and departed the area.

7. Allen and Hope parked their vehicle at the shop area and rode an elevator to the surface. Shortly after that, Marks saw the parked vehicle and became alarmed, since Conner and Washington should have arrived before the bench round crew. As he began to look for them, the bench round exploded. Conner and Washington were later found dead near the toe round. They had been killed by the bench round explosion before they ignited the toe round.

8. Jay Durfee, investigating the accident for MSHA, issued a citation to Domtar on December 21, 1979, which is the subject of this case. It alleges a violation of "57.06-175" and, under "condition or practice" reads,

> Powdermen D.L. Washington and D. Conners, Jr. were fatally injured when they were blasted by an adjacent bench round that had been fired by another crew (powdermen H. Allen and F. Hope). The two crews had not been instructed by Shift Crew (b) Foreman R. Marks to use effective voice communication between themselves to provide ample warning when firing blasts.

Issues

1. Was Respondent properly charged with a violation of the requirement that all persons shall be cleared and removed from areas endangered by the blast?

2. Did the violation occur as alleged and, if so, what is the appropriate penalty?

Discussion

Domtar has raised two procedural objections to the citation. First, it notes that the citation referred to "57.06-175" instead of 57.6-175 and claims, as a result, that it was not given fair notice of the charge. The ordinary person with even a passing acquaintance with the Mine Act would know the part and section intended. Domtar's claim of lack of notice can only be characterized as frivolous and is rejected.

The citation as originally issued refers only to the first sentence of the cited standard requiring ample warning. The Secretary filed a "modified" citation after this action was commenced, in which it is alleged that all persons were not removed from the area, as required by the second sentence of the standard. Domtar contends that the second sentence may not be considered in this proceeding since it was not raised in the citation.

A representative of the Secretary issuing a citation is not held to the rules of pleading in formal agency proceedings. I hold that the principal purpose of a citation's narrative portion is to familiarize the mine operator with the facts upon which the inspector relied in issuing the citation. 1/ Greater precision, of course, is required of the Secretary if and when he files a formal proposal for a penalty with the Commission. In this case, the proposal added an allegation that "all persons were not removed from the area endangered by the blast" in the Narrative Findings for a Special Assessment. Thus, from the moment civil penalty proceedings began, Domtar was on notice that it was charged with violating the first two sentences in 30 C.F.R. § 57.6-175.

Turning to the merits, the undisputed facts show that a violation of the cited standard occurred. It is difficult to seriously argue that the dead miners were given any warning, much less ample warning. It is clear that they had no idea that the bench round had been ignited. It is just as clear that all persons were not cleared from the area endangered by the blast. The fact that the miners' bodies were found in that area is irrefutable proof. 2/

The remaining question is, what penalty should be assessed? This requires an analysis of six criteria. 30 U.S.C. § 820(i). Domtar is a large mine operator whose

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1/ The Legislative History of the Act supports this construction. The Senate Committee on Human Resources, discussing imminent danger closure orders, remarked that "the purpose of the detailed description of conditions is to adequately apprise the operator of the problem involved so he may take appropriate steps to correct the condition or practice. The Committee does not intend that this requirement be a procedural pitfall for the inspector, thus should it not be construed to invalidate orders issued under this section." S. Rep. No. 95-181, 95th Cong., 1st Sess., at 38 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 626.

2/ The Mine Act is generally a strict liability statute. The language of the cited standard and the wording of § 110(a) of the Act make it plain that unforeseeability is not a defense to a violation, nor can the operator avoid a violation by placing the blame on a careless employee. MSHA v. El Paso Rock Quarries, 3 FMSHRC 35 (1981); Hendensfels v. Marshall, 2 BNA MSHC 1107 (5th Cir. 1981); MSHA v. Ace Drilling Co., 2 FMSHRC 790 (1980).

ability to continue in business would not be affected by any penalty I may impose. Its history of prior violations is not such that an appropriate penalty for this violation should be increased because of it.

Domtar displayed ordinary good faith in responding to the citation. Blasting procedures were rewritten and MSHA personnel generally commended company officials for their cooperation in the investigation.

Obviously, the gravity of the violation is extremely serious. Two miners were killed.

It is difficult to attribute any negligence to the operator. Robert Marks testified that he instructed the miners in flashlight signalling procedures, which had been used at the mine for years without incident. He repeated his instructions until he was sure they were understood. The Secretary offered no evidence to contradict Marks's testimony so I must conclude that the accident resulted from the miners' failure to obey their instructions.

The Secretary expended considerable effort at the hearing attempting to show that other methods of communicating between the blasting crews would have been superior. 3/ On the whole, the evidence was unpersuasive. 4/ The issue is not whether Domtar's signalling procedures were superior to any others that could be conceived, but whether they served

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3/ Of course, oral communication is not the only way to provide "ample warning" in compliance with the standard. Any suggestion to that effect by the Secretary is rejected.

4/ Witnesses for the Secretary suggested that a nearby fan should have been turned off to allow voice communication. But the mine was classified as "gassy" by MSHA and continuous operation of the fan appears to have been prudent. It was also argued that one of the bench crew could have walked around to the bench directly over the toe crew and observed their work. However, this would have split the blasting crew into three instead of two components and further increased the risk of inadequate communication. The use of two-way radios would have been inadvisable since radio communications near blasting operations create an additional hazard. Both parties concede, however, that the toe round and the bench round could have been fired from a single location. Domtar's new blasting procedures provide that when more than one round is fired, "all members of the crews will be in accompaniment when firing rounds following the firing of the first round."

the purpose of providing "ample warning" in the past and would have done so on this occasion had they been properly followed. I conclude that Domtar's negligence, if any, was slight.

Based on the above findings and discussion, I conclude that the appropriate penalty for the violation found is $3,000.

Conclusions of Law

1. I have jurisdiction over the subject matter and the parties to this proceeding.

2. Domtar violated 30 C.F.R. § 57.6-175 as alleged by the Secretary of Labor.

3. The appropriate penalty for the violation is $3,000.

ORDER

Respondent, Domtar Industries, Inc., is ORDERED to pay the sum of $3,000 within 30 days of the date of this decision.

James A. Broderick
James A. Broderick
Chief Administrative Law Judge

Distribution: By certified mail.

Horace A. Thompson II, Esq., Attorney for Domtar Industries, Inc., McCalla, Thompson, Pyburn & Ridley, 1001 Howard Avenue, Suite 2801, New Orleans, LA 70013

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

Assessment Office, MSHA, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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OCT 13 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. LAKE 80-142
v.	:	A. C. No. 33-02808-03050
SOUTHERN OHIO COAL COMPANY, Respondent	:	Raccoon No. 3 Mine

DECISION AND ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

The issue involved in this proceeding is whether Respondent unlawfully refused to pay a representative of miners walkaround pay for time spent on a "ventilation technical inspection" and a "roof control survey." Respondent contends that a "spot" inspection was involved while Petitioner initially contended that a regular inspection was involved.

After intervening procedural events, Respondent renewed its quest for dismissal in a motion for summary decision received March 9, 1981. In its response thereto Petitioner indicated:

> The present case involves the issue of whether a miners' representative is entitled to compensation for his participation in a so-called "spot" inspection of the respondent's mine. This issue is substantially the same legal issue that is raised in the cases of Secretary of Labor v. The Helen Mining Company 1 MSHC 2193 (FMSHRC, November 21, 1979), appeal pending No. 79-2537 (D.C. Cir., December 21, 1979) and Secretary of Labor v. Kentland Elkhorn Coal Corporation, 1 MSHC 2230 (FMSHRC, November 30, 1979), appeal pending No. 79-2536 (D.C. Cir., December 21, 1970), cases presently on appeal to United States Court of Appeals for the District of Columbia.

Petitioner now indicates in its letter of September 22, 1981, that a "spot" inspection is involved in this proceeding, but renews its contention that the Commission's decisions with respect to walkaround pay entitlement are incorrect. That miners' representatives are not entitled to pay for participation in "spot" inspections was held by the Commission in the cases of Secretary of Labor v. The Helen Mining Company, 1 MSHC 2193 (FMSHRC, November 21, 1979), appeal pending No. 79-2537 (D.C. Cir., December 21, 1979) and Secretary of Labor v. Kentland Elkhorn Coal Corporation, 1 MSHC 2230 (FMSHRC, November 30, 1979), appeal pending No. 79-2536 (D.C. Cir., December 21, 1979), cases presently on appeal to the United States Court of Appeals for the District of Columbia. I am obliged to follow the Commission's decisions until and unless the same are overruled.

Accordingly, Respondent's motion for summary decision is GRANTED, and this proceeding is DISMISSED.

Michael A. Lasher, Jr., Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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OCT 13 1981

PARAMONT MINING CORPORATION, Contestant	:	Contests of Citation and Orders
	:	Docket No. VA 81-56-R
v.	:	Citation No. 685706; 3/31/81
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. VA 81-57-R
	:	Order No. 685707; 4/1/81
	:	Docket No. VA 81-58-R
	:	Order No. 685708; 4/1/81
	:	No. 7 Underground Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. VA 81-84
	:	A.O. No. 44-05222-03018
v.	:	Citation 0685706; 3/31/81
	:	Citation 0685708; 4/1/81
PARAMONT MINING CORP., Respondent	:	No. 7 Underground Mine

DECISIONS

Appearances: Galen C. Thomas, Esquire, New York, New York, for the contestant-respondent; Lawrence W. Moon, Trial Attorney, U.S. Department of Labor, Arlington, Virginia, for the respondent-petitioner.

Before: Judge Koutras

Statement of the Proceedings

These consolidated proceedings concern contests filed by the contestant challenging the legality of one section 104(a) citation, one section 104(b) withdrawal order, and one section 107(a) imminent danger order issued by MSHA Inspector William W. Mulvey upon inspection of the subject mine on March 31 and April 1, 1981. The citations and orders in dispute are as follows:

Docket VA 81-56-R

Section 104(a) citation no. 0685706, issued on March 31, 1981, charges a violation of mandatory safety standard 30 CFR 75.316. In addition, the inspector made a finding that the violation was "significant and substantial."

Docket VA 81-57-R

Section 104(b) withdrawal order no. 0685707 was issued on April 1, 1981, after the inspector concluded that the previously issued citation no. 685706 had not been timely abated and that the time for abatement should not be further extended. The inspector cited another violation of mandatory standard 30 CFR 75.316, and concluded that the alleged violation was "significant and substantial." He subsequently modified his order to permit mining to continue during the abatement process.

Docket VA 81-58-R

Withdrawal order no. 0685708 was issued on April 1, 1981, and it is a combination section 107(a) imminent danger order and a section 104(a) citation for an asserted violation of mandatory standard 30 CFR 75.316, which the inspector believed was a "significant and substantial" violation.

In addition to the aforementioned citation and orders, respondent, by letter filed with me on August 27, 1981, (as augmented by subsequent motion) requested a consolidation of the Secretary's civil penalty proposals filed in connection with citations 0685706 and 0685708. These citations are included in Docket No. VA 81-84, a recently filed civil penalty proceeding concerning these same parties, in which the Secretary seeks civil penalty assessments for a total of 11 alleged violations. By agreement of the parties, the request for consolidation of that portion of Docket VA 81-84 pertaining to the two citations which are the subject of the instant contests was granted, and the parties advised me that they were prepared to offer evidence concerning the statutory criteria found in section 110(i) of the Act for my consideration in connection with civil penalty Docket VA 81-84.

Hearings were convened in Wise, Virginia, on September 9, 1981, pursuant to notice, and the parties appeared and participated fully therein. During the course of the proceedings, the parties advised me that they had agreed to a settlement disposition of the two citations at issue in Docket VA 81-84, and that in light of the proposed settlement contestant desired to withdraw its contests filed in Dockets VA 81-56-R, VA 81-57-R, and VA 81-58-R. Under the circumstances, the parties were afforded an opportunity to present their arguments in support of their proposed settlement of the cases on the record.

Discussion

Stipulations

The parties agreed and stipulated to the following:

(1) Paramont Mining Company is a medium sized coal mine operator.

(2) The No. 7 Underground Mine has an annual production of 400-450 tons of coal, employing approximately 75 underground miners.

(3) Respondent's previous history of violations is not such as to warrant any increases or reductions in the assessed civil penalties.

(4) Respondent exercised good faith in abating the citations in question.

(5) The penalties assessed will not adversely affect respondent's ability to remain in business.

In addition to the aforementioned stipulations, counsel for the Secretary asserted that while the circumstances surrounding the ventilation plan violations were serious, respondent's negligence with regard to the citations was not great because of the fact that the circumstances which prompted the issuance of the citations may not have been within the mine operator's control. In this regard, counsel stated that the operator may have been unaware of the existence of a body of water in the cited mine area which may have affected the mine ventilation in the cited bleeder entries. Further, counsel argued that there is a genuine dispute as to the existence of the concentrations of methane reported by the inspector and that counsel's investigation of the circumstances surrounding the issuance of the orders reveals a possible misunderstanding between the inspector and mine management with respect to precisely what was required to abate the initial citation and subsequent section 104(b) withdrawal order.

With regard to the imminent danger order, counsel for the Secretary candidly conceded that the order may have been an "afterthought" by the inspector and that it was issued subsequent to the section 104(b) withdrawal order which withdrew miners from the mine. Counsel also asserted that this order may have resulted from a misunderstanding rather than an imminently dangerous condition underground.

Conclusions

On the basis of the foregoing arguments, the parties proposed a settlement for the section 104(a) citation no. 0685706 for the full assessment amount of $880. Upon consideration of the arguments presented in support of the proposed settlement, and pursuant to Commission Rule 29 CFR 2700.30, I conclude and find that the proposal is reasonable and in the public interest and the settlement is APPROVED.

The Secretary's motion to vacate withdrawal order citation no. 0685708 and to dismiss the civil penalty proposal filed in Docket VA 81-84 for an assessment of a civil penalty for this citation is GRANTED and the citation is VACATED and DISMISSED.

The Secretary's motion to amend the civil penalty proposals filed in Docket VA 81-84 to reflect that citation 0685706 is in fact a section 104(a) citation rather than a section 104(b) withdrawal order was granted. In addition, counsel's motion to amend the petition to accurately reflect the Secretary's intention to seek a civil penalty assessment for citation 0685708 on the basis of a section 104(a) citation rather than an order was likewise granted.

ORDER

Respondent IS ORDERED to pay a civil penalty in the amount of $880 in satisfaction of Citation No. 0685706, March 31, 1981, 30 CFR 75.316, and payment is to be made to MSHA within thirty (30) days of the date of this decision. Upon receipt by MSHA, the citation is severed from Docket No. VA 81-84, and MSHA's proposal for a civil penalty for this citation filed in VA 81-84, IS DISMISSED.

IT IS FURTHER ORDERED that Citation No. 0685708, April 1, 1981, 30 CFR 75.316, which has been severed from Docket VA 81-84, IS DISMISSED AND VACATED, and that portion of MSHA's civil penalty proposal seeking a penalty for this citation is DISMISSED.

IT IS FURTHER ORDERED that the contests filed by the contestant in Dockets VA 81-56-R, VA 81-57-R, and VA 81-58-R are DISMISSED.

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. VA 81-45 A.O. No. 44-05222-03014 V
v.	:	No. 7 Underground Mine
PARAMONT MINING CORPORATION, Respondent	:	

DECISION

Appearances: Lawrence W. Moon, Trial Attorney, U.S. Department of Labor, Arlington, Virginia, for the petitioner; Galen C. Thomas, Esquire, New York, New York, for the respondent.

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding initiated by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), proposing civil penalty assessments for one alleged violation of 30 CFR 75.200.

Respondent filed a timely answer in the proceeding, and after extensive discovery, including an interlocutory appeal taken by the respondent with respect to one of my pretrial rulings on a motion for summary partial decision, which was subsequently rejected by the Commission, a hearing was convened at Wise, Virginia, on September 9, 1981, and the parties appeared and participated fully therein. During a brief informal pretrial conference, the parties advised that they proposed to settle the dispute, and they were afforded an opportunity to present their arguments in support of the proposed settlement disposition of the matter on the record for my consideration pursuant to Commission Rule 29 CFR 2700.30.

Discussion

In support of the proposed settlement disposition of this case, petitioner submitted full arguments and information concerning the six statutory criteria found in section 110(i) of the Act, including a discussion of the facts and circumstances surrounding the citation in question. In this regard, the parties stipulated to the following:

1. The respondent owns and operates the subject mine and is subject to the jurisdiction of the Act and the Commission.

2. The citation properly charged conditions or practices which were in violation of the approved roof control plan and mandatory safety standard 30 CFR 75.200.

3. The subject citation was properly served on the respondent by MSHA inspector Nolan White.

4. The penalty assessed for the subject citation will not adversely affect respondent's ability to continue in business.

5. Respondent's history of prior citations is not such as to warrant an increase or reduction in the proposed civil penalty assessment made in this case.

6. Respondent's annual coal production is approximately 400,000 tons, and respondent employs 75 miners underground at the mine in question.

7. The conditions cited by the inspector were rapidly abated and corrected by the respondent when they were brought to respondent's attention.

The citation issued by the inspector in this case, No. 0680403, was issued on November 16, 1980, and charges the respondent with a violation of 30 CFR 75.200, for an asserted failure by the respondent to follow its approved roof control plan. The citation was issued after the inspector found that approximately 20 roof bolts used to support a roof area which had fallen were 18 inches in length rather than 42 inches as required by the approved mine roof control plan. In support of the proposed settlement disposition for this citation, the parties agreed to the following:

1. Section foreman Charles Wyatt was aware of the fact that the short roof bolts were installed, and in fact may have personally installed them himself.

2. The installation of the bolts in question were contrary to the roof control plan as well as company policy, and except for Mr. Wyatt, no one in mine management was aware that they had been installed until they were discovered by MSHA inspector Nolan White on December 16, 1980.

3. The presence of the short roof bolts was not visibly noticeable upon normal visual examination of the roof area by someone standing in the entry. The existence of the short bolts was called to MSHA's attention by an informant, and was subsequently confirmed by Inspector White upon closer examination of the roof area in question.

4. Although the roof area in question was in an area designated as an escapeway from August 22 to October 20, 1980, and was subject to weekly examinations subsequent to October 20, 1980, and up to and including December 16, 1980, the area was not a designated escapeway during this period of time.

5. Although the affected roof was not a face area or working section, it was an "active workings" of the mine. However, the roof was in fact supported by cribs as an additional means of roof support.

6. Mr. Wyatt was discharged from his employment with the respondent prior to the discovery of the installation of the short roof bolts and prior to their discovery by MSHA and mine management. Mr. Wyatt was subsequently indicted by a Federal grand jury for the Western District of Virginia for the intentional installation of the short roof bolts and has entered a guilty plea based on one criminal count returned by the jury.

7. At the time the short roof bolts were discovered, mine employees were not in the roof area in question because the inby area had been temporarily abaondoned.

Conclusion

After careful review of the pleadings, arguments, and submissions submitted by the parties, including the oral arguments advanced by counsel for the petitioner at the hearing in support of the proposed settlement disposition of this matter, I conclude and find that the settlement is in the public interest and should be approved. Although it is clear that a mine operator is responsible for the acts of his management personnel, in this case it also seems clear to me that the conditions cited resulted from the unauthorized acts of a shift foreman without the knowledge of mine management and contrary to company policy. Coupled with the fact that respondent took immediate and decisive action in correcting the cited conditions and discharged the responsible party, these factors may be considered by me in mitigating any civil penalty assessed for the violation in question. Under the circumstances, I conclude that the proposed settlement is reasonable, and pursuant to Commission Rule 30, 29 CFR 2700.30, it is APPROVED.

ORDER

Respondent IS ORDERED to pay a civil penalty in the settlement amount of two-hundred dollars ($200), in satisfaction of the citation in question within thirty (30) days of this decision and order, and upon receipt of payment by the petitioner, this case is dismissed.

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
v.	:	Docket No. WEVA 81-214
	:	A/O No. 46-01418-03034
UNITED STATES STEEL CORPORATION, Respondent	:	No. 9 Mine
UNITED STATES STEEL CORPORATION, Contestant	:	Contest of Citation
v.	:	Docket No. WEVA 81-43-R
	:	Citation No. 897803; 9/15/80
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	No. 9 Mine

DECISION

Appearances: Leo J. McGinn, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner-Respondent, Louise Symons, Esq., United States Steel Corporation, Pittsburgh, Pennsylvania, for Respondent-Contestant.

Before: Judge Charles C. Moore, Jr.

The citation involved in this consolidated review and penalty proceeding reads as follows:

> An unplanned roof fall (accident) above the anchorage zone in the active workings of the 4-Left Sandlick section ID No. 042 (section belt loading point and outby distance of 70 feet) where roof bolts (84 inches long) were in use. Occurred on August 26, 1980, and the operator did not contact the subdistrict office (Princeton, West Virginia).

As stated in the citation, a roof fall did occur on August 26, 1980. While the inspector was notified of the roof fall the next day, he did not see the area until September 10, 1980, and did not issue the citation

quoted above until September 15, 1980. The testimony of the company witnesses indicates that there was a considerable change in the size of the roof fall between the time that it first occurred and the time the inspector saw it. The fall that occurred on the evening of August 26 consisted of an area approximately 12 feet by 15 feet by 5 feet and was not above the anchorage zones of the roof bolts. By 10:30 a.m. on the 27th, the fall had expanded and some roof bolts had fallen out. The area expanded further on the 28th, 29th, and 30th of August. Timbering was started immediately after the first fall and the remaining roof fell despite the company's timbering efforts. On the morning of the 27th of August, a written report of the roof fall was sent to MSHA, and Inspector Snyder, who happened to be at the mine, was informed orally of the fall. The inspector did not think it of sufficient importance to examine the area, however.

30 C.F.R. §50.10 states that if an accident occurs in a mine, the operator "shall immediately contact the MSHA District or Subdistrict Office * * *." Section 50.2(h) defines twelve situations as accidents for the purpose of these regulations. Subsection 50.2(h)(8), at issue herein, defines as an accident:

> An unplanned roof fall at or above the anchorage zone in active workings where roof bolts are in use; or, an unplanned roof or rib fall in active workings that impairs ventilation or impedes passage; . . .

There is no doubt that the roof fall occurred in an active working, that it did not impede ventilation, that it did not impede passage and that at some time it did involve the area of the roof above the anchorage zone of the roof bolts.

U.S. Steel reports all roof falls whether technically reportable or not, but makes a distinction between accidents that are reportable by telephone and those which are reportable by a written document. U.S. Steel contends that it was told by the district manager not to report accidents which occur at night where no miner is injured or trapped, and that it was told it did not have to immediately (by telephone) report a roof fall that was not in a working section unless either ventilation or passage was impeded. Inspector Snyder agreed with the first part of this instruction, that is, that no accidents were to be reported at night unless a miner was injured or trapped. He did not agree with the second part of the assertion by U.S. Steel but his reasons for not doing so were simply that the director was aware of the inspector's actions and had agreed that a citation should be issued.

U.S. Steel also contends, that in addition to the instructions by the subdistrict manager, it relied on almost identical wording contained in the preamble to the accident reporting rule published in Volume 42 of the

Federal Register on December 30, 1977, at page 65535. That statement, under the heading of "DEFINITION OF ACCIDENT" is as follows:

> With respect to §50.2(h)(8), unplanned roof or rib falls in active workings which impair ventilation or passage must be reported immediately, but falls which do not do so need not be reported immediately regardless of their size.

MSHA has an explanation for the fact that the language in the preamble to the regulations is contrary to the language in the regulations themselves. After quoting the regulation and the preamble thereto, MSHA quotes a previous proposed regulation which contained the following words at the end of §50.2(h)(8): "or exceeds 100 cubic feet of material." MSHA makes the following argument:

> MSHA contends that a reading of the three regulatory passages set forth above conclusively shows that the operator's argument is without merit. The paragraph in the preamble to which the operator refers obviously deals only with the second clause of 50.2(h)(8) which, in addition to the first part of paragraph (8), requires immediate notification to MSHA under 50.10. The reason that the preamble to the final rule discusses only the second clause of paragraph (8) is simply that only the second part was revised in the final rule distinguishing it from the version set forth in the notice of proposed rule-making. There is no doubt now, nor was there any doubt during the rule-making process, that the immediate accident notification requirement referred to all unplanned roof falls at or above the anchorage zone in active workings where roof bolts were in use. It is equally clear that the rule-making process resulted in a change in the second clause of paragraph (8), eliminating the 100 cubic feet of material requirement for unplanned roof or rib falls in active workings that impair ventilation or impede passage.

I will accept MSHA's explanation as to how the preamble came into being because I cannot believe that the Government would deliberately try to deceive the public as to the requirements of a regulation. The fact remains, however, that the preamble is deceptive because if the reader happened to be unaware of the proposed "100 cubic feet of material" requirement, he would read it exactly as U.S. Steel read it and as I believe the subdistrict manager read it. In this connection, the affidavit filed by the subdistrict manager, Conrad Spangler, is very general in terms. While he states that he has at all times interpreted the notification requirements for reporting in accordance with the definition in the rules, he does not answer U.S. Steel's contention that he stated there was a difference in the reporting requirements depending on whether the roof fall was in a working section or not, nor does he comment on the clearly established fact that he gave instructions not to report an accident at night unless a miner was trapped or

injured. If he had the authority or thought he had the authority to modify the word "immediately" so that it does not mean at night, except in certain circumstances, then it would seem reasonable that he thought he had the authority to modify that word in other circumstances. Furthermore, the affidavit denies an allegation that has not been made. Mr. Spangler denies that he ever told anyone that an unplanned roof fall above the anchorage zone in active workings was not to be reported "under Section 50.10 unless that fall impairs ventilation or impedes passage." The question involved here is not what has to be reported but what has to be immediately reported and what does that word "immediately" mean? I therefore give very little weight to the affidavit of the subdistrict manager.

Despite the good faith reliance by U.S. Steel on the previously quoted statement in the preamble to the rule and its reliance on statements made by the subdistrict manager, the preamble cannot take precedence over the regulation itself. Unintentional roof falls above the anchorage zone of the roof bolts are reportable immediately. I do not believe that the subdistrict manager has authority to alter the word "immediately" to mean when business starts the next day or that he would have authority to in any way alter the terms of the regulation itself. I therefore agree with MSHA that the unintentional roof fall as described in the citation is of the type that should be reported immediately.

The citation says that an unplanned roof fall above the anchorage zone in the active workings "occurred on August 26, 1980, and the operator did not contact the subdistrict office (Princeton, West Virginia)." The evidence does not establish that the described roof fall occurred on August 26, 1980. On that date, there was a roof fall but it was not above the anchorage zones of the roof bolts. On the following morning, August 27, the accident was reported in writing and it was reported orally to Inspector Snyder who is certainly an agent of the subdistrict office. Had he been at the subdistrict office and answered the phone and received the report, there could be no question that the subdistrict office had been notified and I see no difference created by the fact that he happened to be at the mine when he was notified. He was notified at 8 a.m. on August 27 and made the decision that the fall area was not sufficiently important to inspect. The written report was filled out by 8 a.m. and it was not until 10:30 a.m. that Mr. Paul discovered that the fall had expanded so that some roof bolts had fallen out. It was thus not until 10:30 a.m. on August 27 that a report was required. Inasmuch as the roof fall had already been reported more than 2 hours earlier, however, there would be little point in reporting it again. MSHA had not argued that there is any requirement to continue to report the progress of a roof fall. Once a report has been made, it is up to MSHA whether it wishes to investigate the matter and in this case it obviously chose not to do so since it did not even issue the citation until some 20 days later. But the charge is that on August 26, U.S. Steel failed to report a reportable accident. I hold that it was not a reportable accident until some time on August 27 and that by that time it had already been reported.

The citation is VACATED and the above cases are DISMISSED.

Charles C. Moore, Jr.
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF BRUCE EDWARD PRATT, Complainant	:	Complaint of Discrimination Docket No. KENT 81-88-D No. 1 Mine
v.	:	
RIVER HURRICANE COAL CO., INC., Respondent	:	

DECISION AND ORDER

This matter came on for a confrontational-type hearing in Pikeville, Kentucky on October 7 and 8, 1981. The complaint charged the operator with a violation of the anti-discrimination clause of the Mine Safety Law, 30 U.S.C. § 815(c)(1). More specifically, the Secretary claimed complainant's retaliatory discharge of Bruce Edward Pratt, a mechanic-repairman, for refusing to accept directions to fight fires that occur on the surface in the junction boxes of large, industrial-type, lead-acid batteries was unlawful because the refusal was based on a good faith, reasonable fear that such fires could result in an explosion of hydrogen gas and acid splash that could cause serious physical injury to him or to others.

The operator admitted complainant was discharged for refusing to accept such directions but claimed that because Mr. Pratt's fear was unreasonable and pretextual it was an act of insubordination that justified his dismissal.

The matter was exhaustively pretried. As a result, the parties were able to file plain and concise statements of their positions together with proposed findings, conclusions and orders prior to the hearing. Counsel are to be commended for the professionalism of their performance which contributed greatly to the trial judge's understanding of the technical factual issues. At the conclusion of the hearing, the parties were afforded an opportunity to supplement their proposals and to present oral argument. Thereafter, the trial judge entered the following decision on the record from the bench: 1/

1/ Any deviations in verbiage are due to the unavailability of the transcript and extemporaneous interpolations that are not reflected in retained notes. With footnotes and citations added, this confirming order constitutes my final, definitive disposition of this case.

Findings and Conclusions

After carefully evaluating the credibility of the witnesses, I find and conclude a preponderance of the reliable, probative and substantial evidence establishes:

1. The fire in the battery trays on August 19, 1980, was the result of a short circuit in the connectors located in the junction box or receptacle.

2. The fire could have caused any hydrogen gas present in the recently charged battery tray to burn or explode.

3. The expert testimony and evidence shows that because the tray did not disintegrate there was an insufficient concentration of hydrogen to cause an explosion or the flames did not propogate sufficient heat to spark an explosion. 2/

4. If there had been an explosion it would in all likelihood have been largely contained within the steel covers and casing that surrounded the battery tray.

5. If the receptacle had been opened or the covers removed any explosion could have sprayed battery acid (sulfuric acid) on the clothes and person of any miners standing near or over it. (BX-1, pp. 8-9).

6. On August 20, 1981, James Calvary Sloan, the operator's chief electrician and Mr. Pratt's superior, had little or no understanding or appreciation of the hazards presented by battery fires or how to instruct his subordinates in the appropriate procedures for coping with a battery fire.

7. Mr. Sloan did not know there was no fire suppressant system for the battery trays on the S&S scoop.

8. Mr. Sloan did not know that a 50 pound bag of rock dust and not a hand held fire extinguisher is the method preferred by the operator's expert witness, Mr. Eddins, for smothering an electrical fire on a battery tray.

9. Mr. Sloan did not fully appreciate the danger of acid splash that attends an electrical fire on a battery tray.

2/ I take official notice of the fact that the lower limit for explosive mixtures of hydrogen is 4.1 per cent, but for safety hydrogen should not exceed 2 per cent. The upper limit is 74 per cent. Maximum violence occurs at a mixture of 2 parts of hydrogen to 1 of oxygen. Vinal, Storage Batteries, A General Treatise on the Physics and Chemistry of Secondary Batteries and their Engineering Applications at 316 (4th ed., 1955).

10. Mr. Sloan's demand that Mr. Pratt agree, as a condition of his continued employment, to fight electrical fires on battery trays by attacking the fire without protective clothing or glasses with a hand held ABC fire extinguisher was made without a proper understanding of the hazards involved as detailed by Inspector Lycans.

11. Mr. James Sloan, as chief electrician, was responsible for maintaining the connectors on the battery trays in a corrosion free condition; he failed to do this and this resulted in the short circuit that caused the fire on August 19.

12. Bruce Pratt did not know that because he failed to observe any immediate explosion the danger of a hydrogen gas explosion, if any, may have been over by the time he observed the fire in the battery trays on August 19.

13. Mr. Pratt's ignorance was attributable to a deficiency in the operator's knowledge and in the operator's training program.

14. It was and is impossible for anyone to say with certainty when the danger of a hydrogen gas fire or explosion has passed in a fire on a battery tray.

15. Mr. Pratt's fear, much of which stemmed from his ignorance, was honest and not a pretext for a reckless disregard for his obligation to take reasonable action to protect the lives of his fellow workers or the property of his employer.

16. Mr. Pratt's fear, in view of his lack of training in how best to cope with the danger of a hydrogen gas explosion, was reasonable and certainly, in view of the evidence, was not arbitrary, capricious or so grossly erroneous as to imply bad faith.

17. The operator failed to show that Mr. Pratt's refusal to accept Mr. Sloan's instructions for coping with electrical fires in the connectors of battery trays was arbitrary, capricious or so grossly erroneous as to imply bad faith.

18. Mr. Sloan's discharge of Mr. Pratt was not justified by the circumstances of the alleged insubordination but was largely an overreaction to Mr. Pratt's provocative rejoinders and the long simmering personality conflict between the two men.

19. The conflict in the testimony over the reasonableness of Mr. Pratt's fear is resolved in his favor because much of the contrary testimony consisted of macho, self-serving

testimonials of little probative value. I find much more persuasive the testimony of (1) E. C. Sloan, Mr. Pratt's immediate supervisor and an experienced section foreman who said he would recognize the right of a man to feel a danger, (2) Luther Jarvis, a miner with limited experience and training who said he would have been afraid to approach the fire with just a fire extinguisher, and (3) Inspector Lycans, a miner with over 30 years experience with electrical fires, who said he would consider any attempt to lay hands on the battery trays an imminent danger.

20. Based on Mr. Pratt's knowledge and the attendant circumstances his belief that the fire on August 19 was abnormally dangerous was reasonable.

21. When Mr. Pratt refused to extinguish the fire on August 19 and warned others against it he was engaged in activity protected under section 105(c)(1) of the Mine Safety Law.

22. When on August 20, 1980, Mr. Pratt explained to Mr. Sloan his fear of a hydrogen gas explosion and of the injury such an explosion might inflict he was engaged in activity, i.e., reporting an alleged danger, specifically protected under section 105(c)(1) of the Mine Safety Law.

23. In order to effectuate the purpose of the Mine Safety Law miners must be allowed freedom to express their safety concerns without fear of retaliation by management.

24. Mr. James Sloan's explanation and instructions to Mr. Pratt on August 20 concerning how to cope with fires on battery trays was lacking in technical and factual understanding of the hazards and failed to allay Mr. Pratt's reasonable fears. It is no solution to the problem of recurrent fires in the electrical systems of the electric face equipment at this mine to condone retaliation by discharge of a miner with the temerity to speak out against the hazard.

25. The refusal on August 20 of Mr. Pratt to agree to attempt to extinguish a fire in or around lead-acid batteries under circumstances similar to those that occurred on August 19 was made in a good faith, reasonable belief that a serious risk of injury from an exploding battery existed. 3/

26. Mr. Pratt's refusal to attempt to extinguish such fires in the future was, under the circumstances shown, a protected activity under section 105(c)(1) of the Act and his discharge for such refusal a violation of the Act.

3/ Secretary of Labor on behalf of David Pasula v. Consolidation Coal Co. 2 FMSHRC 2786, 2793 (1980); Secretary of Labor on behalf of Thomas Robinette v. United Castle Coal Co. 3 FMSHRC 803, 812 (1981).

27. Based on the stipulation of the parties Mr. Pratt is entitled to back pay in the amount of $3,348.00.

28. It is the policy of the River Hurricane Coal Company to require its miners to assume unnecessary risks of injury to save mine equipment.

Enforcement Order

Accordingly, it is ORDERED that:

1. On or before Friday, October 30, 1981, River Hurricane Coal Company pay to the Office of the Solicitor a check made payable to Bruce Edward Pratt in the amount of $3,348 plus interest at the rate of 8% from August 20, 1980 to March 1, 1981 and at the rate of 12% from March 1, 1981, until paid.

2. On or before the same date River Hurricane Coal Company pay a civil penalty in the amount of $5,000 for the violation found of section 105(c)(1) of the Mine Safety Law.

3. The River Hurricane Coal Company post a copy of this decision and order in a conspicuous place on the mine bulletin board and maintain it there for thirty days from the date of its receipt.

4. The River Hurricane Coal Company cease and desist from any retaliation or other disciplinary action against miners who refuse to comply with the company policy that requires miners to assume the risk of injury in order to suppress electric fires that pose no hazard other than to equipment.

Confirming Order

The premises considered, it is ORDERED that the foregoing bench decision entered on the record on the eighth day of October 1981, in the City of Pikeville, State of Kentucky be, and hereby is, ADOPTED AND CONFIRMED as the trial judge's final disposition of this matter.

Joseph B. Kennedy
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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OCT 19 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Complaint of Discharge
	:	Docket No. VA 80-128-D
On behalf of CLARENCE BALL,	:	NORT CD 80-14
Complainant	:	No. 1 Mine
v.	:	
B & B MINING COMPANY, INC., LAUREL MOUNTAIN MINING COMPANY, ROBERT ESSEKS, JODA BLANKENSHIP,	:	
Respondents	:	

DECISION

Appearances: Barbara K. Kaufmann, Esq., at the hearing and David T. Bush, Esq., on the Brief, Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Complainant; Robert T. Copeland, Esq., Copeland and Thurston, Abingdon, Virginia, for Respondent B & B Mining Company, Inc.

Before: Judge James A. Laurenson

JURISDICTION AND PROCEDURAL HISTORY

This proceeding was commenced by the Secretary of Labor, Mine Safety and Health Administration, (hereinafter "MSHA") on behalf of Clarence Ball alleging that Clarence Ball was discharged from his employment at B & B Mining Co., Inc., (hereinafter "B & B") on March 7, 1980, because of activity protected under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c) (hereinafter "the Act"). Upon completion of prehearing requirements, a hearing was held in Abingdon, Virginia on August 5, 1981. Clarence Ball was the only witness who testified about the merits of this case.

At the hearing, B & B objected to MSHA's attempt to propose a civil penalty herein without following the procedures set forth in 30 C.F.R. §§ 100.5 and 100.6 and 29 C.F.R. § 2700.25. I sustained B & B's objection, severed the civil penalty proposal from the amended complaint, and remanded the civil penalty proceeding to MSHA to begin the civil penalty assessment process.

ISSUES

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

APPLICABLE LAW

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

> (1) No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.
>
> (2) Any miner or applicant for employment or representative of miners who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate. Such investigation shall commence within 15 days of the Secretary's receipt of the complaint, and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission, with service upon the alleged violator and the

miner, applicant for employment, or representative of miners alleging such discrimination or interference and propose an order granting appropriate relief. The Commission shall afford an opportunity for hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section) and thereafter shall issue an order, based upon findings of fact, affirming, modifying, or vacating the Secretary's proposed order, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The Commission shall have authority in such proceedings to require a person committing a violation of this subsection to take such affirmative action to abate the violation as the Commission deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner, to his former position with back pay and interest. The complaining miner, applicant, or representative of miners may present additional evidence on his own behalf during any hearing held pursuant to this paragraph.

STIPULATIONS

The parties stipulated that the mine in question is a coal mine within the meaning of the Act and that the administrative law judge has jurisdiction over this matter.

Motions to Suspend Proceedings and to Take Deposition of Mack Gamble

After Complainant completed the presentation of his case in chief, B & B moved to suspend proceedings and to take the deposition of Mack Gamble. Counsel for B & B stated that the whereabouts of Mack Gamble had not been ascertained until 2 days before the hearing. In support of the motions, B & B contended as follows: (1) Mack Gamble was the person who discharged Complainant; (2) no one was aware of Gamble's whereabouts; (3) Joda Blankenship, former President of B & B, stated to a representative of B & B's counsel that he didn't know where Gamble could be found; and (4) 2 days prior to the hearing, Gamble was found to be working for Joda Blankenship at another mine. Complainant opposed these motions for the following reasons: (1) Neither the attorneys for B & B nor Gentry Blackwell attempted to find Mack Gamble's home telephone number, checked the U.S. Post Office, or checked B & B's employment records to find Gamble's last known address or telephone number; (2) the complaint identified Mack Gamble as the person who discharged Complainant and B & B had ample notice that he would be a key witness in this proceeding; and (3) assuming that the motions were granted and Gamble testified contrary to Complainant at a deposition, there would be no way for the judge to resolve the credibility issue between Complainant and Gamble since the judge would have no opportunity to evaluate Gamble's demeanor at the deposition.

In addition to the above, it should be noted that present counsel for B & B entered his appearance on May 22, 1981. The Notice of Hearing was

issued on May 28, 1981. At no time prior to the date of hearing did counsel for B & B request a subpoena for Mack Gamble or notify the judge that B & B had been unable to locate this key witness. In fact, it was only after Complainant rested his case in chief that B & B raised the matter of the whereabouts of Mack Gamble and his unavailability to testify.

After considering the testimony presented concerning this matter and the arguments of counsel, I denied the motions for the following reasons: (1) B & B failed to establish good cause for a continuance of the hearing to take Mack Gamble's deposition; (2) there is no evidence that Mack Gamble concealed his whereabouts or attempted to make himself unavailable to give testimony; (3) B & B failed to request a subpoena prior to hearing which could have been served on Mack Gamble to insure his presence at the hearing; and (4) although B & B knew at all times that Mack Gamble would not appear at the hearing, it failed to request any postponement of the hearing. I hereby reaffirm that decision for the reasons stated.

FINDINGS OF FACT

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

1. B & B was the owner and operator of an underground coal mine in Dickinson County, Virginia, until approximately July 24, 1979.

2. On approximately July 24, 1979, B & B turned over the operation of the mine to Laurel Mountain Mining Company, (hereinafter "Laurel Mountain"), which operated the mine until approximately February 20, 1980.

3. On approximately February 20, 1980, B & B filed Chapter 11 proceedings in the U.S. Bankruptcy Court for the Western District of Virginia. (Exh. G-1).

4. On February 27, 1980, the U.S. Bankruptcy Court for the Western District of Virginia ordered Laurel Mountain, to "relinquish and turnover all property belonging to" B & B's representatives. (Exh. G-1).

5. On September 15, 1979, Complainant was hired as a section foreman at the mine in question by Laurel Mountain. Three weeks later, he was promoted to mine superintendent. Until late February, 1980, Complainant's immediate supervisor was Ernest Brown.

6. On approximately February 16, 1980, Complainant received a telephone call from a representative of Joda Blankenship, President of B & B, to withdraw all men from the mine and send them home and that, thereafter, only supervisory personnel consisting of Complainant and three section foremen would be employed at the mine.

7. At some time between February 16, 1980 and March 3, 1980, Mack Gamble was designated by B & B as general manager of this mine. Thereafter, Mack Gamble was Complainant's supervisor.

8. During the week of March 3, 1980, the only persons working at the mine were Complainant and three section foreman. On March 3, 1980, Mack Gamble instructed Complainant to load rock dust from outside the mine and deliver it to the 001 section. Complainant loaded the rock dust but did not deliver it to the section because all other employees left to work at another mine and he did not believe it was safe to enter the mine when no one was outside. The rock dust was delivered to the section by a foreman during the next working shift.

9. On March 4, 1980, Mack Gamble instructed Complainant to clean the production sections and shoot down the coal at the faces. Gamble said he would return in a few days. While Gamble was gone, Complainant and two of the foreman did all of the cleaning necessary to prepare the sections for production, i.e., ventilation, rock dusting, scooping, shoveling, moving belts and equipment, and maintenance.

10. Complainant did not shoot down coal at any of the 21 faces of the mine or instruct his foremen to shoot coal because neither Complainant nor the foremen were trained or licensed to handle or detonate explosives.

11. When Mack Gamble returned to the mine on March 7, 1980, he told Complainant that he was not satisfied with Complainant's work. In response to a request for specifics, Gamble stated that Complainant did not deliver the rock dust to the section. When Complainant responded that the rock dust had been delivered to the section, Gamble stated that Complainant did not shoot down the coal. The following conversation then took place:

> Complainant: "Do you expect me to go on the section and shoot the coal by myself?"
>
> Gamble: "Yes."
>
> Complainant: "I won't do it."
>
> Gamble: "We'll find someone who will. Give me the truck keys and catch you a ride home."

12. Complainant was discharged by B & B's general manager, Mack Gamble, on March 7, 1980.

13. At the time of Complainant's discharge, he was being paid $125 per day.

14. About 1 week after his discharge, Complainant applied for other employment. During the next 3 months, Complainant inquired about or applied for work at the following: MSHA; State of Virginia; Clinchfield Coal Co.; Norella-Ohio; Virginia Iron, Coal and Coke; Russell County, Virginia Board of Education; Jim Walters Resources in Alabama; and U.S. Office of Surface Mining. Complainant also visited the Virginia Employment Commission in Bristol, Virginia.

15. Beginning in approximately June, 1980, Complainant entered into discussions with Virginia Iron, Coal and Coke concerning lease arrangements for Complainant to open his own mine. On July 15, 1980, Complainant filed an application with the State of Virginia for a permit to open his own mine. On September 5, 1980, he received authorization from the State of Virginia to open the mine.

16. Complainant had no income from wages or self-employment from March 7, 1980 to September 5, 1980. Complainant contends that B & B should be required to pay him backpay between March 7, 1980 and September 5, 1980.

17. The complaint filed herein on July 3, 1980, states in pertinent part: "No application for temporary reinstatement has been filed as Applicant Clarence Ball does not desire to be reinstated by Respondent."

DISCUSSION

Complainant contends that he was discharged as superintendent of the mine because of his reasonable and good faith refusal to perform or order others to perform hazardous work. Specifically, he alleges that he was ordered to shoot or blast down coal by the use of explosives when neither he nor any of the employees under his supervision at the time was licensed or trained to handle or detonate explosives. Complainant further asserts that after his discharge, he made a reasonable and diligent effort to find other employment but that he was not successful until September 5, 1980, when he opened his own mine. B & B's Brief does not challenge any of Complainant's claims concerning the circumstances of his discharge but alleges the following: (1) Complainant should not receive backpay after July 15, 1980, because he was no longer actively seeking employment after that date; (2) Complainant failed to mitigate damages prior to July 15, 1980, because he did not conduct a reasonable job search; and (3) Complainant's recovery of backpay is limited to after tax income rather than gross per diem wages.

A. Violation of Section 105(c)(1) of the Act

Since B & B does not contest Complainant's version of the facts leading to his discharge, a brief review of the applicable law concerning the liability of an operator under section 105(c) of the Act will suffice. In Secretary of Labor on behalf of David Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (1980) (hereinafter "Pasula"), the Federal Mine Safety and Health Review Commission (hereinafter "Commission") analyzed section 105(c) of the Act, the legislative history of that section, and similar anti-retaliation issues arising under other Federal statutes. The Commission held: "We hold that in this case the miner's refusal to work was protected under the 1977 Mine Act . . . . His good faith belief was reasonable, and was directed to a hazard that we consider sufficiently severe . . . ." Pasula at 2793. The Commission went on to hold as follows:

> We hold that the complainant has established a prima facie case of a violation of Section 105(c)(1) if a preponderance of the evidence proves (1) that he engaged in a protected activity, and (2) that the adverse action was motivated in any part by the protected activity. On these issues the complainant must bear the ultimate burden of persuasion. The employer may affirmatively defend, however, by proving by a preponderance of all the evidence that, although part of his motive was unlawful, (1) he was also motivated by the miner's unprotected activities, and (2) that he would have taken adverse action against the miner in any event for the unprotected activities alone. On these issues, the employer must bear the ultimate burden of persuasion. Id. at 2799-2800.

The undisputed facts in the instant case establish that prior to this incident, the operator of the mine filed a Chapter 11 proceeding in the U.S. Bankruptcy Court and terminated the employment of all hourly employees. The only employees remaining at the mine were the Complainant, who was the superintendent, and three section foreman. Mack Gamble, B & B's general manager, ordered Complainant to shoot or blast the coal. Neither Complainant nor the section foreman were trained or licensed to handle or detonate explosives. Complainant refused to comply with this order. Mack Gamble discharged Complainant for failure to obey this order. The evidence establishes that Complainant's good faith belief that it would be hazardous for untrained and unlicensed men to shoot or blast coal was reasonable and was directed toward a severe hazard. Hence, I find that Complainant's refusal to work in the manner ordered by B & B's general manager was protected under the Act. Since general manager Mack Gamble stated that Complainant was being discharged for failure to shoot or blast the coal, I find that Complainant has met his burden of persuasion and established a prima facie case of violation of section 105(c)(1) of the Act. B & B did not present any evidence on the merits during the hearing. Thus, B & B failed to meet its burden of persuasion or establish an affirmative defense. Complainant has sustained his complaint of discharge.

B. Complainant's Duty to Seek Other Employment and Mitigate Damages

Section 10(c) of the National Labor Relations Act, 29 U.S.C. § 160(c), provides in pertinent part that where the National Labor Relations Board (hereinafter "NLRB") finds that the charged party engaged in an unfair labor practice, it may take affirmative action, "including reinstatement of employees with or without backpay . . . ." The Supreme Court held that the NLRB must consider the issue of mitigation of damages by deducting from lost earnings, any amounts which the employee failed to earn during the backpay period. See NLRB v. Seven-up Bottling Co., 344 U.S. 344 (1953) and NLRB v. Gullett Gin Co., 340 U.S. 361 (1951). An employee must make reasonable efforts to find other employment and must remain in the labor market for the backpay period. See J. H. Rutter Rex Mfg. Co. v. NLRB, 473 F.2d 223 (5th Cir. 1973) cert. den., 414 U.S. 822 (1974) and NLRB v. Pugh and Barr Inc., 207 F.2d 409 (4th Cir. 1953).

In the instant case, B & B argues that Complainant failed to mitigate damages because he did not conduct a reasonable job search. B & B does not challenge Complainant's testimony that he applied for or inquired about work at eight potential employers and visited the unemployment office. B & B apparently contends that there were other coal mines within several hours driving time of Complainant's residence where he did not apply for work. However, B & B produced no evidence that work was available at any coal mine or other job for which Complainant was qualified. I reject B & B's contention that Complainant failed to make a reasonable job search. Complainant acted reasonably and B & B failed to establish that any amount should be deducted from Complainant's backpay because of a failure to mitigate damages during the period following his discharge by B & B.

C. Complainant's Failure to Seek Rehiring or Reinstatement

The complaint filed with the Commission on July 3, 1980, states that Complainant does not desire to be reinstated by Respondent. Since MSHA determined that the Complainant's complaint was not frivolously brought, Complainant had the right to immediate reinstatement pursuant to section 105(c)(2) of the Act. If Complainant had pursued that right, he would have been reinstated, required to work regular hours, and been paid at his regular rate. The fact that he elected not to be rehired or reinstated tolls the operator's backpay obligation. This is analogous to the rule in NLRB cases that an employer who offers reinstatement, which the employee rejects, is released from backpay obligations as of the date the offer is rejected. NLRB v. Huntington Hospital Inc., 550 F.2d 921 (4th Cir. 1977). Moreover, it would be unfair and improper to require a mine operator to pay backpay to a former employee for a period of time when the employee has unequivocally stated that he does not wish to return to his former employment. Since Complainant elected not to be rehired or reinstated on July 3, 1980, B & B's obligation for backpay ends on that date.

D. Award to Complainant

The evidence establishes that Complainant was earning $125 per day, 5 days a week, at the time of his discharge on March 7, 1980. B & B's liability for backpay terminated on July 3, 1980. Complainant had no earnings from wages or self-employment between March 7, 1980 and July 3, 1980. Thus, Complainant is entitled to an award of $125 per day for 83 days for a total award of $10,375.

B & B submits no authority for its novel contention that "recovery of back wages should be based on after tax income rather than gross per diem wage." B & B Brief at 6. On the contrary, the uniformly followed rule in backpay cases is that discriminatees are entitled to an award of gross backpay where there have been no interim earnings. See NLRB Casehandling Manual, par. 10,530 (1977).

The complaint herein also requests, "that interest be added to the backpay until the date of payment at the rate of .09 per centum [sic]." I

assume that Complainant is requesting an award of interest on the backpay at the rate of 9 percent per annum. Complainant cites no authority for the award of this amount of interest. To my knowledge, the Commission has not awarded a rate of interest in excess of 6 percent per annum. See Peabody Coal Co., 1 FMSHRC 1785, 1792 (1979). Therefore, B & B is ordered to pay Complainant the sum of $10,375 as backpay plus interest at the rate of 6 percent per annum from the dates such payments were due until the date such payment is made.

E. Dismissal of Other Respondents

In addition to B & B, the amended complaint lists the following Respondents: Laurel Mountain, Robert Esseks, and Joda Blankenship. Although all three of these Respondents are in default for failure to answer or appear, Complainant produced no evidence of liability on their part at the hearing. Accordingly, Laurel Mountain, Robert Esseks, and Joda Blankenship are dismissed as parties herein.

CONCLUSIONS OF LAW

1. At all times relevant to this decision, Complainant and B & B were subject to the Act.

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

3. During the week of March 3, 1980, Complainant engaged in activity which is protected under section 105(c)(1) of the Act as follows: He reasonably and in good faith believed that a hazardous condition would result if he obeyed his superior's order to shoot down coal at the face or order his section foreman to shoot down coal because neither Complainant nor his foremen were trained or licensed to handle or detonate explosives.

4. Complainant's refusal to work was protected under the Act.

5. Complainant was discharged on March 7, 1980, by B & B because of his refusal to work, supra.

6. Complainant established a prima facie case of violation of section 105(c)(1) of the Act because he established that he engaged in a protected activity and that his discharge was motivated by the protected activity.

7. B & B failed to establish that it would have discharged Complainant for reasons other than his protected activity.

8. Complainant was discharged by B & B in violation of section 105(c)(1) of the Act.

9. Complainant made a good faith effort to find employment following his discharge and B & B failed to establish that Complainant did not act reasonably to mitigate damages.

10. On July 3, 1980, Complainant elected not to be rehired or reinstated by B & B and B & B's obligation for backpay was tolled as of that date.

11. Complainant is not entitled to an award of backpay after July 3, 1980 due to his election on that date not to be rehired or reinstated.

12. Complainant is entitled to a backpay award for 83 days at $125 per day for a total award of $10,375 plus interest at the rate of 6 percent per annum from the dates such payments were due to the date such payment is made.

13. Although Respondents Laurel Mountain, Robert Esseks, and Joda Blankenship are in default in this proceeding, Complainant has presented no evidence to establish the liability of any of these Respondents. Accordingly, Respondents Laurel Mountain, Robert Esseks, and Joda Blankenship are dismissed from this proceeding.

ORDER

WHEREFORE IT IS ORDERED that Complainant's complaint of discharge is SUSTAINED.

IT IS FURTHER ORDERED that B & B shall pay to Complainant the sum of $10,375 plus interest at the rate of 6 percent per annum from the dates such payments were due to the date such payment is made.

IT IS FURTHER ORDERED that Respondents Laurel Mountain Mining Co., Robert Esseks, and Joda Blankenship are DISMISSED from this proceeding.

IT IS FURTHER ORDERED that MSHA's proposed assessment of a civil penalty is severed from this proceeding and remanded to MSHA for further proceedings pursuant to 29 C.F.R. § 2700.25.

James A. Laurenson, Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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OCT 20 1981

DONOHO CLAY COMPANY, Applicant	:	Contest of Citation
v.	:	Docket No. SE 80-109-RM
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Donoho Mill & Mine

DECISION

Appearances: Charles E. Parks, Esq., for Applicant;
Murray Battles, Esq., Office of the Solicitor,
U.S. Department of Labor, for Respondent.

Before: Judge Fauver

This proceeding was brought by Donoho Clay Company under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., to review the validity of a citation issued by a federal mine inspector pursuant to section 104(a) of the Act. Jurisdiction to adjudicate a civil penalty has been added to this proceeding by consent of the parties. The cases were heard at Birmingham, Alabama. Both parties were represented by counsel, who have submitted their proposed findings, conclusions, and briefs following receipt of the transcript.

Having considered the contentions of the parties and the record as a whole, I find that the preponderance of the reliable, probative and substantial evidence establishes the following:

FINDINGS OF FACT

1. At all pertinent times, Applicant, Donoho Clay Company, operated a clay pit, known as the Donoho Mill & Mine, in Calhoun County, Alabama, which produced clay for sales in or substantially affecting interstate commerce.

2. The clay pit is about 2-1/2 miles west of Anniston, Alabama, and about 5 miles from a processing plant also operated by Applicant. Applicant normally employs about 20 people at the plant and about two at the clay pit. Employment records are maintained separately and the employees are not inter-mingled between pit and plant. Annual clay production is about 120,000 tons.

3. Applicant's clay is a naturally occurring clay refractory. The clay deposit at the pit is over 100 feet thick and lies just beneath a shallow soil overburden. Front-end loaders are used to mine the clay, which is then dumped into trucks and hauled by independent contractors to the plant for processing.

4. At the plant, the unprocessed clay is tested by grade, transported by belt conveyors through crushing machines, rotary driers to remove moisture, and then through a series of screens to remove remaining by-products, which are returned to storage facilities for later use. The screened material is then discharged into an open area for mixing and blending according to customer specifications. As blending materials, Applicant uses silicon rock, sand, and clay, which are also mined from its pit, and at times pitch and coke, which are purchased from outside sources. The material is finally transferred to packaging stations for bagged- or bulk-shipping.

5. Applicant's final product (trade name "Meltzona") is used primarily in the fireclay industry and requires only the addition of water by customers. Meltzona is used primarily by steel and iron manufacturers, as a lining for brick and ceramic furnaces, ladles, and cupolas to extend their lives by acting as a buffer to the molten metal. As Meltzona gradually burns away or corrodes, it must be reapplied.

6. On June 24, 1980, federal inspector Bill Alverson, and Bart Collinge, a supervisory mining engineer, requested permission to inspect Applicant's clay-processing plant. Permission was refused and Inspector Alverson charged Applicant with a violation of section 103(a) of the Federal Mine Safety and Health Act of 1977, as follows (Citation No. 83079):

> On 6/24/80, Mr. C.F. Johnson, Co-owner, refused to allow Billie G. Alverson, an authorized representative of the Secretary, entry into the company's clay mill for the purpose of conducting an inspection of the mill pursuant to Sec. 103(a) of the Act. Mr. Johnson stated that the mill is not subject to the mine Act jurisdiction. Mr. Johnson was advised that the mill is subject to the mine Act jurisdiction.

7. On June 25, 1980, Inspector Alverson returned to inspect Applicant's plant, was again refused admittance, and issued an order of withdrawal under section 104(b) of the Act. This order (No. 83080) reads in part:

> Mr. C.F. Johnson, Co-owner, continued to deny Billy G. Alverson, an authorized representative of the Secretary, the right of entry into the company's Donoho Clay Mill for the purpose of conducting an inspection of the mill in accordance with the requirements of Sec. 103(a) of the Act on 6/26/80 after expiration of the time allowed for Mr. Johnson to comply.

These alleged violations have not been abated.

8. Since 1972, MSHA or its predecessor, MESA, has inspected Applicant's plant and pit 19 times. The Occupational Safety and Health Administration (OSHA) has never inspected the plant or pit.

DISCUSSION WITH FURTHER FINDINGS

Based on the citation and order of withdrawal, the Secretary charges a violation of section 103(a) of the Act, which provides in part:

> Authorized representatives of the Secretary * * * shall make frequent inspections and investigations in coal or other mines each year for the purpose of (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments originating in such mines, (2) gathering information with respect to mandatory health or safety standards, (3) determining whether an imminent danger exists, and (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this title or other requirements of this Act. In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided to any person * * *.

The basic issue is whether Applicant's plant is a milling operation, and therefore part of a "mine" under section 3(h)(1) of the Act and subject to MSHA's jurisdiction, or whether it is a refining operation, and therefore subject to OSHA's jurisdiction under the MSHA-OSHA Interagency Agreement (discussed below).

This is an issue of first impression, and the parties propose that if a violation is found, the assessed penalty be minimal to reflect the test-case nature of the proceeding.

On April 22, 1974, OSHA (Department of Labor) and MESA (MSHA's predecessor in the Department of Interior) entered into a Memorandum of Understanding to resolve jurisdictional disputes between the two agencies. In March 1978, the Secretary of Labor assumed statutory responsibility for enforcing both the Occupational Safety and Health Act and the Mine Act. Since March 1978, the Secretary of Labor has had jurisdiction over both agencies and, through them, discretion in determining the enforcement boundries of each. On March 29, 1979, the agreement between OSHA and MESA was superseded by an "MSHA-OSHA Interagency Agreement,"which recognized the Secretary's dual enforcement role and the continuity of enforcement principles of the earlier agreement.

Section A(3) of the Interagency Agreement explains its purpose and general principles as follows:

> This agreement is entered into to set forth the general principle and specific procedures which will guide MSHA and OSHA. The agreement will also serve as guidance to employers and employees in the affected industries in determining the jurisdiction of the two statutes involved. The general principle is that as to unsafe and unhealthful working conditions on mine sites and in milling operations, the Secretary will apply the provisions of the Mine Act and standards promulgated thereunder to eliminate those conditions. However, where the provisions of the Mine Act either do not cover or do not otherwise apply to occupational safety and health hazards on mine or mill sites (e.g., hospitals on mite sites) or where there is statutory coverage under the Mine Act but there exist no MSHA standards applicable to particular working conditions on such sites, then the OSH Act will be applied to those working conditions. Also, if an employer has control of the working conditions on the mine site or milling operation and such employer is neither a mine operator nor an independent contractor subject to the Mine Act, the OSH Act may be applied to such an employer where the application of the OSH Act would, in such a case, provide a more effective remedy than citing as a mine operator or an independent contractor subject to the Mine Act who does not, in such circumstances, have direct control over the working conditions.

The legislative history of the Mine Act indicates a Congressional intent to resolve jurisdictional doubts in favor of coverage under that statute. The Report of the Senate Committee on Human Resources states:

> The Committee notes that there may be a need to resolve jurisdictional conflicts, but it is the Committee's intention that what is considered to be a mine and to be regulated under this Act be given the broadest possibly [sic] interpretation, and it is the intent of this Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act.

S. Rep. No. 95-181, 95th Cong., 1st Sess. 14 (1977), reprinted in, Legislative History of the Federal Mine Safety and Health Act of 1977 at 602 (1978). Section B(5) of the Interagency Agreement recognizes the Congress' intent that doubts be resolved in favor of coverage under the Mine Act.

Section 3(h)(1) of the Mine Act defines "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 including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities. In making a determination of what constitutes mineral milling for purposes of this Act, the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment. [Emphasis added.]

Under the Act, covered mining operations include the milling of mine products; however, the Act does not define "milling." Appendix A of the Interagency Agreement defines "milling" as: "[T]he art of treating the crude crust of the earth to produce therefrom the primary consumer derivatives. The essential operation in all such processes is separation of one or more valuable desired constituents of the crude from the undesired contaminants with which it is associated." The types of milling processes over which MSHA has jurisdiction under the Interagency Agreement include crushing, grinding, pulverizing, sizing, concentrating, washing, drying, roasting, pelletizing, sintering, evaporating, calcining, kiln treatment, sawing, and cutting stone, heat expansion, retorting (mercury), leaching, and briqueting.

Section B(6)(b) of the Agreement provides that OSHA's jurisdiction includes the following, whether or not located on mine property: Brick-, clay pipe-, and refractory-plants; ceramic plants; fertilizer product operations; concrete batch-, asphalt batch-, and hot mix-plants; smelters and refineries. "Refining" is defined in the appendix to the Agreement as "the point where milling, as defined, is completed, and material enters the sequential processes to produce a product of higher purity." "Refine" is also defined in A Dictionary of Mining and Related Terms (U.S. Department of Interior, 1968), as: "To free from impurities; to free from dross or alloy; to purify, as metals; to cleanse."

The dominant activity of Applicant's plant is the milling of clay, which includes crushing (defined by the Agreement as "the process used to reduce the size of mine material into smaller, relatively coarse particles"); sizing, (defined as "the process of separating particles of mixed sizes into groups of particles of all the same size, or into groups in which the particles range between maximum and minimum sizes"); and kiln treatment (defined as "the process of roasting, calcining, drying, evaporating, and otherwise upgrading mineral products through the application of heat"). These key processes are all defined as "milling" by the Agreement, which recognizes "milling" as a part of mining operations subject to MSHA's jurisdiction.

Applicant's mixing and blending of the clay with other products does not increase the purity of the clay, but simply changes its nature and level of refractoriness. I do not find that these changes are a "refining" process. Even if considered "refining," the mixing and blending are not sufficient in kind or degree to justify inclusion of the plant operations under OSHA's jurisdiction as opposed to MSHA's. Meltzona is a naturally occurring refractory clay that requires principally milling processes to produce a marketable product. Under the purview of the Act and the Interagency Agreement, doubts such as may exist here are to be resolved in favor of jurisdiction by MSHA, not OSHA.

I conclude that Applicant's plant facility is subject to MSHA's jurisdiction and that Applicant violated section 103(a) of the Act as charged.

CONCLUSIONS OF LAW

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

2. Applicant violated section 103(a) of the Act by refusing entry to a federal mine inspector to inspect its clay processing plant, as alleged in Citation No. 83079 and Order of Withdrawal No. 83080.

3. Based upon the statutory criteria for assessing civil penalties, Applicant is assessed a penalty of $1 for this violation.

ORDER

WHEREFORE IT IS ORDERED that:

1. The above-mentioned citation and order of withdrawal are AFFIRMED and the notice of contest is DISMISSED.

2. Applicant shall pay the Secretary of Labor the above-assessed civil penalty, in the amount of $1, within 30 days from the date of this decision.

William Fauver
WILLIAM FAUVER, JUDGE

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE, SUITE 400
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OCT 20 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	)	CIVIL PENALTY PROCEEDING
Petitioner,	)	DOCKET NO. WEST 80-478-M
v.	)	MSHA CASE NO. 48-00155-05056 V
ALLIED CHEMICAL CORPORATION,	)	MINE: Alchem Trona or Alchem Mine
Respondent.	)	

Appearances:

Robert J. Lesnick, Esq., Office of
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For the Petitioner

John A. Snow, Esq.
Van Cott, Bagley, Cornwall, and McCarthy
50 South Main Street, Suite 1600
Salt Lake City, Utah 84144
For the Respondent

Before: Judge John J. Morris

BENCH DECISION

The Petitioner filed a petition for assessment of a civil penalty against the Respondent for the alleged violation of a regulation promulgated pursuant to the Federal Mine Safety and Health Act of 1977. The evidence having been concluded, the parties agreed to waive the filing of post hearing briefs and also agreed that a bench decision be rendered.

Based on statements and agreements of the parties, I entered the following bench decision.

JURISDICTION

The parties agreed that the Federal Mine Safety and Health Review Commission has jurisdiction to hear and determine this case.

STATEMENT OF THE CASE

Petitioner alleges respondent violated 30 C.F.R. 57.21-12. The cited standard provides as follows:

> "Mandatory. Immediately before and continuously during welding or soldering with an open flame, in other than fresh air, or in places where methane is present or may enter the air current, a competent person shall test for methane with a device approved by the Secretary for detecting methane."

ISSUES

The issues in this case are whether respondent violated the standard. A corollary issue is if the standard was violated, what penalty, if any, is appropriate.

FINDINGS OF FACT

Some of the facts in this case are uncontroverted. Those facts that are controverted will be discussed later in the decision. The credible facts are as follows:

1. On April 2, 1980, Inspector William Potter inspected respondent's Trona mine. The mine has been classified as a gassy mine and has produced methane liberating approximately one million eight hundred thousand cubic feet each twenty-four hours.

2. The inspector issued Citation No. 576827 at the J.M.E. Panel where he observed welding being conducted on the head of a continuous miner in the last open crosscut toward the face. The miners were employed by Allied Chemical Corporation, the respondent in this case.

3. None of the miners nor their superintendents monitored for methane.

4. The inspector tested for methane with methanometer Model No. 102. The inby tests that were conducted resulted in the following methane concentrations: .0%, .5%, .2%, .4%, .5%, .4%, .5%, .6%.

5. Methane was found as close as twenty feet from where the men were welding.

6. The methane present might enter the air current.

7. The explosion range for methane is 5% to 15%.

8. Methane explosions have previously occurred at this particular mine.

9. Foreman Tom Jones advised the inspector that he had not tested for methane since 1:00 a.m. The inspection was being conducted at 2:05 a.m.

10. Welding had been going on for one hour before the citation was issued in this case.

11. Methane can build up in the face area from small cave-ins within a few seconds of such an event or close to instantaneously. Such a build-up could be explosive in nature.

12. Continuous testing was not being conducted at the point of the welding.

DEFENSES AND DISCUSSION

Respondent's defense is that everything was working at the time of the inspection and, therefore, methane would not accumulate at this particular work site. I reject that defense, although I do find those underlying facts to be true. If everything was working well, then in the ordinary course of events, there would be no accumulation of methane at the point where the welding was being conducted. However, things are not always in the position where there will not be some difficulty that might cause the accumulation to build up. The regulation itself requires the continuous monitoring, and the regulation says where methane is present "or may enter the air current." It seems to me that on the factual basis where you have methane close to the air current, the methane can, then, enter into it.

One of the issues raised in this case is the credibility of respondent's foreman, Tom Jones, who claimed at the hearing that he was monitoring for methane. I find on this issue in favor of the government's witnesses who related Jones' statement, made at the time of the inspection, that he was not monitoring for methane. Mr. Potter and witness Kinterknecht both testified in this particular regard. I resolve this issue in favor of Mr. Kinterknecht and Mr. Potter because of Mr. Kinterknecht's notes. Although they didn't directly contain the answers therein on this particular issue, they did refresh his recollection as to what was said. As the parties know, the witnesses were sequestered in this case. Mr. Kinterknecht said that his notes that were written at the time of the inspection refreshed his recollection in this matter.

At the hearing, Mr. Jones testified that he was monitoring the particular area for methane, but he was doing it every fifteen minutes. He had been instructed by his supervisors in this regard. Even if Jones' testimony is taken to be true, it is no defense because the standard says that the area shall be "continuously" monitored during welding or cutting with an arc or open flame. So I take the regulation to be that continuous does not mean every fifteen minutes; the regulation means that the monitoring must be without interruption.

Further in support of this view, I note that the equipment approved by the Secretary does in fact, "continuously" monitor. So I see no reason why, technically speaking, if the equipment was there, continuous detection could not have been conducted.

There are several other credibility issues that should be discussed. Witness Potter discussed in detail the various tests he made. When Mr. Jones testified, he only directed his testimony at one of those particular tests. So, as I construe the evidence, Mr. Potter says he conducted nine tests. Mr. Jones only mentions one such test. So, I take it that Mr. Potter's evidence that he tested at least in eight areas and his findings in those areas are uncontroverted.

Further in connection with the case is the testimony of witness Randy Dutton offered on behalf of respondent. Mr. Dutton does not directly contradict the testimony of the compliance officer as to the compliance officer's tests. Mr. Dutton was at the test site after the inspector and he, himself, found some concentrations of methane. As he described it, it was .2%, and he described it as the highest reading he received.

Mr. Dutton further testified that he talked to the MSHA inspector, Mr. Jacobson, concerning monitoring every fifteen minutes or thereabouts. The nature of the defense here is that Mr. Jacobson, in effect, gave permission to respondent to conduct their monitoring on a basis of every fifteen minutes. That is a defense that is in the nature of an equitable estoppel against the Government. The law is clear that an employee or agent of the Government cannot bind the Government to a particular construction of the regulations. Inasmuch as the parties stipulated that Mr. Jacobson did not recall the conversation with witness Dutton, I take it that Mr. Dutton's testimony is correct in this regard. I am not willing to discount that particular evidence because it goes to the negligence of respondent, which is one of the matters to be considered when a penalty is to be assessed in this particular case, if a violation is found.

The last bit of evidence to be considered is the matter of the testimony of the witnesses McLendon and Kovick concerning the ventilation at the work site. I do find that under ordinary circumstances there would be no hazard to employees working in this particular area. I do note that the welding or cutting with an arc or open flame is only prohibited when the atmosphere surrounding that particular flame contains more than 1% of methane as may be determined by a monitoring device. That particular standard is 30 C.F.R. 57.21-13, which immediately follows the standard in contest here.

However, as I see it, 57.21-12 is a control standard that would help protect miners by measuring the amount of methane that may be entering the particular atmosphere in which they are working, and that can only be done if it is done continually. Since respondent had not continuously monitored the area in question for methane, I find that the operator did not comply with 30 C.F.R. 57.21-12.

PENALTY

In considering the statutory penalty in this case I find that Respondent did rely on an interpretation of the regulations that does not appear to have been correct. I believe that the penalty, as proposed, is excessive. I deem a penalty of $500.00 to be appropriate.

ORDER

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

1. Citation 576827 is affirmed.

2. A penalty of $500.00 is assessed.

POST TRIAL ORDER

The foregoing bench decision is affirmed and respondent is ordered to pay the civil penalty in the sum of $500.00 within 30 days of the date of this decision.

John J. Morris
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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CONOCO, INC., Contestant	:	Contest of Citation
v.	:	Docket No. CENT 81-137-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Citation No. 170624; 1/28/81 Karnes County Pits

DECISION

Appearances: Karl T. Skrypak, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for Contestant;
Robert A. Fitz, Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Respondent.

Before: Judge Charles C. Moore, Jr.

Despite the docket number assigned to this case, it is not a coal mine case. The notice of contest was forwarded to the Commission by a letter of February 26, 1981, on Consolidation Coal Company's letterhead and the notice states in paragraph 1 that "at or about 1045 hours on September 14, 1979, Federal Coal Mine Inspector, D. J. Haupt * * * issued Citation No. 170624 * * *." I am assuming that because of this, our docket section gave this case a coal mine docket number. Actually, the mine is a uranium mine located near Falls City, Texas, but I see no necessity of going through any formal procedure to change the docket number.

This is an alleged noise violation where the noise produced by a Caterpillar scraper in the hearing zone of the operator was louder than that allowed by the noise standard but where the operator was wearing hearing protection that would reduce the sound level pressure within his ear to an amount below that allowed by the regulations. It was the opinion of the expert witnesses testifying for MSHA that if the engineering controls recommended for reduction of the noise in the hearing zone of the operator were followed by the Contestant, it would still not reduce the sound pressure level sufficiently so that the equipment operator could forego personal hearing protection. The equipment operator in this case was wearing personal hearing protection that was represented to attenuate noise by 41 decibels. 1/

1/ In this decision I am using the word "decibel" and the term "dBA" interchangeably even though technically there is a difference because the latter term is weighted to allow for different frequencies.

To this extent, this case is similar to the situation that was presented to me in Hilo Coast Processing Company v. Secretary of Labor, 1 FMSHRC 895 (1979). I decided that case against the Government on the basis of the economic feasibility of the engineering controls suggested by MSHA as well as the fact that I considered it improper for MSHA to issue a citation, when the operator of the equipment was wearing hearing protection and when it appeared that the mine operator was required to guess how much money and effort he should expend in trying to reduce the noise level before resorting to personal hearing protection.

The history of the Hilo case, after I decided it, is somewhat strange. The Government appealed my decision and the Commission granted discretionary review. Both of the parties filed briefs and after the briefing, Hilo filed a further pleading indicating that it was engaged in a borrow pit type of operation and inasmuch as MSHA had decided it would no longer exercise jurisdiction over borrow pits, the case should be dismissed. The Commission then wrote to the Secretary of Labor and asked if the Secretary would dismiss its case against Hilo on the grounds that he was not exercising jurisdiction over such a mine if the Commission reversed my decision. The Secretary then properly informed the Commission that the borrow pit exclusion had nothing to do with the Hilo operation and that accordingly it would not dismiss its proceeding should the Commission reverse my decision. Thereafter, without further motion from either party and without any explanation or opinion, the Commission vacated its order granting the petition for discretionary review. This leaves me, the Government and the industry, without guidance as to the Commission's views, and I refuse to speculate as to the possible reasons for the action taken.

PROCEDURAL MATTERS

When the above case was assigned to me, I had already noticed two cases for hearing in Corpus Christi, Texas, for May 27, 1981. Because I thought it might be possible to conclude those two cases in the morning, I noticed the instant case for hearing at 2 p.m. on May 27, 1981, but advised the parties that because of a previous schedule it might be May 28 before this case would commence. The notice of hearing was issued on March 26, 1981, 1 day in excess of 2 months before the scheduled hearing date of May 27, 1981. At the time I issued my notice of hearing, Eve Chesbro, Esq., was the attorney representing the U.S. Department of Labor in this case. By letter of April 8, 1981, not received until April 13, 1981, I was informed that Thomas Mascolino, Esq., would be representing the Secretary of Labor in this case. By letter dated May 6, 1981, but received May 11, 1981, I was requested by Robert A. Fitz, Esq., from the Department of Labor's Dallas office to issue a subpoena requiring Contestant "to produce its unit [No.] 482, a Caterpillar 651-B scraper, at the hearing in the subject administrative law case at 2:00 p.m., Wedneday, May 27, 1981, in Corpus Christi, Texas." Since a Caterpillar scraper is a massive piece of equipment and Falls City, Texas, is more than 100 miles from Corpus Christi and inasmuch as no justification was provided, I declined to issue the subpoena. I did offer to stop in Falls City, Texas, and view the equipment but, as I later learned, the Government did not want

me to look at the equipment but wanted one of its experts to see it. It was subsequently arranged that the expert from the Technical Support Center in Denver, Colorado, would view the equipment on Friday, May 22, 1981.

THE EVIDENCE

On January 28, 1981, Inspector Haupt conducted a noise survey on four pieces of equipment being operated in Contestant's Karnes County Pits. For various reasons, he issued no citations concerning the front-end loader operator, the truck driver, or the backhoe operator. He did issue a citation concerning the scraper operator. He placed the dosimeter in the hearing zone of the scraper operator and left it there for a period of 10 hours and 45 minutes. A dosimeter when properly calibrated does not record any sound level less than 90 decibels. The readout is not in decibels but in a percentage of the allowable noise level for an 8-hour shift. The reading in the case of the scraper was 793.9 percent which is the equivalent of 105 dBA during the shift. At five different times during the 10-hour and 45-minute shift, Inspector Haupt checked the scraper with his sound level meter and found that it registered 90 dBA when idling and 104 dBA when the engine was revved up. 2/ This served as a check on the dosimeter and buttressed the 793.9-percent reading that the dosimeter had given.

The operator of the scraper was wearing the E.A.R. brand of personal ear protection. This is a fibrous-type of plug that is inserted in the ear. Each of the personal ear protection devices has been rated by MSHA as to the amount of sound attenuation it can produce. Each device is assigned an "R" factor and a "D" factor. The "R" factor is the number of decibels that the device can subtract from the noise entering the outer ear shell to obtain the noise impinging upon the tympanic membrane (eardrum). In the case of the E.A.R. device, the "R" factor is 41 decibels meaning that the eardrum receives 41 decibels less than the noise existing just outside of the outer ear. The "D" factor assigned to the E.A.R. device is .0034 and this is a figure which is to be multiplied by a dosimeter percentage reading in order to get the percentage of the allowable sound level that actually reaches the eardrum when the device is being worn. When the recorded dosimeter percent of 793.9 is multiplied by .0034, the result is 2.699 percent of the allowable noise limit. When 41 decibels is subtracted from the recorded 104 on the sound level meter, it leaves 63 decibels. Both of these figures are well below the allowable noise level.

Contestant's Exhibit No. 1 is a letter addressed to Mr. Patts, an employee of Contestant, by Leonard C. Marraccini, Chief of the Field and

2/ The difference between the 104 dBA measured by the noise level meter and the 105 dBA figure measured by the dosimeter is attributable to the fact that total sound during a 10-hour, 45-minute shift must be considered as though an 8-hour shift were involved.

Applications Branch, Physical Agents Division of MSHA's Pittsburgh Health Technology Center. Attached to the letter are the "R" and "D" factors for numerous types of personal ear protection. Only the E.A.R. devices (see page 6 of exhibit) and the Deci Damp manufactured by Marion Health and Safety Inc. (see page 11 of exhibit), have "R" factors as high as 41 decibels. There was also evidence that the Federal Aviation Administration had tested numerous hearing protection devices and decided that the E.A.R. was the best. During the hearing, I announced to the parties that on my way to Corpus Christi, I had visited the flight line of the Navy Jet Training Base at Beeville, Texas. Personnel on the flight line are required to wear personal hearing protection and the devices that were given to me to wear appeared to be the same as the E.A.R. devices.

Mr. Larry Rabius is an industrial hygienist and he is the previously referred to expert witness from the Denver Technical Support Branch of MSHA. He examined the scraper in question and made certain suggestions as to how the noise produced by the machine could be reduced. These included checking the canopy to see if it was generating or reflecting noise, checking the fire wall floor and possibly lining them and checking the engine cover itself. He suggested that belt material could be used for some of the shielding and speculated that if his suggestions were all followed a 4- to 5-decibel reduction might be achieved. While such a reduction is substantial, it is nowhere near the 41-decibel reduction which the personal ear protection supplies and it does not bring the noise level down to that level where no personal ear protection would be required. The evidence was inconclusive as to the cost of the suggested modifications and as stated the 4- to 5-decibel attenuation was stated more as speculation rather than as an expert opinion.

Dr. Garson testified on behalf of the Contestant. It was his testimony that the damage from excessive noise does not occur in the outer portions of the ear, but to the small hairs in the spiral organ of corti which is located in the snail like bone called the cochlea. Any device that can reduce the noise level reaching the eardrum reduces the likelihood of damage to the "outer hair cells" of the spiral organ of corti. His testimony was that the EAR devices would serve that purpose.

There was some evidence that the R and D factor might not be as great as those listed on the MSHA publication that was attached to Contestant's Exhibit No. 1. There was also evidence that some miners found personal ear protection uncomfortable and did not wear it, but there was no disagreement as to the operator of the caterpillar scraper involved in this case. He was wearing ear protection and he was wearing the best type available. MSHA deducts 10 decibels from the R factor as an allowance for a possible poor fit when considering how much sound pressure actually reaches the inner ear through an ear plug type device. If that allowance is made, the EAR device will reduce the noise factor by 31 decibels.

While there was some evidence that the dosimeter sometimes records sounds at 89 decibels, it is designed to record only that sound that exceeds 90 decibels and it stores that sound in an electronic manner similar to the way a

battery is charged. If properly adjusted, the dosimeter will convert the stored electric charge to a percentage of the allowable sound level above 90 decibels during an 8-hour work shift. As indicated earlier, if the work shift exceeds 8 hours, an adjustment is made to allow for the fact that the standard is written in terms of an 8-hour shift. The mine operator's witness, Dr. Garson, agreed with the inspector's action in adjusting the readout to accommodate an equivalent 8-hour shift readout.

The standard in question requires that a mine operator exercise feasible administrative or engineering controls to reduce the noise level before resorting to the use of personal hearing protection. The kind of controls suggested by Mr. Rabius are engineering controls. Administrative controls would be having a sufficient number of equipment operators work on this particular scraper during a shift, so that no individual would exceed his accumulative allowable noise level. The standard allows a miner to work for only 1 hour at 105 decibels. To work an 8-hour shift on this piece of equipment it would require eight operators to each work 1 hour and then be given some other job for the remainder of their shift in which the sound level would be 90 decibels or less. If the noise of the scraper were reduced by 5 decibels and produced only 100, a miner could work for 2 hours on the scraper and it would thus require four miners to operate such a scraper for an 8-hour shift. Administrative controls are thus not practical.

The standard in question says that administrative or engineering controls should be used but it is MSHA's position that both administrative and engineering controls should be used before resorting to personal hearing protection. The coal mine regulations use the word "and" instead of "or." I agree with MSHA that the word "or" in the metal and nonmetal standard conveys the same meaning as "and" but it does not matter in this case. MSHA has the burden of proving feasibility and it has not done so. I find that neither engineering nor administrative controls or a combination of both would be feasible in this case. An air-conditioned noise-proof canopy would protect the miners' ears without personal hearing protection, but attempts to retrofit scrapers with that type of device have been unsuccessful. The Government witnesses so testified.

I see no need in this decision to reexamine the position I took in Hilo. In the instant case, I find that there were no feasible administrative or engineering controls that Contestant should have tried before resorting to personal hearing protection. The EAR plugs were necessary to protect the miners' hearing and there was nothing short of a new piece of equipment with a factory-installed, air-conditioned cab (air conditioning because temperatures of over 100 degrees for a number of days in a row are common in this part of Texas) would have protected the miners' ears and MSHA does not contend that Contestant should have replaced the scraper in issue with a new one.

The citation is VACATED and the case is DISMISSED. All proposed findings not included in the above opinion are REJECTED.

Charles C. Moore, Jr.

Charles C. Moore, Jr.
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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OCT 21 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Civil Penalty Proceeding
	:	Docket No. SE 80-106
Petitioner	:	A.O. No. 40-02287-03014 V
v.	:	
	:	No. 1 Mine
D. C. COAL COMPANY, INC.,	:	
Respondent	:	

DECISION

Appearances: Darryl A. Stewart, Attorney, U.S. Department of Labor, Nashville, Tennessee, for the petitioner;
Rudolph L. Ennis, Esquire, Knoxville, Tennessee, for the respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a proposal for assessment of civil penalty filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), charging the respondent with one alleged violation of mandatory safety standard 30 C.F.R. § 75.201. Respondent filed a timely answer in the proceeding and a hearing regarding the proposal was held on August 27, 1981, in Oak Ridge, Tennessee, and the parties appeared and participated therein. The parties waived the filing of posthearing arguments, but were afforded the opportunity to make arguments on the record and they have been considered by me in the course of this decision.

Issues

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

In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

Applicable Statutory and Regulatory Provisions

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

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

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

Stipulations

The parties stipulated to the following:

1. Respondent is subject to the provisions of the Act, and is a small coal mine operator producing approximately 25,000 tons of coal annually. At the time of the inspection in question, respondent was engaged in "retreat mining," and was producing coal on only one section.

2. On December 5, 1979, MSHA inspector Donn W. Lorenz conducted an inspection of the mine and issued Citation No. 999971, citing the respondent with a violation of mandatory safety standard 30 C.F.R. § 75.201. Respondent was given an opportunity to accompany the inspector during the inspection.

3. Inspector Lorenz fixed the abatement time as 11:30 a.m., December 5, 1979, and the conditions cited were abated at 11:15 a.m., that same day.

Discussion

Citation No. 999971, December 5, 1979, cites a violation of 30 C.F.R. § 75.201, and states as follows:

> The two rows of breaker posts that have been installed in the No. 1 entry on the 003 working section where pillar recovery is being done have been removed, and gob rock and mud have been pushed inby the breaker line. The posts were then re-installed. Four cuts of coal have been taken from this pillar before the breaker posts were removed.

The abatement of the conditions cited reflects that "a safety meeting was held and all persons were warned against this act."

Petitioner's Testimony

Inspector Donn W. Lorenz confirmed that he issued Citation No. 999971 on December 5, 1979, because breaker posts had been removed in order to push gob, rock, and mud inby the breaker line where cuts of coal had already been taken from the pillar. The inspector explained that he had previously issued a citation on November 30, 1979, to respondent for failure to install breaker posts in the No. 1 entry and that these were the same posts which he determined had been removed to push mud behind them. When he returned on December 5, he knew he was in the same areas as on November 30, because he saw the pillar with the cut off one corner. This pillar, which had been under unsupported roof, was the reason he had issued a citation on November 30. On December 5, he saw mud and gob behind the posts which had not been there on November 30. The foreman, Troy Jackson, had told him that they had pushed the mud through the timbers.

Mr. Lorenz testified further that he did not believe the foreman's account of how the mud got pushed to the other side of the breaker posts. The inspector had noticed that the breaker posts were covered with mud from top to bottom and were not sturdy and were not caked with mud on November 30. He assumed that they had been removed and laid to the side while the area was filled. The inspector testified that the posts could not have stood the pressure of having mud pushed through them and would have been knocked out. He also concluded that the mud could not have been pushed through the No. 2 entry because this area had already been robbed and it would have been a violation to do so. He could tell by the angle of the mud that it had not been brought in through this entry. The inspector stated that the mud was angled toward the pillar demonstrating that it had been pushed up by a scoop bucket and then tapered outby the No. 1 entry. He knew that they had not brought the mud in from the left side of the No. 1 entry because it was also full of gob and mud. The inspector, in explaining the violation, stated that by removing the timbers and going inby the breaker line, the miners would be exposed to unsupported roof, since one pillar had been removed and another cut off. Since the area was not bolted, the danger of a potential roof fall was increased (Tr. 9-26, 45-47).

On cross-examination, Mr. Lorenz admitted that he had relied only on his visual observations to determine his location on December 5. He stated that the corner of the pillar which had been cut off was the only one like it in the area, and that there were no other pillars further back that were scarred or marked in a similar fashion. The inspector testified that the mine was muddy and had water in it, and that the mud was anywhere from 4 to 6 inches deep. The timbers were stacked in the mine with two or three laying alongside one another, and he did not know whether there was gob material behind the pillar labeled "D" on Government Exhibit 2 (G-2), which was the one with the cut taken out of it. He restated his belief that the mud could not have been brought through the left of the No. 1 entry because it was full of mud and gob and had been that way on November 30. He stated that there was no evidence of the mud having been moved since that time. The inspector testified that he stood at the line of the breaker posts to make his observations, and

that the slab taken off pillar "D" was not bolted, but he did not get close enough to that pillar to determine whether the area around it had been bolted (Tr. 27-44).

In response to bench questioning, Mr. Lorenz admitted that he did not personally observe the violation but assumed that the posts had been taken down and that miners had worked under unsupported roof. His assumption was based on the fact that there was only a 4-foot spacing between the posts and if machinery had pushed mud through that area, the posts would have fallen. He reiterated his belief that the posts had been taken down in order to push gob into the area behind the breaker line. He stated that he did not take notes at the time of the inspections and could not say how much pillar recovery had been completed (Tr. 50-57).

Testimony and Evidence Adduced by the Respondent

Don D. Collins, owner and operator of D. C. Coal Company, Inc., testified that the particular mine where the violation in question occurred is now closed and was in operation for 14 years, but that his present operation is located about a mile from the old facility. Mr. Collins stated that he employs 6-7 men at most, and that two of them would be involved in pillar extraction. He indicated that he has a cutting machine, a bolting machine, and two battery-powered scoops, and that since they are 26 inches tall and about 30-35 feet long, they often run into columns or knock off corners of pillars as the machines go around them. He also stated that every pillar which is close to the machines is scarred, and that the pillars change shape from square to hexagon or round.

Mr. Collins testified that he spoke with his men about the violation on November 30 because he did not want the violation to reoccur. He stated that once posts are installed, they are never removed and all his men had been instructed in that respect. He did not remember Foreman Jackson telling him that the mud had been pushed through the posts, and he accounted for the presence of mud behind the breaker posts by describing the procedure which was regularly used at their mine. He explained that prior to setting the posts and robbing the pillars, the area around the pillars are cleaned. This involved pushing 2 to 9 inches of mud, dry rock, and loose coal as far as possible toward the last row of breaker posts. This method saved the trouble of making a number of trips outside with the mud while still providing a clean area to set the posts in and to work in.

Mr. Collins testified that once the posts are installed, the pillars are extracted, and they repeat the process of moving the coal, mud, and gob to the next row of pillars. He stated that the pillars are rarely recovered completely, that usually seven or eight cuts are made, leaving one or two of the corner stumps before moving on. The extraction of coal creates more debris in the area which is cleaned up with the rest of the gob and mud in retreating to the next row of pillars. Mr. Collins indicated that it was pillar No. 5942 on Exhibit R-2 which the inspector noticed on November 30, although he could not recall whether it had a corner cut off of it. He

pointed to the pillar No. 5941 as being the one in question on December 5, and asserted that the breaker posts in that area had been installed and not moved prior to cutting into that pillar (Tr. 64-88, 101-102).

On cross-examination, Mr. Collins could not remember whether he accompanied the inspector underground on November 30, although the posts that needed to be installed were pointed out to him. He did remember speaking with the inspector underground on December 5, but contended that on December 5, Mr. Lorenz was in the same entry but near a different row of pillars than on November 30. In further explaining the procedure for moving mud, he stated that a miner would not be exposed to unsupported roof while pushing the mud back because the pillars would not have been robbed (Tr. 88-99).

Troy Jackson testified that he was acting in his capacity as section foreman on both November 30 and December 5. He stated that on November 30, four cuts had been taken from the pillar which needed about seven to eight cuts to be pulled all the way through. He claimed that there was mud, gob, and debris behind the posts on November 30, and that this was the result of having gathered all the muck and rock from the previous stump and putting it in the back to clear an area for the next row of breaker posts. Once the posts were in place, there would be no debris in the mine entrance side of the pillars. He denied that they had taken the posts down to push mud behind them. He stated that if his men had done this, he would have known about it. None of the workers had ever been instructed to engage in this practice of removing the posts. When the inspector issued the citation, he did not explain to him their procedure of pushing away the mud and debris before installing the posts because the inspector was at the mine every week and he assumed he knew the procedure followed. He denied having told the inspector that gob was pushed between the posts. He indicated that stump No. 5942 was the pillar being worked on November 30, but that on December 5, they were working on pillar No. 5941, and had taken out about half of that pillar by making four cuts on it (Tr. 109-123).

On cross-examination, Mr. Jackson confirmed that he accompanied the inspector on November 30, 1979, to the No. 1 entry where the inspector instructed that breaker posts be installed, and conceded the citation was issued because gob was being stored in an unsupported area where cuts had been taken from a pillar. Although asserting that the inspector had been disoriented as to his location in the mine on previous occasions, he stated that he did not try to explain the presence of gob on December 5, and asserted that he did not recall telling Mr. Lorenz that the gob had been pushed through the posts (Tr. 124-130).

On redirect examination, Mr. Jackson stated that it was not their practice to put debris on the retreat side once cuts were made in the pillar. After they were ordered to put posts up on November 30, no gob was put behind them. He asserted that roadway timbers can be knocked down by equipment after they are installed, and he believed that the inspector should have known that the mud had been pushed up prior to installing breaker posts because the inspector had seen them do so on other occasions (Tr. 135-139).

Findings and Conclusions

Fact of Violation

In this case, the respondent is charged with a violation of mandatory safety standard 30 C.F.R. § 75.201, which provides as follows: "The method of mining followed in any coal mine shall not expose the miner to unusual dangers from roof falls caused by excessive widths of rooms and entries or faulty pillar recovery methods."

It seems clear from the record in this case that the storage of gob and mud behind breaker posts in the mine is not per se a violation of any safety standard. However, once the breaker posts are installed, they are not to be removed if men and equipment are still in the area and working under that unsupported roof. In this case, the critical question is whether or not the breaker posts had been removed to facilitate the pushing of the gob and mud behind them, and then reinstalled. If the posts were removed, and then reinstalled after the gob and mud was pushed into the area, a violation of the cited section would have occurred because men would be working under the unsupported roof area, and would therefore be exposed to roof falls from faulty pillar recovery methods.

The inspector's testimony is that when he inspected the area on November 30, he observed no breaker posts installed and no gob or mud stored in the area. Once the breaker posts were installed to abate the citation which he issued on November 30, there was no gob or mud behind the posts. However, when he returned to the same area during his December 5 inspection, he testified that he observed mud and gob behind the same breaker posts, and assumed that someone had taken the eight posts down in order to push the gob and mud behind them (Tr. 141).

Inspector Lorenz testified that on November 30, 1979, there was one active section being mined, and while he served the first citation on Mr. Collins, Mr. Collins was not underground with him. However, he indicated that Section Foreman Jackson was with him underground at that time, and that two rows of breaker posts were installed to abate the citation. When he returned to the section 5 days later on December 5, 1979, he observed mud and gob behind the same breaker posts, and since there was no mud or gob in that area on November 30, he surmised that the posts had been removed to facilitate the pushing of mud and gob behind them, and that once this was done, the posts were reinstalled. Mr. Collins was not with him underground on December 5, but Mr. Jackson was (Tr. 41). When he questioned Mr. Jackson about this, Mr. Jackson purportedly told him that the posts were not removed but that mud and gob was pushed between the posts. At that time, Mr. Lorenz observed that the posts were muddy from top to bottom, and since he believed the posts would have been pushed out of place and broken by the pressure of all of the gob and mud which was behind them, he did not accept Mr. Jackson's explanation and issued the unwawrrantable failure notice.

Inspector Lorenz indicated that during the intervening period from November 30 to December 5, four cuts of coal were taken from the pillar in question (Tr. 62). He specifically recalled that he was at the same location on November 30 and December 5 because the pillar being mined was one and the same, the breaker post location was at a corner which had been "slabbed off" or cut away, and it was the only corner cut in that fashion on both days (Tr. 29). Although Mr. Lorenz stated that he normally does not make notes or sketches at the time he issues a citation but simply relies on the conditions described on the face of the citation, in this case he made a sketch of the scene shortly before the August 27, 1981, hearing, and to the best of his recollection,, the sketch is accurate (Exh. G-2; Tr. 57). More significantly, Mr. Lorenz testified that when he discussed the matter with Foreman Jackson on December 5, Mr. Jackson said nothing to him about being in the wrong location, and Mr. Jackson made no protest that the posts in question were not the same as the previous posts cited on November 30 (Tr. 11-14).

Mine Operator Collins was not sure whether he was with the inspector underground during both of the inspections in question, and I accept the inspector's testimony that he was not. Mr. Collins apparently went underground with the inspector only on December 5 after the citation was served on him. Further, Mr. Collins conceded that he did not recall too much about the row of pillars cited by Inspector Lorenz on November 30 (Tr. 81), and he testified that the basis for his belief that Mr. Lorenz was not in the same location on December 5 is the fact that the mining cycle advances from week-to-week, from pillar row to pillar row, and that it generally takes 3 or 4 days to mine a row of pillars (Tr. 78-79). In this connection, I take judicial notice of the fact that November 30, 1979, was a Friday, and that December 5, 1979, was a Wednesday. Absent any indication that the mine was operated over the intervening weekend, this time span would not have permitted the complete mining out of the pillar rows in question, particularly under the wet and muddy conditions which apparently prevailed in the section at the times in question. Mr. Collins testified that he had no idea how many days coal was mined in 1979, and that "most of the time" coal was mined 6 days a week (Tr. 90). He also testified "possibly three of four shifts" worked during the period November 30 to December 5, but that all three pillars in question could not have been completely mined either on November 30 or December 5 (Tr. 100).

Mr. Collins conceded that Inspector Lorenz was in the right entry on both November 30 and December 5, and while he believed that on December 5 he was in a row of pillars closer to the mine portal, Mr. Collins did not recall too much detail about the three pillars (A, C, D) being mined (Tr. 92). Mr. Collins also conceded that he did not protest the citation of November 30, and does not dispute the fact that the breaker posts were not installed as required. Further, I take note of the fact that after Mr. Lorenz issued his unwarrantable failure notice of December 5, Mr. Collins filed no contest and sought no independent review of that citation. It seems to me that if he was so sure that the citation was erroneously issued, the natural thing would have been to contest it at that time rather than to wait for the civil penalty case to be

filed. Further, even though the record suggests that the three miners working at the scene had no present recollection of the circumstances surrounding a citation which occurred close to 2 years ago, it seems to me that since a safety meeting was called to discuss this matter, and since the inspector accepted this meeting as part of the abatement, someone from mine management would have protested if they believed the inspector was wrong.

Mr. Collins did not personally observe any gob or mud being pushed into the area behind the breaker posts in question, and his belief that the material was pushed there before the posts were installed is based on the fact that this was the usual and routine mining practice (Tr. 102). Mr. Collins could not recall Inspector Lorenz telling him that Mine Foreman Jackson stated to him that the gob and mud were pushed between the breaker posts (Tr. 99), nor could he recall Mr. Jackson ever telling him that the gob and mud was pushed between the posts (Tr. 101). On the day of the December 5 inspection, three men were working on the section where the violation assertedly occurred, but Mr. Collins stated that he spoke with the men recently and none of them could recall the events which transpired nearly 2 years ago (Tr. 88). Petitioner's counsel confirmed that this was the case (Tr. 96), and none of these men were called to testify.

Section Foreman Jackson testified that the citation that Mr. Lorenz issued on November 30 resulted from the fact that gob and mud were being stored in the area without breaker posts being installed to support the roof (Tr. 127). When asked to explain why he offered no explanation to Mr. Lorenz on December 5, Mr. Jackson stated "They usually write us up once or twice a week anyway" (Tr. 130). Although Mr. Jackson denied telling the inspector that the gob and mud were pushed between posts, he candidly admitted that he did not discuss this procedure with the inspector at the time the citation was issued. His explanation for not discussing it was his belief that the inspector knew the procedure they were following. However, it seems to me that once the citation issued, a section foreman would certainly discuss such a situation with an inspector, particularly if he believes that a citation was being issued for a procedure which he believed had the inspector's approval.

The difficulty presented in this case is that the crucial question of violation turns on the credibility of the witnesses and their perceptions as to the events which transpired some 2 years ago. After viewing the witnesses on the stand during the course of the hearing in this case, they all impressed me as being candid and honest in their testimony. However, based on my evaluation of the entire record in this case, I conclude and find that the inspector's account of what transpired is totally credible and that based on the foregoing analysis and evaluation of the testimony and evidence, his inference that the breaker posts were removed to facilitate the pushing of gob and mud behind the posts is supported by a preponderance of the evidence and testimony adduced in this case. Further, I conclude and find that the breaker posts cited by the inspector on November 30 were in fact the same posts, and at the same location, as those cited on December 5. In these circumstances, removal of the posts constituted a violation of the cited mandatory safety standard, and the citation is AFFIRMED.

History of Prior Violations

The parties stipulated that for the 24-month period prior to December 5, 1979, the respondent at its No. 1 Mine had paid and been cited for 53 violations of the Act's mandatory health and safety standards. In addition, petitioner's counsel conceded that except for the citation issued in this case, the respondent had no previous violations issued pursuant to section 75.201 (Tr. 151). Under the circumstances, I cannot conclude that respondent's prior history is such as to warrant any additional increases in the penalty assessment made in this case.

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

Mine operator Don D. Collins testified that the No. 1 Mine is now closed, that he only has small blocks of coal to mine, and that he is presently mining at a location approximately a mile or so from the No. 1 Mine (Tr. 66). The parties agreed that the respondent is a small mine operator (Tr. 151), and I accept this as my finding. Further, I conclude that the civil penalty assessed by me in this case will not adversely affect respondent's ability to continue in business.

Gravity

While it is true that the area of unsupported roof may have exposed two men to a hazard had the roof fallen, the fact is that the roof was otherwise bolted to some extent, and petitioner's counsel conceded that the scoop operator would not have been under unsupported roof because any areas not bolted would have been next to the pillar or rib that had been cut. Further, respondent's witness indicated that the roof areas around the roadways and pillars in the surrounding area were supported by roof bolts and petitioner does not deny this fact. Even so, while the area was apparently adequately roof bolted, the fact is that in the immediate roof area behind the breaker posts, which I have found had been removed, was not supported by the posts, thereby possibly exposing the scoop operator to a hazard. Respondent's counsel conceded that at least two men would have been exposed to a hazard in these circumstances (Tr. 150-151). Under the circumtances, I conclude that the violation was serious.

Negligence

I conclude and find that the violation resulted from the failure by the respondent to exercise reasonable care to prevent the conditions cited, and that this failure by the respondent amounts to ordinary negligence. Although the fact is that the inspector cited an unwarrantable failure to comply, I cannot conclude that the record evidence supports a finding of gross negligence and the petitioner has advanced no such argument.

Good Faith Compliance

Abatement in this case was achieved by calling a safety meeting to explain the provisions of the roof-control plan and to impress on the work force the fact that once installed, breaker posts should not be removed. In the circumstances, I conclude that the citation was abated in good faith and petitioner has established nothing to the contrary.

Penalty Assessment

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, particularly the fact that the respondent is a small operator, has ceased mining in the particular mine which was cited, the gravity of the conditions cited, and the fact that the respondent had not been previously cited for an identical violation, I conclude and find that a civil penalty assessment of $500 is appropriate.

ORDER

Respondent IS ORDERED to pay a civil penalty in the amount of $500 within thirty (30) days of the date of this decision and order, and upon receipt of same by the petitioner, this matter is DISMISSED.

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MABEN ENERGY CORPORATION, Contestant	:	Contest of Citations
v.	:	Docket No. WEVA 79-447-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Citation No. 637734
	:	September 7, 1979
	:	Docket No. WEVA 79-448-R
	:	Citation No. 637735
	:	September 7, 1979
	:	Docket No. WEVA 79-449-R
	:	Citation No. 637736
	:	September 7, 1979
	:	Docket No. WEVA 79-450-R
	:	Citation No. 637737
	:	September 7, 1979
	:	Docket No. WEVA 79-451-R
	:	Citation No. 637738
	:	September 7, 1979
	:	Docket No. WEVA 79-452-R
	:	Citation No. 637880
	:	September 7, 1980
	:	Maben No. 4 Mine

DECISION AND ORDER

On October 16, 1981, the Federal Mine Safety and Health Review Commission in Secretary v. Maben Energy Corporation, Docket No. WEVA 79-123-R, reinstated the citation therein, thereby affirming a violation of the standard at 30 C.F.R. § 77.216-3(a). The parties in the captioned cases have agreed and stipulated that the disposition of the citations in these cases shall be governed by final Commission decision in the proceedings in Docket No. WEVA 79-123-R.

Accordingly, Citation Nos. 637734, 637735, 637736, 637737, 637738, and 637880 are AFFIRMED and the captioned contests of those citations are DISMISSED.

Gary Melick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Civil Penalty Proceeding
	:	Docket No. KENT 81-94
Petitioner	:	A.O. No. 15-07166-03061 V
v.	:	
	:	Sinclair Slope Underground
PEABODY COAL COMPANY,	:	No. 2 Mine
Respondent	:	

DECISION

Appearances: Thomas A. Grooms, Attorney, U.S. Department of Labor, Nashville, Tennessee, for the petitioner; Thomas A. Gallagher, Esquire, St. Louis, Missouri, for the respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a proposal for assessment of civil penalty filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), charging the respondent with one alleged violation of mandatory safety standard 30 C.F.R. § 75.1725(a). Respondent filed a timely answer in the proceeding, a hearing was held in Nashville, Tennessee, and the parties appeared and participated therein. The parties waived the filing of post-hearing arguments, but were afforded the opportunity to make arguments on the record and those have been considered by me in the course of this decision.

Applicable Statutory and Regulatory Provisions

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

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

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

Issues

The principal issue presented in this proceeding is (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the proposal for assessment of civil penalty filed, and, if so, (2) the appropriate civil penalty that should be assessed against the respondent for the alleged violation based upon the criteria set forth in section 110(i) of the Act. Additional issues raised are identified and disposed of where appropriate in the course of this decision.

In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

Stipulations

The parties stipulated that the respondent is subject to the Act, that I have jurisdiction to hear and decide the case, that respondent is a large mine operator whose operations affect interstate commerce, and that any penalty assessments imposed will not adversely affect respondent's ability to continue in business (Tr. 4-5).

Discussion

Section 104(d)(1), Citation No. 1031535, issued on October 30, 1980, by MSHA inspector Lendell Noffsinger, cites a violation of 30 C.F.R. § 75.1725(a), and states as follows:

> There are no less than twenty-three (23) damaged and frozen rollers on the 2nd Main East Belt Conveyor starting at No. 60 stopping and extending outby to the belt drive. This condition was recorded in the belt examiner's book on October 28 and 29, 1980 (Freddie Hill Belt Examiner). The belt is approximately 3,070 feet long and running. The damaged rollers only were marked with red tape. Witness: Donnie Higgins. Responsibility of Bill Hampton.

Petitioner's Testimony

MSHA inspector Lendell W. Noffsinger testified that on October 30, 1980, he was the resident inspector at respondent's mine, was there practically every day, and confirmed that he inspected the mine that day and issued the citation in question. Prior to the inspection, he reviewd the belt examiner's book (Exh. G-4) for the October 28th and 29th day shifts. Several entries in the book indicated that the belt needed rock dusting, that float dust was

present, and belt examiner Freddie Hill had made a notation in the book that damaged and defective or frozen rollers were discovered on the East Main Belt, and the locations were noted by stopping numbers. Mr. Hill told him that he was having some trouble getting the rollers "changed out" on the third shift (Tr. 7-13). Although some of the area had been rock dusted, one area had not, and the inspector issued another citation for that condition (Exh. G-3, Tr. 12).

Inspector Noffsinger confirmed that he issued the citation in question in this case after finding no less than 23 damaged and frozen rollers along the belt line, and he testified that he did so because he considered such conditions to be unsafe and the condition had previously been noted in the belt examiner's book. Under these circumstances, he believed that the respondent should have been aware of the condition of the rollers and changed them out on the shifts prior to his inspection. While he permitted the belt to continue running, he insisted that the area be rock dusted, and that the rollers be changed out on the third shift that same day. He indicated that he did not take the belt immediately out of service because he did not consider the roller conditions to be serous enough to cease production on the three units which were dumping coal on the belt line in question. In addition, by requiring immediate rock dusting, any hazards from the roller conditions would have been minimized. However, if he considers conditions to be "real bad," he will take a belt line out of service, but did not do so in this case as an accommodation to mine management. He maintained that the cited roller conditions were unsafe since a frozen roller could produce heat and it could possibly reach the underside of a bottom roller where the rock dust may have fallen off (Tr. 16-20).

Mr. Noffsinger stated that while no ignition source was present when he observed the rollers, the rollers that were located along the belt areas which had not been rock dusted could have become worse, and since this may have potentially been an ignition source, he insisted that the area be rock dusted (Tr. 28-29). Later in his testimony, he stated that he was concerned that the defective roller condition had been recorded by the belt examiner, but the rollers were not changed out (Tr. 32). He also stated later that he was concerned over the lack of rock dust and the possibility of a fire (Tr. 33).

On cross-examination, Mr. Noffsinger stated that when he reviewed the belt examiner's books, he saw no indication that the roller conditions had been corrected and he identified the rollers which he cited by means of "red flags" apparently placed by the stopping locations by the belt examiner. He made a note of these locations before inspecting the belt in question, and while walking the belt line, he did not observe any hot rollers or rollers turning in coal, and in some places the conditions were wet. He also confirmed that he saw no sources of any potential fire on the belt line, and had this been the case he would have immediately taken the belt out of service. However, he nonetheless considered the cited roller conditions as unsafe (Tr. 20-23, 25). He also indicated that the belt examiner's book did indicate that rollers on other belts had been changed out, but not the ones which he cited (Tr. 27).

Mr. Noffsinger confirmed that he did not identify which rollers were defective or damaged and which ones were frozen. Since they all had to be changed out, he did not believe it made any difference to identify each roller by any specific defect. However, he did observe all of the rollers (Tr. 51), and his concern was that the rollers were not changed out and he wanted the respondent to insure that they were. He also indicated that the cited standard does not provide for any time limits within which a cited "bad roller" must be changed out (Tr. 30).

Inspector Noffsinger described a "frozen" roller as one that would not turn, and he indicated that this condition may be caused by a stuck roller bearing or the presence of mud (Tr. 30-31). In response to my question as to the meaning of the comment "bad roller" as it appears in the belt examiner's book, Mr. Noffsinger stated that it could indicate a broken roller, one with a missing bearing, or one that needed maintenance. Simply recording the condition as "bad" would not give any specific indication upon visual examination as to the precise problem, but it does indicate to the belt examiner that the roller needs to be replaced (Tr. 46-47).

Inspector Noffsinger reviewed a copy of MSHA's enforcement policy guideline concerning the application of section 75.1725(a) (Exh. R-2), indicated that it was recently brought to his attention, and he conceded that it requires that unsafe equipment be immediately removed from service (Tr. 24).

Motion for Directed Verdict

At the close of the petitioner's case, respondent's counsel moved for a summary decision in its favor on the ground that the inspector's testimony and evidence presented by the petitioner does not support his conclusions that the cited conditions were unsafe. In support of his motion, counsel argued that the inspector's critical concern was the fact that the rollers in question had been previously flagged for change out during a previous maintenance shift and that this had not been done. Counsel asserted that the inspector issued the citation in this case only to insure that the rollers were changed out, and that based on his testimony that the rollers were not hot, were not turning in coal, that the belt was made of fire-retardent material, and that he saw no ignition sources or possible fire hazards present, his conclusion that the conditions cited were "unsafe" are simply not supportable. In addition, counsel points to the fact that section 75.1725(a) requires equipment in unsafe condition to be removed from service immediately, and since the inspector permitted the belt to continue to operate and did not require it to be taken out of service immediately, he can hardly be heard to argue now that the conditions were unsafe. Respondent's counsel argues further that section 75.1725(a) does not provide for "degrees of safeness," and the conditions cited by an inspector must either be safe or unsafe (Tr. 52-55).

Petitioner's counsel argued in opposition to the motion for summary decision and asserted that Inspector Noffsinger considered the defective roller conditions to be unsafe in the context of, and in conjunction with, the other

conditions which he observed along the belt line, namely, the lack of rock dust in some areas, and the fact that the preshift book had entries written in attesting to inadequate rock dust and the presence of float coal dust in some of the areas where defective rollers were noted and observed by the belt examiner. Counsel asserted that the term "unsafe" need not be applied in the context of an immediate condition noted by the inspector, but may be applied to a situation which could develop into a problem if not corrected. In short, counsel contends that defective rollers which may not pose any immediately dangerous or hazardous situation are nonetheless unsafe since the defect could eventually deteriorate and lead to a dangerous or hazardous situation if allowed to remain uncorrected. Here, counsel states that the inspector exercised his discretion in not shutting down the belt or requiring respondent to shut it down, and the fact that the belt was not shut down does not detract from the unsafe condition of the cited roller (Tr. 53-54).

The motion for summary decision was taken under advisement, and respondent proceeded to call its witnesses and to present evidence and testimony concerning the citation.

Respondent's Testimony and Evidence

Allen R. Gibson, respondent's safety manager, confirmed that he accompanied Inspector Noffsinger during his inspection of October 30, 1980, and by reference to a mine map (Exh. R-4), he indicated where they had walked the belt line and what they observed. He indicated that both he and the inspector touched approximately 10 of the cited belt rollers and none of them were hot. He also confirmed that the belt line from the No. 39 crosscut to the No. 1 stopping was in need of rock dusting, and that in this area there were 10 rollers among those which were cited. The crosscuts are on 60-foot centers, and the entire length of the belt line cited is 4,200 feet. He also confirmed that the rollers cited by the inspector were tagged by the belt walkers for change out because they were "frozen" and not turning, and that the float coal dust condition which existed from the No. 39 crosscut outby the belt header was not a severe condition because the belt was wet at different locations (Tr. 57-64).

Mr. Gibson testified that at the time the inspector issued the roller and float dust citations, the belt was running and he stated that the inspector was disturbed because the rollers which had been identified as being in need of change out had not been changed out. He also indicated that the belt fire-suppression unit and fire hoses were in operational order (Tr. 66).

Albert Knight, general mine foreman, testified that he first became aware of the citation in question when Mr. Gibson telephoned him over the mine phone and advised him that Inspector Noffsinger had issued the citations on the belt line. He confirmed that he had previously left instructions in the mine manager's book for the second shift to change out the rollers which had been noted by the belt examiner and cited by the inspector. The instructions were written at approximately 1:30 p.m., the day the citation issued, and were intended for the second shift which came on at 4 p.m. (Tr. 70-74).

Mr. Knight testified further that he was not aware of any dangerous or unsafe condition on the belt in question, and that had such a situation existed, the belt examiner would have shut the belt down. He also indicated that belt maintenance is performed on the third shift and that normal maintenance on the belt is done at that time (Tr. 74-76). He confirmed that the belt examiner's books do in fact reflect entries on October 28 and 29 concerning the rollers cited by the inspector on October 30 (Tr. 77-78). Mr. Knight stated that five men are usually assigned for the entire mine to change rollers, and that three men would have been on the section in question to change the rollers (Tr. 80).

With regard to the notations made by the belt examiner on the preshift book for October 29, Mr. Knight stated that they do not indicate an immediate problem or any dangerous or unsafe condition. He also indicated that such notations concerning rollers are not indicative of unsafe conditions and that it is not unusual for 2 or 3 days to go by before such roller conditions are corrected or the rollers changed out (Tr. 82). As for the frozen rollers in question, if six of them were top rollers and were all within a span of some 60 feet, there could be friction on one or two of them, and they could cause some heat (Tr. 84). He also indicated that a roller end bearing could heat up, but that once the roller is frozen, there is no heat generated as such except for some belt friction which is not much (Tr. 85).

Mr. Knight reviewed the language of section 75.1725, and he expressed the view that if an unsafe condition is found, the equipment cited must be taken out of service (Tr. 90). He also identified a statement signed by several miners, including Belt Examiner Hill, who expressed the view that they "did not see any violation of the law on these rollers" (Exh. R-6, Tr. 91). The statement also contains a statement of company policy indicating rollers are normally changed out on the maintenance third shift except that rollers which could cause fires or damage to the belt line are immediately changed out during a production shift.

On cross-examination, Mr. Knight conceded that the belt examiner's preshift books for October 28 and 29 did reflect notations concerning defective rollers and the existence of float coal dust and that the rollers were not changed out during the third shifts on those days. He explained the failure to change them out by stating that company policy dictates that the maintenance shift change as many rollers as they can get to, and that some rollers were changed out for another belt which had been cited, but he conceded that they were changed out only after a citation was issued (Tr. 93). He also conceded that part of the belt line had gone undusted for 2 days after that particular condition was cited and noted (Tr. 94-95, 101).

In clarifying the meaning of a notation in the belt examiner's books which simply states "Bottom rollers on second east, 53, 55, 56 etc", Mr. Knight indicated that the rollers needed to be changed out, but not necessarily right away or on the third shift (Tr. 109).

Findings and Conclusions

Fact of Violation

In this case, the respondent is charged with a violation of mandatory safety standard 30 C.F.R. § 75.1725(a), which provides as follows: "Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately."

Petitioner argues that notwithstanding the fact that the inspector did not take the belt line out of service, he nonetheless considered the roller conditions as an unsafe condition, and he did so because of the presence of float coal dust at several locations along the belt line, and that coupled with the defective and frozen rollers, the conditions were unsafe. Although conceding the fact that there was no immediate ignition source, petitioner maintains that the inspector's concern was with the potential for such an ignition source to develop at any time because of the fact that the defective rollers could become progressively worse. Finally, petitioner argues that the fact that at least 2 days went by before the rollers were changed out, or the area completely rock dusted, supports an inference that mine management is not totally aware of when such conditions will be corrected (Tr. 115-116).

As indicated earlier in the discussion supporting the respondent's motion for summary decision, it is the respondent's position in this case that the petitioner has failed to establish a violation of section 75.1725 because (1) the inspector has not established that the cited belt roller conditions constituted an unsafe condition, and (2) the inspector failed to take the belt line out of service. In support of its case, respondent cites my previous decision of August 3, 1976, in the case of Alabama By-Products Corporation v. MSHA, BARB 76-153 (Tr. 114).

In my previous Alabama By-Products decision cited by the respondent, I vacated a portion of a citation for an alleged violation of section 75.1725(a), and I did so on the ground that MSHA (then MESA) had failed to establish that the cited conditions (13 defective belt rollers along a 3,000-foot belt line) were unsafe. I held that a finding that the equipment is unsafe is a condition precedent to a finding of a violation of this safety standard. However, it should be noted that while I vacated that portion of the citation which alleged a defective and unsafe belt roller condition, I affirmed that portion of the citation which alleged that the cutting of the conveyor belt into numerous bottom belt structures was in fact an unsafe condition constituting a violation of section 75.1725(a). I also concluded that in addition to citing an operator for failing to maintain equipment in safe operating condition, an inspector could also issue a citation if he found that an operator had failed to take such unsafe equipment out of service when the condition was first detected.

My decision in Alabama By-Products vacating that portion of the citation which alleged that 13 rollers were unsafe was made on the basis of the specific facts and evidence of record in that case. I found that the inspector who issued the citation had no rational basis for concluding that the cited roller conditions were in fact unsafe, and that his motivation in issuing the citation was to implement a policy guideline calling for the removal of "faulty" equipment from service. Since I concluded that the inspector obviously believed that "faulty" or "defective" rollers were per se unsafe, without detailing any specifics as to the assertedly dangerous conditions which prevailed in the areas where the rollers were located, I found that he acted arbitrarily.

It should be noted that in the Alabama By-Products case, the mine operator argued that the mere presence of defective rollers does not per se render them unsafe. That is precisely the argument advanced by the respondent in this case. However, I take note of the fact that in the previous case, the operator advanced the argument that an inspector must take into consideration other factors, such as the presence of coal or coal-dust accumulations, or the extent of rock dusting in the affected area, in order to properly evaluate whether the cited roller condition was unsafe. This is the argument advanced by the petitioner in this case.

The question of whether a piece of equipment is in an unsafe condition need not be limited to or determined on the basis of that particular piece of equipment. It seems to me that a piece of equipment which has deteriorated to some degree through normal wear and tear may not necessarily be unsafe simply because it is not new. If it is operating in a totally safe environment, the fact that it is beginning to show signs of wear may not warrant its immmediate replacement. On the other hand, if the equipment is operated in a mine area where other real or reasonably potential hazardous conditions exist, then it is not unreasonable for one to conclude that such equipment, continually operated under those circumstances, may be unsafe and in need of attention. In my view, this is precisely what we are faced with in the instant case. Respondent takes the position that even though the cited rollers may have been defective (frozen), they were not unsafe because the overall prevailing belt conditions where the rollers were located were not hazardous. Further, since the inspector did not shut the belt line down, respondent argues that he obviously could not have considered the rollers unsafe since the standard requires him to take the equipment out of service once he determines it is unsafe. In short, respondent seeks to penalize the inspector for an act of charity in not shutting down the belt line and interrupting production. In retrospect, had the inspector ordered the belt line shut down, I venture a guess that the respondent would then argue that he acted arbitrarily.

On the facts of this case, it seems clear to me that the operator's own belt examiner recognized the fact that the cited rollers were in need of attention and had to be changed out since he specifically noted and flagged them, and made the appropriate entries in the belt examiner's book. Thereafter, the normal procedure calls for corrective action to be taken during

the next available maintenance shift. However, the record in this case reflects that several shifts went by after the initial condition was noted by the belt examiner and the rollers had not been changed out prior to the inspection by Inspector Noffsinger. While it may be true that Mr. Noffsinger saw no ready ignition sources present and was concerned that the rollers were not changed out earlier, his judgment that the rollers were unsafe did take into consideration the presence of float coal dust along several belt line locations as well as his concern that the frozen rollers could have deteriorated further, thereby producing heat in those areas where the rock dust may have fallen off the belt. In these circumstances, I cannot conclude that he acted arbitrarily. In light of all of the prevailing conditions which existed along some of the affected belt line locations where the frozen rollers were found, I conclude that his decision that the rollers were unsafe was correct. As a matter of fact, Mine Foreman Knight conceded that frozen rollers may generate some friction on the belt, and he did not dispute the presence of float coal dust on the belt where rock dusting had not been completed, and that this condition had existed for a day or two prior to the inspection.

In Mid-Continent Coal and Coke Company, DENV 79-29-P, 1 MSHC 2246, October 1, 1979, final order November 9, 1979, the Commission affirmed a decision issued by Judge Broderick affirming a violation of section 75.1725(a). Judge Broderick found that a frayed cable on a hoist assembly used to open an airlock door constituted an unsafe condition. While the record before Judge Broderick did not support a conclusion that the condition of the cable contributed to a fatality which had occurred at the mine, the condition of the cable was such that it possibly could have contributed to serious injuries. Upon subsequent court review, the Tenth Circuit Court of Appeals on September 24, 1981, (No. 2271, unreported), affirmed the decision and noted that "Congress intended the Mine Act to both remedy existing dangerous conditions and prevent dangerous situations from developing" (case noted in the October 7, 1981, issue of the BNA Mine Safety & Health Reporter, pp. 185-186).

In view of the foregoing findings and conclusions, I conclude and find that the petitioner has established a violation of section 75.1725(a), and the citation is AFFIRMED. Respondent's motion for summary judgment is DENIED.

Gravity

While it is true that no ready ignition sources were present in the areas where the frozen rollers were located, the presence of float coal dust and the absence of complete rock dusting along with the possible further deterioration of the roller conditions presented a hazardous situation which I consider serious. The belt was running when the inspector arrived on the scene, and even though he saw no imminent danger present, the fact is that the conditions which prevailed presented a potential danger. Under the circumstances, I find that the violation was serious.

Negligence

The frozen roller conditions were noted by the belt examiner at least a day or two before the inspection in question and the conditions were not

corrected. Although respondent established that corrections were made with regard to similar roller conditions on another belt line and that it had a company policy dealing with such corrections, that policy apparently permits each belt examiner to make his own judgment as to whether a roller condition is such as to start a fire or is simply one that can be taken care of during the next maintenance shift. In this case, the record establishes that the cited roller conditions were not corrected during the next regular maintenance shift after detection by the belt examiner. Under the circumstances, I find that the failure to correct the conditions cited resulted from the respondent's failure to exercise reasonable care to prevent the conditions cited and that this amounts to ordinary negligence. The fact that maintenance was being performed on another belt and that men may not have been available to change out the rollers in question is no excuse. MSHA v. Sewell Coal Company, HOPE 78-744-P, Commission decision of June 11, 1981, 3 FMSHRC 1380.

Good Faith Compliance

I cannot conclude that the respondent is entitled to any additional consideration on the basis of good faith compliance. The fact is that compliance was achieved after the inspector issued his unwarrantable failure citation, and the conditions were subsequently corrected within the approximate time fixed by the inspector. Under these circumstances, I cannot conclude that the respondent acted in bad faith once the citation issued.

History of Prior Violations

The history of prior violations for the Sinclair Slope Underground No. 2 Mine reflects that the respondent paid civil penalty assessments for 452 citations issued at that mine during the period October 30, 1978, through October 29, 1980 (Exh. G-1). Five of the citations were for violations of section 75.1725(a). While the overall number of citations is not particularly good, I cannot conclude that the mine has had problems with compliance with the cited mandatory safety standard, nor can I conclude that the record in this case warrants any additional increase in the civil penalty otherwise assessed by me because of respondent's history of prior citations.

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

The parties stipulated that the respondent is a large mine operator and that any penalty assessed in this case will not adversey affect its ability to remain in business. I adopt these stipulations as my findings on these issues.

Penalty Assessment and Order

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that a penalty assessment in the amount of $750 is reasonable and appropriate for the citation which I have affirmed, and the respondent IS ORDERED to

pay the assessed penalty within thirty (30) days of the date of this decision and order.

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

OCT 23 1981

WILLIAM A. HARO, Complainant, v. MAGMA COPPER COMPANY, Respondent.	COMPLAINT OF DISCHARGE, DISCRIMINATION OR INTERFERENCE DOCKET NOS. WEST 79-49-DM WEST 80-116-DM

Appearances:

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For the Complainant

Douglas Grimwood, Esq.
Twitty, Sievwright, and Mills
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Phoenix, Arizona
For the Respondent

Before: Judge John J. Morris

DECISION

STATEMENT OF THE CASE

Complainant brings these actions on his own behalf alleging he was discriminated against by his employer, Magma Copper Company (Magma), in violation of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

The statutory provision, Section 105(c)(1) of the Act, now codified at § 30 U.S.C. 815(c)(1), provides as follows:

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

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

After notice to the parties, a hearing on the merits was held in Tucson, Arizona on August 12-13, 1980. The parties filed post trial briefs.

INTRODUCTION TO THE CASES

Four separate factual situations are involved in these cases.

The initial incident occurred[1]/ when complainant William Haro refused to remove a bad order (B.O.) railroad car from a production train. He refused because there was no supervisor present to assist him.

The second incident occurred on June 14, 1978, when Haro tied a tail light on a production train "under protest." Shortly after these events Haro was removed as dump mechanic and was given a new assignment on a different shift.

On September 25, 1978, Haro was directed to change a bad order (B.O.) grease line. He made three safety related requests. He did not repair the grease line because his supervisors failed to take any action to comply with his requests.

On November 1, 1978, Haro was involved in an incident which occurred when he and fellow worker, Helmer, were working on an AIRSLUSHER. As a result of this incident Haro was required to attend a two day safety seminar and was transferred to a surface crew. He did not lose any wages, but he complains about the seminar, the "Accident Gram" issued by Magma, the transfer, and a letter issued by Magma in connection with the accident.

APPLICABLE CASE LAW

The Commission has ruled that to establish a prima facie case for a violation of § 105(c)(1) of the Act a complainant must show by a preponderance of the evidence that (1) he engaged in a protected activity and (2) that the adverse action was motivated in any part by the protected activity. The employer may affirmatively defend, however, by proving by a preponderance of all the evidence that, although part of his motive was unlawful, (1) he was also motivated by the miner's unprotected activities, and (2) that he would have taken adverse action against the miner in any event for the unprotected activities alone. David Pasula v. Consolidation

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1/ The transcript is silent as to the date of this event, but it was apparently a day or so before the subsequent incident.

Coal Company 2 FMSHRC 2786 (1980). Further, in order to support a valid refusal to work the miner's perception of the hazard must be reasonable, Robinette v. United Castle Coal Company 3 FMSHRC 803, (1981).

WEST 80-116-DM
B.O. (BAD ORDER) CAR INCIDENTS

FINDINGS OF FACT

FIRST INCIDENT

1. Dispatcher Lockhart instructed Complainant Haro to replace a B.O. (Bad Order) car with a good order car on the Magma production train (Tr. 15).

2. Since the safety latch on the coupler mechanism was broken it was necessary to replace that car with one having a good safety latch (Tr. 15).

3. Haro did not comply with Lockhart's request because Lockhart would not assign a worker to assist him (Tr. 15).

4. Company policy, evidenced by a written memorandum posted and dated May 8, 1976, requires a supervisor to be present when a B.O. car is cut out (Tr. 15-17, Exhibit C2).

5. Haro told Lockhart he wasn't refusing the assignment but was asking that Magma's policy be enforced (Tr. 17, 18).

SECOND INCIDENT

6. On June 14, 1978, assistant chief foreman Cothern told Haro to tie a light on the last car of the production train (Tr. 19).

7. Haro tied on the light "under protest" because he believed the light should be attached on light brackets (Tr. 19, 20).

8. The company procedure is that if an employee is directed to tie on tail lights he does so and logs that event in the log book for the supervisor's knowledge. The tie on can be made without using special light brackets (Tr. 70, 103, 105, 133).

9. Shortly after both of the above incidents Haro was removed as a dump mechanic and was given a new assignment which placed him on a straight days shift (Tr. 20).

10. As a result of being placed on the straight days shift Haro's pay scale did not change, but he lost in wages a shift differential that he normally received as a dump mechanic. He also lost one additional day's pay for every three week period (Tr. 21).

11. Haro has continued to work straight days, and his lost wages (as of the time of the hearing) were between $3,500 and $3,700 (Tr. 22).

DISCUSSION

Magma asserts that the evidence amply demonstrates that Haro's activities were obfuscatory and dissembling and that they were unrelated to improving any safety conditions on the job. I disagree. While it is true that Haro's activities conflicted with management and could well be considered obstreperous, he was, nevertheless, within the protection of the Act at least with respect to the first incident.

Concerning the removal of the B.O. car, a company memorandum dated May 8, 1976 stated in part that "when a B.O. car is cut, a supervisor will be present" (Exhibit C2). Magma's evidence confirms the authenticity of the memorandum. Its supervisor indicated it would have been a violation of company policy not to provide Haro with an assistant (Tr. 90-92). After Lockhart instructed Haro to remove the car, Haro asked for enforcement of this company policy (Fact ¶ 5). Lockhart denied his request, and, consequently Haro refused to remove the car.

A miner has a right to refuse to undertake a task he reasonably considers to be unsafe. The company memorandum supports the reasonableness of Haro's refusal to cut the B.O. car. I, therefore, conclude Haro's actions in this incident were protected under the Act. Robinette and Pasula, supra.

The second incident involves the tying on of a tail light without using a special tail light bracket. Haro's evidence on this act of alleged discrimination is considerably overblown. He admits that if he is directed by a supervisor to tie on a tail light he is to do so. It is company procedure that he then enters that fact in the company log book. The log book would accordingly reflect, in circumstances such as this, that the lights were being installed without special brackets.

No mandatory standard exists regarding the attachment of tail lights, and I am unable to see that Haro's perception of the safety hazard was a reasonable one. Regardless of whether the light was installed in a proper bracket there would be a light protecting the rear of the train. The record does not show that a "tied on" light is in any manner less safe or in any manner more likely to fall out than a similar light installed in a bracket. I accordingly reject Haro's conclusion that the placement of a light in a bracket was "company policy." Under the Act for a claim of discrimination to prevail the belief that a condition is unsafe must be a reasonable one under the circumstances. Robinette, supra. For the foregoing reasons, I do not find that Haro's complaint concerning the tail light was a protected activity. The claim of discrimination based on the tail light bracket should be vacated.

Respondent contends that Haro's inability to cooperate with supervisors, as evidenced by these two incidents was the reason for his being transferred from dump mechanic on a rotating shift to a mechanics

position on straight days. I have ruled that Haro's "uncooperative activity" concerning the removal of the B.O. car was protected activity. I also conclude that his transfer to a different shift was motivated in part by this protected activity. The transfer may also have been motivated by Haro's opposition to tying on the light. However, respondent has failed to meet its burden of persuasion that Haro's action in tying on the light under protest would have itself warranted the adverse action. I, therefore, conclude that Magma's transfer of Haro to another shift and position constituted discriminatory conduct in violation of the Act.

WEST 79-49-DM
GREASE LINE REPLACEMENT

FINDINGS OF FACT

1. On September 25, 1978, complainant, William Haro, a journeyman mechanic, was directed to change the grease line at level 3 A 2075 in Magma's underground copper mine (Tr. 13, 25, C1).

2. The grease line to be serviced was on the front door cylinder on the lip of the loading chute (Tr. 26).

3. Before changing the grease line, Haro requested that his lead man (foreman) spot a skif in front of the loading chute as protection against falling. This was a common practice (Tr. 26-31).

4. Further, Haro requested that the men working on the surface be removed from the top of the shaft. Workers at the top will frequently cause debris, such as burned bolts or nuts, to fall down the shaft. One bolt can cause 50 rocks to fall down the shaft. It is company procedure to remove such men before work is done near the shaft (Tr. 30. 31).

5. Further, in accordance with company procedure Haro asked for a worker to assist him. The lead man, Howard, refused this request. (Tr. 28, 31-32).

6. Haro's requests were never granted, and, therefore, he did not change the grease line. The lead man told Haro he would try to place a skif and he would try to remove the overhead shaft workers but this was never done (Tr. 27, 29, 32).

7. On October 2, 1978, Haro received a written warning from supervisor Torres for his failure to change the grease line. After receiving the notice Haro filed a written grievance (Tr. 34, 35).

8. On October 2 Haro explained to Rudy Navarro (Torres' supervisor) the circumstances concerning the grease line. (Tr. 33).

DISCUSSION

Magma maintains that every credible witness testified that the spotting of a skif is sometimes done, but work is not stopped in its

absence. Magma cites witnesses Torres, Navarro, and Graham in support of its position. I disagree with Magma's construction of the evidence. The issue is not whether the work could be done without a skif, but it is whether Haro's action in not repairing the grease line was reasonable and in good faith. Magma's evidence, as discussed hereafter, supports Haro's position.

Torres, a supervisor, testified that if the skif was available he'd use it in combination with the Sala Block.[2]/ The skif would serve as a backup (Tr. 345-346). Navarro said if a skif was not available a Sala Block would be used (Tr. 135). Graham indicated a lot of journeymen will spot the main hoist (skif) over the lip of the loading area. If a man fell and the safety hook (Sala Block) failed he'd fall into the skif instead of falling to the bottom of the shaft (Tr. 206). Graham considered the shaft to include an area within two or three feet of the shaft. The grease line to be changed was within an arm's length of the open shaft (Tr. 207). In short, Torres, Navarro, and Graham support the practice of a worker spotting the skif immediately below the area where he is changing the grease line. Such a positioning for obvious reasons is a prudent safety practice.

Magma asserts the Sala Block is a safety device that Haro should have used. I agree. Haro could have used such a device; however, the other remedies sought by Haro were reasonable, particularly in view of Magma's confirming evidence.

Concerning the allegation that the workmen should be cleared from the top of the shaft, Magma contends that Haro's allegations on this issue were an afterthought, manufactured for the grievance hearing and these proceedings. I disagree. Haro testified he asked for worker clearance (Tr. 28). A fellow worker, Zagorsky, confirmed Haro's statements that he (Haro) couldn't replace the grease line because of the lack of a skif, lack of a partner, and the riggers located at the top of the shaft (Tr. 177). Haro says he complained to lead man Howard (Tr. 28). Howard, according to Haro, refused the request for a partner, but he said he'd try to get the skif and would remove the men above (Tr. 28, 29). It may well be that the workers above were clear of the shaft as this was apparently a "down" day but the record is devoid of any evidence that such information was ever communicated to Haro. At the deep level on which Haro was located he would hardly be in a position to know if workers were located near the top of the shaft. Journeyman mechanic Thomas Traynor said that for safety reasons he'd make sure there wasn't anyone working overhead when he repaired the grease line (Tr. 146, 156).

Magma's witness, Howard, stated that he had no personal knowledge of Haro's request for the skif or an assistant. (Tr. 158). Howard's testimony does not refute Haro's testimony that he requested that the workers be

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2/ A Sala Block is a device that can be worn by a workman. If working properly it will arrest the fall of a workman.

cleared from the top of the shaft. Further, Howard "could not recall" Haro's statement made in front of Zagorsky indicating why he (Haro) couldn't change the grease line. The inability to recall, which permeates Howard's testimony, is far from a denial of a stated fact. In short, I do not find Howard's testimony credible.

Concerning the furnishing of a partner, the thrust of Magma's argument is that the grease line could be safely changed without a partner. However, supervisor Torres indicated that it is company policy to furnish a partner if you are sent in on other than a down day (Tr. 347). This policy, in my view, confirms Haro's reasonable belief that a partner should have been furnished.

Magma argues that Haro is not credible. It's argument here focuses on the fact that four days after this incident, Haro discussed his failure to repair the grease line with his supervisor, Torres. Magma asserts Haro is not to be believed because on that occasion he failed to state his "complete defense." The complete defense, according to Magma, is Haro's testimony that when he raised the safety issues leadman Howard simply told him not to do the work.

I find Haro's explanation reasonable. On Monday, the 29th, he stated he had already been removed as dump mechanic and had been under a certain amount of pressure. He did not feel obliged to try to prove his case to management. He simply stated the facts as they were and if they wanted to accept them fine, but if they didn't, Haro told them to put it in writing. He stated they should stop threatening him with statements such as "I'm going to nail you to the wall." Haro described this meeting as "emotional." (Tr. 244).

Haro received a written warning for his failure to change the grease line (Tr. 34). Inasmuch as Haro's refusal to work was protected activity because his perception of the safety hazards were reasonable, the warning letter constituted discriminatory conduct in violation of the Act. Local Union 1110 v. Consolidated Coal Company, 1 FMSHRC 338 (1979). This portion of the case should be affirmed. The employment record of William Haro is to be completely expunged of all comments and references to the grease line incident of September 25, 1978.

AIRSLUSHER ACCIDENT

FINDINGS OF FACT

1. On November 1, 1978, Haro and fellow worker, Helmer, were servicing an AIRSLUSHER in a spill pocket (Tr. 36, 37).

2. The AIRSLUSHER, actuated by compressed air, hauls loads in underground mines (Tr. 45, C5).

3. The AIRSLUSHER is controlled by a throttle lever which automatically returns to a neutral position when released (Exhibit C5).

4. The load spring on Magma's throttle lever was defective and after being moved into a straight up position it would fall down. Magma's leadman acknowledged to Haro that the spring was broken (Tr. 38, 51).

5. The throttle control valve operates the controlled movement of the slusher (Tr. 263, 264).

6. As Haro was changing the oil on the AIRSLUSHER the throttle control valve, due to its defective spring, dropped. This movement turned the slusher on (Tr. 37, 179).

7. The force of the slusher movement caused the catwalk grating to come out of its structure and fall to the floor. The return roller struck Helmer in the head (Tr. 37, 38).

8. As a result of this incident Haro was transferred to a surface crew (Tr. 39, 40).

9. An "accident-gram" was issued by the company in November 1978. The document identifies Helmer as the person involved in the incident. It refers to the other person involved in the incident as "Helmer's partner." The document described what happened and why. It indicated "There was a lack of communication between Helmer and his partner... . Helmer's partner exhibited poor judgment when he needlessly engaged the slusher." (Exhibit C-3).

9. Haro received a letter from Magma's superintendent indicating he had been involved in three accidents requiring dispensary attention and seven requiring "attention by the hospital." In addition Haro was identified as being the cause of the Helmer's accident. The letter assigns Haro to a two day safety training course. (Tr. 41, 43, 49, Exhibit C4).

10. After the AIRSLUSHER (Helmer) incident, Haro was transferred to a special two day safety training class. The seminar did not discuss the Helmer incident (Tr. 49).

11. Haro did not incur any loss of pay in attending the safety seminar (Tr. 297, 298).

Based on the above findings of fact I conclude that Haro was not responsible for the injury suffered by Helmer. Magma's actions towards Haro, namely the transfer, the accident-gram, the letter and the assignment of Haro to a two day safety seminar, would therefore appear unjustified. However, the incident concerning the airslusher does not involve any activity on the part of Haro that is protected under the Act. Haro did not make any safety complaint or exercise any other right afforded him under the Act. The actions taken against Haro because of Magma's erroneous belief that Haro was responsible for the incident, therefore, cannot be deemed to be in violation of the Act. Although such actions may have been improper, redress of the damages suffered by Haro as a consequence thereof is not within the authority of the Commission.

Respondent's post trial brief attacks Haro's general credibility asserting that several extrinsic matters reflect poorly on Haro's ability to perceive the events in which he participates. Respondent notes Haro's hospitalization for alcoholism and his alleged use of drugs on the job (Tr. 228, 339). In addition, respondent points to Haro's stressful environment with his co-workers and superiors.

I am not persuaded by respondent's arguments. The record does not reflect that alcoholism and the smoking of marijuana were in any manner factors in the foregoing described events, nor is there a scintilla of evidence to support such a view. Concerning Haro's stressful environment, respondent's brief aptly states the law on this point. The brief states as follows: "The fact that Mr. Haro is profoundly in conflict with most people around him does not mean he is without the protection of the Federal Mine Safety and Health Act."

Respondent's supplemental brief cites Pasula, supra, but the ruling in that case does not cause a different conclusion here.

REINSTATEMENT

Inasmuch as William Haro's complaint of discrimination in WEST 80-116-DM is affirmed he should be reinstated as a dump mechanic. He was removed from that position after the initial incident involving the B.O. car. Ordinarily, a reinstatement order would issue prospectively. However, in a post trial motion filed June 10, 1981, it was indicated that William Haro had been discharged by respondent. Accordingly, rather than reinstatement, I order respondent to pay Haro an amount equal to the wages he lost because he was removed from his position as a dump mechanic from the date of his removal up to and including the last day he worked at the mine. Any order of reinstatement issued in this case would intrude into the issues raised in the cases entitled William A. Haro v. Magma Copper Company, Docket Nos. WEST 80-482-DM and WEST 81-365-DM." These cases are presently assigned to the Commission Judge Jon D. Boltz, of the Denver Regional Office.

The back pay award is necessarily limited because later events not in issue here may indicate further discriminatory and retaliatory conduct by Magma against Haro; or, in the alternative, such later events may establish that Magma justifiably terminated William A. Haro. In any event such issues are not framed in this decision.

CIVIL PENALTIES

In this case the Secretary of Labor did not represent complainant. However, the Act provides that any violation of the discrimination section shall "be subject to the provisions of section 108 and 110(a)." [30 U.S.C. § 818, 820]. The statute authorizes the imposition of a penalty in an amount not to exceed $10,000.00. (30 U.S.C. § 820(a)).

Considering the pertinent statute and in view of the facts as stated above, I deem a penalty of $500.00 to be an appropriate civil penalty for each instance of discrimination.

BACK PAY, COSTS, AND EXPENSES

Section 105(c)(3) of the Act authorizes an award for back pay and interest, as well as all costs and attorneys fees in the event a claim of discrimination is sustained. The uncontroverted evidence shows that complainant's back pay loss includes a loss of the shift differential as well as one additional day's pay for every three week period (Tr. 21)

Haro at the time of the trial estimated his wage loss at $3,500.00 to $3,700.00. Due to the lack of more specific documentation on his back pay, I rule Haro is entitled to back pay in the amount of $3,500.00 plus interest. In addition to said amount, William Haro is entitled to back pay plus interest since the hearing in this case, until the date of his termination by respondent.

The parties stipulated that complainant Haro incurred $3,896.00 in attorneys fees and $585.86 in costs. (Respondent's letter of June 30, 1981 and complainant's partially signed stipulation filed July 2, 1981). Complainant should accordingly be awarded that amount for attorneys fees and costs.

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

ORDER

CASE NO. WEST 80-116-DM

1. Complainant's claim of discrimination concerning the removal and replacement of the bad order car on respondent's production train is sustained.

2. Complainant's claim on discrimination concerning the placement of a light in a light bracket on the end of the production train is vacated.

3. A civil penalty of $500.00 is assessed against respondent for violating Section 105(c) of the Act. Said amount is payable 40 days after the decision of the Commission becomes a final order. Said civil penalties shall be paid in accordance with Section 110(j) [30 U.S.C. § 820(j)].

4. The employment record of William A. Haro is to be completely expunged of all comments and references involved in his refusal to remove and replace the bad order car.

5. Respondent is ordered to pay William A. Haro the sum of $3,500.00

as back pay with interest at 12 1/2% per annum.[3]/Additional back pay shall also continue to accrue after the date of hearing until the date William A. Haro was terminated by respondent. Respondent is directed to pay Haro an additional amount plus interest which complies with this order.

CASE NO. WEST 79-49-DM

6. Complainant's claim of discrimination in connection with the grease line repair is affirmed.

7. Complainant's claim of discrimination in connection with the AIRSLUSHER is vacated.

8. The employment record of William A. Haro is to be completely expunged of all comments and references involved in his refusal to repair the grease line.

9. A civil penalty of $500.00 is assessed against respondent for violating Section 105(c) of the Act. Said amount is payable 40 days after the decision of the Commission becomes a final order. Said civil penalties shall be paid in accordance with Section 110(j) [30 U.S.C. § 820(j)] of the Act.

10. Complainant is awarded the sum of $3,896.00 as and for attorney fees and $585.86 in costs incurred in both of the above cases for a total of $4,481.86.

John J. Morris
Administrative Law Judge

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3/ Interest rate used by Internal Revenue Service for underpayments and overpayments of tax Rev Ruling 79-366. Cf Florida Steel Corporation, 231 N.L.R.B. No. 117, 1977-78, CCH, N.L.R.B. Para 18,484; Bradley v. Belva Coal Company WEVA 80-708-D (April 1981).

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

OCT 23 1981

JUAN N. MUNOZ, aka JUAN MUNOZ NATIVIDAD, Complainant, v. SUMMIT MINERALS, INC., Respondent.	COMPLAINT OF DISCHARGE, DISCRIMINATION OR INTERFERENCE DOCKET NO. CENT 80-331-DM MINE: Summit

DECISION AND ORDER

Appearances:

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For the Respondent

Before: Judge Jon D. Boltz

Statement of the Case

On June 19, 1980, Juan N. Munoz [hereinafter "Munoz"], brought this action pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1978) [hereinafter cited as "the Act" or "the 1977 Act"]. In his complaint, Munoz alleges that Respondent, Summit Minerals, Inc. [hereinafter "Summit"], unlawfully discriminated against him by discharging him from his employment at Summit's mine on February 1, 1980, in violation of the Act. Munoz alleges that he had engaged in activities relating to health and safety protected by section

105(c) of the Act prior to the time of his discharge.[1]/ Munoz requests relief in the form of a finding of discrimination, reinstatement to his former position, back pay plus interest from the time of his discharge, and costs, including attorneys fees. Summit, on November 10, 1980, filed an answer to the complaint containing a general denial and a prayer for relief seeking dismissal of the proceeding at Complainant's cost. Pursuant to notice, the matter came on for hearing on April 7, 1981, in Las Cruces, New Mexico. Submission of post hearing briefs was completed on May 28, 1981.

FINDINGS OF FACT

1. Summit is operator of an underground precious metals mine located in Grant County, New Mexico, known as the Summit Mine.

2. Juan N. Munoz was employed by Summit as a miner for slightly over two years, until February 1, 1980, the date of his discharge.

3. Munoz performed various jobs during his tenure at the mine. Initially, he worked at timbering. After two or three months on the job, he was moved to a drilling position because he was too slow in his work. Munoz worked as a drill operator for only four days. Management then assigned him to work as a locomotive motorman, again, because he was too slow in his work. As a locomotive motorman, Munoz, with the aid of a helper, was responsible for filling ore car trains with production from the stopes and for transporting them to the surface. Munoz was employed in this capacity at the time of his discharge.

1/ Section 105(c)(1) of the 1977 Act, 30 U.S.C. § 815(c)(1), reads in pertinent part as follows:

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

4. In the months preceding his discharge, concern was evidenced by individuals comprising Summit management that Munoz was not filling ore car trains and transporting them to the surface at a fast enough rate. Both the foreman, Guillermo Ortega, and the mine owner, Douglas E. Hanson, repeatedly warned Munoz that he must produce more ore. A month or so prior to his discharge, Ortega and Hanson discussed firing Munoz, but because of the miner's advanced age, Hanson deferred taking such action.

5. On January 15, 1980, at a safety meeting conducted by Alfredo D. Duran, an inspector employed by the New Mexico Bureau of Mine Inspection, Munoz registered a complaint about dust problems and poor ventilation in the main haulage tunnel, where he worked. Munoz told Duran that whenever the State came by to check on the amount of dust raised in attempts to blast free clogged ore chutes, Summit management would refrain from blasting because they felt that existing ventilation was inadequate and that the State would make them take corrective action. Munoz also complained about the fatigue caused by his work. Ortega, the foreman, was present at the meeting and aware of Munoz' complaints.

6. At some point following the meeting, Ortega told several employees that if Summit had to install additional fans, the mine would close down and they would lose their jobs. Ortega renewed his efforts to get Hanson to fire Munoz, but Hanson declined.

7. On or about January 28, 1980, Hanson gave a $10.00 a day raise to everybody at the mine. Although he had been told that Munoz was still not doing his job and, therefore, didn't deserve a raise, Hanson gave Munoz the raise to see if it would make him work a little harder. Additionally, Hanson did not want to show favoritism toward anybody.

8. On February 1, 1980, with encouragement from Ortega, Hanson decided to terminate Munoz. Hanson determined that Summit had given Munoz every opportunity to increase his individual effort, but that results were not forthcoming. Ortega communicated Hanson's decision to Munoz.

ISSUES

By discharging him from his employment at the Summit Mine, did Summit unlawfully discriminate against Juan N. Munoz in violation of section 105(c)(1) of the Federal Mine Safety and Health Act of 1977?

DISCUSSION

In its decision of Secretary of Labor on behalf of David Pasula v. Consolidated Coal Company, 2 FMSHRC 2786 (October 14, 1980), the Federal Mine Safety and Health Review Commission set forth the test to be used to determine whether or not the discharge of a miner who engages in both protected and unprotected activity was discriminatory. The Commission

held as follows:

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

Section 105(c)(1) of the Act sets forth certain enumerated types of employee activity which are protected by a prohibition against discrimination or interference, including:

> " ... a complaint notifying the operator or the operator's agent ... of an alleged danger or safety or health violation in a coal or other mine, ... or because of the exercise by such miner ... on behalf of himself or others of any statutory right afforded by this Act."

The evidence establishes that Munoz was engaged in protected activity when he made his safety complaints known at the January 15th meeting. Although that meeting was conducted by an inspector employed by the New Mexico Bureau of Mine Inspection, the meeting was held on mine property with the permission of the operator. Through this meeting, the State inspector served as the operator's agent with respect to Munoz' complaints. Further buttressing a finding of protected activity is the fact that Ortega, the foreman, was present at the meeting and aware of Munoz' complaints.

However, I am unable to conclude that Complainant has proven, by a preponderance of the evidence, that the discharge was motivated in any part by the protected activity. The evidence establishes that at some point following the safety meeting, Ortega renewed his efforts to get Hanson to fire Munoz, but Hanson declined. Ortega testified that Munoz' remarks at the safety meeting had nothing to do with his telling Hanson that he wanted

Munoz fired. However, Munoz testified that he noticed a change in the way Ortega treated him after his complaints at the safety meeting. Munoz was aware of a seriousness in Ortega and of a lack of direct communication between the two of them regarding working orders. Though it may appear somewhat inconsistent, I find both witnesses' testimony to be credible. Hanson, however, held ultimate responsibility for the decision to dischage Munoz. According to his testimony, the sole reason for his decision to dismiss Munoz was based on lack of production. I find his testimony to be credible.

Assuming, arguendo, that the discharge was motivated in any part by the protected activity, I must nevertheless conclude that Summit has proven, by a preponderance of the evidence, an affirmative defense to Complainant's cause of action. The evidence clearly establishes that Summit management was sufficiently motivated to dismiss Munoz for his inability to fill ore car trains at a fast enough rate. Also, the evidence shows that management would have dismissed him for this one reason alone. I conclude that Summit ultimately did discharge Munoz for that reason.

CONCLUSIONS OF LAW

1. Respondent Summit Minerals is a mine subject to the provisions of the 1977 Act.

2. At all times relevant to this Decision, Complainant Juan N. Munoz was a miner as defined in the Act and entitled to the protection afforded by the Act.

3. The presiding Administrative Law Judge has jurisdiction over the parties and subject matter in these proceedings.

4. On January 15, 1980, Complainant Munoz engaged in activities protected by section 105(c)(1) of the Act, to wit, complaints to New Mexico State Mine Inspector Alfredo D. Duran, in the presence of Mine Foreman Guillermo Ortega, concerning dust problems and poor ventilation.

5. On February 1, 1980, Respondent Summit Minerals discharged Complainant Munoz from his employment. That decision, however, was not motivated in any part by the protected activity described above.

6. Respondent Summit Minerals established that it did in fact consider Complainant Munoz deserving of discipline for engaging in unprotected activity alone and that it would have disciplined him in any event.

7. Respondent Summit Minerals' discharge of Complainant Munoz on February 1, 1980, was not in violation of section 105(c)(1) of the Federal Mine Safety and Health Act of 1977.

ORDER

Accordingly, it is ORDERED that Complainant Juan N. Munoz' complaint of discrimination is DISMISSED and that the above-captioned proceeding is DISMISSED WITH PREJUDICE.

Jon D. Boltz
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE, SUITE 400
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OCT 23 1981

JOSEPH A. CAMPBELL, Complainant,	COMPLAINT OF DISCHARGE, DISCRIMINATION OR INTERFERENCE
v.	DOCKET NO. WEST 80-221-DM
	MD 80-12
THE ANACONDA COMPANY, Respondent.	MINE: Carr Fork

DECISION

Appearances:

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For the Respondent

Before: Judge Jon D. Boltz

STATEMENT OF THE CASE

On February 19, 1980, Complainant filed a complaint alleging discriminatory acts based on section 105(c) of the Federal Mine Safety and Health Act of 1977 (hereinafter "the Act").[1]/ The Complainant alleged that his employment with the Respondent had been terminated on October 26, 1979, because he had refused to drive Respondent's truck. He alleged that the air brakes on the truck had an air pressure leak and that a "retarder," built into the automatic transmission, did not work and that the truck was, therefore, unsafe to drive. The Respondent generally denied Complainant's allegations.

1/ Section 105(c)(1) reads in pertinent part as follows: "No person shall discharge ... any miner ... because such miner ... has ... made a complaint under or related to this Act, including a complaint notifying the operator ... of an alleged danger or safety or health violation in a ... mine ... ."

FACTS STIPULATED TO BY THE PARTIES

1. Respondent [Anaconda] operates a copper mine, known as the Carr Fork Mine, in Tooele, Utah, which mine is under the jurisdiction of the Federal Mine Safety and Health Act of 1977.

2. On October 26, 1979, Joseph Campbell [Complainant] was employed as an equipment operator at Anaconda's Carr Fork Mine.

3. Mr. Campbell had been employed by Anaconda at that location for approximately three years.

4. On October 26, 1979, Mr. Campbell was assigned to transport a standby generator, weighing approximately 23 tons, to the exhaust shaft using a Peterbilt tractor, serial number 78314P, commonly referred to as Unit #36. Such assignment was within the usual course of Mr. Campbell's work duties.

5. Mr. Campbell refused to perform the assignment and was sent home.

6. Mr. Campbell was subsequently released from employment with Anaconda.

7. At the time of his refusal to drive Unit #36, Complainant complained about the safety of the unit to John Bishop, his temporary supervisor.

8. Several times prior to the incident which led to his termination, Complainant had made safety complaints concerning Unit #36 to his regular supervisor, Whitey Thomas.

ISSUES

The principles to be followed in deciding this case are those set forth in two leading cases: Secretary of Labor, on behalf of David Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (1980) and Secretary of Labor, Mine Safety and Health Administration (MSHA), ex rel. Thomas Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981). Thus, the following questions must be answered in order to determine whether or not the Respondent violated section 105(c) of the Act when it fired the Complainant.

1. Did Complainant engage in protected activity?

2. If so, was the firing of the Complainant motivated in any part by the protected activity?

3. If Complainant was engaged in protected activity and Respondent fired Complainant partially because of that protected activity, was Respondent also motivated to fire Complainant because of any unprotected activity of the Complainant?

4. Would Respondent have fired Complainant in any event because of unprotected activity?

5. In refusing to drive Unit #36, did Complainant have a good faith reasonable belief in a hazardous condition and, if so, was Complainant's honest perception a reasonable one under the circumstances of this case?

These questions shall be discussed in the above order.

DISCUSSION

1. The Complainant did engage in protected activity when he complained to his temporary supervisor about the condition of Unit #36.

The Complainant made a complaint to his supervisor of an alleged danger or unsafe condition in regard to the operation of Unit #36. The assignment given to Complainant was to drive Unit #36, attached to a 23-ton generator-trailer, from the shop area at the Carr Fork Mine, in Tooele, Utah, to the exhaust shaft at Bingham, some distance away. In order to get to Bingham, it would have been necessary for Unit #36 to drive up or down grades estimated at 9% to 13% on the road down through Tooele and Bingham Canyon. The reason given by the Complainant for refusing to drive Unit #36 was that there were air pressure leaks in the air brake system and there was no retarder working in connection with the transmission. The Complainant offered to transport the equipment using his regular truck, Unit #35, but he was told by his supervisor that he would have to drive Unit #36. Thus, the Complainant complained to his supervisor, on October 26, 1979, of an alleged danger and this conduct constituted protected activity.

2. The firing of the Complainant was motivated in some part by the protected activity.

It is undisputed that after Complainant refused to drive Unit #36 on October 26, 1979, he was fired. After the plant general foreman had been informed of that refusal, the foreman instructed Complainant's supervisor to notify the Complainant that his employment with Anaconda was terminated. The reason given was "inability to perform duties assigned."

Thus, I conclude that Respondent was motivated, in some part, to fire the Complainant for his having engaged in protected activity.

3. The Respondent was also motivated, in part, to fire the Complainant because of unprotected activity.

Respondent stated in its opening statement that Complainant was fired for refusing without reasonable grounds to perform his job and for past problems with accepting other assignments. In support of this contention, Respondent introduced evidence to show that Complainant on one occasion, in January 1978, had refused to work with a "Mexican" fellow employee and walked off the job. For this incident, Complainant was reprimanded and received a one-day suspension imposed by the Respondent.

Respondent also introduced evidence that in April 1977, Complainant had refused to work with a woman. In the course of assigning laborers or utility people on a regular rotation basis to truck drivers, a woman was assigned to Complainant's truck to work with him. Complainant refused to have the woman work with him because he did not believe a woman should be working on the particular job assigned at that time. Taking this evidence in a light most favorable to the Respondent, I find that Respondent was motivated, in part, to fire Complainant because of this past unprotected activity.

4. Respondent would not have fired Complainant in any event because of unprotected activity.

Respondent's evidence on this point falls far short of showing that Respondent would have fired Complainant because of unprotected activity alone. The activity previously described, involving Complainant's refusal to work with a "Mexican" and with a woman, took place one year and ten months and two years and six months, respectively, before Complainant was fired. If these incidents of unprotected activity did not concern Respondent sufficiently enough to have resulted in further adverse action against the Complainant at those times, they are not persuasive now.

There is no substantial evidence on which to base a conclusion that Complainant would have been fired in any event because of unprotected activity.

5. In refusing to drive Unit #36, the Complainant did have a good faith reasonable belief that there was a hazardous condition and Complainant's honest perception was a reasonable one under the circumstances of this case.

Although Complainant had worked for Respondent only a little over three years as a truck driver before he was fired, he had considerable experience in that occupation. He had a total of 32 years experience as a driver of diesel trucks, including semi-trailer trucks, gasoline trucks, as well as smaller trucks.

Prior to October 26, 1979, Complainant had made several complaints about the mechanical condition of Unit #36. Complainant testified that he had complained to his supervisor several times about an air pressure loss in the air braking system and that the "retarder" did not work in conjunction with the transmission to slow the movement of the truck when necessary.

Complainant defined a retarder as a braking device built into the transmission. Oil under pressure is forced through the device. This process slows down the transmission and, as a result, the vehicle is slowed

down. If there is no retarder on the transmission, then only the brakes are used to slow the vehicle, according to this testimony. There had never been a retarder device on the transmission of Unit #36, but Complainant was never informed of this fact. Complainant reasonably believed that there was one on the transmission and that it just did not work properly. However, there were other trucks with automatic transmissions belonging to the Respondent which did have retarders.

The last complaint made by the Complainant before the one made on October 26, 1979, when he was fired, was made in July or August of that year. Complainant also testified that he made several written complaints on driver's reports about these problems. Two other truck drivers testified as to the unusual loss of air presure in the braking system of Unit #36. One of these drivers stated that he had made complaints to the Respondent's mechanics about the problem. Complainant testified that he could visually observe the air pressure loss as recorded on the air pressure gauge in the truck while the brakes were in use. He stated that the pressure would drop from 120 pounds to approximately 60 pounds of pressure. If the pressure does drop below 60 pounds, the emergency "maxy" brakes lock up. The maxy brakes are ordinarily used as a parking brake. Another truck driver testified that the pressure had dropped to 90 pounds when going down a hill and it was a "a little scary."

There is a direct conflict in the testimony as to whether or not the Complainant was told on October 26, 1979, that the brakes had been safety checked by the mechanics. Complainant denied that he was told this by his temporary supervisor. In any event, if a statement was made to the Complainant about the safe conditions of the brakes, it was not sufficient to convince Complainant that Unit #36 was a safe vehicle to operate with the load of equipment it was to haul. Complainant's conclusions were reasonable under the circumstances since he had made several complaints before, as had other drivers, and there was no evidence that Respondent had ever acknowledged that there was any performance problem in regard to air pressure in the braking system. Respondent's heavy equipment maintenance worker, who testified for the Respondent, stated that he had heard about a complaint in July or August of 1979 regarding an air leak in Unit #36. There was a minor leak, but after recycling the "treadle valve" there were no further leaks. Respondent's garage foreman testified that he test-drove Unit #36, stopping it repeatedly on a hill in July 1979, but experienced no air pressure loss. Significally, two truck drivers other than Complainant, whose job it was to drive these trucks, testified as to the air loss, but the mechanics, whose job it was to fix them, testified that there was none. In deciding this case, I am not making a determination as to whether or not the braking system was, in fact, defective. Whether it was defective or not, Complainant's perception that the system was defective and that it presented a hazardous condition was a reasonable one under the circumstances.

One driver testified that he began driving Unit #36 a month or two after Complainant was fired and that there was still an air pressure leak in the braking system at that time. While driving and applying the brakes, he observed a loss of air pressure on the gauge in the vehicle and could hear the air leaking when the motor was stopped.

I find it significant that Complainant would not have refused to transport the generator-trailer to Bingham if he had been permitted to do so driving Unit #35, which he had been driving without problems. It is understandable and reasonable that Complainant would not want to drive Unit #36 pulling a 23-ton load up and down grades of 9 to 13 percent considering the continuing problems complained of by Complainant and other drivers. The fact that he would have driven Unit #35 in order to carry out the assignment fortifies the conclusion that Complainant did have a good faith reasonable belief that there was a hazardous condition in connection with the operation of Unit #36. This perception was reasonable under the circumstances.

I find that in discharging the Complainant, the Respondent did violate section 105(c) of the Act. I will retain jurisdiction of the case until the relief to be awarded is determined.

CONCLUSION OF LAW

1. The Act gives me jurisdiction over the parties and the subject matter of these proceedings.

2. Respondent violated section 105(c) of the Act when it discharged Complainant on October 26, 1979.

ORDER

1. Respondent, the Anaconda Company, shall offer reinstatement to Complainant, Joseph A. Campbell, in the position from which he was terminated, at the rate of pay fixed for that position on the date of reinstatement.

2. Respondent shall pay to Complainant back pay covering the period from October 26, 1979 until the day he is offered reinstatement. Back pay shall equal the gross pay that Complainant would have received minus any interim earnings. Respondent shall be responsible for withholding from the award the amounts required by State or Federal law and for making any additional contributions which those laws require. Eight percent interest on the net back pay award shall be paid to Complainant.

3. Respondent shall pay a reasonable attorney fee for the services rendered by counsel for Complainant.

4. Respondent shall pay a civil penalty in the amount of $1,000.00 for its violation of the Act, and this amount shall be paid within 30 days of the issuance of my order finally disposing of the present proceedings.

5. Respondent shall expunge from Complainant's employment record any adverse references relating to his discharge and transmit to him a copy of his employment record reflecting the deletion of any adverse references relating to his discharge.

6. Counsel for both parties shall advise me in writing by November 16, 1981, whether they have agreed on the amounts due under paragraphs 2 and 3 of this Order. If so, they shall submit those amounts to me for

approval. If approved, I will issue an order which finally disposes of these proceedings. If counsel are unable to agree, further post hearing orders will be issued.

Jon D. Boltz
Administrative Law Judge

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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding	
	:	Docket Nos.	Assessment Control Nos.
	:	WEVA 81-201	46-05712-03016 V
v.	:	WEVA 81-348	46-05712-03002 V
	:	WEVA 81-349	46-05712-03023
COOK & WORKMAN MINING CO., INC., Respondent	:	No. 1 Mine	

DECISION

Appearances: James P. Kilcoyne, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner;
D. Grove Moler, Esq., Mullens, West Virginia, for Respondent.

Before: Administrative Law Judge Steffey

Pursuant to a notice of hearing issued August 10, 1981, a hearing in the above-entitled proceeding was held on September 22, 1981, in Madison, West Virginia, under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d).

After the parties had completed their presentations of evidence with respect to the only contested issue in the proceeding, I rendered the bench decision which is reproduced below (Tr. 98-104):

> This proceeding involves three Petitions for Assessment of Civil Penalty filed by the Secretary of Labor in Docket Nos. WEVA 81-201, WEVA 81-348, and WEVA 81-349 seeking assessment of civil penalties for a total of five alleged violations of the mandatory health and safety standards by Cook and Workman Mining Company, Inc. The petition in Docket No. WEVA 81-201 was filed on January 21, 1981, and the petitions in Docket Nos. WEVA 81-348 and WEVA 81-349 were both filed on May 12, 1981. The petition in Docket No. WEVA 81-348 involves three alleged violations and each of the petitions in the remaining two dockets alleges one violation.
>
> When the proceeding was convened on September 22, 1981, counsel for respondent indicated that he had a factual issue that he wanted to be considered in this proceeding, and that factual issue pertains to Citation No. 668163, which has been introduced as Exhibit 1 in this proceeding. The only violation, as I have indicated above, which is at issue in Docket No. WEVA 81-201 is the allegation in Citation No. 668163 to the effect that a violation of section 75.1103-4(3) had occurred. I shall make some findings of fact on which my decision will be based, and they will be set forth in enumerated paragraphs.

1. Inspector Harold Baisden made an examination of respondent's No. 1 Mine on May 5, 1980. He observed that the automatic fire sensor for the No. 1 belt conveyor terminated 500 feet outby the tailpiece. He thereafter issued Citation No. 668163 dated May 5, 1980, at 8:15 a.m., alleging a violation of section 75.1103-4(3) which provides in pertinent part, "When the distance from the tailpiece at loading points to the first outby sensor reaches 125 feet when point-type sensors are used, such sensors shall be installed and put in operation within 24 production shift hours after the distance of 125 feet is reached."

2. The inspector decided that the violation should be cited as an unwarrantable failure violation because the mine foreman, Edward Robertson, had told the inspector that one of respondent's owners had ordered Robertson to run coal without installing the belt sensor, and Robertson stated that they had been working four shifts without having installed the sensor. Also, the inspector checked the belt examiner's book and saw an entry made for the date of April 30, 1980, to the effect that the belt sensor had not been installed. The entry about the failure to install the sensor had been countersigned by Robertson.

3. Herbert Cook, respondent's President, testified that the No. 1 belt conveyor had been advanced through some old workings of Island Creek Coal Company directly to the working face (Exh. C). In order to advance directly to the working face, about 20 stoppings had to be erected, additional roof bolts had to be installed, and rock falls had to be cleaned up. Cook testified that the No. 1 belt had been advanced about 800 feet and that three other belt flights known as Nos. 2, 3 and 4 had to be removed and reinstalled for the purpose of extending the No. 1 belt conveyor. Cook testified that the extension of the belt had not been completed until Friday, May 2, 1980, and that coal was run only on the evening shift -- that is, 3 to 11 p.m. -- on May 2, 1980.

4. Johnny Maynard, an employee of respondent who ran the coal drill, stated that the extension of the No. 1 belt was completed on May 2, 1980, about 1 p.m. and that the belt was started and coal was run for about 1-3/4 hours on the day shift and a full 8-hour shift on the evening shift on Friday, May 2, 1980.

5. Lonnie McKinney, a section mechanic employed by respondent, testified that he had participated in the work of taking out the Nos. 2, 3 and 4 belts and reinstalling them through old workings, that the work had taken an entire week to complete, that the belt had been extended by Friday, May 2, 1980, and that production on Friday had taken place. But he stated that no production had occurred when he worked on Saturday and that when he came back to work on Monday, May 5, so little production had been done between his working on equipment on Saturday and Monday, when he came back to work, that he could say that no production had been done on Sunday.

I think those findings of fact are sufficient for considering the arguments made in this proceeding. Counsel for the Secretary, Mr. Kilcoyne, has stressed in his argument that the belt examiner's books, which are Exhibits A and B in this proceeding, contain rather

convincing evidence to the effect that production had taken place for at least 24 hours before the inspector wrote his citation. Mr. Kilcoyne points out, based on Exhibit A, that the entries for April 30, 1980, indicate that work was still being done on removal of the other belts and also, for that same day, there is an entry that the fire sensor line needs to be installed; and he goes on to point out that the entries for May 1 show that the fire sensor line needs to be installed and the entry for May 2 repeats that notation and the entry for May 5, of course, shows that the sensor had been installed, because by that time the inspector had written his citation and had terminated it after the sensor had been installed.

The entries in this belt examiner's book, or Exhibit A, are rather convincing to me in that they show that the sensor needed to be installed and they keep saying that from April 30, 1980, through May 2, 1980; and it's true that that period of time would be more than 24 hours and would be sufficient for 24 production hours to have taken place.

The difficulty with jumping from the fact that those entries were made in the book and finding that a violation of section 75.1103-4(3) occurred, is that there is no proof in this belt examiner's book that production occurred at any time on any of those days; and of course, the section of the regulations that is involved, as to which the inspector had the burden of proving a violation, requires that the sensor be extended and put in operation within a period of 24 production shift hours.

We have testimony from three witnesses who were there and whose demeanor impressed me as people who could be considered as telling the truth. Each of them testified that production occurred only on one shift with the exception of Johnny Maynard, who said production occurred on the day shift on Friday from about 1 p.m. to 2:45 p.m. when they stopped working. So, if we were to add up the production that actually occurred, based on the preponderance of the evidence in this proceeding, we would have use of the belt line for 1-3/4 hours on Friday, May 2nd, on the day shift, and for 8 hours on the second shift on Friday, May 2nd. That would be total production for 9-3/4 hours. Then, assuming the mine operated for 1/2 hour or an hour on May 5th before the inspector cited the violation, a total of perhaps 10 or 10-1/2 hours of production occurred before the citation was written.

I don't think that I can make a finding based on the belt examiner's book and the statements made by Robertson to the inspector as being more convincing and more credible than the testimony of three witnesses, all of whom were working in the mine on April 30, 1980, to the time the citation was written on May 5, 1980; and since their testimony has a greater amount of weight -- or I think should be given a greater amount of weight than the entries in the examiner's book and the uncorroborated statements of Robertson, I think the preponderance of the evidence shows that a violation of section 75.1103-4(3) has not been proven.

Settlement Agreements

After I had rendered the bench decision set forth above, the parties entered into a settlement conference. The Assessment Office had proposed a relatively small penalty of $160 for the violation alleged in the Petition for Assessment of Civil Penalty filed in Docket No. WEVA 81-349, but the Assessment Office had proposed penalties totaling $2,500 for the three violations alleged by the Petition for Assessment of Civil Penalty filed in Docket No. WEVA 81-348. As a result of the settlement conference, respondent agreed to pay the full penalty of $160 proposed by the Assessment Office for the single violation alleged in Docket No. WEVA 81-349 and to pay reduced penalties totaling $700 for the three violations alleged in Docket No. WEVA 81-348.

Section 110(i) of the Act requires that six criteria be considered in determining civil penalties. As to the criterion of the size of respondent's business, the testimony shows that respondent's mine produces about 16,000 tons of raw coal on a monthly basis, but Island Creek Coal Company's preparation plant rejects 60 percent of the coal as waste, so that respondent gets paid by Island Creek for only 6,400 tons of clean coal per month (Tr. 118-119). Respondent employs 22 persons on two production shifts per day (Tr. 106). Those figures support a finding that respondent operates a small coal business and that penalties should be in a low range of magnitude insofar as they are determined under the criterion of the size of respondent's business.

Respondent presented a considerable amount of evidence with respect to the criterion of whether the payment of penalties would cause respondent to discontinue in business. Respondent is a corporation owned by four individuals. Two of the individuals own an interest of 30 percent each and the other two each own a 20-percent interest in the corporation. One of the individuals who owned a 30-percent interest acted as superintendent when the company first began to produce coal. He was discharged on April 1, 1980, by the other three owners of the corporation (Tr. 108; 120). He has brought an action in the Circuit Court in Wyoming County, West Virginia, for dissolution of the corporation and for payment of wages from the date of his discharge. That lawsuit has not even reached the pretrial stage and is a cloud hanging over the corporation's present owners and operations. The company has had to retain an attorney to represent it in the dissolution case and the company has expenses in connection with that legal proceeding (Tr. 109; 115).

Respondent leases the coal reserves it is mining from Island Creek and sells its coal to Island Creek for $21.50 per ton of clean coal. Respondent has to pay Island Creek 65 cents per ton for equipment rental, 40 cents per ton for electricity, 15 cents per ton for road maintenance, and an unstated amount for providing the courses for training and retraining of miners. Respondent has to pay 85 cents per ton, plus the cost of fuel, to have its coal transported from the mine to Island Creek's preparation plant (Tr. 119).

According to a financial statement prepared by a certified public accountant, respondent's net loss for the 10-month period ending December 31, 1980, was $145,348 and for the year ending February 28, 1981, was $166,091 (Exhibits D and E). Even if one deducts an amount for depreciation of $36,145, which does not represent an actual cash loss, respondent suffered a cash loss of

$109,203 (Tr. 107). Respondent's evidence shows that it also owes the Federal Government $14,000 in back taxes which it is trying to pay at a rate of $2,000 per month (Tr. 111). Respondent also owes $90,000 in workmen's compensation payments and it is trying to work out a plan for installment payments on that obligation (Tr. 110). Respondent's largest supplier of mine supplies is the Central Supply Company which respondent owes $14,000. Respondent is trying to pay off that debt at the rate of $2,000 per month. Until respondent discharges that debt, it is having to pay cash for all mines supplies which it currently buys (Tr. 113-114). Respondent owes about $42,000 on a long-term note for money borrowed to purchase three pieces of mining equipment, namely, an S & S scoop, an S & S feeder, and a Ford end-loader. Payments on those three pieces of equipment amount to approximately $5,250 per month (Tr. 111; 122).

Respondent has no profits at the end of the month after it has paid all expenses for operating the mine and making the payments discussed above. One of the owners manages the business affairs of the company and acts as superintendent of the mine. He gets paid a salary for his managerial functions. Another of respondent's owners operates the scoop in the production of coal and gets paid union wages for performing that work. The third owner does not work in the mine and receives no dividends for his interest in the mine, nor do the other two owners get anything in return for their ownership other than their salary or wages for work actually done (Tr. 122-123).

Respondent is just now beginning to achieve a moderate amount of financial stability. Respondent places much of the blame for its dire financial condition on the fact that its contract with Island Creek required it to produce coal in its mine in an area where sandstone rolls severely impaired its ability to find and produce coal. It was not until it had mined eight breaks on 80-foot centers without passing beyond the sandstone rolls, that Island Creek permitted it to develop coal reserves in an area which permits it to produce enough coal to see signs of being able to meet its financial obligations (Tr. 107; 112).

The evidence of record summarized above shows that respondent's obligations are greater than the revenues it has been receiving from the sale of its coal. The evidence, therefore, supports a finding that payment of penalties will have an adverse effect on respondent's ability to continue in business.

The Secretary's counsel introduced as Exhibit 14 a computer printout listing all of the alleged violations at respondent's mine for which penalties have been paid for the 24-month period preceding the occurrence of the violations alleged in this proceeding. That exhibit shows that one prior violation of each of the five violations cited in this proceeding has occurred with exception of the violations of section 75.514 alleged in Order Nos. 669923 and 669925. Neither the official file nor any of the exhibits submitted by the Secretary's counsel contain a calculation of penalty points under the formula set forth in 30 C.F.R. § 100.3 On the basis of Exhibit 14, I find that respondent's history of previous violations is not excessive and that the settlement penalties hereinafter agreed upon are high enough to provide for the assessment of a small amount under the criterion of history of previous violations. The settlement penalties have, of course, been reduced to give a maximum amount of weight to the criterion that payment of penalties would have an adverse effect on respondent's ability to continue in business.

It is somewhat difficult in this proceeding to make a judgment as to the criterion of whether respondent demonstrated a good faith effort to achieve rapid compliance because that criterion normally involves a consideration of whether respondent abated the violation within the time period provided for in the inspector's citation. In this proceeding, all of the violations which were the subject of the settlement conference were orders of withdrawal which, of course, do not contain a time fixed by the inspector for abatement. The inspector's terminations of the orders show, however, that all of the violations were abated within a very short period of time on the same day the orders were written, with the exception of Order No. 668331 which was written on a Friday and abated on the following Monday. Abatement of Order No. 668331 required some roof bolting to be done at a location a considerable distance from the working face and therefore was not easily achieved. Consequently, the evidence supports a finding that respondent demonstrated a rapid good faith effort to achieve compliance and that mitigating factor has been taken into consideration in arriving at the settlement penalties agreed upon by the parties.

The foregoing discussions of four of the six criteria apply equally to all of the settlement penalties agreed upon by the parties. The remaining two criteria of negligence and gravity will be specifically considered in discussing the specific violations which were alleged in each docket.

Docket No. WEVA 81-348

Order No. 669675 alleges a violation of 30 C.F.R. § 75.200 because respondent had violated Safety Precaution No. 12(d) of its roof-control plan by hanging the trailing cables to the shuttle cars on roof bolts which had been installed as an integral part of respondent's roof-control plan, whereas the safety precaution requires that a special roof bolt be installed for the purpose of suspending trailing cables to prevent them from being run over by mining equipment. Since the violation was cited in an order issued under section 104(d) of the Act, or the unwarrantable failure portion of the Act, the Assessment Office waived the formula in 30 C.F.R. § 100.3 normally used for assessing proposed penalties and proposed a penalty of $750 based on special narrative findings of fact.

There is no evidence in the record to show that the torque of any roof bolts had actually been reduced by the hanging of trailing cables on them, so there is no way to determine whether the roof was made hazardous because of the practice of hanging trailing cables on the roof bolts. Nevertheless, respondent is required to know and follow the provisions of its roof-control plan. Therefore, the violation was the result of a high degree of negligence and the practice of hanging trailing cables on roof bolts had a potential for adversely affecting the torques of the roof bolts. Therefore, the Assessment Office may have proposed a reasonable penalty of $750 for a small mine, but the parties agreed to reduce the penalty to $200 in light of respondent's evidence showing that payment of large penalties will have an adverse effect on its ability to continue in business.

Order No. 669923 was also issued under the unwarrantable failure provisions of the Act and alleges a violation of section 75.514 because no electrical connectors were used in the making of a temporary splice in the trailing cable for the roof-bolting machine. A 4-inch piece of stranded wire had been

twisted into the splice instead of the strong connector which is required to be used. Failure to make the splice correctly resulted in a weak splice which might have caused a spark or short with a resultant electrical shock or fire. The Assessment Office made special narrative findings as to this alleged violation and proposed a penalty of $750. Here again, the Assessment Office may have proposed a reasonable penalty if the record did not contain evidence showing that payment of penalties will have an adverse effect on respondent's ability to continue in business. The parties gave considerable weight to respondent's financial condition and agreed to reduce the penalty to $200.

Order No. 668331 was also issued under the unwarrantable failure provisions of the Act and alleges a violation of section 75.200 because the roof had not been supported in a 15-foot area at a place where the mantrip traveled each day in taking miners in and out of the mine. The violation was obviously serious and the violation was accompanied by a high degree of negligence. The Assessment Office made narrative findings of fact and proposed a penalty of $1,000. Respondent agreed that its personnel should have observed the lack of roof support and should have installed additional roof bolts, but respondent's witness explained that the unsupported roof appeared in a curve where they had gone into old workings for the purpose of reducing the overall length of the belt conveyor and he said that the unsupported roof was on one side of the entry in a place where the lack of roof bolts was not easily discernible (Tr. 132-134). Since roof falls are still the primary cause of serious accidents in underground coal mines, the Assessment Office may have proposed a reasonable penalty of $1,000, but the parties agreed to reduce the penalty to $300 in view of the fact that respondent's evidence showed it to be in serious financial condition.

Docket No. WEVA 81-349

The Petition for Assessment of Civil Penalty filed in Docket No. WEVA 81-349 seeks assessment of a civil penalty for a single violation, namely, a violation of section 75.514 alleged in Order No. 669925 which states that respondent had twisted conductors together in making a splice instead of using proper electrical connectors. The only difference between the instant alleged violation of section 75.514 and the violation of section 75.514 alleged in Docket No. WEVA 81-348, supra, is that the improperly made splice was found in the trailing cable to a shuttle car instead of in the trailing cable to a roof-bolting machine. Despite the fact that both alleged violations were cited in orders issued the same day under the unwarrantable failure provisions of the Act, the Assessment Office proposed a penalty of $750 for the violation of section 75.514 alleged in Docket No. WEVA 81-348 and $160 for the violation of section 75.514 alleged in Docket No. WEVA 81-349. There is not in the official file, nor was there introduced at the hearing any exhibits which show how the Assessment Office arrived at a proposed penalty of $160 for the violation involved in Docket No. WEVA 81-349 as compared with the proposed penalty of $750 for the identical violation involved in Docket No. WEVA 81-348, supra.

In considering the previous violation, the parties agreed to a settlement penalty of $200, instead of the penalty of $750 proposed by the Assessment Office. In the instant case, respondent agreed to pay the full penalty of $160 proposed by the Assessment Office. The settlement penalty of $200 for the violation of section 75.514 alleged in Docket No. WEVA 81-348 was agreed upon

by the parties primarily because of respondent's showing that it is in dire financial condition. If I had been determining a settlement penalty for the violation of section 75.514 on the basis of evidence in the record, I would probably have assessed a penalty of $200 for each of the violations of section 75.514 in order to be consistent with the facts alleged in each order which show that each violation involved an equal degree of negligence and was equally serious. Inasmuch as all violations alleged in both Docket Nos. WEVA 81-348 and WEVA 81-349 were disposed of in settlement agreements, it is permissible to approve a different penalty for two similar violations because respondents in settlement proceedings rarely agree to pay penalties larger than those proposed by the Assessment Office. Inasmuch as no testimony was introduced by either party with respect to the violations of section 75.514 alleged in Docket Nos. WEVA 81-348 and WEVA 81-349, there is no evidence in the record which would support findings by me that respondent should be required to pay a larger penalty than the one proposed by the Assessment Office.

There is, of course, a great deal of evidence in this proceeding showing that respondent has demonstrated that payment of large penalties would have a very adverse effect on respondent's ability to continue in business. Consideration of that evidence supports a finding that the parties' settlement agreement in Docket No. WEVA 81-349, under which respondent would pay the full penalty of $160 proposed by the Assessment Office, should be approved.

WHEREFORE, it is ordered:

(A) Pursuant to the parties' settlement agreements, respondent, within 30 days from the date of this decision, shall pay civil penalties totaling $860.00 which are allocated to the respective alleged violations as follows:

Docket No. WEVA 81-348

Order No. 669675 8/19/80 § 75.200	$ 200.00
Order No. 669923 8/19/80 § 75.514	200.00
Order No. 668331 8/22/80 § 75.200	300.00
Total Settlement Penalties in Docket No. WEVA 81-348	$ 700.00

Docket No. WEVA 81-349

Order No. 669925 8/19/80 § 75.514	$ 160.00
Total Settlement Penalties in Docket No. WEVA 81-349	$ 160.00
Total Settlement Penalties in This Proceeding	$ 860.00

(B) The Petition for Assessment of Civil Penalty filed in Docket No. WEVA 81-201 is dismissed for failure to prove that the violation of 30 C.F.R. § 75.1103-4(3) alleged in Citation No. 668163 dated May 5, 1980, occurred.

Richard C. Steffey

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

OCT 30 1981

FMC CORPORATION,		Notices of Contest
	Contestant	
v.		Docket No. WEST 80-497-RM
		Citation No. 576913, 8/20/80
SECRETARY OF LABOR,		
MINE SAFETY AND HEALTH		Docket No. WEST 80-498-RM
ADMINISTRATION (MSHA),		Citation No. 576914; 8/20/80
	Respondent	
		Docket No. WEST 80-499-RM
		Citation No. 576915; 8/20/80
		Docket No. WEST 80-500-RM
		Citation No. 576916, 8/20/80
		Docket No. WEST 80-501-RM
		Citation No. 576917; 8/20/80
		Docket No. WEST 80-502-RM
		Citation No. 576973; 8/20/80
		Docket No. WEST 80-503-RM
		Order No. 576974; 8/20/80
		Docket No. WEST 80-504-RM
		Citation No. 576975; 8/20/80
		Docket No. WEST 80-505-RM
		Citation No. 576976; 8/20/80
		FMC Mine
SECRETARY OF LABOR,		Civil Penalty Proceeding
MINE SAFETY AND HEALTH		
ADMINISTRATION (MSHA),		Docket No. WEST 81-355-M
	Petitioner	A/O No. 48-00152-05048
v.		
		FMC Mine
FMC CORPORATION,		
	Respondent	

DECISION

Appearances: John A. Snow, Esq., Van Cott, Bagley, Cornwall & McCarthy, Salt Lake City, Utah, for FMC Corporation;
James R. Cato, Esq., Office of the Solicitor, U.S. Department of Labor, Kansas City, Missouri, for the Secretary of Labor.

Before: Judge Cook

I. Procedural Background

The FMC Corporation commenced the above-captioned "Notice of Contest" proceedings pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (Supp. III 1979) (1977 Mine Act). The Secretary of Labor also filed a proposal for a penalty in the above-captioned "Civil Penalty Proceeding" pursuant to section 110(a) of the 1977 Mine Act.

On August 11, 1981, a hearing was conducted in the above-captioned proceedings at which time both parties were represented by counsel. During that hearing, certain settlement negotiations were carried out which were later embodied in a joint motion to approve stipulation and settlement agreement which was filed on October 13, 1981. At that same time, a motion was filed to consolidate the above-captioned civil penalty proceeding with the notices of contests in Docket Nos. WEST 80-497-RM, WEST 80-498-RM, WEST 80-499-RM, and WEST 80-500-RM.

II. Stipulation and Settlement Agreement

The joint motion filed by the parties provides as follows:

> Come now the parties and move the Federal Mine Safety and Health Review Commission to approve the settlement of the above-captioned matters pursuant to section 110(k) of the Act. The terms of the settlement are as follows:
>
> A.
>
> 1. Citations numbered 576913, 576914, 576915 and 576916 were all issued for the failure of FMC to comply with the mandatory standard found at 57.20-8(a) in that FMC did not provide readily accessible adequate toilet facilities in and about the No. 7 shaft underground area of the FMC Mine. Though there did in fact exist adequate toilet facilities in the No. 7 shaft underground area of the mine, these facilities were not readily accessible to the miners by virtue of the distance of the toilet facilities from the various workplaces in the area. Citation number 576913 was written by the inspector at the location nearest the toilet facilities where the inspector initially

determined that the distance of the workplace from the toilet facilities made such facilities no longer readily accessible to the miners in that particular workplace. Citations numbered 576914, 576915, and 576916 each were written to reflect workplaces that were farther from the same toilet facilities.

2. Citations numbered 576974, 576975 and 576976 were all also issued for the failure of FMC to comply with the mandatory standard 57.20-8(a) in that FMC did not provide readily accessible adequate toilet facilities in and about the No. 3 shaft underground area of the FMC Mine. Citation 576974 was written as a.104(d)(1) order of withdrawal because FMC had provided a toilet, but kept it locked and the miners in the area did not have ready access at all times to the key. Further, an inspection of the toilet discovered that the toilet in fact had never been made operational. Citations numbered 576975 and 576976 were each written to reflect different workplaces in the No. 3 shaft underground area that were of such distance from toilet facilities that the facilities were not readily accessible to miners in these workplaces.

3. Mandatory standard 30 CFR 57.20-8(a) requires "Toilet facilities shall be provided at locations that are compatible with the mine operations and that are readily accessible to the mine personnel." However, this standard gives no guidance as to what shall be considered a maximum distance that a toilet facility may be from a workplace and still be considered readily accessible. After a thorough research of the available case law, the parties have determined that this issue has not been heard by the Commission.

4. Therefore, the parties, after a thorough review of all the available evidence regarding the aforementioned citations, do agree to the following terms for settlement and abatement of said citations:

a. Docket No. WEST 80-497-RM (Citation 576913)

1. The Secretary modifies citation No. 576913 to remove the determination that the violation alleged on the face of the citation constitutes a "significant and substantial" safety or health hazard within the meaning of the Act. However, this modification does not prohibit the Secretary or MSHA from making such a determination should the same or a similar violation of the standard set forth at 30 CFR 57.20-8(a) be discovered at the FMC Mine in the future.

2. FMC does withdraw its notice of contest to citation No. 576913 and accepts the citation subject to the modification stated above, as final.

b. Docket No. WEST 80-498-RM (Citation No. 576914)
WEST 80-499-RM (Citation No. 576915)
WEST 80-500-RM (Citation No. 576916)

The Secretary vacates citations numbered 576914, 576915 and 576916. These citations were issued pursuant to the same facts and circumstances that gave rise to citation number 576913 and represent a repetition of the violation alleged in Citation No. 576913. It is the Secretary's position herein [that] the issuance of repetitive citations to an operator for an alleged violation of the same mandatory standard based upon these facts and circumstances would not further effectuate the purposes of the Act. Therefore, the operator herein having withdrawn its notice of contest to Citation No. 576913, the Secretary does vacate Citations numbered 576914, 576915 and 576916.

c. Docket No. WEST 81-355-M (Civil Penalty Proceeding)

1. Citations numbered 576913, 576914, 576915 and 576916 are also the subject of the above-referenced civil penalty proceeding.

2. The Secretary has vacated citations numbered 576914, 576915 and 576916, as per above. The respondent does accept citation 576913 and agrees to pay the assessed civil money penalty of $48 in full. The respondent is a large operator and payment of the assessed penalty will not affect the respondent's ability to continue in business. The alleged violation in citation number 576913 was the result of ordinary negligence and the respondent demonstrated the ordinary amount of good faith in abating the violation. The gravity of the alleged violation was not serious. The respondent's history of previous violations is not extraordinary with respect to its size. The inspector's statement for citation number 576913 and the findings of the MSHA Assessment Office are attached hereto and incorporated herein by reference. The parties agree that the aforementioned terms of settlement for this docket are in the public interest and effectuate the intent and purposes of the Act.

d. Docket No. WEST 80-503-RM (Order No. 576974)

1. The Secretary modifies Order No. 576974 to remove the determination that the violation alleged on the face of the citation involved a "significant and substantial" safety

or health hazard within the meaning of the Act. However, this modification does not prohibit the Secretary or MSHA from making such a determination should the same or a similar violation of the standard set forth at 30 CFR 57.20-8(a) be discovered at the FMC Mine in the future.

2. FMC withdraws its notice of contest to Order No. 576974 and accepts the Order, subject to the modification stated above, as final.

e. Docket No. WEST 80-504-RM (Citation No. 576975)
WEST 80-505-RM (Citation No. 576976)

The Secretary vacates ciations [sic] numbered 576975 and 576976. Citations numbered 576975 and 576976 and Order No. 576974 were issued for a violation of 30 CFR 57.20-8(a) in that FMC did not provide readily accessible toilet facilities in and around the No. 3 shaft underground area of the FMC Mine. Citations numbered 576975 and 576976 were written to reflect workplaces of a greater distance from the nearest available toilet facilities than the workplace referenced in Order No. 576974. The issuance of citations numbered 576975 and 576976 represents a repetition of the violation alleged in Order No. 576974. It is the Secretary's position herein that the issuance of repetitive citations to an operator for an alleged violation of the same mandatory standard based upon these facts and circumstances would not further effectuate the purposes of the Act. Therefore, the operator herein having withdrawn its notice of contest to Order No. 576974, the Secretary does vacate citations numbered 576975 and 576976.

Further, with regard to the standard set forth at 30 CFR 57.20-8(a), unless and until the standard is amended to set forth and define "readily accessible," or such a determination is made by the Commission, the FMC Mine shall not be in violation of said standard if it has adequate toilet facilities that are within ten (10) minutes travel time from each and every workplace in the mine by means of travel available to each and every miner in those workplaces, except where the circumstances of the mine are such that it is impossible or unsafe to provide toilet facilities within the distance aforementioned.

B. Docket No. WEST 80-501-RM
WEST 80-502-RM

Citations numbered 576917 and 576973 were issued for an alleged violation of the standard set forth at 30 CFR 57.20-11.

After a thorough and diligent investigation into all the available evidence regarding the issuance of these citations, it is the Secretary's determination that there is insufficient evidence to prove the violations alleged. Therefore, with the concurrence of the contestant, FMC Corp., the Secretary vacates Citations numbered 576917 and 576973.

The parties further agree that the elements of this stipulation and settlement agreement apply only to the particular citations herein and do not prejudice the Secretary in making any future determinations with respect to the operations of FMC Corporation at the FMC Mine. FMC corporation's consent to the terms of this agreement shall not constitute an admission by FMC Corporation of any violation of the Act or the standards promulgated thereunder in any subsequent proceedings other than proceedings brought directly under the Federal Mine Safety and Health Act of 1977, as amended.

It is the parties' belief that approval of this stipulation and settlement agreement is in the public interest and will effectuate the intent and purpose of the Act.

WHEREFORE, the parties pray that this stipulation and settlement agreement be approved and that the above-captioned proceedings be dismissed.

III. Determination

As relates to the settlement proposal concerning Citation No. 576913, information as to the six statutory criteria contained in section 110 of the Act has been submitted. This information has provided a full disclosure of the nature of the settlement and the basis for the original determination. Thus, the parties have complied with the intent of the law that settlement be a matter of public record.

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

As relates to the remaining provisions of the joint motion to approve stipulation and settlement agreement in the above-captioned proceedings, such joint stipulation and settlement agreement is APPROVED and the motion by both parties to dismiss all of the above-captioned proceedings will be GRANTED.

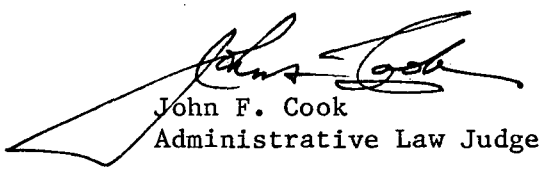
ORDER

The motion to consolidate the above-captioned civil penalty proceeding with Docket Nos. WEST 80-497-RM, WEST 80-498-RM, WEST 80-499-RM, and WEST 80-500-RM, is GRANTED.

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

IT IS FURTHER ORDERED that Respondent, within 30 days of the date of this decision, pay the agreed-upon penalty of $48 assessed in this proceeding.

IT IS FURTHER ORDERED that the above-captioned proceedings be, and hereby are, DISMISSED.



John F. Cook
Administrative Law Judge

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