

Commission Decisions

10-01-84	U.S. Steel Mining Company	WEVA 82-387	Pg. 2305
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Administrative Law Judge Decisions

10-01-84	Montana Contract Mining Co.	WEST 83-83-M	Pg. 2315
10-01-84	Montana Contract Mining Co.	WEST 83-55-M	Pg. 2321
10-01-84	U.S. Steel Mining Co., Inc.	SE 84-10	Pg. 2325
10-01-84	BCNR Mining Corporation	PENN 84-93	Pg. 2334
10-01-84	N. L. Baroid-Div/NL Industries	CENT 84-15-M	Pg. 2340
10-03-84	Beckley Coal Mining Company	WEVA 83-252-R	Pg. 2361
10-04-84	Jumacris Mining, Inc.	WEVA 84-137	Pg. 2409
10-04-84	Kitt Energy Corporation	WEVA 83-125-R	Pg. 2411
10-09-84	South Hopkins Coal Company	KENT 84-92	Pg. 2424
10-10-84	MSHA/James McN. Taylor v. Buck Garden Coal Company	WEVA 83-241-D	Pg. 2425
10-10-84	Southway Construction Co., Inc.	CENT 84-3-M	Pg. 2426
10-12-84	Pittsburg and Midway Mining Corp.	WEST 82-131-R(A)	Pg. 2437
10-12-84	Zeigler Coal Company	LAKE 83-8	Pg. 2441
10-15-84	Homer W. Davis v. Armco Steel Corp.	WEVA 84-118-D	Pg. 2445
10-15-84	MSHA/I.B. Acton and others v. Jim Walter Resources, Inc.	SE 84-31-D	Pg. 2450
10-17-84	Bigelow Liptak Corporation	CENT 84-24-M	Pg. 2459
10-17-84	Terry Davis v. Canyon Valley Electric Co.	WEST 83-97-DM	Pg. 2461
10-17-84	U.S. Steel Mining Co., Inc.	PENN 84-20	Pg. 2462
10-18-84	Faust and Miller Coal Co.	PENN 84-175	Pg. 2464
10-18-84	Local 1609, UMWA v. Greenwich Collieries	PENN 84-158-C	Pg. 2465
10-18-84	Lonnie Jones v. D&R Contractors	KENT 83-257-D(A)	Pg. 2480
10-19-84	Lone Star Industries, Inc.	CENT 84-17-M	Pg. 2484
10-22-84	MSHA/David McConnell v. Jim Walter Res.	SE 84-38-D	Pg. 2486
10-25-84	Pyro Mining Company	KENT 83-212	Pg. 2488
10-26-84	Powderhorn Coal Company	WEST 82-150	Pg. 2501
10-30-84	Silver Ventures Corporation	WEST 82-215-M	Pg. 2503
10-31-84	Incoal, Incorporated	KENT 83-171	Pg. 2512



COMMISSION DECISIONS





OCTOBER 1984

No cases were directed for review during the month of October.

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

Secretary of Labor on behalf of Larry Duty v. West Virginia Rebel Coal Co.,  
Docket No. KENT 83-161-D, KENT 83-232-D. (Petition for Interlocutory Review  
of Judge Broderick's September 18, 1984 Order.)



# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 1, 1984

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. WEVA 82-387
	:	
v.	:	
	:	
U. S. STEEL MINING CO., INC.	:	
	:	

## DECISION

The issues before the Commission are whether the administrative law judge properly found two violations of mandatory safety standards to be significant and substantial ("S&S") within the meaning of 30 U.S.C. § 814(d)(1), section 104(d)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982) ("Mine Act"), and whether the penalties assessed by the judge are appropriate under the statutory criteria set forth at 30 U.S.C. § 820(i), section 110(i) of the Mine Act. 1/ The violations in issue, both conceded by USSM, involve (1) noncompliance with the prohibition against transporting compressed gas cylinders on mantrips [30 C.F.R. § 75.1106-2(c)], and (2) inadequate guarding of a trolley wire [30 C.F.R. § 75.1003]. The judge assessed penalties of \$250 for the cylinder violation and \$750 for the wire guarding violation. 5 FMSHRC 1474 (August 1983)(ALJ). For the reasons that follow, we affirm.

On May 6, 1982, an authorized representative of the U.S. Department of Labor, Mine Safety and Health Administration ("MSHA"), conducted a haulage system inspection at USSM's Gary No. 50 mine in Pineville, West Virginia. The citations in this case were issued on that date by MSHA Inspector Earl Barnett. During his inspection, Barnett was accompanied by USSM senior mine inspector Russell Burge and miners' representative Floyd Cox.

1/ U. S. Steel Mining Co. ("USSM") also maintained that under the single penalty assessment criteria published by the Secretary of Labor at 30 C.F.R. § 100.4 the Commission is limited to a penalty assessment of \$20 if a violation is found not to be S&S. This issue was decided adverse to USSM's position in U. S. Steel Mining Co., Inc., 6 FMSHRC 1148 (May 1984). We adhere to that holding.

The cited standard, 30 C.F.R. § 75.1106-2(c), and other relevant standards in the subpart, provide as follows:

§75.1106-2 Transportation of liquefied and nonliquefied compressed gas cylinders; requirements.

(a) Liquefied and nonliquefied compressed gas cylinders transported into or through an underground coal mine shall be:

(1) Placed securely in devices designed to hold the cylinders in place during transit on self-propelled equipment or belt conveyors;

\* \* \*

(3) Equipped with a metal cap or "headband" (fence-type metal protector around the valve stem) to protect the cylinder valve during transit; and

\* \* \*

(b) In addition to the requirements of paragraph (a) of this section, when liquefied and nonliquefied compressed gas cylinders are transported by a trolley wire haulage system into or through an underground coal mine, such cylinders shall be placed in well insulated and substantially constructed containers which are specifically designed for holding such cylinders.

(c) Liquefied and nonliquefied compressed gas cylinders shall not be transported on mantrips.

While inspecting a three-compartment, self-propelled personnel carrier or mantrip 2/ that belt crew miners had boarded to take into the mine, Inspector Barnett observed one oxygen cylinder and one acetylene cylinder lying unsecured on the floor of one of the two covered compartments of the carrier. None of the miners who had boarded the mantrip was in the compartment where the cylinders were located. Both cylinders had attached valves, but no hoses or gauges. There was a metal cap over the oxygen valve; the acetylene valve was recessed into the top of the cylinder. 3/

2/ U. S. Department of the Interior, A Dictionary of Mining, Mineral, and Related Terms 679 (1968), defines mantrip as "[a] trip made by mine cars and locomotives to take men rather than coal, to and from the working places."

3/ The cylinders were in nylon-reinforced, plastic bags that are used for carrying or dragging the tanks. The bags do not prevent the tanks from rolling or otherwise provide protection.

MSHA Inspector Barnett issued the citation alleging a violation of 30 C.F.R. § 75.1106-2(c) and informed USSM inspector Burge that the tanks should not be transported on a mantrip. After observing their removal, Barnett, accompanied by miners' representative Cox, left the area. Both Barnett and Cox believed that the tanks were taken into the shop. At the hearing it was established that the tanks were taken into the mine by placing them on another mantrip. The tanks were placed in the same open compartment occupied by miners and were steadied during transit by the miners. The testimony given by Barnett and Cox at trial focused on the condition observed and cited, not on USSM's method of abating the violation. It was not until USSM presented its case that the actual method of transport was established.

Barnett testified that the cited condition could result in a mine fire or explosion due to several causes. Vibration of the mantrip on the track and rolling about of the unsecured acetylene tank could loosen the valve, allowing escape of highly flammable gas. A source of ignition was provided by the trolley wire because of the possibility of arcing or sparking. Similarly, rolling of the oxygen cylinder could cause the cap to loosen and the valve to break, creating a projectile. Barnett also testified that valves on both tanks could break in case of a derailment or collision in which the tanks were tossed around or thrown from the vehicle. 4/ While testifying Barnett acknowledged that if the tanks were in proper containers and securely fastened there would not have been a hazard. The inspector did not cite USSM for failing to secure the tanks because, in his view, they should not have been on the mantrip and because he believed the hazard abated when the tanks were removed. 5/ In Barnett's view it was "very likely" that an accident could occur as a result of the violation and "reasonably likely" for serious injury to occur. Tr. 26.

Miner representative Cox stated that the usual practice in the maintenance department was to carry tanks in the front of open jeeps with the driver. He corroborated Barnett's testimony regarding the hazards attendant to transporting the tanks in the same vehicles in which miners were transported.

USSM inspector Burge testified that he knew of no instances at the mine when vibration was sufficient to dislodge a valve or when gas escaped during transport. In his view there was no chance for the cited condition to contribute to an injury.

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4/ Barnett stated that there are frequent derailments and collisions at this mine, with its 46 miles of track, but he could not state specifically how often they occur. However, he testified that he had been involved in a derailment during this inspection and was there to inspect the mine because of a prior head-on collision of mine vehicles. Cox subsequently testified that gas cylinders being transported in the vehicles involved in the prior collision had been found lying along the track, but that none had ruptured or had broken valves.

5/ See 30 C.F.R. §§ 75.1106-2(a)(1) and 2(b).

Burge testified that he had received verbal guidelines from MSHA's local Pineville office authorizing the transport of cylinders in personnel vehicles if they were placed in separate compartments and the only miners on the vehicles were part of the crew that would use the tanks (e.g., belt crew, mechanics). Burge also stated that the Pineville office reaffirmed the policy after the citation in issue was written. Barnett testified he was unaware of the policy and disputed Burge's assertion that during the inspection Barnett authorized the actual method of transport.

The Commission Administrative Law Judge accepted USSM's representation regarding the Pineville office policy because the Secretary failed to submit rebuttal evidence, although the record remained open for 72 hours after trial for receipt of such evidence. However, the judge concluded on the basis of Old Ben Coal Co., 2 FMSHRC 2806 (1980) and King Knob Coal Co., Inc., 3 FMSHRC 1417 (1981) that confusion over the requirements of the cited standard caused by the oral advice of a Pineville official would be relevant only in evaluating USSM's negligence for the purpose of penalty assessment. He further noted that, in any event, USSM failed to comply with the Pineville policy because miners other than those who would use the tanks were on the vehicle, the policy did not include a waiver of the requirement of 30 C.F.R. § 75.1106-2(a)(1) that the cylinders be secured, and the tanks were transported in the same compartment as the miners. 6/ The judge credited the testimony of Barnett and Cox with respect to hazards resulting from the cited condition and concluded:

The preponderance of the evidence clearly supports a finding that it was reasonably likely that hauling unsecured cylinders in the mantrip bus could contribute to the cause and effect of a mine safety hazard which could result in an injury of a reasonably serious nature.

5 FMSHRC at 1484. The judge assessed a penalty of \$250 based on the statutory criteria in section 110(i) of the Mine Act, finding that USSM is a large operation with a favorable or moderate history; that the penalty would not affect the operator's ability to continue in business; that USSM exercised good faith by abating the hazard within the time provided; and that USSM exhibited ordinary negligence because the tanks were transported both unsecured and in the same compartment as the miners.

USSM argues on review that: (1) the evidence relevant to the cited condition does not establish an S&S violation under Cement Division, National Gypsum Co., 3 FMSHRC 822 (April 1981); (2) the judge applied the National Gypsum test and the penalty criteria to the abatement method rather than the cited violation; and (3) the valves on the tanks were adequately protected.

6/ To the extent that the judge's discussion of the merits of the S&S findings includes consideration of the method of abatement subsequently employed rather than the condition cited, we accept USSM's objections and reject those considerations. However, on the basis of the evidence produced by the Secretary and the relevant findings of the judge based on that evidence, the error is harmless. See note 7 and accompanying text infra.

On review the Secretary maintains that the judge's S&S finding is supported by substantial evidence and his penalty assessment is proper. The Secretary does not dispute the existence of MSHA's Pineville office policy, arguing instead that MSHA is not estopped from enforcing the standard because of a prior incorrect interpretation and that there is no evidence that MSHA ever approved a transport method as hazardous as that cited. The Secretary also argues that confusion over compliance responsibilities is relevant only to penalty assessment under King Knob Coal Co., Inc., supra. Further, in his view, USSM's failure to secure the tanks was properly considered by the judge because the failure increased both the gravity and negligence of the violation and undermined USSM's asserted compliance with local policy.

The Commission has held that a violation is properly designated S&S "if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." National Gypsum, supra at 825. In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission further explained:

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

See U. S. Steel Mining Co., Inc., Docket No. PENN 83-63 (August 28, 1984); U. S. Steel Mining Co., Inc., Docket No. PENN 83-39, slip op. at 2-3 (August 23, 1984).

In this case, USSM has conceded the violation; the issue is whether the violation was significant and substantial. The judge credited the testimony of Barnett and Cox, implicitly rejecting Burge's testimony that the valves on the tanks were protected adequately and that the cover on the compartment in which they were placed provided further protection. The judge found that miners were exposed to hazards which could be presented by an explosion of leaking acetylene gas or the creation of a projectile due to the leakage of oxygen. He also found a reasonable likelihood of injury if miners were struck by cylinders being tossed about in a collision or derailment. The judge specifically found it reasonable to expect these occurrences on USSM's extensive rail system, particularly noting Barnett's derailment experience. See note 4 supra. On the basis of the record evidence discussed above, we hold that substantial evidence supports the judge's findings (see note 6 supra) and his conclusion that the violation was significant and substantial under the test set forth in National Gypsum, supra, and its progeny.

The judge properly applied King Knob Coal Co., supra, in which the Commission held that although an incorrect interpretation of a regulatory requirement by an MSHA official does not have the force and effect of law and will not serve to negate liability for violative conduct, detrimental reliance on that interpretation is properly considered in mitigation of penalty. For this reason, we reject USSM's argument that MSHA's approval of its method of transport negates an S&S finding. We also hold that the judge's finding of ordinary negligence is supported by substantial evidence, and we affirm his penalty assessment of \$250 as consistent with the statutory penalty criteria. 7/

Citation #1066940

The cited standard, 30 C.F.R. § 75.1003, is a statutory provision that provides in pertinent part:

§ 75.1003 Insulation of trolley wires, trolley feeder wires and bare signal wires: guarding of trolley wires and trolley feeder wires.

[STATUTORY PROVISIONS]

Trolley wires, trolley feeder wires, and bare signal wires shall be insulated adequately where they pass through doors and stoppings, and where they cross other power wires and cables. Trolley wires and trolley feeder wires shall be guarded adequately:

- (a) At all points where men are required to work or pass regularly under the wires;
- (b) On both sides of all doors and stoppings;
- (c) At man-trip stations.

Barnett, Cox and Burge traveled to the B-Panel section of the underground mine and parked behind an 18-foot portal bus or mantrip that was located 40 feet outby the end of the track, under 5-foot-high, 250-volt trolley wire. Only the first 10 feet of the wire at the end of the track was guarded. 8/ Supplies that apparently had been unloaded on the prior shift were observed along both sides of the track for a distance of 20 to 25 feet outby the bus. It was assumed by the members of the inspection party that the bus had been exited at the end of the track under 10 feet of guarded wire, leaving 8 feet of the bus under unguarded wire. Barnett issued a citation that alleged, "[t]he trolley wire at the end of the supply track in the B-panel section where men and supplies are unloaded was not adequately guarded.

7/ The judge also stated that the MSHA Pineville office guidelines did not include permission to transport tanks in the same compartment as the miners. This conclusion is not relevant to the cited condition and is rejected. See note 6 supra. Nevertheless, because the judge's S&S finding and penalty assessment are supported on alternative grounds relevant to the condition cited, the error is harmless.

8/ USSM was engaged in retreat mining. The 10-foot section of guarding on the wire was apparently the portion that remained after the track was pulled back.



The center compartment of the portal bus was uncovered, the two end compartments were covered. When at the end of the track, the inby covered compartment and part of the open compartment would be under guarded wire. The open section has a capacity of 8 miners. Normally, however, only the operator and the foreman ride in that section. Supply cars have 2 1/2 feet of clearance below the wire; lower personnel carriers have 4 feet of clearance.

Both Barnett and Cox testified that miners exiting the open center compartment were in danger of contacting the energized wire should they rise before exiting the compartment. Barnett also stated that miners could lose their balance and fall backward onto the wire, becoming exposed to burn or electrocution hazards. Barnett stated that the location of the supplies he observed indicated they had been unloaded under unguarded wire, but he did not know whether the wire had been energized at the time the supplies were unloaded. He testified, however, that the citation would have been written regardless of the presence of supplies because miners had arrived and would be arriving at the mantrip station during the shift. In his view, the inadequate guarding should have been apparent when the area received a preshift examination and when the foreman arrived earlier with the crew. ✓

Burge testified that it was not hazardous for miners to exit vehicles in areas of unguarded wire because they exit in a direction away from the energized wire. He was not aware of any instances at the mine in which miners contacted a trolley wire. Burge also stated that a power cut-off switch located 160 feet outby the end of the track was used to de-energize the wire whenever supplies were unloaded or picked up for use on the working section during the shift. Burge's testimony differed from Barnett's regarding the specific location of the supplies, but he acknowledged that timbers were located 3 to 4 feet from the wire.

The judge found that miners would be exposed to the hazard of contacting unguarded wire if they exited a mantrip or jeep and became unbalanced, an event he considered reasonably likely to occur. 5 FMSHRC at 1493-4. He also found, based on a concession by Burge, that any miner who moved the vehicle out of the supply area to facilitate the loading or unloading of supplies would be entering and exiting the mantrip under energized, unguarded wire. 5 FMSHRC at 1491. With respect to USSM's claim that the wire would be de-energized before supplies were obtained from along the track, the judge found that the miner responsible for turning the power on and off would be exposed. Finally, the judge found that any persons arriving at the working section during the shift would be exposed, as was the inspection party, when they exited and returned to their vehicle. 5 FMSHRC at 1493. The judge concluded, ✓

[I]t was reasonably likely that the violation could have resulted in an injury of a reasonably serious nature. I find that the inspector properly considered the violation to be "significant and substantial" as that term has been defined by the Commission in the National Gypsum case, supra.

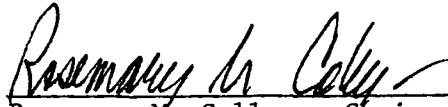
5 FMSHRC at 1494.

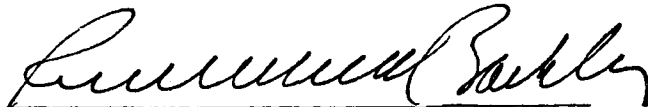
The judge found a high degree of negligence on USSM's part, concluding that the violation was readily observable and the section of wire guarding that remained should have been a reminder that extension of the guard was necessary. He also found the violation to be of serious gravity because of the potential for shock or electrocution. A penalty of \$750 was assessed.

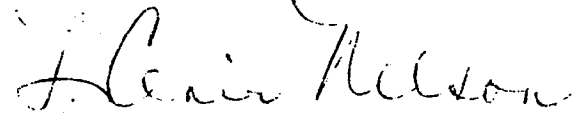
USSM argues on review that the judge improperly based his decision on hazards to miners going to the cut-off switch, a claim that USSM was denied an opportunity to defend against. The operator also argues that record evidence does not support the judge's finding that serious injury was reasonably likely as a result of the violation or his findings regarding negligence and gravity.

We conclude that substantial evidence supports the judge's S&S finding that the trolley wire violation at the mantrip station exposed miners exiting the portal bus or mantrip to the hazard of contacting the 250-volt energized line and sustaining serious injury. Notwithstanding the evidentiary dispute regarding the energized status of the wire when supplies were loaded and unloaded, the evidence clearly establishes that the wire was energized when miners exited the open compartment of the bus at the mantrip station in sufficient proximity to the wire to be exposed to burn or electrocution hazards. We note in this regard that the inspector specifically stated he would have written the citation even had he not observed the supplies along the track. The citation charged a violation at the end of the supply track where men and supplies are unloaded. This location is both a mantrip station and an area where miners are required to work and regularly pass under the wire within the meaning of the cited standard. USSM conceded that violation. It is only the S&S designation of the violation that is before us. Accordingly, we need not and do not decide whether USSM also violated the standard at the location of the cutoff switch or at the location where the inspection party parked its jeep. Furthermore, we reject USSM's argument that the judge's decision was based on the exposure of a miner going to the cut-off switch. Substantial evidence supports the judge's S&S findings for the violation as cited. Substantial evidence further supports the judge's findings of a high degree of negligence and serious gravity for the reasons he gave.

Accordingly, the judge's conclusion that citations #1066938 and #1066940 were significant and substantial within the meaning of section 104(d)(1) of the Mine Act, and his penalty assessments of \$250 and \$750, respectively, are affirmed. 9/

  
Rosemary M. Collyer, Chairman

  
Richard V. Backley, Commissioner

  
L. Clair Nelson, Commissioner

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

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ADMINISTRATIVE LAW JUDGE DECISIONS



# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

OCT 1 1984

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. WEST 83-83-M  
Petitioner : A.C. No. 24-01607-05501  
v. : Elk Creek Mine  
MONTANA CONTRACT MINING CO., :  
Respondent :

## DECISION

Appearances: James H. Barkley, Esq., and Margaret A. Miller, Esq.  
Office of the Solicitor, U.S. Department of Labor,  
Denver, Colorado,  
for Petitioner;  
Mrs. M.J. Good, Montana Contract Mining Company,  
Greenough, Montana, pro se.

Before: Judge Morris

This case, heard under the provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (the "Act"), arose from an inspection of the Elk Creek Mine. The Secretary of Labor seeks to impose civil penalties because respondent allegedly violated safety regulations promulgated under the Act.

Respondent denies any violations occurred.

After notice to the parties, a hearing on the merits was held in Missoula, Montana on April 18, 1984.

The parties waived their right to file post-trial briefs.

## Issues

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

### Citation 578245

This citation alleges a violation of Title 30, Code of Federal Regulations, Section 57.11-50, which provides:

#### Escapeways - Underground Only

57.11-50 Mandatory. Every mine shall have two or more separate, properly maintained escapeways to the surface from the lowest levels which are so positioned that damage to one shall not lessen the effectiveness of the others. A method of refuge shall be provided while a second opening to the surface is being developed. A second escapeway is recommended, but not required, during the exploration or development of an ore body.

In addition to separate escapeways, a method of refuge shall be provided for every employee who cannot reach the surface from his working place through at least two separate escapeways within a time limit of one hour when using the normal exit method. These refuges must be positioned so that the employee can reach one of them within 30 minutes from the time he leaves his work place.

#### Summary of the Evidence

On February 22, 1982, MSHA Inspector Eric Shanholtz inspected respondent's underground barite mine. The inspection failed to locate a secondary escapeway. Miners entered and left the mine through the main portal (Transcript at pages 27 and 30).

The hazard arising from the failure to have a secondary escapeway focuses on the fact that miners can remain trapped in the mine if they cannot use the main escapeway. An unplanned explosion or fire could block the main exit. Powder was stored between the miners and the main portal (Tr. 33, 34).

The condition was abated by installing an escapeway (Tr. 32).

An admission from respondent in the file indicated a lack of funds prevented the installation of the escapeway. Further, the failure to provide it was not a deliberate act (Tr. 31).

Respondent presented no evidence as to this citation.

#### Discussion

The facts establish a violation of the regulation. There were not two escapeways. As the inspector indicated miners could easily have been trapped in this mine.

The citation should be affirmed.



#### Citation 578246

This citation alleges a violation of 30 C.F.R. 57.3-20 which provides:

#### Underground Only

57.3-20 Mandatory. Ground support shall be used if the operating experience of the mine, or any particular area of the mine, indicates that it is required. If it is required, support, including timbering, rock bolting, or other methods shall be consistent with the nature of the ground and the mining method used.

#### Summary of the Evidence

Federal Inspector Eric Shanholtz issued this citation on April 12, 1982. On that date he tested the ground. It sounded drummie and hollow (Tr. 35).

Respondent's admission, a letter in the file, confirms that the back was drummie and hollow. But respondent further states that no one was working in the area (Tr. 34). However, the inspector testified that miners were actively mining as they passed through the area at the time of his inspection. Several slab rounds had damaged the integrity of the shaft. In the inspector's opinion a serious roof fall would occur if this condition remained unabated (Tr. 35-36). If a roof fall occurred death or a serious injury could result (Tr. 36).

#### Discussion

I credit MSHA's evidence concerning this violation. The inspector has a background in mining and is experienced in this area. He was present and observed two miners actively working in close proximity to the violative condition. Cf. White Pine Copper Division Copper Range Company, 5 FMSHRC 825 (1983).

Respondent's witness Mrs. M.J. Good is not shown to have been present at the time of the inspection. For this reason I am not persuaded by her testimony.

The citation should be affirmed.

#### Citation 578252

This citation alleges a violation of 30 C.F.R. § 57.6-168, which provides:

57.6-168 Mandatory. Misfires shall be reported to the proper supervisor and shall be disposed of safely before any other work is performed in that blasting area.

### Summary of the Evidence

Inspector Shanholtz issued the above citation at Elk Creek Mine on May 18, 1982 (Tr. 36, 37; Exhibit P1). The violative condition consisted of approximately 80 misfires located in the secondary escapeway. The escapeway had been completed as a result of a previous citation issued to respondent. The misfires were 10 to 15 years old. With the passage of time powder becomes unstable. As it decomposes the nitro separates. These misfires were unstable. An explosion with resultant serious injury could occur (Tr. 40, 41, 47, 48; Exhibit P2).

The inspector originally set an abatement date of June 16, 1982. When he returned he issued a 104(b) order because the defect had not been corrected; further, respondent had made no effort to remove the misfires (Tr. 38-40).

Respondent's representative, Mrs. M.J. Good, indicated the miners felt they were asking for trouble if they attempted to correct this condition. The company, at MSHA's insistence, put on a work shift to take care of the problem (Tr. 44).

### Discussion

The factual setting here establishes a violation of the regulation. The unstable condition of the powder has presented a serious hazard for many years.

Respondent's evidence does not present a defense. While the miners may have felt unsafe in attempting to correct the misfires they could have sought MSHA's expert guidance on how to proceed in abating this condition.

The citation should be affirmed.

### Citation 578255

This citation alleges a violation of 30 C.F.R. § 57.9-54, which provides:

57.9-54 Mandatory. Berms, bumper blocks, safety hooks, or similar means shall be provided to prevent overtravel and overturning at dumping locations.

### Summary of the Evidence

Inspector Shanholtz issued this citation when he observed two workers dumping at a waste site from a young buggy <sup>1</sup>/<sub>1</sub> and a loader. The vehicles came to the edge of the 20 foot high,

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<sup>1</sup>/<sub>1</sub> A young buggy is a three wheel that can be unstable (Tr. 47).

fairly steep, bank (Tr. 44-47). There were no berms to prevent overtravel of the vehicles (Tr. 44, 45).

The hazard from this condition is that the vehicle can go over the edge. The operator of the vehicle, due to the lack of a berm, does not know when he is on the edge (Tr. 46).

Respondent's evidence indicated the company had eliminated this problem. In addition, some of respondent's evidence dealt with the differences between the ore dump and the waste dump (Tr. 50-52).

#### Discussion

The evidence establishes a violation of the regulation. The waste dump lacked a berm to prevent overtravel by the dumping vehicles.

Respondent's evidence does not raise a defense to the violation.

The citation should be affirmed.

#### CIVIL PENALTIES

The criteria for assessing civil penalties are contained in 30 U.S.C. 820(i).

In connection with these factors, on this consolidated record I find the following facts: In the two years before December 29, 1982, respondent was assessed six violations (Exhibit P1 in WEST 83-55-M).

The proposed penalties do not appear inappropriate in relation to the size of the operator. The operator's negligence was high inasmuch as all of the violative conditions were readily apparent and could have been corrected. The penalties proposed should not affect the operator's ability to continue in business. The record reflects the company has been shut down since March 15, 1983. But it is further indicated the company is waiting for market conditions to improve (Tr. 25, 26). On the record the gravity of each violation is high. A fatality could result from each violative condition.

The final statutory criteria is respondent's demonstrated good faith in attempting to achieve rapid compliance after being notified of the violation. On this issue Inspector Shanholtz indicated that respondent lacked direction, was shoddy, unexperienced and engaged in poor mining practices (Tr. 48). On the other hand Mrs. Good testified that the company had always

fully cooperated with MSHA. In addition, three of her four employees had considerable mining experience. Further, the company relied on such experienced people (Tr. 49, 54, 55).

On this issue I credit MSHA's evidence. In the event respondent's employees were experienced on this record I can only conclude they failed to use their expertise.

After carefully considering all of the statutory criteria I am unwilling to disturb the penalties proposed by the Secretary.

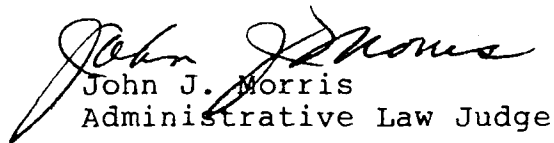
Accordingly, I enter the following:

ORDER

1. The following citations and proposed penalties are AFFIRMED,

<u>Citation No.</u>	<u>Penalty</u>
578245	\$ 20.00
578246	74.00
578252	370.00
578255	68.00

2. Respondent is ordered to pay to the Secretary the sum of \$532 within 40 days of the date of this decision.

  
John J. Morris  
Administrative Law Judge

Distribution:

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

Mrs. M.J. Good, Montana Contract Mining Company, P.O. Box 351, Greenough, Montana 59836 (Certified Mail)

/blc

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

001 1 1984

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 83-55-M
Petitioner	:	A.C. No. 24-01607-05503
	:	
v.	:	Elk Creek Mine
	:	
MONTANA CONTRACT MINING CO.,	:	
Respondent	:	

## DECISION

Appearances: James H. Barkley, Esq., and Margaret A. Miller, Esq.  
Office of the Solicitor, U.S. Department of Labor,  
Denver, Colorado,  
for Petitioner;  
Mrs. M.J. Good, Montana Contract Mining Company,  
Greenough, Montana, pro se.

Before: Judge Morris

This case, heard under the provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (the "Act"), arose from an inspection of the Elk Creek Mine. The Secretary of Labor seeks to impose civil penalties because respondent allegedly violated safety regulations promulgated under the Act.

Respondent denies it violated the regulations.

After notice to the parties, a hearing on the merits was held in Missoula, Montana on April 18, 1984.

The parties waived their right to file post-trial briefs.

## Issues

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

### Citations

Citation 2081208 alleges a violation of Title 30 Code of Federal Regulations, Section 57.4-24 which provides as follows:

57.4-24 Mandatory. Fire extinguishers and fire suppression devices shall be:

- (a) Of the appropriate type for the particular fire hazard involved.
- (b) Adequate in number and size for the particular fire hazard involved.
- (c) Replaced with a fully charged extinguisher or device, or recharged immediately, after any discharge is made from the extinguisher or device.
- (d) Inspected, tested, and maintained at regular intervals according to the manufacturer's recommendations.
- (e) Approved by the Underwriter's Laboratories, Inc., or other competent testing agency acceptable to the Mining Enforcement and Safety Administration.

Citation 2081209 alleges a violation of 30 C.F.R. § 57.6-1 which provides:

#### General-Surface and Underground

57.6-1 Mandatory. Detonators and explosives other than blasting agents shall be stored in magazines.

#### Summary of the Evidence

MSHA Inspector Seibert Smith, a person experienced in mining, inspected respondent's underground barite mine for two days commencing December 28, 1982 (Tr. 7, 9).

Four employees of respondent and two contract core drillers were at the mine site (Tr. 9, 10). They were drilling core samples (Tr. 10).

The inspection party went into the main generator area. A 225 volt DELCO generator was providing electricity. Within six feet of the generator were diesel fuel, motor oil, 7 cases of 50 pound boxes of DuPONT powder and one 50 pound bag of a Prell type blasting agent (Tr. 11-13, 23).

The DuPONT explosives were not a blasting agent. They were high explosives. They should have been stored in a proper magazine (Tr. 13, 14). There was, in fact, an ATF <sup>1/</sup> approved magazine outside the mine, some 50 feet from the portal (Tr. 13).

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<sup>1/</sup> Alcohol, Tobacco and Firearms, an agency of the federal government (Tr. 22).

A powder cache of 350 pounds is significant. No explosives were being used on the day of the inspection. But in this small mine one case of powder would be sufficient for a day's blasting (Tr. 23).

Garth Good told the inspector that the explosives were brought in because they felt they would freeze if they were left outside (Tr. 16). The company was aware of the condition but the core drillers were surprised (Tr. 17-21).

There was no fire extinguisher in the mine (Tr. 12).

In the inspector's opinion a fire extinguisher should be available. A fire could be caused by a spark from the generator exploding the diesel fuel (Tr. 12). The inspector further indicated that if an explosion occurred the concussion could kill the miners in the shaft (Tr. 14, 16). If the condition remained unabated it was reasonably likely that an explosion could occur (Tr. 15).

The violation was abated when four fire extinguishers were purchased and installed. The fuel and explosives were carried by hand out of the mine (Tr. 20, 24, 25).

Respondent offered no evidence to rebut the facts of the violation.

#### Discussion

The evidence establishes that powder was stored outside of a magazine; further, there were no fire extinguishers in the underground area where the generator was located.

The uncontroverted evidence establishes a violation of both regulations and the citations should be affirmed.

#### CIVIL PENALTIES

The criteria for assessing civil penalties are contained in 30 U.S.C. 820(i).

In connection with these factors, on this consolidated record, I find the following facts: In the two years before December 29, 1982, respondent was assessed six violations (Exhibit P1 in WEST 83-55-M).

The proposed penalties do not appear inappropriate in relation to the size of the operator. The operator's negligence was high inasmuch as all of the violative conditions were readily apparent and could have been corrected. The penalties proposed should not affect the operator's ability to continue in business. The record reflects the company has been shut down since March 15, 1983. But it is further indicated the company is waiting for market conditions to improve (Tr. 25, 26).

On the record the gravity of these violations is exceedingly high. A fire, with no extinguisher to inhibit it, could readily ignite the explosives. There was enough powder on hand to create a minor Mount St. Helens.

To respondent's credit is the fact that the company has always fully cooperated with MSHA.

The violations here are of a basic and serious nature. I am unwilling to disturb the Secretary's proposed penalties.

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

ORDER

1. Citation 2081208 and the proposed penalty of \$20.00 are affirmed.
2. Citation 2081209 and the proposed penalty of \$195.00 are affirmed.
3. Respondent is ordered to pay to the Secretary of Labor the sum of \$215.00 within 40 days of the date of this decision.

  
John J. Morris  
Administrative Law Judge

Distribution:

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

Mrs. M.J. Good, Montana Contract Mining, P.O. Box 351, Greenough, Montana 59836 (Certified Mail)

/blc



# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

OCT 1 1984

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 84-10
Petitioner	:	A.C. No. 01-00851-03534
	:	
v.	:	Oak Grove Mine
	:	
U. S. STEEL MINING CO., INC.,	:	
Respondent	:	

## DECISION

Appearances: George D. Palmer, Esq., Office of the Solicitor,  
U.S. Department of Labor, Birmingham, Alabama,  
for Petitioner;  
Louise Q. Symons, Esq., U.S. Steel Mining Company,  
Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Koutras

## Statement of the Case

This proceeding concerns a citation issued by an MSHA inspector pursuant to § 104(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), charging the respondent with a violation of § 103(f) of the Act for failing to compensate an authorized representative of miners for the time spent accompanying the inspector during his visit to the mine. The citation no. 2192163, was issued on July 18, 1983, by MSHA Inspector Theron E. Walker, and the "condition or practice" cited is described as follows:

Steve Marable, an employee of the Oak Grove Mine and an authorized representative of the miners, suffered loss of pay during the period he participated in an accident investigation (an ignition of a mixture of methane gas and air). Steve Marable was accompanying Theron Walker, who was conducting the investigation and is an authorized representative of the secretary on day shift, June 20, 1983.

The investigation was conducted on Mr. Marable's regularly scheduled workshift and no other authorized representative of the miners received pay for the period they participated in the accident investigation.

Respondent filed a timely answer contesting the citation, and a hearing was held in Birmingham, Alabama. The parties filed posthearing arguments, and they 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, 30 U.S.C. § 801 et seq.
2. Sections 110(i), 103(a), and 103(f) of the Act.
3. Commission Rules, 29 C.F.R. § 2700.1 et seq.

#### Issues

The question presented is whether or not the union walk-around representative was entitled to pay for the time spent accompanying the MSHA inspector during his visit to the mine on June 20, 1983.

#### Stipulations

The parties stipulated to the following:

1. The Operator is the owner and operator of the subject mine.
2. The Operator and the mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.
3. The Administrative Law Judge has jurisdiction in this case.
4. The MSHA Inspector who issued the subject citation was a duly authorized representative of the Secretary.
5. A true and correct copy of the subject citation was properly served upon the Operator.
6. The copy of the subject citation and determination of violation at issue are authentic and may be admitted into evidence for purpose of establishing its issuance, but not for the purpose of establishing the truthfulness or relevance of any statements asserted therein.
7. Imposition of a penalty in this case will not affect the Operator's ability to do business.

8. The alleged violation was abated in good faith.
9. The Operator's history of prior violations is average.
10. The Operator's size is large.
11. The MSHA Inspectors and the witnesses who will testify in behalf of the Operator are accepted, generally, as experts in mine health and safety.

#### Discussion

Section 103(f), commonly referred to as "the walkaround right," provides as follows:

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

The facts in this case are not in dispute. A methane face ignition occurred at the mine during the day shift on Friday, June 17, 1983. The incident was promptly reported to MSHA by mine management. MSHA Inspector T. J. Ingram issued a verbal § 103(k) withdrawal order for purposes of preserving the scene of the ignition pending an investigation by MSHA. Inspector Ingram subsequently reduced his verbal order to writing (Exhibit P-20).

On Monday, June 20, 1983, MSHA Inspector Theron E. Walker, was instructed by his supervisor to go to the mine to investigate the reported ignition, and Inspector Walker and other MSHA inspectors, along with company and union officials, conducted an investigation, and the results were reported in MSHA's official report of investigation (Exhibit P-2).

Inspector Walker had previously inspected the mine as part of his regular quarterly inspection, which had not been completed at the time of the ignition in question. However, on Monday, June 20, 1983, his principal mission was to conduct an investigation concerning the ignition, and he did not continue his regular inspection of the mine on that day.

Mr. Steve Marable, a miner employed at the mine, was the duly authorized and recognized UMWA walkaround representative, and he had in the past, accompanied Inspector Walker during his regular inspections of the mine. During the special face ignition investigation conducted on June 20, 1983, Mr. Marable participated in the investigation as the duly designated UMWA representative, but he was not compensated and lost a day's pay. Mine management informed him that he would not be paid, and he so informed Inspector Walker. Respondent's counsel conceded that Mr. Marable was not paid, and counsel further conceded that it was mine management's policy to pay UMWA walkaround representatives only for accompanying MSHA inspections on regular enforcement inspections of the mine, and that no payment was authorized for accident investigations of the kind conducted in this case.

Upon completion of the investigation on June 20, 1983, the § 103(k) order was terminated. MSHA's investigation did not result in the issuance of any notices or orders for any violations of any mandatory safety or health standards, and MSHA's findings concluded that the investigation did not reveal any violations.

Inspector Walker testified that he waited until July 18, 1983, to issue his citation because it took that long for Mr. Marable to produce his payroll records to document the fact that he was not paid for June 20, 1983. Mr. Walker confirmed that he terminated the citation on August 11, 1983, after Mr. Marable documented the fact that he was completely compensated. Respondent's counsel confirmed all of these facts.

#### Petitioner's Arguments

In support of its case, the petitioner states that the Third Circuit has recently joined the District of Columbia

Circuit in holding that compensation of a miner representative is required for spot inspections as well as regular inspections. Consolidation Coal Company v. FMSHRC and Donovan, \_\_\_ F.2d \_\_\_ (3rd Cir. 1984). In response to the respondent's asserted narrow reading of the law, petitioner cites the following from page 6, slip copy of the Court's decision:

The narrow reading urged by the company is inconsistent with the declared intent of Congress to promote safety in the mines and encourage miner participation in that effort.

Petitioner also cites my prior decision in Secretary of Labor v. Monterey Coal Company, 5 FMSHRC 1223 (1983), where I held that a miner's representative accompanying an inspector during a roof control "technical investigation" was entitled to be compensated for the time spent with the inspector. \*/ Petitioner argues that the Monterey decision is consistent with the Interpretative Bulletin published by MSHA on April 25, 1978 (Exhibit P-1), and that when read together, establishes that the respondent has violated § 103(f) of the Act. Petitioner concludes that the "inspection" in question in this case was made for several of the purposes set forth in § 103(a), and that Inspector Walker was obviously present at the mine site to physically observe or monitor safety and health conditions. Under these circumstances, petitioner concludes further that Mr. Walker's physical inspection was part of direct safety and health enforcement activity.

#### Respondent's Arguments

Respondent argues that walkaround pay is not required in cases where a miner's representative accompanies an MSHA inspector during an investigation. Respondent maintains that such pay is required pursuant to § 103(f), only when the inspector is at the mine to perform an inspection function as a duly authorized representative of the Secretary of Labor. In support of its argument, respondent asserts that inspections made pursuant to § 103(f) of the act seems to be limited to physical inspections of the mine and pre- or post-inspection conferences in connection with the inspection held at the mine. Respondent points out that while § 103(f) refers to § 103(a), it does not seem to incorporate all of § 103(a) for § 103(a) refers to both inspections and investigations. Respondent concludes that Congress must have intended two separate activities by these two words or they would have used only one as they did in § 103(f), and it cites Webster's New International Dictionary, 2d Ed., which indicates that "inspect" means "to look upon, to view clearly and critically, especially so as to ascertain quality or state, to detect errors, etc.," while "investigate" means "to follow up by patient inquiry or observation; to inquire and examine into with systemic

\*/ Affirmed by the 7th Circuit on September 14, 1984, Monterey Coal Co. v. FMSHRC, \_\_\_ F.2d \_\_\_ (7th Cir.).

attention to detail and relationship." Respondent maintains that this seems purposefully consistent with the theory that Congress intended that miners be paid when they accompany an MSHA inspector who is engaged in an enforcement activity, i.e., a physical inspection of the premises to determine if the operator has met the standards of compliance required by the mandatory health and safety standards. Respondent concludes that one must presume Congress meant what it said when it left the word "investigation" out of § 103(f), i.e., there is no requirement that a miner be paid to accompany an inspector who is examining the underlying causes of an event.

Respondent recognizes that a methane ignition can occur even when the mine is fully in compliance with the federal regulations (Tr. 49). Conceding the fact that the purpose of a methane ignition investigation is to determine what can be done in the future to prevent a reoccurrence (Tr. 17), and that an inspector has to issue a citation everytime, he sees a violation (Tr. 27), respondent maintains that this does not change the purpose for which he entered the mine.

In response to the petitioner's reliance on Monterey Coal Company, supra, respondent maintains that the inspector there was investigating whether the operator was in compliance with his roof control plan. Respondent points out that since a roof control plan becomes a mandatory safety standard at the mine where it is adopted, the purpose of the investigation was to determine compliance with a mandatory standard. Respondent argues that the instant case is easily distinguishable in that the inspector admits that his purpose in coming to the mine was not to inspect the mine to see if it was in compliance with mandatory safety standards, but to investigate why a methane ignition occurred and to determine what could be done to prevent the occurrence of a second ignition. Respondent concludes that the facts in this case are clear that the visit to the mine on June 20, 1963 was not an enforcement activity (Tr. 17), the inspector did not arrive at any conclusions as to how another ignition could be avoided, and in fact, the mine had another ignition the next shift (Tr. 62).

#### Findings and Conclusions

The arguments made by the respondent in this case are essentially the same arguments made by Monterey Coal Company. The crux of Monterey's arguments was that a roof control technical investigation conducted by an MSHA inspector was not compensable under § 103(f) because the terms "inspections" and "investigations" have different meanings and were never

used interchangeably in the Act. Monterey maintained that the fact that Congress included both terms within the coverage of § 103(a), but used only the term "inspection" in § 103(f), indicated that Congress clearly intended that compensation only be paid for inspections and not for investigations.

Inspector Walker confirmed that the § 103(k) order which was issued in this case contained an "AFC" designation code, and that it is not the same as a § 103 spot inspection (Tr. 18, 22). He indicated that in a methane ignition investigation, witnesses are interviewed in an attempt to determine what can be done to prevent further ignitions, whereas in a spot inspection, he is looking for violations of particular standards (Tr. 22-23). MSHA's official Report of Investigation (Exhibit P-2), confirms that Mr. Walker was conducting an AFC, or "Noninjury Methane Gas Ignition" investigation.

Inspector Walker confirmed that Mr. Marable is the regularly assigned Union walkaround representative who routinely accompanies him during his regular inspection of the mine. Mr. Walker also confirmed that the mine is on an MSHA "103(i) spot inspection cycle" because it is more gassy than some mines (Tr. 12, 14-15), and he testified that during his investigation at the scene of the ignition on June 20, 1983, he checked out the equipment present, the ventilation, roof conditions, equipment permissibility, and made gas tests (Tr. 13). He confirmed that this is essentially what is done during his regular AAA inspections (Tr. 13).

Section 103(a) of the Act authorizes the Secretary to conduct inspections or investigations to determine the causes of accidents. Any time there is a mine accident or disaster, MSHA's usual practice is to issue "control orders" to either withdraw miners from the scene, preserve evidence, or both. Once this is done, accident inspection teams consisting of state, federal, union, and company personnel enter the mine for the purpose of conducting an investigation. In this context, I believe that an MSHA inspector is there to investigate and to inspect. One function cannot be separated from the other, and in both instances, an inspector is performing an enforcement function, and it is unrealistic to suggest that he is there for any other purpose.

While it is true that Mr. Walker's initial investigative mission on June 20, 1983, focused on finding the cause of the methane ignition so as to prevent a second such incident, it is clear that had he found any evidence that a violation of a mandatory safety standard was a contributing factor, he

was authorized to issue a citation. It is also clear that during his investigation of the methane ignition, he conducted a physical inspection of the area, including the equipment. Given these circumstances, I cannot distinguish this case from the Monterey case. While it is true that in Monterey, an investigation as to whether or not the mine operator was in compliance with its roof control plan was closer to a "spot inspection," in both instances, I believe that the inspector was performing an enforcement function.

In the case at hand, Inspector Walker confirmed that after terminating the § 103(k) Order at 9:50 a.m., he left the underground portion of the mine and spent the rest of his time on the surface doing "normal paperwork" while waiting for the second shift to come to work. The second shift reported in at approximately 2:00 p.m. and were then available for interview with respect to the methane ignition (Tr. 23-26).

While I believe that a Union representative must be compensated for the productive time spent walking around with an MSHA inspector, I do not believe that an operator is obligated to compensate the representative for "waiting around" with an inspector while he catches up on unrelated paperwork while awaiting the arrival of mine personnel to interview.

After careful consideration of all of the testimony and evidence adduced in this case, including the arguments made by the parties in support of their positions, I conclude and find that on June 20, 1983, Inspector Walker's visit to the mine in question constituted an inspection and investigation of the mine much akin to a spot inspection, and that the walkaround representative was entitled to be compensated for the time spent accompanying the inspector during the actual performance of duties connected with his investigation and inspection.

In view of the foregoing findings and conclusions, I conclude that the petitioner here has established a violation of § 103(f), and the citation IS AFFIRMED.

#### Negligence

The parties have advanced no arguments concerning negligence. However, I conclude that the respondent's refusal to pay the walkaround representative was prompted by its interpretation of the scope of § 103(f), and that respondent's intent was to test the law. Given these facts, I cannot conclude that there was any negligence in this case.



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

The parties have stipulated that the respondent is a large mine operator and that the proposed civil penalty will not adversely affect its ability to remain in business. I adopt these stipulations as my findings and conclusions.

History of Prior Violations

The parties have stipulated that the respondent has an average history of prior violations, and I adopt this as my finding on this issue.

Gravity

The parties have advanced no arguments concerning the gravity of the violation, and I conclude that it was nonserious.

Good Faith Abatement

The record reflects that the respondent has paid the walkaround representative, and the parties have stipulated that the violation was abated in good faith, I adopt this as my finding on this issue.

Penalty Assessment and Order

MSHA's initial proposed civil penalty assessment of \$20 for the violation in question seems reasonable in the circumstances and I accept it. Respondent IS ORDERED to pay the \$20 civil penalty assessment within thirty (30) days of the date of this decision.

  
George D. Koutras  
Administrative Law Judge

Distribution:

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(Certified Mail)

Louise Q. Symons, Esq., U.S. Steel Mining Co., Inc., 600 Grant St., Rm. 1580, Pittsburgh, PA 15230 (Certified Mail)

/slk

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

OCT 1 1984

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 84-93
Petitioner	:	A.C. No. 36-00967-03564
v.	:	
	:	Clyde Mine
BCNR MINING CORPORATION,	:	
Respondent	:	

## DECISION

Appearances: Howard K. Agran, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner;  
B. K. Taoras, Esq., Kitt Energy Corporation, Meadow Lands, Pennsylvania, for Respondent.

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to § 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq., the "Act" for two violations of the regulatory standard at 30 C.F.R. § 75.200. The general issues before me are whether the BCNR Mining Corporation (BCNR) has violated the regulations as alleged, and if so, whether those violations were of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, i.e. whether the violations were "significant and substantial." If violations are found, it will also be necessary to determine the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act.

The parties have submitted the case on a stipulation of facts and have agreed that the general issues may be resolved upon these facts and the determination of a specific legal issue, i.e. whether Safety Precaution No. 20 of Respondent's approved roof control plan applies to certain cross bars or beams that had been installed as roof support prior to the incorporation of Safety Precaution No. 20 into the approved roof control plan. It is stipulated that the cross bars or beams cited had in fact been installed before the incorporation of Safety Precaution No. 20 into the approved roof control plan. Safety Precaution No. 20 reads as follows:

"On haulageways, all crossbars or beams shall be installed with some means of support that will prevent the beam or crossbar from falling in the event the supporting legs are accidentally dislodged."

The facts as stipulated by the parties are as follows:

I. Factual Background

On November 18, 1983 MSHA Inspector Thomas H. Devault, while making an inspection of the Clyde Mine, noticed approximately 50 steel beams between the 16 Flat overcast and the upright pump 200 feet inby the overcast which were not secured from falling in the event support legs to the beams would be dislodged. As a result, he issued Citation 2105238 at 8:35 a.m. on November 18, 1983 to the Clyde Mine.

On December 2, 1983, while on an inspection checking the abatement of the citation which had been issued on November 18, 1983, Inspector Devault issued a second citation as the result of his observing approximately 30 steel beams located at a point starting 500 feet inby the pump and continuing inby for a distance of 300 feet which were not secured from falling in the event that support legs would be dislodged. Thus, Citation 2105239 was issued at 11:15 a.m. on December 2, 1983.

The said citations were issued pursuant to Section 104(a) of the Act for "significant and substantial" violations of 30 C.F.R. § 75.200, for violation of safety precaution #20 of the Approved Roof Control Plan which states as follows:

"On haulageways, all crossbars or beams shall be installed with some means of support that will prevent the beam or crossbar from falling in the event the supporting legs are accidentally dislodged."

A copy of the roof control plan dated September 13, 1982 is attached hereto, made a part hereof and marked Exhibit "A".

Citation 2105238 was terminated on December 2, 1983 after the mine inspector observed that wire ropes had been installed as straps to provide additional support to the cited steel beams. Citation 2105239 was

terminated on January 19, 1984 when a mine inspector observed that all cited steel beams had been adequately secured and prevented from falling in the event that their supporting legs were knocked out.

Safety precaution #20 was adopted by Approved Roof Control Plan on October 7, 1976. Prior to that date, the safety protection afforded by the said precaution was afforded only by Safeguard 1 GFM which was issued to the Clyde Mine on August 14, 1973. The said safeguard provides as follows:

"Numerous crossbars, steel rails and I beams supported by posts or cribs which could be dislodged in the event of a derailment of a trolley locomotive or a trip of mine cars were observed along the track haulageways of this mine. Cabs or other suitable means of protecting the operators of all trolley locomotives from falling material in the event of a derailment shall be provided at this mine."

On December 16, 1973, the Mine Operator implemented a policy of abating the conditions cited in the said Safeguard by installing roof straps to prevent the "crossbars, steel beams and I beams" from falling. This method of abatement was approved by MSHA as a "suitable means of protecting . . . operators" as required by the Safeguard.

The haulageways requiring strapping extended approximately 12 miles. Following issuance of the safeguard and the Operator's initiation [sic] of abatement efforts in December 1973, citations alleging violations of the Safeguard were extended and/or modified about 100 times as strapping operations continued.

However, on December 15, 1982 a Section 104(b) Order was issued to the Mine for its alleged failure to continue the strapping operation in a timely fashion. That Order was contested and is presently the subject of a notice of contest and penalty contest case under Docket Nos. Penn 83-56-R and Penn 83-139 before Judge William Fauver. That Order was terminated on April 19, 1983.

Thereafter, three § 104(a) citations were issued to the Clyde Mine alleging violation of Safety Precaution #20 of the Approved Roof Control Plan. Those cita-

tions are: Citation 2104665 issued on April 21, 1983, Citation 2104668 issued on May 2, 1983 and Citation 2104672 issued on May 11, 1983. Following their issuance, the mine sat idle for a period of months before Citations 2105238 and 2105239 were issued.

Additional facts concerning the conditions alleged as violations are as follows:

The entry in which the beams are located contains the track haulage road. The entry varies from approximately 16 to 20 feet wide. Men, equipment, and supplies are hauled through this area by means of an electric trolley haulage system. The trolley wire is located on the right side of the entry (looking inby) and is approximately 2-3 feet from the rib. Approximately 3 feet of clearance is provided between the track and the rib on the tight side and about 4-5 feet on the wide side. The height of the entry from floor to bottom of beams is approximately 6 feet. The track is generally the same height as the mine floor.

The beams are lengths of steel track set against the roof crosswise to the direction of the entry. Wooden posts are set under the ends of the beams to hold the beams and the roof above them. The beams are approximately 15-20 feet long and are spaced approximately 5 feet apart.

The trolley locomotives and trip cars which move on the tracks of the track haulage derail from time to time. When they do, they can strike (and have struck) the wooden posts supporting the overhead beams causing the overhead beams to fall, posing a serious hazard to locomotive operators and any other miners in the vicinity.

When the beams were originally installed along the roof of the track haulage entry, some of them were supported by being set on a support system fastened into the rib near the roof. However, over time, due to ordinary weathering, the coal rib and roof suffered sloughage and fell making the original support system inadequate. Wooden posts (legs) were then set from the floor to support the steel beams.

This process occurred over a period of many years. The haulage entry was initially drawn (mined) approximately 40 years ago and the track haulage was installed

shortly thereafter. The beams were installed over a course of years as roof conditions along the haulage changed. By 1970, the original support for the beams had been replaced by the wooden legs.

## II. Facts with Respect to the Size of the Operator and History of Prior Violations

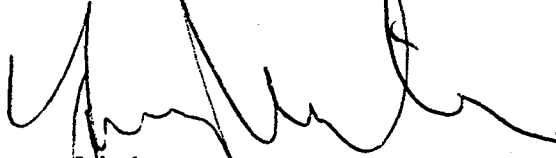
Respondent, BCNR Mining Corporation and its Clyde Mine is an Operator which as of March 21, 1984, was producing 196,923 production tons of coal annually.

During the two year period preceding issuance of Citation 2105238, 678 violations were issued to the Clyde Mine. During the two year period preceding issuance of Citation 2105239, 683 violations were issued to the Clyde Mine.

It may be presumed, based upon the legal issue presented by the parties that the Respondent's position is that the roof control plan approved on October 7, 1976, applies only prospectively in the sense that pre-existing conditions, even though in violation of the plan, are exempt from enforcement action under the plan. Respondent does not, however, cite any legal impediment to the enforcement action for conditions which continued to exist after the effective date of that plan. The violations cited were alleged to have occurred well after the effective date of the roof control plan. I am indeed baffled by Respondent's contention, for even if the roof control plan had incorporated a criminal violation the enforcement action herein was directed to conditions existing after the effective date of the plan and therefore would not have been barred by the Constitutional provisions against ex post facto laws. Accordingly, I reject the Respondent's unsupported argument and affirm the "significant and substantial" violations cited herein. Considering the stipulated facts in light of the criteria under Section 110(i) of the Act, I find that the proposed penalties of \$126 for each citation are appropriate.

ORDER

Citation Nos. 2105238 and 2105239 are affirmed. The BCNR Mining Corporation is hereby ordered to pay civil penalties of \$252 within 30 days of the date of this decision.



Gary Mellick  
Assistant Chief Administrative Law Judge

Distribution:

Howard K. Agran, Esq., Office of the Solicitor, U.S. Department of Labor, 14480 Gateway Building, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

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/nw

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUL 1 1984

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No: CENT 84-15-M
Petitioner	:	A.C. Mo. 41-01007-05503
	:	
v.	:	Corpus Christi Mill
	:	
	:	
N.L. BAROID-DIV/NL	:	
INDUSTRIES, INC.,	:	
Respondent	:	

## DECISION

Appearances: Jack F. Ostrander, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for the Petitioner;  
J.D. Fontenot, Safety and Health Manager, N.L. Baroid Division, NL Industries, Inc., Houston, Texas, 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), seeking civil penalty assessments in the amount of \$80 for four alleged violations of certain mandatory safety standards found in Part 55, Title 30, Code of Federal Regulations.

The respondent filed a timely answer and contest, and pursuant to notice, a hearing was held in Corpus Christi, Texas, on July 12, 1984. The parties waived the filing of post-hearing briefs. However, I have considered their oral arguments made on the record during the course of the hearing.

## Issues

The principal issues presented in this proceeding are (1) whether respondent has violated the provisions of the



### Discussion

All of the citations issued by Inspector White were section 104(a), non "S&S" violations, and they are as follows:

Citation No. 2232152, issued August 16, 1983, citing a violation of 30 CFR, 55.9-87, and the condition or practice cited states:

The hyster forklift was provided with a backup alarm. The alarm was not in working order.

Citation No. 2232254, issued August 16, 1983, citing a violation of 30 CFR 55.9-1, and the condition or practice states:

Records were not made available when requested as to the preshift inspection on the mobile equipment.

Citation No. 2232153, issued August 17, 1983, citing a violation of 30 CFR 55.14-1, and the condition or practice cited states:

The pinch point on the head pulley of the short belt conveyor (recirculating) was not guarded. The head pulley was located next to the catwalk. No one was observed in the area.

Citation No. 2232155, issued on August 17, 1983, citing a violation of 30 CFR 55.12-8, and the condition or practice states:

The power conductors for the overhead hoist in the machine shop had pulled out of the metal housing and was secured by a small wire, thus not properly housed. No one was observed using the hoist.

MSHA Inspector Robert W. White, testified as to his background and experience which includes past employments as a mine superintendent, and service as a Federal mine inspector since 1976. He described the respondent's Corpus Christi mill as a free-standing mill which processes raw barite through a process which includes grinding, milling, and screening of the raw material which is trucked to the facility. The processed barite is stored in silos and then is sold in bulk or as a bagged product (Tr, 10-12).

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 violations 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. Included among these issues is the question as to whether the cited violations were "significant and substantial."

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 violations.

#### 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(1).
3. Commission Rules, 29 C.F.R. §2700.1 et seq.

The parties stipulated that the respondent's Corpus Christi mining operation is small in scope and that it consists of a milling and grinding operation processing approximately 150,000 tons of barite annually, utilizing 40,000 man hours. The parties also agree that as a corporate operation, the respondent operates an additional 10 mining operations, and employs approximately 300 workers in all of its operations (Tr. 7-8).

The parties stipulated further that the respondent's mining operations at the Corpus Christi facility affects interstate commerce and that the respondent is subject to MSHA's enforcement jurisdiction.

The parties stipulated to the authenticity and admissibility of their respective exhibits (P-1 through P-5, and R-1 through R-4.).

Inspector White confirmed that he conducted inspections at the mine on August 16 and 17, 1983, and that he issued the citations in question and served them on respondent's safety representative Bob Spradling (Tr. 12).

With respect to citation No. 2232152, which he issued because of an inoperative back-up alarm on a forklift, Mr. White confirmed that the machine was equipped with an alarm but when he had the operator put the machine in reverse, the alarm did not sound. The machine was not tagged out, and Mr. White did not observe it in actual use. The machine was parked outside of the machine shop, and he believed the machine was used periodically as needed to transport machinery and equipment in and out of the shop, and when it backed out of the shop the rear view at the corner of the shop would be obstructed. The machine was equipped with a canopy, with corner support posts, and Mr. White described it as a forklift which is larger than others which are in use at the facility (Tr. 13-14).

Mr. White did not know how long the backup alarm had been inoperative, and he stated that when he asked for the inspection report record to ascertain how long it had been inoperative, Mr. Spradling couldn't produce it (Tr. 14-16).

With regard to citation 2232154, Inspector White confirmed that he issued it after the respondent's representative failed to produce any record concerning the fact that the hyster forklift had been preshifted and found to have had an inoperative backup alarm. He confirmed that no records have to be kept if no equipment defects are noted, and he indicated that different people use the equipment, but that one equipment operator told him that he did not check the forklift (Tr. 18-19). The citation was abated after the operator's representative noted his records that the backup alarm was inoperative (Tr. 19).

With respect to citation 223215, concerning the hoist power conductors, Mr. White stated that bushings on the box where the wires entered had been pulled out, and while the three or four small wires entering the box through the metal housing were insulated, he believed they were subject to possible breakdown of the insulation, thereby presenting an electrical or short hazard (Tr. 22). The condition was corrected by installing a housing grommet, which kept the wires from pulling out. The grommet also served as added protection for the wires (Tr. 23).

Mr. White confirmed that the hoist was not being used, but that the power was on, and a mechanic advised him that while the hoist is not used for long periods of time, there are days when it is used quite a bit (Tr. 23). Mr. White could not state how long the condition had existed, and he confirmed that the small wires were secured by another piece of wire (Tr. 24).

On cross-examination, Inspector White conceded that when he arrived at the plant on August 16, it was not in normal operation and no materials were being processed. He confirmed that the facility was on a hurricane alert and was in the process of carrying out several phases of shutting down because of the hurricane alert (Tr. 26).

Mr. White confirmed that the cited forklift was in the yard and not in the shop when he inspected it, and he conceded that he did not consider that any hazards were presented by the forklift violation (Tr. 27). He conceded that while the forklift in question has a vertical rollover bar which does not obstruct the operator's view, the operator's view to the rear while backing out of the shop would be obstructed because he could not observe anyone around the shop corner (Tr. 34). Mr. White also confirmed that the machine was not being operated when he observed it, and while the respondent got someone to operate it, the operator was not backing out of the shop, and he did not have an obstructed view at the time he issued the citation (Tr. 34-35). Mr. White conceded that the only time the cited standard requires a backup alarm is when the operator has an obstructed view to the rear (Tr. 36). He also conceded that the machine itself would not obstruct the operator's view in any way, and that he could turn in all directions and see behind the machine (Tr. 38).

With regard to the inspection report citation, Inspector White indicated that after he cited the forklift violation, he asked to see a copy of the inspection reports concerning the mobile equipment inspections, and when asked whether he requested the particular report on the forklift, or all reports, he replied "I don't recall for how long a period I asked for. It could have been that day or that week. I just asked to see the records on the mobile equipment checks" (Tr. 39).

Inspector White stated that he was provided with an "operator's report" concerning "crushing and stuff like that" (Tr. 39). He conceded that "it's left to the operator

as to what type of forms he uses", and he further conceded that no particular prescribed forms are required to be maintained for equipment defects. When shown a copy of respondent's exhibit -3, Mr. White confirmed that he saw such forms, but he indicated that such forms are proper "production reports" under section 55.18-1, and that he advised the respondent's representative that "it looked like a production report rather than a mobile equipment checklist" (Tr.41). However, Mr. White also indicated that had the "bad forklift alarm" been noted on the face of the exhibit in question, he would have accepted it as compliance with the cited standard (Tr. 42).

With regard to the wire conductor citation, Inspector White stated that the hoist was approximately 8-1/2 feet off the ground, and that he observed no rubber outer covering on the wires which went through the hoist housing, but just the wire holding the other small wires together. He could not state whether there was any stress on the wires, and confirmed that he issued the citation because of the lack of a proper bushing to secure the wires as they entered the housing (Tr. 44-46).

In response to certain bench questions, Inspector White indicated that he assumed the cited forklift would be used to transport and protect equipment from the hurricane, and that it is normally used to move motors and parts around, and that he did not believe that it is normally used to store or move the bagged materials which are processed at the plant. He indicated that other forklifts are used for that purpose (Tr. 49). When asked to explain why he issued the citation, he summed it up as follows (Tr. 50):

\* \* \* \* \*

Now, let's assume you've got this forklift parked, and the operator decides not to use it that day at all, then you come on the scene and decide to inspect it, and you crank it up and find that the backup alarm is inaudible. That's essentially what happened here, isn't it?

THE WITNESS: Yes, sir.

ADMINISTRATIVE LAW JUDGE: Would that be a violation?

THE WITNESS: The equipment was ready to be operated. In other words, I had asked them what equipment was subject to be ran and what equipment was being operated during the course of a day, and the only thing they told me was that they had one front-end loader that was out of service, that they knew it needed, I think it was brakes, and they weren't going to let anybody operate it. To me that was fine and ...

ADMINISTRATIVE LAW JUDGE: So based on what you determined, they had some that was tagged out and some that wasn't, and this wasn't?

THE WITNESS: Yes, sir, that's right, from what they told me.

Tom Roe, respondent's plant manager, confirmed that at the time of the inspection the plant was under phase three of a hurricane preparation, and that the plant was in the process of being secured. He described the preparations that were being conducted, and confirmed that the plant was not in production (Tr. 59-61). He confirmed that Hurricane Alicia made landfall in the Galveston area on August 17th. He also confirmed that he knew the cited forklift had an alarm which was out, but it still was used to secure plant equipment (Tr. 63). At the time the citation was issued, a micro-switch required to repair the alarm had already been ordered, but not delivered by the supplier (Tr. 63). Rather than wait, a completely different alarm was purchased and installed that same evening, and it was in operation the next day (Tr. 64). He confirmed that all forklifts at the plant are equipped with alarms, and this is done for the safety of all employees (Tr. 64). Mr. Roe stated that the forklift in question had been tagged out, but that it was put back in service because it was absolutely necessary to secure plant equipment (Tr. 65).

With regard to the reporting citation, Mr. Roe stated that previous MSHA inspectors had accepted the daily reports, such as exhibit R-3, and any defects in equipment are noted on these reports (Tr. 65). He explained how the reports are prepared (Tr. 66).

With regard to the wire conductor citation, Mr. Roe explained as follows (Tr. 67):

Q. Okay, did you have personal knowledge that the grommet had come out of the housing?

A. I had no personal knowledge myself, but my maintenance people did.

Q. Had they attempted to correct?

A. Right. They told me that the rubber grommet that holds the wires into the housing, the least little pull will pull the rubber grommet loose. Our electrician had been notified, and he had checked it, and said he had to change types of grommet because that grommet just would not hold, so a wire was attached to that cable to hold it up to keep anybody from pulling the cord to keep the insulation from being broken on existing wires.

Q. And who installed that wire?

A. It was factory.

Q. No, the extra wire to keep from...

A. Oh, maintenance personnel at the Corpus Christi plant.

Q. Was this under the direction of the electrician?

A. No, huh-uh.

Q. Okay, the electrician evidently didn't feel like there was a hazard because he didn't do anything, is that right?

A. No, he didn't do anything. He said he would have to order a different type of grommet for it.

Q. Okay, was that grommet ordered?

A. It was.

Q. Was it installed?

A. It was installed.

On cross-examination, Mr. Roe confirmed that the cited forklift has a rated lifting capacity of 6,000 pounds, and

would be classified as a large forklift (Tr. 69). He identified exhibit R-4 as an equipment checklist prepared to abate the reporting citation, and indicated that such a form was not previously used (Tr. 70). He conceded that the operational report, exhibit R-3, shown to the inspector, did not note that the forklift alarm was inoperative, but he insisted that it would have been recorded on previous operational reports which he did not have with him at the hearing (Tr. 71). Mr. Roe stated that while he gave Inspector White only the daily record for the day he was there, exhibit R-3, all of his records were available in the office (Tr. 82). He later indicated that he gave the inspector all of the file, and not just the one report (Tr. 90). Mr. Roe explained further as follows (Tr. 74-77):

ADMINISTRATIVE LAW JUDGE: Well, now, did you ask Mr. White what he had in mind when he issued you the citation for not providing these records?

THE WITNESS: When we provided the records he looked them over and first stated, he said, "Well, I can accept these."

ADMINISTRATIVE LAW JUDGE: Which records?

THE WITNESS: The ones you have in your hand.

ADMINISTRATIVE LAW JUDGE: Just this one, R-3?

THE WITNESS: Right.

ADMINISTRATIVE LAW JUDGE: But you provided no other ones prior to this time?

THE WITNESS: No, sir.

\* \* \* \* \*

ADMINISTRATIVE LAW JUDGE: All right, with that I assume that had he found on this one a defect noted on the forklift, he would have accepted that?

THE WITNESS: He didn't state that. He said he would accept these records at first,



and then during the conversation he kept going through there and he said, "No, I don't believe I can accept these records because I don't think any other inspector would accept them," and therefore he wrote the citations.

ADMINISTRATIVE LAW JUDGE: Well, what was his reason for not accepting them, do you remember?

THE WITNESS: His reason that he gave us was that any other inspector would not accept them.

ADMINISTRATIVE LAW JUDGE: For what reason would any other inspector not accept them?

THE WITNESS: He didn't say. He did not say, "Because the forklift is not listed on here I cannot accept these." He said, "I cannot accept these because I don't think any other inspector would accept them."

ADMINISTRATIVE LAW JUDGE: What did you provide to the Inspector, to Mr. White, to have this citation terminated or abated?

THE WITNESS: The additional, number three.

ADMINISTRATIVE LAW JUDGE: Which is what you have in your hand?

THE WITNESS: Yes, sir, R-4.

ADMINISTRATIVE LAW JUDGE: R-4. When was that provided to him?

THE WITNESS: We started this one on the twenty-second, and he was supposed to be back that same week, I believe, but he got tied up and couldn't make it back. He came back the next morning, to abate what we've got on, and he was supposed to come back the following week, and it was several days before he got back.

ADMINISTRATIVE LAW JUDGE: When he came back the next day, he abated the forklift citation because you had put an alarm on it, is that correct?

THE WITNESS: Yes, sir.

ADMINISTRATIVE LAW JUDGE: How did he abate this one?

THE WITNESS: I don't know. I don't know of an abatement made on that.

ADMINISTRATIVE LAW JUDGE: It says September twenty-second.

THE WITNESS: That's when he came back.

ADMINISTRATIVE LAW JUDGE: But this form that you're holding in your hand, which is Exhibit R-4, was that a form that was used prior or at the same time he inspected?

THE WITNESS: No, sir, this is a form that we started using by his request.

ADMINISTRATIVE LAW JUDGE: Who designed that form?

THE WITNESS: He told us what we should have on there, and we designed it ourselves.

Mr. Roe pointed out that equipment defects are noted on the daily reports, and he pointed to the fact that exhibit R-3, contains a notation with respect to a Caterpillar machine (Tr. 78). He insisted that he provided Mr. White with his records, and that he gave him his reports for mobile equipment, but that Mr. White would not accept them as compliance records (Tr. 79).

Bob Spradling, respondent's safety supervisor, confirmed that he accompanied Inspector White on his inspection rounds, and he conceded that the cited forklift had been out of service the day before, but that it was put back in service because of the hurricane emergency. He stated that the respondent had not been previously cited for mobile equipment violations (Tr. 93). He testified that he conducts regular safety meetings, and that equipment which is found to be defective is always taken out of service (Tr. 94).

Mr. Spradling stated that he gave Mr. White the daily operating report, as well as the file for the month, and he indicated that Mr. White did not ask for the specific report for the forklift, but only generally wanted to see mobile equipment reports (Tr. 95). He confirmed that approximately 16 to 20 employees normally work at the plant in question (Tr. 96).

Mr. Spradling stated that he had not previously noticed the grommet pulled out of the hoist connector. However, he indicated that maintenance personnel were aware of it and ordered a replacement part. In his opinion, the wires did not present any hazard because they were individually insulated and no bare wires were present. The wire which held the insulated wires together was there to keep tension off the hoist cable, and this was done to eliminate any safety hazard (Tr. 98).

Mr. Spradling stated that the remainder of the week of August 16, 1983, was spent undoing what was done to secure the plant from the hurricane, and that the plant "was gradually built back up to full capacity by Thursday and Friday", but was shut down over the weekend (Tr. 104).

Inspector White was called in rebuttal, and he testified as follows (Tr. 108-110):

Q. What specifically did you discuss with him then?

A. I asked Mr. Spradling if he could show me the records where the defective backup alarm was not working on this mobile equipment checklist.

Q. What, if anything, did he tell you at that time?

A. He didn't make them available. He didn't know. He just went and got the production sheets.

Q. Now what type of production sheet did he show you?

A. The ones over in the control booth.

Q. Are these the same ones he testified to previously?

A. Yes.

Q. Did he show you a whole month of reports?

A. A whole month?

Q. Yes. He testified he had a whole month of production reports.

A. No, he wouldn't have had a whole month. I don't recall how many reports that he did show me. I looked at some reports. I've never seen the defect list.

Q. Did you bring up the defect with him again?

A. Yes, that was the purpose, yes. That's what I told him, "I'd like to see where this has been reported."

Q. Did he make any effort at all to find the defect in the production reports?

A. Well, he didn't bring it to me. I don't know if he looked back through them and found them or what.

Q. What happened after you were there with the records and you told him that you wanted to see a report of the defects?

A. That he couldn't make it available, and I told him that was the reason I issued the citation, and then we went ahead and did the inspection on the other pieces of equipment, and I showed him what I looked for, and as a recommendation how other people were, told him how other people were complying with that standard.

\* \* \* \* \*

ADMINISTRATIVE LAW JUDGE: No, I mean did you issue a citation here because there

wasn't a record produced that they had known about the defect, or did you issue the citation because the operator was being a little recalcitrant and uncooperative, and just didn't make his files available to you?

THE WITNESS: No, sir, that wasn't it. I issued the deal because there was a defect that I couldn't, that they didn't make available, that it was recorded, that's all (Tr. 114).

\* \* \* \* \*

ADMINISTRATIVE LAW JUDGE: Well, your intent, Mr. White, in issuing this citation in here, the failure of the operator to make it available, was not, or was it, to look at all of his records on mobile equipment, or just on this particular forklift?

THE WITNESS: Just -- I wanted to see his records. When I find a violation on that particular deal, I want to see that they were in fact recording the defects on mobile equipment.

ADMINISTRATIVE LAW JUDGE: Now, as you were perusing through the file that he gave you, did you feel or did you make any judgments then as to the utility of using such a form like this, or did you feel that they probably should have had something over and above this particular form?

THE WITNESS: I gave them some suggestions of what I seen. Maybe that was more of a production report, and it didn't leave much for the operator.

#### Findings and Conclusions

##### Fact of Violations

Citation 2232155. Petitioner has established that the power conductors for the overhead hoist were not properly housed or secured and that they were pulled out of the metal housing and secured with a wire. Section 55.12-8, requires

that such wires entering through electrical compartments either have proper fittings or are bushed with insulated bushings. In this case, they were held together with a piece of wire which had been installed by respondent's maintenance personnel. The citation is AFFIRMED.

Citation 2232154. Section 55.9-87, requires that heavy duty mobile equipment be provided with audible warning devices. When the operator of such equipment has an obstructed view to the rear, the equipment is required to have either an automatic reverse signal alarm which is audible above the surrounding noise level, or an observer to signal when it is safe to back up.

In defense of the forklift citation, respondent asserted that since the forklift is not used to load, dump or haul materials which are processed at the mill, it does not qualify as "heavy duty mobile equipment" under the cited standard (Tr. 32). The fact that the cited standard is listed under the general section 55.9 regulatory heading of "Loading, hauling, dumping", does not mean that equipment not used for these tasks are excluded from the requirements of section 55.9-87. Accordingly, respondent's defense is rejected. I conclude that the record here supports a finding that the forklift in question is a heavy duty mobile piece of equipment.

The forklift in question was provided with a backup alarm, but it was inoperative. Respondent conceded that the cited forklift was not put out of service at the time of the inspection, and that it was to be used to store and secure material from the hurricane (Tr. 57). Mr. Roe confirmed that the forklift had been taken out of service a week before the inspection after the backup alarm went out, but that he had been checking on the switch part which had been ordered because the forklift was needed (Tr. 90).

Respondent's representative indicated that the respondent equipped all of its forklifts with backup alarms, not for compliance with any MSHA requirements, but for the protection of its employees. The representative agreed that backup alarms are sensible items, but that in this case where the backup alarm wasn't working, the parts had been ordered, and the equipment was being used in an emergency situation, he was of the view that the backup alarm was of small consequence (Tr. 119-120).

Inspector White conceded that there was no hazard presented by the forklift violation, and he admitted that

the machine was parked on the parking lot and that he never observed it backing out of the shop. He agreed that the configuration of the machine is such as to not obstruct the operator's view to the rear, and he admitted that the operator could turn in all directions and see behind the machine. Mr. White's only concern was that the operator would not be able to see anyone coming around the corner of the shop if he were to back out of the shop.

Mr. White indicated that the forklift in question is not used to move or store the bagged materials which are processed at the plant, and that other types of forklifts are used for that purpose. He assumed that the cited forklift would be used to help secure equipment from the hurricane, and he indicated that it was normally used to move motors and parts around the plant.

Although it is true that at the precise time that the inspector viewed the forklift, it was not backing up, the fact is that when it is in normal use in and around the plant transporting equipment and parts, one can logically assume that it will back in and out of areas after depositing its load. Mr. Spradling confirmed that the machine might be used during the day to load out trucks with pallets and material or during an overhaul which takes place every two or three months (Tr. 98). Since the machine is equipped with a backup alarm, it makes good sense to insure that it is operational, and the respondent candidly admits that this is true. While the respondent has established that the forklift was not backing out of the shop at the time the inspector observed it, respondent has not rebutted the inspector's assertion that when it does back out of a shop area, the operator can not see around the corner.

After careful consideration of all of the testimony with regard to this citation, I conclude and find that petitioner has established a violation of section 55.9-87, and the citation is AFFIRMED.

Citation 2232154. The inspector here charges that the respondent violated section 55.9-1, for purportedly failing to make available certain records as to the pre-shift inspection on the mobile equipment. The requirements of section 55.9-1, are as follows:

55.9-1. Mandatory. Self-propelled equipment that is to be used during a shift shall be inspected by the equipment operator before being placed

in operation. Equipment defects affecting safety shall be reported to, and recorded by the mine operator. The records shall be maintained at the mine or nearest mine office for at least 6 months from the date the defects are recorded. Such records shall be made available for inspection by the Secretary of Labor or his duly authorized representative.

Respondent's representative indicated that he was under the impression that the citation was issued because the inspector would not accept the company's daily production reports as preshift inspection reports for mobile equipment. The representative stated that the backup alarm defect had been reported a week prior to the inspection of August 16, 1983, and that he only brought to the hearing the daily report for that date because he believed that this was the issue presented (Tr. 71-72). He also maintained that the respondent's records were made available to Inspector White, but that he would not accept them as preshift inspection checklists, and that preshift inspection records are not required unless a defect is noted (Tr. 84).

I believe there is a ring of truth to the respondent's assertion in this case that Inspector White would not accept the daily production form as a suitable form for noting equipment defects. Mr. White admitted that he made some "suggestions" as to what equipment operators may use as a "checklist", and he expressed some reservations that the production report being used at the time of his inspection "didn't leave much for the operator" (Tr. 117). The respondent here obviously followed the inspector's "suggestions" and devised a new form which satisfied him. Further, Mr. White testified that when he asked Mr. Spradling to show him "the records where the defective backup alarm was not working on his mobile equipment checklist", Mr. Spradling produced the production sheets kept in the control booth (Tr. 108-109). Mr. White couldn't recall how many reports he was shown, but confirmed that he looked at "some reports", and he also confirmed that he explained to Mr. Spradling how other mine operators were complying with the standard which he cited (Tr. 110).

The citation does not charge the respondent with a failure to note any defects in equipment. It simply charges that the respondent failed to make preshift inspection records available to the inspector when requested to do so.



Mr. White indicated that had the forklift been tagged out and not used on August 16, he would not have issued the citation (Tr. 126). He confirmed that once the respondent intended to use the machine, it had to be inspected and reported (Tr. 126). This leads me to conclude that Mr. White expected to find the defective backup alarm noted on some "checklist", and when Mr. Spradling failed to produce such a form, and only produced the daily inspection records, Mr. White rejected them and issued the citation.

I find Mr. Roe and Mr. Spradling to be credible witnesses, and I believe their version as to the events surrounding the records in question. I also believe that there was a lack of communication between the respondent's representatives and the inspector, particularly with respect to precisely what was being charged as a violation. The inspector's one sentence description of the charge is lacking in clarity and precision and leaves much to the imagination.

After careful review of all of the testimony and evidence adduced with regard to the citation, I conclude and find that the petitioner has failed to establish the fact of violation by a preponderance of the evidence. I find that the respondent has established that it made its appropriate records available to the inspector at the time of his inspection. The citation is VACATED.

Petitioner's counsel moved to dismiss citation No. 2232153, on the ground that MSHA could not establish the fact of violation by a preponderance of any credible evidence. The motion was granted from the bench, and I hereby re-affirm this action and VACATE the citation (Tr. 8).

While there is merit to the respondent's argument that the plant was preparing to shut down in the face of a hurricane threat and that the inspector should have left the employees alone, this fact does not excuse the violations. However, since the plant was not in production at the time of the inspection, and in view of the emergency situation which was presented, I have considered these factors in mitigating the penalties assessed for the violations which I have affirmed.

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

The parties are in agreement that the respondent operates ten barite mining operations, some of which are dormant, and some of which are in active production. They also agreed that the Corpus Christi Mill is a small grinding mill operation, operating 40,000 man hours a year, processing an average of 150,000 tons a year, and that the overall company personnel consists of approximately 300 employees (Tr. 7-8).

I conclude that the respondent is a small mine operator and that the civil penalties which I have assessed will not adversely affect its ability to continue in business.

#### Good Faith Compliance

The record supports a finding that the violations in question were timely abated by the respondent, and that the cited violations were corrected in good faith.

#### History of Prior Violations

Exhibit P-1, is a computer print-out summarizing the respondent's compliance record for the period August 1, 1981 through July 31, 1983. That record reflects that the respondent received a total of seven citations during this time period, none of which were for violations of the mandatory standards cited in this case. Under the circumstances, I conclude that the respondent has a good compliance record, and this fact is reflected in the penalties which I have assessed for the violations which have been affirmed.

#### Negligence

I conclude and find that the violations in question here resulted from the respondent's failure to exercise reasonable care, and that this amounts to ordinary negligence. While it is true that the respondent placed the forklift in service knowing that it had been tagged out for a defective backup alarm, I have considered the emergency situation facing the respondent at the time this was done.

#### Gravity

Mr. Roe indicated that in his 29 years at the respondent's plant, there have never been any injuries due to forklift operations, and the last time the plant experienced a lost-time accident was in 1982, when a man injured his knee playing basketball during lunch (Tr. 91).

Inspector White conceded that he considered no hazards presented by the use of the forklift in question (Tr. 27). Under the circumstances, I find that this violation is nonserious.

With regard to the hoist conductor citation, I note that Inspector White considered it to be non-"S&S". Given the fact that the wires were insulated, somewhat isolated from anyone's reach and secured with another wire as support, with no evidence of any breaks or wear in the insulation, I agree with his finding and find that the citation is nonserious.

#### Penalty Assessments

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that the following civil penalty assessments are appropriate for the citations which have been affirmed:

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Section</u>	<u>Assessment</u>
2232152	8/16/83	55.9-87	\$20
2232155	8/17/83	55.12-8	\$20

Citations 2232154 and 2232153 are VACATED, and the proposal for assessment of civil penalties as to those citations is DISMISSED.

#### ORDER

Respondent is ORDERED to pay the civil penalties assessed by me for the two citations which have been affirmed, and payment is to be made to MSHA within thirty (30) days of the date of this decision and order. Upon receipt of payment, this proceeding is DISMISSED.

  
George A. Koutras  
Administrative Law Judge

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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FALLS CHURCH, VIRGINIA 22041

OCT 3 1984

BECKLEY COAL MINING CO., : CONTEST PROCEEDINGS  
Contestant :  
v. : Docket No: WEVA 83-252-R  
: Citation No. 2124098; 8/11/83  
SECRETARY OF LABOR, :  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No: WEVA 83-253-R  
Respondent : Citation No: 2124099; 8/12/83  
:  
: Beckley Mine  
:  
SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No: WEVA 84-30  
Petitioner : A/O No: 46-03092-03530  
:  
: Docket No: WEVA 84-31  
: A/O No: 46-03092-03531  
v. :  
: Beckley Mine  
BECKLEY COAL MINING CO., :  
Respondent :

## DECISIONS

Appearances: Edward N. Hall, Esq., Charleston, West  
Virginia, for Contestant/Respondent;  
Sheila K. Cronan, Esq., Office of the  
Solicitor, U.S. Department of Labor,  
Arlington, Virginia, for Respondent/  
Petitioner

Before: Judge Koutras

## Statement of the Proceedings

These consolidated proceedings concern two notices of contests filed by Beckley Coal Mining Company challenging the validity of two section 104(a) citations, with special "significant and substantial" findings, issued pursuant to the Federal Mine Safety and Health Act of 1977, and civil penalty proposals filed by MSHA seeking civil penalty

assessments for those citations, as well as six additional citations (non S&S) issued pursuant to section 104(a) of the Act.

The parties were afforded an opportunity to file post-hearing proposed findings and conclusions, and the arguments presented have been considered by me in the course of these decisions.

### Issues

The issues presented in these proceedings are (1) whether the violations occurred as stated in the citations issued by the MSHA inspectors, (2) the appropriate civil penalties to be assessed for any violations which have been established by the preponderance of the evidence adduced during the hearing in these proceedings, and (3) whether several of the citations were in fact "significant and substantial" as alleged by the inspector who issued them.

### APPLICABLE STATUTORY AND REGULATORY PROVISIONS

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq.
2. Commission Rules, 29 CFR § 2700.1 et. seq.
3. Mandatory Standards 30 CFR §§ 75.1102 and 77.410.

### DISCUSSION

The citations and allegations in each of these dockets follow below.

#### WEVA 83-252-R and WEVA 84-30

Section 104(a) "significant and substantial" Citation No. 2124098, 1:54 P.M., August 11, 1983, cites a violation of 30 CFR § 75.1102, and the cited condition or practice is described as follows:

The slippage switch was inoperative on the southwest No. 1 belt conveyor in that the belt would not stop when the slippage roller was blocked.

#### WEVA 83-253-R and WEVA 84-31.

Section 104(a) "significant and substantial" citation No. 2124099, 10:00 A.M., August 12, 1983, cites a violation of 30 CFR § 75.1102, and the cited condition or practice is described as follows:

The slippage switch installed on the No. 2 conveyor belt southwest was not working properly in that the slippage switch device would not stop the belt conveyor drive when the belt conveyor would slow down or slip in the drive rollers.

WEVA 84-31

In this docket, the inspector issued five non-S&S section 104(a) citations, all for alleged violations of 30 CFR § 75.1102.

Citation No. 2124155, was issued on August 11, 1983, and the inspector found that "the slippage switch installed under the 6 panel section belt conveyor was inoperative."

Citation No. 2124157, was issued on August 16, 1983, and the cited condition is described as follows:

The slip switch device installed on the chestnut mains parallel belt conveyor would not stop the drive rollers in the event the belt would start slipping. The slip switch circuit would only stop the drive rollers if the belt was completely stopped.

Citation No. 2124158, was issued on August 16, 1983, and the cited condition is described as follows:

The slip switch device installed on the 5 panel section belt conveyor would not stop the drive rollers in the event that the belt would start slipping. The slip switch circuit would only stop the drive rollers if the belt was completely stopped.

Citation No. 2124159, was issued on August 16, 1983, and the cited condition is described as follows:

The slip switch device installed on the chestnut mains belt conveyor would not stop the drive rollers in the event that the belt would start slipping. The slip switch circuit would only stop the drive rollers if the belt load completely stopped.

Citation No. 2124160, was issued on August 16, 1983, and the cited condition is described as follows:

The slip switch device installed on the black-burns mains belt conveyor would not stop the drive rollers in the event that the belt would start slipping. The slip switch circuit would only stop the drive rollers if the belt was completely stopped.

#### Stipulation

The parties stipulated to the following (Tr. 8-9):

1. The contestant/respondent owns and operates the mine where the citations in question were issued.
2. The contestant/respondent is subject to the jurisdiction of the Act.
3. The presiding administrative law judge has jurisdiction to hear and decide these cases.
4. The inspectors who issued the citations in these proceedings are duly authorized representatives of the Secretary of Labor.
5. Copies of the citations issued by the inspectors in these proceedings exhibits (G-2, and G-5) including all extensions of the abatement times and terminations, exhibits (G-2, and G-5 through G-19) may be admitted to establish that they were properly issued and served, but not to establish the truth of the conditions or practices recited therein.
6. Payment by the respondent of the civil penalties assessed in these proceedings



will not adversely affect the respondent's ability to continue in business.

7. Respondent's annual coal production for the subject mine at the time the citations were issued was approximately 722,300 tons.
8. The subject mine liberates approximately three million cubic feet of methane per 24-hours.
9. The subject mine employs approximately 490 miners on the surface and underground.
10. Respondent/contestant concedes and admits that the conditions or practices cited by the MSHA inspectors in citation 2124098 and 2124155 constitute violations of the cited mandatory safety standard section 20 C.F.R. § 75.1102.

MSHA's Testimony and Evidence-Docket No. WEVA 84-31

MSHA inspector Billy P. Sloan testified that he is an MSHA coal mine electrical inspector, and that he has served in this position since June, 1971. He confirmed that his duties include the inspection of underground and surface mines for electrical and mechanical hazards, and he testified as to his background and experience in the mining industry, including his experience and training as a mine electrician. He confirmed that he was familiar with the Beckley Mine, and he described it as a slope and shaft mine with eight working sections. He confirmed that coal is mined with continuous miners, and that the coal is transported out of the mine to the surface by a belt conveyor system encompassing some ten to twelve miles of conveyor belts. He also confirmed that the belt conveyors are used only for the removal of the mined coal and that they are not used as designated man-trips or for the movement of supplies and materials.

Inspector Sloan confirmed that his inspection of the mine began on August 11, 1983, and that he was part of two MSHA inspection teams dispatched to the mine as a result of a safety complaint received in his district office from the UMWA district safety department. He also confirmed that he was accompanied on his inspection by an MSHA ventilation specialist, a member of the mine safety committee, and a representative of mine management's safety department (Tr. 10-23).

Inspector Sloan identified exhibit G-3, as a drawing indicating a typical belt conveyor drive with two drive rollers and a head roller dumping on another belt (Tr. 25), and using that diagram, he explained how the sequence switches used to automatically start and stop the drive mechanism for the No.2 belt conveyor are supposed to function. He confirmed that the citations deal with slippage switches, but indicated that while the two switching devices "physically can be the same", they serve different purposes in the belt control circuit (Tr. 30).

Mr. Sloan stated that the citations were issued because of the manner in which the slippage switches were connected in the circuits he cited. Since the cited belts could be started and stopped with the slippage switches, he believed that they were wired incorrectly. A correctly wired slippage switch would not permit the belts to stop and start by means of the slippage switches (Tr. 31). When asked whether it was illegal to start and stop the belt by means of a slippage switch, he replied "the whole idea behind the violations themselves is if the slip switch is wired into the control circuit properly, you can't do that" (Tr. 31).

Mr. Sloan identified exhibit G-4, as a wiring diagram depicting the switch control circuit, and he stated that the diagram was issued by the Continental Conveyor Company in 1960 before the present law was passed (Tr. 62). He used the diagram "to illustrate the manner in which a slip switch should be installed in a control circuit to function the way that I think it should function" (Tr. 34). He also indicated that he intended "to show what would happen if certain things were eliminated from this diagram" (Tr. 34).

Mr. Sloan confirmed that approximately 20 belt drives and slip switches were inspected by MSHA, that they were constructed by different manufacturers, and respondent's counsel asserted that the citations issued by Mr. Sloan were "abated" by the respondent re-designing the slippage switch circuit to conform to Mr. Sloan's opinion as to how they should be wired (Tr. 37). Mr. Sloan also confirmed that none of the cited switching devices were taken apart, and that he determined and concluded that they were improperly wired because they did not perform the way he believed they were intended to perform at the time they were tested (Tr. 39). Aside from changing out slippage switches which may have been faulty, Mr. Sloan

confirmed that the control circuits were re-wired in a manner which he accepted as abatement (Tr. 40). He explained how he believed the slippage switches should function if properly wired (Tr. 40-43).

With regard to Citation No. 214155, Inspector Sloan confirmed that the slippage switch was tested by the maintenance foreman pinching the roller between the roller framework and the roller itself, and that he did this at Mr. Sloan's request. Mr. Sloan indicated that the test was intended to induce the symptoms of a belt slippage, and that when this was done, the slippage switch should have been activated, thereby shutting down the belt drive mechanism and stopping the belt altogether (Tr. 25). Using a diagram, exhibit G-3, Mr. Sloan began to explain how he tested the belt to determine whether the slippage switch was operative. Respondent's counsel pointed out that since the switch was in fact inoperative, and the respondent admitted this, the validity of the test to establish that the other cited slippage switches were also inoperative is suspect (Tr. 27-28).

Mr. Sloan testified that he tested the Hawkeye solid state slippage switch on the 6 panel section belt conveyor by asking the maintenance foreman, Clyde Bare, to stop the belt roller where the slippage switch was connected to, and that Mr. Bare did this by inserting a long roof bolt or a piece of wood between the roller and the conveyor frame. When the roller was completely stopped, the belt conveyor drive mechanism started to slow down, and when Mr. Bare removed the device used to stop the roller, the drive mechanism on the conveyor drive "took off again". He then asked Mr. Bare to test it again, and when Mr. Bare removed the testing device, the belt started up again. Mr. Sloan indicated that he instructed Mr. Bare to remove the testing device before the conveyor came to a complete stop, and while it was "coasting", it started up again (Tr. 44).

Mr. Sloan asserted that Citation No. 214155 "contained exactly the same defect that the remaining ones contained" (Tr. 45). He also asserted that the four remaining cited belts were all tested while the belts were moving, and they were tested by means of a bar inserted between the slippage switch rollers and the belt conveyor structure. However, Mr. Bare was not with him when these belts were tested, and Mr. Sloan indicated that another maintenance foreman, Arnold Hill, was with him on "some of them" (Tr. 46-47).

Mr. Sloan stated that the intent of the standard requiring slippage switches is that in the event of a belt "hang up" or slippage, friction could be encountered in the drive rollers, and the switches are intended to stop the belt. He also indicated that the purpose of the tests was to simulate a belt slippage by interrupting the normal speed of the belt, thereby triggering the switch circuits to take care of the slippage problem (Tr. 49). Since the test on the 6 panel slippage switch resulted in the failure of the switch to function properly in that it failed to keep the belt drive mechanism shut down, he issued Citation No. 214155 (Tr. 50). He was of the view that the condition would result in smoke being generated by the friction between the belt and the driver (Tr. 50). He confirmed that all of the cited belts were running when he inspected and tested them, and that the section was producing coal (Tr. 50).

With regard to the remaining citations which he issued, Nos: 2124157 through 2124160, Mr. Sloan indicated that the cited conditions were the same as those found on the 6 panel belt, and he explained as follows (Tr. 55-57).

Q. Were the conditions that you cited in all five of the citations, were they the same?

A. Basically the way they were connected in the control circuit, yes. However, they were using not only the Hawkeye or the solid state slip device, they were using also a centrifugal drive roller under certain belts. Basically, the function of the switch itself would be the same if connected in a control circuit.

JUDGE KOUTRAS: I am saying that all the conditions or practices that you put in these citations as a violation, the slippage, they are all the same, are they not?

THE WITNESS: You're right.

Q. Including the first one, is that right?

A. Right.

JUDGE KOUTRAS: The conditions are all the same. He is saying that he found a slip switch device that

would not de-energize and shut off the drive rollers when the belts slowed down and that it took the complete shutting down of the -- the only time it would shut it down is if the belt was completely stopped. That's the condition or practice that he observed. And that's the condition or practice that he recited in all of these citations. Isn't that true?

THE WITNESS: Correct.

MR. HALL: Correct.

\* \* \* \* \*

Q. Was the test you performed in all five citations the same?

A. Yes.

Q. And the results were the same in all five citations?

A. Yes.

Mr. Sloan was asked to explain the standards or guidelines that he follows in determining whether or not any particular belt slippage is in compliance with the requirements of the cited mandatory standard. He replied that there was nothing in writing, and he follows "the practice throughout the industry for the diagrams that I've seen and the starters that I have wired myself" (Tr. 58). When asked about the "industry practice", he replied as follows (Tr. 59).

A. Like I said, the only thing I have to go by is what I have seen in the past and the ones I have checked since I have had this job. And I've checked several hundred belt drives since I've had this job and while I was working in industry I wired those panels by myself and wired quite a few belts. I've got 21 years of experience.

With respect to the tests which he conducted, Mr. Sloan indicated as follows (Tr. 61-62):

Q. Is this an industry-wide test? Have you read literature by people putting crow bars and moving

belts conveyor drives to test these circuits?

A. No. This is just the way that I've always checked them and the people that I've been around I've seen them check them the same way.

I might add that this method was employed before this law ever took effect. This schematic that I presented was taken off of a drawing that was put out in the 1960's.

When asked to explain why he did not consider any of the citations to be "significant and substantial", Mr. Sloan explained as follows:

A. For the simple reason that the ventilation man, George Martin, was present with me from the opening day and they were forcing the air on the belt conveyor system from the section down.

In other words, the air part was going in the same direction that the conveyor belt was. They weren't taking air into the belt and dumping it. They were taking the air up by another entry and crossing it over in the belt and taking it down the belt, away from the sections themselves.

Q. So had these slippage switches gone undetected and uncorrected? Your direct testimony was eventually it would bind up the roller and possibly start smoking and possibly start a fire?

A. It could lead to that, yes.

Q. If it could lead to all that, where does the ventilation -- I mean that to me sounds like an S&S violation?

A. It would course the air away from the major part of the mine. That's the reason I only put one person in. Maybe somebody working the belts would be affected. It could very well be S&S. But that was the reason why I didn't mark it S&S was for the reason that the air cart was going away from the major part of the workers.

Q. So based on the fact that you saw on that day, you said it was not S&S.

A. Right.

Q. And you didn't go on this theory?

A. That it could go undetected or go on forever?

Q. Yes.

A. Well, let me tell you something there. At that particular time, when we issued those citations back in August, we have had additional, you might say, training.

Q. What kind of training?

A. Well, there was a whole lot of the fact that a lot of people was under the impression that this S&S would not be applied in the manner that if this went on undetected forever.

Q. Yes.

A. A lot of people were under the influence that this thing, as long as it was corrected, or maybe corrected, in the next scheduled examinations for it, if it was corrected then it wouldn't be S&S but we've had explanations.

Q. Which is what?

A. Well, the simple reason that this violation here now that we are talking about could very well be S&S.

Q. It could be S&S today?

A. Right.

Q. Where did this enlightenment come from?

A. The Marshall District Manager at a recently held staff meeting.

Q. Where was he enlightened from, do you know?

A. I couldn't tell you that. I assume from Senior Staff Meetings. I don't know.

Q. So, today, you would use a different standard to determine whether these five citations would be an S&S than what you used back in August of 1983?

A. It very well could be. Yes.

\* \* \* \* \*

THE WITNESS: We have had several memos come down through the years on S&S policy. This latest one -- there is not anything that I know of in writing. As a matter of fact, it is the understanding of the fact that this violation could go on forever and ever would change the outlook on S&S itself.

Q. How could it go on forever and forever?

A. Just for the simple reason of what I found right here. This was continuing to go on undetected or uncorrected forever and ever, then it would change my understanding of S&S and I would have marked these reasonably likely instead of unlikely.

Q. Well, let me ask you a question. Did you have any indication that any of these belts were slipping before you induced the test? You induced the slippage by making the test.

A. Not on these particular belts that I checked.

Q. If these belts were running from the day that they were put in that mine without any slippage whatsoever, and let's assume as a hypothetical that they were running for ten years without any slippage, then there wouldn't be any problem, would there?

A. Well, the reason that the test was performed was the initiation of the complaint itself from having the belt in the past.

On cross-examination, Mr. Sloan conceded that the results of the "tests" he conducted on the cited belts were his judgements as to whether or not the slippage switches were performing as they are supposed to (Tr. 74). He stated that either he or the person actually performing the tests allowed the belts to come to a complete stop in order to determine whether or not they would start up again (Tr. 75). At no time during the tests did he ever



detect any smoke or friction between the drive rollers and the belts. He confirmed that he stopped the roller itself and at no time did he test the speed of the belt (Tr. 76). He also conceded that at no time did he ever calculate the speed of the belts (Tr. 77).

In response to questions concerning any guidelines as to the speed of the belt and when it should shut down, Mr. Sloan stated that there are no guidelines as to the rpm levels required before a belt is shut down (Tr. 78).

He further explained his testing procedures of the belts as follows (Tr. 79-80).

Q. If you indicated that the belt slowed in every violation, then that means that the switch that you were checking at the time was working because it released the contact points and consequently shut down the power to the rollers, correct?

A. Yes, it could.

Q. In everyone of these, the same thing happened. The belt slowed just like you've testified, is that correct?

A. There's nothing in the regulations that says that the belt has to slow to a certain speed.

Q. Have there been occasions, to your knowledge, in which another electrical inspector has visualized a Hawkeye switch in place operating as you have suggested under testing conditions similar to yours in which it was checked out to be okay?

A. I'm not aware of it.

Q. Would you say that every electrical inspector in your district performs the same tests?

A. You mean by stopping the roller itself?

Q. Yes?

A. I would say the greater percentage of them in District 4 check them the same way I do. I don't know that to be a fact.

JUDGE KOUTRAS: Let me ask you a question if I might. Do you see any problems with inspectors checking belts five or six different ways to determine whether or not there's compliance?

THE WITNESS: Do I see any hazard in it?

JUDGE KOUTRAS: Not hazard. Do you see any problem with that?

THE WITNESS: Yes, I do.

JUDGE KOUTRAS: What's the problem.

THE WITNESS: A difference in interpretation as far as compliance.

JUDGE KOUTRAS: What I am saying is is there nothing in writing in your District as to how to go about checking this slip switch device?

THE WITNESS: That's right.

JUDGE KOUTRAS: Why?

THE WITNESS: I don't know why. That's why I told you a little while ago this is the way I've always checked.

Inspector Sloan confirmed that the drive roller materials are flame resistant, and he conceded that the greatest amount of belt friction is present when the belts are started up (Tr. 83). With regard to his recommended circuitry for the slippage switches, Mr. Sloan indicated that he believed it was used by a great number of manufacturers because he has reviewed their diagrams (Tr. 85). However, he conceded that there are circuits used in the industry which do not contain his "MA insertion" (Tr. 85).

Mr. Sloan confirmed that the belts were operating when he performed his tests, and he further explained his tests as follows (Tr. 88-90):

Q. At the conclusion of the test that you performed in each of these cases, the belt was moving at such a speed that whenever you released the roller, the speed was above that which the switch was designed to

read and consequently shut off the power?

A. On some of them, it possibly could.

Q. The switch does not disengage the power to the drive rollers, is that correct?

A. Right.

Q. So if that is the case, everytime you release the roller, the belt is transferring at such a speed that it was above that which would be sensed by the switch and consequently turn off the drive holes?

A. It could have been.

Q. It's obvious if you shut the system down, you would have had to restart?

A. I didn't have any way to determine what the revolution of that roller was at that particular time.

Q. Did the belt shut down at the time you conducted any of your tests?

A. The way that I had them tested?

Q. Yes.

A. No.

Q. Well, if they didn't shut down, wasn't that what they were supposed to do?

MR. HALL: Your Honor, I am illustrating that the belt speed is what's tested by this device.

JUDGE KOUTRAS: The belt speed is what is tested?

MR. HALL: Right. And that this belt speed is never allowed to get down to the speed where this device would stop the rollers. This test was inaccurate and improper because the speed was so fast.

JUDGE KOUTRAS: Are you saying that by performing this test with the bar, having the man slow it down --

MR. HALL: He stops this hole completely and that is what engages the open contacts because of the stop.

JUDGE KOUTRAS: Are you saying he didn't slow it down enough to cause it to trigger to shut it off?

MR. HALL: Exactly.

Mr. Sloan confirmed that the belts in question have been in operation in the mine for the past ten years, and that there are "stop-start" buttons located along the belts (Tr. 92). Mr. Sloan stated that he could not audibly hear the contactors disconnect in the box when he stopped the roller (Tr. 95). He further explained his testing procedure as follows (Tr. 96-98):

Q. Mr. Inspecor, did you slow the belt down by putting the bar at that point?

A. I had them slow the roller down.

Q. Did that slow the belt?

A. No, not the belt itself.

Q. The belt kept at a constant speed.

A. Right. Once you sense that the belt conveyor was slowing down, when the roller was fouled, then when he released the roller that had the sensing device on it, it began to roll because the conveyor was still coasting. And the drive started right back up.

On all of these systems that I checked, his point is that to determine the speed of the pick-up on this particular one, Hawkeye, is entirely different than the pick-up on a centrifugal roller as far as closing the contacts. So the same method was used to check most of them but I can understand his argument that a predetermined speed of this particular roller.

JUDGE KOUTRAS: Let me ask you a question. Your citation says that the slip switch wouldn't do it's job when the belt started slipping and it would only do its job when the belt completely stopped. What effect did your test have on the belt, Mr. Sloan?

THE WITNESS: Well, your Honor, you couldn't very well stop or slow the belt down.

JUDGE KOUTRAS: Why not?

THE WITNESS: For the simple reason that in most cases there was probably anywhere from 75 to 125 horsepower motor.

JUDGE KOUTRAS: But my question is is there a distinction between belt slippage and stuck rollers?

THE WITNESS: Let me try to clarify something. A slippage switch device operates off of the roller itself. It can operate off of a small roller, or with this particular type, it can operate off of one of the drive rollers or the head roller itself.

JUDGE KOUTRAS: Was this belt slipping when you tested the roller?

THE WITNESS: No.

JUDGE KOUTRAS: Then if it wasn't slipping, your citations say that the thing wouldn't do the job in the event the belt would start slipping?

THE WITNESS: What I did, I simulated a slipping condition by slowing down the roller that would detect if the belt actually would slow down itself.

JUDGE KOUTRAS: You mean to tell me that by fouling that roller it would give you an indication the belt was slipping?

THE WITNESS: It would just simulate a slipping condition of the belt by slowing down the particular roller. Because if the belt would start slipping, this same roller would slow down.

Mr. Sloan again confirmed that the belts he examined were not slipping at the time that he inspected them, and that he simply "fouled" the rollers in order to simulate a slippage situation on the sensor devices to determine whether the switches were operating properly (Tr. 101). He could not state which of the cited belts had belt slack take-up systems and which ones did not (Tr. 107). He further explained his testing as follows (Tr. 111-113):

Q. (By Ms. Cronan) Mr. Sloan, didn't you stop the roller altogether and did the person who was accompanying you do that?

A. Yes.

JUDGE KOUTRAS: So for that one roller to stop altogether, that would give a signal that there's slippage in the belt?

THE WITNESS: Right.

Q. What happened when you stopped that roller altogether?

A. When they stopped the roller altogether and held it until the conveyor belt came to a complete stop, the belt stopped. The drive mechanism stopped.

JUDGE KOUTRAS: And when should it have stopped?

THE WITNESS: Well, it should have stopped when the belt began to slow down. Or what the whole matter is is the simple fact that the method in which I submitted this diagram, if, for any reason, that slippage switch circuit is interrupted, with the diagram that I submitted, the belt would have to be recycled.

I don't have any way of determining the speed of the belt or how slow the belt would have to go in order to drop all these switches because all these switches are not all alike.

JUDGE KOUTRAS: Let me ask you this question. If you stopped that roller completely?

THE WITNESS: I had it stopped.

JUDGE KOUTRAS: But then the belt slowed down?

THE WITNESS: Right.

JUDGE KOUTRAS: And it eventually stopped?

THE WITNESS: Right.

JUDGE KOUTRAS: Isn't that what you are supposed to do?

THE WITNESS: In my own personal opinion, it should stop the belt from operating completely. Right away. Now the whole gist of the thing is that as long as that roller right there was turning a small amount of revolutions, it would energize or the signal would be sensed and the belt would start right back up. So, what I am saying is, going back to the fact that assuming the belt would go 500 feet a minute, okay,--

JUDGE KOUTRAS: Let's assume it started up again. Wouldn't that be an indication that the slippage has gone away? Or that the piece of rock is jammed in the roller or something?

THE WITNESS: Not necessarily.

JUDGE KOUTRAS: What?

THE WITNESS: If you stopped the roller from--

JUDGE KOUTRAS: Let's take your test again. You stop the roller completely, The belt slows down and then it stops. Okay? Let's assume that you take the impediment in the roller out and the roller starts turning again? Will the belt start up again?

THE WITNESS: The way it was wired, yes.

JUDGE KOUTRAS: Then it did that because you unstopped the roller?

THE WITNESS: Right.

And, at (Tr. 119-124):

JUDGE KOUTRAS: Let's talk about your test. Now, you stopped this roller, right?

THE WITNESS: Right.

JUDGE KOUTRAS: On this day?

THE WITNESS: Yes.

JUDGE KOUTRAS: On all of these five locations?

THE WITNESS: Right. Completely.

JUDGE KOUTRAS: How long did it take for the drive rollers to shut down?

THE WITNESS: I don't know exactly how long it would take for all of them to shut down.

JUDGE KOUTRAS: How long did it take you when you conducted the test?

THE WITNESS: There was probably within four or five seconds the belt contactors all dropped out and then the time the belt coasted I don't know.

JUDGE KOUTRAS: All right, Ms. Cronan, the citation says that the slip switch device would not stop the drive rollers in the event that the belt would start slipping.

MR. HALL: That's what he said. It wouldn't stop it in the event the belt starts slipping. When he performed his task he induced a symptom of the belt slipping.

MS. CRONAN: He induced the symptom of the belt stopping altogether.

MR. HALL: Of the belt slipping.

MS. CRONAN: I think there's a distinction here between the slippage and stopping.

JUDGE KOUTRAS: I'm reading from Citation 2124157 and all the others. The first sentence says "the slip switch device installed on the belt conveyor would not stop the drive rollers in the event the belt would start slipping." He says if this belt slipped, the drive rollers wouldn't stop.

MS. CRONAN: That's right.

JUDGE KOUTRAS: Now, when he conducted his test, he simulated the belt slipping, did he not?

MS. CRONAN: And he also simulated the belt stopping.



JUDGE KOUTRAS: Let's take the slipping first. When he stopped that roller he induced a symptom of the belt slipping, did he not?

THE WITNESS: When the roller came to a complete stop it was as if the belt had stopped. It completely stopped.

JUDGE KOUTRAS: How long did it take for it to stop actually?

THE WITNESS: Once the roller was fouled I'd say it was in three or four seconds.

JUDGE KOUTRAS: So it did stop then, didn't it?

THE WITNESS: Yes.

MS CRONAN: It was only when the belt, there was a simulation of the belt coming to a complete halt.

JUDGE KOUTRAS: You mean to tell me when he fouled this roller the belts quit running?

THE WITNESS: Essentially, what they had was two sequence switches -- in a manner of speaking -- they were so wired.

JUDGE KOUTRAS: Mr. Inspector, I am not trying to confuse you and I am not trying to confuse counsel. I am trying to understand the condition here.

MS CRONAN: Your Honor, I think going back to what we were talking about before the roller that he artificially stopped is the roller that would be stopped if the belt stopped. And the switch would sense that and cause the mechanism to stop.

The problem is that it's also supposed to detect slippage. That stops the mechanism, when there's slippage. Now, by slowing down that roller, he simulated slippage. And it did not stop.

JUDGE KOUTRAS: I thought he said in three seconds it did.

MS CRONAN: His citation states and his testimony,

I think, has been consistent with that, that it only stopped when he simulated the belt coming to a complete halt.

JUDGE KOUTRAS: Is that your testimony?

THE WITNESS: Yes.

MS CRONAN: And that's the problem. There would be slippage and the mechanism would continue to operate. The switch would not stop it and the slippage switch is supposed to stop the mechanism when there is slippage. It seems as a matter of definition very clear. That's why the term "slippage" is used. And we didn't have that here.

JUDGE KOUTRAS: Mr. Hall?

MR. HALL: Your Honor, Government's counsel says that there is some point within a three-second interval in which this test can be performed and determine the difference between slippage and stoppage.

Obviously the test did what it was designed to do. It detected when the belt roller was slowing or stopping and it disengaged it.

JUDGE KOUTRAS: At what point in time in this test, Ms. Cronan, is it your understanding that the drive rollers actually stopped?

MS. CRONAN: When the roller was completely stopped. Is that correct?

THE WITNESS: I'd say approximately three seconds or so after the slip switch was completely brought to a stop.

JUDGE KOUTRAS: Are you suggesting that your test indicated that this drive roller would never be shut off?

THE WITNESS: What I am suggesting is the manner in which they were wired would essentially, you could have a belt in that Figure 8, and the manner in which they were wired -- the slip switch would continue to shut the belt off everytime the belt came to a complete stop but as long as the conveyor would run fast

enough to turn that four-inch roller as much as say, 30 RPM's, depending on how the thing is adjusted, it would recycle the drive mechanism and continue on and on and on. That was the only reason why I asked them to incorporate this in the control circuit. It was to eliminate this possibility.

MSHA's Testimony and Evidence- Dockets WEVA 83-252-R, 83-253-R, and WEVA 84-30.

MSHA inspector Pete Teel testified as to his background and experience in the mining industry, and he confirmed that he is an MSHA electrical and mechanical inspector and that his duties include the inspection of underground and surface electrical and mechanical equipment. He also confirmed that he was part of an inspection team that inspected the mine in question, but that he was not part of the inspection party which included Inspector Sloan.

Mr. Teel confirmed tht he issued citations 2124098 and 2124099, and he stated that citation 2124098 concerned a centrifugal slippage switch. In addition to certain tests made on the cited conveyor belts, Mr. Teel confirmed that he determined that the centrifugal slippage switch was inoperative by opening the lid on the switch box and observing that the contactor points were inoperative. The contacts would not open, and the belt would not shut down (Tr. 142-147).

With regard to the centrifugal switch, Mr. Teel stated that if the belt were stopping and starting, as he described it during the testing, the slippage switch would not completely stop the belt unless the roller was completely stalled, and the belt would restart itself. He explained further as follows (Tr. 153):

JUDGE KOUTRAS: Are you saying that even with the blockage slippage roller, did the belt continue to run. Is that what you're asking?

Q. I am saying if there is slippage on the belt which is not sufficient to stop the belt.

A. To stall it completely.

Q. To stall it completely. Just slowing it down with the type of switch that you observed when you

issued this citation, how would that set the switch up?

A. It would not break at all. Because it didn't cut it off at all.

With regard to the Hawkeye slippage switch, Citation No. 2123099, Mr. Teel stated that when he stalled the slippage belt roller, the conveyor motor shut down and the belts began to coast. He allowed the belts to coast "until it was almost dead stopped" and when he released the slippage roller, the conveyor belt started up again. He explained that this was the reason why he issued this citation (Tr. 154).

In further explanation as to why he issued Citation No. 2124099, Mr. Teel testified as follows (Tr. 154-157):

Q. All right, but why is the condition that you observed when you performed this test, why was that a violation?

A. Because it won't control that conveyor when it starts slipping. It won't shut it down and keep it down until some responsible person checks the condition. They go and restart it several times and the belt will go through its cycle and shut itself back down. Somebody has to go and find out what the problem is.

JUDGE KOUTRAS: Well, now, didn't you slow it down with this test?

THE WITNESS: No.

JUDGE KOUTRAS: You just told me when you -- tell me what you did again?

THE WITNESS: I blocked this roller. The drive unit shut down. Not the belt.

JUDGE KOUTRAS: The drive unit?

THE WITNESS: On what?

JUDGE KOUTRAS: On the belt there. That shut down?

THE WITNESS: Yes.

JUDGE KOUTRAS: But the belt kept coasting?

THE WITNESS: The belt kept coasting.

JUDGE KOUTRAS: The belt was moving at a fairly fast speed?

THE WITNESS: I let it slow way down and it was just barely moving and turned this roller loose.

JUDGE KOUTRAS: If you hadn't turned the roller loose, would this belt come to a complete stop?

THE WITNESS: It would have stayed down.

JUDGE KOUTRAS: Isn't that what that thing is supposed to do?

THE WITNESS: The way they have got theirs wired, yes.

Q. What is a proper slippage switch supposed to do?

A. It's supposed to shut the belt down when it starts?

JUDGE KOUTRAS: Instantaneously?

THE WITNESS: No.

JUDGE KOUTRAS: There is some coasting action and that's what happened here, isn't it, when you did something to block that roller, the belt started coming to a blinding halt and then it coasted and it slowed down but before it stopped completely you turned it to the roller and then it kicked on again?

THE WITNESS: Right.

JUDGE KOUTRAS: And it started up again?

THE WITNESS: Right.

JUDGE KOUTRAS: But would it have stopped completely?

THE WITNESS: Sir?

JUDGE KOUTRAS: Would the belt have stopped completely had you not turned loose the roller.

THE WITNESS: If that roller had stayed stalled, it would have stayed down.

\* \* \* \* \*

Q. You're saying that it started slipping and continued slipping for a long period of time before it would come to a complete halt. Is that what you're saying?

A. I am saying the belt can stop that roller and then the belt can move like Mr. Sloan said. When it stalls, there's a lot of tension and it could roll backwards and if that roller moves the belt continues to start itself up. It could start itself over and over.

Q. Why would this be a violation of the regulations?

A. I can't answer that. We don't have any guidelines.

In explaining the guidelines that he follows in finding that citations 2124098 and 2124099, were "significant and substantial" violations, Mr. Teel stated as follows (Tr. 163-164):

Q. Specifically, in making a determination of whether a condition is significant and substantial. What goes into making that determination?

A. First, it has to be a serious-type violation.

Second, they have informed us that when we find the conditions, we have to take that too. It's not going to be corrected. It's going to stay there.

Third, if it's reasonably likely that a health and safety hazard could be caused by it, and taking into consideration that criteria, if it's reasonably likely that it is going to contribute to health and safety hazards, it's not going to be corrected and I have no other choice but to mark it S&S.

And if it's unwarranted on the part of the operator to comply, I have to put a 104(d)(1) citation.

JUDGE KOUTRAS: What's this business about it's not going to be corrected? What does that mean?

THE WITNESS: I don't know. That's a determination someone else made. I didn't make it.

Mr. Teel confirmed that at the time the citations were issued, the section was producing coal and the belt lines were in operation (Tr. 165). In response to a question as to why he believed the violations were "S&S", he explained that the respondent had successfully filed for a modification of its ventilation system to permit the use of a "CL" System", or in more common terms, smoke detectors, along its belt lines. This allowed the respondent to use the belt areas at the faces. However, it was his view that in the event of a belt fire resulting from any friction on the conveyor belt drive rollers, the smoke would be coursed to the working faces where miners would be exposed to possible smoke inhalation. Under these circumstances, he considered this in making his "S&S" determination (Tr. 164).

On cross-examination, inspector Teel conceded that the respondent's ventilation system was in compliance with its approved ventilation plan and that the respondent successfully prevailed in obtaining a modification for the belt area in question and that it was in compliance with the law. He also confirmed that at the time he issued the citations, respondent's belt fire warning and suppression water spray systems were operative and that he found no other conditions which were in violation of MSHA's mandatory safety standards (Tr. 171-179-181).

Inspector Teel stated that it was "possible" that he made a statement that given the fact that the cited conveyor belts were provided with operable water sprays, that the belts were constructed of fire resistant materials, and that he found no other violative conditions in the cited areas, he would not have marked the citations as "significant and substantial" violations. He also stated that given the "possibility" of such an admission on his part, his findings that the violations were "significant and substantial" would have resulted from instructions from George Vargo, his supervisor (Tr. 177-179).

In response to further questions, Mr. Teel confirmed that the tests he performed on the cited belts he cited were similar to those performed by Inspector Sloan, and he explained the test results as follows (Tr. 186):

Q. I believe you indicated on the record that when the slippage roller was introduced into that roller that it slowed to a stop?

A. On the one.

Q. The second citation or Government Exhibit 18 which was issued on the 12th?

A. Yes, sir.

Q. When that switch or roller was engaged the wedge, you performed that yourself?

A. Yes, sir.

Q. And when you engaged the wedge and stopped that roller that the switch worked as it was designed to work?

A. Yes.

Q. There was no smoke or fire hazard in the area at all?

A. No.

Q. There was no friction?

A. The belt was driving normal if that's what you are saying.

#### Respondent's Testimony and Evidence

Ernie Boggs, Chief Engineer, Owens Manufacturing Company, testified that he holds A.S. degrees from the Bloomfield State College in mechanical and electrical engineering. He confirmed that he is familiar with belt slippage switches, and he indicated that he has three years of experience in assisting engineers in the design of such switches. He also confirmed prior mining experience with slippage switches and conveyor belts (Tr. 201-204).



Mr. Boggs examined a Hawkeye slippage switch used for demonstration, and he testified as to its characteristics and operation (Tr. 207-209). He also testified as to the frictional parameters of the belt systems in question, and indicated the conditions under which belt friction would occur (Tr. 209-213). He also testified as to the wiring requirements imposed on the respondent by the inspectors who issued the citations, and in his opinion requiring the belts to be manually restarted once they are shut down by the re-wired switches, pose more of a frictional hazard (Tr. 214).

On cross-examination, Mr. Boggs conceded that he had not inspected the slippage switches at the mine in question, and he affirmed that these switches may be wired in different ways once they are received from the manufacturers (Tr. 220). Mr. Boggs asserted that every time a belt conveyor belt is started up there is a greater degree of friction generated by that action (Tr. 221).

During a bench colloquy with MSHA's counsel and the witness, the following statements were made (Tr. 230-232):

JUDGE KOUTRAS: I am trying to understand the theory of the citations and the theory of enforcement action in this case. It's obvious to me that no amount of tolerance was allowed in this case in terms of slippage, isn't that true?

MS. CRONAN: Well, based on the testimony of the inspectors and the tests they performed, they induced a situation which simulated a considerable amount of slippage and the switch did not shut down.

JUDGE KOUTRAS: What if this device was set below the speed of the simulation then it would never have triggered?

MS. CRONAN: That's right. That's the problem.

JUDGE KOUTRAS: Why is it a problem?

MS. CRONAN: The problem is that there could be slippage, a considerable amount of slippage, enough to cause a fire, and the slippage switch in this particular device that this witness is testifying about, would not stop the belt.

JUDGE KOUTRAS: So by requiring him to put this device in there, this switch now, any amount of slippage? What's the slippage tolerance under the new system?.

MS. CRONAN: I don't know.

THE WITNESS: It would depend upon the switch. I mean if this thing were still set for 39.25 you inserted the contacts here where he has that switch drawn and the belt still has to go to 39.25 to be energized.

Q. You testified about something called a motor overload?

A. Yes.

Q. Can you tell me what that is again?

A. Motor overload is a device that since it's current and/or temperature.

Q. What does it do?

A. It energizes or it de-energizes a set of contacts in the control circuit that would cause the mechanism to de-energize and stall.

Q. But you have no information as to whether the motor overload devices were in existence in the conditions cited in this case?

A. Yes. All motors have overloads.

Q. All motors do?

A. Well, all control boxes have.

Q. So you are saying that they were operating in this instance?

A. That would be my opinion. I did not lay my hands on them to make sure but that's right.

With regard to the testing procedures used by the inspectors in these cases, Mr. Boggs agreed that while they were not safe, they were acceptable means of testing the belts (Tr. 235). He believed that the one way to test

a centrifugal switch is by means of a crowbar or iron bar as used by the inspectors (Tr. 235). He conceded that he has never observed the specific switches in issue in these proceedings, and he had no knowledge as to how they may have been wired (Tr. 2365). However, he did indicate that the inspectors were concerned about the amount of belt slippage between the drive rollers and the belt (Tr. 236). He was of the opinion that as long as the belt was coasting during the testing, there was a chance of it starting up again (Tr. 236).

Danny Morgan, respondent's maintenance superintendent, confirmed that he has had 13 years of experience as an electrician, and he testified as to his mining background and experience (Tr. 238). He confirmed that the Hawkeye and centrifugal switching systems both sense the speed of the belt as it moves across the roller, and he testified as to the belt rpm's and the minimum threshold belt speeds (Tr. 240-243). He also alluded to certain overload safeguards which he believed were operational at the time of the August 12, 1983, inspection (Tr. 245), and he confirmed that the belt would have to slow down to a "very slow" speed before it would smoke or heat up. (Tr. 248).

Mr. Morgan testified as to the work done to abate the citations, and he confirmed that the Hawkeye sensing devices were all wired according to the manufacturer's specifications, and that there was no attempt to re-wire them in order to give false readings or to otherwise jeopardize the integrity of the system (Tr. 250). He explained that the purpose of the interlock device installed for abatement is that "once tripped on belt slip, the belt must come to a complete stop and be recycled" (Tr. 251).

Mr. Morgan stated that he discussed the abatement with the inspectors and that at no time did they indicate that the sensor on the Hawkeye device was inappropriate. He confirmed that the belt monitoring systems have been in effect for a long time, and that the Hawkeye has been used for the past seven or eight years (Tr. 254). He also explained how the belt speed tolerances are activated in both of the belt sensing devices so that the belts are stopped in the event of belt slippage (Tr. 256).

On cross-examination, Mr. Morgan stated that the Hawkeye sensing device is set to stop the belt at speeds below 39.25 feet per minute, and that at speeds above that level, the switch will not come into play. He confirmed

that the normal belt speed is 450 feet per minute, and that if the belt speed is reduced to 40 feet per minute, the belt will not stop (Tr. 258-259). He indicated that if this happened, it does not necessarily mean that slippage will occur in the belt roller (Tr. 259). However, he conceded that if the belt slowed to 40 feet per minute there could be some friction (Tr. 260), and that if any friction continued for a sufficient length of time, some smoke could result (Tr. 261).

Mr. Morgan explained the various operational speeds of the belts (Tr. 263-265). He confirmed that he did not inspect the motor overload systems on August 11 and 12, 1983, and that he personally did not inspect all of the switches which were cited during the inspection (Tr. 272).

Eugene L. Brown testified that he is employed by the respondent as director of safety and training. He stated that he was familiar with the citations issued by Inspector Sloan during his August 11 and 16, 1983, mine inspections, and that he accompanied Mr. Sloan during those inspections (Tr. 328-330).

With regard to citation No. 2124155, (exhibit G-2), Mr. Brown confirmed that the slippage switch on the 6 panel section belt conveyor was inoperative, and that when tested, the switch contact points would not "drop out," or function. He indicated that the condition was corrected on the evening shift on the same day that the citation was issued. He identified the switch in question as a Hawkeye switch, and he stated that the MSHA inspectors inspected the area and found that the fire extinguishers, fire sensors, and other safety systems were operative, and that the mine was "damp to wet" on August 11, 1983, when the citation was issued. He also indicated that the nearest working section was approximately 1,000 feet from the location of the citation, and that the air was going in the opposite direction in accordance with the mine ventilation plan which had MSHA's approval (Tr. 330-333).

With regard to citations 2124157, 2124158, 2125159, and 2125160, (exhibits G-7, G-9, G-11, and G-13), Mr. Brown stated that the cited belt locations were approximately 1,000, 3,000, and 2,000 feet, respectively, from the nearest working sections where miners would be working, but that one belt man would be in those locations (Tr. 334).

With regard to the citations issued by Inspector Sloan on August 16, 1983, Mr. Brown confirmed that the tests, as described by Mr. Sloan were conducted by use of a short scaling bar which Mr. Sloan had with him (Tr. 336).

Mr. Brown identified the slippage switches cited at the 5 panel section belt conveyor and the Blackburns mains belt conveyor as Hawkeye switches, and the slippage switch at the chestnut mains belt conveyor as a centrifugal switch.

With regard to the tests conducted by Inspector Sloan, Mr. Brown stated that once the bar was inserted into the slippage roller by Inspector Sloan to "stall" the roller, it took "a few seconds" to stop the roller. Once the roller stopped, the belts started slowing down, and Mr. Brown stated that he could hear the slippage switch contact points separate. He indicated that the purpose in stopping the rollers by means of the bar was to determine whether or not the contactor points would separate or "drop out." Since they did, it was Mr. Brown's opinion that they performed the function for which they were intended, and stopped the power to the belt conveyor motor (Tr. 338).

Mr. Brown did not know how many centrifugal slippage switches were installed on the mine belt conveyors on August 11, 1983. He stated that he has escorted MSHA inspectors during their underground inspections for the past seven years and that these inspectors have tested the slippage switches on the belt conveyors in the same manner as those tested by Inspector Sloan, and that the slippage switches were always found to be in proper working order (Tr. 339-340).

Mr. Brown confirmed that he was given an abatement schedule by the inspector, but that when he returned the next day, he would not accept the wiring and an electrician immediately began installing interlock devices on the switches in question (Tr. 343).

On cross-examination, Mr. Brown conceded that he had no particular electrical expertise. He confirmed that a citation was issued on August 11, 1983, because of an inoperative water deluge system on the six panel section belt conveyor. He also confirmed that a citation was also issued on August 12, 1983, because of an inoperative surface fire warning monitoring system which had been knocked out by an electrical storm (Tr. 352).

When asked to explain what he knew about the UMW complaint concerning an alleged belt fire on August 5, 1983, Mr. Brown confirmed that the information he received indicated that there was a malfunction on the belt drive and that the belt rubbed in two and there was some smoke but no flame (Tr. 360).

Mr. Brown stated that he was with Inspector Sloan on August 11 and 12, when he tested the slippage switches, and he confirmed that the tests were the standard and normal practice used by MSHA inspectors to test such switches (Tr. 362). Mr. Brown confirmed that he had no knowledge of the specifics concerning the operation of slippage switches (Tr. 363).

In response to further questions concerning the electrical storm, Mr. Brown stated that the citation in question concerned only the audible warning system located on the surface, and that the underground CO monitoring devices located at each position were operational and would sound a warning if there were any problems with carbon monoxide (Tr. 369). Mr. Brown also explained that other precautionary measures were taken and that the inoperative surface system was promptly repaired (Tr. 370-372).

Warren Burkhart, testified that he is employed by the respondent as a safety inspector, and has been employed in that capacity for six years. He testified as to his mining background and experience, and confirmed that his duties include working on the belts "here and there," including their installation and set-up. However, he also indicated that he had no particular experience with respect to the belts.

Mr. Burkhart confirmed that he was familiar with citations 2124098 and 2124099, which were issued by Inspector Teel on August 11, 1983, and August 12, 1983, (exhibits G-15 and G-18), and while they state they were served on "Warren Buckley," he asserted that his last name as shown on the citations is erroneous.

With regard to citation No. 2124099, Mr. Burkhart stated that he was with Mr. Teel when Mr. Teel himself tested the Hawkeye slippage switch on the South West No. 1 belt conveyor. Mr. Burkhart stated further that Mr. Teel tested the switch with a "glut," which he described as a wooden wedge approximately eight to ten inches long. Mr. Teel inserted the wedge between the upper slippage roller and the belt conveyor frame in order to stop the roller from turning. Upon inserting the wedge, it took approximately three to five seconds to stop the roller, and Mr. Burkhart stated that he saw the belt slowing down, that he could hear the belt motor slowing down. He also stated that he heard the switch circuit contactors in the control box which was some 20 to 25 feet away "drop out" or separate, and that this occurred as the belt motor and belt slowed down and as Inspector Teel released the wedge from the slippage roller. Mr. Burkhart asserted that at no time during the test did the belt drive rollers come to a complete stop.

Mr. Burkhart asserted that the nearest working area where miners would be present was approximately 1600 to 1700 feet in by the cited belt head location. He indicated that the area around the cited belt switch in question had operable deluge water sprays and fire sensors, and that the roof and ribs were rock-dusted. He also indicated that the belt drive was taken out of service and that the cited condition was corrected that same evening during the evening shift.

Mr. Burkhart stated that he discussed Mr. Teel's "S&S" finding with him, and when he asked him why he designated the citation "S&S" given the fact that the water sprays, fire sensors, and rock-dust were present, Mr. Teel advised him that while he personally did not believe it was an "S&S" violation, he nonetheless marked the citation "S&S" upon instructions from his supervisor (Tr. 393).

Mr. Burkhart indicated that approximately five to seven seconds elapsed between the time that Inspector Teel began his test with the wedge until he heard the contactor points separate in the control box. Mr. Burkhart was of the opinion that Mr. Teel had the opportunity to see and hear what he saw and observed during the time the test was conducted.

With regard to citation No. 2124098, Mr. Burkhart described the conditions of the area cited, and he indicated that the mine bottom was muddy, that the roof and ribs were rock-dusted, and that the C.O. monitors and other fire safety devices were all in operative condition. He also indicated that the nearest working section was approximately 5100 feet from the cited belt location, and that one belt man would be in that location.

Mr. Burkhart confirmed that he has certified electrician and mine foreman's papers issued by the State of West Virginia, and that the mine operator had no prior knowledge that the slippage switch in question was inoperative (Tr. 397).

On cross-examination, Mr. Burkhart stated that he was not with Inspector Teel on August 11, when he conducted his test, but was with him on August 12, when he tested the centrifugal switch to determine whether to abate the citation (Tr. 401). Mr. Burkhart confirmed that the tests which he did observe being made by Mr. Teel were the same, and that he used the wedge device to test a centrifugal switch and a Hawkeye switch (Tr. 403).

Mr. Burkhart explained the results of the tests conducted by the inspector, and he stated that when the slippage switch

was activated, the belt started to slow up but did not come to a complete stop. Once the roller was stopped and the test wedge released, the drive rollers started up again (Tr. 404). However, at no time did the belt drive roller come to a complete stop, and he indicated that had Inspector Teel left the test wedge in place long enough, the belt would have stopped and could only be started up again by activating the remote switch (Tr. 406).

Blaine Toler, belt foreman, testified that his duties include the installation and maintenance of the mine conveyor belts. He confirmed that the belts are constructed of a rubber neoprene based fire resistant material. Based on his experience, he believed that a drive roller will cause a belt to separate by rubbing before there is any smoke or fire generated (Tr. 417-418). It was his understanding that during the tests conducted by the MSHA inspectors in these proceedings, at no time did the belt reach a speed below that calculated to bring it to a halt (Tr. 419). In his opinion, as long as the belt continues to go through the drive rollers, no smoke or fire hazard is created (Tr. 420).

On cross-examination, Mr. Toler confirmed that the normal belt speed is 450 feet per minute and that the belt drive electrical motors are set to drive the belt at that speed. Should something happen to the belt, the drive rollers would continue to revolve at approximately the same speed required to drive the belt at 450 feet per minute. Should the belt slow down and the rollers continued to revolve at a rapid speed, there would be friction between the belt and the drive rollers (Tr. 421). There would also be a danger of smoke, but when belt slippage occurs, in most cases the belt will come to a complete stop (Tr. 422).

Ronald H. Scaggs, stated that in August 1983, he was employed by Beckley Coal Mining Company as the director of safety and training. He confirmed that he was aware of a citation which was issued on August 12, 1983, for an inoperative fire warning device on the mine belt conveyors (exhibit G-21). He described the mine computerized fire warning system, and he indicated that the system is designed to detect carbon monoxide in the belt entries. He confirmed that when the citation was issued the surface belt alarm system was inoperative, but the underground system continued to function independently (Tr. 431)

Although the citation was marked "S&S" as introduced by MSHA, Mr. Scaggs stated that during a conference in the Mt. Hope office, the inspector who issued the citation deleted the "S&S" finding (Exhibit R-3) (Tr. 436).

#### MSHA's Rebuttal Testimony

Harold Newcomb, Electrical Engineer, MSHA Mountain District Office, testified that he is an authorized mine



inspector and that he deals with both surface and underground mines. He holds a B.S. degree in electrical engineering from the West Virginia Institute of Technology, and he testified as to the operational parameters of the cited belts, including the question of belt slippage (Tr. 441-447).

Mr. Newcomb testified that in the event a belt would energize and then deenergize, friction would result, and smoke or fire would be present (Tr. 451). He confirmed that he was familiar with slip switch equipment, and that the manner in which the inspectors tested the belts was a normal method of testing such equipment (Tr. 454).

On cross-examination, Mr. Newcomb conceded that he was not familiar with the particular belt drives cited by the inspectors in these proceedings. He confirmed that he did review the citations, but that he has never been underground in the mine in question, nor has he ever observed the locations where the citations were issued (Tr. 456). He did not know whether any of the belt drives in question were equipped with devices for reducing belt slack (Tr. 457).

Mr. Newcomb stated that in his opinion, if the speed of a belt were decreased by 50 percent of what it was set at, slippage would result (Tr. 460). He explained the procedure he would follow to determine whether the Hawkeye or centrifugal switches were functioning properly (Tr. 473-477).

#### Findings and Conclusions

Dockets WEVA 83-253-R and WEVA 84-31

Fact of Violation - Citation No. 2124155

Respondent conceded and stipulated that the cited slippage switch here was inoperative and in violation of section 75.1102. Accordingly, this citation IS AFFIRMED.

Fact of Violations - Citations 2124157, 2124158, 2124159, 2124160

Each of these citations charges that the cited slip switch device would not stop the drive rollers in the event the belt would start slipping. The slip switch circuit would only stop the drive rollers if the belt was completely stopped. In each instance, Inspector Sloan cited a violation of 30 C.F.R. § 75.1102, which provides as follows:

Underground belt conveyors shall be equipped with slippage and sequence switches.

Section 75.1102, contains no definition of "slippage" or "slippage switch." However, the Dictionary of Mining, Mineral, and Related Terms, U.S. Department of the Interior, 1968, provides the following definitions:

belt slip. The difference in speed between the driving drum and the belt conveyor. Belt slip at the drivehead can cause heating of the driving drum. Devices are available which measure the belt slip and which cut off the power when a predetermined amount of slip takes place.

belt-slip device. A device fitted to a belt conveyor to give an alarm or to cause the conveyor to stop in the event of belt slip exceeding a predetermined amount.

belt-slip protection device. An assembly which causes the power to be disconnected if the belt slips excessively on the drive pulley.

switch. A mechanical device for opening and closing an electric circuit.

slip. A measure of the slipping of a belt on a pulley, for example, 5 percent slip implies that the driven pulley is rotating 5 percent slower than the driver.

MSHA's approval standards for electrically operated components, 30 C.F.R. 18.48(f), provides as follows:

Belt conveyors shall be equipped with control switches to automatically stop the driving motor in the event the belt is stopped, or abnormally slowed down.

In support of the citations, MSHA asserts that on August 11, 1983, Inspector Sloan first tested the slippage switch which is the subject of citation 2124155, by having the maintenance foreman (Bare), "pinch the roller between the roller framework and the roller itself." When Mr. Bare stopped the roller that activated the slippage switch, the belt began to slow down, and when he turned the roller loose, it picked up speed and the belt started up again. Mr. Sloan then issued the citation because the slip switch device failed to keep the drive mechanism shut down when the "simulated slippage test" was performed. When Mr. Sloan returned to the mine the next day, he tested the slip switch again, and after finding that it still would not stop the drive, he extended

the abatement time after being informed that "the control box pertaining to the solid state switch device" was thought to be defective. Inspector Sloan terminated the citation after the switch was repaired.

Contestant/respondent conceded that the solid state "Hawkeye" switch which was the subject of citation 2124155 was defective, and the record reflects that Inspector Sloan extended the abatement time in order to allow the defective switch to be repaired. Thus, on August 11, 1983, when the "slippage test" was performed, it was apparently performed with the defective slip switch in place.

In support of the four remaining citations issued by Inspector Sloan, MSHA argues that when he returned to the mine on August 16, 1983, he performed the same test as on August 11th, with the same results (Tr. 57). MSHA asserts that company witness Brown corroborated Mr. Sloan's testimony regarding the way the switches were tested and the way they responded to the test (Tr. 336-339; 365). Although three of the switches were solid state "Hawkeye" switches (citations 2124157, 2124518, 2124160), and the other one (2124159), a centrifugal switch, MSHA maintains that there was no difference in the way the two types functioned when tested by the inspector.

I conclude and find that the purpose of the tests conducted by the inspectors in these proceedings was to determine whether or not the slippage switches in question were functioning properly so as to disconnect the power to the electrically driven belt drive rollers in the event of belt slippage. I further conclude and find that the term "belt slippage" includes a reduction in the revolutions per minute of the slippage switch roller below a predetermined set speed, or if stopped completely.

MSHA has the burden of proving by a preponderance of the credible evidence that the alleged inadequate slippage switches were in violation of the requirements of section 75.1102. One basic initial obstacle facing MSHA is the fact that the standard simply requires that belt conveyors be equipped with slippage switches, and the inspectors are left on their own to determine how to interpret and apply the standard.

The basic question cutting across all of the citations in issue in these proceedings is whether or not MSHA has established that the cited slippage switches were inadequate when tested by the inspectors. The thrust of MSHA's case is that the manner in which the switches were wired allowed

the belt to restart itself once slippage was induced by placing a bar between the switch roller and the belt frame. Although Inspector Sloan stated that during the test, and while the conveyor belt was coasting, once the "slipped" roller was released, the Hawkeye sensor device picked up that signal and started the drive mechanism back up, he conceded that this was the way it was designed to work (Tr. 79). Further, contestant/respondent points out that there is no specific mandatory safety standard requiring the slippage switch to insure that the electric motor does not reenergize if the slippage switch roller is released during the test procedure and regain the belt speed above which the slippage switch is set to fully deenergize the motor and disconnect the electric circuitry.

Mr. Brown testified that during all of the tests conducted by Mr. Sloan, once the rollers were stopped by inserting the test bar at the roller switch locations, the starter or control box contactors would "drop out," and the belt would start slowing down. He could hear the reduction in the speed of the motor and visualized the belt itself slowing down. This indicated to him that all of the slippage switches, both Hawkeye and centrifugal, all performed their function and opened the contractor points, thus stopping the power to the motor (Tr. 336-339). However, he confirmed that once the stopped rollers were released, the drive started up again, and the belt continued to operate as it had prior to the testing (Tr. 365-366).

Mr. Brown stated that during a recent inspection prior to the one conducted by Mr. Sloan, MSHA Inspector Phillip Washington tested the slippage switches in the same manner as did Mr. Sloan, but that when Mr. Washington heard the contactors "go out," he released the rollers "and we went about our business." Mr. Brown indicated that Inspector Washington approved the continued operation of the switch following his tests (Tr. 340).

Inspector Sloan testified that he did not calculate the speed of the belt at the time he performed his tests, and he conceded that there are no MSHA guidelines as to the acceptable rpm levels which should be maintained in order to facilitate the particular speed at which the switch sensing device will cut off the current to the drive rollers (Tr. 78). When asked whether all inspectors in his district performed the tests by stopping the roller itself, he replied "I would say the greater percentage of them in District 4 check them the same way I do. I don't know that to be a fact" (Tr. 79-80). He conceded that the lack of any MSHA written procedures or guidelines for testing the switches does present a problem insofar as consistent interpretations and compliance are concerned (Tr. 80).

Although MSHA relies somewhat on the testimony of its rebuttal witness, electrical engineer Harold Newcomb, it seems clear to me that his testimony is based only on his review of the written citations. Mr. Newcomb conceded that he had never been in the underground mine, was not familiar with the particular belt drives in question, and had never observed the particular devices which were cited in these proceedings (Tr. 454-456). Further, he had no idea how much belt slippage would be required to cause the slippage switch to open, and he conceded that it would depend on the speed at which the switch was set (Tr. 471). Under the circumstances, I have given little weight to Mr. Newcomb's testimony.

I cannot conclude that MSHA has established that the cited slippage switches were not functioning in the way they were intended. Inspector Sloan's initial test on August 11, was performed on a switch which was apparently defective at the outset. This not only raises a question as to the credibility of that test, but also as to the others, particularly since he indicated that he followed the same procedures in testing the other switches on August 16th. Inspector Sloan conceded that he did not calculate the speed of the belts he tested, and he admitted that there are no MSHA guidelines or policies concerning the acceptable belt speeds which should be maintained, or the threshold speed limits necessary to trigger the particular belt sensing devices in the event there is any indication of slippage. Further, MSHA has not rebutted the testimony that other inspectors who conducted the same basic tests as did Mr. Teel and Mr. Sloan nonetheless approved the continued operation of the switches. Although MSHA's reply brief argument that the failure by other inspectors to cite violations may not be used to support any "waiver" theory is correct, it seems to me that MSHA should be concerned about inconsistent enforcement practices, particularly in instances where the inspector is left to his own imagination as to how the standard should be interpreted and applied.

I take note of the fact that while the citations charge that the cited slip switches would not stop the belt drive rollers in the event of belt slippage, the inspectors artificially stopped the rollers which activated the slippage switches, and when they did, the activated slippage switches caused the drive roller to be deenergized, and the belt began to slow down. Rather than permitting the belt to come to a complete stop, the inspectors had the rollers released after the belt had slowed to an unknown speed, and when this was done, the belt started up to its normal speed again. Given these circumstances, I conclude and find that the tests conducted by the inspectors indicated that the

switches did precisely what they were expected to do. They detected the induced slippage, they caused the contactors to "drop out," thereby stopping the power to the drive motor, which in turn caused the belt to slow down or come to a "coasting" speed.

After careful consideration of all of the credible testimony and evidence adduced in these proceedings, and on the basis of the foregoing findings and conclusions, I conclude and find that MSHA has failed to establish any violations of § 75.1102. Accordingly, citations 2124157, 2124158, 2124159, and 2124160 ARE VACATED, and petitioner's civil penalty proposals as to those citations ARE DISMISSED.

Dockets WEVA 83-252-R and WEVA 84-30

Fact of Violation - Citation No. 2124098

Inspector Teel confirmed that when he opened the lid on the cited centrifugal switch, he looked at the switch contacts and found that they would not open and the belt would not shut down. Since the switch was obviously inoperative, he issued the citation. When he returned the next day, the switch would still not perform the way he expected it to, and he extended the abatement time so that the switch could be rewired.

Respondent has conceded and stipulated that the cited slippage switch noted in Citation No. 2124098 was inoperative and in violation of § 75.1102, but denies that the violation was "significant and substantial." Accordingly, I conclude that a violation of section 75.1102 has been established, and the citation IS AFFIRMED.

Significant and Substantial

In its post-hearing brief, MSHA relies on the testimony by Inspector Teel that he believed this violation to be significant and substantial because the air along the beltway in the particular area of the mine where the violation was found was ventilated toward the face (Tr. 171). Conceding that the manner in which the air was being coursed was an approved part of the company's ventilation plan, and that the inspector did not indicate any disapproval of the ventilation system, MSHA nonetheless relies on the inspector's view that it greatly increased the danger than an injury could result from the violation since smoke generated by belt slippage would be carried to the face and could result in smoke inhalation injuries to the miners working at the face (Tr. 162-166).

In support of its arguments that the violation was not "S & S," contestant/respondent maintains that Inspector Teel indicated that when considering the condition and likelihood of the occurrence of a hazard in the area, it was possible that he indicated to others present that he would not have marked the citation as "S & S," but that he did so on the instructions of his supervisor, MSHA Inspector George Vargo, who had not been underground to see the conditions. Further, contestant/respondent maintains that Mr. Teel marked the citation "S & S" because he thought the air in the belt entry should not have been coursed in the direction of the face, even though the operator was doing so in compliance with a ventilation plan modification approved by MSHA (Tr. 177-179). In support of these contentions, contestant/respondent offered the corroborating testimony of Mr. Burkhart, indicating that Mr. Teel admitted to him that he would not have marked the citation "S & S," but did so on instructions from his supervisor (Tr. 392-393).

I fail to comprehend MSHA's position with respect to the "S & S" finding made by Inspector Teel in connection with citation 2124098. His principal concern was that the manner in which the area was being ventilated would cause any smoke from a fire to go to the face. Yet, MSHA approved the very same ventilation plan which the inspector is concerned about. Further, MSHA's counsel conceded that the mine operator here has not violated any ventilation regulations or policies, and indicated as follows (Tr. 174-175):

JUDGE KOUTRAS: But if it were not for the fact that the smoke would be directed toward the face, there wouldn't be an S&S in this case, would there?

MS. CRONAN: That's what the Inspector has testified. That was the determination that was made.

JUDGE KOUTRAS: So if you didn't have the modification and the smoke still went to the face, there would be another violation they would be faced with?

MS. CRONAN: That's right.

JUDGE KOUTRAS: But in this case, the approved ventilation system, in the event of a fire, would take the smoke to the face?

MS. CRONAN: That's right.

JUDGE KOUTRAS: That's significant and substantial for the purposes of this but other than that, it's okay. It's perfectly legal to have the ventilation system that way.

MS. CRONAN: Yes.

I believe that the contestant/respondent's assertion that Inspector Teel was reluctant to mark the citation "S & S," and did so at the urging of his supervisor, is true. Inspector Teel's reluctance to flat out admit this is obviously tempered by the fact that he does not wish to offend his supervisor. However, Mr. Teel's admission that it is "possible" that this occurred lends support to the contestant/respondent's testimony concerning this issue, particularly since MSHA did not call Supervisory Inspector Vargo to rebut the allegation.

In connection with citation 2124099 (exhibit G-18), Inspector Teel conceded that the deluge water devices in the cited area were in working order, the fire resistant belt and drive rollers were in proper order, the required fire extinguishers were in place, the roof and ribs were adequately blocked, and the area around the belt drive rollers was wet and muddy (Tr. 179-180). He also confirmed that he detected no smoke or fire hazard in the area, and observed no belt friction (Tr. 186). When asked whether these same safeguards were also in proper working order in connection with citation 2124098, Inspector Teel responded "Yes" (Tr. 185).

During the second hearing day, after Inspectors Teel and Sloan had testified, MSHA's counsel produced a copy of a § 104(a), "S & S" citation, no. 2123864, issued by MSHA Inspector Charles W. Cline, at 11:30 a.m., August 12, 1983, citing a violation of mandatory standard § 75.1103 (exhibit G-21). The "condition or practice" is described on the face of the citation as follows:

The automatic fire warning device for the belt conveyors at this mine was (sic) inoperative in that the system would not give an audible and visual warning when tested. The system in use is a CO monitoring system. The inoperative condition is due to damage to the central computer unit from an electrical storm 8/11/83.



Contestant/respondent asserts that even though the CO monitoring system was rendered inoperative on August 12, 1983, the reasonable likelihood of the occurrence of any hazard was reduced if not eliminated by the installation of cinder block air stoppings and flaps to prevent the transmission of any smoke to the working section following the storm's effect on the CO monitoring system the night of August 11, 1983 (Tr. 396). Further, contestant/respondent points out that the CO monitoring system was only inoperative with regard to the surface audible warning device, and that MSHA has offered no evidence that this would have enhanced the particular hazard potential. Contestant/respondent's assertions are corroborated by the un rebutted testimony of safety director Scaggs that the underground CO monitoring system continued to function independently of the surface system which had been rendered inoperative by the storm, and that the two systems do in fact operate separately and independently of each other (Tr. 431).

Finally, contestant/respondent points to the un rebutted testimony of Mr. Scaggs indicating that the "S & S" finding initially made by Inspector Cline with regard to citation 2123864, for the inoperative CO monitoring system, was subsequently modified by Mr. Cline to delete his "S & S" finding (Tr. 431-435).

I take particular note of the fact that in its posthearing initial and reply briefs, MSHA counsel does not mention the issuance of the aforementioned citation, and the briefs contain no discussion as to how this citation may have impacted on the "S & S" findings made by the inspector. I also take note of the fact that Inspectors Teel and Sloan were not recalled to rebut the testimony and evidence adduced by the contestant/respondent with regard to this citation.

After careful consideration of all of the testimony and evidence, I cannot conclude that MSHA has establish that the inoperative slippage switch cited in citation no. 2124098, was a significant and substantial violation, and its arguments to the contrary ARE REJECTED.

#### Fact of Violation - Citation No. 2124099

Inspector Teel confirmed that during the past eight years, he has been to the belt line 12 to 15 times and was never aware of any belt slippage problems. He conceded that prior to his inspection in this case, he had never previously checked any belts, and he further conceded that his inspection was prompted by a union complaint. Aside from Mr. Teel's testimony concerning the tests in question,

I take particular note of the fact that he admitted that he did not know the definition of a "slip switch," and that he obviously had no guidance from MSHA since there are no guidelines or policies as to how to interpret and apply § 75.1102.

Mr. Teel conceded that the tests he conducted on the belts which he inspected were conducted in a similar manner as those conducted by Inspector Sloan. With regard to citation no. 2124099, Mr. Teel testified that he personally tested the switch roller with a wedge, and when he engaged the wedge and stopped the roller, the switch worked as it was designed to work (Tr. 186). He observed no smoke, fire, or friction hazards and the belt was driving normal (Tr. 186). His earlier direct testimony was that when he blocked the roller, the belt drive unit shut down, but the belt kept coasting. He conceded that had he not turned the roller loose, the belt would have "stayed down," and he conceded that considering the way the switch was wired, this is precisely what it was supposed to do (Tr. 155-156).

I conclude and find that MSHA has failed to establish a violation of § 75.1102. Aside from any reservations concerning the credibility and integrity of the so-called tests conducted by the inspectors in this case, Inspector Teel's own testimony reflects that the slippage switches performed as expected, and I conclude and find that MSHA has failed to establish otherwise. Accordingly, citation no. 2124099 IS VACATED, and MSHA's civil penalty proposal IS DISMISSED.

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

On the basis of the stipulations by the parties, I conclude that for purposes of civil penalty assessments, the respondent is a medium sized operator and that the penalties assessed will not adversely affect its ability to continue in business.

#### History of Prior Violations

Respondent's history of prior violations is reflected in a computer print-out listing the assessed and paid violations for the period July 23, 1981 through July 22, 1983, for the Beckley Mine. The information reflects that the respondent has made payment in the amount of \$19,399 for 386 violations. Three of these prior violations are for violations of § 75.1102, and each was assessed as a "single penalty assessment" in the amount of \$20.

Considering the size of the operation of the Beckley Mine (722,300 tons a year), I conclude that the respondent has a less than average prior history of compliance, and I have taken this into account in assessing civil penalties for the violations which have been affirmed.

#### Good Faith Compliance

The record here supports a finding that the respondent abated the violations in good faith by rewiring the switches to suit the inspectors.

#### Negligence

MSHA's posthearing briefs do not address the question of negligence. As to the two citations which have been affirmed, since the respondent conceded that the cited switches were inoperative, I can only conclude that the violations resulted from the respondent's failure to exercise reasonable care, and that this constitutes ordinary negligence.

#### Gravity

Although I have concluded that the two violations were non-"S & S", I believe that they were serious violations. Since the switches were inoperative, it was altogether possible that belt slippage would have gone undetected, with the possibility of friction and smoke resulting from such belt slippage.

#### Penalty Assessments

On the basis of the foregoing findings and conclusions, and taking into account the requirements of § 110(i) of the Act, I conclude and find that the following civil penalty assessments are appropriate for the citations which have been affirmed:

##### Docket No. WEVA 84-30


<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Section</u>	<u>Assessment</u>
2124098	8/11/83	75.1102	\$75

##### Docket No. WEVA 84-31

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Section</u>	<u>Assessment</u>
2124155	8/11/83	75.1102	\$75

ORDER

Respondent IS ORDERED to pay the civil penalties assessed by me, in the amounts shown above, within thirty (30) days of the date of these decisions. Upon receipt of payment by MSHA, these proceedings are dismissed.

  
George A. Koutras  
Administrative Law Judge

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/slk

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

OCT 4 1984

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 84-137
Petitioner	:	A.C. No. 46-05529-03505
v.	:	
	:	Docket No. WEVA 84-138
JUMACRIS MINING, INC.,	:	A.C. No. 46-05529-03507
Respondent	:	
	:	Jumacris No. 10 Mine

DECISION

Appearances: Leo J. McGinn, Esq., Office of the Solicitor,  
U.S. Department of Labor, Arlington, Virginia,  
for Petitioner;  
Mr. Floyd Barnette, Jr., Owner, Jumacris  
Mining, Inc., Gilbert, West Virginia, for  
Respondent.

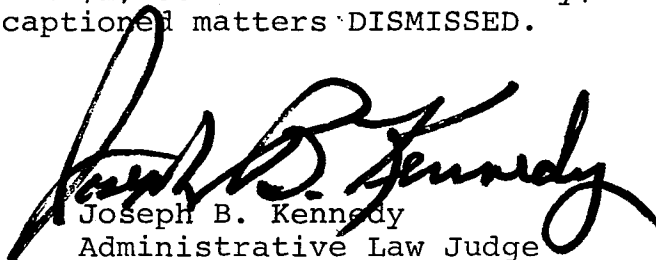
Before: Judge Kennedy

The captioned matters came on for an evidentiary hearing in Paintsville, Kentucky, on July 11, 1984. As a result, the trial judge entered tentative bench decisions with respect to three of the four violations that appear at pages 184, 234, and 272 of the transcript finding the violations charged did, in fact, occur and assessing penalties as follows:

Citation 2145237 - \$300  
Order 2145238 - \$1,000  
Order 2145239 - \$250

Finally, the trial judge entered an order approving settlement of Order 2145240 in the amount of \$300 (Tr. 282). After receipt of the transcript an order issued to show cause why the tentative bench decisions should not be affirmed as the trial judge's final disposition and decision in this matter.

No cause to the contrary having been shown, it is ORDERED that the tentative bench decisions and order approving settlement be, and hereby are, ADOPTED and AFFIRMED as the final decision in this matter. It is FURTHER ORDERED that the operator pay the amount of the penalties assessed and agreed upon, in the amount of \$1,850 on or before Friday, October 26, 1984, and the captioned matters DISMISSED.



Joseph B. Kennedy  
Administrative Law Judge

Distribution:

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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FALLS CHURCH, VIRGINIA 22041

**OCT 4 1984**

KITT ENERGY CORPORATION,	:	CONTEST PROCEEDING
Contestant	:	
v.	:	Docket No. WEVA 83-125-R
	:	Order No. 2115977; 3/24/83
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Kitt No. 1 Mine
ADMINISTRATION (MSHA),	:	
Respondent	:	

**DECISION**

Appearances: Bronius K. Taoras, Esq., Kitt Energy Corp.,  
Meadow Lands, Pennsylvania, for Contestant;  
Howard K. Agran, Esq., Office of the Solicitor,  
U.S. Department of Labor, Philadelphia,  
Pennsylvania, for Respondent.

Before: Judge Fauver

This is a contest proceeding under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq., to review a section 104(d)(2) order issued by a federal mine inspector at the Kitt No. 1 Mine on March 24, 1983. The order cites a violation of 30 CFR § 75.503 in that (1) unauthorized modifications were made to the longwall equipment in use at the mine, and (2) the equipment was not maintained in permissible condition.

The subject order is based upon a previous section 104(d)(2) order issued at Kitt Mine on December 1, 1982, during a previous regular quarterly inspection.

Kitt Energy contests the March 24, 1983, order on the ground that a clean inspection of the mine had occurred since the last preceding section 104(d)(2) order. Two other issues are (1) whether Kitt Energy's failure to obtain approval of mine equipment under 30 C.F.R. Part 18 was a violation of 30 C.F.R. § 75.503 and (2) whether its failure to maintain the equipment in permissible condition was unwarrantable.

The case was heard at Falls Church, Virginia.

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

## FINDINGS OF FACT

1. Kitt Energy Corporation is the owner and operator of Kitt No. 1 Mine, located at Phillippi, Barbour County, West Virginia. At all relevant times the mine produced coal for sale or use in or affecting interstate commerce.

2. A quarterly inspection by MSHA is a complete inspection of the mine and may involve a number of visits to the various sections of the mine.

3. MSHA's first quarterly inspection of Kitt No. 1 Mine for Fiscal Year 1983 began on October 14, 1982, and continued until its completion on December 17, 1982. During that inspection, on December 1, 1982, Inspector John Paul Phillips issued a section 104(d)(1) citation and modified it to a section 104(d)(2) order.

4. MSHA began its second quarterly inspection (FY 83) at Kitt No. 1 Mine on January 12, 1983, and completed it on March 29, 1983. On March 24, 1983, during the second quarterly inspection, MSHA Resident Inspector Frank Cervo made an inspection of the mine's surface area with Mining Engineer Barry Ryan to follow up on an employee complaint that there were hazardous chemicals in that area. Prior to March 24, 1983, Cervo had inspected everything on the surface but for the chemicals, which he had not previously inspected. His inspection on March 24 took about 8 hours to conduct including travel time.

5. On March 25, 1983, Assistant Resident Inspector Bretzel Allen conducted an inspection of the U Mains area of the mine to check on abatement of conditions cited the day before.

6. Frank Cervo and Bretzel Allen were assigned by MSHA to Kitt No. 1 Mine as resident inspector and assistant to the resident, respectively, because the Kitt No. 1 Mine is considered a more hazardous mine. The mine liberates about 3 million cubic feet of methane per day and is on the section 103(i) spot inspection list, which requires inspections every 5 days (for mines liberating more than 1 million cubic feet of methane per day).

7. Methane can be liberated at any time at the Longwall at the Kitt No. 1 Mine, but is liberated particularly during the extraction of coal. Sources of methane at the Longwall are the face itself and the gob area behind it.

8. On Monday, March 21, 1983 (during the 2nd quarterly inspection), Electrical Inspector Wayne Fetty began an



electrical inspection of Kitt No. 1 Mine. He had been assigned to assist fellow Electrical Inspector John Paul Phillips who had conducted a required annual electrical inspection of the mine almost one year earlier.

9. During the evening of March 21, 1983, Fetty was contacted at his home by his supervisor, Paul M. Hall, Chief Electrical Engineer for Special Services, District 3, and advised that there may have been an unauthorized field change on the Section D-5 Longwall. In order to inspect the Longwall, Fetty arranged with Hall to obtain a copy of the electrical diagram for the Longwall kept in the Morgantown MSHA office on Wednesday, March 23, 1983.

10. On Tuesday, March 22, 1983, while at the mine, Fetty asked several miners if there had been any changes to the Longwall Mining Unit and was told that the Eickhoff Shearer had been removed and replaced with a Joy Shearer. The next day, while checking at the MSHA District office in Morgantown, he learned that no documents were on file showing a company application for field modification for the change of shearers.

11. On Wednesday, March 23, 1983, Inspector Fetty was instructed by his supervisor, Mike Lawless, not to issue an unwarrantable failure violation if he found a violation that involved merely a technical violation.

12. On March 24, 1983, Fetty returned to Kitt No. 1 Mine. Before entering the mine, Fetty, accompanied by fellow Electrical Inspector James Cross, met with Kirby Smith, General Maintenance Foreman, Roger Harris, Longwall Maintenance Foreman, and Bob Evans, Superintendent of Kitt No. 1 Mine, and others and asked them if the shearer in the Longwall operation had been changed from an Eickhoff to a Joy Model without making an application for a field change. The company representatives stated that they had changed shearers and had not made an application for a field change, but they believed it was not necessary. Fetty asked if any other changes had been made on the Longwall and was told by Smith, Harris and Evans, "No, none whatsoever."

13. In answer to questions as to what he would do underground, Fetty replied that he could not say until he had actually inspected the Longwall and had seen the conditions himself.

14. Following the meeting at the mine on the morning of March 24, 1983, Fetty, accompanied by James Cross, Ron Cross, Kirby Smith, Roger Harris and Union Representative Roger Mitchell, went underground to the Section D-5 Longwall, arriving at about 10:35 a.m.

15. On arriving at the Longwall, Kirby Smith instructed the Section Foreman to deenergize the Longwall. After this was done the inspection commenced.

16. The Longwall operation involves a number of machines which working together serve to cut coal along a 575 foot face and convey the coal onto conveyor belts. The shearer cuts the coal as it travels the length of the coal face. The coal is dumped onto the face conveyor (pan line), which is driven by motors at either end to convey the coal to the stage loader and onto the mine's belt system.

17. On examining the D-5 Longwall unit, Fetty observed that about 80% of the Longwall equipment had been changed. Specifically, he found that:

(1) The shearer had been changed from an Eickhoff to a Joy model.

(2) The pan line (conveyor line) had been replaced.

(3) The Siemons Allis motors that powered the pan line at the headgate and at the tailgate had been replaced by Reliance motors.

(4) The headgate and tailgate junction boxes had been replaced.

18. Kitt Energy had not applied to MSHA for approval of the above changes.

19. Fetty also observed the following conditions, which he found to be hazardous:

(1) The cable entering the head conveyor junction box was loose indicating that it was inadequately packed.

(2) The mid face junction box cable on the outby side was loose and could be worked in and out freely, indicating that it was inadequately packed.

(3) The cable entering the tail conveyor junction box had been pulled completely out of the packing gland. The outer jacket of the cable had been pulled back for 3 to 4 inches leaving the conductors and ground wire rubbing against the metal packing gland nut. There was no packing at all left in the junction box and the base conductor wires, pilot wire and grounding wire had all been left exposed.

(4) The inside of each of the junction boxes was rusted, wet and contained accumulations of coal dust.

(5) There was no clamping at all for the cables entering the head conveyor junction box and the tail conveyor junction box.

20. The loose and missing packing glands for the head face, mid face and tail gate junction boxes did not provide the flame path protection required to prevent the escape of flames from the junction boxes should an ignition occur inside. Thus, the junction boxes were not permissible.

21. The electrical cables linking the head face, mid face and tail gate junction boxes were subject to the movement inherent in the operation of the pan line. Since there were neither clamps nor packing glands to restrain movement of the cables, the cables were subject to rubbing against packing nuts and straining the internal connections within the junction boxes.

22. Sparks and ignitions are likely within the junction boxes if lead wires come into contact with the junction box frames. Loosening electrical connections within the junction boxes may generate heat causing the breakdown of the wires' insulation and thus cause bare wires to contact the box frames.

23. Each of the junction boxes had become rusty, wet and had accumulated coal dust. Since the Longwall area was subject to the liberation of methane and the generation of coal dust, the junction boxes were hazardous, and lacked the protection that properly maintained packing glands would have provided to contain flames and explosions. A fire or explosion in one of the junction boxes could have easily spread outside the box to the surrounding atmosphere in the mine.

24. After Fetty had discovered the modifications to the Longwall unit and the hazardous conditions listed above, he issued a section 104(d)(2) withdrawal order, citing unauthorized modifications and permissibility violations.

25. Petitioner was aware of the official process by which approvals, certifications and modifications are to be obtained. For example:

(1) During the summer of 1981, prior to the startup of the mine's 1st Longwall operation on Section D-3, Inspectors Fetty and Shuttlesworth along with Electrical Engineer Hall

met with company personnel to discuss all aspects of Longwall certification and approval, including filing for modifications after approval. Also, they advised the Operator to contact MSHA's Approval and Certification office if they had any problems or questions.

(2) Before the 1981 meetings, in June 1979, General Maintenance Foreman Kirby Smith had filed modification requests with MSHA with respect to lights for 12 S&S Scoops at the Mine.

(3) On August 10, 1982, Longwall Maintenance Foreman Roger C. Harris filed a field modification request with MSHA for the Longwall stage loader.

26. Petitioner was aware of the need to properly maintain packing glands and strain clamps as these matters were listed as discrepancies and abated prior to the start-up of its D-3 Longwall system in January of 1982.

27. On March 24, 1983, at a meeting between Inspectors Fetty and Cross and management representatives, it was agreed: (1) the Longwall would be reinspected to determine whether the hazardous conditions cited had been corrected; (2) if other hazardous conditions were observed they would be cited; (3) the Operator would prepare an engineering drawing and letter requesting a field modification for all machinery changed on the Longwall; and (4) the section 104(d)(2) order would be modified permitting the Longwall Unit to operate pending approval of the modifications requested.

28. Inspectors Fetty and Cross reinspected the Longwall. In the process, they determined the abatement of the conditions previously cited and issued citations for additional violations noted. When all violations were found to be abated, Order No. 2115977 was "modified to permit the Longwall mining unit to be operated until MSHA provides formal approval for the modified mining unit," at 8:30 p.m., March 24, 1984.

#### DISCUSSION WITH FURTHER FINDINGS

##### I. Was there a "clean" inspection before the March 24, 1983 order?

The threshold issue is whether the Secretary of Labor met his burden of proving that a "clean" inspection of the mine had not occurred between the last preceding section 104(c)(2) order (December 1, 1982) and the date of the order at issue (March 24, 1983).

Section 104(d) 1/ of the Act creates an enforcement tool which gives the Secretary increased sanctions in the form of withdrawal (closure) orders to operators who repeatedly allow violations to occur through an unwarrantable failure to comply with mandatory health and safety standards. In essence, it authorizes the Secretary to issue withdrawal orders for a certain chain of violations, the chain to be broken only by a "clean" inspection of the entire mine. The question here is whether such a complete inspection of the Kitt Mine took place between the date of the preceding 104(d) (2) order December 1, 1982, and March 24, 1983.

1/ Section 104(d) provides:

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

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

Although the Act does not define what constitutes a complete inspection of a mine, several Commission decisions have held that a complete inspection of a mine is not synonymous with a complete regular quarterly inspection.

In Secretary of Labor (MSHA) v. C F & I Steel Corporation, 2 FMSHRC, 3459 (1980), the Commission held that the burden of proving the absence of a clean inspection is on MSHA as part of its prima facie case to sustain the order. It went on to say that "nothing in the record . . . suggests that the Secretary's position -- that only a complete regular quarterly inspection can constitute a 'clean' inspection of the entire mine -- is necessary" to further the public interest in promoting compliance with mandatory safety and health standards.

In Secretary of Labor (MSHA) v. United States Steel Corporation, 3 FMSHRC 5 (1981), the Commission again held that MSHA must establish the absence of a "clean" inspection after the issuance of a 104(d)(1) order as part of its prima facie case.

In Secretary of Labor (MSHA) v. Old Ben Coal Company, 3 FMSHRC 1186 (1981), the Commission upheld an administrative law judge's vacating of a 104(d)(2) order where the complete inspection of the mine was comprised of a series of spot inspections and regular inspections which were not a complete regular quarterly inspection.

In this case MSHA has established only that a complete regular quarterly inspection had not been finished by March 24, 1983. Mr. Cervo, the resident inspector, felt that until a closeout meeting was held and he completed his paper work, the regular quarterly inspection was not over and, therefore, the mine was not completely inspected. This is the position that MSHA took in the Old Ben case, supra, which the Commission rejected.

All areas of the Kitt No. 1 Mine had been inspected between December 2, 1982, and March 23, 1983. Only two regular "AAA" inspections were conducted after March 23, 1983, and both of those were to check on two specific items. They were Mr. Cervo's inspection of the suspected hazardous chemicals on the surface on March 24, 1983, and Mr. Allen's inspection of U-Mains on March 25, 1983, to check the abatement of a citation issued the previous day during a spot inspection. Both of the areas visited in those two inspections had been completely inspected earlier in the course of the regular quarterly inspection.

It was also brought out in testimony by Petitioner that numerous inspections had occurred between January 19, 1983, and March 23, 1983. Petitioner's Exhibits 6 and 7 show that the

entire mine was completely inspected through numerous visits by MSHA inspectors to all areas of the Kitt No. 1 Mine. This testimony was not disputed. In fact, Mr. Cervo's testimony supported it.

MSHA has failed to pass the threshold requirement of showing that a clean inspection of the mine had not occurred since the last preceding 104(d)(2) order on December 1, 1982. Therefore, the 104(d)(2) order by Inspector Fetty of March 24, 1983, must fail. The proper chain to support such an order was missing.

Independent of this holding, the underlying 104(d)(2) order of December 1, 1982, in this case, has recently been invalidated by the Commission because of an intervening clean inspection before December 1, 1982. Secretary of Labor v. Kitt Energy Corporation, WEVA 83-65-R, decided July 18, 1984. Such holding is a further ground for invalidating the 104(d)(2) order at issue in this case.

Accordingly, the March 24, 1983, order will be invalidated. However, that does not end the case, because the Secretary charged violations in the order. The issues concerning those allegations must be resolved and, if charges of violations are sustained, the 104(d)(2) order should be converted into a section 104(a) citation to the extent of the valid charges.

II. Did the failure to obtain final approval of D-5 Longwall equipment pursuant to 30 CFR Part 18 constitute a violation of 30 C.F.R. §75.503?

Order No. 2115977 contains charges of violation of 30 C.F.R. §75.503 which include Petitioner's implementation of unauthorized modifications to its Longwall Mining Unit, the Operator's failure to maintain adequate packing to secure and provide protection for cables entering junction boxes and the Operator's failure to provide and maintain clamping for cables entering the head face and tail face motor junction boxes.

At the hearing Petitioner stipulated that certain charges listed in Order No. 2115977 constituted violations of 30 C.F.R. §75.503:

It was also discovered that the following permissibility violations existed. (1) The 4/0 3/C type SHD-GC cable is not provided with an adequate amount of packing, where the cable is entering the head face motor junction box, the cable can be moved freely by hand. (2) The 4/0 3/C type SHD-GC trailing cable is not provided with adequate packing where

it enters the mid-face junction box XP 1665-25 on the outby side, the cable is loose and the packing nut can be turned freely by hand and the cable pulled in and out freely. (3) The 4/0 3/C type SHD-GC cable for the 250 HP reliance tail conveyor motor XP 1478-94 is pulled out of the junction box through the packing nut exposing the conductors in the cable. (Tr. 14.)

A main issue is whether the failure to obtain approval of changes in the Longwall equipment, as required by 30 C.F.R. Part 18, constituted a violation of section 75.503.

30 C.F.R. § 75.503 states:

Section 75.503. Permissible electric face equipment; maintenance

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

Section 75.503 does not set the standards for permissibility; it requires only that certain equipment be maintained in permissible condition.

The Act, in section 318(i), defines "permissible" as follows:

"permissible" as applied to electric face equipment means all electrically operated equipment taken into or used in by the last open crosscut of an entry or a room of any coal mine the electrical parts of which, including, but not limited to, associated electrical equipment, components, and accessories, are designed, constructed, and installed, in accordance with the specifications of the Secretary, to assure that such equipment will not cause a mine explosion or mine fire, and the other feature of which are designed and constructed, in accordance with the specifications of the Secretary, to prevent, to the greatest extent possible, other accidents in the use of such equipment; and the regulations of the Secretary or the Director of the Bureau of Mines in effect on the operative date of this title relating to the requirements for investigation, testing, approval, certification, and acceptance of such equipment as permissible shall continue in effect until modified or superseded by the Secretary, except that the Secretary shall provide procedures, including,



where feasible, testing, approval, certification, and acceptance in the field by an authorized representative of the Secretary, to facilitate compliance by an operator with the requirements of section 305(a) of this title within the periods prescribed therein;

In order to meet the permissibility standard of 30 C.F.R. §75.503, the equipment must be built according to the requirements of Schedule 2G, which is set forth in 30 C.F.R. Part 18. See, e.g., Kaiser Steel Corporation, IBMA 75-15, 3 IBMA 489 (1974); and Eastern Associated Coal Corporation, IBMA 75-23, 75-25, 5 IBMA 185 (1975).

Accordingly, the requirement in 30 C.F.R. §75.503 that electric face equipment be maintained in "permissible condition" refers to the requirements of Schedule 2G which are set forth at 30 C.F.R. Part 18.

30 C.F.R. §18.15 requires that:

[i]f an applicant desires to change any feature of approved equipment or a certified component, he shall first obtain MSHA's concurrence pursuant to the following procedure: \* \* \*.

Petitioner was an "applicant" because it was a "corporation" that controlled "the assembly of an electrical machine or accessory" (30 C.F.R. §18.2, definition of "Applicant") when it reassembled its Longwall Mining Unit at the D-5 location. As an "Applicant," Petitioner was required by 30 C.F.R. §§18.15 and 18.81 to apply in writing to the Approval and Certification Center, MSHA, in advance of making the changes to approved equipment so that MSHA could "determine whether inspection or testing will be required. . . if there is a possibility that the change(s) may adversely affect safety" (§18.15(b)). MSHA would also need to determine whether the "[p]roposed modifications . . . conform with the applicable requirements of Subpart B of this part [Part 18], and not substantially alter the basic functional design that was originally approved for the equipment" (Part 18.18(b)).

The Longwall Mining Unit with the original Eikhoff Shearer in place and the Siemens Allis Motors in place had been approved by MSHA under MSHA Approval No. 2G-3365A-0 (Exhibit G-1, Electrical Component Layout). The record establishes that Petitioner made changes to its approved Longwall Mining Unit and operated the unit with those changes without complying with the requirements of 30 C.F.R. Part 18. I hold that the changes in the Longwall equipment without obtaining MSHA approval constituted a violation of 30 C.F.R. §75.503.

III. Failure to provide or to maintain clamps  
for the cable entering the Head face and  
Tail face Motor Junction boxes.

At hearing it was established that there were no clamps to protect the cables entering the head face conveyor junction box and the tail face conveyor junction box against strain from movement of the conveyor system.

Cable clamps are required by 30 C.F.R. §18.40 to be provided:

for all portable (trailing) cables to prevent strain on the cable terminals of a machine. Also insulated clamps shall be provided to prevent strain on both ends of each cable or cord leading from a machine to a detached or separately mounted component.

At hearing, Inspector Fetty testified that the cables leading to the head face and tail face conveyor junction boxes were "trailing cables" and not inner machine cables because they are subject to the movement of the conveyor system during the mining process (Tr. pp. 117-118). I accept this definition and hold that Petitioner failed to comply with 30 C.F.R. §18.40. For the reasons set forth above, I hold that this violation of 30 C.F.R. §18.40 constituted a failure to "maintain . . . electric face equipment . . . in permissible condition" and thus is also a violation of 30 C.F.R. §75.503.

IV. Were the violations of 30 C.F.R. §75.503  
"Unwarrantable"?

Petitioner's management officials intentionally modified the existing approved Longwall Mining Unit by changing the shearer, conveyor motors, pan line and accessories amounting to some 80% of the Longwall Mining Unit, without applying to MSHA for approval of the changes to the Longwall Mining Unit. The management officials were aware of the approval and modification processes required by MSHA, having discussed them with MSHA representatives Fetty, Shuttlesworth and Hall in the summer of 1981, and having filed Field Modification requests concerning S&S Scoop tractors in June 1979 and the Longwall stage loader in August 1982.

I hold that Petitioner's failure to comply with the application and certification procedures was "unwarrantable." If Petitioner had any question as to the requirement for an application for approval of the type modifications it planned, it could have resolved the question by contacting MSHA to see whether an application was needed. By acting without

inquiring into the legality of its actions, it showed a careless disregard for its statutory and regulatory duty as an operator.

As to the other violations of section 75.503, a thorough inspection of the Longwall Mining Unit conducted by MSHA in January 1982 produced a long list of items that needed correction by the operator prior to start up that included numerous references to improperly packed packing glands and cables not provided with adequate strain relief (i.e., strain clamps). I find that Petitioner knew or should have known of the packing gland and cable clamp violations and corrected them before the inspection on March 24, 1983. I therefore hold that these violations constituted an "unwarrantable" failure to comply.

#### CONCLUSIONS OF LAW

1. The judge has jurisdiction over this proceeding.
2. MSHA Order No. 2115977, March 24, 1983, is not valid because the Secretary has not met his burden of proving that an intervening "clean" inspection had not occurred. Order No. 2115977 should be converted into a section 104(a) citation.
3. The violations charged in Order No. 2115977 were proved by the Secretary, by a preponderance of the evidence, and each was proved to be an "unwarrantable" violation.

#### ORDER

WHEREFORE IT IS ORDERED that:

1. MSHA Order No. 2115977 is MODIFIED to change it from a section 104(d)(2) order into a section 104(a) citation. As so modified, this citation including all the charges therein is AFFIRMED.

*William Fauver*

William Fauver  
Administrative Law Judge

#### Distribution:

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/ejp

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

OCT 9 1984

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No: KENT 84-92
Petitioner	:	A/O No: 15-02162-03513
	:	
v.	:	South Hopkins No. 2
	:	
	:	
SOUTH HOPKINS COAL COMPANY,	:	
Respondent	:	

## DEFAULT DECISION

Appearances: Carole M. Fernandez, Esq., Office of  
the Solicitor, U.S. Department of Labor,  
for Petitioner

Before: Judge Moore

The above case was scheduled for hearing on September 5, 1984 at 10:00 A.M. in the Hopkins County Courthouse in Madisonville, Kentucky. At 10:30 A.M. I made the following statement:

"It is now 10:30 A.M. and respondent is not present. My office has proof of service of the Notice of Hearing and site notice. I hereby declare respondent in default and will issue a formal order when I return to my office."

As of the date of this decision being issued I have still not heard from respondent. I hereby confirm my oral ruling that respondent is in default, AFFIRM the two citations involved and assess a penalty of \$242 against respondent.

Respondent is accordingly ORDERED to pay to MSHA, within 30 days, a civil penalty in the amount of \$242.

Respondent is further ORDERED to inform me, within 30 days, why it did not let me, the government's counsel, or the inspector know that it did not intend to appear at the hearing.

*Charles C. Moore, Jr.*

Charles C. Moore, Jr.  
Administrative Law Judge

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

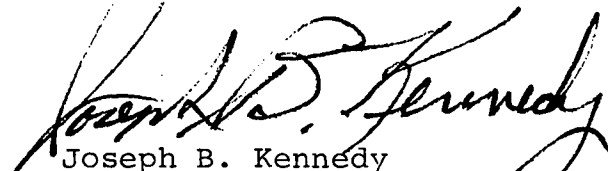
OFFICE OF ADMINISTRATIVE LAW JUDGES  
2 SKYLINE, 10th FLOOR  
5203 LEESBURG PIKE  
FALLS CHURCH, VIRGINIA 22041

OCT 10 1984

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 83-241-D
ON BEHALF OF	:	
JAMES McNEIL TAYLOR,	:	MSHA Case No. HOPE CD 83-25
Complainant	:	
v.	:	No. 4 Mine
	:	
BUCK GARDEN COAL COMPANY,	:	
Respondent	:	

DEFAULT ORDER

The operator having failed to show cause why it should not be declared in default of its settlement agreement and a final enforceable order entered in the captioned matter, it is ORDERED that respondent be, and hereby is, deemed in default of its settlement agreement and the Secretary directed to take such action as is necessary to enforce under section 106(b) of the Mine Act this final order of default and dismissal of this case from the Commission's docket.

  
Joseph B. Kennedy  
Administrative Law Judge

Distribution:

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

OCT 10 1984

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 84-3-M
Petitioner	:	A.C. No. 29-01893-05502
	:	Docket No. CENT 84-19-M
	:	A.C. No. 29-01890-05501
v.	:	
	:	Portable Crushing Plant No.
	:	3 & 4
SOUTHWAY CONSTRUCTION COMPANY,	:	
INC.,	:	Docket No. WEST 84-27-M
Respondent	:	A.C. No. 05-03880-05501 BY2
	:	Docket No. WEST 84-28-M
	:	A.C. No. 05-03880-05502 BY2
	:	Union Carbide Pit

## DECISION

Appearances: James H. Barkley, Esq., Office of the Solicitor,  
U.S. Department of Labor, Denver, Colorado,  
for Petitioner;  
Ms. Izora Southway and Leroy Belt, Southway  
Construction Company, Inc., Alamosa, Colorado,  
pro se.

Before: Judge Morris

These cases, heard under the provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (the "Act"), arose from inspections of respondent's sand and gravel operations in New Mexico and Colorado. The Secretary of Labor seeks to impose civil penalties because respondent violated regulations promulgated under the Act.

After notice to the parties, a hearing on the merits was held in Alamosa, Colorado on August 28, 1984.

The parties waived the filing of post-trial briefs.

## Issues

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

## Stipulation

At the commencement of the hearing the parties stipulated that the respondent was subject to the Act (Tr. 8).

CENT 84-3-M  
Citation 2091920

This citation alleges a violation of Title 30, Code of Federal Regulations, Section 56.14-1 which provides as follows:

Guards

56.14-1 Mandatory. Gears; sprockets; chains; drive, head, tail, and take-up pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons, shall be guarded.

Summary of the Evidence

During this inspection on August 10, 1983 near Wagon Mound, New Mexico, MSHA Inspector Alfredo Garcia was accompanied by Darrell Yohn, the company representative. A particular place in the worksite came to the inspector's attention because a worker was cleaning debris at a tail pulley. The worker was kneeling on the ground about two feet from the end of the pulley. The unguarded tail pulley was under the L.J. Crusher. Photographs taken by the inspector showed the moving parts at the tail pulley. (Transcript at pages 10 through 17, 27, 28; Exhibits P1 and P2).

In the inspector's opinion, there was a hazard to this worker. He could become entangled in the tail pulley. This hazard was further complicated by the dusty conditions in the immediate vicinity. In the event the worker were to be caught in the tail pulley, injuries could range as high as a permanent disability (Tr. 17-21).

Mrs. Izora Southway, an officer of respondent, testified that Inspector Garcia was at this site and issued a citation on March 23, 1983. However, Mrs. Southway pointed out that no citation was issued at that time for this particular unguarded tail pulley. Mrs. Southway felt that since the citation was not issued at the time of the previous inspection it could not now be a violation of a substantial and significant nature (Tr. 22-24).

Discussion

The evidence here establishes a violation of the guarding standard, 30 C.F.R. § 56.14-1. It is true there was a guard located above the tail pulley which would prevent access to the area for anyone other than the employee who was cleaning the tail pulley itself. It is, however, the general purpose of the regulation to protect all employees and this would include the clean-up man working at this location. Cf. Missouri Gravel Company, 3 FMSHRC 2470 (1981).

The evidence further establishes that the violation is of a significant and substantial nature. In view of the testimony and experience of Inspector Garcia, I am unwilling to hold to the contrary, Cf. Consolidation Coal Company, 6 FMSHRC 34, (1984).

It is true that there was a guard located above the tail pulley. Photographs indicate that access was very limited for the clean-up man (Exhibits P1 and P2 illustrate the access.) These factors cause me to conclude that the negligence of the operator is somewhat overstated. This issue is addressed in the assessment of the civil penalty which is considered, infra.

The evidence offered by respondent concerns the failure of Inspector Garcia to issue a citation for this violative condition in March, 1983. This testimony essentially invokes the doctrine of collateral estoppel. In short, should MSHA now be estopped from claiming this violation occurred since it did not previously issue a citation for this condition?

This case particularly illustrates the weakness in respondent's argument. Inspector Garcia indicated that this condition was brought to his attention because the cleanup man was working at the end of the tail pulley. The position of this man, his activities with his shovel and his close proximity to the unguarded tail pulley brought the entire matter into focus. The citation was issued and properly so. The doctrine of collateral estoppel should not and cannot be invoked here to deny miners the protection of the Mine Safety Act. I have previously refused to apply the doctrine in similar circumstances. Servtex Materials Company, 5 FMSHRC 1359 (1983); Kennecott Minerals Company, WEST 82-155-M, August 1984; also on the issue of collateral estoppel, see the Commission decision in King Knob Coal Company, Inc., 3 FMSHRC 1417 (1981).

The citation should be affirmed.

CENT 84-19-M  
Citations 2090946, 2090947, 2090948

The above citations allege separate violations of 30 C.F.R. § 56.5-1(a) and 5-5 which provides:

#### Air Quality

56.5-1 Mandatory. Except as permitted by § 56.5-5:

(a) Except as provided in paragraph (b), the exposure to airborne contaminants shall not exceed, on the basis



of a time weighted average, the threshold limit values adopted by the American Conference of Governmental Industrial Hygienists, as set forth and explained in the 1973 edition of the Conference's publication, entitled "TLV's Threshold Limit Values for Chemical Substances in Workroom Air Adopted by ACGIH for 1973," pages 1 through 54, which are hereby incorporated by reference and made a part hereof. This publication may be obtained from the American Conference of Governmental Industrial Hygienists by writing to the Secretary-Treasurer, P.O. Box 1937, Cincinnati, Ohio 45201, or may be examined in any Metal and Nonmetal Mine Health and Safety District or Subdistrict Office of the Mining Enforcement and Safety Administration. Excursions above the listed thresholds shall not be of a greater magnitude than is characterized as permissible by the Conference.

56.5-5 Mandatory. Control of employee exposure to harmful airborne contaminants shall be, insofar as feasible, by prevention of contamination, removal by exhaust ventilation, or by dilution with uncontaminated air. However, where accepted engineering control measures have not been developed or when necessary by the nature of work involved (for example, while establishing controls or occasional entry into hazardous atmospheres to perform maintenance or investigation), employees may work for reasonable periods of time in concentrations of airborne contaminants exceeding permissible levels if they are protected by appropriate respiratory protective equipment. Whenever respiratory protective equipment is used a program for selection, maintenance, training, fitting, supervision, cleaning, and use shall meet the following minimum requirements:

(a) Mining Enforcement and Safety Administration approved respirators which are applicable and suitable for the purpose intended shall be furnished, and employees shall use the protective equipment in accordance with training and instruction.

(b) A respirator program consistent with the requirements of ANSI Z88.2-1969, published by the American National Standards Institute and entitled "American National Standards Practices for Respiratory Protection ANSI Z88.2-1969," approved August 11, 1969, which is hereby incorporated by reference and made a part hereof.

This publication may be obtained from the American National Standards Institute, Inc., 1430 Broadway, New York, New York 10018, or may be examined in any Metal and Nonmetal Mine Health and Safety District or Sub-district Office of the Mining Enforcement and Safety Administration.

(c) When respiratory protection is used in atmospheres immediately harmful to life, the presence of at least one other person with backup equipment and rescue capability shall be required in the event of failure of the respiratory equipment.

#### Summary of the Evidence

On May 23, 1983, MSHA Inspector Archie Fuller inspected respondent's worksite two miles northeast of Blanco, New Mexico. The location was a basic sand and gravel operation with three workers at the site (Tr. 79-81).

The inspector placed a Bendix dust pump on the lapel of each worker and sampled them for nine hours of an eleven-hour shift. The filters had been pre-weighed, numbered and marked. At this time the foreman, as the primary loader operator, would change off with the crusher operator about half of the time. The clean-up man drove the water truck. At the commencement of the inspection the inspector requested that the workmen perform their normal duties as far as was possible. At the conclusion of the sampling, he sealed the samples and forwarded them to MSHA for an analysis (Tr. 81-84, 87, 88).

The sampling results obtained from MSHA's technical laboratory indicated the following exposures for which citations were issued:

<u>Occupation and Location</u>	<u>Sampling Time-min</u>	<u>Sample Wt.-mg</u>	<u>SiO<sub>2</sub> Wt.-mg</u>	<u>%SiO<sub>2</sub></u>	<u>TWA mg/m<sup>3</sup></u>	<u>TLV mg/m<sup>3</sup></u>
Loader Operator (Foreman)	540	.420	.103	24.52	.515	.377
Crusher Operator	540	.344	.097	28.19	.422	.331
Plant Laborer	540	.407	.095	23.34	.499	.395

(Tr. 84-86; Exhibit P-4)

The company had respirators on the jobsite but they were not being worn. There was very little visible dust to be seen. In the inspector's opinion, the company should have been aware of the silica dust problems due to prior MSHA inspections (Tr. 86-90, 93).

Respondent's evidence shows that on August 2, 1983, this particular worksite was inspected by the same compliance officer. At that time the company was found to be in compliance with this regulation.

### Discussion

The evidence establishes that each of the employees was over-exposed to silica dust. Cf. Climax Molybdenum Company, a division of Amax, Inc., 2 FMSHRC 2748 (1980).

The mere fact that an inspection in August, 1983 revealed the company was in compliance does not constitute a defense to the violations that occurred on May 23, 1983.

The three citations should be affirmed.

### WEST 84-27-M Citation 2096998

This citation alleges a violation of 30 C.F.R. § 56.15-4 which provides:

56.15-4 Mandatory. All persons shall wear safety glasses, goggles, or face shields or other suitable protective devices when in or around an area of a mine or plant where a hazard exists which could cause injury to unprotected eyes.

### Summary of the Evidence

Respondent was crushing rock for Corn Construction Company near Rifle, Colorado when MSHA Inspector Michael T. Dennehy arrived at the worksite before 8:00 a.m. on August 16, 1983. He contacted the company representative, Jim Farley. Before commencing his activities, Inspector Dennehy told Farley that he would be inspecting the area and he suggested that all of the employees wear their safety equipment. At that time it was established that there was only one pair of safety glasses available for the three workers at the jobsite. At that point one of the employees was designated to wear the available safety glasses (Tr. 30-35, 37).

Inspector Dennehy then proceeded with his inspection. During the course of his activities he saw a worker striking metal to metal. He was hammering a metal guard into place. In addition, the worker, who had been designated to wear the safety glasses, was in fact, wearing sunglasses. The sunglasses did not meet safety specifications. Sunglasses, such as he was wearing,

complicates the hazard because those glasses could shatter if struck with a piece of metal (Tr. 32, 33).

It is common practice in the industry to wear safety glasses when striking metal to metal. If this worker continued the practice there would be a substantial likelihood that an injury would occur (Tr. 34, 36).

Respondent offered no evidence to rebut this violation.

#### Discussion

The evidence establishes a violation of 30 C.F.R. § 56.15-4. This particular miner was without safety glasses or other suitable protection when he was striking metal to metal. The hazard was clear. Unprotected eyes could be injured.

The citation should be affirmed.

#### WEST 84-28-M Citation 2096710

This citation alleges a violation of 30 C.F.R. § 56.5-1, cited, supra.

#### Summary of the Evidence

On the day he issued the citation for the failure to have safety glasses Inspector Dennehy conducted a dust and noise survey at the Union Carbide pit (Tr. 40-41, 53).

Inspector Dennehy prepared for his survey by precalibrating his pumps, then numbering them, and sealing the filters. He monitored two miners for an entire day. The sampling device was placed on respondent's employee Phil Miller, the clean-up man. At the conclusion of the work day Inspector Dennehy resealed the filters, recalibrated his pumps, and turned them in to be weighed. In the inspector's opinion, the samples were very valid (Tr. 41, 42).

An MSHA analysis of the sample established that Miller's exposure was 1.6 times over the TLV for silica. There was some visible dust present in the area, as well as some water sprays. MSHA advised the company of its analysis of the silica dust (Exhibit P3). Employee Miller, who was not wearing any personal protective equipment, was exposed to a dust concentration consisting of 16.21 percent silica. The citation itself was issued after the inspector received the technical data from MSHA's staff (Tr. 42-43; Exhibit P3).

Witness Richard Durand, an MSHA industrial hygienist and a person experienced in the effects of silicosis on the human body,

testified in the case. 1/ Witness Durand indicated that a 16 percent concentration of silica dust is relatively high. However, sand and gravel operations usually average silica dust concentrations in the vicinity of 16 to 20 percent (Tr. 55-58).

Silica affects a person's lungs. Fibrosis can result. After a person has been exposed, the scarring may progress further without any additional exposure. The disease and lung problems progress in tandem. As the lungs lose their elasticity, the heart, in turn, must pump harder (Tr. 58-61).

If an individual has been exposed to silicosis, he is thereby susceptible to tuberculosis. A chronic silicosis can develop from an exposure from about 1 to 16 percent over a long period of time. Acute silicosis can develop when there is an exposure above fifty percent for a period of two to five years. The witness considered any exposure above fifty percent to be high (Tr. 60-63, 69, 73).

Disability or death can be the ultimate results (Tr. 60-61, 73).

If workers are not wearing respirators then their problems with silica can be greatly enhanced.

Respondent offered no evidence to rebut the foregoing evidence.

#### Discussion

The evidence here establishes a violation of the regulation. The exposure to employee Miller to silica dust was 1.6 times of the threshold limit value.

On the uncontroverted evidence, the citation should be affirmed.

#### CIVIL PENALTIES

The statutory criteria for assessing a civil penalty is contained in 30 U.S.C. § 820(i). It provides as follows:

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1/ Witness Durant's testimony was offered in connection with WEST 84-28-M and CENT 84-19-M.

The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

In considering these factors I find that respondent had 64 citations issued against it in 1983. These were the result of 14 inspections at five different worksites (Tr. 115-116). Respondent's operations are highly mobile involving as many as 30 different sites a year (Tr. 116).

Respondent's prior citations were assessed a single penalty (Tr. 115, 116). Respondent contends that the citations in contest here should be assessed on the same basis. I reject this view. The Commission is bound by the statutory criteria and has rejected the Secretary's single assessment regulation. United States Steel Mining Co., Inc., 6 FMSHRC 1148 (1984).

Mrs. Southway testified that in 1983 the company compiled 51,136 man hours with no injuries at all of the mine sites (Tr. 116, 117). The company has three to four employees at each site with a maximum of about 20 employees (Tr. 117).

Mrs. Southway's testimony established that the company provided protective equipment in their plants. Further, the employees were instructed in their use, and they understood the MSHA regulations. I accept Mrs. Southway's testimony but an operator must do more than merely furnish protective equipment. It is the company's obligation to insist on the use of such equipment by its employee. This obligation can be met by training and other means. I consider the operator was negligent as noted in connection with each citation.

Mrs. Southway indicated the monetary significance of the penalties was not extreme. But she was concerned about the later effect of these citations on the company (Tr. 120). The general statutory scheme of imposing penalties seeks to promote an operator's efforts to provide for the safety and health of its miners. Since the violations have been established in these cases a penalty in accordance with the statutory criteria must be assessed.

The gravity of each violation appears in the record. As previously stated the negligence concerning Citation 2091920 (unguarded tail pulley) is overstated. The penalty should be reduced to \$25.00. The three citations in CENT 84-19-M relate to silica dust and a civil penalty of \$30.00 is proposed for each. On the other hand, in WEST 84-28-M, the Secretary proposes a penalty of \$63.00 for a single exposure to silica dust. Considering the statutory criteria I believe that the penalty for Citation 2096710 should be reduced to \$30.00 from \$63.00.

It is to respondent's credit that it abated all of the violative conditions (Tr. 121).

After carefully considering the statutory criteria, I deem that the penalties noted hereafter are appropriate and they should be affirmed.

<u>Citation No.</u>	<u>Proposed Assessment</u>	<u>Disposition</u>
2091920	\$54.00	\$ 25.00
2090946	30.00	30.00
2090947	30.00	30.00
2096948	30.00	30.00
2096998	68.00	68.00
2096710	63.00	30.00

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

ORDER

1. In CENT 84-3-M: Citation 2091920 is affirmed and a penalty of \$25.00 is assessed.
2. In CENT 84-19-M: Citations 2090946, 2090947, and 2090948 and penalties of \$30.00 for each such violation are assessed.
3. In WEST 84-27-M: Citation 2096998 is affirmed and the proposed penalty of \$68.00 is assessed.
4. In WEST 84-28-M: Citation 2096710 is affirmed and a penalty of \$30.00 is assessed.
5. Respondent is ordered to pay to the Secretary the sum of \$213.00 within 40 days of the date of this decision.

  
John J. Morris  
Administrative Law Judge

Distribution:

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

Mrs. Izora Southway and Mr. Leroy Belt, Southway Construction Company, Inc., 117 White Pine Drive, Alamosa, Colorado 81101 (Certified Mail)

/blc



# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

OCT 12 1984

PITTSBURGH AND MIDWAY	:	CONTEST PROCEEDING
MINING CORPORATION	:	
Contestant	:	Docket No: WEST 82-131-R(A)
	:	Citation No: 1016965
	:	
v.	:	Edna Mine
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	

## DECISION

Appearances: John A. Bachman, Esq., The Gulf Corporation,  
Law Department, Denver, CO, for Contestant  
James H. Barkley, Esq., Office of the  
Solicitor, U.S. Department of Labor,  
Denver, CO, for Respondent

Before: Judge Moore

During the course of an inspection of applicant's strip mine on February 23, 1982, Inspector Horbatko was approached by a drill operator and informed that a "slump" had occurred. The drill operator expressed some concern for his own safety.

Inspector Horbatko then went to the area of the spoil bank that the driller had indicated and observed conditions that indicated to him that a "slump" had occurred. A "slump" which was called by several other names during the course of the hearing, is a movement in the spoil bank which results in some of the material composing the spoil bank sliding down the bank towards the bottom of the pit. The word "slump" is not used to describe a complete spoil bank failure which would be similar to an avalanche.

A trench at the foot of the spoil bank called a catch pit is designed to catch any slumping material and keep it from going into the pit area where the mining is being done. The inspector testified that a slump does not create a hazard unless the sliding material is in such a quantity that it fills the catch basin and then overflows out into the working area. But the evidence that Inspector Horbatko saw together with the concern expressed by the drill operator led him to believe that the slump had overflowed the catch pit. He considered the slump a hazardous condition and re-examined the company's books and found no notation that a slump had occurred.

After some discussion with loading foreman Isenbager, the inspector issued a citation charging a violation of 30 CFR 77.1713(c). That section provides as follows:

After each examination conducted in accordance with the provisions of paragraph (a) of this section, each certified person who conducted all or any part of the examination required shall enter with ink or indelible pencil in a book approved by the Secretary the date and a report of the condition of the mine or any area of the mine which he has inspected together with a report of the nature and location of any hazardous condition found to be present at the mine. The book in which such entries are made shall be kept in an area at the mine designated by the operator to minimize the danger of destruction by fire or other hazard.

Foreman Isenbager testified that the slump had in fact occurred and that it was of sufficient magnitude to overflow the catch pit and spill out on to the floor of the mine. The slump did not occur on February 22 as Inspector Horbatko had assumed, but on February 21 after the end of the shift. He testified that during the winter months, because of the thawing and the freezing, almost all slumps occur around 5:30 P.M. and after the dragline has advanced one set past the area in question 1/. Mr. Isenbager noticed the slump on his pre-shift examination on the morning of February 22 and had it cleaned up before any other work was done. The slump could have possibly occurred during the early morning of February 22, but because of the history of slumps at this mine during the wintertime, the great probability is that it occurred on the previous day. In any event, it occurred after one shift ended and before the next shift began. No one would have been in the pit at the time of the slump.

Mr. Isenbager testified that if there had been miners working in the pit at the time of the slump he would have recorded it as a hazard because of the possibility of injury to a miner who might be working near the spoil bank. Inasmuch as the slump had already occurred during non-working hours however, he could not see that it was a hazardous condition that had to be recorded.

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1/

After a dragline has removed as much overburden as it can from one location, it is moved to a new location further down the pit so that it can remove overburden from the area where it had previously been stationed. The distance from one location to another is called a set.

During the course of the testimony reference was made to exhibits that had been received in evidence in Dockets No: WEST 82-131-R and WEST 82-170 which involved the same parties in the same mine. (My decision of June 16, 1983 is reported at 5 FMSHRC 1146). Applicant's exhibit 1, is a top view of the pit area where the slump occurred. The station markers - 14 through 20 - are on the highwall side of the pit, but the slump involved herein was on the spoil bank across the pit from the area between station 16 and station 17. Applicant's exhibit 2 is a cross-section of a typical portion of the pit and it shows the catch pit and how a typical slump would fall into the catch pit.

It is obvious that a slump is not some rare and unexpected occurrence 2/ They occur often and the catch pit is designed to contain the material. When material overflows from the catch pit, a hazard could be created if there were a miner in the area to be injured. The question I have to decide however, is whether a condition which was not hazardous when found and cleaned up must nevertheless be recorded in the pre-shift examination book. MSHA argues that it needs such information to assist it in reviewing the ground control plan. It might well be that MSHA does need information as to which slumps overflow the catch basin, but in my opinion the regulation involved in this case does not require that it be recorded. The requirement is that the certified person, after making his examination must record in the book "the nature and location of any hazardous condition found to be present at the mine" (emphasis added). I interpret that to mean that the condition which must be reported, must be hazardous at the time it is found. Unlike a roof fall, which may create further hazards, a slump removes the instability in the spoil pile and eliminates the hazard. In the instant case the hazard had been eliminated before the pre-shift examination while no one was in the pit area, I find that the regulation in question does not require that a slump which occurred between shifts be recorded in the examination book.

The citation is VACATED and the case is DISMISSED.

*Charles C. Moore, Jr.*  
Charles C. Moore, Jr.  
Administrative Law Judge

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2/

The company's hearsay objections are rejected because not only did Inspector Horbatko corroborate the hearsay by visual inspection of the site, but Mr. Isenbager furnished an eye-witness report of the existence of the report.

Distribution:

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/db

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

OCT 12 1984

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No: LAKE 83-8
Petitioner	:	A/O No: 11-01845-03507
	:	
v.	:	Zeigler No. 5 Mine
	:	
ZEIGLER COAL COMPANY,	:	
Respondent	:	

## DECISION

Appearances: Rafael Alvarez, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for Petitioner  
H. Halbert Woods, Esq., Zeigler Coal Company, Des Plaines, Illinois, for Respondent

Before: Judge Moore

On the evening of May 17, 1982, Inspector Buelow entered respondent's mine for the purpose of conducting a ventilation inspection. He was accompanied by mine management personnel Leroy Johnson and Dan Kroll until he got to the dinner hole just inside the section. From there on, Sam Meadows the section foreman accompanied the investigating team. They proceeded down the No. 5 entry toward the faces and as they proceeded under the last check curtain (a pull-through curtain) they saw a continuous miner and a shuttle car operating in a crosscut to the left of No. 5 entry. There was no line brattice directing air to the lefthand crosscut and the cutting blades of the miner were inby the rib of No. 5 entry by about sixty feet. The crosscut was bolted for forty feet.

The inspector issued a 104(d)(1) notice with accompanying findings of significant and substantial as well as unwarrantable failure. The ventilation plan calls for a blowing line curtain to within twentyfive feet of the face and inasmuch as there is no dispute as to the absence of the curtain, there is no dispute as to the existence of the violation. The dispute is as to the violation's designation as significant and substantial and as an unwarrantable failure.

The general practice in this mine is that the continuous miner cuts a crosscut by cutting to a depth of twenty feet and then backs out so that the roof bolter can come in. The continuous miner then goes to other faces and when it

comes back to where it started it cuts another twenty feet, backs out and then again leaves the area so that the roof bolter can come in. Inasmuch as the crosscut on the left had been cut almost sixty feet and then bolted for forty feet, it was the opinion of the inspector that three different twenty foot deep cuts had been made without any air being directed into the crosscut. He blamed the section foreman Sam Meadows for allowing this situation to occur.

He may have made statements to the effect that it was not entirely Sam Meadows' fault, but it was Sam Meadows' negligence that he attributed to the coal mine operator, and it was that negligence that led to the unwarrantable failure aspect of the case. As to the significant and substantial finding, while his methane reading showed only 4/10ths of 1%, there was always a chance of hitting a methane feeder and without the required ventilation the methane concentration could have become high enough to cause an explosion if there had been an ignition.

Section foreman Sam Meadows testified that at the beginning of the shift he gave a standard talk on the importance of ventilation and of keeping the brattice curtains in their proper position. He further testified that the continuous miner was cutting a new crosscut on the right hand side of the entry, and that before he went to the dinner hole for his evening meal he directed the miner operator to square up the new crosscut, a procedure that would have taken some forty-five minutes. He again cautioned the operator and helper to keep their ventilation curtain within twenty-five feet of the face as they squared up. He and a Mr. Crawford, a face man, whose job it was to see that a line curtain was available, went to the dinner hole and proceeded to eat. Before they finished eating, the inspection party showed up at the dinner hole and Mr. Meadows sent Mr. Crawford back to the face area with instructions to make sure that the ventilation curtains were in the proper position.

The rest of the sequence is the same as that related by Inspector Buelow. When they went through the pull-through curtain they saw the continuous miner working in the left hand crosscut with no line curtain directing air to the face. Mr. Meadows testified that the operator of the continuous miner had not followed his instructions and squared up the notch of the new crosscut being driven on the right hand side of the entry. He said that the miner operator had, without any authority, backed out of

the crosscut on the right and started mining the crosscut on the left. The miner operator and helper were reprimanded by Mr. Meadows for failing to carry out his instructions and for mining in the left hand crosscut without authorization to do so. From the conversation it appeared that the miner and helper had deliberately gone into the crosscut, knowing that the line curtain was not up, because they made some remarks as to not wanting to do Mr. Crawford's work while he was sitting in the dinner hole. Mr. Crawford, the man they were referring to had gotten into a conversation with someone after Mr. Meadows had sent him back to the face area and he had not reached the continuous miner before the inspection party got there.

I have no reason to doubt Mr. Meadows' testimony. If his instructions had been carried out, the continuous miner would still have been working in the right hand crosscut squaring it up when Mr. Meadows returned from the dinner hole. While the left hand crosscut would have been the next area to be mined, it had not been mined by any of Mr. Meadows' shifts and I can not make the assumption that Mr. Meadows would have sent the continuous miner into the crosscut without seeing that the appropriate curtains were hung.

I find no negligence on the part of section foreman Meadows and I therefore VACATE the unwarrantable finding. The violation in my opinion was significant and substantial however. The mine liberates 500,000 to 600,000 cubic feet of methane per day and while only a small percentage of that methane comes from the face areas there is always the possibility of a methane build-up if proper ventilating techniques are not used. In view of these findings and together with the other criteria which have been the subject of a stipulation, I consider a \$200 penalty to be appropriate.

The Zeigler Coal Company is accordingly ORDERED to pay to MSHA, within 30 days, a civil penalty in the amount of \$200.

*Charles C. Moore, Jr.*

Charles C. Moore, Jr.  
Administrative Law Judge

Distribution:

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/db



# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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FALLS CHURCH, VIRGINIA 22041

OCT 15 1984

HOMER W. DAVIS, : DISCRIMINATION PROCEEDING  
Complainant :  
 : Docket No. WEVA 84-118-D  
v. :  
 : HOPE CD 84-2  
ARMCO STEEL CORPORATION, :  
Respondent : No. 8 Mine

## DECISION AND ORDER OF DISMISSAL

Before: Judge Lasher

This proceeding, which was initiated by the filing with the Federal Mine Safety and Health Review Commission of a complaint of discrimination by Mr. Homer W. Davis on February 1, 1984, arises under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1976 & Supp. V 1981), hereinafter "the Act".

By letter dated January 23, 1984, the Complainant had been notified that his complaint of discrimination (filed December 15, 1983) before the Mine Safety and Health Administration (MSHA) had been investigated and the determination made that "a violation of section 105(c) had not occurred." Under the Act, a complaining miner has an independent right to bring a complaint before this Commission and this proceeding is based on that right.

On April 17, 1984, the Respondent filed a Motion to Dismiss alleging inter alia that:

1. The Complaint was not timely filed, i.e. not filed within 60 days "after the alleged October 31, 1980 discriminatory act of Respondent."
2. The Complaint fails to state a claim recognizable under the Act.

A preliminary hearing to determine the two issues raised by the motion to dismiss was held on the record in Charleston, West Virginia, on June 21, 1984, at which Respondent was represented by counsel and Complainant appeared pro se.

The reliable and probative evidence of record indicates that the Complainant was employed by Respondent, Armco Steel Corporation (ARMCO), from October 18, 1979 (Tr. 38) through November 15, 1979, on which latter date he voluntarily quit

to take care of "personal business" in California. On or about October 15, 1979, Respondent had received a "Pre-employment" Chest X-ray, the results of which were reported by J. Dennis Kugel, M.D. (Exhibit R-1), and the pertinent portion of which provided as follows:

PA CHEST: The projection is somewhat under-exposed. There appears to be a fine nodular fibrosis in fairly prominent amount throughout the lung fields so that if there is a proper history of exposure an Occupational pneumoconiosis should be considered of a UICC-p 2/3 all six lung zones. A repeat chest study is suggested with some increase in penetration. 1/

Whether the report of Dr. Kugel indicates occupational pneumoconiosis depends on Complainant's having an appropriate history of exposure (Tr. 10, 27). This question which goes to the merits of the complaint was not resolved in the preliminary hearing which was limited to the 2 issues raised in the motion to dismiss. However, as noted subsequently, a Workmen's Compensation claim filed by Complainant in 1982 was turned down because he had insufficient exposure.

Sometime in May of 1980, Complainant discussed re-employment with Terry E. Whitt, Respondent's Personnel Relations Representative, and on May 19, 1980, he filed an employment application. He was not rehired. 2/

At unspecified times during the period May 1980 into the autumn of 1980, conversations took place between Complainant and MSHA officials in which it appears that Complainant had discussed with MSHA possible discrimination by Respondent in not rehiring him (Tr. 20-23).

Although not clearly articulated, Complainant's contention of discrimination appears to be that he was not rehired in the Spring of 1980 (Tr. 54) because he had pneumoconiosis. He became aware that he had pneumoconiosis on or about October 23,

1/ The face of the X-Ray report shows it was taken on 10-12-79, and "Received" on 10-15-79. Since it was part of Complainant's Pre-employment examination, I infer that it is unlikely that Complainant would have gone on the payroll prior to Respondent's being aware of it.

2/ At the prehearing conference, Mr. Whitt gave the following explanation why Complainant was not rehired:

"Basically he was under consideration for hire. We had several other employees, applicants that we had. Mr. Davis worked for us for approximately three weeks, and I wasn't quite sure whether or not his family problems were through and did not know if he was stable or not." (Tr. 17, 18).

1981 (Tr. 46, 56). Complainant contends that sometime during the period July 26, 1982 - August 9, 1982, he first became aware that when he went to work for Respondent in 1979 that Respondent had evidence that he had pneumoconiosis (Tr. 57, 58). On January 27, 1983, Complainant's claim against the West Virginia Workmen's Compensation Fund for pneumoconiosis was turned down because he had insufficient exposure to the hazards of "occupational pneumoconiosis" during the pertinent 10-year and 15-year periods. (Court Exhibit 1). The claim itself was filed by Complainant on July 26, 1982. In approximately October 1981, Complainant sought employment with Kanawha Coal Company. He was rejected on the basis of an X-Ray report dated October 23, 1981, which indicated pneumoconiosis (Tr. 55). Sometime in 1982, Complainant filed with MSHA a discrimination complaint against Kanawha Coal Company which Complainant testified was later withdrawn for reasons which were not delineated at the hearing (Tr. 61-68).

The complaint herein was filed on December 15, 1983 (Tr. 43).

There is no question but that the complaint was not timely filed with the Secretary within the 60-day period prescribed in section 105(c)(2) of the Act.

The Commission has held that the purpose of the 60-day time limit is to avoid stale claims, but that a miner's late filing may be excused on the basis of "justifiable circumstances," Joseph W. Herman v. IMCO Services, 4 FMSHRC 2135 (December 1982). The Mine Act's legislative history relevant to the 60-day time limit states:

While this time-limit is necessary to avoid stale claims being brought, it should not be construed strictly where the filing of a complaint is delayed under justifiable circumstances. Circumstances which could warrant the extension of the time-limit would include a case where the miner within the 60-day period brings the complaint to the attention of another agency or to his employer, or the miner fails to meet the time limit because he is misled as to or misunderstands his rights under the Act.

S. Rep. No. 181, 95th Cong., 1st Sess. 36 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 624 (1978) (emphasis added). Timeliness questions must be resolved on a case-by-case basis, taking into account the unique circumstances of each situation.

Here, Respondent's failure to rehire Complainant occurred in October 1980, but his complaint of discrimination with the Secretary was not filed until December 15, 1983, more than 3 years beyond the statutory filing deadline. Accepting the relevant time factors as presented by Complainant, it appears that at least by the end of 1982, he was aware (1) that he had pneumoconiosis, (2) that Respondent might have had evidence when he was first hired and also when he was subsequently refused re-employment that he had pneumoconiosis (whether or not "occupational" pneumoconiosis), and (3) of his right to bring- and the procedure for bringing-a discrimination complaint under the Act against Respondent (Tr. 22, 23).

The 60-day statutory limitation is not a particularly long filing period in view of the lack of sophistication of the average Complainant and the complexity of some of the legal bases for bringing a discrimination action. On the other hand, the placement of limitations on the time-periods during which a plaintiff may institute legal proceedings is primarily designed to assure fairness to the opposing party by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them. Where, as here, the filing delay is remarkably prolonged, it seems a fair proposition to require a proportionately strong and clear justification therefor.

The lengthy time lapse and sequence of events here mandates the conclusion that Complainant's delay in filing his complaint <sup>3/</sup> was not justified and that the complaint was not timely filed. <sup>4/</sup>

#### ORDER

Respondent's motion to dismiss is granted and this proceeding is dismissed.

*Michael A. Lasher, Jr.*

Michael A. Lasher, Jr.  
Administrative Law Judge

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<sup>3/</sup> Cf. Walter A. Schulte v. Lizza Industries, Inc., 6 FMSHRC 8 (January 1984) (31-day delay).

<sup>4/</sup> In view of this holding, the question of whether the complaint states a cause of action under the Act is not reached.

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yh

2449

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

001 16 1984

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
ON BEHALF OF	:	
I. B. ACTON	:	Docket No. SE 84-31-D
GRADY ADERHOLT	:	SE 84-32-D
FREEMAN BUTLER	:	SE 84-33-D
JAMES L. CAMPBELL	:	SE 84-34-D
J. D. ELLENBERG	:	SE 84-35-D
W. D. FRANKLIN	:	SE 84-36-D
BILLY R. GLOVER	:	SE 84-37-D
TERRY PEOPLES	:	SE 84-39-D
WILLIAM REID	:	SE 84-40-D
CHARLES W. RICKER	:	SE 84-41-D
TERRY SHUBERT	:	SE 84-42-D
THEODORE TAYLOR	:	SE 84-43-D
MARVIN WISE	:	SE 84-44-D
	:	MSHA Case No. BARB CD 83-18
	:	Nebo Mine
	:	
CHARLES BLACKWELL	:	Docket No. SE 84-45-D
	:	MSHA Case No. BARB CD 83-27
ROBERT BURLESON	:	Docket No. SE 84-46-D
	:	MSHA Case No. BARB CD 83-28
HOUSTON EVANS	:	Docket No. SE 84-47-D
	:	MSHA Case No. BARB CD 83-31
	:	No. 7 Mine
	:	
KENNETH RANDALL COFER,	:	Docket No. SE 84-52-D
Complainants	:	MSHA Case No. BARB CD 83-18
	:	Flat Top Mine
UNITED MINE WORKERS OF	:	
AMERICA (UMWA),	:	
Intervenor	:	
v.	:	
	:	
JIM WALTER RESOURCES, INC.,	:	
Respondent	:	

## DECISION

Appearances: Frederick W. Moncrief, Esq., Office of the Solicitor, U. S. Department of Labor, Arlington, Virginia, for Complainants;  
Mary Lu Jordan, Esq., Washington, DC, for Intervenor;  
David M. Smith, Esq., Maynard, Cooper, Frierson & Gale, P.C., Birmingham, Alabama, and Robert W. Pollard, Esq., Jim Walter Resources, Inc., Birmingham, Alabama, for Respondent.

Before: Judge Melick

These consolidated cases are before me upon the complaints of discrimination by the Secretary of Labor on behalf of 17 miners under the provisions of Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act". The individual complainants, former surface miners who had been laid off during a reduction in force, allege that Jim Walter Resources, Inc. (Jim Walter) discriminated against them in violation of Section 105(c)(1) of the Act<sup>1</sup> because they had not been provided the underground safety training required by section

<sup>1</sup> Section 105(c)(1) of the Act provides as follows:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment 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 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 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.

115 of the Act.<sup>2</sup> The alleged discrimination occurred when Jim Walter recalled other miners from the panel lists who had terms of company service shorter than those of Complainants but who had completed that training. Most of the Complainants also allege that Jim Walter is obligated to reimburse them for the time and expense involved in subsequently obtaining the underground safety training during the time when each was laid off.

Jim Walter does not deny that the Complainants were thus bypassed for underground positions at least in part because they had not completed the 32 hour required safety training for underground miners at an MSHA-approved course but maintains that these decisions were mandated by the terms of the applicable collective bargaining agreement (the "Agreement") and in particular by the seniority provisions contained in Article XVII of the Agreement. Those provisions require as an element of seniority that the miner have the ability to perform the work of the job at the time the job is awarded. It is Respondent's position that a miner requiring the safety training is not able to perform the work of the job at the time the job is awarded.

The Commission held in Secretary ex rel Bennett, Cox, et al. v. Emery Mining Corporation, 5 FMSHRC 1391 (1983), that in enacting section 115, Congress did not restrict the prerogative of the mine operators in setting pre-employment qualifications based on

<sup>2</sup> Section 115 states in part:

(a) Each operator of a coal or other mine shall have a health and safety training program which shall be approved by the Secretary.

. . . Each training program approved by the Secretary shall provide as a minimum that -

(1) new miners having no underground mining experience shall receive no less than 40 hours of training if they are to work underground.

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



experience or training and that the operator's policy in that case of requiring applicants for employment to obtain the 32 hours of MSHA-approved training prior to being hired did not violate the Act.

Within this legal framework it is therefore immaterial whether the affected applicants for employment are "strangers" to the industry and the employer, as in the Emery case, or are former employees awaiting the possibility of reemployment from a recall list, as in the instant case. In either case, pre-employment training and experience criteria may be used by the mine operator, including the requirement that prospective underground miners have completed their MSHA-approved safety training, without running afoul of the Act.

It follows then that the mine operator is also free to contract with its employee bargaining unit to require consideration of such pre-employment training as an element of seniority. In neither case is such criteria discriminatory under the Act. Accord UMWA o.b.o. Shepard v. Peabody Mining Co., 4 FMSHRC 1338 (1982); but see UMWA o.b.o. Rowe et.al. v. Peabody Coal Co., 6 FMSHRC 1634 (1984). There is accordingly no need to decide in this case whether or not requiring such pre-employment training as an element of seniority violates the provisions of Article XVII of the collective bargaining agreement. I note however that the Respondent's position (that it was obligated under that part of the Agreement to give priority in its recall decisions to those paneled miners who then had completed the MSHA approved safety training because only they had "the ability to step into and perform the work of the job at the time the job is awarded") was upheld in Arbitration (Joint Exhibit No. 18).

The second allegation of discrimination before me concerns Respondent's failure to pay those miners it recalled for underground positions for the expenses of the training they received and for comparable wages during that training period.<sup>3</sup> The Emery decision is again controlling. It is clear from that decision that since the employer has been made responsible under the Act for the costs of such training, it is unlawful under section 105(c)(1) if, after hiring the Complainants as underground miners, it fails to compensate them for their 32 hours of classroom training but relies on that training to satisfy its training obligations under section 115. The Commission concluded in the Emery decision that under section 115(b) the mine operator was required to reimburse the Complainants for the cost of their training and

<sup>3</sup> Complainants Acton, Aderholt, Burleson, Butler, Campbell, Franklin, Glover, Peoples, Reid, Ricker, Shubert, Taylor, and Wise come within this category.

the equivalent of wages at their starting pay rate for the time spent in training.

Respondent argues that the Emery decision is distinguishable in two respects. It first argues that the training required by the Emery Mining Corporation was a mandatory hiring prerequisite for all applicants whereas in the instant case, new miner training was not an absolute, uniform qualification for hiring or recall by Respondent. Respondent argues, secondly, that the Emery case involved job applicants who had no previous opportunity to obtain new miner training from the operator, whereas, in the instant case, the Complainants' lack of experienced miner status was due to previous decisions by the miners to move out of underground positions.

The thrust of the Emery decision was, however, that the mine operator cannot discharge its statutory obligations by obtaining the benefit of the requisite safety training without reimbursing the miners for the cost of that training. As the Commission pointed out, this action circumvented the statutory mandate that the mine operators must pay for such training and that this interfered with the miners' rights under section 115. Similarly in the case at bar, Respondent relied on the safety training obtained by the individual miners to satisfy its statutory obligations to provide training for those miners. Accordingly, Respondent too should compensate the recalled miners for that training. Emery is not at all distinguishable in this regard.

I agree, however, with Respondent's position that it was not required to reimburse the underground safety training expenses of Complainant Cofer who did not return to underground work. In keeping with the rationale of the Emery decision that the employer took advantage of unreimbursed training to attempt to comply with the training requirements of section 115, it is clear that Respondent is not required to reimburse a miner who returns to surface work where the underground safety training was not required. Respondent did not take advantage of the unreimbursed training for underground positions in regard to this employee. Mr. Cofer is accordingly not entitled to any reimbursement for training which had not been taken advantage of by the Respondent in fulfilling its statutory obligations.

#### Timeliness of Filing

As noted, I have found that Respondent did violate section 105(c)(1) when, after recalling certain Complainants to positions as underground miners, it refused to compensate those miners for their 32 hours of training but relied on that training to satisfy

its training obligations under section 115. Respondent maintains, however, that ten of the Complainants in this category, namely, Acton, Campbell, Franklin, Glover, Peoples, Reid, Ricker, Shubert, Taylor, and Wise filed their complaints beyond the sixty day time limit set forth in section 105(c)(2) of the Act and therefore those complaints should be barred.

If a miner believes that he has suffered discrimination in violation of the Act, and wishes to invoke his remedies under the Act, he is indeed required under section 105(c)(2), to file his initial discrimination complaint with the Secretary of Labor within sixty days after the alleged violation. A miner's late filing may be excused however where "justifiable circumstances" exist. Herman v. Imco Services, 4 FMSHRC 2135 (1982), Hollis v. Consolidation Coal Company, 6 FMSHRC 21 (1984).

In the case at bar, it is apparent that the act of discrimination occurred only after the miners were recalled for underground positions and only after Respondent refused to pay the training expenses and comparable wages upon demand or upon the failure of Respondent to pay such expenses and wages after a reasonable period of time following recall, considering the time needed to perform necessary bookkeeping functions for such payments. In the latter case, I conclude that a date 30 days from the date of recall constitutes the discriminatory event.

Within this framework it appears that no more than three Complainants may have filed untimely, i.e., Messrs. Peoples, Shubert, and/or Wise. These miners were all recalled by Respondent on November 14, 1983, and therefore should have been reimbursed for their training expenses and comparable wages by December 14, 1983. Since Respondent failed to make such payments by December 14, 1983, that date became the date of the discriminatory event. The miners accordingly should have filed their complaints with the Secretary within sixty days thereafter, or by February 12, 1984. Since the Secretary filed his complaint with the Commission on February 24, 1984, and incorporated therein a complaint that the miners had not been reimbursed for their training expenses and comparable wages, it may reasonably be presumed that the complaints now at issue had been brought to the Secretary's attention at least two weeks before that date. Accordingly, I find that the complaints had been timely filed with the Secretary. I note in any event that Respondent does not dispute that the issue of nonpayment for training was raised in a timely manner by other Complainants and Respondent accordingly cannot deny that it had timely notice of the nature of the claim raised. Respondent has, moreover, cited no legal prejudice by any filing delay. Under the circumstances, I find that all of the Complainants met the filing requirements set forth in section 105(c)(2).

## Disposition of Discrimination Proceedings and Damages

A. Dockets No. SE 84-35-D, SE 84-45-D, SE 84-47-D, and SE 84-52-D

Inasmuch as Complainants Blackwell, Ellenberg, and Evans did not attend any training program for underground miners, they incurred no expenses relating thereto. Consistent with my decision herein, they suffered no discrimination and their cases are therefore dismissed. For the reasons stated in this decision, the complaint of Mr. Cofer is also dismissed. Wherefore case Dockets No. SE 84-35-D, SE 84-45-D, SE 84-47-D, and SE 84-52-D are hereby dismissed.

B. Dockets No. SE 84-31-D, SE 84-32-D, SE 84-33-D, SE 84-34-D, SE 84-36-D, SE 84-37-D, SE 84-39-D, SE 84-40-D, SE 84-41-D, SE 84-42-D, SE 84-43-D, SE 84-44-D, and SE 84-46-D

The complaints of discrimination in the remaining cases before me are denied in part and granted in part in accordance with my decision herein. To the extent that the complaints are granted, and based upon the uncontested evidence of expenses and relevant wages, I award the following costs and damages:

<u>Names of Miners</u>	<u>Training Expenses</u>	<u>Comparable Wages</u>	<u>Total</u>
I.B. Acton	\$ 84.60	\$438.88	\$523.48
Grady Aderholt	80.80	404.74	485.54
R. Burleson	128.80	399.94	528.74
F. Butler	18.46	399.94	418.40
J.L. Campbell	55.00	438.88	493.88
W.D. Franklin	32.80	404.74	437.54
B.R. Glover	25.12	404.74	429.86
T. Peoples	36.60	399.94	436.54
W.C. Reid	21.12	404.74	425.86
C.W. Ricker	61.12	438.88	500.00
T. Shubert	20.20	399.94	420.14
T. Taylor	35.00	404.74	439.74
M. Wise	4.92	399.94	404.86

Interest is to be computed on the above amounts based upon my finding that those amounts were due on the 30th day following the recall of each miner and such interest is to be calculated by Complainant in accordance with the formula set forth in Secretary of Labor o.b.o. Bailey v. Arkansas-Carbona Company and Michael Walker, 5 FMSHRC 2042 (1983). Agreement should be reached among the parties as to such calculations and such calculations must be submitted to the undersigned along with any petition for attorney

fees within 20 days of the date of this decision. This decision is not a final disposition of the cases and no final disposition of these cases will be made until such time as the issues of interest and attorneys' fees, if any, are resolved.

#### Disposition of Civil Penalty Proceedings

- A. Dockets No. SE 84-35-D, SE 84-45-D, SE 84-47-D, and SE 84-52-D

Inasmuch as I have found no discrimination in the Complaints of Mssrs. Blackwell, Cofer, Ellenberg, and Evans, the corresponding civil penalty proceedings are dismissed. Wherefore Civil Penalty Proceedings in Dockets No. SE 84-45-D, SE 84-52-D, SE 84-35-D, and SE 84-47-D are dismissed.

- B. Dockets No. SE 84-31-D, SE 84-32-D, SE 84-33-D, SE 84-34-D, SE 84-36-D, SE 84-37-D, SE 84-39-D, SE 84-40-D, SE 84-41-D, SE 84-42-D, SE 84-43-D, SE 84-44-D, and SE 84-46-D

The Secretary's representations in the amended complaint for civil penalty are not disputed in these cases. In light of the clear mandates set forth in the Emery decision (issued August 8, 1983) that new underground miners must be reimbursed for their statutorily required safety training which is taken advantage of by the mine operator, I find that Respondent herein should have promptly paid those training expenses for the Complainants herein who were recalled for underground work. The failure of Respondent to do so in a timely manner warrants not only repayment of those expenses and comparable wages plus interest, but also a civil penalty appropriate to the relevant criteria under section 110(i) of the Act.

In this regard, I observe that no evidence of prior violations has been presented. The mine operator is large in size. The mine operator has not paid for the training expenses or comparable wages noted herein and accordingly has not yet abated the violations. In light of the clarity of the Emery decision on this point, it should have done so. Accordingly, Jim Walter

Resources will be directed to pay a civil penalty of \$50.00 in each of the cases in this category at the time of final disposition of these proceedings.



Gary Melick

Assistant Chief Administrative Law Judge

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/nw

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

OCT 17 1984

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No: CENT 84-24-M  
Petitioner : A/O No: 41-00010-05503 W24  
:  
:  
v. : Capitol Cement Plant  
:  
BIGELOW LIPTAK CORPORATION, :  
Respondent :

## DECISION

Appearances: Jack F. Ostrander, Esq., Office of the  
Solicitor, U.S. Department of Labor,  
Dallas, Texas, for the Petitioner  
Laurel D. Breitkopt, for the Respondent

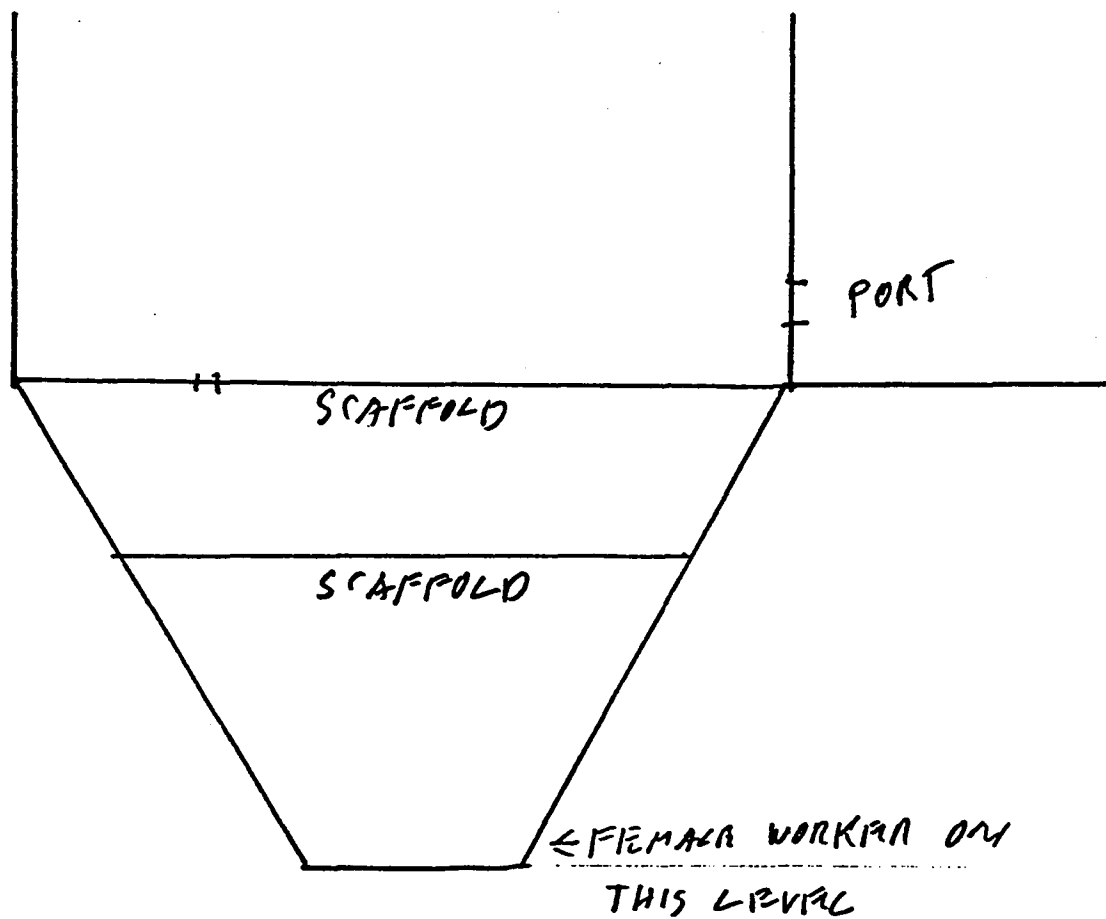
Before: Judge Moore

Bigelow Liptak Corporation is a construction company and at the time of the events involved in this case, it was engaged in the construction of a large vessel for the Capitol Cement Company. Bigelow Liptak stipulated that it was covered by and subject to the Federal Mine Safety and Health Act of 1977.

The company's specific task was to lay the brick and add gunnite to the inside of the steel vessel. Respondent's exhibit 2 was a drawing of the vessel but it was neither to scale nor is it accurate in the measurements shown. <sup>\*</sup>/ The tubular vessel with a cone-shaped lower part is used in the manufacture of cement. At the time of the inspection involved herein, respondent had already laid the brick, and had completed the spraying of the gunnite, a stucco-like cement mixture, and was engaged in cleaning up the gunnite that had bounced off the walls and fallen into the lower part of the conical vessel. Inspector Lilley said he entered the vessel through the port depicted on the right hand side of respondent's exhibit 2 and that he saw workers on two levels below him. On his level there was at least one worker and the scaffolding consisted of loose boards laid

\*/

The court reporter states that the exhibits were mailed with the transcript. This office has no record that they were received. I am attaching a drawing that is consistent with my recollection. If this decision is appealed, the parties will have to resubmit the exhibits for the Commission.



RESPONDENT'S EXHIBIT 2 FROM  
MEMORY.



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

OCT 17 1984

TERRY D. DAVIS, : DISCRIMINATION PROCEEDING  
Complainant :  
 : Docket No. WEST 83-97-DM  
v. : MSHA Case No. MD 82-14  
 :  
CANYON VALLEY ELECTRIC CO., : Logan Wash  
Respondent :

DECISION APPROVING SETTLEMENT

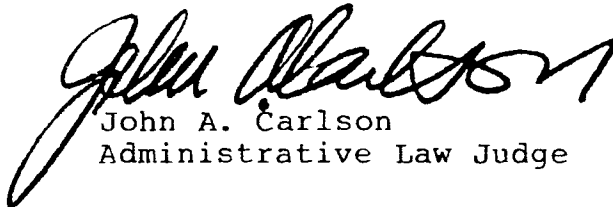
Before: Judge Carlson

The parties, through counsel, have filed a stipulation and other documents which would settle all matters at issue in this discrimination proceeding.

At the center of the settlement is an agreement by the respondent to pay a sum of money to complainant in return for a full release of all claims arising out of respondent's employment and discharge of complainant.

I conclude that the proposed settlement should be approved in all respects. Accordingly, the settlement is approved. Respondent shall pay the agreed sum within 30 days of the date of this decision, with each party to bear its own costs. This proceeding is dismissed with prejudice.

SO ORDERED.

  
John A. Carlson  
Administrative Law Judge

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

OCT 17 1984

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 84-20
Petitioner	:	A.C. No. 36-03425-03543
v.	:	
	:	Maple Creek No. 2 Mine
U.S. STEEL MINING CO., INC.,	:	
Respondent	:	

## DECISION

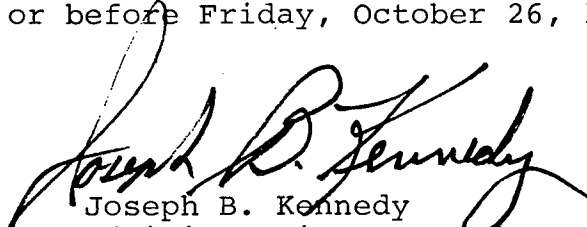
Appearances: Thomas A. Brown, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner;  
Louise Q. Symons, Esq., U.S. Steel Mining Co., Inc., Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Kennedy

On May 24, 1984, the trial judge entered a tentative bench decision vacating the S&S finding and rejecting MSHA's claim that the roof cited in the captioned citation was inadequately supported (Tr. 121-122). At the same time, the trial judge found that because the roof was not bolted to plan there was a technical violation of the approved roof control plan. A penalty of \$150 was assessed for the violation found.

In response to an order to show cause why the tentative decision should not be adopted as the final disposition in this matter, the operator moved to vacate the tentative decision. The ground assigned was that the roof control plan did not apply to the roof in the area cited and/or that the area cited was bolted before the effective date of the requirement for a roof control plan. After the matter came on for oral argument on MSHA's opposition to vacation of the bench decision, the parties agreed to settle the matter provided the trial judge would modify his decision so as to delete the finding of a technical violation of the roof control plan and substitute therefor a finding that the violation was a result of the operator's failure to control adequately the roof in the area cited. This in turn would be predicated on evidence which showed that because the operator initially chose to install bolts on four-foot centers the absence of such a bolting pattern established a failure to adequately control the roof in that area, a violation of the first sentence of 30 C.F.R. 75.200.

Accordingly, it is ORDERED that as so modified the bench decision be, and hereby is, CONFIRMED AND ADOPTED as the final decision in this matter. It is FURTHER ORDERED that the operator pay the amount of the penalty assessed and agreed upon, \$150, on or before Friday, October 26, 1984.



Joseph B. Kennedy  
Administrative Law Judge

Distribution:

Thomas A. Brown, Esq., Office of the Solicitor, U.S. Department of Labor, 3535 Market St., Philadelphia, PA 19104  
(Certified Mail)

Louise Q. Symons, Esq., U.S. Steel Mining Co., Inc.,  
600 Grant St., Rm. 1580, Pittsburgh, PA 15230 (Certified Mail)

/ejp

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

OCT 18 1984

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 84-175
Petitioner	:	A.C. No. 36-07556-03501
v.	:	
	:	Faust and Miller Breaker
FAUST AND MILLER COAL COMPANY,	:	
Respondent	:	

ORDER OF DISMISSAL

Appearances: Mark V. Swirsky, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner;  
W. J. Krencwicz, Esq., Shenandoah, Pennsylvania, for Respondent.

Before: Judge Melick

At hearing, Petitioner requested approval to withdraw his Petition for Civil Penalty in the captioned case for the reason that there is insufficient evidence to support the citation and order therein. Under the circumstances, permission to withdraw is granted. 29 CFR § 2700.11. The case is therefore dismissed.

  
Gary Melick  
Assistant Chief Administrative Law Judge

Distribution:

Mark V. Swirsky, Esq., Office of the Solicitor, U.S. Department of Labor, 1440 Gateway Building, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

W.J. Krencwicz, Esq., 24 West Centre Street, Shenandoah, PA 17976 (Certified Mail)

nw

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

OCT 18 1984

LOCAL UNION 1609, DISTRICT 2,	:	COMPENSATION PROCEEDINGS
UNITED MINE WORKERS OF	:	
AMERICA (UMWA),	:	Docket No. PENN 84-158-C
Complainant	:	Order No. 2254681; 2/16/84
	:	
v.	:	Docket No. PENN 84-159-C
	:	59 Orders of Withdrawal
GREENWICH COLLIERIES,	:	
DIVISION OF PENNSYLVANIA	:	Greenwich Collieries No. 1
MINES CORPORATION,	:	
Respondent	:	

## SUMMARY DECISIONS

Before: Judge Koutras

### Statement of the Case

These consolidated proceedings concern two complaints filed by the complainants against the respondent pursuant to section 111 of the Federal Mine Safety and Health Act of 1977, seeking compensation for miners at the respondent's Greenwich Collieries No. 1 Mine. The cases are before me for a ruling on the respondent's Motions for Summary Decision, filed pursuant to Commission Rule 64, 29 C.F.R. § 2700.64. Complainant's have filed oppositions to the motions, and based on the pleadings filed by the parties, the facts which prompted the complaint follow below.

On February 16, 1984, at approximately 5:00 a.m., an explosion occurred at the Greenwich No. 1 Mine. Subsequently, that same day, at 7:00 a.m., an MSHA inspector issued Order No. 2254355, pursuant to section 103(j) of the Act (Exhibit 1 attached to respondent's Motion for Summary Decision). This Order was subsequently modified by another MSHA inspector from a 103(j) to a 103(k) Order at 2:00 p.m., that same day (Exhibit 2 attached to respondent's motion). This order applied to the entire mine, and prohibited anyone from entering the mine other than federal and state inspectors, UMWA representatives, and company officials. The 103 order thus idled all miners scheduled to work at the mine, and on its face, states as follows:

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

At 10:15 a.m., on February 16, 1984, the same inspector who issued the modified section 103(k) order issued Withdrawal Order No. 2254681, pursuant to section 107(a) of the Act. This order applied to the entire mine, and the condition or practice shown on the face of the order states as follows:

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

The section 107(a) order required the withdrawal of all miners from the mine except those referred to in section 104(a).

On March 20, 1984, the mine was still idled, and MSHA commenced a "Safety and Health (Saturation) (AAB) Inspection" of the entire mine on that day. As a result of that inspection, MSHA inspectors issued 59 withdrawal orders pursuant to section 104(d)(1) of the Act.

At the time of the filing of both complaints, the complainant indicated that it was incapable of listing every coal miner affected by the section 107(a) order or the 59 orders, or the exact dollar amount claimed under section 111 of the Act, but that a prompt effort would be made to obtain this information through the available discovery procedures.

#### Arguments Presented by the Parties

In its complaint filed in Docket No. PENN 84-158-C, the complainant states that it "anticipates that the final results of MSHA's inspections and investigation will reveal that the conditions which led to the issuance of the imminent danger order of February 16, 1984, were caused by the operator's failure to comply with mandatory safety standards." Complainant seeks compensation under section 111 of the Act for each of the miners idled as a result of this order, up to one week's compensation at his or her regular rate of pay. Complainant also seeks interest at 20% per annum, and reimbursement for attorney fees in connection with the claimed compensation.

In its answer to the complaint, the respondent denies that the conditions which led to the issuance of the imminent danger order of February 16, 1984, were caused by the operator's failure to comply with mandatory safety standards. Respondent also denies that the idled miners are entitled to the claimed compensation, and asserts that the complainant has no right to obtain reimbursement for attorney's fees.

In support of its summary decision motion, the respondent asserts that its exhibits demonstrate that the miners who seek a week's compensation were idled by the section 103(j) order, and therefore cannot rely on this order in seeking a week's compensation because the relevant provision in section 111 of the Act makes that remedy available only when miners are idled by certain orders issued pursuant to sections 104 and 107, and not pursuant to section 103.

Although recognizing that MSHA subsequently issued a section 107(a) order, the respondent maintains that this order cannot trigger a week's compensation because it had no idling effect. Respondent points out that by the time MSHA issued the 107(a) order, the miners had already been idled by the 103(j) order, which had closed the entire mine. Respondent concludes that the 107(a) order closed no additional areas or operations and therefore had no effect on the work status of the miners.

Respondent maintains that the pleadings also demonstrate that the second condition found in section 111 of the Act for obtaining one week's compensation has not been satisfied in that the 107(a) order on which the complainant relies does not charge the respondent with "a failure of the operator to comply with any mandatory health or safety standards," nor does the order even hint at any such violation. Respondent also points out that the 103(j) and 103(k) orders likewise show no hint of any violations. Respondent cites a case interpreting section 111 and its predecessor, section 110 of the Federal Coal Mine Health and Safety Act, which it claims held that whether miners are entitled to a week's compensation must be determined by the text of the order. E.g., UMWA, Local 1993 v. Consolidation Coal Co., 8 IBMA 1 (1977) (compensation must be determined "under terms of the closure order as issued").

In support of its opposition to the summary decision motion, the complainant maintains that the fact that the MSHA inspector did not allege a violation of a particular health or safety standard at the time he issued the section 107(a) order should not, in this case, preclude the miners from obtaining a week's compensation under section 111. Complainant argues that the inspector's main concern in issuing an imminent

danger order is to insure the protection of the miners by requiring their immediate removal, or, where miners are already withdrawn, to insure that they do not reenter the mine until the imminent danger has subsided. In the event of an explosion or accident, MSHA's typical response is to issue immediate orders giving themselves the ability to protect lives, avoid the destruction of evidence and, where necessary, supervise the rescue and recovery efforts. In many such cases, asserts the complainant, the conditions that existed at the time of the explosion, and which may have contributed to it, will not be determined until after an investigation. Although orders are issued, and miners are idled at the time the explosion occurs, citations relating to the explosion are not issued until months later.

Complainant asserts that on many occasions, the inspectors will be able to readily determine that a violation of a mandatory health or safety standard caused the imminent danger, and will presumably cite the violation on the face of the order. In other situations like the instant proceeding, it may be difficult, if not impossible, for MSHA to determine the existence of violations at the time the order is issued. Complainant concludes that this should not deprive the miners of the compensation to which they would otherwise be entitled.

Complainant points to the fact that section 107(a) explicitly provides that the issuance of an imminent danger order does not preclude a subsequent citation under section 104 for the violations which precipitated the imminently dangerous condition. Complainant argues that in enacting section 107(a), Congress expressed its awareness that the causes of an explosion or other emergency conditions requiring the immediate withdrawal of miners from the mine might not become apparent until well after the closure order is issued. Complainant concludes that if a subsequent section 104 citation issued pursuant to section 107(a) does describe violations which caused the imminently dangerous condition, then the elements of section 111 have been satisfied and compensation should be awarded.

Complainant argues that since the explosion was the condition which prompted the issuance of the imminent danger order upon which the compensation claims are based, the miners should not be penalized because that explosion which prompted the issuance of the order also prevented MSHA from immediately determining which violations may have caused or contributed to the explosion. Complainant maintains that to deny miners compensation on this basis would serve to reward those operators who have allowed the most dangerous conditions to develop in their mines.



Complainant argues further that allowing a mine operator to escape liability under section 111 on the basis of the respondent's narrow and technical interpretation, would be contrary to the mandate of Congress that the Act be construed liberally to further its primary purpose, the protection of miners. Citing the legislative history of the Act, complainant asserts that the Congressional drafters of section 111 viewed it as "a remedial provision which also furnishes added incentive for the operator to comply with the law." Complainant concludes that requiring the respondent to pay up to one week's compensation in this case best comports with the Congressional intent behind section 111.

In response to the respondent's arguments that the miners had already been idled by the section 103(k) order by the time the inspector issued the section 107(a) order, complainant asserts that it is well-settled that miners are considered idled, for purposes of section 111, by the issuance of a section 107(a) order, regardless of the fact that they may have been previously withdrawn from the mine, and regardless of whether the prior removal resulted from a voluntary action on the part of the operator or whether it resulted from the issuance of an earlier withdrawal order. UMWA District 31 v. Clinchfield Coal Co., 1 MSHC 1668 (1978); UMWA Local 2244, District 5 v. Consolidation Coal Co., 1 MSHC 1674 (1978); Roscoe Page v. Valley Camp Coal Co., 1 MSHC 1394 (1976); and Peabody Coal Co. v. Mineworkers, 1 MSHC 2220 (1979).

Finally, complainant argues that on the facts of the instant case, the condition that caused the idling of the miners was the explosion. Since the explosion is the same condition that led to the issuance of the section 107(a) imminent danger order, complainant concludes that it provides a nexus sufficient to justify compensation under section 111, and that if the violations had been issued simultaneously with the section 107(a) order, the idled miners would have been entitled to up to one week's compensation. Complainant concludes further that allowing an operator to escape liability in those situations where the violations leading to the order are detected after the order's issuance, removes a powerful incentive to comply with the law. Such an approach, maintains complainant, serves to reward those operators who, by their failure to comply with the law, create the most extreme forms of an imminently dangerous situation: an explosion leading to a shutdown of the entire mine.

In Docket No. PENN 84-159-C, the complainant asserts that the violations which led to the issuance of the 59 orders were independent and separate from any violations which may have contributed "to the events which closed the mine on February 16, 1984." Complainant also asserts that but for these violations, the mine would have reopened upon abatement of the violations, and that as a result of these violations the reopening of the mine was delayed by several weeks.

The respondent denies that any alleged violations which prompted the orders existed, and it asserts that it has filed Notice of Contests "over a majority of those orders," and that the contests are still pending.

The complainant maintains that in accordance with section 111 of the Act, each of the miners idled as a result of the 59 withdrawal orders issued during the inspection of the mine initiated on March 20, 1984, is entitled to up to one week's compensation at his or her regular rate of pay, such compensation being apart from and in addition to any compensation received under section 111, for the withdrawal order issued on February 16, 1984, pursuant to section 107(a) of the Act. The complainant also asserts that each miner idled by the orders is entitled to interest on the amount of compensation claimed at the rate of 20% per annum, and to reimbursement for the attorney's fees incurred in obtaining said compensation.

In support of its Motion for Summary Decision, the respondent asserts that section 111 of the Act makes it clear that the compensation sought by the complainant is available only if (1) the withdrawal order that idles the miners is issued under section 104 (30 U.S.C. § 814) or section 107 (30 U.S.C. § 817), and (2) the order is issued "for a failure of the operator to comply with any mandatory health or safety standards."

The respondent maintains that the pleadings and its exhibits demonstrate that the miners who seek a week's compensation were idled by the section 103 order issued on February 16, 1984, and that none of the 59 withdrawal orders issued between March 20 and April 16, 1984, had any idling effect due to the existence of the February 16, 1984, section 103(k) order. Respondent argues that the complainant cannot rely on this section 103 order in seeking a week's compensation because the relevant provision in section 111 of the Act makes that remedy available only when miners are idled by certain orders issued pursuant to sections 104 and 107, and not pursuant to section 103, as was the case here.

The respondent asserts further that the pleadings also demonstrate that the second condition found in section 111 for obtaining one week's compensation has not been satisfied in that the respondent has denied that violations existed which led to the issuance of the orders. Since it has contested a majority of the orders through the filing of Notices of Contests, which are still pending, the respondent concludes that the validity of the orders has not been finally determined and that the prerequisite for the award of one week's pay under section 111 has not been met.

In its opposition to the summary decision motion, complainant again reiterates that for purposes of section 111, miners are considered idled regardless of the fact that they may have been previously withdrawn from the mine. Complainant cites the same cases previously cited in opposition to the motion filed in Docket No. PENN 84-158-C, in support of its arguments, including the previously cited legislative history references.

Complainant again reiterates that the explosion triggered the idling of the miners on February 16, 1984, and that but for the conditions which led to the issuance of the 59 withdrawal orders, the mine would have reopened in March 1984. Quoting from the Commission's decision in Mine Workers, District 17 v. Eastern Associated Coal Co., 2 MSHC 1296, 1298-1299 (1981), complainant asserts that because "withdrawal situations can arise involving . . . complicated sequences of events or concurrent operations of causative factors," the nexus between a withdrawal order and the miners' idlement should be examined on a case-by-case basis. In support of this argument, complainant cites the following language from this case:

[W]here a work stoppage due to safety concerns precedes an order and is occasioned by the same exigent or emergency conditions leading to the order, compensation may be justified to effectuate those safety purposes. Id. at 1299.

Finally, complainant states that it is curious that the respondent should argue that because it denies having committed any of the violations which may have precipitated the issuance of the imminent danger order, summary decision should be awarded in its favor. Complainant's view is that this assertion by the respondent raises genuine issues of material fact, which, under the summary decision provisions of 29 C.F.R. § 2700.64(b)(1), precludes the granting of the motion.

#### Discussion

The first three sentences of § 111 of the Act provides in pertinent part as follows:

[1] If a coal or other mine or area of such mine is closed by an order issued under section 103, section 104, or section 107, all miners working during the shift when such order was issued who are idled by such order shall be entitled, regardless of the result of any review of such order, to full compensation by the operator at their regular rates of pay for the period

they are idled, but for not more than the balance of such shift. [2] If such order is not terminated prior to the next working shift, all miners on that shift who are idled by such order shall be entitled to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than four hours of such shift. [3] If a coal or other mine or area of such mine is closed by an order issued under section 104 or section 107 of this title for a failure of the operator to comply with any mandatory health or safety standards, all miners who are idled due to such order shall be fully compensated after all interested parties are given an opportunity for a public hearing, which shall be expedited in such cases, and after such order is final, by the operator for lost time at their regular rates of pay for such time as the miners are idled by such closing, or for one week, whichever is the lesser.

Section 103(j) provides:

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

Section 103(k) states:

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

Section 107(a) provides:

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

The facts presented in the instant proceedings are similar to those presented in Local Union 1889, District 17, UMWA v. Westmoreland Coal Company, WEVA 81-256-D, summarily decided by Judge Steffey on April 28, 1982, 4 FMSHRC 773 (April 1982). An explosion occurred inside Westmoreland's mine early on the morning of November 7, 1980. When it became aware of this explosion, the company withdrew the miners working on the 12:01 a.m. to 8:00 a.m. shift. At 7:30 a.m., an MSHA inspector issued a § 103(j) withdrawal order. One half hour later, at 8:00 a.m., an inspector issued a § 107(a) imminent danger withdrawal order which stated:

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

On December 10, 1980, after rescue operations had been completed, both orders were modified to show that the area of the mine affected by the orders was limited to sealed portions of the mine, and the orders remained in effect. The miners who were withdrawn from the mine during the 12:01 a.m. to 8:00 a.m. shift on November 7, were paid their entire shift, and miners who were expected to work the November 7 day shift (8:00 a.m. to 4:00 p.m.), were paid four hours of compensation under section 111.

Following its investigation into the explosion, MSHA issued thirteen § 104(d)(2) orders to Westmoreland on July 15, 1982, and they were based on statements taken during the

investigation. Westmoreland contested all thirteen orders, and they were subsequently consolidated with several civil penalty proposals filed by MSHA, and assigned to Judge Steffey for adjudication. On May 4, 1983, Judge Steffey vacated all 13 orders on the ground that they were erroneously issued, but left intact the alleged violations for consideration on the merits in the civil penalty cases. Thereafter, on motion by the parties, Judge Steffey approved a settlement disposition of the cases on May 11, 1984, 6 FMSHRC 1267.

In its complaint filed with Judge Steffey, the Union alleged that the "imminent danger" that existed on November 7, and which led to the issuance of the two orders, was caused by Westmoreland's failure to comply with mandatory safety and health standards. Thus, under the third sentence of § 111, the Union claimed that each miner was entitled to up to one week's compensation based on the imminent danger order. The Union subsequently filed an amended complaint seeking limited compensation for both the § 103(j) and § 107(a) orders under the first two sentences of § 111, and repeated its original claim for a week's compensation under the third sentence of § 111.

Judge Steffey ruled that the miners were entitled to compensation for the remainder of the shift on which the § 103(j) order was issued and for four hours of the next working shift. He denied the Union's request for one week's compensation based on the § 107(a) order because the order did not allege a violation of a mandatory health or safety standard. He also denied the Union's request to retain jurisdiction of the case until MSHA had completed its investigation of the explosion. The Union had apparently believed that upon completion of its investigation, MSHA would then terminate the § 107(a) order either with or without modifying it to allege a violation of a mandatory health or safety standard.

On appeal, the Commission let stand Judge Steffey's rulings concerning the Union's claims to compensation concerning the § 103(j) order, but vacated his order dismissing the Union's claim for a week's compensation and remanded the case with instructions to hold the record open as to this claim. In its remand decision, the Commission stated as follows at 5 FMSHRC 1413, August 12, 1983:

We express no view about whether these thirteen 104(d)(2) orders or any later modification of the 107(a) Order may provide the basis for a week's compensation

under the third sentence of section 111. We also do not reach the legal arguments raised by Westmoreland concerning whether the imminent danger order as issued must contain an allegation of a violation for purposes of section 111 compensation. All of these questions on the merits of the Union's claim are appropriate for resolution in the first instance by the judge.

\* \* \*

\*\*\* The case is remanded to the judge with instructions to hold the record open as to the Union's claim for a week's compensation. The parties are free to submit any appropriate motions or showings. If the Union fails to make appropriate showings upon the completion of MSHA's investigation, Westmoreland may file an application for a show cause order to determine if the claim should be dismissed. The judge's resolutions of the Union's other claims are final, since no review was taken as to those aspects of his decision.

Following the Commission's remand, Judge Steffey issued a second summary decision on September 24, 1984. He denied the Union's claim for up to one week of compensation for the § 107(a) order on the ground that the miners were initially idled and withdrawn from the mine by the § 103(j) order and not by the § 107(a) order. Judge Steffey observed that the Union could not and did not establish that any miners were withdrawn or idled by a § 107(a) order, and at page 11 of his slip decision stated as follows:

Assuming that UMWA could show that miners were withdrawn by the § 107(a) order, MSHA has terminated the 107(a) order without modifying it in any way to reflect that the imminent danger occurred because of Westmoreland's failure to comply with any mandatory health and safety standards. Although MSHA's investigation resulted in the issuance of 13 withdrawal orders pursuant to § 104(d) of the Act, citing alleged violations of the mandatory health and safety standards, those orders cannot be said to allege violations

as part of an imminent-danger order because they could not have been issued in the first instance without a finding that the violations cited in the orders did not cause an imminent danger.

### Findings and Conclusions

#### PENN 84-159-C

The facts here show that on February 16, 1984, after the explosion had occurred, the mine was shut down and the miners were idled by the issuance of the § 103(j) order which later that same day was modified to a § 103(k) order. Thus, the effect of these two initial orders was to idle all miners scheduled to work at the mine. Later that same day, a § 107(a) imminent danger order was issued, and it was obviously intended to maintain the status quo and to prohibit anyone from entering the mine until it could be examined to determine whether it was safe. The mine remained idle until April 17, 1984, when according to the complainant, general work and limited production of coal resumed. During the interim, from the date of the explosion until it was reopened, MSHA had control of the mine and was conducting an investigation of the explosion, as well as a mine inspection which began on or about March 20, 1984. During the course of that inspection, MSHA issued 59 § 104(d)(1), withdrawal orders, and the record reflects that they were all issued during the period March 20 to 27, 1984.

Complainant asserts that the violations which led to the issuance of the 59 withdrawal orders "were independent and separate from any violations which may have contributed to the events which closed the mine on February 16, 1984," and that but for the conditions that led to the issuance of the 59 orders, the mine would have reopened in March. Complainant concludes that since these 59 orders closed the mine for several more weeks, the idled miners are entitled to compensation under § 111.

After careful review of all of the arguments presented by the parties in support of their respective positions, I conclude and find that for purposes of compensation due under § 111 of the Act, the miners in question were idled by the issuance of the § 103 and § 107 orders on February 16, 1984. The 59 § 104(d) orders were issued over a month later, and at that time the mine was still closed, and the miners were still idled by the previously issued



orders. I take note of the fact that some of the orders affected only equipment, one cited an unsanitary toilet, and all of them indicated that "no area" of the mine was affected. This notation is obviously due to the fact that the mine had already been idled by the § 103 and § 107 orders. Even if I were to accept the complainant's assertion that the mine would have reopened had the 59 orders not issued, compensation for one week's pay still would not lie because the previously issued § 103 orders idled the mine, and it stayed in that posture until it reopened. Section 111 simply does not provide compensation for one week's pay for orders issued pursuant to § 103. The third sentence of § 111 makes it clear that the compensation sought is only provided in the event of closure orders pursuant to § 104 and § 107 for failure to comply with any mandatory health or safety standards. Here, the mine had been idled by § 103 orders for at least thirty days before the § 104 orders issued. The question of compensation rights pursuant to the § 107(a) order is the subject of Docket PENN 84-158-C, and my findings and conclusions follow below.

In view of the foregoing findings and conclusions, I conclude and find that the miners are not entitled to one week's compensation because of the issuance of the 59 § 104(d) orders, and the complainant's arguments in this regard ARE REJECTED. Respondent's Motion for Summary Decision IS GRANTED.

PENN 84-158-C

In this case, the complainant maintains that the miners were idled by the explosion which occurred on February 16, 1984, and that the § 107(a) order was issued because of that explosion. Recognizing the fact that the inspector did not cite any violations of mandatory safety or health standards when he issued the § 107(a) order, the complainant nonetheless argues that this should not preclude the miners from receiving a week's compensation. For the reasons which follow, the complainant's arguments ARE REJECTED.

The third sentence of § 111 of the Act makes it clear that miners cannot be awarded one week's pay for the issuance of a § 107(a) order unless that order was issued for a violation of a mandatory standard. In short, the condition precedent for the awarding of a week's compensation in these circumstances is that the mine is idled by the issuance of a § 107(a) order which cites a violation. On the facts of this case, neither condition is present. At the time the § 107(a) order was issued, the mine had already been idled by the § 103 order, and the order, on its face, cited no violations of any mandatory standards.


While I agree with the complainant's assertion that the legislative history of the Act recognizes that § 111 was viewed as a remedial provision which also furnishes added incentive for compliance by a mine operator, complainant would have me ignore the plain wording of the statute, or in the alternative, rewrite it. This I decline to do. Further, I take note of the fact that the legislative history of § 111 indicates that it is not intended to be a punitive provision. Congress obviously intended limited compensation for miners idled pursuant to the types of orders covered by this section of the Act, and I find nothing in the legislative history to support any notion that Congress intended a mine operator to generally guarantee salary compensation for mines which may be idled due to no fault of the miner.

In view of the foregoing, I conclude and find that the miners are not entitled to a week's compensation because of the issuance of the § 107(a) order. Accordingly, the respondent's Motion for Summary Decision IS GRANTED.

#### Additional Rulings

1. The complainant's suggestion that these dockets are not ripe for summary decision because the 59 withdrawal orders have as yet to be litigated IS REJECTED. The parties are in agreement as to the essential facts in these dockets, and I conclude that respondent is entitled to relief as a matter of law. Further, the facts here show that the mine was reopened on April 16, 1984, and production resumed. The complainant's assertion that the "conditions" which led to the issuance of the § 107(a) imminent danger order on February 16, 1984, were caused by the respondent's failure to comply with mandatory standards is simply not so. The § 107(a) order was obviously issued as yet another means by MSHA to insure its control over the scene of the explosion and to maintain the status quo.

2. Complainant's claims for attorney's fees ARE DENIED.

  
George A. Koutras  
Administrative Law Judge

Distribution:

Joseph T. Kosek, Jr., Esq., Greenwich Collieries,  
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Joyce A. Hanula, Legal Assistant, Earl R. Pfeffer, Esq.,  
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/slk

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

OCT 18 1984

LONNIE JONES, : DISCRIMINATION PROCEEDING  
Complainant :  
v. : Docket No. KENT 83-257-D(A)  
: :  
D & R CONTRACTORS, : BARB CD 83-19  
Respondent :

DECISION

Appearances: Jeffrey A. Armstrong, Esq., Appalachian Research and Defense Fund of Kentucky, Inc., Barboursville, Kentucky, for Complainant;  
Larry E. Conley, Esq., Williamsburg, Kentucky, and Ron Perkins, Siler, Kentucky, for Respondent.

Before: Judge Melick

By decision dated May 15, 1984, it was held that the Complainant, Lonnie Jones, was discharged by D & R Contractors in violation of section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq., the "Act". 6 FMSHRC 1312. Hearings were thereafter held on the issues of costs, damages, and attorneys' fees. This decision is limited to resolution of those issues.

Back Pay

Lonnie Jones was unlawfully removed or discharged from D & R Contractors on April 25, 1983. Whether or not that unlawful removal of Mr. Jones from the partnership caused a dissolution and termination of the partnership at that time is not material for purposes of liability. Even had the partnership terminated, the immediate resumption of coal mining by the remaining partners and work force in the same mine, using the same equipment under the same working conditions and methods of production and under the same business name creates a presumption of successorship with its attendant liability. Munsey v. Smitty Baker Coal Co., Inc., et. al., 2 FMSHRC 3463 (1980) citing EEOC v. McMillan Bleodel Containers, Inc., 503 F.2d 1094 (6th Cir. 1974). It is not disputed that this business entity continued mining operations in this manner through May 21, 1983, and that had the Complainant not been discharged, he would have earned \$1,613.50 for this period.

Thereafter, on July 11, 1983, a new partnership agreement was executed, creating another business entity named D & R Contractors with three of the original nine partners (Ron Perkins, Ronnie Siler, and Tony Lambdin). A third partnership, D & R Contractors, commenced business on August 29, 1983, and included the same three original partners.

In Munsey v. Smitty Baker Coal Co., Inc., et al., supra, the Commission applied the criteria set forth in EEOC v. McMillan Bloedel Containers, Inc., supra, in resolving the question of successorship. Those criteria are as follows: (1) whether the successor company had notice of the charge, (2) the ability of the predecessor to provide relief, (3) whether there has been a substantial continuity of business operations, (4) whether the new employer uses the same plan, (5) whether he uses the same or substantially the same work force, (6) whether he uses the same or substantially the same supervisory personnel, (7) whether the same jobs exist under substantially the same working conditions, (8) whether he uses the same machinery, equipment, and methods of production, and (9) whether he produces the same product.

The undisputed evidence shows that the purported managing partner and a partner common to all three partnerships, Ron Perkins, has had notice of discrimination proceedings brought by the Complainant Lonnie Jones as early as May 1983 when Jones filed his first complaint with the Federal Mine Safety and Health Administration. Subsequently, Mr. Jones moved to join D & R Contractors in these proceedings before this Commission on August 2, 1983. Since the law of Kentucky charges each partner with the knowledge of any one of its partners regarding partnership affairs, it is apparent that the "partners" in the successor partnerships, D & R Contractors, had knowledge through Ron Perkins of the continuing litigation concerning Lonnie Jones. See Kentucky Revised Statutes, section 362.205.

The evidence also shows that Jones would have continued working for the successor partnerships had he not been unlawfully discharged and the evidence shows that the successor partnerships did continue in business. Accordingly, full relief would not be available to the Complainant without the joinder of the successor partnerships. I also observe that the subsequent partnerships continued mining operations under the same name in another mine owned by Mingo Coal Company with three of the original partners. The undisputed evidence also shows that the subsequent partnerships continued to produce coal using machinery leased, as before, from the Mingo Coal Company.

Within this framework I conclude that, indeed, the subsequent partnerships were successor business entities and therefore were also liable for damages sustained by Mr. Jones in connection with his unlawful discharge on April 25, 1983. Munsey, supra. Accordingly, the successor partnerships are liable for the pay Mr. Jones could have earned working for these successor entities. It is not disputed that for the relevant period, July 11, 1983, through September 17, 1983, Jones would have earned \$3,059.00. Jones earned \$180 during this period in other work and this is deductible from the back pay award. The undisputed calculation of interest due on the back pay award through September 30, 1984, is \$540.05.

#### Expenses

The parties have stipulated that Mr. Jones expended \$90 in witness fees. The evidence further shows that Jones traveled 430 miles in connection with the preparation of the case and attendance at hearings. Applying the applicable mileage rate of 20.5¢ per mile, he is entitled to \$88.15 in mileage fees. No interest has been requested on these expenses.

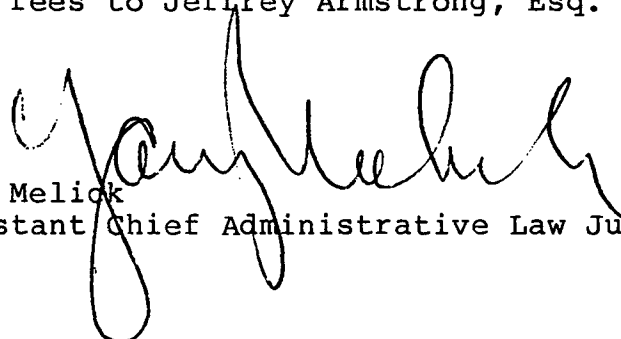
#### Attorney Fees

Respondent does not dispute the reasonableness of the attorney fees sought by counsel for Mr. Jones, but contends that fees attributable to the period before the joinder of D & R Contractors in these proceedings are not chargeable to D & R Contractors. To the extent that counsel for Mr. Jones did in fact cause delay in these proceedings by his failure to have joined D & R Contractors in the initial complaint, there is some merit to the contention. I observe, however, that the time involved for the preparation of trial in this case would not have differed significantly whether or not D & R Contractors had been joined initially. Under the circumstances, I have made a downward adjustment of 6 hours in the fee application attributable only to the time reasonably spent in matters specifically related to the late joinder of D & R Contractors.

Accordingly, I find that counsel devoted 105 hours to the proceedings in this case. Utilizing the uncontested proposed rate of \$65 per hour, I conclude that counsel for Mr. Jones is to be awarded \$6,825 in attorneys fees. No further adjustments are warranted. Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980).

ORDER

D & R Contractors and Ron Perkins are hereby ordered, jointly and severally, to pay to Lonnie Jones within 10 days of the date of this decision the amount of \$5,032.55 in back earnings and interest and the amount of \$178.15 in expenses. D & R Contractors and Ron Perkins are further ordered, jointly and severally, to pay within 10 days of the date of this decision the amount of \$6,825.00 in attorney fees to Jeffrey Armstrong, Esq.



Gary Melick  
Assistant Chief Administrative Law Judge

Distribution:

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Ron Perkins, D & R Contractors, P.O. Box 54, Siler, KY 40763 (Certified Mail)

/nw

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

OCT 19 1984

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 84-17-M
Petitioner	:	A.C. No. 16-00188-05503
v.	:	
	:	Louisiana Cement Company
LONE STAR INDUSTRIES, INC.,	:	New Orleans Plant
Respondent	:	

## DECISION

Before: Judge Kennedy

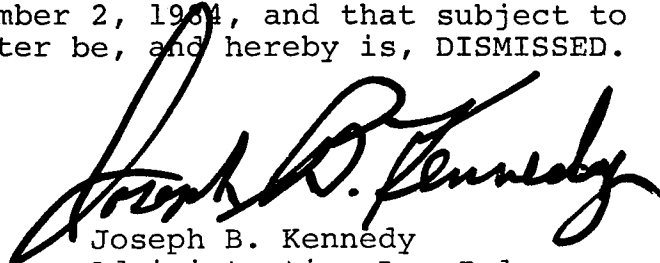
This matter is before the trial judge on the parties' waiver of a testimonial hearing and stipulation to submit the case for decision on the written record. Based on a consideration of that record I find:

1. The parties have agreed to vacation of Citations 2236382, 2236390 and 2236392.
2. That the penalties appropriate for the guarding violations set forth in Citations 2236387 and 2236391 are \$20 each.
3. That the violation charged in Citation 2237386--failure to provide hand rails on an elevated walkway did, in fact, occur; was significant and substantial, and the result of ordinary negligence, but was mitigated by the fact that employees wore safety belts. Accordingly, I conclude the penalty warranted is \$100.
4. That Citation 2236389 should be modified to show the violation, which did, in fact, occur; was an unguarded pinchpoint that was the result of ordinary negligence. Further that it was a serious violation that significantly and substantially contributed to the hazard of a disabling injury. For these reasons, I conclude the penalty warranted and that deemed necessary to deter future violations and insure voluntary compliance is \$150.



5. That based on an independent evaluation and de novo review of the circumstances the settlement proposed for Citation 2236388 in the amount of \$119 should be approved.

The premises considered, I find the amount of the penalties warranted and hereby assessed total \$409 of which \$259 has previously been paid. Accordingly, it is ORDERED that the operator pay the balance of the penalties due, \$150, on or before Friday, November 2, 1984, and that subject to payment the captioned matter be, and hereby is, DISMISSED.



Joseph B. Kennedy  
Administrative Law Judge

Distribution:

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Mr. Joseph Mule, Personnel Manager, Lone Star Industries, Inc., 14900 Intracoastal Drive, New Orleans, LA 70129  
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/ejp

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

OCT 22 1984

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
ON BEHALF OF	:	
DAVID J. McCONNELL,	:	Docket No. SE 84-38-D
Complainant	:	BARB CD-83-18
	:	
UNITED MINE WORKERS OF	:	Nebo Mine
AMERICA (UMWA),	:	
Intervenor	:	
v.	:	
	:	
JIM WALTER RESOURCES, INC.,	:	
Respondent	:	

## ORDER OF DISMISSAL

Appearances: Frederick W. Moncrief, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Complainant;  
Mary Lu Jordan, Esq., United Mine Workers of America, Washington, D.C., for Intervenor;  
David M. Smith, Esq., Maynard, Cooper, Frier-son & Gale, P.C., Birmingham, Alabama, and Robert W. Pollard, Esq., Jim Walter Resources, Inc., Birmingham, Alabama, for Respondent.

Before: Judge Melick

At hearing the Secretary requested approval to withdraw the complaint in the captioned case. Documentation and representations subsequently filed show that Mr. McConnell never filed a complaint of discrimination with the Secretary and that the complaint now before this Commission was inadvertently filed. Under the circumstances, permission to withdraw the complaint is granted. 29 C.F.R. § 2700.11. The case is therefore dismissed.

  
Gary Melick  
Assistant Chief Administrative Law Judge

2486

Distribution:

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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 25 1984

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 83-212
Petitioner	:	A.C. No. 15-10339-03516
	:	
v.	:	Pyro No. 11 Mine
	:	
PYRO MINING COMPANY,	:	
Respondent	:	

## DECISION

Appearances: Carole M. Fernandez, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner; Steven P. Roby, Esq., Pyro Mining Company, Providence, Kentucky, for Respondent

Before: Judge Fauver

The Secretary seeks civil penalties for four alleged violations of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq.

The charges were issued in connection with the investigation of a fatal accident. Dean H. Lundy, a general laborer, was electrocuted while disconnecting a conveyor belt control line.

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

## FINDINGS OF FACT

1. On the date of the accident, September 27, 1982, Lundy was assigned by mine foreman Barry Teaque to work with the belt crew. The crew, under lead belt mechanic and crew leader Harlan Belt, were extending a conveyor belt.

2. Extending the belt required, among other things, disconnecting a splice on a 110-volt pilot line for the belt control switch, splicing new line to the old line, and advancing the switch to the new location.

3. Contrary to a company rule against working on an energized line and a mandatory federal safety standard forbidding it, it was common practice for employees to disconnect, splice, and re-connect a live pilot line a number of times each week when the belt was being advanced. In addition, nonqualified employees were permitted to do this work on pilot lines. As a general practice, nonqualified employees would do this work on pilot lines (disconnecting, splicing, and re-connecting) 2 or 3 times a week. The crew leader, who himself was nonqualified, testified that he also worked on energized pilot lines, that he had seen others do so, and that this was allowed by mine foreman Barry Teaque so long as only 110 volts were involved.

4. On each belt, the pilot line was extended about once a week. About a third of the time, the power was left on when the line was being extended. As a general practice, the power was cut off during an extending operation only when the power center was being moved; that is, when the power center was not being moved during a belt advance, the pilot line was disconnected, extended, and respliced without cutting off the power.

5. On September 27, 1982, crew leader Harlan Belt told his immediate supervisor, Barry Teaque, that one crew member was absent, and requested a replacement. Teaque assigned Dean H. Lundy, a general laborer, to work on Harlan Belt's crew that shift. Lundy, age 24, had 2 years 3 months mining experience.

6. Shortly before the electrocution of Lundy, he was on one side of the tailpiece of the belt, the crew leader, Harlan Belt, was on one side, and the belt mechanic, Eddie Puckett, was near and in clear hearing of both of them. I find Puckett's testimony credible as to what was said by Lundy and Belt at that time, and the following part of his testimony is incorporated herein as factual and accurate (Tr. 191-193):

Q Tell me what was happening right then, who was doing what, and where, and what conversation transpired between Harlan and Dean Lundy.

Q Okay. Like I say, I had stripped outer layer of the dead end wire off.

Q Which end of the pilot was that?

A That was the end next to the tail piece. It hadn't never been hooked into the whole wire yet because I, prior to that, I had hollered up there and made sure Tommy Gatton or one of them--I hollered and made sure none of them had tied it in, made sure it wasn't hot. And Tommy Gatton told me, no. I stripped the wire back and started to pull tail piece. Steve Lone hollered down. Harlan said, "Let's wait on Eddie," and I told him then, I said, "Ya'll go ahead and when you pull it, I'll drop what I'm doing and help set the jacks on the tail piece," because when you pull the tension out on that belt, you need to get the jacks set as quick as you can because the scoop won't just sitting there and holding all the time.

So Steve pulled the tail piece out, and I dropped the wire on the ground. I went over and helped them set the jacks, me and Harlan. Well, Harlan was on one side of the tail piece and Lundy was on the other. I was pretty much in between the two. And Harlan told me to go get the feeder, and the mechanics was working on the feeder that night. Feeders was around 60 feet or better from where he was at then. And that's when Harlan--that's when Lundy had walked over there where I was stripping the insulation off the wire, and the three conductors, three there I had never stripped nothing off of them. And that's what Dean Lundy was doing, and that's when I heard Harlan told him not to fool with that, not to be fooling with the pilot wire because he might kick the belt on, and those guys was up there knocking clamps and might hurt one of them.

And Dean Lundy told him, he said, "No," he said, "What I'm doing," he said, "that end up there is not hooked in yet." He said, "I'm getting this end here ready, and I'll go up

there and get the other end of it ready, and I'll make sure the clamps and everything is knocked off, and clear and all we have to do is take the box off and move it down here and hook it up." And then that's when I went off and got to go get the feeder, and they was putting the front bumper on the feeder.

And I asked them how--the mechanics--how long they was going to be, and they said probably five minutes. And no longer than after I said that, I heard Harlan scream for me, and told me to come up there. And I went up there, and that's when I seen Lundy laying down on the ground.

7. When Lundy screamed, Belt ran over to him. He found Lundy unconscious. He could see that Lundy had touched a bare wire in the pilot line. He assumed that a minor shock had frightened him and that he had hit his head on a top roller. When they (others arrived) turned Lundy over, Belt saw that Lundy's hand was burned, and he then realized that Lundy had probably been shocked with much more power than 110 volts. He told the rest of the crew, "Nobody touch this pilot line until it gets checked out. We got to get somebody down here so I know what's going on" (Tr. 167).

8. Lundy was breathing, but gasping for breath. Belt said, "He's all right. He's breathing. What we need to do is get him out of here. Somebody go get the golf cart so we can get him on and get him outside" (Tr. 167). Belt then went to the phone and called outside to tell them what had happened and to have a vehicle meet the cart at the end of the track.

9. There was room for only two people on the cart. Belt told Puckett to take Lundy out of the mine. The cart left and Belt called outside again, to make sure the vehicle on the outside was on its way to meet the cart.

10. Several men met the cart at the end of the track. Lundy had stopped breathing and they administered CPR. The mine foreman, Teague, arrived and assisted in the CPR as they took Lundy to a helicopter, which took him to a hospital. Lundy did not regain consciousness. He died of the electric shock.

11. After seeing Lundy's burned hand, and suspecting that Lundy had been shocked by more than 110 volts, Belt went to the chief maintenance foreman for the third shift, Lowell Dukes, and told him he thought the pilot line had more than 110 volts, and asked him whether there was any way he could check the voltage on the line. Dukes said he could do that.

12. Dukes checked the pilot line and told Belt the pilot line had only 110 volts. With that, Belt resumed work on the belt move, so the next shift could mine coal.

13. After the accident, the belt move was completed by Belt's crew. When he had it hooked up and ran the belt, he got word from the surface to come out of the mine, because Lundy was dead.

14. MSHA's chief electrical investigator of the accident, Jewell Larmouth, arrived at the mine within three hours after the accident. The work of extending the belt and pilot line had been completed. He suspected, as Belt had, that more than 110 volts had been involved in the electrocution. He first inspected the 480 volt power center that supplied power to the entire belt system. The power was on; there was no evidence that the circuit had been deenergized; the cable coupler had not been removed and there was no lock-out device or tag available. Larmouth questioned those present to see if anyone had tags and no one did. He proceeded to check for a malfunction in the transformer and control circuit. Someone indicated that a check of the pilot line conductors had revealed only 110 volts; but Larmouth made a more thorough examination, testing from wire to earth and to the belt framework and discovered that the transformer was defective. A contact between the primary and secondary windings in the transformer resulted in 330 volts to ground in one of the pilot wires and 230 to ground in the other pilot current-carrying wire.

15. Larmouth immediately issued an imminent danger order forbidding use of the short-circuited transformer. The transformer had remained in service after the accident until Larmouth informed the operator that it was an imminent danger.

16. The operator sent the defective transformer to Minesafe Electronics, Inc., for an opinion as to the cause of the defect. The opinion stated that the failure resulted from inadequate insulation between the primary and secondary windings and one of two other conditions: "(1) a large voltage



transient pierced the varnish shorting primary and secondary, effecting shorted turns, which in time generated sufficient heat to destroy the insulation . . . or (2) sustained overload condition causing overheating weakened the insulation to the point that the area of weakest insulation broke down under normal operating voltages, thus welding primary to secondary."

17. Misuse of a cable could cause an overload of the transformer, but there was no evidence of misuse of a cable.

18. During his inspection on September 27, 1982, Inspector Larmouth discovered that the automatic circuit breakers for the No. 16 AWG (American Wire Gauge) No. 2 conveyor belt control line were 20 amperes and were so stamped; the No. 16 gauge cable was also clearly stamped as to size. Twenty amperes exceeded the correct amperage for this No. 16 standard wire.

19. The remote control pilot line extended from the conveyor belt starter for approximately 480 feet to the existing start-stop switch. The remote line was type S O neoprene No. 16-3 AWG; the ground wire was continuous from the conveyor belt starter metal frame to the start-up switch metal frame. The purpose of the control line was to start or stop the No. 2 unit conveyor belt remotely when necessary. The remote control line involved in the accident was supplied power from a Westinghouse .500 KVA, 480 volt to 110 volt single-phase control transformer located in the conveyor belt starting enclosure.

20. Tests conducted during the investigation revealed that a primary to secondary winding fault had occurred in the control transformer. Resistance readings were approximately 2 ohms from primary to secondary windings of the control circuit transformer. Voltage readings were: XI to ground 330 volts, X3 to ground 230 volts. As a result of the fault in the transformer the white insulated conductor of the remote control line became energized at 330 volts to ground.

21. The last weekly examination (as required by 30 C.F.R. § 75.512) prior to the accident was conducted by Bill Gatton on September 22, 1982, and no defects were recorded.

22. No one deenergized the remote control line before Lundy started to disconnect the switch. Lundy was not wearing gloves, and he was not wearing insulated (shock hazard boots) footwear. The accident area was very wet with some surface water. Lundy contacted the white conductor, which was energized at 330 volts to ground as a result of the primary to secondary fault in the control transformer.

23. Lundy was not qualified to do electrical work as required by 30 C.F.R. § 75.153 and was not working under the direct supervision of a qualified person. The scoop type tractor operator (Steve Long) was the qualified person on the conveyor belt move crew; however, he was not performing or supervising electrical work at the time of the accident.

24. Respondent is a substantial sized mine operator, producing about 3,500 tons of coal daily and employing about 270 underground miners.

25. Respondent's compliance history from April 7, 1981, until the inspection in this case shows 128 violations for which civil penalties totaling \$6,894 were paid.

#### DISCUSSION WITH FURTHER FINDINGS

As a result of his investigation, Inspector Larmouth charged Respondent with four violations of mandatory safety standards.

##### Citation No. 2075231

This citation charges a violation of 30 C.F.R. § 75.509, which provides:

All power circuits and electric equipment shall be deenergized before work is done on such circuits and equipment, except when necessary for trouble shooting or testing.

The citation alleges that the pilot line was not deenergized before work was done on it and a fatality occurred.

Even though Respondent published general instructions against working on energized lines, it was a common practice for work to be done on the belt pilot line while it was still energized. This was a common practice which management knew or should have known and should have prevented by better training and supervision of its line supervisors and miners. Lundy's immediate supervisor, Harlan Belt, acknowledged that the pilot line was frequently re-connected without deenergizing it, and that Belt's immediate supervisor, Teague, allowed this practice. Belt and others assumed that the pilot line would always conduct only 110 volts and that this amount of power would not be hazardous to touch. This attitude reflects a patent disregard of a mandatory safety standard (§ 75.509). It also shows gross error in judgment, since 110 volts, depending on conditions such as wetness, body resistance, clothing, duration of contact, etc., can inflict serious injury, even death. Crew Leader Belt's attitude is imputable

to management. His failure to have the pilot line deenergized for the belt move was gross negligence, which is imputed to management.

The exchange between Harlan Belt and Lundy is not a defense to this charge. When Belt told Lundy "not to fool with" the pilot line, Belt was not concerned with the fact that Lundy might receive an electric shock. Belt was simply concerned about the possibility that touching the pilot line at that time might accidentally start the belt and injure the men who were removing clamps from the belt. Belt did not tell Lundy he should not touch the energized pilot line. When Lundy replied, as follows, Belt did not forbid him to do any work on the pilot line:

[Testimony of Puckett]:

He [Lundy] said, "I'm getting this end here ready, and I'll make sure the clamps and everything is knocked off and clear and all we have to do is take the box off and move it down here and hook it up. [Tr. 192].

I find that Respondent, through gross negligence, violated § 75.509 by failing to see that the pilot line was deenergized before work was done on it. This violation was a major causal factor in the death of Lundy. Belt did not know that the pilot line conductor wires would conduct 330 volts or 220 volts, respectively, instead of 110 volts, because of an unknown short-circuit in the transformer. But the risk he permitted of even a 110-volt electric shock was a most serious violation; a shock of that amount could cause serious injury, even death, depending on conditions.

Gross negligence and severe gravity as to this violation are well established by the probative, relevant, and substantial evidence. In considering the six statutory criteria for assessing a civil penalty, I find that a penalty of \$7,000 is appropriate for this violation.

Citation No. 2075232

This citation charges a violation of 30 C.F.R. § 75.511, because (1) an unqualified person was permitted to perform electrical work on an energized conveyor belt control line and (2) a disconnecting device for the 480 volt A.C. cable coupler was not provided and a method of tagging was not used.

Section 75.511, 30 C.F.R., provides:

No electrical work shall be performed on low, medium, or high-voltage distribution circuits or equipment, except by a qualified person or by a person trained to perform electrical work and to maintain electrical equipment under the direct supervision of a qualified person. Disconnecting devices shall be locked out and suitably tagged by the persons who perform such work, except that in cases where locking out is not possible, such devices shall be opened and suitably tagged by such persons. Locks or tags shall be removed only by the persons who installed them or, if such persons are unavailable, by persons authorized by the operator or his agent.

Dean Lundy was not a qualified person under 30 C.F.R. 75.511-1 and 30 C.F.R. 75.153. At the time of the accident, Steve Long had not required the system to be locked out and there is no indication of any electrical supervision at that time. I conclude that "direct supervision" within the meaning of the regulations would require that the circuit be deenergized and examined by a qualified person and the unqualified person's work be examined prior to reenergizing the circuit. Neither of these things was done in this case.

I find that Lundy's supervisor, Harlan Belt, permitted Lundy to attempt the splice change by failing to order him specifically not to work on the pilot line after Lundy told Belt the following:

... I'll go up there and get the other end of it ready, and I'll make sure the clamps and everything is knocked off, and clear and all we have to do is take the box off and move it down here and hook it up.

Considering management's lax safety attitude toward working on the energized pilot line and permitting nonqualified

persons to work on the pilot line, I find that Lundy's attempt to disconnect the pilot line was permitted by Harlan Belt's attitude and conduct. Harlan Belt did not specifically and effectively order Lundy not to do any work on the pilot line and he did not follow up by seeing that Lundy did not do so. Belt's actions in not exercising proper supervision over the belt move and Lundy's performance constituted gross negligence in allowing a nonqualified employee to work on an electrical circuit. This was a violation of § 75.511. Also, Belt did not attempt to have the pilot line deenergized before working on it. The pilot line was not locked out at the power center or disconnected and tagged before work was done on it. This condition was also a violation of § 75.511 due to gross negligence. The violations of § 75.511 had a direct causal relationship with Lundy's death.

In considering the six statutory criteria for assessing a civil penalty, I find a penalty of \$5,000 is appropriate for Respondent's violation of § 75.511.

Citation No. 2075233

This citation charges a violation of 30 C.F.R. § 75.518, because the automatic circuit breakers in use were of too high a capacity (20 amperes) to provide adequate short circuit and overload protection for the No. 16 American Wire Gauge (AWG) No. 2 conveyor belt control line.

Section 75.518 provides:

Automatic circuit-breaking devices or fuses of the correct type and capacity shall be installed so as to protect all electric equipment and circuits against short circuit and overloads. Three-phase motors on all electric equipment shall be provided with overload protection that will deenergize all three phases in the event that any phase is overloaded.

The condition alleged was discovered during Inspector Larmouth's examination of the control circuit just after the accident. Although there was no direct relationship between this violation and the fatality, it was a serious electrical violation, concerning an integral part of the circuit involved in the fatality and in and of itself a danger to human life. Short circuit and overload protection is an important safety standard to prevent fires, electric shock, explosions, etc., in connection with electrical equipment and circuits.

The operator's negligence is high as to this violation because the violation was clearly visible and should have been apparent to qualified electrical personnel.

Inspector Larmouth relied upon the National Electric Code table, pursuant to 30 C.F.R. § 75.518-1, which provides:

[a] device to provide either short circuit protection or protection against overload which does not conform to the provisions of the National Electric Code, 1968, does not meet the requirement of § 74.518.

The operator at hearing called attention to a private publication, the Electrical Protection Handbook, assertedly based on the 1980 National Electric Code, to support the use of 20 ampere fuses for the circuit in question. However, as Larmouth pointed out, the publication refers to fuses, not circuit breakers. Further, the handbook is not relevant as a mitigating factor because there was no showing of reliance by the operator. Nor was it shown that the operator actually relied on the diagram by Long Aldrex Manufacturing Company for belt starting boxes, also presented by the operator at hearing. Reliance on this diagram would not have been justified in any event since the diagram did not accurately reflect the size of the wire in use.

In considering the six statutory criteria for assessing a civil penalty, I find a penalty of \$200 to be appropriate for this violation.

On November 19, 1982, MSHA Inspector Jewell Larmouth issued a section 104(a) citation, No. 2075924, for violation of 30 C.F.R. § 75.1725(a) because of the hazardous condition of the control circuit transformer. A previously issued 107(a) Order of Withdrawal, No. 2075234, was the basis for issuance of this citation.

Section 75.1725(a) provides:

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.

The stepdown transformer referred to in the citation was supposed to have a primary voltage of 480 volts and a secondary voltage of 110 volts; however, Larmouth's investigation disclosed that on one conductor of the remote control line, at the scene of the accident, there was 330 volts, and on the other conductor of that line there was 230 volts. This increased voltage resulted from a fault in the transformer which created a connection between the primary and secondary windings.

Because of this condition, (1) the pilot line conductors carried 330 volts and 230 volts, respectively, instead of 110 volts, and (2) touching either conductor could create an electric shock whereas under normal conditions the pilot line conductors could shock a person only if both conductors were touched. This condition made the pilot line a deathtrap for the unwary. The transformer was thus an imminent danger, as the inspector found in ordering it out of service after the accident.

Respondent was not negligent before the accident, because the transformer short-circuit was not known or reasonably foreseeable, and because this condition would not be detected by ordinary electrical tests required by the regulations. However, after the accident, a reasonably prudent operator would have suspected that there was a malfunction of the transformer. Harlan Belt did in fact suspect that there was a malfunction. The operator was guilty of gross negligence in failing to take immediate and appropriate action after the accident to detect the hazard in the transformer and to remove the transformer from service until proper repair or replacement

was made. An imminent danger existed at the time, yet work was allowed to continue. The electrical equipment which was in an unsafe condition should have been removed from service immediately.

Respondent's attitude and conduct, through its supervisors, in resuming operations with the defective transformer after the accident shows gross negligence. This violation is of a most serious nature. In applying the six statutory criteria for assessing a civil penalty, I find that a penalty of \$5,000 is appropriate for this violation.

Proposed findings of fact and conclusions of law inconsistent with the above are hereby rejected.


#### CONCLUSIONS OF LAW

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

2. Respondent violated the safety standards as charged in the four citations involved herein and is assessed the civil penalties stated above.

#### ORDER

WHEREFORE IT IS ORDERED that Respondent shall pay the above assessed civil penalties, in the total amount of \$17,200.00, within 30 days from the date of this Decision.



William Fauver  
Administrative Law Judge

#### Distribution:

Carole M. Fernandez, Esq., U.S. Department of Labor, Office of the Solicitor, 280 U.S. Courthouse, 801 Broadway, Nashville, TN 37203 (Certified Mail)

Steve Robey, Esq., The Traders Building, 608 East Main Street, Providence, KY 42450 (Certified Mail)



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

OCT 26 1984

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 82-150
Petitioner	:	A.C. No. 05-00281-03066 V
v.	:	
	:	Roadside Mine
POWDERHORN COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: James H. Barkley, Esq., Office of the Solicitor,  
U.S. Department of Labor, Denver, Colorado,  
for Petitioner;  
Randy Bishop, Safety Director, Powderhorn Coal  
Company, Grand Junction, Colorado, pro se.

Before: Judge Carlson

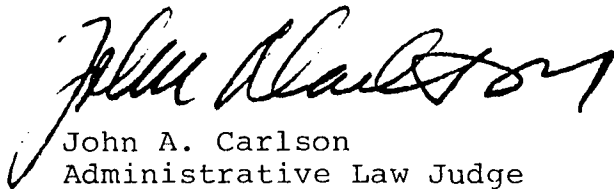
When this civil penalty proceeding was called for hearing at Grand Junction, Colorado, on September 26, 1984, the parties announced upon the record that they had reached a settlement.

Counsel for the petitioner moved that the penalty be reduced from the \$750.00 originally proposed to \$600.00. Respondent, in turn, moved to withdraw its notice of contest.

Based upon my review of the file and information placed upon the record at the hearing, I am satisfied that the settlement terms are appropriate and should be approved.

Accordingly, the motions made at trial are granted. Respondent's notice of contest is withdrawn; the citation is affirmed; and respondent shall pay a civil penalty of \$600.00 within 30 days of the date of this decision.

SO ORDERED.

  
John A. Carlson  
Administrative Law Judge

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Mr. Randy Bishop, Director of Safety, Powderhorn Coal Company, P.O. Box 1430, Palisade, Colorado 81526 (Certified Mail).

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

OCT 30 1984

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 82-215-M
Petitioner	:	A.C. No. 05-03585-05501
	:	Docket No. WEST 83-53-M
v.	:	A.C. No. 05-03585-05504
	:	
SILVER VENTURES CORPORATION,	:	Comstock-Lake Mine
Respondent	:	

## DECISION

Appearances: Margaret Miller, Esq., and James H. Barkley, Esq.,  
Office of the Solicitor, U.S. Department of Labor,  
Denver, Colorado,  
for Petitioner;  
Mr. Alfred G. Hoyl, Silver Ventures Corporation,  
Rollinsville, Colorado, pro se.

Before: Judge Carlson

This consolidated case, heard under the provisions of the Federal Mine Safety and Health Act of 1977 (the "Act"), arose out of inspections conducted on June 2, 1982 and September 22, 1982 at respondent's underground precious metals mine near Idaho Springs, Colorado. As a result of these inspections, the Secretary issued five citations alleging violations of various mandatory safety standards promulgated under the Act.

## REVIEW AND DISCUSSION OF THE EVIDENCE

### General Background.

In 1982, respondent Silver Ventures was engaged in the opening of a gold and silver mine. Shaft driving was in progress, and surface installations were not yet completed. The June and September inspections with which this decision is concerned took place against that background.

Citation No. 573968, Docket No. WEST 82-215-M

During Inspector Richard W. Coon's June 2, 1982 inspection of respondent's mine he examined three wires extending from a switch box in the air building, a surface structure where the

ventilating fan and compressor are located. According to the inspector, the three wires extended from the bottom of the box to about six inches from the floor in what he described as a walkway along an interior wall of the building. The wires had been cut, and insulating material had been stripped from the ends of each. The wire thus made bare, he testified, had been wrapped with a single layer of plastic electrical tape. After determining that the wires were energized with 440 volts, the inspector issued a citation 1/ charging a violation of the mandatory safety standard published at 30 C.F.R. § 57.12-30. That standard provides:

When a potentially dangerous condition is found  
it shall be corrected before equipment or wiring  
is energized.

The inspector believed that the wires represented a "dangerous condition" because the tape wrapping did not provide sufficient insulation. This, coupled with the high voltages involved and the accessibility of the wires to miners, offered a likelihood of a fatal injury.

Mr. Hoyl, respondent's president, testified that the ends of the wires were covered with "two to three" wraps of plastic tape, rather than one as the inspector contended. Moreover, the area in which the wires hung was not in the walkway, he testified; access to equipment in the building could be better achieved by another route. Finally, he suggested that the inspector knew that the wires had been placed there only temporarily to allow use of a welding machine during installation of the air house equipment.

The evidence convinces me that the violation occurred. The wrappings of plastic tape were clearly insufficient. In so finding I rely not only upon the inspector's testimony, but also upon the photographs of the wraps (petitioner's exhibit 2). Whether the wires were wrapped one, two, or three times with tape, the wraps provided much less insulation than the thick factory coating shown in the photograph. It is simply not reasonable to believe that a couple of thicknesses of plastic tape will render a 440 volt conductor safe. 2/

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1/ The inspector also issued a withdrawal order under section 107(a) of the Act. The propriety of the withdrawal order is not at issue in this proceeding.

2/ The inspector's testimony that the tape manufacturer, in response to an inquiry, recommended at least six wraps is accorded little weight because of its hearsay character.

The other matters raised by the respondent do not relate to the question of violation, but to the appropriateness of the proposed \$36.00 penalty. Assuming that the wires did not extend into a frequently used walkway, it is nevertheless plain that they were in an area where anyone could walk. The concededly temporary purpose of the wiring goes to the potential duration of the violation, not its existence.

The inspector classified this wiring violation as "significant and substantial" under section 104(d) of the Act. In Cement Division, National Gypsum Company, 3 FMSHRC 822 (1981), the Commission defined such a violation as one where "... there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature."

The record in the present case shows that the insufficiently insulated wiring, located as it was, created a realistic possibility that an unwary miner could receive a serious or fatal electrical shock. The violation was significant and substantial.

Citation No. 573969, Docket No. WEST 82-215-M

In his inspection of respondent's dry house or change room on June 2, 1982, Inspector Coon found what he cited as another electrical violation. According to his testimony, wiring extending from a switch box on an interior wall of the room lacked the protection of an insulated fitting or bushing around the "knockout plug" through which the wiring exited the metal box. This, in the inspector's view, violated the standard published at 30 C.F.R. § 57.12-8. As pertinent here, that standard provides:

Power wires and cables shall be insulated adequately where they pass into or out of electrical compartments.  
\*\*\* when insulated wires, other than cables, pass through metal frames, the holes shall be substantially bushed with insulated bushings.

The inspector indicated that bushings are necessary to avoid abrasion of the insulation surrounding the electrical wires.

By way of defense, the respondent, in the person of Mr. Hoyl, maintained that the wiring in question was a temporary installation furnishing power to a welding machine. He also insisted that the wiring emerged from the back of the box and thence through a wall to the outside of the building, not from the bottom of the box as the inspector testified. Most important, according to Mr. Hoyl, an MSHA official had looked at this particular wiring installation during an earlier "compliance assistance" visit and found it satisfactory for temporary use.

I accept all of these representations as true. None, however, constitutes a valid defense against the citation. Respondent does not deny that the wiring, wherever it may have emerged from the box, was not protected by a bushing. The bushing requirement set forth in the standard is absolute. As to the "approval" given the temporary wiring during an earlier "compliance assistance visit," no evidence discloses that the MSHA inspector noticed the absence of a bushing. On the contrary, the evidence tends to show that discussions with that inspector focused upon the question of whether the temporary wiring needed to be encased in a conduit for its entire length.

I therefore conclude that respondent violated the standard. The matters raised by Mr. Hoyle may properly be considered to affect the size of the civil penalty.

Citation No. 573970, Docket No. WEST 82-215-M

During the course of Inspector Coon's June inspection he noted that five power switch boxes located in the air house and dry house lacked labels disclosing their respective purposes. He testified that he could not readily determine such purposes by the mere location of the boxes. These conditions, in the inspector's view, violated the following standard, published at 30 C.F.R. § 57.12-18:

Principal power switches shall be labeled to show which units they control, unless identification can be made readily by location.

According to Mr. Coon, the failure to affix labels created a danger that a miner could inadvertently energize the wrong piece of equipment, thus possibly putting fellow miners in jeopardy.

Respondent concedes that the switches lacked labels, but stressed that everything involved was new at the time and that the company had simply lacked the time to use the plastic tape labeler which was already on hand.

The facts of record show a violation. The provisions of the standard make no implied allowance for any citation-free interim between installation and labeling.

Citation No. 574807, Docket No. WEST 82-215-M

While underground in the mine on June 2, 1982, Inspector Coon noted what he perceived to be a violation of the safety standard published at 30 C.F.R. § 57.13-21. That standard provides:

Except where automatic shutoff valves are used, safety chains or other suitable locking devices shall be used at connections to machines of high-pressure hose lines of 3/4-inch inside diameter or

larger, and between high-pressure hose lines of 3/4-inch inside diameter or larger, where a connection failure would create a hazard.

According to the inspector, an air-operated water pump at the base of the shaft had no automatic shutoff valve and lacked safety chains (or restraining cables) on the end of the high-pressure air hose that connected to the pump. The hose was an inch in diameter. Mr. Coon testified that the pump was in operation when he observed it, and that when he pointed out the absence of a chain or cable restraint device, a member of the crew obtained one from a nearby storage area in the shaft and attached it immediately. The inspector maintained that an unrestrained hose, should it become uncoupled during operation, could whip about, thus inflicting injury on any nearby miners.

Mr. Hoyl, on behalf of respondent, pointed out that it was established practice to use cable restraints on the pump in question. He said that such restraints are easy to lose and speculated that the one which had been on the hose had simply dropped off and been lost in the muck. He also maintained that the crew had not started the machine at the time of Inspector Coon's observations.

The inspector, on cross examination, agreed that respondent had a supply of restraints in the mine, and that the pump had recently been moved (and therefore disconnected). He nevertheless testified in a convincing way that he was certain that it was in operation when he noticed the absence of any sort of hose restraint.

I credit that testimony, and consequently find that the violation is established.

Citation No. 2009724, Docket No. WEST 83-53-M

Inspector Coon visited respondent's mine a second time on September 22, 1984. On that occasion he inspected the hoist. The undisputed evidence shows that the Silver Ventures hoist operates on rails on an inclined shaft which, at the time of inspection was over 100 feet deep. The hoist, according to Mr. Coon, lacked an overspeed device as required by the standard published at 30 C.F.R. § 57.19-7. That standard provides:

All man hoists shall be provided with devices to prevent overtravel. When utilized in shafts exceeding 100 feet in depth, such hoists shall also be provided with overspeed devices.

Inspector Coon testified that the overspeed device had been on the hoist in June when he examined it, but had since been

removed. The hoist operator, he said, informed him that the device had been removed because of "some vibration problems." This was done some three weeks before; the device had been "sent ... down to be repaired," the hoistman told the inspector. The inspector testified that the hoist conveyance was moving men up and down the shaft while he was present on September 22, 1982.

Under cross examination he conceded that he had not actually seen the overspeed device in June. Rather, he said, he had inspected the hoist operator's log entries which showed both the overtravel and overspeed devices had been checked daily to confirm that they were operational. He denied that a worm gear drive operating through a speed reducer would furnish protection equivalent to that provided by a separate overspeed device.

In addition to Mr. Coon, another inspector, Mr. Edward Machesky, testified for the petitioner concerning this citation. Machesky indicated that he had been present twice at the mine site prior to Inspector Coon's June inspection. According to Machesky, he was present at the compliance assistance visit in April of 1982, and was present again in early May of that year for a complaint triggered by a worker complaint concerning the unauthorized use of the hoist conveyance to move men. Machesky insisted that during the first visit the lack of an overspeed device was pointed out to management, and that it was agreed that materials but not miners could be moved by the hoist. (Other evidence shows that miners could gain access to all levels of the shaft by a series of ladders.) He maintained that the second visit, in response to a telephone complaint, was limited primarily to interviews with mine personnel to determine whether the hoist had been "misused" to haul miners. The evidence gathered, Machesky testified, did not warrant issuance of any citations. He insisted, however, that no permission had been given during either inspection to hoist miners without an overspeed device.

Mr. Hoyl, testifying for respondent, first stressed that in his belief the hoist required no separate overspeed device since the skip or conveyance was raised or lowered by a low-speed motor with "electric dynamic braking" as well as manual braking and a deadman switch. Hoyl insisted that the entire hoist was intensely examined by the inspectors on the May visit and it had no overspeed device then. The company did attach such a device "just prior" to Inspector Coon's September 22 visit, but the belt was too short. Longer belts were on order when Coon issued the citation. Beyond all this, according to Mr. Hoyl, he had an understanding with other MSHA officials, particularly one Paul Tally of the Denver office, that the existing safeguards on the hoist were sufficient.

I found Mr. Hoyl a credible witness throughout, and I therefore accept that he genuinely believed that the hoist was safe for moving miners. I also accept that he believed that at least some MSHA officials agreed with him. I am not convinced,



however, any MSHA official did in fact agree. It is clear that neither Coon nor Machesky did, and I find it difficult to believe that any official, in the face of the clear words of the standard, would take such a position. Far more likely, I think, was a mutual misunderstanding between MSHA and Mr. Hoyl.

Upon the evidence I must find that an overspeed device is a specific mechanism, operating quite beyond those existing features described by Mr. Hoyl. The later installation of such a device strengthens the finding. Besides, the plain words of the standard clearly contemplate the necessity for such a separate device on all man-hoists which fall within the shaft-depth definitions of the standard.

Finally, even if someone connected with MSHA had indeed told Mr. Hoyl that he could lift men or women on the hoist without an overspeed device, such a clearly erroneous piece of advice could not fully exculpate the company - not, at least, in the absence of evidence of a deliberate design to mislead the company to its detriment. There is no such evidence in this case. We must also bear in mind Inspector Machesky's strong testimony that in May he specified to management that miners could not ride in the skip.

The evidence shows a violation of the cited standard, although the surrounding circumstances militate against a heavy penalty.

#### Penalties

The petitioner seeks relatively small penalties for the three electrical violations and the air hose infraction. Specifically, he proposes a \$36.00 for the wiring in the air house (citation 573968), and \$20.00 for each of the other violations comprising docket No. WEST 82-215-M (citations 573969, 573970, and 574807). Additionally, he proposes another \$20.00 for the single hoist violation comprising docket No. WEST 83-53-M (citation 2009724).

Section 110(i) of the Act requires the Commission, in penalty assessments, to consider the mine operator's size, its negligence, its good faith in seeking rapid compliance, its history of prior violations, the effect of a monetary penalty on its ability to continue in business, and the gravity of the violation itself.

The evidence in the present case shows Silver Ventures to be quite small, with no history of prior violations. It also tends to show that most of the violations were transitory, the products of the start-up phase of a new operation. Moreover, the record shows that, overall, the respondent displayed a commendable interest in complying with all safety requirements from the day the project began. Its good faith was never in question. Where penalties are concerned virtually all factors weigh heavily in respondent's favor.

I must note, however, that the representatives of the Secretary of Labor appear to have been well aware of all of these mitigating considerations, since the proposed penalties were all minimal. On balance, I must conclude that the modest penalties proposed by the petitioner should be imposed.

Consequently, I hold that \$20.00 is the appropriate penalty for each of the citations here involved except for the wiring violation described in citation 373968. For that violation \$36.00 is appropriate.

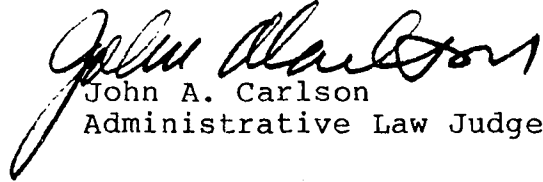
#### CONCLUSIONS OF LAW

Upon the entire record, and in conformity with the factual findings embodied in the narrative portion of this decision, it is concluded:

1. That the Commission has jurisdiction to decide this matter.
2. That respondent, Silver Ventures Corporation, violated the standard published at 30 C.F.R. § 57.12-30 as alleged in Citation No. 573968 in Docket No. WEST 82-215-M; and that \$36.00 is the appropriate penalty for the violation.
3. That respondent violated the standard published at 30 C.F.R. § 57.12-8 as alleged in Citation No. 573969 in Docket No. WEST 82-215-M; and that \$20.00 is the appropriate penalty for the violation.
4. That respondent violated the standard published at 30 C.F.R. § 57.12-18 as alleged in Citation No. 573970 in Docket No. WEST 82-215-M; and that \$20.00 is the appropriate penalty for the violation.
5. That respondent violated the standard published at 30 C.F.R. § 57.13-21 as alleged in Citation No. 574807 in Docket No. WEST 82-215-M; and that \$20.00 is the appropriate penalty for the violation.
6. That respondent violated the standard published at 30 C.F.R. § 57.19-7 as alleged in Citation No. 2009724 in Docket No. WEST 83-53-M; and that \$20.00 is the appropriate penalty for the violation.

ORDER

Accordingly, it is ORDERED that all citations herein are affirmed, and that respondent shall pay penalties totaling \$116.00 within 30 days of the date of this decision.

  
John A. Carlson  
Administrative Law Judge

Distribution:

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

Mr. Alfred G. Hoyl, President, Silver Ventures Corporation, Los Lagos Ranch, Rollinsburg, Colorado 80474 (Certified Mail)

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
2 SKYLINE, 10th FLOOR  
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OCT 31 1984

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 83-171
Petitioner	:	A/O No. 15-02290-03508
v.	:	
	:	Docket No. KENT 83-240
INCOAL, INCORPORATED,	:	A.C. No. 15-02290-03512
Respondent	:	
	:	No. 11 Mine

## DECISION APPROVING SETTLEMENT

Before: Judge Broderick

On October 19, 1984, the Secretary filed a motion to approve a settlement agreement in the above cases.

The two dockets involve nine orders of withdrawal which were issued during the investigation of a coal dust explosion which occurred at the subject mine on December 7, 1981. A copy of the Investigation Report was filed with the settlement motion. The explosion resulted in the deaths of eight miners including the section foreman. The investigation concluded that the explosion occurred with the face and right crosscut were being blasted simultaneously from the solid in the No. 1 entry. A train of explosives in the second hole from the right rib failed to detonate causing the rib hole to blow out and igniting coal dust in suspension from the blast of the other holes and coal dust in suspension which had accumulated on the floor, roof and ribs.

Citation No. 1112641 charged a violation of 30 C.F.R. § 75.400 because of an accumulation of coal dust. It was originally assessed at \$10,000 and the parties propose to settle for \$10,000.

Two orders, Nos. 1111027 and 1111028, charged separate violations of 30 C.F.R. § 75.1303 because (1) blast holes were being shot with excessive explosive powder in the hole and without proper stemming; (2) one blast hole contained a continuous train of undetonated explosives without a blasting cap. Each of these violations was assessed at \$10,000, and the parties propose to settle each for the payment of \$10,000.

Order No. 1112643 charged a violation of 30 C.F.R. § 75.316 because line brattice was not installed or maintained to provide adequate ventilation to the working faces. This violation was assessed at \$8,000 and the parties propose to settle for \$8,000.

Order No. 1112645 charged a violation of 30 C.F.R. § 75.403 because the mine dust had an incombustible content below the minimum required for the intake and return aircourses. This violation was assessed at \$8,000, and the parties propose to settle for \$4,000.

Order No. 1112642 charged a violation of 30 C.F.R. § 75.1307 because the explosives for use in the working places were not kept in separate closed containers located out of the line of blast and not less than 50 feet from the working face. This violation was originally assessed at \$6,000 and the parties propose to settle for \$6,000.

Order No. 1112644 charged a violation of 30 C.F.R. § 75.401 because water was not applied to coal dust on the ribs and roof to minimize explosive hazards. This violation was originally assessed at \$6,000 and the parties propose to settle for \$6,000.

Order No. 1111026 charged a violation of 30 C.F.R. § 75.1305 because explosives in their original shipping paper were transported to the working section in an exposed metal bucket of a battery powered scoop. This violation was originally assessed at \$5,000 and the parties propose to settle for \$2,000. The investigation did not implicate this violation as a cause of, or as contributing to the fatal explosion.

Order No. 1111025 (in Docket No. KENT 83-240) charged a violation of 30 C.F.R. § 75.1702 because the operator did not effectively search for smoking materials to insure that persons entering the underground areas of the mine did not carry smoking materials, matches or lighters. This violation was originally assessed at \$1,000 and the parties propose to settle for \$1,000. The investigation did not implicate this violation as a cause of, or as contributing to the fatal explosion.

Thus, the nine violations were originally assessed at a total amount of \$70,000. The settlement proposal totals \$57,000. In addition, the parties propose that the \$57,000 be paid in 6 monthly installments as follows: \$7,000 shall be paid on the last day of November, 1984 and \$10,000 shall be paid on the last day of each of the next 5 months. This

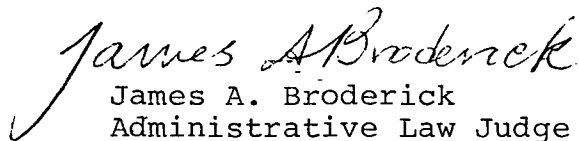
method of payment is proposed because the operator states that the financial condition of the operator makes payment very difficult. The operator does not admit that the violations charged in the orders and citation occurred.

All of the violations involved in these proceedings were very serious. Those directly related to the cause of the explosion, Citation No. 1112641, Order Nos. 1111027 and 1111028 were extremely serious and were assessed at the statutory maximum amount. Those contributing to the fatal explosion, Order Nos. 1112643, 1112642, and 1112644 were assessed at \$8,000, \$6,000 and \$6,000 respectively. These violations were also extremely serious. The violations of 30 C.F.R. § 75.1305 (Order No. 1111026) and 30 C.F.R. § 75.403 (Order No. 1112645), while very serious were not directly related to the explosion, nor was the violation of 30 C.F.R. § 75.1702 (Order No. 1111025). All were the result of the operator's negligence.

The operator is of medium size. The payment of the penalties will not affect its ability to remain in business.

I have carefully considered the settlement proposal in the light of the criteria in section 110(i) of the Act and conclude that it is in the public interest.

Therefore, IT IS ORDERED that the settlement motion is GRANTED; IT IS FURTHER ORDERED that the operator pay the sum of \$7,000 on the last day of November, 1984 and the sum of \$10,000 on the last day of each month for the following 5 months until the total of \$57,000 is paid. When that amount has been paid these proceedings are DISMISSED.

  
James A. Broderick  
Administrative Law Judge

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