OCTOBER 1987

COMMISSION DECISIONS

There were no Commission decisions during October

ADMINISTRATIVE LAW JUDGE DECISIONS

OCTOBER 1987

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

Paula Price v. Monterey Coal Company, Docket No. LAKE 86-45-D. (Judge Melick, September 3, 1987).

Local Union 1810, District 6, UMWA v. NACCO Mining Company, Docket No. LAKE 87-19-C. (Judge Fauver, September 18, 1987).

Secretary of Labor, MSHA v. Freeman United Coal Mining Co., Docket No. LAKE 86-67. (Judge Morris, September 21, 1987)

There was no case filed in which review was denied.

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 5, 1987

GREEN RIVER COAL COMPANY, Contestant v. SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	CONTEST PROCEEDINGS Docket No. KENT 87-99-R Citation No. 9897101; 2/27/87 Docket No. KENT 87-100-R Citation No. 9897102; 2/27/87 Docket No. KENT 87-101-R Citation No. 9897103; 2/27/87 Docket No. KENT 87-102-R Citation No. 9897104; 2/27/87 Docket No. KENT 87-103-R Citation No. 9897105; 2/27/87 Docket No. KENT 87-104-R Citation No. 9897106; 2/27/87 Docket No. KENT 87-105-R Citation No. 9897107; 2/27/87 Docket No. KENT 87-106-R Citation No. 9897108; 2/27/87 Docket No. KENT 87-107-R Citation No. 9897109; 2/27/87 Docket No. KENT 87-108-R Citation No. 9897110; 2/27/87 Docket No. KENT 87-109-R Citation No. 9897111; 2/27/87 Docket No. KENT 87-110-R Citation No. 9897112; 2/27/87 Docket No. KENT 87-111-R Citation No. 9897113; 2/27/87 Docket No. KENT 87-112-R Citation No. 9897114; 2/27/87 Docket No. KENT 87-113-R Citation No. 9897115; 2/27/87 Docket No. KENT 87-114-R Citation No. 9897116; 2/27/87 Docket No. KENT 87-115-R Citation No. 9897117; 2/27/87 Docket No. KENT 87-116-R Citation No. 9897118; 2/27/87 Docket No. KENT 87-117-R Citation No. 9897119; 2/27/87 Docket No. KENT 87-118-R Citation No. 9897120; 2/27/87 Docket No. KENT 87-119-R Citation No. 9897121; 2/27/87 Docket No. KENT 87-120-R Citation No. 9897122; 2/27/87 Docket No. KENT 87-121-R Citation No. 9897123; 2/27/87 Docket No. KENT 87-122-R Citation No. 9897124; 2/27/87 Docket No. KENT 87-123-R Citation No. 9897125; 2/27/87

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

v.

GREEN RIVER COAL COMPANY,
Respondent

Docket No. KENT 87-124-R
Citation No. 9897126; 2/27/87

Docket No. KENT 87-125-R
Citation No. 9897127; 2/27/87

Docket No. KENT 87-126-R
Citation No. 9897128; 2/27/87

Docket No. KENT 87-127-R
Citation No. 9897129; 2/27/87

Docket No. KENT 87-128-R
Citation No. 9897130; 2/27/87

Docket No. KENT 87-129-R
Citation No. 9897131; 2/27/87

Docket No. KENT 87-130-R
Citation No. 9897132; 2/27/87

Docket No. KENT 87-131-R
Citation No. 9897133; 2/27/87

Docket No. KENT 87-132-R
Citation No. 9897134; 2/27/87

Docket No. KENT 87-133-R
Citation No. 9897135; 2/27/87

Docket No. KENT 87-134-R
Citation No. 9897136; 2/27/87

Docket No. KENT 87-135-R
Citation No. 9897137; 2/27/87

Docket No. KENT 87-136-R
Citation No. 9897138; 2/27/87

Docket No. KENT 87-137-R
Citation No. 9897139; 2/27/87

CIVIL PENALTY PROCEEDINGS

Docket No. KENT 87-172
A. C. No. 15-13469-03602

Docket No. KENT 87-173
A. C. No. 15-13469-03603

DECISION APPROVING SETTLEMENT AND ORDER OF DISMISSAL

Before: Judge Weisberger

These cases are before me based on Notices of Contest filed by the Petitioner. The Secretary subsequently filed proposals for assessments of the Civil Penalties.

Both Parties filed a Joint Motion to Approve Settlement on September 23, 1987. The Motion proposed a reduction in total Penalties from $7,800 to $950. I have considered the documentation submitted in these cases, especially the representations of mitigating factors contained in paragraph 4. of the Motion and paragraphs 5. and 7. of Dave Harper's affidavit. I conclude that the proffered penalties agreed upon are appropriate under the criteria set forth in Section 110(i) of the Act.

The Joint Motion also set forth a settlement agreement that 20 of the contested citations be vacated on the ground that they are not violations of the reporting requirements (30 C.F.R. § 50.20), as they do not meet the definition of a reportable "accident", or "occupational injury". I have considered the documentation in these cases, especially paragraphs 3. and 5. of the Joint Motion, paragraph 6. of Dave Harper's affidavit, and Exhibit "A" attached to Dave Harper's affidavit. I conclude that it is proper to vacate the 20 citations referred to in the Motion.

Wherefore, the Joint Motion to Approve Settlement is GRANTED, and it is ORDERED that Petitioner (Operator) pay a penalty of $950, within 30 days of this Order. It is further ORDERED that the following citations be VACATED:

9897101	9897128
9897104	9897129
9897112	9897130
9897114	9897131
9897115	9897133
9897117	9897134
9897119	9897135
9897120	9897137
9897122	9897138
9897125	9897139

It is further ORDERED that the above captioned Notices of Contest be DISMISSED.

Avram Weisberger
Administrative Law Judge

Distribution:

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

Mr. Flem Gordon, Green River Coal Company, Inc., R. R. #3, Box 284A, Madisonville, KY 42431 (Certified Mail)

dcp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

OCT 5 1987

JOHN A. HARRIS, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. PENN 87-72-D
	:	MSHA Case No. PITT CD 86-20
BENJAMIN COAL COMPANY, Respondent	:	Benjamin No. 1 Strip Mine

ORDER DISMISSING COMPLAINT

Before: Judge Koutras

Statement of the Case

This proceeding concerns a pro se discrimination complaint filed by the complainant John A. Harris against the respondent pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977. The pleadings and other information of record reflects that Mr. Harris was employed by the respondent as a blaster, and that as a result of a shot which he detonated a mine foreman was killed by fly rock from the blast. As a further result of this incident, Mr. Harris' state blaster's license was suspended, and he was subsequently discharged by the respondent on August 12, 1986, for violation of company safety practices and for "a pattern of disregard" for company safety procedures and practices.

Complainant filed his initial complaint with the Secretary of Labor, Mine Safety and Health Administration (MSHA), and after completion of its investigation, MSHA advised the complainant that its investigation of his complaint disclosed no discrimination against him by the respondent. The basis for the subsequent pro se complaint filed with the Commission is the assertion by the complainant that his termination "was very unfair," and he requested reinstatement, back pay, and a "clearing of my name by Benjamin Coal Company."

After review of the complaint and the information submitted by the complainant with respect to the circumstances surrounding his discharge, I conclude that there was nothing to suggest that

his discharge was the result of any rights or protections afforded him under section 105(c) of the Act. In short, I concluded that based on the information submitted by the complainant in support of his complaint, there was no claim or cause of action for which relief could be granted under section 105(c) of the Act. Under the circumstances, I issued an Order to Show Cause on July 13, 1987, directing the complainant to state why his complaint should not be dismissed for failure to state a viable claim under section 105(c) of the Act.

The complainant has not responded to my Order to Show Cause. The postal service certified mail receipt reflects that he received the Order on August 5, 1987. Under the circumstances, I conclude that this complaint should be dismissed for failure to state a cause of action or claim and for the failure by the complainant to respond to my Order of July 13, 1987.

ORDER

In view of the foregoing, this complaint IS DISMISSED.

George A. Koutras
Administrative Law Judge

Distribution:

Mr. John A. Harris, RD 1, Box 118, Irvona, PA 16656
(Certified Mail)

Mr. John B. Martyak, Manager Personnel/Safety, Benjamin Coal Company, Benjamin #1 Strip, RD, LaJose, PA 15753
(Certified Mail)

/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

OCT 5 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. VA 86-46
	:	A.C. No. 44-06112-03507
v.	:	
	:	Deep Mine No. 13
PARAMONT COAL CORPORATION, Respondent	:	

DECISION

Appearances: Page H. Jackson, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Petitioner; Karl K. Kindig, Esq., The Pittston Company, Abingdon, Virginia, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a proposal for assessment of civil penalty filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking a civil penalty assessment in the amount of $850 for a violation of mandatory safety standard 30 C.F.R. § 75.202, as stated in a section 104(d)(1) Citation No. 2752968, issued on February 14, 1986, at the respondent's mine. The respondent filed a timely answer contesting the citation and a hearing was held in Duffield, Virginia. The parties filed posthearing briefs, and the arguments presented therein have been considered by me in the course of my adjudication of this case. I have also considered the oral arguments made by counsel during the course of the hearing.

Issues

The parties have stipulated as to the fact of violation, and they agree that a violation of section 75.202 occurred as stated by the inspector in the citation. The parties agree

that the only issue presented in this case is whether or not the proposed civil penalty assessment based on the inspector's finding of "high negligence" was correct (Tr. 5). The parties also agreed that the validity of the section 104(d)(1) citation insofar as it alleges an "unwarrantable failure" by the respondent is not an issue in this civil penalty proceeding (Tr. 5).

Applicable Statutory and Regulatory Provisions

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

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

3. Commission Rules, 20 C.F.R. § 2700.1 et seq.

Stipulations

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

1. The respondent is the owner and operator of the Deep No. 13 Mine, and is subject to the jurisdiction of the Act.

2. The presiding judge has jurisdiction to hear and decide this matter.

3. The inspector who issued the citation in question was acting in his capacity as an authorized representative of the Secretary of Labor.

4. The citation in question was duly served on the respondent, and all witnesses testifying in the hearing are accepted generally as experts in coal mine health and safety.

5. The imposition of a civil penalty for the violation in question will not adversely affect the respondent's ability to continue in business.

6. The respondent is a wholly owned subsidiary of Pyxis Resources Company, a subsidiary of the Pittston Coal Corporation. In 1985, the respondent was a wholly owned

subsidiary of a partnership controlled by the Hanna Mining Company and W. I. Grace Company.

7. In 1986, the respondent produced approximately 400,000 tons of coal, and it is a medium-size coal company.

8. A violation of mandatory safety standard 30 C.F.R. § 75.202, did in fact occur as stated and alleged in the citation which was issued in this case.

9. MSHA's computer print-out concerning the respondent's assessed history of prior violations as reflected in exhibit G-1 may be used in determining an appropriate civil penalty assessment.

10. The violation was abated by the respondent within the time fixed by the inspector.

Section 104(d)(1) "S&S" Citation No. 2752968, issued on February 14, 1986, cites a violation of mandatory safety standard 30 C.F.R. § 75.202, and the cited conditions or practices are described as follows:

> Loose overhanging coal and rock brows and fractured coal ribs were present in the Nos. 2, 3, 4, and 5 entries on the 001 No. 1 active working section beginning at the section belt feeder and extending inby for approximately 200 feet including the interconnecting cross-cuts left and right. The loose overhanging brows and fractured ribs were located in regularly traveled haulways and were readily visible. The mining height is from 9 to 10 feet. The brows were from 3 feet to 8 feet long from 2 feet to 4 ft. thick and overhanging from 10 inches to 3 feet. Also, the belt entry from the 3rd interconnecting crosscut outby the No. 2 drive inby to the belt tailpiece.

The inspector fixed the abatement time as 8:00 a.m., February 18, 1986, and on that day another inspector extended the abatement time to February 29, 1986, because "a roof fall at the mine has stopped all work. Additional time is granted." Thereafter, on March 3, 1986, a third inspector

extended the abatement time to March 10, 1986, for the following reason:

> The operator is in the process of permanently abandoning the mine. However, some of the ribs have been taken down and as the mine is being pulled out the rest of the areas involved will be timbered or taken down. More time is granted to complete the work being done to correct this citation.

The citation was terminated on March 7, 1986, and the termination notice states that "The overhanging coal and rock brows and fractured coal ribs referred to in Citation No. 2752968 were either taken down or supported."

Petitioner's Testimony and Evidence

MSHA Inspector Larry Coeburn confirmed that he issued the citation during the course of a spot inspection conducted on February 14, 1986, with his supervisor Ewing C. Rines. The inspection was in conjunction with a fatal roof fall accident investigation which began that same morning (Tr. 17). Mr. Coeburn stated that he observed overhanging brows in at least 10 locations, and loose ribs at approximately four locations, and that he recorded these in his notes, and later reproduced them on a sketch or map of the area which he prepared for the hearing (exhibit G-3; Tr. 20-22). He measured the brows by means a carpenter's rule and recorded the results on the sketch, and confirmed that none of them were supported (Tr. 24). Some of the brows were pulled down with very little effort, but he did not record these in his notes or on the sketch. He was not aware of any brows where attempts were made to pull them down, and they did not come down.

With regard to the loose and fractured ribs located on the sketch, Mr. Coeburn stated that he observed visible vertical fractures and separations of coal away from the main coal pillar, and that some of the ribs had been rock dusted at places where the pressure on the pillar "had caused it to sort of break outward, ravel, slough" (Tr. 26).

Mr. Coeburn identified exhibits G-4 through G-8 as sketches of the areas where he found he cited rib and brow conditions, and he explained the conditions and locations as depicted on the sketches (Tr. 26-36). He stated that miners would be working in these areas at different times, and he observed signs of travel by shuttle cars and scoops in the

haulageways and entries (Tr. 39, 42). He confirmed that he observed four loose, overhanging coal and rock brows on the walkway clearance side of the belt haulageway outby the areas depicted on the sketch, exhibit G-3, and confirmed that men would normally walk along that walkway. However, he observed no loose ribs in this walkway area (Tr. 45).

Mr. Coeburn confirmed that five people would normally be working in the areas where he observed the loose brows and fractured ribs, and they would be building stoppings and working on the belt. Also, at any given time, one person would be present on a piece of equipment along the travelways (Tr. 42-43). Mr. Coeburn believed that it was highly likely that a roof fall would occur, and that due to the mining height and the size of the overhanging brows and the extent of the fractured ribs, if falls occurred, fatal injuries would result. Under all of these circumstances, he concluded that the cited conditions constituted a significant and substantial violation (Tr. 47-48).

Mr. Coeburn stated that the coal brows were "man-made" and were created during the mining and removal of coal. They were left by the continuous-mining machine that had mined the entries up to the roof line. On the ribs and corners, the exposed brows were left where the machine had not mined all the way up the entry. The machine bit markings were evident on the brows (Tr. 43-44).

In response to a question as to why he made a finding of "high negligence" on part II of the citation form, Mr. Coeburn responded as follows:

> Q. Now, you checked -- under negligence, Part II, you checked high. Why do you believe the respondent, Paramont Coal Corporation, demonstrated high negligence in allowing this condition to exist?
>
> A. The brows were man-made, made with the continuous mining machine as mining progressed. The conditions -- the overhanging brows and loose ribs were very obvious to anyone who entered that area. They were very obvious.
>
> This mining was -- coal was being mined on the section at this time or immediately prior to this and had been -- these conditions had existed -- in my opinion, the brows had existed for some time prior to this taking

about the situation" (Tr. 69). He stated that the ribs on the top side of the "rock parting" were fractured from the No. 3 entry all the way through to the No. 4 entry and had a very visible separation. He described the separation as "you could see as far as you could see back in there and it was sort of on a slip-like plane. It got deeper as it penetrated into the coal fractures" in the No. 3 entry going toward the No. 4 entry (Tr. 70-71).

Mr. Rines explained the circumstances and appearances of the "rock parting" which would give one an indication that the rib was beginning to become loose and fractured, including pressure breaks which would cause "the coal raveling a little bit near the roof line," sloughing of the face of the rib, or visible cracks (Tr. 73-74). On the other hand, the rib may just "roll immediately" (Tr. 74).

Mr. Rines was of the opinion that the rib conditions which he observed "had been in the making for awhile," and that "there had been some indicators as far back as a week," and his reason for these conclusions were stated as follows at (Tr. 74-75):

> A. I would say that there had been some indicators as far back as a week. The reason I say that is the fact that they didn't have a fractured rib problem or rib problem over the entire section. Normally, if you've got rib problems, it will start either from the left side of the section and go all the way across or the right side, all the way across, or go from the middle, out to.
>
> But that wasn't true in this situation here. This was in this localized area for this particular section here even though he did have a loose, fractured rib up here, but it was nothing to the extent that this was down here (indicating).
>
> * * * * * * *
>
> A. These ribs did not -- from the day we seen them, on the 14th -- this condition didn't occur just overnight or over the past three or four days. I'm saying there should have been some indicators or signs there as far back as a week. And the reason I say that is if you

had had this kind of relief occurring instantaneously, the ribs would have rolled out and filled the entry up.

* * * * * * *

Q. Now I want to turn your attention -- well, let me ask you one more question about this loose rib condition or all the loose rib conditions on the section. What would Paramont have had to do to correct the condition if they had noticed it, say, six days before the 14th?

A. They could have taken down that portion that was fractured. * * * I would like to add, too, some people don't like to cut ribs down because it exposes more roof, which requires additional support. So that is why sometimes they set timbers to support.

Referring again to the sketch, exhibit G-3, Mr. Rines described the condition of the brows which existed at the locations shown on the sketch, and he explained the existence of the brows as follows at (Tr. 79-80):

A. These brows, since they didn't have any sloughing or undercutting of the bottom portion of the coal seam under the rock parting, these brows were left there during the continuous mining cycle for whatever time the cycle had been. For what reason, I don't know.

But the miner, when he was on his mining cycle, during the making of these brows, he failed to cut that portion, which originally was part of the coal face, and he failed to cut that portion of it down.

* * * * * * *

A. Since he didn't get it the first time, he definitely -- if they can't get it down no other way, you know, they could support it temporarily till he gets back on the second

cycle, and he should definitely take it and cut it down.

* * * * * * *

Q. What would, in your opinion, a reasonably prudent section foreman do when he observed one of these brows after the miner had pulled out of an entry, a particular entry?

A. He would make arrangements to either have the brow taken down or supported.

* * * * * * *

Q. Based upon your experience in the thick tiller seam and your knowledge of the conditions in the Deep Number 13 Mine, of the mining conditions, do you have any idea, let's say, for example, how long the brows that are immediately inby the belt feeder may have been in existence?

A. Looking from where the belt feeder is located -- and you have an open crosscut immediately inby. That is one (1), two (2), three (3) -- there is four (4) crosscuts to your most inby brow ribs.

And considering the height of their coal, they were high producers, but they probably wouldn't have gotten over eight (8) or nine (9), at the most, or ten (10) cuts per shift, which would have probably averaged about eighteen (18) feet per shift).

So you're talking about several days here to mine this distance; that is, from the feeder up to a short distance of those that are up there in the last line of open crosscuts.

Q. When you say several days, are you talking --

A. Well, at least -- from what I'm looking here and knowing, you know, the way they mine, I'm going to say at least ten days, because this is very high coal.

Mr. Rines was of the opinion that the brow conditions in the crosscut immediately inby the belt feeder should have been apparent to a preshift or onshift examiner at least 10-days prior to the time the citation was issued, and that the brow that was left during the mining cycle should have been noticed by the next trip of the preshift examiner, as well as by the section foreman on his shift (Tr. 82).

Mr. Rines confirmed that MSHA Inspector Ronald E. Adkins works for him, and that he was at the mine on February 10 and 12, 1986. Mr. Adkins informed him that he had not observed the cited rib and brow conditions (Tr. 93-94). The regularly assigned inspector, Teddy Phillips, would not have observed the cited area during his prior inspection visit on January 10, 1986, because mining was going on in another area (Tr. 85, 94). Mr. Rines stated that he has had occasion to visit a mine and found a readily apparent violation that he had missed the day before (Tr. 95).

On cross-examination, Mr. Rines stated that he discussed the cited conditions with Inspector Adkins at length because he was concerned that one could be in the area and miss the conditions. He confirmed that no disciplinary action was taken against Mr. Adkins (Tr. 96).

In response to a question as to whether or not anyone walking from inby the belt feeder toward the face in the No. 3 entry, past the crosscut which he discussed would have occasion to see the cited rib conditions, Mr. Rines responded "not if he didn't go in that particular area" and "if he hadn't went into the crosscut he would not have seen" (Tr. 97-98). If one were walking on the right side of the entry, he should have at least observed the brow immediately at the feeder, unless it was hidden by a line curtain. The walkway was on the left side of the entry (Tr. 98-99).

Mr. Rines confirmed that he was present on February 14, 1986, during the accident investigation and heard Mr. Ron Hamrick a Virginia State Mine Inspector, make the following statement (Tr. 101):

> I'll add something to that, E.C. I inspect that mine regularly. During an inspection, takes me three or four days, I go out on all shifts to do it, and they really impress me. They watch the ribs.
>
> But I can go in today and have every rib we find pulled down, cut down, try to knock

out with scoop or take bar and knock down. I go in tonight and find more ribs that have loosened up just between one shift to the next. I observed this myself.

Mr. Rines confirmed that he was in the mine on one prior occasion several weeks before February 12, 1986, to look at some diesel shuttle cars, and while he was in the section where the rib and brow conditions were cited, that particular area had not been mined. Although he did walk the air intake entry on that occasion, he did not notice any loose ribs or overhanging brows (Tr. 106).

Mr. Rines confirmed that if someone were walking on the left side of the haulway in the No. 3 entry toward the face, they could easily walk by the crosscut at the feeder and not notice the ribs, but if they travelled into the crosscut, it would have been obvious that the ribs were severely fractured (Tr. 107). However, there were a minimum of seven people on this section every day, including the section foreman. Mr. Rines stated that while it was possible for an area where fractured and loose ribs and brows were taken down to have the same problem the next day, such an area would also have serious roof control problems. Shifting roof weight and bottom coal sloughing out would result in coal brows other than those which are left from mining (Tr. 111). However, he saw no such brows on February 14th. Mr. Rines confirmed that the cited brow and rib conditions were prevalent down the belt entry in question (Tr. 116). However, he disagreed that they were prevalent in the working section, but agreed that in the belt entry the respondent had set a lot of timbers and cribs to try to control rib rolls, and that massive ribs rolls existed in that entry (Tr. 117).

Respondent's Testimony and Evidence

Mine Foreman Ronald R. Orender described the system of mining being used in January and February, 1986, and he confirmed that the rib work and setting of cribs was done during the midnight maintenance shift. He stated that the mine had some bad bottom conditions and that the ribs were bad (Tr. 130). Due to a bad and wet uneven mine bottom, the large 12-foot wide ram cars would sometimes tear out the rib cribs. The ribs would be barred or cut down. The brows in question which would be left by the miner were difficult to bolt, and sometimes when the miner returned to cut them down it could not reach the top, and some brows would be left (Tr. 131).

Mr. Orender described the procedures followed for providing protection along the entry as the belt feeder was advanced during the mining cycle. He explained that the belt was usually moved up for two breaks, sometimes once a week, and sometimes it would take 2 weeks to get up far enough to move. They would then go back and do the cribbing work outby, especially in the belt line which seemed to be the worst area. He explained the problems encountered while attempting to timber, crib, or otherwise support some of the rib rolls. Ribs were being pulled inby the belt feeder, and all three shifts were instructed "to try to pull what we could." Some of the brows that could be reached with the miner were pulled, and others would stick to the roof and could not be pulled. Attempts were made to bolt some of the brows, but the bolter could not get close enough to the rib and "some we may have missed." Mr. Orender stated further that ribs were constantly being pulled in the face areas and that "sometimes you would pull and it would leave a brow" (Tr. 132-134).

Mr. Orender stated that steps were taken to alert the work force about the bad rib conditions and that morning safety talks were conducted, and the miners were constantly told to watch the ribs and to try to pull down any bad ribs. He stated that "sometimes they would and sometimes they wouldn't" (Tr. 134). He stated further that a lot of the ribs which were pulled down would again develop cracks by the next day, and some would again develop cracks within 24-hours. However, he could not recall pulling any ribs a day or two prior to the accident, but knew that some were pulled "over that way" (Tr. 135).

Mr. Orender confirmed that the rib conditions inby the belt feed area were particularly bad during January and February of 1986, and more problems were encountered within the last 300 to 400 feet of mining in that area, but steps were taken to protect the miners by installing wire mesh around the shuttle cars which were not designed for an enclosed canopy (Tr. 136).

Mr. Orender confirmed that he accompanied the inspectors at the time the citation was issued, and they called his attention to a rib that had sloughed off in the tailpiece area. The crosscut was dangered off, and the next day two foremen went in with a miner machine and knocked the ribs down and installed crib blocks in the area. No coal was run after the accident and hourly miners were not working the section. Another fall occurred outby the area, and the conditions worsened. Four to 6 days later the decision was made that coal could no longer be mined safely and the mine was

closed because of the rib conditions and the outby top, and out of concern for the safety of the miners (Tr. 138-139).

On cross-examination, Mr. Orender stated as follows at (Tr. 139-141):

> Q. Now, I believe you testified on direct examination in regard to the working places that existed on February 14, the area inby the tailpiece, that you didn't recall having anybody pull any ribs for a day or two prior to the accident. Isn't that correct? You don't recall any ribs being pulled for two days prior to the accident?
>
> A. Not myself personally, no.
>
> Q. You don't have any knowledge of anybody doing it?
>
> A. I didn't see them.
>
> Q. Nobody told you they pulled any either, did they?
>
> A. Well, it wasn't a practice to do that. I mean, if you seen a bad rib, the worker or the foreman, they would pull a rib, you know, without even, you know --
>
> Q. You also talked about you were always telling them to watch the ribs and men were supposed to pull the ribs if they saw a cracked or fractured rib.
>
> A. We tried to, yes.
>
> Q. You tried to. You said sometimes the men did not do that?
>
> A. I'm sure they did. I'm sure there was times they did not pull ribs when they should have.
>
> Q. What was the company's practice when the men did not pull a rib they should pull?
>
> A. We would usually ask them, "why did you go by there?" Or something. And a lot of times

they would answer, "well, we didn't see it." You know, everybody was aware those ribs were bad. And we had safety meetings and it was put in the preshift books where we did have talks with the men about these ribs, that they were to be pulled and so forth.

Q. Mr. Orender, isn't it true that if the men themselves didn't pull the ribs, that management didn't insist those ribs be pulled?

A. No, sir. You're wrong. No. No, that is not true.

Q. Then why in my prior question didn't you tell me that management went and pulled the ribs themselves?

A. Management did pull. We pulled ribs ourself. Everybody worked together in that mines to try to pull what we could when we saw them. I'm sure we didn't see all of them, you know.

Mr. Orender stated that the respondent's efforts to address the rib and brow problems were not confined totally to the maintenance shifts, and that attempts were made to take them down during the day and evening production shifts (Tr. 152-153). Mr. Orender agreed that the entries and crosscuts labeled "hw" on the sketch, exhibit G-3, were the haulageways down the belt entry, and that they were used for that purpose some of the time but not necessarily all of the time. He also agreed that the battery charging station is properly located on the sketch and that it would be used to charge equipment from one shift to the next. Access to these areas by walking was through several possible routes which he described (Tr. 155-156). He agreed that none of the brows which he observed on February 14, 1986, as marked on the sketch, were supported. Some of the brows were taken down before the mine was abandoned, and others were not (Tr. 157-158).

In response to a question as to how long the cited conditions may have existed before they were found by the inspector on February 14, 1986, Mr. Orender responded as follows at (Tr. 158-159):

A. Your Honor, some of the brows could have possibly been there for four or five days, but

the rib conditions, like I say, it's hard to say.

Q. Go ahead.

A. Sometimes you could walk by a corner and there wouldn't be a crack and you go by there two hours after and the pressure had made a crack in it. But some of the brows were probably there, yes.

Q. And you say, the ribs, the conditions could exist from day to day.

A. Yes, sir. They did, definitely, the ribs.

Q. How about loose ribs. I'm not talking about fractured ribs, but what about some of the loose ribs. Is there a distinction between a loose rib and a fractured rib? Is there a difference between those two?

A. In my opinion, a cracked rib maybe is not as dangerous as one that is real loose where it could fall. But then sometimes you could put a bar on one that you wouldn't think was very loose and you take two men and try to pull on it and you couldn't pull it down. And other times you would touch it and it would come down.

Mr. Orender identified exhibit R-2, as an inspection report he signed which indicates that Virginia State Mine Inspector Ron Hamrick was in the mine on February 3, 1986, conducting an inspection for 4 hours and that he issued no violations (Tr. 192-194).

MSHA Inspector Ronald E. Adkins confirmed that he was familiar with the subject mine, had been in it five or six times, and that the sketch depicting the working face areas (exhibit G-3), which existed in February, 1986 appears basically accurate (Tr. 161-163). Mr. Adkins confirmed that he was underground in the mine on February 10, 1986, for 2 hours, and spent the majority of his time in the working faces. He reached the working faces by walking up the number three entry inby the belt feeder as shown on the sketch, and while he was there he observed no overhanging brows or cracked ribs that constituted violations of any MSHA regulations. The purpose of his mine visit was a "walk and talk inspection" for the

purpose of alerting miners as to "what was going on in the industry so far as accidents and try to get across to them how critical their own initiative so far as their safety was, how important it was" (Tr. 165-167).

On cross-examination, Mr. Adkins stated that the working faces on February 10, 1986, were not as depicted on the sketch in question, and that they were probably advanced a crosscut or more. While he was there, line curtains were hung in all working places (Tr. 168). Referring to his notes of his February 10, visit, he confirmed several notations indicating that he examined each of the six working places as depicted on the sketch, and that the working practices he observed were good. Another notation reflected that 5-foot resin roof bolts were being installed in all entries and that the bolting pattern was good. He confirmed that the work habits and procedures of the miners at that time were adequate (Tr. 168-169).

When asked to explain his failure to observe the violative rib and brow conditions in question, Mr. Adkins responded as follows at (Tr. 170-171):

> * * * Eighty percent (80%) of the fatalities occur within fifty (50) feet of the face, of the working faces and, basically, I would say I spend ninety percent (90%) of my time there.
>
> In this situation on the walk and talk inspections, we are assigned a group of mines. We're given, more or less -- we need to finish these in a certain length of time to get back to our regular work. I'm sure by looking at my time sheets, I was pushed for time on this.
>
> But it is my personal policy and MSHA's District 5 policy, too, when we enter a mine, we will make the working faces and check for imminent dangers. I'm sure I did that. As far as seeing these things outby, I just didn't see them. I wasn't in the area.
>
> Q. You say you weren't in the area.
>
> A. It's possible I could have walked by one. It could have been behind a curtain. I could have been talking to someone or something like that and not noticed it.

Q. Okay. Are you telling me on that day you didn't go in specifically to check roof conditions or ribs and brows or fractured ribs, that sort of thing?

Q. No, sir. That is always our number one priority, but the inspection, the walk and talk inspection, is more to make contact with the people, to get on a one-to-one basis with them, talk to them. We talk to them in a group, watch them work and discuss their work habits. That is basically what I was there for that day.

Ronald Hamrick, State of Virginia Coal Mine Inspector, stated that he has inspected the subject mine since it began operating and that he has been in it five or six times. He confirmed that he participated in the fatality investigation on February 14, 1986, and he identified exhibit R-1 as a partial transcript of a statement that he made during the course of a conference held on that day with several MSHA inspectors in connection with the investigation, and read parts of the statement into the record (Tr. 175-177).

A. I'll add something to that, E.C. I inspect that mine regularly. During an inspection, which takes me three or four days, I go out on all shifts to do it, and they really impress me. They watch the ribs.

But I can go in today and have every rib we find pulled down, cut down, try to knock it out with a scoop or take a bar and knock them down. I go back in tonight and find more ribs have loosened up just between one shift and the next.

I observed this myself. And while I'm running my big mouth, I would like to add something to find a way of preventing this accident, but let's not jump off the deep end and come up with some rig that would cause these miners to be exposed to more danger than what the conditions we already have.

Ron and I have talked about trying to design a protection for rib rolls, but we agree, as you said, E.C., rib rolls are not a problem right at the immediate face, but

actually past them but in behind them, two crosscuts back is where the ribs start loosening up and and moves and so on.

But let's not come up with some half-cocked idea that would expose people to more hazards.

Mr. Hamrick confirmed that he was familiar with the mine layout as depicted in the sketch, exhibit G-3, and he confirmed that the rib and brow conditions marked on the sketch "probably" existed generally in the area two crosscuts back from the face. Other than the rib conditions in the mine, he described the general mine conditions as "as average type mining" (Tr. 180). He stated that from his experience in the mine, everyone, including employees and management, were aware of hazardous rib conditions, which he believed were inherent in the Clintwood seam, and that all personnel were constantly on the alert for these conditions, pulling them down when they were discovered. He confirmed that he constantly gave advice to management as to how to guard against the rib conditions, and stated that he never previously discussed these conditions with MSHA inspectors Rines, Coeburn, or Phillips. Mr. Hamrick also stated as follows at (Tr. 181):

A. Well, as I say, this is an inherent condition with the Clintwood seam. There isn't much you can do to these ribs and brows other than watch them, take them down as they're discovered and as they loosen up.

In past experience, I've tried bolting ribs. I've tried putting steel bands around ribs to hold them together. I've tried numerous things. In some thirty-seven (37) years' experience, I never did find anything that was actually a way of handling unsafe ribs other than watching them, stay away from them as much as possible.

Mr. Hamrick stated that he went over the entire section of the mine on February 14, 1986, and with respect to the brow conditions noted on the sketch, exhibit G-3, he confirmed that he observed unsupported brows, but could not recollect how many he observed and could not remember counting them (Tr. 184). He confirmed that he did observe the ribs between the number 3 and 4 entries shown on the sketch, and that he issued a citation for those conditions (Tr. 185). He also confirmed that the cited rib conditions were also in the area between

the belt feeder and the battery charger (Tr. 188). However, he could not state how long the conditions had existed, and stated that such rib conditions "occurred unexpectedly, and often, quite frequently" (Tr. 188). He also stated that the brow conditions which are outby the face areas were probably caused by the coal rolling out from under them, and he doubted that they were caused by a continuous miner leaving them on a prior shift because "the men at the mine were so particular and so self-conscious of the fact that these were hazardous they would not leave one" (Tr. 190). However, he could not explain why the cited brow conditions were not taken care of prior to February 14th when the MSHA inspectors found them (Tr. 190). He also stated that it was entirely possible that the brow conditions came about over a short period and possibly a day, but confirmed that he was not with the inspectors when they viewed the cited brow conditions and issued the citation (Tr. 191). He confirmed that his citation may have been for the same or similar conditions cited by the MSHA inspectors and that he required the ribs or brows to be removed or supported (Tr. 191).

Mr. Hamrick stated that under state regulations, he does not make any negligence findings as part of any citations he issues. He confirmed that while he had no idea how long the conditions cited by the MSHA inspectors may have existed, they may have been there "for hours or days." He further explained that "I have observed by going in on one shift and following immediately, the next shift, brows have loosened up between shifts" (Tr. 192).

Petitioner's Negligence Arguments

During oral argument at the close of its case in response to the respondent's motion for a summary dismissal of this case (which was denied), petitioner's counsel asserted that the testimony of the inspectors makes it clear that the cited rib and brow conditions were readily observable for as much as a week prior to the February 14, 1986 inspection, and that the conditions existed in areas which were regularly travelled and required to be examined by onshift and preshift examiners. Given these facts, counsel concluded that there is a clear inference that the respondent's personnel knew or should have known of the conditions for a week or 10-days prior to the inspection. Under the circumstances, counsel took the position that the respondent was "very negligent-if not grossly negligent" (Tr. 121-122).

Petitioner's counsel asserted that in addition to the testimony of the inspectors, Mine Foreman Orender confirmed

that he was aware of brows which were not taken down or supported because it was impractical to do so due to the use of oversized ram cars which were knocking down the cribs. Counsel further asserted that the evidence establishes that the brows had been in existence since they were created by the continuous-mining machine during the normal mining cycle, and that Mr. Orender specifically admitted that no ribs had been taken down on the section for at least 2-days prior to the inspection. Counsel concluded from this that no brows were created by rib rolls for at least 2-days prior to the inspection, and that they were in fact created by the mining machine (Tr. 196-198).

Petitioner's counsel took the position that mine management had knowledge of the cited conditions, knew what should have been done to correct the conditions, but did not take the appropriate action mandated by the Act. Counsel asserted that "the standard is not what is reasonably practical in the operator's mind, but whether the operator's conduct is reasonable in view of the standard mandated by the Act" (Tr. 196). Counsel suggested that section 75.202, mandates that loose ribs and overhanging brows be immediately taken down or supported. He cited Westmoreland Coal Company, 7 FMSHRC 1338 (September 1985), as an example of a case where a mine operator's negligence was lowered because of evidence that he had immediately tried to support or take down overhanging ribs. In the instant case, however, counsel asserts that the respondent did not give immediate attention to the cited conditions, and that the brows, at least, had been in existence since they were created by the continuous miner (Tr. 98). Conceding that the respondent may have taken appropriate action in other mine areas, counsel concluded that this was not done in the areas which were cited by the inspector (Tr. 210).

Responding to the respondent's suggestion that the cited brow conditions were left after the rib had rolled, counsel stated that if this were the case, the respondent should have put on some direct evidence to support such a conclusion. Counsel took the position that any inferences that the brows were left by rib rolls is directly contradicted by the inspectors' observations of teeth marks made by the continuous-mining machine at each of the brow locations, and that "those teeth marks obviously would not be there if the brow was created by a rib roll" (Tr. 208).

Petitioner's counsel filed a written posthearing brief, and the arguments advanced are essentially the same as those made during the course of the hearing. With regard to the

cited conditions, counsel relies on the testimony of Inspectors Coeburn and Rines that all of the brows they observed were created by the continuous miner, and Mine Foreman Orender's testimony that many of the brows were created by the miner. Counsel also relies on the inspectors' testimony that the brows may have existed for 6 to 10-days prior to the inspection, and Mr. Orender's admission that they may have been present for 4 or 5 days.

With regard to the cited rib conditions, counsel points out that Inspector Rines observed a visible separation between the loose ribs and the remaining block of coal, and was of the opinion that the separation had been apparent for about a week, and Mr. Orender's statement that it was hard to say how long the ribs had been in that condition. Counsel concludes that the violation resulted from the respondent's unwarrantable failure to comply with the cited standard.

Respondent's Negligence Arguments

Respondent's negligence argument is based on mitigating circumstances, and counsel points out that the petitioner had people at its disposal who could have testified as to the respondent's past practices and mine history, but chose only to call people who had no real experience with the mine (Tr. 124). Counsel states that the respondent was well aware of the existing mine conditions, but instructed its employees to watch out for the conditions and that it was doing everything that was reasonably practical to control the conditions. When the respondent concluded that the worsened conditions could not be safely controlled, the mine was shut down (Tr. 195).

Taking issue with the petitioner's characterization of Mine Foreman Orender's testimony, respondent's counsel asserts that Mr. Orender simply stated that he was personally unaware of any ribs being taken down for 2-days prior to the inspection. Counsel points out that Mr. Orender also testified that because of the instructions given to the miners, they would, on their own initiative, routinely take down any loose ribs they encountered. Since it was such a common occurrence, they would not necessarily report it to the mine foreman (Tr. 205). Counsel also points out that in addition to the testimony of Mr. Orender, a man with long experience in the mine, the respondent also presented the testimony of state mine inspector Hamrick, the only disinterested witness in this case, and the testimony of an MSHA inspector who was in the mine 2 to 4-days prior to the inspection on February 14, 1986, whereas

the petitioner has presented testimony from two inspectors who were in the mine for a total of 1 or 2 days (Tr. 205-206).

Referring to the negligence criteria found in Part 100 of MSHA's civil penalty assessment regulations, 30 C.F.R. § 100.3(d), counsel points out that three of the negligence categories, "low," "moderate," and "high," are all based on one common factor, namely whether the operator "knew or should have known of the violative condition or practice." What distinguishes the three levels is the existence of "considerable mitigating circumstances," "mitigating circumstances," and "no mitigating circumstances" (Tr. 206).

Counsel asserts that the circumstances relied on by the respondent to mitigate its negligence consists of its history in dealing with adverse rib and brow conditions, the testimony of state mine inspector Hamrick, who inspected the mine on a regular basis and believed that the cited conditions could have existed for less than a few hours, and the particular circumstances with the particular coal seam where rib rolls occurred either instantaneously or over a very short period of time, leaving loose ribs and brows (Tr. 207). Counsel maintains that the respondent took significant steps to protect its employees from the roof and rib conditions present in the mine, including the designing and installation of personnel protective devices beyond those mandated by MSHA, and the constant reminding of its employees to watch the rib conditions (Tr. 134, 136).

Counsel states that Inspector Coeburn, by his own admission, had no knowledge of the history of the mine, that the petitioner did not produce Inspector Phillips, the regular MSHA inspector, and that the petitioner's perception of this mine is on a very narrow time frame. On the other hand, counsel points out that the respondent has relied on the testimony of its experienced mine foreman, an MSHA roof control specialist (Adkins) who was in the mine 2 to 4-days prior to the inspection and who did not observe the cited conditions, and the state inspector who knew the history of the mine and who testified that the respondent was actively concerned about the cited conditions and was taking all appropriate steps to deal with them (Tr. 207).

Respondent's counsel filed a written posthearing brief and essentially advanced the same arguments made orally during the course of the hearing. Counsel cites a decision by Commission Judge Melick in MSHA v. Rushton Mining Company, 5 FMSHRC 2081 (December 1983), in support of his argument

that the failure of MSHA Inspector Adkins to observe the conditions when he was in the mine, coupled with the testimony of State Inspector Hamrick, belies the petitioner's assertion that the cited rib and brow conditions had existed for at least 4-days prior to the date of the citation. Counsel cites Judge Melick's observation at 5 FMSHRC 2083-2084:

> It is not disputed that Klemick was indeed present in the same mine section-two days before, as alleged, but he claims not to have noticed the rib conditions because he was concentrating on another violation. I find it difficult to believe, however, that an experienced miner and mine safety inspector would be so oblivious to conditions he characterized as "an imminent danger" if they were as obvious and dangerous as he alleges. Thus while there is no doubt that overhanging rib conditions did exist with detectable fractures, I do not find that the conditions were as obvious as now alleged by MSHA. Accordingly, while I find the operator to have been negligent in allowing the cited conditions to exist, I do not find it to have been grossly negligent.

Findings and Conclusions

Fact of Violation

The respondent is charged with a violation of mandatory safety standard 30 C.F.R. § 75.202, which requires in pertinent part that "Loose roof and overhanging or loose faces and ribs shall be taken down or supported." Although the standard does not specifically refer to "brows," the parties are in agreement that a "brow" is akin to an overhanging rib and is located in area where the rib ends and the roof starts (Tr. 197). In any event, the respondent has conceded that the cited rib and brow conditions were present, that they were not taken down or supported, and that the cited conditions constituted a violation of section 75.202. Accordingly, the violation IS AFFIRMED.

History of Prior Violations

Exhibit G-1 is an MSHA computer print-out summarizing the respondent's compliance record for the period August 1, 1984 through August 13, 1986. That record reflects that the respondent was issued nine section 104(a) citations, and one combination section 104(a) - 107(a) citation-order, for which

it paid civil penalty assessments totalling $386. Two prior section 75.202 roof control violations issued in 1984 were assessed a total of $161, and two section 75.200 violations issued in 1985 were assessed at a total of $70. For an operation of its size, I conclude and find that the respondent has a good compliance record, and I find no basis for otherwise increasing the civil penalty assessment for the violation which has been affirmed in this case.

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

The parties have stipulated that the respondent is a medium-size coal operator and that a civil penalty assessment for the violation in question will not affect its ability to continue in business. I adopt this stipulation as my finding and conclusion on this issue.

Good Faith Compliance

The parties have stipulated that the violation was timely abated by the respondent. Inspector Coeburn confirmed that after the citation was issued, the respondent dangered off the cited area by placing boards and a sign across the entry and marked off the affected areas with spray paint (Tr. 46-47). Under these circumstances, I conclude and find that the respondent exercised good faith compliance in timely correcting the violative conditions.

Gravity

The record in this case establishes that at the time the citation issued, the mine was idle due to a fatality which had occurred, and that it was subsequently closed when the roof conditions worsened. There is no evidence that any normal mining activities, other than abatement work, took place subsequent to the issuance of the citation. However, the fact remains that the existing loose ribs and overhanging brows, which were unsupported, and present on the working section, did present a potential hazard to those miners expected to travel and work in the affected areas immediately prior to the inspection. As a matter of fact, the unrebutted testimony of Inspector Coeburn reflects that some of the brow conditions were present along a belt walkway normally used for travel by miners and that the loose ribs which he cited were readily barred down with little or no effort. Inspector Coeburn also confirmed that the cited rib and brow conditions were present along haulageways and entries where miners and equipment would be present during normal mining activities, and that given the

conditions of the ribs, a scoop or anything coming in contact with the ribs could have easily caused them to roll. Further, the testimony of Mine Foreman Orender confirms that the rib and brow conditions were bad in the affected area in question and that oversized mining machines often tore down the cribs used to support the ribs. Mr. Orender also confirmed that brows which were difficult to bolt or which were inaccessible because of their high locations were sometimes left in place. Given all of these circumstances, I conclude and find that the cited violative rib and brow conditions were serious.

Significant and Substantial Violation

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. § 814(d)(1). A violation is properly designated significant and substantial "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

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

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

> We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in

an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

Incorporating by reference my gravity findings, and applying the principles of a "significant and substantial" violation as articulated by the Commission in the aforementioned decisions, I conclude and find that the cited rib and brow conditions constituted a significant and substantial violation of section 75.202. Although it may be true that no coal was being mined at the time the violative conditions were observed and cited, and the mine was later closed because of adverse roof conditions, in terms of continued normal mining operations, the adverse rib and brow conditions which were present on the working section presented a real hazard and potential for rib rolls and falling brows, and I conclude and find that there was a reasonable likelihood that the loose overhanging coal and rock brows and fractured ribs could contribute to the hazards resulting from the violative conditions in question. I further conclude and find that had the unsupported ribs or brows rolled or fallen, and struck miners on foot or in equipment passing by the areas where they were located, injuries of a reasonably serious nature would have resulted. Accordingly, the inspector's "significant and substantial" finding IS AFFIRMED.

Negligence

In support of Inspector Coeburn's "high negligence" finding, petitioner relies on his testimony, as well as the testimony of Inspector Rines, who was with Mr. Coeburn. Both inspectors personally viewed and examined the cited rib and brow conditions, and Mr. Coeburn took measurements and counted the overhanging brows. Both inspectors were of the opinion that the unsupported brows had been created by the continuous miner during prior mining cycles. Based on their observations of the miner cutting bit marks left in the coal ribs, and the advanced mining cuts which had been taken, they believed that the brows had existed for at least six to seven production shifts, and possibly as long as 10 days. As for the loose and fractured rib conditions, both inspectors testified that they were readily visible, and that visible separations were

readily observable between the loose rib areas and the block of coal. Inspector Rines was of the opinion that the separation had been apparent for at least a week, and he discounted any notion that the separation had occurred quickly. In his view, had the separation occurred quickly, there would have been a massive rib roll into the entry.

Petitioner also relies on the testimony of Mine Foreman Orender, and points out that Mr. Orender conceded that many of the brows were created by the continuous miner and were possibly present for 4 to 5-days prior to the issuance of the citation. Petitioner also points out that Mr. Orender admitted that sometimes brows were left by the miners, that he had no knowledge of any rib rolls, or any ribs being pulled, for a day or two prior to the day the citation issued, and his admission that it was difficult to say how long the ribs had been in a loose and fractured condition. Finally, petitioner points out that while respondent's representative Gary Sweeney accompanied the inspectors and viewed the cited conditions, the respondent did not call him to testify in this case.

In support of its argument for a finding of "low negligence with considerable mitigating circumstances," respondent maintains that the violative conditions were constantly being created because of the inherrent nature of the mine strata, and that it had effective procedures to deal with such conditions as they occurred. Respondent maintains that it took a number of steps to protect its work force and that this should be considered as mitigating circumstances in determining the appropriate negligence level.

With regard to the issue of the length of time that the cited conditions actually existed, respondent relies on the testimony of State Inspector Hamrick who testified that the nature of the mine was such that the cited brow and rib conditions could occur overnight or even between shifts. Respondent also relies on the testimony of MSHA Inspector Adkins, who was in the mine on two occasions, within 4 days of the issuance of the citation, and confirmed that he did not see the cited conditions and issued no citations.

Inspector Hamrick could not recall the date of his last visit to the mine prior to the date of the issuance of the citation on February 14, 1986. Although a copy of one of his inspection reports, exhibit R-2, reflects that he was in the mine on February 3, 1986, Mr. Hamrick had no independent recollection of that visit. With regard to the rib and brow conditions cited by Inspector Coeburn, and detailed in the sketch made by Mr. Coeburn from his notes, Mr. Hamrick agreed

that the conditions probably existed generally one or two crosscuts cutby the face area. Mr. Hamrick confirmed that he issued a citation on February 14, 1986, for a violation of state law for brows and ribs which were not removed or supported. However, he was not sure whether his citation covered the same rib and brow conditions cited by Mr. Coeburn, and he explained that he was not with the Federal inspectors when Mr. Coeburn issued his citation and did not discuss the conditions with them.

Respondent relies on Mr. Hamrick's testimony concerning its practices and efforts at controlling and addressing its inherrent adverse rib and brow conditions to mitigate its negligence. Mr. Hamrick's unrebutted testimony is that respondent's management and employees are constantly on the alert for hazardous rib conditions "pulling them down when they are discovered." Mr. Hamrick indicated that anytime he was in the mine, overhanging brows at the face area were always taken down. When asked about the cited areas outby the face, Mr. Hamrick surmised that the overhanging brows could have been caused by rib rolls. Conceding that the brows could have been left by a continuous miner during a prior mining cycle, Mr. Hamrick nonetheless believed that respondent's responsible miners would not leave them in that condition. However, he had no explanation as to why the brow and rib conditions which he and the MSHA inspector cited were undetected and left unattended other than his speculation that they were possibly caused by unexpected rib rolls over a short period of time.

With regard to the question as to how long the particular cited brow and rib conditions may have existed prior to the date of the issuance of the citation, Mr. Hamrick testified that it was entirely possible that they came about over a short period of time, even one day. However, he was not sure if he observed all of the cited conditions, and he conceded that he was not with the MSHA inspectors when they viewed the conditions and confirmed that he did not discuss them with the inspectors. He also conceded that while he observed unsupported brows on the section, he had no recollection as to how many he may have observed and confirmed that he did not count them. With regard to the rib and brow conditions which he cited, Mr. Hamrick had no knowledge as to how long they may have existed prior to the issuance of the citation and indicated that they may have been there "hours or days."

Although I find Mr. Hamrick's testimony with respect to the respondent's general efforts at addressing and controlling

adverse rib and brow conditions to be credible, and have considered this as a general mitigating factor, I find it of little value in determining respondent's negligence level with respect to the specific cited rib and brow conditions which formed the basis for the citation issued by Inspector Coeburn on February 14, 1986. I take note of the fact that while Mr. Hamrick also issued a citation for possibly the same or similar rib and brow conditions cited by Mr. Coeburn, Mr. Hamrick made no negligence findings with respect to his citation, and he apparently is not required to do so under state law.

With regard to the failure by Inspector Adkins to cite any violations during his prior mine visits, although petitioner finds his failure to do so to be inexplicable, it points out that the issue here is whether the respondent was negligent, not MSHA. Petitioner takes the position that any failure by Mr. Adkins to act may not excuse or mitigate the respondent's negligence (Tr. 12). Respondent's counsel took the position that while Mr. Adkins' prior visits may mitigate its negligence, his prior presence in the mine, as a factual matter, simply indicates that had the cited conditions existed when he was there, he would have issued a citation. Counsel concluded that the reason Mr. Adkins did not issue a violation during his mine visits is that he did not observe the conditions, and that his failure to observe them reflects that they did not exist at that time (Tr. 14).

It is clear that the fact that Inspector Adkins did not cite any violative conditions during his prior visit to the mine did not preclude Inspector Coeburn from citing violative conditions which he personally observed. Midwest Minerals, Inc., 3 FMSHRC 251 (January 1981); Missouri Gravel Co., 3 FMSHRC 1465 (June 1981); Servtex Materials Company, 5 FMSHRC 1359(July 1983); Brubaker-Mann Incorporated, 8 FMSHRC 1487 (September 1986). In other words, the failure by one inspector to issue a citation for mine conditions which may be later viewed as a violation by another inspector may not serve as a per se defense to the violation. However, the failure by Mr. Adkins to issue a violation when he was in the same section several days earlier may be considered as an evidentiary factor in any determination as to whether or not the conditions cited by Mr. Coeburn may have existed or were left unattended prior to the time Mr. Coeburn issued his citation on February 14, 1986.

Inspector Adkins testified that he was in the section on February 10 and 12, 1986, pursuant to an MSHA roof evaluation and accident prevention program, and he characterized his

visit as a "walk and talk inspection" with mine personnel for the purpose discussing safety and accident prevention. His duties included the observation of miner work habits and work procedures. He confirmed that he was on the section for approximately 2 hours on February 10, and that ventilation curtains were hung throughout the section. He confirmed that he walked up the No. 3 belt entry, past the belt feeder, went directly to the working faces by walking up the belt entry, and spent the majority of his time at the faces. He was sure that on February 10, the working faces were not as depicted on the map, exhibit G-3, because mining had advanced one or more crosscuts by February 14th. Although he was certain that he checked the faces for imminent dangers, he did not observe any of the cited rib or brow conditions outby the faces because he was not in that area. However, he conceded that it was possible that he may have walked by some of the ribs or brows that could have been behind a curtain, and may not have noticed them while talking to someone.

Mr. Adkins testified further that during his prior visits on February 10 and 12, 1986, he conducted "safety talks" at the dinner hole by the power center in the No. 4 entry as shown on exhibit G-3. He was not certain how he would have travelled to that location, and indicated that it was possible that he walked up the No. 3 entry and across the crosscut beyond the feeder in the No. 3 entry and then over to the No. 4 entry. From that point, he would have proceeded directly to the face area by walking directly up the No. 4 entry. I take note of the fact that Inspector Coeburn found no violative rib or brow conditions in the No. 4 entry near the power center, or in the connecting crosscut between the No. 3 and No. 4 entries.

After careful review of the testimony of Inspector Adkins, I am not convinced that he actually travelled all of the areas where the cited brow and rib conditions were observed by Inspectors Coeburn and Rines. Mr. Adkins' travels apparently took him directly to the faces along the No. 3 entry, and along the No. 4 entry and a crosscut where no brow or rib conditions were cited. Further, his testimony that line curtains were hung throughout the section, thereby possibly obstructing his view, and that he was preoccupied with safety talks and his "walk and talk" inspection, and the fact that the mining cycle when he was there did not appear as advanced as it was on the day the citation was issued, raise doubts in my mind that the then prevailing mining conditions were the same when Mr. Adkins was in the section several days prior to the issuance of the citation. I also doubt that he actually travelled all of the same areas where the cited rib

and brow conditions existed. Under the circumstances, I reject any notion that the testimony by Mr. Adkins reasonably supports any conclusion that the cited rib and brow conditions did not exist during his prior visits to the mine.

With regard to the Rushton decision cited by the respondent, I take note of the fact that the inspector who Judge Melick referred to actually issued the violation which was affirmed. Judge Melick simply found that the failure by the inspector to previously observe conditions which he characterized as an "imminent danger" did not support MSHA's proposed finding of "gross negligence." However, Judge Melick did find that the operator was negligent for allowing the cited conditions to exist.

I conclude and find that the cited rib and brow conditions did not occur overnight, as suggested by the respondent, or immediately before the issuance of the citation on February 14, 1986. To the contrary, I believe that the testimony of Inspectors Coeburn and Rines, and Mine Foreman Orender, which I find credible, supports a conclusion that the cited conditions had been created by the continuous-mining machine during prior mining shifts and had existed for at least 2 days, and possibly longer. I further find and conclude that the failure by the respondent to observe the loose ribs and overhanging brows and to take appropriate action to either take them down or support them resulted from its negligent failure to exercise reasonable care.

I have taken into consideration as general mitigating circumstances the respondent's past 2-year good compliance record, which includes only four prior violations of the roof control requirements of section 75.200, and no prior violations of section 75.202. I have also favorably considered the respondent's generally good attitude towards safety, and the steps taken to control the apparent inherent adverse roof conditions in the mine. However, the fact remains that while the respondent may have generally given timely attention to hazardous brow and rib conditions in the mine, I find no credible evidence to suggest that it did so with respect to the particular brow and rib conditions observed and cited by the MSHA inspectors. As a matter of fact, the record here shows that State Inspector Hamrick issued a citation the same day in the same section for hazardous rib and brow conditions, and Mine Foreman Orender admitted that brows were sometimes left unattended in high locations, that management sometimes would not see all of the brows, and that at times miners would not pull down loose ribs. Under all of these circumstances, I find no mitigating circumstances warranting a finding that the

cited conditions resulted from a low or moderate degree of negligence.

I believe that a reasonable interpretation of section 75.202 would require mine management to insure that loose ribs and overhanging brows be taken down or supported during the same working shift if miners are expected to work in those areas, or at least during the next working or maintenance shift when miners may be expected to work and may be exposed to the hazardous conditions. Since I have found that the cited conditions existed during prior mining cycles in areas where miners would be working and travelling, it follows that the respondent's failure to timely address and correct the conditions before they were found by the inspectors supports Inspector Coeburn's finding of "high negligence." Accordingly, that finding IS AFFIRMED.

Petitioner's posthearing assertion that the violation resulted from the respondent's "unwarrantable failure" to comply with the requirements of the cited standard IS REJECTED. This is not a viable issue in a civil penalty proceeding. See MSHA v. Black Diamond Coal Mining Company, 7 FMSHRC 1117 (August 1985); MSHA v. Brown Brothers Sand Company, 9 FMSHRC 636 (March 1987). In any event, I find no credible testimony or evidence to support a finding of willful intent or reckless disregard for the requirements of the cited safety standard.

Civil Penalty Assessment

During his opening remarks at the hearing, with respect to his suggested $2,000 civil penalty assessment in this case, petitioner's counsel asserted that MSHA's Office of Assessments was not aware "of the significance and the dangers and the number of violations that actually were written up in the one violation. I believe the violations were more serious and more negligent than the assessment office apparently believed" (Tr. 13). During closing arguments, and in further support of his request for a $2,000 civil penalty assessment, counsel cited three decisions concerning rib and brow violations in which substantial penalties were levied by Commission judges, Westmoreland Coal Company, 7 FMSHRC 1338 (September 1985); Valley Camp Coal Company, 7 FMSHRC 138 (January 1985), Jim Walter Resources, Inc., 7 FMSHRC 263 (February 1985) (Tr. 208-210).

Westmoreland Coal involved an overhanging rib condition which resulted in fatal injuries to a scoop operator. The presiding judge found that the violation was the result of an

"unwarrantable failure" to comply with section 75.202, because of a section foreman's knowledge of the violative condition and his failure to take corrective action through indifference or lack of reasonable care. The Commission reversed, and found that the overwhelming weight of the evidence established that repeated efforts to remove the overhanging rib, coupled with the good faith belief on the part of miners and others during their attempts to bar down the rib and that no hazard existed, could not support a finding that the foreman's action in allowing work to proceed represented the degree of aggravated conduct intended to constitute an unwarrantable failure under the Act.

Valley Camp involved an overhanging rock brow that fell and killed a roof bolter. The judge found a violation of section 75.202, and affirmed a section 104(d)(2) unwarrantable failure withdrawal order, and he did so on the basis of evidence which established that a section foreman was aware that the roof had fallen in the accident area immediately prior to the brow fall which killed the bolter, but did not take the time to thoroughly evaluate the residual roof conditions, and allowed production to resume without first examining the work place to determine whether any hazards remained. Further, mine management had a policy which allowed overhanging brows to remain in work areas as long as they were no more than 2 feet thick. Given these circumstances, the judge found that the violation resulted from "gross negligence," an "unwarrantable failure" constituting indifference, willful intent, or a serious lack of reasonable care.

Jim Walter Resources involved a violation of section 75.202, because of loose hanging roof conditions, broken roof bolt plates which allowed loose roof to fall out between the broken roof bolts, roof stress requiring additional roof bolting which was not done, and cracks between roof bolts in various places. The judge found that the conditions had existed for a "substantial period" before the inspection, but his decision contains no discussion of the fact used to support that conclusion. The judge found that the violation was "unwarrantable" because the operator "knew, or with the exercise of reasonable care should have known, of the hazardous roof conditions."

Aside from the fact that I am not bound by the prior judge's decisions cited by counsel, I take particular note of the fact that those decisions were based on the facts there presented. In each instance, the judge made his factual findings on the basis of credible evidence indicating egregious situations where the mine operator's failure to act was the

result of either gross negligence, indifference, or willful intent which directly resulted in fatalities in two of the cases. I find no such circumstances present in the case at hand.

With regard to counsel's conclusions concerning MSHA's assessment office evaluation of the negligence and gravity connected with the violation, my review of the "Narrative Findings" supporting the "special" civil penalty assessment of $850, which is a part of the pleadings, reflects a detailed analysis as to the cited conditions, their locations, the particular hazards presented by the conditions, and the respondent's negligence. Under the circumstances, I disagree with counsel's unsupported conclusions, and find that the assessment office adequately evaluated the facts and circumstances presented by the violation. Under the circumstances, I conclude and find that the proposed civil penalty assessment of $850 is reasonable and appropriate for the violation which has been affirmed.

ORDER

Respondent IS ORDERED to pay a civil penalty assessment in the amount of $850 for the violation in question, and payment is to be made to MSHA within thirty (30) days of the date of this decision. 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
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

OCT 7 1987

CHARLES McGHEE, Complainant	:	DISCRIMINATION PROCEEDINGS
and	:	Docket No. SE 86-98-D
	:	BARB CD 86-16
JACKIE LOWE, Complainant	:	Docket No. SE 86-99-D
	:	BARB CD 86-17
v.	:	
	:	No. 2 Mine
AMERICAN STANDARD COAL SALES, INC., H. CAMERON COAL CO., INC., SCARAB ENERGY CORP., and WINSTON MEREDITH, Respondents	:	

ORDER OF DISMISSAL

Before: Judge Maurer

The Complainants, Charles McGhee and Jackie Lowe, request approval to withdraw their complaints in the above-captioned cases on the grounds that a mutually agreeable settlement of the underlying controversy has been reached. Under the circumstances herein, permission to withdraw is granted. 29 C.F.R. § 2700.11. The cases are therefore dismissed.

At the request of the parties, the specific terms of the settlement agreement are hereby sealed subject to review only by order of the Commission, a Commission judge, or Court having jurisdiction.

Roy J. Maurer
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 8 1987

LOCAL UNION 1248, DISTRICT 5 UNITED MINE WORKERS OF AMERICA (UMWA), Complainant	:	COMPENSATION PROCEEDINGS
	:	Docket No. PENN 87-187-C
v.	:	Maple Creek Mine
U. S. STEEL MINING CO., INC., Respondent	:	

ORDER OF DISMISSAL

Before: Judge Melick

Complainant requests approval to withdraw its Complaint in the captioned case based upon a settlement of the matter at issue. Under the circumstances herein, permission to withdraw is granted. 29 C.F.R. § 2700.11. This case is therefore dismissed.

Gary Melick
Administrative Law Judge
(703) 756-6261

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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 8 1987

HIGHWIRE, INCORPORATED, Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. KENT 86-166-R
	:	Citation No. 2776209; 8/27/86
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	No. 1 Mine

ORDER OF DISMISSAL

Appearances: Eugene C. Rice, Esq., Paintsville, Kentucky, for Contestant;
Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Respondent.

Before: Judge Koutras

This proceeding was one of eight cases scheduled for hearing in Paintsville, Kentucky, during the hearing term September 22-23, 1987. When the case was called, contestant's counsel advised me that the contestant no longer wished to pursue its contest, and requested that it be permitted to withdraw its contest. The request was granted, and this case IS DISMISSED.

George A. Koutras
George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

OCT 15 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 85-19 A.C. No. 05-00301-03551
v.	:	Dutch Creek No. 1 Mine
MID-CONTINENT RESOURCES, INC., Respondent	:	

DECISION

Appearances: James H. Barkley, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Edward Mulhall, Jr., Esq., Delaney & Balcomb, Glenwood Springs, Colorado, for Respondent.

Before: Judge Lasher

This matter was initiated by the filing of a proposal for penalty by the Secretary of Labor under the authority of Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C., Section 801 et seq., (1982) (herein the Act). Subsequent to the hearing the presiding administrative law judge, John A. Carlson, passed away and this matter has been assigned to me for decision.

Petitioner originally sought assessment of a penalty ($345) for an alleged violation of 30 C.F.R. § 75.1704 which is described in the subject Citation No. 2212848 (issued at 1725 hours on June 20, 1984, by Inspector Louis Villegos) as follows:

> "The designated return escapeway from the 102 longwall section was not maintained to insure passage at all times due to the following conditions being present. At a location 450 feet outby the 101 Longwall face, floor material had been pushed up to within 4 feet of the roof forming a bank and a impoundment of water and rock up to 15 inches deep, 6 feet wide and 75 feet in length. No one was observed in the area to correct the condition. Men were at work at the Longwall face."

The alleged violation was designated "Significant and Substantial" on the face of the Citation.

The subject regulation, § 75.1704, pertaining to "Escapeways" provides:

> "Except as provided in §§ 75.1705 and 75.1706, at least two separate and distinct travelable passageways which are maintained to insure passage at all times of any person, including disabled persons, and which are to be designated as escapeways, at least one of which is ventilated with intake air, shall be provided from each working section continuous to the surface escape drift opening, or continuous to the escape shaft or slope facilities to the surface, as appropriate, and shall be maintained in safe condition and properly marked. Mine openings shall be adequately protected to prevent the entrance into the underground area of the mine of surface fires, fumes, smoke, and floodwater. Escape facilities approved by the Secretary or his authorized representative, properly maintained and frequently tested, shall be present at or in each escape shaft or slope to allow all persons, including disabled persons, to escape quickly to the surface in the event of an emergency."

Following the issuance of the Section 104(a) Citation on June 20, 1984, Inspector Villegos, by extension dated July 5, 1984, extended the abatement time to July 11, 1984, with the following justification for his action:

> "Some progress has been made in the clean-up of the 102 longwall section return. At this time the 102 longwall section is broke down for repairs. This would allow ample time to clean up the escapeway."

On July 11, 1984, the Inspector again extended abatement time- to July 20, 1984- with this justification:

> "Evidence of work down in the return escapeway shows that an additional 100 feet of grading has been done. A continuous miner has been placed to do the grading. At this time, the work by this machine should go at a faster pace. This extension is based on this accomplishment."

On July 25, 1984, citing a "Safety" violation of 30 C.F.R. § 75.1704 and under the authority of Section 104(b) of the Act, Supervisory Inspector Lee H. Smith issued Withdrawal Order No. 2336041 and described the "Condition or Practice" thereon as follows:

"The designated return air escapeway from the 102 longwall active working section is still not being maintained to insure passage at all times of any person, including disabled persons. Citation No. 2212848 was issued on 06-20-84 because of this condition. This Citation has been extended twice and at this time travel through the affected area is extremely difficult. Passage of a disabled person or one being carried on a stretcher cannot be assured. 1/
(emphasis added)

I note here that inadequate "maintenance" would appear to be a "practice" and that obstructed passage would be a "condition". Five days later, on July 30, 1984, the Withdrawal Order was terminated by the Inspector on this basis: "The return escapeway from the 102 longwall working section has been graded out to a height of at least 6 feet and a width of 8 feet."

Contentions of the Parties

Following completion of the evidentiary record, counsel for the parties presented oral argument in lieu of briefs.

Respondent contends that the specific obstruction described in Citation No. 2212848 was separate and apart from that described in the Section 104(b) Order of July 25 and that the Order was improperly issued on the basis of its failing to abate the original obstructive condition. Respondent concedes the occurrence of the violation charged in the Citation but contends that such violation was not "significant and substantial". The "significant and substantial" issue, however, was not the subject of particular focus during the hearing.

Petitioner contends that the existence of the violative condition on June 20, 1984, described in Citation No. 2212848 was admitted by Respondent (T. 274) and that the "Failure to Abate" Withdrawal Order was appropriately issued since the escapeway in question was obstructed on July 25 even though the obstruction may have been a separate condition in a different location. Alternately, Petitioner argues that if the 104(b) order is not upheld, the violation described therein occurred and should constitute a second violation of the escapeway standard

1/ Line 13 of the standard form employed for the Withdrawal Order-wherein the "Area or Equipment" involved which is to be withdrawn from is to be described- was left blank. To correct this, on August 1, 1984, a modification of the Order was issued stating: "Order No. 2336041 is hereby modified to indicate the area that was closed as the 102 longwall active working section."

(T. 274-275), calling for modification of the Order to a 104(a) Citation. 2/

Preliminary Findings

On June 20, 1984, coal mine Inspector Louis Villegos, during an accelerated inspection authorized by section 103(i) of the Act where mines liberate excessive quantities of methane, inspected the designated return air escapeway from the 102 longwall active working section of the Respondent's Dutch Creek No. 1 Mine (T. 34, 41, 42). Inspector Villegos was the primary inspector conducting such inspections at the mine (T. 42).

At all material times the mine operated three shifts per day (two production and one maintenance) seven days a week (T. 73). At all material times Respondent employed a longwall mining system at the subject mine which had two entries-an intake and a return entry.

There were two escapeways from the 102 longwall active working section. The primary escapeway was along an intake entry, i.e. a material road going into the section (T. 172-173). The second escapeway was a return air course for the longwall (T. 47) which the Inspector described as follows: "Where the air goes up the face and comes out of the return, that is a designated return escapeway out of this mine." (Tr. 42).

On June 20, 1984, the Inspector walked the return entry and observed a dam which had been built up by equipment grading which was impounding water at a point approximately 450 feet from the face (T. 43-44, 92-93, 100-101). The width of the return entry in this area was 6 feet (Tr. 43-44). The impoundment was 15 inches high, composed of rock and coal, and extended from rib to rib (T. 44-45). The distance from the top of the impoundment itself to the ceiling was 4 feet and the impoundment was 75 feet in length in addition to being 6 feet wide (T. 45-46, 97, 189).

2/ Although there was considerable discussion on the record concerning whether the original Citation was "merged" into the subsequent Section 104(b) Withdrawal Order, I am unaware of such a legal doctrine and reject this notion to the extent that the identity and viability of the 104(a) Citation would be nullified. Both the Citation and Withdrawal Order are integral documentary components of a continuing mine safety enforcement process and the fact that but one penalty is assessed even though there are two enforcement papers seems only to reflect the impact of the 104(b) Withdrawal Order on the penalty assessment determination insofar as it directly bears on one of the six mandatory assessment criteria provided in Section 110(i) of the Act, i.e., "the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation."

The water contained within the impoundment was 3 to 6 inches from the top of the impoundment (T. 46) and covered the entire width of the entry (T. 98).

The hazard envisaged by the Inspector which was created by this condition was that if a fire occurred anywhere in the section, most of the smoke (T. 47, 91, 99, 112) would exit out of the return escapeway, creating this problem:

> "... with smoke present in that return air course, the smoke does have a tendency to hang to the top. If a person was walking out of there and you would -- more or less, would want to get out of the smoke if you were walking in it. You would want to get your head out of the smoke so you would have a tendency to lower your head. As you would come out of there, maybe, it would get to a point that you would be coming out of there on your hands and knees. With this obstruction in there, you would not know what was behind it. So, if you wanted to crawl over it, how do you know by going over it that the back end is clear? (T. 47-48).

XXXX XXXX XXXX XXXX XXXX

> "He would be faced with -- when he would get to the impoundment, he couldn't see any further. If he came on this impoundment, how would he know that past the impoundment it was clear? Now, if there was no impoundment in there, then, he could see ahead of him." (T. 48-49).

XXXX XXXX XXXX XXXX XXXX

> "I believe his first reaction would be panic." (T. 49).

The Inspector also pointed out that the location of a fire would dictate whether miners would utilize the primary (intake) escapeway or the subject return escapeway (T. 103).

Other hazards contemplated by the Inspector necessitating use of the subject escapeway would be roof falls and failure of the pack wall (T. 112-113).

The likelihood of a fire or other hazard occurring was not ascertained. Inspector Villegos had never seen a fire in the subject mine in 14 years (T. 102, 104). There was one explosion, however, which resulted in 15 fatalities not attributable to an escapeways problem (105-107, 110).

The subject Citation was issued at 1725 hours on June 20, 1984; the time for abatement was set for 2100 hours on the same date by Inspector Villegos after Brian Savage, the foreman, agreed to such time. The Inspector's return visit was on July 5, 1984 at which time, according to the Inspector the escapeway had

not been cleared of obstacles and that such were the "same objects" that he "had observed on the first one" (T. 53). 3/ Allyn Davis, mine superintendent, advised the Inspector that they "were working on the problem" in explanation as to why abatement had not taken place (T. 54). Inspector Villegos sympathized with mine management's problem in achieving abatement because there existed a continuing and re-occurring "heaving problem" (T. 54-55, 57, 101) and abatement time was extended to July 11, 1984 at 8:00 a.m. (T. 56). On July 11, 1984, the abatement period was again extended to July 20, 1984 at 8:00 a.m. On this date, July 11, 1984, the same impoundment observed on June 20, 1984, was still in existence (T. 93, 111-112) and the Inspector noted that the mine operator had equipment working "right by this area" and were working "up to it." (T. 94).

Inspector Villegos was not in the area of the subject return escapeway during the interim periods between the issuance of the original Citation and the 2 extensions, i.e., between June 20 and July 5, between July 5 and July 11, and between July 11 and July 20 or July 25, on which latter date the Section 104(b) Withdrawal Order was issued by another Inspector (T. 95-96). Whether the original (June 20) impoundment was abated-and whether the entire escapeway ever came into compliance - during the 2-week period July 11-July 25 was not shown in the record (T. 155).

The Section 104(b) Withdrawal Order was issued during an inspection on July 25, 1984, by Supervisory Inspector Lee H. Smith after he observed another different impoundment (T. 123, 140, 154, 155, 165, 169) in the same escapeway. He described the condition as follows:

> "From the track slope in to where the water accumulation and mud accumulation was, the escapeway was in good condition up to that area that was under citation. From the water accumulation and mud accumulation in-by to within approximately 100 to 150 feet of the face, the heaving problem was very evident. The mine floor was within four feet of the mine roof. The area immediately out-by where they were grading contained water and mud resembling thick soup that was very hard to negotiate. The area where the grading had stopped, referred to earlier as an impoundment, the area was very small. The ventilating air current had picked up a considerable amount of speed. People traveling this area were -- if there was a person in-by or

3/ A close reading of this segment of the Inspector's testimony reveals that such is ambiguous as to whether the obstacle observed on July 5 was the same impoundment cited on June 20 (T. 53). However, on cross-examination, the Inspector made clear that the impoundment he observed on June 20, 1984 when he issued the Citation was still in existence when he issued the first and second extensions of abatement time on July 5 and July 11, 1984 respectively (T. 93, 111-112).

any amount of dust which was coming off the mine roof or off any portion of that entry would result in a type of stinging action with the dust particles and the coal particles and rock particles would hit a person. It was very low." (T. 119).

Prior to July 25, 1984, it had been "some time" since Inspector Smith had been in the 102 longwall return area (T. 141) and he was not familiar with conditions in the area between June 20 and July 25, 1984 (T. 150).

Inspector Smith indicated that the impoundment area he observed was approximately 50-70 feet in length by 6 to 8 feet in width; that water of a depth of approximately 12 inches had accumulated in the impoundment for a distance of at least 20 feet; that the ungraded mine floor in the area had come within 4 feet of the ceiling (T. 120-122); and that the water would tend to gravitate inby toward the face (T. 147).

Inspector Smith felt that the grading process was possibly causing the impoundment of water, i.e. the "removal of material from the mine floor created a backstop against which the water could not continue its normal flow into the tail gate area of the 102 longwall" (T. 128). 4/ The area described in the Withdrawal Order was closer to the face than the area described by Inspector Villegos in the Citation (T. 123; Ex. R-1). After determining that the escapeway in question was not "suitable according to 1704", the decision to issue the Withdrawal order was made "to insure that the grading process would be completed in a reasonable amount of time." (T. 123).

The Inspector testified that the "heaving" problem- stressed by Respondent as one of several problems which made maintenance of the escapeway difficult- was "an ongoing condition" in the area and that while mine crews were in fact engaged in grading the area, after two extensions it was felt that the area "was not being cleaned fast enough" and that the hazard, while located in a different place than that observed by Inspector Villegos, still existed (T. 151).

Inspector Smith described the hazard posed by the violative condition he observed as follows:

"Well, I do not believe that an injured man, particularly an injured man that would need to be transported on a stretcher, would have an easy time while being transported through this area. I know it would be extremely difficult.

4/ On cross examination, however, the Inspector attributed the impoundment to the continuous miner (T. 146).

It was difficult for me to travel through this area and I can imagine how hard it would be to have an injured man on a stretcher going through it or, perhaps, a person with a broken leg or any bone fracture where a jarring movement is quite painful. The stop point of the grading would be a drop of approximately two and a half to three, three and a half feet into a muddy mess." (T. 129).

The Inspector also felt that while "a desperate man could probably make it through" the condition of the escapeway when he observed it would hamper or slow the escape of miners attempting to use it (T. 129). Based on this unrebutted testimony, it is concluded that this condition also constituted a failure to maintain the escapeway in a "safe" condition and thus a violation of the regulation.

Following the issuance of the Withdrawal Order the Respondent abated the violative condition in approximately 5 days (T. 147-148).

Of considerable significance to the ultimate determination of the abatement question is Inspector's Smith's testimony with respect to the condition of the impoundment area cited on June 20 by Inspector Villegos when he (Smith) observed such area on July 25. After first testifying that the area described in the June 20 Citation had not been "completely cleaned up" (T. 154) and after ambivalent responses to questions of the trial judge, the witness then gave the following testimony:

Q. All right. Let's address this from a somewhat different direction. My understanding was that Mr. Villegos indicated that the length of the entry way affected when he was there the first time and -- actually, the second and the third time was about 75 feet. Is that right? Is that the way you recall his testimony?

A. Yes, sir.

Q. Okay. Now, can you tell me with a reasonable degree of certainty when you were there on the 25th how much of that 75 feet had been effectively cleared up and how much hadn't or don't you really know?

A. No, sir, I cannot say that with a reasonable degree of certainty.

Q. Can you assure me that all 75 feet hadn't been cleared up?

A. No, sir.

(T. 155).

Respondent's Mine Superintendent, Allyn Davis, testified at length concerning various inherent difficulties encountered in

the mine in maintaining the escapeway (T. 169-201) and indicated that what Inspector Villegos observed on June 20 was "the pile of muck that had been rooted up by" a Deisel EIMCO machine (similar to a front-end loader) on the previous shift the night before. Mr. Davis attributed the impoundment of water to the pile of muck (T. 175, 176, 188, 190) and essentially agreed with Inspector Villegos' description of it (T. 190). Mr. Davis opined without elaboration that the area in question was "passable" (T. 190-191).

At the time of the issuance of the Citation, Respondent had two EIMCO machines engaged in grading the entire escapeway 2 shifts per day to keep the subject escapeway clear (T. 201-204, 211) one of which machines worked in the escapeway exclusively (T. 204). After the Citation was issued, no machines or personnel were added, nor were any significant changes made in the grading program to achieve abatement (T. 204-205, 217, 221) nor were any such changes made after issuance of the Withdrawal Order on July 25, 1984 (T. 205-206). Issuance of the Withdrawal Order stopped production (T. 205). Mr. Davis pointed out that two machines were the maximum which could be employed (T. 211).

Mr. Davis explained why the Citation was not abated during a period of approximately 30 days but that the Order was abated in five days as follows:

> Well, when we got the original citation, the -- at that point in time, I knew that the job that was ahead of me was to grade the entire tail gate not just that particular area in question. Because that area, you know -- that would just propogate itself. If I cleaned that area up, then, we would find the same thing ahead. So, we started grading from both directions and while the original area was being extended there was a lot of work being done from the in-by end by the face coming back towards that area. That was much more productive. And, in fact, we did grade most of the tail gate out coming from that direction and we had very little luck driving from the out-by end in because of the water. So, at the point in time when the order was issued, there was, in fact, very little tail gate left to be graded out. And, then, the job was finished.
> (Emphasis supplied) (T. 208)

ULTIMATE FINDINGS AND CONCLUSIONS

A. Validity of the Withdrawal Order.

The question arises whether, following the issuance of the initial Citation on June 20, 1984, it was established that the secondary escapeway in question did not come into compliance with the regulation, § 75.1704, prior to the occurrence of the conditions leading to the issuance of the 104(b) Order on July 25, 1984. This would appear to be a prerequisite element of proof to Petitioner's "failure to abate" contention because the second violation occurred in a different area of the escapeway.

Broken down, the elements of the cited regulation itself are that there (1) "at all times" (2) "be at least two separate and distinct travelable passageways" which (3) "are maintained to insure passage ... of any person, including disabled persons" which (4) "are to be designated as escapeways" ... and (5) "shall be maintained in safe condition" ...

Did the dynamics of the type of mining conducted here create a continuous violation, that is, one obstruction of the escapeway always overlapping the other? The validity of the "failure to abate" Order would seem to hinge on an affirmative answer to this question. By way of illustration, if at Point A of one of a mine's two escapeways a violative obstruction occurs and § 75.1704 violation is cited, and before it is removed, another obstruction occurs at Point B, and after A is cleaned up (abated) but before B is cleaned up, a third obstruction occurs at Point C, it cannot be said that abatement of the original violation at Point A occurred, since at no time were there two travelable passageways in the mine which were maintained in safe condition.

In various applications, such as the interpretation of whether an imminent danger exists, or whether a violation is "significant and substantial", the Commission has analyzed a particular mining condition or practice in the perspective of "continued mining operations". If, as a result of the dynamics of continued mining or any other reason, the subject escapeway after the issuance of the 104(a) Citation on June 20, 1984, never came back into compliance with the regulation so as to serve as an escapeway, abatement did not occur. Again, when one of the two designated escapeways is obstructed to the point of non-compliance with the subject regulation (a) at one place or another, or (b) due to one condition or another, or (c) due to a particular mining practice or another, if it fails continuously to serve as a distinct travelable passageway, etc., following the issuance of a Citation and until a "failure to abate" withdrawal order is issued, the issuance of such order should be found appropriate under Section 104(b) of the Act. 5/

5/ Section 104(b) provides:

> "(b) If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection (a) has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, 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.

A violation occurs when one (or both) of the designated escapeways fails to adequately function as such.

The testimony of Petitioner's witnesses was reliable and does establish that there were two separate violations of 30 C.F.R. § 75.1704 one on June 20 and one on July 25, 1984. Other than a bald opinion of one of its witnesses to the contrary (T. 191) Respondent makes no contention that such was not the case. Nevertheless, the Petitioner, in these circumstances where the situs of the second violation was different than the first, did not establish (1) when the second violation commenced or (2) that the first violation was not abated prior to the occurrence of the second, that is, there was no showing that the obstructive condition constituting the first violation was in existence when the second violation was detected. The record reveals that continuous grading efforts were carried on after the Citation's second extension was issued on July 11, 1984. There was no showing that the secondary (return) escapeway was continuously obstructed in one location or another. Even though it is clear that the essence of the standard is the having of two escapeways- as contrasted to a focus on the presence of a particular condition, obstruction, or impediment to passage at a given place in the escapeway- 6/ it has not been established that the escapeway did not come into compliance after the first violation and before the second (a 14-day period), a prerequisite to the conclusion that the mine operator did not abate the first violation.

I thus find insufficient evidence of Petitioner's "failure to abate" allegation, not simply because the second (July 25) violation occurred in a different area, but because there (a) is no reliable evidence as to the condition of the original (June 20) violation situs after July 11, coupled with the fact (b) that there is insufficient evidentiary basis to draw the inference that the return escapeway, for one reason or another, at one location or another, was not cleaned up, or maintained adequately during the period July 11 - July 25 to constitute an abatement at some point in time of the original violation. Accordingly, it is concluded that the 104(b) Withdrawal Order was improperly issued. However, since the Order itself specifically cites a violation of 30 C.F.R. § 75.1704, and the evidence establishes the occurrence of such a violation, modification of the Order to a Section 104(a) Citation is called for within the authority of Section 105(d) of the Act and a separate penalty assessment therefor will be made.

6/ An obstruction, in and of itself, is not a violation of the subject standard.

B. Significant and Substantial

With regard to the "significant and substantial" finding of the Inspector on the face of Citation No. 2212848, 7/ there was no specific attention placed on this subject either during the evidentiary hearing or in oral argument. Respondent did challenge the "significant and substantial" designation (T. 5).

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard[.]" 30 U.S.C. § 814(d)(1). The Commission first interpreted this statutory language in Cement Division, National Gypsum Co., 3 FMSHRC 822 (April 1981):

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

3 FMSHRC at 825. In Mathies Coal Co., 6 FMSHRC 1 (January 1984), the Commission reaffirmed the analytical approach set forth in National Gypsum, and stated:

> 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.

6 FMSHRC at 3-4 (footnote omitted). Accord, Consolidation Coal Co., 6 FMSHRC 34, 37 (January 1984). The Commission has explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984).

7/ No "significant and substantial" designation was made on the Withdrawal Order.

Suffice it to say that the record does not support a finding that there existed a reasonable likelihood that the hazards described which were contributed to by the violation would result in an event in which there is an injury, even under the most liberal construction of the phrase "reasonable likelihood."

C. Penalty Assessment

The Respondent is an underground coal mine operator with a history of 231 prior violations during the 2-year period preceding the issuance of the first Citation No. 2212848 on June 20, 1984 (Ex. P-7). Respondent previously had been cited for obstructed escapeways which were described as a "recurring problem" (T. 57-60). Both violations were obvious (T. 43-47, 122-129) and were the result of the nature of mining being conducted in the context of numerous difficulties encountered by Respondent. 8/ It is concluded that the first violation (June 20) resulted from ordinary negligence. However, the second violation occurred more than a month after the first and Respondent should have been acutely aware of the hazards posed by the violation and a high degree of negligence is attributed to it. Failure to provide two safe escapeways by its very nature is a serious infraction and both violations are found to be moderately serious in view of the gravity of the potential injuries posed by the hazards.

In mitigation, Respondent contends, in addition to its showing of considerable difficulty in keeping the escapeway clear, that it suffered a loss as a result of the inappropriate issuance of the Withdrawal Order which closed down production for 5 days. The vitiation of the "significant and substantial" charge in Citation No. 2212848 must also be considered. These factors in mitigation serve to reduce the level of penalties otherwise called for. Based on the foregoing considerations, a penalty of $175.00 for each violation is deemed appropriate and is assessed.

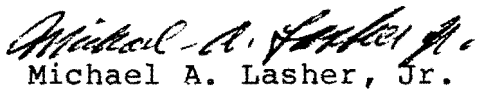
8/ Was compliance with the 2 escapeway standard shown to be impossible? Respondent presented at length a variety of geologic, equipment, spatial, and time problems which it maintained posed difficulties in obtaining compliance, i.e., keeping the secondary return escapeway adequately cleared while production was ongoing. Nevertheless, the second impoundment was abated in 5 days after the Withdrawal Order issued and Inspector Villegos' testimony (T. 104) that the first violation could have been abated in 6 or 7 days went unrebutted. I thus conclude that compliance with the subject regulation was not impossible. See Sewell Coal Co., 3 FMSHRC 1380 (1981).

ORDER

(1) Citation No. 2212848 is modified to delete the "Significant and Substantial" designation thereon, is otherwise affirmed, and a penalty of $175 is assessed therefor.

(2) Withdrawal Order No. 2336041 issued pursuant to Section 104(b) of the Act is modified pursuant to Section 105(d) of the Act to a Section 104(a) Citation and a penalty of $175 is assessed therefor.

(3) On or before 30 days from the date of this decision Respondent shall pay to the Secretary of Labor the penalties above assessed in the total sum of $350.00.



Michael A. Lasher, Jr.
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 15, 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. PENN 87-37
	:	A. C. No. 36-05018-03629
v.	:	
	:	Docket No. PENN 87-38
U. S. STEEL MINING COMPANY, INC.,	:	A. C. No. 36-05018-03630
	:	
Respondent	:	Docket No. PENN 87-127
	:	A. C. No. 36-05018-03646
	:	
	:	Docket No. PENN 87-157
	:	A. C. No. 36-05018-03648
	:	
	:	Cumberland Mine

DECISION

Appearances: Susan M. Jordan, Esq., Office of the Solicitor, U. S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner; Billy M. Tennant, Esq., U. S. Steel Mining Company, Inc., Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Merlin

These cases are petitions for the assessment of civil penalties filed under the Federal Mine Safety and Health Act 30 U.S.C. § 801 et seq., by the Secretary of Labor against U. S. Steel Mining Company, Inc.

The parties agreed that the issues in these cases are identical. Accordingly, they proposed to try only Docket No. PENN 87-37 and have the decision in that case determine the result in the others. I accepted this proposal and consolidated the cases for hearing and decision (Tr.4-6).

The parties agreed to the following stipulations:

(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 over these cases;

(4) the inspector who issued the subject citations was a duly authorized representative of the Secretary;

(5) true and correct copies of the subject citations were properly served upon the operator;

(6) copies of the subject citations and determinations are authentic and may be admitted into evidence for the purpose of establishing their issuance, but not for the purpose of establishing the truthfulness or relevance of any statements asserted therein;

(7) imposition of a penalty will not affect the operator's ability to continue in 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.

PENN 87-37

The subject citation, dated September 18, 1986, sets forth the condition or practice as follows:

> As observed on September 18, 1986 at 9:30 a.m. the trailing cable receptacles were not properly identified or labeled so as to identify the electrical equipment plugged into the power center receptacles for the feeder, roof drill, welder, shuttle car no. 2, fan no. 2, scoop charger, ram car no. 2. Charger and the continuous mining machine in the 8 Butt East 009-0.

Section 306(b) of the Act, 30 U.S.C. § 866(b), and section 75.601 of the mandatory standards, 30 C.F.R. § 75.601, provide:

> Short circuit protection for trailing cables shall be provided by an automatic circuit breaker or other no less effective device approved by the Secretary of adequate current-interrupting capacity in each underground conductor. Disconnecting devices uses to disconnect power from trailing cables shall be plainly marked and identified and such devices shall be equipped or designed in such manner that it can be determined by

visual observation that the power is disconnected.

The MSHA Underground Manual for Inspectors dated March 9, 1978, provides in pertinent part with respect to section 75.601:

> A visual means of disconnecting power from trailing cables shall be provided so that a miner can readily determine whether the cable is de-energized. Enclosed circuit breakers are not acceptable as visible evidence that the power is disconnected. Plugs and receptacles located at the circuit breaker are acceptable as visible means of disconnecting the power. These devices shall be plainly marked. For example, the loading machine cable disconnecting device shall be plainly marked (LOADER), the shuttle car cable disconnecting device shall be plainly marked (S.C. No. 1 or S. C. No. 2) or the disconnecting devices shall be readily identifiable by other equally effective means.

The MSHA Inspector's Electrical Manual dated June 1, 1983 sets forth the following regarding section 75.601:

> A visible means of disconnecting power from each trailing cable shall be provided so that a miner can readily determine whether the cable is de-energized. Enclosed circuit breakers are not acceptable as visual evidence that the power is disconnected. Plugs and receptacles located at the circuit breaker and trolley nips are acceptable as visual means of disconnecting the power.
>
> These devices shall be plainly marked for identification to lessen the chance of energizing a cable while repairs are being made on the cable. For example, the loading machine cable plug shall be plainly marked "LOADER," the shuttle car cable plug shall be plainly marked "S.C. NO. 1" or "S.C. NO. 2."

The proper use of disconnecting devices has a long history at the Cumberland Mine. As set forth in an MSHA Investigation Report and as described by an MSHA electrical supervisor who had participated in the investigation, a fatality occurred in 1979 when two shuttle cars were being repaired at the same time (Government Exhibit 4, Tr. 144, 152-159, 191). A mechanic working on the first car was electrocuted when a mechanic who had finished working on the second car mixed up the cars' trailing

cables and mistakenly plugged in the cable of the first car, electrifying it. The tag and lock out which had originally been placed on the first car were subsequently removed by mistake with the result that the first car could be energized while it was still being repaired. The trailing cable plugs of the shuttle cars were not identified to correspond with the receptacles and circuit breakers at the load center. The receptacles and circuit breakers were marked shuttle car No. 1 and shuttle car No. 2, while the trailing cable plugs were marked shuttle car No. 105 and shuttle car No. 106. In addition, the trailing cable marked as No. 106 was attached to a shuttle car marked No. 110. Finally, in order to energize the first car, the mechanic manually overrode the circuit breakers. As the MSHA electrical supervisor explained, the fatality had multiple causes (Tr. 191). One of them was the method of labelling.

In 1982, a citation was issued at Cumberland for a violation of § 75.601 due to unmarked trailing cable plugs. The Commission affirmed the citation and found the violation was significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1834 (1984).

MSHA's electrical supervisor testified that under the mandatory standards MSHA could require that the tag and receptacle, but not the circuit breaker, be identified by reference to the piece of equipment (Tr. 136-137, 167, 173-174, 191). The witnesses agreed that at the Cumberland Mine from the 1979 fatality up to the end of 1986 trailing cable plugs, receptacles as well as circuit breakers were identified in terms of the equipment (Tr. 136-137, 245-246). The system at Cumberland was not followed at U. S. Steel's Maple Creek Mine (Tr. 87). The electrical supervisor stated that Maple Creek was an isolated exception (Tr. 143). Both the supervisor and the MSHA electrical specialist who also testified, asserted that the only approved policy was the one where the plug and receptacle both were tagged by specifying the equipment (Tr. 107, 139). In the latter part of 1986 the system at Cumberland was changed so that only the label on the plug referred to the equipment (Tr. 245-246, 256).

Accordingly, when the inspector visited the Cumberland Mine on September 18, 1986 he found that the trailing cable plugs were labelled with the name of the piece of equipment to which they were attached, but that the receptacles which were identified as Circuit 1, 2, etc., were not so labelled. Circuit breakers were identified in the same way as the receptacles (Joint Exhibit 1, Tr. 17-18).

The Secretary's position is that the plug and the receptacle constitute a disconnecting device, whereas the operator maintains that only the plug is the disconnecting device. As the parties point out in their briefs, the term "disconnecting device" is neither defined in the Act nor in the regulations. After consideration of the matter, I accept the testimony of the MSHA

electrical specialist that the plug and receptacle are one thing (Tr. 107) and conclude that both together are a disconnecting device. Only when one is separated from the other does a disconnection occur. Therefore, they both together should be viewed as a unit for purposes of the mandatory standard. The operator's brief refers to the testimony of its electrical engineer that the reference to disconnecting device in 30 C.F.R. § 75.511 means plug because he would not lock out a receptacle (Tr. 218). However, the engineer further noted that he would not say that locking out a receptacle is never done and that he knew manufacturers make provisions so a lock can be placed on a receptacle (Tr. 218-219). Also, although the MSHA electrical supervisor testified that disconnecting device as used in 30 C.F.R. § 75.903 is a plug, he further explained that § 75.903 and its subpart, are not concerned with trailing cables and that there is a difference (Tr. 175, 177).

The record demonstrates that the Secretary's position regarding the labelling of plugs and receptacles measurably advances the cause of safety as contemplated and required by the Act. I find convincing the testimony of the MSHA electrical supervisor that when a miner wants to energize or de-energize a piece of equipment he does not look at the plug, but rather goes directly to the circuit breaker he believes is being used for the equipment in question (Tr. 147-148). A hazard arises when unbeknownst to him someone has changed the plug (Tr. 148). Thus, when neither the circuit breaker nor the receptacle is identified in terms of the particular piece of equipment, the miner, merely relying upon the fact that a certain circuit and breaker are customarily used for a given item of equipment, would be in danger if the plug were changed without his knowledge. The wrong piece of equipment could be energized shocking a miner or there could be a delay in de-energizing, thereby prolonging the time of exposure to electrical shock (Tr. 29-30, 122).

These hazards are magnified when more than one piece of equipment is being worked on or repaired at the same time. As the MSHA electrical specialist explained, cables of machinery around the load center resemble spaghetti, the way they are all wrapped around each other so that it is difficult to distinguish which cable is which (Tr. 115-116). Without a ready means of identification, a miner might energize the wrong trailing cable leading to a piece of equipment still being worked on, thereby causing an accident by shocking a miner (Tr. 116). The Commission has accepted evidence that it would not be unusual for two shuttle cars on the same section to be down for repairs at the same time. U. S. Steel, supra, at 1838. And in this case the operator's electrical engineer admitted multiple equipment breakdowns and shut-downs are customary (Tr. 239). I accept the testimony of the MSHA electrical specialist that labelling the plug and the receptacle in the same way, i. e., referring to the equipment, sets up a pattern of behavior which individuals will memorize through habit (Tr. 114).

The view expressed by the operator's witnesses that the best system would be one where the miner follows the trailing cable back to the piece of equipment is unpersuasive (Tr. 240, 252). The equipment could be a substantial distance away so that it would take too much time where seconds count to avoid an electrical shock. In addition, it would be impractical to expect miners to undertake such a course of conduct. I acknowledge the operator's arguments that MSHA's requirements mean less flexibility and convenience (Tr. 222-223, 247). But under the Act safety considerations are paramount. Indeed, it is the very broad flexibility and freedom inherent in the operator's approach which create the hazards described herein.

Finally, I find particularly compelling the fact that the Secretary's position in this case is the one he has espoused since the law was enacted. The electrical supervisor testified that disconnecting devices have always been identified to include the plug and receptacle and the policy now is the same as it was in 1979 (Tr. 138, 166-167). The 1978 and 1983 manuals provide that plugs and receptacles are acceptable as visible means of disconnecting power. I do not believe that the 1983 manual's reference just to plugs as examples of disconnects signifies any change in policy. The 1983 examples are illustrative, not exclusive. The general language of the manuals, which identifies both items as visible means of disconnecting power, represents MSHA's declared policy. Admittedly, the inspector's manual is not binding upon the Commission. However, where, as here, the manuals have fairly and rationally interpreted the mandatory standard since its enactment, they are entitled to weight and should be followed. See, Alabama By-Products, 4 FMSHRC 2128, 2132 (1982). Under such circumstances deference should be given to the interpretation of the Secretary, as the official charged with enforcement under the Act. Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533 (D. C. Cir. 1986). Although there appears to be some conflict on the matter, I accept the testimony of the MSHA supervisor already set forth that although this policy was not followed at U. S. Steel's Maple Creek Mine, that was an isolated exception (Tr. 139). Compare (Tr. 211-214). Therefore, this inconsistency in enforcement is not a basis for disapproving MSHA's general position. Southern Ohio, 8 FMSHRC 1231 (1986). Moreover, the MSHA supervisor testified that MSHA is awaiting the outcome of this case before any action is taken at Maple Creek with regard to that mine's labelling system (Tr. 143). Under the circumstances, I agree with the Solicitor that estoppel would not be appropriate.

In light of the foregoing, I conclude that a violation of 30 C.F.R. § 75.601 occurred. It next must be determined whether this violation was significant and substantial.

The Commission has held that a violation is properly designated significant and substantial 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. Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (1981). In Mathies Coal Co., 6 FMSHRC 1, 3-4 (1984), the Commission explained:

> In order to establish that a violation of 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.

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

In the instant case, it is established that a violation occurred, and that the violation contributed to a discrete safety hazard, i.e., electrical shock (Tr. 29). As already set forth, the evidence of record indicates that multiple equipment shut-downs during a shift are customary (Tr. 239) and that it is difficult to distinguish between the different cables at the load center (Tr. 115-116). Accordingly, I conclude it was reasonably likely that the wrong piece of equipment would be energized or that delay would occur in de-energizing the correct piece of equipment which would cause serious injury to that miner. There is no dispute that the resultant injury, which could be a bad burn or a fatality, would be of a reasonably serious nature (Tr. 29).

At the hearing and in its post hearing brief, the operator argued that the most readily available and quickest means and of de-energizing equipment is the "crash" button located at the load center. The operator further asserts that the use of the crash button in an emergency situation eliminates the hazard associated with de-energizing equipment. This argument fails. First, when a miner resorts to the crash button, the accident has already occurred. The crash button does not address the hazard of initially turning power on the wrong piece of equipment, but only concerns de-energizing equipment (Tr. 95, 238). Second, in the context of de-energization, the crash button is not the preferred

method of de-energizing quickly. The accepted method is to open the circuit breaker (Tr. 125-126). If the crash button is utilized, the auxiliary fans would stop functioning which in turn would kill the ventilation to the working place (Tr. 100). And finally, the crash button controls the outby breaker that feeds the power center. Once the crash button is thrown, power to the section can be restored only by traveling to the outby breaker and manually resetting it. The outby breaker generally is located a substantial distance from the power center (Tr. 123-125).

In light of the foregoing and for purposes of section 110(i) of the Act, 30 U.S.C. § 820(i), I conclude the violation was serious. In addition, I find the operator was guilty of ordinary negligence. The operator was aware of MSHA requirements with respect to disconnecting devices. The isolated exception at the Maple Creek Mine did not relieve the operator of the responsibility to comply with the MSHA policies well known to it.

The post hearing briefs of the parties which were very helpful, have been reviewed. To the extent they are inconsistent with this decision, they are rejected.

As set forth above, the parties agree that the decision in PENN 87-37 will control the other three dockets. The finding of a violation and the conclusions regarding the statutory criteria for PENN 87-37 are therefore, applicable to the other cases.

Accordingly, it is ORDERED that all the citations of the subject cases are hereby affirmed.

It is further ORDERED that the following civil penalties are assessed:

Docket No.	Citation No.	Penalty
PENN 87-37	2678740	$200
PENN 87-38	2681964	$200
PENN 87-127	2687405	$200
PENN 87-157	2687467	$200

It is ORDERED that the operator pay $800 within 30 days from the date of this decision.

Paul Merlin
Chief Administrative Law Judge

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OCT 20 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. KENT 86-142
	:	A.C. No. 15-13469-03564
v.	:	
	:	Docket No. KENT 87-32
GREEN RIVER COAL COMPANY, INC., Respondent	:	A.C. No. 15-13469-03575
	:	Docket No. KENT 87-33
	:	A.C. No. 15-13469-03579
	:	Docket No. KENT 87-79
	:	A.C. No. 15-13469-03588
	:	Green River No. 9 Mine

DECISIONS

Appearances: Mary Sue Ray, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner; Flem Gordon, Esq., Gordon & Gordon, Owensboro, Kentucky, for the Respondent.

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking civil penalty assessments for 11 alleged violations of certain mandatory safety standards found in Part 75, Title 30, Code of Federal Regulations, and one alleged violation of the accident reporting requirements of 30 C.F.R. § 50.12.

The respondent filed timely answers and notices of contests challenging the alleged violations and MSHA's "special assessments" which formed the basis for the proposed civil

penalty assessments filed by the petitioner in these proceedings.

The respondent's answers also included challenges to the merits of a section 107(a) imminent danger order upon which three violations in issue were based (KENT 86-142); the merits of two section 107(a) imminent danger orders issued in conjunction with four section 104(a) citations (KENT 87-79); the merits of a section 104(d)(1) order on which the petitioner's civil penalty proposal is based (KENT 87-32); and the merits of a section 104(d)(1) Order No. 2216256, included as part of the petitioner's proposals for assessment of civil penalties.

These cases were scheduled for hearings on the merits in Owensboro, Kentucky, during the hearing term September 1-3, 1987. In Docket No. KENT 86-142, the parties filed a pretrial motion proposing a settlement disposition of the case pursuant to Commission Rule 30, 29 C.F.R. § 2700.30. However, in view of the failure by the parties to submit full information regarding the six statutory civil penalty assessment criteria found in section 110(i) of the Act, a dispositive ruling on the motion was held in abeyance, and the parties were afforded an opportunity to present the information on the record at the hearings.

With regard to the remaining cases, when the dockets were called for trial, respondent's counsel informed me that upon further consultation with a representative of the respondent who was present in the courtroom, the respondent decided not to go forward with the cases and decided to settle the matters with the petitioner. The parties were afforded an opportunity to present their arguments in support of their settlement proposals on the record in each of the cases. The violations, initial assessments, and the proposed settlement amounts are as follows:

DOCKET NO. KENT 86-142

Citation No.	Date	30 C.F.R. Section	Assessment	Settlement
2214778	04/16/86	75.400	$ 700	$ 700
2214779	04/16/86	75.1725	$ 700	$ 700
2214780	04/16/86	75.1722	$ 400	$ 400
			$1,800	$1,800

DOCKET NO. KENT 87-79

Citation No.	Date	30 C.F.R. Section	Assessment	Settlement
2216502	10/21/86	75.301	$ 800	$ 500
2216503	10/21/86	75.308	$ 800	$ 500
2216504	10/21/86	75.403	$ 600	$ 500
2216514	11/17/86	75.316	$ 600	$ 500
			$2,800	$2,000

DOCKET NO. KENT 87-32

Order No.	Date	30 C.F.R. Section	Assessment	Settlement
2216241	07/15/86	75.400	$ 800	$ 800

DOCKET NO. KENT 87-33

Citation/ Order No.	Date	30 C.F.R. Section	Assessment	Settlement
2216247	07/28/86	75.400	$1,000	$1,000
2216814	08/02/86	50.12	$ 100	$ 50
2216816	08/02/86	75.400	$ 700	$ 700
2216256	08/05/86	75.200	$ 600	$ 600
			$2,400	$2,350

Issues

The issues presented in these proceedings are whether the respondent violated the cited mandatory safety standards as stated in the contested citations and orders, and if so, the appropriate civil penalty assessments which should be assessed for those violations based on the criteria found in section 110(i) of the Act. Additional issues raised by the parties are discussed and disposed of in the course of these decisions.

Applicable Statutory and Regulatory Provisions

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

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

3. Commission Rules, 20 C.F.R. § 2700.1 et seq.

Procedural Rulings

The parties were advised that the issues raised as part of the respondent's answers with respect to the merits of the previously mentioned section 107(a) imminent danger orders, and the "unwarrantable failure" section 104(d)(1) orders were not viable issues in these civil penalty proceedings. The parties acknowledged their understanding of my bench ruling, and no objections or exceptions were noted.

With regard to the respondent's challenge to MSHA's "special assessment" civil penalty procedures found in Part 100, Title 30, Code of Federal Regulations, the parties were advised that MSHA's Part 100 civil penalty procedures are not controlling in these de novo civil penalty proceedings, and that any civil penalty assessments levied by me will be on the basis of the record made in these cases, including any credible testimony or evidence presented with respect to the alleged violations, and the information and evidence presented with respect to the six statutory civil penalty assessment criteria set forth in section 110(i) of the Act.

Preliminary Matter

With regard to Dockets KENT 87-32 and KENT 87-33, the parties were advised that according to a memorandum dated August 19, 1987, from MSHA's Civil Penalty Compliance Office, to the Commission's Docket Office, MSHA's records reflect that it has received payment from the respondent for the proposed civil penalty assessments made in these two cases.

Upon consultation with the respondent's assistant Safety Director, Grover Fishbeck, who was present at counsel table, respondent's counsel confirmed that the respondent had in fact tendered payment to MSHA for the civil penalties in Dockets KENT 87-32 and KENT 87-33. Counsel asserted that he was unaware of the payments, that they were made in error, and that the mistaken payments should not be construed as a waiver of the respondent's rights and intentions to contest the violations in question.

Stipulations

With regard to Dockets KENT 87-32, KENT 87-33, and KENT 87-79, the parties submitted the following written relevant stipulations:

1. For the calendar year 1986, respondent produced 1.7 million tons of coal.

2. Respondent currently has 384 employees.

3. The proposed civil penalty assessments for the violations in question will not seriously affect the respondent's ability to continue in business.

4. The respondent acted in good faitn in correcting or abating all of the alleged violative conditions.

The parties also agreed that notwithstanding the settlements which have been approved in all of the cases, all of the citations and orders which are the subject of these proceedings will stand as issued, including the inspector's "S&S", negligence, and gravity findings. They also agreed that I may properly consider the information concerning the respondent's history of prior violations as reflected in the pleadings filed by MSHA, namely the information which appears on MSHA's Proposed Assessment Form 100-179, with regard to the number of prior assessed violations and the number of inspection days during which those violations were issued.

Discussion

DOCKET NO. KENT 86-142

This case concerns three section 104(a) "significant and substantial" (S&S) citations issued by MSHA Inspector George W. Siria on April 16, 1986. The citations relate to the accumulation of loose coal and coal dust, inoperative conveyor belt rollers, and an inadequately guarded tail roller on the slope belt conveyor of the subject mine. In particular, the inspector cited violations of mandatory safety standards 30 C.F.R. § 75.400, 75.1725 and 75.1722. He also found that the cited conditions, taken collectively, constituted an imminent danger, and he issued a section 107(a) order on April 16, 1986, withdrawing miner's from the cited slope belt areas.

By motion received August 10, 1987, respondent's counsel filed a request to dismiss this case on the ground that the respondent agreed to pay the proposed civil penalty assessments in full. On August 13, 1987, I issued an order denying the motion, and directed the parties to file an appropriate

settlement motion pursuant to Commission Rule 30, 29 C.F.R. § 2700.30.

On August 25, 1987, the parties filed a joint motion for approval of a proposed settlement of the case, and the respondent agreed to pay the proposed civil penalty assessments in full. The parties stated that the cited conditions were corrected and abated at 5:00 p.m., April 17, 1986, and that the imminent danger order was lifted at that time. They also agreed that the citations should be affirmed without further modification.

In view of the fact that the settlement motion failed to include any information with respect to the six statutory criteria set forth in section 110(i) of the Act, my dispositive ruling was held in abeyance in order to afford the parties an opportunity to present the information on the record during the course of the scheduled hearings.

During the course of the hearings, the parties stipulated to the following:

1. The violations occurred as stated in the subject citations.

2. For the calendar year 1986, the respondent produced 1.7 million tons of coal.

3. For calendar year 1986, the respondent had approximately 384 employees.

4. The proposed civil penalty assessments will not adversely affect the respondent's ability to continue in business.

5. The respondent exhibited good faith in timely abating the cited conditions.

Since the parties have agreed that the citation may be affirmed as issued, I adopt the inspector's negligence, gravity, and "S&S" findings on these issues, and take note of the respondent's history of prior violations as stated in the petitioner's pleadings reflecting 127 prior assessed violations during 450 inspection days during the 24-month period prior to the issuance of the citations in question.

DOCKET NO. KENT 87-79

This case concerns four section 104(a) "significant and substantial" (S&S) citations issued by MSHA Inspector James E. Franks on October 21, and November 17, 1986. The three citations issued on October 21, relate to an inadequate quantity of air, excessive levels of methane, and inadequate rock dusting. The inspector cited violations of mandatory safety standards 30 C.F.R. § 75.301, 75.308, and 75.403. He also found that the cited conditions, taken collectively, constituted an imminent danger, and he issued a section 107(a) order withdrawing miners from the cited areas.

The remaining citation issued by the inspector on November 17, cites a violation of mandatory safety standard 30 C.F.R. § 75.316, and relates to a violation of the respondent's approved mine ventilation plan in that the inadequate ventilation resulted in the presence of excessive methane levels in an abandoned area of the mine. In conjunction with this citation, the inspector issued a section 107(a) imminent danger order on November 17, ordering the withdrawal of miners from the areas where methane was detected. The record reflects that the citation was terminated on the same day that it was issued after adequate ventilation was restored, and the inspector subsequently modified the citation to change the number of mine personnel exposed to the hazard from 24 to 12.

The respondent asserted that the imminent danger order issued by the inspector was invalid in that the air bottle sample taken by the inspector to support the order, when tested, reflected the actual presence of only a maximum of 1.3 percent methane, which was well within MSHA's standards. Since MSHA's proposed civil penalties for the three citations which the inspector believed collectively constituted an imminent danger were "specially assessed" because of the issuance of the order, respondent's counsel disputed the validity of those assessments based on an "invalid order."

Petitioner's counsel agreed that the bottle sample reflected the presence of 1.33 percent methane in the affected areas. In further mitigation of the citations, counsel stated that the respondent cooperated fully with the MSHA inspector in conducting an evaluation of the ventilation in the affected areas.

With regard to Citation No. 2216514, petitioner's counsel introduced a copy of the mine map confirming the fact that the methane found in the inadequately ventilated area was in fact found in an abandoned area of the mine (exhibit G-1). Counsel

also confirmed that no methane accumulations were reaching the working face areas of the mine.

In mitigation, respondent's answer to the petitioner's civil penalty proposal includes notes by the respondent's Assistant Safety Director Grover Fishbeck reflecting that the assistant mine foreman and another employee were in the cited area at the beginning of the shift and were attempting to deal with the ventilation problem when the inspector arrived at the scene, and that a recent fall had blocked the air course.

Mr. Fishbeck, who was present in the courtroom, stated that the ventilation problem was corrected shortly after the citation was issued, and that a telephone call was placed to MSHA between 2:30 and 3:00 p.m., that same day, reporting the fact that corrective action had been taken to restore the ventilation, and requesting that an inspector come to the mine to terminate the citation.

Petitioner's counsel did not refute Mr. Fishbeck's assertions, and the record reflects that the citation was terminated by MSHA Inspector Ronald D. Oglesby at 5:00 p.m., on November 17, 1986.

The parties proposed to settle all of the citations in this case, and they agreed that civil penalty assessments of $500 for each of the citations was reasonable and appropriate. Respondent agreed to pay civil penalty assessments totaling $2,000 in satisfaction of the four citations in question.

DOCKET NO. KENT 87-32

This case concerns a section 104(d)(1) "significant and substantial" Order No. 2216241, issued by MSHA Inspector L. Cunningham on July 15, 1986, citing a violation of mandatory safety standard 30 C.F.R. § 75.400. The inspector issued the order after finding accumulations of loose coal and float coal dust alongside and under a belt conveyor in "spot locations" on the mine floor and walkway. He also found float coal present in the crosscuts adjacent to the belt, and that the belt bottom and rollers were running in the loose coal at three locations. He noted that the fire boss records for July 12-15, 1987, included notations that certain locations along the belt were in need of cleaning and dusting.

The record reflects that the inspector modified his order approximately 3 hours after it was issued to allow normal production to begin as long as miners were assigned to clean

and re-rockdust the cited areas. The record also reflects that the order was terminated at 11:30 a.m., on July 17, 1986, after the cited areas were cleaned up and re-rockdusted.

The parties proposed a settlement of this case, and the respondent agreed to pay the full amount of the proposed civil penalty assessment of $800 for the violation in question.

DOCKET NO. KENT 87-33

This case concerns two section 104(d)(1) "significant and substantial" (S&S) orders issued at the mine on August 2 and 5, 1986, one "S&S" section 104(a) citation issued on August 2, 1986, and one non-"S&S" section 104(a) citation issued on August 2, 1986. The citations and orders relate to accumulations of loose coal and float coal dust on the mine floor along a belt conveyor, the failure to preserve an "accident site" where a methane ignition occurred, accumulations of loose coal and dust along a belt feeder, and a failure to follow the roof-control plan with respect to the installation of roof timbers. The inspector cited violations of mandatory safety standards 30 C.F.R. § 75.400, 50.12, and 75.200.

The parties agreed to settle all of the violations, and the respondent agreed to pay the full amount of the proposed civil penalty assessments for three of them. With regard to Citation No. 2216814, for a violation of 30 C.F.R. § 50.12, the parties agreed that a civil penalty assessment of $50 is reasonable and appropriate for the violation, and the respondent agreed to pay that amount.

Citation No. 2216814, concerns a non-"S&S" violation of 30 C.F.R. § 50.12. This section prohibits a mine operator from altering an "accident site or an accident related area" until the completion of an MSHA investigation. The standard contains certain exceptions which do not apply in this case.

The inspector issued the citation after finding that a face methane ignition had occurred. Production was stopped, but a shot firer shot the area where the purported ignition occurred, thereby "altering" the location of the ignition. By definition found in section 50.2, an "accident" includes an unplanned methane gas ignition, and the parties agreed that the purported ignition is within that definition.

The parties explained the circumstances connected with the incident which resulted in the issuance of the citation. They agreed that the section foreman acted properly and in good faith by immediately taking appropriate action to report

the ignition to MSHA and to preserve the site. However, the shot was fired inadvertently before this could occur, and it was not the result of any or intent by the respondent to avoid compliance with the standard.

With regard to the coal accumulation violation, No. 2216816, the respondent submitted an affidavit from Face Boss Robert Sandidge, stating that at the time the violation was issued, the unit was idle due to the ignition, and that the cited area would have been cleaned during the normal mining cycle but for the ignition.

With regard to coal accumulation violation No. 2216247, the respondent submitted an affidavit from foreman Finis Todd, stating that at the time the violation was issued, three men were cleaning the belt during all hours of the working shift in question. In addition, the respondent's Assistant Safety Director Grover Fishbeck, produced copies of certain mine records for July 25-28, 1986, supporting the respondent's contention that the belt was being cleaned.

Findings and Conclusions

After review of the pleadings filed by the parties in these proceedings, and upon careful consideration of the arguments advanced in support of the proposed settlement disposition of these cases, I conclude and find that the proposed settlements are reasonable and in the public interest. I also conclude and find that the parties have presented reasonable justifications for the reduction of the civil penalty assessments as noted above. Accordingly, pursuant to 29 C.F.R. § 2700.30, the settlements ARE APPROVED.

ORDER

The respondent IS ORDERED to pay civil penalty assessments in the settlement amounts shown above in satisfaction of the violations in question within thirty (30) days of the date of these decisions and order, and upon receipt of payment by the petitioner, these proceedings are dismissed.

George A. Koutras
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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OCT 20 1987

RONALD R. MORRIS, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. PENN 87-77-D
DUNKARD MINING CO., Respondent	:	PITT CD 86-15

DECISION

Appearances: Harold Cancelmi, Esq., Thompson and Baily, Waynesburg, Pennsylvania, for Complainant; C. Robert McCall, Esq., McCall, Stets & Hardisty, Waynesburg, Pennsylvania, for Respondent.

Before: Judge Weisberger

Statement of the Case

Complainant filed a complaint with the Commission under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c) (the Act) alleging, in essence, that he was illegally discriminated against in that he made a valid safety complaint which caused "the loss of my employment."

Pursuant to notice, the case was set for hearing in Washington, Pennsylvania on March 17, 1987. On March 17, 1987, the Complainant and Respondent both appeared, and the Complainant was represented by Counsel. The Respondent made a motion to have the case adjourned in order to be represented by Counsel. This motion was granted, and the case was rescheduled for May 27, 1987, in Pittsburgh, Pennsylvania. At the hearing, on May 27 - 28, 1987, Ronald D. Morris, Frank Rutherford, and Ann Kerr testified for the Complainant. Ernest Sauro, Barbara Smith, Barbara Bircher, Harvey Litten, Floyd Jenkins, Karl-Hans Rath, Barbara Betchy, and James Earl Mason testified for the Respondent. Subsequent to the hearing, Respondent, on July 7, 1987, requested an extension of time until August 4, 1987, to file Posthearing Findings of Fact. On July 30, 1987, Complainant, on behalf of both Parties, requested a further extension until August 24, 1987. On August 26, 1987, Respondent filed its Posthearing Brief and Requested Findings of Fact. On August 24, 1987, and September 10, 1987, Complainant requested further extensions of time to file its

brief and Requested Findings of Fact. These requests were granted. Complainant filed his Requested Findings Fact and Memorandum Brief on October 5, 1987.

Issues

1. Whether the Complainant has established that he was engaged in an activity protected by the Act.

2. If so, whether the Complainant suffered adverse action as the result of the protected activity.

3. If so, to what relief is he entitled.

Findings of Fact

Complainant and Respondent are protected by, and subject to, the provisions of section 105(c) of the Act. I have jurisdiction to decide this case.

The Complainant, commencing in April 1985, and continuing through all dates in question herein, was a truck driver for the RMW Trucking Company which had an agreement to haul coal from Respondent's mine and dump it at Respondent's processing plant. The Complainant, in essence, has alleged that as a consequence of safety complaints that he made to Respondent, the Respondent "barred" him from entering on Respondent's property and as such, according to a complaint filed with the Commission, caused the loss of his employment.

On January 14, 1986, the truck that the Complainant was driving, skidded on the Respondent's haulage road which was snow covered, and had a maximum grade of 20 percent. In this connection I base my finding upon the testimony of Rath as it was predicated upon a detailed topographical map, Exhibit 2, rather than upon the approximations of Morris and Sauro.

The testimony was in conflict between Ronald R. Morris (Complainant) on the one hand, and Carl-Hans Rath (Respondent's Vice President) and Ernest Sauro (Respondent's Superintendent), on the other hand, with regard to the following: the time the incident occurred, whether it was witnessed by Rath, whether the Morris' truck skidded down the slope or on a level grade at the end of the slope, the order in which Morris and Harvey Litten, another truck driver employed by RMW Trucking, arrived at the processing plant, and whether, after the incident, Morris drove back up the hill or left by another exit. Although the weight of the evidence tends to support the version testified to by Rath, as it was corroborated by Sauro and Litten, it is not critical to these proceedings to reconcile all these conflicts.

Morris, on January 14, 1986, after the truck skidding incident occurred, did not register any safety complaints about the condition of the road with either Sauro or Rath.

On January 15, 1986, Rath observed that the truck that Morris was driving, had coal left in its bed after the rest of the load had been dumped. He requested Morris to either clean the truck of the remaining coal or get it light weighed. Morris testified that he complied with this request. According to the testimony of Rath, Morris first responded by telling Rath that he (Rath) was not to tell him (Morris) anything. I find that Morris did respond as testified to by Rath, as Rath's testimony was not rebutted by Morris when he testified in rebuttal.

According to Morris, he then saw Rath in the weighhouse and said that he had done Rath a favor in light weighing the coal and asked Rath to do him a favor in keeping the road clear. He testified that he then told Rath about the incident of the truck skidding on January 14. Morris testified that Rath did not respond.

Morris testified that later on in the day he was asked by the weighmistress to go to the office to see Rath. Morris testified that when he saw Rath in the office there was no one else in the area and Rath said that he was the boss of the company and that he was not going tell his employees to stay late or to pay them overtime to clean the haulage road of snow. Morris testified that Rath told him that he was not to make complaints about the road condition.

According to Morris, after he spoke with Rath, he received permission from the weighmistress to use the telephone in Respondent's office, and called his union representative, Frank Rutherford, at UMW Headquarters. He testified that he told him he had a safety problem and "...started to relate to him what happened..." (Tr. 60). Rath, who was in another office, then picked up the phone and told Morris, in essence, not to use the office phone.

Morris further testified that at the end of the day he returned to the RMW Company and James Earl Mason, RMW's owner, told him that Rath had called on the telephone and told him that he (Morris) is no longer to be allowed on the site. Morris testified that when he asked Mason for the reason, Mason said that he understood that Morris had made complaints about the road condition.

Rath testified, in essence, that after Morris had refused to follow instructions to either clean out the truck or get it light weighed, he asked Barbara Smith (Respondent's payroll clerk), Barbara Bircher (Respondent's bookkeeper and weighmistress), and Barbara Betchy (Respondent's office manager) to identify Morris. Rath testified that he could not recall who said what, but that these employees complained that Morris had dumped coal on Taylortown Road, and had sat around for 2 to 3 hours if anything was wrong with his truck. He also testified that Smith, Bircher, and Betchy had told him that Morris had dumped coal in the wrong places and when reminded responded by saying "don't tell me anything." I adopted Rath's testimony as to what was told to him as it was essentially corroborated by Bircher and Betchy.

Subsequently, Rath asked Morris to come to his office. Rath told Morris that the women in the office had complained about him. Rath testified that Morris said that he (Rath) was not his boss. Rath said that Morris then told him that the road the previous night was not in good condition and he requested that an employee be on the premises all night to clear the road of snow. I adopt Rath's version of this conversation as it was corroborated, in the essential parts, by Betchy and Smith.

After this conversation occurred, Rath testified that he called Mason and asked him to replace Morris as the latter was not following instructions. Rath further said that later on Mason called back to ask him to reconsider and he refused. I accept Rath's version of what he told Mason as it was essentially corroborated by Mason.

Morris testified that subsequent to January 15, 1986, RMW trucking employed him maybe a total of 5 or 6 weeks in 1986 to drive a truck at sites other than Respondent's facilities. He testified that he did not have any other earnings in 1986, aside from unemployment compensation, and that he is presently unemployed.

Discussion

The Commission, in a recent decision, Goff v. Youghiogheny & Ohio Coal Company, 8 FMSHRC 860 (December 1986), reiterated the legal standards to be applied in a case where a miner has alleged acts of discrimination. The Commission, Goff, supra, at 1863, stated as follows:

> A complaining miner establishes a prima facie case of prohibited discrimination under the Mine Act by proving that he engaged in protected activity and that the adverse action complained of was motivated in any part

by that activity. Pasula, 2 FMSHRC at 2797-2800; Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was not motivated in any part by protected activity. Robinette, 3 FMSHRC at 818 n. 20. See also Donovan v. Stafford Constr. Co., 732 F.2d 954, 958-59 (D.C. Cir 1984); Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission's Pasula-Robinette test).

Applying the above standards to the case at bar, I find that the evidence is uncontradicted that on January 15, 1986, Morris voiced his concern about the road conditions at Respondent's preparation plant the day before. Further, based on the 20 percent grade of the haulage road, Morris' testimony that it was snow covered, as corroborated by Sauro's comment that it was "slick," along with the fact that Morris' truck did skid, whether on the level or on a grade, established that Morris had good cause in voicing his complaint to Rath about the condition of the roadway. Furthermore, the action of Rath in effect telling Mason on January 15, 1986, to stop using Morris as a truck driver on Respondent's premises, was adverse to Morris, as it, in essence, prevented him from working for RMW Trucking Company on a full time bases. Moreover, inasmuch as Rath took this action right after Morris had voiced complaints about the road condition, and after the latter attempted to contact his union representative, I find that the adverse action was motivated in part by Morris' protected activity. According, I find that Morris has established a prima facie case. (Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, (April 1981)).

In analyzing whether Respondent has rebutted the Complainant's prima facie case, I found Rath's testimony credible as to his motivation in having Morris replaced as a truck driver on Respondent's premises. In this connection, I found that Betchy, Smith, and Bircher told Rath, on January 15, 1986, that Morris has said "don't tell me anything," when reminded that he had dropped coal in the wrong places. In addition, I found that, on January 15, 1986, when Rath requested Morris early in the day to clean the truck bed or light weigh, Morris had told Rath not to tell him anything. Also, I found that subsequently on January 15, 1986, when Rath told Morris that the women in his office had complained about him, Morris had said that Rath was not his boss. I find that Morris' comments and responses were unprotected activities.

Based upon the above, I find that when Rath told Mason on January 15, 1986, to no longer have Morris sent to Respondent's facilities, Rath was motivated by comments made to him by Morris

as well as information provided to him by Bircher, Betchy, and Smith of Morris' responses to their requests. I therefore conclude that the adverse action taken by Rath would have been taken in any event for the unprotected activities alone. Accordingly, I find that the Complainant has failed to establish a case of prohibited discrimination under the Act. (see, Sedgmer v. Consolidation Coal Co., 8 FMSHRC 303, 306 (March 1986)).

ORDER

Based upon the above findings of fact and conclusions of law it is ORDERED that this proceeding be DISMISSED.

Avram Weisberger
Administrative Law Judge

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OCT 20 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) ON BEHALF OF DAVID WILLIS Complainant v. BABCOCK MINING CO.; HENRY McCOY, Individually and as Operator of Babcock Mining Co.; VIRGIL McMILLION, Individually and as Operator of McMillion Enp., Inc., McMILLION ENP., INC., CRAFT COAL COMPANY, Respondents	:	DISCRIMINATION PROCEEDING Docket No. WEVA 87-106-D HOPE CD 86-24 HOPE CD 87-2 No. 1 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF ALBERT HALSTEAD Complainant v. BABCOCK MINING CO.; HENRY McCOY, Individually and as Operator of Babcock Mining Co., VIRGIL McMILLION, ENP, INC.; CRAFT COAL COMPANY, Respondents	:	DISCRIMINATION PROCEEDING Docket No. WEVA 87-107-D HOPE CD 87-1 HOPE CD 87-4 No. 1 Mine

DEFAULT DECISION

Before: Judge Fauver

On October 6, 1987, an Order to Respondents to Show Cause was issued, allowing Respondents 10 days to show cause why the Secretary's Motion for a Default Decision should not be granted in each of the above cases.

Respondents have not responded to the Show Cause Order. The Secretary has moved to withdraw Craft Coal Company as a Respondent, and asks for a default decision against the other Respondents.

ORDER

FOR GOOD CAUSE SHOWN IT IS ORDERED:

1. The Secretary's Motion to Withdraw Craft Coal Company as a Respondent is GRANTED, and the above cases are DISMISSED as to Craft Coal Company. The hearing scheduled for October 27, 1987,is CANCELLED.

2. The Secretary's Motion for a Default Decision against the other Respondents shown above is GRANTED in each of the above cases. The allegations of the Petition in each case are deemed to be true and are incorporated herein as Findings of Fact and Conclusions of Law in each case respectively. The Secretary shall have 10 days from this date to submit a proposed order for relief in each of the above cases.

3. This Decision shall not operate as a final disposition of these cases until an order for relief is entered in each of the above cases.

William Fauver
William Fauver
Administrative Law Judge

Distribution:

Carol B. Feinberg, Esq., Office of the Solicitor, U. S. Department of Labor, Room 516, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified Mail)

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Babcock Mining Company, c/o Drew Hunter, Secretary, P. O. Box 2057, Ashland, KY 41105 (Certified Mail)

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dcp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

OCT 22 1987

LOCAL UNION 1261, DISTRICT 22, UNITED MINE WORKERS OF AMERICA, Complainant	:	COMPENSATION PROCEEDING
	:	Docket No. WEST 86-199-C
	:	Emery Mine
v.	:	
CONSOLIDATION COAL COMPANY, Respondent	:	

DECISION

Before: Judge Morris

This is a proceeding for compensation under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the Act).

The parties waived their right to a hearing and submitted the case for a decision on stipulated facts. Briefs were further submitted by the parties in support of their respective positions.

Issue

The issue is whether the miners are entitled to compensation under Section 111 of the Act when they had been withdrawn by the operator before MSHA issued an order under § 103(k) of the Act.

Applicable Statute

Section 111 of the Act provides as follows:

"ENTITLEMENT OF MINERS"

"Sec. 111. If a coal or other mine or area of such mine is closed by an order issued under section 103, section 104, or section 107, all miners working during the shift when such order was issued who are idled by such order shall be entitled, regardless of the result of any review of such order, to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than the balance of such shift. If such order is not terminated prior to the next working shift, all miners on that shift who are idled by such order shall be entitled to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than four hours of such shift.

If a coal or other mine or area of such mine is closed by an order issued under section 104 or section 107 of this title for a failure of the operator to comply with any mandatory health or safety standards, all miners who are idled due to such order shall be fully compensated after all interested parties are given an opportunity for a public hearing, which shall be expedited in such cases, and after such order is final, by the operator for lost time at their regular rates of pay for such time as the miners are idled by such closing, or for one week, whichever is the lesser. Whenever an operator violates or fails or refuses to comply with any order issued under section 103, section 104, or section 107 of this Act, all miners employed at the affected mine who would have been withdrawn from, or prevented from entering, such mine or area thereof as a result of such order shall be entitled to full compensation by the operator at their regular rates of pay, in addition to pay received for work performed after such order was issued, for the period beginning when such order was issued and ending when such order is complied with, vacated, or terminated. The Commission shall have authority to order compensation due under this section upon the filing of a complaint by a miner or his representative and after opportunity for hearing subject to section 554 of title 5, United States Code.

Stipulated Facts

The parties stipulated as follows:

1. The Federal Mine Safety and Health Review Commission has jurisdiction over this matter;

2. The relevant members of Local Union 1261 are underground coal miners who are employed at Consolidation Coal Company's (Consol) underground Emery Mine. The UMWA is the authorized representative of such miners for purposes of this proceeding;

3. The Emery Mine is a mine whose operations and products affect interstate commerce;

4. On April 16, 1986 at 7:00 p.m., Consol removed its employees from the Emery Mine to insure their safety because of rising gas levels behind the North seals. Consol informed the afternoon shift employees that the mine was idled until further notice because of the rising gas levels. Consol's office manager and foremen called the miners who were scheduled on the next two shifts (graveyard and daylight) and told them "the mine is idle until further notice." All underground miners who worked on that date were paid for the time worked. The day shift employees on April 16, 1986, worked a full shift and the afternoon shift employees on that date worked four and one-half (4 1/2) hours;

5. Concurrent with Consol's management's decision to remove its employees from the mine, Consol notified MSHA and the UMWA of that action;

6. MSHA personnel arrived at the mine on the morning of April 17, 1986, and conducted an investigation which included a review of the air samples taken by Consol. MSHA Inspector Donald B. Hanna issued an order under §103 (k) of the Act at 7:14 a.m. on April 17, 1986;

7. The § 103 (k) order states "Based on the results of air samples taken by the Company ... this mine has experienced a possible fire, therefore, all persons has (sic) been removed from the mine by Company order to insure their safety and no person shall enter inby the mine portals without modification of this order, after consultation with appropriate persons selected from Company officials, State officials, the miners representative and other persons";

8. At the time the §103 (k) order was issued, no Local Union 1261 underground miners were working. After the § 103(k) order was issued, no miners could enter the mine nor could mining activities resume until MSHA modified the order;

9. The § 103(k) order never alleged that Consol had committed any violation of a mandatory standard and the order was not issued under § 104 or § 107 of the Act;

10. Consol did not pay any Local Union 1261 underground miners for April 17, 1986;

11. On April 20, 1986, at 2:36 p.m. the § 103(k) order was modified to allow mining to resume, and on May 16, 1986, at 2:00 p.m. the order was terminated.

Discussion

The miners involved here seek compensation under Section 111 of the Act. The pivitol stipulated facts establish that MSHA issued a § 103(k) order on April 17, 1987. The operator contends the miners are not entitled to compensation on that date because the company had already voluntarily withdrawn them from the affected area.

Previous Commission decisions construing this section are not factually controlling since they involve the last paragraph of the section. Local Union 1609, District 2, United Mine Workers of America v. Greenwich Collieries, (Division of Pennsylvania Mines Corporation, 8 FMSHRC 1302 (1986); Local Union 2274, District 28, United Mine Workers of America v. Clinchfield Coal Company, 8 FMSHRC 1310 (1986); Local Union 1889, District 17, United Mine Workers v. Westmoreland Coal Company, 8 FMSHRC 1317 (1986).

However, I am persuaded by the reasoning in Mine Workers, District 31 v. Clinchfield Coal Company, 1 MSHC 1010 (1971), (Interior Board of Mine Operations Appeals); Mine Workers Local 1993 v. Consolidation Coal Company, 1 MSHC 1668 (1978)(Broderick, J.); and Mine Workers Local 2244 v. Consolidation Coal Company, 1 MSHC 1674 (Fauver, J.). In sum, these cases hold that an MSHA withdrawal order is more extensive in scope than a voluntary withdrawal by the operator. Specifically, an MSHA order prohibits reentry until the danger no longer exists. Further, regardless of the sequence of events or the method by which the miners were originally withdrawn, a mine, or section thereof, is officially closed upon the issuance of an order under the Act. The miners were thus officially idled by the 103(k) order.

It follows, accordingly, that the miners are entitled to compensation under the Act.

John J. Morris
Administrative Law Judge

Distribution:

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Robert M. Vukas, Esq., Consolidation Coal Company, 1800 Washington Road, Pittsburgh, PA 15241 (Certified Mail)

/ot

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

OCT 23 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. KENT 86-126 A.C. No. 15-12295-03533
v.	:	
J. C. LONDON COAL COMPANY, INC., Respondent	:	Docket No. KENT 86-127 A.C. No. 15-12295-03534 No. 1 Mine

DECISIONS

Appearances: G. Elaine Smith, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner.

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern civil penalty proposals filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking civil penalty assessments for 18 alleged violations of certain mandatory safety and health standards found in Parts 70, 75, and 77, Title 30, Code of Federal Regulations.

The respondent contested the proposed civil penalty assessments, and pursuant to notice served on the parties, a hearing was convened in Paintsville, Kentucky, on Thursday, September 24, 1987. The petitioner appeared, but the respondent did not. Under the circumstances, the hearing proceeded without the respondent and the petitioner presented testimony and evidence with respect to the violations in question.

Issues

The issues presented in this proceeding are whether the respondent has violated the cited mandatory safety standards, and if so, the appropriate civil penalty to be assessed for

those violations based on the criteria found in section 110(i) of the Act. The matters concerning the respondent's failure to appear, and its purported bankruptcy status, are discussed in the course of these decision.

Applicable Statutory and Regulatory Provisions

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

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

3. Commission Rules, 20 C.F.R. § 2700.1 et seq.

Discussion

Respondent's Failure to Appear at the Hearing

Respondent, who is pro se, failed to appear at the scheduled hearing. The record reflects that the initial hearing notice, and subsequent amendments notifying the parties of the time and place of the hearing were duly served on the respondent. The postal service return certified mail receipts reflects that each of the notices were served on the respondent's corporate president Harold C. Hale, and Mr. Hale signed each of the mailing receipts.

It seems clear to me that the failure of a party-respondent to appear at a hearing pursuant to a duly served order and notice issued by the judge is sufficient ground for the judge to hold the respondent in default and to proceed without him, Williams Coal Co., 1 FMSHRC 928 (July 1979); White Oak Coal Company, 7 FMSHRC 2039 (December 1985); Neibert Coal Company, Inc., 7 FMSHRC 887 (June 1985); Pollard Sand Company, 8 FMSHRC 973 (June 1986).

The respondent has had an ample opportunity to refute the alleged violations and proposed civil penalty assessments filed by the petitioner. However, since the respondent is no longer in business and has previously indicated that it was either in bankruptcy or had contemplated filing for bankruptcy, it seems obvious to me that it no longer wishes to litigate this matter. Under the circumstances, I find the respondent to be in default, and I have considered its failure to appear at the hearing as a waiver of its right to be heard on the merits of the violations and the proposed civil penalty assessments.

Respondent's Bankruptcy Status

In response to an Order to Show Cause issued by Chief Judge Paul Merlin, Mr. Hale indicated that he was "in the process of going or filing bankruptcy," and he furnished the name and address of the attorney who was representing him in the bankruptcy proceeding. A subsequent letter of record from this attorney reflected that the attorney had done some legal work for Mr. Hale in the past, but the attorney clearly stated that he was not representing Mr. Hale in the instant proceedings.

During the course of the hearing, petitioner's counsel produced a copy of the respondent's 1986 Federal tax return (exhibit P-2), furnished by Mr. Hale. Counsel stated that based on information furnished by Mr. Hale's former attorney, although the respondent had contemplated filing for bankruptcy, it has not done so and no bankruptcy proceeding has been formally initiated or finalized.

In view of the respondent's failure to appear at the hearing or to further communicate with petitioner's counsel in this matter, no further information has been forthcoming with respect to the respondent's bankruptcy status. However, the fact that the respondent may be in bankruptcy does not divest the Commission or its judges of jurisdiction to proceed with the adjudication of these cases. Leon's Coal Company, et. al., 4 FMSHRC 572 (April 1982); Oak Mining Company, 4 FMSHRC 925 (May 1982); Stafford Construction Company, 6 FMSHRC 2680 (November 1984). Accordingly, I conclude and find that I have jurisdiction to adjudicate these matters.

Petitioner's Testimony and Evidence

In support of the violations in question, petitioner presented the testimony of MSHA Inspectors John Smallwood and Charles Slone. The inspectors testified that Mr. Hale operated the mine for approximately 6 months after purchasing an existing coal mining lease on the property. The information provided by the inspectors reflects that the respondent ceased its mining operation in approximately April or May, 1986, and that the mine is now idle and all of the equipment had been removed from the mine and reclaimed by the company who leased it to the respondent. The inspectors confirmed that to their knowledge, Mr. Hale is not mining at any other locations within their enforcement jurisdiction.

The record reflects that in Docket No. KENT 86-126, the respondent was served with nine section 104(a) citations for

violations of certain mandatory safety standards found in Parts 75 and 77, Title 30, Code of Federal Regulations. Three of the citations were non-significant and substantial (S&S), and five were designated as "S&S" violations by the inspectors who issued them.

The record reflects that in Docket No. KENT 86-127, the respondent was initially served with eight section 104(a) citations for violations of certain mandatory safety and health standards found in Parts 70 and 75, Title 30, Code of Federal Regulations. An additional section 104(a) citation was issued in conjunction with a section 107(a) imminent danger order. Five of the citations were non-S&S violations, and four were issued as S&S violations. Further, the record reflects that when the inspector next returned to the mine he found no one there, and since the violations had not been abated, he issued section 104(b) withdrawal orders for non-abatement of the cited conditions.

Inspectors Smallwood and Slone confirmed that they issued the citations and orders in question, and they confirmed that they were issued in the course of their regular inspections of the mine. The inspectors confirmed that the citations were served on a representative of the respondent who was at the mine when it was in operation, and they testified as to the conditions or practices which caused them to issue the violations. They also confirmed their negligence and gravity findings as shown on the face of the citations.

In Docket No. KENT 86-126, the inspectors testified that the violations in question were timely abated by the respondent in good faith, and Inspector Smallwood testified that the respondent was a cooperative mine operator who made a good faith effort to comply with MSHA's mandatory safety and health standards.

With regard to Docket No. KENT 86-127, Inspector Smallwood confirmed that the section 104(b) orders which were issued for eight of the section 104(a) citations were served on the respondent by certified mail. Mr. Smallwood explained that when he next returned to the mine on May 5, 1986, to abate the citations, the mine was idle and no one was there. He made several subsequent trips to the mine and attempted to contact the respondent by telephone in an effort to ascertain whether or not the cited conditions had been abated. Mr. Smallwood stated that he was unable to contact the respondent, and that the respondent did not contact him to discuss the matter. Under the circumstances, Inspector Smallwood issued the section 104(b) withdrawal orders, and he confirmed

that this was his normal procedure. He conceded that it was possible that the cited conditions were corrected before his May 5, 1986, visit to the mine, but since it was idle and he could not gain access to the mine, he had no way to confirm whether or not the violations had been abated.

Findings and Conclusions

Fact of Violations

Although given an opportunity to rebut the violations, the respondent has not done so. Accordingly, on the basis of the record in these proceedings, including the testimony of the inspectors who issued the citations, I conclude and find that the petitioner has established each of the violations, and the citations ARE AFFIRMED as issued by the inspectors.

History of Prior Violations

The respondent's history of prior violations is reflected in an MSHA computer print-out (exhibit P-1). The print-out reflects that for the period January 29, 1986 to April 13, 1986, the respondent was served with 18 violations, 12 of which were "significant and substantial" (S&S) violations. The respondent paid the civil penalty assessments for six of the violations. I cannot conclude that the respondent's past compliance record is such as to warrant any additional increases in the civil penalty assessments made for the violations which have been affirmed in these proceedings.

Good Faith Compliance

In Docket No. KENT 86-126, the record establishes that the respondent timely abated the cited violations in good faith. I take note of Inspector Smallwood's testimony that the respondent was a cooperative mine operator who attempted in good faith to comply with the law, and I have taken this into consideration in my adjudication of these cases.

With regard to Docket No. KENT 86-127, although it is true that the inspector issued section 104(b) withdrawal orders for failure by the respondent to abate the conditions, I take note of the fact that at the time of his abortive return visits to the mine, the inspector found that it was abandoned and he could find no one to confirm whether or not the violations had been corrected. I take note of the fact that in one instance (Citation No. 2769497), 2-months passed before the inspector next returned to the mine, and in the remaining instances, approximately 3-weeks passed before the

inspector returned to the mine. I also take note of the fact that Inspector Smallwood conceded that it was possible that the conditions had been corrected prior to his subsequent mine visits, but he simply could not confirm this since he was unable to communicate with the respondent, and the respondent did not return his telephone calls. However, based on the inspector's credible testimony that he considered the respondent cooperative, and the fact that prior citations were timely abated, I have given the respondent the benefit of the doubt and I cannot conclude that the respondent acted in bad faith in this case.

Negligence

The inspectors found moderate or low negligence with respect to all of the citations issued in these proceedings. Under the circumstances, I conclude and find that all of the violations which have been affirmed resulted from the respondent's failure to exercise reasonable care, and that this constitutes ordinary negligence.

Gravity

Docket No. KENT 86-127

In this case, the inspector found that Citation Nos. 2769497, 2769648, 2769649, 2769650, and 2769651 were non-S&S and that an injury or illness was unlikely to occur as a result of the cited conditions. He also found that the cited conditions would not reasonably be expected to result in any lost workdays. Under these circumstances, I conclude and find that these violations were non-serious.

With regard to the remaining citations, the inspector found that an injury or illness was reasonably likely to occur, and in the case of the section 104(a)-107(a) citation-imminent danger order, he found that an injury or illness was highly likely to occur. Under these circumstances, I conclude and find that the violations were serious. I also affirm the inspector's S&S findings with respect to these violations.

Docket No. KENT 86-126

In this case, the inspector found that Citation Nos. 2769641, 2769642, and 2769652 were non-S&S and that an injury or illness was unlikely to occur as a result of the cited conditions. He also found that the cited conditions would not reasonably be expected to result in any lost workdays.

Under these circumstances, I conclude and find that these violations were non-serious.

With regard to the remaining citations, the inspector found that an injury or illness was reasonably likely to occur. Accordingly, I conclude and find that these violations were serious. I also affirm the inspector's S&S findings with respect to these violations.

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

MSHA's proposed civil penalty assessment information filed with its pleadings reflects that when the mine was in operation it had an annual production of 62,500 tons. The information provided by the inspectors who inspected the mine and issued the citations in this case reflect that when the mine was in operation there were approximately 10 miners working underground, and approximately two or three working on the surface. Petitioner's counsel agreed that the mine was a small-to-medium sized operation when it was producing coal, and I concur in this conclusion.

It seems clear to me that the respondent is no longer in business at the mine in question. Although a copy of the respondent's 1986 tax return reflects that the mine operated at a loss for that year, the respondent's failure to appear at the hearing or to otherwise provide any credible information as to its present financial condition and ability to pay the civil penalty assessments for the violations in question precludes any finding by me that the respondent is unable to pay those penalties. Based on the information of record, it does not appear that the respondent is in bankruptcy or that the respondent or Mr. Hale, as its corporate president, is in fact bankrupt. Further, I take note of a letter dated July 13, 1987, to Mr. Hale from the petitioner's counsel, which is in the official record of this case, indicating that Mr. Hale's offer to settle these cases was rejected by the petitioner.

Civil Penalty Assessments

In view of the foregoing findings and conclusions, I believe that the petitioner's proposed civil penalty assessments in Docket No. KENT 86-126 are appropriate and reasonable, and they ARE AFFIRMED.

With respect to Docket No. KENT 86-127, I take note of the fact that in the initial civil penalty assessments levied

by the petitioner's Office of Assessments, no consideration was given for the respondent's good faith compliance. The five non-S&S citations which are normally assessed as "single penalty assessments" pursuant to the petitioner's assessment regulations, were assessed at higher monetary amounts, and the remaining citations were assessed without regard to any good-faith compliance. I believe that one can conclude that the increased civil penalty assessments resulted from the fact that the inspector issued section 104(b) orders when he found that the mine was not in operation, and he could find no one to confirm whether or not the violations had in fact been abated.

It is well-settled that I am not bound by the petitioner's proposed civil penalty assessments, nor am I bound by its civil penalty assessment regulations found in Part 100, Title 30, Code of Federal Regulations. Civil penalty proceedings before the Commission and its judges are adjudicated de novo on a case-by-case basis, and any civil penalty assessments levied by a judge are based on his independent findings and conclusions with respect to the particular case. On the facts of this case, given my findings with respect to the respondent's good faith compliance, I conclude and find that some reduction with respect to the civil penalty assessments proposed by the petitioner in Docket No. KENT 86-127 are reasonable and warranted in the circumstances.

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, the following civil penalties are assessed by me for the violations which have been affirmed in these proceedings:

DOCKET NO. KENT 86-126

Citation No.	Date	30 C.F.R. Section	Assessment
2769641	04/09/86	75.1805	$ 20
2769642	04/09/86	75.1403	$ 20
2769684	04/09/86	75.400	$ 50
2769644	04/10/86	75.604(b)	$ 50
2769645	04/10/86	75.1719-1(d)	$ 54
2769688	04/10/86	75.604	$ 50
2769689	04/10/86	75.17228	$ 50
2769652	04/14/86	75.1103-4(a)	$ 20
2769653	04/14/86	77.504	$ 50
			$364

DOCKET NO. KENT 86-127

Citation No.	Date	30 C.F.R. Section	Assessment
2769497	02/10/86	75.313	$ 35
2769686	04/09/86	75.514	$140
2769646	04/10/86	75.1725	$150
2769647	04/10/86	75.400	$100
2769690	04/10/86	70.400	$100
2769648	04/14/86	75.503	$ 50
2769649	04/14/86	75.1107-4(a)(2)	$ 35
2769650	04/14/86	75.316	$ 35
2769651	04/14/86	75.1713-7(b)	$ 50
			$695

ORDER

The respondent IS ORDERED to pay the civil penalties in the amounts shown above within thirty (30) days of the date of these decisions. Payment is to be made to MSHA, and upon receipt of payment, these proceedings are dismissed.

George A. Koutras
Administrative Law Judge

Distribution:

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Mr. Harold C. Hale, President, J. C. London Coal Company, Inc., Star Route 1, Box 118, Foster, WV 25081 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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OCT 23 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. KENT 87-95
	:	A.C. No. 15-15684-03508
v.	:	
	:	Docket No. KENT 87-156
HIGHWIRE, INCORPORATED, Respondent	:	A.C. No. 15-15684-03509
	:	
	:	No. 1 Mine

DECISIONS

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Nasvhille, Tennessee, for the Petitioner;
Eugene C. Rice, Esq., Paintsville, Kentucky, for the Respondent.

Before: Judge Koutras

Statement of the Proceedings

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

These cases were among eight cases scheduled for hearing in Paintsville, Kentucky, during the hearing term September 22-23, 1987. When the cases were called for trial, counsel for the parties advised me that the parties agreed to a proposed settlement of the cases, and they were afforded an opportunity to present their proposals on the record pursuant to Commission Rule 30, 29 C.F.R. § 2700.30. The citations, proposed assessments, and the settlement amounts are as follows:

Docket No. KENT 87-95

Citation No.	Date	30 C.F.R. Section	Assessments	Settlements
2784217	11/13/86	77.404(a)	$ 63	$ 63
2784219	11/13/86	77.410	$ 63	$ 63
			$126	$126

Docket No. KENT 87-156

Citation No.	Date	30 C.F.R. Section	Assessments	Settlements
2780392	03/04/87	77.1605(b)	$ 85	$ 85
2780393	03/04/87	77.1606(c)	$ 85	$ 85
2780394	03/04/87	77.410	$ 85	$ 85
2780395	03/04/87	77.410	$ 85	$ 85
2780396	03/05/87	77.1606(c)	$ 20	$ 20
2780397	03/05/87	77.1606(c)	$ 20	$ 20
			$380	$380

Discussion

In support of the proposed settlement of these cases, the parties presented information with respect to the six statutory civil penalty assessment criteria found in section 110(i) of the Act. The parties incorporated by reference certain stipulations entered into in the prior proceedings conducted on September 22, 1987, and they are as follows:

1. The respondent is subject to the Act.

2. The respondent is a small-to-medium sized operator engaged in auger and strip coal mining activities. During the period November, 1986 through March, 1987, the respondent employed approximately 25-45 employees, with an annual coal production of 241,616 tons.

3. Respondent's history of prior violations for the period July 1, 1986 through March 4, 1987, reflects that the respondent paid civil penalty assessments for 36 violations, all of which were issued as section 104(a) citations.

4. All of the citations in question were timely abated by the respondent in good faith.

5. Payment of the proposed civil penalty assessments will not adversely affect the respondent's ability to continue in business.

I take note of the fact that the respondent has agreed to make payment for the full amount of the proposed civil penalty assessments for the violations in question. I note further that the inspectors who issued the citations were present in the court room, and petitioner's counsel asserted that he discussed all of the violations with the inspector's and that they concurred in the proposed settlement dispositions advanced by the parties.

Conclusion

Upon careful review and consideration of the pleadings, and the information furnished by the parties in support of the proposed settlement of these cases, I conclude and find that they are reasonable and in the public interest and should be approved. Accordingly, pursuant to 29 C.F.R. § 2700.30, the settlements ARE APPROVED.

ORDER

The respondent IS ORDERED to pay civil penalty assessments in the settlement amounts shown above in satisfaction of the violations in question within thirty (30) days of the date of these decisions. Upon receipt of payment by the petitioner, these proceedings are dismissed.

George A. Koutras
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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October 27, 1987

GREEN RIVER COAL CO., INC. Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. KENT 87-13-R Citation No. 2216153; 9/18/86
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. KENT 87-14-R Citation No. 2216154; 9/18/86
	:	Docket No. KENT 87-15-R Citation No. 2216740; 9/18/87
	:	Docket No. KENT 87-16-R Order No. 2216023; 9/19/86
	:	Green River No. 9 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. KENT 87-37 A. C. No. 15-13469-03581
v.	:	Docket No. KENT 87-67
GREEN RIVER COAL CO., INC. Respondent	:	A. C. No. 15-13469-03585
	:	Green River No. 9 Mine

DECISION

Appearances: Flem Gordon, Esq., Gordon, Gordon & Taylor, Owensboro, Kentucky, for the Respondent; Mary Sue Ray, Esq., Office of the Solicitor, U. S. Department of Labor, Nashville, Tennessee, for the Petitioner.

Before: Judge Weisberger

STATEMENT OF THE CASE

In these consolidated cases, the Operator (Respondent) sought to challenge the following Citations/Orders issued to it by the Secretary (Petitioner): 2216153 (alleged violation of 30 C.F.R. § 75.400), 2216154 (alleged violation of 30 C.F.R.

§ 75.316), 2216023 (alleged violation of 30 C.F.R. § 75.0303), 2216024 (alleged violation of 30 C.F.R. § 75.307-1), 2216025 (alleged violation of 30 C.F.R. § 75.302-1), and 2216740 (alleged violation of 30 C.F.R. § 75.0503). The Secretary sought civil penalties for alleged violations by the Operator of the above cited sections. On August 10, 1987, Respondent filed a Motion to Dismiss Order No. 2216023. On August 10, 1987, Respondent filed a Motion to Dismiss the Contest Proceeding and the Civil Penalty Proceeding involving Order No. 2216154 on the ground that it tendered payment to the Secretary of the proposed penalty on or about August 6, 1987.

Pursuant to notice, the remaining cases were scheduled for hearing in Nashville, Tennessee, on August 11, 1987. At the hearing, Counsel for both Parties indicated that a settlement had been reached in the Civil Penalty Proceeding, Docket No. KENT 87-67 (Citation Nos. 2216023, 2216024, and 2216025, (Docket No. KENT 86-16-R)). At the hearing, after argument, the Motion to Dismiss Order No. 216023 was denied. At the hearing, Counsel for both Parties indicated, in essence, that an agreement had been reached with regard to the relevant facts involved in Docket No. KENT 87-15-R, and that the legal issues involved in this case would be briefed. The remaining cases, KENT 87-37 and KENT 87-13-R, were heard in Nashville, Tennessee, on August 11, 1987. James Franks testified for Petitioner, and Grover Fischbeck testified for Respondent. Respondent submitted its Posthearing Brief and Memorandum of Authority on August 17, 1987, and Petitioner submitted its Post Trial Memorandum on August 31, 1987. On October 1, 1987, Petitioner filed three stipulations with regard to the criteria in Section 110(i) of the Act.

On August 31, 1987, Respondent filed a Joint Motion to Approve Settlement in Docket Nos. KENT 87-67 and KENT 87-16-R. Initially, the Secretary had proposed the following Civil Penalties for the following Citations: 2216023, $300; 2216024, $500, and 2216025, $700. The Parties proposed a settlement of the following Citations in the following amounts: 2216023, $100; 2216024, $700, and 2216025, $700. I considered the representations and documentation submitted in these cases, and I conclude that the proffered settlements are appropriate under the criteria set forth in Section 110(i) of the Act.

KENT 87-15-R (Citation No. 2216740)

On September 18, 1986, Citation No. 2216740 was issued alleging a violation of 30 C.F.R. § 75.503 in that "a violation was observed on the long-airdox roof bolter (extra bolter on No. 7 Unit) in that an opening in excess of .004 inch was present between the main breaker box lid and breaker box. Also two bolts were missing from the main on and off switch box."

35 C.F.R. § 75.503 provides as follows:

> The Operator of each coal mine shall maintain in permissible condition all electric face equipment required by Sections 75.500, 75.501, and 75.104 to be permissible which is taken into or used inby the last open crosscut of any such mine.

The Parties stipulated that there was an opening of .004 inch on the electrical switch box of the bolter in question, and that two bolts were missing from the on-off electrical switch box. It was further stipulated, that at the time of the alleged violation, the bolter in question was not energized, and was located outby the last open crosscut. In its Post Trial Memorandum, the Secretary has alleged that the roof bolter in question was operated as an alternate on the No. 7 Section, that it was available for use at the face area if one of the face roof bolters was inoperative, and that in fact it was intended to be used as a backup for the No. 7 Section. However, the record does not contain any evidence to support these allegations of the Secretary. Thus, inasmuch as there is no evidence which would tend to establish that the Respondent intended to use the bolter in question inby the last open crosscut, I conclude that a violation of Section 75.503, supra, did not occur (c.f. Secretary v. Solar Fuel Company 3 FMSHRC 1384 (June 1981). Hence the Notice of Contest is allowed.

KENT 87-14-R.

On August 10, 1987, Respondent filed a Motion indicating, in essence, that the violation which had been contested in KENT 87-14-R, had in fact occurred, and that Respondent has tendered payment of the proposed penalty. Accordingly, Docket No. KENT 87-14-R is dismissed.

KENT 87-37 (KENT 87-13-R, Citation No. 2216153)

On September 18, 1986, MSHA Inspector James Franks issued Citation No. 2216153, alleging a violation of 30 C.F.R. § 75.400, and stating as follows:

> Accumulations of loose coal and coal dust (1/2 to 15 inches deep and averaging 15 ft. wide) was present around the tail piece long the belt and under the belt drive of the No. 3 Unit conveyor belt, beginning at the tail piece and extending outby approximately 800 feet.

30 C.F.R § 75.400 provides as follows:

> Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on an electric equipment therein.

MSHA Inspector James Franks testified that on June 18, 1986, when he inspected Respondent's No. 9 Mine, he found coal accumulations that ranged from 1/2 to 15 inches in depth, along and under the No. 3 Unit belt, from the tail piece to the belt drive. Franks said, in essence, that the accumulations appeared to have been in existence for several days, and that the physical appearance of the coal dust was not that of a recent spill. Preshift mine examiner's reports indicate that on September 17, in an examination, between 9:00 p.m. and 12:00 p.m., it was noted that "...No. 3 Unit belt need to be cleaned." In an examination on September 18, between 5:00 a.m. and 8:00 a.m., it was noted that "...No. 3 Unit belt needs cleaned (sic) and dusted."

Franks testified that no one was in the area working on cleaning the belt during his inspection. Grover Fischbeck, Assistant Safety Director for Green River Coal Company, stated, in essence, that he was not present during Franks' inspection, but that the foreman and the man who traveled with Franks told him that the belt was being cleaned prior to Franks' inspection. The latter two personnel were not present at the hearing. Preshift examination records indicate that the area was cleaned sometime during the 8:00 a.m. - 4:00 p.m. shift on September 18, 1986; however, these records do not establish the time of day during which the cleaning began.

The No. 3 Unit was idle on the shift during which Franks conducted his inspection on September 18, 1986. However, Fischbeck indicated it had run the preceding shift and the belt was dirty. (Tr.61).

Franks testified that both the fire suppression spray system and the dust-control water spray system were inoperative at the time of the violation. (These conditions resulted in citations for which civil penalties were paid by the Operator.) Franks testified that on September 18, the return air from No. 9 Mine had .6 of methane gas, and that "...I have reports on at least five methane ignitions at the mine." (Tr. 30). He stated that in his opinion this indicates that the mine liberates gas. Franks testified that this condition could cause or contribute to a mine fire or explosion which would result in lost work days or a restricted duty accident involving six men working on the No. 3 Unit.

Based on the uncontradicted testimony of Franks, I find that on September 18, 1986, there was an accumulation of loose coal approximately 1/2 to 15 inches in depth from the tail piece to the belt drive along and under the No. 3 Unit conveyor belt. Section 75.400, supra, provides, in essence, that coal dust and loose coal shall be cleaned up and not be permitted to accumulate in "active workings." Essentially, it is Respondent's position that because the unit was not in operation when Franks observed the accumulation of coal, that the accumulation can not be considered to have occurred in a "active workings." In this connection, it should be noted that 30 C.F.R. § 75.2(g)(4) defines "active workings" as "...any place in a coal mine where miners are normally required to work or travel;". Applying this definition to the instant case, it is clear that the belt line at the No. 3 Unit is a place where the miners are normally required to work or travel. It thus is irrelevant that the unit was not in operation when Franks made his inspection and issued the citation in question. Thus, I conclude that Respondent did violate Section 75.400, supra.

It is the position of Respondent, as asserted in its Post Hearing Brief, that "...a violation has not occurred as when the belt became dirty, no further mining actives were conducted in the area." There was no testimony offered by either side as to how long the coal accumulation in question had existed before it was cleaned by Respondent. However, Respondent's mine examiner's reports indicate that on September 17, between 9:00 p.m and 12:00 p.m., and again September 18, between 5:00 a.m and 8:00 a.m., it was noted that the belt in question had to be cleaned. Further, it does not appear to be contested that the unit was in operation the shift immediately proceeding the one in which Franks made his inspection. Fischbeck, who was not present at the No. 3 Unit when Franks made his inspection, testified that the foreman and the man who traveled with Franks told him that the belt was being cleaned prior to Franks' arrival at 10:30 in the morning. Rather than rely upon the out of court statements of two person who were not present to testify, I rely upon the testimony of Franks as to what he actually observed. Hence, I conclude, that when Franks made his inspection at 10:30 in the morning on September 18, the coal accumulation at the No. 3 belt line had not been cleaned and was not being cleaned. As such, I conclude that violation of Section 75.400, supra, was as the result of Respondent's "unwarrantable failure." (U. S. Steel Corporation, 6 FMSHRC 1423 (June 1974)).

I find, based upon the testimony of Franks, that there have been at least five methane ignitions at the subject mine. In addition, I adopt Franks' uncontradicted testimony that both the fire suppression spray system and the dust-control water spray system were inoperative at time of the violation. I further find, that the accumulation of coal up to 15 inches in depth under the belt line, did contribute to the possibility of a mine fire or explosion, especially taking into account the above factors. I adopt the opinion of Franks that such a fire or explosion would result in lost work days or restricted duty involving six men working on the No. 3 shift. In this connection, I find, based on Respondent's mine examiner's reports, and the testimony of Fishbeck, that the unit in question had been in operation the shift prior to Franks' inspection and that the belt area had an accumulation of loose coal or coal dust. As such, I find that the violation herein was significant and substantial (see Mathies Coal Company 6 FMSHRC 1 (January 1984)).

The Parties have stipulated that the total tonnage at the Green River No. 9 Mine is 2,440,390 tons for the year of 1986. I thus find that the Operator had a large sized business. Documentary evidence indicates that the condition giving rise to the violation herein was cleaned up in the shift in which the violation was first noted. The Order itself was terminated at 9:15 a.m. on September 19, 1986, by Franks who noted that the accumulation of loose coal and coal dust had been cleaned up and the area was rock dusted. Accordingly, I find good faith by the Operator in attempting to achieve compliance. Due to the likelihood of an explosion, and taking into account the history of methane ignitions at the mine as well as the fact that the suppression spray system and the dust-control water spray system were inoperative, I find that the gravity of the violation to be high. I also find that Respondent's negligence was high as, on two previous shifts, it was noted by examiners that the coal in question had to be cleaned. Accordingly, taking into account all the factors in Section 110(i) of the Act, I find that the proposed penalty of $700 is appropriate.

ORDER

It is ORDERED that Docket Nos. KENT 87-13-R and 87-14-R be DISMISSED. It is ORDERED that the Notice of Contest, KENT 87-15-R be allowed, and that Citation No. 2216740 be VACATED. It is further ORDERED that Order No. 2216023 be modified to a Section 104(a) Citation. As modified the Citation is affirmed. It is further ORDERED that the Motion to Approve Settlement in Docket No. KENT 87-67 is GRANTED, and it is ORDERED that Docket No. KENT 87-16-R be DISMISSED.

It is further ORDERED that the Operator pay the sum of $2,200, within 30 days of this Decision, as civil penalties for the violations found herein.

Avram Weisberger
Administrative Law Judge

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 28 1987

ARNOLD SHARP, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. KENT 86-149-D
BIG ELK CREEK COAL CO., INC., Respondent	:	BARB CD 86-49

FINAL ORDER

Appearances: Leon L. Hollon, Esq., Hazard, Kentucky, for the Complainant;
Stephen C. Cawood, Esq., Pineville, Kentucky, for the Respondent.

Before: Judge Fauver

Counsel for Complainant has moved for an Order awarding an attorney's fee, and Respondent has no objection to the proposed fee.

WHEREFORE IT IS ORDERED that:

1. The Motion for an attorney's fee is GRANTED, and Respondent shall pay the attorney's fee of $1,725.00 to Counsel for Complainant within 15 days from the date of this Order.

2. The Decision of July 22, 1987, and the Supplemental Decision of September 15, 1987, along with this Order are hereby made FINAL and constitute my final disposition of this proceeding under section 113(d)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

William Fauver
William Fauver
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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OCT 29 1987

ALFRED DANIELS, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. LAKE 87-46-DM
SOUTHWESTERN PORTLAND CEMENT COMPANY, Respondent	:	

DECISION

Appearances: Mr. William H. Kojola, Kansas City, Kansas, for Complainant; John J. Heron, Esq., Dayton, Ohio, for Respondent.

Before: Judge Fauver

Complainant brought this proceeding under section 105(c) of the Federal Mine Safety and Health Act of 1987, 30 C.F.R. § 801 et seq., contending that he was suspended without pay because of safety complaints made to Respondent and to the Mine Safety and Health Administration, United States Department of Labor. Respondent contends that he was suspended for insubordination, and not because of safety complaints.

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

FINDINGS OF FACT

1. At the time of the hearing, Daniels was a general equipment operator for Southwestern. He had been employed by Southwestern for nine years.

2. At all relevant times, Daniels has been a member of Local Lodge D357, United Cement, Time, Gypsum and Allied Workers Union. The collective bargaining agreement between Southwestern and Local Lodge D357 expired on September 1, 1985. At that time, Southwestern implemented the terms and conditions of its final offer.

3. Southwestern, at all relevant times, has maintained published Plant Rules designed to promote safety and efficiency.

Category I, Rule No. 2 of the Rules provides that insubordination is a dischargeable offense.

4. At some point after September 1, 1985, Daniels was appointed by the president of Local D357 "to turn in safety complaints" in his work area. Daniels was assigned to the North Annex area of Southwestern's plant "on and off" for about a year before his suspension on October 14, 1986.

5. Employee safety complaints and safety suggestions at Southwestern are normally submitted to Ted Weatherhead, Safety Consultant. Weatherhead investigates the complaint or suggestion and, if he deems it appropriate, he prepares a work order for corrective action. The necessary work to remedy the complaint or suggestion is then completed and the work order returned to Weatherhead with a notation that the work has been completed. If known, the initiating employee is then notified that the work has been completed.

6. The safety suggestion or complaint forms, known as safety inspection reports, may be filed with the Union or Company Safety Committee, or with the respective foreman. The employee does not have to include his or her name on the report. Southwestern's program is designed to encourage safety suggestions or complaints.

7. Since September 1, 1985, approximately 100 safety complaints have been filed at Southwestern's Fairborn plant. Daniels has filed more complaints than any other employee, but numerous other employees have also filed safety complaints and suggestions. Safety complaints are not kept in an employee's personnel file.

8. Many safety complaints by Daniels were responded to and remedied by Southwestern. In August 1986, eight work orders initiated by Daniels were completed by Southwestern.

9. At least 43 additional safety work orders were initiated by 19 other employees of Southwestern between June and September 1986, including 14 work orders initiated by David Gullett, Vice-President of Local D357. In each case, the work requested was completed by Southwestern.

10. There has been no contention or evidence that any other employee of Southwestern has been disciplined or otherwise discriminated against because of the filing of safety complaints or suggestions.

11. Although a new collective bargaining agreement has not been reached, Southwestern and Local D357 have established a

Joint Safety and Health Committee for the purpose of jointly considering, inspecting, investigating and reviewing health and safety conditions and practices. The Committee also investigates accidents and recommends corrective measures to eliminate unhealthful or unsafe conditions. The Committee meets at least once a month.

12. Daniels has contacted OSHA or MSHA several times concerning perceived safety problems. In August of 1986, Daniels made a safety complaint to OSHA regarding alleged hazards at the North Annex. Daniels' name does not appear on the complaint filed with OSHA.

13. OSHA transferred the above complaint to MSHA. MSHA inspector Tom Kenney conducted an inspection of Southwestern's facility on September 8-9, 1986. Four section 104(a) citations were issued during that inspection.

14. On or before December 4, 1986, 14 employees of Southwestern filed a written complaint with MSHA requesting an inspection of Southwestern because of alleged unsafe and hazardous conditions. A copy of this complaint was sent to Gary Leasure, Director of Industrial Relations for Southwestern. A citation was issued by MSHA on December 4, 1986. On December 11, 1986, a Company-Union Safety Committee meeting was held to discuss and attempt to resolve that citation. None of the employees signing that complaint were disciplined because of filing the complaint.

15. For several months before his suspension, Daniels had worked in the North Mill area of the plant. On October 13, 1986, Daniels returned to the North Annex. Glenn Parker was the foreman in charge of cleaning the silos in the North Annex. Parker had previously worked as a foreman at Southwestern's Odessa, Texas facility. On July 8, 1986, he began working as a shift supervisor in the North Annex, and became the foreman in charge of cleaning the silos in early September. Daniels had not worked for Parker before October 13, 1986, and as of that date Parker was unaware of any safety complaints filed by Daniels.

16. Between 7:00 and 7:30 a.m. on October 13, 1986, Parker assigned Daniels to work with the maintenance crew on the screw conveyor on the north side of the silos. Daniels accepted this assignment without questioning Parker's status as his foreman. Later in the morning, Parker began to discuss an absenteeism problem with a temporary employee, Steve Marshall. Daniels interrupted and erroneously informed Marshall that Marshall did not have anything to worry about and that temporary employees were not subject to the Company's point system for absenteeism.

17. Later in the morning, Parker again talked with Marshall regarding Marshall's absenteeism. Once again, Daniels intervened and incorrectly informed the employee that the point system did not apply to temporary employees. At this time, Marshall left the area and returned to his job. Parker then approached Daniels and informed him that he wanted to work together with Daniels and "get off to a good start." He did this because Daniels had interfered with Parker's supervising of Marshall. Daniels then told Parker:

> A. [By Parker] He let me know that he didn't have to cooperate with me; that he didn't have to work with me; that he was assigned to work for me, not with me.
>
> I told him we need to work together, because it will work better that way.
>
> Q. Did he use any profanity to you?
>
> A. Yes, he did.
>
> Q. What did he way?
>
> A. He told me he was an asshole and he was a mother-fucker, and he was all this stuff, and that he didn't have to work with me; and that he would not cooperate with me, and he would fuck with me as much as he could.
>
> Q. What did you do then?
>
> A. I tried to explain the problem that we had and get it straightened out, and I wanted to work things out where we could work together and wouldn't have to be at each other's throat all the time.
>
> To no avail, he wasn't accepting it. He brought it up at that time that he didn't know who his supervisor was. We talked rather loudly I would say.
>
> [Tr. 131, 132.]

18. The only other individual present at the time of this conversation was Tom Anderson, who is a bulk loader at Southwestern and a union member. Anderson was on his way to the pump room when he ran into Parker and Daniels. Anderson's testimony and recollection of the conversation between Parker and Daniels is entirely consistent with that of Parker.

19. After this conversation, Parker approached Roy Garman, with Daniels, concerning Daniels's allegation that he did not

know who his supervisor was. Garman, who was foreman of the pack house and Daniels' previous supervisor, informed Daniels that Daniels was working for Parker.

20. At no time during his heated conversation with Parker did Daniels raise a safety issue with Parker. Parker had no knowledge of Daniels' prior safety complaints. Shortly after their exchange, Daniels threatened Parker with filing an unfair labor practice charge because temporary employees were performing Daniels' job of pumping cement. Parker indicated that he would check on this matter.

21. Parker then met briefly with Gary Leasure, Director of Industrial Relations, and Ted Stute, Plant Manager. Stute told Parker to return Daniels to his job of pumping cement, Parker did so. No unfair labor practice charge was filed about this issue.

22. During his meeting with Leasure and Stute, Parker told Leasure and Stute about Daniels' interference with Parker's supervision of Marshall and Daniels' abusive language towards Parker. Because Leasure and Stute were going to a meeting, Leasure told Parker that they would discuss the matter later that day. Later that day, Leasure asked Parker to think about the events overnight and meet with Leasure the first thing in the morning, on October 14, 1986.

23. At 8:00 a.m. on October 14, 1986, Parker met with Leasure and Garman. Parker described in detail what Daniels had said and done on October 13th. At that time, Leasure prepared a typed statement of the events as described by Parker. Parker indicated that he thought disciplinary action should be taken in accordance with plant rules. Following Parker's comments and Leasure's review of Daniels' personnel file, Leasure made the decision to suspend Daniels pending discharge.

24. On October 14, 1986, at about 9:30 a.m., Daniels was suspended pending discharge pursuant to Category I, Rule No. 2 of Southwestern's Plant Rules specifying insubordination as a dischargeable offense and pursuant to the management rights clause of the implemented contract authorizing discipline for just cause.

25. At the time the decision was made, on October 14, 1986, to suspend Daniels pending discharge, Leasure and Parker were unaware that MSHA's inspection of Southwestern in September was the result of an employee complaint. They were also unaware of any prior safety complaints by Daniels.

26. At the time Daniels was informed of his suspension, he was given a disciplinary form setting forth the reason for the

discipline. Attached was a typed statement prepared by Leasure, which had been signed by Parker and Anderson. Under "Employee Remarks" Daniels wrote "FYFO," known by employees to mean "fuck your final offer."

27. At the time he was informed of his suspension, Daniels was told to leave company property, but he proceeded to Leasure's office, attempting to use the telephone and creating a disruption. He then slammed the phone on Parker's finger. No disciplinary action was taken as a result of this conduct.

28. On October 15, 1986, Leasure and Stute met with Daniels and the Union Committee concerning Daniels' suspension. Daniels was given the opportunity to present his side of the story. Leasure subsequently interviewed two witnesses identified by Daniels and the Union. These interviews were witnessed by Union representative R. Lykins.

29. At no time during Leasure's meetings with Daniels on October 14 and 15, 1986, did Daniels make any reference to safety complaints, a safety inspection, or MSHA inspection. Leasure, who commenced employment at Southwestern on September 15, 1986, was unaware of any safety complaints by Daniels until this matter was first raised by the Union in the meeting on October 15, 1986.

30. On October 22, 1987, Leasure notified Daniels and James Cantrell, the president of Local D357, that Daniels would be given a 60-day disciplinary layoff as a result of Daniels' violation of the Plant Rules and pursuant to the management rights clause of the implemented contract. Leasure indicated that threats to and intimidation of a foreman would not be tolerated and that Daniels had been previously warned of his poor attitude. The 60-day layoff was the recommendation of Leasure, which was accepted by Plant Manager Stute and Division Vice-President Strautman.

31. Leasure's decision to suspend Daniels for 60 days was based on his finding of insubordination -- a plant rule violation and dischargeable offense -- and Daniels' prior disciplinary record as contained in Daniels' personnel file.

32. Leasure observed the following items in Daniels' personnel file when he reviewed the file before deciding to suspend him pending discharge:

(a) a June 24, 1986 memorandum from W. H. Strautman, Division Vice-President (Tr. 268), documenting an instance in which Strautman and a potential buyer, while touring the North Annex, found Daniels eating his lunch outside the mill building. When Strautman told

Daniels that he was not permitted to leave his post and should eat inside where he could observe the control panels, Daniels became irritated and stated that he didn't want to eat there. After Strautman again reminded Daniels of his job responsibility, Daniels stated, "It won't do any good; this place is a disaster and never will be anything else." The buyer noted Daniels' "very poor attitude." Strautman indicated that this incident was typical of the attitude displayed by Daniels during Strautman's visits to the North Annex during the past month (R-22).

(b) a July 7, 1986 memorandum from Plant Manager Stute to Ken Herr regarding a July 1, 1986, meeting of Stute, Daniels and Dave Gullett regarding Daniels' poor attitude. Daniels was informed that the Company needed his cooperation and would not put up with a poor attitude in the future. Stute also indicated that Daniels would be working with a new foreman and that Stute wanted Daniels to get off to a good start (R-23).

(c) an August 18, 1986 memorandum from Lloyd Steinkamp, Daniels' supervisor at the time, detailing Daniels' refusal to obey a work order by Steinkamp on that date. Daniels responded to the order "do what you have to." Daniels was sent home for the day as discipline for this misconduct (Tr. 224, 239; R-17).

(d) an August 19, 1986 memorandum from Lloyd Steinkamp regarding an altercation between Daniels and another employee (R-18).

33. On October 27, 1986, Daniels filed a charge of discrimination with MSHA . On February 18, 1987, following its investigation of the charge, MSHA found no violation of section 105(c) of the Act.

34. On December 1, 1986, Daniels filed an unfair labor practice charge with the National Labor Relations Board alleging that his suspension was the result of his union activities and the filing of safety complaints. On January 5, 1987, following its investigation of the charge, the NLRB dismissed the charge.

This dismissal was sustained upon Daniels' appeal to the Office of the General Counsel, NLRB.

DISCUSSION WITH FURTHER FINDINGS

The issue in this proceeding is whether Daniels was discriminatorily suspended, contrary to the provisions of section 105(c) of the Act. 1/

The burdens and allocations of proof under section 105(c) are now well-settled. A complainant bears the initial burden of establishing a prima facie case of discrimination. In this regard, he bears the burden of production and proof in establishing that (1) he engaged in protected activity and (2) the adverse action was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2799 (1980), rev'd on other grounds sub nom., Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817 (1981). See also: Hall v. Clinchfield Coal Co., 8 FMSHRC 1624, 1628 (1986). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. If the operator cannot rebut the prima facie case in this manner, it may nevertheless affirmatively defend by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action in any event for the unprotected activity alone. Smith v.Reco, Inc., 9 FMSHRC 992, 994 (1987); Pasula, 2 FMSHRC at 2799-2800; Robinette,

1/ Section 105(c) provides, in pertinent part:

> (c)(1) No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment . . . has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine . . . or because 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.

3 FMSHRC at 817-18. See also: Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983). The ultimate burden of persuasion does not shift from the complainant. Robinette, 3 FMSHRC at 818, n.20; Boich, 719 F.2d at 195-96. Allegations of general unfairness, or inequities in the employment are not sufficient for relief under the Act. Alexander v. Freeport Gold Co., 9 FMSHRC 1112, 1121 (1987) (Judge's decision).

As noted above, an essential element of Daniels' prima facie case is that his suspension was motivated in part by his safety complaints. Pasula; Robinette. Stated otherwise, a complainant must initially establish some nexus between his protected activity and the adverse action taken against him. A failure to establish such nexus necessarily results in the dismissal of a complaint. See e.g., Hall, 8 FMSHRC at 1630; Cox v. Pammlid Coal Co., 9 FMSHRC 435, 524-25 (1987) (ALJ), review denied (April 1987); Holcomb v. Colony Bay Coal Co., 8 FMSHRC 1077, 1080-81 (1986) (ALJ); Hutchinson v. Ida Carbon Coal Co., 7 FMSHRC 2247, 2251 (1985) (ALJ).

In analyzing an operator's motivation with respect to an adverse personnel decision, the Commission has noted that "the operator's knowledge of the miner's activity is probably the single most important aspect of a circumstantial case." Secretary ex rel. Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510 (1981), rev'd on other grounds sub nom., Donovan ex rel. Chacon v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983). In light of the basic underlying issue of motivation, knowledge by the relevant decision-makers of the miner's protected activity is crucial.

Complainant has not shown by a preponderance of the evidence that his suspension was motivated in any part by protected activity -- his safety complaints to the Company or to MSHA. Rather, Respondent has shown by a preponderance of the evidence that Daniels' suspension was motivated only by his insubordinate conduct towards his supervisor, Glenn Parker, and Daniels' prior disciplinary record. In this regard, neither of the two individuals primarily responsible for the suspension, Parker and Gary Leasure, was aware of Daniels' prior safety complaints to the Company or to MSHA when Daniels was suspended pending discharge.

Southwestern has demonstrated by a preponderance of the credible evidence that it would have taken the adverse action against Daniels for the unprotected activity alone -- i.e., for Daniels' violation of Southwestern's Plant Rules and management prerogative clause forbidding insubordination and protecting the operator's right to operate its business.

In the Hall case, supra, the Commission affirmed the Administrative Law Judge's denial of a section 105(c) claim based on the fact that there had been no showing that the adverse actions against the miner were motivated in any part by the miner's protected activity and, accordingly, no establishment of a prima facie case. The Commission noted that:

> With respect to Hall's discharge, the judge found that Pendergast [Manager of Industrial Relations] had no knowledge of Hall's protected activity [safety concerns] at the time he prepared the notice of discharge and that he had not consulted with other mine officials prior to terminating Hall [citation omitted] . . .
>
> [8 FMSHRC at 1629.]

Similarly, in Cantrell v. Gilbert Industrial, 4 FMSHRC 1164 (1982), Judge Broderick held that the complainant failed to show by a preponderance of the evidence that she was laid off due to her complaint to MSHA (which resulted in the issuance of a citation to the operator). Judge Broderick stated, in pertinent part:

> I accept the evidence that the persons responsible for her layoff on May 6, 1981, were unaware of the report to MSHA, the inspection, and the subsequent citation. There is not evidence linking any adverse action against Complainant to her call to MSHA officials. Thus, Complainant has failed to establish the basic requirement for liability under 105(c): a nexus between the adverse action and protected activity under the Mine Act [citations omitted].
>
> [4 FMSHRC at 1166.]

In Johnson v. Eastern Associated Coal Corp., 4 FMSHRC 398, 399 (1982), Judge Melick likewise dismissed the § 105(c) complaint where there was not sufficient evidence to prove that the individual who made the decision to discharge the complainant had any knowledge of the complainant's safety complaints. See also: Paugh v. Mettiki Coal Corp., 8 FMSHRC 829, 880-81 (1987) (no evidence that safety complaints were discussed in meeting where decision made to discharge miner); Cox v. Pammlid Coal Co., supra, at 519-20 (company president had no knowledge of complainant's journal of allegedly unsafe conditions and violations of law); Everett v. Industrial Garnet Extractives, 6 FMSHRC 998, 1001 (1984) (no evidence that foreman who discharged complainant had knowledge of complainant's affidavit alleging safety violations).

In the case at bar, the evidence demonstrates that Glenn Parker, Daniels' immediate supervisor on October 13, 1986, and Gary Leasure, Director of Industrial Relations, were the individuals ultimately responsible for the 60-day suspension of Daniels. On October 13, 1986, Parker notified Leasure of Daniels' abusive language and insubordinate conduct toward Parker earlier that day. (Tr. 1162-63, 165-66.) On the morning of October 14, 1986, Parker detailed Daniels' actions to Leasure and indicated that he believed disciplinary action should be taken in accordance with the Plant Rules. (Tr. 172, 251.) After Leasure and Parker discussed the matter and Leasure reviewed Daniels' personnel file, the decision was made to suspend Daniels pending discharge. (Tr. 251.) At approximately 9:30 a.m., on October 14, 1986, Daniels was notified of his suspension pending discharge. (Tr. 19, 251; R-19.) Leasure subsequently recommended the decision not to discharge Daniels, but to issue a 60-day suspension. (Tr. 266-67, 316.) A critical point is that, at the time the decision was made to suspend Daniels pending discharge, neither Parker nor Leasure was aware of Daniels' prior safety complaints to the Company or to MSHA.

Parker commenced employment at Southwestern's Fairborn facility on July 8, 1986. Prior to that time, he had worked as a union laborer and foreman at Southwestern Odessa, Texas facility. On July 8, 1986, he began as Shift Supervisor of the North Annex; at the beginning of September 1986, he became the foreman in charge of cleaning the silos in the North Annex. Parker had worked with Daniels on only one occasion before October 13, 1986, when their respective shifts overlapped. Parker indicated that there were no problems at that time. Most significantly, as of October 13 and 14, 1986, Parker was unaware of any safety complaints by Daniels. Daniels' previous supervisor, Lloyd Steinkamp, had not mentioned any safety problems with Daniels. Steinkamp had commenced employment with Southwestern in June 1986, and had supervised Daniels from July 1986 to October 1986. Although Parker had heard that other supervisors had had problems with Daniels' attitude and poor cooperation, Parker had not been informed of any safety grievances or safety complaints by Daniels. Moreover, although he was aware of MSHA's inspection in September 1986, Parker had no knowledge that the inspection was initiated by a complaint. In fact, Parker had no knowledge of Daniels' safety complaints even as of October 22 when the 60-day lay-off was issued.

Gary Leasure, the individual ultimately responsible for the 60-day suspension of Daniels, had no knowledge of any safety complaints by Daniels until after Leasure suspended Daniels pending discharge.

Leasure commenced his employment with Southwestern as Director of Industrial Relations on September 15, 1986 -- less than one month before Daniels' suspension. As noted, Leasure met with Parker on the morning of October 14, 1986, regarding Parker's encounter with Daniels the previous day. Parker informed Leasure in detail what had occurred between him and Daniels and recommended disciplinary action against Daniels. At about 9:30 a.m., on October 14, following Parker's detailed explanation of the events of October 13 and Leasure's review of Daniels' personnel file, Leasure suspended him pending discharge for violation of Category 1, Rule No. 2 of the Plant Rules and the management prerogative clause. (Tr. 19, 251; R-19.)

Not until the following day, October 15, when Leasure met with Daniels and the Union concerning Daniels' suspension pending discharge, did Daniels' prior safety complaints arise. Until that time, Leasure was unaware of any safety complaints or grievances by Daniels, and was unaware of MSHA's inspection on September 8 and 9.

Although insubordination is a dischargeable offense under Southwestern's Plant Rules, Leasure recommended only that Daniels be suspended for 60 days. This recommendation was accepted by the Plant Manager and Division Vice-President. Thus, even after the Union informed Leasure of Daniels' prior safety complaints, Leasure recommended discipline less severe than that available under the Plant Rules. This conduct does not indicate discrimination.

Another significant factor to be considered in determining whether an adverse employment decision has been motivated in any part by protected activity is the operator's hostility -- or lack thereof -- toward the protected activity. Chacon, 3 FMSHRC at 2511; Haro v. Magma Copper Co., 4 FMSHRC 1948, 1953 (1982) (Judge's decision), review denied (January 1983).

In Harmon v. Consolidation Coal Co., 9 FMSHRC 549 (1987), the Commission Judge noted, in the course of concluding that the complainant had failed to establish a prima facie case, that management had attended to the complainant's safety complaints. Id. at 573. Likewise, in Brazell v. FMSHRC, 716 F.2d 902 (6th Cir. 1983) (unpublished decision, but reproduced at 3 MSHC 1036 (BNA)), the Sixth Circuit, in affirming that the miner had not established a prima facie case of discrimination, noted, inter alia, that the company acted upon the miner's complaint rather than reacting with hostility.

There is abundant evidence that Southwestern has an active safety program designed to encourage safety complaints and

suggestions and a responsive and cooperative attitude toward them rather than a hostile or retaliatory attitude.

David Gullett, Vice-President and walkaround representative of Local D357, called as a witness by Daniels, indicated that he was unaware of any other employees of Southwestern who have been disciplined or in any way discriminated against because of the filing of safety complaints or grievances. Gullett himself initiated 14 safety work orders in June and July of 1986 (R-9B, R-9C). Of record are 43 work orders initiated by employees of Southwestern in June through September 1986. In each instance, the work order was completed (R-9A, R-9B, R-9C). Also of record are many other safety grievances initiated by employees other than Daniels. There has been no allegation of any retaliatory or adverse action toward any of these employees.

A written complaint to MSHA was signed by 14 employees of Southwestern (R-6). A copy was delivered to Gary Leasure. There has been no adverse action taken against any of the employees signing this complaint as a result of its filing.

As noted, as a matter of practice safety complaints and suggestions are submitted to Southwestern's Safety Consultant, who investigates the complaint or suggestion and prepares an appropriate work order. When corrective work is completed the work order is returned to the Safety Consultant. The safety suggestion slips may be turned into the Union or Company Safety Committee, or to the employee's foreman. The employee does not have to include his or her name on the slip. Southwestern's program is designed to encourage safety suggestions and complaints and to take effective action to improve safety.

Southwestern and Local D357 have established a Joint Safety and Health Committee for the purpose of jointly considering, inspecting, investigating, and reviewing health and safety conditions and practices and investigating accidents, as well as making recommendations to eliminate unhealthful or unsafe conditions. This Committee meets at least once a month and upon request by either the Union or the Company.

I find that there is no evidence that Respondent had a hostile attitude toward the protected activity but, on the contrary, encouraged safety suggestions or complaints and showed a positive attitude toward them.

Apart from the question of whether or not Complainant made a prima facie case of discrimination (and I hold that he did not), I conclude that Southwestern affirmatively proved that it would have suspended him for insubordination alone even if he had never made a safety complaint.

The credible evidence shows that on October 13, 1986, Daniels on two occasions interrupted his supervisor's (Parker) attempts to counsel another employee concerning that employee's absenteeism, and Daniels belligerently contradicted Parker's statements to that employee and interfered with his supervisory duties. (Tr. 128, 130.) When his supervisor took Daniels aside and tried to counsel him to cooperate with him, to avoid employment problems, Daniels belligerently assaulted him verbally in defiant, profane and clearly insubordinate language. During the summer before this verbal assault, Daniels (1) was away from his post without authorization and informed the Division Vice-President, in the presence of a potential customer, that "this place is a disaster and never will be anything else" (R-22); (2) received a warning regarding his poor attitude (R-23); (3) was docked four hours' pay and sent home for his refusal to obey an order from his supervisor (Tr. 224, 239; R-17); and (4) was in an altercation with another employee (R-18).

I credit the testimony of Southwestern's Director of Industrial Relations that Daniels' 60-day suspension was motivated solely by Daniels' insubordination and his prior misconduct as reflected in Daniels' personnel file. (Tr. 266-67.) As noted in an October 22, 1986, letter from Leasure to the president of Local D357, "Daniels blatantly interfered with this right of the Company on October 13, 1986 by making repeated threats to foreman Parker and by trying to intimidate and undermine such foreman to a point of ineffectiveness. Such 'assaults' and agonistic [sic] behavior on management or any other employee cannot and will not be tolerated." (R-21.)

CONCLUSION OF LAW

1. The Commission has jurisdiction in this proceeding.

2. Complainant has failed to meet his burden of proving a violation of § 105(c) of the Act.

ORDER

WHEREFORE IT IS ORDERED that this proceeding is DISMISSED.

William Fauver
William Fauver
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 30 1987

THOMAS W. GODFREY, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. KENT 87-92-D
BIG ELK CREEK COAL COMPANY, Respondent	:	BARB CD 87-08

ORDER OF DISMISSAL

In a conference call on October 26, 1987, between Complainant, Counsel for Respondent, and the undersigned, the Parties indicated that the above case has been fully settled and that the Respondent is to pay Complainant $25,000 as settlement of his claim.

Accordingly, the above case is DISMISSED.

Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

OCT 30 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 87-28-M A.C. No. 42-01661-05504
v.	:	Pioneer Sand & Gravel Pit
PIONEER SAND & GRAVEL COMPANY, Respondent	:	

DECISION

Appearances: James H. Barkley, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Mr. Ronald Savage, Vice President, Pioneer Sand and Gravel Company, pro se.

Before: Judge Cetti

Statement of the Case

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., ("Mine Act"). The Secretary of Labor, on behalf of the Mine Safety and Health Administration, charges the operator of an open pit mine with violating safety standard 30 C.F.R. § 56.11001 which requires that safe means of access must be provided and maintained to all working places. The Secretary charges that safe access was not provided to the work place under the primary trap where a laborer was cleaning up spilled materials while front end loaders were dumping material into the trap.

On July 29 and 30, Mr. James Skinner, a MSHA mine inspector, inspected the Pioneer Sand and Gravel Pit. As the result of that inspection he cited the operator for allegedly violating four mandatory safety standards.

The Secretary of Labor thereafter initiated this proceeding with the filing of a petition for assessment of a civil penalty pursuant to section 110(a) of the Mine Act. Each citation number, date issued, standard alegedly violated, and the Secretary's proposed penalty is as follows:

Citation No.	Date	30 C.F.R. §	Proposed Penalty
2644264	7/30/86	56.12005	$ 74.00
2644265	7/30/86	56.12013	74.00
2644266	7/30/86	56.11001	400.00
2644267	7/30/86	56.9006	20.00

Pioneer Sand & Gravel Company filed a timely answer contesting the existence of all the violations and the amount of the related proposed civil penalties. After notice to the parties, an evidentiary hearing on the merits was held before me on June 11, 1987, at Salt Lake City, Utah.

At the hearing respondent Pioneer Sand and Gravel Company withdrew its notice of contest of three of the four citations and the related proposed penalties so as to leave in contest Citation No. 2644266 which alleges a violation of § 56.1101 and its related proposed civil penalty.

Issues

1. Whether or not there was a failure to provide safe access to a work place as required by 30 C.F.R. 56.11001.

2. If a violation of 30 C.F.R. § 56.11001 is found should the violation be classified as "significant and substantial."

3. The amount of the penalties.

Stipulations

The parties entered into stipulations as follows:

1. Pioneer Sand and Gravel Company, respondent, operates the sand and gravel pit designated "Pioneer Sand and Gravel Pit" located near Kearns, Utah.

2. The respondent in its operation of the Pioneer Sand and Gravel Pit is subject to the provisions of the Mine Act.

3. As the Administrative Law Judge assigned by the Federal Mine Safety and Health Review Commission to hear this case, I have jurisdiction to hear and decide this case.

4. Respondent is a small operator employing approximately 12 employees.

5. Respondent exercised good faith in the abatement of the violations.

6. The proposed penalities would not affect the ability of respondent to continue in operation.

7. During the two year period ending June 29, 1986, respondent had a total of two violations which had an assessed penalty of $20.00 each.

Citation No. 2644266

The citation alleges:

One of the plant operators was cleaning up material under and near the primary trap while two (2) front-end loaders were dumping into the trap intake. The employee was subjected to being hit by large falling rocks. Some of the rocks were 12 inches in diameter. The employee could be fatally injured if hit by one of these rocks. The above situation did not provide the employee with a safe access.

The Regulation

30 C.F.R. § 56.11001 provides as follows:

Safe means of access shall be provided and maintained to all working places.

Review of Evidence and Discussion

The Pioneer Sand & Gravel Pit has a primary crushing operation and a subsequent wash plant. The plant produces sand and aggregate up to two inches in size and sells to both residence and commercial customers.

At the time of the inspection four employees worked at the plant. The employees consisted of two front-end loader operators who dump the sand and gravel into a funnel like trap which funneled the raw material onto the prime conveyor belt below. This belt took the raw material into the plant for processing.

In addition to the two front-end loader operators there was a crusher operator who operates the controls and a laborer.

The employee who allegedly was exposed to the hazard of falling rocks was the laborer who spent 15 to 20 minutes each day cleaning up in an area below the trap next to the conveyor. Using a shovel he cleaned up the fine material and rocks that occasionally spilled off the conveyor belt onto the conveyor's platform floor. The conveyor was waist to chest high. The laborer shoveled the spilled material back on the conveyor belt.

The entrance to the area under the trap was a corridor two or three feet wide. The inspector testified "I couldn't actually see him back in under the trap, but he was working back in there and then progressing." (T. 35). It appeared to the inspector from his point of observation that the laborer did not have safe access to the area where the laborer was working. At the time the two front-end loaders using an elevated roadway, were dumping raw material from the pit into the trap. The inspector stated "it appears that while the loaders were dumping he (laborer) could have been struck by material had the loader not positioned (his load) just right."

However, the inspector did not observe any falling material of any kind. Other than "occasional dust" no rocks or other material spilled over the top rim of the trap.

The agency records indicate that the company abated the alleged violation by instituting a practice of shutting off the power to the conveyor and prohibiting the dumping of material into the trap while the employee was cleaning the spillage in the area below the trap.

Respondent presented evidence that the trap was 10 feet wide and 20 feet long. Half way back it had a solid metal headwall that was 8 1/2 feet high. There was a fluorscent red line about 18 inches below the back side of the trap and the material dumped into the trap was kept 18 inches to two feet below the head wall.

Mr. Savage respondent's vice president testified that it would be "virtually impossible" for a rock to ever come over the rim of the hopper. He also explained that there was approximately 20 feet (horizontally) from the place where the material was being dumped to where the laborer was doing the clean up. In his opinion there was no "danger in any way" to the employuee working below.

Employer presented evidence that due to changing conditions in the pit the cited practice and the entire trap area was discarded in May of 1987. It was not discarded because of any suspected hazard.

During the five year period preceding this citation MSHA inspectors inspected the pit at least twice a year and none noted or commented to respondent about any potential hazard involved in the cited practice.

Although the inspector did not observe any falling material other than occasional dust, it was the Secretary's position that there was a "possibility that in a moment of mental lapse on the part of the operator"of the front-end loader that a load could be dumped in such a manner that rocks would come over the headwall and down on the laborer as he walked underneath the trap to or from a work point.

On the basis of the evidence presented I find that there was a violation and a remote possibility it could result in an injury. However, I find the possibility of such an accident is unlikely rather than a reasonable possibility. I therefore find that there was a violation of 30 C.F.R § 56.11001 but that the violation was not "significant and substantial".

Significant and Substantial Violation

A "significant and substantial" violation is defined in section 104(d)(1) of the Mine Act as a violation "of such nature

as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. § 814(d)(1). A violation is properly designated significant and substantial "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

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

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, the Commission stated:

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

In this case based upon the plant's past history and the evidence presented by respondent it is found that it is unlikely that the hazard contributed to will result in an event in which there is an injury. I therefore find the violation of 30 C.F.R. § 56.11001 was not significant and substantial.

The gravity of the violation is high with respect to the seriousness of the injury which could result if a rock were to fall over the top of the trap and hit an employee. However, the likelihood of such an accident is found to be very low. This finding is consistent with the 21 year history of no injury from falling rocks while using the practice and procedure for which the citation was issued. The employer's negligence is evaluated

as low. I accept the stipulations of the parties with respect to the remaining statutory criteria set forth in section 110(i) of the Mine Act.

I have considered the six statutory penalty criteria set forth in Section 110(i) of the Mine Act, and find that the appropriate penalty for the violation cited in Citation No. 2644266 is $75.00, and with respect to Citation Nos. 2644264, 2644265 and 2644267 the appropriate penalties are the penalties proposed by the Secretary, which are $74.00, 74.00 and 20.00 respectively.

Based upon the entire record the stipulations and the findings made in the narrative portion in this decision the following conclusions are entered:

CONCLUSIONS OF LAW

1. The Pioneer Sand & Gravel Pit operated by Pioneer Sand & Gravel Company is subject to the provisions of the Mine Act.

2. The Commission has jurisdiction to decide this case.

3. Respondent violated 30 C.F.R. § 56.11001; the violation was not significant and substantial; a civil penalty of $75 is assessed.

4. Respondent violated 30 C.F.R. § 56.12005.

5. Respondent violated 30 C.F.R. § 56.12013.

6. Respondent violated 30 C.F.R. § 56.9006.

7. The Secretary's proposed penalties for the violations found in findings 4, 5, and 6 are appropriate under the criteria set forth in section 110(i) of the Act.

ORDER

1. Citation No. 2644266 as modified by deleting the characterization of the violation as significant and substantial is affirmed.

2. Citation No. 2644264 and the proposed $74 are affirmed.

3. Citation No. 2644265 and the proposed $74 penalty are affirmed.

4. Citation No. 2644267 and the proposed $20 penalty are affirmed.

Pioneer Sand and Gravel Company is ordered to pay within 40 days of the date of this decision a civil penalty of $243.00.

August F. Cetti
Administrative Law Judge

Distribution:

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