

OCTOBER 1994

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OCTOBER 1994

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

Secretary of Labor, MSHA v. Peabody Coal Company, Docket No. WEVA 94-392.
(Request for Relief from Final Order)

Review was denied in the following case during October:

Secretary of Labor, MSHA v. The Pit, Docket No. WEST 94-516-M.
(Request for Relief from Final Order)

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 25, 1994

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket Nos. KENT 93-614
	:	KENT 93-615
v.	:	KENT 93-646
	:	KENT 93-884
	:	
MANALAPAN MINING COMPANY,	:	
INC.	:	

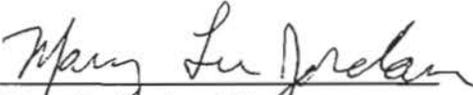
ORDER

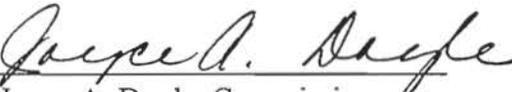
In this consolidated civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (1988) ("Mine Act"), the Secretary of Labor ("Secretary") and Manalapan Mining Company, Inc. ("Manalapan") have filed with the Commission a joint motion to approve settlement of all matters contained in Docket Nos. KENT 93-614 and 615. Petitioner Manalapan has also filed a motion to voluntarily dismiss its appeal of these cases.

On September 14, 1994, the Commission granted Manalapan's petition for discretionary review of the August 8, 1994, decision of Administrative Law Judge Avram Weisberger in Docket Nos. KENT 93-614 and 615.¹ In their joint motion to approve settlement, the parties have agreed to civil penalties lower than those assessed by the judge. The parties have further noted that, in assessing the civil penalties, "the judge did not discuss the six statutory penalty criteria with respect to each violation." Motion at 3.

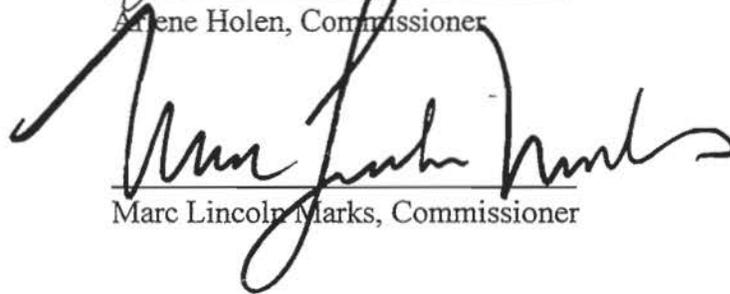
¹ The Commission granted the Secretary's petition for discretionary review of the judge's decision in Docket Nos. KENT 93-646 and 884. These cases remain on review with the Commission.

Docket Nos. KENT 93-614 and 615 are remanded to the judge, who shall rule on the joint motion to approve settlement. If the joint motion is denied and Manalapan wishes to pursue its appeal, it shall so advise the Commission within 30 days of the judge's decision.


Mary Lu Jordan, Chairman


Joyce A. Doyle, Commissioner


Arlene Holen, Commissioner


Marc Lincoln Marks, Commissioner

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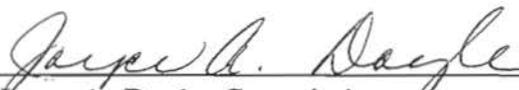
challenging MSHA's proposed civil penalty within the 30-day period set forth in section 105(a), due to confusion among temporary employees in its legal department regarding procedures for contesting proposed civil penalties. The Commission has held that in appropriate circumstances and pursuant to Fed. R. Civ. P. 60(b) ("Rule 60(b)"), it possesses jurisdiction to reopen uncontested assessments that have become final under section 105(a). Jim Walter Resources, Inc., 15 FMSHRC 782, 786-89 (May 1993); see also, Jim Walter Resources, Inc., 16 FMSHRC 1209, 1210 (June 1994). Relief from a final order is available in circumstances such as a party's mistake, inadvertence, or excusable neglect.

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

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



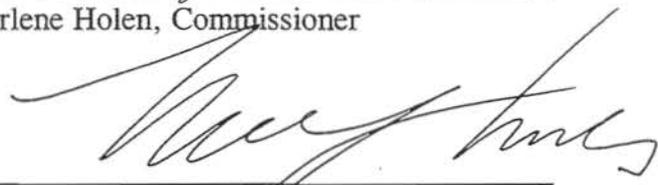
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 28, 1994

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 :
 :
v. : Docket No. WEST 94-516-M
 : A.C. No. 24-01958-05503
THE PIT :

BEFORE: Jordan, Chairman; Doyle, Holen and Marks, Commissioners

ORDER

BY THE COMMISSION:

In this matter arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act"), The Pit ("Pit") filed with the Commission a request seeking to reopen an uncontested civil penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). The Secretary of Labor ("Secretary") filed a response opposing the granting of Rule 60(b) relief.

Section 105(a) of the Mine Act requires that, after issuing a citation or withdrawal order for an alleged violation, the Secretary notify the operator of "the civil penalty proposed to be assessed." 30 U.S.C. § 815(a). Section 105(a) allows the operator 30 days to contest the proposed penalty and further provides that, if the operator fails to contest it, the assessment "shall be deemed a final order of the Commission and not subject to review by any court or agency." Id.

Pit failed to timely file a "Green Card" notice of contest challenging the proposed civil penalty assessment by the Department of Labor's Mine Safety and Health Administration ("MSHA"). Pit states that it first became aware of this matter when it received a letter dated March 30, 1994, from MSHA's Office of Assessments requesting payment of the penalty. Pit asserts that this letter arrived after the time for contesting the proposed civil penalty assessment had passed, that MSHA had not sent the notice of violation to Pit's current address, that confusion resulted because of another MSHA proceeding involving Pit, and that Pit's representative was out of the country during the time for contest. Pit essentially asks the Commission to reopen this matter pursuant to Fed. R. Civ. P. 60(b) ("Rule 60(b)") so that it may file its notice of contest. The proposed penalty has not been paid.

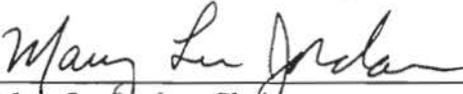
The Commission has held that, in appropriate circumstances and pursuant to Rule 60(b), it possesses jurisdiction to reopen uncontested assessments that have become final under section 105(a). Jim Walter Resources, Inc., 15 FMSHRC 782, 787-90 (May 1993). Rule 60(b) relief from a final order is available in circumstances such as a party's mistake, inadvertence, or excusable neglect. Requests to reopen under Rule 60(b) must be made within a reasonable time and are committed to the sound discretion of the judicial tribunal in which relief is sought. See, e.g., Randall v. Merrill Lynch, 820 F.2d 1317, 1320-21 (D.C. Cir. 1987), cert. denied, 484 U.S. 1027 (1988). The Court stated in Randall: "Rule 60(b) is the mechanism by which courts temper the finality of judgments with the necessity to distribute justice. It is a tool which ... courts are to use sparingly" 820 F.2d at 1322. See also Tolbert v. Chaney Creek Coal Corp., 12 FMSHRC 615, 619 n.1 (April 1990).

Because Pit failed to contest the proposed assessment within 30 days, it became a final order of the Commission on February 12, 1994. Pit claims that it had no notice of the instant penalty assessment until it received MSHA's March 30, 1994, letter and complains that the Secretary served the notice at an incorrect address. Under 30 C.F.R. § 41.12, it is Pit's responsibility to inform MSHA of its correct address and Pit must bear the consequences of its failure to do so. The Secretary notes that receipt of the proposed assessment was acknowledged on January 13, 1994, by an individual who is listed on Pit's Legal Identity Report as Pit's bookkeeper. Thus, service at the address Pit had registered with MSHA provided Pit with notice of the proposed penalty assessment on January 13, 1994.

Similarly, we are not persuaded that the absence of Pit's owner from December 20, 1993, through March 15, 1994, excuses Pit's failure to challenge the Secretary's penalty assessment. Pit states that, during this period, it requested and received an extension of time to respond to a proposed penalty assessment in another case. Thus, the owner's absence was no impediment to a timely response from Pit to the proposed penalty assessment in this case.

We also find Pit's assertion that confusion resulted from the Secretary's proposal of civil penalties in another case during the same time period to be lacking in merit. Even if confusion may have existed at the start of these proceedings, Pit explicitly acknowledged, in a letter to MSHA dated April 5, 1994, the existence of two separate cases. Although MSHA declined, by letter dated April 25, 1994, to process Pit's untimely penalty contest, Pit failed to request relief from the Commission until June 27, 1994, more than two months later. Accordingly, we conclude that Pit's request does not justify relief under Rule 60(b).

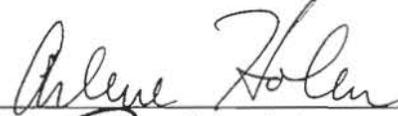
For the foregoing reasons, Pit's request is denied.



Mary Lu Jordan, Chairman



Joyce A. Doyle, Commissioner



Arlene Holen, Commissioner



Marc L. Marks, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 31, 1994

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 :
v. : Docket No. KENT 93-184
 :
PYRAMID MINING INCORPORATED :
 :

BEFORE: Jordan, Chairman; Doyle and Holen, Commissioners¹

DECISION

BY THE COMMISSION:

This civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act"), presents the issue of whether Pyramid Mining Incorporated ("Pyramid") violated 30 C.F.R. § 77.1505 by failing to block auger holes.² Administrative Law Judge Avram Weisberger determined that Pyramid was not required to block the holes because they had not been "abandoned" within the meaning of the standard. 15 FMSHRC 1950 (September 1993) (ALJ). For the reasons that follow, we vacate the judge's decision and remand.

I.

Factual and Procedural Background

Pyramid owns the Hall No. 2 Mine, a surface coal mine in Ohio County, Kentucky.

¹ Commissioner Marks assumed office after this case had been considered at a decisional meeting and a decision drafted. In light of these circumstances, Commissioner Marks elects not to participate in this case.

² 30 C.F.R. § 77.1505 provides that, "[a]uger holes shall be blocked with highwall spoil or other suitable material before they are abandoned."

The mine is "L"-shaped, with sections A and C at the ends and section B between the two. A haul road is located around the perimeter of the pit and a ramp in section A is used to transport coal by truck from the pit to a preparation plant.

In November 1991, Pyramid's contractor began mining the highwall in Section A: A continuous highwall miner, or auger, approximately 55 feet wide and 28 feet high, extracted coal by drilling holes into the highwall, approximately 4 feet high, 10 to 11 feet wide, and up to 420 feet long. Although Pyramid had instructed its contractor to fully penetrate the auger holes, maximum penetration was not reached if adverse geological conditions were encountered or mechanical problems developed. 15 FMSHRC at 1952; Tr. 48-49.

On March 20, 1992, when Darold Gamblin, an inspector from the Department of Labor's Mine Safety and Health Administration ("MSHA"), inspected the mine, the auger was mining section C and moving along the highwall toward section B. Inspector Gamblin observed 35 to 40 unsealed auger holes in section A and concluded that they had been abandoned because section A was no longer being mined. 15 FMSHRC at 1951; Tr. 30-31. He believed that the auger holes presented hazards associated with high methane and low oxygen levels and with unsupported roof and that such hazards could be fatal to anyone entering the holes. *Id.* Inspector Gamblin also believed that, because the pit was unguarded and there were no barriers or warnings around the holes, a possibility existed that someone could enter the pit and the auger holes. Tr. 20, 30. He had seen children playing in a residential area approximately one-quarter mile from the mine. Tr. 30. Accordingly, he issued a citation pursuant to section 104(a) of the Act, 30 U.S.C. § 814(a), alleging a significant and substantial ("S&S") violation of section 77.1505.

A few days later, Pyramid's safety and reclamation supervisor, James Michael Hollis, informed MSHA that Pyramid did not consider the cited auger holes to be abandoned and that it intended to redrill them to "full penetration." Tr. 75-76. Nonetheless, in order to abate the citation, Pyramid filled the mouths of the holes with spoil. Pyramid contested the citation and the matter was heard by Judge Weisberger.

The judge concluded that Pyramid had not violated section 77.1505 by failing to block the auger holes because the holes had not been "abandoned" within the meaning of the standard. The judge relied on the dictionary definition of "abandoned," i.e., "to cease to assert or exercise an interest, right or title to esp[ecially] with intent of never again resuming or [re]asserting it." 15 FMSHRC at 1952 (citations omitted). He reasoned that the record did not establish when Pyramid had ceased working on the cited holes and credited the testimony of Pyramid witnesses that Pyramid intended to resume drilling them. *Id.* Accordingly, the judge concluded that the Secretary had not established a violation and vacated the citation. *Id.* at 1953.

The Secretary filed a petition for discretionary review challenging the judge's decision, which the Commission granted.

II.

Disposition

The Secretary argues that auger holes are "abandoned" within the meaning of section 77.1505 when "the evidence shows that the operator is no longer present at the site, and does not show that the operator intends to return to the site in the near future." S. Br. at 5. He contends that Pyramid was required to block the holes because they had been left unmined for three to five months, there was no operator activity in section A, that section was not visible from the nearest mining activity, there were no warning signs placed around the holes, and Pyramid had no identifiable intent to return to section A in the near future. S. Br. at 8. The Secretary asserts that his interpretation of the standard is entitled to deference and that the judge's interpretation renders the safety purpose of the standard meaningless.

Pyramid responds that the judge correctly considered the plain meaning of section 77.1505 and that an operator's intent is the governing factor in determining abandonment. Pyramid contends that it had not intended to abandon the holes but, rather, intended to redrill them to obtain full penetration.

The term "abandoned" is not defined in Part 77, nor does the regulatory history of the standard elucidate its intended meaning. See, e.g., 36 Fed. Reg. 9364 (May 22, 1971). It is recognized that, in the absence of express definitions, terms in regulations should be defined according to their "commonly understood definitions." See, e.g., Tenneco Oil Co. v. Federal Energy Admin., 613 F.2d 298, 302 (Temp. Emer. Ct. App. 1979); Colorado Dep't of Labor & Emp. v. U.S. Dep't of Labor, 875 F.2d 791, 797 (10th Cir. 1989). In interpreting such terms, however, reviewing bodies "cannot concentrate on individual terms and ignore a consideration of the context in which the term appears." Colorado Dep't of Labor & Emp., 875 F.2d at 797 (citations omitted). A safety standard must be interpreted to effectuate its purpose and to further the objectives of the statute it implements. See Dolese Bros. Co., 16 FMSHRC 689, 693 (April 1994), quoting Emery Mining Co. v. Secretary of Labor, 744 F.2d 1411, 1414 (10th Cir. 1984); Arch of Kentucky, Inc., 13 FMSHRC 753, 756 (May 1991).

The legislative histories of the Mine Act and the Federal Coal Mine Health and Safety Act of 1969 recognize the hazards presented by abandoned mining areas and address the health and safety of non-miners as well as miners. See 123 Cong. Rec. 19,960 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 997 (1978); S. Rep. No. 411, 91st Cong., 1st Sess. 85 (1969), reprinted in Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Part I Legislative History of the Federal Coal Mine Health and Safety Act of 1969, at 211 (1975). The conditions giving rise to the subject citation, unblocked holes, could have posed a significant hazard to anyone entering them.

The judge, relying on a dictionary definition, determined that the holes had not been "abandoned" because Pyramid asserted an intent to resume drilling them. We agree with the Secretary that the judge's reliance on a narrow meaning of "abandoned" thwarts the standard's protective purpose and does not serve the safety objectives recognized in the legislative history. Cf. Consolidation Coal Co., 15 FMSHRC 1555, 1557 (August 1993). Under the judge's interpretation, auger holes may remain unblocked based entirely on an operator's asserted intent to resume mining them at an unspecified future time. Holes could remain unsealed indefinitely if an operator expressed an intent to attempt extraction of the additional coal an auger were capable of extracting.³

Moreover, the judge failed to give adequate consideration to the context in which the term "abandoned" appears. Section 77.1505 expressly requires that auger holes shall be blocked before, rather than after, they are abandoned. Accordingly, we conclude that the judge misconstrued section 77.1505.

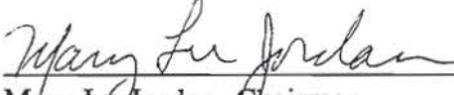
The standard suggests that auger holes be blocked at the earliest reasonable time, taking into account the hazards associated with open holes as well as an operator's mining intentions. A determination of whether an operator has violated section 77.1505 requires consideration of the following factors, in addition to the operator's statement of intent: the existence of any active mining in the area in question, the period of time that had passed since holes were created in the initial coal extraction, whether the operator has taken action to resume drilling, and the hazards presented by the holes.

³ Although Pyramid initially planned to mine lengths of 420 feet, it had begun considering the possibility of mining up to 1,000 feet. Tr. 70.

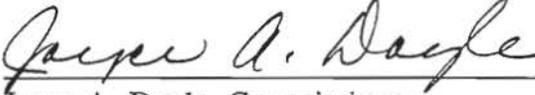
III.

Conclusion

For the reasons set forth, we vacate the judge's determination that Pyramid did not violate section 77.1505 and remand for reconsideration consistent with this decision. On remand, the judge should consider whether Pyramid violated the standard by failing to block the cited holes at the earliest reasonable time, taking into consideration the factors set forth above. He may take such additional evidence as he deems necessary. If the judge determines that Pyramid violated the standard, he should also consider whether the violation was significant and substantial and assess an appropriate civil penalty.



Mary Lu Jordan, Chairman



Joyce A. Doyle, Commissioner



Arlene Holen, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 31, 1994

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket Nos. YORK 92-117-M
	:	YORK 92-128-M
BUFFALO CRUSHED STONE, INC.	:	
	:	

BEFORE: Jordan, Chairman; Doyle and Holen, Commissioners¹

DECISION

BY THE COMMISSION:

This civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act" or "Act"), presents the issue of whether five similar violations of 30 C.F.R. § 56.9301 by Buffalo Crushed Stone, Inc. ("Buffalo") were significant and substantial ("S&S").² Administrative Law Judge Avram Weisberger determined that the violations were not S&S. 15 FMSHRC 1641 (August 1993)(ALJ). For the reasons that follow, we reverse and remand.

I.

Factual and Procedural Background

Buffalo operates the Wehrle Quarry, an open pit limestone quarry in New York State. On May 5, 1992, Joseph Denk, an inspector from the Department of Labor's Mine Safety and Health

¹ Commissioner Marks assumed office after this case had been considered at a decisional meeting and a decision drafted. In light of these circumstances, Commissioner Marks elects not to participate in this case.

² 30 C.F.R. § 56.9301, entitled "Dump site restraints," provides:

Berms, bumper blocks, safety hooks, or similar impeding devices shall be provided at dumping locations where there is a hazard of overtravel or overturning.

Administration ("MSHA"), along with his supervisor, Richard Duncan, inspected five stockpiles of finished stone in the quarry. The stockpiles, which abutted a highwall, were approximately 25 feet high and 60 feet in diameter and were flattened to accommodate travel. Stone from the stockpiles was placed around the top perimeters of the stockpiles to create berms.

Inspector Denk observed that the berms were approximately one foot high and did not reach the three-foot, mid-axle height of the WA-500 front-end loader, the largest piece of equipment operated on the stockpiles, as required by 30 C.F.R. § 56.9300(b).³ Tr. 59, 68. The inspector also observed a Mack M-30 haul truck dumping stone over a stockpile's edge and concluded that overtravel could occur because of the low berm. Tr. 65-68. Accordingly, the inspector issued citations, pursuant to section 104(a) of the Act, 30 U.S.C. § 814(a), alleging S&S violations of section 56.9301 for each of the five stockpiles. Buffalo contested the citations.

Following an evidentiary hearing, Judge Weisberger concluded that Buffalo had violated section 56.9301 in all five instances, but that the violations were not S&S. 15 FMSHRC at 1645-46. The judge based his liability determination on his findings that a hazard of overtravel existed, that a vehicle had been observed dumping at the edge of a stockpile, and that the berms did not reach the height required by section 56.9300(b). *Id.* With respect to the S&S issues, the judge found that, although "an injury-producing event ... could have occurred" because of the height of the stockpiles and the low berms, the Secretary had not established a reasonable likelihood that such an event would occur. *Id.* at 1646 (emphasis in original). The judge assessed a civil penalty of \$50 for each violation. *Id.*

The Commission granted the Secretary's petition for discretionary review, which challenged the judge's determination that the violations were not S&S.⁴

II.

Disposition

The Secretary argues that substantial evidence does not support the judge's finding that Buffalo's violations of section 56.9301 were not S&S. He asserts that the judge erred when he

³ 30 C.F.R. § 56.9300, entitled "Berms or guardrails," provides in part:

(b) Berms or guardrails shall be at least mid-axle height of the largest self-propelled mobile equipment which usually travels the roadway.

⁴ The Secretary designated his petition for discretionary review as his brief; Buffalo did not file a response brief.

determined that the reasonable likelihood of an injury had not been established because there was no direct testimony based on personal knowledge as to how close trucks were driven to the cited berms. According to the Secretary, the judge failed to consider evidence that Buffalo's trucks routinely backed up to the edges of the berms, a practice that has caused accidents at other mines.

The S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to a more serious type of violation. A violation is S&S if, based on 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 Div., Nat'l Gypsum Co., 3 FMSHRC 822, 825-26 (April 1981). In Mathies Coal Co., 6 FMSHRC 1 (January 1984), the Commission further explained:

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

Id. at 3-4. See also Austin Power, Inc. v. Secretary of Labor, 861 F.2d 99, 103-04 (5th Cir. 1988), affg 9 FMSHRC 2015, 2021 (December 1987)(approving Mathies criteria).

The first and second Mathies elements have been established. The issue on review is whether the judge erred in finding that there was not a reasonable likelihood that the hazard of overtravel contributed to by the low berms would result in an injury.

The Commission is bound by the terms of the Mine Act to apply the substantial evidence test when reviewing an administrative law judge's factual determinations. 30 U.S.C. § 823(d)(2)(ii)(I). The term "substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." Rochester & Pittsburgh Coal Co., 11 FMSHRC 2159, 2163 (November 1989), quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938). While we do not lightly overturn a judge's factual findings and resolutions, neither are we bound to affirm such determinations if only slight or dubious evidence is present to support them. See, e.g., Krispy Kreme Doughnut Corp. v. NLRB, 732 F.2d 1288, 1293 (6th Cir. 1984); Midwest Stock Exchange, Inc. v. NLRB, 635 F.2d 1255, 1263 (7th Cir. 1980). We are guided by the settled principle that, in reviewing the whole record, an appellate tribunal must also consider anything in the record that "fairly detracts" from the weight of the evidence that supports a challenged finding. Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951). We conclude that substantial evidence does not support the judge's determination.

In determining that the Secretary failed to establish the third Mathies element, the judge reasoned that the stockpiles were flat, there was no evidence of overtravel, the stockpile vehicles had no braking or steering problems and there was "no direct testimony in the record, from anyone having personal knowledge based on observation, as to how close the various vehicles in use actually, in the normal course of operation, travel to the edge of the berms." 15 FMSHRC at 1646 (emphasis in original).

The overwhelming weight of the evidence detracts from the judge's finding. Inspector Denk testified that a truck backing up or driving near the edge of a stockpile could travel through the berm, falling 25 feet. Tr. 65. Duncan testified that the low berms created a "significant hazard" because they were not high enough to prevent overtravel, which could result in serious accidents. Tr. 135-37. He testified that the drivers were "backing these trucks up using mirrors, and [were] not ... people [who] do this on a daily basis." Tr. 136. He further testified that "[i]t's very easy to misjudge in a rear view mirror backing [sic]." Id. Duncan also explained that, as a truck dumps its load, a "tremendous" amount of weight is shifted toward the rear of the truck and the outside edge of a stockpile. Id. In one fatal accident that Duncan investigated, a truck was backing up to a stockpile similar to those cited when a wheel of the truck "went in at an angle" and "caught the edge." Tr. 137. As the truck dumped its load, its weight shifted, a wheel dropped, and the truck flipped over, crushing the cab. Id. Duncan stated that, on account of their inadequate height, the berms would not restrain overtravel but would function only as "speed bump[s]." Tr. 135.

Contrary to the judge's finding, there is evidence in the record as to how close vehicles travelled to the berms' edges during normal operations. Inspector Denk testified that, when he observed a Mack M-30 haul truck back up to the berm and dump a load of material, the truck's "wheels were actually touching the berm." Tr. 67. He also testified that he observed tire tracks on the stockpiles that were "[a]lmost actually on the berm." Tr. 66. Inspector Denk's testimony was based on his personal observations at the mine. Denk was not required to observe the mine's operations for an extended period of time for his observations to have probative value. Moreover, there is no requirement that the Secretary's case be based exclusively on testimony founded on personal knowledge. In making factual determinations, a judge may consider all "[r]elevant evidence, including hearsay evidence." 29 C.F.R. § 2700.63(a) (1993). See Mid-Continent Resources, Inc., 6 FMSHRC 1132, 1135-37 (May 1984).

Furthermore, the judge focused on factors that, in this case, the Secretary need not prove to establish the third Mathies element. Under the circumstances, the fact that the stockpiles were flat and that there were no equipment problems at the time does not establish that an accident was not reasonably likely to occur. The hazard of overtravel presented here did not arise from the contour of the top of the stockpiles or the condition of the vehicles, but from the fact that trucks backing up to the edge experienced great shifts in weight as they dumped their loads. Likewise, the absence of previous instances of overtravel does not establish that an accident would not be reasonably likely to occur, given the nature of the hazards presented. As noted, serious accidents resulting from overtravel had occurred at stockpiles similar to those cited. Tr.

136-37. Accordingly, we reverse the judge's determination that the Secretary failed to establish the reasonable likelihood of an injury-producing event.

Although the judge did not expressly consider the fourth Mathies factor, he recognized in determining liability that "[b]oth Duncan and Denk testified regarding the hazards of a vehicle going over the edge of a stockpile and causing serious injuries to the driver of the vehicle." 15 FMSHRC at 1645; Tr. 65-66, 135-37. Given this uncontroverted evidence, the fourth Mathies element was established.

III.

Conclusion

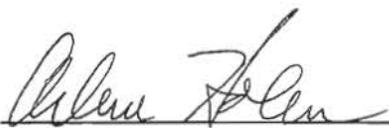
For the reasons set forth above, we conclude that the judge's determination that the violations of section 56.9301 were not S&S is not supported by substantial evidence and we reverse the judge's conclusion. We remand for reassessment of civil penalties in light of our determination. See, e.g., Gatliff Coal Co., Inc., 14 FMSHRC 1982, 1989 (December 1992).



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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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OCT 5 1994

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE AND SAFETY AND HEALTH :
ADMINISTRATION (MSHA) : Docket No. SE 94-92-M
Petitioner : A.C. No. 38-00626-05502 S45
v. :
: Ridgeway Mine
FLUOR DANIEL INCORPORATED, :
Respondent :

DECISION

Appearances: Leslie John Rodriguez, Esq., Office of the
Solicitor, U.S. Department of Labor, Atlanta,
Georgia, for the Petitioner;
Carl B. Carruth, Esq., McNair & Sanford, P.A.,
Columbia, South Carolina, for the Respondent.

Before: Judge Feldman

This matter is before me as a result of a petition for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (the Act). This proceeding concerns three citations issued to the respondent, Fluor Daniel Incorporated (Fluor Daniel), as an independent contractor performing services at the Ridgeway Mine. The Secretary has proposed a total civil penalty of \$15,000.00 in this matter. Fluor Daniel has stipulated that it is subject to the jurisdiction of the Mine Act in that it is a "mine operator" as contemplated by section 3(d) of the Act, 30 U.S.C. § 802(d).

The hearing in this case was conducted on June 2, 1994, in Charlotte, North Carolina. Mine Safety and Health Administration (MSHA) Inspector Ronald Lee Lilly and Robert M. Friend, Supervisory Mine Inspector of MSHA's North Carolina Field Office, testified on behalf of the Secretary. The respondent called former employees Steven Crapps, William A. Reynolds and Roland C. Caldwell. The respondent also called Bruce E. Sellars, its regional safety manager for the southeast region, as well as George M. Canady III, its site superintendent at the Ridgeway Mine. (Tr. 24). The parties' posthearing briefs are of record.

Preliminary Findings Of Fact

This case involves an April 21, 1993, fatal forklift accident that occurred at the Ridgeway Mine, an open pit gold mine located near the town of Ridgeway in Fairfield County, South Carolina. The Ridgeway Mine is operated by the Kennecott Ridgeway Mining Company (Kennecott). Fluor Daniel is a publicly held corporation based in Irvine, California. (Tr. 25-26). At the time of the accident, Fluor Daniel was an independent contractor of Kennecott engaged in the performance of surface construction work at the Ridgeway mine site. (Tr. 68-69).

The cause of the accident was brake failure on a Komatsu Model No. FD135-5 forklift truck owned by Kennecott and operated on April 21, 1993, by Fluor Daniel. The forklift was routinely used by Kennecott and all of Kennecott's on site contractors, including Fluor Daniel. (Tr. 191). Kennecott contracted with the Edwards Warren Company to perform on site forklift maintenance and repair. Work that could not be performed by Edwards Warren was performed by a local Komatsu dealer. (Tr. 174). Fluor Daniel had authority to "tag out" (remove from service) the forklift if it failed to operate properly. The accident occurred when the brakes failed immediately after the engine on the Komatsu forklift had been turned off.

The basic facts surrounding the accident are not in dispute and can be briefly stated. On April 21, 1993, William Reynolds, an employee of the respondent, operated the subject forklift intermittently during the period from 9:00 a.m. until approximately 2:00 p.m. Reynolds testified that, prior to operating the forklift that morning, he tested the service and parking brake systems with the engine running and found them to be working properly. (Tr. 75-81). Reynolds testified that the respondent had a policy of pre-operation inspections of the forklift by each operator although the policy was not always enforced. (Tr. 86-87). The respondent's site superintendent George Canady also testified about the company's pre-operation inspection policy. (Tr. 291, 293). Bruce Sellars, the respondent's regional safety director testified about the company's safety program. (Tr. 285-288).

Reynolds turned the forklift over to respondent employee Steven Crapps at approximately 2:00 p.m. (Tr. 81, 92). Crapps testified the forklift was on "a very little" incline when he took it from Reynolds. (Tr. 49). Crapps could not remember the degree of incline and did not recall thinking the size of the incline was pertinent to the accident investigation. (Tr. 50). Crapps stated he conducted a walk-around inspection but did not perform any specific test on the brakes. Crapps intended to use the forklift to install 500 feet of electrical cable, which was coiled around a reel or spool, from the top of the south pit to the bottom. The spool of cable was to be loaded onto a pickup

truck in the laydown yard with the forklift. After the electrical cable was transported to the top of the pit by the pickup, the cable was to be unloaded with the forklift. Crapps drove the forklift to the laydown yard where he loaded the pickup. He then followed the pickup with the forklift to the top of the pit where he unloaded the cable. The total trip was approximately one mile or more. Crapps testified that he did not notice any problem with the brakes. (Tr. 62-63).

Upon arriving at the top of the highwall at approximately 2:30 p.m., Crapps unloaded the cable from the back of the pickup truck and positioned it near the edge of the pit. Crew member Johnny Ray was positioned in front of the forklift between the forks attempting to guide the cable to the edge of the berm. (Tr. 38-39). As Crapps positioned the cable, he put the forklift in neutral and set the parking brake. He then shut off the engine and the forklift started to roll forward. Crapps applied the brakes and put the forklift in gear to try to stop it, but to no avail. (Tr. 39-40). The forklift traveled approximately 15 feet down a 5 to 6 per cent grade pushing Ray over the berm to the second bench about 86 feet below. The forklift was prevented from going over the highwall by the berm. Ray was evacuated by helicopter to a local hospital but he did not survive. (Ex. P-6).

An accident investigation was initiated by MSHA beginning on the morning of April 22, 1993. During the period April 22 through April 23, 1993, three citations were issued to Fluor Daniel. Combined Citation/Imminent Danger Order No. 4094231 was issued for an alleged defect of the forklift service brakes; Citation No. 4094232 cited an alleged failure of the forklift's parking brake system; and Citation No. 4094234 specified an alleged failure to inspect mobile equipment prior to placing such equipment in service.

The forklift was removed from mine property by MSHA on April 24, 1993. The forklift's brake system was thoroughly inspected on May 26, 1993, at Industrial Truck Company, Incorporated, in Greensboro, North Carolina. Generally speaking, when the engine of a Komatsu forklift truck is running, the service brake system relies on a brake pump to maintain the requisite hydraulic pressure. An examination of the service brake system with the subject forklift's engine operating revealed the warning alarm was functioning properly, there was an adequate supply of brake fluid, and there was hydraulic pressure of 1500 p.s.i., which was within the manufacturer's specifications.

When the engine on a Komatsu forklift is turned off the brake pump no longer operates. The accumulator serves as an alternative brake system when the engine is not running. An accumulator is a container that holds approximately 300 cubic

centimeters of brake fluid. When the brake is depressed when the forklift engine is off, a valve opens forcing brake fluid into the brake system. (Tr. 98). The accumulator permits the brakes to be depressed approximately 5 to 10 times with the engine off. (Tr. 129).

During the course of the May 26, 1993, tests, a pressure gauge was connected to the accumulator on the subject forklift. When the brake pedal was depressed with the engine off the gauge indicated zero pressure. The brakes failed to perform as designed with the engine off due to a malfunction of the accumulator.

The May 26 inspection of the forklift's parking brake revealed it was ineffective due to a combination of three factors. There was no adjustment left at the top of the park brake lever. In addition, an oil seal between the park brake assembly and the differential was leaking, which allowed oil to enter the drum, saturating the shoes. Finally, the thickness of the shoe pad ranged from 0.150 inch to only 0.125 inch. The manufacturer's recommended replacement specification was 0.130 inch.

At the hearing, the parties entered into the following fundamental stipulations of material issues of fact:

1. The service brakes functioned adequately with the engine running on the forklift but did not function adequately with the engine off. (Tr. 357).
2. Although the respondent is not responsible for maintenance of the equipment [owned by Kennecott], it was authorized to tag out equipment if it was not functioning properly. (Tr. 198, 358).
3. Failure to have operational emergency [parking] brakes or operational service brakes when the vehicle is not running are conditions involving violations that are properly characterized as significant and substantial in nature. (Tr. 223, 358).

Further Findings and Conclusions

Citation/Order No. 4094231

Combined 104(a) Citation and 107(a) Imminent Danger Order No. 4094231 was issued to the respondent by MSHA Inspector Ronald Lilly on April 22, 1993, for a cited violation of the mandatory safety standard in section 56.14101(a)(1), 30 C.F.R. § 56.14101(a)(1). In considering whether the facts support a section 56.14101(a)(1) violation it is helpful to examine the

provisions of sections 56.14101(a) and 56.14101(b). These sections provide:

§ 56.14101

(a) **Minimum requirements.** (1) Self-propelled mobile equipment shall be equipped with a service brake system capable of stopping and holding the equipment with its typical load on the maximum grade it travels. This standard does not apply to equipment which is not originally equipped with brakes unless the manner in which the equipment is being operated requires the use of brakes for safe operation. This standard does not apply to rail equipment.

(2) If equipped on self-propelled mobile equipment, parking brakes shall be capable of holding the equipment with its typical load on the maximum grade it travels.

(3) All braking systems installed on the equipment shall be maintained in functional condition.

(b) **Testing.** (1) Service brake tests shall be conducted when an MSHA inspector has reasonable cause to believe that the service brake system does not function as required, unless the mine operator removes the equipment from service for the appropriate repair; (2) The performance of the service brakes shall be evaluated according to Table M-1.

* * * * *

(5) Where there is not an appropriate test site at the mine or the equipment is not capable [of] traveling at least 10 miles per hour, service brake tests will not be conducted. In such cases, the inspector will rely upon other available evidence to determine whether the service brake system meets the performance requirement of this standard.

Table M-1 sets forth the maximum allowable stopping distances for vehicles of different gross weights traveling at speeds varying from 10 to 20 miles per hour.

The term "service brake system" in section 56.14101(a)(1) must be read in the context of the service brake test provisions of section 56.14101(b). In so doing, it is evident that the requisite condition of service brakes contemplated by section 56.14101(a)(1) relates to the service brakes' effectiveness in stopping moving (in service) vehicles in that tests to support

violations of this mandatory standard are conducted on moving vehicles in accordance with the standards contained in Table M-1. In fact, section 56.14101(b)(5) provides that where equipment is not capable of traveling at least 10 miles per hour, service brake tests will not be conducted.

In this case, combined Citation/Order No. 4094231 was issued by Inspector Lilly on April 22, 1993, following his on-site inspection. Lilly testified that his April 22, 1993, testing of the subject forklift revealed that the service brake pedal was low and that the service brake would not stop the machine with the engine running. (Tr. 138-139, 144-145). However, Lilly's preliminary conclusion with respect to the service brakes was not supported by the subsequent May 26, 1993, tests performed under MSHA's direction. In this regard, MSHA Supervisory Inspector Friend testified the service brakes could pass the Table M-1 test with the engine running and that there was no evidence of any significant hazard posed by the condition of the service brakes. (Tr. 251-254). Moreover, the Secretary's stipulation that the service brakes functioned adequately with the engine running is dispositive of this issue. (Tr. 357).

Under these circumstances, section 56.14101(a)(3), which refers to brake systems in general, is the applicable mandatory safety standard for the accumulator malfunction. While I am mindful that Inspector Lilly's April 22, 1993, inspection revealed the brake system was defective with the engine off (Tr. 147), Lilly did not cite the respondent for a violation of section 56.14101(a)(3). Moreover, at trial, the Secretary expressly withdrew any allegations of a section 56.14101(a)(3) violation. (Tr. 17-21). Accordingly, the Secretary has failed to establish that there was a violation of the cited mandatory safety standard in section 56.14101(a)(1) as the service brakes performed with the engine running. Consequently, Citation No. 4094231 must be vacated.

With respect to the remaining 107(a) imminent danger order, imminent danger orders permit an inspector to remove miners immediately from a dangerous situation. See 30 U.S.C. § 817(a). Here, the gravity of the hazard posed by the inoperable accumulator and defective parking brake is indisputable. Therefore, the forklift clearly constituted an imminent danger. An imminent danger order requiring the immediate removal of hazardous equipment is appropriate even if the withdrawal order is not caused by a violation of the Act or of the Secretary's mandatory safety standards. Utah Power and Light Company, 13 FMSHRC 1617, 1622 (October 1991). Thus, severing and vacating the 104(a) citation from combined 104(a) Citation/107(a) Order No. 4094231 where the cited section 56.14101(a)(1) violation has been vacated does not, alone, invalidate the 107(a) imminent danger order.

The final issue for resolution is whether the imminent danger order was properly issued to the respondent, the operator of the defective forklift, rather than to the forklift's owner Kennecott Ridgeway Mining Company. The testimony reflects that the respondent had exclusive control of the forklift from 9:00 a.m. on April 21, 1993, until approximately 2:30 p.m. when the fatal accident occurred. It is conceivable that employees of the respondent could have continued to be exposed to the risk caused by this defective equipment. Therefore, Lilly's issuance of 107(a) Order No. 4094231 was appropriate and shall be affirmed.

Citation No. 4094232

Inspector Lilly issued 104(a) Citation No. 4094232 on April 22, 1993, for a violation of section 56.14101(a)(2) after he determined that the parking brake was incapable of holding the forklift on grades it was called upon to travel. At the time of the accident, Crapps testified that he engaged the parking brake but it failed to prevent the forklift from rolling down the six per cent grade. (Tr. 139). Lilly and Friend's on-site tests on April 22, 1993, confirmed that the parking brake had no resistance and was ineffective. (Tr. 138, 182, 219, 237, Ex. p-2). Repeat tests by Kennecott Ridgeway Mining Company on April 23, 1993, also revealed the parking brake could not hold the forklift. (Tr. 148-149, 344-348, Ex. P-10). Finally, the MSHA supervised May 26, 1993, extensive inspection and testing demonstrated that the parking brake was defective. (Tr. 171-172, 200, 202, 204, 210, 219, Ex P-6).

In the face of this record evidence, the respondent ". . . does not dispute that at the time of the accident the parking brake was not capable of holding the forklift as required." (Resp. posthearing brief at p.26). Rather, the respondent argues that immediately ". . . prior to the accident the parking brake worked fine and the sudden and unexpected failure of the parking brake could not have been anticipated or prevented by the Respondent." Id.

The respondent's assertion of a sudden brake failure without any opportunity for prior warning is unconvincing and unsupported by the record. As a threshold matter, Reynolds' testimony regarding the nature and extent of his pre-operation inspection of the forklift and Canady's testimony concerning the respondent's rigid enforcement of its pre-operation inspection program are exculpatory statements that are afforded little evidentiary value. Moreover, Crapps testified that although he noted the brakes to be "o.k." on the company walk-around inspection checklist, he performed no specific tests on the brakes because he assumed they were working as the forklift had been previously driven. (Tr. 53-54). Crapps' testimony that the parking brake apparently held on a "very little" dip in the road does not evidence that it was functioning properly shortly before

the accident. (Tr. 49). Significantly, while Crapps testified that it was the respondent's policy to require completion of a pre-operation walk-around inspection sheet, he also testified, "[i]t was never really enforced, though." (Tr. 58). Although Reynolds testified that the respondent's walk-around inspection policy "was supposed to be" enforced, he stated "[he] couldn't say it was enforced" rigorously. (Tr. 86-87).

Thus, the evidence reflects that the purported pre-operation inspections were, at best, perfunctory in nature. Therefore these inspections provide little support for the respondent's contention that the parking brake was determined to be functional shortly before the accident.

Finally, the respondent's assertion of a sudden parking brake malfunction is belied by the May 26, 1993, inspection of the forklift. The inspection findings included leaking oil seals saturating the brake shoe and drum as well as worn parking brake linings. These conditions are not indicative of an acute mechanical failure.

In view of the above, it is apparent that the Secretary has established the fact of occurrence of the cited violation of section 56.14101(a)(2). The respondent has stipulated to the significant and substantial nature of this violation. (Tr. 223, 358). With respect to the appropriate civil penalty to be imposed, the respondent's attempted mitigation, i.e., sudden unanticipated brake failure, is unsupportable. In applying the penalty criteria in section 110(i) of the Act, 30 U.S.C. § 820(i), I note the degree of negligence manifested by the respondent in this matter is high given the fact that the pre-operation inspection procedure was ineffective in view of the longstanding nature of the parking brake defects. In addition, I credit the testimony of Crapps that the respondent's pre-shift inspection policy was not enforced. Considering the gravity of the violation and its contribution to a fatality, and, the fact the respondent is a large publicly held corporation, I am assessing a civil penalty of \$7,500 for Citation No. 4094232.

Citation No. 4094234

104(a) Citation No. 4094234 was issued by Inspector Lilly on April 23, 1993, for an alleged violation of section 56.14100(a). This mandatory safety standard provides: "Self-propelled mobile equipment to be used during a shift shall be inspected by the equipment operator before being placed in operation on that shift."

As noted above, the evidence manifested by the testimony of Reynolds and Crapps reflects that the respondent's pre-operation inspection program was perfunctory and deficient. As this mandatory standard only requires one inspection per shift, the

failure of Reynolds, who took control of the forklift at 9:00 a.m., to detect any parking brake or accumulator malfunctions at the beginning of the April 21, 1993, morning shift constitutes a violation without regard to the adequacy of Crapps' pre-operation walk-around inspection. My conclusion, as noted above, is based on the longstanding nature of the defective parking brake and accumulator which should have been discovered if an adequate pre-shift inspection had been performed.

Although the inadequacy of the preshift inspection provides a sufficient basis for establishing the violation, there is an independent justification for finding that section 56.14100(a) has been violated. A primary cause of this fatal accident was the defective and inoperable accumulator. The function of an accumulator which permits a multi-ton construction vehicle to be stopped or to be prevented from rolling when the engine is turned off is not an obscure mechanical concept. Inspectors Lilly and Friend testified that it is "standard procedure" to test accumulators and that all equipment manufactured in the last several years have functional brake systems when the engine is off. (Tr. 95-99, 162, 182, 236). Such a malfunction could easily result in a runaway construction vehicle in the event of an engine stall.

Industry recognition of the importance of this auxiliary brake system is demonstrated by the Komatsu Operation & Maintenance Manual for its forklift truck Model Nos. FD100/115-5 and FD135/150E-5 wherein detailed instructions are provided for a pre-operation testing procedure to ensure that the brake accumulator is properly functioning. (Ex. P-1, p.25).¹ It is a simple two step test. The operator pumps the brake repeatedly with the engine off until the hydraulic brake fluid in the accumulator is depleted and a buzzer sounds. The engine is then started. If the buzzer goes off after a few seconds it indicates the accumulator has been refilled and the reservoir is not defective. If the buzzer does not go off it means the accumulator is malfunctioning and cannot be refilled.

The respondent has admitted that the Komatsu accumulator test was not performed because the procedure was unknown.

¹ The Komatsu forklift in issue was Model No. FD135-5. The Komatsu maintenance manual identified and admitted in evidence as Petitioner's Exhibit No. 1 was received despite the respondent's objection. It is clear on its face that this manual relates to forklift Model No. FD135-5, the model in question, as well Model Nos. FD150E-5, FD100-5 and FD115-5. Moreover, Komatsu furnished the manual in response to the Secretary's request for the pertinent manual for the subject Model No. FD135-5 forklift truck that was tested under MSHA's supervision on May 26, 1993, in Greensboro, North Carolina. (Tr. 121-128, Ex. P-1).

Reynolds and Crapps knew nothing about testing the brakes with the engine off. (Tr. 43-44, 84-86). George M. Canady III, the respondent's superintendent at the Ridgeway Mine site, testified that neither he nor Phil Boughtman, the supervisor responsible for training forklift operators, was familiar with Komatsu's accumulator test procedure. (Tr. 47, 299-302).

The explanation given for the respondent's lack of knowledge with respect to the accumulator's function and testing was that Fluor Daniel had requested the Komatsu forklift maintenance manual from the Kennecott Ridgeway Mining Corporation but it had not been provided. (Tr. 291). In essence, the respondent continued to operate this heavy piece of construction equipment despite the fact that it had never read the operational instruction manual. For example, Crapps testified that he had driven the Komatsu forklift "off and on for five years." (Tr. 63). Kennecott's reported failure to provide the forklift's operational manual does not absolve the respondent from its responsibility to read it. As evidenced in this case, the respondent's failure to acquaint itself with the manufacturer's operational and testing instructions for the forklift prior to its continued use is inexcusable and highly negligent.

Finally, the respondent, in its posthearing brief, maintains that the standard in section 56.14100(a) is unconstitutionally vague. The Commission in Ideal Cement Company, 12 FMSHRC 2409 (November 1990), addressed a similar issue. In Ideal, the Commission considered whether the standard in section 56.9002, 30 C.F.R. § 56.9002 (1987), was overly broad. Section 59.9002 provided: "Equipment defects affecting safety shall be corrected before the equipment is used."² The Commission stated:

Section 56.9002 must be construed in light of its underlying purpose -- the protection of miners operating the equipment or exposed to the equipment's use. That purpose was plainly set forth in the Secretary's statement of purpose and scope of the Part 56 standards, which provided: "The purpose of these standards is the protection of life, the promotion of health and safety, and the prevention of accidents." 30 U.S.C. § 56.1 (1987). (Section 56.1 has been carried forward unchanged in the Secretary's present Part 56 regulations.) Any overly narrow or restrictive reading of the scope of section 56.9002 cannot be reconciled with that statement of purpose or with the fundamental protective ends of the Mine Act itself, as set forth in section 2 of the Mine Act. See 30 U.S.C. § 801(a), (d), & (e).

² The provisions of section 56.9002 are currently contained in section 56.7002, 30 C.F.R. § 56.7002.

Thus, section 56.9002, which relates to the performance of equipment used in mines, must be interpreted and applied in a manner fostering the basic aim of protecting the health and safety of miners. (Emphasis added). 12 FMSHRC at 2414.

The Commission further stated:

However, in interpreting and applying broadly worded standards, the appropriate test is not whether the operator had explicit prior notice of a specific prohibition or requirement, but whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard. (Emphasis added). 12 FMSHRC at 2416.

The requirement of familiarizing oneself with the instruction manual for potentially dangerous self-propelled mobile equipment so that an adequate preshift brake system test can be performed, and, the requirement of performing meaningful preshift brake system tests, are readily discernible from the language of section 56.14100(a). Consequently, the respondent's contention that this standard is overly broad is rejected.

As a final matter, at trial, and in its posthearing brief, the respondent relies on the fact that it was not responsible for the forklift's maintenance and repair in an attempt to escape or mitigate liability. While I recognize that the respondent was not responsible for the forklift's maintenance and repair, it had a duty to ensure the safe operation of this potentially dangerous vehicle. While longstanding maintenance problems may have been a contributing factor, the respondent, who had possession and control of this vehicle on April 21, 1993, from 9:00 a.m. until the brake failure at approximately 2:30 p.m., had the opportunity to prevent this accident if proper unsophisticated preshift brake inspections had been performed. Having failed to perform such tests, the respondent must be held accountable. It should be noted that, while not the subject of this proceeding, Kennecott, as the forklift owner, was also cited by MSHA for its culpability in this matter. (Ex. P-6).

Thus, the evidence establishes a violation of the cited mandatory standard. As discussed above, the violation is attributable to a high degree of negligence by the respondent in that inadequately trained individuals were required to perform preshift inspections of mobile equipment. This lack of training contributed to ineffective preshift inspections and the resultant serious gravity of the violation. Given the penalty criteria of section 110(i) of the Act, which include consideration of the size of the respondent corporation, a publicly held company listed on the New York Stock Exchange, I conclude that \$20,000 is

the appropriate civil penalty to be assessed for Citation No. 4094234.

ORDER

Accordingly, consistent with this decision, **IT IS ORDERED** that Citation No. 4094231 **IS SEVERED** from Order No. 4094231 and **IS HEREBY VACATED**. **IT IS FURTHER ORDERED** that Order No. 4094231 and Citation Nos. 4094232 and 4094234 **ARE AFFIRMED**. The respondent, Fluor Daniel Incorporated, **SHALL PAY**, within 30 days of the date of this decision, a total civil penalty of \$27,500.00 in satisfaction of Citation Nos. 4094232 and 4094234 affirmed herein. Upon receipt of payment, this matter **IS DISMISSED**.



Jerold Feldman
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

OCT 6 1994

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 94-76-M
Petitioner	:	A.C. No. 24-02023-05501
v.	:	
	:	Docket No. WEST 94-279-M
	:	A.C. No. 23-02023-05503
KONITZ CONTRACTING, INC.,	:	
Respondent	:	Mine: Konitz #3
	:	
	:	Docket No. WEST 94-277-M
	:	A.C. No. 24-01450-05501 QYQ
	:	
	:	Mine: Zortman
	:	
	:	Docket No. WEST 94-278-M
	:	A.C. No. 24-01813-05509
	:	
	:	Mine: Portable Crusher #2

DECISION

Appearances: Kristi Floyd, Esq., Office of the Solicitor, U. S. Department of Labor, Denver, Colorado, for Petitioner;
Tom Konitz, President, Konitz Contracting, Lewistown, Montana, Pro Se.

Overview

These cases arise out of three inspections of Respondent's worksites by the Mine Safety and Health Administration (MSHA). The first (Docket WEST 94-278-M) involves a citation for excessive noise exposure issued during an inspection of Konitz's portable crusher # 2. The second inspection (Dockets WEST 94-76-M and 94-279-M) occurred at a "rip-rap" operation in Fergus County, Montana, over which Respondent claims MSHA had no jurisdiction. The third inspection (Docket WEST 94-277-M)

involves a citation alleging an improper splice in an electrical cable, and was issued at a time when portable crusher #2 was operating near Zortman, Montana ¹.

Docket WEST 94-278-M

On April 29, 1993, MSHA Inspector Seibert Smith inspected a mine site at which Respondent was engaged in crushing rock to be used in road construction (Tr. 27-28). Smith sampled the noise exposure of the operator of Respondent's D8L Caterpillar bulldozer with a dosimeter (Tr. 27-45). The results of this sampling showed that the employee was exposed to 635% of the permissible exposure limit for noise (Exh. G-6, Tr. 36-44). This correlates to an 8-hour time weighted average of 103.5 dba, compared with the permissible limit of 90 dba set forth in 30 C.F.R. § 56.5050. Periodic Sound Level Meter readings showed instantaneous noise levels of between 94-104 dba (Exh. P-6, Tr. 37).

The bulldozer operator was wearing earplugs which had a noise reduction rating (NRR) of 33 dba (Exh. P-6) ². Therefore, Inspector Smith issued Respondent citation 4331385 alleging a non-significant and substantial violation of section 56.5050(b), which requires a mine operator whose employee(s) are exposed to noise levels in excess of the permissible exposure limit to reduce these levels to below the permissible limit through the implementation of feasible engineering or administrative controls. A \$50 civil penalty was proposed for this citation.

Respondent abated this citation by installing a cab on its bulldozer at a cost of approximately \$4,000 (Tr. 183). Mr. Konitz's reason for contesting the civil penalty for this citation is that "I disagree that when operators can wear ear protection, and they do, that this kind of money should be spent for a cab (Tr. 183)." Respondent's disagreement is also due to the denouement of a prior citation he received in May, 1990, alleging excessive noise exposure for the operator of the same bulldozer (Exh. P-5).

In May, 1990, Mr. Konitz wrote MSHA asking for technical assistance in abating the prior citation (Exh. P-3). An MSHA technical advisor performed what Mr. Konitz believes was a cursory inspection of his equipment and then wrote a report

¹ Apparently other citations, for which the penalty was contested, were issued during this inspection. However, they are not included in any of these dockets and are not before me.

² The noise reduction rating (NRR) of ear muffs and ear plugs is determined by the U. S. Environmental Protection Agency through laboratory tests, Appendix B to 29 C.F.R. § 1910.95.

recommending that a cab be installed on the bulldozer (Exh. P-4, Tr. 182). The report recommended that, if the cab failed to bring the employee's noise exposure below 90 dba, that acoustic foam be installed on the walls and roof of the cab, plus belting and an acoustic mat on the floor (Exh. P-4, page 4).

Mr. Konitz did not install the cab in 1990. He did put rubber conveyor belting on the floor and side of tanks of the bulldozer (Tr. 203), and asked MSHA to resample for noise. Inspector Fran Maulding sampled the bulldozer operator's exposure in May, 1991, and measured it at 126% of the permissible exposure limit (Exh P-5, page 3). Since this measurement was within the 33% error factor for such sampling, Respondent was considered to be in compliance with the standard and the citation was terminated.

The Secretary's burden of proving a violation of 56.5050 is set forth in the Review Commission's decision in Callahan Industries, 5 FMSHRC 1900 at 1909 (November 1983). The Secretary must prove: 1) a miner's exposure to noise levels in excess of the limits specified in the standard; 2) sufficient credible evidence of a technologically achievable engineering control; 3) sufficient credible evidence of the reduction in noise level that would be obtained through implementation of the engineering control; 4) sufficient evidence of the expected economic costs of the control; and 5) a reasoned demonstration that, in view of elements 1-4 above, the costs of the control are not wholly out of proportion to the expected benefits.

The Secretary has easily met his burden of proof for the first 4 elements of the Callahan standard. Inspector Smith's dosimeter readings establish the bulldozer operator's overexposure to noise. The report of MSHA's technical expert (P-4), which followed the 1990 noise citation and the installation of the cab by Mr. Konitz, establishes that a technologically achievable engineering control was available. Mr. Konitz provided the evidence regarding the cost of this control--\$4,000. Finally, the evidence of noise reduction is provided at page 4 of the instant citation (numbered 4331385-1 in the upper right hand corner). On November 17, 1993, the noise exposure of the bulldozer operator was sampled at 74% of the permissible exposure limit, after the cab had been installed.

The fifth element of the Callahan test requires some discussion because Respondent has at least a facially appealing argument as to whether the \$4,000 he spent to abate the citation was not wholly out of proportion to the benefits to his employee. That employee was wearing ear plugs with a noise reduction rating of 33 dba. If the employee actually obtained the 33 dba reduction, only 80 dba of noise reached his inner ear.

MSHA and its counterpart for non-mining industries, the Occupational Safety and Health Administration (OSHA), have long wrestled with this issue, See Commissioner Lawson's dissent in Callahan. Both agencies have generally assumed that personal protective equipment often does not provide the noise attenuation in the workplace that it does in the laboratory where the noise reduction ratings are determined. Indeed, the agencies have assumed that, unless ear protection is worn properly and its use is closely monitored, it may provide little protection.

OSHA's response to this problem, with regard to general industry (manufacturing) only, was to promulgate a detailed hearing conservation standard, which requires, for example, regular audiometric testing for employees who must wear ear plugs or ear muffs, 29 C.F.R. § 1910.95(c). In light of this regulation, OSHA has also modified its noise enforcement policy in general industry. The OSHA Field Operations Manual provides in Chapter IV, paragraph C. 3, BNA Occupational Safety and Health Reporter paragraph 77:2513-2514:

Current enforcement policy regarding 29 CFR 1910.95(b)(1) allows employers to rely on personal protective equipment and a hearing conservation program rather than engineering and/or administrative controls when hearing protectors will effectively attenuate the noise to which the employee is exposed to acceptable levels as specified in Table G-16 or G-16a of the standard. Professional judgment is necessary to supplement the general guidelines provided here.

a. Citations for violations of 29 CFR 1910.95(b)(1) shall be issued when engineering and/or administrative controls are feasible, both technically and economically; and

(1) Employee exposure levels are so high that hearing protectors alone may not reliably reduce noise levels received by the employee's ear to the levels specified in Tables G-16 or G-16a of the standard. Given the present state of the art, hearing protectors, which offer the greatest attenuation, may not reliably be used when employee exposure levels border on 100 DBA..., or

(2) The costs of engineering and/or administrative controls are less than the cost of an effective hearing conservation program.

b. A control is not reasonably necessary when an employer has an ongoing hearing conservation program

and the results of audiometric testing indicate that existing controls and hearing protectors are adequately protecting employees...

I take judicial notice of the OSHA Field Operations Manual and conclude that ear plugs and/or ear muffs in the absence of the kind of hearing conservation program that complies with the OSHA standard does not reliably protect employees from noise levels in excess of the permissible exposure limits in 30 C.F.R. § 56.5050. I, therefore, conclude that on this record, the \$4,000 cost of a cab for Respondent's bulldozer is not wholly out of proportion to benefits to Respondent's employees. I, thus, affirm citation 4331385.

I assess a \$20 civil penalty for this citation, rather than the \$50 penalty proposed by MSHA. Respondent had been cited for a noise violation previously on the same piece of equipment and had not implemented MSHA's suggested engineering solution. However, I regard Respondent's negligence very low since MSHA's noise sampling in 1991 indicated to Mr. Konitz that he could comply with the standard by merely installing rubber conveyor belting on the machine.

Respondent obviously demonstrated good faith in abating the violation by spending \$4,000 to install the cab. Finally, given the fact that the exposed employee wore ear plugs, the gravity of the violation does not warrant a higher penalty. The other section 110(i) penalty criteria; size, prior history, and Respondent's ability to stay in business, do not warrant either a higher or lower penalty.

Dockets WEST 94-76-M and WEST 94-279-M

On August 25, 1994, Inspector Smith visited a worksite west of Utica, Montana, at which Respondent was engaged in producing "rip-rap", large rocks used in road building or to reinforce riverbanks (Tr. 14-16). When Smith arrived at the site there were two employees of Konitz Contracting present and a subcontractor who was engaged in drilling and blasting rock (Tr. 14-16). One of Respondent's employees was operating a front-end loader. With this loader he drove up a ramp and deposited rock into a hopper, which was covered with a "grizzly." The function of the grizzly is to separate the larger rocks, the rip-rap, from smaller materials not suitable for use as rip-rap.

Respondent contends that this worksite, designated as Konitz # 3, was not subject to MSHA jurisdiction because no rock-crushing was performed at the site. For this reason he neither notified MSHA before starting work at this site, nor filed a legal identity report for the site, MSHA form 2000-7.

Inspector Smith issued Respondent citation 4331469 for failure to notify MSHA, alleging a violation of 30 C.F.R. § 56.1000. He also issued citation 4331470, alleging a violation of 30 C.F.R. § 41.20, for failure to file the identification form.

I conclude that Konitz # 3 was operating as a "mine" as that term is defined in section 3(h) of the Federal Mine Safety and Health Act, 30 U.S.C. 802(h). "Mine" is defined in that section as, "... (A) an area of land from which minerals are extracted in nonliquid form...." The site, at which Respondent was operating on August 25, 1993, was an area of land from which minerals (rock) was being extracted in nonliquid form (by drilling and blasting).

Furthermore, Congress in section 3(h) delegated to the Secretary of Labor some degree of discretion in making determinations which worksites are subject to the Mine Safety Act or to the OSH Act. The Secretary exercised this discretion in an interagency agreement between MSHA and OSHA in 1983, BNA Occupational Safety and Health Reporter paragraph 21:7071. This agreement is entitled to deference from the Commission, Donovan v. Carolina Stalite Company, 734 F.2d 1547 (D.C. Cir. 1984).

Appendix A of the Interagency Agreement sets forth specific areas of MSHA authority. It provides:

Following is a list with general definitions of milling processes for which MSHA has authority to regulate subject to paragraph B6 of the Agreement. Milling consists of **one or more** of the following processes: crushing, grinding, pulverizing, **sizing**, concentrating, washing, drying... (emphasis added)

Sizing is defined as:

...the process of separating particles of mixed sizes into groups of particles of all the same size, or into groups in which particles range between maximum and minimum sizes.

BNA Occupational Safety and Health Reporter, at page 21:7073.

I find that Konitz Contracting's plant number 3 was engaged in sizing, an activity that is within MSHA jurisdiction. A similar operation previously found to be within MSHA jurisdiction was the passing of sand through a screen for use on icy roads, New York State Department of Transportation, 2 FMSHRC 1749 (ALJ July 1980); Also see, Cyprus Industrial Minerals Co. v. FMSHRC, 664 F.2d 1116 (9th Cir. 1981) [driving an exploratory shaft in search of commercially exploitable material found to be subject to MSHA].

Having found Respondent's # 3 plant subject to the Act, I affirm citations 4331469 and 4331470. The Secretary proposed a \$50 civil penalty for each of these citations. As Respondent's delict is essentially the same for both citations--failing to inform MSHA of a new operation, I conclude that a single penalty is appropriate for the two citations. Considering the six statutory criteria, I assess a \$50 penalty.

As Mr. Konitz points out, Respondent has diligently reported the commencement of his various operations to MSHA in the past. Nevertheless, I believe he had a duty to check with MSHA as to whether the "rip-rap" operation had to be reported, rather than unilaterally assuming that it was not subject to the Act. Given the fact that the rip-rap operation could expose employees to hazards indistinguishable from hazards in his other operations, such as elevated ramps, inadequately protected pulleys and drive shafts, and electrical hazards, the assumption that the rip-rap operation was exempt from MSHA jurisdiction, was not reasonable. The degree of negligence in not contacting MSHA is sufficient to warrant a \$50 civil penalty.

The Berm Citation

Inspector Smith observed Respondent's front end loader operator drive his vehicle up a ramp which had no guardrails or berms on either side (Tr. 20-21). The ramp was relatively short in length, possibly less than ten feet long (Tr. 112-13, Exhibits 2a & b). However, there was only one foot clearance on each side of the ramp for the loader (Tr. 26, 113). The ramp was elevated 4-5 feet on one side and about 6-8 feet on the other (Tr. 23-25).

Smith issued Respondent citation 4331471 alleging a significant and substantial violation of 30 C.F.R. § 56.9300. The inspector concluded that an accident was reasonably likely due to the narrow width of the ramp, and that it was reasonably likely that such an accident would result in death or serious injury--particularly since the loader driver was not wearing a seat belt (Tr. 25, 108, 205).

Given the short length of the ramp and the fact that the operator would normally not turn the steering wheel, I conclude that, in the normal course of mining operations, it is not reasonably likely that an accident would occur. Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984). However, given the extreme seriousness of an accident if one did occur, I find the six penalty criteria (particularly gravity) warrant the assessment of a \$100 civil penalty.

The Unguarded Tail Pulley

During the August 25, 1993 inspection of Respondent's rip-rap operation, Smith observed a self-cleaning, or fin-type tail

pulley on a conveyor under the hopper that was unguarded (Tr. 52-53, Exh. G-7). He observed an employee walk across the steel frame behind this pulley on two occasions (Tr. 55-56). Smith issued Respondent citation 4331474 alleging a significant and substantial violation of 30 C.F.R. 56.14107(a). Given the obvious hazard of the exposed pulley and equally obvious exposure of a miner to the pinch-point of the unguarded pulley, this violation clearly meets the criteria of Mathies Coal Co. for a significant and substantial violation.

I assess an \$80 penalty. Both the gravity of the violation and Respondent's negligence in not protecting the pulley warrant at least an \$80 penalty.

Unguarded Belt and Pulley on Generator

Inspector Smith also observed an employee turn a generator either on or off on three different occasions (Tr. 57-61, 121-23, Exh. G-8). Two feet below the on/off button manipulated by the miner was an unguarded pulley and drive belt (Tr. 63). The area in front of the generator was slick and muddy, which led the inspector to conclude that it was reasonably likely that an employee could fall and contact the unguarded pulley or belt (Tr. 121-26).

Smith issued Respondent citation 4331475 alleging an "S&S" violation with regard to the generator. Although as the inspector admitted, an employee who slipped might grab the top of a pump or fuel filter before contacting the pulley or belt (Tr. 124-126), I conclude that in the course of continued mining operations, it is reasonably likely for a miner to come in contact with the hazard. Therefore, I affirm the citation as a significant and substantial violation.

The Secretary proposed an \$81 civil penalty for this citation; I assess a \$60 penalty. I consider the gravity of this violation to be less than that of the unguarded tail pulley since contact was much less likely to occur.

Fire-fighting Equipment and Records Violations

The inspector asked Respondent's employees where their fire-fighting equipment was located; they could not tell him (Tr. 63-64). Respondent has not asserted that fire-fighting equipment was at the site. Therefore, I affirm citation 4331477, which alleges a violation of 30 C.F.R. § 56.4200(a), and assess a \$50 civil penalty.

Smith asked Respondent for records of continuity and resistance tests on its electrical grounding systems. No such records were provided and Respondent has not contended in this proceeding either that the records were kept or that the tests

were made (Tr. 64-68). I, therefore, affirm citation 4331478 which alleges a non-significant and substantial violation of 30 C.F.R. § 56.12028 and assess a civil penalty of \$40.

Inspector Smith also asked to see records of the workplace examinations required by 30 C.F.R. § 56.18002 (Tr. 68-71). Although Smith did not recall whether he asked Mr. Konitz for these records, Respondent did not come forth at hearing with any evidence that it either performed the required examinations or kept the records of such examinations that must be maintained and provided to the Secretary by section 56.18002(b). I, therefore, affirm citation 4331479 and assess a \$25 civil penalty.

Prior Arrangements for Medical Assistance

Section 56.18014 provides that:

Arrangements shall be made in advance for obtaining emergency medical assistance and transportation for injured persons.

During the inspection, Smith determined that the only arrangements made by Respondent for obtaining emergency medical assistance were directing employees to go to the nearest ranch house and call 911 (Tr. 74, 143-45, 151). Inspector Smith concluded that this did not satisfy the requirements of the regulation because the standard requires that emergency personnel be informed before an emergency as to the exact location of a worksite and how to reach it (Tr. 127-33).

I agree with the inspector and affirm citation 4331581. When the standard requires that arrangements be made in advance, it is obviously not satisfied by a 911 call after an accident has occurred. The standard can only be satisfied by arrangements made before work commences that emergency assistance and transportation will be available to a specific worksite, whose location is known to emergency personnel. I assess a \$25 civil penalty for this violation.

Toilet Facilities

It is uncontroverted that there were no toilet facilities at the rip-rap site (Tr. 75-77). Inspector Smith visited the site on its third day of operation and employees either had to relieve themselves outside or travel to a nearby ranch house (Tr. 75-77, 196). Respondent was issued citation 4331583 alleging a violation of 30 C.F.R. § 56.20008(a). That regulation requires, at a minimum, that clean and sanitary portable toilets be provided on the mine site. I, therefore, affirm the citation and assess a \$30 civil penalty.

Docket WEST 94-277-M

On November 4, 1993, MSHA Electrical Inspector Richard Ferreira visited the Zortman surface gold mine in Phillips County, Montana, at which Respondent was working as a contractor with portable crusher #2 (Tr. 158-159). At this site he observed a power cable with an inadequate splice. The outer jacket bonding was not sufficient to cover the individual conductors and, therefore, might not exclude moisture from infiltrating the conductors (Tr. 160-173, Exh. G-10)

Ferreira issued Respondent citation 4331678, alleging a non-significant and substantial violation of 30 C.F.R. § 56.12013(c)³. That standard requires that permanent splices and repairs in power cables be provided with damage protection as near as possible to that of the original, including good bonding to the outer jacket.

Inspector Ferreira cited the violation as non-significant and substantial because the improper splice was behind an I-beam and not particularly accessible to employees. This violation is uncontroverted and, thus, I affirm the citation. I assess a \$30 civil penalty, noting that the record is devoid of evidence regarding the degree of Respondent's negligence as to this violation.

Other Contentions

Respondent contends that the citations in these cases, particularly those involving his rip-rap operations, are the result of retaliation on the part of MSHA for letters he wrote to his congressmen regarding the agency (Tr. 184-86). I find no evidence to support this belief.

I do not construe Mr. Konitz's objections to the rip-rap citations as contending that the operation was not subject to commerce clause of the Constitution. In any event, the rip-rap was sold to the Federal Highway Administration for use of roads leading to an Air Force missile site (Tr. 198-99) and was mined in part with equipment produced outside the state of Montana (Tr. 197). Therefore, the rip-rap operation was clearly affecting interstate commerce.

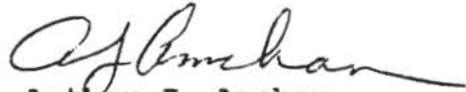
³ As noted previously, Inspector Ferreira issued other citations which are not before me.

ORDER

The citations are affirmed as discussed above and the following civil penalties are assessed:

4331385	\$ 20
4331469	\$100
4331470	\$ 50 in conjunction with 4331471
4331474	\$ 80
4331475	\$ 60
4331477	\$ 50
4331478	\$ 40
4331479	\$ 25
4331481	\$ 25
4331483	\$ 30
4331678	\$ 30
Total:	\$510

These penalties shall be paid within 30 days of this decision.



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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

OCT 11 1994

PEABODY COAL COMPANY, : CONTEST PROCEEDING
Contestant :
v. : Docket No. KENT 94-347-R
: Citation No. 3861905; 1/6/94
SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH : Camp No. 11 Mine
ADMINISTRATION (MSHA), : I.D. No. 15-08357
Respondent :
SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 93-813
Petitioner : A.C. No. 15-08357-03743
v. :
: Camp No. 11 Mine
PEABODY COAL COMPANY, :
Respondent :

DECISION

Appearances: David Joest, Esq., Henderson, Kentucky, for Peabody Coal Company;
Anne T. Knauff, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Secretary of Labor.

Before: Judge Melick

These cases are before me pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq., the "Act," to challenge two citations issued by the Secretary of Labor to the Peabody Coal Company (Peabody) for operating its Camp No. 11 Mine without approved ventilation plans and therefore in violation of 30 C.F.R. § 75.370(a)(1).

Citation No. 3547687 was issued May 14, 1993, by Supervisory Ventilation Specialist Louis Stanley of the Mine Safety and Health Administration (MSHA) for the failure of Peabody to have included in its April 26, 1993, ventilation plan, provisions for a four-cut mining sequence (Joint Exhibit No. 5). It was Stanley's conclusion that the two-cut mining sequence provided in the Peabody plan (Appendix A, Figure 1) was not suitable to the Camp No. 11 Mine and that it could not therefore be approved. The citation was abated when Peabody thereafter submitted a ventilation plan providing for a four-cut mining sequence (Exhibit 7-A, page 3, Appendix A, Figure 2).

Section 303(o) of the Act requires a coal mine operator to adopt "a ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine" The plan must be approved by the Secretary, who has delegated this responsibility to the appropriate MSHA District Manager. 30 C.F.R. § 75.370. The Secretary's standards require that the plan be "designed to control methane and respirable dust and shall be suitable to the conditions and mining system at the mine." 30 C.F.R. § 75.370(a)(1).

If the operator and MSHA are unable to agree on the suitability of a plan provision after good faith negotiations over a reasonable period, then the operator may refuse to include the disputed provision in its ventilation plan, whereupon MSHA may revoke its previous approval of the mine's plan and cite the operator for failing to have an approved ventilation plan.¹ The operator may obtain review of the disputed requirement in proceedings arising out of the citation. Peabody Coal Co., 15 FMSHRC 381, 387-388 (1993). The Secretary bears the burden of proof in such proceedings as to the suitability of the disputed plan provision, Peabody Coal Co., at p.388, and the Secretary has previously acknowledged that in cases in which he seeks to require changes to previously approved plans, he does not object to "bearing the burden of proving the non-suitability of those plans."²

While the Commission has never specifically articulated a formula to apply the standard "suitable to the conditions and mining system" of the mine, the undersigned previously held in Peabody Coal Co., 15 FMSHRC 1703, 1705 (1993), that the

¹ There is no claim in these cases that good faith negotiations did not precede this action.

² In his posthearing brief the Secretary, contrary to his previous position, now argues that because a ventilation plan, once approved, has the legal force and effect of a mandatory safety standard, his decision to impose a requirement in a ventilation plan should be reviewed by the administrative law judge under the "arbitrary and capricious" standard of review employed by the courts of appeal in judicial review of the Secretary's regulations. This position is inconsistent however with the role Congress has provided for the Commission and with the nature of the plan approval process itself. See Old Ben Coal Co., 1 FMSHRC 1480, 1484 (1979) and Zeigler Coal Co. v. Kleppe, 536 F.2d 398, 405-406 (D.C. Cir. 1976). More specifically as noted above, in Peabody Coal Co., 15 FMSHRC 381, 388 (1993), the Commission held that the Secretary has the burden of proving the suitability of a ventilation plan requirement he seeks to impose.

Secretary could meet his burden of proof if he has "objectively identified a measurable safety hazard that is not addressed in the previously approved ventilation plan" and that he can establish the suitability of the disputed plan provision by showing that "his proposed modifications address the above safety hazard."

Within this framework the underlying issues before me in case Docket No. KENT 93-813 are (1) whether the previously approved ventilation plan for the Peabody Camp No. 11 Mine providing a two-cut mining sequence was no longer suitable to the conditions of that mine as of May 14, 1993, and (2) whether the ventilation plan provisions (incorporating a four-cut mining sequence) advocated by the Secretary were suitable to the Camp No. 11 Mine as of that date.

According to MSHA Supervisory Ventilation Specialist Stanley, the Secretary's proposed ventilation plan changes were warranted by evidence of increasing methane liberation. He testified that the objective measurable safety hazard to be addressed by the four-cut mining sequence was the hazard of methane ignition. In this regard, he cited as a basis for the proposed plan changes, "the fact that we did some in-mine inspections and we observed that methane was being liberated from the face at a higher rate than I had seen before at Camp No. 11."

Rather than present evidence of increased face methane liberation, however, Stanley cited evidence of increased total mine methane liberation.³ That evidence shows that the total methane liberated from the mine for the 24 hour period on February 10, 1992, was 258,896 cubic feet, on June 11, 1992, was 436,462 cubic feet, on December 15, 1992, was 491,674 cubic feet, during the period January 21 through February 5, 1993 was 499,392 cubic feet, and on April 6, 1993 was 387,508 cubic feet.⁴ Based on this information Stanley opined that the two-cut sequence of mining at the Camp No. 11 Mine was no longer suitable and that a four-cut sequence was required.

³ Stanley's reference to an in-mine evaluation lacks record support (See May 17 Tr. 145). Moreover, I do not find that Stanley's reference to the observations of his assistant, Troy Davis, that he (Davis) once noted methane levels briefly exceeding one percent, constitutes sufficient evidence of increased face methane concentrations.

⁴ While the evidence also shows that 410,003 cubic feet of methane was liberated over the 24 hour period on June 21, 1993, Stanley obviously did not have this information when he issued the citation on May 14, 1993.

It is clear, however, from the testimony of highly qualified expert Donald Mitchell,⁵ as well as the expert testimony of James Wolfe, that total mine methane liberation is not a valid measure of face methane liberation. Indeed, both Mitchell and Wolfe unequivocally reject the use of total mine methane liberation as a valid measure of face methane liberation in this case.

Both of these experts noted, in explaining why total mine methane liberation is not relevant to the issue of face methane liberation, that total mine methane liberation increases as the number of active working sections increases. In particular, they noted that from February 1992 to June 1992 the number of working sections at the Camp No. 11 Mine increased from three to five. They also observed that overall mine methane liberation increases as mining progresses because there are more inactive sections and more rib lines to produce methane. Indeed, Mitchell concluded that the increases in total mine methane liberation at the subject mine between February 1992 and December 1992 were low considering the increased number of worked-out areas, increased rib lines and increased production. Finally, Mitchell noted that in order to determine face methane liberation you must examine the records of each working section. He did so and found no changes in face methane liberation.

In light of Mitchell's extraordinary credentials and the inherent logic of his presentation I give his testimony particular weight. I therefore conclude that the Secretary's reliance upon total mine methane liberation to determine the need for the proposed changes is misplaced and indeed does not support the proposed changes in Peabody's ventilation plan from a two-cut mining sequence to a four-cut mining sequence. In addition, the unchallenged evidence from the section records that face methane liberation has in fact not changed, completely undermines the Secretary's position herein. The Secretary has accordingly failed in his burden of proving that Peabody's pre-existing plan setting forth a two-cut mining sequence was not suitable to the Camp No. 11 Mine as of May 14, 1993, and has failed in his burden of proving that the four-cut sequence

⁵ Mitchell has a Masters Degree in Mining Engineering from Columbia University, is a registered professional engineer in Pennsylvania, and is presently a consultant for unions, mine operators and governments throughout the world specializing in mine ventilation, mine fires and mine explosions. He was formerly MSHA's principle mining engineer in technical support and, in that capacity, was chief of its approval certification center, chief of miner emergency operations and chief of the electrical laboratories. Mitchell was also assistant coordinator in the development of regulations under the Federal Coal Mine Health and Safety Act of 1969.

should be substituted as suitable to the conditions at the Camp No. 11 Mine as of that date. Accordingly, Citation No. 3547687 must fail and civil penalty proceeding Docket No. KENT 93-813 must be dismissed.

In reaching the above conclusions, I have not disregarded Mr. Stanley's testimony that in finding the pre-existing plan unsuitable, he also considered a "draft" from "headquarters" that included language recommending that cuts be limited to twenty feet "unless it can be proven that a deeper cut is all right to take." I have also not disregarded Stanley's testimony that he also relied upon reports from "other people" in MSHA that his MSHA district, District 10, was the only district in the country that permitted a two-cut sequence and did not require a four-cut sequence. However, such statements, without any underlying foundation or analysis, can be given but little weight.⁶

The Secretary also argues, in essence, that even if the citation was issued without sufficient grounds, results of a face ventilation investigation by MSHA's Pittsburgh Safety and Health Technology Center (Tech Center) obtained subsequent to the citation at issue justifies his prior conclusion that the pre-existing plan calling for a two-cut mining sequence was not suitable and that the four-cut mining sequence should be substituted at the Camp No. 11 Mine. The investigative report (Report) resulting from a May 11 through 13, 1993 study directed by MSHA mining engineer Michael Snyder, appears, however, to have been seriously flawed for several reasons.

First, the underlying data may have been seriously compromised by the presence during the study of eight to ten people between the line brattice and the rib thereby obstructing the face ventilation. James Wolfe the Peabody supervisor of ventilation at Camp No. 11, who was present during the subject investigation, testified that he frequently observed persons in the area between the brattice and the rib, including two working miners and up to eight participants in the study group.

Wolfe later performed a test in this area in January 1994, and found that, on average, one person within the area between the brattice and the rib produced a ten percent reduction in the

⁶ This evidence suggests, moreover, that the Secretary has been attempting to enforce a provision that is not mine specific, but should have been implemented through the Act's notice and comment rulemaking procedures set forth in section 101 of the Act. See Zeigler Coal Co. v. Kleppe, 536 F.2d 398 (D.C. Cir. 1976), and Secretary v. Peabody Coal Co., 15 FMSHRC 381 (1993).

volume of air and two persons caused a fifteen percent reduction. According to Wolfe, the actual air flow during the testing period would therefore have been somewhat less than the actual readings observed during the MSHA investigation. Under the circumstances, it may reasonably be inferred that the face ventilation was in fact restricted during the MSHA investigation thereby causing more frequent and higher methane readings than otherwise would have resulted. On this basis alone, the face ventilation investigation must be viewed with caution.

In any event, even assuming the accuracy of the investigation data, I nevertheless give significant weight to the expert testimony of Donald Mitchell who, even when assuming the validity of the investigative results, rejected each of the conclusions in the Report based on those results. Mitchell also rejected the underlying premise of the Report, i.e., that relatively brief peak periods (averaging 10 seconds) of methane of one percent or slightly higher provided a basis for the proposed ventilation plan modifications.

Mitchell testified that the regulatory requirement for corrective measures to be taken upon reaching one percent methane was developed to create a margin of safety. He noted that it was established as the last point before which you must take action. Mitchell further noted that since the peak methane readings taken in the investigation were essentially instantaneous and since no action was necessary to actually reduce the methane concentration, no modifications to face ventilation were needed. Mitchell concluded that nothing in the Report showed any reason for concern for the existing face ventilation at the Camp No. 11 Mine. He maintains that there is no statutory or regulatory basis or actual need based on safety for the ventilation plan to guarantee that methane be less than one percent at all times.

Mitchell testified, in summary, that the two-cut system is a safe and efficient method of mining and that it was a "suitable" method for the subject mine. Mitchell further observed that the four-cut system may indeed create an even greater hazard to miners because it requires more frequent movement of the continuous miner and shuttle cars. According to Mitchell, this movement exposes the miner helper to more back injuries and slipping injuries in handling the trailing cable and exposes the miner helper to the danger of moving shuttle cars.

Citation No. 3861905 (Docket No. KENT 94-347-R) was issued by Stanley on January 6, 1994, for Peabody's refusal to incorporate two further provisions in its ventilation plan in addition to the requirement for a four-cut mining sequence, i.e., (1) that at least 8,000 cubic feet per minute (cfm) of air be delivered to the inby end of the line brattice when the

wet bed scrubber is operating and (2) that a second methane sensor be installed on the line brattice side of the continuous miner between the cutting head and the scrubber inlet (Joint Exhibit No. 20, 4th and 5th pages, paragraphs 3 and 6).

As before, the issues regarding this citation are similarly (1) whether the previously approved ventilation plan for the Peabody Camp No. 11 Mine was no longer suitable to the conditions of that mine as of January 6, 1994, and (2) whether the ventilation plan amendments advocated by the Secretary were suitable to the Camp No. 11 Mine as of that date. As previously noted, the Secretary bears the burden of proof on these issues. Peabody Coal Co., 15 FMSHRC 381 (1993) and Peabody Coal Co., 15 FMSHRC 628 (1993).

As the basis for the Secretary's insistence on these two additional requirements, Stanley testified that he relied upon the same evidence of an increase in overall mine methane liberation previously discussed in reference to Citation No. 3547687. For the reasons already noted, however, I find such reliance to have been misplaced and that such data is invalid for determining face ventilation requirements. Stanley testified that he also relied upon the MSHA Report (Joint Exhibit No. 12) and, in particular, upon the following suggestions in the Report:

3. Based on the data collected during the investigation, a quantity of 12,200 cfm (5.76 m³/s) would have been necessary to maintain a peak face area methane concentrations below 1.0 volume percent 97.5 percent of the time. This indicates that an increase in the available air quantity or other modifications to the face ventilation system may be necessary.

4. Since 20 of 26 peaks detected on the right side of the miner were not detected on the left side of the miner, an additional sensor located on the right side of the miner would improve the detection of methane in the face area.

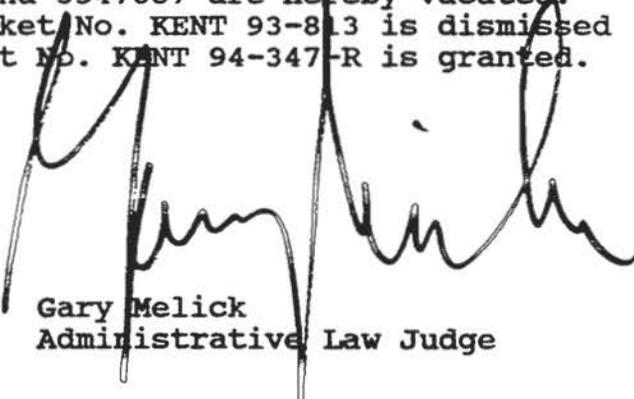
The Report itself may not be relevant however since the study on which it was based was conducted while the Camp No. 11 Mine was following the two-cut mining sequence. When the Report was prepared, MSHA had already required Peabody to switch to the four-cut sequence. No additional study was conducted under the four-cut sequence and no in-mine investigation was performed before MSHA imposed the new requirements.

In any event, Stanley's decision to require the subject modifications in the ventilation plan was bottomed on his belief that a ventilation plan must be such that it "guarantees that [in all areas being mined] methane can be kept to a one percent or less than one percent value." However, neither the Secretary nor his representatives can simply and arbitrarily decide through the ventilation approval process that ventilation plans should be required to maintain methane at such levels at all times. Zeigler Coal Co. v. Kleppe, 536 F.2d 398 (D.C. Cir. 1976); Carbon County Coal Co., 7 FMSHRC 1367 (1985), and Peabody Coal Co., 15 FMSHRC 381, 186-387 (1993).

For the reasons previously noted, however, and giving decisive weight to the testimony of Peabody's highly qualified expert, Donald Mitchell, that neither the "8,000 cfm" nor the "second methane monitor" proposed requirements were necessary for proper ventilation at the Camp No. 11 Mine, I do not find that the Secretary has met his burden of proving that the pre-existing plan was "not suitable" to the Camp No. 11 Mine, or that the proposed modifications were "suitable" or necessary to that mine. Under the circumstances Citation No. 3861905, issued January 6, 1994, must also be vacated.

ORDER

Citation Nos. 3861905 and 3547687 are hereby vacated. Civil Penalty Proceeding Docket No. KENT 93-813 is dismissed and Contest Proceeding Docket No. KENT 94-347-R is granted.



Gary Melick
Administrative Law Judge

Distribution:

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APPENDIX A

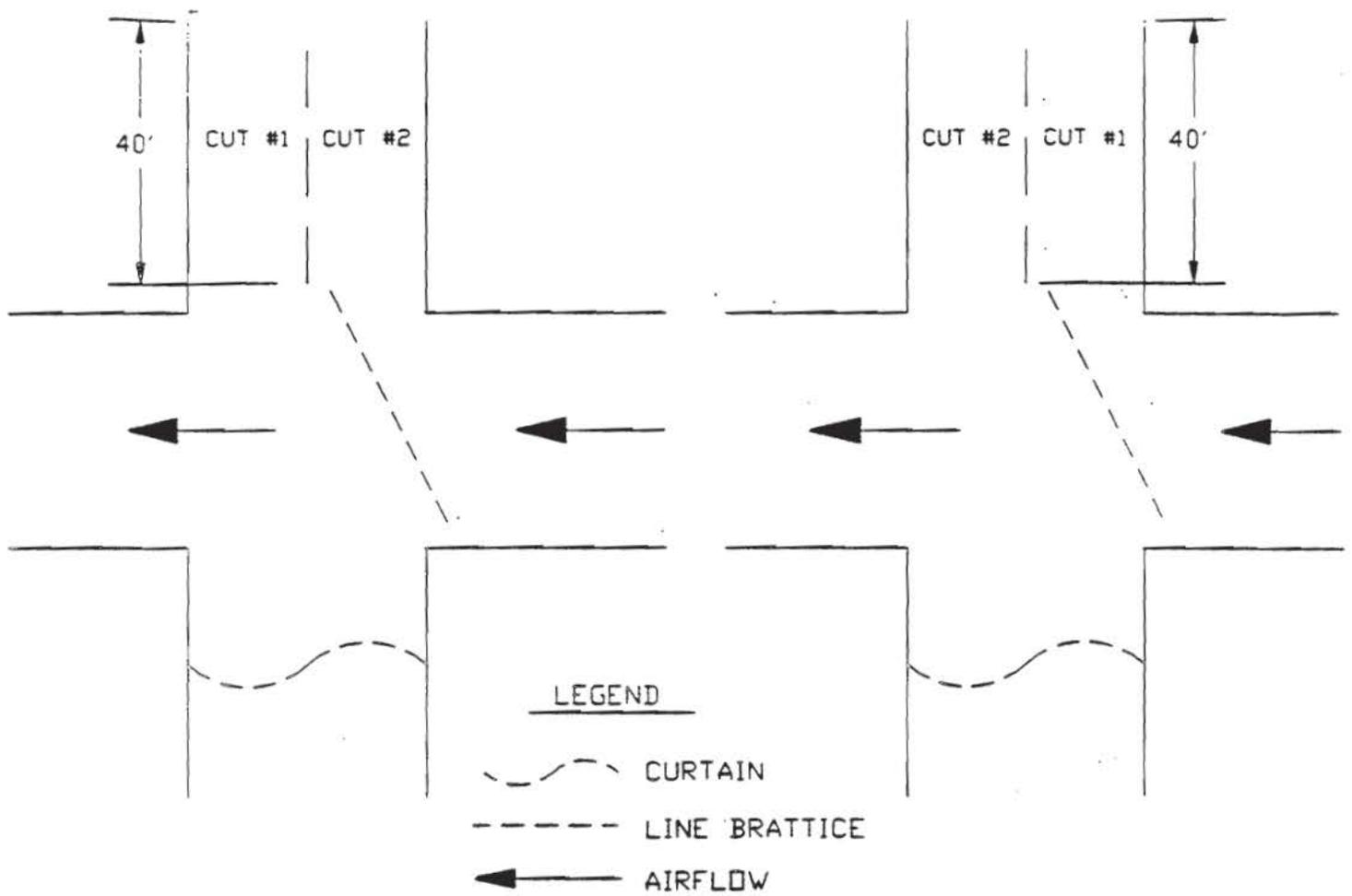


Figure 1

APPENDIX A

Camp Engineering

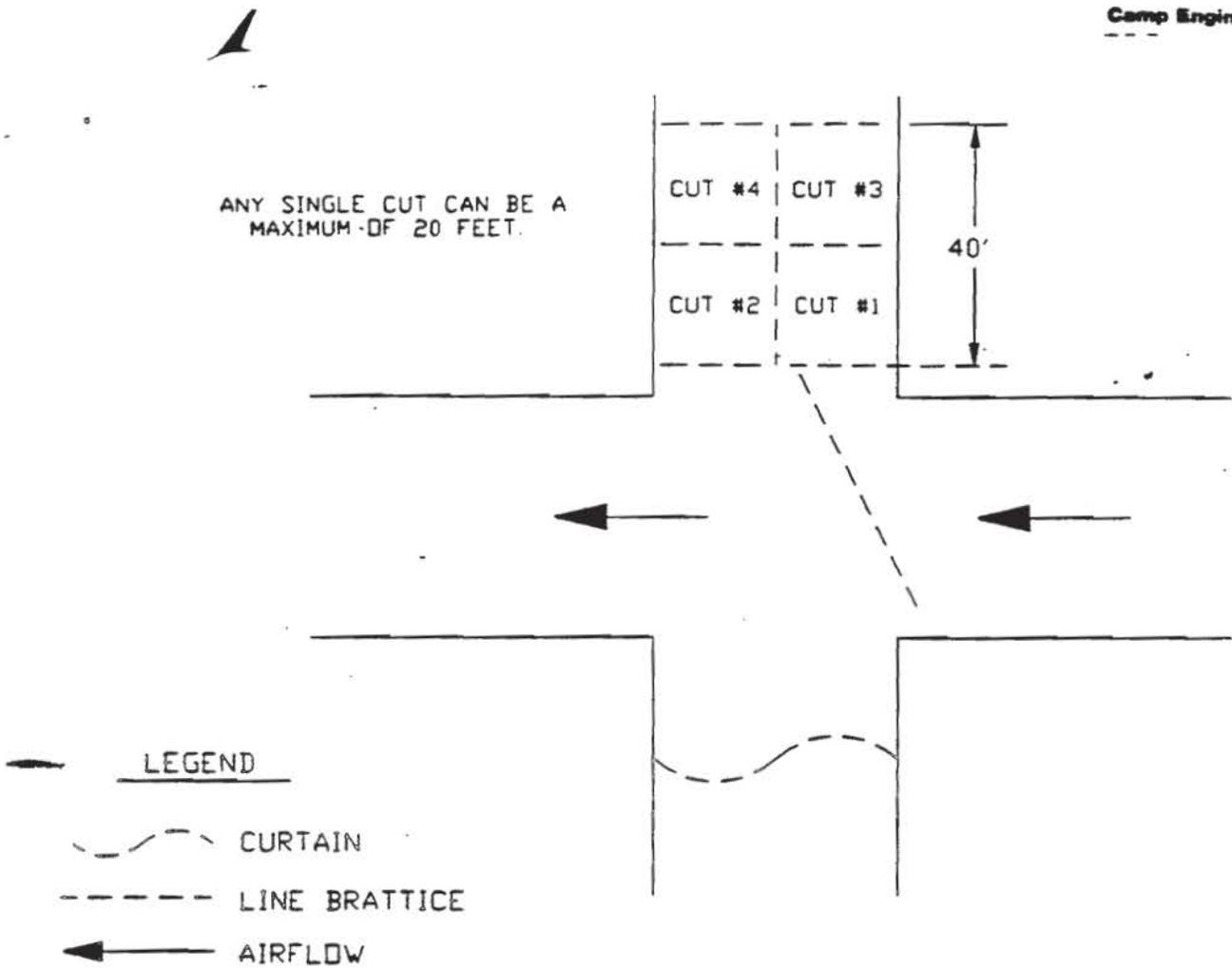


Figure 2

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

OCT 12 1994

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. VA 94-53-M
Petitioner : A.C. No. 44-00101-05539
v. :
: Docket No. VA 94-55-M
RIVERTON CORPORATION, : A.C. No. 00101-05540
Respondent :
: Quarry #1

DECISIONS

Appearances: Glenn M. Loos, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia, for
the petitioner/respondent;
Dana L. Rust, Esq., McGuire, Woods, Battle and
Boothe, Richmond, Virginia, for the
contestant/respondent.

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern civil penalty proposals filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(c), seeking civil penalty assessments for thirty-four (34) alleged violations of certain mandatory safety standards found in Part 56, Title 30, Code of Federal Regulations. A hearing was held in Charlottesville, Virginia, and the parties appeared and participated fully therein.

Issues

The issues presented in these proceedings include the fact of violation, whether some of the violations were "significant and substantial", and the appropriate civil penalty assessments to be made for the violations. Additional issues raised by the parties are identified and disposed of in the course of these decisions.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 301 et seq.
2. Sections 110(a) and 110(i) of the Act.
3. Commission Rules, 29 C.F.R. § 2700.1, et seq.

Admissions

The respondent has admitted that it is the owner and operator of the mine at which the citations in these proceedings were issued, and that its mining operations are subject to the jurisdiction of the Mine Act, as well as the Commission and the presiding judge in these proceedings.

Discussion

In the course of the hearings the parties were afforded an opportunity to discuss settlements of all of the contested violations in these proceedings, and evidence was presented with respect to the six statutory civil penalty assessment criteria found in section 110(i). In addition to trial counsel, the MSHA inspector who issued all of the disputed citations, and the respondent's manager of operations were present in the courtroom and actively participated in the settlement negotiations. Arguments in support of the proposed settlement disposition of thirty (30) of the citations were presented on the record, and I issued bench decisions approving those dispositions pursuant to Commission Rule 31, 29 C.F.R. § 2700.31. My bench decisions are herein reaffirmed.

John E. Gray, the respondent's Manager of Operations, confirmed that the respondent's mining operation at the No. 1 Quarry consists of a limestone quarry that produces material for use in its masonry plant for the production of masonry products, agricultural lime, and pre-mix cement products. He characterized the operation as an "old" quarry and plant that has been in operation for many years. He stated that the operation has an annual production of approximately 400,000 to 600,00 tons. Petitioner's counsel asserted that MSHA's records reflect a production of 431,797 tons for the year 1992 (Tr. 53-54).

MSHA Inspector James E. Goodale, who issued all of the citations in these proceedings, agreed to the age, size, and scope of the respondent's mining operations, and he stated that mine management was cooperative and timely abated all of the citations in good faith (Tr. 31-32).

Docket No. VA 94-53-M

The respondent conceded the fact of violations with respect to citation Nos. 4288839, 4288843, 4288849, 4288711, 4288715, 4288842, and 4288848, and agreed to accept the citations as issued and to pay the proposed penalty assessments.

The petitioner agreed to delete the "S&S" designations with respect to Citation Nos. 4288845, 4288714, and 4288844 and to modify the citations to non-"S&S". The petitioner amended its proposed penalty assessments to reflect proposed penalties of fifty-dollars (\$50) for each of the citations. The respondent agreed to accept the amended citations and to pay the amended proposed penalty assessments.

The petitioner agreed to vacate citation Nos. 4288853, 4288846, and 4288708 (Tr. 34-36; 61-62).

The remaining Citation No. 4288838, issued on December 8, 1993, citing an alleged violation of 30 C.F.R. § 56.14107(a), was submitted to me for summary decision by agreement and stipulations by the parties.

Docket No. VA 94-55-M

The respondent conceded the fact of violations with respect to Citation Nos. 4288824, 4288825, 4288826, 4288830, 4288831, 4288835, 4288836, 4288841, 4288847, 4288850, and 4288851, and agreed to accept the citations as issued and to pay the proposed penalty assessments.

The petitioner agreed to delete the "S&S" designations with respect to citation Nos. 4288832 and 4288852, and to modify the citations to non-"S&S". The petitioner amended its proposed penalty assessments to reflect proposed penalties of fifty-dollars (\$50), for each of the citations. The respondent agreed to accept the amended citations and to pay the amended proposed penalty assessments. The parties agreed that Citation No. 4288852, should be amended to reflect a violation of 30 C.F.R. § 56.2003(a), rather than 30 C.F.R. § 56.4102, as initially cited.

The petitioner agreed to vacate Citation Nos. 4288823 and 4288834. The petitioner further agreed that the negligence finding of the inspector with respect to Citation No. 4288827 should be modified from "moderate" to "low", and that the initial proposed penalty of \$50 should be amended to reflect a proposed penalty assessment of \$25. The respondent agreed to accept the amended citation and to pay the penalty assessment of \$25 (Tr. 36-40; 62).

The remaining Citation Nos. 4288828, 4288829, and 4288840, issued on December 7 and 8, 1993, citing alleged violations of 30 C.F.R. § 56.14107(a), were submitted to me for summary decision by agreement and stipulations by the parties.

With regard to the four outstanding citations concerning the interpretation and application of guarding standard 30 C.F.R. § 56.14107 (Citation Nos. 4288838, 4288828, 4288829, and 4288840), the parties submitted posthearing briefs in support of their respective motions for summary decision, and they have stipulated to the following:

1. Inspector James Goodale was acting in his official capacity when he issued Citation Nos. 4288838, 4288828, 4288829 and 4288840, and true copies of the citations were served on the respondent.
2. The respondent owns the Euclid diesel haul trucks, Co. #T-12, Co. #T-16 and Co. #T-14, and the Cat 920 front end loader which were cited in Citation Nos. 4288838, 4288828, 4288829 and 4288840, and all of this equipment was operational at the time the citations were issued.
3. The cited V-belts are part of the diesel engine assembly of each piece of equipment in question. The engine compartment is covered by a hood on the top and by a radiator grill on the front. The side compartment facing the tires is partially open and a gap exists between the engine compartment and the wheels. (Photographs of each cited vehicle are included as joint exhibits with the motions filed by the parties).
4. The open sides of the engine compartment together with the gap between the engine compartment and the wheels allows access to and contact with the engine assembly.
5. The gaps in the sides of the engine compartments of the vehicles were not guarded by the vehicle manufacturers.

All of the citations were issued as non-"S&S" violations, with "moderate" negligence findings, and the cited conditions are described as follows:

The V-belts on the diesel engine of the Euclid haul truck Co. #12 were not guarded to prevent contact with pinch points or moving parts. The belts were approx. 4 1/2 feet above ground level. No exposure in this area while machinery is being operated (No. 4288838).

The V-belts on the diesel engine of the Euclid haul truck Co. #T16 were not guarded to prevent accidental contact with pinch points or moving parts. The belts were approx.

4 1/2 feet above ground level. No exposure in this area while machinery is operating (No. 4288828).

The V-belts on the diesel engine of the Euclid haul truck Co. #T14 were not guarded to prevent accidental contact with pinch points or moving parts. The belts were approx. 4 1/2 feet above ground level. No exposure in this area during operations of this equipment (No. 4288829).

The V-belts on the diesel engine of the Cat 920 front end loader were not guarded to prevent contact with pinch points or moving parts. The belts were approx. 4 feet above ground level. No exposure in this area during operations of equipment (No. 4288840).

The legal issue presented with respect to the citations is whether the guarding requirement of 30 C.F.R. § 56.14107(a), applies to mobile machinery -- trucks and a front end loader in particular -- or only to stationary machinery. Section 56.14107(a) states as follows:

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

Section (b) of section 56.14107, provides as follows:

Guards shall not be required where the exposed moving parts are at least seven feet away from walking or working surfaces.

Petitioner's Arguments

In response to the respondent's argument that moving parts of mobile machinery such as the cited trucks and loader are not required to be guarded pursuant to section 56.14107(a), the petitioner asserts that the general safety purpose of the mine Act, together with the history, language and purpose of the regulation and the existing case law supports a finding that the moving parts of mobile machinery are subject to the guarding requirement of § 56.14107(a).

In support of its argument, the petitioner states that the Mine Act is remedial safety legislation with a primary purpose of protecting miners, and as such, it should be liberally construed and not interpreted in a limited or narrow fashion.

The petitioner argues that its interpretations of the Act and its regulations are entitled to deference and that when Congress has spoken directly to an issue in a statute so that its

intent is clear, that intent must be given effect. If the Act is silent or ambiguous on a specific issue, the petitioner believes that the trial judge must defer to the petitioner's interpretation, so long as it is reasonable and consistent with the purpose of the Act, and not in conflict with its plain language, and that this deference must be shown especially when the petitioner and the Commission agree on an interpretation of the regulation in issue.

The petitioner asserts that the history of section 56.14107(a), makes clear that the purpose in promulgating this regulation was to insure that all hazardous moving machine parts be guarded to protect persons from coming into contact with those parts, and that the regulation was intended to apply to the moving machine parts of mobile machinery such as vans, pickup trucks, and larger, off-road vehicles, 53 Fed. Reg. 32509 (August 25, 1988). The petitioner further believes that the objective of the regulation is to prevent contact, and that guards must enclose moving parts to the extent necessary to achieve this goal.

The petitioner further argues that since it has consistently interpreted section 56.14017(a), as covering the moving parts of mobile equipment, its interpretation is entitled to deference because it is consistent with, and promotes, the remedial safety purpose of the Act. Further, the petitioner believes that the fact that the regulation does not explicitly refer to mobile machinery is irrelevant because such regulations are often written in a brief and simple manner "in order to be broadly adaptable to myriad circumstances", Kerr-McGee Corporation, 3 FMSHRC 2128, 2130 (December 1982).

The petitioner asserts that in Thompson Brothers Coal Co., Inc., 6 FMSHRC (September 1984), an identical case under the analogous safety standard found in 30 C.F.R. § 77.400(a), the Commission considered the question of whether that regulation was violated when the mine operator failed to guard the cooling fan blades and air compressor belts and pulleys on the engines of two Euclid R-50 dump trucks. The petitioner asserts that the Commission set forth the test for proving a violation of § 77.400(a), and required that the Secretary, "prove: (1) that the cited machine part is one specifically listed in the standard or is 'similar' to those listed; (2) that the part was not guarded; and (3) that the unguarded part 'may be contacted by persons' and 'may cause injury to persons.'" Thompson Brothers Coal Co., Inc., supra at 2096.

The petitioner points out that working with facts indistinguishable from those in the present cases, the Commission found that the Secretary had proven all three factors and affirmed the Administrative Law Judge's finding that a violation of § 77.400(a) existed, and affirmed findings that the cooling

fan and the air compressor belts and pulleys were "similar moving machine parts," that these parts were accessible and unguarded and that contact, however unlikely, with these parts could cause injury. Therefore, the Commission found a "reasonable possibility of contact and injury."

The petitioner concludes that the Thompson Brothers decision provides persuasive precedent in support of the citations issued in the instant cases. Although Thompson Brothers interpreted a Part 77 regulation, rather than a Part 56 regulation, the petitioner points out that the language of section 77.400(a), is virtually identical to the language of section 56.14107(a). The petitioner further points out that the purpose of the two regulations is identical in that they are both designed to protect miners from being injured or killed by contacting the moving parts of machinery. Finally, the petitioner asserts that identical fact patterns exist in both cases so that the reasoning of Thompson Brothers is equally applicable to the facts of the present cases.

The petitioner asserts that the argument that the Commission did not consider the question of whether section 77.400(a), applies to trucks is not persuasive. The petitioner believes that when the Commission affirmed the judge's decision finding a violation of section 77.400(a), it implicitly decided that the regulation required guards over all types of moving machine parts, whether they were located on stationary equipment or not, that the only real concern of the Commission was whether the citation concerned the type of moving machine part listed in the regulation or other similar exposed moving machine parts, and that the question of whether these parts were located on stationary or mobile equipment was not deemed relevant. The petitioner concludes that the Commission did not explicitly address the question because it is obvious, given the history and text of the regulation, together with the above-stated legal standards for construction and interpretation under the Act, that moving machine parts of trucks are subject to the guarding requirements of 30 C.F.R. § 77.400(a) and 30 C.F.R. § 56.14107(a).

The petitioner states that Inspector Goodale determined that the guarding requirement of 30 C.F.R. § 56.14017(a), was being violated on three Euclid haul trucks and one front end loader at the respondent's No. 1 Quarry. He observed that the V-belts on the engine assemblies of the trucks were not guarded to prevent contact with pinch points or moving parts of the engines. The trucks each had a hood covering the top of the engine and a grill covering the front of the engine, but the sides of the engine compartment were open and allowed contact with the moving parts of the engine. While the inspector realized that it was unlikely that a person would come in contact with the V-belts of the engines when the trucks were running, the petitioner believes

that he correctly determined that some potential for an injury existed and issued the citations in question.

In view of the foregoing arguments, the petitioner believes that it is entitled to a finding that the guarding requirements of section 56.14107(a), apply to the cited mobile machinery in these cases, and not only to stationary equipment, and that as a matter of law, it is entitled to a summary decision in its favor.

The Respondent's Arguments

The respondent states that like most vehicles, the cited haul truck engines are guarded by a hood on top and a radiator grill on the front. Further, the trucks are not large enough for a person to stand underneath them, and that only a mechanic who intended to perform maintenance on the truck could access the engine assembly from underneath. Although there are small gaps on the sides of the truck engine compartment that are not guarded by the manufacturer, a person would have to climb over or around the wheels and the wheel assembly to access the engine compartment from the side.

With regard to the front-end loader, the respondent states that the engine assembly is also covered on the top, front, and back, and partially covered on the sides. To access the engine compartment from the side, a person would have to climb over or around the vehicle's wheels, and these areas were not guarded by the vehicle's manufacturer.

The respondent states that the petitioner has a fundamental obligation to give mine operators fair warning of the conduct it prohibits or requires. Respondent asserts that a regulation must give "a reasonably prudent person notice that it prohibits the cited conduct", Pontiki Coal Corp., 15 FMSHRC 48 (January 1993), and that "even a broad standard cannot be applied in a manner that fails to inform a reasonably prudent person that the condition at issue was prohibited by the standard", Mathies Coal Co., 5 FMSHRC 300 (March 1983).

The respondent points out that section 56.14107(a), is found in Subpart M of Part 56, Title 30, Code of Federal Regulations, entitled "Maintenance and Equipment", and that while some of the regulations found in this subpart expressly cover mobile equipment, section 56.14107(a) does not state that it applies to haul trucks, front end loaders, or any other form of mobile equipment. The respondent believes that this omission is significant because the term "mobile equipment" is expressly defined in 56.14000, and used in other regulations contained in Subpart M, including 56.14100, 56.14101, 56.14103 and 56.14132, while other regulations contained in Subpart M go even further and specify with particularity the exact types of vehicles which are covered, e.g., 56.14106 expressly covers only "fork-lift

trucks, front-end loaders and bulldozers"; 56.14131 covers only "haulage trucks." Section 56.14107(a), provides no such guidance.

The respondent states that other regulations found in Subpart M are clearly not intended to cover vehicles, (56.14109, conveyors adjacent to travelways; 56.14116, hand held power tools). The respondent asserts that all of the Commission's reported cases decided under section 56.14107, reported on Westlaw, and where the machinery or equipment involved in the citation is actually identified, involved stationary equipment (19 case citations omitted).

The respondent asserts that the petitioner's official comments published in the Federal Register when section 56.14107, was promulgated in 1988, represent its only statement regarding the scope and intent of this regulation, and that nothing in these comments indicates that the petitioner intended the regulation to cover haul trucks or front end loaders. To the contrary, respondent believes that the comments establish that the petitioner intended the regulation to cover, at most, vehicles which were so large that a person could actually walk underneath them. The respondent believes that these vehicles presented "special hazards" because there was a realistic possibility that someone walking underneath one could accidentally contact moving machine parts. In contrast, the respondent asserts that ordinary vehicles were not within the scope of the rule because the engine hood and vehicle size would, in most cases, provide adequate protection, and it cites MSHA's comments as follows at 53 Fed. Reg. 32509 (1988):

In those situations, the vehicle size and engine hood would act to prevent access and contact with the exposed moving parts, and no additional guard would be required. However, larger, off-road vehicles present special hazards because of the greater accessibility to their moving machine parts. In some instances, persons can walk directly under the vehicle to inspect the engine and be exposed to its moving parts.

The respondent points out further that MSHA also indicated in its comments that it did not expect operators to install new guards on the large, off-road vehicles which were covered by the regulation, and operators using these vehicles could rely on manufacturer-installed guarding. The respondent cites the following MSHA comments at 53 Fed. Reg. 32509, in support of its conclusion:

In most instances, these parts are already guarded by the manufacturer, but guards are sometimes removed during repair work and not replaced. MSHA's objective is to ensure that these guards remain in place.

The respondent believes it is entitled to summary decision because section 56.14107, does not clearly cover haul trucks or front end loaders, and nothing in the regulation itself suggests that it applies to such vehicles or any other form of mobile equipment. Respondent maintains that Subpart M's title, "Machinery and Equipment," does not indicate that all of the regulations in the subpart apply to mobile equipment, and that many of the regulations in the subpart clearly were not intended to cover vehicles, while other regulations in the same subpart specify with particularity that they cover mobile equipment such as front end loaders and haul trucks. The respondent concludes that MSHA was required to use the same specificity in section 56.14107, and as a minimum was required to indicate if the regulation covered mobile equipment. The respondent further concludes that in its present form, section 56.14107, fails to give fair notice that mobile equipment is covered, and that this is confirmed by the fact that every Commission case decided under the regulation involves stationary equipment. Because of the critical ambiguities in the regulation, the respondent believes that the citations should be vacated.

The respondent argues further that MSHA has stated in the comments accompanying the regulation that ordinary vehicles, like the respondent's front end loader or haul trucks, are adequately protected by their engine hoods and vehicle size, and that the regulation applies, at most, only to vehicles which are so large that a person can walk directly underneath them, thus presenting "special hazards because of the greater accessibility to their moving machine parts." 53 Fed. Reg. 32509 (1988). The respondent concludes that the failure of the petitioner to give notice that the regulation covered mobile equipment, either in the regulation itself, or in its regulatory comments, preclude it from now expanding the scope of the regulation.

The respondent states that MSHA commented that mine operators may rely on guarding supplied by vehicle manufacturers, and that its chief concern was operator's removing such guards. Respondent emphasizes that it has not removed any manufacturer-installed guarding from the cited equipment and that it properly relied on that guarding.

The respondent concludes that the petitioner's reliance on the Commission's decision in Thompson Bros. Coal Co., supra, is misplaced. Respondent argues that Thompson Brothers was decided under section 77.400, and while it bears some similarity to section 56.14107, the petitioner's official comments when section 56.14107 was promulgated represent its clearest statement regarding the scope and definition of that regulation. The respondent does not believe that the petitioner may use a case decided under section 77.400 to expand that definition.

The respondent argues that the principle issue in Thompson Brothers was whether there was substantial evidence to support the judge's decision, and that the Commission concluded that the judge's findings were supported by the evidence, and therefore affirmed his decision after finding no basis for overturning his credibility determinations and resolution of conflicting testimony. The respondent concludes that the decision is inapposite to the facts presented in the cases at hand.

Findings and Conclusions

The present language of section 56.14017(a), was published in the Federal Register on August 25, 1988, during MSHA's rulemaking updating, clarifying, and revising its equipment and machinery standards, and the final rules became effective on October 24, 1988. 53 Fed. Reg. 32509 (August 25, 1988). Respondent is correct in its assertion that MSHA's Federal Register comments with respect to the promulgation of this standard appears to be the only statement regarding the scope and intent of section 56.14107(a), and the petitioner has not cited any additional MSHA comments or statements in this regard.

The petitioner's assertion that it has consistently interpreted section 56.14107(a), as covering the moving parts of mobile equipment is not well taken. MSHA's metal and nonmetal safety and health Guide to Equipment Guarding, published in 1980, and covering the requirements of mandatory standards 55, 56, and 57.14-1, does not mention mobile equipment or vehicles, and all of the illustrations and information in that publication with respect to mechanical guarding is limited to stationary machinery.

During its consideration of proposed revisions of its Part 55, 56, and 57 machine guarding standards, MSHA commented that its equipment Guide was "well received by the mining community" and MSHA believed that the proposed rules' use of the concepts set forth in that guide will provide a clearer statement of the requirements for guarding, 49 Fed. Reg. 8377 (March 6, 1984). However, as noted, that publication is silent on the application of MSHA's moving machine parts guarding standards to mobile equipment or vehicles. As far as I can determine, MSHA's guide to equipment guarding has not been revised or updated to make it clear that mobile equipment and vehicles are covered by the standard. Indeed, if one were to rely on that guide as the clear definitive word on the intent of the guarding standard in question, one could reasonably conclude that since it does not even mention mobile equipment or vehicles, the guarding requirements covered therein are limited to stationary machinery such as the types discussed and depicted in that publication, and not to mobile equipment or vehicles such as the trucks and loader cited in these cases.

MSHA's current policy guidelines with respect to the application and interpretation of sections 56/57.14107, do not even mention mobile equipment or vehicles. Under the circumstances, MSHA's policy and guide, which are intended to inform and educate the industry with respect to the application of the regulatory moving machine parts guarding regulations can hardly be characterized as providing consistent, longstanding, and clear interpretations by MSHA that section 56.14107(a), is intended to apply to the moving parts of mobile equipment or vehicles.

During the 1988, rulemaking and in response to some industry comments that guards should provide protection against inadvertent, careless, or accidental contact but not against deliberate or purposeful actions, MSHA noted that based on accident statistics in which person suffered serious or fatal injuries by moving machine parts, in most instances those persons were performing deliberate or purposeful work-related actions with the machinery and that the installation of a guard to enclose the moving machine parts would have prevented most of the injuries. MSHA stated that the objective in promulgating section 56.14107, "is to prevent contact with these machine parts", and that it applies where the moving machine parts can be contacted and cause injury. 53 Fed. Reg. 32509 (August 25, 1988).

The respondent's assertion that MSHA stated in its rulemaking comments that "ordinary vehicles" such as its haul trucks and front end loader are adequately protected by their engine hoods and vehicle size and that the regulation applies, at most, only to vehicles which are so large that a person can directly walk underneath them is inaccurate and taken out of context.

MSHA's 1988 rulemaking comments with respect to the application of section 56.14107, made reference to small vehicles such as vans or pickup trucks and they were made in response to a question as to whether section 56.14107, would require guarding beyond that provided by the manufacturer for the engine cooling fan on such vehicle. MSHA responded as follows at 53 Fed. Reg. 32509:

In those situations the Vehicle size and the engine hood would act to prevent access and contact with the exposed moving parts, and no additional guard would be required.

With regard to the application of Section 56.14107, to "larger, off-road vehicles", MSHA commented as follows at 53 Fed. Reg. 32509:

* * larger, off-road vehicles present special hazards because of the greater accessibility to their moving machine parts. In some instances persons can walk directly under the vehicle to inspect the engine and be exposed to its moving parts. In most instances, these parts are already guarded by the manufacturer but guards are sometimes removed during repair work and not replaced. MSHA's objective is to ensure that these guards remain in place.

The respondent's reliance on MSHA's comments that operators may rely on guarding supplied by vehicle manufacturers, and that it did not remove any manufacturer installed guarding from the cited equipment is irrelevant. The respondent stipulated that none of the cited machine parts were guarded by the vehicle manufacturer.

The parties have stipulated that the cited v-belts are part of the engine assembly of the cited haul trucks and loader, and although the engine compartments are covered by a hood on the top and by a radiator grill on the front, they further stipulated that the side engine compartments facing the tires are partially open and a gap existed between the engine compartment and the wheels. None of the gaps in the sides of the engine compartments were guarded by the vehicle manufacturers. The parties further stipulated that the open sides of the engine compartments, together with the gaps between the engine compartments and the wheels, allowed access to, and contact with the engine assemblies.

Although the respondent argues that the cited trucks are not large enough for a person to stand underneath them, it has confirmed that a mechanic who intended to perform maintenance on the trucks could access the engine assemblies from underneath, and that a person could access the engine compartment from the side, but would have to climb over or around the wheels and the wheel assembly to access the engine from that location.

With regard to the front-end loader, there is no evidence that it is large enough to allow someone to access the engine assembly from under the machine. However, the respondent confirmed that the engine compartment can be accessed from the side, and a person could do this by climbing over or around the vehicle's wheels.

The respondent has cited 19 decided cases concerning section 56.14107, and points out that all of them involved stationary equipment. One of the cited cases, Overland Sand & Gravel Company, 14 FMSHRC 1337, 1346 (August 1992), concerned an affirmed violation of section 56.14107(a), for an unguarded pinch point of a v-belt drive and alternator pulley of the main diesel engine of a sand and gravel dredge. Another cited case, GFD

Construction Company, Incorporated, 15 FMSHRC 223, 230 (February 1993), concerned a violation of section 56.14107(a), for an unguarded drive shaft of a diesel powered sand dredge pump.

In Highlands County Board of Commissioners, 14 FMSHRC 270, 291 (February 1992), I affirmed a violation of section 56.14107(a), for an unguarded belt drive on a discharge pump located on a platform on the water in a pit area.

In affirming the violation, I concluded that the cited pump belt drive was a moving machine part within the meaning of section 56.14107(a), and that the obvious intent of the standard is to prevent contact with a moving part. I also concluded that even though no one was on the platform while the cited pump was running, and that it was turned off when maintenance was performed, these preventive measures only mitigated the gravity and potential hazards against which the standard is directed, and could not serve as a defense to the violation.

In Walsenburg Sand & Gravel Company, 11 FMSHRC 2233 (November 1989), Commission Judge Cetti affirmed a violation of the guarding requirements of section 56.14001, which was in effect at that time and required the guarding of moving machine parts virtually identical to those required to be guarded by section 56.14107(a). In that case, the inspector cited a caterpillar road grader for an inadequately guarded engine fan blade. The engine had no side panels, and the inspector indicated that he would not have issued the citation if the engine had a side panel because he would have considered this adequate protection for the fan blade. The mine operator defended on the ground that the grader was manufactured in 1951 without any side panels, the engine had a shroud semi-covering around the fan blade that guarded half the blade, and the grader had operated for 27 years without any accident or injury. Judge Cetti considered all of this in finding that the exposure to contact with the motor fan blade was very limited, and he affirmed the citation as a non-"S&S" violation.

In Thompson Brothers Coal Company, 4 FMSHRC 1763, 1764 (September 1982), Commission Judge James Broderick specifically found that the unguarded cooling fan blades and air compressor belts and pulleys in the engine compartment of two Euclid R-50 dump trucks were moving machine parts similar to those listed in the cited guarding standard section 77.400(a), and were accessible and might be contacted by persons examining or working on the vehicles. Judge Broderick stated as follows at 4 FMSHRC 1764:

Respondent attempted to show that it was virtually impossible for a person not suicidally inclined to contact the parts in question while moving. On this issue, I accept the testimony of the inspector, and

conclude that a person working around the engine or inspecting it while the engine was running, could inadvertently come in contact with one of the moving parts. Should a person come in contact with one of the moving parts described above, it might cause an injury to that person.

The Commission affirmed Judge Broderick's decision at 6 FMSHRC 2094 (September 1984), and it adopted a "likelihood of contact and injury" test after analyzing the "may cause injury" language found in surface mining standard section 77.400(a). The Commission noted that while the operator asserted in its petition for discretionary review that the machine parts in question were not the kind to which the standard applied, it did not further develop this issue in its supporting brief. Thus, it would appear to me that the question of whether the cited standard applied to mobile mechanical equipment, including vehicles, and was not limited to stationary machinery, was not specifically addressed by the Commission because the parties failed to develop this question on appeal and not, as suggested by the petitioner, that it was obvious and not deemed relevant by the Commission. Although the thrust of the Commission's decision focused on the likelihood of contact and injury within the meaning of the challenged regulatory language, the Commission specifically ruled as follows at 6 FMSHRC 2096-2097:

There is no question that the cooling fan blades and air compressor belts and pulley were not guarded when the citations were issued. We also find that these machine parts were the types of machine parts to which the standard applies. (Emphasis Added).

There is no dispute that the engines on these trucks were physically accessible and that on occasion mechanics could be called on to examine or work on the engines while the engines were idling. The judge specifically credited the testimony of the inspector that a miner checking or working on the engine while the engine was running could come into contact with any of the cited machine parts. Thompson's witnesses all agreed that contact was possible even though they regarded it as unlikely. At a minimum, contact could result from such causes as a sudden movement, stumbling, or momentary distraction or inattention. We find no basis for overturning the judge's resolution of conflicting testimony regarding the possibility of contact. The judge also found that the possibility of such contact was "minimal." 4 FMSHRC at 1765. On the facts of this case, we construe a "minimal" possibility of contact to be within the realm of reasonable possibility. Given the physical accessibility of the engine compartment, the fact that mechanics could check

and work on running engines, and that contact with the cited machine parts could occur, we conclude that a reasonable possibility of contact existed. (Emphasis Added).

In Thompson Brothers there was credible evidence that mechanics would occasionally be called on to examine or work on the truck engines while the engines were idling and that a miner checking or working on the engine while it was running could come into contact with any of the cited machine parts. In the instant case, the parties presented no evidence or information as to whether or not any maintenance, repairs, or visual inspections are ever performed in the cited trucks or loader while parked with the engines running.

I note that section 56.14105, requires that repairs or maintenance of machinery or equipment be performed only after the power is off and the equipment in machinery is blocked against hazardous motion. Section 56.14204, prohibits the manual lubrication of machinery or equipment while it is in motion where the application of the lubrication may expose persons to injury. Section 56.14100(b), requires timely correction of equipment and machinery defects to prevent the creation of a hazard to a person. Section 56.14100 (d) requires that self-propelled mobile equipment with defects that make continued operation hazardous to persons be taken out of service until the defects are corrected.

The citations issued in these cases were all classified as non-"S&S" and the inspector noted that there was no hazard exposure while the machinery was in operation and that an injury was unlikely. He also found that if an injury did occur, it could reasonably be expected to be permanently disabling. I conclude and find that all of these facts go to the question of gravity and may not serve as a defense to the validity of the violation.

Although Thompson Brothers concerned a violation of section 77.400(a), rather than of section 56.14107(a), the guarding requirement of both standards are virtually identical and they both apply to surface mining areas. I agree with the petitioner's arguments that the identical purpose of the two standards is to protect miners from contacting moving machine parts, that the Commission and its judges have followed case law established under analogous standards of Parts 56, 75 or 77 of Title 30, Code of Federal Regulations, and that the Commission's Thompson Brothers holding is equally applicable to the facts of the instant cases.

I conclude and find that following its regulatory Federal Register comments in connection with the revisions of section 56.11407(a), MSHA has not done a good job in updating and revising its publications to make it clear that

section 56.14107(a), applies to mobile equipment such as the types of trucks and loader cited in these cases. However, I cannot conclude that MSHA's failure in this regard is so egregious as to warrant the vacation of the citations and the dismissal of these cases.

I further conclude and find that MSHA's Federal Register comments in connection with the aforementioned rulemaking, coupled with the Commission's decision in the Thompson Brothers Coal Co. Case, supra, which I find controlling, provided adequate notice that the guarding requirements of section 56.14107(a), apply to mobile machinery such as the trucks and loader cited in these cases, and not only to stationary equipment. Accordingly, based on the facts and stipulations presented in these cases, I conclude and find that the violations have been established, and the contested citations ARE AFFIRMED.

I further conclude and find that the respondent's No. 1 quarry and plant operations constitute a medium-to-large mining operation. I have also reviewed all of the citations and abatements issued by Inspector Goodale and I conclude and find that the respondent timely abated all of the cited conditions in good faith.

With respect to Riverton's history of prior violations, MSHA's counsel produced a computer print-out of the mine compliance record for the period beginning in October, 1983 through March, 1994. Counsel asserted that the respondent's history of prior violations does not warrant any penalty assessment increases over those which have been made in these proceedings, and upon review of the print-out, I agree.

In the absence of any evidence to the contrary, I conclude and find that the payment of the penalty assessments agreed to by the parties in settlement of the violations in question, as well as the proposed penalty assessments for the four contested guarding citations, will not adversely affect the respondent's ability to continue in business.

I further conclude and find that the four contested guarding violations were non-serious and were the result of a moderate degree of negligence on the part of the respondent.

ORDER

In view of the foregoing findings and conclusions, IT IS ORDERED AS FOLLOWS:

Docket No. VA 94-53-M

The following Section 104(a) citations ARE AFFIRMED, and the respondent IS ORDERED to pay the civil penalty assessments shown below.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. Section</u>	<u>Assessment</u>
4288838	12/8/93	56.14107(a)	\$50
4288839	12/8/93	56.14132(a)	\$50
4288843	12/8/93	56.20003(a)	\$157
4288849	12/8/93	56.11002	\$50
4288711	12/15/93	56.20003(a)	\$157
4288715	12/15/93	56.14107(a)	\$204
4288842	12/8/93	56.20003(a)	\$50

Section 104(a) Citation Nos. 4288853, 4288846, and 4288708 ARE VACATED, and the petitioner's proposed civil penalty assessments ARE DENIED and DISMISSED.

Section 104(a) Citation Nos. 4288845, 4288714, and 4288844 ARE MODIFIED to non-"S&S" citations, and as modified they ARE AFFIRMED. The respondent IS ORDERED to pay civil penalty assessments of fifty-dollars (\$50) for each of the citations (\$150 total).

Docket No. VA 94-55-M

The following section 104(a) citations ARE AFFIRMED, and the respondent IS ORDERED to pay the civil penalty assessments shown below.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. Section</u>	<u>Assessment</u>
4288824	12/7/93	56.16005	\$50
4288825	12/7/93	56.12013	\$50
4288826	12/7/93	56.12032	\$50
4288828	12/7/93	56.14107(a)	\$50
4288829	12/7/93	56.11001	\$157
4288830	12/7/93	56.12030	\$50
4288831	12/7/93	56.12030	\$50
4288835	12/7/93	56.11001	\$157
4288836	12/7/93	56.4130(b)	\$50
4288840	12/8/93	56.14107(a)	\$50
4288841	12/8/93	56.12032	\$50
4288847	12/8/93	56.20003(a)	\$204
4288850	12/8/93	56.12030	\$50
4288851	12/8/93	56.2003(a)	\$50

Section 104(a) citation Nos. 4288823 and 4288834 ARE VACATED, and the petitioner's proposed civil penalty assessments ARE DENIED AND DISMISSED.

Section 104(a) "S&S" Citation Nos. 4288832 and 4288852 ARE MODIFIED to non-"S&S" citations and as modified they ARE AFFIRMED. The respondent IS ORDERED to pay civil penalties of fifty-dollars (\$50) for each of the citations (\$100 total). Citation No. 4288852 IS FURTHER MODIFIED to reflect a violation of mandatory safety standard 30 C.F.R. § 56.20003(a).

The inspector's negligence finding with respect to section 104(a) non-"s&s" citation No. 4288827, IS MODIFIED to reflect a low, rather than moderate degree of negligence, and as modified, IT IS AFFIRMED. The respondent IS ORDERED to pay a civil penalty assessment of twenty-five dollars (\$25) for the violation.

Payment of all of the aforesaid civil penalty assessments in these proceedings shall be made by the respondent to MSHA within thirty (30) days of the date of these decisions and Orders, and upon receipt of payment, these cases are dismissed.


George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 13, 1994

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 90-383
Petitioner	:	A.C. No. 05-00301-03753
	:	
v.	:	
	:	Dutch Creek Mine
MID-CONTINENT RESOURCES	:	
INCORPORATED,	:	
Respondent	:	

ORDER TO VACATE
ORDER OF DISMISSAL

Before: Judge Merlin

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

On March 8, 1994, I issued an order vacating the order of dismissal previously entered and reinstating this case. Upon a motion from the Secretary I determined that this matter had been dismissed in error because the penalty assessment did not involve excessive history. The parties were ordered to confer to determine if this case could be settled.

The Solicitor has filed a motion to vacate the one violation in this case and to withdraw the penalty petition. Upon review of the Solicitor's motion, I have determined that it should be granted.

In light of the foregoing, it is ORDERED that Citation No. 3410440 be VACATED.

It is further ORDERED that this case be DISMISSED.



Paul Merlin
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

OCT 14 1994

LAURA D COAL, INC.,	:	CONTEST PROCEEDING
Contestant	:	
v.	:	Docket No. PENN 94-238-R
	:	Citation No. 3711113;
SECRETARY OF LABOR,	:	2/11/94
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Stuft Mine
Respondent	:	Mine ID #36-07661
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 94-384
Petitioner	:	A.C. No. 36-07661-03509
v.	:	
	:	Stuft Mine
LAURA D COAL, INCORPORATED,	:	
Respondent	:	

DECISIONS

Appearances: John M. Strawn, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Respondent/Petitioner; Joseph A. Yuhas, Esq., Barnesboro, Pennsylvania, for the Contestant/Respondent.

Before: Judge Koutras

Statement of the Proceedings

These consolidated proceedings concern a Notice of Contest filed by the Laura D Coal Company pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, challenging the legality of a section 104(d)(1) "S&S" citation alleging a violation of mandatory safety standard 30 C.F.R. § 77.1000. The civil penalty case concerns a proposed civil penalty assessment of \$1,800, for the alleged violation. A hearing was held in Somerset, Pennsylvania, and the parties appeared and participated fully therein.

Issues

The issues presented in these proceedings are whether the cited conditions or practices constituted a violation of the cited safety standard; whether the alleged violation was

"significant and substantial"; whether the alleged violation resulted from an "unwarrantable failure" to comply with the cited standard; and the appropriate civil penalty to be imposed for the violation, taking into account the civil penalty criteria found in section 110(i) of the Act.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977; 30 U.S.C § 301 et seq.
2. Section 104(d), and 110(a) and (i) of the Act.
3. Commission Rules, 29 C.F.R. § 2700.1 et seq.

Stipulations

The parties stipulated to the following (Tr. 9-11).

1. The Stufft Mine is owned and operated by Laura D Coal, Inc., and it is subject to the jurisdiction of the Act.
2. The presiding judge has jurisdiction in this matter.
3. The citation in question was properly issued and served by an authorized representative of the Secretary on an agent of Laura D Coal, Inc., on the date and at the time and place stated therein, and may be admitted for the purpose of establishing its issuance.
4. The proposed civil penalty assessment will not affect Laura D Coal's ability to continue in business.
5. Laura D Coal's, annual coal production for 1993, was 29,632 tons, and the Stufft Mine production for that year was 5,834 tons.
6. Laura D Coal, Inc., was assessed for three citations during six inspection days in the 24-month period preceding the issuance of the citation in issue in this case.
7. Laura D Coal, Inc., is a small mine operator with a good compliance record.
8. Laura D Coal, Inc., demonstrated ordinary good faith in obtaining compliance after the issuance of the citation.
9. The parties stipulate to the authenticity of their exhibits but not to the relevance or truth of the matters asserted therein.

Discussion

Section 104(d)(1) "S&S" citation No. 3711113, issued at 10:00 a.m., on February 11, 1994, cites an alleged violation of 30 C.F.R. § 77.1000, and the cited condition or practice states as follow:

The operator did not establish and follow a ground control plan for the safe control of all highwalls, pits and spoil banks of the active coal pit. The operator's ground control plan calls for all loose material to be removed for a safe distance from the top of the highwall and for trees to be cleared for a distance of 50 feet. The plan also calls for benches to be provided where unstable conditions exist. This highwall is about 60 feet high and 300 feet long. The top 20 to 30 feet of this is unconsolidated material consisting of large rocks, trees, and old spoil material. On 2/10/94, this material failed and slid into the 002 pit. No benches were provided and trees still exist along the top of the highwall. A review of the daily exam book indicated that slides had also occurred on 2/3/94 and 1-26-94. No appropriate action was taken to prevent more slides.

In support of the alleged violation, the Secretary presented the testimony of MSHA Inspector Mark Ronan, who testified to the conditions that he observed, the reasons for issuing the citation, and his special "S&S" and "unwarrantable failure" findings (Tr. 15-114).

Laura D. Coal Company presented the testimony of its owner, James W. Stufft, who testified about the mine ground control plan and its relationship to the sediment pond that was under construction at the pit area in question. He also testified about the materials located on the spoil pile and the work being performed to remove and control this material. Mr. Stufft believed that the mine ground control plan did not apply to the pond in question because the coal that was removed from the pit was for the purpose of lining the pond with clay pursuant to State environmental guidelines (Tr. 115-147).

The parties agreed to submit posthearing briefs, and without objection, the Secretary proposed to take the posthearing deposition of an expert witness, Dr. Kelvin WU, Chief of MSHA's Mine Waste and Technical Unit, Bruceton MSHA Technology Center, Pittsburgh, Pennsylvania (Tr. 155-156).

The parties subsequently informed me that they proposed to settle the civil penalty matter, and in view of the settlement, the respondent agreed to withdraw its contest. The petitioner submitted a motion pursuant to Commission Rule 31, 29 C.F.R. § 2700.31, seeking approval of the proposed settlement. In support of the settlement, the petitioner has submitted information pertaining to the six statutory civil penalty criteria found in section 110(i) of the Act and a full discussion and disclosure concerning the facts and circumstances surrounding the issuance of the citation.

The parties are in agreement that the respondent's negligence was not as high as initially determined. The petitioner states that it has no evidence to refute the respondent's assertion that it was not aware that its ground control plan applied to the pit in question since it was designed to serve as a pond. Further, the petitioner cannot rebut the respondent's evidence that it had taken steps to prevent employees from working under the highwall when conditions were unfavorable and that it was in the process of undercutting the spoil bank to reduce the hazard of falling material. Under the circumstance, the petitioner agrees that the section 104(d)(1) "S&S" citation should be reclassified to a section 104(a) "S&S" citation, and that a reduction of the proposed civil penalty assessment from \$1,800 to \$175, is warranted.

I take note of the fact that the record reflects that the respondent is a small mine operator, has a good compliance record, and demonstrated good faith in abating the violation.

Conclusion

After careful review and consideration of the pleadings, the testimony and evidence presented at the hearing, as reflected in the trial transcript, and the arguments presented in support of the proposed settlement, I conclude and find that the proposed settlement disposition is reasonable and in the public interest. Accordingly, pursuant to 29 C.F.R. § 2700.31, the motion IS GRANTED, and the settlement IS APPROVED.

ORDER

In view of the foregoing, IT IS ORDERED AS FOLLOWS:

1. Section 104(d)(1) "S&S" Citation No. 3711113, February 11, 1994, citing a violation of 30 C.F.R. § 77.1000, IS MODIFIED to a section 104(a) "S&S" citation, and as modified IT IS AFFIRMED.

2. The respondent IS ORDERED to pay a civil penalty assessment in the amount of \$175, in satisfaction of the violation in question. Payment is to be made to MSHA within thirty (30) days of this decision and order, and upon receipt of payment, this matter is dismissed.


George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

OCT 14 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
v.	:	
	:	Docket No. WEVA 94-155
	:	A. C. No. 46-07678-03548-A
	:	
	:	Barbara Lynn No. 4
DAVID REED	:	
Formerly Employed by GOLD	:	
RIVER MINING COMPANY, INC.,	:	
Respondent	:	
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
v.	:	
	:	Docket No. WEVA 94-156
	:	A. C. No. 46-07678-03549-A
	:	
	:	Barbara Lynn No. 4
JOHN MILLER	:	
Formerly Employed by GOLD	:	
RIVER MINING COMPANY, INC.,	:	
Respondent	:	
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
v.	:	
	:	Docket No. WEVA 94-172
	:	A. C. No. 46-07678-03550-A
	:	
	:	Barbara Lynn No. 4
DONALD SALTSGAVER	:	
Formerly Employed by GOLD	:	
RIVER MINING COMPANY, INC.,	:	
Respondent	:	

DECISION

Appearances: Edward H. Fitch, IV, Esq., Office of the
Solicitor, U.S. Department of Labor, Arlington,
Virginia for Petitioner;
David G. Reed, Beckley, West Virginia and
Donald R. Saltsgaver, Cedar Grove, West Virginia,
Pro Se, for Respondents.

Before: Judge Hodgdon

These cases are before me on petitions for assessment of civil penalties filed by the Secretary of Labor against David Reed, John Miller and David Saltsgaver, all formerly employed by Gold River Mining Company, Inc., pursuant to Sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820. The petitions allege that each of the named respondents knowingly authorized, ordered or carried out, as an agent of Gold River, a violation of Section 75.220, 30 C.F.R. § 75.220, of the Secretary's Regulations. For the reasons set forth below, I find that the Respondents did not knowingly violate the regulation.

A hearing was held in these cases on August 3, 1994, in Summersville, West Virginia. Mine Safety and Health Administration (MSHA) inspectors Michael S. Hess and Charlie M. Meadows testified for the Secretary. Herbert McKinney, Martin Copley and David G. Reed testified on behalf of the Respondents.¹

BACKGROUND

On July 1, 1992, Inspector Hess began a AAA (quarterly) inspection of Gold River's Barbara Lynn No. 4 Mine. On observing eleven entries which had loose mud and rock at their faces, he concluded that Gold River's roof control plan had been violated and issued Citation No. 3731550 to the company alleging a violation of Section 75.220 of the Regulations. (Pet. Ex. 1.) The citation stated:

¹ John C. Miller failed to appear at the hearing. On August 5, 1994, an Order to Show Cause was issued to Mr. Miller ordering him to show cause why a default decision should not be issued against him. He responded to the order on August 9. His response was accepted, and on August 25 an order was issued sending Mr. Miller a copy of the hearing transcript and offering the Secretary and him an opportunity to request a further hearing and submit additional evidence. On September 1, Mr. Miller filed a letter stating that he did not have any additional evidence to submit. On September 8, counsel for the Secretary submitted Petitioner's Exhibit 9, Memorandum of Interview of John Miller on May 11, 1993. No objection has been made to this exhibit and it is admitted into evidence.

The roof control plan was not being complied with on the 001 section. Mining was performed in 9 entries within 150 feet of outcrop or highwall without having supplemental support limiting the roadway width to 16 feet. The outcrop was cut in too [sic], some of this area was pillared and mud and rock was [sic] present in the working faces. Cracks was [sic] present along the pillared area and the roof sounded drummy when tested in faces.

On July 7, 1992, the citation was modified to add:

Management showed reckless disregard for the health and safety for the miners in that after mining in one place to the highwall or outcrop and observing mud and rock in the face, mining continued. The operator knew that this condition existed then willfully mined eight other face and two pillar splits in this area without setting additional roof support. The approved map shows the highwall line. This condition is highly likely to cause death because of the hazardous roof conditions while mining near the outcrop or highwall without additional roof support added.

Gold River paid the \$3,000.00 civil penalty assessed it for this violation in MSHA case No. 46-07678-03531 on January 19, 1993. (Tr. 17.)

During May 1993, Charlie Meadows, an MSHA Special Investigator conducted a special investigation to determine whether cases should be brought against Reed, the mine's Superintendent/General Foreman, and Saltsgaver and Miller, section foremen, under Section 110(c) of the Act, 30 U.S.C. § 820(c), for having knowingly violated the regulation. He concluded that they should. (Tr. 72.)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Section 110(c) of the Act provides, in pertinent part:

Whenever a corporate operator violates a mandatory health or safety standard . . . any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation . . . shall be subject to the same civil penalties . . . that may be imposed upon a person under subsection[] (a)

Consequently, to prevail in his cases against the corporate agents, the Secretary must prove (1) that a violation of a mandatory health or safety standard occurred, and (2) that the corporate agents "knowingly authorized, ordered, or carried out" the violation. I conclude that the Secretary has failed to prove either circumstance.

Violation of a Mandatory Health or Safety Standard

Section 75.220(a)(1), 30 C.F.R. § 75.220(a)(1), requires that "[e]ach mine operator shall develop and follow a roof control plan, approved by the District Manager" The roof control plan for the Barbara Lynn No. 4 Mine, which was in effect on July 1, 1992, was approved by the district manager on December 19, 1991. (Pet. Ex. 3.) The plan states that:

[r]oof bolts shall not be used as the sole means of roof support when underground workings approach and/or mining is being done within 150 feet of the outcrop or highwall. Supplemental support shall consist of at least one row of posts on 4-foot spacing, maintained up to the loading machine operator, limiting roadway widths to 16 feet.

(Pet. Ex. 3, p. 4.)

Obviously, to show that the roof control plan was not being followed with respect to this provision, it must be shown that mining was being done within 150 feet of an outcrop² or highwall.³ The evidence in this case does not support finding that there was either a highwall or an outcrop within 150 of where the mining in question was done.

² An "outcrop" is defined as "[t]he part of a rock formation that appears at the surface of the ground" or "[c]oal which appears at or near the surface; the intersection of a coal seam with the surface." However, "[i]t does not necessarily imply the visible presentation of the mineral on the surface of the earth, but includes those deposits that are so near to the surface as to be found easily by digging." Bureau of Mines, U.S. Department of Interior, *A Dictionary of Mining, Mineral, and Related Terms* 778 (1968).

³ A "highwall" is "[t]he unexcavated face of exposed overburden and coal or ore in an opencast mine or the face or bank on the uphill side of a contour strip mine excavation." *Id.* at 543.

The citation modification states that "the approved map shows the highwall line." However, none of the maps offered into evidence, (Pet. Ex. 5, Resp. Exs. A and E), show a highwall line. There is an indication on one of the maps that some areas had been strip mined, but the areas are not near the location of the alleged violation. (Resp. Ex. E.)

As is apparent from the citation, the inspector was not positive as to whether this violation involved a highwall or an outcrop. He was no more specific in his testimony and never stated what exactly had been cut into. The closest he came was to imply that it was a highwall since the area looked reclaimed rather than natural because of the loose rock, mud and dirt. (Tr. 22.)

Inspector Meadows clearly believed that a highwall had been mined into. Thus, he stated "the area to the right side of where you have entry No. 4, that whole area has been stripped," (Tr. 82), "Ray Charles could see that that area had been stripped," (Tr. 107), and "I've took [sic] pictures of it, too, David, and the pictures I've got plainly show it's been strip mined" (Tr. 108).

On the other hand, Mr. McKinney, who had been an MSHA inspector at the time of the violation, but had retired about four months prior to the hearing, testified (referring to Resp. Ex. C) that "that area looks like there must have been spoil put in there, for whatever reason. I couldn't say it had been stripped, but there's spoil put in there - - it looks like there's been spoil put in there and it was resealed. . . ." (Tr. 129.)

Mr. McKinney further testified, on cross examination, as follows:

Q. Do you know the area around the Barbara Lynn No. 4 Mine?

A. I'm well acquainted with it.

Q. Has that area been strip mined to your knowledge?

A. There's been a lot of mining activities took in there. There's been several mines faced up there, and for whatever reason, they didn't make a go of it. And

as far as saying that it had been stripped, I guess the most disturbance that has taken place around the Barbara Lynn Mine is when they cut that haulageway through that mountain up there to get to that preparation plant to make a shorter haulway to the coal, but as far as knowing that there's a whole lot of stripping going on up there, I'm not certain. I'm not a surface inspector, and I had no reason to be in the areas that was [sic] surfaced [sic] mined.

(Tr. 142.)

Mr. Copley, also a retired MSHA inspector who had been active at the time of the violation, when asked whether, when he viewed the faces of the eleven entries, it looked like a highwall had been run into, responded:

I couldn't tell. It was in the dirt, and I couldn't say it was a highwall. I don't know if there was ever a highwall there for sure, because there were four mines faced up in that area, and when we went in there to do the initial roof control plans for all four mines, there was no strip mine activity in there, and I couldn't tell. There's four mines and a cleaning plant had been put in there and there was a lot of dirt disturbed, and I don't know if it was all disturbed for that, or if there had been strip activity in the area. I don't know; I never saw it.

(Tr. 148.)

This evidence is simply insufficient to establish the existence of a highwall. There is nothing on the mine maps to indicate the possibility that a highwall was present; in fact, there is nothing on the maps to indicate that strip mining occurred in that area. No one testified that strip mining had occurred in that area, even though several of the witnesses were well acquainted with the area. The testimony as to what the area looked like proves only that the area appeared to have been reclaimed. Indeed, the strongest inference that can be made from that evidence is that the area was reclaimed to build the haulage road. Consequently, I conclude that the evidence does not show that the Respondents mined within 150 feet of a "highwall."

Nor does the evidence establish that they mined within 150 of an "outcrop." All of the maps show an outcrop line, although it is clearest on page one of Pet. Ex. 5 and on Resp. Ex. A. However, the undisputed testimony is that based on this line the mining was over 150 feet from the outcrop. (Tr. 157, 173.)

The Secretary's case appears to be based on the assumption that since dirt, rocks and mud were mined into, the Respondents had to have mined into either a highwall or an outcrop. There is no direct evidence which establishes that what was mined into was an outcrop. There is surmise that perhaps the outcrop line on the map was improperly marked, but nothing to show that it was. Furthermore, there is no explanation at all as to why the outcrop line on the map, which had been shown to be correctly marked up until the day in question, was suddenly out of place.

In *Halfway, Inc.*, 8 FMSHRC 8 (January 1986) the Commission affirmed a decision which found that Halfway had violated its roof control plan by mining within 150 of an outcrop without supplemental roof support. The inspector determined that a violation had occurred by examining the mine map which "showed that mining operations had advanced within 150 of the outcrop" and then going into the mine and observing that only roof bolts were supporting the roof. *Id.* at 9.

If the Secretary is not going to rely on the mine map, as he did in *Halfway*, to show where the outcrop is, then he must have some other means of proving where the outcrop is. This is particularly true in a situation where his case is based on an assumption that the mine map is wrong. In this case he has presented nothing other than the nature of the material cut into. His supposition that this established an outcrop is entitled to no more weight than the miners conjecture that what they had mined into was a "washout." (Tr. 160-61, 176.) In fact, based on the testimony about washouts throughout the hearing and the depiction of washouts on the maps, the Respondents' evidence is the more persuasive. Accordingly, I conclude that the Secretary has failed to prove that the Respondents mined within 150 of an outcrop.

The Secretary has not proved that the Respondents mined within 150 feet of either a outcrop or a highwall. Accordingly, it has not been established that the roof control plan was not followed and that Section 75.220 was violated. Since the violation has not been established, the Respondents cannot be found to have knowingly authorized, ordered or carried it out.

Knowingly Authorized, Ordered, or Carried Out

Furthermore, even if the violation had been proved, the evidence does not support a finding that Reed knowingly ordered that it be committed or that Saltgaver and Miller knowingly carried it out. The Commission set out the test for determining

whether a corporate agent acted "knowingly" in *Kenny Richardson*, 3 FMSHRC 8, 16 (January 1981), *aff'd*, 689 F.2d 623 (6th Cir. 1982), *cert. denied*, 461 U.S. 928, 103 S.Ct. 2088, 77 L.Ed.2d 299 (1983) when it stated:

If a person in a position to protect safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition, he has acted knowingly and in a manner contrary to the remedial nature of the statute.

In *Roy Glenn*, 6 FMSHRC 1583 (July 1984), the Commission expanded the test to cover a situation where the violation does not exist at the time of the agent's failure to act, but occurs after the failure. It said:

Accordingly, we hold that a corporate agent in a position to protect employee safety and health has acted 'knowingly', in violation of section 110(c) when, based upon facts available to him, he either knew or had reason to know that a violative condition or conduct would occur, but he failed to take appropriate preventative steps.

Id. at 1586. The Commission has further explained "that a 'knowing' violation under section 110(c) involves aggravated conduct, not ordinary negligence." *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1245 (August 1992) (citation omitted).

In this case, the Respondents neither failed to act, nor had reason to know that a violation had occurred, or would occur. Reed testified that he had begun his vacation when he received a telephone call from Saltsgaver advising him that the miners had "hit rock" and asking Reed what they should do.

Reed looked at his mine map, determined that the mining was taking place more than 150 feet from the outcrop marked on the map, had Saltsgaver check the certified map in the mine office to see if anything was marked on it that was not on his map and, on hearing that there was not, told Saltsgaver to continue mining. He told Saltsgaver that they did not need to start using posts because they were "not within the required area." (Tr. 173.)

Reed further instructed Saltsgaver "to consult with his roof control men and make sure that the bolts were anchoring, that the area was safe" (Tr. 157.) Reed also advised him "that if he seen [*sic*] any roof or rib failure, to cease mining

immediately." (Tr. 173.) Reed then called Miller, section foreman on the shift after Saltsgaver's, prior to the beginning of his shift, and told him "to continue mining; any sign of roof or rib support failure to cease mining at once; if not, continue mining till we skirted it all the way around." (Tr. 173.)

It is clear from this evidence that the Respondents did not cut eleven entries to the dirt without checking to find out what was happening. The first time that dirt was hit, Saltsgaver called Reed, advised him what had happened and asked him how to proceed. Reed looked at the mine map, came to the not unreasonable conclusion that they were not within 150 feet of the outcrop, so that what had been hit must have been a "washout", and instructed his foremen to keep cutting to the dirt until they had skirted the area, as had been done when other "washouts" were encountered.

This is certainly not aggravated conduct.⁴ The Respondents acted under a reasonable, good faith belief that they were dealing with a "washout." *Wyoming Fuel Company/Basin Resources, Inc.*, 16 FMSHRC 1618, 1630 (August 1994). They did not fail to act when the problem was first encountered. *Cf. Prabhu Deshetty*, 16 FMSHRC 1046 (May 1994) (Deshetty failed to address an ongoing problem when he had actual knowledge of it). Moreover, Reed acted to protect the safety of his men with his instructions to check the roof support and to cease mining if there was any sign of roof or rib failure. *Cf. Michael W. Brunson*, 10 FMSHRC 594, 600 (May 1988) (managerial directions not to use a loader if the brakes were inadequate in conjunction with ambiguous knowledge on the part of the agent did not provide a basis for a knowing violation).

⁴ I am somewhat troubled by the indications in Saltsgaver's Memorandum of Interview, (Pet. Ex. 8), that he knew that they were supposed to use timbers and so advised Reed, who told him to keep cutting, and by the statement that Reed told him to cover up the violation. If true this would be extremely aggravated conduct. However, I give this evidence no weight because it is not a direct statement, but rather a summary of the interview by the investigator and, thus, is hearsay filtered through the recollection of the investigator; it is not consistent with the Memoranda of Interview of Reed and Miller, (Pet. Exs. 7 and 9), and the evidence presented at the hearing, including the fact that there was no evidence that anything was covered up; and, the Memorandum itself evidences a bias on Saltsgaver's part against Reed in that he believed Reed wanted him to quit so that Reed could hire one of his buddies.

ORDER

I conclude that the evidence does not establish that the Respondents mined within 150 feet of an outcrop or highwall, and that, even if it did, it does not prove that they knowingly ordered or carried out the violation. Accordingly, it is **ORDERED** that the petitions for assessment of civil penalty filed against David Reed, John Miller and Donald Saltsgaver are **DISMISSED**.



T. Todd Hoagdon
Administrative Law Judge

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Mr. David Reed, 112 Boganville Avenue, Beckley, WV 25801
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Mr. Donald Saltsgaver, P.O. Box 201, Cedar Groove, WV 25039
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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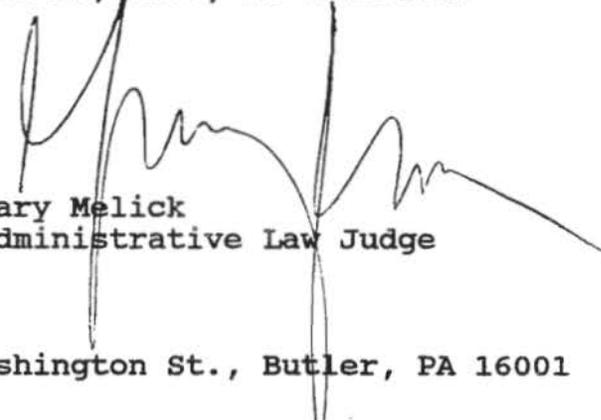
OCT 17 1994

KENNETH E. VOGT, SR., : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. PENN 94-323-DM
: MSHA Case No. NE MW 94-03
BRADYS BEND CORPORATION, :
Respondent : Kaylor Mine No. 3 36-00033

ORDER OF DISMISSAL

Before: Judge Melick

Complainant, Kenneth E. Vogt, Sr., requests approval to withdraw his complaint in the captioned case. Under the circumstances herein, permission to withdraw is granted. 29 C.F.R. § 2700.11. This case is therefore **DISMISSED** and the hearing scheduled for October 18, 1994, is canceled.



Gary Melick
Administrative Law Judge

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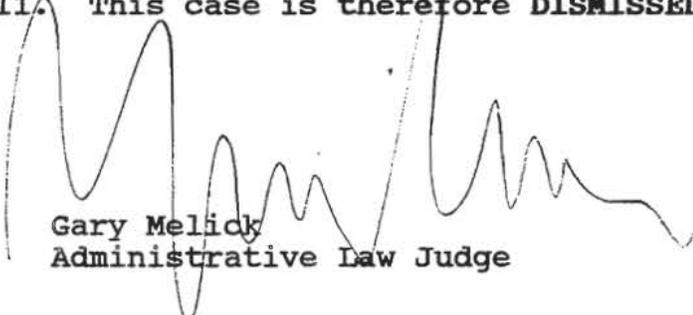
OCT 17 1994

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. WEVA 93-343-D
ON BEHALF OF LINK M. SMITH,	:	MSHA Case No. HOPE CD 92-08
JIM ALTIZER AND GARY RITCHIE,	:	
Complainants	:	
v.	:	Amonate No. 31 Mine and Prep
	:	
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	

ORDER OF DISMISSAL

Before: Judge Melick

The Secretary requests approval to withdraw his Complaint in the captioned case in reliance upon the Commission's decision in Swift et al v. Consolidation Coal Co., 16 FMSHRC 201 (1994). 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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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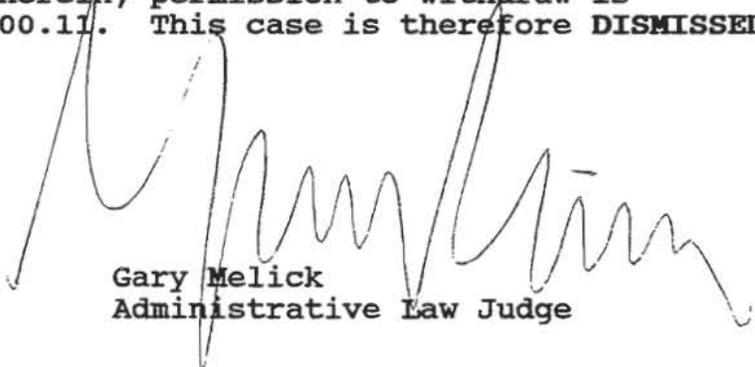
OCT 17 1994

SECRETARY OF LABOR, : DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) : Docket No. VA 93-100-D
on behalf of RONALD ROSE, : MSHA Case No. NORT CD 92-02
Complainant :
v. : McClure No. 2 Mine
CLINCHFIELD COAL COMPANY, :
Respondent :

ORDER OF DISMISSAL

Before: Judge Melick

The Secretary requests approval to withdraw his Complaint in the captioned case in reliance upon the Commission's decision in Swift et al v. Consolidation Coal Co., 16 FMSHRC 201 (1994). 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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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OCT 17 1994

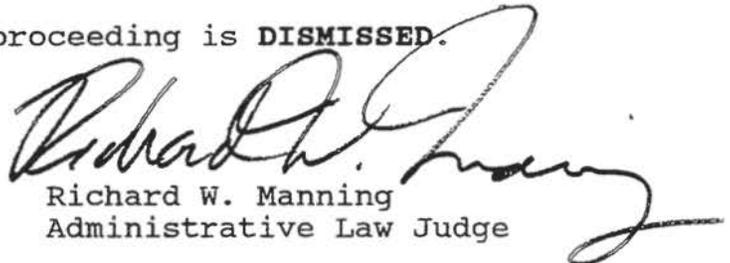
KENNETH J. GARRETT, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. CENT 94-61-D
BASIN COOPERATIVE SERVICES, : DENV CD 93-13
Respondent : Glenharold Mine

DECISION DISMISSING PROCEEDING

Before: Judge Manning

In a letter dated October 10, 1994, Kenneth J. Garrett stated that he no longer wishes to pursue his discrimination complaint because he has been "fully compensated financially for the day of work missed [when] Basin Cooperative Services send [him] home for going on the mine inspection." He further stated that he brought this case, in part, to resolve certain safety issues on the mistaken belief that the Commission and the Department of Labor's Mine Safety and Health Administration (MSHA) are "linked." He stated that he will pursue these issues directly with MSHA.

For good cause shown, this proceeding is **DISMISSED**.


Richard W. Manning
Administrative Law Judge

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Deborah Levchak, Esq., Office of the General Council, BASIN
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ND 58501

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DENVER, CO 80204-3582
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OCT 17 1994

SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	PROCEEDING
ADMINISTRATION (MSHA),	:	
on behalf of WILLIAM C.	:	Docket No. WEST 94-390-D
YOUNG, JR.,	:	DENV CD 93-17
Complainant	:	
	:	
v.	:	Caballo Rojo Mine
	:	
F&E ERECTION COMPANY,	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 94-430-D
on behalf of WILLIAM C.	:	DENV CD 93-17
YOUNG, JR.,	:	
Complainant	:	Caballo Rojo Mine
	:	
v.	:	
	:	
F&E ERECTION COMPANY,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT
ORDER TO PAY

Before: Judge Cetti

The Stay Order of May 13, 1994, in Docket No. WEST 94-390-D is lifted.

The above-captioned discrimination and reinstatement proceedings are consolidated for evaluation and disposition. Both cases were filed by the Secretary of Labor on behalf of William C. Young, Jr., pursuant to Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, against F&E Erection Company.

The Secretary alleges in the complaints that Mr. Young was engaged in protected activity under the Mine Act, at the Caballo Rojo Mine when he was wrongfully discharged on July 2, 1993. F&E Erection Company filed a timely answer denying that it violated Section 105(c) of the Mine Act.

The parties now have reached a settlement resolving all issues in these cases. Under the terms of the settlement agreement, F&E Erection has agreed to pay to Mr. Young five-thousand dollars (\$5,000) for back wages, less any reductions required by law to be withheld for taxes. In addition, F&E Erection will pay Mr. Young the sum of fifteen-thousand dollars (\$15,000) for his damages, including pain and suffering and emotional distress.

In consideration of the payment of twenty-thousand dollars (\$20,000) in back wages and damages, Mr. Young waives his right to reinstatement and reemployment by F&E Erection and has signed a general release.

F&E Erection agrees to pay a civil penalty of two-thousand five hundred dollars (\$2500) to the Secretary of Labor to settle the alleged violation of Section 105(c) of the Act.

I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate.

WHEREFORE, the motion for approval of settlement is **GRANTED**. Accordingly, Respondent is directed to pay the agreed settlement amounts to William C. Young, Jr. and to pay a civil penalty in Docket No. WEST 94-430-D of \$2,500 to the Secretary of Labor within 30 days of this decision. Both above-captioned proceedings, upon full compliance with the terms of the approved settlement agreement, are **DISMISSED**.



August F. Cetti
Administrative Law Judge

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Mr. William C. Young, Jr., Route 4, Box 158, Pittsburgh, TX 75686

Office of Special Investigation, MSHA, Coal, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington VA 22203

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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OCT 17 1994

CYPRUS PLATEAU MINING CORPORATION, Contestant	:	CONTEST PROCEEDING
	:	
	:	Docket No. WEST 92-371-R
	:	Order No. 3588140; 3/12/92
v.	:	
	:	Star Point No. 2
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Mine I.D. 42-00177
	:	
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	
	:	Docket No. WEST 92-485(B)
	:	A.C. No. 42-00171-03633
	:	
v.	:	Star Point No. 2
	:	
	:	
CYPRUS PLATEAU MINING CORPORATION, Respondent	:	
	:	

DECISION AFTER REMAND

Before: Judge Morris

On August 26, 1994, the Commission issued its decision in the above cases reversing the Judge's conclusions on S&S and unwarrantability. The Commission further remanded the cases for a recalculation of the civil penalty.

On October 5, 1994, the parties filed a stipulation of appropriate penalty.

The original proposed penalty for the violation of 30 C.F.R. § 75.220(a)(1) was \$2,600.00 and the parties agreed on remand that, based on the evidence at the hearing, as well as the penalty criteria set forth in the Act, an appropriate penalty would be \$1,820.00.

The parties further agree that stipulation agreed to by Cyprus Plateau does not constitute a waiver of Cyprus Plateau's right to seek review of the Commission's decision in the United States Court of Appeals when the decision becomes final after the imposition of a penalty.

Discussion

I have reviewed the stipulation and I find that is reasonable and in the public interest. It should be approved.

Accordingly, I enter the following:

ORDER AFTER REMAND

1. The stipulation is **APPROVED**.
2. A civil penalty of \$1,820.00 is **ASSESSED**.


John J. Morris
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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OCT 17 1994

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 93-313-M
Petitioner	:	A.C. No. 04-05134-05505 ABXN
	:	
v.	:	Docket No. WEST 93-314-M
	:	A.C. No. 04-05134-05506 ABXN
	:	
JOHN HETER, GEORGE HALUSKA,	:	Docket No. WEST 93-329-M
GERALD MOULIN, and	:	A.C. No. 04-05134-05504 ABXN
ELIEZER GONZALES, employed	:	
by EIU OF CALIFORNIA	:	Docket No. WEST 93-458-M
Respondents	:	A.C. No. 04-05134-05502 ABXN
	:	
	:	Specialty Sand Plant

DECISION

Appearances: Edward H. Fitch, IV, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;

John Heter, Saugus, California; George Haluska, Simi Valley, California; Gerald Moulin, Cyprus, California; Eliezer Gonzales, Bakersfield, California, all employees of EIU of California and all appearing pro se.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration (MSHA) charged Respondents Heter, Haluska, Moulin and Gonzales with violating Section 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the "Act").

A hearing commenced in Simi Valley, California on August 30, 1994. After evidence was partially heard, the Secretary moved for the following disposition:

1. The Secretary moved to withdraw his request for civil penalties against Respondents Heter and Haluska. (Tr. 120).

2. The Secretary has further concluded that there is inadequate evidence to establish that Respondent Moulin knowingly authorized, ordered or carried out a violation of 30 C.F.R.

§ 57.12002 and therefore, the Secretary withdraws the request for a 110(c) civil penalty as to said Respondent. (Tr. 123).

3. After considering the testimony of Respondent Gonzales, the Secretary has agreed to reduce his proposed civil penalty to \$1,000.00 payable in monthly installments of \$100.00 per month with the first payment due October 20, 1994.

Respondent Gonzales accepted this arrangement. (Tr. 128).

4. The Secretary has concluded that there is adequate evidence to establish that as an independent contractor the OHM Corporation¹ should be charged by MSHA with a 110(a) corporate violation of 30 C.F.R. § 57.12002 based on the totality of the events which transpired. These events are the result of the joint effort between OHM Corporation personnel and CZS Corporation personnel relating to an incorrect electrical installation. (Tr. 123, 124).

5. It is further agreed that a civil penalty of \$2,500.00 will be assessed in any corporate case brought by MSHA against OHM Corporation for a violation of 30 C.F.R. § 57.12002. (Tr. 123-125).

6. Additional statements by the parties also involve OHM Corporation and CZS Corporation. Such statements are in the record of the proceedings.

I have reviewed the settlement and I find it is reasonable and in the public interest. The settlement was approved at the hearing and the approval is formalized in this decision.

Accordingly, I enter the following:

ORDER

1. In re: Secretary v. John Heter, WEST 93-313-M.

The Secretary's motion to withdraw his request for penalties herein is **GRANTED** and the case is **DISMISSED**.

2. In re: Secretary v. George Haluska, WEST 93-314-M.

The Secretary's motion to withdraw his request for penalties herein is **GRANTED** and the case is **DISMISSED**.

¹ OHM Corporation is not a party in the captioned cases but it designed a 16 KV Electrical Power Distribution System for use in the Specialty Sand Plant operated by CZS Corporation (Joint Stipulation of Facts filed August 30, 1994).

3. In re: Secretary v. Gerald Moulin, WEST 93-329-M.

The Secretary's motion to withdraw his request for penalties herein is **GRANTED** and the case is **DISMISSED**.

4. In re: Secretary v. Eliezer Gonzales, WEST 93-458-M.

The Secretary's motion to reduce the proposed civil penalty to \$1,000.00 is **GRANTED**.

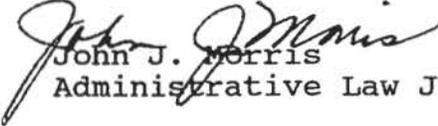
Accordingly, it is **ORDERED** that Respondent Gonzales pay a penalty of \$1,000.00 in accordance with the payment schedule set forth below:

<u>DATE</u>	<u>PAYMENT</u>
October 20, 1994	\$100
November 20, 1994	\$100
December 20, 1994	\$100
January 20, 1995	\$100
February 20, 1995	\$100
March 20, 1995	\$100
April 20, 1995	\$100
May 20, 1995	\$100
June 20, 1995	\$100
July 20, 1995	\$100

Payments shall be made by certified or cashier's check made payable to "The U.S. Department of Labor - MSHA," and mailed to Mine Safety and Health Administration, P.O. Box 360250M, Pittsburgh, PA 15251-6250. Each payment instrument shall include the relevant docket number, WEST 93-458-M, and the Assessment Control Number, 04-05134-05502-ABXN. Compliance with this payout scheme requires Respondent to have his monthly payments deposited in the U.S. Mail by the dates above listed.

In the event of Respondent Gonzales' default on any of the above recited installments, the total amount of the proposed penalties as amended, less any monies paid before Respondent's default, shall become due and payable and interest shall be assessed against such remaining unpaid balance at a rate provided by 28 U.S.C. § 1961 from the date of default until the total amount is paid in full. Furthermore, Respondent shall be liable for all court costs, attorney fees, and other expenses reasonably incurred by the U.S. Department of Labor in pursuing the recovery of the remaining unpaid balance plus any interest assessed thereon.

Upon payment of the agreed settlement in full, Docket No. WEST 93-458-M is **DISMISSED**.


John J. Morris
Administrative Law Judge

Distribution:

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Mr. George Haluska, 3018 San Angelo Avenue, Simi Valley, CA 93063
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Mr. Gerald Moulin, OHM Corporation, 5951 Lakeshore Drive, Cypress, CA 90630 (Certified Mail)

Mr. Eliezer Gonzales, 3712 Woodbine Avenue, Bakersfield, CA 93307
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E.I.U. OF CALIFORNIA, INC., Ms. Donna Moore, 6950 District Boulevard, P.O. Box 40878, Bakersfield, CA 93384
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

OCT 18 1994

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 94-128
Petitioner : A.C. No. 15-02363-03639
v. :
SOUTHFORK COAL COMPANY, : Justus Mine
Respondent :

DECISION

Appearances: Brian W. Dougherty, Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville, Tennessee,
for the Petitioner;
G.E. Chip Barker, Corporate Counsel, Sterns Coal
Company, Bristol, Virginia, for the Respondent.

Before: Judge Barbour

STATEMENT OF THE CASE

In this proceeding the Secretary of Labor (Secretary), on behalf of the Mine Safety and Health Administration (MSHA) and pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 (Mine Act or Act), filed a petition for assessment of a civil penalty against Southfork Coal Company (Southfork). The Secretary alleged that Southfork violated 30 C.F.R. §75.1711-3, a mandatory safety standard promulgated pursuant to the Act. The Secretary further alleged that the violation occurred at Southfork's Justus Mine and that the violation was a significant and substantial (S&S) contribution to a mine safety hazard. Southfork denied that it violated the cited standard.

The matter was heard in Somerset, Kentucky. The parties presented testimony and documentary evidence, and subsequent to the hearing counsels submitted helpful statements of position and briefs.

STIPULATIONS

The parties stipulated as follows:

1. Southfork is subject to the jurisdiction of the Act.
2. Southfork and the Justus Mine have an effect on interstate commerce within the meaning of the Act.

3. Southfork and the Justus Mine are subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and the administrative law judge has the authority to hear and decide this case.

4. During 1993 the Justus Mine was in active status but no coal was produced.

5. A reasonable penalty will not affect Southfork's ability to remain in business.

6. During the two years prior to May 20, 1993, nine violations of mandatory safety standards were cited and assessed at the Justus Mine during the course of four inspection days. (See Tr. 11-12).

THE ALLEGATIONS AND THE TESTIMONY

The alleged violation is described in a citation issued pursuant to section 104(a) of the Act, 30 C.F.R. § 814(a), and in conjunction with an imminent danger order of withdrawal issued pursuant to section 107(a) of the Act, 30 U.S.C. §817(a). The order asserts that an imminent danger existed in that the doors of the building housing the main mine fan shaft were open and there was no protection against unauthorized persons entering the building (Gov. Exh. 4). The citation states:

The doors of the main mine fan shaft [were] wide open. The amount of time this condition existed was undetermined, however, it appeared that it had been some time in that there was no evidence that anyone had checked the fan shaft in awhile.

(Gov. Exh. 5.) After the citation was issued it was modified in order to change the standard the Secretary alleged Southfork violated (Gov. Exh. 5). Initially, the inspector charged Southfork with a violation of the mine methane and dust control plan. Because of apparent uncertainty regarding the status of the plan, the inspector, at the direction of the MSHA conference officer, modified the citation to alleged a violation of section 75.1711-3 (Gov. Exh. 5; Tr. 65-55).

30 C.F.R. § 75.1711-3 states:

The openings of all mines not declared by the operator, to be inactive, permanently closed, or abandoned for less than 90 days shall be adequately fenced or posted with conspicuous signs prohibiting the entrance of unauthorized persons.

Peggy Langley, an MSHA inspector, testified she inspected the Justus Mine between December 1992 and May 1993 (Tr. 16).

Specifically, she inspected the mine in December 1992, March 1993 and May 1993 (Tr. 51). There is a fan house on the mine property. It encloses the opening of the main mine ventilation shaft.

Langley inspected the fan house on May 20, 1993. At that time there were persons working at the mine, but the mine was not producing coal (Tr. 16). Langley testified she had been inside the fan house previously, but not during an inspection she was conducting. Rather, she went inside when she was training to become an inspector and when she was accompanying another inspector (Tr. 51).

She stated that in September 1992, the Blue Diamond Coal Company, a prior operator of the mine, agreed to take specific steps in lieu of capping the shaft. The steps were contained in an amendment to the company's ventilation system and methane and dust control plan, which stated:

1. Fan building is locked with explosion doors left cracked open. No smoking signs are posted.
2. Elevator shaft has grating over opening, fence around opening and no smoking signs posted.
3. Both shafts are checked daily for methane and unsafe conditions. No methane is being detected at this time. Security people are on the property 24 hours a day (Gov. Exh. 3; Tr. 19-22).

Southfork took over the mine following the bankruptcy of Blue Diamond (Tr. 49). In addition to the mine, in MSHA's view, Southfork also took over Blue Diamond's commitments with respect to the fan house.

Langley and her supervisor went to the mine on the morning of May 20, 1993, and parked their automobile at the gate to the property. The gate (a tube-type gate) was locked, but Langley and the supervisor walked around it (Tr. 27). There was no fence surrounding the property. When she was asked whether a chain link fence would have kept unauthorized persons off the property, Langley stated that, although it would have made it more difficult for persons to get in, she did not know "if they could ever keep anybody out if they wanted in bad enough" (Tr. 83). To her knowledge the adequacy of the gate had never been questioned by MSHA (Tr. 84).

Langley could not recall if any signs were posted at the gate. However, she stated there might have been a no trespassing sign (Tr. 27, 56-57). About 200 yards down the road Langley noticed that all of the windows at the mine office were broken (Tr. 27, 57). (No one was in the office (Tr. 36.)) Langley

and her supervisor then proceeded to the rock dust hole where Langley sampled for methane and oxygen. Finally, the two walked to the building housing the main mine fan (Tr. 27).

Langley noticed that the outer and inner doors of the building were open. A padlock was hanging on one the doors. It had been pried loose, and where it had been pried, the metal had rusted (Tr. 28-29). As she stated, "it wasn't like a new skimp place" (Tr. 58). Although Langley believed that there may have been a "no smoking" sign posted on the door, she could not recall a sign warning of the dangers of the shaft or a no trespassing sign (Tr. 29, 40). She stated, "That's not to say they weren't there, but I don't recall them" (Tr. 52-53). During the course of the inspection Langley did not see any watchmen or security guards (Tr. 35).

Langley and her supervisor walked into the fan house and observed the open shaft. The shaft was located about 10 feet from the doors. Because it was dark in the building, Langley could only see a few feet into the shaft. However, from looking at the mine map she understood the shaft was approximately 650 feet deep (Tr. 29-30, 32-34). A handrail blocked access to the shaft (Joint Exh. 7). Langley believed a person who wanted to get to the edge of the shaft could crawl under, over or through the handrail (Tr. 30). However, she agreed that as far as she knew the hand rails never had been found inadequate by MSHA (Tr. 52).

On the floor of fan house Langley observed 20 to 30 cigarette butts, which indicated to her that people had been in the fan house (Tr. 32-33). Langley tested for methane and found none. Still, this was the same fan house where, in 1989, two teenagers had entered and received third degree burns caused by a methane ignition (Tr. 38).

Langley believed that the open doors failed to keep unauthorized persons out of the fan building and away from the open ventilation shaft. She feared "children, teenagers or even adults ... that might be adventurers" would enter the fan house and encounter the dangers presented by the open shaft (Tr. 39, see also 40, 55). Those dangers consisted of falling into the shaft or being burned by ignited methane.

She believed a fall into the shaft was the most likely thing to happen (Tr. 42). Because only 10 to 15 feet of the shaft were visible, anyone venturing near the shaft would not know how deep it really was (Tr. 39, 44). She also believed it "reasonably likely that serious physical harm or death could occur from a fall of 650 feet." Id.

Langley understood unauthorized persons came on mine property because she spoke with people who lived near the mine

and they told her people traveled the property to get to a pond (Tr. 40). The information about the pond was confirmed when Langley inquired at a business office located near the house (Tr. 42). She also noted a house located approximately a quarter of a mile from the fan house that had small children's toys in the yard (Tr. 41).

After finding the open door at the fan house, Langley and her supervisor returned to their car and drove to the mine office. When she arrived at the office the only person present was Sam Blankenship, Southfork's manager of operations, who did not realize there had been possible vandalism on the property (Tr. 42-43, 45). This, coupled with the fact there were no tire tracks on the road leading to the fan house, caused Langley to conclude the company had not been checking the fan house as it should (Tr. 59). Langley asked Blankenship if he had any records of when the fan house had been checked and he did not (Tr. 63).

Because of a prior accident when two teenagers who entered the fan house without authorization were burned, Southfork management should have realized that heightened surveillance of the fan house was needed. Indeed, as Langley noted, one of the provisions to which Blue Diamond and Southfork agreed to in lieu of capping the shaft was to provide around-the-clock security (Tr. 42-43). If security personnel had been at the mine, they might not have prevented a person or persons from prying the lock open, but they would have quickly observed the open doors and relocked them (Tr. 43). In Langley's opinion, 24 hour security meant that the company would check the fan house at least once an hour, or as often as required to take care of any problems (Tr. 62, 76).

After being cited for the condition, Southfork bolted the doors shut (Tr. 44).

Blankenship testified for Southfork. He stated that in August 1992, Blue Diamond Coal Company sold the property on which the mine is located to Stearns Coal Company and that Southfork operated the mine under a contract with Stearns (Tr. 68). The property consists of 27,000 acres. There are parts of the property where people live and Blankenship described the property by saying that "parts of it [are] populated and parts of it [are] remote" (Tr. 70).

There are eight areas on the property that are checked by security personnel. They include the operation facility, the pond, the slag dumps, the three office buildings, and the water tank (Tr. 70, 77). Company Employees are present on the property 24 hours a day (Tr. 70, 75). Security personnel check the eight areas for 11 hours during the day. Id.

"No trespassing signs" are posted throughout the property. They are posted at all entrances to the property. There is a gate that stays locked on the road leading to the fan house. In addition, there is a no trespassing sign posted at the gate (Tr. 71). Unless a person has a key to the gate, he or she must walk to the fan house, and there is another no trespassing sign along the road on the way to the fan house. The signs are of the standard "store bought" variety (Tr. 78).

The fan house is three-tenths of a mile from the gate. The closest houses to the fan house are located one half mile away (Tr. 72). The fan house completely encloses the fan shaft. The door is locked and there is no way to get into the house without breaking in (Tr. 72). On May 20, 1993, there was a no trespassing sign, a no smoking sign and a danger sign on the fan house (Tr. 72-73, 79). The trespassing sign was posted on the same side of the fan house as the doors (Tr. 80).

After receiving Langley's report that the fan house had been broken into, Southfork bolted the doors to the frame of the house. It would have required a hack saw and torch to cut off the bolts (Tr. 74). (In addition, and subsequent to the abatement of the alleged violation, the shaft was capped with concrete (Id.)).

Blankenship stated that the ignition at the fan house that involved the teenagers occurred when Blue Diamond owned the property and that he had no knowledge of the accident until Langley advise him of it (Tr. 75). Further, he had no knowledge of any current methane dangers at the fan house (Tr. 75-76).

THE VIOLATION

To determine whether the Secretary has proven the existence of the violation, it is first necessary to determine what the standard requires. On its face the standard seems clear, the operator must adequately fence or post with conspicuous signs prohibiting the entrance of unauthorized person into the openings of mines not declared permanently closed or abandoned for less than 90 days. Here, there is no question but that the mine was not declared permanently closed or abandoned for less an 90 days. Nor is there any question about the ventilation shaft being an opening of the mine. Thus, the shaft had to be "adequately fenced or posted."

The determinative question is what is meant by the phrase "adequately fenced or posted" and specifically what is meant by the word "or"? In common parlance, and as used normally, the word "or" connotes disjunction. However, this general rule of construction must yield, when a disjunctive reading frustrates a

clear statement of legislative intent. See U.S. v. Smeathers, 884 F.2d 363, 364 (8th Cir. 1989). In such a situation, "or" is read as meaning "and". Wiggins v. Secretary of DHHS, 17 Cl. Ct. 551,557 (1989).

Section 75.1711 restates section 317(k) of the Act, 30 U.S.C. § 877(k). The section gives authority to the Secretary to prescribe how an operator shall seal the openings of inactive or abandoned mines and how an operator shall protect the openings of other mines. Section 317(k) was carried over unchanged from the Federal Coal Mine Safety and Health Act of 1969. In prescribing how the sealing and protection of mine openings was to be accomplished, the Secretary of the Interior promulgated, without comment, subsections 75.1711-1 through 75.1711-3. 35 Fed. Reg. 17890, 17926 (November 29, 1970). The subsections have not been revised since promulgation.

Initially, the Secretary of the Interior's instructions to his inspectors regarding how to interpret section 75.1711-3 indicated that in the Secretary's view "or" meant "and" and that both fencing and the posting of signs were required. The 1971 edition of the inspection manual of the Mining Enforcement and Safety Administration (MSHA's predecessor) stated:

Isolated openings, such as intake or return airways in remote areas shall be fenced, and conspicuous signs prohibiting entrance of unauthorized persons shall be posted at all mine openings.

U.S. Dept. of Interior Bureau of Mines Coal Mine Safety Inspection Manual for Underground Mines 97 (December 1971) ("Coal Manual"). This same wording was carried forward into the 1972, 1973 and 1974 editions. Coal Manual (September 1972); Coal Manual (August 1973); Coal Manual (June 1974).

However, the instruction was dropped after the Mine Act took effect. The Secretary of Labor's first version of the manual simply restated verbum section 75.1711-3, thus eliminating the "and" when referencing fencing. U.S. Dept. of Labor Mine Safety and Health Administration Coal Mine Health & Safety Inspection Manual for Underground Coal Mines II-633 (March 9, 1978) ("Manual"). In his most recent version of the Manual, the Secretary has deleted all reference to section 75.1711-3 and does not offer any guidance to his inspectors. V Manual 141.

The above history of promulgation and interpretation hardly provides that clear statement of intent necessary to override the common meaning of "or." As has been noted, in promulgating the regulation, the Secretary of the Interior provided not one clue that the regulation was couched in terms other than those in which it normally would be understood -- that is, in terms of disjunctive choice. While the Secretary

of the Interior's initial interpretation of section 75.1711-3 indicated the Secretary envisioned the operator as required to provide both fencing and signs to safeguard mine openings, the deletion of this interpretation, its replacement with the regulation and the regulation's subsequent deletion suggest to me that either the Secretary of Labor intends the usual disjunctive meaning to apply or that the Secretary is uncertain how the standard should be interpreted. In any event, I am compelled by the general rule of statutory and regulatory interpretation to find that the commonly understood meaning of the words applies, that is to say, that an operator must either fence or post with conspicuous signs the openings of mines that are not inactive, permanently closed or abandoned for less than 90 days.

Southfork did not meet the first of these requirements. The verb "to fence" is defined as "to keep in or out with or as if with a fence." Webster's Third New International Dictionary 837 (1986). No fence was present around the opening to keep unauthorized persons out. The gate at the entrance to the property did not bar access by pedestrians, as the Langley's inspection proved. Moreover, even if the fan house itself was an instrument of fencing in that it could keep out unauthorized persons "as if with a fence," it was inadequate for that purpose because the lock was broken and the doors were open.

Thus, the opening was not fenced as required by the standard. However, the Secretary also must establish that conspicuous signs prohibiting the entrance of unauthorized persons were not posted and this he has not done. Langley could not recall if a no trespassing sign was posted at or near the gate, although she acknowledged one might have been present (Tr. 27, 56-57). Blankenship, on the other hand, was certain a no trespassing sign was posted at the gate (Tr. 71). In addition, Blankenship stated there was a no trespassing sign along the roadway leading to the fan house (Tr. 78).

Langley also was uncertain whether there were no trespassing signs in or around the fan building. "[N]o trespassing signs[,] I don't recall. That's not to say they weren't there, but I don't recall them" (Tr. 52-53). Blankenship had no such doubts. He stated that a no trespassing sign was located on the same side of the fan house as the doors (Tr. 80). Despite the fact that Blankenship was unable to point out the sign on the photograph of the back side of the fan house (Joint Exh. 2), I credit Blankenship's testimony that the sign was in place as he testified. His certainty outweighs Langley's uncertainty and his explanation that "You couldn't see the sign with this picture." [referring to Joint Exh. 2] was not challenged (Tr. 81).

I therefore conclude that by posting the signs, especially the sign on the fan house itself, Southfork complied with section 75.1711-3. Accordingly, the citation must be vacated.

In reaching this conclusion I am mindful of the Secretary's argument that "the purpose of the ... regulation is to protect the public from the dangers of open mines by requiring operators to take adequate measures to prohibit entry into such dangerous areas" and consequently that section 75.1711-3 "should be interpreted broadly" (Sec. Br. 7). However, in light of both the Secretary's choice of wording of the standard and the Secretary's history of interpretation, I can, in all fairness, reach no other conclusion than that the words of the standard mean exactly what they say. If this is not the case and the Secretary wants the standard to mean that openings should be adequately fenced and posted, the Secretary should revisit the standard.

Finally, this result implies no criticism of Langley. In the face of conditions that clearly were dangerous, she took immediate action by issuing an imminent danger order of withdrawal. (The validity of the order is not before me in that Southfork did not seek its timely review.) While it is true the conditions did not constitute a violation of the standard that MSHA ultimately determined she should cite, it is equally true that she did not promulgate the standard.

ORDER

Citation No. 4042811 is **VACATED**. The Secretary's petition is **DENIED** and this matter is **DISMISSED**.



David Barbour
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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OCT 19 1994

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 93-184-M
Petitioner : A.C. No. 04-04619-05522-A
: :
v. : Docket No. WEST 93-200-M
: A.C. No. 04-04619-05523-A
: :
JOHN KEMP & BRAD NICOLAY, :
employed by AMERICAN RIVER :
AGGREGATES, : American Aggregates Mine
Respondents :

DECISION

Appearances: J. Phillip Smith, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Petitioner;
Dana P. Matthews, Esq., DELANEY & BALCOMB, P.C.
Glenwood Springs, Colorado,
for Respondent.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration (MSHA), charges Respondents with violating Section 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq. (the "Act").

Respondents Kemp and Nicolay were the two top management officials at the mine and the individuals who gave work instructions and orders to the miners. (Tr. 22-23).

Section 110(c) of the Act provides as follows:

Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this Act or any order incorporated in a final decision issued under this Act, except an order incorporated in a decision issued under subsection (a) or section 105(c), any director, officer, or agent of such corporation who knowingly authorized,

ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d).

The Commission defined the term "knowingly," as used in 110(c) of the Mine Act, as follows:

"Knowingly" as used in the Act, does not have any meaning of bad faith or evil purpose or criminal intent. Its meaning is rather that used in contract law, where it means "knowing or having reason to know." A person has reason to know when he has such information as could lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence We believe this interpretation is consistent with both the statutory language and the remedial intent of the Coal Act. If a person in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition, he has acted knowingly and in a manner contrary to the remedial nature of the statute. Kenny Richardson v. Secretary of Labor, 3 FMSHRC 8, 16 (1981) 689 F.2d 632 (6th Cir. 1982), cert. denied, 461 U.S. 928 (1983).

In the instant case, Respondents were charged with violating 30 C.F.R. § 56.14101(a)(1). The section in its entirety provides as follows:

(a) **Minimum requirements.** (1) Self-propelled mobile equipment shall be equipped with a service brake system capable of stopping and holding the equipment with its typical load on the maximum grade it travels. This standard does not apply to equipment which is not originally equipped with brakes unless the manner in which the equipment is being operated requires the use of brakes for safe operation. This standard does not apply to rail equipment.

(2) If equipped on self-propelled mobile equipment, parking brakes shall be capable of holding the equipment with its typical load on the maximum grade it travels.

(3) All braking systems installed on the equipment shall be maintained in functional condition.

(b) **Testing.** (1) Service brake tests shall be conducted when an MSHA inspector has reasonable cause to believe that the service brake system does not function as required, unless the mine operator removes the equipment from service from the appropriate repair;

(2) The performance of the service brakes shall be evaluated according to Table M-1.

BACKGROUND

The American River Aggregates Mine is a sand and gravel operation located in Folsom, Sacramento County, California, operated by American River Aggregates, employing 22 miners. Respondent John Kemp is the mine manager, president, and 25 percent owner of the company.

Respondent Brad Nicolay is plant foreman at the mine. At the hearing, it was stipulated that American River Aggregates is a corporation and that each of the Respondents is an agent of the corporate mine operator within the meaning and scope of Section 110(c) of the Mine Act. Further, the Commission has jurisdiction over these proceedings, in that the products of the mine affect interstate commerce. (Tr. 5).

On October 24, 1991, MSHA Inspector Michael Brooks issued a Section 107(a) Order, No. 3911980 to American River Aggregates, citing a violation of 30 C.F.R. § 56.14101(a)(1).

The order stated as follows:

The front-end loader that feeds the main plant did not have service brakes capable of stopping and holding the equipment. The operator would put the loader into gear the opposite direction it was traveling to stop the loader. The loader was working on ground with a slight grade. The operator has been reporting this hazard since July 10, 1991, according to company records. There was mobile traffic moving in the area where the front-end loader was working. These vehicles included commercial trucks and company trucks. With the brakes in this condition, an injury is highly likely to happen and the results are likely to be fatal to the operator or someone who may be in the path of the loader unable to stop. Cat 988 front-end loader Company #L1.

The Caterpillar 988, Company L1, front-end loader, involved in this case, weighs approximately 50,000 or 60,000 pounds. (Tr. 63).

DISCUSSION AND FURTHER FINDINGS

During his inspection on October 24, 1991, Inspector Brooks observed the loader being operated on a slight grade, backing and going into gear quickly in both directions. Mobile truck traffic was moving in the area where the loader was operating. (Tr. 12; Ex. P-2). The Inspector approached the loader operator and asked him how he was stopping the vehicle. His answer was, "By putting the machine in gear of the opposite direction it was traveling because it has no brakes." (Tr. 19).

The loader normally traveled to the dump site over a grade, going up the grade to the top of the pad, and then back down the grade to leave the pad. There was usually truck traffic involving the haul trucks. (Tr. 55, 60-61).

Inspector Brooks asked the loader operator to drive the loader off the hill and to apply the service brakes on the grade. As the operator did this, the service brakes did not hold the loader. At this point, Inspector Brooks shut the loader down. (Tr. 66, 68, 70-71).

Persuasive evidence of defective brakes is the company's daily equipment checklist (Ex. P-3) involving 50 inspections between August 1, 1991, and October 22, 1991. The inspection forms indicated there were essentially "no brakes" on the loader and the machine was described as being unsafe to operate.

In support of their position, Respondents argue that the loader must travel on a grade in order to fall within the prohibition of the regulation. Mr. Nicolay testified the loader was routinely operated on "flat ground" and it could be stopped by using the gears or lowering the bucket. (Tr. 33, 61). Therefore Respondents contend no violation occurred.

I am not persuaded by these arguments. As a threshold matter, Inspector Brooks indicated in MSHA's order that the "loader was working on ground with a slight grade." (Ex. P-2). In any event, the violation here is the failure to have the loader equipped with a "service brake system capable of stopping and holding the equipment." [Section 56.1410(a)(1)]. The typical load on the maximum grade it travels is merely a measure of the efficiency of the braking system. The use of the transmission or the bucket to stop mobile equipment, instead of using service brakes, has been rejected by the Commission in numerous cases, including: Evansville Materials, Inc., 2 FMSHRC 2321, 2326 (Aug. 1980); Mineral Exploration, 6 FMSHRC 316, 321 (Feb. 1984); Brown Brothers Sand Co., 9 FMSHRC 636, 656-657 (March 1987); Missouri

Rock, Inc., 10 FMSHRC 583, 587 (April 1988), aff'd, 11 FMSHRC 136 (Feb. 1989); Brown Brothers Sand Co., 14 FMSHRC 190, 199 (Jan. 1992); Missouri Rock, Inc., 16 FMSHRC 624, 629 (March 1994); and Morris Sand and Gravel, 16 FMSHRC 770, 779 (April 1994).

In Robert Shick, 14 FMSHRC 340, 341 (February 1992) Administrative Law Judge William Fauver stated that "Dropping the bucket to try to stop a front-end loader is not a safe practice."

Respondents further argue the front-end loader could be stopped well within the guidelines mandated by Table M-1 because it would be pushing a 12- to 20-ton load. (Tr. 64). Mr. Nicolay stated that the reversal of gears was in reality a faster method of stopping the loader than using service brakes. (Tr. 65).

These views are a re-argument of service brakes versus transmission or bucket as a stopping method. These arguments are again rejected. Further, 30 C.F.R. § 56.14101(2) particularly states: "The performance of the service brakes shall be evaluated according to Table M-1."

Respondents further contend there was no danger to vehicles or individuals by operating the loader in the manner in which it was routinely operated at the time the order was issued.

In connection with this argument, Respondents overlooked the testimony of Inspector Brooks that the condition cited involved imminent danger. It was his opinion, if this condition continued to exist, it was highly likely that a fatal injury could occur. (Tr. 14). I am persuaded by Mr. Brooks' opinion.

Liability of Agents Kemp and Nicolay under Section 110(c)

During his inspection at the mine on October 24, 1991, Inspector Brooks was accompanied by Respondent Brad Nicolay. (Tr. 19). Before citing the subject violation, Inspector Brooks asked Mr. Nicolay if he knew about the brakes being bad on the loader before his (Brooks') inspection. Mr. Nicolay admitted that he knew that the brakes were bad. (Tr. 20-22, 37).

Later on, in his signed interview statement dated May 5, 1992, given to MSHA Special Investigator Michael Turner (Ex. P-4), Respondent Nicolay admitted that he had reviewed the Daily Equipment Checklist on the subject loader (Ex. P-3) prior to October 24, 1991. He also admitted that he knew that the loader needed brakes and that they needed to take care of the problem. (Tr. 34; Ex. 4, pp. 5-6)

When asked when he was first aware of the condition cited in the imminent danger order, Mr. Nicolay replied this occurred about September 24, 1991. (Ex. P-4, p. 7; Tr. 35).

The evidence indicating Respondent Kemp's knowledge of the defective brakes was established in a slightly different manner.

In Mr. Nicolay's statement to MSHA's investigator he stated that Mr. Kemp was aware the brakes were bad and that he (Nicolay) told Kemp that at least once. Although it was known to him, he (Kemp) did not think the brakes were an imminent danger and they could wait another month. (Tr. 35-36; Ex. P-4, p. 8).

Later on, in MSHA's interview statement, Mr. Nicolay was asked the name of the individuals who knew of the conditions described in the imminent danger order, and he responded: "Myself (Nicolay), Mark Bradley (mechanic), John Kemp, and Howard Ahner (the loader operator)" and that "he (Nicolay) had reported the defective brakes to Kemp." (Tr. 38; Ex. P-4, p. 11).

Mr. Kemp testified in these proceedings. He denied having been told by Mr. Ahner (equipment operator) that the brakes were defective. However, no evidence was offered (nor sought in cross-examination) as to what other knowledge he had acquired as to the condition of the brakes.

The direct testimony of Mr. Nicolay establishes that Mr. King was also aware of the defective brakes.

Corporate Liability

The parties stipulated that American River Aggregates, the corporate mine operator, did not contest the imminent danger order or the violation cited. Further, on April 27, 1992, it paid a civil penalty for the underlying violation of 30 C.F.R. § 56.14101(a)(1), pursuant to Section 110(a) of the Mine Act, 30 U.S.C. § 820(a). (Tr. 39-40).

Abatement

The Section 107(a) Order citing the operator for a violation of 30 C.F.R. § 56.14101(a)(1), was abated when the company repaired the service brakes on the loader so they would hold the loader with a typical loaded bucket on the maximum grade it travels. (Tr. 44-45; Ex. P-2). It took about 32 hours for two men to repair the brakes. (Tr. 36).

Based on the record, I conclude the Section 110(c) cases against Respondents John Kemp and Brad Nicolay should be affirmed and civil penalties should be assessed.

Civil Penalties

The penalties in agent cases can be imposed upon a corporate agent under subsection (a) and (d) of Section 110 of the Act. Further, the Commission shall have the authority to assess all

civil penalties under the Act. Section 110(i) set forth the statutory criteria in assessing any penalties.

In the instant cases, there is no adverse history of previous violations. Further, the penalty assessed herein is appropriate and will not affect the agent's ability to continue in business. In addition, I agree with Inspector Brooks that the agents were negligent. Further, the gravity of the violation was serious. Finally, the agents demonstrated good faith in attempting to achieve rapid compliance after notification of the violative condition.

For the above reasons, I enter the following:

ORDER

1. In re **West 93-184-M**: Secretary of Labor v. John Kemp, employed by American River Aggregates: this 110(c) case is **AFFIRMED** and a penalty of \$600.00 is **ASSESSED**.

2. In re **WEST 93-200-M**: Brad Nicolay employed by American River Aggregates: This 110(c) case is **AFFIRMED** and a penalty of \$500.00 is **ASSESSED**.


John J. Morris
Administrative Law Judge
Tel. 303-844-3912

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

OCT 20 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) on behalf of ROBERT HARLOW, Complainant	:	TEMPORARY REINSTATEMENT PROCEEDING DISCRIMINATION PROCEEDING CIVIL PENALTY PROCEEDING
v.	:	Docket No. KENT 94-1327-D MSHA Case No. PIKE CD 94-04
NARROWS BRANCH COAL, INC., Respondent	:	No. 1 Mine

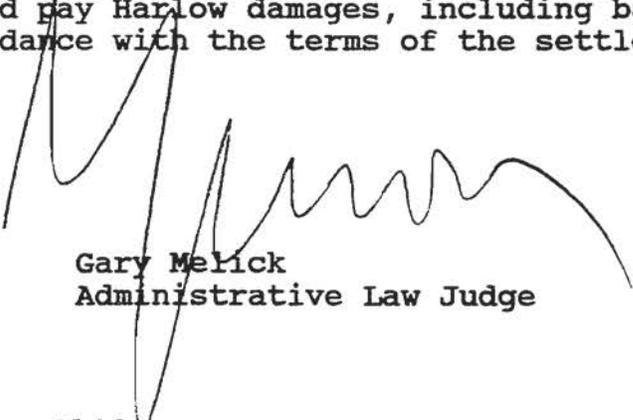
DECISION APPROVING SETTLEMENT

Appearances: Susan Foster, Esq., MaryBeth Bernui, Esq.,
Office of the Solicitor, U.S. Department of
Labor, Nashville, Tennessee, for the Complainant;
Billy Shelton, Esq., Baird, Baird, Baird & Jones,
P.S.C., Pikeville, Kentucky, for the Respondent.

Before: Judge Melick

These consolidated cases are before me upon an Application for Temporary Reinstatement, a Complaint of Discrimination and a Petition for Assessment of Civil Penalty under the Federal Mine Safety and Health Act of 1977 (the Act). At hearing, the parties filed a motion to approve a settlement agreement in which Respondent agreed to reinstate the individual complainant, Robert Harlow, to pay him back pay and interest for lost work and to pay a civil penalty of \$1,000. The Secretary and Mr. Harlow agreed to the terms of settlement on the record. I have considered the representations and documentation submitted in these cases, and I conclude that the proffered settlement is acceptable.

WHEREFORE, the motion for approval of settlement is GRANTED, and it is ORDERED that Respondent pay a penalty of \$1,000 within 60 days of this order. Respondent is further ordered to reinstate Robert Harlow and pay Harlow damages, including back pay and interest, in accordance with the terms of the settlement agreement.



Gary Melick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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OCT 20 1994

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), :
Petitioner : Docket No. WEVA 94-176
v. : A.C. No. 46-01453-04113
: :
CONSOLIDATION COAL COMPANY, : Docket No. WEVA 94-194
Respondent : A.C. No. 46-01453-04114
: :
: Docket No. WEVA 94-225
: A.C. No. 46-01453-04119
: :
: Humphrey No. 7 Mine
: :
: Docket No. WEVA 94-195
: A.C. No. 46-01455-04013
: :
: Osage No. 3 Mine

DECISIONS

Appearances: Robert S. Wilson, Esq., Elizabeth Lopes, Esq.,
Office of the Solicitor, U.S. Department of Labor,
Arlington, Virginia, for the Petitioner;
Elizabeth S. Chamberlin, Esq., Consolidation Coal
Company, Pittsburgh, Pennsylvania, for the
Respondent.

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern civil penalty proposals filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(c), seeking civil penalty assessments for five (5), alleged violations of certain mandatory safety standards found in Parts 75 and 77, Title 30, Code of Federal Regulations. Hearings were held in Morgantown, West Virginia, and the parties appeared and participated fully therein. The parties informed me that they proposed to settle these matters, and arguments in support of their proposals were made on the record.

Issues

The issues presented in these proceedings include the fact of violation, whether one of the violations was "significant and substantial", whether the violations were the result of the respondent's "unwarrantable failure" to comply with the cited safety standards, and the appropriate civil penalty to be made for the violations.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977; 30 U.S.C. § 301 et seq.
2. Section 110(a) and 110(i) of the Act.
3. Commission Rules, 29 C.F.R. § 2700.1 et seq.

Discussion

WEVA 94-176

Section 104(d) (2) non-"S&S" Order No. 3305717, September 8, 1993, cites a violation of 30 C.F.R. § 75.360(f), and the cited condition or practice states as follows:

There is not enough initials, date, and time in the 6 nw construction area to show that the entire area has been examined. There is one set at I.D.J. at the track and one at the Battery Changer. All work is being done inby this area. The miners working in this area are Tim Tuttle and Dick Keryneski. The preshift examination was done by Frank Sloevensky between 5:00 a.m. and 7:50 a.m. on 9-8-93.

Section 104(d) (2) non-"S&S" Order No. 3305720, September 9, 1993, cites a violation of 30 C.F.R. § 77.502, and the cited condition or practice states as follows:

The last examination on the outside shop and supply house was done on 7-12-93. All the equipment except the compressors and welders are still energized. The welders and compressors are not tagged out of service.

WEVA 94-194

Section 104(d) (2) non-"S&S" Order No. 3305555, September 8, 1993, cites a violation of 30 C.F.R. § 75.360(g), and the cited condition or practice states as follows:

According to the preshift examiner's book for the track haulage a hazardous condition has existed from 0 block to 8 east. This condition was first recorded on 8/17/93, by the day shift and is still recorded in the preshift examiner's book on 9-8-93 and no immediate action has been taken by the mine foreman to correct this condition. The condition recorded in the preshift examiner's book is spillage in the walkway.

These records are signed daily by the mine foreman and certified foremen are entering the condition in the preshift examiner's book.

WEVA 94-195

Section 104(d)(2) "S&S" citation No. 3118845, June 9, 1993, cites a violation of 30 C.F.R. § 77.502, and the cited condition or practice states as follows:

Electric equipment is not being frequently examined and properly maintained by a qualified person at Osage Shop area. Several electrical violations have been issued this day for hazards that have existed for some time and not corrected, as well as items not properly maintained. Citation 3118838, 6-9-93, exposed energized parts. Citation 3118839 frayed electrical card that has existed for several weeks. Citation No. 318839, 6-9-93, frayed electrical cord that has existed for several weeks. Citation Nos. 318840 and 318841 on 6-9-93, two hot plates without frame grounds. Although not being used have not been inspected in several months. Citation No. 3118842, 6-9-93, no frame ground on the pressure switch for the compressor that has existed for several months. Citation 3118844, switch cover plate separated. These conditions, cumulatively, present hazards that constitute a reasonably likelihood of a lost time electrical injury.

The most recent electrical inspection was on 6-3-93. There are four violations that, according to workers, have existed for several weeks, and the monthly electrical examiner, acting as an agent of the operator, should have found and corrected. All of these violations existed in one shop area that is approximately 50 ft. x 50 ft, four of which, according to workers existed prior to 6-3-93, and therefor constitute an inadequate electrical examination. Additionally, Citation 3118847, 6-9-93, is being issued for electrical hazards on a welder, exposed energized parts not guarded, and citation 3118848, 6-9-93, is being issued for exposed energized parts on a cable where isolation had broken down due to overcurrent.

Section 104(d)(2) non-"S&S" Order No. 3305766, September 21, 1993, cites a violation of 30 C.F.R. § 75.360(g), and the cited condition or practice states as follows:

The preshift of the 7 North empty and load track indicates that a hazardous condition exists and action has not been taken in a timely manner to correct the condition. Starting 7-21-93, spillage was reported and it has been in the record book each shift, with the exception of 8-25-93 and 8-26-93 to date. This condition was dropped these two days for no reason. The last work recorded in this area was 8-18-93, on the preshift conducted between 9:00 p.m. and 11:30 p.m. The record book was countersigned by the mine foreman.

Findings and Conclusions

Petitioner's counsel presented arguments on the record in support of the proposed settlement of the violations. Counsel stated that the Humphrey No. 7 mine was on strike at the time violations were issued, and due to the absence of any hazards to any miners, all the violations noted at that mine "were not deemed to be "significant and substantial", (S&S).

Petitioner's counsel agreed that all of the cited conditions were timely abated in good faith by the respondent, and that the respondent's history of prior assessments, as reflected in the pleadings, do not warrant additional increases in the penalty assessments made in these cases.

Petitioner's counsel asserted that the facts and evidence as now known to him will not support any of the "unwarrantable failure" determinations made by the inspectors who issued the violations, and that the evidence does not establish that the violations resulted from any "aggravated conduct" on the part of the respondent. Under the circumstances, counsel stated that MSHA has agreed to reclassify and modify all of the section 104(d)(2) orders and citation to section 104(a) citations. In addition, MSHA agreed to modify all of the "high" negligence findings to "moderate" negligence.

As a result of MSHA's reevaluation of these matters, and the settlements agreed to by the parties, petitioner's counsel stated that the initial proposed civil penalty assessments, which were "specially assessed" as a result of the issuance of the section 104(d)(2) orders and citation, have been reduced and assessed according to MSHA's Part 100 regulations, and the newly proposed settlement assessments reflect the modified and amended

section 104(a) citations, with moderate negligence findings, as well as the six statutory civil penalty criteria found in section 110(i) of the Act. The initial assessments and proposed settlement amounts are as follows:

Docket No. WEVA 94-176

<u>Order No.</u>	<u>Date</u>	<u>30 C.F.R. Section</u>	<u>Assessment</u>	<u>Settlement</u>
3305717	9/8/93	75.360(f)	\$1,500	\$220
3305720	9/9/93	77.502	\$1,500	\$220

Docket No. WEVA 94-194

<u>Order No.</u>	<u>Date</u>	<u>30 C.F.R. Section</u>	<u>Assessment</u>	<u>Settlement</u>
3305555	9/8/93	75.360(g)	\$2,000	\$220

Docket No. WEVA 94-195

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. Section</u>	<u>Assessment</u>	<u>Settlement</u>
3118845	6/9/93	77.502	\$4,000	\$595

Docket No. WEVA 94-225

<u>Order No.</u>	<u>Date</u>	<u>30 C.F.R. Section</u>	<u>Assessment</u>	<u>Settlement</u>
3305766	9/21/93	75.360(g)	\$1,500	\$220

After careful review of all of the pleadings and arguments presented by the parties in these proceedings, including the six statutory penalty assessment criteria found in section 110(i) of the Act, I rendered bench decisions approving the settlement dispositions pursuant to Commission Rule 31, 29 C.F.R. § 2700.31. My bench decisions are herein reaffirmed and I conclude and find that they are reasonable and in the public interest.

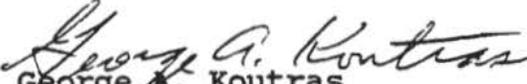
ORDER

In view of the foregoing, IT IS ORDERED as follows:

1. Section 104(d)(2) non-"S&S" Order Nos. 3305717, 3305720, 3305555, and 3305766 ARE MODIFIED to Section 104(a) non-"S&S" citations, with moderate negligence findings, and as modified, they are affirmed.

2. Section 104(d)(2) "S&S" Citation No. 3118845, IS MODIFIED to a section 104(a) "S&S" citation with a moderate negligence finding, and as modified, it is affirmed.

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


George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

OCT 24 1994

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. YORK 94-51-M
Petitioner : A. C. No. 30-00012-05522
v. :
: Wehrle Quarry
BUFFALO CRUSHED STONE, :
Respondent :

DECISION

Appearances: William G. Staton, Esq. Office of the Solicitor,
U.S. Department of Labor, New York, New York
for Petitioner;
Salvatore A. Castro, Safety Director, Buffalo
Crushed Stone, Inc., Buffalo, New York for
Respondent.

Before: Judge Weisberger

Statement of the Case

This case is before me based upon a Proposal for Assessment of Civil Penalty filed by the Secretary of Labor (Petitioner) alleging violations of various mandatory safety standards. Subsequent to notice, the case was scheduled and heard in Amherst, New York on August 2, 1994. Samuel B. Waters testified for Petitioner. Dennis T. Sullivan, and Thomas C. Rashford, testified for Respondent. Petitioner filed a Post-Hearing Memorandum on September 22, 1994. On October 3, 1994, Respondent filed a Post-Hearing Summary.

Findings of Fact and Discussion

Introduction

Respondent operates the Wehrle Quarry, a limestone operation, wherein rock is blasted, crushed, screened and sized. Samuel B. Waters, an MSHA inspector, inspected the site on December 14, 15, and 16, 1993. In the course of this inspection, he issued Respondent seven citations, which are the subject of this proceeding.

Citation No. 4289703

On December 14, 1993, Waters inspected a fuel station building located on the subject site. He observed that a metal panel or guard, approximately 20 inches by 2 feet, had been removed from the back of a fuel pump, exposing two pinch-points inside the fuel pump where a belt went around two pulleys. Waters indicated that one pinch-point was 19 inches above the ground, and the other was 16 inches above the ground. According to Waters, the pinch-points, which were recessed within the pump, were, approximately, within an arms length distance of the exposed opening of the pump. In essence, he indicated that a person going between the back of the pump and the adjacent wall to repair or service the pump mechanism inside the pump, could be injured by the exposed pinch-points. In this connection, he indicated that he had observed accidents wherein a person's pants leg had gotten caught up in an exposed pinch-point. Waters indicated that during the three days that he was on the site, he saw the pump being used. He issued a citation alleging a violation of 30 C.F.R. §56.14112(b) which provides as follows: "Guards shall be securely in place while machinery is being operated, except when testing or making adjustments which cannot be performed without removal of the guard."

Dennis T. Sullivan, the equipment superintendent at the site, indicated that prior to Waters' inspection, one of the mechanics had told him that there was a fuel leak in the pump. Also, there were some problems with a bearing. Sullivan told him to repair the pump. Essentially, according to Sullivan, it is not possible to observe any fuel leak inside the pump with the guard panel in place. Sullivan indicated that the mechanic told him on the day of the inspection that he was waiting to replace the panel until fueling time, i.e., 3:30 p.m., so he could check for a fuel leak.

Waters indicated that one of the shop mechanics told him that he had been servicing the bearings inside the pump on December 13, and had not put the panel back.

I accept the testimony of Waters that the pump was in use when he was there. Also, his testimony that the guard was not in place exposing the pinch-points, was not contradicted or impeached. I thus find that the evidence establishes that Respondent was in violation of the first clause of Section 56.14112(b), supra. I also find that Respondent has failed to establish that the circumstances at issue fit within the exception provided for in the second clause of Section 56.14112(b), supra. There is no testimony from any person having personal knowledge that any testing or adjusting of the equipment recessed in the pump was being performed when the pump was cited by Waters. I find that a penalty of \$50 is appropriate for this violation.

Citation No. 4289704.

According to Waters, on December 14, 1993, he observed a glass panel in one of the two access doors to the fuel station building.¹ According to Waters, the glass panel, 17 inches by 27 inches, contained various intersecting fractures. He said that he could feel several sharp edges on the panel in four different areas. The bottom of the glass panel was approximately 4 1/2 feet above the ground. The glass panel was reinforced with the one inch by inch mesh.

Waters issued a citation alleging a violation of 30 C.F.R. § 56.14103(b). On May 27, 1994, Petitioner moved to amend the citation to change the standard allegedly violated from 30 C.F.R. § 56.14103(b) to 30 C.F.R. § 56.11001.² On June 16, 1994, an Order was entered granting Petitioner's motion.

Respondent has not contradicted or impeached the testimony of Waters regarding the existence of broken glass in the panel of the door at issue. Therefore, I accept his testimony. I find that the glass panel in an access door was cracked, and contained sharp edges of glass. Hence, there was some degree of diminution of safe access to the fuel station, as the condition of the glass panel could cause lacerations to persons contacting the panel as they passed through the doorway.³ The hazard of possible contact with the broken glass in the panel exists inspite of the fact that the glass was reinforced with wire mesh. Hence, I conclude that Respondent did violate Section 56.11001, supra. I find that a penalty of \$50 is appropriate for this violation.

¹ Near the pinch-points, the door at issue led from the fuel station building to the shop.

² Section 56.11001 supra, provides as follows: "Safe means of access shall be provided and maintained to all working places."

³ Sullivan testified that normally the door was kept open. This normal practice does not relieve Respondent from complying with Section 56.11001, supra. The door can be closed, and miners can thereby gain access to and from the fuel station by opening and closing this door, thus, exposing them to the hazard of the broken glass.

Citation No. 4289705

Violation of 30 C.F.R. § 56.12032

According to Waters, on December 15, 1993, the front cover had come off the electric junction box that was utilized for the lighting circuits. Because the cover was off, the conductors inside the box were exposed. The conductors were part of a 120 volt system. Waters issued a citation alleging a violation of 30 C.F.R. § 56.12032 which provides as follows: "Inspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs."

Based on the testimony of Waters, I find that the junction box at issue did not have a cover plate that was in place. There is no evidence that Respondent was performing any testing or repairing at the time. I thus find that Respondent did violate Section 56.120032, supra.

Significant and Substantial

The box was located within inches of an adjacent walkway, and was one foot above the walkway surface. The surface of the walkway was composed of metal plates which were not slippery at the time. Waters opined that "material" gets spilled on the walkway surface. (Tr. 36).

Waters opined that because of the absence of the front cover, the conductors within the junction box would be exposed to ultraviolet rays from the sun which, over time, could deteriorate the conductors' insulation, leading to the junction box becoming energized. He also indicated that a person, in ascending the walkway, could slip and fall, and inadvertently place his hand inside the box. He opined that a person cleaning the walkway with a shovel, could contact energized parts inside the box with the shovel. He indicated that contact with energized parts of the junction box could be fatal, since the majority of electricity-caused fatalities occur when the voltage is at 120 volts, as is the case herein. Based on these factors he concluded that an injury was reasonably likely to occur, and that a fatality could result. For these two reasons, he concluded that the violation was significant and substantial.

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).

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.

I find that the factors taken into account by Waters could occur. However, the record before me fails to establish that an injury producing event i.e., contact with bare wires or other metal material energized at 120 volts, was reasonably likely to have occurred. In this connection, I note that the wires inside the junction box were secured and insulated. I conclude that the violation was not significant and substantial. I find that a penalty of \$50 is appropriate for this violation.

Citation No. 4289706

The number 3A conveyor is equipped with an emergency stop cord which is located along the side of the conveyor belt. Generally, the cord is supported by metal vertical standards. According to Waters, the purpose of the stop cord is to allow a person to intentionally pull the cord in an emergency to stop the conveyor belt. Also, the conveyor belt might be stopped if the cord is inadvertently hit, and pulled down by a person accidentally falling while walking on the walkway.

On December 15, 1993, Waters observed that one of the vertical support standards was loose for a distance of approximately 20 feet, and the stop cord was not in its normal location. He stated that for a distance of a couple of feet, the cord dropped 2 inches below the level of the conveyor belt. Waters said that normally the stop cord is located at the level of the conveyor, or up to several inches above it. Waters opined that since the cord was not in its normal position, should a miner slip and not be able to hit the cord to deactivate the conveyor, an injury could result.

Waters issued a citation alleging a violation of 30 C.F.R. § 56.14109(a) which provides that unguarded conveyor next to travelways ". . . shall be equipped with-(a) Emergency stop devices which are located so that a person falling on or against a conveyor can readily deactivate the conveyor drive motor; . . .".

The conveyor in question was equipped with an emergency stop cord. Waters admitted that he did not check the pull cord to see if it worked. There is no evidence that, at the location cited, a person falling could not readily deactivate the conveyor drive motor by pulling on the stop cord. There is no requirement in Section 56.14109, supra that the stop cord be at a any specific height. Within this context, I find that Petitioner has not established that Respondent violated Section 56.14109, supra. Accordingly, Citation No. 4289706 is to be dismissed.

Citation No. 4289707

Violation of 30 C.F.R. § 56.11009

According to Waters, the inclined walkway adjacent to the number C8 conveyor, extends approximately 7290 feet. The surface of the walkway consists of wooden plank boards, and is not nonskid. In general, the walkway surface is provided with cleats. Waters described these as wooden boards, 1 inch square, which are nailed perpendicular to the edges of the walkway. Waters indicated these are usually placed every 12 to 18 inches. He testified that the surface of a 16 foot long section of the walkway was not cleated, nor was it nonskid. He issued a citation alleging a violation of 30 C.F.R. § 56.11009, supra which, as pertinent, provides as follows: "Inclined railed walkways shall be nonskid or provided with cleats."

Rashford, who accompanied Waters, indicated that, in normal practice, the distance between the cleats allows for a person traversing the walkway to hit a cleat with every other step. He indicated that in the walkway at issue the cleats were a stride apart i.e., a little less than 3 feet. However, he did not specifically rebut Waters' testimony that a 16 foot long section of the walkway surface was not cleated or nonskid. Nor was Water's testimony impeached. I thus find that a 16 foot long section of the walkway was nonskid and there were no cleats provided. According to Waters, the surface of the walkway contained compacted material. He said that a miner's representative who accompanied him on the inspection told him that this material becomes slippery when wet. Hence, a person

traversing the 16 foot uncleated portion of the walkway, would have been deprived of the protection against the risk of slipping provided for in Section 56.11009, supra. For these reasons, I find that Respondent did violate Section 56.11009, supra.

Significant and Substantial

Waters opined that when the walkway becomes slippery, it is easy to trip and fall and hit the surface of the walkway. According to Waters, such an accident can result in fractures to fingers or wrists, or possible head injuries. He concluded that the violation was significant and substantial, because it was reasonably likely that a person traversing the area without cleats would fall, and a resulting injury would cause a loss of work days.

According to Rashford, there was no debris on the walkway. The greater portion of the walkway was properly provided with cleats. I find that in this context, an injury producing event, i.e., slipping or falling on the uncleated portion of the walkway, was not reasonably likely to have occurred. I thus find that violation was not significant and substantial. (See Mathies, supra). I find that a penalty of \$50 is appropriate for this violation.

Citation No. 4289709

Waters indicated that there was a steep stairway leading to the tail of the No. 1 belt.⁴ He said that one side of the stairway was up against a wall, and the outside of the stairway was provided with a handrail. He said that handrail was between 18 to 21 inches high. Waters indicated that when he observed the handrail, he concluded that it was too low to restrain a person who might stumble while descending the stairway, and tumble over the handrail. He indicated that in this situation a person could fall, and land on the concrete surface 12 feet below the stairway. He issued a citation alleging a violation of 30 C.F.R. § 56.11002 which provides, as pertinent, that stairways shall be "provided with handrails, and maintained in good condition."

The evidence establishes that the stairway was provided with a handrail. There is no evidence that the handrail was not in good condition. There is no requirement in Section 56.11002 supra, that the handrail be of a minimum height. It is clear, as indicated by Waters on cross-examination, that the optimum height depends upon the degree of incline of the stairway. I agree with

⁴ The stairway was at a fifty degree angle.

Petitioner that Section 56.11002 supra, must be construed to effectuate its remedial purposes. Hence, the handrail required by Section 56.11002 supra, must be capable of providing effective protection for miners using the stairway. Waters opined that the handrail at issue was too low to restrain a person who might fall using the stairway. Respondent did not impeach or contradict this opinion. It therefore is accepted. I find that it has been established that Respondent violated Section 56.11002, supra.

The lack of a proper handrail contributed to the hazard of a person falling off the stairway. However, there are no specific facts in the record to predicate a finding that an injury-producing event, i.e., falling on the stairway, was reasonably likely to have occurred. I therefore find that the violation was not significant and substantial. (See, Mathies, supra).

I find that a penalty of \$50 is appropriate.

Citation No. 4289712

A seat belt provided on a Caterpillar loader contained a tear that started at the side edge of the belt, and extended three quarters of an inch perpendicular to the length of the belt. The belt was 3 5/16 inches wide. Waters opined that there was plenty of belt left to hold a person in place, should the vehicle turn over. He issued a citation alleging a violation of 30 C.F.R. § 56.14130(i) which provides as follows: "Seat belts shall be maintained in functional condition, and replaced when necessary to assure proper performance."

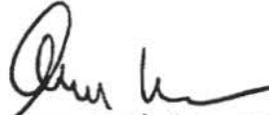
Although the seat belt was torn, there is no evidence that it was not in functional condition. Nor is there any evidence that the tear was of sufficient length in relation to the width of the seat belt, as to diminish the proper performance of the seat belt. Indeed, Waters opined that should the vehicle turn over there was plenty of belt left to hold a person inside. Within this framework, I conclude that it has not been established that Respondent violated Section 56.14130(i), supra. Therefore, citation No. 4289712 shall be dismissed.

ORDER

It is **Ordered** as follows:

1. Citation Numbers 4289706 and 4289712 shall be dismissed.
2. Citation Number 4289705, 4289707 and 4289709, shall be amended to indicate violations that are not significant and substantial.

3. Respondent shall pay a civil penalty of \$250 within 30 days of this decision.



Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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OCT 25 1994

JIM WALTER RESOURCES, INC., : CONTEST PROCEEDING
Contestant :
v. : Docket No. SE 94-326-R
: Order No. 2807385; 3/30/94
SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH : No. 4 Mine
ADMINISTRATION (MSHA), : MINE ID 01-01247
Respondent :

DECISION

Appearances: David M. Smith, Esq., and J. Alan Truitt, Esq.,
Maynard, Cooper & Gale, P.C., Birmingham, Alabama,
and R. Stanley Morrow, Esq., Jim Walter Resources,
Inc., Brookwood, Alabama, for Contestant;
Patrick K. Nakamura, Esq., Longshore, Nakamura &
Quinn, Birmingham, Alabama, for Intervenors;
William Lawson, Esq., Office of the Solicitor,
U.S. Department of Labor, Birmingham, Alabama for
Respondent.

Before: Judge Hodgdon

This case is before me on a notice of contest filed by
Jim Walter Resources, Inc. (JWR) against the Secretary of Labor
pursuant to Section 105 of the Federal Mine Safety and Health
Act of 1977, 30 U.S.C. § 815. JWR contests the issuance of Order
No. 2807385 to it on March 30, 1994. For the reasons set forth
below, the order is affirmed.

This case was heard on July 26, 1994, in Birmingham,
Alabama. Judy Ann McCormick testified on behalf of the
Secretary. Thomas E. McNider and Edward W. Grygiel testified for
JWR. The parties have also filed briefs which I have considered
in my disposition of this case.

BACKGROUND

This case is a classic example of what happens when all
terms of an agreement are not reduced to writing. The essential
facts are undisputed, but the conclusions that JWR and the Mine
Safety and Health Administration (MSHA) have drawn from those
facts are widely divergent.

Early in 1992, JWR submitted to MSHA a ventilation control plan to be implemented for all of its longwall mines, including the No. 4 Mine. Among other things, the plan proposed an alternative method for sampling the respirable dust exposure of the designated occupation on the longwall section to that set out in Section 70.207(e)(7) of the Regulations, 30 C.F.R. § 70.207(e)(7).¹ MSHA had, at least, two objections to this particular proposal.

First, MSHA did not agree to determining the time that miners would be permitted to work downwind of the shear to be based on the weight of the dust collected in the sampling device. Section K(2) of the plan provided that seven dust pumps would be operated for one, two, three, four, five, six and seven hour intervals during standard operating cycles of the longwall and that the permissible downwind time would correspond to the interval sample which did not exceed 2 mg. of dust. MSHA wanted the plan to provide for equivalent concentrations as set out in Section 70.206 of the Regulations, 30 C.F.R. § 70.206.² MSHA

¹ Section 70.207(e)(7) states:

(e) Unless otherwise directed by the District Manager, the designated occupation samples shall be taken by placing the sampling devices as follows:

. . . .

(7) *Longwall section.* On the miner who works nearest the return air side of the longwall working face or along the working face on the return side within 48 inches of the corner.

² Section 70.206 explains:

The concentration of respirable dust shall be determined by dividing the weight of dust in milligrams collected on the filter of an approved sampling device by the volume of air in cubic meters passing through the filter and then converting that concentration to an equivalent concentration as measured with an MRE instrument. To convert a concentration of respirable dust as measured with an approved sampling device to an equivalent concentration of respirable dust as measured with an MRE instrument, the concentration of respirable dust measured with the approve sampling device shall be multiplied by the constant factor prescribed by the
(continued on next page)

apparently prevailed on this issue because the approved plan states that the downwind time will be adjusted to correspond to the interval sample that does "not exceed 2mgm³ [sic]." (Gvt. Ex. 2.)

Secondly, and what has caused the problem in this case, MSHA did not agree with JWR's interpretation of what Section K(3)(e) meant when it said that when dust sampling revealed that dust exposure levels upwind of the shear were not in compliance with the permissible level of exposure, that the time that all workers on the longwall face would be permitted to work would "be adjusted utilizing the downwind exposure time in place." To JWR, "downwind exposure time in place" referred to the permissible downwind time determined under Section K(2) of the plan. (Tr. 108-09.) To MSHA, "downwind exposure time in place" would be determined by using a computer formula taking other ingredients, including upwind exposure levels, into consideration. (Tr. 49, 98-99.)

The plan for the No. 4 Mine was approved sometime after June 1992.³ (Gvt. Ex. 2.) Although there were many discussions between JWR and MSHA concerning the interpretation of K(3)(e), some of which evidently took place after the plan was approved, MSHA consistently has held to its interpretation of the plan. The approved plan, however, contains the original language for Section K(3)(e) proposed by JWR. There is no evidence that MSHA communicated its interpretation to JWR in writing, nor is there any evidence that JWR affirmatively agreed, in writing or otherwise, to MSHA's interpretation.

Nevertheless, JWR had been furnished copies of the computer program used by MSHA to calculate the downwind time no later than August 1992, and was aware of what the program involved. (Cont. Ex. F.) By December 1992, JWR was also aware that in calculating the downwind time, MSHA would not necessarily use all seven

Secretary for the approved sampling device used, and the product shall be the equivalent concentration as measured with an MRE instrument.

³ There is no evidence, direct or otherwise, as to when the plan was actually approved. Gvt. Ex. 2 does not contain the standard cover letter from the District Manager approving the plan. No one testified concerning the date the plan was approved. However, no one disputed that the plan was in fact approved.

samples provided for in K(2), but would eliminate up to two samples that were out of "progression." (Cont. Ex. E., Tr. 74-79.)

At least once, prior to the order in question, JWR was issued a citation at the No. 4 Mine for violating its ventilation control plan with respect the downwind exposure on the longwall. (Tr. 33-4, 37, 127.) JWR apparently did not challenge MSHA's interpretation of the plan with respect to any alleged violations received prior to the instant one.⁴

On March 28, 1994, MSHA notified JWR that the March 23 dust sample results for the shear operator showed noncompliance with the applicable dust standard and that, therefore, the corresponding face time for the longwall was "0" hours. In other words, the longwall could not be operated. That same day, JWR submitted a supplemental plan to allow the longwall to resume operations. The plan was approved on March 29.

On March 30, Judy McCormick, an MSHA coal mine inspection supervisor, while at the No. 4 Mine, was informed by JWR employees that the longwall had been operated between the time JWR was notified of the "0" face time and the time the supplemental plan was approved. Consequently, Section 104(d)(2)⁵ Order No. 2807385 was issued to JWR on March 30. The order cited a violation of Section 75.370(a)(1) of the Regulations, 30 C.F.R. § 75.370(a)(1), and stated:

⁴ JWR's challenge to MSHA's disapproval of this ventilation plan, particularly Section K(2), with respect to its No. 5 Mine was denied by another Commission judge, *Jim Walter Resources, Inc.*, 16 FMSHRC 851 (Judge Melick, April 1994). That decision is currently pending before the Commission.

⁵ Section 104(d)(2) of the Act, 30 U.S.C. § 814(d)(2), provides, in pertinent part:

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

On 3/28/94, the operator was notified via telephone and fax that the "K" sample results indicated that the shear operator was in non-compliance on the No.#2 Longwall (MMU 0200) and the downwind time was 0 hours. As a result, the face time for the longwall was also 0 hours. A plan was approved on 3/29/94 approximately mid day-shift which allowed the longwall to resume operations in order for samples to be collected. On the morning of 3/30/94, it was revealed, through interviews with longwall employees, that at approximately 10:30 PM on 3/28/94, the #2 longwall did resume operation in violation of item K.3.E. of the approved dust control portion of the current ventilation plan. The longwall continued to operate through the owl shift and was then closed on the day shift on 3/29/94.

(Gvt. Ex. 3.)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Section 75.370(a)(1) provides, in pertinent part, that "[t]he operator shall develop and follow a ventilation plan approved by the district manager. The plan shall be designed to control methane and respirable dust and shall be suitable to the conditions and mining system at the mine."

In another case involving JWR, the Commission described how the ventilation plan is supposed to be developed and approved. It said:

The approval and adoption process is bilateral and results in the Secretary and the operator, through consultation, discussion, and negotiation, mutually agreeing to ventilation plans suitable to the specific conditions at particular mines. *Zeigler v. Kleppe*, 536 F.2d 398, 406-407 (D.C. Cir. 1976); *Carbon County Coal Co.*, 6 FMSHRC 1123 (May 1984). The process is flexible, contemplates negotiation toward complete agreements, and is aimed at compliance with mine safety and health requirements. Under the approval and adoption process, the operator submits a plan to the Secretary who may approve it or suggest changes. The operator is not bound to acquiesce in the Secretary's suggested changes. The operator and the Secretary are bound, however, to negotiate in good faith over disputes as to the plan's provisions and if they remain at odds they may seek resolution of their disputes in enforcement proceedings before the Commission. *Carbon*

County Coal Company, 7 FMSHRC 1367, 1371 (September 1985); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2771 (December 1981). The ultimate goal of the approval and adoption process is a mine-specific plan with provisions understood by both the Secretary and the operator and with which they are in full accord. Once the plan is approved and adopted, these provisions are enforceable at the mine as mandatory safety standards. *Zeigler, supra* at 409; *Carbon County*, 7 FMSHRC at 1370; *Penn Allegh*.

Jim Walter Resources, Inc., 9 FMSHRC 903, 907 (May 1987). Unfortunately, the process did not work as it was supposed to in this case.

Clearly, if the provisions of JWR's ventilation plan were understood by both JWR and MSHA and if they were in full accord in that understanding, this case would not have arisen. Both parties share the blame for this. If MSHA intended to interpret Section K(3)(e) of the plan as it has, it should have required that the section be written in accordance with its interpretation. If JWR would not agree to that, then MSHA should not have approved the plan. On the other hand, once JWR learned how MSHA was interpreting the section, it was incumbent on them to notify MSHA immediately if they did not agree to that interpretation, rather than wait a year and a half and at least one citation later to claim that the interpretation was not part of their plan.

Based on the facts in this case, I conclude that JWR violated the provisions of its ventilation plan and, thus, violated Section 75.370(a)(1) as alleged. This conclusion is grounded on a finding that JWR acquiesced in MSHA's interpretation of the plan. There are two factors which indicate that JWR acquiesced in MSHA's interpretation.

First, the method for sampling the dust-exposure of the designated occupation on the longwall section was not required to be in the ventilation plan and was, therefore, gratuitous to the plan. In fact, Section 70.207(e)(7) specifically provides the method for sampling the longwall section and the only alternative to that method is as otherwise directed by the District Manager.⁶ Consequently, since the method of dust sampling is not an option with the operator, the district manager could have rejected that part of the plan out of hand.

⁶ The text of Section 70.207(e)(7) is set out in fn. 1, *supra*.

Instead, the district manager, apparently as an accommodation to JWR, considered that section of the plan to determine if he wanted to "otherwise direct" JWR's proposed method of sampling. In effect, he directed the method with

MSHA's modifications. While this direction should have been in writing, at this point, JWR could either have accepted the modifications, or sampled in accordance with Section 70.207(e)(7). Since they continued to operate under the plan, JWR apparently accepted the modifications.

The second element that indicates that JWR assented to MSHA's interpretation is the time factor. JWR knew by August 1992 how MSHA was interpreting Section K(3)(e) and they knew by at least December 1992 that MSHA was not always using all seven samples submitted to apply the section, yet they apparently did nothing about it. For over a year they continued to submit monthly samples. JWR received at least one citation for violating the section and apparently had other occasions when the longwall was shut down for a period of time because of the section, but they did not contest MSHA's interpretation.

It was only when JWR received a serious 104(d)(2) order that they suddenly claimed that the plan was being applied improperly. By then, it was too late. JWR had acquiesced in MSHA's interpretation and is bound by that acquiescence.

This violation was determined by the inspector to be "significant and substantial."⁷ In *Consolidation Coal Company*, 8 FMSHRC 890, 899 (June 1986), *aff'd sub nom. Consolidation Coal v. FMSHRC*, 824 F.2d 1071 (D.C. Cir. 1987), the Commission held that "when the Secretary proves that a violation of 30 C.F.R. § 70.100(a), based upon excessive designated occupation samples,

⁷ A "significant and substantial" (S&S) violation is described in Section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981).

has occurred, a presumption that the violation is a significant and substantial violation is appropriate."

Although this case involves a violation of Section 75.370(a)(1), not Section 70.100(a), the same principle is involved. By violating its ventilation plan, JWR's miners were exposed to excessive dust concentrations. Thus, the reasoning behind the presumption applies as well to this case.

JWR has not presented any evidence to rebut the presumption that the violation in this case was "significant and substantial." Accordingly, I conclude that it was "significant and substantial."

MSHA also characterized this violation as having occurred as the result of an "unwarrantable failure" on JWR's part.⁸ Ms. McCormick testified that it was characterized this way because:

first this was not the first time that this has happened at the No. 4 mine. Second, the operator was notified by telephone and by fax of the fact that the shearer [sic] operator sample . . . was not in compliance. When I talked to Mr. Andrews on the telephone, the safety inspector for the company, we discussed the fact that the longwall was closed. It was a convenient opportunity for it to come at that time because the longwall was down for maintenance problems anyway. So when the maintenance problems were over and they put the longwall back to work, we did feel that it was reckless disregard on their part because they were well aware of what the plan required and had been notified that they were in violation.

(Tr. 37-8.)

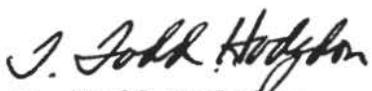
In addition to this, the evidence indicates that JWR submitted a supplemental plan to MSHA to permit them to resume operating the longwall, but started operations before the plan had been approved. Taken all together, I conclude that JWR's

⁸ The Commission has held that "unwarrantable failure" is aggravated conduct constituting more than ordinary negligence by a mine operator in relation to a violation of the Act. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (December 1987); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2010 (December 1987).

conduct in committing this violation was inexcusable, unjustifiable and, therefore, aggravated. Consequently, the violation resulted from JWR's "unwarrantable failure."

ORDER

JWR violated Section 75.370(a)(1) of the Secretary's Regulations by not complying with its ventilation control plan. The violation was both "significant and substantial" and the result of an "unwarrantable failure." Accordingly, it is **ORDERED** that Order No. 2804385 is **AFFIRMED**.



T. Todd Hodgdon
Administrative Law Judge

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OCT 26 1994

OLD BEN COAL COMPANY,	:	CONTEST PROCEEDING
Contestant	:	
v.	:	Docket No. LAKE 94-615-R
	:	Citation No. 4050921; 7/29/94
	:	
SECRETARY OF LABOR,	:	Spartan Mine
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Mine ID 11-00612
Respondent	:	

DECISION

Appearances: Timothy M. Biddle, Esq., Crowell & Moring, Washington, D. C., and Thomas L. Clarke, Esq., Old Ben Coal Co., Fairview Heights, Illinois, for Contestant;
Miguel J. Carmona, Esq., Office of the Solicitor, U. S. Department of Labor, Chicago, Illinois, for Respondent.

Before: Judge Amchan

Procedural Background

This case arises out of Old Ben Coal Company's contest of citation No. 4050921, which was issued on July 29, 1994, alleging that Old Ben was operating without an approved ventilation plan. Section 75.370(a)(1) of volume 30 of the Code of Federal Regulations requires a mine operator to develop and follow a ventilation plan designed to control methane and respirable dust. That plan must be suitable to the conditions and mining system at the mine and must be approved by MSHA.

Ventilation plans must be reviewed by MSHA every 6 months to assure that they are suitable to the current conditions at the mine, 30 C.F.R. § 75.370(f). In the spring of 1994, during such a review of Old Ben's ventilation plan for its Spartan mine in Randolph County, Illinois, MSHA concluded that the then approved ventilation plan was deficient. On March 22, 1994, MSHA wrote Contestant advising them of these perceived deficiencies and requesting their correction (Exh. R-3, pp. 21-22).

All of the alleged deficiencies were changed to MSHA's satisfaction save one (Exh. R-3, pp. 7-8). After a meeting on June 7, 1994, Contestant requested that MSHA issue a citation so that the dispute could be resolved before the Commission (Tr. 147). The approval for the ventilation plan expired on June 30, 1994 (Exh. R-2). The instant citation was issued shortly thereafter (Tr. 13-14).

To abate the citation Old Ben submitted a revised plan which was approved by MSHA on August 1, 1994 (Exh. C-6). On August 2, 1994, Old Ben filed a notice of contest to citation No. 4050921, claiming that the changes that were forced upon it by MSHA were not warranted by the conditions at the Spartan mine.

The Disputed Plan Provision

The unresolved issue in Contestant's disapproved plan concerned the typical sequence of extended face cuts. More specifically, MSHA was concerned with the ventilation of the straight (or straight portion of an entry) when a crosscut was made to the right, (Exh. C-2, p. 18, top sketch).

The same procedure was employed by Old Ben with all three of the continuing miner units at the Spartan mine. As depicted on the right side of exhibit C-4, notch 9 (in purple) and in exhibit C-5, the continuous miner would advance over 100 feet inby the last open crosscut and then would back up over 76 feet to cut a notch to start a crosscut to the right of the entry. When the mining machine cut this notch, the line curtain, which had extended to within 38 feet of the working face on the right side of the entry, was removed in the area in which the notch was cut (Tr. 23, 126).

The line curtain in this area was not generally replaced until this notch was bolted. This could occur within a few minutes or as much as an hour and a half after the notch was cut (Tr. 131-32). The continuous miner would back out of the entry after cutting the right notch and then return at a later time to cut the crosscut all the way through to the adjacent entry to the right. The line curtain would also have to be taken down or curved to the right, to allow completion of the crosscut (Exh. C-2, p. 18).

During its review of Contestant's ventilation plan in the spring of 1994, MSHA concluded that Old Ben's mining procedure did not provide adequate ventilation to the straight, the area inby the notch (Tr. 33, area C of exhibit C-5). The agency concluded that, due to this condition, methane which was liberated from the coal seam would not dilute or dissipate and could explode (Tr. 35-36, 39, 43).

Under the ventilation plan approved by MSHA in August 1994, the continuous miner advances only 20 feet beyond the inby rib of the crosscut which it will start to the right (Exh. C-7, C-8), as opposed to 76 feet under the disapproved plan (Tr. 154-56, Exh. C-5). The post-August 1994 procedure requires Contestant to move its equipment more frequently, which results in a decrease in coal production of 800 - 1,000 tons per mining cycle (Tr. 166-67).

Contestant also alleges that the new procedure is more hazardous than the old. It submits that the increased number of equipment moves is likely to result in an increased number of back injuries (Tr. 158, 180-81).¹ Further, Contestant believes the new procedure increases the chances of a miner being crushed by its machinery (Tr. 193-94), and increases the exposure of its miners to coal dust (Tr. 203, 210).

Most importantly, Contestant claims that the changes imposed upon it by MSHA's disapproval of its prior ventilation plan are unnecessary in protecting the health and safety of its miners (Tr. 165-67). Thus, it concludes that its old plan was suitable to the conditions at the Spartan mine and that the MSHA-imposed plan is unsuitable in that it increases hazards and reduces the profitability of the mine without legitimate reasons.

The Spartan mine is not a high methane liberation mine (Tr. 46). In approximately 38,000 examinations made at the working faces of the Spartan mine between December 1992 and August 1994, no concentrations of methane were found above four-tenths of one percent (Tr. 186, Exh. C-9)². Four-tenths was detected on two occasions, three-tenths on another two occasions. Two-tenths of one percent or less was detected on all other occasions (Tr. 186-87).

There is no indication that there has ever been a methane explosion at the Spartan mine, or a citation issued for excessive methane. Similarly, there is no indication that a continuous miner has ever been de-energized at the Spartan mine due to methane concentrations over one percent (Tr. 132-33, 189-90). However, in 1986, 7% methane was detected for a split second when a roof bolting machine drilled into it (Tr. 197-98).

¹ Transcript page 158, line 5 erroneously attributes to the undersigned statements made by Contestant's witness, William Patterson, regarding these hazards.

² The Spartan mine experienced a strike between May 10, 1993 and December 16, 1993 (Tr. 186).

Old Ben also contends, and I find, that methane releases at the Spartan mine are and will be very rare and will occur in relatively small pockets (Tr. 227). It is unlikely that methane liberation will increase at the Spartan mine in the foreseeable future (Tr. 235-36).

Ninety-five percent of the methane in the Spartan mine is likely to be released during the cutting of coal (Tr. 229-30). Very little of the methane at this mine is residual gas which will be released after cutting is finished (Tr. 232-34).

There are no ignition sources in the straight after the continuous mining machine backs up until the roof bolting machine enters the area (Tr. 236). The roof bolting machine operator must check for methane before entering this area and every twenty minutes thereafter (Tr. 191-92, 243-44).

Disposition of the Citation

In cases arising out of a dispute over the disapproval of a ventilation plan, the Secretary of Labor has the burden of proving that the rejected plan was no longer suitable and that the new plan is suitable, Peabody Coal Company, 15 FMSHRC 628 (April 1993); 15 FMSHRC 381 (March 1993). In the instant case, the Secretary has not met either burden.

The Secretary has not established that the disapproved plan created hazards to Contestant's miners that made it unsuitable. Similarly, in view of his failure to show the unsuitability of the old plan, he has failed to establish the suitability of the new plan, given the significant increased costs of production, which the new plan imposes upon the operator.

Much of MSHA's theory that the old plan is dangerous depends on conclusions drawn from smoke tests made at the Martwick mine in Western Kentucky and other mines (Tr. 36, 82-83). From those tests MSHA concludes that there is no air movement in the straight under the conditions existing under the disapproved plan at Contestant's mine. However, Contestant's expert, Donald Mitchell, whose opinion I credit, concluded that there is sufficient air flow into the straight at the Spartan mine under the old plan to render whatever methane is released harmless (Tr. 237-38).

Following the hearing in this matter I requested that the parties file briefs to address the applicability, if any, of MSHA's regulations at 30 C.F.R. § 75.330 and § 75.333(g) to this

case. The parties agree that section 75.333(g) does not have any relevance to this case (Secretary's brief at page 10).³

Section 75.330 requires that ventilation control devices be installed at a distance no greater than 10 feet from the area of deepest penetration to which any portion of the face has been advanced unless an alternative distance is specified and approved in the ventilation plan. Section 75.330(b)(1)(ii) requires that ventilation control devices be used to ventilate "any other working places as required by the approved ventilation plan."

I am persuaded by Contestant's brief at pages 3-5 that section 75.330(b)(1)(i) and 75.330(b)(2) are not applicable to this case. When the continuous mining machine backs up in the straight, the area of deepest penetration ceases to be a "working face."⁴ Thus, I conclude that there is no general rule indicating that it is necessary to maintain ventilation control devices at any particular distance from the area of deepest penetration when the mining machine is cutting a notch or crosscut 76 feet outby that location.

The requirements of section 75.330(b)(1)(ii) are somewhat circular as applied to this case. If Contestant had submitted a plan requiring that ventilation controls be maintained within a certain distance of a "working place," that requirement would be binding on Old Ben. However, if such a requirement were forced upon Contestant through the mechanism of the plan approval process, the Secretary would have to demonstrate its suitability.

³Section 75.333(g) provides:

Before mining is discontinued in an entry or room that is advanced more than 20 feet from the inby rib, a crosscut shall be made or line brattice shall be installed and maintained to provide adequate ventilation...

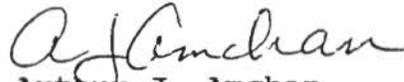
The parties appear to agree that the word "discontinued" means permanent cessation of mining in an area, not the movement of a mining machine out of an area temporarily to extract coal at another location to continue the mining cycle (Contestant's brief at 10-12, Secretary's brief at 10).

⁴"Working face" is defined in MSHA's regulations as any place in a coal mine in which the work of extracting coal from its natural deposit in the earth is performed in the mining cycle. "Working place" is defined as the area of a coal mine inby the last open crosscut, 30 C.F.R. § 75.2.

If the Secretary desires to prohibit the mining practice represented by Exhibit C-4, he would have to do so through notice and comment rulemaking. There is nothing about the conditions at the Spartan mine, or about a number of mines that are similarly situated, that would warrant a prohibition of this practice at the Spartan mine while allowing it at many or all other mines. Peabody Coal Company, 15 FMSHRC 381, 386 (March 1993).

CONCLUSION AND ORDER

For the reasons stated herein I vacate citation No. 4050921.



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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-5267/FAX 303-844-5268

OCT 27 1994

SECRETARY OF LABOR, : TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH : PROCEEDING
ADMINISTRATION (MSHA) :
On behalf of : Docket No. WEST 94-711-D
ROBBIE A. SMITH, :
Complainant : Centralia Gold Mine
v. : Mine I.D. 45-00416
CENTRALIA MINING COMPANY, INC., :
Respondent :

ORDER OF DISMISSAL

Before: Judge Morris

The parties filed a joint settlement agreement together with a joint motion to dismiss.

For good cause shown, the settlement agreement is **APPROVED** and the case is **DISMISSED**.


John J. Morris
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

OCT 27 1994

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEVA 94-237
Petitioner : A.C. No. 46-08146-03505
v. :
CATENARY COAL COMPANY, : Campbells Creek Surface
Respondent : Facilities

DECISION

Appearances: Patrick L. DePace, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia,
for the Petitioner;
Frenchette C. Potter, Esq., St. Louis, Missouri,
for the Respondent.

Before: Judge Melick

This case is before me pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq., the "Act," to challenge a citation issued by the Secretary of Labor against Catenary Coal Company (Catenary) for one violation of the standard at 30 C.F.R. § 77.1600(b). The general issue before me is whether there was a violation as alleged and, if so, what is the appropriate civil penalty for that violation. Additional specific issues are addressed as noted.

The citation at issue, No. 3743671, alleges a "significant and substantial" violation of the noted standard and charges as follows:

It was revealed during a fatal powered haulage accident, that standardized traffic rules and warning signs had not been posted along the roadways to warn drivers to use lower gears, to travel at slow speeds, to indicate proper CB channel to monitor, and to warn that specific locations are only suitable for one way traffic. This condition was one of the contributing factors to the issuance of Imminent Danger Order No. 3743670 therefore no abatement time is set.

The cited standard provides that "[t]raffic rules, signals and warning signs shall be standardized at each mine and posted."

Two haul roads at the Campbells Creek Surface Facilities are at issue. The Point Mine Road runs from the Campbells Creek No. 3 Mine approximately .4 miles to the Campbells Creek Preparation Plant over a 12 percent average downgrade. On April 23, 1993, there were no signals or warning signs anywhere on that road. The Winchester Mine Road runs approximately 2.3 miles from the Campbells Creek No. 2 Mine to the Campbells Creek Preparation Plant and over an average downgrade of 13.24 percent. On the Winchester Mine Road there was a section approximately 3,800 feet long, having a maximum downgrade of 17 percent. As of April 23, 1993, there were five signs posted along this road (identified on Respondent's Exhibit No. 1 with blue "X"s). The location of the signs and the captions on the signs are not in dispute. Near the Winchester Mine there was a sign captioned "speed 25 limit." Approximately two-thirds of the way down the Winchester Mine Road there was a yield sign and a sign labeled "one lane traffic loaded trucks have rt. of way" (Gov't Exhibit No. 3). At the bottom of the Winchester Mine road and facing uphill was a sign "CB 18 channel" and a "stop" sign.

Mine Safety and Health Administration (MSHA) Coal Mine Inspector Paul Hess, Jr. conducted an investigation on April 23, 1993, of a fatal accident at the subject complex. He issued the citation at bar upon his belief that the signage at the mine was inadequate. The 25-mile-per-hour speed limit was, according to Hess, too fast for loaded coal trucks and, in particular, much too fast for loaded trucks in the downgrade area. Truck drivers interviewed by Hess, reported they ordinarily drove only five to 15 miles-per-hour on this road.

Hess further opined that the sign designating "one lane traffic loaded trucks have rt of way" was not readily visible and could be read only if you were close to it. In addition, Hess found that a sign should have been at the bottom of the hill where the Winchester Road intersects near the preparation plant identifying the proper CB channel to be monitored. He believed that the existing sign was facing the wrong way on Winchester Road. Hess also opined that a sign was needed to warn drivers against shifting gears while proceeding downhill. He testified that if you are unable to engage a gear in the shifting process on the "Autocar" haul trucks and your speed builds up, the service brakes may not be sufficient to stop on the downgrade. I accept the testimony of Inspector Hess and find that the violation existed as charged.

Hess opined that the violation was also "significant and substantial." A violation is properly designated as "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 a mandatory standard is significant and substantial under National Gypsum the Secretary must prove: (1) the underlying violation of a mandatory safety standard, (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation, (3) a reasonable likelihood that the hazard contributed to will result in an injury, and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

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

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 (1984), and also that the likelihood of injury be evaluated in terms of continued normal mining operations. U.S. Steel Mining Co., Inc., 6 FMSHRC 1473, 1574 (1984); see also Halfway, Inc., 8 FMSHRC 8, 12 (1986) and Southern Oil Coal Co., 13 FMSHRC 912, 916-17 (1991).

In this regard, Hess testified that without warning signs and proper reminders, there was a particular danger to new drivers unfamiliar with the mine property. Hess was particularly concerned with the sign indicating the right-of-way for loaded trucks. Hess believed that the fatal haulage accident that occurred on April 23, 1993, was caused by the driver's attempt to shift gears on the downgrade and his inability to engage a gear thereby resulting in a runaway truck. Hess opined that fatal injuries were indeed highly likely with a resulting run-away truck. More particularly, Hess testified that the fatality was the result of the truck out-of-gear and losing control. This conclusion was the result of examination of the truck's gears, which were neither scorched, discolored nor chipped and interviews of witnesses that the truck was moving at 70 to 80 miles per hour when it struck the coal stockpile.

Hess acknowledged that he attributed only low negligence to the operator because of frequent prior inspections by MSHA at this mine without any indication or citations for inadequate signage. The operator had not previously been cited for any

similar violations and indeed it is stipulated that, while Respondent is a large operator, it has an "excellent history." Hess also attributed low negligence to the operator because of the acknowledged ambiguity and lack of clear guidance in the cited standard.

I agree with the inspector's assessment that a violation occurred and that the violation was "significant and substantial." In particular, a new driver at the mine site would not on April 23, 1993, have been warned of any hazards on the Point Mine Road since no signs then existed. On the Winchester Road, there were seriously deficient signs. The 25-mile-per-hour speed limit sign could easily have lulled a new driver into exceeding a safe speed. It is undisputed that this speed well exceeded the safe limits on the downgrade section of the haul road. In addition, I accept the inspector's credible testimony corroborated by the photograph in evidence (Exhibit No. 3), that the sign indicating "one lane traffic loaded trucks have rt. of way" was too small to be readily observed (Gov't Exhibit No. 3). Moreover, there were no signs warning new truck drivers not to change gears in the approaching downgrade of the Winchester Mine Road. It may reasonably be inferred from the investigation conducted in part by Inspector Hess that indeed the fatal haulage accident at that location was caused by an attempt to change gears while proceeding into that downgrade.

Finally, it may reasonably be inferred that confusion could have been engendered by the absence of signs to indicate the appropriate CB channel for drivers to monitor. This confusion could very well have been furthered by the "hazard training" program at the subject mine and in particular the contradictory terms of Item No. 16 of that program which indicates as follows: "Citizen band channel 16 is utilized by off-road haulage trucks. Citizen band channel 18 is utilized by the Prep. Plant and on road haulage trucks while on the property" (Respondent's Exhibit No. 3).

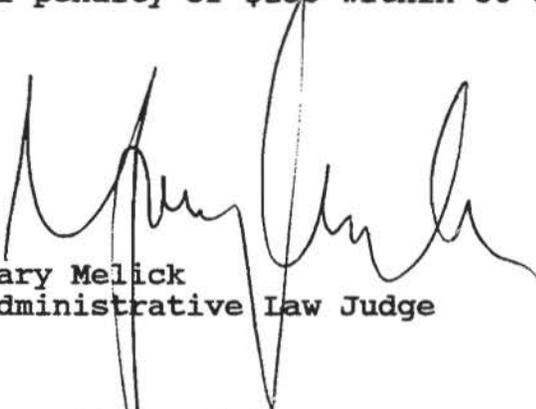
In reaching the above conclusions, I have not disregarded the Respondent's argument that the hazard training document (Respondent's Exhibit No. 3) would have sufficiently warned new truck drivers of the hazards on the haulage roads at the mine prior to April 23, 1993. I simply disagree with this argument. In particular, the ambiguities, if not contradictions, in the hazard training document (see Statement Nos. 4, 11 and 16) could easily lead to confusion in the traffic rules further aggravating the absence of appropriate signs.

In proposing a penalty in this case however I give significant weight to the fact that MSHA had frequently inspected this mine without any indication or citations for inadequate signage and to Inspector Hess' admission that the cited regulation was both ambiguous in its requirements and provided little guidance

to mine operators. In King Knob Coal Co., Inc., 3 FMSHRC 1417, 1422 (1981), the Commission held that unclear or confusing MSHA policies may be a factor mitigating operator negligence. In the instant case, the lack of clear guidance and the ambiguities in the Secretary's regulation and his lack of prior enforcement may similarly be considered in mitigating operator negligence. Within this framework and considering all of the criteria under section 110(i) of the Act, including the stipulation that this operator has an "excellent history," I conclude that a civil penalty of \$250 is appropriate for the violation.

ORDER

Citation No. 3743671 is **AFFIRMED** and Catenary Coal Company is hereby ordered to pay a civil penalty of \$250 within 30 days of the date of this decision.



Gary Melick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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OCT 31 1994

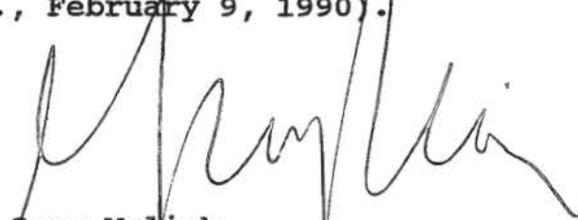
UNITED MINE WORKERS OF : COMPENSATION PROCEEDING
AMERICA ON BEHALF OF :
LOCAL 5817, : Docket No. WEVA 94-284-C
Complainants :
v. :
MUTUAL MINING INCORPORATED, : Mutual No. 1 Mine
Respondent :

DEFAULT DECISION

Before: Judge Melick

On August 1, 1994, Respondent, Mutual Mining Incorporated, was ordered to file an Answer to the Complaint for Compensation within 30 days of that date or show good reason for failing to do so.

To date no response to the above order has been received. Accordingly, Respondent is in default and is hereby ORDERED to pay compensation within 30 days of the date of this order to the miners listed in Exhibit "E" attached to the Complaint for Compensation and in the amounts enumerated, plus interest to the date of payment, calculated in accordance with the formula set forth by the Commission in Secretary on behalf of Bailey v. Arkansas-Carbona Co., 5 FMSHRC 2642 (1983) and as applicable, Loc. U. 2274, UMWA v. Clinchfield Coal Co., 10 FMSHRC 1493 (1988), aff'd sub nom. Clinchfield Coal Co. v. FMSHRC, No. 88-1873 (D.C. Cir., February 9, 1990).



Gary Melick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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OCT 31 1994

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. PENN 94-281-D
<u>ex rel.</u> , DALE BEERS,	:	PITT CD 93-18
ROY HARVEY, HUGH KELLS	:	
AND LARRY ROUGEAUX, ON	:	Urling No. 1 Mine
BEHALF OF MIDNIGHT AND	:	
DAYSHIFT MINERS,	:	
Complainant	:	
v.	:	
	:	
KEYSTONE COAL MINING CORP.,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Fauver

This is an action for back pay, based upon an alleged act of discrimination under § 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

The parties have moved the judge to approve a settlement agreement in which the miners named in the settlement shall be paid the back pay agreed to.

I have considered the reasons and documentation submitted and I conclude that the proposed settlement is consistent with the purpose of § 105(c) of the Act. Accordingly, the settlement is approved.

ORDER

1. The motion to approve a settlement is GRANTED.
2. The parties shall promptly comply with all of the terms of the settlement.
3. Based upon the above, this proceeding is DISMISSED.

William Fauver
 William Fauver
 Administrative Law Judge

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 4, 1994

SOUTHWESTERN PORTLAND : CONTEST PROCEEDING
CEMENT COMPANY, :
Contestant : Docket No. CENT 94-239-RM
 : Citation No. 4117681; 7/27/94
v. :
 :
SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION, (MSHA), : Odessa Plant
Respondent : Mine ID 41-00060

ORDER DENYING MOTION TO STAY ORDER DENYING MOTION TO EXPEDITE ORDER OF ASSIGNMENT

The above-captioned action is a notice of contest filed by the operator under section 105(d) of the Federal Mine Safety and Health Act, 30 U.S.C. § 815(d), challenging the issuance of a 104(d)(1) unwarrantable failure citation.

On September 16, 1994, the Solicitor filed his answer and a motion for continuance until the related penalty proceeding is filed.

On September 19, 1994, the operator filed an opposition to the motion for continuance and a motion for expedited hearing pursuant to 29 C.F.R. § 2700.52(a). The operator asserts that because of the unwarrantable failure finding it is exposed to elevated enforcement actions under section 104(d) of the Act, it will be subject to a possible special investigation under section 110(c) of the Act, and the violation will receive a special assessment which will result in elevated penalties.

Section 2700.52(a), supra, does not specify the basis upon which an expedited hearing may be sought and granted. The Commission has held that consideration of an expedited hearing request remains within the discretion of the judge. Wyoming Fuel, 14 FMSHRC 1282 (August 1992). Commission Judges have held that in order to be entitled to such consideration, an operator must show extraordinary or unique circumstances resulting in continuing harm or hardship. Consolidation Coal Company, 16 FMSHRC 495 (February 1994); Energy West Mining Company, 15 FMSHRC 2223 (October 1993); Pittsburgh and Midway, 14 FMSHRC 2136 (December 1992); Medicine Bow Coal Company, 12 FMSHRC 904 (April 1990). In the foregoing cases, it was held that the possibility operators could be subject to withdrawal orders under section 104(d) of the Act, 30 U.S.C. § 815(d), did not justify expedited hearings. I concur with these holdings and note in addition that so many of the cases that are filed with the Commission involve 104(d) citations and orders, that it would be impossible to hold

expedited hearings in all of them. The operator in the instant matter has offered the same arguments that were rejected in the cases noted above.

However, the operator's assertion that this matter should not be stayed is well taken. Because of the operator's potential exposure to a 104(d) chain, this case should not be stayed the several months it takes for a penalty to be assessed and a petition filed.

In light of the foregoing, it is ORDERED that the Solicitor's motion for continuance be DENIED.

It is further ORDERED that the operator's motion for expedited hearing be DENIED.

It is further ORDERED that this case be assigned to Administrative Law Judge Manning.

All future communications regarding this case should be addressed to Judge Richard W. Manning at the following address:

Federal Mine Safety and Health
Review Commission
Office of Administrative Law Judges
Colonnade Center
Room 280, 1244 Speer Boulevard
Denver, CO 80204

Telephone No. 303-844-3577



Paul Merlin
Chief 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 4, 1994

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 94-294
Petitioner : A. C. No. 15-17134-03514
: :
v. : No. 4 Mine
KYN COAL COMPANY :
INCORPORATED, :
Respondent :
: :
SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 94-324
Petitioner : A. C. No. 15-17143-03501 KJS
: :
v. : No. 4 Mine
ENVIRONMENTAL MINE SERVICES, :
Respondent :
: Docket No. VA 94-32
: A. C. No. 44-06596-03501 KJS
: :
: Docket No. VA 94-33
: A. C. No. 44-06395-03502 KJS
: :
: No. 2 Mine
: :
: Docket No. VA 94-34
: A. C. No. 44-06210-03501 KJS
: :
: No. 9 Mine
: :
: Docket No. VA 94-37
: A. C. No. 44-04703-03501 KJS
: :
: No. 1 Mine
: :
: Docket No. VA 94-38
: A. C. No. 44-03465-03501 KJS
: :
: No. 3 Mine
: :
SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. VA 94-27
Petitioner : A. C. No. 44-03465-03534
: :
v. : No. 3 Mine
C & S COAL COMPANY, :
Respondent :

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. VA 94-28
	:	A. C. No. 44-06210-03527
	:	
	:	No. 9 Mine
v.	:	
EASTERN COAL COMPANY, Respondent	:	
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. VA 94-29
	:	A. C. No. 44-06395-03569
	:	
	:	No. 2 Mine
v.	:	
BRENT COAL CORPORATION, Respondent	:	
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. VA 94-30
	:	A. C. No. 44-06596-03579
	:	
	:	No. 2 Mine
v.	:	
BLANKENSHIP AND RIFE INCORPORATED, Respondent	:	
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. VA 94-36
	:	A. C. No. 44-04703-03578
	:	
	:	No. 1 Mine
v.	:	
HIGHLANDER COAL CORPORATION, Respondent	:	

ORDER TO SUBMIT INFORMATION

On August 18, 1994, the Solicitor filed a letter requesting that the stays in Kyn Coal Company, Docket No. Kent 94-294 and Environmental Mine Services, Docket Nos. KENT 94-324, VA 94-32, VA 94-33, VA 94-34, VA 94-37, and VA 94-38 be lifted, and that the remaining dockets, C & S Coal Company, Docket No. VA 94-27; Eastern Coal Company, Docket No. VA 94-28; Brent Coal Company, Docket No. VA 94-29; Blankenship & Rife Inc., Docket No. VA 94-30; and Highlander Coal Corp., Docket No. VA 94-36, not be

stayed. A copy of the letter was sent to counsels for the operators.

On April 13, 1994, I issued an order of stay in Kyn Coal Co., pending a decision in the case specific trial in Keystone Coal Company, PENN 91-451-R et. al. A decision on the common issues had been previously rendered. 15 FMSHRC 1456 (July 1993). It appeared that the decision in Keystone Coal would be of some guidance in these matters. The cases involving Environmental Mine Services were stayed for the same reason. Thereafter, on April 20, 1994, a decision was issued in the case specific trial in Keystone Coal Company. 16 FMSHRC 857. And on May 27, 1994, the Commission granted review in IN RE: CONTESTS OF RESPIRABLE DUST SAMPLES ALTERATION CITATIONS, Master Docket No. 91-1 and Keystone Coal Mining Corporation, Docket Nos. PENN 91-451-R et al., involving both the common issues and mine-specific decisions. By order dated August 31, 1994, I granted the Secretary's motion to stay all cases in the master docket except for those on appeal to the Commission.

The Solicitor's letter in the instant cases states that the ultimate disposition in the cases now before the Commission will not affect the outcome of these cases because the respirable dust filters and the abnormal appearances are different than those in Keystone. I do not believe the specific outcome in these cases must depend upon the Commission's decision in Keystone in order for a stay to be appropriate. It is my belief that determinations by the Commission on matters such as burden of proof and expert testimony would be of assistance in these cases. However, the operators have not been heard from with respect to a stay.

In light of the foregoing, it is ORDERED that within 30 days the operators submit their views on whether or not these cases should be stayed.



Paul Merlin
Chief Administrative Law Judge

Distribution: (Certified Mail)

Edward H. Fitch, Esq., Trial Attorney, Stephen D. Turow, Esq.,
Office of the Solicitor, U. S. Department of Labor, 4015 Wilson
Boulevard, Arlington, VA 22203

Steven and Yvonne Rife, Environmental Mine Services, P. O. Box
567, Hurley, VA 24620

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 5, 1994

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. WEVA 94-236
Petitioner	:	A. C. No. 46-07857-03538
	:	
v.	:	Mine No. 14
LONG BRANCH ENERGY,	:	
Respondent	:	

ORDER ACCEPTING LATE FILING ORDER OF ASSIGNMENT

On July 26, 1994, the Solicitor filed the penalty petition in the above-captioned case. On August 24, 1994, the operator filed its answer to the penalty petition and a motion to dismiss because the penalty petition was untimely. On September 7, 1994, the Solicitor filed a response in opposition to the operator's motion to dismiss.

Commission Rule 28 requires that the Secretary file the penalty petition within 45 days of the date he receives an operator's notice of contest for the proposed penalty. 29 C.F.R. § 2700.28. The Secretary received the operator's notice of contest on April 19, 1994, and the penalty petition was due June 3, 1994. The petition was sent by certified mail on July 25, 1994 and received at the Commission on July 26. It was therefore, 52 days late.

The Commission has not viewed the 45 day requirement as jurisdictional or as a statute of limitation. Rather, the Commission has permitted late filing of the penalty petitions upon a showing of adequate cause by the Secretary and where there has been no showing of prejudice by the operator. Salt Lake County Road Department, 3 FMSHRC 1714, 1716 (July 1981); Rhone-Poulenc of Wyoming Co., 15 FMSHRC 2089 (Oct. 1989).

The Solicitor's response to the motion to dismiss represents that the delay occurred because the case was not sent to his office until July 22, 1994. This was caused by an oversight in the handling of this case by the Office of Assessments which is implementing a new procedure for handling penalty assessments. The Office of Assessments sent its portion of the case file to the wrong MSHA Field Office and the error was not discovered until July 19, 1994. The Solicitor attached a copy of a memorandum from C. Bryon Don, Chief of the Civil Penalty Compliance Office of MSHA's Office of Assessment which sets forth in detail the new assessment procedure and the cause for delay in this

case. I find these circumstances constitute adequate cause for the delay in the filing of the penalty petition.

The operator alleges that it has been prejudiced by the Secretary's delay in filing because the mine area involved in the citation was abandoned on June 21, 1994, after the due date for filing the petition. I do not find this circumstance prejudicial to the operator's ability to defend itself against the charge of an unguarded trolley wire. Witnesses can still testify about conditions on the day the citation was issued.

In light of the foregoing, it is ORDERED that the operator's motion to dismiss be DENIED.

It is further ORDERED that the late filed penalty petition be ACCEPTED.

This case is hereby assigned to Administrative Law Judge Gary Melick.

All future communications regarding this case should be addressed to Judge Melick at the following address:

Federal Mine Safety and Health
Review Commission
Office of Administrative Law Judges
Two Skyline Place, Suite 1000
5203 Leesburg Pike
Falls Church, VA 22041

Telephone No. 703-756-6261


Paul Merlin
Chief Administrative Law Judge

Distribution: (Certified Mail)

Javier I. Romanach, Esq., Office of the Solicitor, U. S. Department of Labor, Suite 516, Ballston Towers #3, 4015 Wilson Boulevard, Arlington, VA 22203

Mr. Gregory D. Patterson, Long Branch Energy, P. O. Box 776, Danville, WV 25053

/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

OCT 11 1992

MINGO LOGAN COAL CO.,	:	CONTEST PROCEEDING
Contestant	:	
v.	:	Docket No. WEVA 93-36-R
	:	Order No. 3350011; 10/2/92
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. WEVA 94-61
Petitioner	:	A.C. No. 46-06958-03565
v.	:	
	:	Mountaineer Mine
MINGO LOGAN COAL CO.,	:	
Respondent	:	

DECISION DENYING MOTION
TO APPROVE SETTLEMENT

Before: Judge Fauver

These cases involve a petition for civil penalties and a contest of a § 107(a) order under § 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

The parties have filed a motion for approval of a settlement agreement to vacate the § 107(a) order, convert § 104(d)(2) Order No. 3350012 to a § 104(a) citation, vacate § 104(d)(2) Order No. 3350013, vacate § 104(a) Citation No. 3350014, and reduce proposed civil penalties of \$70,000 to \$10,000.

I have considered the representations and documentation submitted and conclude that the proposed settlement, with the exception of the conversion of Order No. 3350012 and reduction of penalties to \$10,000, is consistent with the criteria in § 110(i) of the Act.

Order No. 3350012

The settlement motion states that on September 4, 1992, a fatal machinery accident occurred on the surface of the Mountaineer Mine, operated by Mingo Logan Coal Company. The victim, David A. White, longwall foreman, was in the process of manually collapsing longwall shields that had been set up on the surface for demonstration and training purposes. White attempted to block one of the canopies with a forklift, and then positioned himself under the canopy between the linkage bars and hydraulic jacks. He then removed the hydraulic staple lock and pressure

relief valve capsule from the rear canopy tilt jack. The rear of the canopy collapsed on him, crushing him to death.

On October 2, 1992, MSHA Inspector Davis issued § 104(d)(2) Order No. 3350012, charging a violation of 30 C.F.R. § 77.405(b) for failing to securely block the canopy that crushed Mr. White.

Inspector Davis found that this was a significant and substantial violation. He also found that the violation was due to a high degree of negligence and reflected an unwarrantable failure to comply with a mandatory safety standard. Mingo Logan abated the violation by retraining all longwall miners in safe methods for operating and handling longwall shields. A civil penalty of \$35,000 was proposed for this order.

Mingo Logan does not contest the violation. Nor does it dispute Inspector Davis' determinations that the violation significantly and substantially affected the safety of employees and that the fatality occurred as a result of this violation. However, Mingo Logan disputes Inspector Davis' determination that the violation was the result of a high degree of negligence and reflected an unwarrantable failure to comply with a mandatory safety standard. Mingo Logan asserts that the victim was a longwall foreman who had extensive experience manually collapsing longwall shields from prior employment and had also safely manually collapsed several other shields on the day of the fatality. Mingo Logan also asserts that on the day of the fatality, the victim had collapsed other shields that required additional effort before they would completely collapse, and he may have had a reasonable belief that the shield in question would not collapse completely, particularly when blocked with a forklift. Mingo Logan contends that the victim's conduct, while clearly a mistake in judgment, did not rise to the level of aggravated conduct and, therefore, did not reflect a high degree of negligence or an unwarrantable failure to comply with a mandatory safety standard.

The motion further states that counsel for the Secretary has concluded that the evidence at trial may not establish that the victim's actions reflected a high degree of negligence or an unwarrantable failure to comply with a mandatory safety standard.

The parties propose to settle this violation by converting Order No. 3350012 to a § 104(a) Citation, modifying the allegation to charge moderate negligence instead of a high degree of negligence, and reducing the civil penalty from \$35,000 to \$10,000.

I find that the motion does not state facts sufficient to conclude that the attempted use of a forklift to block a longwall canopy was only ordinary negligence. The forklift did not hold, and the foreman was killed as a result of his misjudgment that it would hold. Because of the extreme safety risk involved in substituting a forklift for proper blocking devices, the facts point to gross negligence and an unwarrantable violation. Accordingly, in the absence of adequate evidence to reduce the

charge, I deny the motion to convert Order No. 3350012 to a § 104(a) citation and to reduce the penalty to \$10,000. Based upon the facts indicated, I would approve a settlement of \$20,000 for this violation without modifying the § 104(d)(2) order.

ORDER

1. As presently written, the motion to approve a settlement is DENIED.

2. The parties may amend the settlement motion consistent with this decision or the cases will proceed to hearing.

William Fauver

William Fauver
Administrative Law Judge

Distribution:

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David J. Hardy, Esq., Jackson & Kelly, P.O. Box 553, Charleston, WV 25322 (Certified Mail)

/lt

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 20, 1994

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 94-623-M
Petitioner	:	A.C. No. 45-03184-05528-A
	:	
v.	:	Docket No. WEST 94-624-M
	:	A. C. No. 45-03184-05529-A
EUGENE RUSSELL, ERVIN E.	:	
NICHOLS, JAMES M. DODD,	:	Docket No. WEST 94-625-M
REYNOLD E. CHANNER, AND	:	A. C. No. 45-03184-05530-A
SCOTT FURMAN EMPLOYED BY	:	
ECHO BAY MINERALS COMPANY,	:	Docket No. WEST 94-626-M
Respondents	:	A. C. No. 45-03184-05531-A
	:	
	:	Docket No. WEST 94-627-M
	:	A. C. No. 45-03184-05532-A
	:	
	:	Overlook Mine Site

ORDER

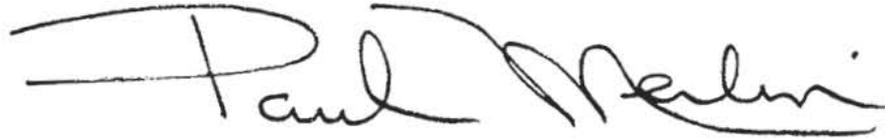
The above captioned cases are petitions for the assessment of civil penalties filed by the Secretary of Labor against the named individuals under section 110(c) of the Act. The related section 110(a) case is presently assigned to Administrative Law Judge John J. Morris.

On October 12, 1994, Judge Morris issued an order in the 110(a) case denying the operator's motion to dismiss the Secretary's penalty petition on the ground that it was untimely. Counsel for respondents who represents the operator in the 110(a) matter, has now filed a motion to dismiss the instant cases on the basis that they were not timely. In addition, by letter addressed to me dated October 18, 1994, counsel has requested that I rule on the merits of the dismissal motion before assigning the case. Counsel asserts that the findings in Judge Morris' Order may predispose him to deciding the timeliness issue against the individuals. On October 20, 1994, the Solicitor filed a letter objecting to counsel's request. Respondents' counsel submitted a further letter on October 20.

The request of counsel cannot be granted. As her brief demonstrates, the issue of untimeliness in these 110(c) cases raises matters that are separate and distinct from those that arose in the 110(a) action. The circumstances and questions presented with respect to the individuals are not the same as those previously considered by Judge Morris. Moreover, there is nothing in the judge's order dated October 12 which would disqualify him from ruling upon the motion in these cases. He made

no determination regarding the status of the respondents, but merely pointed out that for purposes of deciding whether or not the operator had been prejudiced by delay, persons other than the deceased general mine foreman would be available to testify.

In light of the foregoing, counsel's request is **DENIED**. A separate assignment order will be issued.

A handwritten signature in black ink that reads "Paul Merlin". The signature is fluid and cursive, with a large initial "P" and a distinct "M".

Paul Merlin
Chief Administrative Law Judge

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