OCTOBER 2003

COMMISSION DECISION

ADMINISTRATIVE LAW JUDGE DECISIONS

ADMINISTRATIVE LAW JUDGE ORDERS

OCTOBER 2003

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

Secretary of Labor, MSHA v. CKC Materials Division, Docket Nos. WEST 2003-268-M, et al. (Unpublished Default Orders issued by Chief Judge Lesnick on September 23, 2003)

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

Secretary of Labor, MSHA, on behalf of Charles Scott Howard v. Panther Mining, Cave Spur Coal, et al., Docket No. KENT 2003-313-D. (Judge Melick, August 22, 2003)

Secretary of Labor, MSHA v. U.S. Steel Mining Co., LLC, Docket No. WEVA 2003-16. (Judge Zielinski, September 5, 2003)

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
SUITE 9500
WASHINGTON, DC 20001

October 31, 2003

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) on behalf of JOSEPH M. ONDREAKO	: : : :	
v.	:	Docket No. WEST 2003-403-DM
KENNECOTT UTAH COPPER CORPORATION	: :	

BEFORE: Duffy, Chairman; Beatty, Jordan, Suboleski, and Young, Commissioners

DECISION

BY THE COMMISSION:

This temporary reinstatement proceeding arises under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 ("Mine Act" or "Act"), 30 U.S.C. § 815(c)(2) (1994). On October 15, 2003, the Commission received from Kennecott Utah Copper Corporation ("Kennecott") a petition for stay and review of Administrative Law Judge Richard Manning's October 9, 2003 decision and order of temporary reinstatement issued pursuant to section 105(c)(2) of the Act. 25 FMSHRC ___, slip op. at 9, No. WEST 2003-403-DM (Oct. 9, 2003). *See also* 29 C.F.R. § 2700.45. On October 22, the Commission received the Secretary of Labor's opposition to Kennecott's petition. For the reasons that follow, we grant the petition for review, deny Kennecott's request for a stay, and affirm the judge's order requiring the temporary reinstatement of Joseph M. Ondreako ("Ondreako").

Complainant Ondreako was hired by Kennecott in 1999 as a haul truck driver. Slip op. at 2. In 2002, he was promoted to "advanced operator." *Id.* He was notified on May 8, 2003, that he had been demoted to the position of "operator B." *Id.* at 3; Tr. 39-40. In June 2003, he was laid off. Slip op. at 5.

On July 9, 2003, Ondreako filed a complaint of discrimination with the Department of Labor's Mine Safety and Health Administration. *Id.* at 2. After MSHA conducted a preliminary investigation, the Secretary filed an application for temporary reinstatement alleging that

Kennecott, on May 8, 2003, demoted Ondreako and, on June 26, 2003, laid him off because of safety complaints he made over the course of several months. Application at 2. The application for temporary reinstatement requested that Ondreako be reinstated to the position which he held before his demotion on May 8, 2003. *Id.*

On October 2, 2003, Judge Manning held a hearing on the Secretary's application for the temporary reinstatement of Ondreako. Slip op. at 1. The judge found that the Secretary presented evidence sufficient to demonstrate that Ondreako's discrimination complaint was not frivolously brought, including evidence that Ondreako engaged in protected activity, that Kennecott took adverse action against Ondreako, that the protected activity and the adverse action were proximate in time, and that Ondreako's complaints were public and open. *Id.* at 7-9. The judge noted that Kennecott presented evidence that may amount to "a convincing defense to Ondreako's complaint in the underlying discrimination case." *Id.* at 7. However, the judge declined to resolve conflicts in testimony at this preliminary stage of the proceeding and reiterated that "the purpose of a temporary reinstatement proceeding is to determine whether the evidence presented by the applicant establishes that the discrimination complaint is not frivolous." *Id.* The judge ordered Ondreako reinstated to the position he held immediately prior to his lay-off, or to a similar position at the same rate of pay and with similar benefits. *Id.* at 9.

Under section 105(c)(2) of the Mine Act, "if the Secretary finds that [a discrimination] complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint." 30 U.S.C. § 815(c)(2). The Commission has repeatedly recognized that the "'scope of a temporary reinstatement hearing is narrow, being limited to a determination by the judge as to whether a miner's discrimination complaint is frivolously brought.'" *See Sec'y of Labor on behalf of Peters v. Thunder Basin Coal Co.*, 15 FMSHRC 2425, 2426 (Dec. 1993) (quoting *Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd*, 920 F.2d 738 (11th Cir. 1990)). The Commission applies the substantial evidence standard in reviewing the judge's determination.[1] *Sec'y of Labor on behalf of Bussanich v. Centralia Mining Co.*, 22 FMSHRC 153, 157 (Feb. 2000).

Thus, the only issue before us is whether Ondreako's discrimination complaint was frivolously brought. After careful review of the evidence and pleadings, we conclude that the

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[1] When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "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 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

judge's determination that the complaint is not frivolous is supported by the record and is consistent with applicable law. We intimate no view as to the ultimate merits of this case.[2]

Accordingly, we affirm the judge's decision reinstating Ondreako.

Michael F. Duffy, Chairman

Robert H. Beatty, Jr., Commissioner

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

[2] Kennecott's request for a stay of the temporary reinstatement order fails to demonstrate extraordinary circumstances and is therefore denied. 29 C.F.R. § 2700.45(f). *See Sec'y of Labor on behalf of Bowling v. Perry Transport, Inc.*, 15 FMSHRC 196, 198 (Feb. 1993).

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W. Suite 9500
Washington, DC 20001-2021

October 8, 2003

RS&W COAL CO.	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. PENN 2003-171-R
	:	Citation No. 3561084; 8/18/03
v.	:	
	:	Docket No. PENN 2003-172-R
SECRETARY OF LABOR	:	Citation No. 3561085; 8/18/03
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	R S & W Drift
Respondent	:	Mine ID 36-01818

DECISION

Appearances: Randy Rothermel, President, R S & W Coal Company, Klingerstown, Pennsylvania, for the Contestant.
John Strawn, Esq., U.S. Department of Labor, Philadelphia, Pennsylvania, for the Respondent.

Before: Judge Weisberger

Statement of the Case

At issue in the above captioned Notices of Contest, consolidated for hearing on an expedited basis, are: 1) the validity of two citations issued to R S & W Coal Company alleging failure to abate two previously issued safeguards, and 2) the validity of the two underlying safeguards. A hearing was held in Harrisburg, Pennsylvania. Subsequent to the hearing the parties each filed a brief.

Findings of Fact

R S & W has been operating an anthracite coal mine at the subject site since 1984. In connection with its operation, men and coal, respectively, are transported from the surface into the underground mine by five cars, hooked up in tandem to a battery powered locomotive,[1] which in turn pushes the cars into the mine. The coal and miners are transported out of the mine in these cars which are pulled out of the mine by the locomotive. Subsequent to the commencement of operations through the date of the hearing, August 27, 2003, this method of transportation has not resulted in any accidents or injuries.

The locomotive which travels at a speed of four miles an hour when pushing or pulling a

[1]The transport of the cars in tandem along with the locomotive, is called a trip.

trip, is operated by a miner who is positioned about ten feet from the leading edge of the locomotive, and approximately 60 feet from the leading edge of the first car of the trip. The top of the locomotive is approximately 48 inches above the track, and the top of the cars are about 54 inches above the track. The travelway from the surface into the mine does not have any illumination; the sole source of illumination are the cap-lights in the miner's helmets. The locomotive weights approximately 6 tons, and each car weights three to four tons.

In traveling inby, the trip travels up a six tenths of a percent grade, and must negotiate two turns including one of approximately 90 degrees. Due to the length of the trip, the operator of the trip can not see the first car after it enters the 90 degree turn. When traveling inby, the locomotive operator watches the roof and the miners' heads to alert them to low roof[2], and other hazardous conditions in the roof. In traveling inby, a miner is stationed in the lead car to watch for debris and other hazardous conditions on the track, and to warn the locomotive of the same. Should this miner observe a hazardous condition, the practice is for him to turn his head backward in the direction of the locomotive operator, and to issue a verbal warning.

On July 16, 2003, MSHA Inspector Michael J. Dudash, while inspecting the subject site, issued a Notice to Provide a Safeguard (No. 7005339) which refers to 30 C.F.R. § 1403-7(c)[3], and which contains the following language:

> THE MINE'S GREENBERG SCOUT LOCOMOTIVE (SER. NO. S433) WAS PUSHING 5 MINE CARS TRANSPORTING 7 MINERS FROM THE SURFACE TO THE ACTIVE WORKING SECTION OF THE HOLMES VEIN EAST SIDE (MMU- OO10). THE CARS WERE PUSHED A DISTANCE OF ABOUT 6000 FEET FROM THE SURFACE PORTAL TO THE SECTION'S WORKING PLACE. THE MINERS WERE RIDING IN VARIOUS CARS. EACH CAR HAS A 3 TON CAPACITY AND EACH IS 10 FEET LONG BY 3.5 FEET HIGH BY 4 FEET IN HEIGHT. THIS IS A NOTICE TO PROVIDE A SAFEGUARD FOR ALL OF THIS MINE'S MAN TRIPS TO BE PROVIDED WITH LOCOMOTIVES PULLING THE MAN CARS INTO AND OUT OF THE MINE.

On the same date, Dudash issued another Notice to Provide a Safeguard containing the same language as No. 7005339, supra, except that it refers to "all of the mine's trips" and cites 30 C.F.R. Section 75.03-10(b)[4] .

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[2]In places, the roof is two to three inches above the locomotive operator, who is six feet, two inches tall.

[3]30 C.F.R. § 1403 authorizes the Secretary to provide "other safeguards" to minimize hazards relating to the transportation of men and materials. Section 1403-7, supra, provides the following criteria for mantrips" ...(c) [m]antrips should not be pushed."

[4]Section 75.1403-10 sets forth criteria for "haulage", and in subsection b provides that "[c]ars on main haulage roads should not be pushed, ..."

On August 18, 2003, Dudash returned to the subject site, and noted that RS&W had failed to abate the two safeguards at issue . Dudash issued, respectively, two citations for failure to abate the safeguards, citing, respectively, Section 75.1403-7(c) supra, and Section 75.1403-10(b), supra. According to Dudash, after he observed the company's manner of transporting men and materials into the mine, he concluded that pushing a trip into the mine presented a derailment hazard, and that pushing, according to the criteria set forth in Section 1403, supra, is a hazard due to the lack of control. He indicated that on July 16 a hazard existed in the company's mine since pushing "is inherently less controlled as to visibility than pulling" (sic) (Tr. 57). On cross-examination he indicated that the safeguard was issued "based on the pushing of the locomotives - of the mine cars and mantrip "(sic) (Tr. 85). He also opined, based on the criteria in Section 1403, supra, that just pushing the cars was a hazard because of less control. Dudash indicated that because of less control by the operator, and less visibility in pushing the cars, there was a high potential for derailment. Dudash explained that when the locomotive pushes the trip, the operator would have less visibility than when pulling the trip because of the distance from the operator to the end of the trip. Dudash noted that when the locomotive pushes the trip, the operator is located 60 feet from the leading edge of the first car of the trip, whereas, in pulling the trip, the operator is located only approximately 10 feet from the leading edge of the locomotive. Dudash pointed out that the two sharp turns of the track limit the ability of the operator to see past the lead car of the trip until the trip straightens out. Thus, when traveling inby the operator's ability to see debris on the track would be limited, contributing to the possibility of derailment. Further, contributing to this possibility is the presence of water on the track, which would diminish the stopping ability of the locomotive. In addition, although dispersal of sand increases breaking power, it is not done efficiently as the method of dispersal is not automatic. Lastly, Dudash opined that when the trip is being pushed if the lead car of the trip derails, the rest of the cars might jack-knife into the rib.

Dudash indicated that the miners being transported in the cars could be thrown out of the open cars in a derailment, and possibly suffer a fracture or a head injury. Also, should a derailment occur, due to the weight and size of the cars, it is possible that timber supporting the roof could be dislodged thus causing a roof fall which could cause a fatality.

Dudash indicated that the best way for RS&W to comply with the safeguards is to use a second locomotive which would be attached to pull the trip out of the mine. He opined that, as an alternative, RS&W could install another set of tracks and two switches which would allow the locomotive to be uncoupled after it pulls the trip into the face area, and be re-routed to the other track. It then could travel outby, then return inby to the trip to pull it out of the mine. However, he indicated that the only area of the mine that would allow sufficient room for the placement of these switches was located about 1000 feet outby the face.

Ronald Medina, a professional engineer, indicated that, generally, the following factors, which are involved in pushing a trip, contribute to the likelihood of derailment: 1) since the first car is empty when the trip is pushed into the mine, it is thus lighter than the locomotive and therefore is more likely to be derailed due to rocks on the track, 2)that when a trip is being pushed, a sideways force is exerted that could cause a car to derail, 3) that because the visibility

of the operator of the locomotive is more limited when pushing rather than pulling, a derailment is more likely to occur when the cars are being pushed rather than pulled, and 4) that when the locomotive pulls the cars its headlight illuminates the tracks, whereas, when the trip is being pushed the only illumination is from the caplight of the miners positioned in the lead car. Also, he opined that when the trip is pushed, its forward momentum would tend to push the cars against the ribs, thus causing a greater likelihood of injury as opposed to the likelihood of injury should the cars be pushed and then derail. Further, according to Medina, when cars are pushed they tend to jack-knife in a derailment, increasing the likelihood of a serious injury.

DISCUSSION

Validity of the underlying safeguards

Section 314(b) of the Federal Mine Safety and Health Act of 1977 (the Act), authorizes the Secretary of labor to issue safeguards "... to minimize hazards with respect to transportation of men and materials ... ."

In general, the Commission has concluded that, regarding safeguards, "... it is within the Secretary's sound exercise of discretion to issue mandatory standards or to issue safeguards for commonly encountered transportation hazards." Southern Ohio Coal Co., 14 FMSHRC, 1, 9 (Jan 1992). The Secretary bears the burden of establishing the validity of the underlying safeguard (Southern Ohio at 13). The Commission in Southern Ohio at 14, elaborated as follows: "The Secretary is required to demonstrate only that the inspector evaluated specific conditions at the particular mine and determined that a safeguard was warranted in order to address a transportation hazard. In rebuttal, the operator would be free to offer evidence that the safeguard was not based on conditions present at its mine, or that the safeguard was routinely applied without consideration of conditions at its mine."

Applying the principles set forth above, the issue presented herein is whether the issuance of the safeguards in question, regarding the pushing of a trip, was a sound exercise of discretion. In other words, considering the evidence adduced by the Secretary regarding the inspector's evaluation of the conditions at the mine as well as evidence adduced by RS&W regarding conditions at its mine, the issue is whether considering the Secretary has met its burden in establishing that the specific conditions at the mine warranted the issuance of the safeguards. I conclude, for the reasons forth below, that considering all the conditions at the mine, the issuance of the safeguards was not warranted, and was not an exercise of sound discretion by the Secretary.

The inspector noted the specific conditions at the mine which he found to be hazardous when a locomotive pushes a trip of five cars[5], either loaded with men, or coal and other materials. In his opinion, when the locomotive pushes a trip the following conditions limit the ability of the

[5]The inspector indicated, in essence, that these conditions are existent even when the locomotive pushes only one car.

operator to see hazardous track conditions, and contribute to the hazard of a derailment which could cause serious injuries: the fact that the operator has to see over the tops of the cars which are higher than the top of the locomotive; the distance between the position of the locomotive operator and the leading edge of the lead car; and the fact that track is not straight and has two sharp curves, including one at a 90 degree angle, which deprives the operator of the locomotive from seeing the lead car and the tracks beyond the car in such bends.

However, I note the uncontradicted evidence proffered by RS&W that the locomotive, and hence the trip, travel at only four miles an hour; that in normal operations, a miner is positioned at the front of the lead car in a trip to watch out for hazards on the track and to alert the operator of such hazards by turning his head and shouting back to the operator; that the operator would immediately be alerted to such hazards due to the extremely low speed of the trip, and because in the dark conditions of the underground mine the operator would immediately notice movement in the miner's caplight when the latter would turn to alert him of a hazardous condition; that when the locomotive pushes the cars, in contrast to pulling them, the locomotive operator observes the miners' heads and the roof to warn miners of hazardous conditions in the extremely low roof, which the operator can not do when the trip is being pulled; and, most significantly, that trips have been pushed into the subject mine on a daily basis since 1984, and there have not been any accidents or injuries caused by or related to this manner of operation.

Thus, taking into account all the conditions at the subject mine, I find that the issuance of the two safeguards herein was not a sound exercise of the Secretary's discretion. The Secretary has failed to establish that the safeguards were warranted based on a proper evaluation of all conditions at the mine. Hence, the safeguards herein were not validly issued. Thus, the citations at issue citing, in essence, failure to abate these safeguards, were not validly issued and therefore shall be dismissed.

ORDER

It is **ORDERED** that the Notices of Contest herein are sustained, and that Citation Nos. 3561083 and 3561084 be **vacated**.

Avram Weisberger
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W. Suite 9500
Washington, DC 20001-2021

October 8, 2003

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, on behalf of WYMAN OWENS, Complainant	:	DISCRIMINATION PROCEEDINGS Docket No. SE 2002-134-D BIRM CD 2002-04
and	:	
UNITED MINE WORKERS OF AMERICA	:	
v.	:	
DRUMMOND COMPANY, INC., Respondent.	:	Mine ID 01-02901 Shoal Creek Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, on behalf of GARY WATSON, Complainant	:	Docket No. SE 2002-135-D BIRM CD 2002-05
and	:	
UNITED MINE WORKERS OF AMERICA	:	
v.	:	
DRUMMOND COMPANY, INC., Respondent.	:	Mine ID 01-02901 Shoal Creek Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, on behalf of HENRY JOHNSON, Complainant	:	Docket No. SE 2002-136-D BIRM CD 2002-07
and	:	
UNITED MINE WORKERS OF AMERICA	:	
v.	:	
DRUMMOND COMPANY, INC., Respondent.	:	Mine ID 01-02901 Shoal Creek Mine

DECISION

Appearances: MaryBeth Bernui, Esq. and Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Secretary.
Ann C. Robertson, Esq., Gordon, Silberman, Wiggins & Childs, Birmingham, Alabama, for the Complainants.
Daryl H. Dewberry, Esq., United Mine Workers of America, Birmingham, Alabama, and Judith Rivlin, Esq., (on brief), United Mine Workers of America, Fairfax, Virginia, for the Intervenor.
Harry Hopkins, Esq. and Brian Bostick, Esq., Olgetree, Deskins, Mash, Smoak & Stewart, PC, Birmingham, Alabama, for the Respondent.

Before: Judge Weisberger

Statement of the Case

On August 12, 2002, the Secretary filed before the Commission three Complainants of Discrimination under Section 105(c) of the Federal Mine Safety and Health Act of 1977 (the Act), alleging respectively, that Wyman Owens who was employed by Drummond as a safety committeeman, Gary Watson who was employed by Drummond as a fireboss and Henry Johnson who was employed by Drummond as a fill-in fireboss, all engaged in protected activities, and were discharged on or about March 20, 2002 in violation of Section 105(c) of the Act, because they had engaged in protected activities.[1] On September 9, 2002, Drummond filed an Answer denying, inter alia, that Owens, Watson and Johnson had engaged in protected activities. The answer also denies any causal connection between the protected activities and the adverse actions, and asserting an affirmative defense that it would have taken adverse action based on unprotected activities alone. Subsequently, Drummond filed a motion for summary decision, which was denied in a decision issued on March 6, 2003. On March 11, 12 and 13, 2003, a hearing was held in Birmingham, Alabama.[2] At the hearing, the United Mine Workers (UMW) appeared as Intervenor, and the individual complainants were represented by private counsel.

Subsequent to the hearing the parties filed the following: proposed findings of fact and

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[1]Initially, on June 13, 2002, the Secretary filed applications for temporary reinstatement on behalf of Owens, Watson, and Johnson. Subsequent to a hearing on July 26, 2002, a decision was issued granting these applications subject to the parties' agreement regarding economic reinstatement. Drummond filed a petition for review before the Court of Appeals, 11th Circuit. The petition was denied in an unpublished opinion, Drummond v. FMSHRC, Secretary of Labor, and MSHA, sub. nom. Owens, Watson, and Johnson, (No. 02-14394, May 9, 2003).

[2]On March 3, 2003, the Secretary filed a motion in limine seeking to limit the introduction of certain testimony and documentary evidence. The motion was denied in a telephone conference call with all parties on March 3, 2003.

legal argument, replies to other parties' proposed findings of fact. In addition, Respondent filed a response to the Secretary's reply brief.

I. Complainants, Their Protected Activities, and Adverse Actions Taken Against Them.

A. Gloy Wyman Owens

Owens worked for Drummond for over 25 years. He worked at the Shoal Creek Mine from January 1994 through March 22, 2002, when he was terminated. For the last three years until he was terminated, he worked the 3 p.m. to 11 a.m. ("owl shift") Monday through Saturday, and occasionally on Sunday.

Owens served as a full-time Health and Safety Committeeman for the United Mine Workers Union. The committee consisted of three persons including Owens. His duties included checking for safety violations, accompanying MSHA inspectors on their inspections, and discussing conditions in the mine with miners.

Owens indicated that if any problems were reported to him, he then inspected for hazardous conditions. He indicated that if a miner asked him to look at a condition, he would look at it. If he found the condition hazardous, he contacted whoever was in charge to report the condition. Owens indicated that when asked by a supervisor for his recommendation as to what to do to abate or correct the condition, he gave his opinion. Owens testified that if the condition was not abated, he shut the mine down and notified proper management officials in order to explain the condition.

In February 2001, Drummond was engaged in the construction of an overcast. According to Owens, there was not sufficient air in the area. He contacted the immediate foreman, Marty Lewis, and told him to ventilate the area. According to Owens, Lewis said that he could not do it. Owens shut the mine down until the ventilation was approved. Owens then called the mine shift foreman, Doug Altizer, and explained the situation. Altizer told Lewis to get air to the area. The situation was corrected, and the mine was reopened.

According to Owens, in March 2001, he met five or six times with various Drummond officials regarding a petition for modification relating to the use of a 24,000 volt Miner. Among these officials were Ken McCoy, the director of operations, Rich Painter, the mine manager, and Dickie Estep, the director of health and safety. Owens stated that he told them that they had to agree to various stipulations, or the union would oppose the petition for modification. Owens indicated that at these meetings, at times, there were differences of opinion.

In June 2001, the safety committee presented a petition to McCoy, Painter, and Estep regarding the use of truss-bolts. Owens indicated , in essence, that in discussions with the latter, he presented his position that this equipment would weaken roof support.

In July 2001, a petition was re-submitted by Drummond to modify from a 35 foot cut to a 40 foot cut. According to Owens, at a meeting with Painter and Estep, he, along with two other union members, opposed the petition and said they would not be able to get sufficient air in the face. Subsequently, the petition was granted for a 40 foot cut, but was not implemented.

On September 11, 2001, at a Stakeholder's meeting with MSHA officials, Owens disagreed with McCoy who, in his speech, had advocated more of a role for management. Owens stated that in disagreeing with McCoy, he noted that rates of citations, accidents, and severity of citations had not been decreasing.

In March 2002, Drummond asked for a waiver from the State of Alabama to use a backup fan should another fan not be operative. Owens informed Tom Sheback, the owl shift foreman, that he opposed this request.

After the state granted the waiver, Owens and Safety Committee Chairman Ronnie Griffith, held a meeting with union members. At the meeting, Owens and Griffith passed out flyers with the telephone numbers of Tom Wilson, a member of the international division of the UMWA, and a Mr. Sanders, an employee of the State of Alabama, and McCoy. Owens and Griffith told the union members that the granting of the waiver for the backup fan was "taken out of our hands" and if they opposed it, they should contact the three officials identified in the flyer who were the officials responsible for the waiver (T.R. Vol I. 39-40).[3] All of the owl shift supervisors attended this meeting with approximately 80 or 90 union members. Owens and Griffith also passed out these flyers to the union members who worked on the day and evening shifts.

Owens indicated that he, along with the safety director at the mine, normally met with MSHA inspectors once a month after their inspections, to discuss any violative conditions noted by the inspectors, and citations they issued. According to Owens, in the last six months prior to his termination, the union did not support Drummond's requests to vacate citations it had received. In the last year prior to his termination he agreed with Drummond, on only one occasion, that two citations it had received should be combined .

On March 22, 2002, Owens received a letter from Drummond dated March 20, 2002, which stated that he was suspended with intent to discharge due to "[r]eceiving stolen company property". Seventeen other Drummond bargaining unit employees, three unrepresented miners and four members of management were also terminated based on their allegedly having stolen or received stolen company property, possessed or sold drugs, or consumed alcoholic beverages on

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[3]T.R. Vol. I, refers to, the volume and page of the Temporary Reinstatement hearing transcript which, based on the parties agreement is incorporated in the record of the instant proceedings. Tr., refers to the transcript of the instant proceedings.

company property. Owens and six others were not voluntarily reinstated[4] On March 27, 2002, Owens met with management officials regarding this letter. At the meeting, he was told by a Mr. Eller that he had taken a battery or batteries, either automobile or marine. In response, Owens said that he did not receive any such items from Terry Clark, who worked at the warehouse.

B. Gary Lee Watson

Watson worked for Drummond since 1985, and at the Shoal Creek facility since March 1994. He served as a fireboss since 1995. Watson indicated that, as a fireboss, he was responsible for performing a preshift examination which involved walking the belt lines and walkways, and inspecting for dangerous conditions. He indicated there were four separate routes, and the firebosses rotated inspection of these routes on a monthly basis. Any dangerous conditions were noted in the fireboss book which was kept in the foreman's office, and also signed by a foreman. Any hazardous condition so noted was to be addressed immediately. Additionally, he would call a foreman or an assistant foreman. If they were not present, he then would call the communication office. Between June 1, 2001, and December 31, 2001, Watson wrote up at least 42 hazardous conditions in the pre-shift examination book that had to be corrected immediately before the oncoming shift could enter the mine.

On February 18, 2002, Watson found 24 inches of water in a primary roadway, noted it as a hazardous condition in the pre-shift examination book, roped off the area, and reported it to a foreman.

Between January 1, 2002, and March 18, 2002, Watson wrote up at least five hazardous conditions in the pre-shift examination book that had to be corrected before the oncoming shift could enter the mine.

From June 1, 2001, up and until March 18, 2002, Watson noted various and multiple hazardous conditions in his pre-shift reports on at least 47 occasions and noted comments of various violations on over 50 occasions. Between June 13, 2001, and March 2002, Watson conducted 17 weekly examinations where he noted, in the weekly examination books, conditions that needed to be repaired or corrected.

On several occasions he discussed, with various management officials, hazardous conditions he had noted, and they did not always agree with him. According to Watson, on one occasion in 2001, at a safety meeting at which Dickie Estep, Don Hendrickson, and Leonard Woodby were present, Watson told them that if problems with air changes continue to occur while men are underground, "... we are going to have to address it more severely" (T.R. I, 103). Watson testified that on one occasion in 2002, between January and March, after he had reported

[4]On July 26, 2002, subsequent to a hearing, an order was entered granting the Secretary's application for temporary reinstatement of Owens, subject the terms of the parties' agreement regarding his economic reinstatement.

icing on a walkway to his supervisor, Woodby made "... some little snide comments about it was fine when I went down it, or, you know, the men said they could go up and down it" (sic) (T.R., I., 98-99) Watson said that several times over the last eight years management officials told him that what he had termed to be hazardous should have been put in the comment section of the fireboss book. Further, according to Watson, a foreman, John Redmill used to curse him all the time.

On March 21, 2002, Watson was advised by management that he was being suspended for theft of property. He said management told him that he had taken five gallons of gas, a bag of Quickrete cement, cleaning supplies, a pick, an ax, a shovel, a pre-made sandwich, and a soft drink. Drummond did not subsequently voluntarily reinstate him.[5]

C. Henry Johnson

Johnson has been a Drummond employee since 1975 or 1976, and worked at Shoal Creek since June 1995, until he was discharged in March 2002. He worked as an outby utility man, but served as a fireboss four to five days a week during the 11 p.m. to 7 a.m. owl shift. He indicated that if he found a hazardous condition, he would call his immediate supervisor or the assistant, or mine foreman, or the company operator. According to Johnson, in addition, on several occasions in 2001, and 2002, he shut down an area of the mine due to hazardous conditions. According to Johnson, on one occasion when he had to shut down the main belt due to gas and the problems were corrected the next day, he was told by Rich Painter, Mine Manager, in his office, "[d]on't you ever shut my damn belt down again" (T.R. I., 176).

Between June 1, 2001, and December 31, 2001, Johnson wrote up at least six hazardous conditions in the pre-shift examination book that had to be corrected immediately before the oncoming shift could enter the mine. During this same time period, Johnson noted least 65 conditions in the comments section of the pre-shift examination books.

Between June 20, 2001, and March 20, 2002, Johnson conducted 13 weekly examinations, and noted, in the weekly examination book, conditions that needed to be repaired or corrected. Between January 1, 2002, and March 20, 2002, Johnson entered, in the pre-shift examination book, at least four hazardous conditions that had to be corrected immediately before the oncoming shift could enter the mine. Johnson stated that the more conditions he wrote, "the meaner you got looked at" (T.R., Vol. I, 174). On one occasion, after Johnson noted the existence of hazardous conditions, Robert Payne, a foreman, told him that other fire bosses on his shift had not seen these conditions and "... why did you write it up." (T.R., Vol. I, 172).

On March 20, 2002, Johnson was notified by the company that it intended to terminate him. He stated that he was told that on two separate occasions he had purchased one pill for which he paid three dollars. Johnson said that it was a Lortab 5. Johnson was told he also had

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[5]See footnote 1, infra.

stolen soap, paper towels, garbage bags, Windex, a car battery, a No. 9 spray, a wire brush, and brought 40 dollars worth of marijuana to Terry Clark. Johnson indicated that none of these allegations are true except for an incident involving the pills. Drummond did not subsequently voluntarily reinstate him.[6]

II. Drummond's Actions

A. Investigation

In November 2001, Drummond was told that Terry Clark, whom it had hired on March 19, 2001, to work in the warehouse, was stealing from the company. Thereafter, Drummond enlisted the services of North American Security, an outside security firm, to perform surveillance at the Shoal Creek warehouse in an effort to determine who might be engaged in this alleged theft. North American conducted its surveillance from mid-November until December 12, 2001, when its surveillance team was discovered by Drummond workers who destroyed some of their surveillance equipment. The video did not show Watson, Owens, or Johnson engaged in any of the acts of wrong doing alleged in their suspension notices.

In December 2001, Drummond received information from a non employee confidential informant that she had some of Drummond's stolen property in her possession. The informant implicated Terry Clark, a supply clerk who worked in the warehouse at the Shoal Creek Mine, as being involved in the theft of Drummond property. On January 7 or 8, 2002, Tim Mosko, Respondent's Director of Security, received a list from the confidential informant identifying 20 employees allegedly engaged in misconduct at the Shoal Creek Mine.

The police began an investigation of a theft ring based upon information supplied by the confidential informant, and recovered Drummond property at the residence of the confidential informant. During the course of the police investigation, Terry Clark admitted that he had stolen property from Drummond, and he also identified several other employees as being involved in theft or the sale or use of drugs and alcohol at the mine. Terry Clark was arrested and charged with theft by the Jefferson County Sheriff's Department and the Walker County Sheriff's Department. He was facing potentially 15-20 years in jail. Terry Clark's employment with Drummond was terminated on January 12, 2002.

In late January 2002, Drummond determined that the police were losing interest in the investigation, and requested and received permission to pursue its own investigation into the alleged misconduct. Drummond engaged the services of David P. Frizell, Jr., to conduct an investigation on its behalf. Frizell is an investigator with past work experience for the U.S. Naval Investigative Service, the Central Intelligence Agency, and the U.S. Office of Personnel Management.

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[6]See footnote 1, infra.

Drummond did not direct that Frizell investigate any particular employee, other than Terry Clark. Drummond gave Frizell a list, compiled by Terry Clark and the confidential informant, of those employees allegedly involved in theft. Frizell began his investigation on or about February 11, 2002, and met with the Jefferson County Sheriff's Department on February 11, 2002, regarding Terry Clark. He then proceeded to interview seventeen employees, including management and labor, and the confidential informant. Frizell took several statements from Terry Clark regarding misconduct by other workers. The investigation provided additional details of the misconduct of Watson, Johnson, Owens, other unrepresented workers, and members of management.

On February 22, 2002, Frizell interviewed the confident informant who identified Terry Clark, Henry Johnson, Gary Watson, Wyman Owens and 17 other employees as involved in theft, drug use, drug sales, and drug purchases. There is no evidence that the confidential informant identified Watson, Johnson, and Owens as being guilty of misconduct because they held jobs that involve safety activities. Further, there is no evidence that she knew that Watson, Johnson, or Owens held such positions.

On March 8, 2002, Terry Clark, his brother, Teddy Clark, another former employee, and Drummond entered into an agreement wherein Terry and Teddy Clark agreed to "[f]ull, honest and complete cooperation and agreement to testify in arbitration or litigation regarding certain matters. ...." (T.R., Resp. Ex. 36). Also, the District Attorney's office in charge of their case proposed to resolve the criminal charges against them.

After Drummond was informed about alleged theft and drug use on its property, Mike Zervos, Drummond's president, formed a security committee consisting of the following employees to address these allegations: Ken McCoy, Mike Zervos, Dean Hubble, Rich Painter, Tim Mosko, Mike Tracy, Ed Sellers, David Muncher, Curt Jones, and for a while, Darryl Riley. The committee commenced to meet daily, and by early February 2002, it decided it believed Terry Clark, and was going to use information he had provided.

Subsequently, Frizell informed the Committee that it was his opinion that Terry Clark was a reliable witness. Frizell told the Committee that he based this opinion on the following: Terry Clark's numerous statements were "highly consistent;" that Clark "made full admission without minimizing or rationalizing his own involvement;" that Clark made admissions against his own interest; that there was "a high percentage of corroboration" between his statements and the statements of others; that Clark was careful to provide appropriate caveats between "facts and his own opinions and beliefs"; and that Clark's statements contained "no major or significant discrepancies and that the evidence that was garnered during the investigation disclosed no fabrication of facts at all in any instance by [him]" (T.R. II, 97). Frizell recommended to Drummond that it not rely on Teddy Clark's testimony unless they had independent verification. Frizell determined Teddy Clark had lied during their interview, and "later admitted so" (T.R. II., 98). Also, Frizell found that Terry Clark had difficulty focusing on the questions asked, and that his responses were "all over the road," (id.) Further, Frizell noted that Teddy Clark was unable

to give explanations as to his involvement in a coherent manner.

The Security committee requested written reports from Frizell as to the involved persons with a summary of the misconduct of which they were accused. On or about March 15, 2002, Frizell provided the committee with a matrix, based on his investigation, setting forth the names of individual employees of Drummond allegedly implicated in wrong-doing, the allegations made against them, the source of the allegations and other evidence implicating them.[7]

The security committee ranked the severity of the misconduct and the evidentiary support for the allegations made against each individual listed on the matrix with a grade of A,[8] A/B,[9] B/A,[10] B, or B/C[11]. Those individuals placed in the A category were considered to have engaged in the most severe misconduct. Terry Clark's statements constituted the "major part" of these decisions. (T.R. II, 65) There is no evidence that the security committee ever discussed or considered any of the claimants' safety related activities in their discussions of the allegations made against them.

B. Adverse Actions

1. Discharge of Employees

The committee concluded that the following 18 bargaining unit employees whom it rated A, A/B, B/A, B, or B/C, committed misconduct sufficient to warrant their terminations: Dan Patrick, Ricky Smith, Ray Wallace, Wyman Owens, Henry Johnson, Clarence Gaines, Eddie Tucker, Morris Caffey, Gary Watson, Ralph Harper, Terry Short, Mike Alexander, Johnny Cooley, Rick Marquis, B.G. Evans, Earl Cagle, Marlin Strickland, and Mike Williams. On March 20, 2002, Drummond issued letters to each of these 18 individuals advising them of their suspension with intent to discharge. In addition, four members of management, three unrepresented employees, Terry Clark, Teddy Clark, and John Stewart, were also terminated.

2. Reinstatement of Some Employees

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[7]In the matrix, the names of the individuals previously considered, but found by investigation not to be implicated, were deleted.

[8]The following employees were placed in the A category: Dan Patrick, Ray Wallace, Ricky Smith, Henry Johnson and Ralph Harper.

[9]The following employees were placed in the A/B category: Gary Watson and Johnny Cooley.

[10]The following five employees were place in the "B/A" category: Wyman Owens, Clarence Gaines, Eddit Tucker, Morris Caffey, and Bob Evans.

[11]The following six employees were placed in the B or B/C category: Terry Short, Mike Alexander, Rick Marquis, Earl Cagle, Mike Williams, and Marlin "Butch" Strickland.

On March 21-22, 2002, and on March 27, 2002, Drummond and the local union held 24-48 hour meetings for each of the accused. The company was represented at these meetings by Dean Hubble, Jay Vilseck, Rich Painter and Ken Eller.

As a result of these meetings, one employee resigned and another was reinstated with one day loss of pay.[12]

The company and local union also scheduled 2nd step meetings for the remaining 16 employees for March 29, 2002. The company informed the union that it "would not move" relating to those nine suspended employees whose cases involved drugs, or those whom "we had on video" (Tr. 408).[13]

On April 3, 2002, pursuant to a settlement with the union, the company reinstated the following seven employees without back pay: Cagle, Williams, Strickland, Marquis, Evans, Cooley and Alexander.[14] The company also, based on an agreement with the union, offered to reinstate the following employees with back pay on the condition that they take and pass a polygraph test: Tucker, Morris, Caffey, Gaines, Owens, and Watson. In addition, Tucker, Gaines, and Caffey would be required to take a drug test. These individuals refused to take a polygraph and/or drug test.

On April 4, 2002, pursuant to a settlement with the union, the company agreed to allow Harper to remain in sickness and absence ("S&A") status until these benefits expire and then be allowed to retire on January 3, 2003. As a result, Harper received additional retirement benefits resulting from the new union contract that took effect on January 1, 2003.

On May 12, 2002, Drummond offered Wallace, who was initially placed on disciplinary suspension from March 20, 2002, through May 12, 2002, a last chance agreement, and he was reinstated without back pay.

VII. Additional Facts and Discussion

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[12]Dan Patrick, whom Terry Clark had accused of theft of hundreds of dollars of company property, including over 100 welding torches, resigned on March 21, 2002, in exchange for the company's agreement not to prosecute him. Terry Short, who was accused of theft of cable based on video surveillance of him taking cable from a company truck and placing it in his personal vehicle, told Drummond at the 24-48 meeting that he had permission to take the cable. This was confirmed with Short's foreman later that same day, and Short was reinstated on March 21, 2002, with one day loss of pay.

[13]These employees are Wallace, Smith, Johnson, Watson, Owens, Tucker, Caffey, Harper, and Gaines.

[14]None of the discharged management employees or unrepresented employees were offered reinstatement.

A. Case Law

Section 105(c) of the Act prohibits the discharge or discrimination of a miner who made a complaint under or related to the federal mine safety and health act including "... a complaint notifying the operator or the operator's agent ... of an alleged danger or safety or health violation in a coal or other mine ... or because of the exercise by such miner ... on behalf of himself or others of any statutory right afforded by this act."

Under established Commission Law, the complainant in a Section 105(c) proceeding, establishes a prima facie case of a violation of Section 105(c), if a preponderance of the evidence proves 1) that he engaged in a protected activity, and 2) that the adverse action was motivated in any part by the protected activity. Pasula v. Consolidation Coal Co. ,2 FMSHRC 2786, 2799-2800 (Nov. 1980), reversed on other grounds, Sub. Nom. Consolidation Coal Co. v. Marshall, 663 F. 2d , 1121 (3rd Cir. 1981). The Operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. Id. If the Operator cannot rebut the prima facie case, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activities and would have taken the adverse action in any event based on unprotected activities alone. Id. at 2800; Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (Apr. 1981).

1. The Prima Facie Case

a. Protected Activities and Adverse Actions

The record clearly establishes that all three claimants, Owens, Watson, and Johnson, engaged in protected activity. Owens, as a safety committeeman, examined the mine on a daily basis for hazardous conditions. Any such conditions were reported by Owens to mine management. Acting within the scope of his authority, Owens shut the mine down on two separate occasions in the twelve months prior to his discharge.

Johnson worked as a fill-in fire boss two to three days a week, and Watson worked as a fire boss on the owl shift.[15] They conducted pre-shift examinations looking for hazardous conditions, and when found, they notified a mine foreman so that the hazard could be corrected. From June 2001, thru March 20, 2002, they each recorded hazardous conditions in the pre-shift books. On one occasion in February 2002, upon noting water accumulations, Watson roped off the area and recorded the condition to the foreman. Johnson shut the beltline down upon noting rollers turning in coal, and on another occasion shut the mine down and pulled the men out after

[15]I take cognizance of Drummond's argument that actions performed in execution of one's required job duties are not protected activities. This argument was initially made by Drummond in its motion for summary decision. This argument was considered and rejected in the order denying motion for summary decision, issued March 6, 2003, and the rationale for the rejection, is incorporated herein.

he had found an excess of methane.

The record also clearly indicates that Drummond took adverse action against Owens, Watson, and Johnson, when it notified them of their suspension with the intent to discharge and by not voluntarily reinstating them after their discharge.

b. Adverse Action Motivated in any Part by Protected Activities

Commission case law establishes that in evaluating whether the Secretary has proven a causal connection between protected activities and adverse action, the following factors are to be considered: 1) knowledge of the protected activity 2) hostility or animus toward protected activity 3) coincidence in time between protected activity and the adverse action and 4) disparate treatment. Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510 (Nov. 1981), rev'd on other grounds, 709 F. 2d 86 (D.C. Cir. 1983).

Knowledge of Protected Activity

Owens notified various mine foremen when he found hazardous conditions. Watson and Johnson noted hazardous conditions in examination books that are co-signed by mine foreman. Hence, management had knowledge of their protected activities.

Animus toward protected activity

On one occasion when Johnson shut down the belt due to having observed a hazardous condition, Rich Painter, a mine manager, told him "don't ever shut my damn belt down again" (T.R. I.,176).

According to the uncontradicted testimony of Watson, a management official had cursed him, and on other occasions other management officials told him that conditions that he had reported in examination books as being "hazardous" should, instead, have been listed in the "comments" section. Thus the record contains some evidence of animus towards Johnson and Watson's protected activities engaged in by Johnson and Watson.

Coincidence in time between protected activity and adverse action.

In early March 2002, just weeks before he was discharged, Owens handed out fliers with names and phone numbers of the Drummond officials who had agreed to seeking a waiver of a back-up fan. Watson shut down the smoke walkway in the first week of January 2002, due to excessive icing. Also, he noted high water as a hazardous condition on January 21, February 14, and February 18, 2002, and two days before his discharge. Johnson noted hazardous high water on January 22, 2002, and noted ice on the slope on January 4, January 16, and February 7, 2002. Thus, the record contains some evidence of some protected activities engaged in by all three

complainants, in a period of time in close proximity to the date of their discharge. This provides a basis for a finding of some coincidence in time between protected activities and adverse action.

Disparate treatment

The record does contain some evidence of some disparate treatment. Owens was accused of having received stolen company property and was terminated, and not reinstated. Watson was accused of taking company property and was terminated, and not reinstated. Johnson, who was accused of selling drugs was terminated and not reinstated. On the other hand, the following eight individuals who also had been accused of either theft of company property or selling or giving drugs to others on company property were subsequently reinstated: Wallace, Alexander, Cooley, Marquis, Evans, Strickland, Williams, and Harper.

McCoy indicated that, regarding Owens, he was not reinstated because his theft was premeditated as he had asked Terry Clark to steal a battery on two occasions. In contrast, Alexander, Cagle, Marquis, and Williams, were subsequently reinstated although they had been accused by Clark of asking him for stolen goods on two occasions.

Watson, who was not reinstated, had been accused by Clark of taking various items belonging to the company property including cleaning supplies. In contrast, Cagle, was reinstated although he also had been accused by Terry Clark of taking cleaning supplies and another item of company property.

Johnson, who had been accused by Terry Clark of selling drugs on company property, was not reinstated. However, Cooley and Evans, who had similarly been accused of selling and giving drugs to other employees were reinstated. Additionally, Harper, who had been accused of giving drugs to other employees, was allowed to retire under a new union contract which provided him with additional retirement benefits.

Taking into account all the above factors, in combination, I find that the Secretary has adduced a sufficient quantum of evidence to establish that Drummond's motivation in taking adverse action against claimants was based, in any part, on their protected activity. Thus, I find that Secretary has established a prima facie case.

2. Drummond's Affirmative Defense

a. Applicable case law

In Sec. ex. rel. Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2516-17 (Nov. 1981), rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F. 2d, 86 (D.C. Cir. 1983) the Commission explained the proper criteria for analyzing an operator's business justifications for an adverse action:

... Commission judges must often analyze the merits of an operator's alleged business justification for the challenged adverse action. In appropriate cases, they may conclude that the justification is so weak, so implausible, or so out of line with normal practice that it was a mere pretext seized upon to cloak discriminatory motive. But such inquiries must be restrained. (Emphasis added).

The Commission and its judges have neither the statutory charter nor the specialized expertise to sit as a super grievance or arbitration board meting out industrial equity. Cf. Youngstown Mines Corp., 1 FMSHRC 990, 994 (1979). Once it appears that a proffered business justification is not plainly incredible or implausible, a finding of pretext is inappropriate. We and our judges should not substitute for the operator's business judgement our views on 'good' business practice or on whether a particular adverse action was 'just' or 'wise.' Cf. NLRB v. Eastern Smelting & Refining Corp., 598 F.2d 666, 671 (1st Cir. 1979). The proper focus, pursuant to Pasula, is on whether a credible justification figured into motivation and, if it did, whether it would have led to the adverse action apart from the miner's protected activities. If a proffered justification survives pretext analysis ..., then a limited examination of its substantiality becomes appropriate. The question, however, is not whether such a justification comports with a judge's or our sense of fairness or enlightened business practice. Rather, the narrow statutory question is whether the reason was enough to have legitimately moved that operator to have disciplined the miner. Cf. R-W Service System, Inc., 243 NLRB 1202, 1203-04 (1979) (articulating an analogous standard).

In William H. Haro v. Magma Copper Co., 4 FMSHRC 1935, 1938 (Nov. 1982), the Commission further explained its holding in Chacon as follows:

Thus, we first approved restrained analysis of an operator's proffered business justification to determine whether it amounts to a pretext. Second, we held that once it is determined that a business justification is not pretextual, then the judge should determine whether 'the reason was enough to have legitimately moved the operator' to take adverse action.

In Haro, id., the Commission also elaborated on the scope of the Judge's examination of an operator's business justification response as follows:

... we intend that a judge, in carefully analyzing such defenses, should not substitute his business judgement or sense of "industrial justice" for that of the operator. As we recently explained, 'Our function is not to pass on the wisdom or fairness of such asserted business justifications, but rather only to determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed.' Bradley v. Belva Coal Co., 4 FMSHRC 982, 993 (Jun. 1982) (emphasis added).

b. Discussion

In essence, it appears to be the position of Drummond, that its affirmative defense is predicated upon a business justification for the adverse action taken against complainants, in that they were discharged for theft and other misconduct. In this regard, it asserts that it had a good faith belief that the claimants committed misconduct. In contrast, the Secretary argues, in essence, that Drummond's justification is pretextual, in that its reliance on Terry Clark is not credible, that Clark was motivated to lie, that there were conflicts and inconsistencies in McCoy's testimony, that Drummond failed to investigate beyond the word of Terry Clark, and that the evidence does not support Frizell's testimony regarding Terry Clark's credibility. In addition to these arguments, counsel for the individual claimants asserts that the latter suffered disparate treatment, and accordingly the assertion by Drummond of a business justification for the adverse action taken against them, is only pretextual. For the reasons set forth below, I conclude that Drummond has established by a preponderance of the evidence, the existence of a business justification for the adverse action taken against the individual claimants, that was credible, and that was enough to have legitimately moved it to take the adverse actions (see Haro at 1938).

A preponderance of evidence establishes that, by March 15, 2002, the company had become aware that it had a problem relating to the theft of company property and the selling of drugs on its property. In order to obtain information regarding the individuals involved in these activities the company arranged for video surveillance of its property, and hired an independent private investigator. On March 15, 2002, Drummond was presented with a report by the private investigator based upon the latter's interviews of a former employee, Terry Clark, other employees, and surveillance tapes. Once the company learned that it had a serious theft and drug selling problem on its site, it certainly was credible for it to arrange for surveillance and the services of an investigator. In these regards, there is no evidence that any instructions were given to the investigator or the firm that conducted the surveillance, to single out or focus in on Owens, Johnson, Watson, or other firebosses. It certainly is credible that receipt by Drummond of Frizell's report implicating Owens, Johnson, and Watson, and other employees, in theft and or drug activities, would have legitimately moved it decide to suspend them with intent to terminate. It is not for this body to determine whether the operator should have accepted Frizell's conclusions knowing that, in main part, they were based on information supplied by Terry Clark, who had previously been fired by Drummond for having allegedly stolen property from Drummond, and who had agreed to complete cooperation in exchange for Drummond's agreement to acquiesce in an agreement proposed by the District Attorney's office to resolve the criminal charges against him. Also, it is not proper for this body to question Frizell's reliance on Terry Clark's information provided to him, and Frizell's opinion regarding Clark's credibility. What is relevant is that Drummond was presented with information from various sources implicating Owens, Watson, and Johnson in serious misconduct, which it acted upon in suspending them with the intent to discharge. Within the context of Drummond's concern of widespread theft of its property and use of drugs on its property, it was legitimate for it to arrange for an investigation of these alleged acts, and individuals allegedly implicated. Further, on its

face, the information provided to it by its investigator implicating Owens, Watson, and Johnson was, within the above context, credible and legitimate to move it to terminate these individuals. In this connection, it is significant to note that 15 other Drummond employees who also had been implicated in videotapes and/or the investigator's report as having been involved in theft of company property and/or selling drugs, were, along with Owens, Johnson, and Watson, suspended with intent to terminate on March 21,2002.

It is the contention of Complainants that, subsequent to their being suspended with intent to discharge, additional adverse action was taken against them when they were not provided, by Drummond, with the opportunity to be reinstated. In contrast, seven other individuals, who had been included in the group of eighteen employees who had been suspended with intent to discharge were all reinstated on April 3, 2002, without back pay, pursuant to a settlement with the union. Also, two other individuals who had previously been part of the class of employees who were suspended on March 21, received treatment more favorable than that accorded Complainants. Harper was continued on sick leave status until those benefits expired and then was allowed to work one day in the calendar year 2003 and retire on January 3, 2003. As a result he received additional retirement benefits based on a new union contract that became effective on January 1, 2003. Wallace, after serving a fifty day suspension, was offered a last chance agreement and was reinstated without back pay.

In these regards, the record contains some evidence of disparate treatment of Owens, Johnson, and Watson, as discussed above. (VII, (A)(1)(b)). This quantum of evidence was found to have been sufficient, when considered in combination with some evidence of animus, knowledge of protected activities, and coincidence in time, to have been of sufficient probative weight to have met the Secretary's burden of establishing that Drummond's motivation in not reinstating Owens, Johnson, and Watson, was based in any part on their protected activities. (id.) However, the record as a whole does not contain a sufficient quantum of evidence of disparate treatment to establish, as argued by complainants, that Drummond's asserted justification was pretextual. In this connection I find it most significant that Owens, Johnson, and Watson, were initially suspended with intent to discharge along with fifteen other individuals who also had been implicated in theft of company property and/or selling or use of drugs. Also, although the Complainants were not reinstated, they were treated in this regard the same as three other individuals, Tucker, Caffey, and Gaines, who also had been implicated in theft and/or drug selling, and were not reinstated. There is no evidence in the record that the latter three individuals had engaged in protected activities, or that Drummond was motivated in any part in its decision not to reinstate them based upon their protected activities.

The Secretary argues that Drummond's reliance on the uncooberated statements of Terry Clark was not credible because he had only been employed at Drummond for nine months before he had been discharged, was involved in theft of Drummond property, and was not prosecuted for the alleged theft based upon his agreement to cooperate with Drummond. However, while such reliance might not have been the wisest business determination by Drummond, the function of the Commission is not to pass judgement on the wisdom of this determination (See, Bradley v.

Belva Coal Co., 4 FMSHRC 982, 993 (June 1982)). Since Drummond hired an independent investigator to ascertain the facts relating to alleged theft of company property and use of drugs on its property, and since Frizell, the independent investigator provided his opinion to Drummond that Clark's accusatory statements were reliable, it can not be found that Drummond's reliance on Frizell's opinion and conclusions was "plainly incredible or implausible" Haro at 1937. Accordingly I conclude that, given these circumstances, "... a finding of pretext is inappropriate." (id.).

The Secretary, in its brief, refers to various inconsistencies in McCoy's testimony and in his deposition to, in essence, defeat the good faith of Drummond's business justification for suspending with intent to fire the complainants, and subsequently not reinstating them. In essence, the main thrust of the asserted inconsistencies relate to the soundness of Drummond's determinations regarding the classification of the 18 implicated employees by degrees of culpability, and quality of supporting evidence. It is not for this forum to perform a detailed inquiry as to the wisdom of Drummond's determinations. I observed McCoy's demeanor and found him to be a credible witness regarding matters essential to Drummond's affirmative defense, i.e., that in determining not to offer reinstatement relating to the claimants it relied on Frizell's report which set forth, for each of these individuals, specific allegations of unprotected activities, and the supporting witness and additional evidence, if any. On this basis, it appears that the business justification was not plainly incredible or implausible, and thus a finding of pretext is inappropriate. (id.).

Lastly, the fact that Drummond offered the Complainants, along with Tucker, Caffey, and Gaines, the opportunity to take a polygraph test and be reinstated with back pay should they pass such a test, which all these individuals refused to take, is further credible justification for Drummond's action.

Therefore, based upon all the above, it is concluded that although the Secretary has established a prima facie case of discrimination under the Act regarding the three named Claimants, Drummond has prevailed in its affirmative defense. Therefore the Complaints of Discrimination are dismissed.[16]

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[16]At the hearing Drummond proffered six polygraph reports of tests administered to Terry Clark on April 26, 2002. The Secretary objected, and a decision on the admissibility was reserved. Since the tests were administered to Clark on April 26, 2002, and since the adverse actions taken against Owens, Watson, and Johnson consisting of their firing on or about March 20, 2002, and their not being reinstated on April 3, 2002, the reports themselves are not relevant to Drummond's motivation and justification.

ORDER

It is **ORDERED** that these cases be **DISMISSED**.

Avram Weisberger
Administrative Law Judge

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October 9, 2003

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of JOSEPH M. ONDREAKO, Applicant	:	TEMPORARY REINSTATEMENT PROCEEDING Docket No. WEST 2003-403-DM MSHA No. RM MD 03-11
v.	:	Bingham Canyon Mine
KENNECOTT UTAH COPPER CORP., Respondent	:	Mine I.D. 42-00149

DECISION AND ORDER GRANTING TEMPORARY REINSTATEMENT

Appearances: John Rainwater, Esq., Office of the Solicitor, U. S. Department of Labor, Denver, Colorado, for Applicant;
James M. Elegante, Esq., and Jan Smith, Esq., Kennecott Utah Copper Corp., Magna, Utah, for Respondent.

Before: Judge Manning

This case is before me on an application for temporary reinstatement brought by the Secretary of Labor on behalf of Joseph M. Ondreako against Kennecott Utah Copper Corporation ("Kennecott") under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(c)(2) (the "Mine Act"). The application was filed on or about September 2, 2003 and Kennecott requested a hearing within 10 days of receipt of the application. The application alleges that Kennecott discriminated against Ondreako when, on May 8, 2003, Kennecott demoted Ondreako from shovel operator to dozer operator after he made safety complaints to mine management. The application further alleges that Kennecott discriminated against Ondreako when Kennecott laid Ondreako off, effective July 5, 2003, as a result of safety complaints he made to management and to MSHA. The application states that the Secretary has determined that the underlying discrimination complaint filed by Ondreako was not frivolously brought. A hearing in this temporary reinstatement proceeding was held in Salt Lake City, Utah, on October 2, 2003. For the reasons set forth below, I find that the applicant established that Ondreako's discrimination complaint was not frivolously brought.

II. SUMMARY OF THE EVIDENCE

On or about July 9, 2003, Ondreako filed a complaint of discrimination with the Department of Labor's Mine Safety and Health Administration ("MSHA"). Ondreako was the only witness called by the Secretary in this temporary reinstatement proceeding. Ondreako testified that he worked as a heavy equipment operator for Newmont Gold Company for about ten years prior to working for Kennecott. He began working for Kennecott at the Bingham Canyon Mine in November 1999 as a haul truck driver. This mine is a very large, open-pit copper mine. After about six months, he started working in "roads and dumps," operating dozers, track hoes, and other heavy equipment building roads and sloping banks. About 18 months later, he became a shovel operator trainee. At Newmont, Ondreako had operated hydraulic shovels, but Kennecott used large P & H shovels powered with electricity through trailing cables. Because there were no current openings for shovel operators, Ondreako returned to roads and dumps after he completed his training, but he would operate shovels when called upon. Sometime in 2002, Kennecott purchased a hydraulic shovel and needed an experienced operator. Ondreako became a shovel operator and began operating both types of shovels. The job title for shovel operators later changed to "advanced operator."

In late March 2003, Ondreako was operating the hydraulic shovel along the Carr Fork Road. (Tr. 20-22). Ondreako was working at night and there was snow in the area. He was concerned that the benches above the area in which he was digging were full of rock. He estimated that there were at least 100,000 tons of material above him on the benches. He believed that, if any rock started falling, the benches were too full to catch the falling material and that this condition created a hazard. He called Mark O'Driscoll on the mine radio to express his concerns. O'Driscoll, who was a supervisor, looked at the area and told Ondreako that everything would be fine and to keep on working. *Id.* Ondreako continued digging in the area.

On April 4, 2003, Ondreako was operating the hydraulic shovel in the Carr Fork area while it was raining and snowing. (Tr. 22-24). The material he was digging was wet and thick. He believed that it contained limestone because of the way it was adhering. Visibility was poor. As he was working, a boulder fell from the area above him and hit the shovel. Some of the falling material hit the windshield. He called Anthony Hoffman, an operations supervisor, to complain about the unsafe conditions. Hoffman told him to keep working and that he would get back to him after the production meeting. Their conversations were over the mine radio. Using the radio, Ondreako warned others that, because of the wet conditions, "the highwalls would be moving." (Tr. 24).

On April 26, 2003, Ondreako was operating the #52 electric shovel on the 4940 bench near the bottom of the pit. (Tr. 27-30). He was assigned to shovel and load previously blasted ore-bearing rock into haul trucks. The other two electric shovels were loading ore-bearing rock from an area that produced material that tended to plug up the crusher. As a consequence, mine management wanted Ondreako to load as much ore-bearing rock as possible so that the crusher could keep operating. If the rock he was loading was mixed with the rock that the other shovels

were loading, the crusher would not get plugged up. As Ondreako loaded out the rock, the area in which he was working became horseshoe-shaped which limited his visibility along the face and prevented the haul trucks from being in a good location for loading. (Tr. 30). Ondreako decided that he needed to reposition his shovel to operate more effectively and safely. Ondreako wanted to reposition his shovel so that the front of the shovel would be parallel to the line of rock that he was loading; this is called "squaring the face." Ondreako asked Allen Pearson on the radio for permission to square the face. Pearson, the dispatch supervisor, told him to keep working because the rock he was loading was needed at the crusher. (Tr. 31). Ondreako kept on working but he was concerned that he would soon be working in a narrow slot. Ondreako heard Pearson say to Hoffman on the radio, "Did you copy that? Joe needs to move." (Tr. 32). To which Hoffman replied, "Joe, go ahead and stay there. I'll be right down and I'll get with you." *Id.* Ondreako kept working without repositioning.

When Hoffman arrived at the shovel, he told Ondreako to keep loading, at least until after the 11:30 a.m. production meeting. (Tr. 33). Ondreako testified that the material that he was loading was sitting higher than normal. The benches were 50 feet high, but because of the nature of the rock in that particular area the material was about 75 feet high in some places after blasting. (Tr. 34-35). The rock was like aggregate, but some large boulders were also present. Dust was kicked up as he worked. At one point he noticed a large boulder sitting up on top of the material above the shovel. (Tr. 35). It is the shovel operator's responsibility to manage large boulders so that they do not fall and damage the shovel or cause injury to the shovel operator. It was not clear at the hearing exactly what options the shovel operator is required to consider, but Ondreako testified that one option was to block the boulder with the bucket on the shovel. Ondreako testified that he was keeping an eye on the boulder when he saw it start to move as he was swinging the shovel toward the haul truck. (Tr. 36). He dumped the load on the ground and started to swing back toward the boulder to block it. Because the shovel is large, changing directions takes time and the boulder hit the right side boarding ladder on the shovel before he could block it with the bucket. *Id.* Ondreako testified that the boulder gave the shovel a jolt and caused about $1,700 in damage. (Tr. 37).

Ondreako called Hoffman to tell him about the incident. Ondreako was tested for drugs and alcohol, the results of which were negative. When Ondreako returned to work the following work day, he was sent home without pay pending an investigation. (Tr. 39). Ondreako believes that whenever there is an accident, a team is formed to investigate and the implicated miner is a member of the team. *Id.* Ondreako testified that he was told by Hoffman on May 3, 2003, that the investigation had been completed and that he was being demoted to a lower paying position that did not involve operating shovels. (Tr. 39; Ex. G-1). Ondreako was surprised that the investigation had been completed without any significant input from him. His union, the Operating Engineers, filed a grievance on his behalf.

On May 12, 2003, Ondreako called the local MSHA office about the boulder incident on the #52 shovel and the previous events, described above, concerning the hydraulic shovel.

(Tr. 42-43). MSHA officials told Ondreako that he should consider filing a discrimination complaint. On May 23, 2003, MSHA inspected the area around the Carr Fork Road as a result of another call from Ondreako. (Tr. 44). MSHA issued two citations, one alleging a violation of section 56.3130 for allowing the benches to overfill with rock, creating a hazard to those working below, and another alleging a violation of 56.3200 for failing to barricade the area until the hazardous ground conditions were corrected. (Ex. R-33).

In early June 2003, Ondreako was operating a grader in the bottom of the pit. He testified that spilled rock was "literally scattered across the road and deep enough to where I had to pull multiple windrows across the road." (Tr. 45). Ondreako believed that this condition created a hazard to vehicles driving through the area, particularly at night. (Tr. 46). It appears that the spillage occurred when shovel operators either overfilled haul trucks or spilled material as they were loading the haul trucks. When Ondreako talked about it with Hoffman, Hoffman told the shovel operators to "load 'em up" and said "we have people who love to chase spillage." (Tr. 45). Ondreako testified that other miners complained about the spillage. Ondreako talked to the local MSHA office about this issue on June 16, but no citations were issued.

On June 23, 2003, there was a step-two hearing on his demotion from his advanced operator position. Ondreako testified that at this hearing, he stated that he could not accept responsibility for the incident and that he objected to his exclusion from the investigation. (Tr. 49-50). He believed that management took control of his environment when he was denied permission to move and that the boulder was unforeseen. (Ex. R-18 p. 4). He testified that management told him that they could have terminated him for this incident but that they were willing to pay him for the wages he lost during his suspension. These back wages were paid to Ondreako, but his demotion remained in place. On June 25, 2003, Ondreako was advised that he was being laid off along with 119 other Kennecott employees. (Tr. 51). He was given a letter explaining the layoff the next day. (Ex. G-2).

Kennecott produced evidence to show that the mine-wide layoff and Ondreako's safety complaints were two separate and unrelated events. Kim Moulton, Kennecott's employee relations director, testified that the price of copper was at its lowest level since the Great Depression. (Tr. 94). As a consequence, Kennecott had to increase its efficiency to remain competitive. It engaged a consulting company to study its operations.* Some of the consultant's recommendations included more outsourcing, better use of technology, increasing employees' skills through training, and reducing the workforce. (Tr. 97). Many of these recommendations have been put into place. For example, the number of hourly job classifications has been reduced from 172 to 11. (Tr. 99). At the same time that Kennecott was putting more emphasis on efficiency, its collective bargaining agreement with its unions expired, effective October 1, 2002. When its "best and final offer" was rejected by the unions, it declared an impasse and

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* This case involves the Bingham Canyon Mine, but Kennecott also operates other facilities in the area including a concentrator and a smelter. Kennecott's undertakings to improve efficiency were applied across the board to all its facilities.

implemented its final offer as the collective bargaining agreement. Apparently, the National Labor Relations Board approved Kennecott's actions. (Tr. 98-99).

A committee of Kennecott's upper-level supervisors and managers was given the task of developing a "fair and objective method of ranking employee qualifications to meet the requirements of the organization." (Tr. 103-06; Ex. R-23). Although seniority was used in the rankings, it was only one of many factors that the committee decided to consider. After the committee determined what factors are important to Kennecott, the committee developed a "Qualifications Assessment" worksheet ("rating form") to be used when ranking employees. (Tr. 109-15; Ex. R-24). This form has seven qualification categories, as follows: (1) Safety-Personal Safety Plan and Participation; (2) Safety-Incident Rate; (3) Work Output-Effectiveness; (4) Performance Effectiveness-Working with Others (Team Skills); (5) Performance Effectiveness-Adaptability; (6) Work Experience-Number of and Quality of Industrial Experiences; and (7) Technical Skills-Demonstration of Skills Needed to Complete Job Assignments. *Id.* Within each category there are five short statements, each with a box next to it that can be checked.

These forms were given to front line supervisors with instructions to rate employees. (Tr. 125). They rated each employee by checking the box next to the statement in each category that most closely matched the employee being rated. These front line supervisors did not participate in the development of these forms; they were not told that the information provided would be used in future layoffs, and they were not given the scoring formula. In addition, these supervisors were told not to discuss the ratings or employees with other supervisors but that they were to complete the forms independently. Kennecott plans to have every employee rated on a quarterly basis. Each employee was rated by at least three supervisors who were familiar with the employee's work. Ondreako was rated by John Simonson, Team Leader Mine Operations; Dave Lanham, Operations Supervisor; and Allen Pearson, Dispatch Supervisor. (Ex. R-28). Each employee was given an average score using a computer spreadsheet. (Exs. R-25 & R-30). Ondreako received a score of 2.1271, which ranked him at number 404 out of 410 mine operations employees. (Tr. 128-29; Ex. R-30). Later that June, when Kennecott determined that it needed only 371 employees in mine operations, it sent a layoff notice to everyone ranked 372 or below, including Ondreako. *Id.* About 39 mine operations employees were laid off. Each of these employees is subject to recall if more employees are needed in mine operations. (Tr. 130-31). Kennecott contends that this objective method of ranking employees did not take into consideration Ondreako's complaints about safety and that, as a consequence, the application for temporary reinstatement should be dismissed.

Moulton testified that Ondreako has a history of disciplinary problems that contributed to his low ranking. (Tr. 63-81; Ex. R-6). He was given a verbal warning for working unsafely on May 21, 2001; he was given a written warning for refusing to follow a supervisor's instructions on September 16, 2001; he was given a one-day suspension for committing an unsafe act by running over the trailing cable with his shovel on October 24, 2001; and he was given a three-day suspension and was demoted for the events described above that occurred on May 3, 2003. *Id.*

Moulton testified that Ondreako has exhibited "high risk behavior" that is not typical of Kennecott employees. (Tr. 90-92).

Tom Lohrenz, a human resources representative for Kennecott, testified that he was present at Ondreako's second step grievance that occurred on June 24, 2003, and that he took detailed notes at that meeting. (Tr. 147-49; Ex. R-18). He testified that Ondreako specifically stated that safety was not an issue at the time Hoffman came to his work area on April 26, 2003 and told him to keep operating the shovel without squaring the face. (Tr. 148; Ex. R-18 at 5). At this grievance, Hoffman stated that Ondreako told him that he could safely load that day. (Ex. R-18 at 2-3). At the hearing in the present case, Hoffman testified that he did not participate in Ondreako's rating. (Tr. 156). He also testified that when he went to Ondreako's work area on April 26, 2003, he told him that he needed to keep working so that the crusher did not get plugged up. (Tr. 156-57). Ondreako did not raise any safety concerns with him and Ondreako told him at the second step grievance that safety was not an issue. (Tr. 159). Hoffman stated that Ondreako could have been terminated for allowing the boulder to damage the shovel.

Ben Stacy, Mine Operations Superintendent, testified that he told the front line supervisors how to fill out the rating forms. He instructed them to (1) fill out the forms individually without discussing them with others; (2) review safety and discipline files before completing; and (3) use "demonstrations of behavior" when filling out subjective parts of the forms. (Tr. 165). Stacy stated that he accompanied the MSHA inspectors on the May 23, 2003, inspection and the citations were issued to him. He testified that he had no idea that the citations were issued as a result of Ondreako's complaint about the conditions to MSHA. (Tr. 170-72).

Mr. O'Driscoll testified that Ondreako complained about safety conditions in January 2003 but he could not remember any complaints in March or April of that year. (Tr. 152). O'Driscoll did not care that Ondreako had expressed concerns about safety and never disciplined him. He did not participate in the rating of Ondreako. Mr. Simonson testified that he was not Ondreako's supervisor but that they were on the same team and that he had worked with him. He testified that he did not know that Ondreako had complained to MSHA when he rated him. (Tr. 175-76). Mr. Pearson testified he is the individual who must give approval if a shovel operator wants to reposition his shovel. He usually gives such permission unless there is a particular operational need for the shovel to remain in place. He was not aware that Ondreako had called MSHA when he filled out his rating form and that such complaints would not matter. (Tr. 182). Lanham was also unaware that Ondreako had raised safety complaints with MSHA when he filled out his rating form. (Tr. 188).

II. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

Section 105(c)(2) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Mine Act. The purpose of the protection is to encourage miners "to play an active part in the enforcement of the [Mine] Act" recognizing that, "if miners

are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation." S. Rep. No. 181, 95th Cong., 1st Sess. 35 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 623 (1978) (*"Legis. Hist."*).

Section 105(c)(2) provides, in pertinent part, that the Secretary shall investigate each complaint of discrimination "and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint." The Commission established a procedure for making this determination at 29 C.F.R. § 2700.45. Subsection (d) provides that the "scope of a hearing on an application for temporary reinstatement is limited to a determination as to whether the miner's complaint was frivolously brought."

"The scope of a temporary reinstatement proceeding is narrow, being limited to a determination by the judge as to whether a miner's discrimination complaint is frivolously brought." *Secretary of Labor on behalf of Price v. Jim Walter Resources, Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd sub nom. Jim Walter Resources Inc. v. FMSHRC*, 920 F.2d 738 (11th Cir. 1990). Courts and the Commission have equated the "not frivolously brought" standard contained in section105(c)(2) of the Mine Act with the "reasonable cause to believe standard" at issue in *Brock v. Roadway Express, Inc.*, 481 U.S. 252 (1987). It has also been equated with "not insubstantial." *Jim Walter Resources*, 920 F.2d at 747. Congress indicated that a complaint is not frivolously brought if it "appears to have merit." (*Legis. Hist.* at 624-25).

Mr. Ondreako testified that he engaged in protected activity when he complained to management about the condition of the benches near the Carr Fork Road in March 2003 and when he complained to MSHA about these conditions in May 2003. He also alleges that he engaged in other protected activity, as detailed above. He testified that he was laid off soon thereafter and believes that these events are related. Kennecott's witnesses testified that Ondreako's layoff was part of a mine-wide reduction in force that was totally unrelated to his protected activity. The Commission has frequently acknowledged that it is often difficult to establish a "motivational nexus between protected activity and the adverse action that is the subject of the complaint." *Sec'y of Labor on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953, 957 (Sept. 1999). The applicant relies on the proximity in time between his protected activity and his layoff and Kennecott's knowledge of his safety complaints to management. Kennecott relies on the fact that it was undergoing a comprehensive reorganization of its operations that required a significant reduction in force. It contends that Ondreako's inclusion in the reduction in force occurred solely as the result of the application of the company's fair and objective ranking system of its employees.

Although Kennecott's evidence shows that it may be able to present a convincing defense to Ondreako's complaint in the underlying discrimination case, the purpose of a temporary reinstatement proceeding is to determine whether the evidence presented by the applicant

establishes that the discrimination complaint is not frivolous. It is not the judge's duty to resolve conflicts in testimony at this preliminary stage of the discrimination case. *Secretary of Labor on behalf of Albu v. Chicopee Coal Co., Inc.*, 21 FMSHRC 717, 719 (July 1999). The judge should also not consider the probability that the applicant will succeed on the merits of the discrimination complaint or try to balance the harm to the respective parties.

I find that the applicant showed that the underlying discrimination complaint was not frivolously brought. Kennecott did not establish "that things could not have happened the way the [applicant] alleges that they did. . . ." *Sec'y of Labor on behalf of Stahl v. A & K Earth Movers Inc.*, 22 FMSHRC 233, 237 (Feb. 2000); *aff'd* 22 FMSHRC 323 (March 2000). Kennecott relies on the three rating forms that rated Ondreako quite poorly when compared to other employees. (Ex. R-28). I do not doubt that Kennecott attempted to develop these forms to be as objective as possible. Kennecott argues that the front line supervisors who performed the employee ratings did not know that they would be used during a reduction in force. Moreover, it also argues that these supervisors were not told how the rating forms would be scored. Nevertheless, anyone looking at the form could easily determine how to rate an employee highly or poorly. In every category, the descriptive sentences that are to be checked explicitly indicate whether the supervisor believes that the rated individual is a good employee. For example, under "Work Output," the supervisor can check "Disruptive/Negative attitude toward work assignments" at the low end, "Highly motivated employee" at the high end, or three other choices in between. *Id.* It would be easy to figure out how to give an employee that is complaining about safety conditions a poor score under this system.

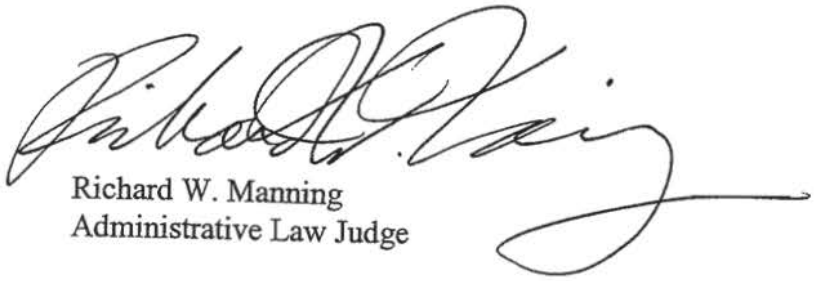
Under one of the safety categories, two of the supervisors that rated Ondreako checked the sentence that reads, in part, "considers possible unsafe conditions but relies on supervision to remedy." Although I make no finding in this regard, a supervisor might check this sentence if an employee complains to management about safety conditions. The front line supervisors who performed the ratings were given little or no training on what to consider when filling out the forms. As stated above, they were simply told to independently check the appropriate sentence based on the employee's "demonstrations of behavior." Thus, it would have been possible for a supervisor who rated Ondreako to consider the safety complaints that he made to management in this and in other sections of the rating form. Ondreako made these complaints over the mine's radio system so the supervisors who rated him could have easily known about his complaints. Given the close proximity in time between his complaints and his layoff, the Secretary established that the complaint is not frivolous.

Kennecott also relies on Ondreako's statements at the second step grievance hearing that the incident involving the boulder on April 26, 2003, did not involve a safety issue. It should be noted, however, that Ondreako also advised management at this hearing that he would take the entire matter to MSHA to investigate the safety program because Kennecott's investigation of the incident was not accurate. (Ex. R-18 at 6). Ondreako also complained that other miners who had damaged the #52 shovel were not disciplined. *Id.* at 4. As stated above, conflicts in evidence should not be resolved at this preliminary stage of the discrimination proceeding.

Kennecott also argues that Ondreako was not terminated from his employment but that he was laid off due to lack of work and that he is subject to recall. I find that this layoff constitutes a termination for purposes of the Mine Act because Ondreako is no longer working at the mine or being paid for his services. Kennecott also argues that, because Ondreako was let go as a result of a layoff, there is no position available for him at the mine and the company will be forced to lay off the next person up the rating list if it is ordered to reinstate Ondreako. (Tr. 132-33). This argument could be made any time an application for temporary reinstatement is granted following a layoff. It is important to remember that this proceeding involves the *temporary* reinstatement of Ondreako and, if he does not prevail on the underlying discrimination case, the order of temporary reinstatement will be lifted. When a miner's complaint is determined not to be frivolous, the employer must reinstate the miner regardless of whether it is economically beneficial for the employer to do so. In enacting this provision, Congress determined that the employer must run the risk of paying a discharged miner whose claim may ultimately fail, rather than requiring a miner, who may prevail, to go through the discrimination proceeding without income. For this reason, it is incumbent on the Secretary to complete her investigation of her underlying discrimination complaint as quickly as possible.

III. ORDER

For the reasons set forth above, Kennecott Utah Copper Corporation is hereby **ORDERED** to immediately reinstate Joseph M. Ondreako to the position he held immediately prior to the layoff that was effective July 5, 2003, at the same rate of pay and benefits for that position, or to a similar position with the same or equivalent duties, at the same rate of pay and benefits. The Secretary **SHALL COMPLETE** as quickly as possible her investigation of the underlying discrimination complaint.



Richard W. Manning
Administrative Law Judge

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RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W. Suite 9500
Washington, DC 20001-2021

October 14, 2003

DRUMMOND COMPANY, INC.,	:	CONTEST PROCEEDING
Contestant	:	
v.	:	Docket No. SE 2003-101-R
	:	Citation No. 7395286; 03/24/2003
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Shoal Creek Mine
Respondent	:	Mine ID: 01-02901

DECISION

Appearances: Timothy M. Biddle, Esq., Bridget E. Littlefield, Esq., Crowell & Moring, Washington, D.C., for the Contestant;
Thomas A Grooms, Esq., U.S. Department of Labor, Nashville, Tennessee, for the Secretary.

Before: Judge Weisberger

Statement of the Case

This case is before me based upon a Notice of Contest filed by Drummond Company, Inc. (Drummond) challenging the issuance to it by the Secretary of Labor of an Order alleging a violation of Section 107(a) of the Federal Mine Safety and Health Act of 1977 (the Act).[1] After an answer was filed by the Secretary of Labor a hearing was held in Birmingham, Alabama on July 22, 2003. Subsequent to the hearing the parties each filed a post hearing brief.

I. Findings of Fact and Discussion

A. The Secretary's case

1. The Inspector's testimony

Michael Eugene Pruitt, an MSHA inspector, testified that Drummond's underground Shoal Creek Mine (a coal mine) has a history of methane emissions. According to Pruitt, an

[1]This case is hereby **severed** from Docket Nos. SE 2003-99-R et. al.

examination of Drummond's record at the local MSHA office indicated the mine had nine methane emissions in the year prior to March 24, 2003. Also, the mine liberates 14 million cubic feet of methane in a 24 hour period. Also, Pruitt noted that an accident occurred in February 2001, at Jim Walter's No. 5 mine in which 13 miners were killed, and in which the liberation of methane played a part. According to Pruitt, Entry No. 5 mine is in the same seam of coal as Shoal Creek, the mine at issue.

On March 24, 2003, at approximately 5:45 a.m., Pruitt's field office supervisor, Ken Ely, told him that over the weekend Shoal Creek had a change in ventilation, and had methane problems. Ely asked Pruitt to check it out. Pruitt went to the mine, arriving at approximately 7:15 a.m.. Upon his arrival, he observed men outside the mine and asked Ed Sartain, Drummond's safety inspector, why the men were outside. The latter told him a ventilation change was made over the weekend, and that Drummond was in the process of making another change. Pruitt asked Claude Edwin Sartain, Drummond's safety inspector at Shoal Creek, how much methane was found at the mine. Sartain told him that from two-tenths of a percent to seven-tenths of a percent had been reported in the North Mains section.

Pruitt was told that Henry Johnson, a fireboss on the owl shift, wanted to talk to him. Pruitt testified that at approximately 8:30 a.m. he spoke to Johnson on the surface, and the latter told him that when he had proceeded through a man-door in Entry No. 6 on the North Mains section, heading inby, his portable methanometer ("spotter") issued an audible and visual alarm indicating the presence of more than one percent of methane. According to Pruitt, Johnson checked his spotter and it indicated methane between two to three percent. Pruitt testified that Johnson told him he then went to the face in the North Mains and found eight percent methane, which Pruitt termed as being within the explosive range of between five and fifteen percent. Johnson did not tell Pruitt the time or day this had occurred. Pruitt assumed it was on the third shift that day. According to Pruitt, Johnson also told him that he detected five percent methane near the face in Entry No. 2 outby a rock-fall, six percent in Entry No. 6 and eight percent at the face. According to Pruitt, the men who were present, during his conversation with Johnson, confirmed Johnson's readings. Pruitt indicated that Johnson also told him that the water level in the Entry No. 8 had reached the roof thus blocking the entry.

Pruitt determined a hazard existed in the North Mains due to a methane reading of eight percent methane, and he was concerned about ignition or explosion sources such as electricity, power boxes and water pumps. He was also concerned with rocks falling from the roof causing sparks as there had been a roof fall in the last cross-cut in Entry No. 7, approximately one month prior to March 24. He opined that the roof fall in the last open cross-cut in Entry No. 7 and the condition of water up to the roof in Entry No. 8 caused a ventilation blockage. He concluded that methane was still present in the explosive range in the area between cross-cuts 41 and 40.

At approximately 8:50 a.m. Pruitt went to the office of Jay Vilseck, the manager for operations, and issued an oral Section 107(a) order covering the entire mine due to explosive

levels of methane.[2] Pruitt explained that he didn't want an explosion to occur like the one that had occurred at the Jim Walter No. 5 Mine the previous year. Pruitt stated that in his conversation with Vilseck, he (Vilseck) did not tell him that the problem had been fixed.[3] He also said that not one of Drummond's managers told him that there was no longer a problem with methane at the mine.

On cross examination he conceded that he did not know the methane reading at 8:50 a.m. when he issued his order, and he could have gone to the affected area at that time.

2. Henry Johnson's testimony

According to Johnson, on March 24, at approximately 2:00 a.m., he along with Otha Pennick, and J.D. Aaron were assigned to carry a 30 h.p. pump inby in Entry No. 6. At approximately 2:30 a.m., about three seconds after they and Michael Wayne Sanders, a pump foreman, went through a door located in Entry No. 6 between cross-cuts 38 and 39, Johnson's spotter emitted an audible alarm. He looked at the spotter and it went from two percent, to three percent, to eight percent. The eight percent reading was approximately fifteen to eighteen feet inby the man-door which was located in Entry No. 6 at cross-cut 39. The other miners with him obtained methane readings between five and seven percent At the time of these readings the electric pump was not connected to a power source. Johnson went along the cross-cut to Entry No. 8. As he proceeded to within five or six feet of Entry No. 8, he saw that the water was up to the roof. There was not any movement of air, which normally courses outby in that entry. Johnson had the power cut off in the North Mains area, and started to build temporary curtains or stoppings, as he was very concerned about sparks from the power center located two and one-half cross-cuts from his location. He also was concerned that opening the door in the area, which he thought to be metal, could result in sparks being emitted. Also sparks could be caused by a rock falling or by the action of dragging the pump through the door. However, he checked the roof and rib and did not see any problems. The roof was supported and he did not see any bad roof in the area. Johnson built three curtains to make the area airtight so that the ventilation path would be changed and methane would be pushed out of the area. He did not take any further methane readings. Johnson left the area at approximately 6:35 to 6:45 a.m.

B. Drummond's evidence

Michael Wayne Sanders, a Drummond pump foreman on the owl shift, testified that at

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[2]On March 24, Pruitt subsequently modified the order to allow Drummond to have workers enter the area to take care of the methane. He modified it again to allow miners to return to the rest of the mine with the exception of the north main area where he continued the order until March 27, at which time the order was terminated because permanent controls were put into place to vent methane build-up.

[3]However, according to Johnson, he told Pruitt that three stoppings had been installed to correct the condition.

approximately 3:00 a.m. on March 24, when he heard a miner shout that he detected six and a half percent methane, he told Pennick to shut off the power, and then told Johnson to make sure that everything was shut off. At about 4:00 a.m. Sanders took the men with him outby through the door that they had entered into fresh air. According to Sanders, at about 4:00 a.m., there were no other men on the section.

Sanders then told his supervisor, Scott Meadows, that there were problems with methane on the north main section and help was needed. At approximately 5:00 a.m. he went with Meadows to the section and the latter said to build three temporary brattices to redirect the air. This work was completed at approximately 6:30 a.m. All Sanders' crew had reached the surface by 7:30 a.m.

Scott Meadows, the general mine foremen at Shoal Creek, went inby in Entry No. 6 at approximately 4:00 a.m. on March 24. When he was approximately 50 to 60 feet inby the man-door in Entry No. 6, he observed a methane reading of approximately two-point-two to two-point-five percent, and he was concerned. According to Meadows, all power had been cut off from the North Mains face outby fifteen hundred feet covering all entries in the G-3 south, North Mains and G-4.

Meadows indicated that after the temporary stoppings were built, he was in Entry No. 8 outby cross-cut 38 and could see that water "... was whitecapping from the velocity of the air" (Tr. 176).

At 7:00 a.m. work started on building permanent stoppings to further bleed off the methane. The stoppings were constructed and sealed "around 10:00" (Tr. 179).

Meadows indicated that at approximately 10:00 or 11:00 a.m. after the temporary brattices were constructed a methane reading of five percent was obtained in Entry No. 6 at cross-cut 38. An hour later, methane in Entry No. 7 was found to be five percent. Meadows said that at the time, methane was being released "... at our leisure" (Tr. 188). In addition, Meadows indicated that at different times during the day of March 24, as Drummond was coursing methane from the rock fall in Entry No. 7, the methane readings were five percent, and the pumps were running.

Don Hendrickson, Drummond's production superintendent at Shoal Creek is responsible for ventilation. On March 24, at approximately 5:30 a.m., he was advised by the Communication Organization ("CO") clerk that there was methane in the North Mains section. He went to the section and temporary brattices were being constructed in Entry Nos. 5 and 6, and at cross-cut 40 towards Entry No. 7.

At approximately 6:30 a.m. Hendrickson took methane readings in Entry Nos. 5 and 6 and at cross-cut 40 towards Entry No. 7. He obtained methane readings of one-point-four, four-point-five, and two and one-half percent, respectively. In addition to the temporary brattices, a

curtain was hung in Entry No. 6 inby cross-cut 40 which provided a complete barrier splitting the entry. Another curtain was placed in cross-cut 40 between Entry Nos. 6 and 7 up to the edge of the water. The purpose of the curtains was to sweep these areas immediately of methane and to push it to cross-cut 44, the most inby cross-cut. Also, some blocks were removed from the stopping in the 38 cross-cut between Entry Nos. 7 and 8. According to Hendrickson, after all these changes were made at approximately 6:45 a.m., he monitored air movement in cross-cut 40 and noted it coursing from Entry No. 7 to Entry No. 6. He concluded that the air would have gone across cross-cut 41 through the fall area, and then down Entry Nos. 7 and 8 and back through cross-cut 40 to Entry No. 6.

According to Hendrickson, at about 7:30 to 8:00 a.m., the methane level in Entry No. 5 at cross-cut 38 was four-tenths of a percent; in Entry No. 6 at cross-cut 40 it was five-tenths of a percent; in cross-cut 40, at the edge of the water towards Entry No. 7, it was seven-tenths or eight-tenths of a percent; at cross-cut 38 and Entry No. 8 it was nine-tenths of a percent; and in Entry No. 8 between cross-cuts 38 and 39, at 6:30 a.m., the methane was one-point-two percent. He concluded that there was air movement, and that methane was being vented.

Claude Edwin Sartain, safety inspector at Shoal Creek, testified that on March 24, between 5:30 and 6:00 a.m., he was told that there was some methane accumulation at the North Mains. At 7:30 a.m. he met Pruitt and told him of the accumulation. He also told Pruitt that miners were outside as ventilation changes were ongoing, and Drummond was in the process of correcting the condition. According to Sartain, Pruitt did not make any further inquires of him.

C. Discussion

1. Commission case law

In essence, it is the Secretary's position that MSHA has wide discretion in issuing a Section 107(a) order, and that the standard to be applied in evaluating whether the contest to the 107(a) order should be sustained is whether the inspector abused his discretion. The Secretary argues that if the inspector acted reasonably in issuing the order, it should be sustained and the contest be dismissed. In order to determine the standard to be applied in deciding whether the Secretary met its burden herein of establishing the existence of an imminent danger as defined in Section 3(j) of the Act, supra, I am guided by the following Commission precedent.

In Utah Power and Light Co., 13 FMSHRC, 1617, 1621 (1991), the Commission first reviewed the legislative history of the term "imminent danger" as found in the Act, and concluded that "... the hazard to be protected against by the withdrawal order, must be impending, so as to require the immediate withdrawal of miners." (Emphasis added.) Continuing further, Utah Power & Light Co., supra, at 1622, the Commission held that to support a finding of imminent danger, the inspector must determine "whether the condition presents an impending threat to life and limb". (Emphasis added) The Commission went on to state that only by limiting Section 107(a) withdrawal orders to such impending threats does the imminent

danger provision assume its proper function under the Mine Act. In this connection, the Commission reasoned as follows:

> If the imminent danger provisions of the Act are interpreted to include any hazard that has the potential to cause a serious accident at some future time, the distinction is lost between a hazard that creates an imminent danger, and a violative condition that 'is of such nature as could significantly and substantially contribute to the cause and effect of a mine safety hazard.'
> Utah Power, supra, at 1622.

The Commission in Utah Power & Light, supra, clarified its earlier ruling in Rochester & Pittsburgh, 11 FMSHRC 2159 (November 1989) wherein the Commission, in discussing imminent danger used the phrase, "at any time". In explaining that phrase, the Commission, in Utah Power & Light Co., supra, at 1622, stated as follows: "The Commission used the phrase, 'at any time,' in the sense of, 'at any moment.' " (Emphasis added) In summarizing, the Commission, in Utah Power & Light, supra, at 1622, held as follows: "To support a finding of imminent danger, the inspector must find that the hazardous condition has a reasonable potential to cause death or serious injury within a short period of time," (Emphasis added)

Following Utah Power and Light, supra, the Commission issued Wyoming Fuel Co., 14 FMSHRC 1282 (1992). In Wyoming Fuel, supra, the Commission noted its previous decision in Rochester & Pittsburgh, supra, a 1989 decision which quoted from Eastern Associated, supra, 277, 278, as follows: "an imminent danger exists when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated."

It might appear that the Commission was retreating somewhat from its earlier pronouncement in Utah Power & Light, supra, linking the term "imminent danger" to a degree of imminence, in other words, a time-related situation. That is not the case. In Wyoming Fuel, supra, in the paragraph following the Commission's quote from Eastern Associated Coal, Supra, the Commission, at 14 FMSHRC supra, at 1290, discussed its previous ruling in Utah Power & Light Co., supra and stated that it had held in Utah Power & Light Co., supra, that, "there must be some degree of imminence to support a Section 107(a) order." (Emphasis added.) The Commission in Wyoming Fuel, supra, at 1290, reiterated that in Utah Power & Light Co., supra, at 1621 the Commission had "noted that the word 'imminent', is defined as ready to take place: near at hand: impending ...: hanging threateningly over one's head: menacingly near."

In Wyoming Fuel, supra, at 1290 - 1291, the Commission, in further discussing its prior decision in Utah Power & Light Co., supra, stated that it had previously determined, referring, to Utah Power & Light Co., supra, "that the legislative history of the imminent danger provision supported the conclusion that, 'the hazard to be protected against by the withdrawal order must be impending so as to require the immediate withdrawal of miners'" (Emphasis added). It

appears at least through Wyoming Fuel, supra, that the Commission was maintaining its holding that imminent danger means an imminence of something occurring within a short period of time.

In Island Creek, 15 FMSHRC 339, 346 (1993), the Commission noted its prior holding in Wyoming Fuel, supra, at 1291, that in imminent danger cases the judge must determine, "whether a preponderance of the evidence showed that the conditions or practices, as observed by the inspector could reasonably be expected to cause death or serious physical harm before the conditions or practices could be eliminated."[4] It might be construed that the Commission was retreating from its position that, as stressed by Utah Power and Light, supra, some degree of imminence was required to establish an imminent danger, since Utah Power and Light, supra, was discussed in its decision prior to its discussion of Wyoming Fuel, supra. However, in the most recent discussion by the Commission of imminent danger Blue Bayou Sand and Gravel, 18 FMSHRC 853 (1996) the Commission, after reviewing the definition in the Act of imminent danger and noting language from its prior decision in Rochester & Pittsburgh, 11 FMSHRC supra at 2163, quoted the following language it had set forth in Rochester & Pittsburgh, supra, at 2163: "an imminent danger exists when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated." Blue Bayou, supra, at 858. However, it is very important to note that in the same paragraph, the Commission in Blue Bayou, supra, at 858, the most recent commission decision on imminent danger explained as follows quoting from Utah Power and Light, supra: "[t]he Commission has explained that '[t]o support a finding of imminent danger, the inspector must find that the hazardous condition has a reasonable potential to cause death or serious injury within a short period of time.' (Emphasis added.) Utah Power & Light Co., 13 FMSHRC 1617, 1622 (October 1991) ("U P & L")."

I conclude that Commission doctrine, at this point in time, requires, regarding the existence of an imminent danger, that it be established by a preponderance of the evidence, that a hazardous condition or practice has a reasonable potential to cause death or serious injury within a short period of time.

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[4]In V.P. Mining Co. 15 FMSHRC 1531, 1535, (1993) the Commission again noted the legislative history of the Act wherein Congress made clear that in defining an imminent danger, the focus is on the potential of the condition to cause serious physical harm "at any time." The Commission noted that this reasoning was adopted by the Commission in Rochester v. Pittsburgh Coal Co., supra, at 2163. However, in affirming the judge's imminent danger findings, the Commission held that the Secretary met his burden of establishing that the hazard "was imminent" (id.). In elaborating on this holding, the Commission stated as follows: "The Secretary's evidence makes clear that the inspector reasonably concluded that the conditions in the ... gob presented an impending hazard requiring that the logwall be shut down immediately." (Emphasis added.) (Id.) Thus, any language in V.P. Mining, supra, which would indicate that a degree of imminence was not required to establish any imminent danger is clearly dictum.

2. Further Discussion

Considering all the above, I am constrained to find that it has not been established that an imminent danger still existed when Pruitt issued the 107(a) order at 8:50 a.m. In this connection, the inspector failed to make a reasonable investigation of the facts that existed after Johnson left the mine at approximately 6:50 a.m.

Pruitt's decision to issue the Section 107(a) order at 8:50 a.m., was based solely on conditions reported to him by Johnson earlier that morning, i.e., methane readings in the North Mains section at eight percent, diminished air flow due to a recent rock fall in the face of Entry No. 7 water roofing in Entry No. 8, and the presence of ignition or explosion sources such as the power center, electric pumps, and a metal door. Also of concern, was the recent rock fall in the area, and the possibility of additional rocks falling causing sparks. The inspector also considered the following: that there were nine ignitions at the mine in the previous year, that the mine liberates 14 million cubic feet of methane in a 24 hour period, and that in the year 2001, 13 miners were killed in a methane explosion at a nearby mine in the same coal seam as the subject mine.

The inspector's concern about preventing a similar disaster by issuing the 107(a) order was certainly legitimate. Also, there is no evidence that his reliance only on Johnson's statements was not in good faith. However, his testimony has failed to set forth the existence of specific conditions, i.e., that there was a reasonable potential of a methane explosion or ignition causing death or serous injury occurring within a short period of time at the time the order was issued.

According to Pruitt, Johnson did not indicate to him the date or time when the excessive readings were noted. According to Johnson, excessive methane readings, in the explosive range, were taken at approximately 2:30 a.m. on March 24, six hours prior to the issuance of the 107(a) order. At 4:00 a.m., methane readings 50 to 60 feet inby the man-door in Entry No. 6 were in the range of two point two percent to two point five percent.

Methane readings, at 6:30 a.m., were four percent in Entry No. 6. However, at approximately 7:30 to 8:00 a.m., testing by Hendrickson indicated four-tenths of a percent of methane in cross-cut 38; five-tenths of a percent in Entry No. 6 at cross-cut 41; and seven-tenths or eight-tenths of a percent in cross-cut 40 at the edge of the water near Entry No. 7, and nine-tenths of a percent at cross-cut 38 and Entry No. 8.

After methane levels were found in the explosive range at 2:30 a.m. three temporary stoppings or brattices were constructed to provide better ventilation, and were completed by approximately 6:00 a.m.

Although Johnson had been concerned earlier, at 2:30 a.m., about sparks from opening and closing the metal man-hole door and dragging the water pump, these activities ceased by

6:30 a.m. Further, although rocks falling from the roof were a possible concern, Johnson indicated that he checked the roof and rib; that he did not see bad roof in the area they were in; and that he did not see any problems with roof support. Moreover, by the time he vacated the section, the power was off.

I find that in issuing the imminent danger order at 8:40 a.m., Pruitt relied solely on Johnson's statements to him regarding conditions Although he was not told by Johnson the time and date these conditions were existent, Pruitt assumed, without further investigation, that they existed earlier that day in the mine, i.e., methane levels in the explosive range, and energized power center and electrical equipment. These conditions were existent at approximately 2:30 a.m., six hours before Pruitt issued his withdrawal order at 8:40 a.m. Pruitt did not investigate whether the conditions that constituted an imminent danger at 2:40 a.m., were still in existence at 8:40 a.m. Neither did he investigate whether the overall conditions in the North Mains had changed by 8:40 a.m., so that the danger of a methane explosion was no longer imminent. Had he made "a reasonable investigation" of the facts, he would have learnt that by 8:40 a.m., although a methane reading in Entry No.6 had been four percent at 6:30 a.m., temporary stoppings had been completed, and subsequent methane readings at approximately 7:30 a.m. to 8:00 a.m. indicated four tenths of a percent in cross-cut 38; five tenths of a percent in Entry No. 6 at cross-cut 41 and seven-tenths of a percent in cross-cut 40.

I, thus, conclude that the record does not contain sufficient evidence to establish that when the order was issued there was a reasonable potential of an explosion or ignition causing death or serious injury within a short period of time especially considering the fact that by that time electricity had been removed from a significant area.[5]

Accordingly, I find that it has not been established that when the 107(a) order was issued there existed an imminent danger. Therefore the notice of contest is sustained and the Order is Dismissed.

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[5]Five percent methane had been observed at approximately 11:00 a.m. and seven percent an hour later and at different times during the day there were readings at five percent. However, the existence of methane at these levels can not be related back in time to 8:50 a.m. when the inspector issued his order, inasmuch as these readings were caused by subsequent action by Drummond intentionally coursing methane from the rock fall and releasing it.

II. Order

It is **Ordered** that Drummond's Notice of Contest be sustained, and that Order No. 7395286 be **Dismissed**.

Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001

October 21, 2003

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. KENT 2003-103 A.C. No. 15-18317-03508
v.	:	
CARBON RIVER COAL CORPORATION, Respondent	:	Mine No. 8

DECISION

Appearances: Brian Dougherty, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, on behalf of Petitioner;
Billy R. Shelton, Esq., Jones, Walters, Turner & Shelton, PLLC, Lexington, Kentucky, on behalf of Respondent.

Before: Judge Zielinski

This case is before me on a Petition for Assessment of Civil Penalty filed by the Secretary of Labor against Carbon River Coal Corporation ("Carbon River"), pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petition alleges a single violation of a regulation requiring that operators of mobile equipment wear seatbelts, 30 C.F.R. § 77.403a(g). A civil penalty of $20,000.00 is proposed for the violation, which resulted in fatal injuries to a miner. For the reasons set forth below, I find that Carbon River violated the regulation, and impose a civil penalty of $5,000.00.

Findings of Fact - Conclusions of Law

The facts are largely undisputed. Carbon River's No. 8 Mine is a surface coal mine located near Carrie, Kentucky. On December 17, 2001, a miner was operating a small bulldozer clearing and leveling rocky ground for the placement of a dewatering pump. About 11:50 a.m., a coworker discovered that the bulldozer was lying on its side. The operator was pinned beneath the dozer's rollover protection device ("ROPS"), and exhibited no vital signs. It was later determined that the dozer had most likely encountered a large rock that caused it to overturn onto its side. The dozer was equipped with a functioning seat belt. However, the operator was not wearing the seatbelt and, as a result, was thrown from the seat and pinned beneath the ROPS when the dozer overturned.

Following an investigation by the Secretary's Mine Safety and Health Administration ("MSHA"), Lester Cox, Jr., an MSHA inspector with over 12 years of experience and over 17 years of previous mining experience, issued Citation No. 7530842, charging Respondent with a violation of 30 C.F.R. § 77.403a(g), which requires that: "Seat belts . . . shall be worn by the operator of mobile equipment required to be equipped with ROPS." The violation was designated significant and substantial, and the gravity was assessed as very serious because the violation resulted in a fatality. The operator's negligence was rated as "High." The Secretary proposed a specially assessed civil penalty of $20,000.00.

Respondent does not dispute that the regulation was violated, or that the violation was significant and substantial.[1] It contends that its negligence was no more than low, and that the civil penalty proposed by the Secretary is excessive.

Negligence

The parties agree that the operator of the bulldozer was highly negligent in failing to wear the seatbelt. However, the negligence of a rank-and-file miner cannot be imputed to the operator for purposes of penalty assessment. *Western Fuels-Utah, Inc.*, 10 FMSHRC 256, 260-61 (March 1988); *A. H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983); *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1464 (Aug. 1982). "[W]here a rank-and-file employee has violated the Act, *the operator's* supervision, training and disciplining of its employees must be examined to determine if *the operator* has taken reasonable steps to prevent the rank-and-file miner's violative conduct."[2] *Id.*

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[1] A violation is properly designated significant and substantial "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 Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

[2] The Secretary's regulations describing criteria for the assessment of proposed civil penalties define negligence, and assign penalty points for various levels of operator negligence. The pertinent regulation, 30 C.F.R. § 100.3(d), provides, in part:

> The negligence criterion gives appropriate consideration to the factors relating to an operator's failure to exercise a high degree of care to protect miners from safety or health hazards. When applying this criterion, MSHA considers actions taken by the operator to prevent or correct conditions or practices which caused or allowed the violation to exist. In determining the operator's diligence in protecting miners in any given hazard situation, due recognition is given to mitigating circumstances which explain the operator's conduct in minimizing or eliminating a hazardous condition. Mitigating circumstances may include, but are not limited to, actions which an operator has taken to prevent, correct, or limit exposure to mine hazards. . . .

The dozer operator was considered to be an experienced and careful equipment operator, and there is no evidence that he had failed to wear his seat belt on prior occasions. Tr. 60. Carbon River had a written policy requiring the use of seat belts, a copy of which had been given to the dozer operator. Tr. 24, 71, 80; ex. R-2. The topic of seat belt use was covered in annual refresher training, which included the use of two MSHA-produced video presentations on the subject. Tr. 64-5. That training also included coverage of MSHA-issued "fatalgrams," bulletins on fatal accidents, copies of which were distributed at the training, and occasionally posted on bulletin boards. Tr. 77. The dozer operator had undergone annual refresher training less than three months before the accident. Tr. 67; ex R-1. There were no conspicuously posted signs reminding miners of the seat belt policy. Tr. 22, 82. However, equipment operators were verbally instructed to wear seat belts. Tr. 28. Carbon River did not hold periodic formal safety meetings. Safety issues peculiar to the day's work were addressed as work assignments were made at the start of a shift.[3] Tr. 69, 78. Although there was no formal program of supervision to check whether seat belts were actually being used by equipment operators, supervisors would occasionally "walk up" on them and check whether they were wearing seat belts.[4] Tr. 75. If an equipment operator was found not using his seat belt, he was verbally directed to use it. Tr. 72, 82. Equipment operators have not been formally disciplined for failing to wear seat belts. Tr. 72. However, that option existed, depending upon the seriousness of the violation. Tr. 84. Carbon River had not previously been cited for a violation of the regulation requiring use of seat belts. Tr. 32.

In an enforcement proceeding under the Act, the Secretary has the burden of proving an alleged violation by a preponderance of the evidence. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd, Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998); *ASARCO Mining* Co., 15 FMSHRC 1303, 1307 (July 1993); *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989); *Jim Walter Resources, Inc.*, 9 FMSHRC 903, 907 (May 1987).

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[3] Cox was critical of the lack of weekly safety meetings, although they are not required by regulation. Tr. 25, 42, 46-7. He was aware of underground mines that conduct weekly safety meetings, but was unable to identify a surface mine that did so. Argus Brock, another MSHA inspector, testified that he knew of surface coal mining companies that hold monthly, not weekly, safety meetings. He also stated that five to ten minute daily sessions where supervisors discussed the upcoming day's work, pointing out safety considerations, could be called safety meetings. Tr. 100.

[4] Most of the mobile equipment used at Carbon River had an enclosed cab for the operator, such that seat belt use could not be easily determined. Tr. 74.

The Secretary argues that Carbon River's negligence was high because it failed to adequately communicate, supervise and enforce its seat belt policy.[5] Carbon River contends that it took significant steps to prevent the dozer operator from operating the equipment without using a seat belt, including installing and maintaining a fully functional seat belt on the dozer, distribution of a written policy requiring the use of seat belts, verbal reminders to use seat belts and highlighting of mandatory use of seat belts in annual refresher training that was given to the dozer operator less than three months before the accident.

While the posting of signs and periodic verbal reminders may have enhanced communication of the seat belt policy, the absence of such measures does not establish that Carbon River's seat belt policy was not effectively communicated to its employees. The miners interviewed by Cox uniformly were aware of the policy and had been told to wear seat belts. The topic was highlighted during annual refresher training and would have been emphasized in the posting of any fatalgram involving use of a seat belt. Significantly, on the facts of this case, the dozer operator was given his annual refresher training, which included emphasis on use of seat belts, less than three months prior to the accident that generated the citation. I find that Carbon River's seat belt policy was effectively communicated to its employees, in particular, the fatally injured dozer operator.

Cox concluded that the seat belt policy was not being properly enforced based upon statements of three miners and a foreman, to the effect that employees did not always wear seat belts. Tr. 43-44. His interpretation of those interview statements, however, is open to question. As to the foreman, it was based only on his agreement that the dozer operator had not been wearing his seat belt at the time of the accident. Tr. 40. The specific content of the other statements was not disclosed. Michael Fields, one of Carbon River's foremen, testified that equipment operators had, on occasion, been found not to be wearing seat belts. They were verbally instructed to do so, but were not formally disciplined. Tr. 72.

An on-the-spot verbal instruction or reprimand appears consistent with a reasonable progressive discipline system, in which more formal disciplinary action is reserved for repeat offenders or egregious violations. The Secretary contends, with some justification, that Carbon River had an unreasonably high threshold for formal discipline, i.e. "a knowing[] commit[ment] of an unwarranted failure to comply" with a safety rule. Ex. R-2. However, in the absence of evidence of violations of the company seat belt policy warranting more than a verbal directive, the fact that there had been no formal disciplinary actions for non-use of seat belts does not establish that Carbon River's enforcement of its policy was seriously deficient.[6] As noted above,

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[5] Cox's determination that Carbon River's negligence was high was based, primarily, on his conclusion that the seat belt policy was not being properly enforced and that regular safety meetings were not being held. Tr. 46-7.

[6] Fields testified that formal disciplinary actions might result in the loss of skilled operators, who were in short supply. Tr. 84. Such considerations would provide no justification

Respondent had not been cited for a violation of the seat belt regulation in previous MSHA inspections.

The essence of the Secretary's argument, and Cox's assessment, is that Carbon River's seat belt policy was frequently or regularly ignored by miners and supervisors, resulting in the fatal accident.[7] The evidence does not support such a finding. Considering all of the above factors, I find that Respondent's negligence was low.

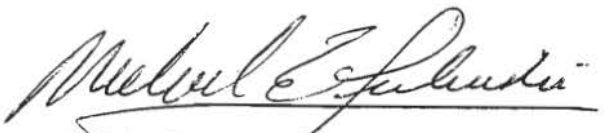
The Appropriate Civil Penalty

The parties stipulated that the Respondent is a medium-sized coal mine with a small controlling entity. It received 19 citations and orders over the course of 108 inspection days in 2001. Imposition of the proposed penalties would not threaten Respondent's ability to remain in business. Respondent demonstrated good faith in promptly abating the violation. The gravity and negligence assessments with respect to the violation are discussed above.

Citation No. 7530842 is affirmed as a significant and substantial violation. However, the operator's negligence was low. The Secretary proposed a civil penalty of $20,000.00 based upon a special assessment. Upon consideration of the factors itemized in section 110(I) of the Act, I impose a penalty of $5,000.00.

ORDER

Citation No. 7530842 is **AFFIRMED**, as modified, and Respondent is directed to pay a civil penalty of $5,000.00 within 45 days.



Michael E. Zielinski
Administrative Law Judge

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for pervasive ignorance of the seat belt policy by employees or supervisors.

[7] Cox testified that the sign-in sheet at the training session held to abate the violation stated that use of seat belts would "now" be company policy. Tr. 26-7. The Secretary argues that this statement indicates that Carbon River's written policy had not been adequately communicated, exercised or enforced prior to the accident. As noted above, however, the miners interviewed by Cox were aware of the policy and had been told to wear seat belts. I find that the language used on the sign-in sheet indicated a new emphasis on the seat belt policy.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, DC 20001
October 22, 2003

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. KENT 2003-107 A.C. No. 15-17651-03619
v.	:	
ROCKHOUSE ENERGY MINING COMPANY, Respondent	:	Mine No. 1

DECISION

Appearances: J. Phillip Giannikas, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, for Petitioner;
M. Shane Harvey, Esq., Massey Coal Services, Inc., Charleston, West Virginia, for Respondent.

Before: Judge Hodgdon

This case is before me on a Petition for Assessment of Civil Penalty brought by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against Rockhouse Energy Mining Company, pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petition alleges a violation of the Secretary's mandatory health and safety standards and seeks a penalty of $30,000.00. A hearing was held in Pikeville, Kentucky. For the reasons set forth below, I affirm the citation, as modified, and assess a penalty of $7,000.00.

Background

Rockhouse Energy operates Mine No. 1, an underground coal mine, in Pike County, Kentucky. Rockhouse is a wholly owned subsidiary of A. T. Massey Coal Company.

On March 22, 2002, foreman Keith L. Casey was fatally injured when his head was struck by the boom of a continuous mining machine that he was tramming through a cross-cut. After investigating the accident, MSHA Investigator Robert Bates issued Citation No. 7389525, alleging a violation of section 75.220(a)(1) of the Secretary's regulations, 30 C.F.R. § 75.220(a)(1), because:

> The safety precautions specified on pages six and fifteen of the approved roof control plan were not being followed while the remotely controlled continuous mining machine was being trammed in the last open crosscut of the 001 section. Page six of

> the plan requires that while the miner is being trammed from place to place, all persons will remain outby the boom of the machine. Page fifteen specifies that while the miner is in motion, no person will be positioned between the machine and the coal rib.
>
> On March 22, 2002, Keith L. Casey was fatally injured when he was caught between the tip end of the conveyor boom and the coal rib while he was tramming the miner in the last open crosscut of the 001 section. The position of the victim at the time of the accident indicates that he was located between the machine and the coal rib, which is a violation of the approved roof control plan.

(Govt. Ex. 4.) Section 220(a)(1) provides that: "Each mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to prevailing geological conditions, and the mining system to be used in the mine."

Findings of Fact and Conclusions of Law

MSHA's Report of Investigation found that the accident occurred as follows:

> On March 22, 2002, a 33 year old section foreman was fatally injured when he was caught between the conveyor or boom of a continuous mining machine and the coal rib. Keith L. Casey (victim) was using a remote control unit to back the machine across the last open crosscut of the 001 section when the accident occurred. According to the only eyewitness, the victim was kneeling behind the machine, on the right side, while backing it through the crosscut. As the machine came through the intersection of the No. 2 entry and the last open crosscut, it suddenly moved to the right and pinned him against the rib. The accident occurred primarily because the victim was located too close to the pinch point created by the boom of the machine and the coal rib.

(Govt. Ex. 3 at 2.)

The parties stipulated that "there were no operational or physical defects of the continuous miner that contributed to the accident." (Tr. 24.) Further the company did not contest at the hearing either the fact of violation or that the violation was "significant and substantial." (Tr. 29, 32-35, 122.) Accordingly, I conclude that the Respondent violated section 75.220(a)(1) as alleged and that the violation was "significant and substantial."

Civil Penalty Assessment

The Secretary has proposed a penalty of $30,000.00 for this violation. However, it is the judge's independent responsibility to determine the appropriate amount of penalty in accordance with the six penalty criteria set out in section 110(i) of the Act, 30 U.S.C. § 820(i). *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 483-84 (April 1996). Section 110(i) provides that:

> In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of the violation.

With regard to the penalty criteria, the parties have stipulated that the proposed penalty will not affect the company's ability to remain in business. (Tr. 24.) Therefore, I so find.

I find, as shown on the Proposed Data Assessment Sheet, that Mine No. 1 is a fairly large mine and that Massey is an extremely large coal company. (Govt. Ex. 1 at 1.) I further find, based on the Company's Assessed Violation History Report, the Proposed Data Assessment Sheet and the parties' stipulation, that Rockhouse has an average history of previous violations. (Tr. 26, Govt. Ex. 1 at 2, Govt. Ex. 3.) I also find that the gravity of the violation was very severe in that it resulted in the death of a miner.

Although the parties have stipulated that the Respondent demonstrated good faith in abating the violation, (Tr. 27), they do not agree whether Massey's development of a proximity device designed to prevent similar accidents is entitled to any credit under this criterion. The Secretary's position is that, while the development of such a device is commendable, it "should not be considered as [a] factor[] that can serve to reduce the amount of the assessed penalty by way of the "good faith" criterion." (Sec. Br. at 7.) On the other hand, the company argues that "[b]ecause of the very high levels of good faith exercised by Respondent . . . the penalty should be small." (Resp. Br. at 6.) I find that the Respondent has the better argument in this instance.

The Secretary argues that "demonstrated good faith . . . in attempting to achieve rapid compliance after notification of the violation" means "taking certain steps to correct a particular violation within a relatively short time period immediately following notification of a particular violation's existence." (Sec. Br. at 5.) Thus, if the steps to correct the violation are not taken "within a relatively short time period immediately following notification" of the violation, there can be no good faith credit. In part, the Secretary bases this interpretation on section 100.3(f) of the regulations, 30 C.F.R. § 100.3(f), which provides that an operator will receive "a 30%

reduction in penalty amount of a regular assessment where the operator abates the violation in the time set by the inspector."

While there do not appear to be any cases interpreting this specific criterion, I find the Secretary's argument to be too restrictive. In the first place, the penalty point formula in 30 C.F.R. § 100.3 is not binding on the Commission or its judges. *Sellersburg*, 736 F.2d at 1152. In the second place, the Act says nothing about abating the violation "in the time set by the inspector." In the third place, there are cases, such as this one, where there is nothing to correct. There were no defects in the continuous miner. Unlike a guarding violation, where a missing guard can be installed to abate the violation, or an accumulations violation, where the accumulations can be removed to abate the violation, there was no action of a similar nature for the operator to take to achieve rapid compliance.

Instead, the inspector required Rockhouse to give training sessions to all personnel who worked on sections using continuous mining machines "to raise awareness of the hazards that can exist when walking or working around continuous mining machines." (Tr. 57.) While the training sessions could not correct the particular violation, they would probably make it less likely that the same thing would happen again. Nonetheless, because these training sessions were all completed the same day as the violation, the Secretary asserts that this is the type of rapid compliance required under the Act.

In essence, the Secretary seems to be arguing that if you take an action to prevent a violation from reoccurring you are entitled to credit for good faith abatement if the action is taken within "a relatively short time period," but you are not entitled to credit if the action takes longer than a relatively short time period. Yet it appears that the Respondent's development of a proximity device is very likely to really prevent reoccurrences of the accident.

In an MSHA paper entitled "Remote Control Fatal Accident Analysis Report of Victim's Physical Location with Respect to the Mining Machine," April 26, 2002, an analysis of 18 remote control-related fatal accidents including the one in this case, the authors stated that:

> The high incidence of poor work practices in the fatal accidents also highlights the dangers associated with the psychological detachment from the machine and complacency that develops in the minds of the operators with the use of remote control technology. Because of these factors, *established work practices and training alone are not sufficient to prevent the type of accidents that have occurred.*

(Resp. Ex. C at 6.) (Emphasis added.) The paper concluded by stating that: "It is estimated that the use of proximity protection with machine shutdown could have been a preventative factor in 15 of the 18 fatal accidents . . . . The technology for personnel proximity protection currently exists and its development and use on remote controlled mining machinery needs to be pursued." (Resp. Ex. C at 6.)

The company began trying to design such a device as a result of this accident. According to Inspector Bates, testing of the device has gone well. (Tr. 89.) Although development of the device had not been completed at the time of the hearing, I conclude that the Respondent's undertaking of this task, specifically in response to this violation, is entitled to consideration under the "good faith" element of the penalty criteria.

The final factor to be considered is negligence. The inspector determined that Casey was "moderately" negligent because "he simply misjudged his location with respect to the moving machine. He simply made a mistake in judgment . . . ." (Tr. 55.) Normally, the negligence of a foreman is imputable to the operator in determining the amount of penalty. Here, the company argues that Casey's negligence should not be imputed to it based on the so-called *Nacco* defense. The Commission has summarized the imputation of negligence and the *Nacco* defense as follows:

> It is well established that the negligent actions of an operator's foremen, supervisors, and managers may be imputed to the operator in determining the amount of a civil penalty. *See, e.g., Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1463-64 (August 1982). In *Nacco Mining Co.*, 3 FMSHRC 848 (April 1981), the Commission recognized a narrow and limited exception to this principle. The Commission held that negligent misconduct of a supervisor will not be imputed to an operator if: (1) the operator has taken reasonable steps to avoid the particular class of accident involved in the violation; and (2) the supervisor's erring conduct was unforeseeable and exposed only himself to risk. 3 FMSHRC at 850. The Commission emphasized, however, that even a supervisory agent's unexpected, unpredictable misconduct may result in a negligence finding where his lack of care exposed others to risk or harm or the operator was otherwise blameworthy in hire, training, general safety procedures, or the accident or dangerous condition in question. 3 FMSHRC at 851.

Wilmot Mining Co., 9 FMSHRC 684, 687 (April 1987).

The Secretary asserts that the defense is not available in this proceeding because when Inspector Bates required additional "awareness" training to abate the violation, he "implicitly" found a deficiency in the operator's training plan which indicates that the training plan was inadequate. (Sec. Br. at 4-5.) This assertion is contrary to the evidence.

Inspector Bates testified that he required the training, not because he believed the miners needed additional training, but because it "is a standard course of action in cases of accidents and fatalities where issues of awareness and other human factors are involved." (Tr. 92.) He further stated that "[t]he company's training plans were in compliance to the best of my knowledge" and that all of the witnesses who were interviewed "indicated that they had received training

concerning what Massey calls the red zone, which is the area not to stand while the mining machine is in motion." (Tr. 92-3.)

In addition, the investigation report states that: "A review of the company's training records indicated that the victim had received task training on the operation of the remote control continuous mining machine. The victim had also received training regarding the approved roof control plan." (Govt. Ex. 3 at 8.) Finally, Frank Foster, Safety Coordinator for all of Massey Energy, testified extensively concerning Massey's safety training program, known as the "S-1 Safety Program," as well as the MSHA training received by Casey and other supervisors, Rockhouse's weekly safety meetings and the types of discipline administered for safety violations. (Tr. 107-10.)

No other evidence concerning the Respondent's training and general safety procedures was presented at the hearing. Consequently, I find that the company's training and general safety procedures were sufficient.

None of the other *Nacco* requirements were addressed in the Secretary's brief. Nevertheless, I find that the operator had taken reasonable steps to preclude the particular class of accident involved by having a specific prohibition against such conduct in its roof control plan and providing the training already discussed. I further find that Casey's conduct was not foreseeable. He was "well respected" as a foreman, (Tr. 110), and, as addressed above, he was properly trained. There is no evidence that he had performed in an unsafe manner in the past, took short cuts or otherwise did not perform properly. Furthermore, he exposed only himself to risk. Inspector Bates testified that the investigation indicated that no one else was in danger at the time of the accident and that there was no danger of the mining machine running by itself and putting miners in danger after Casey was struck and dropped the remote control box. (Tr. 61, 94-5.) Finally, I find that the company was not otherwise blameworthy in this accident.

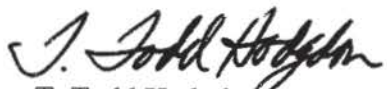
In *Nacco*, a "section foreman, while supervising two miners cutting a roof belt trench, proceeded alone past the last row of permanent supports under loose, unsupported roof, where a large rock fell on him" causing injuries from which he subsequently died. 3 FMSHRC at 848. The Commission held that: "Where as here, an operator has taken reasonable steps to avoid a particular class of accident and the erring supervisor unforeseeably exposes only himself to risk, it makes little enforcement sense to penalize the operator for 'negligence.' 3 FMSHRC at 850.

I can find no difference between the facts in this case and *Nacco*. Accordingly, I find that the Respondent was not negligent.

Taking all of these factors into consideration, I conclude that a penalty of $7,000.00 is appropriate.

Order

In view of the above, Citation No. 7389525 is **MODIFIED** by reducing the level of negligence from "moderate" to "none" and is **AFFIRMED** as modified. Rockhouse Energy Mining Company is **ORDERED TO PAY** a civil penalty of **$7,000.00** within 30 days of the date of this decision.



T. Todd Hodgdon
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W. Suite 9500
Washington, DC 20001-2021

October 27, 2003

DRUMMOND COMPANY, INC.,	:	CONTEST PROCEEDING
Contestant	:	
v.	:	Docket No. SE 2003-102-R
	:	Citation No. 7395287; 03/26/2003
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Shoal Creek Mine
Respondent	:	Mine ID: 01-02901

SUMMARY DECISION

Appearances: Timothy M. Biddle, Esq., Bridget E. Littlefield, Esq., Crowell & Moring, Washington, D.C., for the Contestant;
Thomas A. Grooms, Esq., U.S. Department of Labor, Nashville, Tennessee, for the Respondent.

Before: Judge Weisberger

Statement of the Case

In this Notice of Contest proceeding, Drummond Company, Inc., (Drummond) seeks to contest Citation No. 7395287 issued to it on March 26, 2003, which alleges that Drummond violated 30 C.F.R. Section 75.363(b). On June 27, 2003, Drummond filed a motion for summary decision. On September 23, 2003, the Secretary of Labor, (Secretary) filed a statement in opposition to Contestants motion for summary decision, and a cross motion for summary decision.

I. Findings of Fact

The parties' motions indicate that there is no genuine issue as to any material fact. Drummond operates the Shoal Creek Mine, an underground coal mine. During the night shift of March 24, 2003, in Entry No. 6 of the North Mains section, one miner's methane detector displayed two point zero percent methane, and another miner obtained a reading in excess of five point zero percent methane. One of the miners told Mike Sanders that he found six point five percent methane. Sanders then informed Scott Meadows, the de-watering coordinator at the mine, and a certified examiner, that there was an accumulation of gas at the mine and requested

that he come to the section.[1] Meadows arrived at the section, and his methane detector showed a reading of two point two, to two point five percent methane. He assumed that if he were to go further, the level of methane would increase. Meadows then took measures to ventilate the methane from the area.

Meadows filled out a on-shift examiners report dated March 24, 2003, and noted that at 5:30 a.m., in the location "NO. MAINS", there was a hazardous condition which he described as follows: "Excessive Levels of CH4" followed by the notation "2.2%". The comments section of the on-shift examiners report states that "During supplement exam for pump repairs in No. Mains return, *excessive levels of CH4 exceeding 2%* [w]ere detected[.] [P]ower was removed from North Mains and G-4 area. After further exams water was discovered blocking right return [at crosscut No. 39]. Management was notified[,] mine[ ] was evacuated and ventilation was restored around water to lower CH4. [Sic]. (Emphasis added.)

On March 26, 2003, Inspector Michael Pruitt issued Citation No. 7395287 which states as follows:

> The examiner failed to record the hazardous condition found on the North Mains. This record shall be kept in a book maintained for this purpose on the surface at the mine. The examiner found an excess [sic] of 5% percent methane. A 107(a) imminent danger order was issued and the mine was withdrawn. This condition was discovered at approximately 0410 and not recorded. The examiner at 0520 put in the book 2.5 percent of methane. [Sic]. This examiner stated that he never traveled to the face to check the methane, due to the high levels of CH4 methane and there was no air movement in this area. [Sic].

Citation No. 7395287 alleges a violation of 30 C.F.R. Section 75.363(b) which, as pertinent, provides as follows:

> A record shall be made of any hazardous condition found. This record shall be kept in a book maintained for this purpose on the surface at the mine. The record shall be made by completion of the shift on which the hazardous condition is found and shall include the nature and location of the hazardous condition and the corrective action taken.

II. Discussion

Section 75.363(b), supra, requires as pertinent, that 1) a report of "any hazardous

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[1] Initially, Sanders testified in his deposition that he did not remember whether he reported to Meadows the six point five percent reading that one of the miners had reported to him. Later on in the deposition he said that he thought it was accurate that he had told Meadows that six percent methane had been found at the face.

condition" found shall be recorded by the completion of the shift on which the condition was found, and 2) the report shall include "the nature" and location of the hazardous condition and the corrective action taken. The uncontroverted facts herein establish that a record was made by Meadows, a certified examiner, in the on-shift examiner's report of March 24, 2003, reporting excessive levels of methane at the location "NO. MAINS" followed by the notation "2.2%". Further, the comments section of this report state that in the North Mains return there was a detection of excessive levels of methane "exceeding two percent", and that the following corrective action was taken: power was removed from the North Mains, the mine was evacuated, and ventilation was restored to lower the methane. It thus would appear that Drummond fully complied with the dictates of Section 75.363(b), supra.

It is the position of the Secretary that Drummond did not comply with Section 75.363(b), supra, because Meadows did not report methane at five percent, which he had measured, and methane at six percent, which Sanders told him that he had found, both of which readings indicated methane levels in the explosive range. In this connection, the Secretary relies on the definition of the term "nature" as set forth Webster's Third New International Dictionary (1993 Edition) as ... 2b: "The distinguishing qualities or properties of something ... ." and 2a: "The essential character or constitution of something." The Secretary argues that, because Meadows reported only a level of two-point-two percent of methane, he did not convey to management the distinguishing quality, or property, or the essential character of the hazard which he found.

I find that the report by Meadows clearly complied with the plain meaning of the clear language of Section 363(b), supra, specifically, I find that his report of excessive levels of CH4 exceeding two percent, to clearly set forth the nature or distinguishing character of the hazard that he found, i.e., methane in excess of two percent, which, is clearly a hazardous condition, as this finding requires withdrawal of miners and the necessity of ventilation changes, (30 C.F.R. Section 75.323). There is not any requirement in Section 363(b), supra, on its face, to set forth each and every hazardous methane reading amount found. A report of methane that exceeded two percent clearly identifies the nature, or essential character of the hazard.

I thus find that based on the material facts that are not in issue, Drummond was in compliance with Section 363(b), supra. Accordingly, I find the citation was improperly issued, Drummond is entitled to summary decision as a matter of law.

Order

It is **Ordered** 1) that Drummond's motion for summary decision is **Granted**, 2) that the Secretary's cross motion for summary decision is **Denied**, and 3) the Notice of Contest herein shall be **Sustained**.

Avram Weisberger
Administrative Law Judge

Distribution: Certified Mail

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3577/FAX 303-844-5268

September 23, 2003

HAZEL OLSON,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEST 2002-302-D
	:	DENV CD 2001-01
	:	
v.	:	Mine I.D. 48-01355
	:	North Rochelle Mine
TRITON COAL COMPANY,	:	
Respondent	:	

ORDER REQUIRING THE SECRETARY OF LABOR TO PRODUCE DOCUMENTS FOR *IN CAMERA* REVIEW

Complainant, Hazel Olson, contends that she was discriminated against by Triton Coal Company ("Triton") in violation of section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c) ("Mine Act"). Olson asserts that Triton did not hire her because of her safety activities at another mine. Applicants for employment are protected from discrimination under section 105(c)(1) of the Mine Act.

Olson filed the discrimination complaint at issue in this case with the Department of Labor's Mine Safety and Health Administration ("MSHA") on December 15, 2000. MSHA investigated her complaint. When MSHA declined to file a discrimination complaint before the Commission on her behalf under section 105(c)(2) of the Mine Act, Olson filed her own discrimination complaint under section 105(c)(3) of the Mine Act. In order to prosecute her case, Olson used the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, to obtain documents from the file developed by MSHA during its investigation of her discrimination complaint. MSHA provided most but not all of the documents that Olson requested.

Olson filed a motion in this proceeding to compel production of the statements of interview of Scott Pribyl and Carrie Kienzel taken by either MSHA Special Investigator Lana Passarella or MSHA Supervisory Investigator Judy Peters.[1] Olson indicated that she needed these statements to prepare her case for trial. Olson also served a subpoena on Ms. Passarella. The subpoena directed Ms. Passarella to appear at a hearing that was previously scheduled in this case. In response, I issued an order to the Secretary requiring her to produce the subject statements of interview for my *in camera* review. In my order, I provided that if the Secretary

[1] Pribyl and Kienzel were employees of Manpower, Inc., a temporary employment agency, that was involved in hiring workers at Triton's North Rochelle Mine.

opposes Olson's motion to compel production, her response to my order should set forth her reasons and legal argument for her opposition.

The Secretary filed a response in which she objected to my order to compel production on several grounds and sought to have the subpoena quashed. As a consequence, I canceled the hearing in order to resolve this issue because Olson believes that the information she seeks is critical to her case.

I. SUMMARY OF THE ARGUMENT

A. Secretary of Labor

In the Secretary's response to my order to compel production, the Secretary maintains that the Federal Mine Safety and Health Review Commission ("Commission" or "FMSHRC") lacks jurisdiction over MSHA, the Department of Labor, and its employees in this matter. She states that the Commission is an "agency created under the Mine Act with certain defined and limited administrative and adjudicative powers." *Rushton Mining Co.*, 11 FMSHRC 759, 764 (May 1989). The present case is a discrimination proceeding brought by a private party under section 105(c)(3) of the Mine Act that does not involve MSHA or the Secretary. Consequently, the Commission, being a quasi-judicial agency, has no jurisdiction over the Department of Labor, MSHA, or its employees in this case. "To require the Secretary to submit to the jurisdiction of FMSHRC in 105(c)(3) cases is tantamount to directing the manner in which the Secretary chooses to enforce the Mine Act, and thus outside the scope of FMSHRC's statutory responsibilities and outside its Congressional grant of authority." (S. Response 6).

The Secretary next argues that the Commission lacks the authority to compel the production of documents from the Secretary through subpoena. Section 113(e) of the Mine Act authorizes Commission administrative law judges to issue subpoenas. The Secretary believes that the word "person" in that section does not include the Secretary. Consequently, the Commission does not have subpoena powers with respect to employees of the Department of Labor in proceedings in which the department is not a party.

The Secretary contends that the Commission lacks authority to compel the production of documents previously determined by the Department of Labor to be non-disclosable under FOIA. Olson filed a FOIA request in 2002 asking for everything in MSHA's investigation file regarding her discrimination complaint against Triton. The Secretary states that she supplied "over 200 pages of materials collected by MSHA" during its investigation. (S. Response 8). Some documents were withheld or redacted because disclosure of the protected information could (1) "reasonably be expected to divulge the identities of confidential sources;" (2) "reasonably be expected to constitute an unwarranted invasion of privacy;" or (3) reveal predecisional materials

and internal deliberations.[2] *Id.* The Secretary states that on July 26, 2002, she responded to Olson's FOIA request and advised Olson of her appeal rights. Olson failed to appeal the Secretary's FOIA determinations. The Secretary contends that FOIA is the sole vehicle for obtaining information in federal government files where the government is not a party to an action. Olson cannot forego her FOIA appeal rights before the Department of Labor and then attempt to use the Commission to obtain the requested documents. An agency's decision to withhold documents under FOIA "may be appealed only through FOIA channels." (S. Reply 10).

Next, the Secretary argues that the Privacy Act and the Department's system of records prohibit disclosure of the sought-after documents. She believes that the requested records are prohibited from disclosure by the Privacy Act and the disclosure does not fit within any exemptions established by the Department. The Department is not a party to the litigation and has no interest in the litigation sufficient to warrant the production of the records. The Secretary argues that the Commission is not a "court of competent jurisdiction" having the authority to issue a subpoena to the Secretary that would allow disclosure under 5 U.S.C. § 552a(b)(11) of the Privacy Act.[3]

Finally, the Secretary argues that by virtue of the Department's regulations at 29 C.F.R. Part 2, Subpart C, the Commission lacks the authority to compel the production of documents of departmental employees in matters in which the department is not a party. The Department's Deputy Solicitor for Regional Operations has, through directives, the authority to determine the conditions under which subpoenas shall be complied with. He determined that the Department will not comply with Olson's subpoena of MSHA Special Investigator Passarella. Departmental employees are bound by the Deputy Solicitor's instructions. Although the Deputy Solicitor's decision is reviewable, such review may only be had in a U.S. District Court. The Secretary submits that "neither FMSHRC nor its administrative law judges may compel the production of documents, or compel the testimony of departmental employees, in response to an administrative subpoena in a case in which the Department is not a party." (S. Response 19).

B. Hazel Olson

In response, Olson states she is asking that "Ms. Passarella provide testimony concerning specific witness statements that Ms. Passarella took during her investigation of my claim against Triton Coal Company." (Olson letter 1). She states that "[b]ecause there seem to be

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[2] In order to protect the identities of those who were interviewed by the MSHA Special Investigators, the Secretary declined to disclose whether Scott Pribyl or Carrie Kienzel were actually interviewed during MSHA's investigation. For purposes of this order, I assume that such interviews occurred.

[3] In making this argument, the Secretary cites a statement of Eva Kletterman, OMB Privacy Act Advisor, Office of Management and Budget, dated March 18, 2003.

discrepancies between the witness statements now and the statements made subsequent to the initial investigation, this testimony is critical to my case." *Id.* Olson maintains that the cases cited and arguments made by the Secretary do not apply in this instance. First, many of the cases cited by the Secretary concern subpoenas filed against a federal agency by state agencies and courts. Federal courts clearly have the authority to order a nonparty agency to comply with a subpoena "if the government has refused production in any arbitrary, capricious, or otherwise unlawful manner." *Id.* (citation omitted).

Olson maintains that a second difference between the cases cited by the Secretary and her case concerns the fact the she is "seeking witness statements themselves that Ms. Passarella took as part of her official business." (Olson Letter 1-2). Olson maintains that this important testimony cannot be replicated and there is no other way to determine what witnesses actually said during MSHA's initial investigation. These statements are necessary so that the administrative law judge can determine whether these witnesses "have changed what they said regarding my job application since Ms. Passarella interviewed them." *Id.* at 2. Olson believes that Mr. Pribyl and Ms. Kienzel "are retracting the statements that they gave." *Id.* Courts look to see if the documents requested under the subpoena are otherwise available. In this instance, "[t]here is no other way to discover what these witnesses said when Ms. Passarella first conducted her investigation, other than to talk to her and see her documents." *Id.*

Olson argues that the only complicating factor in this case is that a subpoena was issued by the Commission rather than a federal court. She contends that the Commission has compelled the production of witness statements using a balancing test and that application of a balancing test in this instance will show that her interests outweigh the interests of the Secretary in protecting the interview statements. The work product rule and the informant's privilege should yield to her need for the interviews. Olson believes that it is important to keep in mind that the statements were made during the initial stages of MSHA's investigation. Olson asserts that these two individuals have "first-hand knowledge of what the supervisor said after she saw my job application." *Id.* at 4. Because these witnesses made the statements to Ms. Passarella shortly after the incident that prompted the MSHA investigation, Olson states that she has a substantial need for them, especially since Olson believes that their statements about the events have changed over time. Consequently, Olson believes that the "witness statements that Ms. Passarella took when she conducted the MSHA investigation into my discrimination complaint should be produced." *Id.*

II. ANALYSIS OF THE ISSUES

Under section 105(c)(2) of the Mine Act, the Secretary was required to investigate the discrimination complaint filed by Ms. Olson. If the Secretary determined that she was discriminated against, the Secretary must file a complaint with the Commission alleging such discrimination and propose an order granting appropriate relief. In this instance, the Secretary determined that Olson was not discriminated against and so notified Olson by letter dated August 29, 2001. Olson filed her discrimination complaint with the Commission under section 105(c)(3)

of the Mine Act.

Neither the Department of Labor nor employees of the Department of Labor are parties in this case. Under section 113(e) of the Mine Act, however, an administrative law judge has broad authority to compel the testimony of witnesses and the production of documents. 30 U.S.C. § 823(e). This provision states, in part:

> In connection with hearings before the Commission or its administrative law judges under this Act, the Commission and its administrative law judges may compel the attendance and testimony of witnesses and the production of books, papers, or documents, or objects and order testimony to be taken by deposition at any stage of the proceedings before them. Any person may be compelled to appear and depose and produce similar documentary or physical evidence, in the same manner as witnesses may be compelled to appear and produce.

In the first sentence of this provision, Commission judges are granted the authority to compel the testimony of witnesses at a hearing or by deposition. Commission judges are also authorized to compel the production of books, papers, documents, or objects. In the second sentence, Commission judges are authorized to compel "[a]ny person" to testify at a hearing or at a deposition. In addition, "[a]ny person" may be compelled to "produce similar documentary or physical evidence, in the same manner as witnesses. . . ."

The Commission's rule implementing this provision provides that the "Commission and its judges are authorized to issue subpoenas, on their own motion or on the oral or written application of a party, requiring the attendance of witnesses and the production of documents or physical evidence." 29 C.F.R. § 2700.60(a). Nothing in Mine Act or the Commission's rules limits a judge's subpoena power to witnesses who are called to testify by a party or to individuals who are employed by a party. The subpoena power applies to any witness and to any person.

Section 113(e) of the Mine Act goes on to state:

> In case of contumacy, failure, or refusal of any person to obey a subpoena or order of the Commission or an administrative law judge . . . to appear, to testify, or to produce documentary or physical evidence, any district court of the United States . . . within the jurisdiction of which such person is found, or resides, or transacts business, shall, upon application of the Commission or the administrative law judge . . .have jurisdiction to issue to such person an order requiring such person to appear, to testify, or to produce evidence as ordered by the commission or administrative law judge.

This provision grants the U.S. District Court the authority to enforce Commission subpoenas.

The Secretary argues that these broadly written provisions do not apply to her. First, she argues that neither the Secretary nor employees of the Department of Labor are persons, as that term is defined in the Mine Act. Section 3 of the Mine Act defines the term "person" to mean "any individual, partnership, association, corporation, firm, subsidiary of a corporation, or other organization. 30 U.S.C. § 802. The Commission has held that the term "person" does not include the Secretary of Labor or MSHA in the context of section 105(c) of the Mine Act. *Wagner v. Pittston Coal Group*, 12 FMSHRC 1178, 1184 (June 1990), *aff'd*, 947 F.2d 943 (table), 1991 WL 224257 (4th Cir. 1991). Two Courts of Appeal have reached the same conclusion. *Wagner v. Secretary of Labor*, 947 F.2d 943 (table), 1991 WL 224257 (4th Cir. 1991); *Meredith v. FMSHRC*, 177 F.3d 1042, 1052-54 (D.C. Cir. 1999). These decisions hold that, given the structure of section 105(c), MSHA employees cannot be "persons" subject to discrimination actions under that provision. These decisions did not hold, however, that the word "person" can never include the Secretary and her employees. Indeed, the court in *Meredith* specifically rejected this approach. 177 F.3d 1053-04 & n.11. That court limited its analysis to situations in which a discrimination complaint is brought against an employee of MSHA and its holding cannot be broadly applied to section 113(e) of the Mine Act. I find that I have jurisdiction to issue a subpoena to the Secretary in this case to require her to produce the requested documents. Enforcement of the subpoena would be through the U.S. District Court.

Under section 113(e) of the Mine Act, a Commission judge is specifically authorized to compel the production of documents. This authority is not tied to witnesses or persons. Nothing in section 113(e) indicates that the Commission's authority does not apply to official documents in the custody of the Department of Labor. The cases and arguments supplied by the Secretary concern situations in which a private party is seeking to obtain information from a Federal agency in a proceeding totally unrelated to the agency's mission. The moving party is seeking to use the government as a free source of information or expertise in a state court proceeding or other unrelated proceeding. For example in *Davis Enterprises v. U.S. E.P.A.*, 877 F.2d 1181 (3rd Cir. 1989), the EPA produced documents requested by a party in a state court proceeding but refused to allow its employees to testify in that proceeding. Among other reasons, the EPA stated that the "cumulative effect of allowing such testimony would constitute a drain on EPA resources . . . and such testimony was not in the EPA's interest." *Id.* at 1186. The court held that the EPA's position was not arbitrary or capricious.

Although the Secretary is not a party in this case, she is inexorably tied to the events leading up to this case. Ms. Olson was required by the Mine Act to file her discrimination complaint with the Secretary. The Secretary, acting through MSHA, investigated the complaint by interviewing potential witnesses and gathering information. When the Secretary determined that section 105(c) was not violated, Olson filed a complaint on her own behalf before the Commission. The documents sought by Olson in this case are a portion of the information gathered by the Secretary during her investigation of Ms. Olson's complaint. The Secretary is not a stranger to this proceeding and she is not disinterested in the outcome of this case.

It is clear that Congress intended the Secretary to rigorously enforce section 105(c) of the Mine Act. (S. Rep. No. 181, 95th Cong., 1st Sess. 36 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 624 (1978)). It is also clear that the Secretary, like all human institutions, is not infallible. Although the Secretary has determined that Triton did not violate the anti-discrimination provisions of section 105(c), the Secretary should want to see justice done and should not deliberately obstruct Ms. Olson's ability to pursue her case on her own behalf. If I find that Triton violated section 105(c), the Secretary will initiate a civil penalty case against the company to collect a civil penalty. Rather than remaining neutral, however, the Secretary has chosen to purposely impede Olson's ability to prosecute her case. As stated above, Ms. Olson believes that the information she has requested is crucial to her case. It is not clear whether Ms. Olson will be able to establish her case without the requested information.

The Secretary's position with respect to the document request is unnecessarily obstructive and callous. The Secretary's attitude seems to be that if MSHA did not find a violation of the Mine Act then such a violation did not occur. She treats this case as though it is totally unrelated to her mission under the Mine Act. Nothing could be further from the truth. The Commission and its judges have found violations of section 105(c) in many instances in which MSHA determined that a violation did not occur. The Secretary appears to have no regard for the needs of this potential discriminatee and is content to impede her ability to establish a violation of section 105(c). Unlike the EPA in *Davis Enterprises*, the Secretary is not only refusing to allow one of its employees to testify in a Commission proceeding, she is refusing to provide the two requested documents.

The Secretary's argument that Olson's only avenue to obtain the two documents is through FOIA is rejected. Commission administrative law judges have independent authority to require the production of documents in cases before them. The Secretary's Privacy Act arguments are rejected as irrelevant in the context of this case. As stated above, the Secretary, while not a party, is intimately involved in this case. The interview statements were given to the Secretary's investigators by Mr. Pribyl and Ms. Kienzel with the knowledge that the information provided could be used in a case against Triton on Ms. Olson's behalf. That the Secretary determined that she will not pursue this case does not change that fact or raise any special privileges. The information is being sought by the very same complainant on whose behalf the Secretary conducted her investigation.

In my initial order, I required the Secretary to provide the requested documents for my *in camera* review so that I could analyze them for two purposes: (1) to determine if the statements contain the information that Ms. Olson believes is present; and (2) if so, to determine whether the information sought should be withheld because it is protected by a privilege. I did not order the Secretary to provide the documents to Ms. Olson. In spite of these protections, the Secretary unreasonably refused to comply with my order. I hold that the Secretary's refusal to provide a

copy of the statements is arbitrary, capricious, and an abuse of her discretion [4]

III. ORDER

For good cause shown as discussed above, the Secretary of Labor is **ORDERED TO PRODUCE** for my *in camera* review on or before **October 16, 2003** any interview transcripts or statements of interview taken of Scott Pribyl and Carrie Kienzel during MSHA's investigation of the discrimination complaint filed by Hazel Olson.

If the Secretary refuses to comply with this order to produce documents, I will certify this order for interlocutory review by the Commission under 29 C.F.R. § 2700.76. Enforcement of this order to compel production can only be obtained in the U.S. District Court. Prior to such enforcement, the Commission should have the opportunity to address the issues raised herein.

Richard W. Manning
Administrative Law Judge

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RWM

[4] I am not requiring the Secretary to produce Ms. Passarella for testimony at this time. If the requested documents do not contain the information that Olson contends that they do, then that issue will be moot. If the documents support Olson's position, then Ms. Passarella's testimony may be necessary.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001

October 2, 2003

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. RICKY BRYSON, Employed by ELK RUN COAL COMPANY, Respondent	: : : : : : : : : :	CIVIL PENALTY PROCEEDING Docket No. WEVA 2003-173 A.C. No. 46-08402-03562 A Black Knight II
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. CLIFFORD MASSIE, Employed by ELK RUN COAL COMPANY, Respondent	: : : : : : : : : :	CIVIL PENALTY PROCEEDING Docket No. WEVA 2003-174 A.C. No. 46-08402-03564 A Black Knight II
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. GARY LILLY, Employed by ELK RUN COAL COMPANY, Respondent	: : : : : : : : : :	CIVIL PENALTY PROCEEDING Docket No. WEVA 2003-178 A.C. No. 46-08402-03563 A Black Knight II

ORDER DENYING MOTION TO EXCLUDE WITNESS

On September 25, 2003, Petitioner filed a motion to exclude the testimony of Mr. Gary Hartsog at the hearing now scheduled for October 21, 2003. On September 26, 2003, I convened a telephone conference to hear arguments from both sides on this motion.

From the arguments of counsel it is clear to me that the Petitioner seeks to exclude the testimony of Mr. Hartsog as a sanction for alleged discovery irregularities by the Respondents.

The alleged irregularities fall in the general class of failure to respond completely to written interrogatories intended to elicit information on an expert witness. Because of normal delays in the discovery process, answers to written interrogatories were not exchanged until 30 days before the scheduled hearing and two weeks before the scheduled depositions. According to counsel, the expected testimony of the Respondents' expert will focus on a diagram of roof bolt placement. The diagram was not furnished with the answers to written interrogatories. Respondents' answers to written interrogatories identified in a very general way the material the expert is expected to rely upon in offering an opinion but did not identify any document in which the expert's opinion and the reasons for that opinion were set forth.

Inquiry of Respondents' counsel as to the expert opinion to be obtained from Mr. Hartsog produced only vague generalizations. Whether Mr. Hartsog will be able to provide expert testimony consistent with the *Daubert* requirements is not clear. Counsel for Respondents has agreed to provide additional material to Petitioner's counsel on an expedited schedule to assist her in preparing for the depositions. I note that the Federal Rules of Civil Procedure, Rule 26(a)(2)(C) provide that names of experts as witnesses shall be disclosed no less than 90 days before the hearing date unless the court orders otherwise. In this instance, no court order on timing of discovery was entered.

Discovery is intended to assist the parties and the Judge in assembling a record adequate and appropriate for reaching a reasoned decision. I believe for me to exclude now the testimony of Mr. Hartsog from the hearing as a sanction for discovery irregularities described above would not serve the intended purpose of discovery. The Petitioner's motion is denied without prejudice to a renewal of the motion at the hearing in light of the actual experienced difficulties in conducting a deposition under the circumstances.

Irwin Schroeder
Administrative Law Judge

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October 29, 2003

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 2003-222 A.C. No. 46-01438-03501 VVJ
v.	:	
HLC TRUCKING COMPANY, INC., Respondent	:	Ireland River Loading Facility

ORDER GRANTING MOTION TO AMEND PLEADINGS

This case is before me on a Petition for Assessment of Civil penalty filed by the Secretary of Labor ("the Secretary") pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 ("the Act"), 30 U.S.C. § 815(d). On September 23, 2002, an inspector of the Mine Safety and Health Administration ("MSHA") issued Citation No. 7119595 to HLC Trucking Company ("HLC") at its Ireland River Loading Facility in Marshall County, West Virginia. The citation alleges a violation of section 77.1607(p) of the Secretary's safety regulations respecting operation of loading and haulage equipment, requiring that " Dippers, buckets, scraper blades, and similar movable parts shall be secured or lowered to the ground when not in use." 30 U.S.C. § 77.1607(p). The "condition or practice" is described in the citation as follows:

> A[n] independent contractor mechanic was observed standing between the rear tandem tires of a Mack tandem dump truck (Ohio License PUV 7596) and leaning over the truck frame while the trucks dump bed was in the raised position. The truck bed was not blocked or secured against motion. The contract mechanic was removed from under the raised bed immediately and instructed [that] the bed had to be secured against motion before work could resume under the raised bed. The 104(a) citation is being issued in conjunction with Imminent Danger Order No. 7119594.

On July 7, 2003, the Secretary filed a petition to assess a $450.00 penalty for the violation. HLC filed an Answer on July 25, 2003. A hearing is scheduled for November 18, 2003, in Wheeling, West Virginia.

The Secretary has filed a motion for leave to amend Citation No. 7119595 to allege a violation of a different safety regulation. Respondent opposes the motion or, alternatively, seeks additional time to conduct discovery respecting the new allegation. For the reasons set forth below, the motion is granted.

The Secretary proposes to change the regulation alleged to have been violated to section 77.405(b), respecting performance of work from a raised position. It requires that "No work shall be performed under machinery or equipment that has been raised until such machinery or equipment has been securely blocked in position." The Secretary asserts that the proposed modification does not alter the substance of the alleged violation and that, therefore, there is no prejudice to Respondent.

Although there is no provision in the Commission's Rules for amending citations, the Commission has held that modification of a citation or order is analogous to amendment of pleadings under Federal Rule of Civil Procedure 15(a).[1] *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1289 (August 1992); *Cyprus Empire Corp.*, 12 FMSHRC 911 (May 1990). The Commission has required a liberal application of Rule 15(a) explaining that:

> In Federal civil proceedings, leave for amendment "shall be freely given when justice so requires." Fed . R. Civ. P. 15(a). The weight of authority under Rule 15(a) is that amendments are to be liberally granted unless the moving party has been guilty of bad faith, has acted for the purpose of delay, or where the trial of the issue will be unduly delayed. *See* 3 J. Moore, R. Freer, *Moore's Federal Practice*, Par. 15.08[2], 15-47 to 15-49 (2d ed. 1991) . . . . And, as explained in *Cyprus Empire*, legally recognizable prejudice to the operator would bar otherwise permissible modification.

Wyoming Fuel, 14 FMSHRC at 1290.

Guided by Rule 15(b), the Commission has also recognized that a citation may be modified even *after* a hearing, where the parties have, in fact, litigated an unpled claim:

> The result is in accord with Rule 15(b) of the Federal Rules of Civil Procedure, which provides for conformance of pleadings to the evidence adduced at trial, and permits the adjudication of issues actually litigated by the parties irrespective of pleading deficiencies.

Faith Coal Company, 19 FMSHRC 1357, 1362 (August 1997); *see Berwind Natural Resources Corp.*, 21 FMSHRC 1284, 1323, at n. 41 (December 1999).

There is no evidence that the Secretary is acting in bad faith or seeking amendment for the purpose of delay. Respondent's contest of the citation appears to be focused on challenging

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[1]The Commission's Procedural Rules provide that on questions of procedure not regulated by the Act, the Commission's Rules, or the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, the Commission and its Judges shall be guided by the Federal Rules of Civil Procedure so far as "practicable." 29 C.F.R. § 2700.1(b).

the inspector's observations, which remain unchanged, rather than the underlying safety standard allegedly violated. It follows that, because the standards at issue are very similar in nature, Respondent's evidence should be applicable to either. In any case, since the hearing is not scheduled until November 18th, Respondent has ample opportunity to further develop its defense.

Accordingly, the Secretary of Labor's Motion to Amend Pleadings is **GRANTED** and it is ordered that Citation No. 7119595 is **MODIFIED** to allege a violation of 30 C.F.R. § 77.405(b). Respondent may conduct additional discovery, as it deems necessary.

Jacqueline R. Bulluck
Administrative Law Judge
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
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October 30, 2003

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2003-165-M
Petitioner	:	A.C. No. 34-01348-05529
	:	
v.	:	Docket No. CENT 2003-166-M
	:	A.C. No. 34-01348-05530
ALLIED CUSTOM GYPSUM,	:	
Respondent	:	Docket No. CENT 2003-193-M
	:	A.C. No. 34-01348-05531
	:	
	:	Mine: Bessie Plant

ORDER DENYING MOTION TO DISMISS FOR LACK OF JURISDICTION

Before me for consideration is a Motion for Summary Decision filed by Allied Custom Gypsum ("Allied") asserting that its Bessie Plant ("the Plant"), a gypsum salt processing facility, is not subject to the jurisdiction of the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq. (1994) ("Mine Act or "Act") because it is an off-site facility that is not located where the raw materials are extracted.[1] Allied's motion primarily is based on its assertion that an Interagency Agreement between the Mine Safety and Health Administration (MSHA) and the Occupational Health and Safety Administration (OSHA), 44 Fed. Reg. 22827 (April 17, 1979), provides MSHA with jurisdiction of salt processing facilities **only if** such facilities are located on mine property. *Allied Mot.* at p.5. The Secretary opposes Allied's motion. For the reasons discussed, Allied's motion shall be denied.

Allied's Bessie facility is a gypsum plant located in Bessie, Oklahoma. Gypsum is a salt. Specifically, gypsum is the sulfate salt of calcium. *Id.* The Plant obtains its gypsum from Allied's Bouse Junction Mine located approximately seventy miles away. *Id.*

[1] Allied also filed for summary decision with respect to 15 of the 34 citations in issue in these proceedings. Allied's motion for summary decision concerning these citations was denied during a telephone conference as these citations, in the absence of relevant stipulations agreed to by both parties, present genuine issues of material fact.

The gypsum is transported to the Plant by truck and conveyed through a series of hoppers and conveyors until it reaches the milling area.[2] At the milling area, the Plant utilizes a Raymond roller mill to crush and grind the gypsum until it is sized to meet the specifications provided by a particular customer. *Sec'y Mot.* at pp.2-3.

During the crushing and grinding process, heat is also applied to the gypsum to remove moisture. The heat is either applied by a burner, or it is generated by the Raymond mill. The heating process utilized is determined by the degree of moisture in the gypsum. *Id.*

After the gypsum is sized and dried, it is moved by another series of conveyors and hoppers to the bagging area where it is prepared for distribution to customers. Allied's customers include Fleischman's Yeast, Anheuser-Busch, Sara Lee, Earthgrain Bakeries, Innovative Cereal and Archer Daniels Midland. *Id.*

A. **Whether the Bessie Plant Engages in "Milling"**

In support of its motion, Allied argues that the processing at its Bessie Plant "is best characterized as a salt distribution facility" rather than a gypsum milling operation because the sizing and drying performed does not separate non-ore waste material from the extracted mineral.[3] *Allied Mot.* at p.4. Allied relies solely on Appendix A of the Interagency Agreement wherein the term "milling" is described as:

> . . . the art of treating the crude crust of the earth to produce therefrom the primary consumer derivatives. The essential operation in all such processes is separation of one or more valuable desired constituents of the crude from the undesired contaminants with which it is associated.

44 Fed. Reg at 22829.

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[2] The information concerning the processing and sales activities at the Bessie facility was provided in the Secretary's Cross-Motion for Summary Decision. *Sec'y Mot.* at pp.2-3. The information was obtained from the August 12, 2003, deposition testimony of Randall Gene Wenninger, the Bessie Plant Manager. Allied has concurred with Wenninger's deposition testimony regarding the processes that occur at Bessie. *Resp. Reply* at p.1. Consequently, there are no issues of material fact with respect to the Plant's activities.

[3] This proposition was advanced in Allied's Motion for Summary Decision filed on August 21, 2003. Allied did not continue to rely on its "separation of desirable from undesirable constituents from the earth's crude crust theory" in its subsequent October 14, 2003, Reply to the Secretary's September 23, 2003, Cross Motion for Summary Decision. Instead, Allied asserted, ". . . regardless of the processes utilized at the Bessie Facility . . . ," the Secretary's Interagency Agreement limits MSHA jurisdiction only to salt processing facilities located **on** mine property. *Allied Reply* at p.3.

Section 4 of the Mine Act provides that "[e]ach coal or other mine" shall be subject to its statutory provisions. 30 U.S.C. § 803. Section 3(h)(1) of the Mine Act defines a "coal or other mine" to include "facilities . . . used in . . . the milling of . . . minerals." 30 U.S.C. § 802(h)(1). Although the term milling is not defined in the Mine Act, in section 3(h)(1), Congress expressly delegated the authority to the Secretary to determine what constitutes milling. The Secretary's interpretation of milling is entitled to deference if it is reasonable. *Energy W. Mining Co. v. FMSHRC*, 40 F3d 457, 460 (D.C. Cir. 1994); *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843-44 (1984).

To further delineate MSHA jurisdiction, in 1979 the Secretary formulated an Interagency Agreement between MSHA and OSHA that incorporated the guiding principle that the elimination of ". . . unsafe and unhealthful working conditions on mine sites and in milling operations. . . ." will be accomplished through application of the Mine Act's provisions. 44 Fed. Reg at 22827. The Secretary identified the processing activities constituting milling that gives rise to Mine Act jurisdiction. *Id.* at 22829, 22830. Sizing and drying are among the activities identified by the Secretary as "milling."

The Secretary's Promulgation of the Interagency Agreement in furtherance of the legislative authority delegated to her in section 3(h)(1) establishes reasonable parameters for milling and may not be disturbed by this Commisson. *See Watkins Engineers & Construtors*, 24 FMSHRC 669, 673 (July 2002) *citing United States v. Mead Corp.*, 533 U.S. 218, 226-27, 229 (2001) (Congress delegates to an agency the authority to speak with the force of law when it authorizes the agency to clarify ambiguities in a statute). In this regard, the Commission has noted that the list of "general definitions of the milling processes for which MSHA has authority to regulate" provided in Appendix A of the Interagency Agreement ". . . are commonly associated with the concept of milling and fall squarely within the Secretary's interpretation of that term." *Id.* at 673-74, 675; *see also* 44 Fed. Reg. at 22829. As the Commission noted, the ordinary meaning of "to mill" is "to crush or grind (ore) in a mill," and "a mill" is defined as "a machine for crushing . . . ." *Id.* at 674 *citing Webster's Third New Int'l Dictionary* (*Unabridged*) 1434 (1993). The Raymond roller mill at the Bessie Plant crushes, grinds and dries the gypsum. *Sec'y Mot.* at pp.2-3.

Moreover, the Commission has expressly rejected the assertion that ". . . [non-mineral] separation was critical to a determination that 'milling' took place," because neither the statutory language nor the legislative history imposes such a technical definition of milling on the Secretary. *Watkins,* 24 FMSHRC at 675. In this regard, the legislative history reflects jurisdictional doubts should be resolved in favor of inclusion under the Mine Act. *Id.* at 675-76 (citations omitted). Accordingly, the Secretary's interpretation of the term "milling" is entitled to deference because the interpretation is consistent with the general usage of the term in the mining industry, consistent with the legislative intent for jurisdictional inclusion, as well as consistent with the statutory mandate delegated to the Secretary in section 3(h)(1) of the Mine Act.

B. **Whether Off-Site Salt Milling Facilities Are Subject to Mine Act Jurisdiction**

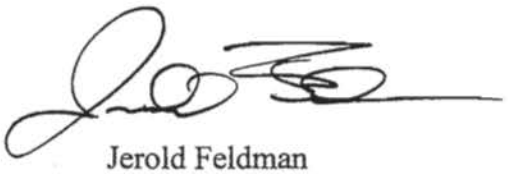
Section B(6)(a) of the Interagency Agreement provides that "MSHA jurisdiction *includes* salt processing facilities on mine property." (Emphasis added). 44 Fed. Reg. at 22828. Section B(6)(b) of the Agreement provides that "OSHA jurisdiction . . . *includes salt . . . distribution terminals* not located on mine property, and milling operations associated with gypsum board plants not located on mine property." *Id.* (Emphasis added).

Allied views the declaration in section B(6)(a) of the Interagency Agreement that MSHA jurisdiction includes salt processing facilities **on** mine property as exclusive rather than illustrative. Thus, Allied argues the Interagency Agreement must be interpreted as reflecting that the converse is true, *i.e.*, that salt processing facilities located **off** mine property are not subject to MSHA jurisdiction. *Allied Reply* at p.3.

Allied's view of the Interagency Agreement fails for several reasons. As a threshold matter, as discussed above, Congress expressly delegated to the Secretary the authority to determine the nature and location of the activities that constitute the milling of minerals that give rise to Mine Act jurisdiction under section 3(h)(1). Second, Allied's proffered interpretation rings hollow in that Allied has stipulated that "MSHA has been inspecting the Bessie facility for more than ten years." *Allied Mot.* at p.2. Third, Allied's interpretation is contrary to the plain meaning of Section B(6)(b) that excludes only salt distribution terminals, and, milling operations associated with gypsum board plants, that are not located on mine property. Since Congress intended that doubts concerning Mine Act jurisdiction should be resolved in favor of inclusion, the Secretary's expressed exclusion of only milling associated with off-site gypsum board plants and salt distribution terminals rather than all off-site gypsum milling is consistent with MSHA's jurisdictional claim over the Bessie Plant. *Watkins,* 24 FMSHRC at 675-76. Finally, and most significantly, the Commission has expressly rejected the assertion that stand-alone milling operations are not mines subject to MSHA's Part 48 training requirements simply because the milling facilities are not part of surface or underground mines. *Alcoa Alumina & Chemicals, L.L.C.*, 23 FMSHRC 911,916 (September 2001).

Accordingly, the Secretary's application of section 3(h)(1) to include the sizing and drying processes at the Bessie gypsum plant under the penumbra of 'facilities used in the milling of minerals' as contemplated by the Mine Act is reasonable, consistent with Congressional intent, and consistent with the Secretary's history of dispatching MSHA inspectors to the Bessie facility during the prior ten year period. Finally, MSHA's exercise of jurisdiction over the Bessie facility, which is neither solely a salt distribution terminal nor a gypsum board processing plant, is consistent with the terms of the Secretary's Interagency Agreement. Accordingly, the Bessie Plant is a milling operation subject to Mine Act jurisdiction. Consequently, Allied's Motion for Summary decision on the jurisdictional issue **IS DENIED**.

Although these matters had been scheduled for a hearing on September 16, 2003, in the vicinity of Oklahoma City, Oklahoma, further proceedings were stayed on August 21, 2003, pending a decision on Allied's Motion for Summary Decision. Having denied Allied's motion, **IT IS ORDERED** that the parties initiate, **within 14 days of the date of this Order,** a telephone conference with the undersigned to lift the stay and discuss a mutually satisfactory hearing date.



Jerold Feldman
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