November 1982

Commission Decisions

Administrative Law Judge Decisions

Commission Decisions

NOVEMBER

The following case was Directed for Review during the month of November:

Secretary of Labor, MSHA v. Thompson Brothers Coal Company, Docket No. PENN 81-171. (Judge Broderick, September 23, 1982)

Review was Denied in the following cases during the month of November:

Secretary of Labor v. FMC Corporation, Docket Nos. WEST 81-131-RM, WEST 81-234-M, WEST 80-380-M. (Judge Morris, October 7, 1982)

Secretary of Labor v. Bill Garris, Docket No. LAKE 82-90. (Judge Moore, Interlocutory Review of October 14, 1982 Order)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 30, 1982

WILLIAM A. HARO	:	
	:	Docket Nos. WEST 79-49-DM
v.	:	WEST 80-116-DM
	:	
MAGMA COPPER COMPANY	:	

DECISION

This discrimination case involves a number of alleged violations of section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1976 & Supp. IV 1980). For the reasons that follow, we affirm the administrative law judge's decision in part, and reverse and remand in part. 1/

At the time of the events in this case, the complainant, William Haro, was a journeyman mechanic at Magma Copper Company's underground copper mine in San Manuel, Arizona. Haro asserted below that Magma took discriminatory actions against him in three separate incidents because of his exercise of rights protected by the Mine Act. The first alleged act of discrimination was Haro's transfer in June 1978 from the swing shift to the day shift. The transfer occurred after Haro had refused to remove a railroad car from a production train unless he received assistance and had protested an order to tie a tail light on another railroad car. In the second incident, Haro received a written warning for refusing to change a grease line. In the final incident, Magma required Haro to attend safety training and transferred him to a different job after he was involved in an accident while servicing an airslusher in November 1978. 2/

The administrative law judge concluded that Haro's refusal to cut the railroad car from the train was a protected work refusal and that Magma discriminated against Haro by transferring him after this incident.

1/ The judge's decision is reported at 3 FMSHRC 2421 (October 1981)(ALJ).

2/ Two complaints of discrimination filed by Haro are consolidated in this case. The first, Docket No. WEST 79-49-DM, involves the grease line and airslusher incidents; the second, Docket No. WEST 80-116-DM, involves the railroad car incident. In addition to these complaints, Haro filed with the Commission two others, which were dismissed after hearings before an administrative law judge. Haro v. Magma Copper Co., 4 FMSHRC 1350 (July 1982)(ALJ), and Haro v. Magma Copper Co., WEST 81-365-DM (November 1, 1982)(ALJ). In the former case, the judge concluded that Haro failed to prove that a five day suspension and reprimand were motivated in any part by protected activity. In the latter, the judge concluded that Haro had not proved that his termination by Magma on February 12, 1981, was motivated in any part by protected activity.

3 FMSHRC at 2424-25. He determined, however, that Haro's protest over tying a tail light on a railroad car did not involve protected activity. 3 FMSHRC at 2424. The judge held that Haro's refusal to change the grease line was a protected work refusal, and concluded that Magma's issuance of a written warning to Haro violated the Mine Act. 3 FMSHRC at 2425-27. Concerning the airslusher incident, the judge concluded that Haro did not prove that he had engaged in protected activity, and dismissed Haro's complaint as to this incident. 3 FMSHRC at 2427-28. The judge awarded Haro back pay of $3,500 for the time from his transfer after the railroad car incident to the date of the hearing, and additional backpay in an unspecified amount from the hearing until Haro's termination by Magma. 3 FMSHRC at 2430. The judge also ordered that Haro's employment record be expunged of all references to his refusal to change the grease line. 3 FMSHRC at 2427. 3/

Magma raises several issues on review: First, that the judge erred in disregarding its evidence of a legitimate business reason for transferring Haro after the railroad car incident; second, that the judge erred in finding that Haro had a reasonable, good faith belief in a hazard when he refused to change the grease line; and third, that the judge erred in calculating back pay. Finally, although Magma prevailed on the issue of discrimination in the airslusher incident, it objects to the judge's finding that Haro was not responsible for the airslusher accident. Haro did not file a petition for review.

We reverse the judge's finding of a violation regarding the railroad car incident, and remand for further findings of fact and conclusions of law. We affirm his holding that Magma violated section 105(c)(1) of the Mine Act in connection with the grease line incident. While we will not review the merits of the airslusher incident because Haro did not petition for review, we do disapprove the judge's dicta concerning responsibility for the accident.

Analytical Framework

We first established the general principles for analyzing discrimination cases under the Mine Act in Sec. ex rel. Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981), and Sec. ex rel. Robinette v. United Castle Coal Co., 3 FMSHRC 803 (April 1981). In these cases we held that a complainant, in order to establish a prima facie case of discrimination, bears a burden of production and persuasion to show (1) that he engaged in protected activity and (2) that the adverse action was motivated in any part

3/ The judge declined to order Haro's reinstatement because Haro's termination was the subject of a discrimination complaint in WEST 81-365-DM then pending before a different administrative law judge, and he did not wish to "intrude into the issues raised in that case." 3 FMSHRC at 2429. (As noted above (n. 2), the judge in that case determined that Haro's termination was in no part motivated by protected activity, and dismissed his complaint.)

by the protected activity. Pasula, 2 FMSHRC at 2799-2800; Robinette, 3 FMSHRC at 817-18. 4/ In order to rebut a prima facie case, an operator must show either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. Robinette, 3 FMSHRC at 817-18 & n. 20. If an operator cannot rebut the prima facie case in this manner, it may nevertheless defend by proving that (1) it was also motivated by the miner's unprotected activities, and (2) that it would have taken the adverse action in any event for the unprotected activities alone. Pasula, 2 FMSHRC at 2799-2800. The operator bears an intermediate burden of production and persuasion with regard to these elements of defense. Robinette, 3 FMSHRC at 818 n. 20. This further line of defense applies only in "mixed motive" cases, i.e., cases where the adverse action is motivated by both protected and unprotected activity. We made clear in Robinette that the ultimate burden of persuasion does not shift from the complainant in either kind of case. 3 FMSHRC at 818 n. 20. The foregoing Pasula-Robinette test is based in part on the Supreme Court's articulation of similar principles in Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 285-87 (1977).

In Sec. ex rel. Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508 (November 1981), pet. for review filed, No. 81-2300 (D.C. Cir. December 11, 1981), we affirmed our Pasula-Robinette test, and 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.
>
> 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 judgment our

4/ As we have recently held, illegal discrimination may also occur in the absence of protected activity where the adverse action is motivated by a suspicion or belief that protected activity has occurred. Moses v. Whitley Development Corp., 4 FMSHRC 1475, 1480 (August 1982). The analysis of such cases closely follows the analytic framework described here. Id.

> 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).

3 FMSHRC at 2516-17. Thus, we first approved restrained analysis of an operator's proffered business justification to determine whether it amounts to a pretext. 5/ 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.

The Secretary misunderstands our holding. He asserts that the formulation of the operator's defense quoted above allows an employer to meet its burden merely by putting forward "any facially plausible reason, other than protected activity, for the adverse action." Br. at 7. To the contrary, the reference in Chacon to a "limited" and "restrained" examination of an operator's business justification defense does not mean that such defenses should be examined superficially or be approved automatically once offered. Rather, we intend that a judge, in carefully analyzing such defenses, should not substitute his business judgment 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 (June 1982)(emphasis added). 6/

5/ See, e.g., Moses v. Whitley, 4 FMSHRC at 1481-82, in which we concluded that evidence of a "business justification" based on poor performance was so weak as to make the defense virtually pretextual.

6/ In Bradley v. Belva, we also mentioned some of the ways in which an operator may attempt to establish that it was motivated by the asserted business reason: "Ordinarily, an operator can attempt to demonstrate this by showing, for example, past discipline consistent with that meted out to the alleged discriminatee, the miner's unsatisfactory past work record, prior warnings to the miner, or personnel rules or practices forbidding the conduct in question." 4 FMSHRC at 993.

Having restated the principles that govern this case, we now apply them to the facts before us. 7/

The Alleged Incidents of Discrimination

The "Bad Order" Railroad Car

On June 13, 1978, Haro was asked by a dispatcher to cut out a bad order ("B.O") car on a production train. 8/ "Bad order" means in unsafe condition. Haro, relying on a company memorandum, refused to remove the car without assistance. After speaking with the dispatcher, Haro reported to Stonehouse, the shaft foreman and his immediate on-site supervisor. Tr. 62. Haro then called Torres, a supervisor from Haro's

7/ This case provides an appropriate occasion for noting recent developments in an analogous body of discrimination law developed by the National Labor Relations Board. That agency also took its lead from Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, supra, and established a discrimination case analysis similar to the one we adopted in Pasula and Robinette. Wright Line, a Div. of Wright Line Inc. 251 NLRB 1083, 1086-89 (1980), enf'd sub nom. NLRB v. Wright Line, a Div. of Wright Line Inc., 662 F.2d 899 (1st Cir. 1981), cert. denied, 102 S. Ct. 1612 (1982). A number of Circuit Courts of Appeals have approved the NLRB's Wright Line approach in its entirety. See, for example, Zurn Indus. Inc. v. NLRB, 680 F.2d 683, 686-93 (9th Cir. 1982); NLRB v. Fixtures Mfg. Corp., 669 F.2d 547, 550 & n. 4 (8th Cir. 1982). The First Circuit, in its decision enforcing the NLRB's Wright Line decision, substantially agreed with the NLRB's test, but disagreed on two points: The Court held that a burden of production, but not persuasion, shifts to the employer after a prima facie case is established, and that the employer's burden to produce such evidence "in no way resembles a true affirmative defense." 662 F.2d at 901-07 & n. 9. The First Circuit noted that the Supreme Court announced a similar scheme for allocating burdens of proof in Title VII cases in Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981). On November 15, 1982, the Supreme Court granted certiorari in a case involving Wright Line issues to resolve the conflict in the Circuits regarding the Wright Line test, and perhaps to resolve the apparent tension between Mt. Healthy, supra, and Burdine, supra. NLRB v. Transporation Management Corp., 674 F.2d 130 (1st Cir. 1982), cert. granted, 51 U.S.L.W. 3373 (U.S. November 16, 1982)(No. 82-168).

For the present, we will adhere to the allocation of burdens of proof announced in Pasula and Robinette in Mine Act discrimination cases.

8/ At the time of these events, Haro was a dump mechanic working on the swing shift with no supervisors from the mechanical department, which was his own division. Tr. 59, 131, 291. A dump mechanic is one who handles mechanical problems in the dumps (spill pockets, shafts and sumps), and does other assigned tasks. Tr. 59, 68, 131, 292.

department at Torres' home, and Stonehouse listened on an extension phone. Tr. 62, 92-93, 111, 268. Torres agreed that Haro should not cut the car alone. Tr. 92-93, 111. Haro did not discuss the events with Cothern, the shift boss, and Stonehouse's supervisor. Tr. 66, 316. Torres testified that Haro was acting according to instructions when he called him at home. Tr. 93. He stated that if dump mechanics cannot work out problems with the shaft foreman and shift boss, they are to call him, or his supervisor, Navarro. Id. Navarro also testified that mechanics are to call if they have problems, but are encouraged to try to work out problems with those on the spot. Tr. 132.

The day after the B.O. incident, Haro was directed to tie a tail light onto a railroad car that did not have a special bracket for a light. Haro protested, stating that it was against company policy to tie lights on cars and that a car with brackets should be moved to the end of the train. Haro did, however, attach the light. The judge found that it was company policy to tie on a light if so ordered and to log this for a supervisor's benefit. 3 FMSHRC at 2423.

Shortly after these incidents Haro was removed as a dump mechanic on the swing shift and assigned to work in shafts and dumps on the day shift, when he would be supervised by a foreman from his own department. Haro earned less on the day shift than he had on the swing shift. Tr. 21, 317-18.

In his decision, the judge found Haro's refusal to cut the B.O. car was based on a reasonable, good faith belief in a hazard, and, therefore, that the refusal was protected activity under section 105(c) of the Mine Act. 3 FMSHRC at 2424. The judge found no protected activity in Haro's protest concerning tail lights because he was "unable to see that Haro's perception of a safety hazard was a reasonable one." Id. (Haro did not petition for review of the judge's finding of no protected activity in this incident, and, in any event, the evidence supports the judge's finding.) The judge determined that Haro's transfer to a different shift was motivated in part by the protected activity in the B.O. car incident. He stated that the tied-on lights may also have motivated the operator, but concluded:

> [Magma] has failed to meet its burden of persuasion that Haro's action in tying on the light under protest would have itself warranted the adverse action. I, therefore, conclude that Magma's transfer of Haro to another shift and position constituted discriminatory conduct in violation of the Act.

3 FMSHRC at 2425 (emphasis added).

Magma admits that Haro's refusal to cut the B.O. car was protected activity (Br. at 13), and conceded below that the B.O. car and tail light incidents "were factors 'in some part' in the determination to transfer" Haro. Post-hearing Supp. br. at 3. Thus, Magma concedes a prima facie case as to the B.O. car incident. Magma, however, contends that it successfully defended against that prima facie case by showing it would have transferred Haro in any event for legitimate reasons alone.

Br. at 12-14; Post-hearing Supp. br. at 4, 7. In this regard, Magma does not rely on the tail light incident as a defense (as the judge implied). Rather the operator argues that it legitimately transferred Haro because he was "duplicitous and dissembling" and needed more supervision, which was available on the day shift from supervisors in his own department. Br. at 4-5; Post-hearing Supp. br. at 6-7. In addition, Magma contends that Haro broke the "chain of command" by calling a supervisor off the scene and became involved in a conflict with the supervisor who was at the mine. Br. at 2-5. At the hearing below, Magma presented this business justification for transferring Haro, and it asserts that its presentation satisfied its defensive burden. Magma further contends that the judge's failure to rule on this claimed legitimate business reason for transferring Haro violates the standards for decision in the Administrative Procedure Act.

Magma has not appealed the judge's findings that Haro engaged in protected activity in the B.O. car incident and that his transfer was motivated in part by that protected activity. There is no argument as to whether Haro proved a prima facie case. The precise question before us is whether Magma successfully defended against Haro's prima facie case by showing it would have transferred Haro anyway.

Magma's arguments that the judge ignored its defense are well founded. As we have stated:

> The APA and our rule require findings of fact, conclusions of law, and supporting reasons in order to prevent arbitrary decisions and to permit meaningful review. ... Without findings of fact and some justification for the conclusions reached by the judge, we cannot perform that function effectively.

The Anaconda Co., 3 FMSHRC 299, 299-300 (February 1981). The judge's decision did not address Magma's defense and thus has made review impossible. For example, the judge did not mention Haro's call to a supervisor off the property; therefore, he did not discuss Magma's argument that Haro was transferred for breaking the "chain of command" at the mine. Nor did he address the operator's evidence of a conflict with the supervisor on the scene as a result of Haro's call off the property. The judge appears to have believed that Magma's defense was based on the tail light incident, a "defense" Magma did not raise. Accordingly, we remand the case for further findings of fact and conclusions of law on the evidence relevant to Magma's defense.

Because we agree that Haro proved a prima facie case, the judge need only analyze whether Magma proved that it would have transferred Haro anyway for legitimate business reasons, regardless of his protected refusal to cut the B.O. car. We express no view on the merits of this issue.

Before turning to the next incident of alleged discrimination, we must address the judge's award of back pay stemming from the B.O. car incident. The judge found that, after his transfer, Haro's pay was reduced by a shift differential and an extra day's pay every three weeks. He awarded $3,500 and an additional unspecified amount of back

pay for the period after the hearing and up to Haro's termination by Magma. If the judge upholds Magma's defense on remand, his award cannot stand. If the judge determines that Haro's transfer violated section 105(c), we conclude that he must reconsider the question of the appropriate amount of back pay.

Magma argues that the judge erred in awarding compensation up to the time of the hearing because Haro requested a transfer in October 1978, and was transferred November 2, 1978. 9/ The company asserts that its obligation for back pay, if any, should be tolled as of the time that Haro voluntarily sought a transfer. Magma also argues that the judge's award of back pay was based on unreliable calculations. Finally, Magma contends that the judge failed to explain how he arrived at his figures, and, therefore, a remand is necessary for detailed findings.

The judge's award was based on Haro's estimate at the hearing that he had lost between $3,500 and $3,700. 3 FMSHRC at 2430. The judge noted that Haro's testimony was unrefuted, and commented on the "lack of more specific documentation." Id. Further, the judge also granted Haro an unspecified amount of "back pay plus interest since the hearing of this case, until the date of [Haro's] termination by [Magma]." 3 FMSHRC at 2430. The date of Haro's discharge, February 12, 1981, is a matter of public record. Haro v. Magma Copper Co., Docket No. WEST 81-365-DM (November 1, 1982) (ALJ). We recognize that "unrealistic exactitude" or "mathematical certainty" is not required in ascertaining the award due to a victim of discrimination. See Kaplan v. International Alliance of Theatrical and Stage Employees, 525 F.2d 1354, 1362-63 (9th Cir. 1975)(Award in Title VII cases); NLRB v. Carpenters Union, Local 180, 433 F.2d 934, 935 (9th Cir. 1970)(Award in NLRA cases). Nonetheless, more precision is required than the judge provided in this case. We also recognize that although Magma had the opportunity to present evidence to the judge at the hearing on the correct amount of the award, it did not do so. However, it appears from the record that the judge did not indicate how he was going to proceed on back pay, and the operator may not have anticipated that an award would be included in the decision. Thus, in the interest of fairness, if Haro prevails on his claim, the judge should solicit the information necessary to make further findings on the relief due to Haro and should address Magma's various arguments on the appropriate amount of back pay. See Moses v. Whitley, 4 FMSHRC at 483-84.

The Grease line Incident

Approximately three months after the events discussed above, on September 25, 1978, Haro was instructed to change a grease line near a

9/ Haro admits requesting a transfer in September 1978, but claims the request was made because of continuing harassment. Haro further asserts that his transfer in November (after the airslusher accident discussed below) was not related to his request.

shaft in a loading pocket. Before changing the grease line, Haro made several requests: He asked that a skip be spotted in front of the loading chute; that men working on the surface be removed from the top of the shaft; and that a worker be assigned to assist him. Haro testified that he wanted the skip for protection in the event of a fall, and that men on the surface sometimes caused debris to fall down the shaft, which could result in rock falls. Haro's requests were not granted, and he did not change the grease line. On October 2, 1978, Haro received a written warning for failing to change the grease line.

We note initially that the judge's discussion of this incident fulfills the requirements of the APA and our rules. The judge found that Haro's refusal to repair the grease line was a protected work refusal, and that the written warning Haro received over the incident constituted discriminatory action. 3 FMSHRC at 2427. Because the warning was admittedly issued for not changing the line, the only question is whether Haro met the requirements for a protected work refusal--that is, whether he had a good faith, reasonable belief in a hazardous condition. Robinette, 3 FMSHRC at 812. If Haro's work refusal meets this test, then the warning he received was issued in violation of section 105(c).

Magma raises three arguments: First, that Haro was not motivated by a concern for safety but by a desire for "a punctilious adherence to what he felt the work rules were" (Br. at 19); second, that Haro failed to communicate his safety concerns at the time of his work refusal; and, third, that it was safe to change the grease line without having a skip in the area and without a partner.

In our view, Haro was motivated not only by a good faith concern for safety, but also communicated that concern at the time. Haro's testimony, corroborated by that of another witness, indicates that he made several specific requests to the lead man at the time of the grease line incident: He requested that a skip be spotted, that persons be cleared from the shaft area, and that he be assigned a partner. In their testimony, Haro and the corroborating witness explained that the skip was to prevent falling (Tr. 27, 170-71), and that men should be removed from above to prevent discarded objects from causing rocks to fall down the shaft. Tr. 30, 171. A third witness testified that mechanics often spot a skip where it would stop their fall (Tr. 206), that workers should be cleared to avoid debris falling down the shaft and ricocheting off its side (Tr. 217), and that a partner "observes in case of a malfunction or fall." Tr. 210-11. We are satisfied from this testimony that Haro's requests were made in good faith and that their focus was safety. Magma also attacks the judge's crediting of Haro's testimony on the grease line incident, but nothing presented on review persuades us to take the unusual step of overturning the judge's credibility resolution.

We also affirm the judge's conclusion that Haro's belief in a hazard was a reasonable one. Magma argues that, from an objective standpoint, it was safe to change the line without the safety measures Haro requested. We have expressly rejected a requirement that miners

who have refused to work must objectively prove that hazards existed. Robinette, 3 FMSHRC at 811-12. Rather, we adopted "a simple requirement that the miner's honest perception be a reasonable one under the circumstances." 3 FMSHRC at 812. Magma has only demonstrated that perhaps reasonable minds could differ as to the validity of Haro's safety beliefs. As the judge correctly stated, "The issue is not whether the work could be done without a ski[p], but it is whether Haro's action in not repairing the grease line was reasonable and in good faith." 3 FMSHRC at 2426. He found that it was, and the testimony outlined above supports his conclusion.

In sum, Haro articulated a safety concern and had a reasonable basis for refusing to work. Magma's warning to Haro over this exercise of protected activity therefore violated section 105(c)(1) of the Mine Act. Accordingly, we affirm the judge on this issue.

The Airslusher Incident

On November 1, 1978, Haro and another miner were assigned to service an airslusher in a spill pocket. In the course of their work, Haro turned on the air to the machine and an accident occurred resulting in injury to his partner. Haro received a letter dated November 2, 1978, which identified him as the cause of the accident and required him to attend two days of safety training. He suffered no loss of pay for attending the safety training. Haro was also transferred to a position on the surface.

The judge opined that Haro was not responsible for the injury to his partner, and that the company's actions toward Haro "appear unjustified." 3 FMSHRC at 2428. The judge, however, found no protected activity and dismissed the complaint as to this allegation of discrimination. He concluded:

> Haro did not make any safety complaint or exercise any other right afforded him under the Act. The actions taken against Haro because of Magma's erroneous belief that Haro was responsible for the incident, therefore, cannot be deemed to be in violation of the Act. Although such action may have been improper, redress of the damages suffered by Haro as a consequence thereof is not within the authority of the Commission.

Id.

Although it prevailed on this incident, Magma argues that the judge erroneously found that Haro was not responsible for the accident. Haro did not seek review in this case, and we need not address the merits of the judge's dismissal of this aspect of Haro's complaint. We wish to note, however, that once the judge found that Haro had not engaged in protected activity and thus had not proved a prima facie case, any speculation as to the cause of the accident and the "fairness" of Magma's discipline was irrelevant.

For the foregoing reasons, we affirm the judge's decision regarding the grease line incident and his order expunging all references to the matter from Haro's employment record. While affirming the judge's dismissal of the discrimination complaint concerning the airslusher incident, we disapprove his dicta on the cause of the accident. We reverse and remand for further findings of fact and conclusions of law on the railroad car incident and, if necessary, for determination of what award is due to Haro. The judge's present award of back pay with respect to this incident is vacated. 10/

Rosemary M. Collyer, Chairman

Richard W. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

10/ Commissioner Nelson assumed office after this case had been considered at a Commission decisional meeting and took no part in the decision of the case. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary and is not required for the Commission to take official action. The other Commissioners voted on the disposition of the case prior to Commissioner Nelson's assumption of office. Accordingly, in the interest of efficient decision-making, Commissioner Nelson elects not to participate in this case.

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Administrative Law Judge Decisions

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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NOV 1 1982

WILLIAM A. HARO, Complainant, v. MAGMA COPPER COMPANY, Respondent.	COMPLAINT OF DISCHARGE, DISCRIMINATION OR INTERFERENCE DOCKET NO. WEST 81-365-DM MSHA CASE NO. MD 81-70 MINE: San Manuel

DECISION AND ORDER

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For the Respondent

Before: Judge Jon D. Boltz

STATEMENT OF THE CASE

Complainant, William A. Haro, alleges in his complaint filed pursuant to provisions of the Federal Mine Safety and Health Act of 1977, (hereinafter the "Act") that respondent, Magma Copper Company, terminated Haro's employment with respondent on February 12, 1981, in violation of section 105(c)(1) of the Act.[1/] Haro alleges that he was terminated for reasons other than misconduct, namely, because of his participation in proceedings before the Federal Mine Safety and Health Review Commission.

1/ Section 105(c)(1) reads in pertinent part "No person shall discharge or ... discriminate against ... any miner ... because such miner ... has filed or made a complaint under or related to this Act, including a complaint notifying the operator ... of an alleged danger or safety or health violation in a ... mine ..."

Respondent denies the allegations and alleges that Haro's termination was based on his "refusal to follow the directives of management; insubordination."

From conflicting testimony I find the facts to be as follows:

Respondent operates a mine, mill, smelter, refinery, a rod plant, metallurgical facilities, and maintenance facilities for all the maintenance work near the town of San Manuel, Arizona. Since 1974, the claimant, William A. Haro, had been a mechanic employed by the Respondent. In the past Haro had filed three complaints with the Mine Safety and Health Administration alleging discrimination. These complaints had been filed on July 3, 1978, January 4, 1979, and September 10, 1979. Haro had also filed approximately 20 to 30 grievances in 1979.

On February 10, 1981, Haro's supervisor, Rueben Roberts, instructed Haro to assist two electricians who were going to be working on the overhead crane in the car shop. Haro told Roberts at about 9:30 a.m., that the electricians were going to try to move the overhead crane from the middle of the shop to one end of it and that Haro had called for the use of a Grove crane. Roberts decided the overhead crane should be moved by other persons so the Grove crane and operator were not needed.

After lunch on the same day, February 10, 1981, Roberts wanted to have a crane operator move some cars and sought out Sledge, the supervisor who had access to a crane. When Roberts approached Sledge, Sledge was on his way to correct what he considered to be an unsafe practice by his employee, Clifford Kelly, in the way he was moving a suspended load while operating the Grove crane. On a previous occasion, June 12, 1980, Sledge had observed Kelly and Haro moving a load with a crane and had verbally reprimanded Kelly for moving the load without the load being physically restrained to keep the load from swaying. Sledge's instructions were that suspended loads must be physically restrained by a tag chain, rope that is hand held, or the object itself must be hand held. However, Roberts had told his employees, including Haro, that in moving a suspended load, they could either restrain the load or guard it. In the instant case Haro was walking along with the suspended load (a work platform) while it was in transit.

Sledge asked Roberts to walk with him in following the Grove crane. When the crane had parked and the work platform that was being transported was on the ground, Sledge went to Kelly, the crane operator, and told him the load being transported had not been physically restrained as required. Kelly stated that the load had been physically restrained. Sledge then walked over to where Haro and his supervisor, Roberts, were standing and asked Haro if the load had been physically restrained. Haro responded with words to the effect of "are you asking me a direct question?" When Sledge

said that he was asking a direct question, Haro stated that if Sledge wanted an answer, he could ask Haro's boss, Roberts, to ask the question. Sledge then asked Roberts to repeat Sledge's question to Haro and after Roberts did so, Haro responded to the effect that "I have no comment at this time." This response upset Sledge, and he angrily left the area.

Haro commented to Roberts that Sledge was not as big a supervisor as he thought he was, and that Haro was going to file a grievance against Sledge. After Roberts returned to his regular duties, Haro came to Roberts and said that he wanted to invoke section 6.1.H of the collective bargaining agreement. That section provides:

> "In a grievance arising out of complaints of unsafe working conditions, the employee may request the immediate supervisor in his department to make arrangements to relieve the grievance man to handle the grievance with the immediate supervisor. This shall not be construed as permitting any employee to interfere with the employees job assignment."

When Roberts went to obtain a grievance man, the assistant mine superintendent told Roberts to return to Haro and find out what type of grievance Haro wanted to file and what kind of unsafe working conditions Haro wanted to file it against.

When Roberts again contacted Haro, Roberts was informed by Haro that he wanted to file a grievance regarding the procedures on moving materials with the Grove crane. Roberts suggested that since no imminent danger existed, the appropriate time to file the grievance asking for clarification would be at the start of the shift, at lunch time, or at the end of the shift. Haro disagreed and stated that he would not file a grievance if Roberts would get Sledge from his department and have him come over to talk to Haro. Roberts declined and then went to look for a grievance man.

Sledge contacted his supervisor, Bud Vogt, the section foreman of the mechanical division, in order to find out if it would be proper to suspend Kelly for a safety infraction and Haro for insubordination. Vogt conferred with the general foreman, Lino Gonzales. The mine superintendent, Bob Zerga was then contacted and after some discussion, Zerga decided to have a meeting of those persons in his office in regard to the conduct of Haro. After the information was discussed in Zerga's office, he telephoned Tom Hearon, the assistant general manager, for advice because Zerga knew there already was "litigation outstanding involving Mr. Haro" and that Zerga had been accused of being prejudiced against Haro. Fifteen to twenty minutes later Bob Skiba, manager of personnel services, called Zerga recommending that Haro be suspended pending investigation of the charges against him.

Although it was unusual to have higher levels of management involved in the discharge of a miner for insubordination, Zerga "pushed it there" because the miner involved was Haro.

At approximately 3:00 p.m. on February 10, 1981, in the presence of Haro and his grievance man, a suspension hearing was conducted by Tim Acton, the assistant mine superintendent. Lorenzo Chavez, the senior personnel administrator was also present. Haro was given a suspension notice stating that he was suspended until 8:00 a.m., February 11, 1981, pending investigation of poor performance of duties and insubordination. The grievance man for Haro asked Acton who Haro was allegedly insubordinate to. Acton replied that the insubordination was with respect to Sledge and Roberts. Haro said that the suspension notice did not conform to the collective bargaining agreement, that the notice contained no explanation, and that it was unsigned. Roberts signed the notice, and it was given to Haro. Haro put the suspension notice on the desk and stated that he had not been given a full reason and explanation in writing and was going back to work. He also stated that Roberts had trumped up this action and that it was different than "what had happened an hour ago". Haro was informed that unless he accompanied the guards and left with them, Chavez would call "law enforcement". Haro voluntarily left the premises.

At approximately 4:00 p.m., February 10, 1981, several management personnel met to review the events involving Haro. It was decided that the electricians who were present with Haro that morning and who would know whether the work platform was supposed to have been moved by Haro should be interviewed the next morning on February 11, 1981. It was their opinion that "if the balance of the investigation confirmed what we already knew about the situation, that Mr. Haro would be discharged for insubordination." The points discussed at the 4 o'clock meeting were (1) that Roberts had told Haro not to move the work platform or use the Grove crane, (2) that Haro had refused to answer Sledge and Roberts in their direct questions; and (3) Haro had refused to be suspended. Since further investigation was to take place on February 11, 1981, Haro was contacted by telephone and told not to come in on February 11, 1981, as he had been instructed, but to appear on February 12, 1981 at 9:00 a.m. Acting on the advice of his union, Haro did appear on February 11, 1981. Haro gave Roberts two grievances which alleged (1) the company was in violation of the collective bargaining agreement in that the supervisor failed to contact the grievance man on Haro's request and that on Haro's persistence that the supervisor contact the grievance man, Haro was suspended on unfounded charges, and (2) the company was in violation of the collective bargaining agreement in that it did not explain the reason for the suspension for insubordination and that the company would not explain "who Mr. Haro was insubordinate towards." Since Haro's hearing date had been changed by management to February 12, 1981, Haro was then escorted from the property.

On February 11, 1981, at 4:00 p.m. Sledge held a disciplinary conference with Kelly, the Grove crane operator, and his grievance man. Kelly acknowledged having been instructed in the proper way to move a suspended load by Sledge. Kelly was then given a three day disciplinary layoff.

On February 12, 1981, Tim Acton, the assistant mine superintendent, held the termination hearing with Haro and his grievance man present. Acton told Haro he had some questions he wanted to ask Haro and that after the questions were answered, Haro could state his own defense. The first question was why he had not followed Roberts instruction about using the Grove crane and moving the work platform. Haro's response was that he did not have to answer Acton's question. Haro then replied that Roberts had not told him not to move the work platform. Acton then asked a second question concerning why Haro had refused to answer Sledge's and Roberts' questions about holding onto the load. Haro refused to answer the question and said that he was being denied due process, and that he wanted a full trial where witnesses could be called. Acton then asked Haro why he had refused to be suspended on February 10th. Haro then said that the company was in violation of the collective bargaining agreement. He stated that he had not been given a full explanation and generally objected that he had not been given due process of law. After Haro's refusals to answer the questions, Chavez, the senior personnel administrator, indicated that Haro would have to be terminated. Haro was given a termination slip. He refused to sign it, but his grievance man did sign it.

Haro filed a grievance regarding his termination alleging that respondent had violated the collective bargaining agreement in its termination of him. The parties stipulated in this proceeding before the Administrative Law Judge that the record be expanded to include the subsequent determination of the arbitrator that there had been no violation of the collective bargaining agreement in the discharge of Haro by the respondent.

ISSUE

The issue is whether or not the termination of Haro's employment with the respondent was contrary to section 105(c)(1) of the Act.

DISCUSSION

The complainant establishes a prima facie case if:

> " ... A preponderance of the evidence proves (1) that (the miner) 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 (1980) at 2799.

The complainant claims two protected activities:

1. "The incident on February 10th, for which he was initially suspended and later terminated, involved his calling for a safety grievance and a grievance man on his job site pursuant to section 6.1.H of his union contract."

2. "His testifying in engaging in administrative law appeals against Magma Copper Company on at least two prior occasions involving three different complaints."

In addition, Haro introduced evidence of filing numerous grievances, an indeterminate number of which were connected with safety. These activities are protected by the Federal Mine Safety and Health Act of 1977, and may not be the motivation in taking adverse personnel action against an employee. Pasula v. Consolidation Coal Co., supra; Robinette v. United Castle Co., 3 FMSHRC 803 (1981). Thus, the complainant established by a preponderance of the evidence that he did engage in protected activities by filing complaints with the Mine Safety and Health Administration in 1978 and 1979 and then filing safety grievances in 1979.

The second element of Haro's prima facie case must be a showing that adverse action was taken and was motivated in any part by the protected activity. In Secretary of Labor, Mine Safety and Health Administration, Ex Rel. Johnny N. Chacon v. Phelps Dodge Corporation, 2 FMSHRC 2508 (1981), the Review Commission utilized four criteria in analyzing the operators motivation with regard to an adverse personnel action:

"1. Knowledge of the protected activity;
"2. Hostility toward protected activity;
"3. Coincidence in time between the protected activity and the adverse action; and
"4. Disparate treatment of (the complainant)."

A reasonable inference to be drawn from the activities of Haro in filing three different complaints under the jurisdiction of a Federal Mine Safety and Health Act of 1977, as well as the filing of numerous grievances against the respondent is that management had knowledge of Haro's protected activities. Bud Vogt, the section foreman, mechanical division, testified that he was aware that Haro had filed MSHA complaints and "a tremendous amount of grievances". He also testifed that he was aware that MSHA or the State Mine Inspector had come out to the property on one occasion in response to Haro's complaint. Bob Zerga, the mine superintendent, also had knowledge of Haro's protected activity. He had been involved in the MSHA charges brought by Haro and was also involved in his safety grievances.

However, there was no evidence from which to draw an inference that management was in any way hostile toward protected activity on the part of Haro. When Zerga was notified of the facts concerning the alleged in-

subordination of Haro, he contacted the assistant general manager, Tom Hearon, in order to obtain an objective opinion in regard to the action to be taken involving Haro. Although Hearon's advise was ordinarily to terminate the miner involved, he recommended that a careful evaluation of the case be made because of the legal matters already pending involving Haro. Thus, management took extra precautions in this particular case because Haro was involved.

As further evidence that respondent did not bear any hostility toward protected activity, it was shown that between October 30, 1980 and January 15, 1982 the seven Unions involved at the company had filed a total of 135 grievances related to safety. Of the employees who had filed these grievances, there were several who "quit for personal reasons", one was terminated for being absent without leave, but other than Haro, the rest of the personnel who filed safety grievances were still employed with the respondent. The manager of personnel services, Bob Skiba, testified that his impression of Haro was that he was not a "reasonable person" and that he was "very arrogant, challenged authority of supervision, very testy, a difficult personality to supervise ..." This impression was formed in a grievance hearing in December, 1979, when Haro's supervisor was making his presentation. Mr. Skiba testified as follows:

> "and as I recall, in the course of his explanation, he was interrupted by Bill Haro. This was after there had been some, I think, bantering back and forth. It was not a quiet meeting. Generally, the the meetings with Mr. Haro were not quiet type meetings. The general maintenance foreman, Hamilton, was making his presentation and Mr. Haro had interrupted him, and he said words to this effect that "We can have you replaced."

At this point, Skiba told Haro that if he did not change his attitude toward supervision, he would probably lose his job.

There was no coincidence in time between the protected activity and the adverse action taken against Haro. All of the MSHA complaints had been filed by September, 1979. The only dates given for the "protected activity" related to safety grievances were also filed in 1979. MSHA discrimination charges involving Haro had been "pending" since July 3, 1978. It is unlikely that the respondent would wait over 31 months to terminate Haro for filing such charges. Thus, the conclusion is that there was no coincidence in time between the protected activity and the adverse action.

There was no disparate treatment of Haro. One of Haro's witnesses testified that Haro's suspension hearing, termination hearing, and second step grievance hearing were handled differently than other individuals in

that it was not explained to Haro what he was accused of doing. However, the respondent's tape recording and notes of the suspension hearing on February 10, 1981, disclosed that Haro was told what he was being suspended for and to whom he had been insubordinate, namely supervisors Roberts and Sledge. The opinion of the arbitrator upholding Haro's termination as not being violative of collective bargaining agreement is further evidence that Haro was given the same treatment as other miners similarly situated, and that there was no disparate treatment.

Haro has failed to show any of the direct circumstantial indicia of discriminatory intent. He suffered no disparate treatment. There is no significant coincidence in time between the protected activity and the adverse action. There is no evidence of hostility by the respondent toward the protected activities in which complainant engaged. The respondent stated a legitimate, non-discriminatory reason for discharging Haro. Supervisor Sledge had observed one of his employees engaged in an unsafe act about which that employee had been previously instructed and previously disciplined. The employee had denied to Sledge that he had committed an unsafe act on February 10, 1981. Sledge had inquired of his co-worker, Haro, whether the unlawful act had been committed. Although Sledge was not Haro's immediate supervisor, Roberts was, and Haro would not answer the question even when it was repeated by Roberts. Respondent has the right to obtain whatever information is required regarding unsafe work practices taking place on its property and to take the appropriate disciplinary action to prevent their reoccurrence. Haro was interferring in a legitimate business function of the operator by refusing to answer. Skiba and Zerga testified concerning the fact that the respondent's personnel policy considers insubordination to be an offense requiring immediate discharge. Haro failed to show that the termination for insubordination and poor work practices was "so weak, so implausible or so out of line with normal practice that it was a mere pretext seized upon to cloak discriminatory motive". Secretary, ex rel. Jonny Chacon v. Phelps Dodge, supra. Haro failed to show that the justification was pretextual.

CONCLUSION

I find that the complainant, William A. Haro, has failed to sustain his burden of proof showing that his termination of employment with respondent was motivated in any part by protected activity.

ORDER

The complaint is dismissed.

Jon D. Boltz
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

NOV 2 1982

RAYMOND FARMER,	:	COMPLAINT OF DISCRIMINATION,
Complainant	:	DISCHARGE, OR INTERFERENCE
v.	:	
	:	Docket No. WEVA 82-135-D
EASTERN ASSOCIATED COAL	:	HOPE CD 82-7
CORPORATION,	:	
Respondent	:	Wharton No. 4 Mine

DECISION

Appearances: Raymond Farmer, Big Creek, West Virginia, pro se;
Mark C. Russell, Esq., Jackson, Kelly, Holt and O'Farrell, Charleston, West Virginia, for Respondent.

Before: Judge Melick

This case is before me upon the complaint of Raymond Farmer under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," alleging that the Eastern Associated Coal Corporation (Eastern) discriminated against him on September 23, 1981, presumably in violation of section 105(c)(1) of the Act. 1/ He seeks one million dollars in damages. Evidentiary hearings were held on Mr. Farmer's complaint in Charleston, West Virginia.

In order to establish a prima facie violation of section 105(c)(1) of the Act, Mr. Farmer must prove by a preponderance of the evidence that he has engaged in an activity protected by that section and that he has suffered discrimination or interference which was motivated in any part by that protected

1/ Section 105(c)(1) of the Act provides in part as follows: "No person shall * * * in any manner discriminate against * * * or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner * * * in any coal or other mine subject to this act because such miner * * * has filed or made a complaint under or related to this act, including a complaint notifying the operator or the operator's agent or the representative of miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, * * * or because of the exercise by such miner * * * on behalf of himself or others of any statutory right afforded by this act.

activity. Secretary, ex rel David Pasula v. Consolidation Coal Co., 2 FMSHRC 276 (1980), rev'd on other grounds, Consolidation Coal Co. v. Secretary, 663 F. 2d 1211 (3rd Cir., 1981).

Mr. Farmer complains herein that the mine operator discriminated against him by failing to immediately call an ambulance upon his representations that he had suffered chest pains and could not continue working. More specifically, Farmer complains that 1 1/4 to 1 1/2 hours had elapsed between his first complaint to the operator and the arrival of an ambulance. He is unable, however, to cite any precipitating protected activity in which he had been engaged that caused the alleged discrimination. Under the circumstances, even assuming there was in fact evidence of discrimination as alleged, Mr. Farmer has failed to show that it was within the scope of section 105(c)(1).

Even if Mr. Farmer's complaint of a sudden onset of a physical impairment could in itself be considered a protected refusal to work as resulting from a good faith reasonable belief that continuing to work would involve safety hazards, there is insufficient evidence in this case of any proscribed retaliation, discrimination, or interference against Mr. Farmer. Pasula, supra; Secretary, ex rel Robinette v. United Castle Coal Co., 3 FMSHRC 803 (1981); Bradley v. Belva Coal Co., 4 FMSHRC 982 (1982).

The evidence shows that around 6:20 on the morning of September 23, 1981, mine foreman Robert Jarrell was called over the "trolly phone" and told by the dispatcher that both motor crews, consisting of four miners (including the Complainant), had reported "sick" and wanted a ride outside the mine. When Jarrell reached the purportedly sick miners, one, Ernie White, said that he had something in his eye and another, Herman Wagoner, complained that he had the flu. Mr. Farmer complained that he was beginning to have "chest pains", that his "chest felt like a heavy weight was against it", and that his left arm hurt. The fourth miner apparently changed his mind about being "sick" and decided to go ahead and work. Jarrell apparently became angry at what appeared to be flimsy excuses to get out of work and to close down the section. It is not disputed that Jarrell nevertheless took the three "sick" miners out of the mine in his jeep and that someone called an ambulance.

The accident report based on information furnished by Mr. Farmer establishes the time of occurrence at 6:20 a.m. The records of the Boone County ambulance authority indicate that someone from the mine called at 6:30 that morning, that an ambulance was dispatched six minutes later, and that it arrived at the mine at 7:00 that morning. The records further indicate that the ambulance was enroute to the hospital at 7:10 a.m. and arrived at Boone Memorial Hospital at 7:37 a.m. with Farmer. Farmer was admitted for observation and claims that he was told he had a "light heart attack". No medical evidence has been submitted to corroborate his claims.

Within this framework of evidence, I cannot find that Eastern denied or impeded Mr. Farmer's access to an ambulance or to other appropriate medical services. I observe, moreover, that Mr. Farmer conceded at hearing that if indeed there was truly a medical emergency, there was nothing to prevent him

from using the mine telephone and calling for an ambulance himself. I find accordingly that even assuming, arguendo, Mr. Farmer had engaged in an activity protected by the Act, there is insufficient evidence of any resulting discrimination or interference to support the complaint herein.

Accordingly, the Complaint is denied and the case Dismissed.

Gary Melick
Assistant Chief Administrative Law Judge

Distribution: By certified mail.

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Mark C. Russell, Esq., Jackson, Kelly, Holt and O'Farrell, P.O. Box 553, Charleston, WV 25322

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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NOV 4 1982

CONSOLIDATION COAL COMPANY, Contestant	:	Contest of Order
	:	Docket No. LAKE 82-69-R
v.	:	Order No. 824092; 3/11/82
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Oak Park No. 7 Mine

DECISION AND ORDER

On October 28, 1982, this matter came on for oral argument on the operator's motion for summary decision and the Secretary's opposition thereto.

The motion was supported by a deposition of the charging inspector in which he testified he did not believe the conditions cited in his 107(a)-104(a) Order-Citation constituted either (1) an imminent danger or (2) a violation of 30 C.F.R. 75.308 of the mandatory safety standards. 1/

The Secretary opposed the challenge to the validity of the order on the ground that a 1.5% accumulation of methane constitutes per se an imminent danger. Pittsburgh Coal Company, 2 IBMA 277 (1973); Eastern Associated Coal Corp., 3 IBMA 60, 62 (1974). These holdings were, in

1/ The inspector testified he issued the order and citation because he received the following written instructions from his superior on March 10, 1982, the day before the order-citation issued:

Dean:

In event of methane in excess of 1.5% or more you must issue 107(a) imminent danger, whether they find it or you.

You must also use the section number 75.308. State in body of notice the circumstances: In other words management was aware of condition and took appropriate action by withdrawing miners and pulling the power.

There will be no penalty assessed if operator does what he is supposed to do.

Paul

turn, predicated on the legislative history of the standard (Section 303(h)(2) of the Coal Act) which states:

> This provision makes it clear that the operator has an obligation to take positive steps when there is a methane buildup. Production must cease and all efforts must turn to reducing the danger where methane reaches the 1-percent level. If the air contains 1.5 percent of methane, withdrawal of the miners by the operator or inspector, if he is present, is required and electric power must be shut off. Legislative History, Coal Mine Health and Safety Act, Committee on Education and Labor, House of Representatives, 91st Cong., 2d Sess. 58-59 (1970).

I find that as a matter of fact and law a 1.5% concentration of methane is an imminent danger.

The operator also urged that because the inspector found that all miners, except those required to abate the condition, 2/ had been voluntarily withdrawn, albeit only some 400 feet to the power center, issuance of a withdrawal order was unnecessary and improper. 3/ As the Secretary points out, it is well settled that the withdrawal of miners by the operator (so-called voluntary withdrawal) does not abate an imminent danger nor does it preclude issuance of an imminent danger withdrawal order. The purpose of such an order is to insure the miners will not be required to return until the condition of imminent danger has been corrected. Itmann Coal Company v. Secretary, 1 FMSHRC 1472, 1577 (1979); Eastern Associated Coal Corp., 2 IBMA 128, 136 (1973), affd. sub. nom. Eastern Associated Coal Corp. v. Interior Board of Mine Operations Appeals, 491 F.2d 277 (4th Cir. 1974); Eastern Associated Coal Corp., 3 IBMA 60, 62 (1974). The same is true of the operator's

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2/ The methane buildup was the result of cutting into a methane feeder in the corner of the A Entry of the 2D Off 3 North Section. This was known as a "hot" section. While the area was apparently well rock dusted and the section deenergized, the condition would have to be classed as highly explosive inasmuch as the buildup continued for some time after the withdrawal order issued. The record shows the order issued at 1140 but was not abated until 1310, an hour and a half later. The record does not show when the feeder was first discovered nor why, after it was discovered, the section was not dangered off. A concentration of 5% is, of course, extremely explosive. It is unfortunate that the inspector was so unconcerned that he failed to remain on the section to monitor the situation.

3/ For this proposition, the operator relied on a decision by Judge Boltz. Secretary v. C.F. & I. Steel Corporation, 3 FMSHRC 99 (1981). Judge Boltz later recognized his decision rested on an erroneous reading of the precedents. C.F. & I Steel Corporation v. Secretary, 3 FMSHRC 2819 (1981).

claim that it was making a good faith effort to abate the condition. UMWA v. Clinchfield Coal Company, 1 IBMA 33, 41 (1971); Valley Camp Coal Company, 1 IBMA 243, 248 (1972).

This brings us to the challenge to the 104(a) violation charged. The authorities are clear that a 1.5% accumulation of methane standing alone does not constitute a violation of 75.308. 4/ Eastern Associated Coal Corp., 1 IBMA 233, 237 (1972); Mid-Continent Coal and Coke Company, 1 IBMA 250, 253 (1972).

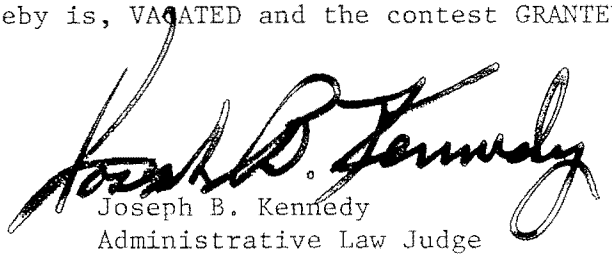
The inspector found mining operations had ceased, the area de-energized and an effort made to remedy the situation. Despite these efforts the concentration was still at 1.7% when discovered by the inspector. It took another hour and a half to bring the condition within the acceptable limit of 1%. This indicates it may have worsened before it was controlled. Counsel for the Secretary expressed some reservations about the level and effectiveness of the effort to abate and the diligence with which precautions were being pursued since the section had not been dangered off. 5/ Based on representations made by the inspector, however, counsel for the Secretary was compelled to concede he had insufficient evidence to prove the operator had failed to take the necessary action to abate as specified in 75.308. Compare, Mid-Continent Coal and Coke Company, supra. For these reasons, I find the motion for summary decision as to the fact of violation must be granted.

4/ I believe a more precise reading of the law would show that while a 1% concentration is not a violation an operator's failure to control and dissipate the concentration before it reaches 1.5% warrants a finding of violation. A close reading of all of the provisions relating to the control of methane discloses that whenever a concentration of .25% to .5% is observed safe mining practice dictates immediate action be taken to monitor the situation closely and to adjust the ventilation system so as to keep the concentration from ever reaching 1.5%.

5/ Counsel for the Secretary and the trial judge were shocked to learn that the inspector, who had eleven years of experience, did not believe any danger existed as he did not know that a methane accumulation of 1.5% is per se an imminent danger. Prior to this case, the inspector and apparently other inspectors in the Vincennes District, believed that as long as the miners were withdrawn from the face and the section deenergized there was no danger and no violation. It is understood that as a result of these disclosures the Assistant Secretary for Mine Health and Safety will take appropriate action to correct this deficiency in the inspectors' training.

I conclude, therefore, there is no triable issue of fact; that as a matter of law the Secretary is entitled to a summary decision on the validity of the imminent danger withdrawal order; and that the operator is entitled to a summary decision on the violation charged.

Accordingly, it is ORDERED that the validity of the order challenged is AFFIRMED and the contest DISMISSED. It is FURTHER ORDERED that the violation charged be, and hereby is, VACATED and the contest GRANTED.



Joseph B. Kennedy
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 8, 1982

ENERGY COAL CORPORATION, Contestant	:	Notices of Contest
	:	
	:	Docket No. WEVA 82-371-R
v.	:	Citation No. 1071316; 5/19/82
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. WEVA 82-372-R
	:	Citation No. 1071318; 5/20/82
	:	
	:	Docket No. WEVA 82-373-R
	:	Citation No. 1071319; 5/24/82
	:	
	:	Docket No. WEVA 82-374-R
	:	Citation No. 1071321; 5/24/82
	:	
	:	Docket No. WEVA 82-375-R
	:	Citation No. 1071329; 5/27/82
	:	
	:	No. 14 Mine

ORDER OF DISMISSAL

On August 20, 1982, Energy Coal Corporation filed a "Notice of Appeal And/Or Request For A Hearing" with respect to the above-captioned citations. The Notice of Appeal which has been given the designated docket numbers indicated that the operator had had a conference with the MSHA District Manager and that no penalty proposals had then been issued. The Notice stated that it was being filed to preserve the record and in order to notify MSHA of the intention to contest the proposed violations and/or the proposed penalties.

On September 20, 1982, the Solicitor filed a motion to dismiss the notices of contest for untimely filing. The Secretary's motion explained that the citations were received by the operator from May 19, 1982 to May 27, 1982. The Solicitor cited section 105(d) of the Act which provides that a notice of contest to a citation be filed within 30 days of its receipt. Based thereon the Solicitor argued that since the notices of contest were not contested until

August 18, 1982 1/, they were not filed within the requisite 30-day period. The Secretary further stated that if Energy Coal intended to contest the civil penalties arising from the five citations, the cases were not yet ripe for docketing because the penalties had yet to be proposed.

On October 1, 1982, the operator filed a response to the Secretary's motion to dismiss alleging that it had 30 days from the date of its July 21, 1982 safety and health conference with MSHA within which to contest the citations at issue.

The Solicitor's motion to dismiss must be granted. Section 105(d) of the Act is clear in directing that an operator contest issuance of a citation within 30 days from the citation's receipt. 29 CFR 2700.20. Island Creek Coal Company, 1 FMSHRC 989 (August 3, 1979) affirming PIKE 79-18 (January 30, 1979) reported at 1 MSHC 2143-2144. In these cases, the operator waited for periods ranging from 83 to 91 days before mailing the notices of contest. No reason has been given for the long delay. Even if I accepted the operator's allegation that on July 21, 1982 the conference officer stated that the 30 days ran from the date of the conference, the notices could not be accepted as timely. The 30 days for appealing the notices had long since run by then and in any event, the conference officer could not change the requirements of the Act and regulations.

It appears that the operator may be confusing an appeal from issuance of the citations with an appeal from proposed penalty assessments. The penalty aspects are still open. However, this period does not begin to run until MSHA has proposed the penalty. 29 CFR 2700.26. From the materials before me it appears that penalties have not yet been proposed for these citations. Therefore, it is too early for the operator to request a hearing regarding penalties.

In light of the foregoing, these cases are DISMISSED.

Paul Merlin
Chief Administrative Law Judge

1/ They were mailed to the Commission and the Secretary by certified mail on August 18, 1982 and received by the Commission on August 20, 1982.

Distribution: Certified Mail.

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David E. Street, Esq., Office of the Solicitor, U. S. Department of Labor, Rm. 14480-Gateway Building, 3535 Market Street, Philadelphia, PA 19104

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

NOV 10 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. SUN LANDSCAPING & SUPPLY COMPANY, Respondent.	CIVIL PENALTY PROCEEDING DOCKET NO. WEST 80-425-M MINE: White Marble

Appearances:

Marshall P. Salzman, Esq., Office of Daniel W. Teehan, Regional Solicitor, United States Department of Labor, San Francisco, California
For the Petitioner

Before: Judge John J. Morris

DECISION

The Secretary of Labor, on behalf of the Federal Mine Safety and Health Administration, (MSHA), charges respondent with violating three safety regulations adopted under the authority of the Federal Mine Safety and Health Act, 30 U.S.C. 801 et seq.

After notice to the parties a hearing on the merits was held in Phoenix, Arizona on August 31, 1982. Respondent, who was represented by counsel, did not appear at the hearing.

JURISDICTION

At the request of petitioner the Judge took official notice of the decision of Sun Landscaping and Supply Company, 2 FMSHRC 975 (1980).

The foregoing case adjudicated that respondent at this location was subject to the Federal Mine Safety and Health Act. On the basis of such official notice and with the evidence in this case showing the mine was in operation at the time of the inspection respondent is held to be subject to the Act.

ISSUES

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

CITATION 383496

This citation alleges a violation of Title 30, Code of Federal Regulations Section 50.40(b), which provides as follows:

> (b) Each operator shall maintain a copy of each report submitted under § 50.30at the mine office closest to the mine for five years after submission. Upon request by the Mining Enforcement and Safety Administration, an operator shall make a copy of any report submitted under § 50.20 or 50.30 available to MESA for inspection or copying.

The evidence shows that respondent did not have the quarterly report form (Tr. 6).

This citation should be affirmed.

CITATION 383498

This citation alleges a violation of Title 30, Code of Federal Regulations, Section 55.15-1 which provides as follows:

> § 55.15 Personal protection
>
> 55.15-1 Mandatory. Adequate first-aid materials, including stretchers and blankets, shall be provided at places convenient to all working areas. Water or neutralizing agents shall be available where corrosive chemicals or other harmful substances are stored, handled or used.

The evidence shows the facility did not have stretchers and blankets (Tr. 6).

This citation should be affirmed.

CITATION 383500

This citation alleges a violation of Title 30, Code of Federal Regulations, Section 65.13-21 which provides as follows:

> 55.13-21 Mandatory. Except where automatic shutoff valves are used, safety chains or other suitable locking devices shall be used at connections to machines of high-pressure hose lines of 3/4 inch inside diameter or larger, and between high-pressure hose lines of 3/4 inch inside diameter or larger, where a connection failure would create a hazard.

The evidence shows that the two inch high pressure air hose at the double connection between the compressor and the drilling machine did not have a safety chain or locking device (Tr. 7). The pressure in the hose was 100 psi (Tr. 7).

The citation should be affirmed.

CIVIL PENALTIES

Petitioner proposes penalties of $40, $72, and $72, respectively, for the foregoing violations.

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

The public record here shows that respondent, a small company, has a prior history of 18 violations (Tr. 4). Statutory good faith is not appropriate here since the violations were not abated by affirmative action (Tr. 4-5). One of the violations in the prior case involving this respondent was a violation of 30 C.F.R. § 55.13-21 in that the hose coupling did not have a safety chain, Sun Landscaping, 2 FMSHRC at 980.

Considering all of the statutory criteria I deem that the proposed civil penalties are appropriate.

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

ORDER

1. Citation 383496 and the proposed penalty of $40 are affirmed.

2. Citation 383498 and the proposed penalty of $72 are affirmed.

3. Citation 383500 and the proposed penalty of $72 are affirmed.

4. Respondent is ordered to pay the amount of $184 within 30 days of the date of this order.

John J. Morris
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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NOV 10 1982

SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No: WEST 81-385-M
Petitioner	:	A.O. No: 42-01472-05005 I
	:	
v.	:	Betty Mine
	:	
ENERGY FUEL NUCLEAR,	:	
Respondent	:	

DECISION

Appearances: Robert J. Lesnick, Esq., Office of the Solicitor, U.S. Department of Labor, 1961 Stout Street, Denver, CO for Petitioner;
Bill Maywhort, Esq., Holland and Hart, P.O.B. 8749, Denver, CO, for Respondent

Before: Judge Moore

The citation in this case resulted from an accident caused by a premature explosion in which a miner was severely injured. While the injured miner takes sole responsibility for the fact that he was injured, and admits that he was taking short cuts not allowed by management, it is MSHA's position that that fact does not subtract from the operator's guilt in this matter. In fact, MSHA seeks a penalty in excess of that recommended by the assessment office on the theory that the employment of a bonus system for miners increases the negligence factor. The argument is that an incentive plan or bonus system encourages miners to push production at the expense of safety.

Terminology is important in this case. Ignitor cord is an easily ignited cord which burns with a hot external flame at a certain speed. A slow burning cord would burn at the rate of twenty seconds per foot and a fast burning cord would burn at 5 seconds per foot. The cord is marked off at 1 foot intervals so if you know the burning rate it is easy to assemble a series of explosions that will go off as desired. In a normal connection, the ignitor cord is passed under the lip of the thermalite connector sometimes referred to as a spitter and the lip of the thermalite connector is crimped down with the thumb. The thermalite connector is a small metal capsule which is a type of fuse lighter. The end not connected to the ignitor cord is crimped around the fuse. The fuse itself is a wax and string covered powder stream that in this case burned at a rate of forty-five seconds per foot. The other end of the fuse sets off the blasting cap which in turn sets off the primer and then the main body of the dynamite and prell explosion. "Prell" is a trade name for ANFO which stands for ammonium nitrate and fuel oil.

During the course of the questioning of the injured miner and the inspector there was an obvious confusion concerning the meaning of the terms, test fuse, spitter (fuse lighter) and ignitor cord. I also think there are errors in the transcript which add to the confusion. There were, however, terminology problems unassociated with the transcript. For example the narrative findings for a special assessment refers to "lead spitters which had a burning rate of 4.5 seconds per foot." The accident report (petitioner's exhibit 7) states "Dupont fuse ignitors and caps were used and when tested burned at 45 seconds per foot." A fuse lighter (the type used at this mine), a spitter, and a thermalite connector are all the same thing. They are metallic devices with a diameter sufficient for a safety fuse to be inserted and very much resemble a blasting cap. The length is about 1" to 1-1/2" and there is no burning rate in the normal sense of the word 1/ involved. A blasting cap does not have a burning rate, in the practical sense of the word, since it explodes. Whatever the accident report and the special assessment writers were talking about it was not spitters or blasting caps. It must have been either safety fuse or ignitor cords. Sometimes the inspector, Mr. Deason, used the term "spitter cord" when he meant ignitor cord. I do not believe, however, that the inspector said that ignitor cord was the same thing as a spitter as indicated on page 117 of the transcript. In his testimony concerning overdrilling however, he did seem to confuse ignitor cord and safety fuse. At times he seemed to think that the ignitor cord was burning back down in the drill hole toward the detonator. It is the fuse (safety fuse) that burns back in the hole.

The company is charged with 2 violations in connection with this accident. One of the citations alleges a violation of 30 C.F.R. 57.6-90 which states:

> "persons who use or handle explosives or detonators shall be experienced men who understand the hazards involved...."

In connection with this standard it is charged that Mr. Tate did not understand the hazards involved. The other citation alleges a violation of 30 C.F.R. 57.6-116 which states:

> "fuse shall be ignited with hot wire lighters, lead spitters, ignitor cord, or other devices designed for that purpose. Carbide lights shall not be used to light fuses."

1/ Technically even explosions have a propagation rate but it is not on the scale involved here. None of the items involved in this case have a burning rate of 4.5 seconds per foot and only the safety fuse has a burning rate of 45 seconds per foot.

30 C.F.R. 57.2 contains definitions of ignitor cord and safety fuse but does not contain a definition of "fuse." I am interpreting the regulation as requiring that "safety" fuse "be lighted with hot wire lighters, lead spitters, ignitor cord, or other such device designed for this purpose." Despite the fact that both the inspector and Mr. Tate as well as the attorneys for both parties were of the opinion that the lighting of the spitters with a propane torch is prohibited by 57.6-116, I am of the opinion that it is not. The regulation says that you can not light the fuse except with certain devices, and Mr. Tate in this case lit the fuse with a spitter. Using a propane torch to light the spitter may violate company policy but it does not violate the regulation. Every fuse had a blasting cap on one end and a spitter on the other. (Tr. 139-140). If he had used his torch to light the fuse directly, it would have been a violation. But he did not do that. Citation No. 576778 is Vacated.

As to the remaining charge, that Mr. Tate did not fully understand the hazards involved, there are two items that must be considered. The first involves the allegation, made for the first time at the trial, that it was an unsafe practice to overdrill, that is, drill too many holes, in the face area. The inspector testified that the area had been over-drilled and that this created a hazard in that certain holes may not fire and may end up in the muckpile. Mr. Tate had been questioned about the overdrilling and did not think it was a hazard. Since this particular so-called hazardous practice was not mentioned in the citation, the accident report, or the special assessment, but only for the first time at the trial, I doubt that anyone gave it serious consideration until just before the trial. I am going to disregard the charge. Moreover the standard requires that the miner understand the hazards. It does not require that he agree with an inspector as to what the hazards are.

The second item involves the practice of wrapping the ignitor cord around the spitter once before crimping the rim of the spitter down on the cord. The inspector did not convince me that this practice would lead to the failure of the round to fire and there was other testimony including that of Mr. Tate that it was an acceptable method of attaching ignitor cord to a spitter. Like the prior matter, this was not mentioned in the citations, in the accident report, or in the narrative findings for a special assessment. It is not fair to raise such a charge for the first time at a trial but, as stated, the inspector's testimony regarding this practice was unconvincing in any event.

The are two versions of what actually went on at the accident site just before the premature explosion. One version is supplied by the victim himself and the other version is supplied by the inspector who examined the site after the accident and interviewed the victim. I think it fairly obvious that the victim had not recovered from the explosion effects at the time of his interview with the inspector.

The victim, Mr. Tate, was not too clear in his testimony about the distinction between the main face area and what he called the slab round. From hearing his testimony I thought he put fifty or so loaded holes in the face and about twenty in the rib right next to it. I thought he lit all of the spitters with a butane torch and had his safety test fuse on the ground at his feet. The safety test fuse was merely a fuse of the same length as the others that he lit so that he could observe it burning and see how much time he had left before his rounds would go off. If he lit the safety fuse first and if it burned at the proper rate it should complete its burning before any of the fuses that he lit with the torch and spitter would ignite and explode the detonator caps. From the inspector's testimony it turns out that the so-called slab round was thirty or fifty feet away from the face round and was not in a direct line. In other words the entry after the slab area turned slightly to the right. The inspector says that Mr. Tate told him he wired up the face area correctly with spitter and ignitor cord and was using his torch to light the spitters in the slab area when the face explosions went off. But regardless of which version actually occurred, Mr. Tate was well aware of the hazard involved in lighting the spitters with a torch rather than ignitor cord. The hazard involved in lighting the spitters with a torch rather than ignitor cord is that you have to stand there and light each spitter, whereas if you use ignitor cord you just light it and leave. Using the ignitor cord, as the inspector said Mr. Tate did, to light spitters and then stand there and make sure the spitters are properly lighted does not make sense. I do not believe he did that. But Mr. Tate did light spitters with his torch, which while not prohibited, is not as safe as using ignitor cord. He did it, because he was in a hurry and trying to get some extra production so that his crew would get an incentive bonus.

The standard states that the blaster should be aware of the hazards involved and I think it clear that Mr. Tate was aware. He deliberately chose to ignore safety precautions. He was however, an experienced blaster and I can not find that he failed to understand the hazards involved. Citation No: 576779 is vacated and the case is DISMISSED.

Charles C. Moore, Jr.

Charles C. Moore, Jr.,
Administrative Law Judge

Distribution: By Certified Mail:

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NOV 12 1982

DAVID HOLLIS, Complainant	:	COMPLAINT OF DISCHARGE, DISCRIMINATION, OR INTERFERENCE
v.	:	
CONSOLIDATION COAL COMPANY, Respondent	:	Docket No. WEVA 81-480-D
	:	Osage No. 3 Mine

DECISION

Appearances: J. Montgomery Brown, Esq., Fairmont, West Virginia for Complainant;
Jerry Palmer, Esq., Pittsburgh, Pennsylvania for Respondent.

Before: Judge Melick

This case is before me upon the Complaint of David Hollis, under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq., the "Act," alleging that the Consolidation Coal Company (Consol) discharged him on September 29, 1980, in violation of section 105(c)(1) of the Act. 1/ Evidentiary hearings were held on Mr. Hollis's complaint in Morgantown, West Virginia.

Motion to Dismiss

At hearing, Consol renewed, in a Motion to Dismiss (and Motion for Summary Decision), its argument made in prior motions that Complainant had failed

1/ Section 105(c)(1) provides in part as follows:

"No person shall discharge * * * or cause to be discharged or otherwise interfere with the exercise of the statutory rights of any miner * * * in any coal or other mine subject to this act because such miner * * * has filed or made a complaint under or related to this act, including a complaint notifying the operator or the operator's agent, or the representative of miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine * * * or because such miner * * * has instituted or caused to be instituted any proceeding under or related to this act * * * or because of the exercise by such miner * * * on behalf of himself or others of any statutory right afforded by this act."

to meet the time deadlines set forth in sections 105(c)(2) and 105(c)(3) of the Act. 2/ Under section 105(c)(2), of the Act, the miner or representative of miners who believes that he has been discharged in violation of the Act "may, within 60 days after such violation occurs, file a complaint with the Secretary". There is no dispute in this case that the Complainant, David Hollis, was discharged by Consol on September 29, 1980, but did not file a complaint of discriminatory discharge with the Secretary of Labor, Federal Mine Safety and Health Administration (MSHA) until April 7, 1981, more than six months later.

In UMWA v. Consolidation Coal Co., 1 FMSHRC 1300 (1979) the Commission examined the legislative intent underlying the statutory time periods established for filing discrimination complaints:

> In explaining section 105(c)(2)'s requirement that a discrimination complaint be brought within 60 days of the alleged Act, the Senate Committee [Committee on Human Resources, Subcommittee on Labor] stated:
>
> > The bill provides that a miner may, within 60 days after a violation occurs, file a complaint with the Secretary. While this time limit is necessary to avoid stale claims being brought, it should not be construed strictly where the filing of a complaint is delayed under justifiable circumstances. Circumstances which could warrant the extension of the time limit would include a case where the miner within the 60 day period, brings the complaint to the attention of another agency or to his employer, or the miner fails to meet the time limit because he is misled as to or misunderstands his rights under the act. [Report No. 95-181, 95th Congress, 2nd Session at page 624 (1978)].
>
> The Senate Committee also expressed a similar view as to the 30 day period provided for in section 105(c)(3) in which a miner can file a discrimination complaint on his own behalf if the Secretary determines that no violation has occurred:
>
> > [A] As mentioned above in connection with

2/ Judge John Cook, to whom this case was initially assigned, had treated Consol's Motion to Dismiss as a Motion for Summary Decision under Commission Rule 64, 29 CFR § 2700.64, and denied the Motion for the reason that unresolved issues of material fact then existed. I am now ruling on the Motion to Dismiss in light of the additional evidence presented at hearing and in light of my determinations of credibility.

> the time in filing complaints, this 30 day limitation may be waived by the court in appropriate circumstances for excusable failure to meet the requirement. Legislative History, supra, at 625.

Thus, it is clear that Congress intended that the time periods for filing discrimination complaints under the 1977 Act can be extended in appropriate circumstances.

The specific issue to be decided, then, is whether appropriate circumstances exist in this case that would justify an extension of the filing deadlines set forth in sections 105(c)(2) and (3). The operator as the moving party and proponent of the statutory limitation periods carries the burden of establishing that the Complainant is barred by those provisions. 5 U.S.C. § 556(d); Raymond v. Eli Lilly & Co., 412 F. Supp. 1392, at p. 1401 (DCNH, 1976).

Mr. Hollis explained in his initial complaint to MSHA the reasons for his late filing:

> First of all, the reason that I did not file under this Act was just plain ignorance of the Act. I was basically in total confusion during my whole discharge proceedings. No one informed myself [sic] of any rights I may have used after my discharge. Union representatives urged myself [sic] to have the five-day arbitration hearing and once the verdict was in. Discharge was upheld by arbitrator (P. Selby). I was told by the union local indirectly and by District Vice-Pres. Carrol Rogers they were not obligated to do anything else for me. I was appointed to the chairmanship of the safety comm. after Robert Moore's resignation during the Four States [Mine] discharges and I had never been on the safety comm. and never attended a safety comm. training class to have direct knowledge of safety act.
>
> After my discharge, I filed with the Human Rights Comm., a state funded organization, and the National Labor Review Board [sic]. I filed with H.R.C, (October 15, 1980) against Consol and Local and District (Local 4043 and District 31) for discrimination and unfair representation. It has been over six month [sic] since filing with West Virginia H.R.C. and still no fact finding meeting or investigation. I felt it was solely my obligation as the complaintee to be able to verify my charges against both respondents. I felt I knew what had taken place, resulting in my discharge; but the problem was verifying the reasoning for my discharge and what each accused party had done to abuse or deny my rights under the Health and Safety act.

Subsequently, in his deposition, Hollis alleged that he first became aware of his right to file a discrimination complaint under the Federal Mine Safety and Health Act only a few days before he actually filed the complaint.

He claims that he discovered this right in talking to MSHA employee Earl McManus at the Morgantown MSHA office. McManus did not testify in this case.

Consol argues that Hollis knew of his section 105(c) rights within the statutory filing period and consciously chose not to exercise those rights. It is clear that, because of the position held by Hollis as Chairman of the Mine Safety Committee, he certainly should have known of his rights under the Act to file complaints of unlawful discharge and discrimination with MSHA. Indeed, it is not disputed that he had been an active, if not militant, chairman of the Safety Committee since his appointment by the local union in April 1980, and that in that capacity he frequently met with state and Federal (MSHA) safety officials. He had access to copies of the Federal law and Hollis himself asserts that he "knew the law" and had more knowledge of the Federal Mine Safety law than any other member of the Safety Committee. Moreover, the successor chairman of the Safety Committee, Edward Pugh, acknowledged that it was one of the duties of that position to advise miners of their rights under section 105(c) of the Act. The fact that Hollis has also achieved a high level of education, having completed two years of college, also reflects on his ability to have understood and waived his rights.

However, even if Hollis did not, even in his capacity as Chairman of the Safety Committee, know of his section 105(c) rights, he nevertheless was clearly advised of those rights in the decision of Arbitrator Paul Selby. In that decision, issued October 20, 1980, Arbitrator Selby specifically informed Mr. Hollis that "[i]n both the Mine Health and Safety Act and the National Labor Relations Act, there are prohibitions against an employer taking disciplinary action against an employee for making charges or filing claims under the particular legislation." (Operator's Exhibit No. 15 at p.37).

In light of the foregoing, I do not find the Complainant's claimed ignorance of his rights under the Act to be credible. It may reasonably be inferred that he did not file timely under the Act because the Arbitrator had already specifically rejected his claims that he had been fired for activities protected by the Act. In a well-reasoned and thorough decision, the Arbitrator had found "no evidence in the record that this discharge action was taken in any time reference to, or was caused by, any activity of the Grievant [Hollis] with respect to any grievances, or any of the demands for inspection under § 103(g) of the Mine Health and Safety Act * * *" (Operator's Exhibit No. 15 at p. 37). Hollis admitted that after the Arbitrator's decision, he thought his best case was with the West Virginia Human Rights Commission, charging discrimination against a racial minority. It appears from Hollis's initial complaint to MSHA that he changed his mind and decided to file under the Act only after more than 6 months had elapsed and the state Human Rights Commission had not even begun its investigation.

Under all the circumstances, I conclude that Mr. Hollis did indeed know, within 60 days of the alleged unlawful discharge, of his right to file a complaint under section 105(c) of the Act but consciously chose not to file such a complaint until more than 5 months after he knew that such a right existed. I do not find in this case any justification to extend the filing time. Accordingly, Consol's Motion to Dismiss is granted and this case is Dismissed.

Secondary Disposition on the Merits

Even assuming, however, that the Complaint had been timely filed, the case would nevertheless fail on its merits. A prima facie violation of section 105(c)(1) of the Act may be proven by a preponderance of the evidence showing that the miner has engaged in an activity protected by that section and that the discharge of him was motivated in any part by that protected activity. Secretary ex rel David Pasula, v. Consolidated Coal Co., 2 FMSHRC 2786 (1980), Rev'd. on other grounds, Consolidated Coal Co. v. Secretary, 663 F. 2d 1211 (3rd Cir. 1981). In this case, it is not disputed that Mr.Hollis had engaged in protected activities. Indeed, the parties have stipulated as follows:

> During the period, April 1980 through September 1980, on the date of his discharge; that the safety committee filed with the operator approximately 30 safety complaints; all of which eventually were examined or read or seen by Mr. Joseph Pride [mine superintendent] at some point in time; and that Mr. Price was aware at all times that Mr. Hollis was a member of or chairman of the safety committee during that period, when these safety complaints were filed.

Consol specifically concedes in its brief that Hollis did in fact engage in safety related activities during his tenure on the Safety Committee at the Osage No. 3 Mine (Operator's Brief p. 27).

The second element of a prima facie case is a showing that the adverse action was motivated in any part by the protected activity. The Complainant herein alleges the following circumstantial evidence to show discriminatory intent: knowledge by management of his protected activities, hostility towards those protected activities, and disparate treatment of him. See Secretary ex rel Johnny Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508 (1981).

At the time of his discharge on September 29, 1980, Mr. Hollis had been employed by Consol for more than eight years. He had various experience in the mines as a buggy operator, loading machine operator, general inside laborer, and lastly, as a wireman. In April 1980, Hollis was appointed by the union local to serve as chairman of the Safety Committee at the Osage No. 3 Mine. Hollis claims in this case that it is because of his activities on the Safety Committee that he was singled out for discharge. In this regard it is undisputed that during the period April 1980 through September 1980, the Safety Committee filed with the operator approximately 30 safety complaints. It is further undisputed that all of these complaints were at some point in time seen by mine superintendent Joseph Pride. In particular, Hollis cites four complaints written by him under section 103(g) of the Act during his tenure as chairman of the Safety Committee. 3/ While ordinarily the identity of the

3/ Complaints under section 103(g) of the Act may be made by a representative of miners or a miner directly to MSHA and MSHA must then perform an inspection pursuant to those complaints.

person initiating such a complaint is not disclosed to the operator, Mr. Hollis apparently did not hide from Superintendent Pride the fact that he had authored those complaints. According to Hollis, the complaints dealt essentially with coal spillage on the tracks at the lower end of the mine. Superintendent Pride was apparently irritated at these complaints because he felt that area of the mine "wasn't in that bad a shape". Pride conceded that he wanted to clean the outby areas, particularly in light of complaints in that area originating from the motorman, but that Hollis would disagree, and insist on cleaning the lower end of the mine. According to Pride, Hollis would get his way by filing a 103(g) complaint with MSHA and "pretty soon, we'd be cleaning track [in the lower end of the mine]". Pride admitted that as a result of these complaints, he was required to do "all the work in one area, the lower part of the mine", thereby interfering with work he wanted to complete in other areas of the mine.

While the Complainant produced testimony from other members of the Safety Committee, including Larry Taylor, concerning statements made by Superintendent Pride that the Safety Committee "was costing him a lot of money on a lot of equipment checks we was [sic] making and shutting down a lot of sections that we had went [sic] to", it appears that at least some of these statements had been uttered in 1979, several months before Hollis had even become a member of that Safety Committee. Ralph Hicks testified, on the other hand, that members of the Safety Committee, including Hollis, did in fact attend a meeting about a month before Hollis's discharge at which Pride also complained of the increased costs caused by the Safety Committee.

There is no doubt that the relationship between Hollis and Superintendent Joe Pride, for whatever reasons, was poor. This poor relationship was due at least in part to problems under the collective bargaining agreement unrelated to health or safety and to Mr. Hollis's admittedly arrogant nature. Indeed, the label "trouble-maker" placed by Superintendent Pride upon Hollis was, according to the Complainant's own witness, David Gearde, based upon Hollis's apparent involvement in a wildcat strike. According to the Complainant's witness, Larry Taylor, the relationship between Pride and Hollis was "pretty rocky". "They didn't like one another a damned bit and they had lots of squabbles". Gearde testified that in several safety committee meetings he attended "it was always a shouting match". Gearde admitted that he too joined in the shouting at these meetings. It appears that the relationship between Hollis and Pride may have been further aggravated by Hollis's admitted arrogance and the fact that he "showed off" his knowledge of "the contract and the law" in the presence of other miners to the apparent irritation and humiliation of Superintendent Pride.

In a somewhat related matter, the Complainant alleges that he had broken a personal "agreement" with Superintendent Pride to improve their relationship. Hollis claims that this was an additional source of ill-will toward him. The terms of the alleged "agreement" are not at all clear, however. According to Complainant's testimony, it was as follows:

> Q. Now, in exchange for Mr. Pride being safe and for his providing indirect assistance to you in the election, what were you to give to him in return?

A. He told me that I'd have to confine my act, you know, sort of -- excuse me. Let me answer it this way; Mr. Pride directly said, he said, the problem with you, Hollis, is you know law and contract and when you come out -- when you come out the mine or you come to the mine, that you -- like, you may catch me in the hallway and you embarrass me in front of the other union -- union and company people. And he said, that's what you got to tone down. He said, now, I don't mind you going into your act, you know, your aggressiveness and stuff, but wink at me, let me know you don't mean it. And I asked him specifically, is that what goes on with the other people in the committees? They -- before me, you know, I said, I asked him specifically, is that the way people act on the committee, as I'm on now or the people before me? And he said, well, we had arrangements that, you know, in front of the men we acted like we didn't like one another, but behind closed doors was another -- was another thing.

Hollis alleges that he breached this "agreement" by subsequently becoming "aggressive" again and by writing a personal safety grievance under state law against assistant mine foreman McNair. Within this framework of evidence, however, I certainly cannot conclude that there was any "agreement" in the first place. The description of the alleged "agreement" is so ambiguous, it is difficult to discern how its terms may have been breached by Hollis. At best, the "agreement" seems essentially to call only for civility between the men. In any case, it is impossible to draw any reasonable inference that Superintendent Pride would, as a result of any breach of that agreement, have necessarily harbored anti-safety animus toward Hollis. 4/

Thus, while Hollis and Pride no doubt disliked each other and did not get along, many reasons for this attitude and relationship existed that were not related to any activity protected by section 105(c)(1) of the Act. While there is also evidence to show that part of the poor relationship between the men may have been the result of Hollis's safety complaints, there is insufficient evidence that a causal connection existed between that specific aspect of their relationship and Hollis's discharge.

As other evidence of alleged unlawful motivation, however, the Complainant charges that the reason given by Consol for his discharge, namely fighting, was merely a pretext and that no one who had previously engaged in fighting at the Osage No. 3 mine had ever been discharged. This precise factual issue was thoroughly addressed by the Arbitrator. (Operator's Exhibit No. 15). Considering the criteria set forth in Pasula (2 FMSHRC at p.2795), and in Alexander v. Gardner-Denver Company, 415 U.S. 36 (1974), I accord the arbitral

4/ To the extent that Hollis believes he breached an agreement with mine management, that, of course, reflects negatively on his own credibility.

findings on this factual issue great weight. 5/ Moreover, after my own de novo analysis of all the evidence before me, I find that I am in complete agreement with Arbitrator Selby's considered analysis and conclusions on this issue.

The credible evidence in this regard clearly demonstrates that the Complainant as well as all mine employees had been informed, and it was well recognized, that fighting was a dischargeable offense. The evidence further shows that following a raucous Christmas party in December 1979, the local union demanded from Superintendent Pride stricter enforcement of the disciplinary rules against, among other things, fighting. The credible evidence further shows that shortly thereafter, and no later than February 1980, a large bulletin was posted on a mine bulletin board restating the rules against fighting.

The facts as reviewed by Arbitrator Selby surrounding the fight at issue are as follows:

> Turning to the events shown in the record to have led to the discharge and grievance under consideration, as background, the record shows that at the bottom of the shaft through which the cage runs, where the cage opens at the bottom for entry and exit, a room, separate from the other structures in the mine proper, has been constructed which is equipped as a waiting room. It is to be inferred from the testimony that the cage is operated electrically in response two signal buttons in the same fashion as other passenger elevators operate. The waiting room was generally described by the witnesses to be some 50 feet long. The cage, its doors and shaft enclosure, along with the button signal panel, apparently constitutes the major portion of the wall of the waiting room at that end. At the opposite end of the room, there is a revolving door opening out into the mine, and that apparently constitutes the major portion of that wall. The two side walls are equipped with benches on

5/ Under the Pasula and Gardner-Denver decisions, the arbitral findings may be entitled to great weight where, as here, full consideration was given by the arbitrator to the employee's statutory rights; the issue before the Commission Judge is solely one of fact; the issue was specifically addressed by the parties before the arbitrator; and the issue was decided by the arbitrator on the basis of what certainly appears to have been an adequate record. I observe, in addition, that Franklin Cleckley, a professor of law at the University of West Virginia Law School, and a practicing attorney with whom Mr. Hollis consulted regarding his discharge, conceded that he indeed respected Paul Selby as an arbitrator in the coal industry. Mr. Selby's special competence in the field is further recognized by the fact that he had been selected by both the coal operators and the union to be the Chief Umpire under the previous contract and the fact that he was also appointed to the faculty of the University of West Virginia Law School apparently as a specialist in the field of labor law.

which the employees may sit while waiting for the cage and the trip out of the mine to the surface.

The record also shows, as further background to the events in this case, that prior to Friday, September 26, 1980, there had been some difficulty between management and the employees, at least those on the afternoon - the 4:00 p.m. to midnight - shift so far as this record shows, concerning the time at which the employees coming off the shift should "cage" to the surface. Cutting through much of the details of the dispute, management sought to assure that the employees would not cage out until 15 minutes to the hour. A number of employees had been caging out as early as 11:15 p.m. and collecting pay until the 12:00 midnight time for the end of the shift. To stop this practice, the Employer had docked the pay of employees to reflect their early caging from the bottom. This had caused some protest, but according to the record, apparently was not altogether effective. A meeting between management and the Mine Committee did not resolve the matter of the acceptable time for caging out, and in the meeting, management announced that it would be taking steps to issue disciplinary slips (apparently, from the reaction expressed, a part of the progressive discipline policy to remedy "unsatisfactory work") for caging out early.

At any rate, one of the first such "slips" issued after that meeting was issued to the Grievant [Complainant Hollis in this case] for his caging out earlier than 5 minutes until the hour. On the grievance filed over the issuance of that slip, a series of meetings was had with mine supervision and higher supervision. As a result of those meetings, it was agreed that henceforth no one would "cage out" until 20 minutes until the hour and an agreed procedure for enforcement of the agreed caging time was worked out. That is, on the first offense thereafter, the offending employee would be "talked to" by the Superintendent. On the next and subsequent offenses, a further series of progressively more serious forms of discipline would be assessed. And, as a particular and specific part of the agreement, it was agreed that the matter would be handled as a disciplinary matter and there would be no further docking of pay as a remedy. Importantly, a part of the agreement on the policy and in settlement of the grievance on the Grievant's slip, that slip was removed and expunged. It is to be inferred from the testimony that all of this had just occurred shortly before September 26, 1980.

Then, on the night of September 26, 1980, toward the end of the afternoon shift, as the Grievant testified, the

Grievant and his buddy, David Cottingham, both classified and working as wiremen, had gone about their normal duties which included bringing equipment to the bottom. They got to the bottom at about 11:05 to 11:15 p.m (putting the testimony of both together on the timing). As the Grievant came through the revolving door into the waiting room, he saw two employees going onto the cage and on up to the top. Shortly after, members of a "dead-head" crew, which included Ralph Hicks, William Coburn, and two ladies, came in and sat on one of the benches at about the middle of the room. In the short period following, a number of persons began to gather in the waiting room up to number ranging in estimates by witnesses from 15 to 30 or so.

Then, according to the testimony, Mr. Hicks said, "Let's go up at 11:25." At this Grievant raised up from his resting position, saying that the agreement was to stay on the bottom until 11:40, and that Hicks, as a Committeeman, ought to aid in observing the agreement. With that, Grievant got up from the bench and walked over and leaned against the cage door. At the same time, since Grievant did not carry a watch, he asked another employee, David Mollisee, who was sitting on the bench next to the cage door and the button device used to signal for the cage, what time it was, and was told: "11:23."

A short while later, estimated by the Grievant to be two or three minutes, William Coburn got up from the bench where he was seated, moved toward the cage, saying, "let's go", and asking Mr. Mollisee to push the button for the cage. At this point, an altercation between the Grievant and Mr. Coburn ensued, which altercation, its nature, extent, and course of events, is the subject of controverted testimony, and, eventually, the basis on which this case arose.

William Coburn, subpoenaed as an Employer witness, stated that he came to the waiting room around 11:15 p.m. with his crew and sat down with them on the bench. Other employees came in and he estimated that some 30 had gathered. Some time around 11:30, he got up, walked to the cage, and asked Mr. Mollisee to push the button and Mr. Mollisee did so. At this, the Grievant told Mr. Coburn it was not time to go out, and Coburn retorted that Grievant was not going to tell him when he could go out or come in. At this remark, he said, the Grievant started cussing him. During this exchange, the cage came down and the door opened. At about this time, Grievant hit Mr. Coburn on the right side of his face alongside his nose and pushed him onto the cage. Mr. Coburn was dazed by the blow, but did recall that others got on the cage and that Mr. Cottingham restrained the Grievant.

Mr. Coburn also said that there were some 15 employees on the cage when the cage doors closed and it started up. He claims that three times on the way up, the Grievant broke away from restraining fellow emloyees and came at Mr. Coburn, grabbing him, one time getting a headlock on Mr. Coburn before he was restrained and pulled off. On the occasion of one of those rushes, Mr. Coburn threw up his hands to protect himself, and his dinner bucket which he was holding was knocked from his hands to the floor where it was smashed. He also reports that Grievant threw his, the Grievant's hard hat at him, but it missed.

When the cage got to the top, Mr. Coburn sought out supervisory employees to report the incident and to make a complaint. In the course of this, he reported to Kurt Zacher, a section foreman; Bill Pride, Shift Foreman; and eventually, "Pete" Simpson, the Assistant Superintendent. After making his report, Mr. Coburn went on to the bathhouse, took his shower and got dressed, and went to his buddy'ls truck to ride home. He reports that after he got in the truck, the Grievant came out and tried to get Mr. Coburn out of the truck, saying that he would "get him".

Mr. Coburn claimed he got a broken nose in the affray, and that he went to the doctor for treatment after the meeting on Saturday, the next day.

On cross-examination, Mr. Coburn denied using abusive language toward the Grievant at the bottom, but admits he probably used such language in his yelling back and forth at the grievant on the cage. He also admitted that he told the Grievant that Grievant couldn't tell him when to leave.

On the other hand, the Grievant testified that when Mr. Coburn moved to the cage and remarked, "Let's go," he asked Mr. Coburn where he was going. Mr. Coburn replied that he was going outside. Grievant explained that it was too early and why they must wait until 11:40. At this Mr. Coburn said grievant couldn't tell him when to leave and that Grievant didn't care anyway. Grievant responded that Mr. Coburn was one of those who was always trying to tear down what he was working for, and that they - the two - were going to see Joe Pride (the Superintendent) tomorrow to get it straightened out. To this, Grievant reported, Mr. Coburn made derogatory remarks, repeating for the record the alleged words as he remembered them.

All this while, the cage was on the way down. When the cage arrived, Grievant got on the cage with Mr. Coburn, intending to go to management. Grievant stated that there is always a "mad dash" by everyone to get on the cage on the first trip, and on this occasion, there was a lot of shoving in the course of which he got shoved into Mr. Coburn as the Grievant started around him to go on the cage and while the two were still having words. They made contact with each other and both grabbed each other's clothes. Grievant conceded that, under the conditions of the verbal exchanges between them, Mr. Coburn thought this was an agressive move. When the cage began moving up, the others on the cage restrained both of them. After both were restrained, the Grievant told the others on the cage that the people were going to ruin the policy that he had worked for and that he was trying to represent the majority of them. Grievant reports that Mr. Coburn then said that Grievant was an egotistical Committeeman, to which the Grievant replied that Mr. Coburn was no good and was selfish.

Grievant further stated that, by the time the cage got to the top, the confrontation got out of hand and he probably set a bad example, and probably should have let Mr. Coburn go on up. He reported that he has had problems with Mr. Coburn before, and while he tries to do his job, he knows he is not the most popular person. He explained that his way of doing things is to go at it aggressively and go straight to the point - even to the extent that it might be called emotional, sometimes using rough and harsh language. However, that is the way most people around the mine who get things done, both Union and supervisors, go about getting things done. In this case, there were no licks thrown and thus there was not a fight. While there may have been derogatory language used by both men, it was nothing out of the ordinary around a mine.

Employer witnesses Zacher and Simpson, both supervisors on the afternoon shift, reported that Mr. Coburn had come out of the mine and reported to them about the incident. Both reported that, within a short time after he got off the cage, Mr. Coburn told them that there had been a fight on the bottom and on the cage and that Grievant had "pounded on him" in the cage and on the way up and that he wanted to make a complaint. Both reported that Mr. Coburn was very upset, hands shaking, and lips and voice trembling as he spoke. Both reported that Mr. Coburn had a scratch on his face in the vicinity of his right cheek bone, and his nose was red as if bruised.

Mr. Simpson also testified that when he went into the men's shower room to tell Grievant about the investigative meeting to be held the next day, Saturday, Grievant had a

scratch on his face along in front of his eyes. He also reported that as he told Grievant about the meeting, the Grievant told him to leave him alone, that he didn't want to talk about it right then.

Other than the grievant and Mr. Coburn, there were eleven witnesses who testified that they had been on the bottom at the end of the afternoon shift on September 26, 1980, at the time the altercation took place. All were classified employees. (The Employer witnesses stated that, in their investigation, they determined that no supervisor was present at the bottom or on the cage at the time, and that the one who arrived at the bottom nearest the time involved, did not arrive until after the cage had gone up with the two.) Seven testified in the Employer's presentation, having been subpoenaed pursuant to the Interim Order entered at the end of the Sunday first partial hearing. Of the eleven, seven witnesses (four testifying in the Employer's case and three in the Union case) could testify only about what they saw and heard at the bottom while the cage door was open and before doors closed and the cage started up. These seven witnesses did not ride up in the cage with the Grievant and Mr. Coburn, some because they did not attempt to get on for one reason or another; and some because they got on but were pushed off or got off when they saw what was going on. The other four witnesses, three testifying in the Employer case, and the other in the Union case, were on the cage during the whole affair.

None of the eleven witnesses reported seeing any blows struck outside the cage. All of them reported that there was an exchange of language in argument between Grievant and Mr. Coburn about whether Mr. Coburn was going up and why. Most reported the exchange to include profanity derogatory to the character, ancestry and sexual practices of the receiver, and that both of the men used such words in loud and angry tones of voice.

Of the witnesses who did not ride up in the cage with the two, one reported that he didn't see anything because he came into the waiting room just as the cage started up; however, he did hear angry yelling and a ruckus going on. Another of those witnesses, reported only that she heard the discussion about going up early and saw a "scuffle" before the doors closed. None of the witnesses who did not ride up in the cage reported or corroborated that there was a "mad rush" to get on the cage. To the contrary, most reported that the Grievant and Mr. Coburn got on ahead of the others who did get on. The other five who did not ride up with the two (one testifying in the Union case and four in the Employer's case) reported seeing the Grievant pushing and grappling Mr. Coburn and Mr. Coburn pushing back.

They also stated they saw a Mr. Cottingham restraining the Grievant and holding him off Mr. Coburn. Two of those witnesses reported seeing another employee, a Mr. Mayhew, also holding the Grievant and restraining along with Mr. Cottingham. One of the witnesses, who says he knows the Grievant well and only reluctantly testified because he was subpoenaed, also said that he heard the Grievant say something to the effect, "Let me go; I'll kill him." However, the witness hastened to say that the words were said in anger and he doesn't believe they were meant in the literal sense that the Grievant did mean to kill Mr. Coburn. This witness also reluctantly made the comment, in response to close questioning, that the only thing between him and the Grievant over the five years he has known the Grievant is that the Grievant has a quick temper and reacts "badly" to criticism, and that was the reason, as he told Grievant at the time, that he wouldn't support the Grievant for Union office.

Of the four witnesses who were on the cage as it went to the top with Grievant and Mr. Coburn on it, three were subpoenaed to testify in the Employer's presentation; the other testified in the Union's presentation. Mr. Cottingham, testifying in the Union's presentation, reported that, in getting on the cage, all the while with the angry exchange of words between Grievant and Mr. Coburn going on, because of the press, the Grievant bumped into Mr. Coburn and Mr. Coburn swung his bucket, hitting Grievant with it. The Grievant grabbed Mr. Coburn on the face, and Mr. Cottingham grabbed the Grievant and restrained him while others restrained Mr. Coburn.

The other three witnesses contributed various aspects of a point of view of the events. All testified that there were some 15 employees on the cage while it was going up, and, questioned on cross-examination about the reasonableness of any such action as they reported given the crowded condition on the cage, they reported that the cage is rated to carry 26 persons and is large enough to hold 40. Thus, they said, even though it may have been awkward, and certainly dangerous, there was room to move around.

John Yellets testified to seeing the Grievant have a headlock on Mr. Coburn and seeing Messrs. Cottingham and Mayhew pull Grievant off Mr. Coburn. Then, he reported, the Grievant broke away from the two holding him and surged after Mr. Coburn again. This time, a Mr. Nunez, along with Mr. Cottingham pulled Grievant off. Then, Grievant broke away again and went after Mr. Coburn; and this time, Messrs. Mayhew and Cottingham pulled him off. In the course of all this, Mr. Yellets reported, the two took a full revolution or two around the cage with others getting out of the way as best they could. Mr. Yellets also reported seeing a hard

hat fly by him, which he assumed was thrown by the Grievant because only the Grievant was without a hat at the time.

Anthony Nunez reported that while Mr. Cottingham was holding the Grievant, he, Nunez, grabbed the Grievant's arm and told the Grievant to wait until they got to the outside. Mr. Nunez was thrown off and got shoved against the door, reinjuring his back (he'd had a prior injury to his back) to the point where he filed an accident report on the incident. Mr. Nunez objected to the writing in the report characterizing the incident in which he got his back hurt as a "fight", saying that was not the language he used, but what the safety men for the Company had written. However, in his testimony in the hearng, while not characterizing the action of the parties involved, he did report as stated here in that testimony. Further in the course of his testimony, Mr. Nunez reported that the Grievant "surged at" Mr. Coburn three times. And, in addition, he saw the Grievant throw his hard hat at Mr. Coburn.

Ralph Hicks had made a written statement in the course of the Employer's investigation. However, he stated, at the time of the hearing, that some of the statements in the writing were inaccurate and not what he had wanted to say. He explained his signing the statement by saying that he had not read the statement because he did not have his glasses with him at the time. This testimony was controverted by Employer witnesses who reported that the statement had been read back to him, before he signed it, and that several changes had been made, at his request, even to the extent of adding a further paragraph which was signed separately in addition to the main body of the statement.

However that may be, in the hearing, Mr. Hicks testified that he had seen the Grievant "have Mr. Coburn by the face" and that Mr. Coburn had his hands up. He also reported that Messrs. Cottingham and Mayhew "restrained" the Grievant, while others "got in front of" Mr. Coburn. Mr. Hicks also reported seeing the Grievant pick up a bell wrench which was taken away from him, although the witness said he did not see the Grievant attempt to use or swing the wrench (Operator's Exhibit No. 15, pp. 20-27).

Arbitrator Selby also thoroughly analyzed the claim that other miners had previously engaged in fighting but were not discharged.

Turning now to the matters involving the contention of the Union that the discharge of the Grievant in this case was discriminatory, the factual thrust of the claim and the testimony elicited to support it was that the Employer has not, prior to this incident, asserted discipline to enforce its Rules, and that this is the first time anyone can recall that any employee has been disciplined for a breach of the Rules.

On cross-examination of virtually every witness testifying in the Employer's case, the Union elicited, or sought to elicit, recollections of incidents of breaches of the Employer's Rules by both classified and supervisory employees. Upon such recollections, further questions were asked for the details of time, place, and whether any discipline was assessed. The recollections were of incidents of breaches of the rules against drinking, gambling, horseplay, and a few fights. All the witnesses stated that they could not recall any employee, classified or supervisory, who had been disciplined for the breaches.

Of the eleven witnesses called in the Union's case, four were called, including the Grievant, to testify to the events on the cage, September 26. Mr. Hicks was also called as a witness in the Union case, but his testimony at this point was directed to facts involving the enforcement of the Rules rather than the facts of the incident in question. The point, however, is that with all of its witnesses, the Union also sought to elicit testimony concerning the laxity of enforcement of the Rules prior to this case. And, again, the thrust was directed at reported incidents of breaches of the Rules against drinking, gambling, horseplay and fighting. Another aspect of the point is that, as is the case in any situation where the object is to establish a course of conduct, it was relevant to that matter to present a substantial number of incidents along with a substantial number of details. In this case, the testimony produced a larger number of such incidents, and a recital of them in any summary would produce an extremely long piece of writing - even longer than is already imposed here.

The incidents related included a great number of incidents of horseplay in which both classified and supervisory employees indulged. They also included incidents of drinking and gambling, some notable ones involving Christmas parties at the mine which seems to have been a tradition at this mine. There were also incidents of fights. All of the incidents were claimed to have gone without discipline being imposed upon the participants. For purposes of relevance and materiality, however, it has to be noted that the great majority of incidents reported were stated in generalities in terms of: "great deal of horseplay goes on all the time"; "a great deal of gambling and drinking goes on all the time at the mine"; and "there have been a number of fights which management did nothing about". In a great number of those instances where time and details were provided, relevance and materiality to the issues in this case were attenuated by reason of time and nature of the claimed offenses.

That is, many of those incidents on which detail of time and happening was given were reports of breaches of rules against drinking, gambling and horseplay. The record shows that, although prohibiting such activities and making breaches thereof

causes for discipline, the Employer's Rules state that such breaches "may" be cause for disciplinary action, but do not make the breaches specifically dischargeable offenses unless they are liable to, or do cause personal injury. Only fighting is made specifically a dischargeable offense by the Rules, and it is the assertion of discharge discipline for fighting which is the subject of this case. Thus, while the various illustrations may tend to show a laxity in enforcment of other rules, unless they are related to the more serious offense of fighting, or a showing of personal injury caused by the other offenses, such illustrations do not demonstrate laxity in enforcement of the Rule against fighting and the failure to discharge for breach of that Rule.

Further on the matter of relevance and materaliality of the various illustrations, the timing of the incidents contributes to such judgments. The record shows that since Joe Pride has become Superintendent at this mine, there has been an attempt to "tighten up" enforcement of the Rules. That is, after complaint made by the Mine Committee, the new summary was posted and even Union witnesses concede that after the posting "things were better" even while insisting that "it still goes on". The record also shows that, effective April 1, 1980, the Safety rules, reiterating that fighting is a dischargeable offense, were promulgated and the Grievant was given a copy of the same. Whatever may have been the "policy and practice" prior to about the first of the year 1980, the record shows that the Employer has attempted to reverse any apparent laxity, and the material question on fighting, especially, is the course of enforcement of the Rules with respect thereot since that time.

Another problem to be dealt with with respect to the use of examples of lack of enforcement is the question whether management knew of the incidents and did nothing about them. As this case demonstrates, it is one thing to complain that management does not enforce Rules, but it is material to any determination of discriminatory enforcement to have evidence that management knew of the incidents and took no steps for assessment of discipline.

Accordingly, it is important to note here that of the many incidents reported in the testimony, I have summarized those which, under the foregoing principles of relevance and materiality, I judge to be probative on the question of discriminatory enforcement of the Rules here asserted. On that point, then, even of those incidents reporting fights in the past, I do <u>not</u> summarize the evidence thereon which does not show that management knew of the incidents, either because they were not reported or because it was shown that any such knowledge could have come only by hearsay without anyone being willing to present factual testimony on which the Employer could assay to "establish just

cause for discipline or discharge" as has been required by the National Agreement specifically since 1971 or by virtue of burdens of proof imposed by the arbitrators prior to the introcuction of those provisions into the Agreement. And, I do not summarize those incidents in which there was an angry exchange of words and threatening gestures, but no physical contact, on the ground that such instances do represent threats to safety, to be sure, but could well be judged at the time, not to have developed into a fight, and thus, subject to different treatment than discharge discipline for fighting.

Cindy Loughry Hammond, testifying in the Union case, related an incident in September, 1979, during the term of Joe Pride as Superintendent, about an altercation she had with Keith Fox, a section foreman, over an unsatisfactory work slip. In the course of an angry argument in the parking lot during which Mr. Fox cussed her and called her names, he punched her in the chest with his finger, threw her into a car and slapped her. She reported the incident to management. A meeting was held to investigate the matter at which Steve Webber and Dave Gearde of the Mine Committee were present along with her. Present for manaagement were Joe Pride, Superintendent and "Pete" Simpson, Assistant Superintendent. Mrs. Hammond contended in her testimony that she and Keith Fox made their statements before the supervisory employees and that Keith Fox called her a liar in most profane and derogatory terms. Since Dave Fox, a classified employee had been present, he was called into the meeting to state what he saw. Mrs. Hammond stated that Dave Fox corroborated her story. Her testimony is that management did nothing about the incident and that Keith Fox is still working as a supervisor.

Both Steve Webber and Dave Gearde testified in the Union case about this matter (as well as other pertinent matters, of course). In the course of outlineing a list of past instances of fighting in which management did nothing, Mr. Webber cited the Cindy Hammond incident, but did not add detail. Dave Gearde, on the other hand, also cited the Mrs. Hammond incident, saying that Dave Fox "admitted that Keith had punched her", and otherwise corroborated her testimony.

Keith Fox, however, called as a rebuttal witness for the Employer, denied that he had touched Mrs. Hammond. He also stated that Dave Fox had corroborated his version of the events in the course of the meeting before higher supervision, and had stated only that the two were arguing and using bad language to each other. His testimony in this hearing was that Dave Gearde, in that previous meeting on the affair, had stated that he knew Keith Fox and didn't believe that he would have poked or punched Mrs. Hammond. He stated that that previous meeting had broken up with agreement that nothing further would be done. Joe Pride

and Thomas Simpson, also testified to the matter. Both reported that the statements in the meeting on the Cindy Hammond affair were that Keith had "shook his finger" at Cindy, but did not touch her. Both reported that Dave Fox said that Keith was shaking his finger at her, but did not touch her. Both reported that the meeting broke up with an agreement that there had been no contact and thus nothing further was to be done. Both also reported that neither Mrs. Hammond nor the Mine Committee took up a grievance on the matter.

Michael Kovach testified that during the Christmas Party, 1979 in the "safety room", they all were sitting around playing cards and drinking. Some of the guys were going home. He was sitting in a chair next to a fellow named Keener. Someone hit Mr. Kovach alongside his head knocking him to the floor. Mr. Kovach got up and hit Mr. Keener. Mr. Keener told him that he didn't hit him, that it had been Bill Pride, Afternoon Shift Foreman, who was pointed out as at that moment going out the door to the room. Mr. Kovach said he then went home. He also said that he later asked Bill Pride if he had hit him to which Mr. Pride responded that of course he did not. Mr. Kovach made no complaint to anyone, adding that he was going to take care of it himself. No one was disciplined for any breach of the Rules on this occasion.

Steve Webber related an incident which he said had been reported to the Mine Committee by Joe Pride. In that incident, apparently two men, one named Gene Pugh and the other McNair, were arguing loudly in the hallway outside the Superintendent's Office. In the course of that argument a coffee cup was knocked to the floor. Joe Pride called them into the office and discussed the matter. According to Mr. Webber, the findings were reported to the Committee that the two were arguing and McNair shook his finger in Pugh's face and Pugh knocked it away. Mr. Pride testified that the way it was determined was that McNair had a cup of coffee in his hand and while Pugh was talking and waving his hands around, he knocked the cup from Mr. McNair's hand. There was no discipline assessed on this occasion.

Mr. Webber also reported that he himself had had a fight with another classified employee in which they "had got into it pretty heavy". This, however, was back in 1972, and although he contended management knew about it, nothing ever came of it by way of discipline nor did anyone even mention it.

Mr. Cottingham testified that in early part of 1979, while on the section on which Keith Fox was the foreman, Keith Fox didn't want Mr. Cottingham to do something he was supposed to do and Mr. Cottingham insisted upon doing it. There

were angry words and a Bobby Carter jumped in between them. No blows were struck, and Mr. Cottingham reported no ill feelings because he shortly thereafter bid off the section. Reports were made to management but no discipline was taken.

Mr. James Michaels, presently a member of the Mine Committee, testified to a fight he had in June, 1977 with an employee named Varner. There had been some horseplay on the cage in the presence of the shift foremen during which a shirt had been ripped off Mr. Michaels and when he didn't take kindly to it and remonstrated, Mr. Varner made threats to others about getting Mr. Michaels. After the following working shift, Mr. Michaels made claim to Mr. Varner for payment for the shirt. A fight ensued in which Mr. Varner was injured. Mr. Varner tried to report the incident as an accident to the Assistant Shift Foreman. Mr. Michaels said the Assistant Shift Foreman talked Mr. Varner out of filing the report warning him that the consequences would likely be that Mr. Varner would be disciplined. No discipline was assessed. On cross-examination, Mr. Michaels conceded that if discipline or discharge had been assessed, and if the two involved had denied there had been a fight, it would have been difficult for managment to make the discipline stick. In this case, no boss saw the fight and no bosses were present. Mr. Michaels said that he understood that Mr. Weimer, the Company Safety Man did try to look into it without much success. (Operator's Exhibit Number 15 p. 27-32)

* * *

The Union contends the Employer has not enforced its Rules against fighting by disciplining offenders at any time prior to the occasion even though there have been numerous incidents of violations of the Rules by fighting in the past. The record does show that there may have been laxity in the enforcement of the Rules of Conduct in the past. However, as commented upon in the summary of the evidence, in my opinion, that laxity was neither as broad as the union argues, nor was any laxity with respect to enforcement of rules against drinking, gambling or horseplay necessarily carried over to the far more serious offense of fighting. The fact shown in this record is that fighting was and is treated separately and more seriously than the other offenses by the Rules. Moreover, much of the evidence of past fights-gone-undisciplined was afflicted with lack of specificity as to time and detail, and more importantly, with lack of any indication that the Employer knew or had reason to know the incidents so as to be able to do anything about them. Even some of those where knowlege was alleged, the evidence was in the form that "management knew of it", but "no reports were made to to management." Thus, most of the incidents related,

even though related in this case by first person protaginists, were just unprovable hearsay and rumor so far as the Employer could do anything about it at the time the incidents occurred.

In addition, the incidents of fighting shown in the evidence to have occurred before Joe Pride became Superintendent have been discounted. The reason is that even though an Employer may have been lax in enforcement of its rules over a period of time, that laxity cannot result in a "past practice" binding upon a employer to the point where that employer is bound to forever ignore fighting or other activity which may or does cause injury. Thus, an Employer may, on proper notice, call a halt to any such laxity, especially with regard to safety rules, and to renew enforcement. That renewed enforcement, of course, is bound by the limitations and protections that notice must be given, the renewed enforcement must be evenhanded and consistent, and must be pursued with a proper "business purpose" as opposed to some discriminatory or arbitrary purpose.

The record here shows that this Employer did, around the first of the year 1980, take steps to tighten up enforcement of its rules. Moreover, the Mine Committee assumes substantial responsibility for urging such renewed enforcement, even asserting that if the Employer didn't do something to stop some of the things going on, it would take steps to stop them.

Pursuant to that resolve, the Rules summary was posted as a reminder that the Rules remained in effect and that the Employer would take steps to enforce them. It is to be acknowledged that many of the Mine Worker witnesses denied having seen the Rules posted, but the record clearly shows that they were posted. Then, the new Safety Rules, specifically stating that fighting is a dischargeable offense were promulgated. These were given to the Grievant as chairman of the Safety Committee for the purposes of Article III, section (g) requiring that notice be given before proposed new rules are scheduled to become effective. No protest of this part of the rules of the Committee, or of any part of the rules is shown in this record. Grievant had specific notice that the rules would be enforced as written with respect to fighting.

During the term of Joe Pride as Superintendent, the record discloses one other incident of fighting for sure, and possibly two others occurred. Except for the Cindy Hammond incident, the evidence clearly shows that all such incidents either were not fights of the kind involved here, or management was not notified of them so that it could take any action. One such incident, the Pugh-McNair incident, illustrates that the Employer did investigate those instances

which came to its attention and did make determinations concerning whether a fight did in fact occur. That Pugh-McNair incident cannot, in my opinion, be called a fight anywhere near like was involved in this case.

The Cindy Hammond-Keith Fox incident was of a more serious nature. However, that case was not presented to me for determination on all its facts and evidence. What was presented was sharply conflicting testimony about who said what and what agreements were made concerning the incident and whether it should be pursued. In light of the fact that no grievance was filed and taken up, and in light of the necessities of proof if disciplinary action is taken, I find that this incident was not one in which the Employer ignored evidence and facts on which to take disciplinary action for fighting in breach of the Rules.

The point is that I find from this record that the Employer, during the term of Joe Pride's Superintendency, has not failed to pursue discipline for fighting in violation of its renewed rules in cases where there has been evidence available on which it could reasonably be expected to establish that a fight occurred and that the particular employees were accountable for the fight. In this case, the Employer took disciplinary action against both employees involved, and on that basis, in this first such case, there was no disparity of treatment between the Grievant and Mr. Coburn, so far as the Employer's actions are concerned.

Now, I have found that the Grievant did engage in the fight with Mr. Coburn and that such fight was in violation of the Rules and was a dischargeable offense. I do not find from the evidence in the record that the Employer took disciplinary action against the Grievant because of any built-up, accumulated animus against the Grievant because of his activities on behalf of the Union and because of his activities in making claims and charges with regulatory agencies. Instead, it cannot be avoided that the Grievant did engage in fighting. It cannot be avoided that the response of the Employer was in reaction to the fight and was assessed against both the Grievant and Mr. Coburn, the employees involved. (Operator's Exhibit No. 15 pp. 39-41).

While the evidence developed at the hearing before me provided some greater detail than was available to the Arbitrator, there is nothing in that additional evidence that would warrant any change in the analysis and conclusions of these incidents made by the Arbitrator. Within this framework of evidence, I have no difficulty concluding that the Complainant was engaged

in fighting with co-worker Coburn on September 26, 1980, that physical injuries were sustained by Coburn, that the matter was a serious breach of the known rules of conduct of a severity far beyond that of any other incident cited, and that fighting was and is a well-recognized dischargeable offense. In addition, I have no difficulty concluding that Hollis's discharge was not discriminatorily disproportionate.

Under all the circumstances, I do not find sufficient evidence to conclude that, in discharging Hollis, the operator was motivated in any part by his protected activities. Moreover, because of the seriousness of his infraction, it is clear that the operator would have in any event, been justified in discharging Hollis and indeed would have done so based on his unprotected activities (fighting) alone. Pasula, supra.

For these additional reasons, the Complaint herein is accordingly Denied and this case is Dismissed.

Gary Melick
Assistant Chief Administrative Law Judge

Distribution: By certified mail.

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Jerry Palmer, Esq., Consolidation Coal Company, Consol Plaza, Pittsburgh, PA 15241

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

15 NOV 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) on behalf of OMAR J. PERSINGER, Complainant, v. ASH GROVE CEMENT COMPANY, Respondent.	COMPLAINT OF DISCHARGE, DISCRIMINATION OR INTERFERENCE DOCKET NO. CENT 80-202-DM MD 79-85 MINE: Louisville Plant Quarry and Mill

DECISION

Appearances:

Robert S. Bass, Esq.
Office of the Solicitor
United States Department of Labor
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Kansas City, Missouri 64106
For the Complainant

Mr. John H. Ross, III
Vice President and Secretary
and
Mr. Harry N. Ahl, Superintendent
Ash Grove Cement Company
1000 Tenmain Center
Kansas City, Missouri 64105
For the Respondent

Before: Judge Virgil E. Vail

STATEMENT OF THE CASE

The Secretary, on behalf of Omar J. Persinger (hereinafter "Persinger"), filed a complaint against respondent Ash Grove Cement Company (hereinafter "Ash Grove"), alleging that on or about July 9, 1979 and for a period of time thereafter, Ash Grove discriminated against Persinger in violation of section 105(c)(1) of the Federal Mine Safety and Health Act

of 1977, 30 U.S.C. § 801(c) et seq., (hereinafter cited as "the Act").[1/] Pursuant to notice, a hearing on the merits was held in Omaha, Nebraska following which both parties were afforded the opportunity to submit post hearing briefs. To the extent that the contentions of the parties are not incorporated in this decision, they are rejected.

STIPULATION

The parties stipulated to the following:

1. On July 9, 1979, and all times material thereafter, respondent Ash Grove Cement Company operated the Louisville Plant Quarry and Mill near Louisville, Nebraska. This is a mine as that term is defined in section 3 (h)(1) of the Federal Mine Safety and Health Act of 1977.

2. Respondent employed Omar J. Persinger as a loader operator and laborer, and as such, Mr. Persinger was a miner as that term is defined in section 3 (g) of the Act. Mr. Persinger was so employed as of July 9, 1979.

3. Ash Grove Cement Company and the mine are subject to the Federal Mine Safety and Health Act of 1977.

4. This proceeding is authorized by section 105(c)(2) and 113 of the Act. The Federal Mine Safety and Health Review Commission and this Administrative Law Judge has jurisdiction in this case.

5. Respondent Ash grove had a total of 55 assessed violations for the years 1979 and 1980.

1/ Section 105(c)(1) reads in pertinent parts as follows:

No person shall discharge or in any other manner discriminate against ... or otherwise interfere with the exercise of the statutory rights of any miner ... because such miner ... has filed or made a complaint under or relating to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners ... of an alleged danger or safety or health violation ..., or because such miner ... has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner ... on behalf of himself or others of any statutory right afforded by this Act.

6. Respondent Ash Grove had 439,033 man-hours worked in 1979 and 225,096 man-hours worked in 1980.

FINDINGS OF FACT

1. The facts stated in the above stipulation are accepted and adopted as Finding of Fact.

2. Persinger was employed by Ash Grove on December 29, 1956 and has continued this employment through the date of the hearing.

3. In April 1977, Ash Grove created a new job of loader operator and laborer in Departments 27 and 55 to work during the third shift (4 p.m. to midnight), Persinger was successful in his bid for this job. The notice of job vacancy number 35 stated in part as follows:

> Remarks: Employee will work as loader operator and if time permits can be used as laborer in Dept. 27. If kiln goes down he will be used as laborer in either Dept. 27 or 55 but will continue to receive Bracket 18 pay. 2/

4. Persinger's duties as a loader operator primarily involved using a front-end loader to stockpile coal and haul it from the stockpiles to a hopper from which the coal was then transferred by a feeder to a crusher and through a vibro-conveyor to an elevator which carried the coal to silos. The silos hold coal for use in an Allis Chalmers kiln in the cement plant. Additional duties involved digging out the crusher and coal spouts if they became plugged. Prior to May 1979, Persinger's principal job was to keep the coal silos full and when that was finished he would clean up around the coal building using a broom and shovel.

5. Departments 27 and 55 are designations used by respondent in its bookkeeping. Department 27 in the job description (Exhibit P-1) was to designate a vacancy in the coal handling system for the ACL kiln. Department 55 is the yard department description.

6. On May 9, 1979, Persinger, as a miner's representative, accompanied two mine inspectors of the Mine Safety and Health Administration (MSHA) on a walkaround inspection of Ash Grove's plant. During the inspection, Persinger pointed out certain housekeeping problems in the coal silo area where he worked including some grates which were "curled" and had holes in them through which a miner's leg could drop. He also pointed out

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2/ Exhibit P-1.

an area under a conveyor belt where a fire had occurred and was allowed to burn itself out. As a result of this inspection, several citations were issued to Ash Grove for violations of the Act, some of which pertained to violations involving conditions in the area where Persinger worked.

7. Following the MSHA inspection which took place between July 9 and 12, 1979, a plant labor gang was utilized to clean-up the areas cited including the coal area. On July 19, 1979 after the general cleanup, Henry Mueller, ACL kiln foreman, told Persinger that he would have to clean the areas around the coal silos every day.

8. On a date not certain, but following the inspection ending July 12, 1979 and prior to July 20, 1979, Melvin Gerdes, a foreman in Ash Grove's quarry, told Persinger that he was to clean the air cleaners every night on the Hough 400 loader he operated on his shift.

9. On July 20, 1979, Persinger wrote a letter addressed to the MSHA inspectors stating that he considered the requirement to clean the air cleaners on his loader by himself, constituted an unsafe practice. 3/ The safety complaint was delivered by Persinger to Kenneth Sjogren, union president, who in turn delivered it to Ed Lilly, an MSHA inspector.

10. On July 24, 1979, Gar Summy, Ash Grove's supervisor of production and quality controls, inspected the ACL coal silo area and found the housekeeping conditions unacceptable.

11. On July 25, 1979, Summy wrote a letter to Persinger outlining that he had been verbally warned on two occasions about his responsibility to clean the coal silo area and that an inspection on July 24, 1979, by Summy, revealed that Persinger was not complying. The letter stated that continued neglect of duties will result in further action up to and including dismissal. 4/

12. On the same day, July 25, 1979, Lilly investigated Persinger's safety complaint regarding the air cleaners at Ash Grove's plant. After a discussion of the problem, with management, it was agreed that Persiuger would not clean the air cleaners on the loader unless another miner was present to help him. No citation was issued to Ash Grove as a result of this complaint.

13. On August 7, 1979, Persinger filed a complaint of discrimination against Ash Grove with MSHA alleging that since the inspection of July 9, 1979, he had been harassed by supervisors, assigned additional work, and sent a letter threatening dismissal. 5/

3/ Exhibit P-3.

4/ Exhibit P-4.

5/ Exhibit R-5.

14. On August 23, 1979, Persinger filed a grievance through the union with Ash Grove alleging that the extra duties involved in cleaning the coal silos and the loader changed his job description. 6/ A denial of this grievance was not appealed by the union.

15. Since the filing of the complaint of discrimination, Persinger has continued to work for Ash Grove in the same job and pay bracket and has been considered by his supervisors as doing a satisfactory job of housekeeping in his work area.

16. Persinger is the only miner employed by Ash Grove in the job position of loader operator and laborer in the coal silo area.

ISSUE

Did Ash Grove discriminate against Persinger in violation of section 105(c)(1) of the Act, while Persinger was engaged in a protected activity?

DISCUSSION

In its decision of Secretary of Labor on behalf of David Pasula v. Consolidated Coal Company, 2 FMSHRC 2786, (October 14, 1980), Rev'd on other grounds, No. 80-2600 (3d Cir. October 30, 1981), the Federal Mine Safety and Health Review Commission set forth tests for determining whether or not a miner had been discriminated against. The Commission ruled that to establish a prima facie case for a violation of section 105(c)(1) of the Act, a complainant must show by a preponderance of the evidence that (1) he had engaged in a protected activity, and (2) that the adverse action taken against him was motivated in any part by the protected activity. The employer may affirmatively defend, however, by proving by a preponderance of all the evidence that, although part of his motive was unlawful, (1) he was also motivated by the miner's unprotected activities, and (2) that he would have taken adverse action against the miner in any event for the unprotected activities alone.

The first element of a prima facie case is a showing that protected activity occurred. The evidence in this case shows that Persinger, as a miner's representative, during a walkaround inspection on July 9, 1979, pointed out to MSHA inspectors various conditions which were health and safety violations and resulted in citations being issued to Ash Grove. Further, Persinger on July 20, 1979, filed a safety complaint with MSHA

6/ Exhibit R-7.

regarding a requirement by Ash Grove, that he clean air cleaners on his loader every night he used the machine. There is no question that these activities and complaints regarding health and safety amount to protected activity. Section 105(c)(1) in its relevant parts protects the miner or miner's representative who has "filed or made a complaint under or relating to this Act ... of an alleged danger or safety or health violation ... ." It is concluded that the first element of the requirement to establish discrimination is established.

The second element of a prima facie case is a showing that adverse action was motivated in any part by protected activity. Persinger, in his complaint of discrimination, alleged that as a result of his protected activity, he was harrassed by his supervisor, assigned additional work which he was accused of not completing, and subsequently received a letter from a supervisor threatening possible dismissal.

A review of the evidence of record shows a lack of direct evidence to show that the actions on the part of Ash Grove were motivated by the complaints of Persinger about health and safety violations. The Commission in its decision in Secretary of Labor on behalf of Johnny N. Chacon v. Phelps Dodge Corporation, 3 FMSHRC 2508, (November 13, 1981), stated as follows:

> Direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect. As the Eighth Circuit, for example, has analogously stated with regard to discrimination cases arising under the National Labor Relations Act:
>
> > It would indeed be the unusual case in which the link between the discharge and (protected) activity could be supplied exclusively by direct evidence. Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence. Furthermore, in analyzing the evidence, circumstantial or direct, the (NLRB) is free to draw any reasonable inferences. NLRB v. Melrose Processing Co, 351 F. 2d 693, 698 (8th Cir. 1965).

The Commission in Phelps Dodge, supra, in dealing with indirect evidence suggested four criteria to be utilized in analyzing the operator's motivation with regard to an adverse personnel action:

1. Knowledge of the protected activity;
2. Hostility toward protected activity;
3. Coincidence in time between the protected activity and the adverse action; and
4. Disparate treatment of (the complainant).

Persinger in his complaint of discrimination dated August 7, 1979 alleged that he had worked for Ash Grove since 1956 and had always received compliments on his work and never had an adverse comment placed in his employment file until July 1979. However, since the inspection conducted at the plant on July 9, 1979, in which he participated, he had been harassed by his supervisors and sent a letter threatening dismissal. He stated that he believed this harassment was a result of his pointing out safety violations to the inspectors. 7/ A reasonable inference can be drawn from the evidence in this case that Ash Grove's management were aware of Persinger's activities as a miner's representative during the walk-around inspection which took place on July 9, 1979. Several of the citations that were issued involved safety violations in the coal silo area where Persinger was the only employee such as those involving the steel grates, the fire that was allowed to burn itself out, and the accumulations of coal and dust in the area. Further, it is apparent that a reasonable inference could be drawn that there was a coincidence in time between the date of the inspection and the assignment of additional duties to Persinger for clean-up in his area. These activities complained of all occurred within a three week period of time following the inspection.

However, the primary issue here is whether or not the activities complained of by Persinger amounted to adverse action motivated in any part by the protected activity. The evidence supports Ash Grove's contention that actions taken by them in ordering additional clean-up duties on the part of Persinger was motivated by the requirements of the citations issued by MSHA during the inspection conducted from July 9 through 12, 1979 and not as a result of Persinger's involvement therein as a miner's representative.

Henry Mueller, ACL kiln foreman and Persinger's direct supervisor since 1977, testified that prior to July 1979, he had discussed with Persinger that he needed to put more effort into clean-up in the coal silo area. Mueller stated that after the inspection, he had assigned miners from the day crew to do the initial heavy cleaning in the coal silo area required by the citations. On July 19, 1979, Mueller told Persinger that the area had received a good clean-up and was in "pretty good shape and that we would like to keep it that way."

On the next day, July 20, 1979, Persinger talked to Mueller and stated he was having trouble doing his regular work and the clean-up too. Mueller testified that he suggested to Persinger that he quit dumping coal earlier so he could do the clean-up that was required. On July 24, 1979, Persinger went to Mueller's office and stated that he was unhappy about the additional clean-up duties assigned to him and maintained that he was a

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7/ Exhibit P-5.

loader operator and should not be responsible for the clean-up in the coal silo area. Mueller testified that he told Persinger that clean-up was part of his job classification as it was with all jobs at Ash Grove.

Summy testified that he was a party to the conversation with Persinger and Mueller on July 24, 1979 and told Persinger that he was expected to do more clean-up in his area. Summy also testified that on the next day, July 25, 1979, he inspected the coal silo area after Persinger completed his shift and did not feel Persinger had spent any time on his clean-up. As a result of this observation, Summy sent Persinger the letter dated July 25, 1979 indicating Persinger had previously been warned about the lack of clean-up on two previous occasions and specifying items that needed immediate attention. Summy also stated in the letter that "continued neglect would result in further disciplinary action up to and including dismissal." Mueller testified that after July 25, 1979, Persinger has done the clean-up and has also kept the silos full.

I find that the most credible evidence supports Ash Grove's contention that Persinger was not discriminated against. There is no evidence of disparate treatment of Persinger as the testimony of record indicated that housekeeping and clean-up was the responsibility of all employees at Ash Grove. Persinger was not discharged from his job, transferred, nor did he suffer a reduction in pay. The evidence shows that prior to the inspection on July 9, 1979, Persinger was required to do some clean-up. The fact that the duties were expanded considerably can logically be attributed to the increased housekeeping requirements placed on Ash Grove by the MSHA inspectors rather than any adverse treatment by Ash Grove's management of Persinger. The evidence does not show that Ash Grove ever complained that Persinger did not keep the silos full of coal or do his other assigned tasks.

Persinger has also alleged that the safety complaint filed on July 20, 1979 with MSHA over cleaning the air cleaners on the loader was an additional aggravation to Ash Grove. 8/ This may be true, however, Ash Grove was not aware of the complaint until it was brought to their attention by inspector Lilly on July 25, 1979 which is after the alleged harassment over the clean-up duties described above. There is no evidence of record that Summy knew of this complaint prior to his writing the letter dated July 25, 1979. There does not appear to be a nexus between this complaint and the alleged harassment over the clean-up duties.

Persinger did testify that since the events described above, other employees use his loader to move clinkers and leave it dirty so that he has to clean the machine before and after he uses it. Also, he has on several occasions had to go to the office to straighten out his pay checks and has difficulty in getting drinking water on his job site. These complaints fall short of establishing a complaint of discrimination for there is no showing of a disparate treatment on his part from that of other employees at the plant.

8/ Secretary's Brief p. 2.

The "ultimate burden of persuasion" on the question of discrimination rests with the complainant and never "shifts." As indicated in Pasula, supra, there are intermediate burdens which do shift. The complainant bears the burden of producing evidence and the burden of persuasion in establishing a prima facie case. In this case, Persinger has established that his activities involving the inspection and the safety complaints were protected activity. However, he fails in proving that he was discriminated against as a result of this protected activity.

On August 23, 1979, Persinger filed a grievance through the union against Ash Grove alleging that the additional clean-up duties changed his job description. Although the facts surrounding the grievance itself is basically similar to the complaint of discrimination, it is not to be confused with the requirements of section 105(c)(1). A change of duties may effect the employees rights under the bargaining contract with the union and not be based upon a violation of employees protected activity. At times, the thrust of the evidence in this case is more pertinent to the grievance than to the discrimination complaint herein.

Ash Grove in its answer to the complaint and its post hearing brief have requested it be awarded costs and attorney fees if successful herein. Under 28 U.S.C. § 2412, the government is exempt from liability for costs and attorney fees except as specifically and unequivocally authorized by Congress. Van Hoomisson v. Xerox Corp., 503 F.2d 1131. Ash Grove must look to 5 U.S.C. § 504 for any relief it might seek herein, but its request is premature at this time. 9/

CONCLUSION

In conclusion, I find that Persinger has failed to prove by a preponderance of the evidence that he was discriminated against.

ORDER

The complaint is dismissed.

Virgil E. Vail
Administrative Law Judge

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9/ Title II - Equal Access to Justice Act.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

15 NOV 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	CIVIL PENALTY PROCEEDING
v.	DOCKET NO. WEST 82-33-M
JOHN CULLEN, d/b/a/ JOHN CULLEN ROCK CRUSHING, Respondent.	MSHA CASE NO. 05-03488-05002
	MINE: Marrow Pit

Appearances:

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Pro Se

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For the Petitioner

Before: John A. Carlson, Judge

DECISION

This is a civil penalty proceeding arising out of respondent's alleged refusal to allow one of petitioner's mine inspectors to inspect respondent's rock quarrying and crushing operation near Pueblo, Colorado. The matter is before me under the provisions of the Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (the "Act").

A hearing on the merits was held on September 23, 1982. The parties declined to submit briefs or proposed findings of fact and conclusions of law. The Secretary charges respondent with violation of section 103(a) of the Act which provides:

> "Sec. 103. (a) Authorized representatives of the Secretary or the Secretary of Health, Education, and Welfare shall make frequent inspections and investigations in coal or other mines each year for the purpose of (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments originating in such mines, (2) gathering information with respect to

> mandatory health or safety standards, (3) determining whether an imminent danger exists, and (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this title or other requirements of this Act. In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided to any person, except that in carrying out the requirements of clauses (1) and (2) of this subsection, the Secretary of Health, Education, and Welfare may give advance notice of inspections. In carrying out the requirements of clauses (3) and (4) of this subsection, the Secretary shall make inspections of each underground coal or other mine in its entirety at least four times a year, and of each surface coal or other mine in its entirety at least two times a year. The Secretary shall develop guidelines for additional inspections of mines based on criteria including, but not limited to, the hazards found in mines subject to this Act, and his experience under this Act and other health and safety laws. For the purpose of making any inspection or investigation under this Act, the Secretary, or the Secretary of Health, Education, and Welfare, with respect to fulfilling his responsibilities under this Act, or any authorized representative of the Secretary of the Secretary of Health, Education, and Welfare, shall have a right of entry to, upon, or through any coal or other mine.

The undisputed evidence shows that James P. Ploughman is an authorized representative of the Secretary of Labor. Ploughman's duties under the Act included the inspection of mines. He attempted to conduct an inspection of respondent's operation on April 15, 1981 but was turned away by Mr. Cullen who insisted inspectors had no right to come upon the property without a search warrant.

The evidence also shows that respondent sells the rock extracted and crushed in his operation to various construction companies, and that in in conducting his business he uses equipment manufactured outside of Colorado. He employed three workers at the time of inspection.

Mr. Cullen's defense, as articulated at the hearing, appeared to be based upon a belief that the inspection provisions of the Act purport to allow warrantless inspections of business properites in violation of the Fourth Amendment's bar against unreasonable searches and seizures. He also questioned whether his operation is subject to the Act, suggesting in his testimony that he had heard that the Act was to be amended to exclude coverage of rock crushing operations. Beyond this, he maintained that at the time of the questioned inspection he was attempting to contest five

earlier citations upon essentially the same grounds. 1/ These earlier citations arose from a single inspection. He believed that a further inspection was unfair until these earlier charges were heard and decided. Finally, he suggested that he was being harassed, and that the inspection provisions of the Act are "communistic."

I first observe that there is no legitimate issue of coverage under the Act. The Act extends to sand and gravel pits and to rock quarries under the broad definition of a mine in Section 3(h). 2/ Attempts to amend the Act to exclude these activities have been made, but no such change has been enacted. For a time, certain temporary appropriations measures forbade the Mine Safety and Health Administration to expend funds for enforcement of the Act against sand, gravel or quarry operators, but no such provisions were in effect at the time of the inspection or hearing in this case. Moreover, whether an appropriations measure not the affecting substance of the Act is enforceable before this Commission (which has no express authority to adjudicate disputes arising under appropriation acts) is highly questionable. Finally, the evidence shows that the Cullen operation "affects commerce" as that term is used in the Act. This is so irrespective of whether respondent sells his product intrastate or interstate. 3/

Respondent's constitutional objection to the inspection also lacks merit. The "warrantless inspection" issue has been settled by the United States Supreme Court in Donovan v. Dewey, ____ U.S. _____, 101 S. Ct. 2534 (1981). There the Court held that the nonconsensual, warrantless inspections authorized under the Act do not offend the Fourth Amendment guarantees against unreasonable searches and seizures.

Since the uncontroverted evidence shows that Mr. Cullen turned away the inspector because he lacked a search warrant, a violation of section 103(a) of the Act occurred.

1/ The existence of these earlier citations was stipulated. Respondent asserted that he wanted a hearing on their validity, but that his letters had apparently been lost by MSHA, and that he was still trying to ascertain why he had not been granted a hearing. Counsel for petitioner knew nothing of the fate of the citations except that they were issued, and that civil penalties were now somewhere in the collection process.

2/ Waukesha Lime and Stone Company, Inc., 3 FMSHRC 1703, n. 3 (1981).

3/ Wickard v. Filburn, 317 U.S. 111 (1942).

Nor is it a defense that respondent believed it somehow improper for the inspector to visit the mine while previous citations were pending. Neither the Act, nor any holding of the courts, nor any holding of this Commission supports such a notion. 4/ The Act requires that surface operations be inspected at least twice a year, but imposes no limits on the frequency of inspections.

We now turn to the matter of appropriate penalty. Waukesha Lime, cited previously, stands for the proposition that a refusal of inspection justifies imposition of a civil penalty under the Act. In the present case the Secretary proposes a penalty of $200. For the reasons which follow, I conclude that $200 is excessive.

Section 110(i) of the Act sets forth the criteria a judge must weigh in assessing a reasonable penalty. These are the degree of the operator's negligence, the size of his mine, his good faith in abating the violation, the gravity of the violation, and whether exaction of a particular penalty will affect the operator's ability to continue in business. Here the respondent's refusal of entrance to the inspector was more than negligent, it was deliberate. This factor weighs against respondent. Neither does he deserve extensive credit for good faith. He did ultimately abate by allowing an inspection, but the inspection at issue here was not his first. During the initial inspection respondent was apprised of the existence of the Act. From that time he was under a duty to make reasonable inquiry as to his obligations under the statutes. Nevertheless, one can have some sympathy for this pro se respondent whose financial means are limited and for whom federal safety regulation is a fairly new experience. I give credence to his testimony that he was confused by a second inspection while he was attempting to obtain review on the earlier inspection, which he believed to have been unlawful. The uncertainty surrounding his apparent attempts to contest the results of the earlier inspection tends to blunt the effect of that inspection as an unfavorable "prior history."

Since this case does not involve a violation of a substantive safety and health standard, the customary measurements of gravity cannot be applied. There is no evidence of what hazards, if any, actually existed at the site.

The size of respondent's crushing operation is quite small. While the evidence did not establish that imposition of the proposed penalty of $200 would affect his ability to remain in business, it did show that in the year preceding the year of inspection he suffered a loss of approximately $30,000 and in 1981 he only broke even. These facts weigh in his favor.

On balance, I conclude that a civil penalty of $75 is appropriate.

4/ This case presents no proper issue as to whether or not the inspection attempt was made in bad faith -- that is, for reasons other than those authorized by the Act. Respondent's allegation of "harassment" was based upon the mere fact of inspection. It was supported by no specific evidence from which a wrongful purpose or active misconduct may be inferred.

CONCLUSIONS OF LAW

Upon the entire record in this case, including the determinations of fact made in the narrative portion of this decision, the following conclusions of law are entered.

(1) The Commission has jurisdiction to hear and decide this matter.

(2) Respondent, John Cullen, violated section 103(a) of the Act.

(3) The appropriate civil penalty is $75.

ORDER

Accordingly, the citation is affirmed and respondent is ORDERED to pay a civil penalty of $75 to the Secretary within 30 days of the issuance of this order.

John A. Carlson
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Complaint of Discharge, Discrimination, or Interference
	:	Docket No. CENT 81-183-DM
On behalf of LENWARD H. WOOD, Complainant	:	MD 79-02
v.	:	Jenny Lind Quarry and Plant
ARKHOLA SAND AND GRAVEL COMPANY, Respondent	:	

DECISION

Appearances: Richard Collier, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, on behalf of Complainant;
William B. Miller, Esq., Atlanta, Georgia, on behalf of Respondent.

Before: Administrative Law Judge Broderick

STATEMENT OF THE CASE

Complainant alleges that he was discharged on January 1, 1979, from the position he held with Respondent as a shovel operator because he refused to work under unsafe conditions. He does not seek reinstatement and is claiming lost wages for the two-week period from January 1, 1979 to January 15, 1979. Respondent denies that Complainant was discharged and denies that his leaving Respondent's employ was related to activities protected under the Mine Safety Act. Complainant filed his complaint with the Secretary of Labor on January 5, 1979. His complaint was filed with the Review Commission on May 7, 1981.

Pursuant to notice, the case was called for hearing on the merits on September 14, 1982, in Fort Smith, Arkansas. Lenward H. Wood, the Complainant, and William Wilcox, a Federal Mine Safety and Health Administration special investigator, testified for Complainant. George Ross, Bill Scarbrough, and Joe Wasson testified on behalf of Respondent.

Both parties waived their rights to file posthearing briefs and made oral arguments on the record at the close of the hearing. Based on the entire record, and considering the contentions of the parties, I make the following decision.

FINDINGS OF FACT

1. Respondent at all times pertinent to this proceeding was the operator of the Jenny Lind Quarry and Plant near Fort Smith, Arkansas, which was a mine as that term is defined in the Federal Mine Safety and Health Act of 1977.

2. Complainant was employed by Respondent as a shovel operator from about June 1975 to April 1977 and from November 1977 until January 1, 1979, and was a miner as that term is used in the Act. He normally worked from about 7 o'clock a.m. until dark, 6 days per week.

3. The shovel which Complainant operated consisted of a cab and crane with a large scoop in front designed to pick up rocks and load them into dump trucks. The trucks then took the rocks to the crusher. The capacity of the shovel was in excess of 5 tons of rock.

4. The shovel in question had both hand and foot controls. Levers operated by hand were used to swing the crane around and hoist the load. Foot pedals were used to keep the bucket in place, that is to keep the stick from going in or out, and to keep the bucket from dropping. While the shovel is being operated, the hand and foot controls are constantly being used. At some time in the Spring of 1978, Respondent had a partition put in the cab of the crane which had the result of deflecting some of the heat from the engine away from the cab.

5. On a number of occasions prior to January 1, 1979, Complainant complained to his supervisor about the lack of heat in the cab of the shovel.

6. Complainant operated the shovel in January, 1977, in January 1978, and in February 1978, when temperatures ranged from 4 degrees Fahrenheit to 19 degrees fahrenheit with wind speeds varying from 3 to 13 knots per hour.

7. On January 1, 1979, when Complainant reported to work, he was informed that the temperature was minus 11 degrees fahrenheit. In fact, at the Fort Smith, Arkansas airport the temperature was 19 degrees fahrenheit at 6:00 a.m., January 1, 1979. It was 18 degrees at 9:00 a.m. The wind speed at 6:00 a.m. was 10 knots, and at 9:00 was 13 knots. The wind was coming from North by Northwest. The subject quarry was on the north slope of the mountain and therefore exposed to the wind.

8. It is necessary for the safe operation of the power shovel in question, that the operator have full feeling in his hands and feet when he operates the controls.

9. Complainant reported to work on January 1, 1979. The employees attended a regular safety meeting prior to the beginning of the shift. Complainant asked his supervisor, Jack Servold if a heater had been put in the cab. When he was told that it had not been installed, Complainant told Servold he would not run it because of the cold weather. Complainant offered to take a heater from another crane that was not running and install it in the crane involved herein. The supervisor refused the offer and told Complainant to punch out and go home.

10. In the evening of January 1, 1979, Complainant called Ed Ellis, Superintendent of the mine and told him what happened. Ellis told Complainant that if Servold told him to punch out and go home, that meant he was fired.

11. After Complainant went home on January 1, 1979, the shovel was operated by his assistant George Ross. Ross completed the shift and does not recall any safety problems related to the cold weather.

12. At the time his employment was terminated, Complainant was earning $5.50 per hour with time-and-one-half for all hours worked over 40 in a week. He worked an average of 50 hours per week, and thus earned $302.50 per week.

13. Respondent's records show that Complainant voluntarily quit work "because he did not want to run shovel without heater installed in it."

14. The Arkansas Employment Security Division found with respect to Complainants claim for unemployment benefits that he quit his job "when he became dissatisfied with his job assignment" and denied unemployment benefits.

15. Complainant filed a discrimination complaint with the Mine Safety and Health Administration on January 9, 1979. Respondent was notified of the claim and an investigation was conducted at the mine on January 10 and January 11, 1979. The MSHA investigator spoke to Servold and Ellis in addition to other company officials.

16. The Solicitor of Labor filed a complaint on behalf of Lenward Wood with the Review Commission on May 7, 1981.

17. Neither Servold nor Ellis was in Respondent's employ at the time of the hearing. Counsel for Respondent stated that Ellis died about 2 weeks prior to the hearing and Servold is presently living in Colorado.

STATUTORY PROVISION

Section 105(c) of the Act provides in part as follows:

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

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

(3) Within 90 days of the receipt of a complaint filed under aparagraph (2), the Secretary shall notify, in writing, the miner, applicant for employment, or representative of miners of his determination whether a violation has occurred.

ISSUES

1. Whether the complaint is barred by the statute of limitations or by laches.

2. Whether Complainant was discharged or voluntarily left his employment with Respondent.

3. Whether Complainant's refusal to work was protected under the Mine Safety Act.

4. If Complainant was discriminated against, what is the appropriate relief to which he is entitled.

CONCLUSIONS OF LAW

1. Complainant and Respondent were subject to the provisions of the Federal Mine Safety Act at all times pertinent hereto, and the undersigned Administrative Law Judge has jurisdiction over the parties and subject matter of this proceeding.

2. The complaint is not barred by the limitations contained in section 105(c) of the Act or by laches.

DISCUSSION

The Complainant filed his complaint with MSHA within 10 days of the alleged discrimination. The Secretary forwarded a copy of the complaint to Respondent upon its receipt and commenced an investigation within 2 or 3 days of the filing of the complaint. It does not appear that the Secretary notified Complainant in writing within 90 days of the receipt of the complaint whether a violation occurred. There is no specific requirement in the Act that such notification be sent to the mine operator. The record does not indicate when the Secretary determined that a violation occurred, but he did not file a complaint with the Commission until May 7, 1981, more than 2 years after the alleged discrimination and more than 2 years after the investigation was apparently completed. The only explanation for the delay in filing is that the case "was never entered into the computer system" of the Dallas Solicitor's Office and was overlooked because of the immense caseload in the Office from 1979 to 1981.

It has been held that the statutory filing deadlines are not jurisdictional. Secretary/Bennett v. Kaiser Aluminun and Chemical Corporation, 3 FMSHRC 1539 (1981). See also Christian v. South Hopkins Coal Co., 1 FMSHRC 126 (1979); Local 5429 v. Consolidation Coal Co., 1 FMSHRC 1300 (1979); S. Rep. No. 95-181, 95th Cong., 1st Sess. at 36, reprinted in LEGISLATIVE HISTORY of the FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, Senate Subcommittee on Labor, Committee on Human Resources (July 1978) 624 (hereinafter LEG. HIST.) ("It should be emphasized, however, that these time-frames [in 105(c)] are not intended to be jurisdictional.")

In considering whether the complaint is barred because of late filing, by analogy to a statute of limitiations or principle of laches, it must be remembered that this proceeding is not brought solely to make the Complainant whole, but to vindicate a public right. The primary purpose of section 105(c) as of the entire Act, is to promote health and safety in the nation's mines.

The failure to file a timely complaint with the Commission in this case was the fault of the government, and not of the Complainant. The Senate Committee report states that "the Complainant should not be prejudiced because of the failure of the Government to meet its time obligations." The time obligation that the Secretary failed to meet in this case is the obligation under section 105(c)(2) to "immediately file a complaint with the Commission, with service upon the alleged violator . . ." when the Secretary has determined that the provisions of the subsection have been violated.

In a case brought by EEOC under Title VII of the Civil Rights Act of 1964 approximately 3 years after the complaint was filed with EEOC, the Supreme Court held that "the benchmark, for purposes of a statute of limitations, is not the last phase of the multistage scheme, but the commencement of the proceeding before the administrative body." Occidental Life Insurance Co. v. EEOC, 432 U.S. 355, 372 (1977). Prompt notice to Respondent of the filing of a complaint should alert him to the possibility of a proceeding and give him an opportunity to gather and preserve evidence. If he can show prejudice, a court "may restrict or even deny backpay relief." Id., at 373.

The case of Marshall v. Intermountain Electric Company, Inc., 614 F.2d 260 (10th Cir. 1980), was a suit by the Secretary of Labor to enjoin future violations of the prohibition under the Occupational Safety and Health Act against discharging an employee for filing safety complaints. The Court held, following the Occidental Life Insurance case, that the State statute of limitations did not apply.

"When an action is brought by the government to enforce private as well as public rights, state statutes of limitations do not apply to bar the action even though no federal period of limitations is provided. However, unlike the rule relating to actions brought exclusively for the benefit of the federal government, the doctrine of laches may be applied in these hybrid cases to limit relief." (Emphasis added). 614 F.2d at 263.

Following these principles, I conclude that if prejudice has occurred, laches may be invoked, not to defeat the claim, but only to limit relief. The evidence of prejudice in this record is the absence from the hearing of Ed Ellis, the Plant Superintendent who signed the document in which Complainant's employment termination was recorded and who allegedly told Complainant that he was fired, and witness, Jack Servold, who was Complainant's foreman. Counsel stated that Ellis died about 2 weeks prior to the hearing, and that Servold was out of State and unavailable to testify. No showing was made of any effort by Respondent to preserve testimony or to obtain the testimony of Servold by deposition or otherwise. I conclude, however, that potential prejudice has been shown, and I will consider that conclusion in discussing relief.

3. Complainant was discharged, actually or constructively, because of his refusal to perform certain work.

DISCUSSION

Complainant refused to operate the shovel unless a heater was installed, and he was told to punch out and go home. Complainant states that he was fired; Respondent states that he quit. What the termination

of employment is called is not important to this proceeding if it resulted from protected activity.

4. Complainant's refusal to operate the shovel in question on January 1, 1979, was based on a good faith belief that it involved a safety hazard because of the extreme cold.

DISCUSSION

It is true that Complainant operated the shovel on prior occasions when the weather was more severe than it was on January 1, 1979. However, the partition referred to in Finding of Fact No. 4 had not been installed on these occasions and more heat from the engine came into the cab. It is also true that another employee operated the shovel on January 1, 1979, without incident. Neither of these aforementioned facts persuades me that Complainant was acting otherwise than in good faith when he refused to operate the shovel on January 1. There is no other adequate explanation for his refusal.

5. Complainant's refusal to operate the shovel in question on January 1, 1979, was based on a reasonable belief that it involved a safety hazard because of the extreme cold.

DISCUSSION

MSHA Special Investigator Wilcox, a mining engineer, stated his opinion that it was a safety hazard to run a shovel such as the one in question in subfreezing temperatures without any heat. Others who testified disagree with him, but I accept the testimony of Wilcox as establishing that Complainant's refusal to run the shovel was reasonable and was related to safety considerations.

6. Complainant's refusal to operate the shovel in question on January 1, 1979, was activity protected under the Mine Act.

DISCUSSION

Refusal to perform work is protected under section 105(c)(1) of the Act, if it results from a good faith belief that the work involves safety hazards, and if the belief is a reasonable one. Secretary of Labor/Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (1980), rev'd on other grounds, sub nom Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary of Labor/Robinette v. United Castle Coal Co., 3 FMSHRC 803 (1981); Bradley v. Belva Coal Co., 4 FMSHRC 982 (1982).

7. Complainant's employment was terminated by Respondent because of his refusal to operate the shovel on January 1, 1979, referred to above. This constituted a violation of section 105 of the Act.

8. Because of the delay in filing the complaint, I will not order Respondent to pay interest on the award of back wages.

ORDER

Based upon the above findings of fact and conclusions of law, Respondent is ORDERED to pay Complainant within 30 days of the date of this decision the sum of $605 for 2 weeks lost wages.

James A. Broderick
Administrative Law Judge

Distribution: By certified mail

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MOUNTAIN DRIVE COAL COMPANY, Contestant	:	Contest of Citation
	:	Docket No. KENT 81-110-R
v.	:	Citation No. 993137
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	March 10, 1981
Respondent	:	No. 1 Strip Mine

DECISION

Appearances: Lloyd R. Edens, Esq., Middlesboro, Kentucky, for Contestant; Darryl A. Stewart, Esq., Office of the Solicitor, U. S. Department of Labor, for Respondent.

Before: Administrative Law Judge Steffey

A hearing in the above-entitled proceeding was held on May 11 and 12, 1982, in Barbourville, Kentucky, pursuant to section 105(d), 30 U.S.C. § 815(d), of the Federal Mine Safety and Health Act of 1977. After the parties had completed the introduction of evidence, counsel for the parties made closing arguments, and I rendered a bench decision.

When the reporter failed to submit a transcript of the hearing within a reasonable period of time, efforts to call him by telephone were unsuccessful. A letter written to his post office box number was not answered. Finally, I wrote him a letter by certified mail on October 19, 1982. The letter was returned by the post office with a notation on the front of the envelope that the addressee had not claimed the registered letter. A telephone call to the post office resulted in our being advised that the reporter does still pick up his mail at that post office, but he would not claim the registered letter when he was given three notices that a registered letter was being held for his signature.

The only address I have for the reporter is a post office box number. I assume that I could personally travel to Tazewell, Virginia, and ask enough questions to determine where the reporter lives and I probably could find his home and he might be willing to give me, or sell me, the stenographic notes which he made of the hearing. I do not know, of course, whether his notes are legible or whether another reporter could produce a transcript of the hearing from his notes.

An alternative way to obtain a written transcript would be for me to hold a second hearing, but I am reluctant to burden the parties with a second hearing in view of the fact that 11 witnesses testified at the

previous hearing. Even if they could all be assembled again for a second hearing, a period of more than 20 months has elapsed since the citation being contested was issued, and it is unlikely that they would recall the occurrences vividly enough to produce a satisfactory record.

Fortunately, I retained all of the exhibits which were introduced at the hearing. The issue in this case dealt exclusively with whether contestant was providing sufficient illumination to provide safe working conditions at its surface mine. Twelve of the exhibits consisted of color photographs which contestant had had made of its mine and the equipment used at the mine. Many of my findings of fact are based on contestant's color photographs. Although my bench decision resulted in an unfavorable decision for the Secretary of Labor, it is entirely possible that counsel for the Secretary will not believe that it is necessary to file a petition for discretionary review with the Commission because the decision is based almost entirely upon evidentiary facts. Therefore, my decision will have little precedential value for any operator other than the contestant in this proceeding.

In view of the circumstances described above, I have decided to issue the bench decision in final form. If counsel for the Secretary of Labor should decide, after evaluating the decision, that it is necessary to file a petition for discretionary review, the case can be remanded to me so that I can either hold another hearing or try to obtain a transcript from the notes made by the reporter who appeared at the first hearing.

The material which follows is the bench decision which was orally given on May 12, 1982, after counsel for the parties had completed their closing arguments.

> This proceeding involves a notice of contest filed on April 8, 1981, in Docket No. KENT 81-110-R by Mountain Drive Coal Company alleging that Citation No. 993137 issued on March 10, 1981, under section 104(a) of the Federal Mine Safety and Health Act of 1977 is invalid because the citation incorrectly alleged that Mountain Drive had violated 30 C.F.R. § 77.207. Section 77.207 reads as follows:
>
> > Illumination sufficient to provide safe working conditions shall be provided in and on all surface structures, paths, walkways, stairways, switch panels, loading and dumping sites, and working areas.
>
> At the hearing MSHA presented its case through the testimony of one coal mine inspector supervisor and Mountain Drive supported its case through the testimony of 10 witnesses. My decision will be based on the following findings of fact:
>
> 1. It was stipulated that Mountain Drive is subject to the jurisdiction of the Act, that Mountain Drive operates the No. 1 Strip Mine here involved, that Mountain Drive is a large operator,

that Mountain Drive has no history of having previously violated section 77.207, and that payment of penalties will not adversely affect Mountain Drive's ability to continue in business.

2. As to the penalty criterion of contestant's good-faith effort to achieve rapid compliance, MSHA agreed that Mountain Drive could continue to use the illuminating methods which were in operation when Citation No. 993137 was issued, pending the rendering of a decision in this proceeding as to whether Mountain Drive's illumination method is a violation of section 77.207.

3. It was further stipulated that Citation No. 993137 was issued on March 10, 1981, alleging a violation of section 77.207 by Federal Coal Mine Inspector Supervisor Kenneth T. Howard who was accompanied by another inspector named H. M. Callihan. The stipulations are given in a two-page document which is Exhibit 1 in this proceeding.

4. The inspector supervisor testified that he and another inspector went to Mountain Drive's No. 1 Strip Mine on March 10, 1981, at about 5:30 to 6 p.m. and examined various areas of the mine for a period of about 4 or 5 hours. He was concerned about the adequacy of lighting in two different areas.

5. The first area was at a dumping site in N Section where large trucks were dumping overburden into a hollow about 20 feet in depth. A dozer was leveling dumped materials and the inspector supervisor was told by Mountain Drive's safety director that the dozer was available for extra illumination or spotting if needed. The inspector supervisor said the dozer's lights, when he observed them, were shining toward the dump trucks so as to be in the truck drivers' eyes as the drivers approached the dumping site. The inspector supervisor was accompanied by Mountain Drive's safety director, Buddy Johnston, and the inspector supervisor asked Johnston to have the dozer turn so that its lights were shining on the dumping area rather than toward the approaching trucks coming in to dump overburden.

6. The inspector supervisor would have accepted the dozer's lights as adequate supplemental illumination for the dumping area except for his belief that the dozer operator would normally be engaged in spreading overburden and could not be expected to shine his lights on the dumping site every time a truck approached. Moreover, he believed that the dozer had been placed in a supplemental lighting position to impress upon him that adequate lighting was available at the dumping site.

7. The inspector supervisor did not get out of his truck to discuss lighting with any truck driver or the dozer operator and did not actually examine the number of lights on the front of the truck or its rear, but he estimated that each truck had two lights on its front end and one back-up light on its rear end. The inspector supervisor concluded that the lighting was inadequate in the dumping area on the basis of the above-described examination.

8. The second area which the inspector supervisor believed to be insufficiently illuminated was a pit area known as the N-3 pit. He recalled the equipment he had observed in the N-3 pit as two dozers, but the citation was written over a year prior to the date of the hearing and the inspector supervisor's memory was not sufficiently keen to enable him to say for certain whether he had observed two end-loading machines in the N-3 pit or two dozers or one of each in the N-3 pit. The only aspect of the N-3 pit's illumination as to which the inspector supervisor was certain was that while the light from the dozers or loaders was sufficient for the operators to see the material they were pushing, the lighting on the equipment was not bright enough to enable the equipment operators to see all the way to the top of the highwall near which they had to work from time to time.

9. It was the inspector supervisor's opinion that a highwall may become hazardous during any given 8-hour shift and that equipment operators must be able to observe the highwall all the way to the top to be certain that it does not develop cracks which may release loose material which may fall into the pit where the equipment is being used. In fact, the inspector supervisor indicated that a fatality had occurred at another mine not owned by Mountain Drive a short time before he wrote the citation here involved and that fatality occurred shortly after a new shift had begun to work following a preliminary inspection of a highwall. Therefore, the inspector supervisor concluded that supplemental lighting was needed in the N-3 pit.

10. Based on the facts summarized in Finding Nos. 4 through 9 above, the inspector supervisor and Inspector Callihan both signed Citation No. 993137. The condition or practice on that citation reads as follows: "Sufficient illumination to provide safe working conditions was not provided at dumping location in "N" section and the "N-3" pit area. At the dumping locations only vehicle headlights and/or back-up lights were available and in the pit area, sections of the highwall where equipment was required to work in close proximity were not illuminated."

11. Charles Warren, a commercial photographer, was hired by Mountain Drive to take some color pictures showing the degree of illumination provided by the lights on Mountain

Drive's equipment. The photographer did not provide any illumination in addition to that supplied by the existing lights on the equipment. Exhibit A is an 8" x 10" photograph of lighting provided by an end loader like the one operating in the N-3 pit when the inspector supervisor cited the N-3 pit for insufficient lighting. Exhibits B through E are 8" x 10" photographs of illumination provided by the Euclid 75 trucks being used in the dumping area cited by the inspector supervisor for insufficient lighting. Those photographs support a conclusion that the trucks and end loaders provided a great deal of light.

12. Buddy Johnston, Mountain Drive's safety director, accompanied the inspector supervisor and the other inspector on March 10, 1981. He introduced six 5" x 7" color photographs of one of the Euclid 75 trucks which was being used in the dumping area on March 10, 1981. Exhibit I is a close-up picture of the front of the truck. Johnston explained that the manufacturer installs four lights on the front and that Mountain Drive additionally installs four supplemental lights on the front of the truck, one on each end of the bumper and one on each side of the hood about even in height with the last rung of the ladder used by the truck driver to climb up to the truck's cab. Exhibit H is a close-up of the rear of the same Euclid truck showing the two sealed beam back-up lights which are standard equipment installed by the manufacturer and two supplemental lights which are installed by Mountain Drive to shine diagonally toward the left and right sides of the rear dual wheels. Exhibits F and G are two photos of the same Euclid truck showing a supplemental light which Mountain Drive adds just behind each front wheel so as to illuminate the area in front of the rear dual wheels. The actual illumination is illustrated by the 8" x 10" photographs described in Finding No. 11 above.

13. Johnston also introduced as Exhibits K and L two 5" x 7" photographs of a 992 Caterpillar end loader like the two being used in the N-3 pit when the N-3 pit was cited for insufficient lighting. Johnston's Exhibits K and L show that the manufacturer equips the loader with lights on the boom on each side near the lower part of the windshield and with one light on each side of the top of the cab. Mountain Drive supplements the manufacturer's cab lights with two lights between the two top cab lights and the middle lights are directed upward so that the operator of the end loader may see the highwall above him. Johnston also testified that the inspector supervisor found the lights on the end loaders to be insufficient only when they were being used in a position which was parallel to the highwall.

14. James Courtney is an operator of a 992 Caterpillar end loader and he was operating it in the N-3 pit on March 10, 1981, when Mountain Drive was cited for insufficient lighting.

He testified that he had worked for another company, Pine Mountain Industries, at a time when that company had installed six portable power plants to provide lighting for a pit area as shown in Exhibit M, and that he was unable to work at all until the portable light plants were removed because they created an unacceptable amount of glare in his eyes by reflecting off of mirrors and by shining directly into his eyes. He insisted that he could see the entire highwall and that he could see it clearly enough to have known it if any hazardous conditions had developed on the highwall in N-3 pit. He said he nearly always approached the highwall at a 45° angle which enabled him to see to the top of the highwall and he further said that if he were to drive his end loader exactly parallel and close to the highwall, he would in that position be unable to see to the top of the highwall because of the roof of his cab and not because he lacked sufficient light to see to the top of the highwall.

15. George Brock was a truck driver on the day shift but he was fairly often asked to report for work at 3 a.m. and work to 1 p.m. During such shifts, he had worked when Mountain Drive had experimented with portable lighting units. No matter how those units were positioned, they blinded him so as to make his work more hazardous and difficult when they were used than when they were not used.

16. Three other truck drivers supplemented Brock's testimony. Their names were B. B. Wilson, B. Eugene Johnston, and Mike Polly. All of them testified that they were driving Euclid 75's on March 10, 1981, when Citation No. 993137 was written and that they could see very well where they were dumping with the lights installed on the trucks as described in Finding Nos. 11 through 13 above. All of them said they would come into the dumping area and make one pass around the dumping site so as to choose the place where they wanted to dump. Then they would back up and dump their trucks by looking first into their top rear view mirror and then into the lower mirror, as those mirrors are shown on Exhibits F, G, I, and J and as the areas are illustrated in Exhibits B, C, and D.

17. Doug Hoskins has worked for Mountain Drive since 1970 and he became the mine manager in January 1980. He was not available to testify in person at the hearing held on May 11, 1982, but his deposition was taken on May 5, 1982, in Knoxville, Tennessee, at which time he was questioned by MSHA's counsel. It was agreed that his deposition could be received as evidence in this proceeding. According to pages 7 and 8 of that deposition, Mountain Drive expanded its overburden removal ability in 1975 and the company experimented with portable lighting units for a few months to determine whether such units could be used to maximize safety and upgrade efficiency. After the lights in

the portable units had been positioned both high and low without overcoming the equipment operators' objections to the glaring and blinding characteristics, they discontinued the use of the portable units and had operated for about 6 years without using any illumination other than the lights installed on the equipment as hereinbefore described. During that 6-year period, Mountain Drive was not cited for having insufficient lighting until the citation involved in this case was written on March 10, 1981.

18. After Citation No. 993137 was issued, Hoskins discussed the matter of illumination with other management personnel and management decided that their record of no equipment operators' complaints and their safety record free of disabling injuries justified their conclusion that their methods of illumination provided safe operating conditions and merited their filing a notice of contest with respect to the citation.

Consideration of Parties' Arguments

Counsel for Mountain Drive argued that his witnesses had carried their burden of showing that the supplemental lights installed by Mountain Drive on its trucks and end loaders provided sufficient light to satisfy the requirements of section 77.207, that is, illumination sufficient to provide safe working conditions.

I agree with Mountain Drive's counsel that the testimony of its witnesses and its exhibits support a finding that there was sufficient illumination in the N dumping area and N-3 pit to provide safe working conditions. I also agree with Mountain Drive's counsel that the testimony of the inspector supervisor lacked the certainty which is required for me to find that the inspector supervisor's testimony alleging insufficient lighting should be found to preponderate over the testimony of the truck drivers and end loader operators who said that they could see perfectly well.

In his argument, counsel for the Secretary of Labor correctly stated that there is nothing in section 77.207 which specifically requires an operator to provide illuminating or self-generating plants. The Secretary's counsel also agreed that Mountain Drive's equipment operators are uniform in their dislike for lighting plants.

The Secretary's counsel was critical of Mountain Drive for its failure to present as a witness the operator of the dozer in the dumping area. I am not certain that the dozer operator could have contributed much useful information as to the sufficiency of the illumination provided by his dozer's

lights when it is considered that the inspector supervisor testified that the dozer's lights would have provided sufficient illumination to satisfy the provisions of section 77.207, but the inspector supervisor rejected use of the dozer's lights as a consistent supplemental light source because the inspector supervisor was unwilling to accept the fact that the dozer operator would always be alert and willing to shine his dozer's lights on the dumping area at the time each truck was dumping.

Also it must be recalled that the inspector supervisor criticized the use of the dozer for supplemental lighting because the dozer's lights, when the inspector supervisor came to the N-3 pit, were shining toward the oncoming trucks. The inspector supervisor said that, in his opinion, the dozer's lights were blinding the truck drivers rather than helping them to see. To that extent, the inspector supervisor was in complete agreement with the equipment operators' objections to lighting plants because the equipment operators said that the glare from the lighting units made it difficult for them to see where they were dumping. While a dozer operator can move his dozer to keep his lights from shining into a truck driver's eyes, there is no way for a stationary lighting plant to vary its position so as to eliminate its glare from an equipment operator's eyes. Moreover, every truck driver was segregated prior to testifying but, without exception, each driver testified that the operator of the dozer turned off the dozer's lights when the trucks were dumping so that the dozer's lights would not shine in their eyes.

Therefore, I do not find that Mountain Drive's failure to add an eleventh witness to its list of witnesses is an evidentiary gap which would support a finding that Mountain Drive has failed to carry its burden of countervailing the testimony of the inspector supervisor. It is not my practice to cite shortcomings in testimony, but it is a fact that Inspector Callihan did jointly sign Citation No. 993137. I do not know what effect his testimony would have had on the outcome of this proceeding, but his failure to testify constitutes a larger gap in the Secretary's proof than the absence of the dozer operator's testimony creates in Mountain Drive's case.

The Secretary's counsel also objects because I sustained objections of Mountain Drive's counsel to questions about how the truck drivers could see when they were in the N-3 pit area. The Secretary's counsel says that he relies on all the language in Citation No. 993137 as to the N-3 pit and that he was prevented by my ruling from developing his arguments in support of the citation. The total claim of insufficient light in the N-3 pit is "* * * in the pit area, sections of

the highwall where equipment was required to work in close proximity were not illuminated". The violation of section 77.207 as to the N-3 pit depends exclusively on what the inspector supervisor used to support his conclusion that the highwall was not sufficiently illuminated. The inspector supervisor does not claim to have seen a single truck in the N-3 pit. He supported the violation in the N-3 pit exclusively by saying that the operator of the dozer or end loader (he didn't know which it was) couldn't see the top of the highwall when the loader or dozer was in close proximity to the highwall.

Assuming, arguendo, that the Secretary's counsel should have been allowed to develop the question of how much illumination trucks could have provided in the N-3 pit, the evidence is overwhelming that all of the lights on the trucks were directed to the ground so that the truck drivers could see where they were backing their trucks before dumping their overburden. Thus, it is certain that the lights on the trucks would not have illuminated the highwall and no amount of cross-examination of the truck drivers could have changed the basis for the inspector supervisor's claim that the highwall was not sufficiently illuminated to provide safe working conditions.

In its decision issued in Capital Aggregates, Inc., 3 FMSHRC 1388 (1981), the Commission considered two alleged violations of section 56.17-1 which reads the same as section 77.207 involved in this proceeding. The Commission stated on page 1388 that the question presented is what constitutes illumination sufficient to provide safe working conditions. The Commission then added that resolution of the question "* * * requires a factual determination based on the working conditions in a cited area and the nature of the illumination provided". The Commission found a violation in that case because lights at a coke storage bin and adjacent walkways were not operable. The operator in that case argued that it had provided adequate illumination because it had provided electrical outlets for portable lighting equipment. The Commission then stated at page 1389, "[p]ortable lighting could satisfy the standard where such lighting is accessible, its use is feasible and safe, and it provides adequate light under the circumstances". The Commission stated that the operator in that case had presented no evidence to show that it had the portable equipment nor how much light it would provide even if it had been available.

In this proceeding, Mountain Drive has gone far beyond the evidence considered in the Capital Aggregates case. Mountain Drive has presented a large number of witnesses who have used portable lighting in strip mining and those witnesses have shown without any equivocation that portable

lighting, when used, failed to make conditions safer than the conditions were without such equipment. In short, portable lighting has been shown by Mountain Drive's evidence to be neither feasible nor safe.

I believe that Mountain Drive has established by a preponderance of the evidence that the lights on its trucks and end loaders furnished sufficient illumination to provide safe working conditions in the N dumping area and N-3 pit and that no violation of section 77.207 has been proven.

Since I have found that no violation was proven, there is no need to consider the civil penalty issues which were consolidated for consideration in this proceeding.

WHEREFORE, it is ordered:

The notice of contest filed on April 8, 1981, in Docket No. KENT 81-110-R by Mountain Drive Coal Company is sustained and Citation No. 993137 issued March 10, 1981, alleging a violation of section 77.207 is vacated.

Richard C. Steffey

Richard C. Steffey
Administrative Law Judge
(Phone: 703-756-6225)

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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NOV 19 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. KENT 81-141
v.	:	A. C. No. 15-04338-03044 F
EASTOVER MINING COMPANY, Respondent	:	Brookside No. 3 Mine

DECISION APPROVING SETTLEMENT

When a hearing was convened on May 13, 1982, in Barbourville, Kentucky, in the above-entitled proceeding, counsel for the Secretary of Labor stated that the parties had reached a settlement of the issues. The Secretary's counsel then made an oral motion for approval of settlement. Under the settlement agreement, respondent would pay reduced penalties of $1,250 instead of the penalties of $2,250 proposed by the Assessment Office for the two alleged violations involved in this proceeding.

Since the oral motion for settlement was made in the presence of a court reporter, it is normal procedure to wait until a transcript of the hearing is received from the reporter before acting upon the oral motion for approval of settlement. After the transcript is received, the judge normally issues his decision on the basis of the motion which has been transcribed by the reporter. In this instance, the court reporter failed to submit a transcript of the hearing. We have been unable to talk to the reporter by telephone to ask whether he ever intends to transcribe the hearing, and he will not accept a letter sent by certified mail. Therefore, I am issuing this decision on the basis of the notes which I took at the hearing.

Section 110(i) of the Federal Mine Safety and Health Act of 1977 lists six criteria which are required to be used in determining civil penalties. The six criteria were considered by the parties when they reached their settlement agreement. As to the criterion of the size of respondent's business, the proposed assessment sheet in the official file shows that respondent produces over 2,000,000 tons of coal on an annual basis and that the Brookside No. 3 Mine involved in this proceeding produces over 200,000 tons of coal per year. Those figures support a finding that respondent is a large operator and that any civil penalties assessed in this proceeding should be in an upper range of magnitude insofar as they are determined under the criterion of the size of respondent's business.

The parties have presented no evidence, and the official file contains no facts, pertaining to respondent's financial condition. The former Board of Mine Operations Appeals held in Buffalo Mining Co., 2 IBMA 226 (1973), and in Associated Drilling, Inc., 3 IBMA 164 (1974), that a judge may presume that an operator is able to pay civil penalties if the operator fails to present any evidence regarding its financial condition. In the absence of any statements by the Secretary's counsel or facts in the official file indicating that a contrary conclusion should be drawn, I find that payment of penalties will not cause respondent to discontinue in business.

As to the criterion of respondent's history of previous violations, counsel for the Secretary stated that during the 24 months preceding the writing of the two citations involved in this proceeding, respondent had been assessed for a total of 243 violations during 390 inspection days. Application of those figures to the assessment formula in 30 C.F.R. § 100.3(c), which was in effect prior to May 21, 1982, when the penalties in this proceeding were proposed by the Assessment Office, shows that a total of nine penalty points should be assigned under the criterion of respondent's history of previous violations. I find that the settlement penalties are sufficiently large to allow for an appropriate amount to be included under the criterion of respondent's history of previous violations.

The remaining three criteria of negligence, gravity, and the operator's good-faith effort to achieve rapid compliance will be considered in the ensuing discussion of the allegations contained in each citation. Citation No. 741492 alleged that respondent had violated 30 C.F.R. § 75.1725 by failing to remove from service a track vehicle which had a defective device for holding the trolley pole against the trolley wire which supplied the vehicle with electrical power. One of respondent's foremen used the track vehicle even though he knew that the trolley pole frequently came loose from the trolley wire. The foreman was electrocuted when he tried to reattach the trolley pole to the source of power. The Assessment Office waived the normal penalty formula described in section 100.3 and proposed a penalty of $1,000 for the violation based on narrative findings of fact.

A copy of the narrative findings is a part of the official file. Those findings show that the Assessment Office considered the violation to have been the result of negligence and to have been very serious. The Secretary's counsel stated that the parties had agreed to reduce the proposed penalty of $1,000 to $600 primarily because the facts do not warrant a finding that respondent was as negligent as the Assessment Office found it to be. A foreman had used the car with the defective power attachment device with knowledge that the track vehicle was not in safe operating condition. I believe that the Commission's decision in Nacco Mining Co., 3 FMSHRC 848 (1981), can be cited as a precedent for allowing some reduction in the proposed penalty under the criterion of negligence. In the Nacco case, the Commission found that the operator was nonnegligent for a violation of section 75.200 in circumstances which showed that a foreman

had gone out from under roof support for a distance of 10 to 12 feet in violation of the operator's roof-control plan. The foreman was killed when the roof fell on him. The facts showed that the foreman had received proper training and that he had shown good judgment on prior occasions with respect to following safety regulations, but on the day of the accident, he acted aberrantly and engaged in conduct which was wholly unforeseen. The foreman's action did not expose anyone else to harm or risk. The Commission stated that finding an operator negligent in such circumstances would discourage pursuit of a high standard of care because, regardless of what an operator did to insure safety, a finding of negligence would always result.

Using a track vehicle with a defective trolley wire attachment necessarily exposes the operator of such a vehicle to a hazardous condition, especially if he undertakes to reattach the trolley pole to the trolley wire without deenergizing the trolley wire, as the foreman did in this instance. Therefore, the Assessment Office correctly found that the violation was serious.

The second civil penalty sought in this proceeding is based on Citation No. 741493 which alleged a violation of section 75.512 because a weekly examination of the track vehicle cited in the preceding discussion was not being made. The Assessment Office found the violation to have been serious, to have been the result of a high degree of negligence, and proposed a penalty of $1,250. The reason that the Assessment Office proposed a larger penalty for the alleged violation of section 75.512, than it had for the violation of section 75.1725 described above, is that the Assessment Office concluded that the cause of the foreman's death was respondent's failure to make the required weekly examination of electrical equipment and to repair such equipment when defects were found.

Counsel for the Secretary stated that the parties had agreed to a reduction of the proposed penalty from $1,250 to $650 because, if a hearing had been held, there was some doubt that a violation of section 75.512 could have been proven. Also the Secretary's counsel noted that there was a considerable amount of overlapping of the two alleged violations in that both the previous violation of section 75.1725 and the instant violation of section 75.512 depended to the same extent upon a failure to inspect and correct the defects in the device which was supposed to keep the trolley pole attached to the trolley wire.

As the Commission observed in Lone Star Industries, 3 FMSHRC 2526, 2529 (1981), the occurrence of an accident or of a fatality does not by itself prove or disprove existence of a violation. Occurrence of an accident, however, may cause inspectors to notice violations which they may have overlooked on previous occasions. The doubt as to occurrence of the violation, coupled with the overlapping nature of the violations, warrants a reduction of the proposed penalty from $1,250 to $650.

The only criterion which has not been discussed is the question of whether respondent demonstrated a good-faith effort to achieve rapid compliance. The Assessment Office found that respondent abated both alleged violations "* * * within a reasonable period of time." The inspector observed the alleged violation of section 75.1725 at 7 a.m. and gave respondent an hour within which to terminate the violation. The subsequent action sheet terminating the citation indicates that the track vehicle was removed from the mine and taken completely away from the track by 9 a.m.. While respondent did not achieve abatement within the hour given by the inspector, it appears that abatement within a period of 2 hours is sufficiently close to the time allowed for abatement by the inspector to support a finding that respondent demonstrated a good-faith effort to achieve abatement so that no additional monetary amount should be assessed under the criterion of good-faith abatement.

The subsequent action sheet terminating Citation No. 741493 was not written until November 20, 1980, or nearly 6 months after the citation was written. Sometimes the inspectors who initially write citations overlook the need to write subsequent action sheets to terminate the citations. Thereafter, another inspector will check the files in MSHA's office and find that a given citation is still outstanding. He will then go to the mine and determine whether the citation should be abated. The termination sheet in this instance was written by a different inspector from the two inspectors who originally wrote the citation. Since abatement was achieved for Citation No. 741493 by taking out of service the same vehicle which was removed from service to abate Citation No. 741492, it is safe to conclude that there is no basis to make a finding of a lack of good faith in connection with the 6-month abatement period associated with Citation No. 741493. Therefore, no additional monetary amount should be assessed for the alleged violation of section 75.512 under the criterion of good-faith abatement.

I believe that the foregoing discussion of the six criteria shows that the Secretary's counsel gave sufficient reasons to warrant the grant of his oral motion for approval of settlement.

WHEREFORE, it is ordered:

(A) The motion for approval of settlement made at the hearing on May 13, 1982, is granted and the settlement agreement is approved.

(B) Pursuant to the settlement agreement, respondent, within 30 days from the date of this decision, shall pay civil penalties totaling $1,250 which are allocated to the respective alleged violations as follows:

Citation No. 741492 5/19/80 § 75.1725 ..... $ 600.00
Citation No. 741493 5/19/80 § 75.512 ..... 650.00

Total Settlement Penalties in This Proceeding $1,250.00

Richard C. Steffey

Richard C. Steffey
Administrative Law Judge
(Phone: 703-756-6225)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. SE 81-50
v.	:	A. C. No. 40-02512-03009 W
BILLY MOON TIPPLE, Respondent	:	Moon Tipple No. 2

DEFAULT DECISION

Appearances: Darryl A. Stewart, Esq., Office of the Solicitor, U. S. Department of Labor, for Petitioner;
No one appeared at the hearing on behalf of Respondent.

Before: Administrative Law Judge Steffey

When the hearing in the above-entitled proceeding was convened in Barbourville, Kentucky, on May 12, 1982, pursuant to written notice of hearing dated April 5, 1982, and received by respondent on April 7, 1982, counsel for the Secretary of Labor entered his appearance, but no one appeared at the hearing to represent respondent.

Under the provisions of 29 C.F.R. § 2700.63(a), when a party fails to comply with an order of a judge, an order to show cause shall be directed to the party before the entry of any order of default. An order to show cause was sent to respondent on May 17, 1982, pursuant to section 2700.63(a), requiring respondent to show cause why it should not be found to be in default for failure to appear at the hearing convened on May 12, 1982. Since respondent had failed to reply to the prehearing order issued February 5, 1982, in this proceeding, the show-cause order also required respondent to explain why it should not be held in default for failure to provide the information requested in the prehearing order. A return receipt in the official file shows that respondent received the show-cause order on May 20, 1982. Respondent was required to answer the show-cause order by June 7, 1982, but no reply has been received.

Respondent's owner, Mr. Billy Moon, called me at the motel in Barbourville about 7:30 p.m. on May 12, 1982, to explain why he had not been present at the hearing when it was convened about 1:30 p.m. on May 12, 1982. The reason given by Mr. Moon for not appearing at the hearing was that he had left home in plenty of time to drive to Barbourville before the hearing was due to commence, but the steering mechanism on his truck ceased working and it was necessary for him to take his truck to a garage. Mr. Moon said that it first appeared that the steering could be repaired in time for him to drive to Barbourville before the hearing, but subsequently it became clear to the mechanic that the problem was too serious

to be repaired until late in the afternoon. Mr. Moon told me that he had called the MSHA office in Barbourville when he found that his vehicle could not be repaired in time for him to be at the hearing, but he was advised that MSHA's counsel, the reporter, MSHA's witnesses, and the judge had already left the building where the hearing was to be held.

The personnel in MSHA's Barbourville Office have always advised me promptly in the past when I have received telephone calls. I waited over 30 minutes after the scheduled hearing time for Mr. Moon to appear before the hearing was convened, and I did not leave the hearing room for over an hour after the hearing had been scheduled to begin. Therefore, it is difficult for me to understand how Mr. Moon could have called me as soon as it became clear that his truck could not be repaired in time for him to appear at the hearing.

Mr. Moon stated in his phone call to me on the evening of May 12 that his defense in this proceeding was that new equipment was being tested at the tipple when the citations were issued and that no coal was being processed. All of the civil penalties sought in this proceeding are for alleged violations of section 104(b) of the Act because, according to the orders of withdrawal, respondent continued to operate its tipple after the withdrawal orders had been issued. There is nothing in the official file to explain why respondent would have continued to operate its tipple, even for testing purposes, after withdrawal orders had been issued.

Moreover, the four withdrawal orders involved in this proceeding have little relationship, if any, to the mechanical operation of the tipple. The foregoing statement is based on the fact that the underlying citations were for (1) failure to replace a shattered windshield in an end loader, (2) failure to provide a certified person to make examinations for hazardous conditions, (3) failure to submit a noise survey as to two employees, and (4) failure to record the results of examinations of electrical equipment.

In any event, the show-cause order gave the operator an opportunity to explain why he failed to respond to the prehearing order, why he failed to give prompt notice of the fact that his truck had broken down, and why his defense of testing new equipment would have been relevant for avoidance of penalties for continuing to operate after withdrawal orders had been issued.

Inasmuch as no reply to the show-cause order has been submitted, I find respondent to be in default for failure to appear at the hearing convened on May 12, 1982, and for failure to reply to the prehearing order issued February 5, 1982. Section 2700.63(b) of the Commission's rules provides that "[w]hen the Judge finds the respondent in default in a civil penalty proceeding, the Judge shall also enter a summary order assessing the proposed penalties as final, and directing that such penalties be paid."

WHEREFORE, it is ordered:

Billy Moon Tipple, having been found in default, is ordered, within 30 days from the date of this decision, to pay civil penalties totaling $705.00 which are allocated to the respective alleged violations as follows:

Citation No. 979886 11/13/80 § 104(b) cited in Order No. 986079 issued 9/19/80	$ 130.00
Citation No. 979887 11/13/80 § 104(b) cited in Order No. 986080 issued 9/19/80	150.00
Citation No. 979889 11/13/80 § 104(b) cited in Order No. 979888 issued 11/13/80	125.00
Citation No. 983862 11/13/80 § 104(b) cited in Order No. 986077 issued 9/19/80	300.00
Total Civil Penalties Proposed by Assessment Office	$ 705.00

Richard C. Steffey

Richard C. Steffey
Administrative Law Judge
(Phone: 703-756-6225)

Distribution:

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Billy W. Moon, Owner, Billy Moon Tipple, Box 314, Monteagle, TN 37356 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. KENT 81-228 A.O. No. 15-07212-03016
v.	:	No. 21 Mine
SHAMROCK COAL COMPANY, Respondent	:	

DECISION

Appearances: Carole M. Fernandez, Attorney, U.S. Department of Labor, Nashville, Tennessee, for the petitioner; Neville Smith, Esquire, Manchester, Kentucky, for the respondent.

Before: Judge Koutras

Statement of the Proceedings

This proceeding concerns a proposal for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), charging the respondent with one alleged violation issued pursuant to the Act and the implementing mandatory safety and health standards. Respondent filed a timely answer in the proceedings and a hearing was held on August 25, 1982, in London, Kentucky, and the parties appeared and participated fully therein.

Issues

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

In determining the amount of civil penalty assessments, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of

such penalty to the size of the business of the operator charged, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violations, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violations.

Applicable Statutory and Regulatory Provisions

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

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

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

Stipulations

The parties stipulated to the following (Tr. 3-5):

1. The subject mine is subject to the jurisdiction of the Act.

2. At the time the citation issued in 1981, the mine had an annual coal production of 200,000 tons.

3. The citation in question was issued by a duly authorized representative of the Secretary of Labor.

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

5. Once the citation was issued, the respondent acted in good faith in rapidly abating the cited conditions.

6. Respondent's history of prior violations is reflected in petitioner's exhibit G-1, a computer print-out listing such violations.

MSHA's testimony and evidence

MSHA Inspector Joe M. Burke confirmed that he issued the citation in question on April 8, 1981, because of the failure by the respondent to drill a test hole in the roof as required by its approved roof control plan dated January 7, 1980. He identified the applicable portion of the plan as section 9, page 7, and indicated that it required a test hole to be drilled to a depth of 12 inches above the anchorage horizon of the bolts being used during each production shift. The plan also required that such a test hole be left open, plugged with a readily removable plug, or painted with a distinctive paint to identify it as a test hole (Tr. 7-10).

Mr. Burke stated that when he arrived at the mine for his inspection at 3:05 p.m., the first production shift had just ended. He determined that no work had been done on the second shift when he arrived at the section, and section foreman Corbett Caldwell told him that the roof bolting crew had not been in the place in question during the second shift. While examining some loose roof bolts with Mr. Caldwell, Mr. Burke started looking for a test hole, but could not find one. Mr. Caldwell informed him that the roof bolting work had been done on the previous first shift. The nearest test hole which could be found was 150 feet back from the face. Since a fresh cut had been taken out of the number 1 working place, a test hole should have been made in that area, and Mr. Burke indicated that he issued the citation for the first shift which had just completed its work. Had the work been done on the second shift he would not have issued any citation. He did so because he considered that the roof work had been done on the prior shift (Tr. 10-16).

Mr. Burke believed that the respondent should have been aware of the violation in that the first shift foreman should have conducted an examination of the roof for the oncoming second shift. Mr. Burke indicated that he checked the preshift record book and it did not indicate that any test holes were being drilled and it did not indicate any problems or roof abnormalities (Tr. 17).

Mr. Burke stated that during his inspection he detected that 24 out of 30 roof bolts were not properly torqued, and he determined that this was due to the roof bolting machine being out of adjustment (Tr. 18).

On cross-examination, Mr. Burke confirmed that out of the 51 feet mined in the number one entry of the 001 section, a fresh cut of approximately 20 feet taken out in the number one working place was not bolted as yet, but 31 feet of the roof was bolted (Tr. 22). He examined the 51 feet working area and found no evidence of any test hole being drilled, and Mr. Caldwell told him that all of the work had been done on the previous shift (Tr. 25). Had the first shift drilled a test hole, Mr. Caldwell would have the entire remainder of the second shift to drill a test hole based on the amount of coal he produced during his shift (Tr. 26).

Mr. Burke stated that the respondent's normal practice is to leave the test holes open and that on prior inspections at the mine he has observed such test holes drilled in the roof (Tr. 27). The purpose of such test holes is to determine the adequacy of the anchorage roof strata where the roof bolts will be installed (Tr. 30). A test hole was drilled in the area which had been permanently bolted in order to abate the citation, and this was done some five to ten minutes after he issued the citation (Tr. 33).

Respondent's testimony and evidence

James Napier, testified that he was the first shift foreman on April 8, 1981, and he stated that the required test hole was drilled

in the first cut of coal taken out of the number one working place that day. The location of the hole was approximately 40 to 45 feet from the face area, and the hole was left open but was not marked (Tr. 38-39).

Mr. Napier testified that the test hole complied with the roof control plan and that he personally observed it after Mr. Burke's inspection immediately the next morning. The hole was drilled approximately 10 feet inby the last open crosscut approximately five to six feet from the right rib (Tr. 40). He stated that when he learned that the citation had issued he asked the roof bolter to show him where he had drilled the test hole, and he personally saw that hole as well as the one which was drilled to abate the citation (Tr. 41).

On cross-examination, Mr. Napier confirmed that when he saw Mr. Burke the day after the citation issued he advised him that the test hole had been drilled on the first shift (Tr. 43). He also confirmed that he told Mr. Caldwell that the test hole was drilled (Tr. 45).

Corbett Caldwell, second shift section foreman, testified that on the day of the inspection he and Mr. Burke looked for the test hole and could not find it. The test holes are normally drilled through the middle of the roof, and in this case the hole had been drilled to the side. He determined that the hole had in fact been drilled when Mr. Napier advised him of this the next evening. He went to the area and found the hole and he indicated that it was hard to see because of the way the coal was cut. He indicated that this was the reason why he and Mr. Burke had not seen the hole during the inspection (Tr. 49).

On cross-examination, Mr. Caldwell confirmed that he found the test hole precisely where Mr. Napier said it was drilled, and he indicated that he and Mr. Burke missed it because they were not looking in that area. He could not recall whether he should Mr. Burke the test hole after he discovered it (Tr. 51).

Rebuttal testimony

Inspector Burke was called in rebuttal and he confirmed that when he returned to the mine the day after he issued the citation, Mr. Napier mentioned the test hole to him and indicated that one had been drilled. However, he could not recall Mr. Caldwell mentioning the test hole, nor could he recall looking for it on that day (Tr. 58).

Mr. Burke stated that even if he had found a test hole the next day there would be no way that he could determine when it was drilled. He indicated that at the time of his inspection, the person who would have drilled the hole and the shift foreman had already gone home (Tr. 62). He also conceded that the test hole could have drilled as stated by Mr. Napier, and had he gone back to look the next day he would not have vacated the citation because he found none during his inspection (Tr. 64).

Findings and Conclusions

The citation issued in this case charged the respondent with a failure to follow its roof control plan requirement that a test hole be drilled in the roof on a horizontal plane of 12 inches. In its answer to the charges the respondent maintained that under the roof control plan the respondent was only required to drill such a hole sometime during the shift, and that the inspector acted prematurely by issuing the citation before waiting for the end of the shift. In short, respondent initially argued that the test hole would have been drilled had the inspector not acted hastily and prematurely (Tr. 6-7).

At the hearing respondent's counsel stated that during his investigation of the facts surrounding the citation in preparation for trial he discovered evidence that the required test hole had in fact been drilled on the first shift. This evidence was presented at the hearing by testimony by the first shift foreman James Napier. I find Mr. Napier to be a credible witness, and I accept his testimony as proof of the fact that the test hole was in fact drilled, and I take note of Inspector Burke's testimony that it was possible that the hole was drilled as testified to by Mr. Napier.

It seems clear to me that on the facts of this case the inspector issued the citation because he found no test hole had been drilled on the first shift. He and the second shift foreman looked for the hole in an area where it would normally have been drilled. They apparently did not look at the area where the first shift foreman stated it was located.

The pertinent roof control provision, paragraph nine, exhibit P-2, requires that a test hole he drilled during each production shift. Since no production had taken place on the second shift at the time of the inspection conducted by Inspector Burke on April 8, 1981, his citation was issued because he found no evidence that the test hole had been drilled on the immediate preceding first shift which had just ended. The roof area which had been completed on that shift was fully bolted (TR. 35-37).

Conclusion and Order

After careful consideration of all of the testimony and evidence adduced in this case, I conclude and find that the respondent has established that the required roof control test hole was in fact drilled as required by its plan. Under the circumstances, IT IS ORDERED that Citation No. 990824, issued on April 8, 1981, charging a violation of mandatory safety standard 30 CFR 75.200, IS VACATED, and this matter IS DISMISSED.

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

RICHARD E. BJES, Complainant	:	Discrimination Complaint
	:	Docket No. PENN 82-26-D
v.	:	
	:	Laurel Mine
CONSOLIDATION COAL COMPANY, Respondent	:	

DECISION

Appearances: Carson Bruening, UMWA District #2, Edensburg, Pennsylvania, for the complainant; Jerry E. Palmer, Esquire, Pittsburgh, Pennsylvania, for the respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a complaint of discrimination filed by the complainant against the respondent pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977. The complaint was filed with the Commission after the complainant was advised by MSHA that its investigation of his complaint did not disclsose any discrimination under the Act.

The complaint filed by Mr. Bjes in this case states as follows:

> I was removed from the mine at 7:30 p.m. on July 30, 1981, and informed that I was being suspended with intent to discharge effective immediately for refusing to run a shuttle car, that in the opinions of the mine safety committee, Federal Inspector Charles Burke and myself was a hazard to myself and members of my crew. The problem was caused by my size and the lack of room in the car. A safety grievance and a regular grievance were then filed which sent the case into arbitration. The arbitrator's decision was that I would be suspended for 30 working days. I feel that my individual safety rights were violated and that I was disciplined illegally under Federal law protecting my right to a safe working place.

Respondent filed a timely answer denying that it had discriminated against Mr. Bjes, and asserting that the action taken against him was a result of insubordination because of his failure to comply with a direct management order to operate the shuttle car in question.

A hearing was conducted in this matter in Pittsburgh, Pennsylvania, on April 6, 1982, and the parties appeared and participated fully therein. The parties filed post-hearing briefs, and the arguments presented therein have been considered by me in the course of this decision.

Issues

The principal issue presented in this case is whether Mr. Bjes' refusal to operate the shuttle car in question was protected activity under the Act, and whether respondent's disciplinary action taken against him for this refusal is discriminatory under the Act. Additional issues raised by the parties are identified and discussed in the course of this decision.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 301 et seq.

2. Sections 105(c)(1), (2) and (3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815(c)(1), (2) and (3).

3. Commission Rules, 29 CFR 2700.1 et seq.

Complainant's Testimony and Evidence

Richard Bjes testified that on July 30, 1981 he was ordered to operate the number 9 shuttle car, but he found it uncomfortable and he was unable to reach the brake pedal with his leg and he could not steer with his hand because his leg was in the way. He advised the shift boss of his difficulties, but was told to try and operate it anyway and he operated the machine for the remainder of the shift. However, the machine had to be shut down for repairs for two hours because he ripped off some motor hoses while trying to manuever the machine in the section. The car in question is a low profile machine and then he experienced difficulty in reaching the controls so as to facilitate backing in and out of areas where pillar extraction was taking place. After the shift was over he discussed the matter with a safety committeeman and with mine foreman Hofrichter. After his discussion with Mr. Hofrichter, he was under the impression that someone else would be assigned to the low profile machine and that he (Bjes) would be assigned to a high profile car which had more room under the operator's overhead canopy.

After returning to work the next day, Mr. Bjes stated that he told the section boss that he was not going to operate the low profile car and that he was supposed to operate the high profile one instead. After checking with the office, his boss told him he was to operate the low profile machine, and when Mr. Bjes refused to operate it Mr. Hofrichter and the safety committeeman came to the section and Mr. Bjes demonstrated

the problem he had operating the machine. They did not agree with him, and federal inspector Charles Burke was called to the scene to look at the machine with another safety committeeman, and Mr. Bjes claims they agreed with his position that he could not safely operate the low profile shuttle car. When he asked management to assign him to other duties pending a resolution of the dispute, he was informed that he was under suspension with intent to discharge and was sent home (Tr. 15-19).

Mr. Bjes stated that after returning to work after his suspension, he was assigned to the same low profile shuttle car and attempted to operate it. He did so because he lost his arbitration case concerning his initial refusal to operate the machine. He ran the car for two hours but was injured when he struck his knee on the steering wheel while attempting to stop the machine while pulling in behind a continuous mining machine. He suffered a fractured knee cap and torn ligaments, underwent an operation, and was incapacitated for five months. Mr. Bjes stated further that Inspector Burke's accident report reflected that the injury was caused by his leg being positioned above the steering wheel, and instead of going outside the wheel when he attempted to stop the machine, his leg went inside, thereby causing his injuries (Tr. 20).

On cross-examination, Mr. Bjes confirmed that he had worked for the respondent for some six years. He also identified the machine he refused to operate as a standard low profile shuttle car, and stated that there were two additional cars operating in the section at the same time, one a low profile machine and one a high profile machine. Prior to July 1981, he operated a scoop in the four east section, but would "fill in" as a shuttle car operator when the regular operator did not show up for work. He estimated that he operated a shuttle car on and off for six months prior to July 1981, but always on a "fill in" basis. His regular job classification was as a scoop operator and he operated a scoop 95 percent of the time and the shuttle car five percent of the time (Tr. 25).

Mr. Bjes confirmed that prior to July 1981, he operated the other low profile number 10 car, and while he complained to management that the machine was too small, he did not invoke his safety rights. He also stated that he regularly operated the high profile number four machine until July 27 or 28 when the regular operator returned to work, and he (Bjes) was reassigned to the low profile car. Mr. Bjes confirmed that he understood that seniority on his crew dictated that he would be required to operate the number 9 shuttle car, but that he decided it was unsafe during the course of the shift and not when the regular operator (Wall) returned to work (Tr. 27-29).

Mr. Bjes indicated that the number 9 machine was not defective, and he explained how he tore the hose off the machine on July 28th while operating it in the section. He reported the damage to section foreman Wayne Ross, and he stated that Mr. Ross told him to get off the machine because he could not steer it around the corner. Mr. Bjes also confirmed that when he met with Mr. Hofrichter, both he and safety committman John Adams were left with the impression that he could switch to the higher profile machine (Tr. 34).

Mr. Bjes stated that he is six feet one and a half inches tall and weighs 195 pounds, and that he has observed shuttle car operator Richard Shaffer operate the low profile machine. Mr. Shaffer is six feet, three or four inches tall and weighs 200 pounds, and Mr. Bjes stated he has observed him operate the machine, but does not believe he can do it safely since he does not consider it safe "when you have to operate it with your knees under your chin" (Tr. 35).

Mr. Bjes stated that at the time Mr. Ross removed him from the machine he did not tell him of his injury and that Mr. Ross assigned him to some belt work. Mr. Bjes walked to the belt and commenced shovelling work, but did not report his injury because "if we would report every little injury we get during the course of the shift we wouldn't get any work done" (Tr. 37). He indicated that at the time of his injury he thought he had simply "twisted his knee up a little bit" and commented that this "happens all the time in the mines" (Tr. 37).

On redirect, Mr. Bjes stated that a "few people" had previously been removed from shuttle cars because of their size and inability to operate the machines, and that there had never been any questions about it and no disciplinary action was ever taken against them. He confirmed that Consol did not contest his injury compensation claim, and that mine management found that the cause of the accident was that he was "injured while operating the shuttle car and my left knee struck the steering wheel" (Tr. 38-39).

In response to bench questions, Mr. Bjes identified one Mike Wyatt as an operator taken off the same machine two years ago because he could not safely operate it. He also stated that "everybody that run that shuttle car complained that it was too small no matter what their size was" (Tr. 40). He also indicated that the problems with low profile shuttle cars has been discussed at union safety committee meetings and that he invoked "his individual safety rights and I got fired for it so I guess everybody is afraid to do anything" (Tr. 43). He also confirmed that "nobody ever refused to run it because it was unsafe. Everybody just went ahead and said, I guess I'll just run it, to keep out of trouble" (Tr. 43). He described his actions after he was injured as follows (Tr. 44-46):

> JUDGE KOUTRAS: And then you went ahead---
>
> THE WITNESS: I went home.
>
> JUDGE KOUTRAS: No, what was the---
>
> THE WITNESS: They carried me out on a stretcher.
>
> JUDGE KOUTRAS: Let me see if I can---you hit your knee on the shuttle car and you got off. And were you assigned to shovel coal then?

THE WITNESS: I couldn't do it, that's why I was only there for such a short time and I was looking for the boss and couldn't find him so I went and sat by the pole until he came back.

JUDGE KOUTRAS: Okay, so you weren't assigned to shovel coal for any extended period of time?

THE WITNESS: No.

JUDGE KOUTRAS: Okay.

THE WITNESS: I didn't even finish what I was supposed to do.

JUDGE KOUTRAS: And then you were carried out of the mine on a stretcher?

THE WITNESS: Yes, sir. To the hospital.

JUDGE KOUTRAS: And you were diagnosed as having a fractured knee cap?

THE WITNESS: At the emergency room they diagnosed it as a possible fracture and torn ligaments with sprain or something.

JUDGE KOUTRAS: It wasn't actually torn ligaments of fracture, just possible but, in any event you were incapacitated, right?

THE WITNESS: Right.

JUDGE KOUTRAS: How long were you off work?

THE WITNESS: Five and a half months I think it was.

JUDGE KOUTRAS: Due to that injury?

THE WITNESS: Yes, sir. I ended up getting operated on and the recovery after that.

Mr. Bjes stated that his salary as a scoop operator was the same as that of a shuttle car operator. He also indicated that he volunteered to accept other work after refusing to run the shuttle car, and that he would also accept a lower paying job or take alternate work while his dispute was being resolved (Tr. 52).

Richard Borella, testified that he is employed by the respondent and also serves as chairman of the mine safety committee. He confirmed that prior to the instant litigation, Ray Siefert was taken off the shuttle car because he could not operate the car safely and efficiently due to his size and he was not disciplined for this. Mr. Borella confirmed that he was present on July 30, 1981, in the section in question with Federal inspector Charles Burke and Mr. Bjes. Mr. Bjes demonstrated the problem he was having with the shuttle car in question. Mr. Bjes had great difficulty in reaching the brake, and when he did so his left foot would get above the steering wheel itself which in turn created a problem in steering the machine. Mr. Borella stated that Inspector Burke indicated to him that because of his (Borella's) size, he couldn't run the machine safely. Mr. Borella indicated that Mr. Burke sat in the machine and also took some measurements, and commented that it was possible to make some modifications to the machine to alleviate the size problems (Tr. 54-56).

Mr. Borella confirmed that after Mr. Burke looked at the machine, he (Borella) advised Mr. Bjes that he agreed with his conclusion that he could not operate the car safely, and that he did so on the assumption that the machine could be modified to permit Mr. Bjes to operate it safely. Mr. Borella also indicated that he made his recommendations concerning machine modifications to Mr. Hofrichter. When Mr. Hofrichter rejected his recommendations as invalid, he (Borella) advised Mr. Bjes that he should not operate the machine and indicated that "we will go through whatever actions being necessary to alleviate this problem" (Tr. 57). Mr. Borella confirmed that he was not disciplined for advising Mr. Bjes not to operate the machine, and he believed that he acted within his jurisdiction as a safety committeeman in advising Mr. Bjes not to operate the machine (Tr. 59). He also confirmed that he specifically suggested to Mr. Hofrichter that Mr. Bjes be taken off the machine, reassign him to another machine, or assign him other work (Tr. 60). However, management believed they had the right to assign him to the same machine, and he confirmed that the arbitrator denied Mr. Bjes' relief because the arbitrator did not believe that his operation of the machine constituted an imminent danger (Tr. 62).

Mr. Borella confirmed that he was aware of the fact that Mr. Bjes was injured upon his return to work, but does not have a copy of the accident report. He also confirmed that some modifications were made to the machines but that operators still complained with operational problems while running them. Management took the position that they could purchase any equipment they desired, and the union's position was that the men would operate the machines if they can do so safely (Tr. 63). He believed that Mr. Bjes had a legitimate reason for refusing to operate the machine even though the arbitrator did not believe that an imminent danger existed under the contract, and he believed "it was just foolish to even consider to make somebody do something that they feel is unsafe when there is a way that can be alleviated (Tr. 65).

On cross-examination, Mr. Borella stated that it was not necessary to purchase low profile shuttle cars for the four east section. The

mine has two low profile cars and they both operate in that section, and have been continuously operating in the section since July 1981 (Tr. 66). The low profile cars in question have been the subject of discussions at union meetings and "just about everybody that run them has some problems because of their size. But, Rich's was getting to the point that it was unsafe, totally unsafe" (Tr. 67). Some of the operator's are smaller in stature that Mr. Bjes, and some are larger, and he conceded that none of the other operators have invoked their safety rights (Tr. 68). He believed Mr. Bjes acted in good faith in asserting his rights, and he described some of the problems in operating the low profile car (Tr. 69-71). He conceded that Mr. Bjes' complaint about the car in question seems to be peculiar to him and that no one else complained to the point where they intended to shut the machine down and invoke their individual safety rights (Tr. 74). He concurred in Mr. Bjes' judgment that he could not operate the machine safely (Tr. 74). He confirmed that Mr. Seifert is six feet five inches tall and weighs 260 pounds and is significantly larger that Mr. Bjes (Tr. 75).

Respondent's Testimony and Evidence

Wayne T. Ross, section foreman, testified that Mr. Bjes was first assigned to his crew on Monday, July 27, 1981, and that the next day the crew was working in the four east section on retreat mining work. He identified a scale map of the section (exhibit R-1), and testified as to where mining work was taking place, including the areas where the shuttle cars were operating (Tr. 114-119). Mr. Ross indicated that three shuttle cars were operating on the section at that time, and he identified them as car numbers four, nine, and ten. The number four car is the high profile off-standard car, the number nine is a low profile standard car, and the number ten is a low profile off standard car. On July 28th, cars four and nine were used and the mine operator purchased the two low profile cars because of the height of the coal. Mr. Bjes was operating the number nine car on July 28th, and Tim Peterman was operating the number four car, and he did not make the initial car assignments. The senior operator has his choice of cars (Tr. 119-121).

Mr. Ross testified that during the shift on July 28, Mr. Bjes advised him that he was running his machine only in low gear, and Mr. Ross believed that it was due to a bad trammer. He observed nothing out of the ordinary with regard to the manner in which Mr. Bjes was operating the machine and he observed him make two or three trips prior to his making the statement concerning low gear. Mr. Bjes also stated to him that he "could not understand why the company buys junk", and when afternoon shift foreman Bill Ross visited the section that day he discussed Mr. Bjes' comments with him (Tr. 124). Mr. Wayne Ross confirmed that the machine was down during the shift, and a report he identified reflected that it was down for 45 minutes because of a damaged hydraulic hose on the torque converter, and he explained that the damage occurred when the machine ran over a large lump of coal on the tram road (exhibit R-2; Tr. 125). Mr. Ross identified a schematic drawing of the shuttle car, explained where the damage was sustained, and indicated that it was not caused by the car running into the coal rib (exhibit R-3; Tr. 127).

Mr. Ross testified that his crew worked again on July 29th in the four east section and before the shift began he discussed Mr. Bjes' comments made the day before with Mr. Hofrichter and Mr. Hofrichter responded "we will just have to see how it goes" (Tr. 128). When the shuttle cars did not show up, Mr. Ross went to locate them and found Mr. Bjes and Mr. Peterman engaged in a conversation. At that time Mr. Bjes advised him that he was not going to operate the number nine car because it was unsafe and this was the first time Mr. Bjes had made that claim to him. When he asked Mr. Bjes to explain, Mr. Bjes told him that he was having trouble working the pedals, and he refused to operate the machine and advised Mr. Ross that he was invoking his individual safety rights. Mr. Peterman then refused to operate machine number nine and stated that "if Bjes didn't have to run number nine car he didn't have to run it either" (Tr. 129). However, Mr. Peterman agreed to operate the machine after Mr. Ross advised him he was going to find out what was going on.

Mr. Ross stated that his crew worked again on Thursday, July 30, and that he discussed Mr. Bjes' refusal to operate his machine with Mr. Hofrichter, and the three of them had a meeting that same day. Mr. Bjes was assigned alternate work, and during the rest of the day meetings were held between representatives of the safety committee, mine management, and a federal inspector. At no time did Mr. Ross hear Mr. Bjes offer to operate the number 10 shuttle car. Mr. Ross expressed an opinion that Mr. Bjes operated the number four car safely during the entire shift of July 28, and he saw no problems with Mr. Bjes operating the car. Another operator, larger than Mr. Bjes, operated the number nine car without any problems for two or three months in the section and he identified him as Dave Monteith.

Mr. Ross stated that Mr. Bjes returned to work on September 14, 1981 and was assigned to his crew on the same four east section operating the number nine shuttle car. Mr. Peterman was operating the number four car at this time. After a couple of trips, the miner operator (Cecil Wall) asked him to take Mr. Bjes off the car because he (Wall) thought that Mr. Bjes was not trying to operate it safely during the retreat mining which was going on. He immediately removed Mr. Bjes from the machine and explained to him that Mr. Wall had complained that he wasn't trying to operate it safely, and Mr. Ross agreed with Mr. Wall that this was the case (Tr. 133). Mr. Ross then reassigned Mr. Bjes to labor work shovelling the belt, and Mr. Bjes did not inform him about any injuries at that time (Tr. 134).

Mr. Ross stated that after assigning Mr. Bjes to belt work, he observed him walking toward the belt area and that he was "walking fine". About an hour later when he discovered that the belt was not running, he went to see why and observed Mr. Bjes sitting by the power center. Mr. Bjes advised him that he had injured his knee and Mr. Ross summoned shift foreman Bill Ross to come to the area and take Mr. Bjes away. Mr. Bjes was taken away on a stretcher and Mr. Wayne Ross could not explain how Mr. Bjes was injured, but he did not believe he was injured on the steering wheel of the car because Mr. Bjes had complained that his knee was positioned above the steering wheel (Tr. 135). Mr. Wayne Ross confirmed that Bill Ross is his brother (Tr. 137).

On cross-examination, Mr. Ross confirmed that Mr. Bjes had never previously refused to run equipment or to do what was expected of him during the time that he worked for him. He also denied that mine management had never warned him to "watch out" for Mr. Bjes (Tr. 138). In explaining Mr. Wall's complaints about the manner in which Mr. Bjes operated the machine, Mr. Ross stated as follows (Tr. 141-142):

JUDGE KOUTRAS: Mr. Wall was running a continuous mining machine?

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: Mr. Bjes was running a shuttle car?

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: And the two work in tandum? The loading process?

THE WITNESS: Yes, sir. Once Mr. Bjes got three quarters loaded he put on a big show, crawled out of the buggy--

JUDGE KOUTRAS: Now, wait a minute, don't characterize him as a big show just tell me what he did.

THE WITNESS: Okay, he took his time changing around positions in the seat.

JUDGE KOUTRAS: Okay.

THE WITNESS: Mr. Wall felt that it was unsafe. He didn't want to do it that way.

JUDGE KOUTRAS: Do what? Change seats?

THE WITNESS: No, the way he was doing it.

JUDGE KOUTRAS: And how was that?

THE WITNESS: You can't turn around and you can turn around quick, which is the way you have to do it. But, Mr. Bjes didn't want to do it quick. He wanted to take his time.

Mr. Ross confirmed that Mr. Peterman was not disciplined for initially refusing to run his machine because he gave him a second opportunity, as he did Mr. Bjes, and he ran it (Tr. 143). He confirmed that in retreat mining the continuous miner operator wants the shuttle car to get out as quickly as possible because all the coal is gone and it will cave in, and the fact that one car operator is not as swift as another is cause to take him off the car. When asked to explain why Mr. Bjes could not move in and out as quickly as other operators, Mr. Ross stated that it was his opinion that Mr. Bjes did not want to because he did not want to run the number nine car and Mr. Ross believed he was "sluffing off" and wanted to make an issue over it. However, he could not explain why Mr. Bjes had not done this earlier (Tr. 145-146).

Mr. Ross did not dispute the fact that when Mr. Bjes operated the number four shuttle car, his knee was up in his face, but he disputed Mr. Bjes' claim that he had difficulty in reaching the brake pedal (Tr. 150). Mr. Ross also confirmed that he looked at Mr. Bjes' knee when he claimed he had been injured, observed a red mark but nothing unusual, and noticed no swelling (Tr. 151). Mr. Ross did not follow up on Mr. Bjes' condition after he was taken away on a stretcher, and he subsequently learned that he had fractured his knee cap (Tr. 151). Regarding Mr. Peterman's reluctance to operate the shuttle car, Mr. Ross stated as follows (Tr. 152-153):

JUDGE KOUTRAS: Okay, this conversation with Mr. Peterman now, I take it since Mr. Peterman had seniority on Mr. Bjes, that he would have the selection of which machine to operate, correct?

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: And when Mr. Bjes suggested that he wasn't going to operate the number nine machine, you wanted to get on with your production, you wanted to get the matter resolved, you wanted to go ahead, you suggested that Mr. Peterman make a switch for the time being, is that the way it was?

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: And Mr. Peterman did not object?

THE WITNESS: At first he did, yes.

JUDGE KOUTRAS: And that's when he made the comment, well, if he doesn't have to run it, why do I?

THE WITNESS: Right.

JUDGE KOUTRAS: And his reluctance to run it would be on what, do you have any idea as to why Mr. Peterman made that statement? Did he independently believe that he would be unsafe? Or is it simply that how come you are treating him different than me?

THE WITNESS: I feel that it was like, you know, why should he get special treatment. If he doesn't have to run it why should I? There was no question of safety with Mr. Peterman at all.

JUDGE KOUTRAS: And so, he made the agreement to make the switch?

THE WITNESS: Yes, he did.

William A. Ross, shift foreman, testified that he has known Mr. Bjes for six years and that Mr. Bjes worked for him from time to time as a general laborer during weekend "dead work". He confirmed that he went to four east section on July 28, 1981, spoke with section foreman Wayne Ross, and observed Mr. Bjes operate the shuttle car. He observed nothing unusual while observing him load three shuttle cars and watching him unload the cars at the dumping point. He then flagged him down and inquired about the "problems" he was having with the car and Mr. Bjes explained that he couldn't run the car in second gear. When Mr. Bjes began to show him by moving his feet, Mr. Ross was called to the phone and left the area (Tr. 160). He next returned to the section on July 30, in the company of Inspector Burke and safety committeeman Borella. He heard Mr. Burke comment that he observed no imminent danger and that he (Burke) saw no reason why Mr. Bjes or anyone else could not operate the car safely. He has observed other men bigger than Mr. Bjes operate the number nine car with no problems, and he never heard Mr. Bjes volunteer to operate the number ten car (Tr. 161).

On cross-examination, Mr. Ross explained that "running the car in second gear" means that the car is operated in a faster mode. Mr. Ross stated further than when Mr. Bjes told him he was not going to run the car in second gear, he said nothing to him and had no time to evaluate the situation. However, he did recall Mr. Bjes explain that he could not reach the machine brake pedals while driving the machine faster (Tr. 166-167).

Thomas Hofrichter testified that in July 1981, he was the mine foreman and acting superintendent at the mine in question, and that he is still serving as acting superintendent. He confirmed that he suspended Mr. Bjes in July 1981, with intent to discharge him, and he identified letters given to Mr. Bjes concerning the suspension and discharge (Exhs. R-4, R-5). He also confirmed that Mr. Bjes was discharged for insubordination for refusing to operate the number nine shuttle car in the four east section. Mr. Hofrichter also identified a copy of the "employee conduct rules" which are posted at the mine (Exh. R-6), and indicated that rule No. 4 covers insubordination for refusal to perform work assigned or to comply with a supervisor's direction (Tr. 168-170).

Mr. Hofrichter confirmed that Mr. Bjes filed a grievance concerning his suspension and that it went to arbitration. He indicated that Mr. Bjes received a thirty-day suspension rather than being discharged, and that the arbitrator issued this penalty because it was a first time offense, no previous bad work record by Mr. Bjes, and the arbitrator's "confusion" as to whether the case before him was a safety grievance or an arbitration case (Tr. 171).

Mr. Hofrichter testified that he first learned of any potential problem with the shuttle car in question on Wednesday, July 29, 1981, when Mr. Wayne Ross advised him that Mr. Bjes was having a problem with the car. Mr. Bjes came to see him in the company of safety committeeman

John Adams and advised him that he was having problems operating the number nine car and asked if there was something he could do to aleviate the problem. During the ensuing discussions, problems concerning the machine seat location and canopy heights were discussed, as well as whether or not Mr. Bjes could be switched to another car. Mr. Hofrichter advised Mr. Bjes that he would look at possible solutions, including to switch Mr. Peterman, but indicated that Mr. Peterman was the senior man and would have the choice as to which car to operate (Tr. 173). The next day, Mr. Ross advised him that Mr. Bjes refused to run the car and had indicated that Mr. Hofrichter told him that he did not have to because he would switch to another car. Mr. Hofrichter advised Mr. Ross that this was not the case, and that he told Mr. Bjes that he was to operate the car until a solution to the problem was reached. Another meeting was held that day with Mr. Bjes, and union and management people were present. Mr. Bjes again stated that he would not run the car because he did not believe it was safe, and Mr. Hofrichter advised him that his intent was not to effect an immediate switch, and that Mr. Bjes was to operate the car until the problem was solved. Mr. Bjes then informed him that he was invoking his safety rights and refused to operate the machine (Tr. 174-175).

Mr. Hofrichter stated that after the aforementioned meeting, the union representatives advised him that they would summon Federal Inspector Burke to the mine to look at the machine. Later that day, he entered the mine with the union safety committeemen and, a company maintenance foreman, and Mr. Bjes was summoned to the face area where the number nine shuttle car was parked. The operator pulled it back into the roadway and Mr. Bjes sat in the car and demonstrated his problem with operating the machine. Mr. Bjes sat in the seat facing inby, and operated the brake pedal, the tram, and the steering wheel. He then sat in the seat facing the opposite direction (outby) and did the same thing. However, at that point Mr. Bjes advised him that he had no problem in that position, but that his problem was in sitting facing inby, and in that position he experienced a problem in turning the seat and that he couldn't stand the canopy when he turned. Safety committeeman Adams was asked whether he saw any imminent danger connected with the problems demonstrated by Mr. Bjes and replied "no". Mr. Hofrichter then climbed into the car and had no problems with it and he stated that he "really didn't understand the problem" (Tr. 177-178).

Mr. Hofrichter stated that when Inspector Burke arrived to look at the car in question, he announced that he was there to determine whether an imminent danger existed and he proceeded to climb into the car and take measurements. He also asked Mr. Bjes to demonstrate any problems, and Mr. Burke then concluded that no imminent danger existed, and advised Mr. Bjes that it was safe for him or anyone else to run the machine (Tr. 179). Safety committeeman Borella also agreed that no imminent danger existed, but Mr. Hofrichter conceded that both Mr. Borella and Mr. Burke did comment that some "hazards" and "problems" did exist with the operation of the machine. He explained that these problems were in connection with the canopy height, the seat location, and the possible relocation of the machine brake pedals, but that Mr. Burke advised him there was nothing he could do about these items and that it was "between you and the men as far as what solutions you come up with" (Tr. 180). Mr. Hofrichter explained what transpired next, as follows (Tr. 181-182):

We went through the discussion and we really couldn't resolve the problems at hand, there really wasn't anything that since Rich had run the car before that there was anything that was abnormally hazardous to him in operating that car. And he could continue to operate that car until such a time that we could look at the possibility of making it more comfortable for him by making these changes.

At that time I had made the decision that it's safe for Rick Bjes to run that car and he was in turn going to. There was still more discussion among all the people there because, as I say, there were eight people.

I tried to communicate with all the people that were there at the time. So then Wayne Ross came up to me and asked well, what are we going to do? I said, as far as I'm concerned we've been through it all and Rich is going to run that shuttle car.

In the mean time Rick Borella, John Adams had walked down the track and I went over to Rich and said, you know we have been through this all now, it's time to get on the shuttle car and go.

He said, no, I'm not running that shuttle car, it's not safe for me to run. He left, he went down the track and got Rick Borella and John Adams, they came back up and asked me are you suspending Rick with the intent to discharge. I said, yes, I am. Because we've been through the full gambit, I've done everything that I thought was physically and practical at the time and it's been resolved and Rich is to get back on the car.

Rick said that as a member of the safety committee that he was recommending that Rich not run that car. Now, is a good time to tell him that I had already made the decision that Rich was going out of the mine and so we proceeded out of the mine then.

Mr. Hofrichter indicated that the number nine and ten shuttle cars were practically identical, and that at no time did Mr. Bjes offer to operate the number ten car, and his refusal to operate one car was the same as not operating the other one (Tr. 183). Mr. Hofrichter believed that Mr. Bjes would have encountered no hazards in operating either car, and he indicated that people of his size have operated both cars on a regular basis with no problems (Tr. 186-187). When asked whether he believed that Mr. Bjes was acting in good faith when he refused to operate the car, Mr. Hofrichter replied (Tr. 187):

A. No, not at all.

Q. What is the basis for your opinion?

A. It was right at the time that Wayne Ross was the new section foreman, Rich Bjes was just in the process of just being bumped back from the number four shuttle car to the number nine shuttle car.

He saw the potential of operating number nine car until he was able to bid off. And there really that many bids available, there weren't any bids available at the time and he could see himself positioned in four east, in a retreat section, under Wayne Ross operating number nine. And it was not something that he totally chose to do and this was his only way out.

On cross-examination, Mr. Hofrichter testified as to the dimensions of the machine, and he confirmed that at the time of the meetings underground with the union representatives, safety committeman Borella did recommend that Mr. Bjes be removed from the machine in question in accordance with the contract terms (Tr. 193-201). When asked to explain why some machine operators were permitted to be taken off their cars, while others were not, Mr. Hofrichter responded as follows (Tr. 204):

A. It's a simple fact that the eyes of managers same as all the other foremen at that mine to make the decisions as far as what is safe and what is not safe, what is practical, what is efficient for the operation of the mine. You see a guy operate and say yes, he can run a machine or no, he can't run a machine. That's managements decision to make that determination. And in the case with the other ones it was decided that they weren't capable of running the machine, so they were taken off.

Joseph Grosholz, section foreman, testified that Mr. Bjes worked under his supervision from October 1980 to July 1981, in the four east section. He was initially classified as a scoop operator but operated a shuttle car on and off filling in for the regular operator. Sometime in January 1981, Mr. Bjes asked to be assigned to the number four shuttle car since he had seniority over the operator at that time. Mr. Hofrichter approved the switch and Mr. Bjes was assigned as a shuttle car operator. He operated the number ten car at times, and it too was a low profile car. The number ten and nine cars were originally in the section, but after the number four car was purchased, it replaced the number ten car which was taken out of service to use as a spare. Mr. Bjes operated the number ten car without any problem and never claimed it was unsafe (Tr. 229-234). Mr. Grosholz indicated that there is no basic difference between the operating parameters of the number nine and ten shuttle cars other than the fact that one is a standard car and the other an off-standard (Tr. 235).

Discussion

As indicated earlier, the issue presented in this proceeding is whether Complainant Bjes' refusal to run the No. 9 shuttle car at the Laurel Mine on Thursday, July 30, 1981, is protected by § 105(c) of the Act. Refusal to perform work is protected under section 105(c)(1) of the Act, if it results from a good faith belief that the work involves safety hazards, and if the belief is a reasonable one. Secretary of Labor/Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2 BNA MSHC 1001 (1980), rev'd on other grounds, sub nom Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary of Labor/Robinette v. United Castle Coal Co., 3 FMSHRC 803, 2 BNA MSHC 1213 (1981); Bradley v. Belva Coal Co., 4 FMSHRC 982 (1982). Further, the reason for the refusal to work must be communicated to the mine operator. Secretary of Labor/Dunmire and Estle v. Northern Coal Co., 4 FMSHRC 126 (1982).

In considering the effect of a previous arbitration decision which had denied Pasula's claims of discrimination, the Court, at 663 F.2d 1219, made the following observation:

> In this case, the considerations underlying the standards of gravity of injury in the Wage Agreement and in the statute are different. The Wage Agreement requires the arbitrator to determine whether the hazard was abnormal and whether there was imminent danger likely to cause death or serious physical harm. The underlying concern of the Mine Act, however, is not only the question of how dangerous the condition is, but also the general policy of anti-retaliation (against the employee by the employer). Because this is a major concern of the Mine Act, it requires proof merely that the miner reasonably believed that he confronted a threat to his safety or health. Those who honestly believe that they are encountering a danger to their health are thereby assured protection from retaliation by the employer even if the evidence ultimately shows that the conditions were not as serious or as hazardous as believed. Questions of imminence and degree of injury bear more directly on the sincerity and reasonableness of the miner's belief. (emphasis added)

In a detailed footnote at 663 F.2d 1216-1217, the Pasula Court discussed the right of the miner to refuse work, and although the Court did not state any specifics, it did agree that there was such a right in general when it stated:

> Thus, although we need not address the extent of such a right, the statutory scheme, in conjunction

> with the legislative history of the 1977 Mine Act, supports a right to refuse work in the event that the miner possesses a reasonable, good faith belief that specific working conditions or practices threaten his safety or health.

Id. at 1217 n. 6.

In Pasula the Commission established in general terms the right of a miner to refuse work under the Act, but it did not attempt to define the specific contours of the right. In several decisions following Pasula, the Commission discussed, refined, and gave further consideration to questions concerning the burdens of proof in discrimination cases, "mixed-motivation discharges", and "work refusal" by a miner based on an asserted safety hazard. See: MSHA, ex rel. Thomas Robinette v. United Castle Coal Company, VA 79-141-D, April 3, 1981, MSHA ex rel. Johnny N. Chacon v. Phelps Dodge Corporation, WEST 79-349-DM, November 13, 1981.

In Robinette, the Commission ruled that any work refusal by an employee on safety grounds must be bona fide and made in good faith. "Good faith" is interpreted as an "honest belief that a hazard exists", and acts of deception, fraud, lying, and deliberately causing a hazard are outside the "good faith" definition enunciated by the Commission. In addition, the Commission held that "good faith also implies an accompanying rule requiring validation of reasonable belief", but that "unreasonable, irrational or completely unfounded work refusals do not commend themselves as candidates for statutory protection".

In fashioning a test for application of a "good faith" work refusal, the Commission rejected the "objective, ascertainable evidence" test laid down in Gateway Coal Co. v. Mine Workers, 414 U.S. 368 (1973), and instead adopted a "reasonable belief" rule, which is explained as follows at 3 FMSHRC 812, April 3, 1981:

> More consistent with the Mine Act's purposes and legislative history is a simple requirement that the miner's honest perception be a reasonable one under the circumstances. Reasonableness can be established at the minimum through the miner's own testimony as to the conditions responded to. That testimony can be evaluated for its detail, inherent logic, and overall credibility. Nothing in this approach precludes the Secretary or miner from introducing corroborative physical, testimonial, or expert evidence. The operator may respond in kind. The judge's decision will be made on the basis of all the evidence. This standard does not require complicated rules of evidence in its application. We are confident that such an approach will encourage miners to act reasonably without unnecessarily inhibiting exercise of the right itself.

* * * * * * * * * * * *

> In sum, we adopt a good faith and reasonableness rule that can be simply stated and applied: the miner must have a good faith, reasonable belief in a hazardous condition, and if the work refusal extends to affirmative self-help, the miner's reaction must be reasonable as well.

In MSHA ex rel. Michael J. Dunmire and James Estle v. Northern Coal Company, WEST 80-313-D and WEST 80-367-D, February 5, 1982, the Commission defined further the scope of the right to refuse work under the Act by adding a requirement that a statement of a health or safety complaint must be made by the complaining miner, and adopted the following requirement:

> Where reasonably possible, a miner refusing work should ordinarily communicate, or at least attempt to communicate, to some representative of the operator his belief in the safety or health hazard at issue. "Reasonable possibility" may be lacking where, for example, a representative of the operator is not present, or exigent circumstances require swift reaction. We also have used the word "ordinarily" in our formulation to indicate that even where such communication is reasonably possible, unusual circumstances--such as futility--may excuse a failure to communicate. If possible, the communication should ordinarily be made before the work refusal, but, depending on circumstances, may also be made reasonably soon after the refusal.

Complainant's arguments

In his post-hearing arguments, complainant's representative argues that Mr. Bjes opted to invoke his individual safety rights and refused to operate the shuttle car in question after encountering conditions on the shuttle car which severely limited his ability to operate it. After several near accidents, Mr. Bjes felt strongly that to operate this piece of equipment would in all probability lead to a serious injury or death to himself or to another member of his crew. In support of this conclusion, complainant's representative points to the fact that upon his return to work following his 30-day suspension Mr. Bjes suffered a serious knee injury as a result of operating the shuttle car in question. Complainant suggests that Mr. Bjes' refusal to operate the shuttle car is protected by Section 105(c) of the Act, as well as Article III, Section (i) of the National Bituminous Coal Wage Agreement of 1981.

In further support of his case, complainant's representative argues that respondent Consolidation Coal Company, as well as the arbitrator who heard Mr. Bjes' grievance, misinterpreted the aforementioned contract provision by concluding that an employee has to be exposed to an "imminent

danger" before he can invoke his individual safety rights and refuse to operate a piece of equipment that he believes is hazardous.

With regard to the testimony by several Consol witnesses at the hearing that they operated the shuttle car in question without invoking their individual safety rights, complainant's representative asserts that individual safety rights are dependent on what an individual miner believes may be dangerous, and not what a collective group of miners believe. Further, the representative points to the fact that since two employees were removed from the shuttle car in question upon request, while Mr. Bjes' request was denied, this raises an inference that "the company had a vendetta on Mr. Bjes". The representative suggests that the only reason other employees declined to exercise their individual safety rights was out of fear of "the exact repercussions experienced by Mr. Bjes".

Finally, complainant's representative points out that two other employees had approached and complained to Richard Borella, Chairman of the Mine Safety Committee, about the operation of the shuttle car in question, and that even though MSHA Inspector Charles Burke had observed that the car presented "a potentially dangerous situation", and made certain corrective recommendations, Mine Foreman Hofrichter ignored them, even after Chief Mechanic Bill Young stated that any repairs would be minor.

Complainant's representative seeks the following remedies:

1. Reimbursement of all lost wages incurred as a result of Mr. Bjes' suspension.

2. All record of discipline involving this matter be removed from Mr. Bjes' file.

3. Mr. Bjes not be required to operate this piece of equipment in the future.

Respondent's arguments

Respondent argues that in order to determine whether Mr. Bjes validily exercised his right under section 105(c) of the Act on Thursday, July 30, 1981, by refusing to operate the No. 9 shuttle car, it must first be determined whether he was acting in good faith, and if so, whether he had a reasonable belief that his operation of the shuttle car posed a hazard.

Respondent submits that upon an analysis of the testimony and documentary evidence in this case, it seems clear that Mr. Bjes was not acting in good faith on Thursday, July 30, 1981, and the preceding two days, and that he has failed to present substantial evidence to prove that he was acting in good faith when he refused to operate the No. 9 shuttle car. Although he asserted at the hearing that he was sincere in his belief that operating the car posed a hazard, respondent submits that Mr. Bjes cannot point to other evidence that would lend support to his

assertion of good faith, and that the very nature of the inquiry, i.e., whether an individual acted in good faith, requires the Judge to look to circumstantial evidence and possible motives to account for why an individual acted as he did. In this case, respondent asserts that the circumstantial evidence and motivation behind Mr. Bjes' refusal to operate the machine prove that he was acting in bad faith.

In support of its position in this matter, respondent states that on the surface, this case may appear similar to the case of Pasula v. Consolidation Coal Company, 2 MSHC 1001 (Review Commission 1980). In that case, the operator of continuous mining machine refused to operate the equipment after running it for an hour and a half. The machine had been damaged in a roof fall and had been repaired wherein several gears had been replaced, and the operator complained that it was making excessive noise which was hurting his ears and giving him a headache. He made this complaint immediately to his section foreman, and the Commission held that this was a valid exercise of his right to refuse to do work posing a hazard beyond the hazards normally encountered in underground mining.

Respondent maintains that the instant case is distinquishable from the Pasula case, in that in Pasula there was never a question about the sincerity of the operator's motivation, whereas in this case the motivation of Mr. Bjes is subject to question. Although Mr. Bjes argues that he was motivated out of concern for his safety and the safety of his fellow miners, respondent says Mr. Bjes invoked his safety right because having found the No. 9 car to be uncomfortable, he realized he would have to operate it until he could bid to another job.

In support of its conclusions that Mr. Bjes' motivation is suspect, respondent points to the uncontroverted evidence that Mr. Bjes operated the No. 10 shuttle car on numerous occasions, and that Safety Committeeman Borella conceded that his investigation disclosed Mr. Bjes' operation of the No. 10 car prior to July of 1981. Respondent also points to the testimony of one of Mr. Bjes' former supervisors, Joseph Grosholz, that Mr. Bjes operated the No. 10 car for him when the No. 9 car was down.

With regard to Mr. Bjes' contention that the No. 9 and 10 cars, even though they are both low profile cars, are different because one is a standard car and the other an off-standard, and that the tram pedals and steering wheels are in different positions, respondent asserts that its witnesses were of the opinion that there was no difference between operating the No. 9 and 10 cars, and that this testimony is supported by Exhibit No. 9, comparing the various dimensions of the respective compartments and the distances between the pedals on the two shuttle cars.

In response to Mr. Bjes' attempt to prove his good faith by showing that he in fact offered to operate the No. 10 car instead of the No. 9 car,

respondent points to the fact that Mr. Bjes did not initially testify on this point but did so in rebuttal after Mr. Borella testified, and that Mr. Bjes admitted that he did not direct this offer to any member of mine management. Respondent submits "that it is incredible that Mr. Bjes would make such an offer and not press mine management for an answer in this situation and it is questionable why Mr. Bjes waited until Thursday, July 30, 1981, to make such an offer if he ever did."

Respondent suggests that consideration be given to Mr. Bjes' timing in invoking his rights under section 105(c) of the Act. In this regard, respondent states that Mr. Wall, who was the miner operator, returned to work the week of July 28, 1981, and consequently, every member of the crew was bumped back. Mr. Bjes was bumped from the senior shuttle car operator to the junior one. His senior, Mr. Peterman, chose the No. 4 car that Mr. Bjes had operated since January so Mr. Bjes was forced to operate the low-profile cars. Since the No. 10 car was the older one, the No. 9 car was used, and Mr. Bjes realized that he would be forced to operate the No. 9 car which by his own admission (with which Mr. Peterman apparently concurred) was more uncomfortable than the No. 4 car until he was able to bid to another job. Thus, respondent concludes that his right to refuse unsafe work afforded him with an opportunity to remove himself from an uncomfortable situation.

Further, respondent contends that Mr. Bjes failed to exercise his right immediately. On Tuesday, July 28, 1981, when he was first assigned to the No. 9 car, he operated it for the entire shift, and did not tell his immediate supervisor, Wayne Ross, that he believed it was unsafe for him to operate the machine. Mr. Bjes merely stated that he would not run the car in second gear. Although he did show the shift foreman, William Ross, that he was having a problem with the pedals, he did not state that it was unsafe for him to operate the machine, and both of his supervisors observed him operating the machine and did not believe that he was running it unsafely. In these circumstances, respondent questions Mr. Bjes' sincerity.

Summarizing its defense in this case, respondent maintains that the record does not demonstrate that Mr. Bjes was exercising his right in good faith, and that given the fact that he operated the No. 10 car and the timing of his exercise of his rights, his motivation in this case is very suspect. Even assuming that one can find that Mr. Bjes was sincere in his belief, respondent submits that it was not a reasonable one in that he operated the No. 10 car in the past and never complained about that car even though the weight of the evidence is that the No. 9 and 10 cars are similar. Further, respondent points to the fact that miners larger than Mr. Bjes operated the No. 9 without alleging that their size prevented them from operating the car safely, and Mr. Bjes did not testify that he had a physical limitation that limited the flexibility and use of his legs that would distinguish him from those other miners.

Finally, the respondent submits that little weight should be given to the injury Mr. Bjes received on September 14, 1981. Respondent maintains

that Mr. Bjes' failure to tell Wayne Ross of the incident when Mr. Ross removed him from the No. 9 car and his ability to walk to the belt line raise serious questions regarding Mr. Bjes' story about how and when that accident occurred. Respondent suggests that Mr. Bjes could very well have stumbled on a lump of coal and found it convenient in light of his complaint with MSHA to claim that his knee bumped the steering wheel of the shuttle car, and that his version of what happened is subject to further question when one considers that his alleged problem with operating the No. 9 car was that his knee was above the steering wheel.

Findings and Conclusions

As indicated earlier, the critical issue in this case is whether Mr. Bjes' refusal to operate the Number 9 Shuttle Car when ordered to do so was protected activity under the Act. Mr. Bjes claims that he could not operate the shuttle car safely, and that management's insistence that it could be operated safely and that he should operate it, exposed himself and his fellow crew members to possible injuries. On the other hand, the respondent maintains that the shuttle car could be operated safely by Mr. Bjes, that he operated a similar car in the past with no complaints, that other miners of comparable size and weight operated the car in question with no safety complaints, and that Mr. Bjes complaint really resulted from his displeasure over having to operate a low-profile machine which he found uncomfortable. Under these circumstances, and in view of the guidelines set down in the discrimination decisions previously discussed, it is necessary to explore the following issues:

1. Whether Mr. Bjes registered and communicated any safety complaints with the operation of the shuttle car in question.

2. Whether Mr. Bjes' safety concerns connected with his being requires to operate the shuttle car in question were made in good faith.

3. Whether the refusal by Mr. Bjes to operate the shuttle car in question was reasonable, and if so, whether the work refusal is protected activity under the Act.

4. Whether respondent has carried its burden of showing that Mr. Bjes' suspension for insubordination was motivated by unprotected activities and that he would have been disciplined anyway for refusal to operate his shuttle car.

Statement of a Safety Complaint

The record in this case establishes that as early as July 28, 1981, Mr. Bjes had complained to his section foreman Ross that he was having difficulty operating the low profile No. 9 shuttle car. That initial

complaint was not specifically framed in terms of any safety difficulties, but rather, had to do with Mr. Bjes' claim that he could only run the car in low gear because of his claimed difficulties in reaching or manipulating some of the controls. These complaints carried over to the next day when Mr. Ross and mine superintendent Hofrichter discussed the matter further. These compalints blossomed into a full-blown safety complaint on July 30, when Mr. Hofrichter, Mr. Bjes, safety chairman Borella, MSHA Inspector Burke, and possibly a few others had a meeting or get-together to explore the difficulties that Mr. Bjes claims he was having with the operation of the shuttle car in question. At that meeting Mr. Bjes decided to invoke his individual safety rights and specifically advised mine management that his refusal to continue to operate the No. 9 shuttle car was based on the fact that he (Bjes) did not believe he could operate it safely.

In view of the foregoing, I conclude and find that the record in this case supports a conclusion that Mr. Bjes communicated his belief about the safety hazard presented in his operation of the shuttle car to his section foreman and to the acting mine superintendent prior to his proposed discharge and subsequent suspension.

Whether the Safety Complaint was Made in Good Faith

Respondent suggests that Mr. Bjes' complaint was motivated by his desire to avoid operating a low profile machine which he found to be uncomfortable while awaiting a successful bid on another job. Further, respondent suggests that Mr. Bjes' complaint is a sham, that he concocted a story of safety concerns, and that the injury which he suffered after his return to duty after serving his 30-day suspension was the result of his striking his knee on something other than a shuttle car. Respondent also points to the fact that Mr. Bjes' claimed willingness to operate the No. 10 shuttle car was made for the first time in rebuttal during the course of the hearing, and only after the subject was brought up by his witness Borella.

Having viewed Mr. Bjes on the stand during the course of the hearing in this case, I find him to be a straightforward and credible witness. I believe that he was sincere when he initially complained about the cramped shuttle car kitchen and the fact that he had problems reaching some of the controls. I am not persuaded by the fact that other shuttle car operators may have found no difficulties when they operated the machine. The issue is whether Mr. Bjes' difficulties were reasonably related to any real safety concerns, and whether he was sincere in articulating those concerns. Although it may be true that Mr. Bjes' purported offer to operate the No. 10 shuttle car may have been made belatedly during the course of the hearing, well after the fact, it seems clear to me that Mr. Bjes' decision on July 30, not to operate the car was influenced to a great degree by some input from MSHA Burke after his examination of the car in question, as well as by safety committeeman

Borella who advised or implied to Mr. Bjes that he had an absolute right to invoke his individual safety rights and could refuse to operate the machine in question. Given all of these circumstances, I conclude and find that the safety complaint made by Mr. Bjes was made in good faith, and was not made to avoid operating the shuttle car to which he was assigned until something better could come along.

The Reasonableness of Mr. Bjes' Refusal to Operate the Shuttle Car

The record in this case reflects that at the time of his discharge Mr. Bjes had worked for the respondent for some six years. There is nothing to suggest that prior to the incident over the shuttle car that Mr. Bjes was other than a good worker, that he was a chronic complainer, or that he had ever refused a work assignment.

In addition to the testimony by Mr. Bjes with regard to the difficulties he was experiencing in operating the shuttle car in second gear (fast mode), there is the testimony by safety committeeman Borella that after Mr. Bjes demonstrated his difficulties in operating the machine on July 30, in the presence of MSHA Inspector Burke, he (Borella) agreed with Mr. Bjes' assessment that his continued operation of the shuttle car in question presented a safety hazard. Mr. Borella communicated his agreement directly to Mr. Bjes and advised him that he could invoke his individual safety rights and refuse to operate the machine. Mine Superintendent Hofrichter confirmed that Inspector Burke sat in the machine in question, took some measurements, and advised him that "it could be hazardous" and that he should address the problems dealing with the machine seats, pedals, and the overhead canopy.

Prior to July 30, Mr. Bjes advised shift foreman William Ross that he has having a problem operating the No. 9 shuttle car. Although Mr. Ross indicated that he saw nothing unusual about the manner in which Mr. Bjes was running the car on July 28, he confirmed that when he flagged Mr. Bjes down to inquire about any problems Mr. Bjes did tell him that he could not operate the car in second gear because he could not reach the brake pedal. Just as Mr. Bjes was about to demonstrate his difficulties, Mr. Ross was called away to the telephone and left the area, and did not return until the July 30 meeting in the section.

Section foreman Wayne Ross confirmed that as early as July 28, Mr. Bjes would only run the machine in low gear. He also confirmed that continuous mining machine operator Wall had complained about Mr. Bjes "taking his time" while changing his seat position in his car during the loading process while in retreat mining, and that Mr. Wall considered this to be unsafe since he wanted the shuttle cars to come in and out quickly during the loading process. Although Mr. Ross indicated that Mr. Wall complained about the manner in which Mr. Bjes operated the shuttle car, and attributed certain statements in this regard to Mr. Wall, Mr. Wall was not called as a witness and did not testify. Under the circumstances, I have given little weight to Mr. Wall's purported

characterizations as the difficulties encountered by Mr. Bjes in operating the car on that day, and I accept Mr. Bjes' testimony that the configuration of the machine, coupled with its operational limitations restricted his movements while seated at the controls, thereby contributing significantly to his inability to reach the brake pedals.

In view of the foregoing, I conclude and find that Mr. Bjes' safety concerns over his inability to operate the number 9 shuttle car safely were reasonable. Under all of these circumstances, I conclude that Mr. Bjes had a good faith reasonable belief that if he were forced to continue to operate the shuttle car in question on July 30, this would have presented a serious safety hazard to himself and to at least the miner operator in the section, and possibly to other miners who may have been working on the section in close proximity to where he was required to operate the machine. Although the injury which he suffered to his knee came after he served his suspension and returned to work, it does bolster his argument that requiring him to operate the shuttle car while he was cramped into the operator's kitchen with his knees in his face presented a real safety hazard. Although respondent believes that the injury may have been caused by Mr. Bjes falling and striking his knee on a piece of coal, the fact is that his testimony that he struck it on the steering wheel of the machine remains unrebutted, and respondent's own accident report, exhibit C-3, reflects that the knee injury occurred when Mr. Bjes attempted to stop the car while making a turn and struck his knee on the steering wheel. The report also reflects that the car struck the coal rib when the brakes were applied.

Respondent's defense

Respondent's defense in this case rests on an assertion that Mr. Bjes' refusal to operate the shuttle car was based on his dislike for a machine which he found to be uncomfortable. In support of this theory of its case, respondent maintains that Mr. Bjes deliberately went out of his way to conjure up excuses for not operating the machine, including a suggestion or inference that his fractured knee-cap was self-inflicted. Respondent also attempted to show that the No. 9 car was similar to another car which Mr. Bjes may have operated without any difficulty, that other miners of comparable size operated the same or similar shuttle without any difficulty and without filing any safety complaints, and that Mr. Bjes was observed operating the very same car without any difficulty before he made his safety complaint.

As indicated earlier in this decision, the issue presented in this case is whether Mr. Bjes reasonably and in good faith believed that the operation of the shuttle car in question presented a safety hazard to him. The fact that other miners of similar size and weight may have had no problems with the car in question is not that critical. While this factor may weigh on the reasonableness of Mr. Bjes' safety concerns, I have found that these concerns were reasonable. Further, I rejected the "laundry list" of miners who respondent claimed were able to safely operate the car (exhibit 0-1), and I note that none of these miners were called to testify.

With regard to the operational differences in the two low profile shuttle cars, no. 9 and no. 10, respondent takes the position that the two machines are so similar, that there are no differences in the two from an operator's point of view. The testimony and evidence adduced by the respondent on this issue consists of opinions by Mr. Hofrichter and section Grosholz, as well as the diagrams and measurements of the three shuttle cars being used in the section (exhibits 0-3, 0-7, and 0-9). Neither Mr. Hofrichter nor Mr. Grosholz were offered as expert witnesses, and their is no testimony or evidence that they have operated the shuttle car in question. Further, while the measurements of the No. 9 and No. 10 machines are close, there are some differences in the brake pedal distances from the operator's seat, as well as in the height of the operator's seat. In addition, one car is a standard car, and the other one is an off-standard car. Thus, to this extent their are some operational differences, and I accept as credible Mr. Bjes' assertions that he was experiencing difficulties in operating the No. 9 car, and reject the respondent's assertion that since the cars are so similar Mr. Bjes cannot be believed.

Conclusion

On the basis of the foregoing findings and conclusions, including a preponderance of all of the credible evidence and testimony of record in this proceeding, I conclude and find that Mr. Bjes has satisfactorily established that requiring him to operate the No. 9 shuttle car in question under the circumstances here presented constituted a safety hazard to himself, and possibly to his fellow miners. I further conclude and find that Mr. Bjes promptly made his safety concerns in this regard known to mine management, that his complaints in this regard were reasonable and made in good faith, and that his refusal to operate the car in question was protected activity under section 105(c) of the Act. Under the circumstances, I further find and conclude that his initial discharge, subsequently reduced to a 30-day suspension, constituted unlawful discrimination under the Act, and his complaint of discrimination filed with this Commission IS SUSTAINED.

Remedies

The record in this case reflects that Mr. Bjes' initial discharge from his job was modified after it went to arbitration and the arbitrator reduced the penalty to a 30-day suspension (exhibit C-4). After serving his suspension, Mr. Bjes returned to work until the September accident in which he injured his knee. He was incapacitated and did not work for four or five months. Upon his return to work after recuperating from his injuries, he was not required to again resume operation of the No. 9 shuttle car. Further, as of the date of the hearing in this case, counsel stated that the mine has been out of production and everyone working there has been laid off. Assuming that Mr. Bjes is called back to work, he indicated that because of his seniority he probably would not be again assigned to operate that low profile machine and that he would be entitled to bid on a better job (Tr. 258-259).

The parties were in agreement that the relief requested by Mr. Bjes in this case is the reimbursement of his lost wages during his 30-day suspension period, and an assurance from mine management that he not be required to operate the same shuttle car which prompted his instant discrimination complaint (Tr. 259). In his post-hearing arguments, Mr. Bjes' representative requested the following remedies:

1. Reimbursement of all lost wages incurred as a result of Mr. Bjes' suspension.

2. All record of discipline involving this matter be removed from Mr. Bjes' file.

3. And most importantly, Mr. Bjes not be required to operate this piece of equipment in the future.

ORDER

1. Respondent IS ORDERED to compensate Mr. Bjes for the period of his thirty-day suspension by paying him in full the salary which he would have received had he not been disciplined. Payment is to be made for the thirty working days Mr. Bjes was off respondent's payroll, commencing on July 30, 1981, and ending on September 14, 1981. The rate of pay should be at the rate of pay Mr. Bjes was earning at the time of the suspension, and counsel for the respondent and Mr. Bjes' representative are directed to confer with each other for the purpose of calculating the amount due Mr. Bjes and the manner in which payment shall be made.

2. Respondent IS FURTHER ORDERED to remove all references of Mr. Bjes' disciplinary action in this case from his official mine and company personnel records.

Full compliance with this Order is to be made within thirty (30) days of the date of this decision.

Complainant's request that I order the respondent not to require Mr. Bjes to operate the No. 9 Shuttle Car at any time in the future IS DENIED.

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 82-176
Petitioner-Respondent	:	A.O. No. 36-01048-03009
	:	
v.	:	Contest of Citation
	:	
WEST FREEDOM MINING CORPORATION,	:	Docket No. PENN 82-62-R
Contestant-Respondent	:	Citation No. 1143078; 12/29/81
	:	
	:	West Freedom Strip

DECISIONS

Appearances: James Crawford, Attorney, U.S. Department of Labor, Arlington, Virginia, for the Petitioner-Respondent; Bruno A. Muscatello, Attorney, Butler, Pennsylvania, for the Contestant-Respondent.

Before: Judge Koutras

Statement of the Proceedings

These consolidated cases were heard on the merits in Pittsburgh, Pennsylvania, on September 15, 1982. Docket No. PENN 82-176, concerns a proposal for assessment of civil penalties filed by the Secretary pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking civil penalties for two alleged violations of certain mandatory safety standards found in Part 77, Title 30, Code of Federal Regulations. Docket PENN 82-62-R is the contest filed by West Freedom Mining Corporation challenging one of the citations issued in the civil penalty case.

Issues

The principal issues presented in these proceedings are (1) whether respondent violated the provisions of the Act and implementing regulations as alleged in the proposals for assessment of civil penalties filed in these proceedings, and, if so, (2) the appropriate civil penalties that should be assessed against the respondent for the alleged violations based upon the criteria set forth in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of these decisions.

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

Applicable Statutory and Regulatory Provisions

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

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

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

Discussion

Section 104(a) Citation No. 1143078, was issued on December 29, 1981, at 11:00 a.m., and it alleges a violation of mandatory safety standard 30 CFR 77.410. The condition or practice cited by the inspector is described as follows on the face of the citation:

> The automatic warning device which shall give an audible alarm when such equipment is put in reverse for 980 High life operating at 023-0 pit was not operative.

The inspector fixed the abatement time as 2:00 p.m., December 29, 1981, and the termination notice reflects that the cited condition was abated at 12:40 p.m., December 29, 1981.

Section 104(a) Citation No. 1143079, was issued on December 30, 1981, at 8:55 a.m., and it alleges a violation of mandatory safety standard 30 CFR 77.410. The condition or practice cited by the inspector is described as follows on the face of the citation:

> The automatic warning device which shall give an audible alarm when such equipment is put in reverse for 41 B Bulldozer (serial number 7553268) was inoperative operating 023.0 pit.

The inspector fixed the abatement time as 1:00 p.m., December 30, 1981, and the termination notice issued by the inspector reflects that he terminated the citation at 8:00 a.m., December 31, 1981, after the cited inoperative alarm was repaired.

During the course of the hearing, West Freedom's counsel asserted that he contested the citations because the mine operator had initially indicated that no coal was being mined at the subject West Freedom Strip Mine. Counsel stated further that he was led to believe that the mine was a gravel pit mining operation, and since the citations alleged that the violations occurred while the operator was mining coal, he believed that there was no legal basis for MSHA's issuance of the citations. Subsequently, in preparation for the hearing, counsel learned for the first time from the operator that coal was in face being mined at the mine in question. Under these circumstances, counsel stated that he has no defense to the citations and agreed that they were properly issued and that the conditions or practices cited by the inspector as violations did in face occur.

West Freedom's counsel indicated that while his original contest asserted that the inspector made findings that the citations were "significant and substantial", he agreed that this assertion was in error and he conceded that the inspector made no such findings (Tr. 5-12).

Findings and Conclusions

Fact of Violations

West Freedom Mining Company does not now contest the fact of violations in these proceedings and admits that the conditions or practices cited by the inspector in the section 104(a) citations constitute violations of mandatory safety standard 30 CFR 77.410 (Tr. 10, 13-14). Accordingly, the citations are AFFIRMED.

History of Prior Violations

Respondent's history of prior violations is reflected in a computer print-out offered by the petitioner during the hearing (Exhibit P-1). That print -out reflects a total of 44 paid violations by the respondent during an 11-year period beginning on January 1, 1970, and ending December 28, 1981. While there are 11 prior citations of section 77.410, three were issued during the 24-month period prior to the issuance of the citations at issue in this case. On the basis of this information, I conclude and find that the respondent has a satisfactory compliance record and I cannot conclude that any additional increases in the civil penalties assessed in this case are warranted.

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

Petitioner asserted that the respondent is a medium sized mine operator employing approximately 30 employees with a daily production of 400 tons (Tr. 18). I adopt this as my finding on this issue, and I also find and conclude that the payment of the penalties assessed in these proceedings will not adversely affect the respondent's ability to remain in business.

Negligence

The record reflects that the automatic back-up alarms were on the two vehicles in questions but were simply inoperative. A preshift or on-shift examination would have discovered the conditions, and it is altogether possible that the alarms were rendered inoperative after the equipment was put in operation. In any event, I conclude that the respondent failed to exercise reasonable care and that this constitutes ordinary negligence as to both citations.

Good Faith Compliance

The record here reflects that citation 1143078 was abated approximately an hour or so after it was issued and prior to the time fixed by the inspector. I find this was rapid compliance. Citation 1143079 was timely abated and I find that as to both citations, the respondent exercised good faith compliance.

Gravity

The information provided by the petitioner reflects that people were working in the pit area where the cited equipment was operating but that the closest person around the equipment was 300 feet away (Tr. 26).

Respondent's counsel pointed out that in connection with citation no. 1143079, the "inspector's statement" reflects that the area was being back-filled, that no one was in the area when the violation was observed, and that the inspector believed that any accident was "improbable" (Tr. 27). No information was forthcoming regarding the other citation.

Although it is true that no one was in close proximity to at least one of the pieces of equipment cited, it is also true that the equipment could seriously injure someone if it were to back over them. This is precisely what the standard is designed to prevent. I conclude and find that the conditions cited were serious (Tr. 28).

Penalty Assessments

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that the civil penalties assessed and proposed by MSHA in these proceedings are reasonable, and they are AFFIRMED.

ORDER

Respondent IS ORDERED to pay the following civil penalties within thirty (30) days of the date of this decision and order, and upon receipt of payment by MSHA, this case is dismissed:

Citation No.	Date	30 CFR Section	Assessment
1143078	12/29/81	77.410	$38
1143079	12/30/81	77.410	$36
			$74

In view of my disposition of the civil penalty case, West Freedom's Contest filed in Docket PENN 82-62-R, is DISMISSED.

George A. Koutras
Administrative Law Judge

Distribution:

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NOV 23 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceedings
	:	Docket No. WEVA 82-250
	:	A.O. No. 46-05490-03007V
v.	:	No. 25 Kelly Hatfield Mine
NEW RIVER FUEL, INC., Respondent	:	Docket No. WEVA 82-251
	:	A.O. No. 46-05490-03008V
	:	No. 26 Kelly Hatfield Mine

DECISIONS

Appearances: Howard Agran, Attorney, U.S. Department of Labor, Office of the Solicitor, Philadelphia, Pennsylvania, for the petitioner.

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), charging the respondent with a total of four alleged violations of certain mandatory safety standards promulgated pursuant to the Act. Respondent contested the citations and requested a hearing. A consolidated hearing was convened pursuant to notice in Charleston, West Virginia, on November 4, 1982. In view of a proposed settlement of the cases, arguments in support of the settlement were heard on the record and a bench decision was issued approving the settlements.

Discussion

The citations issued in these cases are as follows:

Docket WEVA 82-250

Section 104(d)(1) Citation No. 906335, November 17, 1981, cites a violation of mandatory safety standard 30 CFR 75.603, and the condition or practice cited is as follows:

Two temporary splices were found in the trailing cable supplying power to the cutting machine being operated in the 001-0 section.

Section 104(d)(1) Order No. 906338, November 19, 1981, cites a violation of 30 CFR 77.506, and the condition or practice cited is as follows:

Two 25 amp fuses protecting the breaker box located in the lamp house and supplying power to the heater and the stationary grinding machine were bridged out with wire. Also, the four fuse holders for the 2 heaters contained welding rods instead of fuses.

Section 104(d)(2) Order No. 906339, November 19, 1981, cites a violation of mandatory safety standard 30 CFR 77.700, and the condition or practice cited is as follows:

The stationary grinding machine located in front of the lamp house was not frame grounded.

Docket No. WEVA 82-251

Section 104(d)(2) Order No. 907002, February 12, 1982, cites a violation of mandatory safety standard 30 CFR 77.1605(b), and the condition or practice cited is as follows:

The foot brake on the Michigan endloader would not stop said endloader when brake was tested.

The citations, assessments, and proposed settlements are as follows:

Docket No. WEVA 82-250

Citation No.	Date	30 CFR Section	Assessment	Settlement
906335	11/17/81	75.603	$ 300	$ 250
906338	11/19/81	77.506	750	500
906339	11/19/81	77.700	500	400
			$1550	$1150

Docket No. WEVA 82-251

Citation No.	Date	30 CFR Section	Assessment	Settlement
907002	2/12/82	77.1605(b)	$ 750	$ 500

The arguments advanced by the petitioner in support of the proposed settlements follow below.

Citation No. 906335

In support of the proposed settlement of this citation by a payment of $250, petitioner's counsel asserted that the inspector first believed that the respondent had permitted the cutting machine to operate for a month with two temporary splices. However, the respondent maintains that the splices in question were in fact permanent cold splices and not temporary ones. Further, counsel states that when the inspector first observed the two splices he conceded that they adequately covered the cable areas which were spliced.

With regard to the respondent's negligence, petitioner's counsel stated that the cited conditions should have been known to mine management. As for the gravity connected with the citation, counsel asserted that there was a potential shock hazard present, but only if the splices had been subjected to further deterioration.

Citation No. 906338

With regard to the proposed settlement of this citation by a payment of $500, petitioner's counsel stated that the respondent maintained that the inspector first believed that the mine operator himself bridged out the breaker box in question. However, during his discussions with the respondent, counsel stated that the respondent's defense is that a security guard working the night shift made the fuse box changes after the regular fuses blew out, and that he did so to provide heat for the lamp house where he was located. Respondent maintains that he had no knowledge that this had been done and also maintained that the lamp-house was not an area that was required to be preshifted.

Petitioner's counsel stated that the respondent exhibited good faith compliance by immediately removing the bridging devices and installing proper fuses. Counsel also believed that the respondent should have known about the conditions, and that the gravity was "probable" in that the bridged-out fuses would over-ride the normal protection provided by regular fuses.

Citation No. 906339

In support of the proposed settlement of this citation by the payment of $400, petitioner's counsel stated that the respondent's defense is that he had no prior knowledge of the cited condition because the lamp house was not required to be preshifted. While counsel believed that the gravity of the cited condition was such as to present the "probability" of an accident, he also indicated that the respondent promptly removed the grinding machine from service when the condition was called to his attention. Counsel also believed that the respondent should have been aware of the cited condition.

Citation No. 907002

The parties proposed a settlement payment of $500 for Citation No. 907002. In support of this proposal, petitioner's counsel asserted that his investigation of the facts and circumstances surrounding the endloader brake conditions reflects that the inspector observed it operating some fifteen minutes before the brakes were tested, but at that time it was sitting unattended at the side of the work site. Counsel also indicated that the respondent's defense is that the endloader was parked and taken out of service. While it was not "tagged-out", the respondent takes the position that this was not necessary since his operation is so small that he would know that the endloader was taken out of service.

Petitioner's counsel stated further that the respondent demonstrated good faith abatement in that the endloader was immediately removed from service and a broken airline was replaced. With regard to the question of negligence, counsel asserted that the respondent should have been aware of the brake conditions, and that there was a potential present for an accident had the equipment been used further.

Respondent's Size of Business

Petitioner's counsel stated that the respondent is a small mine operator who owns and operates the one mine in question in this case. As of April 20, 1982, annual mine production was 50,000 tons. However, respondent indicated that current mine production is approximately 300 tons daily, and that the mine operates five days a week employing 25 miners. Since respondent has agreed to pay the proposed settlement amounts, petitioner asserted that the payment of same will not adversely affect the respondent's ability to continue in business.

History of prior violations

Petitioner's counsel stated that the respondent's mine is a new mine with no record of any previous violations. However, counsel asserted that the respondent previously operated another mine and that for a two-year period the mine had a history of 14 paid civil penalty assessments, none of which were for violations of any of the mandatory safety standards in issue in these proceedings.

Conclusion

After careful review and consideration of the arguments advanced by the petitioner in support of the proposed settlements, I conclude and find that the settlements are reasonable and in the public interest. Accordingly, pursuant to 29 CFR 2700.30, they are APPROVED.

ORDER

Respondent IS ORDERED to pay civil penalties in the settlement amounts shown above in satisfaction of the citations in question within thirty (30) days of the date of this decision and order, and upon receipt of payment by the petitioner, this proceeding is DISMISSED.

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MELVIN L. CASS, Complainant	:	Complaint of Discrimination
	:	Docket No. YORK 82-22-DM
v.	:	
	:	East Deerfield Quarry & Mill
TREW CORPORATION, Respondent	:	

DECISION

Appearances: Melvin L. Cass, Buckland, Massachusetts, pro se;
Lewis A. Whtnet, Jr., Esquire, Easthampton, Massachusetts, for the respondent

Before: Judge Koutras

Statement of the Case

This proceeding concerns a discrimination complaint filed by the complainant with the Commission on March 19, 1982, pursuant to Section 105(c) of the Federal Mine Safety and Health Act of 1977. The complaint was filed pro se after the complainant was advised by MSHA on February 17, 1982, that its investigation of his complaint disclosed no discrimination against him by the respondent.

Respondent filed an answer to the complaint on April 15, 1982, denying any discrimination, and the case was docketed for hearing in Springfield, Massachusetts, on August 3, 1982. The parties were afforded an opportunity to file post-hearing arguments.

Issues

The critical issue presented for adjudication in this case is whether the termination of Mr. Cass from his employment with the respondent was in fact prompted by protected activity under section 105(c)(1) of the Act. Specifically, the crux of the case is whether the refusal by Mr. Cass to perform certain asserted unsafe drilling duties without the assistance of a helper insulated him from termination from his job. Additional issues raised by the parties are identified and discussed in the course of this decision.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 301 et seq.

2. Sections 105(c)(1), (2) and (3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815(c)(1), (2) and (3).

3. Commission Rules, 29 CFR 2700.1, et seq.

The Complaint

In his initial complaint filed with MSHA on June 1, 1981, Mr. Cass asserted that on May 20, 1981, he was drilling on a 68 foot face to complete a shot, and that he had several more holes to drill. He was being assisted by a helper. Quarry superintendent Paul Warner reassigned his helper to other duties and instructed him not to help Mr. Cass further. At this time, Mr. Cass had three more holes to drill about three feet from the face, and four "B" holes (Back up holes) to finish. Mr. Cass informed Mr. Warner that it was not safe to drill alone. He then shut down and went to the office. Mr. Warner advised him that he was to drill alone and did not need a helper. Since it was quitting time, Mr. Cass went home.

The complaint states further that when Mr. Cass returned to work on May 21, 1981, and informed Mr. Warner that he was not going to drill alone because he did not believe it was safe, Mr. Warner informed him that if he did not drill alone he was fired, and Mr. Warner gave him until May 28, 1981, to make up his mind. Mr. Cass has not been back to work at the quarry since this time.

Complainant's testimony

Melvin L. Cass testified that since July 26, 1982, he has been employed by the Pine Rest Plantation, a trailer park, doing general construction work. He confirmed that he left the employ of the respondent Trew Corporation on May 21, 1981, and at that time he was employed as a driller, and his salary was approximately $9.00 per hour, and that he worked a 40-hour week. The mine was a union mine represented by Operating Engineers Local No. 98. He also confirmed that since his termination on May 21, 1981, he has been self-employed as a carpenter restoring an investment home which he purchased, and that he has also "cut wood" for a living.

Mr. Cass testified that he was employed with the respondent for approximately 8-1/2 years as a crushed rock driller. He identified a copy of the written complaint he filed with MSHA on June 1, 1981. He also confirmed that on May 20, 1981, he refused to continue his work as a driller on one of the pit working faces after mine management superintendent Paul Warner informed him that his helper would no longer

be assigned to assist him in his driller work. Mr. Cass stated that he believed he could not safely perform his duties without a helper. Mr. Cass indicated that his drilling work was being performed at the top of a 68 foot pit face, which was at a slight angle, and that the helper would stand by the side of the drilling truck and assist him in the handling of the 65 pound steel drilling devices stored on a rack on the truck. He would position himself two to three feet from the edge of the face while inserting the steel drill on the truck, and during the actual drilling process he would position himself to the side and in back of the truck away from the drill hammer. Without the aid of a helper he would have to do all of the work himself, and he believed that this exposed him to the danger of slipping over the edge of the face (Tr. 7-17).

Mr. Cass stated that he had worked for a week on the drilling project in question, and that he had drilled some 55 to 60 holes on the "shot" project. He had also drilled some 25 holes at the top of the face during the week, and all of this work was accomplished with the assistance of a helper. The helper was shared with the blasting crew, and at the time his helper was taken away from him he had six more holes to drill to complete his project (Tr. 18-19).

Mr. Cass confirmed that on previous occasions when he did not have a helper assigned to him he performed his drilling duties without the helper even though "it wasn't really safe". He did so because "he had to work" and believed that he would be fired if he didn't perform his drilling duties by himself (Tr. 22). He stated that he complained to the pit foreman about having to drill alone, but did not complain to his union representative (Tr. 24).

Mr. Cass confirmed that while he had performed his drilling duties for 8-1/2 years without the assistance of a helper, on May 20 he was drilling in an area where he was out of sight of the shovel operator and the haul truck drivers, and since he was working alone he was concerned that in the event of an emergency no one would be able to see him and come to his assistance (Tr. 25). He believed that if he had a helper, the helper could go and summon assistance (Tr. 26).

Mr. Cass confirmed that when he returned to the mine on May 21, he and Mr. Warner visited the drill site and Mr. Cass still refused to work alone. At that point, Mr. Warner advised him that it was not unsafe, that he had being doing the work for 8-1/2 years, and that a week before when he drilled 25 holes, he did not always have a helper. Mr. Warner then told him that he would have a week "to cool off or I was fired" (Tr. 28). Mr. Cass then informed Mr. Warner that he was going to contact MSHA and file a safety complaint (Tr. 26). After Mr. Cass left work, the drilling work was completed by Mr. Spooner, and later by Mr. Kenny Lemclair (Tr. 35).

Mr. Cass confirmed that he never received an actual notice of discharge or termination from the respondent. He assumed that since he did not go back to work after the week he was given to "cool off", that he was fired.

Even though he was aware of his union grievance rights, he opted to file a complaint with MSHA, and filed no grievance (Tr. 42). Mr. Cass stated that he expected MSHA to come to the mine and tell the respondent that he needed a helper for safety reasons. He conceded that MSHA investigated his complaint, issued no violations, and found that he had not been discriminated against (Tr. 43-66; 49).

Mr. Cass explained the operation of the drill rig he was operating, stated that it was equipped with a drill rack which he designed, and he confirmed that he and Mr. Warner had some prior problems over safety gloves and raingear three years prior to the instant complaint, but that those encounters were resolved to his satisfaction (Tr. 54). Mr. Cass also indicated that even if he were to be furnished with a safety belt for use around the drilling rig in question, he would not use it because it would get in the way and restrict his movements around the drill rig. He would prefer a helper (Tr. 55).

On cross-examination, Mr. Cass identified a photograph (exhibit R-1) as the drill rig in question, and he confirmed that for most of his employment period with the respondent for more than eight years he has worked as a driller, but that he has done some driving, welding, and mechanic's work. He explained that his drilling work involves the preparation for blasting trap rock out of the quarry, and he identified a photograph (exhibit R-2) as a fair picture of what the quarry looks like (Tr. 56-58). Mr. Cass indicated that on the day in question in this case he was working in the area marked "A" on the photograph, and the shovel was digging on top of the face shown as "B" on the photograph. He also identified a roadway shown in the photograph as the haul road used by trucks. He also indicated that on May 20, there were two trucks operating on the haul road with a reasonable degree of regularity every seven to eight minutes, and that the shovel operator was on duty all the time while he was drilling (Tr. 62).

Mr. Cass testified that during his drilling operations for Mr. Warner, it was customary for him (Cass) to ask for a helper if he needed one and that "most of the time" over an eight-year period he received one "if I complained enough" (Tr. 62). Mr. Cass confirmed that on May 20, Mr. Warner did not order him to leave work. Since his work shift was at an end, he simply went home. When he returned the next morning, he and Mr. Warner went to the work site and at that time Mr. Warner told him he was to either drill or he wasn't going to work. Mr. Cass made no offers to return to work during the following week because he was in the process of contacting MSHA, and he made no further contacts with Mr. Warner (Tr. 64). He indicated that he filed no formal complaints with his union, although he did have a conversation with the local's business agent, and he had never previously complained to MSHA (Tr. 67). He confirmed that the drill rig had been cited in the past by MSHA during an inspection, and they resulted from his moving the machine while the boom was in an unsafe position and his failure to insure that a safety chain was connected to the machine air hose (Tr. 68).

Mr. Cass explained the procedure for drilling and preparing a shot to be fired, and he indicated that the drilling work he was engaged in at the time in question was over a four or five day period. During that time Mr. Teddy Lemclaire was his helper, but he did not have the use of his help during the first part of those days. Even though he needed a helper during this early stage of the drilling, he drilled without Mr. Lemclaire and did not ask for any help (Tr. 74). With regard to his relationship with Mr. Haas, the driller, Mr. Cass testified as follows (Tr. 76-78):

> Q. There never was any question raised by Mr. Warner about whether you were cooperating with Mr. Haas?
>
> A. There wasn't a question. I told Paul I wouldn't help Mr. Haas on shots.
>
> Q. You told him you wouldn't help him?
>
> A. Yes.
>
> Q. That, you feel, was a cooperative attitude?
>
> A. That was just the way it was.
>
> Q. You didn't find it too easy to work together with Mr. Haas?
>
> A. No.
>
> Q. I am correct, you did not find it easy to work with him?
>
> A. Correct.
>
> Q. For how long a period did you have this feeling that you couldn't work with him?
>
> A. About the first day he was there.
>
> Q. The first day he was there?
>
> A. Yes.
>
> Q. How long was Mr. Haas there, up until the time you left? Do you know?
>
> A. Two years -- three years?
>
> Q. Two years?
>
> A. Two years, I believe.

Q. He was the blaster and you were the driller.

A. Yes.

Q. During that period of time, you found you couldn't work cooperatively with Mr. Hass, no matter whose fault it was?

A. Right.

Q. Is the answer yes?

A. Yes.

Q. And was that true, pretty much, throughout that two-year period?

A. Well, we never had -- Mr. Warner had us working apart, so we never had much call to get together.

Q. Except with respect to drilling and blasting?

A. No. I usually drilled the holes and he shot them.

Q. If there was any difference as to where holes were to be drilled or the pattern to be drilled, you found it difficult to cooperate with Mr. Haas?

A. No. They marked them and I drilled them. They had another blaster up from Boston. He went and marked a bunch of holes and I drilled them.

Q. Was there anybody else in the quarry crew that you couldn't get along with?

A. No.

Mr. Cass testified that during his tenure as the quarry driller he used the same drill rig. For the first two years, it was without a drill rack, but he fabricated a rack at company expense in the shop with the respondent's consent and he conceded that this was done to help him in his work (Tr. 85). Mr. Cass took the position that he should be the one to determine whether he needs a helper for safety purposes, and even if mine management assessed the situation and found otherwise, he would still not drill alone. He indicated that drillers working on similar union jobs in construction work outside the quarry are required by OSHA regulations to provide a helper or chuck tender for the driller for safety reasons (Tr. 89-91).

Mr. Cass conceded that there were times when he drilled alone without a helper, and indicated that this was true 80 percent of the time (Tr. 93).

His concern on the day his helper was taken away from him stemmed from the fact that he did not believe he would be within sight of the shovel operator working away from his area. As for the truck drivers going by, he conceded that they could observe him for the time it took them to come and go, but assumed they would be paying attention to their driving. He also indicated that there was no radio on the drill rig, but that he did take a coffee break at 10:30 a.m. in the shop, and then would return to the drill rig to work until lunch. Usually no one would come by to visit the work site unless there was a problem or an inquiry as to how long drilling would take (Tr. 96). He believed he needed a helper to keep him under observation, to go for help in an emergency, and to help him with the drill steel (Tr. 97). He also alluded to annual safety meetings, and conceded that he never brought up the need for an observer while he was drilling (Tr. 100). He further explained his need for a helper as follows (Tr. 101-102):

> THE WITNESS: And when you are drilling close to the face, you should have a helper.
>
> JUDGE KOUTRAS: Then, that would be the safety consideration. When you are drilling near the face, you need a helper.
>
> THE WITNESS: Yes.
>
> JUDGE KOUTRAS: But when you are drilling away from the face, when I asked you the hypothetical, you seemed to think that you needed one anyway because in case you got hurt doing something.
>
> THE WITNESS: If nobody could see you.
>
> JUDGE KOUTRAS: If no could see you.
>
> THE WITNESS: You're up, you know, by yourself.
>
> JUDGE KOUTRAS: But if someone had you within their vision --
>
> THE WITNESS: (Interrupting.) Within close, yes. Where they could get to you, like the shovel down underneath you or something like that.
>
> JUDGE KOUTRAS: So I take it if your were at the top of this high wall, up the top of this face, drilling away from the face, a couple of feet let's say; and there is a dozer or a shovel or something working down the pit; and the guy has line of sight vision -- he can observe you; and he is standing there doing all his things that he has to do with his shovel; and occasionally, if he looks

up there, he will see you working the drill, away from the face, you have no problem with that.

THE WITNESS: Yes. Right.

JUDGE KOUTRAS: You have no problem?

THE WITNESS: Not as long as I am in visual contact.

JUDGE KOUTRAS: With him?

THE WITNESS: Or with somebody.

JUDGE KOUTRAS: Is this some kind of company rule, policy, or what?

THE WITNESS: I don't know. About what, taking a helper away or what?

JUDGE KOUTRAS: No, working in an isolated area or being out of sight of someone.

THE WITNESS: No. This is the first time it ever happened on this shot. Usually, I am within sight of somebody or there is somebody working right beside me, close by. This was the first.

Respondent's testimony

Paul H. Warner, respondent's materials superintendent and president testified that his job responsibilities include the complete control and operation of the quarry in question. He has worked at the quarry since 1972 and was placed in charge of the operation in 1975. Mr. Warner stated that on May 20, 1981, he directed Tom Haas, a blaster, to go to the area where Mr. Cass was working and to ask him when his drilling work would be completed so that blasting operations could begin. Mr. Haas reported that Mr. Cass would not speak to him and wouldn't "give him the time of day". Mr. Warner indicated further that Mr. Haas and Mr. Cass had not gotten along for two years, that they both had a "communications problem", and that this situation had caused him some management problems. To alleviate the problem he attempted to keep them physically separated in order "to keep the peace". However, since blasters and drillers normally work as a team, Mr. Warner indicated that maintaining such separation was not always possible (Tr. 103-106).

Mr. Warner testified that on the afternoon of May 20, he personally went to the area where Mr. Cass was working and asked him why he did not respond to Mr. Haas after he (Warner) had sent him there to inquire

as to when the drilling work would be completed. Mr. Cass informed him that he did not speak to Mr. Haas, and in effect told him that the shot would be ready when he finished drilling the remaining holes (Tr. 108). After observing the work that was required at the drill site, Mr. Warner decided that Mr. Cass did not need the helper who was with him and instructed the helper (Mr. Lemclair) to get into his pickup truck so that he could transport him away from the drill site (Tr. 107). Mr. Warner stated that he told Mr. Cass that he saw no reason why he needed a helper and that "this was the last time we were going to be playing games" (Tr. 109). Mr. Warner explained that Mr. Haas and Mr. Cass had been at odds with each other over their respective duties and responsibilities, that Mr. Cass had previously indicated a desire to work as a truck driver rather than a driller, that he once threatened to quit over a misunderstanding about the company supplying him with some work gloves, and that while he considered Mr. Cass to be a good driller, he repeatedly caused him problems over his lack of cooperation with Mr. Haas and his refusal to speak to him (Tr. 110-111). Mr. Warner was also concerned about disparaging remarks made by Mr. Cass about Mr. Haas to other employees when Mr. Haas was not present (Tr. 113), and he explained his problems with Mr. Cass as follows (Tr. 117-118):

> A. I had many problems with the blaster, Tom Haas, coming to me and saying that the driller would not work with him. To give you the particular days they happened on would be a bit difficult, but it was a repeated -- they just would not work together. Or he would not work with the blaster, I should say.
>
> Q. Is it true that the continued over most of the two year period?
>
> A. Yes. In fact, that is why we went to marking the holes, because at the point where we were marking them, we were using an experimental blasting machine -- well, experimental to us -- and the fellow that was operating it explained to us that it was particularly critical in that instance to drill precisely where the holes were supposed to be drilled, so we mark the holes at that time.
>
> Q. You couldn't get a communication going between Mr. Haas and Mr. Cass with respect to the location of the holes, so you had to have them painted on the rock?
>
> A. Yes.

Mr. Warner testified that on the morning of May 21, the day after his conversation with Mr. Cass at the drill site, he told Mr. Cass that "we were a little hot-headed" the previous day and that he wanted to go with him to the drill site so that Mr. Cass could clarify why he believed he needed a helper. Mr. Cass advised him that he would need a helper

"every place in.the f...ing quarry from now on", and that Mr. Cass alluded to the fact that the union contract required this. Mr. Warner indicated that Mr. Cass was confused and that the contract does not require such a helper (Tr. 115). Mr. Warner then stated as follows (Tr. 115-116):

> The conversation did not last too long when I heard that. I told him, at that point, that he in effect had pulled my jock long enough and that until he got his head back on his shoulders, squared away where it belonged, and could start working with the blaster like he should, that he was all done as far as I was concerned; and I don't remember if it was then or if it was down as he was leaving, but I told him that he had a week from Friday -- he had until the twenty-ninth to think it over and let me know.
>
> Q. Did you require him not to work in that ensuing week, or was that discussed?
>
> A. Nothing was discussed. He left very upset, demanding I give him the phone number of the local MSHA authorities, which I did. He said he would contact them and he would be talking to the Union, and that was the last I saw of him.
>
> Q. That was after you told him that he had until the twenty-ninth to get his act together?
>
> A. Yes, sir.
>
> Q. Now, as a consequence of his request, you gave him the local number of MSHA?
>
> A. Yes, sir.

And, at Tr. 118:

> Q. At any time between the twenty-first and the twenty-ninth of May, did Mr. Cass come to you and ask for his job back?
>
> A. No.
>
> Q. At any time during that period, did he communicate with you in any effort to resolve the problem?
>
> A. Directly?
>
> Q. Yes.
>
> A. No.

Mr. Warner confirmed that MSHA conducted an investigation at the quarry in response to the complaint filed by Mr. Cass, and that he and other workers were interviewed. MSHA's inquiry and observations at the quarry lasted some three days, but no citations for safety infractions were issued (Tr. 116-117).

In response to further questions, Mr. Warner indicated that drilling near the face of the wall takes place for every shot, and that Mr. Cass had never been concerned about drilling near the face. Mr. Warner indicated that a helper would not be necessary at this location because the driller would be visible (Tr. 128). Mr. Warner also confirmed that Mr. Cass may have been disgruntled over the fact that he wanted to drive a truck, but he also indicated that Mr. Cass never asked to be assigned as a truck driver (Tr. 130-132).

Mr. Warner testified that Mr. Cass had never filed any safety complaints because of the lack of any helper, and he also confirmed that the respondent has published safety procedures and regulations (Tr. 135). However, he indicated that there is no policy concerning employees being kept under observation while performing work and he indicated that there are ten persons working at the quarry (Tr. 136-137).

Mr. Warner confirmed that the mine is a union mine, but that it does not have a safety committee. However, he did indicate that there is an employee representative at the mine and he identified him as Alonzo Spooner. Mr. Spooner would walkaround with MSHA inspectors and Mr. Warner assumed that employees would report safety problems to Mr. Spooner (Tr. 138). He is not aware of any complaints ever filed by Mr. Spooner with MSHA on behalf of Mr. Cass (Tr. 139), and Mr. Warner indicated that he has never fired, suspended, or disciplined any employees during his tenure as quarry superintendent, and if he did so an employee could file a grievance (Tr. 140-141).

In response to questions as to whether Mr. Cass was actually discharged, Mr. Warner responded as follows (Tr. 141-142):

> JUDGE KOUTRAS: Now, when he opted not to come back after you told him to cool off a little bit, did you, in fact, fire him? Was he terminated? What do you consider -- how would you classify what happened? Would you consider him to be fired -- discharged; and if so, for what reason?
>
> THE WITNESS: I guess I'm not certain what the word would be. The way it was in my mind, I like to feel like I bend over backwards to try to get along with people.
>
> I felt like I bent over backwards too many times, and that's why I told him to stop pulling

my jock and everything, to get his head squared away, and when he could do that, to come back to work.

JUDGE KOUTRAS: Apparently, he has never done that?

THE WITNESS: He never communicated anything other than to go to the Mine Safety and to the Union.

JUDGE KOUTRAS: How did you separate him from the payroll? Is there a record someplace of his personnel folder? What if I were an employer now, and I come to you for a reference. What would you tell me; he was fired, he quit, resigned?

THE WITNESS: I guess he fired himself is what he did. He refused to work. He left.

JUDGE KOUTRAS: Is refusal to work grounds for discharging any of your employees out there?

THE WITNESS: Well --

JUDGE KOUTRAS: Have you ever had this happen before?

THE WITNESS: No, sir, I have not had this happen before.

Alonzo Spooner, employed by the respondent as a truck driver, confirmed that on May 20, 1981, he was the union safety representative at the quarry. He stated that at that time Mr. Cass told him that he had to have a helper, and when he advised him that the union contract did not provide for a helper, Mr. Cass indicated that he would contact the local union representative. Mr. Spooner stated that when he was employed as quarry foreman helpers were assigned to Mr. Cass when he needed them. He also indicated that helpers were assigned to assist drillers, but when they were not needed the driller would work alone and would be paid more money (Tr. 148-151).

Mr. Spooner testified that Mr. Cass had never complained to him that the lack of a helper presented a safety problem, and that his concern was whether a helper was required under the union contract (Tr. 151). Mr. Spooner stated that he did not agree that Mr. Cass needed a helper and that when Mr. Cass left he (Spooner) was assigned to finish the drilling work. He finished it alone without a helper and did not believe it presented any safety hazards. He had no problem in finishing the drilling and did not believe he was in jeopardy (Tr. 152-153).

Findings and Conclusions

As indicated earlier, the issue in this case is whether complainant Cass' refusal to perform his assigned drilling duties on May 21, 1981, is protected by section 105(c) of the Act. Refusal to perform work is protected under section 105(c)(1) of the Act if it results from a good faith belief that the work involves safety hazards, if the belief is a reasonable one, and if the reason for the refusal to work is communicated to the mine operator. Secretary of Labor/Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2 BNA MSHC 1001 (1980), rev'd on other grounds, sub nom Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary of Labor/Robinette v. United Castle Coal Co., 3 FMSHRC 803, 2 BNA MSHC 1213 (1981); Bradley v. Belva Coal Co., 4 FMSHRC 982 (1982); Secretary of Labor/Dunmire and Estle v. Northern Coal Co., 4 FMSHRC 126 (1982).

It seems clear to me in this case that Mr. Cass was not fired or suspended from his job for exercising any protected safety rights. I believe that his frustration over his inability to get along with the blaster, Mr. Haas, coupled with a possible rejection by Mr. Warner of his efforts to become a truck driver, led Mr. Cass on a course of confrontation with Mr. Warner, the quarry superintendent. Mr. Warner was obviously pushed to the brink, his patience had worn thin, and when Mr. Cass made the remark that he would need a helper everywhere on the mine site, Mr. Warner made the management decision that he no longer would have a helper. When Mr. Cass would not accept this decision, he was given the opportunity to think it over, and Mr. Warner left the door open for Mr. Cass to return to work. However, rather than returning to his job, Mr. Cass opted to pursue his complaint over the lack of a helper with MSHA. In these circumstances, I conclude and find that Mr. Cass abandoned his job voluntarily and that this was of his own doing.

Having viewed all of the witnesses on the stand during the course of the hearing, I conclude that mine management, in the person of quarry superintendent Warner, treated Mr. Cass fairly and that Mr. Warner tried to mediate the differences between Mr. Haas and Mr. Cass. Further, Mr. Warner considered Mr. Cass to be a good worker and driller, accomodated him on more than one occasion when he requested certain safety equipment, allowed him to modify his drilling rig at company expense in order to make his job easier, and on at least one occasion Mr. Warner talked Mr. Cass out of quitting his job.

Mr. Cass conceded that prior to his leaving his job, he filed no complaints with MSHA or with his union safety representative over any safety hazards connected with his drilling without a helper. Here, his concern was over his assertion that the location where he was required to drill isolated him from others working in the pit, and that they would be unable to come to his assistance in the event of an emergency. However, his testimony establishes that trucks passed by his drilling location on a regular and routine basis, and that his regular routine included a coffee

break in the morning and time out for lunch. Although one would expect the drivers to pay attention to their driving, Mr. Cass conceded that they would have him in sight as they drove by his drill rig. Given all of these circumstances, I doubt very much that Mr. Cass would not be seen by anyone in the event of an emergency during the time he was expected to drill the remaining six holes to complete his work project.

The record in this case reflects that Mr. Cass had performed similar drilling duties for some eight years, most of the time without the assistance of a helper. Further, respondent has established that during this period of time, mine management accomodated Mr. Cass with a helper whenever one could be spared from other assignments. As a matter of fact, Mr. Cass was provided with a helper for most of the week leading up to the day he decided to leave his job, and at that time he had six holes left to drill to complete the project.

I reject the assertion by Mr. Cass that he needed a helper for safety reasons and that the lack of such a helper placed him in such a hazardous situation that he could not safely do his job. I accept Mr. Warner's testimony that the lack of a helper was not a safety hazard. His testimony, which I find credible, is supported by the testimony of union safety representative Spooner. He finished the project left undone when Mr. Cass left his job, and he did it without a helper and with no exposure to any safety hazards.

I also believe that Mr. Cass' insistence on a helper stemmed from an erroneous assumption on his part that the union contract required the assignment of a helper. In addition, I believe that he was also influenced by some OSHA regulation which he claimed required that an observer or helper be assigned to a driller on general construction projects. All of these assumptions, which proved to be inapplicable in this case, obviously contributed to Mr. Cass' belief that he was entitled to a helper simply because he wanted one, regardless of any management decisions to the contrary.

Conclusion and Order

In view of the foregoing findings and conclusions, and after careful consideration of all of the evidence and testimony adduced in this case, I conclude and find that the respondent did not discriminate against Mr. Cass, and that his rights under the Act have not been violated. Accordingly, his discrimination complaint IS DISMISSED.

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 24, 1982

CONSOLIDATION COAL COMPANY, Contestant	:	Contest of Citations
v.	:	Docket No. PENN 82-203-R
	:	Citation No. 1146664; 3/15/82
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. PENN 82-204-R
	:	Citation No. 1146668; 3/15/82
	:	Renton Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. PENN 82-217
	:	A.C. No. 36-00807-03118
v.	:	
	:	Renton Mine
CONSOLIDATION COAL COMPANY, Respondent	:	

DECISION

Appearances: Robert M. Vukas, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for Contestant/Respondent, Consolidation Coal Company;
Agnes M. Johnson-Wilson, Esq., Office of the Solicitor, U. S. Department of Labor, Philadelphia, Pennsylvania, for Respondent/Petitioner, MSHA.

Before: Judge Merlin

Statement of the Case

The first two docket numbers captioned above are notices of contest filed by Consolidation Coal Company under section 105(d) of the Act to challenge the validity of two citations issued by an inspector of the Mine Safety and Health Administration for alleged violations of 30 C.F.R. § 75.1100-3. The third docket number is a petition for the assessment of civil penalties filed by the Secretary of Labor under section 110(a) of the Act for violations alleged in the citations.

The hearing was held as scheduled on September 8, 1982. Documentary exhibits and oral testimony were received from both parties. The cases were consolidated for hearing and decision with the consent of the parties (Tr. 4). At the conclusion of the hearing, I directed the filing of written briefs simultaneously by both parties within 21 days of receipt of the transcript (Tr. 148).

The Mandatory Standard

Section 75.1100-3 of the mandatory standards, 30 C.F.R. § 75.1100-3, provides as follows:

> § 75.1100-3 Condition and examination of fire-fighting equipment.
>
> All firefighting equipment shall be maintained in a usable and operative condition. Chemical extinguishers shall be examined every 6 months and the date of the examination shall be written on a permanent tag attached to the extinguisher.

The Cited Conditions or Practices

Citation No. 1146664 (PENN 82-203-R) cites a violation of 30 C.F.R. § 75.1100-3 for the following condition:

> The chemical fire extinguisher located in the car shop was not maintained in an operable condition in that the gauge indicated that the extinguisher needed recharged [sic].

Citation No. 1146668 (PENN 82-204-R) cites a violation of 30 C.F.R. § 75.1100-3 for the following condition:

> The chemical fire extinguisher on the trackmens motor #18 was not maintained in a usable and operative condition in that the gauge indicated the extinguisher needed recharged [sic]. The motor was being operated along the empty track to the North Mains.

Stipulations

At the hearing, the parties agreed to the following stipulations which were accepted (Tr. 5):

1. Consolidation Coal Company is the owner and operator of the Renton Mine.

2. The operator and the Renton Mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

3. The presiding administrative law judge has jurisdiction over this proceeding.

4. The inspector who issued the subject citations was a duly authorized representative of the Secretary.

5. A true and correct copy of each of the subject citations was properly served upon the operator.

6. All witnesses are accepted generally as experts in coal mine health and safety.

7. Imposition of any penalties in this proceeding will not affect the operator's ability to continue in business.

8. The violations were abated in good faith.

9. The history of prior violations is non-contributory with respect to determining the amount of the civil penalties.

10. The operator is large in size.

11. The conditions set forth in the citations constituted violations of the cited mandatory standards.

Discussion and Analysis

As appears from the stipulations set forth above, the operator does not contest the finding that the two extinguishers which needed to be recharged were in violation of the Act as alleged.

The issue presented for resolution is whether the subject violations were significant and substantial. I conclude first that a finding that a condition is "significant and substantial" properly may be included in a section 104(a) citation. Judge Broderick so held in National Gypsum Company, 1 FMSHRC 2115 (1979) and this holding was not disturbed by the Commission on appeal. National Gypsum Company, 3 FMSHRC 822 (1981).

In National Gypsum the Commission considered at length what would constitute a violation which "could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." The Commission held that a violation was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard if, based upon the particular facts surrounding that violation, there existed a reasonable likelihood that the hazard contributed to would result in an injury or illness of a reasonably serious nature. 3 FMSHRC at 825. In addition, the Commission expressed its understanding that the word "hazard" denoted a measure of danger to safety or health, and that a violation significantly and substantially contributed to the cause and effect of a hazard if the violation could be a major cause of danger to safety or health. 3 FMSHRC at 827.

The record contains a great deal of testimony describing the areas where the two deficient fire extinguishers were located. The first fire extinguisher was in the car shop where there was oil and grease on the floor and some other combustible materials. The car shop itself had a concrete floor and concrete walls and its two entrances had metal doors. The second extinguisher was on the trackmen's motor which was covered with grease, oil and coal dust. In addition, power was going into the motor since the trolley pole was attached to a live wire. Welding and torching routinely occur at both locations. The repair of mine cars in the car shop requires welding which is done with acetylene torches. The trackmen's motor is used to carry equipment for repairing and rejoining rail tracks and cutting rails and bolts all of which is done with torches. Gas bottles and cutting torches were on the motor at the time.

After a review of the evidence I have concluded that both violations were significant and substantial within the criteria set forth by the Commission. Both deficient fire extinguishers were present at locations where welding and torching were routinely carried out. The danger of fire is inherent and ever present in the performance of these activities. Also to be noted is the presence of some combustible materials in the vicinity of the extinguishers and live power sources on the trackmen's motor. Injury or illness of a reasonably serious nature becomes a reasonable likelihood when firefighting equipment such as extinguishers is not in working condition in such an environment. Accordingly, I determine that the particular circumstances presented here raise the degree of hazard in the cited violations to the level of significant and substantial.

I have not overlooked the operator's evidence regarding the presence of other fire extinguishers within 50 to 100 feet from the extinguishers. Nor have I overlooked evidence regarding the existence of rock dust. Assuming acceptance of this evidence, a finding of significant and substantial still would be appropriate in light of the entire record. An MSHA electrical expert testified that when confronted with a fire, miners often panic, may not do the logical thing and may follow an unexpected course of action. I find the electrical expert's testimony persuasive and indeed, compelling and I accept it. Therefore, even if other fire extinguishers and rock dust were where the operator alleged they were (and overlooking the absence of any evidence showing those extinguishers were in working order), there would be no guarantee that in the event of a fire a miner would go to the next nearest extinguisher or rock dust. As the electrical expert testified, a miner might run in the other direction and the first couple of minutes in any fire is critical with smoke the major problem.

With respect to the amount of penalty to be assessed in accordance with the six statutory criteria set forth in section 110(i) of the Act, I conclude in accordance with the analysis set forth herein that the violations were serious. Based on the evidence I next conclude there was ordinary negligence. Stipulations 7-10 set forth above cover the remaining statutory criteria.

I have reviewed the briefs. To the extent they are inconsistent with this decision they are rejected.

ORDER

In light of the foregoing, it is Ordered that the operator's notices of contest be DISMISSED.

It is further Ordered that a penalty of $200 be assessed for Citation 1146664 and that a penalty of $200 be assessed for Citation 1146668.

It is further Ordered that the operator pay $400 within 30 days from the date of this decision.

Paul Merlin
Chief Administrative Law Judge

Distribution: Certified Mail

Robert M. Vukas, Esq., Consolidation Coal Company, 1800 Washington Road, Pittsburgh, PA 15241

Agnes M. Johnson-Wilson, Esq., Office of the Solicitor, U. S. Department of Labor, Rm. 14480-Gateway Building, 3535 Market Street, Philadelphia, PA 19104

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 24, 1982

MATHIES COAL COMPANY, Contestant	:	Contest of Citation
v.	:	Docket No. PENN 82-209-R
	:	Citation No. 1145237; 3/30/82
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Mathies Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. PENN 82-260
	:	A.C. No. 36-00963-03201
v.	:	
	:	Mathies Mine
MATHIES COAL COMPANY, Respondent	:	

DECISION

Appearances: Robert M. Vukas, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for Contestant/Respondent, Mathies Coal Company; Agnes M. Johnson-Wilson, Esq., Office of the Solicitor, U. S. Department of Labor, Philadelphia, Pennsylvania, for Respondent/Petitioner, MSHA.

Before: Judge Merlin

Statement of the Case

The first docket number captioned above is a notice of contest filed by Mathies Coal Company under section 105(d) of the Act to challenge the validity of a citation issued by an inspector of the Mine Safety and Health Administration for an alleged violation of 30 C.F.R. § 75.200. The second docket number is a petition for the assessment of a civil penalty filed by the Secretary of Labor under section 110(a) of the Act for the violation alleged in the citation.

The hearing was held as scheduled on September 8, 1982. Documentary exhibits and oral testimony were received from both parties. The cases were consolidated for hearing and decision with the consent of the parties (Tr. 4). At the conclusion of the hearing, I directed the filing of written briefs simultaneously by both parties within 21 days after receipt of the transcript (Tr. 102).

The Mandatory Standard

Section 75.200 of the mandatory standards, 30 C.F.R. § 75.200 provides as follows:

> § 75.200 Roof control programs and plans.
>
> Each operator shall undertake to carry out on a continuing basis a program to improve the roof control system of each coal mine and the means and measures to accomplish such system. The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs. A roof control plan and revisions thereof suitable to the roof conditions and mining system of each coal mine and approved by the Secretary shall be adopted and set out in printed form on or before May 29, 1970. The plan shall show the type of support and spacing approved by the Secretary. Such plan shall be reviewed periodically, at least every 6 months by the Secretary, taking into consideration any falls of roof or ribs or inadequacy of support of roof or ribs. No person shall proceed beyond the last permanent support unless adequate temporary support is provided or unless such temporary support is not required under the approved roof control plan and the absence of such support will not pose a hazard to the miners. A copy of the plan shall be furnished to the Secretary or his authorized representative and shall be available to the miners and their representatives.

The Cited Condition or Practice

Citation No. 1145237 cites a violation of 30 C.F.R. § 75.200 for the following condition:

> There was loose drawn roof at intersection in No. 2 track haulage entry surveyor spad No. 29+721 which measured approximately 80 ft. [in length] 16 ft. in width and was drawn approximately 2 inches across crosscut. Section foreman Martin Nogy.

Stipulations

At the hearing, the parties agreed to the following stipulations which were accepted (Tr. 5):

1. Mathies Coal Company is the owner and operator of the Mathies Mine.

2. The operator and the Mathies Mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

3. The presiding administrative law judge has jurisdiction over this proceeding.

4. The inspector who issued the subject citation was a duly authorized representative of the Secretary.

5. A true and correct copy of the subject citation was properly served upon the operator.

6. All witnesses are accepted generally as experts in coal mine health and safety.

7. Imposition of any penalty in this proceeding will not affect the operator's ability to continue in business.

8. The alleged violation was abated in good faith.

9. The history of prior violations is non-contributory with respect to the amount of any civil penalty that may be assessed.

10. The operator is large in size.

Discussion and Anaysis

The inspector testified that on the track haulageway there was loose or deteriorated roof, described as a cutter, for 80 feet near the the rib on the tight side and along the wide side for 40 feet. He also testified that there was a 2-inch wide crack in the roof in the intersection extending across the 16-foot haulageway from the center to one side. According to the inspector the crack was in a clay vein and a clay vein is an indication most of the time of a deteriorated roof. Wedges were missing from two posts on the tight side outby the intersection. In addition, the inspector noted sloughage of the coal on the tight side which was being cleaned up at the time he saw the condition. The sloughage appeared to him to be of recent origin and in his opinion was an indication of pressure. Based upon what he saw the inspector believed that there was a reasonable likelihood of a roof fall which could result in death or crushing injury. The shift foreman told him that the operator knew of the condition and intended to install steel beams. The inspector felt he could not wait for the beams to be installed. The inspector admitted that there were eight to ten posts installed along the tight side of the entry outby the intersection and that the operator had done far more bolting than was required or necessary in the intersection. The inspector did not know the length of the bolts installed and did not ask because when he saw the separation in the roof and the stress he figured that whatever bolting had been done was not enough. The inspector also did not know if the crack along the clay vein had been present before the additional roofbolting had been done and he did not know if the crack had opened up more after the rebolting. He expressed the view that the sloughage indicated stress although he could not say whether the sloughing occurred before the additional bolts were put in. He had not seen the roof condition before he cited it or he did not recall seeing it.

The operator's shift foreman testified that about 20 to 22 days before the citation was issued this area had been mined through and the clay vein had been noticed indicating to him abnormal roof conditions which needed additional support. About a week after the original mining the operator installed 35 to 40 additional 12-foot roof bolts in the intersection and along the cutter on the rib for a distance of 120 feet. According to the shift foreman, after rebolting and until the citation was issued there was no change in the

condition of the roof. In particular, the 2-inch gap along the clay vein was present at the time of rebolting and remained unchanged thereafter with no widening. Also the deteriorated roof along both ribs had been present at the time of rebolting and he did not see any change in this from the day of rebolting until the citation was issued. The shift foreman went through the area twice a week or more. With respect to the future installation of steel beams, the shift foreman testified that the operator was going to put a ramp in the next intersection inby this area which would necessitate taking more off the corner and thereby taking some support from the subject area. Steel beams were going to be installed for this reason and not because of the subnormal nature of the roof. The shift foreman admitted that he did not tell the inspector this was the reason steel beams were going to be installed. The shift foreman did not know exactly when the sloughing occurred, but he stated that at the time of rebolting there already was some sloughage from the ribs and that rebolting itself had caused some more. The sloughage had not been cleaned up at the time of rebolting.

The operator's assistant supervisor who was the walkaround accompanying the inspector on the day the citation was issued, corroborated the shift foreman's testimony. He also stated that right after the area was mined through, a determination was made to install extra roof supports and this was done on March 13. The assistant supervisor agreed with the shift foreman that there was no change whatsoever in the roof along the cutter or in the crack, from the time of rebolting until the citation was issued. He further testified that he made it a specific point to go to the area and recheck it, that he went at least twice a week and that after the rebolting there was no additional sloughage. The assistant supervisor explained that the men whom the inspector saw cleaning up were removing sloughage which had been there from the time of rebolting. According to the assistant supervisor this was not a totally abnormal time for sloughage to be left.

Finally, the operator's underground mine foreman testified that he had ordered the additional rebolting and he agreed with the statements of the shift foreman and the assistant supervisor about the rebolting. He also agreed that the roof including the gap in the clay vein had not changed after rebolting. He stated that some of the sloughage had been present before rebolting and some had been caused by the rebolting itself.

The citation alleges a violation of 30 C.F.R. § 75.200 which requires, inter alia, that the roof and ribs of all active underground roadways, travelways and working places be supported or controlled adequately to protect a person from falls of the roof or ribs. There is no contention that the operator failed to comply with its roof control plan.

No dispute exists as to the condition of the roof when the inspector cited it. Therefore, I accept the inspector's description of the roof at that time. The issue presented is whether these conditions demonstrated that the roof was not adequately supported. I conclude they did not. The inspector knew additional bolting had been done but he did not believe the roof was adequately supported because of the sloughage, cutters and clay vein. He did not however, know the chronological sequence of relevant events affecting the nature and status of the roof. In particular, he did not know when the sloughing, clay vein and cutters occurred in relation to the rebolting. His conclusion that the roof was subject to stress and needed support was based upon the assumption that the sloughing and other conditions happened after the installation of additional roof supports. This assumption is shown to be wrong by the operator's evidence which demonstrates that there had been no change in the condition of the roof after rebolting and that the sloughage being cleaned up when the citation was issued was not of recent origin. The testimony of the operator's witnesses is consistent on this crucial point. Moreover, the operator's witnesses had been in the area from the time it was first mined until the citation was issued, whereas the inspector testified that he had not seen the intersection prior to his issuance of the citation or that at the very least he did not recall seeing it previously.

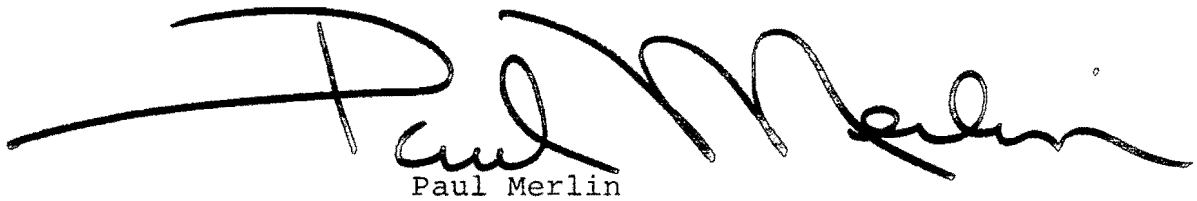
I find the operator's evidence regarding the condition of the roof before and after rebolting persuasive and I accept it. Based upon this evidence I conclude the additional bolting was sufficient to support the roof and that there had not been further deterioration after rebolting. The fact that the inspector was mistaken in believing that the steel beams were going to be installed because of the condition of the roof may not have been his fault, but this circumstance cannot alter the fact that the evidence convincingly demonstrates the roof was adequately supported by the rebolting.

I have reviewed the briefs. To the extent they are inconsistent with this decision they are rejected.

ORDER

In light of the foregoing, it is Ordered that the operator's notice of contest be Granted.

It is further Ordered that the petition for the assessment of a civil penalty be Dismissed.



Paul Merlin
Chief Administrative Law Judge

Distribution: Certified Mail.

Robert M. Vukas, Esq., Consolidation Coal Company,
1800 Washington Road, Pittsburgh, PA 15241

Agnes M. Johnson-Wilson, Esq., Office of the Solicitor,
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

NOV 30 1982

COMMONWEALTH MINING CO., INC., Applicant	:	Notice of Contest
	:	Docket Nos. KENT 81-96-R KENT 81-97-R
v.	:	
		No. 1 Surface Mine
SECRETARY OF LABOR, Respondent	:	

DECISION

Appearances: Mr. Michael Templeman, for Applicant
Carole M. Fernandez, Esq., for Respondent

Before: Judge Fauver

These proceedings were brought by Commonwealth Mining Company, Inc. ("Commonwealth") to review and have vacated two citations issued under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq.

The cases were consolidated and heard in Louisville, Kentucky.

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

FINDINGS OF FACT

1. Commonwealth is the operator of No. 1 Surface Mine in Pike County, Kentucky, which produces coal for sale or use in or substantially affecting interstate commerce.

2. On December 31, 1980, Mine Safety and Health Administration (MSHA) Inspector B.G. Cure issued a citation to the operator for failure to provide berms or guards along the entire length of the elevated roadway and pit area. According to the citation, the distance of roadway concerned was about 3/4's of a mile beginning at the entrance of the roadway and running to the end of the 001-0 pit area.

3. At the time the citation was issued the operator had built or was in the process of building a roadway along a coal seam, at an elevation higher than the existing public road, which ran into a creek bed. Berms were not adequately provided along this new roadway and elsewhere, including along the top of the pit area.

4. On January 9, 1981, Inspector Cure issued a citation to the mine operator for failure to maintain an accurate up-to-date mine map. The "relocated" roadway was not shown on the map, and a projected roadway was shown but had not been built.

5. By letter of February 23, 1981, Commonwealth filed a notice of contest of the citations, which states that it had placed berms on the roadway that has not been designated a public road and that the map presented at the time the citation was issued meets all the requirements of 30 CFR § 75.1200. Further, the operator states that it was upgrading the road before mining operations bean.

6. When the mine inspector arrived at the mine on December 31, 1980, he observed the operator building an elevated roadway along a coal seam.

7. The operator admits that the road was built for the purpose of mining coal, as an access and haulage road.

8. Commonwealth was under an agreement with the surface owner, Arnold Thacker, to remove the coal seam where the road was being built and to give it to Thacker. Commonwealth had in fact already broken up some of the coal and delivered it to Thacker.

9. At the time the citation regarding the berms was issued, Commonwealth intended to remove the coal at the road construction site.

DISCUSSION WITH FURTHER FINDINGS

The Citation Concerning Berms

The operator is required by 30 CFR § 77.1605(k) to provide berms or guards on the outer bank of elevated roadways. In his testimony the inspector identified several locations where there were missing or inadequate berms -- beginning along the top of the pit down to and including the roadway, marked number one on the mine map, which the operator had constructed along the coal seam.

Commonwealth does not deny that the berms were inadequte in the pit area. There is, therefore, no question that there was a violation of the regulation in that area. However, Commonwealth contends that it was not required to provide berms on the elevated roadway marked number one on the map because the roadway was a public road.

The Act defines a "coal or other mine" to include not just the area of land from which the minerals are extracted but also "private ways and roads appurtenant to such area." In determining what will be considered a "private" road as opposed to a "public" road for purposes of the Act, the fact that the County Judge (in letters introduced by Commonwealth) has declared the road to be a public road is not the determining factor. Nor is the Department of Interior's exercise of jurisdiction over roads determinative in this case.

The jurisdiction of the Act extends over counties and other political subdivisions. In Secretary v. Salt Lake County Road Dept., WEST 79-365-M (Nov. 25, 1980), where a governmental entity was operating a gravel pit, the pit was found to be subject to MSHA regulation on the basis that the operation of a gravel pit is not an integral government function.

If a county operates a mine and builds a road for the sole purpose of operating that mine, the road should not be considered a public road because the county built it; therefore, a road built by a private mine operator for the sole purpose of access to a mine and haulage should not be considered a public road for the purposes of the Act, merely because a county official has declared it "public" for county purposes.

Several factors should be considered in determining the nature of the roadway involved in this case.

First, the operator built the road. There was no evidence that the county had requested the construction or paid for it. The operator built the road for its own purpose, not for the county's purposes.

Second, the letters from the County Judge submitted in evidence by the operator indicate that the county considered the new roadway to be a public road in the sense that the county has required the company to comply with its standards in constructing the road. The county placed the burden on the operator to maintain the road. No evidence was presented that the county would not allow berms to be constructed on the roadway.

Third, we should consider the "public" that will be making use of the road. The surface owner is Thacker. The portion of the road that was built by the operator and that the mine inspector considered to be in violation begins at the last dwelling house. There is no dwelling located on the new road. Except for Commonwealth's mining operations, the only persons who would normally use the road would be the surface owner and his family and, if necessary, those seeking access to the gas well on the property.

Commonwealth has not presented a letter from the county stating that Commonwealth cannot limit access to the road. Instead, it has presented letters from the private surface owner and his family stating that Commonwealth cannot deny them access to their property.

The record indicates that Commonwealth had to obtain Thacker's permission to build the road on his property. There is no evidence of a public condemnation or a public easement. Rather, Commonwealth pays "royalities" to the Thackers to mine the coal, so there is a financial arrangement with regard to the coal whereby the surface owner profits from the mining operation.

An issue similar to the one involved here arose in Harmon Mining Corporation v. Secretary of Labor, Docket No. VA 80-94-R, where a mine operator argued that the area on which N & W Railroad tracks were located was not part of the mine. Employees of the railroad company were on the property where the tracks were located on a daily basis. There was a fatal railroad haulage accident involving a railroad employee. In charging the mine operator, MSHA argued that a deed and agreement between the operator and the railroad granted an easement or license to the railroad for "the purpose of providing a mutually beneficial and convenient method of transporting coal off mine property." The mining company could not have operated without the services of N & W. The judge found that the railroad track was an "integral and indispensable part of contestant's mining operations" and rejected the attempt to divorce the track from the normal mining operations based on what he termed "a somewhat artificial and semantical interpretation" of the old deed and agreement "entered into by the contestant and the railroad for their mutual benefit."

The analysis used in Harmon should be applied here, along with the concept of private as opposed to governmental function in the Salt Lake County case. In the instant case, the coal operator could not use the existing county road to haul coal, so it built a new road along a coal seam, for the sole purpose of access and haulage. The county required it to maintain the road to county standards. The road is located on land owned by Thacker, the surface owner who is under a contractual agreement with Commonwealth whereby the surface owner obtains a direct finanicial benefit from the mining of the coal. The road under these circumstances if a private-purpose road and should therefore be considered a part of Commonwealth's mining operation, subject to the Act.

The Citation Concerning the Mine Map

Section 77.1200,30 CFR, requires a mine operator to "maintain an accurate and up-to-date map of the mine," and lists items that the map should include. Among these are "the location of railroad tracks and public highways leading to the mine." A reading of the list indicates that it is not an exclusive list. The fact that it mentions only public roads and railroad tracks does not mean that the location of roads within the mine are not required to be shown.

The evidence establishes inaccuracies in the mine map as cited. As to one of these -- the failure to show a roadway -- Commonwealth contends that a hollow fill is shown on the map and that, where one sees a hollow fill one knows that there are "going to be roads all over" (Tr. 72, 106). The fact that one may assume that there will be roads does not mean that the location of the road actually used was properly shown on the map.

MSHA regulations require that an accurate, up-to-date map be available. Although Commonwealth argues that this is a difficult requirement, the testimony indicates that an engineer or surveyor had apparently already prepared an amendment for submission to the State Department of Reclamation, but there is no reason given why the map provided at the mine could not have been changed or amended at the same time.

If the mine operator had amended the map there was no evidence that the amendment was available at or near the mine to meet the requirements of § 77.1200. No amendment was provided to the mine inspector. Although 30 CFR § 77.1201 requires that mine maps be made by a registered engineer or surveyor, this does not guarantee that a map that is accurate when made will remain accurate and up-to-date.

ORDER

WHEREFORE IT IS ORDERED that Citations 953348 and 953357 are AFFIRMED and the above proceedings are DISMISSED.

William Fauver

WILLIAM FAUVER, JUDGE

Distribution Certified Mail:

Carole M. Fernandez, Esq., US Department of Labor, Office of the Solicitor, 280 US Courthouse, 801 Broadway, Nashville, TN 37203

Michael Templemen, President, Commonwealth Mining Co., Inc., PO Box 2497, Pikeville, KY 41501

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

NOV [illegible]

U.S. STEEL CORPORATION, Applicant	:	Contest of Citation
	:	Docket No. PENN 81-207-R
v.	:	Cumberland Mine
SECRETARY OF LABOR, Respondent	:	
v.	:	
SECRETARY OF LABOR, Petitioner	:	Civil Penalty Proceeding
	:	Docket No. PENN 81-221
v.		AC No. 36-05018-03089V
	:	
U.S. STEEL CORPORATION, Respondent	:	Cumberland Mine

DECISION

Apppearances: Louise Q. Symons, Esq., U.S. Steel Corporation, Pittsburgh, PA for U.S. Steel Corporation

Robert Cohen, Esq., US Department of Labor, Office of the Solicitor, Arlington, VA for Secretary of Labor

Before: Judge Fauver

These proceedings involve the same citation. The Secretary seeks a civil penalty and the operator seeks review and vacating of the citation, under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq. The cases were consolidated and heard at Morgantown, West Virginia.

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

FINDINGS OF FACT

1. At all pertinent times, U.S. Steel operated an underground mine known as Cumberland Mine, which produced coal for sale or use in or substantially affecting interstate commerce.

2. On June 19, 1981, MSHA Inspector Robert Newhouse inspected the South Right section of the mine and found accumulations of loose coal and float coal dust in the center of the roadways and along the ribs in the areas and distances designated by spiraled lines on Govt. Exhibit No. 1.

3. The accumulations were about five feet in width in the center of the roadways, smaller widths along the ribs, and ranged in depth from zero to four inches. The accumulations were black and had been run over by vehicles, accounting for the float coal dust.

4. The mine liberates substantial quantities of methane.

5. Based on his findings, Inspector Newhouse issued a citation under section 104(d) of the Act, charging a violation of 75 CFR § 75.400.

6. The areas cited were traveled by men and vehicles.

7. There were sources of ignition in the cited areas.

DISCUSSION WITH FURTHER FINDINGS

The Secretary has charged U.S. Steel with a violation of 75 CFR § 75.400, which provides:

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

U.S. Steel contends that there was an accumulation of loose coal in only one of the cited areas, not in the rest cited by the inspector. This accumulation was described by a U.S. Steel witness as being about ten feet long, two feet wide, an inch or two deep, and caused by spillage from a vehicle at the junction of No. 3 Entry and No. 94 Crosscut. It also contends that its dust samples taken in all the areas cited showed adequate rock-dusting except in the one area in which it concedes there was an accumulation.

I find that the inspector's testimony and his firsthand notes of his observations as to the accumulations are credible, and more reliable than the testimony of U.S. Steel's witnesses on these points. I also find that the dust samples introduced by U.S. Steel are not reliable because of a change of conditions in at least some of the areas and the likelihood of change in the others, between the time the citation was issued and the time the dust samples were taken. I credit the inspector's testimony as to color and approximate dimensions and quantities of loose coal and float coal dust in each of the cited areas.

The accumulations constituted a serious violation because of the hazard of a methane or float coal dust explosion and its propogation by substantial quantities of combustible material accumulated over large areas. I also find that the accumulations could have been prevented by the exercise of reasonable care. The violation was an unwarranted failure to comply with the cited standard, due to the operator's negligence.

CONCLUSIONS OF LAW

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

2. U.S. Steel violated 75 CFR § 75.400 as charged in Citation No. 843779. Based upon the statutory criteria for assessing a civil penalty for a violation of a safety standard, U.S. Steel is assessed a penalty of $800 for this violation.

Proposed findings or conclusions inconsistent with the above are rejected.

ORDER

WHEREFORE IT IS ORDERED:

1. U.S. Steel shall pay the Secretary of Labor the above-assessed penalty of $800.00 within 30 days from the date of this decision.

2. Citation No. 843779 is AFFIRMED, and the proceeding in Docket No. PENN 81-207-R is DISMISSED.

William Fauver

WILLIAM FAUVER, JUDGE

Distribution Certified Mail:

Louise Q. Symons, Esq., U.S. Steel Corporation, 600 Grant Street, Room 1583, Pittsburgh, PA 15230

Robert Cohen, Esq., U.S. Department of Labor, Office of the Solicitor, 4015 Wilson Boulevard, Arlington, VA 22203

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR, MINE SAFETY ANDHEALTH ADMINISTRATION on behalf of George Mateleska, Applicant	:	Application for Review of Discrimination
	:	Docket No. PENN 81-209-D
	:	MSHA CASE No. PITT CD 81-10
v.		
	:	Shannopin Mine
SHANNOPIN MINING COMPANY, Respondent	:	Sol No. 12874

DECISION

Appearances: Covette Rooney, Esq., for Applicant
Jane A. Lewis, Esq., for Respondent

Before: Judge William Fauver

This proceeding was brought by the Secretary of Labor on behalf of George Mateleska, under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq. The Secretary charges a violation of that section, concerning Respondent's action in suspending Mateleska for five days without pay in March, 1981, and seeks back pay and other relief.

The case was heard in Pittsburgh, Pennsylvania.

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

FINDINGS OF FACT

1. At all pertinent times, Respondent operated an underground coal mine known as Shannopin Mine, which produced coal for sale or use in or substantially affecting interstate commerce.

2. George Mateleska, a miner at Shannopin Mine, was a member of the miners' Safety Committee from January 1980 until May 1981.

3. On March 4, 1981, when Mateleska reported for work on the midnight shift, he was informed that, because of a water problem, the crew would be reassigned to another section of the mine.

4. I credit Mateleska's testimony as to the events that followed, including the following part of the transcript of his testimony (Tr. pp. 10-16):

Q. Could you describe for us the events that occurred when you reported for work on that shift?

A. At 12:01, we was notified by foreman Jess Fox, that we wasn't going to go to our assigned job areas, and the crew in 213 Section was to be idle, due to the water at 11 Butt, and that we were supposed to go down the cage, and go to this waiting room, for job assignments.

Q. Did you go to that area?

A. Yes, ma'am, we did.

Q. And what happened at that point?

A. At that point, there was approximately seven to eight guys in that waiting room, and Jess Fox told us that we were going back to 6 Flat A Section to retrieve 7200 cable.

At this time, Jess Fox told Ed Martin and myself, to get two motors, and a flat car and proceed back, and that Don Deal's and Floyd Hornick would be back to 13 Butt to the pump, and Tommy Kurilko was the shift foreman, or the foreman on the section with these other foremen, he was to proceed with the jeep with these other men back to the section.

Well Art Vernon was in the waiting room, he asked Jess Fox how he was going to get these men back into A section, he told him that there was a water problem at 6 Flat 13 butt, and he wanted to know how he would get the men around the water, and Jess asked him if there was any kind of transportation on the other side of the water, and Art told him yes, that his little eight ton motor was on the other side, that they could walk them around, and put them three or four at a time on the motor, and take them back to the section.

Q. Let me ask you this, were you present when that conversation took place?

A. Yes, man'am.

Q. Okay.

A. So Mr. Martin and I left, and everybody else left, the fire boss left, and Mr. Hornick left with Don Deal and Tommy Kurilko, and the rest of the men.

So we went up to the dispatcher shanty, where we called the dispatcher to find out where our motors were located, we picked our motors up, and our flat car, and we proceeded on 4 Main, and then we crossed over to 3 Main, and down to the mouth of 6 Flat, and we called the dispatcher and got the right of way on back to 6 Flat 13 Butt, where we met with Art Vernon around 4 Butt, 6 Flat, and we had to wait for Art to move out of our way, so that we could proceed on down to our jobsite.

So we got down to 6 Butt, 13 or 6 Flat 13 Butt, and Floyd Hornick was present, Ed Martin, the foreman Don Deal and myself.

Tom Kurilko and the rest of the crew had already switched their jeep out the switch and had already proceeded back to retrieving the 7200 cable.

So upon arrival at 6 Flat 13 butt, I asked Don Deal how these men got around the water, and he pointed to the left side, and wire side, of the section, so I went over and took a look, went over one block, and down, and there was no possible way for these men to get around this way, because there was a fall back there, so I come back out, and I talked with Floyd Hornick, in the pop house, and I come back out, and I told Don Deal, I says, I don't think that these men should be back in this area, due to the water problem, and I just feel that I should go out and get consultation with Danny Barzanti, because he is the Chairman of the Safety Committee, and I can't take it upon myself to do anything, so I asked him to stop my time, and I was going out on union business.

Don said I think you are wrong George, but he said okay, he said go ahead, but call the first phone, you call Jess Fox, the shift foreman, so I did that, and he told me to take the motor and go ahead out, so I took the motor and went in to the phone, and called Jess Fox, and told him the situation that I was coming out on union business, he okayed it, called the dispatcher back, he told me to proceed to the Mouth of 6 Flat, and to get further clearance from there.

So as I proceeded up the haulage Art Vernon was there in my road, he was checking the pumps and whatever his job assignment was, but I would also like to state that Art Vernon was not fire bossing that night in that area, that he was on other assigned job somewhere else in the mine, but he was to check that pump or something.

So I proceeded to mouth 6 Flat, where Art Vernon had switched out, and I called the dispatcher again, and he told me that Jess Fox had called him back, and for me to get in touch with Jess again, so he give me this number to call, and I called, at the mouth of 6 Flat, I kept calling, couldn't get through, and finally, I did get through to Jess, and he asked me, he told me rather, that he called Al Smalara, the superintendent of mines, and Al wanted to know if I was going to use my individual safety rights, I said, no, sir, and he said if you were, he said, I will have to assign you to another worksite, to another area of that mine, I said no, sir, it doesn't prevail here, I just want to talk with the chairman of the safety committee, and discuss this problem, I had already told Don Deal, and Jess Fox on the phone, that I wanted my time stopped, I was coming out on union business, and I proceeded out from the mouth of 6 Flat, I called Dan Barzanti, once I hit topside, and told him the situation, he came to the mine, and the next morning --

Q. Okay, before we go into the next morning, back to when you were at the location where the water was, you said that you went to the left of the water?

A. Yes, man'am.

Q. And you felt that the men could not get around that water, did you ever go to the right of the water?

A. No, I didn't.

Q. And for what reason?

A. Because the foreman informed me that the men went to the left.

Q. What hazard, or what problem did you see with the presence of the water in the section?

A. The problems was it was so deep and so long, it was approximately three hundred feet long, and approximately eleven to thirteen inches deep, and considering that they was going back there to retrieve 7200 cable, how would we get this cable out, and if one of the men would get hurt back on that section, how would we get them back out of the mine, around that water, we would have to carry them a long distance, I didn't know if there was communications back there on the section, which I didn't go back to the section, I only went to the water at 6 Flat, 13 Butt, and I just felt that the men shouldn't be back in that area, as that part of the mine hasn't been worked for approximately two and one half years, and what was the big hurry, for the 7200 cable that evening, to be retrieved.

5. The section to which Mateleska and the rest of the crew were reassigned on March 4, i.e., 6 Flat A Section, was an inactive area that had not been an active working section for about 2 1/2 years.

6. Art Verna, union fireboss, asked Jess Fox, shift foreman, how miners would get back into A section, because he had examined the area the day before and there was a water problem at 6 Flat 13 Butt. Fox asked him if there were any kind of transportation on the other side of the water. Verna informed him that an 8-ton motor vehicle, which could hold 3-4 men at a time, was available on the other side of the water but the men would have to walk around the water.

7. Verna felt that the limitation of one vehicle which could hold only 3-4 men presented a danger. Additionally, he was concerned because the phone in the assigned area was inoperative (he had checked the phone the day before), and there was no radio on the motor. If an accident had occurred, the miners would have been isolated in the area without any communication.

8. Metelaska had no means of contacting Barzanti while on the section. Mateleska did not attempt to stop any other miners from working, nor did he disrupt the work force when he left the area.

9. There was another safety committeeman, Joe Varna, working on the midnight shift at 5 Face. Mateleska did not want to consult with him because this would have required Varna to leave his section and travel a long distance to get to Mateleska's assigned section. If Varna left his section there would have been a disruption of production.

10 . Mateleska's safety concern was that, in the event of an emergency, there might be serious difficulty in getting men out of the assigned area and around an accumulation of water 300 feet long and 11-13 inches deep. An injured man would have had to be carried a long distance, and Mateleksa did not know whether there was any communication back there.

11. When Mateleska called Barzanti, he told him about the water, and he also told him about some other conditions that he considered hazardous. Mateleska had observed these other conditions on his way out of the mine. He had not stopped to record them or to make an examination of mine safety conditions.

12. Barzanti took notes of the water problem and the other safety problems Mateleska had mentioned, and compiled these into a list.

13. When Smalara arrived at the mine on the morning of March 4, Meteleska, Barzanti and two mine committee members, Art Verna and Andy Wanto, met with him. Meteleska's action and the safety items he raised were discussed with Smalara.

14. As a result of that meeting, Barzanti, Mateleska, Verna, and Wanto understood that Smalara would take care of the listed safety items and that the matter of Mateleska having left his job site would be forgotten.

15. About 4:45 p.m. on the same day, Mateleska received a phone call from Smalara, who informed him he had consulted with the president of the company, Dominic Esposto, and it was decided that Mateleska would be given a 5-day suspension without pay.

16. On March 5 and 6, 1981, Mateleska filed a Mine Grievance Form and a Safety Grievance Form, after having consulted with his union representatives. Both grievances have gone through the first two grievance steps and are being held in abeyance pending the outcome of this case.

17, On March 6, 1981 after his suspension, Mateleska submitted a 103(g) complaint to MSHA. An MSHA inspection on March 9, 1981 produced negative findings.

18. On March 12, 1981, the union Safety Committee made a safety run of the area, to inspect the matters listed by Barzanti and to inspect the safety of the mine at specified locations. This indicated that only one item on Barzanti's list had been corrected.

19. On April 6, 1981, Mateleska filed another section 103(g) complaint, this time alleging that a pre-shift examination had not been made of the A section before his shift on March 4. On April 8, 1981, MSHA investigated the complaint and issued a 104(a) citation because the pre-shift examination had taken place 3 1/2 hours prior to the beginning of the shift.

20. On a previous occasion, Mateleska had participated in a fatality investigation at the mine and Dominic Esposto remarked that Mateleska was too harsh during the investigation and he wanted to see Mateleska off the safety committee. Later, in March 1981, at a meeting between the Mine and Safety Committees and management concerning Mateleska's suspension, Dominic Esposto stated that, if Mateleska had invoked Article III of the contract, he would have "had him." When he came out of one meeting concerning Mateleska's 5-day suspension and the list of safety items, Esposto stated to another management official, "I told you I was going to get him (Mateleska) off the Safety Committee."

21. Floyd Hornick, Ed Martin and Art Verna, all miners on the March 4 midnight shift, felt that the water presented a potential safety hazard, but they did not refuse to work on the section.

DISCUSSION WITH FURTHER FINDINGS

On March 4, 1981, George Mateleska was given a 5-day suspension without pay for the following purported reasons: 1) abandoning his job duties and alleging to go out of the mine on union business, 2) resorting to self-help instead of using the procedures of Article III (i) and (p) of the labor-management contract, and 3) acting as a "safety committee" in gathering a list of alleged unsafe conditions in violation of Article III (d)(4) of the contract.

On the midnight shift on March 4, Mateleska was advised of a water problem at 6 Flat A section, an area that had not been worked in for over 2-1/2 years. He and other members of his crew were assigned to work inby the water. The water prevented readily accessible transportation into and out of the area. In the event of an emergency or injury, only three or four men could be transported at a time in the small motor vehicle available inby the water and once the motor reached the water the men would have to walk a long distance around it. At the time, Mateleska had a bona fide, reasonable belief that there were dangers involved in having the men work inby the body of water with limited transportation and possibly no communication in that area. He was a member of the Safety Committee and wanted to consult the chairman of committee in order to determine whether action by the committee should be taken. He asked his foreman, Deal, whether Deal would take him off the clock (i.e., stop his pay) so that he could leave the mine on union business to call the Safety Committee chairman, Barzanti. His foreman said he thought he was wrong about the safety problem, but gave him permission to leave the section on union business, and said he should call Jesse Fox, the next higher foreman, on his way out of the mine. Mateleska complied, and called Fox, who told him to call him back at a later point in his travel out of the mine.

Mateleska did so. Fox then said he had talked to Smarlara, the mine superintendent, who wanted to know whether Mateleska was exercising his individual safety rights under the contract. Mateleska said, "No," that he was going out on union business. Fox said that, if Mateleska was exercising his individual safety rights, he would be assigned to other duties, meaning that during the time the safety matter was being investigated Mateleska could be assigned other duties. Mateleska repeated that he was not exercising such rights, but was going out on union business to discuss the safety matter with the chairman of the Safety Committee. Fox said, "Okay," and gave him clearance to leave the mine.

Mateleska's time was stopped as he requested, and the union paid for his time from the time he left the section with Deal's permission. At no time did Deal or Fox refuse Mateleska permission to leave the mine on union business. Mateleska did not disobey any order from amanagement. In addition, there was a custom and practice, including a history with the predecessor owner of the mine, of permitting union committee members to leave the mine on union business.

The miners' Safety Committee is an important link in the discovery and transmission of safety problems and complaints to MSHA, and it has the authority, as representative of the miners, to initiate section 103(g) investigations by MSHA. The importance of this link is evident from section 105(c) of the Act, which states in part:

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

Mateleska was acting as a member of the Safety Committee, in behalf of other miners and himself, in bringing a bona fide safety concern to the attention of his supervisors and in requesting and obtaining permission to leave the mine to discuss this concern with the chairman of the Safety Committee. These actions were protected activities within the meaning of section 105(c) of the Act.

Concerning the first ground for management's disciplinary action, I find that the attempt to deny management's previous permission to Mateleska to pursue the safety matter as union business outside the mine, on union time, was not in good faith and was in controversion of the clear facts. The facts showed, further, management animus toward Mateleska because of his safety work on the Safety Committee and a discriminatory intent by Esposto, the owner of Respondent, to get him off the Committee.

Bad faith and a discriminatory intent on the part of management are also shown by the second ground for the discipline of Mateleska. The allegation that Mateleska resorted to "self help" and should have exercised his rights under Article III(i) and (p) cannot be sustained. The contractual rights of section III(i) are limited to a narrow class of hazards, those that are "abnormally and immediately dangerous . . . beyond the normal hazards inherent in the operation which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." This was not Mateleska's situation. Mateleska felt the condition was abnormal but he was not sure that it presented an imminent or immediate danger. That is why he wanted to discuss the matter with the chairman of the Safety Committee. Section III(i) of the contract does not override the safety complaint rights guaranteed by section 105(c) of the Act. An attempt to discipline a miner for failure to rely on the narrower scope of complaint rights under section III(i) contravenes the purpose of section 105(c) of the Act. Nor could section III(p) be used to lessen Mateleska's rights under the Act. This contract section provides a procedure for settlement of health and safety disputes, which includes the filing of a grievance within 24 hours. That right exists under the contract, but it cannot override the greater protection of section 105(c) of the Act. Management cannot discipline a miner because he chooses other means of calling safety problems to the attention of his supervisors, his union, or MSHA.

Finally, the third ground for management's discipline of Mateleska shows discrimination and bad faith. Mateleska did not compile the list of safety problems or attempt to conduct a Safety Committee investigation in violation of section III(d)(4) of the contract. The list of safety problems was drawn up and presented by Barzanti, the chairman of the Safety Committee, who wrote down the conditions Mateleska had observed in going out of the mine. If management were in good faith in alleging this list and its presentation to be a violation of section III(d)(4), it would have charged Barzanti as well as Mateleska. Its action against Mateleska alone showed a discriminatory intent directed at him. Moreover, all miners are statutorily guaranteed the right to make complaints to their employers concerning alleged safety or health hazards or violations. An attempt to discipline a Safety Committee member for presenting safety hazards to management contravenes the provisions and purpose of section 105(c) of the Act.

The preponderance of the evidence shows that management discriminated against Mateleska because of safety-complaint activities that were protected by the Act.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and subject matter of this proceeding.

2. On March 4, 1981, Respondent violated section 105(c) of the Act by suspending George Mateleska for five days without pay, as found above.

Proposed findings or conclusions inconsistent with the above are rejected.

PENDING A FINAL ORDER

The Secretary shall have ten days from the date of this decision to submit a proposed order granting relief for the violation found above, with service of a copy on Respondent. Respondent shall have ten days from receipt thereof to reply to the proposed order.

William Fauver

WILLIAM FAUVER, JUDGE

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