

November 1983

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Commission Decisions

NOVEMBER

The following cases were Directed for Review during the month of November:

Secretary of Labor, MSHA v. United States Steel Mining Co., Docket No. PENN 83-39 (Judge Broderick, October 4, 1983)

Secretary of Labor, MSHA v. United States Steel Mining Co., Docket No. PENN 82-299 (Judge Broderick, October 6, 1983)

Secretary of Labor, MSHA v. United States Steel Mining Co., Docket No. PENN 82-322 (Judge Broderick, October 11, 1983)

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

Secretary of Labor, MSHA v. United States Steel Mining Co., Docket No. PENN 83-43 (Judge Broderick, September 22, 1983)

Secretary of Labor on behalf of Shelby Eperson v. Jolene, Inc., Docket No. KENT 83-38-D (Judge Melick, September 30, 1983)

Secretary of Labor, MSHA v. United States Steel Mining Co., Docket No. PENN 83-3 (Judge Broderick, October 4, 1983)

Secretary of Labor, MSHA v. United States Steel Mining Co., Docket No. PENN 83-52 (Judge Broderick, October 14, 1983)

Secretary of Labor, MSHA v. United States Steel Mining Co., Docket No. PENN 83-40 (Judge Broderick, October 19, 1983)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006
November 9, 1983

TODILTO EXPLORATION AND DEVELOPMENT CORPORATION	:	
	:	
	:	
v.	:	Docket No. CENT 79-91-RM
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	
	:	
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. CENT 79-310-M
	:	
TODILTO EXPLORATION AND DEVELOPMENT CORPORATION	:	

DECISION

This is a consolidated civil penalty and contest of citation proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1976 & Supp. V 1981). At issue is an alleged violation of 30 C.F.R. § 57.5-50, the noise standard applicable to metal-nonmetallic underground mines. 1/ The question presented is whether in order to be "feasible" within

1/ 30 C.F.R. § 57.5-50 provides:

(a) No employee shall be permitted an exposure to noise in excess of that specified in the table below. Noise level measurements shall be made using a sound level meter meeting specifications for type 2 meters contained in American National Standards Institute (ANSI) Standard S1.4-1971, "General Purpose Sound Level Meters," approved April 27, 1971, which is hereby incorporated by reference and made a party hereof, or by a dosimeter with similar accuracy. This publication may be obtained from the American National Standards Institute, Inc., 1430 Broadway, New York, New York 10018, or may be examined in any Metal and Nonmetallic Mine Safety and Health District or Subdistrict Office of the Mine Safety and Health Administration.

(Footnote continued)

83-11-3

the meaning of section 57.5-50(b) of the noise standard, an engineering control must reduce a miner's exposure to noise to the permissible levels set forth in subsection (a) of the standard. The administrative law judge answered that question in the affirmative. ^{2/} We disagree. For the reasons that follow, we hold that an engineering control may be "feasible" even though it fails to reduce a miner's exposure to noise to the permissible levels contained in the standard. Accordingly, we reverse and remand for a determination as to the question of feasibility consistent with our decision in Callanan Industries, Inc., 5 FMSHRC ____ (YORK 79-99-M, decided November 9, 1983).

On January 31, 1979, a Department of Labor Mine Safety and Health Administration ("MSHA") inspector conducted a noise survey at an underground uranium mine operated by Todilto Exploration and Development Corporation. Using a dosimeter to collect the noise sample, the inspector surveyed an operator of a jackleg percussion rock bolt drill for an 8-hour period. At the time of the noise survey, the jackleg drill was not equipped with a muffler. The operator of the drill was, however, wearing both foam earplugs and earmuffs. The results of the noise survey showed that for his 8-hour shift the drill operator was exposed to 114 decibels ("dBA"). The maximum allowable exposure level for an 8-hour period is 90 dBA. ^{3/} Therefore,

Fn. 1/ continued

PERMISSIBLE NOISE EXPOSURE

Duration per day, hours of exposure	Sound level dBA, slow response
8 -----	90
6 -----	92
4 -----	95
3 -----	97
2 -----	100
1½ -----	102
1 -----	105
½ -----	110
¼ or less -----	115

No exposure shall exceed 115 dBA. Impact or impulsive noise shall not exceed 140 dB, peak sound pressure level.

* * * * *

(b) When employees' exposure exceeds that listed in the above table, feasible administrative or engineering controls shall be utilized. If such controls fail to reduce exposure to within permissible levels, personal protection equipment shall be provided and used to reduce sound levels to within the levels of the table.

(Emphasis added.)

^{2/} The judge's decision is reported at 3 FMSHRC 1824 (1981).

^{3/} Because of the logarithmic nature of noise measurement, 114 dBA is 2,634 percent of 90 dBA. See Callanan Industries, Inc., supra, slip op. at 3 n.4.

in light of the 114 dBA reading and the fact that Todilto had not implemented feasible administrative or engineering controls to reduce the noise level, the inspector issued a citation alleging a violation of section 57.5-50(b).

Todilto abated the alleged violation by installing a muffler on the drill. 4/ Subsequent noise readings taken by an MSHA inspector with a sound level meter after the muffler had been installed showed that excessive noise levels still existed. Those readings established that the drill operator's average noise exposure level ranged between 110 dBA and 113 dBA. 5/ Thus, even though Todilto attached a muffler to the drill, the drill operator was still required to wear personal protective equipment.

Thereafter, Todilto filed a notice of contest with the Commission (CENT 79-91-RM) and, in a separate proceeding, the Secretary filed a proposal for assessment of a penalty (CENT 79-310-M). The two proceedings were consolidated and an evidentiary hearing was held. At the conclusion of the hearing, the judge issued a bench decision in which he held that the installation of the muffler was not a feasible engineering control. 6/

On July 21, 1981, the judge's final decision was issued. In that decision, the judge found that the drill operator was exposed to an excessive noise level. 3 FMSHRC at 1826. The judge stated, however, that although the Secretary established that installation of the muffler was an engineering control available to Todilto, "he has also shown that even with such controls the exposure to noise was not within permissible levels as required by the regulation." 3 FMSHRC at 1827. Concluding that the installation of the muffler was, therefore, not a feasible engineering control, the judge vacated the citation. Id.

Following the issuance of the judge's decision, the Secretary's petition for discretionary review was granted. Upon consideration of the question presented, we hold that a control may indeed be "feasible" within the meaning of 30 C.F.R. § 57.5-50(b) even though it does not reduce the miner's exposure to noise to permissible levels set forth in subsection (a) of the standard. Our holding is based upon the

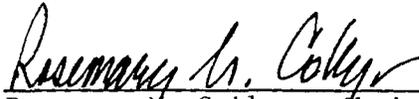
4/ The MSHA inspector who issued the citation estimated the cost of the muffler to range between \$50 and \$150. In its brief, Todilto set the muffler's cost at \$110.

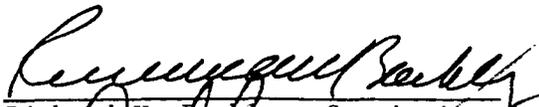
5/ The 110 dBA to 113 dBA reading reflects the driller's exposure to noise as the drill was being used to drill a hole. Although the readings taken with the sound level meter were for a substantially shorter period of time than were the readings taken with the dosimeter, we do not have before us the question as to whether the sound level meter readings were insufficient to establish the drill operator's continued overexposure to noise. Therefore, we accept the judge's conclusion that the sound level meter readings established the fact that the drill operator was overexposed to noise after the muffler was installed. See 3 FMSHRC at 1826.

6/ The Secretary sought to establish a violation of section 57.5-50(b) by showing that it was feasible to install the muffler. The Secretary did not attempt to prove that other feasible controls existed.

express wording of the noise standard. Section 57.5-50(b) unambiguously provides that when excessive noise exposure levels exist, "feasible administrative or engineering controls shall be utilized." It continues, "[i]f such [feasible] controls fail to reduce exposure to within permissible levels, personal protection equipment is to be provided and used...." (emphasis added). Thus, the noise standard clearly contemplates that in a given case a control might not reduce the noise exposure level to within permissible levels, but nevertheless be a "feasible" control required to be implemented. To allow a mine operator to proceed directly to the use of personal protective equipment and thereby avoid implementing otherwise feasible administrative or engineering controls, solely because use of the controls themselves does not achieve permissible exposure levels, would be to allow circumvention of the standard's clear requirement that excessive noise levels first be addressed at their source. We note that under the judge's approach a control that reduces the level of noise from 114 dBA to 91 dBA (on the basis of an 8-hour exposure period) would not be feasible simply because it fails to reduce the noise level to 90 dBA. We find no support for this result in the standard.

Thus, we hold that the judge's apparent conclusion that any control that does not reduce noise exposure to permissible levels is per se infeasible is erroneous. Because his disposition was based on this conclusion it must be reversed. The question remains, however, as to whether, based on the specific facts in this case, the Secretary proved a violation of the standard for failure to implement a feasible engineering control. The determination regarding the muffler's "feasibility" requires further findings consistent with our decision in Callanan Industries, Inc., supra. On remand the parties are to be allowed the opportunity to present additional evidence and to submit further arguments in light of the considerations set forth in Callanan. ^{7/}


Rosemary M. Collyer, Chairman


Richard V. Backley, Commissioner


Frank R. Deshrab, Commissioner

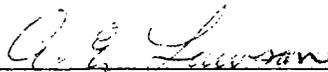

L. Clair Nelson, Commissioner

^{7/} Because the judge who presided in this case is no longer with the Commission, the case is remanded to the Chief Administrative Law Judge for reassignment.

Commissioner Lawson concurring and dissenting:

I would concur in the majority's holding that an engineering control may be feasible even though it fails to reduce a miner's exposure to the permissible levels contained in the standard.

For the reasons stated in my dissenting opinion in Callanan Industries, Inc., YORK 79-99-M, however, I would disagree with their conclusion as to the need for further findings on "feasibility", would find this operator in violation of the standard, and remand to the judge below solely for the purpose of assessing a penalty therefor.



A. E. Lawson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 9, 1983

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

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Docket No. YORK 79-99-M

v.

CALLANAN INDUSTRIES, INC.

DECISION

I. Introduction

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1976 & Supp. V 1981). It involves an alleged violation of 30 C.F.R. § 56.5-50, a mandatory standard regulating miners' exposure to noise. 1/ Callanan Industries was issued a citation charging a violation of the noise standard for allegedly failing to implement feasible administrative or engineering controls to reduce a drill operator's exposure to excessive noise levels. The administrative law judge vacated the citation on the ground that

1/ 30 C.F.R. § 56.5-50 is the noise standard applicable to "Sand, Gravel and Crushed Stone Operations". It in part provides:

(a) No employee shall be permitted an exposure to noise in excess of that specified in the table below. Noise level measurements shall be made using a sound level meter meeting specifications for type 2 meters contained in American National Standards Institute (ANSI) Standard S1.4-1971, "General Purpose Sound Level Meters," approved April 27, 1971, which is hereby incorporated by reference and made a part hereof, or by a dosimeter with similar accuracy. This publication may be obtained from the American National Standards Institute, Inc., 1430 Broadway, New York, New York 10018, or may be examined in any Metal and Nonmetallic Mine Safety and Health District or Subdistrict Office of the Mine Safety and Health Administration.

(Footnote continued)

the Secretary failed to prove that a proposed engineering control was feasible. 2/

We granted the Secretary of Labor's petition for discretionary review of the judge's decision. 30 U.S.C. § 823(d)(2)(A). We also granted the United Steelworkers of America leave to file a brief as amicus curiae and heard oral argument. On review, the broad question before the Commission involves the meaning of the term "feasible" as contained in section 56.5-50(b).

As discussed below, we conclude that economic as well as technological factors must be taken into account in determining whether a noise control is "feasible" under the standard. We expressly reject, however, the assertion that a "cost-benefit analysis," as that term is commonly understood and used, is the appropriate analytical method for determining whether a noise control is required.

Fn. 1/ continued

PERMISSIBLE NOISE EXPOSURES

Duration per day, hours of exposure	Sound level dBA, slow response
8 -----	90
6 -----	92
4 -----	95
3 -----	97
2 -----	100
1½ -----	102
1 -----	105
½ -----	110
¼ or less -----	115

No exposure shall exceed 115 dBA. Impact or impulsive noises shall not exceed 140 dB, peak sound pressure level. *****

(b) When employees' exposure exceeds that listed in the above table, feasible administrative or engineering controls shall be utilized. If such controls fail to reduce exposure to within permissible levels, personal protection equipment shall be provided and used to reduce sound levels to within the levels of the table. [Emphasis added.]

(30 C.F.R. § 56.5-50 is identical to 30 C.F.R. § 55.5-50, the noise standard applicable to "Metal and Nonmetallic Open Pit Mines", and 30 C.F.R. § 57.5-50, the noise standard applicable to "Metal and Nonmetallic Underground Mines.")

2/ The judge's decision is reported at 3 FMSHRC 168 (January 1981).

II. Factual Background

On September 14, 1978, a Department of Labor, Mine Safety and Health Administration ("MSHA") inspector conducted an 8-hour noise survey on an Ingersoll-Rand CM-2 air track drill at a stone quarry operated by Callanan Industries. 3/ The inspector used a Du Pont dosimeter to measure the drill operator's exposure to noise. At the time of the noise survey, the air track drill was not equipped with a muffler. The drill operator was, however, wearing earmuffs, a form of personal protective equipment. The results of the survey showed that for the 8-hour shift, the operator of the air track drill was exposed to 103.6 dBA, the equivalent of 660 percent of the permissible noise exposure level established by 30 C.F.R. § 56.5-50(a) for an 8-hour period. 4/ Thus, on the basis of the 103.6 dBA reading and because Callanan assertedly had not implemented feasible administrative or engineering controls to reduce the driller's exposure to noise, the inspector issued a citation alleging a violation of 30 C.F.R. § 56.5-50. 5/

3/ The Ingersoll-Rand air track drill is mounted on caterpillar tracks and is run from an air compressor unit. It was used by Callanan to drill satellite, or auxiliary, holes near the quarry face into which explosives were placed. The MSHA inspector who conducted the survey described the drill as having "a mast which has a drill hammer attached to it and the hammer moves up and down in the drill mast. As you start your drill [steel] and go deeper into the hole, the hammer goes down the drill mast." Tr. 31.

4/ For an 8-hour period the maximum permissible exposure level is 90 dBA. Because the measurement of noise is logarithmic rather than arithmetical, 103.6 dBA equals 660 percent of 90 dBA. The logarithmic scale of noise measurement is explained in the Accident Prevention Manual for Industrial Operations, National Safety Council (7th ed. 1978) at p. 1242 as follows:

To avoid working with unwieldy numbers of evaluating sound intensity,... a logarithmic scale is used with the decibel as the unit of measure. Because decibels are logarithmic units, they cannot be added or subtracted arithmetically. In fact, if the intensity of a sound is doubled, there will be a corresponding increase of only three decibels, not double the number. For example, if one machine caused an exposure of 90 dB, a second identical machine placed adjacent to the first would result in a noise exposure of 93 dB, not 180 dB.

See also, Fundamentals of Industrial Hygiene, National Safety Council, (2nd ed. 1979) at pp. 238-239.

5/ Although the inspector cited section 56.5-50, it is clear from both the wording of the citation and the hearing transcript that Callanan was alleged to have violated subsection (b) of the noise standard. In that regard, subsection (a) generally sets forth the maximum permissible noise exposure levels on a time-weighted average basis. Subsection (b) sets forth the required conduct in the event that the exposure levels contained in subsection (a) are exceeded -- that is, the requirement that the operator implement feasible controls. Here, the citation charged that excessive noise exposure levels existed and that feasible controls were not implemented by Callanan.

After the citation was issued, a close-out conference was held between the MSHA inspector and Callanan management personnel. At that conference, the inspector requested that Callanan contact the Ingersoll-Rand Corporation, the manufacturer of the drill, for suggestions as to how to reduce the level of noise created by the operation of the drill. Thereafter, Callanan contacted Ingersoll-Rand and received the following response:

After a good deal of research, we find that we are unable to muffle this drill. The CM-2 drill was produced prior to any noise requirements by the Mine Safety and Health Administration. The muffler system on this drifter does not lend itself to be piped away from the operator nor can we change the exhaust system to meet your requirements.

Gov. Exh. 2.

Callanan sent a copy of the Ingersoll-Rand response to the inspector who had issued the citation and requested MSHA's assistance concerning the noise problem. On March 23, 1979, Jerry Antel, the lead noise control engineer with MSHA's Pittsburgh Technical Support Center, conducted a noise survey on the air track drill. 6/ The Tech Support survey was for the purpose of suggesting noise controls only. It had no effect upon the validity of the noise survey results obtained by the inspector at the time the citation was issued. 7/

An MSHA supervisory inspector who accompanied Antel on the noise survey testified that Antel told Callanan management representatives that a muffler designed by MSHA's Denver Technical Support Center had achieved a 4 to 5 dBA reduction on drills that were "similar" to the Ingersoll-Rand drill being surveyed. The supervisory inspector also testified that Antel qualified that statement by adding that unlike the "similar" drills referred to, the Ingersoll-Rand air track drill posed a problem for the attachment of a muffler because it exhausted through the chain in its mast.

6/ In general, Mr. Antel's qualifications in the field of noise control are as follows. Antel has been employed in the area of acoustics for approximately 16 years. He began working for MSHA in 1972. From that time up to the time of the hearing, Antel had directly participated in 200 to 300 noise cases. A substantial portion of Antel's duties with MSHA is to suggest noise control measures. Prior to working for MSHA, Antel was employed by a private concern as a consultant in sales and service of audiological testing equipment for use in hearing conservation programs. Before that, Antel was employed by the University of Pittsburgh as a technician in the acoustics department. At the hearing, the judge referred to Antel as an "expert". Callanan did not challenge Antel's expertise in the field of noise control.

7/ On the basis of the Tech Support noise survey, the Secretary sought to prove that feasible noise controls did in fact exist which Callanan should have implemented.

The MSHA supervisor's testimony also indicated that Antel had informed Callanan of the existence of a company in Joplin, Missouri, that could possibly retrofit (i.e., modify) the shell of the air track drill so that a muffler could be attached. However, at the time of the MSHA Tech Support survey, Callanan was not provided with any specific details regarding the drill shell modification process.

On April 23, 1979, MSHA Tech Support issued its "Noise Survey Report" containing the results of the noise survey on the Ingersoll-Rand air track drill. Gov. Exh. 6. 8/ A copy of the noise survey report was sent to Callanan. In the report, MSHA proposed two noise controls that it believed together would reduce the drill operator's exposure to noise to 89-90 dBA for an 8-hour period, bringing Callanan within compliance limits. One of the proposals involved an engineering control. In that regard, MSHA suggested that Callanan modify the shell of the air track drill so that it would exhaust through a port in its side, instead of through the chain in its mast, thereby allowing a muffler to be attached. More specifically, the noise survey report stated:

A muffler should be placed on the drill to reduce the noise level of the exhausting air. This can readily be done by making certain modifications to the drill cylinder. Since welding is required, extreme care is necessary to avoid distorting the cylinder. This tedious undertaking should be left to experienced professionals in this field. The Mid-Western Machinery Company [fn. omitted] (P.O. Box 458, 902 E. Fourth Street, Joplin, Missouri 64901, telephone number: (417) 624-2400) will make this modification and have been doing so for many years. The cost for this work [is] as follows:

Cost of cylinder	-	\$3,198.00
Less 25%	-	799.50
		<hr/>
		\$2,398.50

Noise Survey Report at 2. The report added that certain parts needed for the conversion of the drill cylinder would increase the cost of modifying the drill shell to \$2,672.78.

The noise survey report also stated that Callanan could either purchase a muffler commercially or could construct one itself. Attached to the noise survey report was a publication titled Sound and Vibration, listing various companies engaged in the business of noise control. Also attached was a copy of MSHA's Instruction Manual for the Construction of Cylindrical Mufflers. Gov. Exh. 7. 9/ In the report, MSHA concluded that the attachment of a muffler would result in a noise reduction of approximately 5 dBA.

8/ The report was prepared by Antel.

9/ The noise survey report did not, however, list the cost of a commercially purchased muffler. Nor did it list the cost involved in the event that Callanan chose to construct a muffler itself. However, at the hearing Antel testified that in 1977, the preceding year, a muffler kit for a slightly smaller drill could be purchased from the EAR Corporation for approximately \$175. Antel also testified that the labor required for construction of a muffler would probably be an 8-hour day.

The other control proposed in the noise survey report involved positioning the operator of the air track drill 20 to 25 feet away from the drill after it was put into operation. On the basis of an expected 5 dBA reduction in noise resulting from the drill shell modification and the attachment of a muffler, MSHA concluded that the positioning of the drill operator 20 to 25 feet away from the drill would reduce the driller's exposure to noise to a permissible level of 89-90 dBA for an 8-hour period. 10/

Thereafter, the Secretary filed with the Commission a proposal for assessment of a penalty for the alleged violation of section 56.5-50. 11/ At the hearing, Callanan generally defended on the ground that the proposed drill shell modification was infeasible because it was too costly to transport the Ingersoll-Rand air track drill from its stone quarry in upstate New York to the Mid-Western Machinery Company in Joplin, Missouri, for retrofitting. 12/ The Secretary generally argued that the proposed engineering control -- the modification of the air track drill shell and the muffler attachment -- was feasible because it was both technologically achievable and reasonable from a cost standpoint.

III. Judge's Decision

In his decision the judge held in Callanan's favor and vacated the noise citation. The judge, in effect, concluded that the determination of feasibility involves a consideration of both technological and economic factors. 3 FMSHRC at 169. He found that with respect to the proposed engineering control, the Secretary's cost estimate was "too imprecise to allow a proper economic analysis" and further, that "[w]ithout more accurate figures, a true cost-benefit analysis cannot be made." 3 FMSHRC at 170. 13/ He also stated that:

10/ On review, however, only the feasibility of the engineering control is at issue. The Secretary did not seek Commission review of the aspect of the judge's decision concerning the feasibility of the proposed administrative control.

11/ In June 1979, an MSHA inspector had issued an order of withdrawal under section 104(b) of the Mine Act because Callanan had not abated the citation at issue here by implementing feasible noise controls. After the withdrawal order was issued, Callanan removed the Ingersoll-Rand drill from active service and replaced it with a new Gardner-Denver drill at an approximate cost of \$100,000. The validity of the section 104(b) withdrawal order is not, however, before the Commission in this case.

12/ Callanan's safety director testified that the involved air track drill was valued under \$2,500.

13/ The judge found the Secretary's cost estimate to be insufficient because it did not include the cost of a muffler, certain labor costs and the cost of transporting the Ingersoll-Rand air track drill from upstate New York to Joplin, Missouri for retrofitting. 3 FMSHRC at 170.

In any event, regardless of the accuracy of MSHA's cost estimates, I do not find on the facts of this case any reasonable assurance that there would be an appreciable and corresponding improvement in working conditions as a result of the proposed controls.

(3 FMSHRC at 170; emphasis added.) 14/ Accordingly, the judge vacated the citation.

IV. Discussion

As we stated at the outset of our opinion, the broad question presented in this case involves the meaning of the term "feasible" in 30 C.F.R. § 56.5-50(b). Subsection (b) of the noise standard provides that in the event that the noise exposure levels set forth in subsection (a) are exceeded, "feasible administrative or engineering controls shall be utilized." Here, it is undisputed that the drill operator's noise exposure level was 103.6 dBA, thus exceeding the maximum permissible level of 90 dBA for an 8-hour period. 15/ The controversy centers on whether the proposed engineering control--modifying the air track drill shell and attaching a muffler--is "feasible" within the meaning of section 56.5-50(b).

The standard at issue was originally promulgated and adopted by the Secretary of Interior under the Federal Metal and Non-Metallic Mine Safety

14/ The judge in part noted that the MSHA noise control engineer did not know the specific degree of noise reduction expected to be achieved as a result of implementing the proposed engineering control, but could only "speculate" that a 5 dBA reduction "might" be obtained. 3 FMSHRC at 170. 15/ While Callanan does not contest the accuracy of the noise survey results obtained by either the inspector or the Technical Support Center noise control engineer, it does argue that the MSHA noise samples were taken from the wrong noise source. In that regard, Callanan contends that the noise samples should have been collected from inside the driller's earmuffs. (Here a subsequent noise survey conducted on the track drill by Callanan showed that under normal operating conditions, the earmuffs reduced the drill operator's exposure to noise to within permissive limits. Tr. 209-210.) Instead, the MSHA noise samples were collected from within the driller's hearing range, but outside of the earmuffs in accordance with MSHA's inspection manual. Tr. 40-41. We reject Callanan's argument that noise levels are to be measured inside earmuffs as being inconsistent with the express language of the noise standard. Measuring noise exposure in the manner suggested by Callanan would allow operators to proceed directly to the use of personal protective equipment without first attempting to implement feasible engineering controls. This result is contrary to the intent of the noise standard. Todilto Exploration and Development Corporation, 5 FMSHRC _____ (CENT 79-91-RM; 79-310-M, decided November 9, 1983).

Act of 1966, 30 U.S.C. § 725 (1976)(amended 1977). Pursuant to section 301(b)(1) of the Federal Mine Safety and Health Amendments Act of 1977, 30 U.S.C. § 961(b)(1), this standard remained in effect as a mandatory standard enforceable under the 1977 Mine Act. No indication is provided in the preamble to the standard published in the Federal Register (39 Fed. Reg. 28433, Aug. 7, 1974), the text of the 1966 Act, or that Act's legislative history as to the intended meaning of the word "feasible" as used in the standard. Furthermore, the preamble to the standard acknowledged that the noise standard being adopted was "essentially the same as the noise standard being enforced by the Secretary of Labor under the Walsh-Healey Act", 41 U.S.C. §§ 35-45. 39 Fed. Reg. 28433. An examination of the Walsh-Healey Act and its legislative history, as well as the history of the noise standard adopted under that Act, likewise provides no clue to the intended meaning of the word "feasible" in the noise standard.

In view of the fact that the word "feasible" was not given any special meaning by the promulgators of the standard, or by Congress in the statute authorizing adoption of the standard, we must attribute to the word its ordinary and plain meaning. The Supreme Court has held that the plain meaning of the word "feasible" is "capable of being done, executed, or effected." American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490, 508-509 (1981). Accordingly, we will apply this meaning to "feasible" as used in 30 C.F.R. § 56.5-50(b). 16/

We further conclude that the determination of whether use of an engineering control to reduce a miner's exposure to excessive noise is capable of being done involves consideration of both technological and economic achievability. This conclusion also stems from the plain meaning of the word as found by the Supreme Court. Whether something is actually, rather than theoretically, capable of being done depends on economic as well as technological achievability. This reality was recognized in American Textile Mfrs., supra, where the Supreme Court gave detailed examination to the question of the economic feasibility of an occupational health standard. In fact, the Secretary does not argue otherwise in this case, but concedes that his standard "involves some element of economic impact." Sec. Br. at 16 (emphasis added).

Our conclusion that use of an engineering control must be both technologically and economically capable of being done does not, however, end our inquiry into the general interpretation of the standard. Rather, we must examine more closely what is generally meant by "technologically capable of being done" and "economically capable of being done."

In answering the above questions, the ultimate purpose and the basic structure of the noise standard must be kept foremost in mind. The standard seeks to protect miners from exposure to noise levels in excess of the limits specified in the standard. Where excessive noise

16/ But see Donovan v. Castle & Cooke Foods, Inc., No. 77-2565, 9th Cir., November 19, 1982.

levels are present, feasible engineering controls are required to be implemented. Quite obviously, the purpose of an engineering control is to reduce excessive noise levels and, therefore, the first component of a feasible engineering control is that it be a control the implementation of which will result in a reduction of the noise level to which a miner is exposed.

The second component of a feasible engineering control is that it be technologically achievable. A technologically achievable control is not necessarily just an "off-the-shelf," prefabricated device that can be applied, as is, to a noise source. Although such a device would be the clearest example of a technologically feasible control, an engineering control also is technologically achievable if through a reasonable application of existing products, devices or work methods with human skills and abilities, a workable engineering control can be applied to the noise source at issue. In other words, a technologically achievable engineering control is not one that exists only in the realm of engineering or scientific theory; it must have a realistic basis in present technical capabilities.

The third component of a feasible engineering control is that it be economically achievable. The Secretary suggests two tests of economic achievability. The Secretary argues that a noise control is economically achievable "if the cost of the control is neither 'prohibitively expensive' nor wholly out of proportion to the expected benefits."

According to the Secretary, the "prohibitively expensive" test of economic achievability, involves consideration of whether a standard makes "'financial viability generally impossible' throughout an entire industry." Sec. Br. at 24. The Secretary suggests that this consideration is "primarily" applicable at the rulemaking stage. He strongly implies that the impact of the cost of implementing a technologically achievable engineering control on a particular operator's profitability, competitiveness, and ability to stay in business is not an appropriate consideration in an enforcement proceeding. The Secretary, however, has not approached this question in any depth. Given this issue's potential importance and the complexity of factors bearing on its resolution, in this case we neither accept nor reject the Secretary's formulation and application of the "prohibitively expensive" rationale. Rather, as discussed infra, given the estimated cost of the engineering control at issue here, and the conceded ability of the operator to accommodate this cost without threatening its viability, we find that the cost of the suggested control cannot be considered "prohibitively expensive" under any reasonable interpretation of that phrase. See American Textile Manufacturers Institute v. Donovan, supra, 452 U.S. at 530 n.55.

The second test for economic achievability suggested by the Secretary is whether the cost of the engineering control is "wholly out of proportion to the expected benefits." The Secretary states that this test is "basically one of 'rationality'" requiring analysis of "whether the control can be expected to achieve any significant result and whether the costs are so great that it would be irrational to require the use of the control to achieve those results." Sec. Br. at 24, 25 (emphasis added). Insofar as "irrational" means unreasonable, impractical or unrealistic, we believe that this interpretation and application of the

economic achievability component of the term "feasible" as used in the noise standard is reasonable and appropriate. It gives effect to the basic purpose of the standard, i.e., the reduction of noise and the concomitant protection of miners' hearing, but at the same time gives meaning to the standard's use of the term "feasible," which includes economic cost factors. It is important to emphasize that this test of economic achievability does not require, and we do not suggest or approve, application of classic, cost-benefit analysis. 17/

Therefore, because in the present case the question of whether the suggested engineering control is "prohibitively expensive" is not an issue, we hold that the economic feasibility of the control is to be determined by consideration of whether the economic costs of the control are wholly out of proportion to the expected benefits, i.e., whether given the reduction in noise level to which a miner would be exposed after implementation of the control, and the costs of achieving that reduction, it would not be rational to require the implementation of the control. We believe this is as precise a formulation as can be articulated and applied on a case-by-case basis in enforcement proceedings.

Our next consideration is the appropriate burden of proof to be applied. We hold that in order to establish his case the Secretary must provide: (1) sufficient credible evidence of a miner's exposure to noise levels in excess of the limits specified in the standard; (2) sufficient credible evidence of a technologically achievable engineering control that could be applied to the noise source; (3) sufficient credible evidence of the reduction in the noise level that would be obtained through implementation of the engineering control; (4) sufficient credible evidence supporting a reasoned estimate of the expected economic costs of the implementation of the control; and (5) a reasoned demonstration that, in view of elements 1 through 4 above, the costs of the control are not wholly out of proportion to the expected benefits. After the Secretary has established each of the above elements, the operator in rebuttal may refute any of the components of the Secretary's case. The burden borne by the operator is one of production; the burden of proof remains on the Secretary.

Although, as explained below, we conclude that a remand for further proceedings is appropriate in this case, for the guidance of the parties and the judge we will tentatively apply the burdens outlined above to the facts of this case as established by the present record.

We find that the record establishes that the drill operator was in fact exposed to an excessive noise level. The judge stated that it was undisputed that the air track drill operator was overexposed to noise and we agree that the Secretary established that the drill operator was exposed to excessive noise.

17/ To paraphrase the Supreme Court: "Thus cost-benefit analysis ... is not required by the [standard] because feasibility analysis is." American Textile Mfrs., supra, 452 U.S. at 509.

The next consideration is whether the Secretary presented credible evidence as to the availability of a technologically achievable engineering control capable of reducing the drill operator's exposure to excessive noise. In this regard, the judge made no specific finding as to whether the proposed engineering control of modifying the air track drill shell and attaching a muffler was technologically achievable. On the basis of the record, however, we find that the Secretary presented sufficient credible evidence supporting his view that the proposed engineering control was both technologically achievable and capable of reducing noise.

We base this conclusion upon the MSHA Pittsburgh Tech Support's noise survey report and the corresponding testimony of Jerry Antel, the lead noise control engineer who conducted the MSHA noise survey and prepared the report. In the noise survey report (Gov. Exh. 6), MSHA proposed that Callanan modify the air track drill so that a muffler could be attached. MSHA concluded that the modification process could "readily be done" and that the Mid-Western Machinery Company in Joplin, Missouri, "will make this modification and have been doing so for many years." The report added that "[a] muffler may be purchased commercially or constructed according to the enclosed instructions." In addition, at the subsequent hearing, Antel disputed the claim made by the Ingersoll-Rand Corporation in its December 7, 1978, letter to Callanan in which it advised that the air track drill could not be equipped with a muffler. In that regard, Antel stated that it has been "pretty much the rule" that manufacturers of pneumatic drills, the type of drill involved here, have erroneously taken the position that noise controls did not exist for such drills. He added:

We've worked with drill manufacturers in the past and it's been our experience that generally they're speaking of an off the shelf type of this retrofittable noise control, something that can be readily applied which doesn't necessarily mean that nothing can be done. And with this approach in mind, we decided that we would explore the possibilities further to see if in fact that this was true, that nothing could be done.

(Tr. 112-113.) Accordingly, Antel contacted the Mid-Western Machinery Company.

With respect to Mid-Western, Antel testified that it had "vast experience" in the Canadian mining industry and further, that it had experience in modifying the Ingersoll-Rand CM-2 air track drill so that a muffler could be attached. The MSHA supervisory inspector who accompanied Antel on the noise survey stated, without objection, that he was told by Antel that Mid-Western already had an air track drill shell retrofitted so that a muffler could be attached and that the retrofitted shell could be shipped to Callanan. Thus, despite the fact that Antel testified that he was told by Mid-Western personnel that they could not recall the names of the Canadian operators for which the muffler modification work had been done and that the work "had been done in years past", this testimony is sufficient to make a prima facie showing that the proposed engineering control was technologically achievable.

The third element of the Secretary's prima facie case involves evidence as to the noise level reduction that would be obtained from the proposed control. Here, the judge stated that "even MSHA's expert conceded that he did not know what specific degree of noise reduction could be achieved from his proposed controls and could only speculate that a 5-decibel improvement might be expected based on MSHA's experience with muffling other types of drills." 3 FMSHRC at 170. We find this assessment of the expert's testimony erroneous. In that regard, we note that Antel testified in part as follows:

[Counsel for the
Secretary]

Q. You also state that ... you are assuming a reduction of 5 decibels from the muffler.

[Antel]

A. Yes.

Q. What was the source of that particular information?

A. Through past work in drills with Tech Support and work that has been done through contractual work with the Bureau of Mines, it's been determined that exhaust noise is the primary noise source on percussive drills -- pneumatic drills. That besides the fact that we have worked with a number of drills in putting mufflers on them and in all cases a 5 dB reduction has been the minimum amount that we have achieved by putting a muffler on.

Q. Is it your opinion then that a 5 decibel reduction from the muffler is a conservative estimate?

A. Yes, I would say so.

(Tr. 127.)

This testimony regarding the degree of noise reduction expected to be achieved cannot properly be viewed as speculative. Nor does the above testimony constitute some kind of concession as the judge suggests. Rather, the noise control engineer simply stated that based upon past experience, attaching a muffler to the air track drill would result in a noise reduction of at least 5 dBA. The MSHA supervisory inspector likewise testified that the attachment of a muffler on similar drills had resulted in a 5 dBA reduction. Tr. 83. Thus, we find that the Secretary's evidence established a prima facie case as to this element.

The next element of the Secretary's prima facie case requires sufficient credible evidence supporting a reasonable estimate of the cost of implementing the proposed control. Here, MSHA's noise survey report placed the cost of modifying the drill shell at approximately \$2,672. In addition, Antel testified that a muffler kit for a slightly smaller drill cost about \$175 in the preceding year. The noise control engineer also estimated that the time required for constructing the muffler would probably be an 8-hour day. Although the Secretary did not introduce evidence establishing the precise cost of attaching the muffler or the cost of transporting the drill shell from Callanan's quarry in upstate New York to the Mid-Western Machinery Company in Joplin, Missouri for retrofitting, we conclude that the Secretary's cost estimates are sufficiently specific and supported for purposes of establishing a prima facie case.

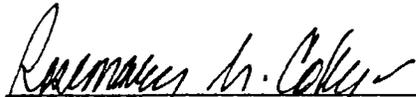
In summary, we hold that the Secretary has introduced sufficient credible evidence establishing that the operator of the air track drill was exposed to excessive noise, that an engineering control capable of reducing noise was technologically achievable, that the engineering control was expected to obtain a significant noise reduction, and that the cost estimates for implementing the control were sufficiently precise and supported. We further conclude that the Secretary has demonstrated, based on the above, that the costs of the control are not wholly out of proportion to the expected benefits. Therefore, in our view, the Secretary established a prima facie violation of the noise standard.

On the basis of the present record, we would further hold that Callanan failed to rebut the Secretary's prima facie case. In that regard, the Ingersoll-Rand letter stating that the drill could not be equipped with a muffler does not alone overcome the testimony of MSHA's noise control engineer that a muffler could in fact be attached. Also, Callanan's safety director testified that the Ingersoll-Rand sales engineer who had written that letter, upon later reviewing the MSHA Tech Support noise survey report, stated that the proposed engineering control was not feasible from a cost standpoint -- not that the retrofitting could not be done. Tr. 255-256. Furthermore, Callanan's quarry supervisor, although not familiar with the type of drill involved here, testified that the drill probably could be retrofitted, but that it would be an involved process. Tr. 194. Thus, Callanan failed to rebut the Secretary's proof that the suggested modification of the drill shell was technologically achievable.

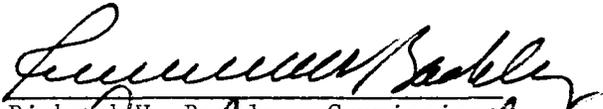
In addition, Callanan introduced no evidence to the effect that the potential benefits expected to be obtained as a result of the proposed engineering control were less than the predicted 5 dBA reduction in noise or that the estimated cost of implementing the control was more than MSHA projected. Instead, Callanan principally argued that in view of the age of the involved air track drill and its approximate value of under \$2,500, it was infeasible from a cost perspective to require it to ship the drill to the Mid-Western Machinery Company for the modification of the drill shell. We do not find that argument to be of sufficient specificity or merit to rebut the Secretary's prima facie case. In sum, on the basis of the record as it presently stands, we would conclude that Callanan has not rebutted any of the individual elements of the Secretary's case, nor has it established that, on the whole, the estimated costs of the suggested engineering control are wholly out of proportion to the expected benefits.

Nevertheless, in the circumstances of this case, and given the extensive and confusing history of litigation under the noise standard, we are not inclined to interpret for the first time at the review level the word "feasible" as it appears in 30 C.F.R. § 56.5-50(b) and render a final determination against Callanan for failing to anticipate our interpretation and allocation of the burden of proof. We believe that the rights of the parties involved, as well as the spirit of the Mine Act, are best served by remanding this case to allow both parties the opportunity to submit additional evidence, if they choose to do so, and to frame any further arguments in the light of our decision. We note that the violation at issue was abated by removing the involved drill from service. Therefore, the remand has no adverse impact on the health of miners.

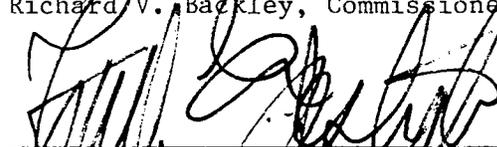
Accordingly, the decision of the judge is reversed and the case is remanded for further proceedings consistent with this decision.



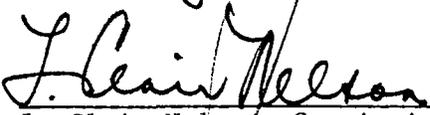
Rosemary M. Collyer, Chairman



Richard V. Backley, Commissioner



Frank F. Estrab, Commissioner



L. Clair Nelson, Commissioner

Commissioner Lawson dissenting:

As the majority recognizes in reversing the decision of the judge below, his use of a "cost-benefit" criterion to determine whether there is a violation in this case is inexplicable given the facts of this case and the language of the Act. It is, however, unprecedented that this reversal is accompanied by an invitation to the parties--in actuality, of course, only the operator--to retry this case, since even under my colleagues' view of the law, the Secretary has established a prima facie case which the operator has failed to rebut. Elongation of this proceeding thus fails to comport with even minimal standards of judicial economy, nor does the majority suggest what "additional evidence" (slip op. at 14) should be presented, in view of the Secretary's admittedly having proven a violation of the Act.

Callanan did not challenge the accuracy of the noise survey results submitted by the Secretary's inspector, and it is undisputed that the noise exposure level (103 dba) substantially exceeded the maximum level permissible for an eight-hour period (90 dba); indeed the exposure was, as the majority notes, 660% of the level permitted. 1/ Slip op. at 3.

There is no dispute, either, that the Secretary proved that the proposed engineering control was technologically feasible. 2/ Nor is there any disagreement that a technologically feasible control is not limited to off-the-shelf, stock or prefabricated devices, and that the proposed engineering control was expected to achieve a significant noise reduction. The control of noise at its source is obviously critical, in order that miners can detect other mine hazards.

However, the majority has now mandated its own substantively indistinguishable "cost-benefit" analysis in this--and indeed all other--safety and health cases in which a claim is made that the "cost" of preventing death or illness to miners, outweighs the health or safety "benefits" to be gained.

Even more contradictory is the majority's position that "a classic, scientific "cost-benefit analysis"--is not imposed by either the statute or the standard," (slip op. at 10) but that determination of the feasibility of the control required under the standard is now to be had "by consideration of whether the economic costs of the control are wholly out of proportion to the expected benefits" (slip op. at 10). This test in reality leaves unchanged the rule imposed by the judge below. A cost-benefit determination is imposed, subject to all the impossibilities of proof and application which have plagued adjudicators for over a decade.

1/ The legislative history of the Act reflects the fact that hearing loss has been found to be "probably the most common condition among metal-nonmetal miners," and notes that up to 25 percent of currently employed miners may suffer from some degree of hearing impairment. H. Conf. Rep. 95-312, 95th Cong., 1st Sess. 12-13 (1977).

2/ Callanan has conceded that there is no element of financial inability on its part to buy any machine on the market, and that it was this operator's choice to purchase a new drill, rather than retrofit the existing unit (oral arg. 22-24).

The conclusion of the judge below and the majority here, that in determining whether "feasible" ... engineering controls shall be utilized", economic factors are to be taken into account, is not reflected in the language of the Act. Slip op. at 8, 9. Nor does the standard itself, although lengthy and detailed, include even a hint, much less a requirement, that cost-benefit analysis is required or appropriate, nor the possible extent to which economic factors might be relevant.

Economic considerations were not written into the standard when it was initially promulgated under Walsh-Healey, nor upon repromulgation under the Mine Act. How, then, can it be maintained that Congress intended to introduce such a factor into the litigation of cases in which the Secretary seeks to enforce a mine safety and health standard, derived from an already established federal standard? Indeed, reading the standard to include economic as well as technological feasibility, in determining whether a violation of the Act has occurred, relieves employers of their continuing duty to develop and implement engineering controls. Claimed present economic difficulties will therefore be allowed to vitiate the technology forcing process recognized in the standard. See Society of Plastics Industry, Inc. v. OSHA, 509 F.2d 1301, 1309, cert denied, 421 U.S. 992 (1975) and Secretary of Labor v. Continental Can Company, 4 BNA OSHC 1541, 1550 (1976).

Strikingly, the majority's claim that the asserted silence of the Act and its legislative history compels the conclusion that economic feasibility is properly to be read into the language of this regulation, departs radically from this same majority's very recent reading of the Act and the regulation involved in UMWA v. Secretary of Labor, 5 FMSHRC 807 (May 11, 1983) pet. for review filed No. 83-1519 (D.C. Cir. May 13, 1983). In that case they found that silence led to the opposite conclusion, and that one could not properly infer therefrom any right of miners to contest citations. Id at 815.

Even given my colleagues contradictory analytical approaches, however, there is no dispute that the "plain meaning" of feasible is "capable of being done, executed or effected." Slip op. at 8. Nowhere in any dictionary of which I am aware is feasible modified, either explicitly or implicitly, by "provided it's done cheaply enough".

Further, as a matter of English grammar, "feasible", an adjective, must and does modify a noun, in this case "controls". Adding "cheaply", to reach the result propounded by the majority, is no more defensible or persuasive than would adding "expensive" to the regulation, or "best". Indeed, the latter construction would far more closely comport with the purpose of the Mine Act, "to prevent death and serious physical harm". 30 U.S.C. § 801.

Procedurally, the Mine Act requires immediate abatement of violations, as contrasted with the Occupational Safety and Health Act and its litigate first-abate later structure. Energy Fuels Co., 1 FMSHRC 299, 306, n. 9 (1979). Compare also section 6(b) 7 of the Occupational Safety and Health Act and Section 101(a)(7) of the Mine Act; the former mandates standards, "necessary for the protection of employees"; the latter mandates standards which "...assure the maximum protection of miners". 29 U.S.C. § 655(b)(7) and 30 U.S.C. § 811(a)(7), respectively. See Ashton v. Pierce, 716 F.2d 56 at 62-63 D. C. Cir. (1983). To add a cost benefit qualification to the mandatory standards promulgated under our Act clearly lessens the protection furnished miners, subverting thereby the congressional intent that those employed in this most dangerous of industries be provided commensurate safety and health assurances. 1977 Act Legis. Hist. at 595. "Maximum" is nowhere modified by any economic feasibility limitations.

The majority in its only citation of precedent, selectively if obliquely commends the Supreme Court's decision in The American Textile Manufacturers Institute, Inc. v. Donovan, et al, 452 U.S. 490 (1981). The operative language in that opinion, affirming the decision of the Court of Appeals, (617 F.2d 636 D.C. Cir. 1980) is:

The plain meaning of the word "feasible" supports respondents' (the Secretary's) interpretation of the statute. According to Webster's Third New International Dictionary of the English Language, "feasible" means "capable of being done, accomplished or carried out"; Funk & Wagnalls New "Standard" Dictionary of the English Language 903 (1957) ("That may be done, performed or effected"). Thus, § 6 (b)(5) directs the Secretary to issue the standard that "most adequately assures...that no employee will suffer material impairment of health," limited only by the extent to which this is "capable of being done." In effect then, as the Court of Appeals held, Congress itself defined the basic relationship between cost and benefits, by placing the "benefit" of worker health above all other considerations save those making attainment of this "benefit" unachievable. Any standard based on a balancing of costs and benefits by the Secretary that strikes a different balance than that struck by Congress would be inconsistent with the command set forth in § 6 (b)(5). (Citation omitted) (Emphasis added.) (PP. 508, 509).

When Congress has intended that an agency engage in cost-benefit analysis, it has clearly indicated such intent on the face of the statute. One early example is the Flood Control Act of 1936, 33 U.S.C. § 710a.

"[T]he Federal Government should improve or participate in the improvement of navigable waters or their tributaries, including watersheds thereof, for flood-control purposes if the benefits to whomsoever they may accrue are in excess of the estimated costs, and if the lives and social security of people are otherwise adversely affected." (Emphasis in original.)

A more recent example is the Outer Continental Shelf Lands Act Amendments of 1978, 43 U.S.C. § 1347 (b), providing that offshore drilling operations shall use

"the best available and safest technologies which the Secretary determines to be economically feasible, wherever failure of equipment would have a significant effect on safety, health, or the environment, except where the Secretary determines that the incremental benefits are clearly insufficient to justify the incremental costs of using such technologies." (Emphasis in original.)

These and other statutes demonstrate that Congress uses specific language when intending that an agency engage in cost-benefit analysis. See Industrial Union Department v. American Petroleum Institute, supra, slip op. at 23, n. 27 (Marshall J., dissenting). Certainly in light of its ordinary meaning, the word "feasible" cannot be construed to articulate such congressional intent. We therefore reject the argument that Congress required cost-benefit analysis in § 6 (b)(5). (Emphasis added.)

This precedent thus rejects the analysis approved by the majority here, and indeed reaches a contrary result. The Secretary's position, in which he is perhaps reacting to his perception of what is currently popular, rather than to any statutory imperative, is similarly deficient, and contrary to the position he has advanced in prior litigation. Secretary of Labor v. Castle & Cooke Foods, 692 F.2d 641, 645, 9th Cir., (1982), Turner Company v. Secretary of Labor, 561 F.2d 82, 83, 7th Cir. (1977), Secretary of Labor v. Sun Ship, Inc. 11 BNA OSHC 1028, 1030 (1982), Secretary of Labor v. Samson Paper Bag, 8 BNA OSHC 1515, 1520 (1980), and Continental Can Company, supra at 1548-1549.

Since the drafters of the Mine Act obviously knew how to deal with business costs, as exemplified by section 110(i) of this Act, 3/ it would appear beyond dispute that there was no intent on their part to apply cost-benefit analysis in the implementation of required engineering controls, contrary to my colleagues' construction of the Act. This specific reference to costs, as they may impact upon an employer's ability to continue in business, as a result of the compliance mandated

3/ In assessing civil monetary penalties, the Commission shall consider "...the effect on the operator's ability to continue in business...." 30 U.S.C. § 820(i).

by the statute, has no counterpart in the Occupational Safety and Health Act. If one is searching for a quantifying mechanism to determine the possible economic impact of compliance, the penalty provisions of the Mine Act certainly direct us to a more relevant reference point. 4/

The majority is therefore at best disingenuous in requiring that "... the economic feasibility of the control is to be determined by consideration of whether the economic costs of the control are wholly out of proportion to the expected benefits; i.e., whether given the reduction in the noise level to which a miner would be exposed after implementation of the control, and the cost of achieving that reduction, it would not be rational to require the implementation of the control". Slip op. at 10. (Emphasis added.)

Thus, and contrary to Congressional intent, the majority will now require a cost-benefit test to be applied in every case, asserting that this is "reasonable and appropriate." Slip op. at 10. In truth, the criteria now to be imposed is totally subjective, has no foundation in the statutory language, and would encourage this Commission and its judges to undertake economic speculation of a particularly dangerous--to miners--variety.

The conscientious operator who complies with the Act, and utilizes state-of-the-art drills, will now be disadvantaged by comparison with his less scrupulous competitors, who will henceforth be encouraged to neglect their equipment and facilities, rewarded for this neglect, and motivated to plead poverty when their--equal--compliance with the law is sought. Uniform application of a standard can realistically be obtained only at the time that a standard is promulgated, not in individually initiated enforcement proceedings.

4/ At least one view at the Occupational Safety and Health Review Commission is that economic considerations, under that statute, could only be taken into account with respect to setting an appropriate abatement time:

We can fulfill the Act's stated purpose of improving the safety and health of American workers, and at the same time give due consideration to the realities of the marketplace, by requiring all employers to meet the standard's requirements, and then adjusting the abatement period for those financially incapable of proceeding with abatement at a more rapid pace. Samson Paper Bag, 8 BNA OSHC 1515, at 1525. (Commissioner Cottine concurring)(1980).

Whether this interpretation would conform to Congressional intent under the Mine Act has not been determined, but would be in closer conformity to the statute than the majority's proposed treatment of costs and benefits.

How the "rationality" test is to be distinguished from that of whether a proposed control is "prohibitively expensive" (not here in dispute) is left unexplained, both by the Secretary and the majority. The Secretary appears to be asserting that if the control is, in some undefined manner, too costly, you need not implement engineering controls under either test. No intelligible structural analysis of how one determines whether the cost is so great that it would be "irrational" to require the use of the engineering control to achieve those results is given, by either the majority or the Secretary (the latter apparently keeps these decisions in pectore). 5/

The majority also fails to explain or delineate how one arrives at a determination that the "costs of control are wholly out of proportion to the expected benefits." Slip op. at 9, 10. This is apparently to be left to the unfettered discretion of the judge, whose decision, given that 'standard', will be impossible of review.

Finally, placing the burden of proof on the Secretary to establish the "expected economic cost of the implementation of controls", to use the majority's phrase "would not be rational." Slip op. at 10. No explanation is given as to how the Secretary is to ascertain such cost; in truth, he will be at the mercy of the operator's no doubt generous, and understandably self-serving, figures. 6/

The practical problems presented by the majority's imposition of a cost-benefit test, however described, are also immense. As amicus Steelworkers has noted, citing a recent and commendably thorough Congressional Report, 7/ one needs to know the adverse effects created by the exposure to noise, the inescapable fact that health benefits do not lend themselves to monetary measurement, and that both costs and benefits occur over different periods of time. The quantifying of benefits is thus at the least made extraordinarily difficult, if not impossible.

5/ See oral argument by the Secretary, pp. 10-12 for further "enlightenment".

6/ Inconsistent disclosures of financial information to different federal agencies, depending upon the purpose for which such data is submitted, provides one example of the perils of ascertaining accurate economic data, much less truth, in the area of cost impact in a safety and health case. (House Report, *infra*, n. 7, pp. 11-16.)

7/ Cost-Benefit Analysis: Wonder Tool or Mirage, Subcommittee on Oversight and Investigation of the House Committee on Interstate and Foreign Commerce, 96th Congress, 2d. Sess., December 1980; Committee Print 96 IFC-62. (House Report).

In the legislative history of the 1977 Act, cost-benefit analysis was specifically discussed, but--significantly--only with respect to § 101(a)(6)(A), the statutory authority for the Secretary to set health standards regulating harmful physical agents. Strict cost-benefit analysis, even at that stage, was rejected by the Congress, and nowhere reflected in the history of the Act is any intention that cost-benefit analysis is to play any part in enforcement proceedings. As the Senate Report states:

Information on the economic impact of a health standard which is provided to the Secretary of Labor at a hearing or during the public comment period, may be given weight by the Secretary. In adopting the language of section [101(a)(6)(A)] the Committee wishes to emphasize that it rejects the view that cost benefit status alone may be the basis for depriving miners of the health protection which the law was intended to insure. 1977 Act Legis. Hist. at 609-610, emphasis added.)

Clearly, given this history, cost-benefit analysis would, if ever, be appropriate for consideration only at the time regulations are promulgated, when all affected parties within the mining community are given the opportunity to comment upon the particular regulation, and the data submitted in justification thereof. Determination through the enforcement mechanisms of this Commission, given the inherent limitations of the courtroom, and the inevitably narrow focus of any individual case, makes cost-benefit analysis totally unsuitable for litigative determination.

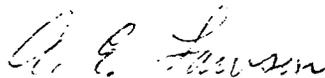
The record necessary to make a cost-benefit analysis can be compiled in standard setting proceedings, but the fact customarily developed in individual enforcement proceedings fail to lend themselves to such analysis. Indeed, the probability is that the relevant data will vary significantly from case to case. As stated in Samson Paper Bag, (supra at 1531, n. 25) "[N]either the Secretary nor an individual employer could be expected to invest the resources necessary to generate this type of record in each case before the [OSHA Review] Commission". One might add that such a requirement is, almost by definition, beyond the capabilities of a smaller operator.

Indeed, the unstated assumption that regulatory or adjudicatory, decisions drive up business costs, which are then passed through to the consumer in the form of higher prices, is in itself questionable. To the extent that absenteeism is decreased, and the cost of workers compensation and medical and hospital care lessened, a net benefit to the enterprise will obviously result. Rather than regulations imposing a hidden tax, it is at least equally plausible that these remove a hidden subsidy, one which permits operators to sell their product at market prices below those which would have been established if the full cost of production, including the health and safety consequences of such production, were included in the market price. See House Report, pp. 26-27, supra.

In summary, the attempt by the majority in this case to import "cost-benefit" into the question of determining whether a regulation has been violated is contrary to both the statute and its legislative history. Nor are any guidelines or parameters possible of implementation provided for undertaking such analysis.

Experience reflects the difficulties that the Occupational Safety and Health Review Commission has had with the identical issue, and the identical standard. 8/ If costs and benefits are to be considered in providing miners the "maximum" protection required by the Act, 9/ authority to weigh these lies with the Congress.

I would therefore concur in finding this operator in violation of this standard, that the implementation of the engineering control required to abate such was feasible, and would remand to the judge below solely for the purpose of assessing a penalty therefor.



A. E. Lawson
A. E. Lawson, Commissioner

8/ Castle & Cooke Foods, supra; Sun Ship, Inc., supra; Samson Paper Bag Co., supra; Turner Company, supra; Continental Can Company, supra; Society of Plastics Industry, Inc., supra, and others.

9/ See 30 U.S.C. § 811(a)(7).

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Administrative Law Judge Decisions

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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NOV 3 1983

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. PENN 83-25
Petitioner : A.C. No. 36-03137-03502
 :
v. : Docket No. PENN 83-146
 : A.C. No. 36-03137-03508
GLEN IRVAN CORPORATION, :
Respondent : Bark Camp No. 2

DECISIONS

Appearances: David Bush, Office of the Solicitor, U.S.
Department of Labor, Philadelphia, Pennsylvania,
for Petitioner;
Robert M. Hanak, Esq., Reynoldsville, Pennsylvania,
for Respondent.

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), charging the respondent with 11 alleged violations of certain mandatory safety standards found in Parts 75, and 77, Title 30, Code of Federal Regulations. Respondent filed timely answers and the cases were heard in Pittsburgh, Pennsylvania on July 27, 1983, along with two other cases involving these same parties.

Issues

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

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, 29 C.F.R. § 2700.1 et seq.

Stipulations

The parties stipulated that the respondent is subject to the Act, that I have jurisdiction to hear and decide the cases, that the respondent has a good history of prior citations, and that it is a small operator (Tr. 5; 134-137).

Discussion

During a colloquy on the record with counsel for the parties in these proceedings, it was made clear to counsel that the Secretary's Part 100 Civil Penalty Assessment regulations are not binding on the Commission or its Judges. It is also clear to me that under the Act all civil penalty proceedings docketed with the Commission and its Judges are de novo and that any penalty assessment to be levied by the Judge is a de novo determination based upon the six statutory criteria found in section 110(i) of the Act, and the evidence and information placed before him during the adjudication of the case. Sellersburg Stone Company, 5 FMSHRC 287, March 1983.

The fact that the petitioner may have determined that some of the violations in issue in these proceedings are not "significant and substantial", and therefore qualify for the so-called "single penalty" assessment of \$20 pursuant to section 100.4, and are not to be considered by the petitioner as part of the respondent's history of prior violations pursuant to section 100.3(c), is not controlling or even relevant, in these proceedings. Regardless of the Secretary's regulations, once Commission jurisdiction attaches, I am bound to follow

and apply the clear mandate of section 110(i) in determining the civil penalty to be assessed for a proven violation after due consideration of all of the criteria enumerated therein. The fact that Congress chose to include language in section 110(i) which arguably authorizes the Secretary not to make findings on the penalty criteria clearly is inapplicable to the Commission.

Section 110(i) of the Act requires Commission consideration of all six penalty criteria, and the fact that the Secretary chooses to ignore \$20 citations as part of a mine operator's compliance record is not controlling when the case is before a Commission Judge. Accordingly, for civil penalty assessment purposes, I will take into consideration all previously paid citations by the respondent, including any "single penalty" \$20 citations which have been paid.

Findings and Conclusions

Docket No. PENN 83-146

The parties proposed a settlement for all of the citations in this case. The proposal called for the respondent to make full payment for all of the proposed assessments with the exceptions of Citation Nos. 2112921 and 2112924. The parties proposed a reduction in the penalty assessments for these citations (Tr. 108-109). Although the inspector who issued the citations was not present (he was on vacation), the parties furnished relevant and material information in support of their proposed settlement disposition for the citations, including the facts and circumstances surrounding each of the cited conditions (Tr. 118-133). After consideration of the arguments in support of the proposed settlements, I approved the following dispositions for nine of the citations:

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Section</u>	<u>Assessment</u>	<u>Settlement</u>
2112828	2/24/83	77.400(a)	\$ 20	\$ 20
2112829	2/24/83	75.403	20	20
2112836	3/22/83	75.303(a)	58	58
2112838	3/23/83	75.512	20	20
2112839	3/23/83	75.601	20	20
2112840	3/23/83	75.516-2(a)	20	20
2112921	3/23/83	75.1722(a)	54	40
2112923	3/24/83	75.503	20	20
2112924	3/24/83	75.1704	106	66
			<u>\$ 338</u>	<u>\$ 284</u>

With regard to Citation No. 2112837, March 22, 1983, citing an alleged violation of section 75.202, I rejected the proposed settlement requiring the respondent to pay the full penalty of \$20 for this "non-S&S" citation (Tr. 117, 133-134). I did so because the conditions or practices as stated by the inspector on the face of the citation indicated to me that miners were exposed to certain hazardous roof conditions while performing certain work at the face. By agreement of the parties, the petitioner's counsel was directed to contact the inspector to ascertain all of the prevailing circumstances surrounding this citation, including some explanation as to why he believed the conditions cited did not present a "significant and substantial" violation, and to file a further statement with me posthearing. Counsel was also directed to file a copy of the respondent's history of prior citations.

By letters filed September 16 and October 7, 1983, petitioner's counsel submitted a computer print-out of respondent's prior history of violations and a full and complete explanation of the circumstances surrounding the issuance of Citation No. 2112837. Included in this explanation is an assertion by the inspector that his finding that the violation was not significant and substantial was based on the fact that no miners were exposed to any hazard, and the inspector's supervisor fully concurred in his evaluation of the violation and the potential hazard. After careful consideration of this information, I conclude that the proposed settlement disposition for this citation is reasonable, and it is approved as follows:

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Section</u>	<u>Assessment</u>	<u>Settlement</u>
2112837	3/22/83	75.202	\$20	\$20

Docket No. PENN 83-25

This case involves a section 104(a) citation issued by Inspector Walter E. Kowaleski on August 19, 1982, charging the respondent with a violation of section 75.200. Citation No. 2000842 is "non-S&S", and the conditions or practices cited by the inspector are as follows:

The roof control plan was not fully complied with in that the posts installed along the low belt were spaced from 4 1/2 feet to 7 feet at several locations. The approved roof control plan specifies that posts will be set at 4 foot spacings.

These violations will not be terminated until such time as a responsible official explains

to all crew members on all shifts the part of the roof control [sic] pertaining to the allowable spacing of post.

Inspector Kowaleski confirmed that he issued the citation in question, and he testified that on the day in question he rode into the working section with the mine superintendent. After alighting from the mantrip approximately 150 feet from the working face, he and the superintendent proceeded to crawl through the low coal to the face. As they were proceeding to the face he observed that the posts used to support the roof were wide, and after taking measurements he determined that they were spaced on centers ranging from 4 1/2 to seven feet. Since the roof control plan required that they be spaced on four-foot centers, he decided to issue a citation and advised the superintendent accordingly (Tr. 14-18).

Mr. Kowaleski confirmed that at the time he observed the wide spacing the crew had advanced beyond that point, and after the superintendent conceded that the spacing was wide and led him to believe that it was due to oversights by the working crew, he (Kowaleski), advised the superintendent that "I'll not make it S&S" (Tr. 19).

Mr. Kowaleski testified that based on his observations of the conditions which he cited he did not believe that those conditions presented a reasonable likelihood of an injury (Tr. 19). He explained further that after pointing out the wide spacing to superintendent James Bailor, face mining ceased and Mr. Bailor called in a crew to install the roof supports on four foot centers (Tr. 20).

In response to further question, Mr. Kowaleski confirmed that the roof conditions where mining was taking place consisted of "pretty good roof" (Tr. 23). He also confirmed that abatement was achieved immediately by the next crew installing the roof supports to the required interval (Tr. 25).

In response to certain bench questions, Mr. Kowaleski conceded that the approved roof control plan was binding on the respondent, and that the plan required that the roof support posts in question be installed on four-foot centers (Tr. 26). He confirmed that the reason he concluded that the violation was "non-S&S" was the fact that men would not be working in the area "and no one will go there in the next five years" (Tr. 27).

Mr. Kowaleski confirmed that approximately 11 posts were installed wider than the specifications called for by the roof

control plan (Tr. 29). He also confirmed that aside from the wide spacing of the posts, the roof was in good condition, it was solid and otherwise supported, and the crew was not in the area on a regular basis. Given these circumstances, and the fact that the conditions were not present at the working face, he concluded that the violation was not "significant and substantial" (Tr. 30).

In response to a question as to why he did not make a negligence finding in this case at the time he issued the citation Mr. Kowaleski stated that based on instructions from his subdistrict office, once he found that the violation was not "S&S", he was not to make any gravity findings (Tr. 31). He conceded that the mine area which he cited was an area which was required to be preshifted, and respondent's counsel conceded that there is negligence in this case (Tr. 32). Mr. Kowaleski conceded that the respondent has a good compliance record and that it has a basic safe roof control plan which it has always adhered to (Tr. 33).

At the hearing I observed that the petitioner has established the fact of violation. I also observed that the testimony by the inspector in support of the citation supported a finding of negligence and the respondent conceded this point (Tr. 37-38). With regard to the question of gravity, I made a finding that while the roof was otherwise supported and sound, the roof support spacings at the area observed by the inspector were wider than allowed by the roof control plan. Since the inspector and the superintendent were in the area, I can only conclude that they were exposed to a possible hazard from a roof fall due to the wide roof support spacing (Tr. 38-39).

Respondent declined to call any witnesses in support of its case. Under the circumstances, and based on the inspector's testimony there is no doubt as to the fact of violation. Accordingly, I find that the conditions cited constitute a violation of the cited mandatory standard and the fact of violation IS AFFIRMED.

With regard to the inspector's "non-S&S" finding, as far as I am concerned this presents a question of gravity. Based on the inspector's testimony that he and the mine superintendent had to crawl through an area which contained inadequate roof support spacings which did not comply with the approved roof control plan, I can only conclude that the violation was serious. With regard to negligence, the respondent has conceded that the conditions should have been observed by the preshift examiner, and that mine management's failure to detect and correct the cited conditions before the inspector arrived on the scene constituted negligence on its part (Tr. 40).

Petitioner's proposed civil penalty of \$20 IS REJECTED. Based on my gravity and negligence findings, as well as the prior history of six violations of the roof control standards found in section 75.200, I simply cannot conclude that a \$20 civil penalty is reasonable. Based on my independent de novo consideration of this violation, including the six statutory criteria found in section 110(i) of the Act, I conclude that a civil penalty assessment of \$150 is appropriate and reasonable for the citation in question.

ORDER

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 penalty assessments which have been agreed upon by settlement, as well as those imposed by me on the basis of the preponderance of the evidence adduced in these proceedings are appropriate and reasonable for the citations which have been affirmed. Accordingly, the respondent IS ORDERED to pay the civil penalties approved by settlement or otherwise imposed by me within thirty (30) days of these decisions and order, and upon receipt of payment by the petitioner, these proceedings are dismissed.


George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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NOV 4 1983

UNITED MINE WORKERS OF : DISCRIMINATION PROCEEDINGS
AMERICA (UMWA), :
ON BEHALF OF :
JAMES ROWE, et al., : Docket No. KENT 82-103-D
: MADI CD 81-23
:
DELMAR SHEPARD, : Docket No. KENT 82-104-D
: MADI CD 82-01
:
JERRY D. MOORE, : Docket No. KENT 82-105-D
: MADI CD 82-05
:
LARRY D. KESSINGER, : Docket No. KENT 82-106-D
: MADI CD 82-04
:
JAMES RUSSELL, : Docket No. LAKE 82-83-D
: VINC CD 81-23
:
HOWARD COGNION, : Docket No. LAKE 82-84-D
Complainants : VINC CD 81-26
:
v. : Eastern Division Operations
:
PEABODY COAL COMPANY, :
Respondent :
:
and :
:
SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), :
ON BEHALF OF :
THOMAS L. WILLIAMS, : Docket No. LAKE 83-69-D
Complainant : VINC CD 83-04
:
v. :
Eastern Division Operations
:
PEABODY COAL COMPANY, :
Respondent :

DECISION APPROVING SETTLEMENT

Before: Judge Kennedy

The captioned individual and class action discrimination complaints charge the operator with violating section 105(c)(2)

and (3) of the Mine Safety Law by establishing a policy that required miners in a layoff status to pay for their training or retraining as a condition of maintaining their position of seniority on the layoff panels. Under pressure from MSHA, this policy, which was promulgated in June 1981, was rescinded in April 1983. The parties then attempted to negotiate a settlement. When this failed, the matter came on for a prehearing/settlement conference on August 4, 1983. As a result of that conference, the parties (1) divided the claimants into three categories: Rehires (Category I), Bypassed (Category II), and Not Rehired (Category III); (2) agreed to file a stipulation to settle the claims under Category I; and (3) to negotiate further with respect to settling the other two categories.

At a status hearing on October 13, 1983, the last details of the stipulation for settlement of Category I were worked out. When no settlement for Categories II and III could be achieved the parties agreed to waive an evidentiary hearing and to submit the issue of liability only for determination on the basis of a joint stipulation of material facts not in dispute together with cross motions for summary decision.

A related proceeding, recently reassigned from Judge Fauver, involves a discrimination complaint brought, somewhat belatedly, by the Secretary on behalf of a Category II miner. Secretary of Labor on Behalf of Thomas L. Williams v. Peabody Coal Company, LAKE 83-69-D. I understand the Solicitor will endeavor to join the stipulation of facts filed by the UMWA and Peabody in the retained proceedings so that the Williams case can be decided at the same time the retained cases are determined.

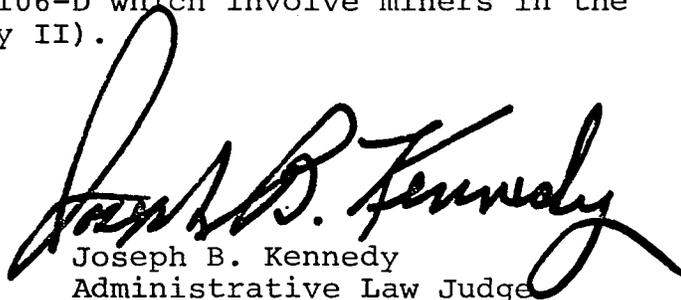
These matters are now before me on the parties Joint Motion to Approve Settlement and to Dismiss with prejudice three of the captioned matters which involve only Category I and the John Does falling in Category I in the class action Docket No. KENT 82-103-D.

While these matters were pending, the Commission decided Secretary and UMWA v. Emery Mining Company, 5 FMSHRC 1391 (1983), appeal pending in the Tenth Circuit. There the Commission held that under section 115 of the Mine Safety Law an operator can require applicants to take new miner training as a precondition of their employment but, if that training is used to satisfy the requirement for training new hires, the operator must reimburse new miners for the costs previously incurred. Emery's refusal to reimburse the new miners was held an unlawful interference with rights guaranteed new hires (but not applicants) under the anti-discrimination provisions of section 105(c)(1) of the Act.

Earlier, Judge Broderick held that Peabody could require that as a condition of rehire a laid-off surface miner must pay for the training needed to obtain a certificate of training as an experienced underground miner. UMWA v. Peabody, 4 FMSHRC 1338 (1982).

As indicated, the stipulation for settlement presently before me involves only miners who were laid off and then recalled without compensation for the training they paid for in order to comply with the condition for recall established by Peabody in June 1981. I find the reasons advanced on the record at the prehearing conferences of August 4 and October 13, 1983, together with the information provided in the motion and supporting affidavits of the stipulation for settlement show the settlement proposed is in accord with the purposes and policy of the Act.

Accordingly, it is ORDERED that the operator pay forthwith the amount of the settlement agreed upon, \$23,076.05, to the 134 miners in Exhibits A and B attached hereto and made a part hereof, and that subject to payment Docket Nos. KENT 82-104-D, LAKE 82-83-D, LAKE 82-84-D, and KENT 82-103-D insofar as it pertains to recalled (Category I) miners be, and hereby are, DISMISSED WITH PREJUDICE. It is FURTHER ORDERED that jurisdiction is retained over Docket No. KENT 82-103-D to the extent that it involves miners falling in the bypassed category (Category II), and the not rehired or recalled category (Category III), as well as over Docket Nos. KENT 82-105-D and KENT 82-106-D which involve miners in the bypassed category (Category II).



Joseph B. Kennedy
Administrative Law Judge

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EXHIBIT A

<u>Name</u>	<u>Docket No.</u>	<u>Mine</u>	<u>Rate</u>	<u>Hours</u>	<u>Total</u>
Delmar Shepherd	KENT 83-104-D	Ken	\$11.876	8	\$95.00
Earl Greenwood	LAKE 82-83-D	Sunnyhill	\$10.698	32	\$342.34
James Henry	LAKE 82-83-D	Sunnyhill	\$10.698	32	\$342.34
Everett Tennant	LAKE 82-83-D	Sunnyhill	\$10.698	32	\$342.34
Gregory Dobson	LAKE 82-83-D	Simco	\$10.698	32	\$342.34
Wayne Hart	LAKE 82-83-D	Sunnyhill	\$10.698	32	\$342.34
James Womer	LAKE 82-83-D	Simco	\$10.698	32	\$342.34
Richard Beamer	LAKE 82-83-D	Sunnyhill	\$10.698	32	\$342.34
Frank Cronin	LAKE 82-83-D	Sunnyhill	\$10.993	32	\$351.78
Mark Wharton	LAKE 82-83-D	Sunnyhill	\$10.698	32	\$342.34
Howard Cognion	LAKE 82-84-D	Sunnyhill	\$10.698	32	<u>\$ 342.34</u>
Total					\$3518.40

EXHIBIT B

<u>Name</u>	<u>Mine</u>	<u>Rate</u>	<u>Hours</u>	<u>Total</u>
James J. Williams	Sunnyhill	\$10.698	32	\$342.34
Jerry T. Wilson	Sunnyhill	\$10.698	32	\$342.34
Roger L. Ginnery	Sunnyhill	\$10.698	32	\$342.34
Michael W. DeMoss	Sunnyhill	\$10.698	32	\$342.34
John R. Taylor	Sunnyhill	\$10.698	32	\$342.34
Loy E. Wiggins	Sunnyhill	\$10.698	32	\$342.34
Charles T. Whiteman	Sunnyhill	\$11.765	32	\$376.48
Ronald E. Groves	Sunnyhill	\$11.713	32	\$374.82
Thomas L. Williams	Sunnyhill	\$11.765	32	\$376.48
Howard Harris	Sunnyhill	\$10.698	32	\$342.34
Fred Robinson	Sunnyhill	\$10.698	32	\$342.34
D. D. Armstrong, Sr.	Sunnyhill	\$10.698	32	\$342.34
Kenneth W. Krebs	Sunnyhill	\$10.698	32	\$342.34
Ralph O. Erwin	Sunnyhill	\$11.765	32	\$376.48
Thomas D. Hewlett	Sunnyhill	\$10.698	32	\$342.34
Vernon L. Noland	Sunnyhill	\$12.364	32	\$395.65
Ralph E. Jasper	Sunnyhill	\$12.364	32	\$395.65
Chester Green	Simco	\$12.612	32	\$403.58
Larry Holsky	Camp #11	\$12.612	32	\$403.58
S. William Reed	Sunnyhill	\$12.364	32	\$395.65
Victor Strain	Sunnyhill	\$10.698	32	\$342.34
Paul Wright	Sunnyhill	\$10.698	32	\$342.34
Virgil Smith	Camp #11	\$10.698	32	\$342.34
Tommy Wilson	Camp #1	\$11.360	8	\$90.88
Hershel Knight	Ken Surface	\$11.226	16	\$179.62
Jackie Tichenor	Ken Surface	\$11.226	16	\$179.62
Burnie C. Cain, Jr.	Ken Surface	\$11.876	16	\$190.02
Ronnie Allen	Ken Surface	\$11.512	16	\$184.19
Jerry Wilcox	Ken Surface	\$11.512	16	\$184.19
Orval Wiles	Camp #11	\$10.698	8	\$85.58
Jerry D. Farris	Ken Surface	\$11.876	16	\$190.02
Dan W. Raymer	Ken Surface	\$11.876	16	\$190.02
Danny J. Roberts	Camp #2	\$10.998	8	\$87.94
Carl E. Smith	Camp #11	\$11.765	8	\$94.12
Cola Duncan	Camp #11	\$10.698	8	\$85.58
Allen D. Richardson	Camp #2	\$10.993	8	\$87.94
William D. Beadnell	Camp #1	\$11.765	8	\$94.12
Edward L. Harris	Camp #11	\$10.698	8	\$85.58
Carroll R. Jones	Ken Surface	\$11.876	16	\$190.02
Raymond E. Higbee	Camp #2	\$10.993	8	\$87.94
Donnie E. Howell	Camp #11	\$10.698	8	\$85.58
Arthur G. Mellott	Camp #2	\$10.993	8	\$87.94
Garry E. Conrad	Camp #2	\$10.993	8	\$87.94
Jimmie W. O'Neal	Camp #2	\$10.993	8	\$87.94
Jeffery L. Wilkins	Camp #1	\$11.765	8	\$94.12
William D. Hayes	Camp #1	\$10.993	8	\$87.94
Truman E. Mannahan	Camp #1	\$11.765	8	\$94.12
F. A. Gregory, Jr.	Camp #1	\$11.765	8	\$94.12
Steven W. Noffsinger	Camp #2	\$11.765	8	\$94.12
Lawrence E. Lee	Camp #2	\$11.765	8	\$94.12

Harold Pointer	River Queen	\$11.512	16	\$184.19
Chapman Merrill	Camp #9 Prep.	\$11.469	16	\$183.50
Donnie Jackson	Camp #9 Prep.	\$11.469	16	\$183.50
Jose Martinez, Jr.	Camp #9 Prep.	\$11.713	16	\$187.41
Charles Campkin	River Queen	\$11.512	16	\$184.19
William D. Green	Homestead	\$11.512	8	\$92.10
Vernon G. Warren	Camp #9 Prep.	\$11.469	16	\$183.50
Kerry D. Sweeney	Camp #9 Prep.	\$11.713	16	\$187.41
Dallas R. Miller	Camp #9 Prep.	\$11.469	16	\$183.50
Carl Addington	Alston Surface	\$11.876	8	\$95.01
Bobby Shemwell	Ken Surface	\$11.876	8	\$95.01
Dannie Harris	Ken Surface	\$11.512	8	\$92.10
Thomas M. Foster	Camp #1	\$11.765	32	\$376.48
Vernon W. Hines	Alston	\$11.145	8	\$89.16
Stephen M. Raymer	Alston	\$11.512	8	\$92.10
Jeraid Harper	Alston	\$11.512	8	\$92.10
Betty A. Martin	Sinclair #2	\$10.698	8	\$85.58
Donald R. Sadler	Sinclair #2	\$10.993	8	\$87.94
David W. Wester	Sinclair #2	\$10.698	8	\$85.58
John Iler	Ken Surface	\$11.512	8	\$92.10
Stephen Goode	Ken Surface	\$11.512	8	\$92.10
David D. Shocklee	Ken Surface	\$11.876	8	\$95.01
Anna J. Johnson	Ken Surface	\$11.145	8	\$89.16
Randy G. Scott	Ken Surface	\$11.876	8	\$95.01
Dwayne A. Hill	Ken Surface	\$11.512	8	\$92.10
Delmar J. Parrent	River Queen	\$11.145	8	\$89.16
Steven W. Geary	Homestead	\$11.145	8	\$89.16
Robert J. Richard	Ken Surface	\$11.512	8	\$92.10
Wesley L. Lake	Ken Surface	\$11.876	8	\$95.01
Carlos R. Goff	Homestead	\$11.876	8	\$95.01
Michael E. Davis	Homestead	\$11.512	8	\$92.10
Darrell L. Rice	River Queen	\$11.512	8	\$92.10
Ellis J. Thompson	Homestead	\$11.512	8	\$92.10
Mark Killingsworth	Camp #9 Prep.	\$11.876	8	\$95.01
Damon E. Robinson	Gibraltar	\$11.876	8	\$95.01
Charles J. Moegling	Gibraltar	\$12.527	8	\$100.22
Bobby D. Gentry	Alston	\$11.876	8	\$95.01
Jerrold L. James	River Queen	\$11.512	8	\$92.10
James M. Brown	Gibraltar	\$12.612	8	\$100.90
Liston Wright	Ken Surface	\$11.415	16	\$182.64
Melvin Johnson	Walton Creek	\$10.698	8	\$85.58
Donnie J. Jackson	Ken #4	\$10.993	8	\$87.94
Jimmy R. Asher	Ken Surface	\$11.445	16	\$180.64
Charles D. Campkin	Ken #4	\$10.698	8	\$85.58
Charlie Crabtree	Ken #4	\$10.698	8	\$85.58
William D. Greene	Ken #4	\$10.698	8	\$85.58
John Isbell	Ken Surface	\$11.512	16	\$184.19
Kerry R. Sweeny	Ken #4	\$10.698	8	\$85.58
Tommy W. West	Ken Surface	\$11.512	16	\$184.19
Elmer R. Atherton	Ken Surface	\$11.512	16	\$184.19
Ralph F. Shephard	Ken Surface	\$11.512	16	\$184.19
Ellis Randolph	Camp #1	\$11.765	8	\$94.12
William S. Jones	Ken Surface	\$11.876	16	\$190.02
Roger D. Sims	Ken Surface	\$11.876	16	\$190.02

George K. Whitten	Camp #11	\$10.993	8	\$87.94
Cary Graham	Camp #1	\$11.765	8	\$94.12
Vernon Keeling	Camp #11	\$10.698	8	\$85.58
Marvin Crick	Camp #9 Prep.	\$11.713	16	\$187.40
James Ellis	Camp #1	\$10.698	8	\$85.58
James Milligan	Camp #11	\$11.765	8	\$94.12
Jerry Moore	Camp #11	\$11.765	8	\$94.12
Rickie Williams	Camp #9	\$11.713	16	\$187.41
Clifton Stewart	Ken Surface	\$11.876	16	\$190.02
Kenneth Sullivan	Camp #9 Prep.	\$11.713	16	\$187.40
John D. Zachery	Camp #2	\$10.993	8	\$87.94
Ronnie L. Gossett	Camp #11	\$11.765	8	\$94.12
Otis Halcomb	Camp #9	\$11.713	16	\$93.70
John Chinn	Camp #1	\$11.765	8	\$94.12
Roger Travis	Camp #2	\$10.993	8	\$87.94
Lonnie Neumann	Camp #11	\$11.765	8	\$94.12
Kenneth Cardwell	Camp #11	\$11.765	8	\$94.12
Roy L. Miller	Camp #2	\$10.993	8	\$87.94
Dickie W. Rock	Ken #4	\$10.698	8	<u>\$ 85.58</u>
Total				\$19,557.65

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

NOV 4 1983

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. VA 83-40
Petitioner : A.C. No. 44-03868-03510
v. :
: No. 1 Mine
C C & P COAL COMPANY, :
Respondent :

DECISION APPROVING SETTLEMENT

Before: Judge Broderick

On November 2, 1983, the Secretary filed a Motion to Withdraw its Civil Penalty Petition based on Respondent's agreement to pay the full amount assessed by MSHA. Accompanying the motion were prior assessment records, a copy of the Investigation Report of October 20, 1982, and information as to the size of Respondent's operation. On October 13, 1983, the parties filed a stipulation of fact pursuant to my prehearing order of August 22, 1983 and October 12, 1983.

I am treating the motion as a motion to approve a settlement, since sufficient information has been submitted for me to apply the statutory criteria to the proposed disposition of this matter. When a penalty case comes before the Commission, it must be considered de novo under section 110(k) of the Act, in the light of the criteria in section 110(i). A proposed payment of the amount previously assessed by MSHA is a proposal for approval of a settlement and may not be disposed of by ruling on a "motion to withdraw."

This proceeding was instituted following a fatal accident on October 21, 1982, when the rippers on a continuous mining machine being repaired started up suddenly and caught a miner working on the ripper chain adjustment and killed him. Three violations were charged: (1) a violation of 30 C.F.R. § 75.1725(c), because repairs were being made on the ripperhead chain of the miner while the machine was energized; (2) a violation of 30 C.F.R. § 75.509, because electrical work was being performed on the control circuit of the miner without the circuit being deenergized; (3) a violation of 30 C.F.R. § 75.511, because electrical work was being performed on the control circuit without opening and locking out the disconnecting device. The violations were assessed at \$5,000, \$5,000, and \$2,000 respectively.

Respondent is a small operator. The subject mine, which is its only mine, produces less than 100,000 tons annually. The mine will be worked out in approximately 5 months. During calendar year 1980, 12 violations were assessed at the mine; during 1981, 16 violations were assessed. From January through October, 1982, 19 violations were assessed (presumably including the 3 involved herein). This appears to be a moderate history of previous violations.

The violations were extremely serious, since each of them contributed to the fatal accident. Respondent was highly negligent: The repairs were being performed under the direction of the section foreman, a certified electrician. There was a history of electrical conductors being grounded on the continuous miner in question and the conveyor or ripperhead motors would inadvertently start. This history should have made for greater than ordinary caution in working on the machine. The violations were abated in a reasonable time.

Having considered the motion in the light of the criteria in section 110(i) of the Act, I conclude that the settlement should be approved.

Accordingly, the settlement is APPROVED and Respondent is ORDERED TO PAY the sum of \$12,000 within 30 days of the date of this order, and upon such payment, this proceeding is DISMISSED.


James A. Broderick
Administrative Law Judge

Distribution:

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(Certified Mail)

Douglas G. Campbell, Esq., Campbell, Newlon, White, Heileman, P.C., P.O. Box 549, Tazewell, VA 24651 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

NOV 4 1983

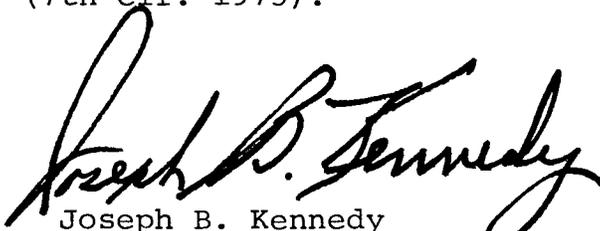
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 83-170
Petitioner	:	A.C. No. 46-03140-03507
v.	:	
	:	Hampton No. 3 Prep. Plant
WESTMORELAND COAL COMPANY,	:	
Respondent	:	

ERRATA

Before: Judge Kennedy

The first sentence on page 3 of the decision in this matter issued October 28, 1983 should be deleted and the following substituted therefor:

The operator, of course, has the burden of persuasion with respect to rebutting a prima facie showing that a violation is S&S. Miller Mining Co. v. FMSHRC, 3 MSHC 1017 (9th Cir. 1983); Old Ben Coal Corp. v. IBMOA, 523 F.2d 25, 39 (7th Cir. 1975).



Joseph B. Kennedy
Administrative Law Judge

Distribution:

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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 7 1983

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEVA 83-202
Petitioner : A.C. No. 46-01283-03513
v. :
WESTMORELAND COAL COMPANY, : Docket No. WEVA 83-203
Respondent : A.C. No. 46-01283-03514
: Docket No. WEVA 83-204
: A.C. No. 46-01283-03515
:
: Docket No. WEVA 83-205
: A.C. No. 46-01283-03517
:
: Hampton No. 3 Mine

DECISION APPROVING SETTLEMENT

Before: Judge Kennedy

Based on an independent evaluation and de novo review of the circumstances set forth in the solicitor's well crafted motion, I concluded that two of the violations of 75.400 (Citations Nos. 2141405 and 2141406) were under assessed. Thereafter, in a teleconference the operator and the solicitor presented their respective positions. I found their arguments unpersuasive and adhered to my original view. This was that it was reasonably foreseeable that these violations considered either singly or in concert could significantly and substantially contribute to a mine hazard, namely a mine fire or explosion. 1/

1/ I recognize that under the Commission's Gypsum decision, 3 FMSHRC 822 (1981), it is arguable that to be S&S it must be found that the "hazard contributed to will result in an injury or illness of a reasonably serious nature." Id. at 825. If that is correct, I must respectfully disagree. I cannot agree that a requirement that a violation "could . . . contribute to a cause and effect of a mine hazard" is the functional equivalent of a requirement that "the hazard contributed to will result in an injury or illness of a reasonably serious nature." In my view, the Commission definition changes the focus of Congressional concern from

Applying this criteria, I found the two violations in question had a high potential for triggering a hazard of greivous proportions. Finally, I advised the parties that in order to deter such violations and encourage voluntary compliance I could not approve their settlement unless the penalties were in the case of Citation 2141405 increased to

fn 1 (continued)

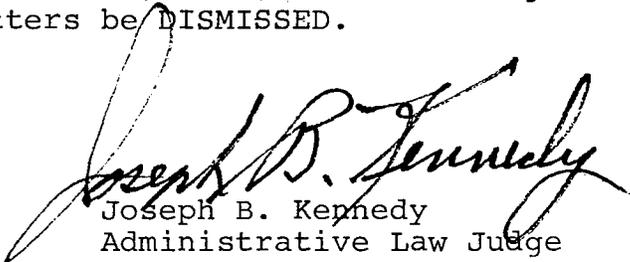
the capacity or ability of the contributory violation (the underlying violation) to act as a catalyst or synergist for the creation of a recognizable mine safety or health hazard to the gravity of the consequences if the hazard perceived and contributed to were to actually occur. This is not a distinction without a difference unless the difference between life and death is a distinction without a difference. I simply cannot agree that if the consequences or fall out of the hazard contributed to are not "reasonably serious" there is no need to be concerned about deterring the contributory or underlying violations. From an enforcement standpoint, the difficulty with this post hoc reasoning is that it requires the parties, as well as the trial judge, to enter an arena of speculation where the operator's guess is as good as the inspector's.

Under the statutory definition this speculation is avoided as it is only necessary to show that the contributory violation could be a meaningful and important factor in the creation of a recognizable hazard, not what the consequences of that hazard might be. For example, the presence of float coal dust on rock dusted surfaces or around electrical connections in an area where the power station is not adequately ventilated into the return air course leads me to conclude we have an accident, if not a disaster, waiting to happen. Each of these violations whether singly or in combination could be a meaningful, i.e., significant and important, i.e., substantial factor in the creation of a recognizable ignition, fire or explosion hazard whether or not I find that the "hazard contributed to will result in an injury or illness of a reasonably serious nature."

I am persuaded that the pattern of readily recognizable violations that contributed to the disaster at the Scotia Mine is the lodestar that should guide our understanding of the Congressional purpose that underlies and illuminates the meaning of the S&S finding. I think that until the enforcement authorities recognize that purpose and firmly reject the view that violations with such a vast potential for magnifying the inherent and unavoidable hazards of the mine environment are not to be treated lightly miners will continue to suffer deaths and disabling injuries at rates that should be unacceptable to a civilized society.

\$300 and in the case of Citation 2141406 to \$200. The parties agreed to this and thereupon orally amended their motion to increase the amount of the penalties proposed for each of these citations.

Accordingly, it is ORDERED that the motion, as amended, be, and hereby is, GRANTED. It is FURTHER ORDERED that the operator pay the amount of the penalty agreed upon, \$4,091, on or before Friday, November 18, 1983, and that subject to payment the captioned matters be DISMISSED.



Joseph B. Kennedy
Administrative Law Judge

Distribution:

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(Certified Mail)

F. Thomas Rubenstein, Esq., Westmoreland Coal Company, P.O. Drawers A & B, Big Stone Gap, VA 24219 (Certified Mail)

/ejp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

NOV 9 1983

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 82-66
Petitioner : A. C. No. 15-12650-03009
: :
v. : No. 4 Mine
: :
BARTLEY & BARTLEY COAL COMPANY, :
Respondent :

DEFAULT DECISION

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

Before: Judge Steffey

When the hearing in the above-entitled proceeding was convened in Pikeville, Kentucky, on October 6, 1983, pursuant to a written notice of hearing dated September 8, 1983, and received by respondent on September 12, 1983, 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 October 12, 1983, 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 October 6, 1983. A return receipt in the official file shows that respondent received the show-cause order on October 14, 1983. The time within which a reply to the show-cause order should have been received has passed and no reply has been submitted.

Inasmuch as no reply to the show-cause order was submitted, I find respondent to be in default for failure to appear at the hearing convened on October 6, 1983. 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:

Bartley and Bartley Coal Company, having been found to be in default, is ordered, within 30 days from the date of this decision, to pay a civil penalty of \$22.00 for the violation of 30 C.F.R. § 77.516 alleged in Citation No. 953536 dated July 29, 1981.

Richard C. Steffey
Richard C. Steffey
Administrative Law Judge

Distribution:

Darryl A. Stewart, Esq., Office of the Solicitor, U. S. Department of Labor, Room 280, U. S. Courthouse, 801 Broadway, Nashville, TN 37203 (Certified Mail)

Bartley and Bartley Coal Company, Attention: Gobel and Robert Bartley, Co-Owners, Box 142, Rockhouse, KY 41561 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
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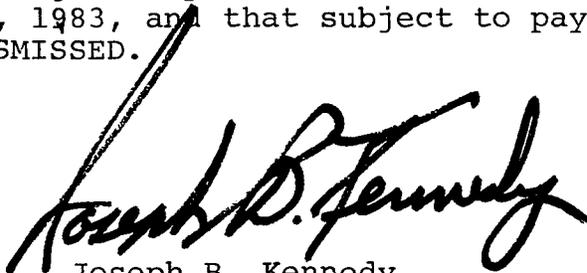
NOV 9 1983

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEVA 83-74
Petitioner : A.C. No. 46-03851-03504
v. :
: No. 3 Mine
PEERLESS EAGLE COAL COMPANY, :
Respondent :

DECISION APPROVING SETTLEMENT

Before: Judge Kennedy

For the reasons set forth in the parties' joint motion to approve settlement of the two violations alleged in the captioned matter, it is ORDERED that the same be, and hereby is, GRANTED. It is FURTHER ORDERED that the operator pay the amount of the penalties agreed upon, \$800.00, on or before Friday, November 25, 1983, and that subject to payment the captioned matter be DISMISSED.



Joseph B. Kennedy
Administrative Law Judge

Distribution:

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(Certified Mail)

Barbara L. Krause, Esq., Smith, Heenan, Althen & Zanolli,
1110 Vermont Avenue, NW, Washington, DC 20005 (Certified Mail)

/ejp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

NOV 14 1983

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 82-35-M
Petitioner : A.C. No. 24-00163-05015 F
v. :
 : Yellowstone Mine
CYPRUS INDUSTRIAL MINERALS :
CORPORATION, :
Respondent :

DECISION

Appearances: Phyllis Caldwell, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado, for
Petitioner;
Harley W. Shaver, Esq., Canges, Shaver, Volpe &
Licht, Denver, Colorado, for Respondent.

Before: Judge Melick

This case is before me upon the Petition for Assessment of Civil Penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq., the "Act," for two violations of regulatory standards. The general issue before me is whether the Cyprus Industrial Minerals Corporation (Cyprus) has violated the cited regulatory standards and, if so, whether those violations were "significant and substantial" as defined in the Act and as interpreted by the Commission in Secretary v. Cement Division, National Gypsum Company, 3 FMSHRC 822 (1981). If it is determined that violations have occurred, it will also be necessary to determine the appropriate penalty to be assessed.

On June 8, 1981, a truck driver was killed at the Cyprus Yellowstone Mine when his 35-ton haul truck went over the edge of an ore stockpile. MSHA inspector Darrel Woodbeck subsequently issued two citations under section 104(a) of the Act for regulatory violations in connection with the incident. One of the citations (No. 342876) charges a violation of the standard at 30 C.F.R. section 55.9-54 and reads as follows:

On June 8, 1981, at approximately 1330, a haul truck driver was fatally injured when the 35-ton haul truck he was driving went over the edge of a 30-foot high ore stock pile. The stockpile was located at the pit sorter area. The berm that was provided was not of sufficient height and it was not located far enough back from the dump edge to prevent overtravel onto unstable ground. Statements made by employees that were working in the area indicated that the berm was approximately two feet high. The axle height of the truck was three feet.

The cited standard requires that "berms, bumper blocks, safety hooks, or similar means shall be provided to prevent overtravel and overturning at dumping locations."

Cyprus readily concedes that there was no berm or other required restraint in place where the haul truck went over the edge of the stockpile but argues that it was not in violation of the standard because the haul truck was itself in the process of "dumping a berm". Cyprus claims that it had instructed its truck-drivers, including the victim in this case, to dump 15 to 20 feet back from the edge of the stockpile and that the front-end loader or bulldozer would then push the material to the edge to form a berm. The evidence shows, however, that contrary to the purported instructions, ore had in fact been previously dumped right at the edge of the stockpile. Inspector Woodbeck found this to be the case and the photographic evidence supports this finding. Moreover, according to the undisputed eyewitness testimony of the front-end loader operator, Shirley Lane, the rear wheels of the victim's haul truck would have been only 5 to 6 feet from the edge of the stockpile when the ground gave way, thus confirming that the loads were in fact not being dumped 15 to 20 feet back from the edge.

In light of the operator's contentions that the stockpile was inspected each day by management personnel and that only one trip had been made by a haul truck to the stockpile before the accident that day and the evidence that the haul trucks had for some period of time been dumping right at the edge of the stockpile, it may reasonably be inferred that agents of the operator were aware of the practice of dumping close to the edge without a berm and had not stopped the practice. I accordingly find that there was a violation of the cited standard and that the operator was negligent in permitting continuing violations of the standard for some period of time.

The violation was also of high gravity. There is no dispute that at the same time the haul trucks were dumping on the 30 foot stockpile, a front end loader was in effect undermining the stockpile directly below the dumping location as it removed the ore. Under these circumstances, I find that there indeed existed a reasonable likelihood that a truck would back too close to the unstable edge of the stockpile and fall through, thereby resulting in death or injuries of a serious nature. The fact that such an incident did occur and did cause the death of a truck driver confirms that the violation herein was "significant and substantial" and of high gravity. Secretary v. Cement Division, National Gypsum Company, supra.

The second citation arising out of this incident (Citation No. 342877) alleges a violation of the standard at 30 CFR section 55.9-55, alleging that the ground failed at the edge of the stockpile under the weight of the haul truck. The cited standard requires that "where there is evidence that the ground at a dumping place may fail to support the weight of a vehicle, loads shall be dumped back from the edge of the bank."

As previously noted, the operator contends that its truck drivers had been instructed to dump their loads 15 to 20 feet from the edge of the stockpile. As also previously noted however, the trucks had been, for some time prior to this accident, dumping right at the edge of the stockpile and the rear wheels of the victim's haul truck were in fact only 5 to 6 feet from the edge of the stockpile when it gave way. Thus it is apparent that if such instructions had been given, those instructions were customarily ignored without any corrective action by the operator.

Since I have already found that it was the regular practice for the front end loader to remove ore and thus undermine the stockpile directly beneath the dumping location, it is clear that the operator also knew or should have known that the ground above it, near the edge of the stockpile, could very well fail to support the weight of the 35-ton haul trucks dumping at the edge above. I therefore find that the violation has been proven as charged and that the operator was negligent. Under the circumstances, there also existed a reasonable likelihood of ground failure near the edge of the stockpile and that a haul truck could very well pass through the failed portion of the 30 foot stockpile resulting in death or injuries of a serious nature. The violation was therefore "significant and substantial" and of high gravity. Secretary v. Cement Division, National Gypsum Company, supra.

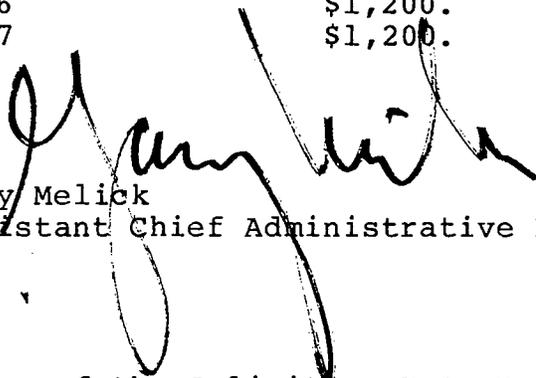
In determining the appropriate penalty to be assessed in this case, I have also taken into consideration that the operator

is of medium size and that the violative practices were immediately discontinued. There is insufficient evidence of any prior violations and no evidence that the penalties here imposed would impair the operator's ability to continue in business. Under all the circumstances, I find that penalties of \$1,200 for each violation are appropriate.

ORDER

The Cyprus Industrial Minerals Corporation is hereby ordered to pay the following civil penalties within 30 days of the date of this decision:

Citation No. 342876	\$1,200.
Citation No. 342877	\$1,200.


Gary Melick
Assistant Chief Administrative Law Judge

Distribution:

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Harley W. Shaver, Esq., Canges, Shaver, Volpe & Licht, 600 Capitol Life Center, Denver, CO 80203 (Certified mail)

nw

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

KAISER STEEL CORPORATION, : CONTEST PROCEEDING
Contestant :
v. : Docket No. CENT 81-264-R
: Citation/Order No. 326835; 8/4/81
SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH : York Canyon No. 1 Mine
ADMINISTRATION (MSHA), :
Respondent :
: :
SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. CENT 82-50
Petitioner : A.C. No. 29-00095-03059 V
v. :
: York Canyon No. 1 Mine
KAISER STEEL CORPORATION, :
Respondent :

DECISION

Appearances: David B. Reeves, Esq., Industrial Relations,
Kaiser Steel Corporation, Fontana, California,
for Contestant/Respondent;
Leo J. McGinn, Esq., Office of the Solicitor,
United States Department of Labor, Arlington,
Virginia,
for Respondent/Petitioner.

Before: Judge Vail

STATEMENT OF THE CASE

Pursuant to provisions of section 105(d) of the Federal Mine Safety and Health Act of 1977 (hereinafter the "Act"), Kaiser Steel Corporation (hereinafter "Kaiser"), filed a Notice of Contest alleging that a type 104(d)(1) citation No. 326835, was improperly issued on August 4, 1981. The notice challenged the findings accompanying the citation that the violation significantly and substantially contributed to the cause and effect of a mine safety hazard and was caused by an unwarrantable failure to comply with the standard. Pursuant to notice, a hearing was held in Raton, New Mexico. Subsequent to the hearing, the Secretary of Labor, (hereinafter "Secretary"), filed a petition proposing the assessment of a penalty against Kaiser based upon citation No. 326835 alleging a violation of mandatory safety standard 30 C.F.R. 75.601-1.

The parties stipulated that the above two cases be consolidated and that a decision in the civil penalty case be made upon the record developed in the notice of contest case. Both parties submitted post-hearing briefs.

STATUTORY PROVISION

Section 104(d)(1) of the Act, provides in pertinent part as follows:

(1) If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act

REGULATORY PROVISION

30 C.F.R. § 75.601-1 provides in pertinent part:

Circuit breakers providing short circuit protection for trailing cables shall be set so as not to exceed the maximum allowable instantaneous settings specified in this section; however, higher settings may be permitted by an authorized representative of the Secretary when he has determined that special applications are justified:

Conductor Size	Maximum allowable circuit breaker
AWG or MGM	instantaneous setting (amperes)
4/0	2,500 ^{1/}

FINDINGS OF FACT

1. Kaiser is the owner and operator of an underground coal mine near Raton, New Mexico known as the York Canyon Mine No. 1.

^{1/} There being no controversy over the type of cable and setting on the circuit breaker in this case, only that portion of the table applicable herein is set out.

2. The subject mine has a daily production of 4,301 tons of coal and employees 270 miners underground. Kaiser is considered a large operator.

3. The assessment of a civil penalty in this case will not affect Kaiser's ability to continue in business.

4. The York Canyon mine contains six working sections consisting of two longwall and four continuous miner sections. The mine is classified as "gassy" and is subject to the specific methane inspection requirements found in section 103(a)(i) of the Act (Transcript at 13).

5. On August 4, 1981, during an inspection of the 7 left longwall section of the subject mine, Federal Mine Inspector Daniel Martinez observed the number 2 circuit breaker in the power center feeding electrical current to the longwall conveyor system was set at its maximum setting of 4000 amperes (Tr. 22).

6. Electrical power to operate the machinery and equipment in various sections of the mine is transmitted through power centers which act like transformers and reduces the current to an amount permissible for the operation of the equipment.

7. The power center cited in this case is a box approximately eight feet wide by fifteen feet long containing circuit breakers which are designed as short circuit protection for the equipment in the mine. The individual pieces of equipment in the mine are attached by a cable to a distribution box which in turn is attached by another cable to the power center. Both the distribution box and power center are movable and move along in conjunction with the mining process. The distribution boxes are moved more frequently, possibly two times a week, whereas the power center may move only once every two months (Tr. 31).

8. The circuit breaker in the power center cited in this case was used to protect the supply of electrical power to the distribution box for the longwall conveyor system. The cable between the power center and distribution box was approximately 500 feet long Essex 4/0 3 conductor cable with an outer rubber jacket encasing three phase wires plus a ground and a ground pilot conductor (Tr. 32).

9. Kaiser was cited on two prior occasions, July 13 and 23, 1981, for similar violations of standard 75.601-1 as that contained in citation No. 326835 (Ex-G-3 and G-4).

ISSUES

The issues in this case are:

1. Whether a violation of 30 C.F.R. 75.601-1 occurred as alleged in citation No. 326835.
2. Whether such violation was of such a nature as could significant and substantially contribute to the cause and effect of a mine safety hazard.
3. Whether such violation was caused by an unwarrantable failure of the operator to comply with the mandatory safety standard.
4. If a violation is found, what is the appropriate penalty to be assessed.

DISCUSSION

TRAILING CABLES:

There is no dispute between the parties that the circuit breaker in the power center serving the longwall conveyor was set at a maximum setting of 4000 amperes. Also, it is agreed that section 75.601-1 requires that circuit breakers for trailing cables of the size involved here should be set at 2500 amperes. However, Kaiser argues that the cable between the power center and the distribution box cited in this case is not a trailing cable as specifically referred to in § 75.601-1 and therefore not subject to the maximum allowable circuit breaker settings for certain cable sizes. Kaiser argues that trailing cables are used primarily to connect the distribution boxes to various pieces of machinery used in the mining process and that they are exposed to hazards such as mobile equipment running over them. Kaiser contends that these same hazards to the cable are not present in the area between the power center and the distribution boxes.

An examination of the regulations causes me to reject Kaiser's definition of what is a trailing cable. Admittedly, there is not a definition of trailing cable in part 75 of the regulations or in parts 55, 56 and 57 covering electricity in open pit, sand and gravel and nonmetal mines. However, the term is expressly defined in part 18 of the regulations which deals with electrical equipment in general.

It must be noted that the definitions in part 18 are prefaced by the phrase "as used in this part." However, I believe, lacking specific definitions in part 75, these definitions should be applicable as the term should not mean one thing in part 75 and

another in 18. Particularly since the term trailing cable is used in at least five different parts of the regulations but is defined only once, that being in part 18 which applies to electric motor-driven mine equipment and accessories. Under subpart A, general provisions, are several definitions that are particularly relevant to this case and are as follows: § 18.2 definitions.

"Accessory" means associated electrical equipment, such as a distribution or splice box, that is not an integral part of an approved (permissible) machine.

"Distribution box" means an enclosure through which one or more portable cables may be connected to a source of electrical energy, and which contains a short circuit protected device for each outgoing cable.

"Portable cable" or "trailing cable" means a flame-resistant, flexible cable or cord through which electrical energy is transmitted to a permissible machine or accessory. (A portable cable is that portion of a power supply system between the last short circuit protective device, acceptable to MSHA, in the system and that machine or accessory to which it transmits electrical energy.)

The term "portable gate end boxes", "distribution box", and "distribution center" were used throughout the hearing to describe the piece of equipment into which the cables from the power center entered, and from which the cables then extended to various equipment operating on the longwall system. These boxes, whether distribution centers or portable tail gate boxes, were described as small sized, covered, square boxes, which in addition to switches, contained circuit breakers. They are mounted on skids and are moved at least several times a week as the mining process continued. It is obvious that these boxes by their description by witnesses' testimony at the hearing are an "accessory" as defined in part 18.2. It follows that the 4/0 cable in this case that connected the distribution box as "accessory" to the power center was a trailing cable as above defined for it is a "flame resistant, flexible cable or cord through which electrical energy is transmitted to a permissible machine or accessory." (emphasis added).

In light of the foregoing, I find that the cable involved in this case is a trailing cable as described in 75.601-1. Although I have seriously considered Kaiser's arguments to the contrary, I must believe that the purpose of the regulation is to provide protection in the form of a circuit breaker for the cable that is feeding power to the machine directly or by way of an accessory in the form of a distribution box. This protection provides a proper maximum setting of the circuit breaker for the particular type and size of cable used, should an electrical problem occur such as a ground fault or short circuit.

WARRANTABLE FAILURE

In that the parties agreed as to the type of cable being used in this instance, and it is admitted that the No. 2 circuit breaker in the power center was set at 4000 amperes; whereas the maximum allowed under 75.601-1 is 2500 amperes, I find that a violation of the regulation occurred.

Kaiser further argues that if it is found that a violation occurred, there was not an unwarrantable failure on their part in this instance. It is contended that even though Kaiser had been cited for similar violations on two prior occasions, the specific issue is whether they knew or should have known about the particular circuit breaker cited here.

The term "unwarrantable failure" was defined by the Interior Board of Mine Operation Appeals in Ziegler Coal Company, 7 IBMA 280 (1977) as follows: "[A]n inspector should find that a violation of any mandatory standard was caused by an unwarrantable failure to comply with such standard if he determines that the operator involved has failed to abate the conditions or practices constituting such violation, conditions or practices which the operator knew or should have known existed or which it failed to abate because of a lack of due diligence, or because of indifference or a lack of reasonable care." This definition was approved in the legislative history of the 1977 Act. S. Rpt. No. 95-181, 95th Cong., 1st Sess. 32 (1977).

The evidence of record in this case shows Kaiser was issued two prior citations for violations of 75.600-1 on July 13 and 23, 1981 and that Kaiser was aware of the existence of the problem with the circuit breakers. However, Kaiser argued, and it was indicated by memorandums they had issued, that the problem arose from disgruntled employees tampering with the settings. Even assuming that it were true that employees were responsible for the wrong settings involved in these citations, the operator's prior knowledge requires it to take whatever steps are necessary to prevent the reoccurrence of these acts and stay in compliance with the regulations of the Act. If it is not accomplished by memorandum, then other protective measures must be adopted. I therefore find that Kaiser demonstrated unwarrantable failure in their actions in this case.

SIGNIFICANT AND SUBSTANTIAL

Kaiser further argues that if a violation is found in this case, it was not such as to be of a significant and substantial nature. Extensive and divergent testimony was presented by both

parties on the safety hazards associated with the circuit breaker on the power center being set at 4000 amperes rather than the 2500 amperes provided for in the Act for the type of cable being used.

The Secretary contends in his brief that the violation would most probably result in the cable over-heating and as a consequence cause a fire or explosion. It was conceded that large numbers of miners would normally not be in the immediate area of the cable, but miners traveling along the area where the cable lay or performing pre-shift and on-shift inspections would be exposed. Also, if a fire or explosion occurred in that portion of the cable located in the intake air entry, smoke and fire would be carried forward into the face areas and present a hazard to miners working there.

Inspector Martinez, a MSHA designated coal mine inspector-electrical, testified that should a short circuit occur in the cable, with the circuit breaker set at 4000 amperes, the breaker would not trip out and the cable would become over-heated and catch fire. This would occur because of an excess of current flow (Tr. 37, 38). Further, Martinez stated that the burning of the cable caused by fire or explosion would cause smoke which would be ventilated down the face because of the location of the cable which would be inhaled by the miners resulting in asphyxiation, lung damage, and possible death. Also, the fire in the cable could cause a fire in the coal seam or float coal dust and possibly methane (Tr. 40, 93).

Kaiser refutes the testimony of inspector Martinez and argues that the construction of the cable and its specific location between the power center and distribution box made it highly unlikely it would suffer any damage that would cause a short circuit or ground fault resulting in an excessive load of electrical current. Also, because of the thermal trip system built into the circuit breaker and the existence of a ground fault system also installed, there was no probability of the occurrence described by Martinez happening. Fred Rivera, an electrical engineer and Kaiser's electrical foreman, testified that the setting of the circuit breaker at 4000 amperes rather than 2500 amperes, under the circumstances involved here, did not create a hazard. Also, the chance of fire or an electrical shock due to the high setting was practically impossible due to the construction of the cable (Tr. 116, 120).

The critical questions in this case are highly technical and Rivera's credentials as an electrical engineer and his apparent candor as a witness give considerable credibility and weight to this testimony regarding the equipment utilized at the area cited here. The most credible evidence in this matter clearly demonstrates that the cable used to connect the power center to

the distribution box serving the longwall conveyor was approximately 500 feet long consisting of 4/0 Essex, three phase, SHD cable. Because of its location, this cable is not exposed to the same hazards as the trailing cables that connect the distribution boxes to the moving equipment. That cable can incur damage resulting in a short circuit from being run over by equipment or a rock falling on it. The cable between the power center and distribution box is five times the size of the cable connecting the box to the equipment.

The circuit breaker in the distribution box is set to trip at 800 amperes for each piece of equipment connected to it and would trip-out and disconnect should there be a problem between it and the equipment it serves. The only problem considered in this citation is that which could arise with the cable between the power center and the distribution box. This would likely be a short circuit caused by damage to the cable. In addition to the circuit breaker in the power center involved here, there is a ground fault protection designed to trip out and disconnect the electrical power should a phase wire become grounded causing at least 5 amperes to run through the ground. This would occur should the cable be damaged.

Also, incorporated in the system is further protection in the form of a thermal trip set to disconnect at 600 amperes. This is designed to trip out the electrical current should it detect a load of 600 amperes or more for four or five seconds. This is similar to having too many appliance cords plugged into an electrical socket and over-loading the circuit which causes the fuse to trip.

Rivera stated that the cable is very substantial with a thick outer sheath covering three power conductors which include a metallic shield wrapped around the outer insulation of the phase indicator which is a quarter of an inch thick. In the circumstances where this particular cable was located, it was highly improbable that the cable would receive external damage that would cause a short circuit (Tr. 116, 120). If damage occurred to the cable from external causes, such as a puncture to the outer shell, this would cause contact with the grounding conductor sending current of less than 5 amperes and tripping the breaker before a short circuit occurred. If the cable were to heat for four to five seconds, the thermal rating of the breaker trips at 600 amperes which disconnects the current. If it were possible to maintain 3000 amperes, as an example for four to five seconds, this is what would happen (Tr. 118). A short circuit usually causes a surge of current far in excess of the 4000 amperes that the circuit breaker was set at and would immediately trip the breaker anyway. The final opinion of Rivera was that the likelihood of a fire or electrical shock resulting from this particular circuit breaker being set at 4000 amperes instead of 2500 is practically impossible (Tr. 120).

In light of the foregoing, I conclude that there is not a reasonable likelihood of an injury to a miner as a result of the violation herein and that the Secretary has failed to prove by a preponderance of the evidence that the violation was significant and substantial.

Also, by failure to sustain his burden of showing that the violation was significant and substantial, the § 104(d)(1) order can not stand.

PENALTY

In Island Creek Coal Co., 2 FMSHRC 279,280 (February 1980), the Commission held that section 110(a) of the Act, 30 U.S.C. § 820(a), mandates a penalty for the violation of any mandatory safety standard regardless of the impropriety of a 104(d)(1) order. Kaiser must therefore be assessed a penalty for their violation of § 75.601-1 which is a mandatory safety regulation.

The six criteria for assessing a penalty are set out in 30 U.S.C. § 820(i). The size of the operator is large. No claim was made that the proposed penalty will adversely affect Kaiser's ability to continue in business, and no such adverse consequences will be assumed. I find that Kaiser was negligent in not taking steps to ensure compliance, i.e., making the settings tamper proof. Kaiser's knowledge of the general problem of excessive circuit breaker settings is evident from their own internal memos and the two prior citations.

The possibility of injury is small. As discussed above, the collateral protection provided by the ground fault and thermal trip settings make it very unlikely that an injury would occur. If an injury did occur it would probably be serious or fatal. If the cable began to burn or smoke it could cause asphyxiation or a methane explosion. Generally there are no employees working in the area between the power center and the distribution box. However, if an explosion did occur, there is a possibility that the smoke could be carried to the working face where the longwall shear was being operated. This would expose miners to smoke inhalation or asphyxiation.

CONCLUSIONS OF LAW

Upon the entire record, and in consonance with the factual findings embodied in the narrative portion of this decision, it is concluded:

1. That the Commission has jurisdiction to decide this matter.
2. That Kaiser violated the mandatory standard published at 30 C.F.R. § 75.601-1.

3. That the violation was caused by an unwarrantable failure on the part of Kaiser to comply with standard 30 C.F.R. § 75.601-1.

4. That the violation was not of such a nature as could "significantly and substantially" contribute to the cause and effect of a safety or health hazard.

5. That Kaiser's notice of contest or application for review of citation No. 326835 is sustained as to the finding that the violation was "significant and substantially" and the designation of this citation as being a section 104(d)(1) violation is removed and amended to be a 104(a) violation.

6. That \$200.00 is the appropriate penalty for the violation.

ORDER

Accordingly, the 104(a) type citation No. 326835 is ORDERED AFFIRMED: and Kaiser is ORDERED to pay a civil penalty of \$200.00 in connection with such affirmed citation within 40 days of the date of this decision.



Virgil E. Vail
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

NOV 15 1983

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEVA 83-138
Petitioner : A.C. No. 46-02557-03504
v. :
: Jerry Run Surface Mine
THOMPSON COAL & CONSTRUCTION, :
INC., :
Respondent :

DECISION

Appearances: Thomas A. Brown, Esq., Office of the Solicitor,
U.S. Department of Labor, Philadelphia, Pennsyl-
vania, for Petitioner;
Charles G. Johnson, Esq., Johnson & Johnson,
Clarksburg, West Virginia, for Respondent.

Before: Judge Melick

Hearings were held in this case on September 22, 1983, in Clarksburg, West Virginia. A bench decision was thereafter rendered and appears below with only non-substantive changes.

The case before me today is based upon the Petition for Assessment of Civil Penalty filed by the Secretary of Labor, Mine Safety and Health Administration (MSHA). One violation of the standard at 30 CFR Section 41.20 is alleged and charges the Thompson Coal & Construction Company, Inc. (Thompson), with failing to file an updated "Form 2000-7" with the MSHA District Manager listing the operating officials and principal officer in charge of safety at the Jerry Run Mine. The standard at 30 CFR Section 41.20 requires that "[e]ach operator of a coal or other mine shall file notification of legal identity and every change thereof with the appropriate District Manager of the Mine Safety and Health Administration by properly completing, mailing, or otherwise delivering Form 2000-7. 'legal identity report' which shall be provided by the Mine Safety and Health Administration for this purpose."

The general issue before me, of course, is whether there was indeed a violation as alleged, and, if so, what is the appropriate civil penalty to be assessed. The specific issue before me is whether on December 8th, 1982, the date this citation was issued and the violation cited, the mine operator had failed to file a modification of his legal identity report as required. The evidence in this case shows that as of March 15, 1982, the operator had filed a proper legal identity report (Form 2000-7), and there is no dispute over that (Exhibit G-2). At that time, Richard L. Bryant was identified as mine superintendent and in charge of health and safety. The evidence shows that when MSHA Inspector Alonzo Curry appeared on December 8, 1982, for a spot inspection at Thompson's Jerry Run Mine, Bryant was not present and that Larry Reall represented to the inspector that he was then in charge of health and safety and was mine superintendent. It is not at all clear, however, how long Mr. Reall had been in charge, either as superintendent or in charge of health and safety matters, and it appears that there was a transitional period around this time; that is, transition from Mr. Bryant's being superintendent and in charge of health and safety and turning those responsibilities over to Mr. Reall.

Now, Section 41.20 of the regulations does not set forth any time limit within which the operator must file his notification of changes in his legal identity. However, 30 CFR § 41.12 gives the operator thirty days after the occurrence of any change to file the information required and the Secretary has acknowledged in this case that the operator would indeed have thirty days from the date of any change to file any corresponding modification to his legal identity report.

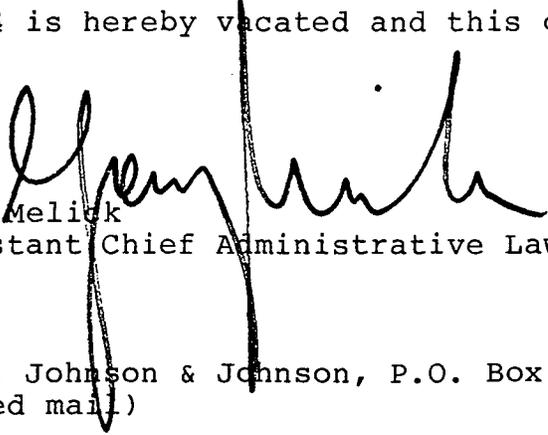
Under the circumstances of this case it is not known precisely when the change in job responsibilities actually occurred. There is absolutely no evidence on that point so as of December 8th, when the citation was drawn, it is not known whether Mr. Reall had been acting as superintendent and in charge of health and safety for one day, five days, twenty days, thirty days, forty days, or whatever. Under the circumstances, it is impossible to determine whether the operator failed to

file within 30 days of the change in management. Accordingly, I cannot find a violation of the cited standard, and I am going to vacate the citation.

I think in spite of this ruling that Mr. Thompson does recognize the significance of filing these reports even though, in this case, it appears that there is no question that there was someone in charge, whether it was Bryant or Mr. Reall. If MSHA is unable to maintain a current roster of who is responsible for the operation of a mine and who is going to be in charge of health and safety, some less responsible operators would certainly use that to their advantage in not complying with health and safety matters and perhaps would not even have someone in charge of health and safety. So, although there is not that situation in this case, I think the operator would have to recognize that there is a valid reason for this regulation to be on the books, and it is essential that it be complied with.

ORDER

Citation No. 2020854 is hereby vacated and this case is dismissed.


Gary Melick
Assistant Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

NOV 17 1983

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. VA 82-41
Petitioner : A.C. No. 44-05171-03022F
: :
v. : No. 1 Mine
: :
BRIDGETT COAL COMPANY,
Respondent

DECISION APPROVING SETTLEMENT

Before: Judge Fauver

The Secretary has moved for permission to withdraw his petition for assessment of civil penalty on the ground that Respondent has paid the full amount of the proposed penalty (\$3,000).

Section 110(k) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq., provides that "No proposed penalty which has been contested before the Commission under Section 105(a) shall be compromised, mitigated, or settled except with the approval of the Commission." Respondent's payment of the proposed penalty is deemed to be an offer of settlement, and not grounds for withdrawing the Secretary's petition. Accordingly, the Secretary's motion to withdraw the petition is DENIED, but deemed to be a motion to approve settlement.

This proceeding involves a Section 104(a) citation, No. 942313, alleging a violation of 30 CFR 75.200, for failure of the operator to follow the approved roof control plan by not installing cap blocks between the jacks and the mine roof, or not providing bearing plates of not less than 36 square inches. The Secretary contends the violation was serious because 2 roof bolters were killed when an undetected slip in the roof caused a roof fall. Investigation by MSHA determined that the absence of the required cap blocks or steel plates contributed to the extent of the fall, and the two fatalities. The Secretary also contends the operator was negligent since it is its responsibility to enforce the provisions of the roof control plan. There were no witnesses to the accident, and the required blocks or plates were used in other areas of the mine as required. Based upon the single penalty assessment criteria set forth in 30 CFR 100.4 MSHA proposed a penalty in the amount of \$3000.00.

The Solicitor of Labor has been advised by MSHA that payment in full was made by the Operator, on September 30, 1983.

Counsel for the Secretary has reviewed the factual circumstances of the violation as well as all relevant criteria including company size, negligence, gravity, and good faith in abatement. Based upon this review of the facts and assessment procedures employed, the Secretary believes payment in full of the proposed penalty in the amount of \$3000.00 is reasonable, and that payment in this amount will serve to effect the intent and purposes of the Act.

I find that the proposed settlement is consistent with the criteria for assessing civil penalties in Section 110(i) of the Act and is supported by the record. Accordingly, the motion is GRANTED.

ORDER

WHEREFORE IT IS ORDERED THAT settlement by payment of the above-mentioned amount of civil penalty is APPROVED and this proceeding is DISMISSED.

William Fauver

William Fauver
Administrative Law Judge

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kg

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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NOV 22 1983

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No: CENT 83-12
Petitioner : A/O No: 34-01242-03501
: :
v. : Porter No. 1 Mine
: :
TURNER BROTHERS, INC., :
Respondent :

DECISION

Appearances: Reid Tilson, Esq., Office of the Solicitor,
U.S. Department of Labor, 555 Griffin Square,
Dallas, TX 75202, for Petitioner;

Before: Judge Moore

This civil penalty case came on for hearing in Tulsa, Oklahoma, on November 1, 1983. Mr. Tilson, an attorney in the Dallas Regional Solicitor's office came to Tulsa from Dallas, and I came to Tulsa from Falls Church, Virginia, but respondent's counsel, Mr. Petrick, apparently did not think this case important enough to come the approximate 40-some miles from Muskogee, Oklahoma. Nor did he think it important enough to inform either Mr. Tilson or me that he intended not to appear. Before making my travel plans the week before the trial I called Mr. Petrick's office, and while he was out of town, his secretary did manage to reach him. She informed me that he said to go ahead with the hearing because he could not reach a settlement.

Mr. Tilson had informed me by telephone prior to the trial that he had made a settlement offer, but that he had not been able to get in touch with Mr. Petrick, himself, to learn what Mr. Petrick's views were. While I do not know what settlement was offered by Mr. Tilson, I suspect it was under the proposed assessment of \$168. It is a matter of public record that in the week before trial, Mr. Petrick had failed to appear at a Turner Brothers hearing before Judge Melick in Fort Smith, Arkansas. Because of this cavalier attitude toward the Federal Mine Safety and Health Act, which shows the contempt with which the respondent regards the Federal inspectors and the Federal Mine Safety and Health Review Commission, I am adding \$100 to each penalty that I hereinafter assess.

The five citations involved in this case concern two pieces of equipment. As the testimony of Inspector Clyde Davis shows, citation number 2007441 was issued because a bulldozer did not have the seat belts required by 30 C.F.R. 77.1710(i). The bulldozer was working on a 10% grade (1' vertically for every 10' horizontally) which the inspector considered steep. The bulldozer is normally in operation for twelve hours a day, seven days a week. If the bulldozer had turned over the resulting injury could have been fatal.

Turner Brothers is the largest, or second largest coal mining operation in the state of Oklahoma. I find it was negligent and that there is a small history of prior violation. Abatement was accomplished the next day, but the bulldozer continued in operation after the citation was issued. The Secretary did not prove a high degree of gravity. The Assessment Office considered this an appropriate case for a \$20 single penalty. I assess \$100 plus the previously mentioned \$100 for attitude for a total of \$200.

The other five citations involved a truck about the size of the old Army 6x6 which contained one thousand gallons of diesel fuel plus lubricating oil. This truck had the function of refuelling and oiling all the other mobile equipment at the mine. At the time that the citations were issued the truck had not performed its usual function of going to the location of the equipment that needed servicing. Two pieces of equipment had come to the truck for fuel, but ordinarily it would go throughout the mine servicing the various pieces of mobile equipment. This truck had no parking brake (Citation 2007442), it had no regular road brake (Citation 2007443), it had no horn (Citation 2007444) and it had no back-up alarm (Citation 2007445). The truck was a menace and had an imminent danger order been issued I would have affirmed it. Instead of an order, four citations were issued with respect to this truck, and three of them were not marked significant and substantial and were assessed at \$20 each. Citation 2007443 was marked as significant and substantial and the assessment office did assess a \$68 penalty for that citation.

The inspector issued another citation, No: 2007446 which charged a violation of 30 C.F.R. 77.1606(a) in that because of all of the other violations it was obvious that the equipment was not being inspected and equipment defects were not being reported to the mine operator. I find that all these citations were valid and that the hazard and negligence were

of a very high order. I assess \$1,000*/ for each of the five citations concerning the refuelling truck and add \$100. to each for respondent's attitude.

The citations are AFFIRMED and respondent is ORDERED to pay to MSHA, within 30 days, a penalty in the total sum of \$5,700.

Charles C. Moore, Jr.
Charles C. Moore, Jr.,
Administrative Law Judge

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Mr. William Turner, President, Turner Bros. Inc., P.O.B. 447,
Muskogee, OK 74401 (Certified Mail)

Reid Tilson, Esq., Office of the Solicitor, U.S. Department
of Labor, 555 Griffin Square, Suite 501, Dallas, TX 75202
(Certified Mail)

* There was a discrepancy in the Inspector's testimony about whether the truck was taken out of service, or whether respondent continued to use it. (Tr. 24). I accept his latter testimony (Tr. 37) that the truck was taken out of service. Otherwise, I would assess higher penalties concerning this truck.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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NOV 23 1983

MONTEREY COAL COMPANY, : CONTEST PROCEEDING
Contestant :
v. : Docket No. WEVA 83-136-R
: Order No. 2034234; 3/2/83
: SECRETARY OF LABOR, : Docket No. WEVA 83-137-R
MINE SAFETY AND HEALTH : Citation No. 2034235; 3/7/83
ADMINISTRATION (MSHA), :
Respondent : Wayne Mine
: SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEVA 83-199
Petitioner : A. C. No. 46-05121-03513
v. : Docket No. WEVA 83-230
: A. C. No. 46-05121-03514
MONTEREY COAL COMPANY, :
Respondent : Wayne Mine

DECISION APPROVING SETTLEMENT AND
ORDER GRANTING MOTION TO DISMISS

Before: Judge Steffey

Counsel for the Secretary of Labor filed on November 16, 1983, in the above-entitled proceeding motions to approve settlement with respect to the two civil penalty cases listed above. Under the settlement agreements, respondent has agreed to pay the full amount of \$3,500 proposed for the violations alleged in both civil penalty cases. Counsel for Monterey Coal Company filed on November 18, 1983, a motion to withdraw the contest pleadings filed in Docket Nos. WEVA 83-136-R and WEVA 83-137-R on the grounds (1) that the witnesses on whose testimony Monterey would have to rely at a hearing are unavailable and (2) that Monterey has entered into settlement agreements with respect to the civil penalty cases. I find that the motions to approve settlement and the motion to withdraw should be granted for the reasons hereinafter given.

Section 110(i) of the Federal Mine Safety and Health Act of 1977 lists six criteria which are required to be considered in determining civil penalties. One of those criteria is whether the payment of penalties would cause respondent to discontinue in business. There are no data in the official file or in the motions for approval of settlement providing any information about respondent's financial condition. The Commission held in Sellersburg Stone Co., 5 FMSHRC 287 (1983), that when an operator

fails to present any evidence concerning its financial ability in a civil penalty proceeding, a judge may presume that payment of penalties will not cause the operator to discontinue in business. In the absence of any information in this proceeding to support a contrary finding, I find that payment of penalties will not adversely affect respondent's ability to continue in business.

As to the criterion of the size of the operator's business, the proposed assessment sheets attached to the motions for approval of settlement show that Monterey Coal Company produces about 18,670,610 tons of coal on an annual basis and that the Wayne Mine, here involved, produces approximately 149,220 tons of coal per year. Those production 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.

A third criterion listed in section 110(i) is respondent's history of previous violations. The proposed assessment sheets accompanying the motions for approval of settlement indicate that Monterey has been assessed penalties for 60 violations during 129 inspection days in the 24-month period preceding the occurrence of the two violations alleged in this proceeding. That history of previous violations caused MSHA to assign two penalty points under section 100.3(c) of the penalty formula described in 30 C.F.R. § 100.3. Inasmuch as an operator may be assigned up to 20 penalty points under section 100.3(c), I find that respondent has a very favorable history of previous violations and that low penalties should be assessed to the extent that they are determined under the criterion of respondent's history of previous violations.

A fourth criterion listed in section 110(i) requires consideration of whether respondent demonstrates a good-faith effort to achieve compliance after an alleged violation has been cited. Both of the motions for approval of settlement state that respondent did demonstrate a good-faith effort to achieve compliance after the violations here involved were cited. Therefore, respondent should be given credit for having reacted properly when it was advised that the inspector believed it had violated two mandatory health and safety standards.

The remaining two criteria of gravity of the violations and whether respondent was negligent with respect to their occurrence should be considered in light of the specific violations alleged by the inspector. Both of the violations involve the same factual situation in that six miners, including a section foreman, were making repairs to a continuous-mining machine. In Citation No. 2034235, the inspector cited respondent for a violation of section 75.1726(b) because of respondent's failure to block the raised ripper head of the machine. Citation No. 2034236 cited respondent for a violation of section 75.1725(c) because the cat-head of the machine's power cable had not been tagged and locked out.

The motion for approval of settlement states that both alleged violations were the result of a high degree of negligence because a section foreman was assisting in making the repairs and he should have made certain that the ripper head was secured to prevent it from falling and should have made certain that the power would not come on while the repairs were being made. The motion also states that both alleged violations were serious because the same continuous-mining machine on the same working section had previously been involved in a fatal accident in similar circumstances.

In view of the fact that a large operator is involved and that the alleged violations were both serious and associated with a high degree of negligence, it appears that MSHA appropriately proposed a penalty of \$2,000 for the violation of section 75.1726 (b) and a penalty of \$1,500 for the violation of section 75.1725 (c). Since respondent has agreed to pay the full amounts proposed by MSHA, I find that the motions for approval of settlement should be granted and that Monterey's motion for withdrawal of the contest pleadings should be granted.

WHEREFORE, it is ordered:

(A) Monterey Coal Company's motion to withdraw is granted, the contest pleadings filed in Docket Nos. WEVA 83-136-R and WEVA 83-137-R are deemed to have been withdrawn, and the proceedings in those two dockets are dismissed.

(B) The motions for approval of settlement filed by the Secretary of Labor are granted and the settlement agreements are approved.

(C) Pursuant to the parties' settlement agreements, Monterey Coal Company shall, within 30 days from the date of this decision, pay civil penalties totaling \$3,500 which are allocated to the respective alleged violations as follows:

Docket No. WEVA 83-199

Citation No. 2034235 3/2/83 § 75.1726(b) \$2,000.00

Docket No. WEVA 83-230

Citation No. 2034236 3/2/83 § 75.1725(c) \$1,500.00

Total Settlement Penalties in This Proceeding \$3,500.00

Richard C. Steffey
Richard C. Steffey
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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NOV 25 1983

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 83-9-D
ON BEHALF OF	:	
FRANK CRONIN AND MERREL NIXON,	:	MSHA Case No. VINC-CD-82-17
Complainant	:	
	:	Sunnyhill No. 9 South Mine
v.	:	
	:	
PEABODY COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Patrick M. Zohn, Esq., Office of the Solicitor, U. S. Department of Labor, Cleveland, Ohio, for Complainant;
Michael O. McKown, Esq., St. Louis, Missouri, for Respondent;
Thomas Myers, Esq., Shadyside, Ohio, for Intervenor.
Local Union 1340, UMWA District Six.

Before: Judge Steffey

Pursuant to an order consolidating issues and providing for hearing issued August 12, 1983, a hearing in the above-entitled proceeding was held on September 27 through September 30, 1983, in Columbus, Ohio, under section 105(c)(2), 30 U.S.C. § 815(c)(2), of the Federal Mine Safety and Health Act of 1977.

The complaint was filed on October 19, 1982, and alleges that respondent attempted to discharge both complainants because they refused to shovel coal out of a belt feeder without proper precautions having been taken to assure that the belt feeder was deenergized and that all power to the belt feeder had been disconnected. It is also alleged that respondent prohibited complainants from exercising their right to have a safety committeeman called to determine if complainants were properly exercising their individual safety rights. The discharge was subsequently modified by an arbitrator to a 5-day suspension without pay and employee benefits. Therefore, the primary economic relief sought by complainants was full back pay and employment benefits for the 5-day suspension.

After the parties had completed their presentations of evidence, I rendered the bench decision which is reproduced below (Vol. IV, Tr. 30-59):

It is necessary in a decision such as this to make some findings of fact. After 3 long days of hearing, the findings are somewhat extensive, but I feel that they are necessary in order to set forth the basic facts which the various witnesses have presented. The findings will be made in enumerated paragraphs.

1. Merrel Nixon and Frank Cronin were working in Peabody's Sunnyhill No. 9 South Mine on June 23, 1982, on the 4-p.m.-to-midnight shift as the loader operator and loader helper, respectively, in the 1 South 1 East Section. They traveled into the mine in a man trip and arrived on the section about 4:45 p.m. There was a lack of brattice curtains and there were some water leaks in the hoses supplying water to the loading machine, but eventually enough curtains were obtained to provide the required 9,000 cubic feet of air per minute at the last open crosscut and an adequate amount of water was provided for loading coal.

2. After Nixon and Cronin had loaded two or three cuts of coal, their section foreman, Ralph Simms, ordered them to go to the feeder which was out of order. They went to the feeder and found that it had been trammed to a point about 25 feet in by the tailpiece where the feeder was stuck in a diagonal position in D Entry, which is also known as the belt entry.

3. A repairman named Milan Bizic had determined that the tram chain had broken which prevented further movement of the feeder under its own power. The conveyor belt on the feeder was also inoperable, and Simms, the section foreman, believed that the repairs to the conveyor belt could not be made unless someone shoveled about 2 tons of coal out of the feeder. Simms, therefore, asked Cronin to obtain two coal shovels at the tailpiece so that the coal could be removed from the feeder where it had been left in a pile when the conveyor chain broke. After Cronin had obtained the two shovels, Nixon and Cronin claim that Simms asked them to get into the feeder and shovel out of the feeder 2 tons of coal which were in the feeder when the feeder's conveyor belt ceased to work.

4. Cronin asked Simms if the power was off the feeder and Simms did not answer Cronin until Cronin had asked about the feeder's deenergization a second time. After Cronin's second question, Simms told Cronin the power would not hurt him and that the breaker had been knocked or turned off. Cronin and Nixon then went around to the end of the feeder into which the shuttle cars dump coal and started shoveling coal from that position with their feet on the mine floor. Nixon and Cronin say, however, that Simms, after telling them to get up into the feeder twice, gave them a third order to get up in the feeder and shovel coal. At that point, Nixon claims he asked Simms to

call the Safety Committee. Nixon and Cronin say that without responding to Nixon's request for the Safety Committee, Simms left the feeder and went into the dinner hole. Nixon and Cronin say they thought Simms had gone to call the Safety Committeemen, but, in fact, he called the Mine Manager, John Ludwig, and asked him to send a vehicle to the section to transport from the mine two employees who had refused to shovel coal when Simms asked them to do so.

5. After Simms had finished talking to Ludwig, he returned to the feeder where Nixon and Cronin say they were still shoveling coal from the dumping end of the feeder. Nixon and Cronin say that Simms advised them that their time had stopped and he told them to go to the dinner hole and wait to be taken out of the mine.

6. About 20 minutes later, Ludwig arrived on the section with Assistant Mine Manager John Holskey. Ludwig went into the dinner hole where other miners were waiting for Simms to give them further orders. While Ludwig was in the dinner hole, the operator of the roof-bolting machine, Ronald Baker, told Ludwig that he had personally observed both Nixon and Cronin shoveling coal out of the feeder when he walked within 30 feet of the feeder on the way to the dinner hole. Ludwig responded that he had come to take Nixon and Cronin out of the mine rather than to argue the merits of the situation.

7. While Nixon and Cronin were walking to the personnel carrier, known as a "mule," to be taken out of the mine, Nixon asked for safety glasses because Peabody has a rule that persons riding in open vehicles should wear safety glasses. Ludwig wanted to know if they had not been issued safety glasses, and they replied, "Yes," but Cronin had left his at home and Nixon had left his in his clothes basket in the bathhouse. Ludwig obtained glasses for them and they started out of the mine in the mule, but the batteries were low on power and would hardly move the mule. The batteries continued to lose power, so Ludwig and Holskey called for another vehicle to come to pick them up and they transferred to another personnel carrier called a four-man rover. Nixon asked to inspect the brakes and lights before he got into the rover, but Cronin said that Holskey told Nixon to get the goddamn hell in here; you don't need to inspect. Therefore, Nixon and Cronin got into the rover and all four men went on out of the mine. Once they reached the surface, Nixon saw MSHA Inspector Elmer Cornett and went to him to ask him to check the lights and the brakes on the rover because Holskey had refused to let him examine the rover. Nixon went with Cornett to examine the brakes and lights on the rover and Cornett found them to be satisfactory. Nixon then told Cornett about a missing jack and bar. Cornett wrote a citation for the failure of the rover to have a jack and bar, after

Cornett had returned to his office and had obtained a proper safeguard notice for inclusion in the citation as a basis for its issuance.

8. Nixon also told Cornett that he and Cronin had been fired, but Nixon did not finish explaining the details to Cornett because Ludwig advised Nixon and Cronin that they should leave the mine property as they had been suspended.

9. Nixon and Cronin came back to the mine for a 24/48-hour meeting on their suspension notices, but there had been a partial work stoppage and John Goroncy, the mine superintendent, declined to participate in a discussion of the merits of the suspension at that time. Goroncy did, however, hand Nixon and Cronin a letter of suspension with intent to discharge. A meeting on the merits was eventually held after the 48-hour period had expired and the matter went to arbitration. A hearing was held on July 15 and July 22, 1982, and the arbitrator's decision was issued on August 10, 1982. The arbitrator held that Nixon and Cronin had contrived the safety issue as a pretext after they were discharged, but he also held that discharge was overly severe under the circumstances and required Peabody to reinstate Nixon and Cronin after suspending them for 5 days without pay and other employee benefits.

10. Elmer Cornett, the inspector who wrote the citation for failure of Peabody to have a jack in the rover, as described in Finding No. 7 above, was at the mine on June 23 for the purpose of performing a respirable dust inspection. He had been on the 1 South off 1 East Section for about the first 2 or 3 hours of the shift and had taken an air reading indicating at that time that there was a velocity of 9,500 cubic feet per minute at the last open crosscut. Although he was performing a respirable dust inspection, he could have written a citation for any violation he might have seen, but wrote none. He left the 1 South off 1 East Section before the feeder became inoperable, but he testified that it would have been a violation of section 75.1725(c) for Nixon and Cronin to have been inside the feeder shoveling coal without having the power cable locked out at the power center. The inspector said he would consider it a violation for Nixon and Cronin to shovel from the dumping end of the feeder if their shovels had come into contact with the conveyor belt while the breaker was off on the feeder but with the power cable still energized. He also said he would consider it unsafe for Nixon and Cronin to shovel out coal from the dumping end of the feeder while the breaker was off if the power cable was still energized; and that while he might not write a citation for shoveling in the last-described instance, he would still require them, that is, Nixon and Cronin, to stop shoveling in that situation as he considered that such shoveling would be an unsafe practice, because there is always

a chance that the feeder could move even though the breaker has been put in the off position.

11. Wayne Hart was one of the shuttle car operators on June 23 when the feeder became inoperable. Simms asked him to assist in the repair work on the feeder. After Hart had assisted Simms and Milan Bizic, the repairman, in lining up the tram chain, Bizic went to the parts wagon to get a connecting link. Therefore, Hart claims that he was the only other person present at the time Simms ordered Nixon and Cronin to get into the feeder and shovel coal. Hart said that he is certain that Simms wanted Nixon and Cronin to get inside the feeder to shovel coal, and Hart insisted that the only way the feeder could have been completely cleared of coal would have been for them to get into the feeder at its narrowest point, that is, inby the apron where the shuttle cars dump coal. Nixon and Cronin would have had to have been very close to the pick breakers in order to shovel from the position described in the preceding sentence. Hart claims that he is certain from the gesture made by Simms when he ordered Nixon and Cronin to shovel coal that Simms wanted them to shovel coal from inside the feeder in the aforesaid position which is also the location which Nixon and Cronin say they believe they were ordered by Simms to position themselves for shoveling. Hart also claims to have heard Nixon ask for the Safety Committee and alternate work and he supported Nixon's claim that Simms did not respond to Nixon's request for the Safety Committee to be called. Hart also claims that he thought Simms had gone to call the Safety Committee and said that he was very surprised when Simms returned and advised Nixon and Cronin that their time had stopped and that they should go to the dinner hole to be taken out of the mine.

12. Milan Bizic was the repairman on 1 South off 1 East Section. He explained that the feeder stopped functioning when the chain which drives the conveyor belt stopped working and that he and Simms agreed that coal could still be produced on that shift if the feeder were trammed out of the way so that one of the shuttle cars could be lined up with the conveyor belt and used as a temporary feeder while the other shuttle car continued to haul coal. It was their intention to tram the feeder into the second crosscut outby the face, but the tram chain also broke so as to leave the feeder in a position which prevented use of a shuttle car as a substitute feeder. After Simms, Bizic, DeMoss, and Hart had done some alignment on the tram chain, Bizic left to get a connecting link. He spent about an hour at the parts wagon without ever finding the part he wanted, but finally he started back to the feeder with a bolt with which he hoped to make a temporary repair of the tram chain. He found that everyone else on the crew had gone away from the feeder to the dinner hole, so he also went to the dinner hole and did not go back to work on the feeder at all.

13. Bizic has had 34 years of experience in coal mines including a lot of work as a repairman and as a safety inspector for Consolidation Coal Company. He did not hear Simms order Nixon and Cronin to get into the feeder to shovel coal, but he did not think it would have been safe for them to work in the feeder without having the trailing cable locked out at the power center. He said any miner had the right to go to the power center and disconnect the cathead before getting on a piece of equipment to work where moving parts might cause him injury, if the machine were to start as he has known equipment to start, even after the breaker switch has been turned off. Bizic said that if he had been present when Simms ordered Nixon and Cronin to shovel coal, he would have gone to the power center and would have locked out the cathead for the feeder's power cable regardless of whether Simms asked that that be done or not.

14. The superintendent of the Sunnyhill Mine on June 23, 1982, when Nixon and Cronin were suspended with intent to discharge, was John Goroncy. He was called at home by Ludwig between 11:30 p.m. and midnight and was told that Ludwig had brought Nixon and Cronin out of the mine for refusing to obey Simms' direct order to shovel coal out of the feeder. Goroncy specifically asked Ludwig if a safety issue was involved, and Ludwig said that no safety issue was raised about the refusal to shovel coal, but that Nixon and Cronin had requested safety glasses before riding in the mule and had been given glasses, and that Nixon had requested that he be allowed to inspect the four-man rover when they transferred to that vehicle, after the batteries ran down on the mule, and that Nixon would not get into the rover until Holskey had given him a direct order to do so. Goroncy denied that Holskey used profanity in ordering Nixon to get into the rover.

15. Goroncy confirmed Nixon's and Cronin's statement that the next morning, June 24, Goroncy personally handed Nixon and Cronin letters stating that they had been suspended with intent to discharge. Goroncy said that he refused to hold a 24/48-hour meeting provided for in the Wage Agreement when he learned that there had been a work stoppage at the Sunnyhill Mine. Goroncy said a 24/48-hour meeting was eventually held within the 48-hour period based on the date when the miners returned to work. Goroncy declined to reinstate Nixon and Cronin to their jobs after that meeting and the matter went to arbitration as described in Finding No. 9, supra.

16. Goroncy, who has a B.S. degree and is a professional engineer with electrical training, introduced Exhibits A, G, H, and I to show the power circuits on the feeder. In layman's terms, there is a lever on the side of the feeder which, when pushed down, stops the power from flowing into the circuit breaker. The lever has to be pushed down and pulled back through a horizontal position to reenergize the circuit breaker.

Additionally, there are 3 buttons to the right of the breaker lever as shown on Exhibit A. They are labeled and one starts the pick breakers to running when held in for about 2 seconds; another button starts the conveyor belt moving after the pick breakers have started; and the third button is a stop button which will stop both the pick breakers and the belt conveyor from moving, but the circuit breaker does not open until the lever is pushed down. Although Goroncy thinks it is safe to shovel coal out of the feeder with only the breaker switch pushed down, he would feel safe about having a person work inside the feeder near the pick breakers only with the cathead on the feeder cable withdrawn at the power center.

17. Goroncy made the decision to discharge Nixon and Cronin. In doing so, he did not take into consideration that neither of them had ever previously refused to obey a work order given by their supervisor. Goroncy said that it was important that discipline be maintained, because Peabody is responsible for all personnel and discipline is easily eroded if employees can ignore a section foreman's work orders without giving a reason which management can consider and evaluate at the time the employee refuses to obey the order. Goroncy thinks that the issue of Simms having ordered Nixon and Cronin to get into the feeder to shovel coal was raised for the first time at the arbitration hearing.

18. Ralph Simms' testimony agreed in general with the findings made above. He agrees that he was confronted with a number of production problems during the early part of the shift on June 23, but he considers them to have been routine in nature. He agrees that there were broken trailing cables and problems with curtains and water hose connections, but he said that his first real difficulty occurred about 9:30 p.m. when the conveyor chain on the feeder broke just as a shuttle car was dumping coal on it. He said that he tried to get the feeder out of the belt entry so that a shuttle car could be used as a substitute, temporary feeder, but the tram chain broke, thereby leaving the feeder stalled partially in the second crosscut from the face and partially in the belt entry. At that point he knew he could not produce any more coal, so he left the feeder and made a tour of the face giving orders to the miners to hang curtains, take the cutting machine to the track for replacement of a tire, and requesting Nixon, Cronin, and Hart to assist down at the feeder.

19. Simms' testimony varies from Nixon's and Cronin's in important respects from the point that DeMoss, Bizic, Hart, Nixon, and Cronin gathered at the feeder. Simms said they first tried to get the tram chain repaired and that DeMoss, Bizic, and Hart were working on that while he asked Cronin to get two shovels to shovel coal out of the feeder. Simms agreed that

Cronin asked if the power was off the feeder; and Simms stated that he told Nixon and Cronin that the breaker had been knocked and stated that Nixon and Cronin finally went to the dumping end of the feeder and threw out three or four shovels of coal. At that point, Bizic asked that the tram cogs be jogged so that it was necessary to ask Nixon and Cronin to stand back while he reenergized or closed the circuit breaker on the side of the feeder. After Simms had lined up the cogs to Bizic's satisfaction, he pushed the breaker lever back down to deenergize the circuit breaker. By that time, Nixon and Cronin had gone over and had sat down against the rib of the closest pillar in the crosscut. Simms stated that he asked them twice again to resume shoveling; and that after one request, Nixon told Simms to get off his back. Simms said he told Nixon he was not on Nixon's back, but that the coal needed to be shoveled out of the feeder so that the next shift, which was purely a maintenance shift, could repair the conveyor chain. Simms claimed that he finally addressed Nixon and Cronin by name and told them he was giving them a direct order to shovel coal. When they still did not respond, he told them that if they were not going to work, he would get them a ride out of the mine. Thereafter, Simms called Ludwig, the mine manager, and asked him to send transportation for two miners who refused to obey an order to shovel coal. After calling Ludwig, Simms returned to the feeder and told Nixon and Cronin that, as far as he was concerned, their time had stopped and that they could go to the dinner hole and wait for their transportation out of the mine.

20. Simms' testimony also differs from Nixon's and Cronin's in that Simms claims DeMoss came around the dumping end and began shoveling coal when Nixon and Cronin failed to respond to Simms' order. Simms' statement also differs from Hart's testimony in that Simms claims he told Hart to shovel when Nixon and Cronin failed to do so, and that Hart did shovel, whereas Hart denies that he ever shoveled any coal at all. Hart also claims that DeMoss went with Bizic to the parts trailer and that no one was left around the feeder other than Hart, Simms, Nixon, and Cronin. Simms also denies that Nixon requested the Safety Committee, whereas Nixon and Hart both say Nixon requested the Safety Committee; and Hart even claims that Nixon asked for alternate work, which Nixon himself never claims to have requested.

21. Ludwig received the phone call from Simms about 11:30 or 11:40 p.m. Ludwig first asked Holskey to go in the mine by himself and bring Nixon and Cronin out, and then decided he would go along and get first-hand knowledge of the facts. On the way in, they came to a derailed supply car and transferred from a four-man rover to a five-man mule. The jack from the mule was being used to get the car back on the track, so Ludwig took the jack from the rover and put it in the mule. On the way back out of the mine, the batteries became so weak in the mule that Holskey had to call for another vehicle and the pumper

brought them the four-man rover they had used to commence their trip into the mine in the first place. Ludwig forgot to remove the jack from the mule and replace it in the rover. Therefore, when all four men arrived on the surface, Inspector Cornett was waiting for Nixon to come out of the mine with the respirable dust sampling device which Cornett had put on Nixon at the beginning of the shift. Nixon asked Cornett to inspect the rover, and Nixon told Cornett that there was no jack in the rover. Cornett found the brakes and the lights working satisfactorily, but as indicated in Finding No. 7, supra, there was no jack in the rover.

22. Ludwig's testimony generally conforms with the other witnesses' testimony except that he denied that Holskey used profanity in ordering Nixon to get into the rover when they transferred from the mule to the rover on the way out of the mine. Also Ludwig stated that Baker remarked when he, Nixon, and Cronin were leaving the dinner hole to go to the mule, that Baker told Nixon and Cronin to go on to the surface with Ludwig and that the Union would see that they returned to work the next day with full pay. Ludwig also claims that even though he declined to argue with Baker as to whether Nixon and Cronin had actually shoveled any coal, that his refusal to argue that point was no reason for Baker to refrain from discussing a safety issue with him if one existed. Ludwig's recollection of Nixon's discussion with Cornett was that Nixon only told Cornett about the jack in the rover, whereas Cornett claims that Nixon told him about other things, including the fact that he had been fired.

23. Holskey's testimony is also in general agreement with that of the other witnesses, except that he denied that he used profanity in ordering Nixon to get into the rover and stated that it is contrary to Peabody's policy for management personnel to use profanity in giving orders to employees. Holskey had just come out of the mine from accompanying Inspector Cornett underground when Simms called, thereby requiring him to go immediately back underground. Neither Ludwig nor Holskey recall that Cornett was at the mine on June 23 to make a respirable dust inspection and neither recalls that Nixon was wearing a respirable dust collecting device, but Holskey said the mine was inspected so frequently that he could not recall the specifics as to the inspectors' visits to the mine. Holskey said that he, Ludwig, and Simms discussed the shoveling incident and each of them wrote a separate report at Goroncy's request, and that it was about 1:00 a.m. when he and Simms left the mine to return home. Holskey and Simms are in the same car pool.

In the arguments which the parties made prior to the rendering of the bench decision, Mr. McKown referred to some pertinent Commission and court cases with respect to what is required before it can be said that a miner has properly raised his right to refuse to work because of a safety problem.

One of the cases that Mr. McKown mentioned is Secretary on behalf of Michael J. Dunmire and James Estle v. Northern Coal Co., 4 FMSHRC 126 (1982). In that case the Commission stated that where reasonably possible, a miner should ordinarily give the operator an expression of the hazard at issue before leaving; and if not possible, as soon after leaving as reasonably possible. There should also be a good-faith belief as to the existence of the hazard.

Mr. McKown has made that same observation about the requirements for raising a refusal to work because of a hazardous condition. And, as Mr. McKown also pointed out, if a miner does refuse to work, he should make the complaint about the unsafe condition so that the operator would be able to take action to correct the unsafe condition and protect other miners who are still working.

I think that Mr. Zohn has stated in reply to Mr. McKown's argument that there were no other people who could have been assigned to shovel in this instance, but, it is a fact that Cronin testified that when he went into the dinner hole, Hart and Bizic were shoveling coal out of the feeder. That was also the testimony of Simms, except that Simms stated that DeMoss and Hart were shoveling coal out of the feeder. So, at least Cronin agreed with Simms to the extent that they both testified that Hart was shoveling coal out of the feeder.

By Cronin's only having asked Simms if there was power on the feeder without expressly talking about the safety hazard, Simms failed to realize that a safety hazard was involved. Therefore, he also ordered Hart to shovel coal after Cronin and Nixon declined to do so, and Cronin agrees that Hart was shoveling coal at the time Cronin and Nixon left the feeder to go to the dinner hole to await transportation out of the mine.

Now, as for the argument that all Cronin had to do was to ask Simms if the power was on, and at that point it became Simms' obligation to figure out what needed to be done and interpret that as a refusal to work because of a safety hazard, the evidence does not support an argument to that effect, because Simms believed that as long as a person is not actually working on an electrical circuit, it is only necessary to knock the circuit breaker on the side of the machine to make it entirely safe to work on such things as shoveling coal out of the feeder even if a person is inside the feeder doing the shoveling.

The issue of whether power must be turned off at the power source before mechanical labor, as distinguished from electrical work, is performed on equipment was decided by the Commission in Kaiser Steel Corp., 3 FMSHRC 2463 (1981). In that case, the

Commission held that it is a violation of section 75.509 for an operator to fail to deenergize equipment before mechanical work is done on it, even if the mechanical work involves only the changing of bits on a shearing wheel because, in that case, the wheel started running accidentally even though the operator thought he had turned off the power.

Therefore, the Commission has already rejected the same argument that Simms felt was appropriate in this case, namely, that knocking the breaker on the feeder was sufficient deenergization preparatory to having coal shoveled out of the feeder. Ludwig and Goroncy both agreed with Simms, that is, Ludwig believed that all a person had to do in the case of the feeder was to knock the breaker at the feeder and that he did not have to go back and pull the cathead out of the power center. The only time Goroncy differed from that view was that he thought that the cathead had to be pulled if a person intends to work right beside the pick breakers.

As I understand the requirement for raising a safety issue in connection with a refusal to work, the burden is on the miner to establish that there is a safety matter to be considered, that the work he has been asked to do is dangerous, and that he is refusing to do the work because it is unreasonable for him to be asked to expose himself to the hazards involved. The burden is not on the section foreman to read the employee's mind and try to determine why the employee is refusing to work, especially as was true in this case, when the section foreman thinks that he has satisfied the miner's complaint about safety by knocking the breaker, assuming that the section foreman even comprehended that a safety issue had been raised in this case.

The Commission expressly ruled in Kenneth E. Bush, 5 FMSHRC 993 (1983), that if an operator listens to a complaint about safety and eliminates the hazards raised by the complaint, the work refusal loses protection under the Act. Mr. Zohn, on behalf of complainants, has argued that Simms' interpretation of the safety standards is incorrect. The Commission's ruling in the Kaiser Steel case, supra, shows that Mr. Zohn is correct in arguing that Simms did not properly understand the deenergization requirement which is necessary before mechanical work may be done on equipment powered by electricity.

Nevertheless, the fact remains that if the miners, as was true in this case, are unable to explain to their section foreman what safety matter they have in mind and what it is that they fear and, if, as was also true in this case, the section foreman does all that he thinks is necessary to alleviate their fear or problem, then I think that the section foreman has done all that can be done to make their working conditions safe at that point. Unless the miners continue to express a fear that the machine still has not been sufficiently deenergized to make

shoveling a safe activity, the section foreman does not know why the miners are continuing to refuse to shovel coal out of the feeder.

Mr. Zohn is also correct in saying that the entire decision in this proceeding must be based on the credibility of the testimony given by the respective parties' witnesses. It strains my credulity to believe that Cronin and Nixon actually thought that they were supposed to crawl through about a foot or less of space between the side boards on the feeder and the mine roof to get down onto the actual conveyor belt very close to the pick breakers in order to shovel coal which was located closer to the dumping end of the feeder than it was to the pick breakers.

It would have been practically impossible for complainants to have gotten into the feeder since Nixon is about 6 feet 1 inch tall and Cronin is about 5 feet 10 inches tall and quite stocky. In other words, the physical problems associated with complainants' getting into a position inside the feeder are such that I do not believe that Simms would order men to undertake such an unreasonable feat as getting inside the feeder so as to shovel coal out of the narrow opening between the top of the feeder and the mine roof.

The testimony of Hart was that he based his certainty that Simms wanted Nixon and Cronin to get inside the feeder simply on a gesture which he claims Simms made, while Simms claims that his gesture was to the back of the machine where the coal is dumped onto the feeder.

One of the problems in all these cases is that miners have a tremendous amount of difficulty in communicating with each other. I believe that if they would talk over with their section foremen what their real problems are, and vice versa, that they would avoid a great many of the disputes which seem to occur. I cannot understand why Nixon and Cronin could not have asked Simms where he wanted them to position themselves in order to perform the shoveling of coal. Neither of them claims to have asked that question. The most that either one of them claims is that Cronin asked if the power was off and Nixon says he asked for a safety committee meeting. That is the extent of their conversation. The rest of the conversation consists of Simms repeating that he wanted them to get the coal shoveled out of the feeder.

We have in the record the testimony of Baker, a roof bolter, who had come down to the dinner hole after he had finished doing some work at the face assigned to him by Simms. He says that he saw both Nixon and Cronin shoveling coal out of the feeder. But Nixon's and Cronin's testimony confirms that when Baker saw them doing the shoveling, they were doing the only shoveling which Simms agreed that they had done the whole evening. Therefore,

Baker's statement made to Ludwig that he had seen Nixon and Cronin shoveling coal out of the feeder while standing at the end of the feeder was based on the single instance when all witnesses agreed that Nixon and Cronin did shovel a little coal out of the feeder.

Hart's testimony about the shoveling out of the feeder is flawed by the fact that he became involved in a lengthy discussion about the fact that Simms wanted the coal thrown into the crosscut so that the scoop could come down and pick it up even if the feeder could not be moved, whereas Simms made it perfectly clear that he did not care where the coal was thrown so long as it was taken out of the feeder so that the conveyor chain could be repaired. I believe that Hart's testimony has very low credibility to it in some other respects because Hart claims that DeMoss was not at the feeder because he had gone to the parts wagon with Bizic. Yet Bizic stated that he remained at the parts wagon for an entire hour looking for a connecting link. Simms testified convincingly that there would have been no need for DeMoss to go to the parts trailer with Bizic to bring back one little connecting link for a chain and that he recalls DeMoss shoveling at the feeder. Even if DeMoss did leave for a short time, it is difficult for me to believe that he would have stood for an hour by Bizic who was simply looking for a connecting link.

Hart also testified that Nixon not only asked for the safety committee, but also requested alternate work, but Nixon did not claim that he ever asked for alternate work. Therefore, it appears to me that Hart simply decided to testify on behalf of the two complainants and that his preparation for appearance as a supporting witness was not well organized.

Cronin agreed, when he was being cross-examined by Mr. McKown, that at no time did he ever tell Simms or Ludwig or Goroncy or any boss that he thought it was unsafe to shovel coal out of the feeder with only the circuit breaker on the feeder thrown or in an off position. As Mr. McKown has argued, it is not convincing to believe that two men who are being taken out of the mine to be fired would have the courage to further irritate the very bosses who are going to discharge them by asking for safety glasses, asking to inspect the rover, and going up to an inspector right in their bosses' presence to report the lack of a jack on the rover, but would not have the courage to tell their section foreman that it was too hazardous to shovel coal out of a feeder without having the cathead disconnected at the main power source. Their requests for safety glasses, inspection of the rover, etc., would have been things they would have been happy to forego mentioning, in my opinion, if they had actually been afraid of making complaints to their supervisors.

In short, I believe that neither Nixon nor Cronin had any safety thoughts in mind when they were refusing to shovel coal,

or they would have brought those safety concerns to their supervisors' attention when they were threatened with suspension.

Cronin discussed several times during his cross-examination that he believed that it was possible for a feeder to start running, even though the breaker switch on the feeder has been thrown to the off position, because moisture and dirt may collect in the panel box and cause a short to occur which will reenergize the machine's motor. Yet, in that very testimony, Cronin stated that he had learned about such things at the arbitration hearing. Since Cronin is basing his knowledge of that kind of danger on testimony given at an arbitration hearing which was held in July, his claim that he was objecting to shoveling coal in June because of his fear of getting a shock, even when the breaker switch was in the off position, is not a credible story and fails to show that he would have had such safety concerns when he refused to shovel coal on June 23 before the arbitration hearing had ever been held.

Mr. Zohn has emphasized that Simms is not a reliable witness because, in filling out his application for employment with Peabody, he stated in the application that he had 1 year of prior experience as a coal miner, but stated in this proceeding that he did not know how the figure "1" got on the form as he did not recall putting it there and had no prior experience as a coal miner. On that same application, Simms also wrote that he had had 3 years of high school. When I asked him about that, he said that it was attendance at a mission school of some sort and that it was not high school training at all, but he had nevertheless entered that schooling in a blank on the form which was labeled "high school" to indicate that only high school training was supposed to be listed in that space. We have to keep in mind that Simms was not able to avail himself of a great deal of formal education. When he is filling out an application, he is likely to make mistakes of a clerical nature. Such mistakes do not necessarily mean that everything he says is subject to doubt.

As far as credibility goes, Cronin assured us several times that he had never had any accidents in the 11 years that he has worked in the coal mines. He even stated that he has developed a sixth sense so that if he just gets in a dangerous situation, he will immediately feel that he is in danger. Yet, Mr. McKown introduced as Exhibits E and F two accident reports showing that Cronin had his thumb mashed by a cinder block in one instance and, in another instance, had his hand wrenched or strained by a steering wheel on a Kersey motor he was driving in the mine. Of course, it is possible for witnesses to forget things and not intentionally be trying to misstate the truth. I think that some incidents just have to be accepted as events which people do not remember. Witnesses' failure to remember does not necessarily mean that everything they say should be thrown out as a fabrication.

In Frederick G. Bradley, 4 FMSHRC 982 (1982), the Commission pointed out that it is not an administrative law judge's function to pass upon the wisdom or fairness of an operator's action in disciplining an employee, but rather it is his function to determine if the operator's claims are credible, and if those reasons would cause an operator to act as he did. No one in my position enjoys seeing a miner lose his job or even be suspended for 5 days, but the only ground that Nixon and Cronin have in this case for arguing that there was a violation of section 105(c)(1) of the Act is that they were ordered to do an unsafe act and that they had a right to refuse to do that act because of the safety issues involved.

But, as I pointed out with respect to the cases mentioned by Mr. McKown, and one or two others that I referred to above, the Commission has left the burden on the complainants to show that they did have a reasonable basis to raise a safety issue and that it was done in such a fashion that the operator knew what he was required to do in order to satisfy that complaint. I cannot find on the basis of the record in this proceeding that Peabody was properly given a reason to know why Nixon and Cronin refused to shovel the coal from the dumping end of the feeder. It appears to me that there is sufficient credibility to Simms' explanation of what happened to show that he believed he simply had before him two miners who had refused to carry out a reasonable work order. Simms says that he did not intend to do any more than just show them that he could not allow that kind of insubordinate action. Simms said that he also regretted that it was the decision of management above his level to suspend the men with intent to discharge them, but he felt that he had to take the action which he did in order to maintain discipline on his section.

It appears to me that Simms made a credible defense of what he did. It further seems to me that Goroncy, Holskey, and Ludwig also made a credible defense of the action they took. Therefore, I find that there was no violation of section 105(c)(1) of the Act because the evidence fails to support complainants' claim that they refused to shovel coal out of the feeder because such shoveling would have exposed them to hazardous conditions.

WHEREFORE, for the reasons hereinbefore given, it is ordered:

The discrimination complaint filed on October 19, 1982, in Docket No. LAKE 83-9-D is dismissed.

Richard C. Steffey
Richard C. Steffey
Administrative Law Judge

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

NOV 25 1983

SECRETARY OF LABOR, : DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 82-199-D
ON BEHALF OF TENNIS MAYNARD, JR., :
Complainant : No. 1 Surface Mine
: :
v. : :
DIAMOND P. COAL COMPANY, INC., :
Respondent :

DECISION APPROVING SETTLEMENT

Before: Judge Koutras

Statement of the Case

This is a discrimination proceeding initiated by the complainant against the respondent pursuant to Section 105(c) of the Federal Mine Safety and Health Act of 1977, charging the respondent with unlawful discrimination against Mr. Tennis Maynard, Jr., for exercising certain rights afforded him under the Act. The matter was scheduled for hearing in Paintsville, Kentucky, September 27, 1983, but the matter was continued when the parties advised me of a proposed settlement disposition of the dispute.

On November 9, 1983, the parties filed a Joint Stipulation and Settlement Agreement proposing to dispose of this matter. Included as part of the negotiated settlement is an agreement by the respondent or its subsidiaries to reinstate Mr. Maynard and to pay him certain back wages. In addition, respondent agrees to consider him for all job openings in a truck driver's position or in positions requiring lesser skills, and shall consider him for layoff, on the basis of his original hire date of November 20, 1981.

Respondent and its subsidiaries agree that they will not discriminate against Mr. Maynard in violation of Section 105(c) of the Act. Further, the parties agree that if Mr. Maynard voluntarily quits his employment with the companies or is

terminated by the companies for reasons which are not discriminatory under § 105(c) of the Act, Maynard shall be treated for purposes of rehire in the same manner as other former employees who voluntarily quit or were terminated for reasons not discriminatory under § 105(c) of the Act, as the case may be.

Conclusion

After careful review and consideration of the settlement terms and conditions executed by the parties in this proceeding, including Mr. Maynard, I conclude and find that it reflects a reasonable resolution of the complaint filed by MSHA on Mr. Maynard's behalf. Since it seems clear to me that all parties are in accord with the agreed upon disposition of the complaint, I see no reason why it should not be approved.

ORDER

The proposed settlement IS APPROVED. Respondent IS ORDERED AND DIRECTED to fully comply forthwith with the terms of the agreement. Upon full and complete compliance with the terms of the agreement, 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

NOV 30 1983

MICHAEL D. YOUNG, : DISCRIMINATION PROCEEDING
Complainant :
 :
v. : Docket No. KENT 83-126-D
 :
TERRY GLEN COAL COMPANY, : MSHA Case No. BARB CD-83-08
Respondent : Barn Branch Mine

DECISION

Appearances: Michael D. Young, Grundy, Virginia, pro se;
Randall Scott May, Esq., Craft, Barret & Haynes,
Hazard, Kentucky, for Respondent.

Before: Judge Steffey

Pursuant to an order consolidating issues and providing for hearing issued September 8, 1983, as amended on September 26, 1983, a hearing in the above-entitled proceeding was held on November 1, 2, and 3, 1983, in Jonesville, Virginia, under section 105(c)(3), 30 U.S.C. § 815(c)(3), of the Federal Mine Safety and Health Act of 1977.

The complaint was timely filed on February 7, 1983, under section 105(c)(3) of the Act after complainant had received a letter dated January 11, 1983, from the Mine Safety and Health Administration advising him that its investigation of his complaint had failed to show that a violation of section 105(c)(1) of the Act had occurred. The complaint alleged that complainant was discharged by respondent on November 19, 1982, in violation of section 105(c)(1), because complainant had complained about the condition of the conveyor belts which were used by respondent to transport miners into its mine. The complaint also alleged that respondent wished to discharge complainant because respondent feared that he might report the unsafe conveyor belts to MSHA.

After the parties had completed their presentations of evidence and had made their concluding arguments, I rendered the bench decision which is reproduced below (Transcript dated November 3, 1983, pages 3 through 28):

The issues in this case are whether there was a violation of section 105(c)(1) of the Federal Mine Safety and Health Act of 1977 and, if so, whether Mr. Young, the complainant, is entitled to the relief he seeks under section 105(c)(3) of the Act.

Findings of Fact

Based on the demeanor of the witnesses and the credible evidence in this proceeding, the following findings of fact are made:

1. The complainant in this proceeding, Michael David Young, is 27 years of age. He attended Grundy Senior High School up to the eleventh grade, at which time he quit and joined the United States Navy. Before leaving high school, he had taken a 1-year trade school course in welding. While he was in the Navy, he received a certificate dated July 19, 1974, showing that he had completed a course in basic electricity and electronics (Exh. 4). He also holds certificates of competency issued by the Virginia Board of Examiners certifying his ability to act as a certified underground shot firer and an electrical repairman (Exh. Nos. 2 and 3). Additionally, he has currently dated cards issued by MSHA showing he is a certified underground electrician, certified surface electrician, and certified underground and surface high voltage electrician (Exh. Nos. 6, 7, and 8). Young has 5-1/2 years of mining experience of which 4-1/2 years were obtained while he was performing maintenance work on underground and surface electrical equipment. Young is currently working as an electrical repairman for Island Creek Coal Company and is attending Southwest Virginia Community College studying electronics technology.

2. Young was working for Island Creek Coal Company in 1982, but was laid off in September 1982 when Island Creek found it necessary to reduce its work force by 800 people. Island Creek's personnel manager received an inquiry from Sidney Fee about an electrical repairman and recommended Young. Thereafter, Young was interviewed by Sidney Fee, who works as general manager for Terry Glen Coal Company. Terry Glen's Barn Branch Mine is located near Crummies, Kentucky. Young was then living in Buchanan County, Virginia, with his wife and one child. Fee hired Young for a 30-day probationary period. If Young's work proved to be satisfactory, Young planned to move his family about 100 miles to the Crummies, Kentucky, area. During the 30-day probationary period, Young was not a member of the Southern Labor Union, which is the miners' representative at the Barn Branch Mine. At the end of the 30-day period, if Young's work had proven to be satisfactory, he would either have been given a position as a salaried or management employee, or a position as a wage employee. It was understood that Young would join the Southern Labor Union if he became a wage employee.

3. During the interview by Sidney Fee, before Young was hired as a probationary employee, Fee asked Young if he had had experience repairing a Wilcox continuous-mining machine. Fee understood Young to say that he had worked on a Wilcox Model 21 continuous miner for about 2 weeks, whereas Young believes he explained to Fee that he had had enough experience in repairing Joy continuous-mining machines and other types of equipment to enable him, without difficulty, to adapt to repairing what Young referred to as the relatively simple components of a Wilcox continuous miner. As a matter of fact, Young had had no experience at all in repairing Wilcox continuous-mining machines when he began working for Terry Glen on November 10, 1982.

4. In order to save Young the time and expense of the 3-hour one-way drive from Terry Glen's mine to Buchanan County, Virginia, Fee provided Young with living quarters in a building owned by Terry Glen. Young was not charged for those living quarters.

5. Young began working for Terry Glen on Wednesday, November 10, 1982, and was discharged on Friday, November 19, 1982. Since Young did not work on Saturday or Sunday, he was employed by Terry Glen for only 8 working days. Young performed some work on the surface of the mine on Wednesday and Thursday, November 10 and 11, consisting of cutting off old bits and welding new bits on some augers for a Wilcox continuous-mining machine. Young's first trip underground occurred on Friday, November 12, 1982. He was shown how to ride the conveyor belt into the mine on that day and was given an opportunity to familiarize himself with the operation of a Series 21 Wilcox continuous-mining machine. Young had set timbers in the vicinity of a Series 20 Wilcox continuous-mining machine while employed by another coal company, but he did not perform any work on the Series 20 machine. There are no significant differences in the way a Series 20 operates as compared with the Series 21 used in Terry Glen's mine.

6. On Monday, November 15, 1982, Young went underground with Johnny Mack White, a certified maintenance foreman, to install some shims on a motor which had burned out on a Wilcox continuous miner. The new motor had been installed, except for inserting the shims behind the motor, and all work replacing the motor had been performed by a repairman named Robert Housley who worked from 11:45 p.m. to 7:45 a.m. Housley showed Young where the shims had to be placed and went on out of the mine. Housley did not remain to assist in installing the shims because Housley had been told that Young was an experienced repairman. Young had never installed a new motor on a Wilcox continuous-mining machine. Therefore, the shims were actually installed by White, but Young claimed credit for having thought of loosening the bolts so that the shims could be inserted. Housley claimed,

however, that he had deliberately left the motor loose so that the shims could be inserted without loosening any bolts.

7. On Tuesday, November 16, 1982, about 1:30 p.m., Young was asked by the mine superintendent, Steven Teshon, to go underground for the purpose of trouble shooting, or determining whether another motor had burned out on the Wilcox continuous-mining machine. Coal had been coming out on the belts which made it impracticable to ride into the mine on the belts, so Young rode into the mine on a scoop to determine what was wrong with the other motor on the Wilcox miner. Young was given an ohmmeter by Teshon before going underground, but Young did not take the ohmmeter to the continuous-mining machine and did some taping of lead wires and some brief energizing or "bumping" of the motor, which caused the circuit breaker to trip out. Young spent about 40 minutes to determine that the motor was burned out and needed replacement. The continuous-mining machine's operator, Wilburn Hale, and a roof bolter, Randy Evans, were present while Young was doing the trouble shooting, and both of them believed that Young should have been able to use an ohmmeter and determine in just a few minutes that the motor was burned out, as they had already assumed on the basis of their experience in working around and operating a Wilcox continuous-mining machine.

8. On Wednesday, November 17, 1982, Young went into the mine with Charlie Bumgardner (now deceased) and Johnny Mack White to complete installation of the second motor on the Wilcox continuous-mining machine, but Young's light battery became caught on a portion of the No. 2 belt conveyor which caused the light to go off. By the time Young had gone back out of the mine to obtain a replacement light and had started back to the face area, he met White returning to the surface. Young also turned around and went back to the surface because White advised him that the work of installing the second motor had been completed.

9. While Young was on the surface obtaining a replacement light on Wednesday, November 17, as explained in Finding No. 8 above, he was asked by Teshon to crawl along the No. 1 belt and determine what had caused some belt structures, being transported into the mine, to become stuck on the No. 1 belt, which only extends about four breaks into the mine before it terminates at the No. 2 belthead. The No. 1 belt had been stopped by an employee named Charles Hatmaker when Hatmaker realized that the belt structures had been caught between his location at the No. 2 belt drive and the mine surface. Hatmaker's assignment at that time was the transfer of belt structures from the No. 1 belt to the No. 2 belt. Another employee named William Caldwell was helping Hatmaker move belt structures from the No. 1 to the No. 2 belt, and Caldwell was asked to crawl toward the outside or surface of the mine while Young was crawling in the opposite direction from the surface. Caldwell came to the stuck belt structures

before Young. After Young had joined Caldwell at the point of obstruction, they succeeded in releasing the stuck belt structures, and both miners then crawled back into the mine along the No. 1 belt toward the No. 2 belthead with Young preceding Caldwell into the mine.

10. Young was welding augers for the Wilcox continuous miner on the surface on Thursday, November 18, 1982, when the mine superintendent, Teshon, advised Young that he was going to terminate Young's probationary position at the end of the shift on the next day, November 19, 1982, because Young was not competent in performing repairs on the Wilcox continuous-mining machine.

11. On Friday, November 19, 1982, Young returned to the mine before 7 a.m. and engaged in some discussions with other miners about the fact that he believed Teshon, the mine superintendent, was actually discharging him because he criticized the safety of riding in and out of the mine on the conveyor belts. None of the other miners agreed with Young that riding the belts exposed them to any hazard. When Teshon arrived at the mine, Young asked Teshon if he was still fired. When Teshon answered that question in the affirmative, Young stated that Teshon's real reason for discharging him was for his having made complaints about the safety features of the belt.

12. Teshon denied that he had ever said anything on Thursday when he told Young he was being discharged, that he was afraid Young might get hurt on the belt. Teshon agrees that he refused to allow Young to use the phone to call MSHA to request a special inspection of the belt conveyors, because of the threats Young was making, and that he ordered Young to leave mine property.

13. After Young left mine property, he drove to the office of Terry Glen's general manager, Sidney Fee, at Crummies, Kentucky. Young told Fee that Teshon had discharged him because Teshon was afraid Young would get hurt on the belts. When Fee advised Young that Teshon had given Fee his reasons for discharging Young and had stated that those reasons appeared to be valid so that Fee was supporting the discharge, Young became angry and said he would cause Fee and Fee's son trouble. Fee told Young to leave his son, Wayne, who is the mine's safety director, out of the discussion.

14. When Young was unsuccessful in getting Fee to reverse Teshon's discharge, Young proceeded to Harlan, Kentucky, and requested under section 103(g) of the Act that MSHA make a special inspection of the belt conveyors at Terry Glen's Barn Branch Mine, especially from the standpoint of their use as a means of transporting miners in and out of the mine.

15. MSHA sent Inspector Lester Reed and a trainee named Lawrence Rigney to make a special investigation in response to Young's request, and they rode the belts into the mine and wrote no citations or orders with respect to the use of the belts for haulage of miners. They inspected the pull cords and other features of the belts, but cited no violations of the regulations. While they were there, they inspected other areas in the mine and wrote five citations for violations of 30 C.F.R. §§ 75.400, 75.503, 75.1722, 75.1101-1, and 75.514. Only the alleged violation of section 75.1722 was considered to be a significant and substantial violation, as that term has been defined by the Commission in National Gypsum Company, 3 FMSHRC 822 (1981).

16. A Kentucky State Inspector named James E. Gilbert had been inspecting the Barn Branch Mine for about 5 years, including the short time during which Young worked for Terry Glen, and he has not written or seen violations cited for clearances of the belt for purposes of transporting miners. He has ridden into the mine on the belt. Gilbert testified that the required clearance of 18 inches between the top of the belt and the mine roof is the same under both Kentucky and Federal regulations.

17. Young contends that he had made complaints to management about the unsafe aspects of riding the conveyor belts into the mine. The unsafe conditions which Young claims existed were: (1) there was less than the required 18 inches of space between the top of the belt and the mine roof, (2) there was a practice at the mine of having the miners jump from one belt to another without stopping the belt at the time of the transfer, or even having the miners get off one belt before jumping on to the next belt, and (3) there were inoperable pull cords running along the conveyor belts.

18. Without exception, all the witnesses called by Young and Terry Glen's counsel stated that the clearance between the top of the belt and mine roof was 18 inches or more, that they did not jump from one belt to another without getting off one flight before getting on another flight, and that any inoperable pull cords were immediately repaired because their failure to work could be corrected simply by reattaching them to the toggle switches to which they are attached until a rock or some other object hits them and knocks them loose so as to make reattachment necessary.

Consideration of Young's Arguments

Young was given several months, on two different occasions, to obtain an attorney to represent him in this proceeding. He was ultimately unable to secure legal representation, although it appeared for a short time on two different occasions that he had been successful in retaining a lawyer to represent him.

Young, therefore, had to represent himself at the hearing and succeeded very well in presenting his case. His primary argument is that he made complaints to management about the hazardous nature of the practice of having miners ride to and from the working faces on conveyor belts. Young contends, therefore, that he was engaged in a protected activity under section 105(c)(1) of the Act which provides 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 such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

The test for determining whether a complainant has shown a violation of section 105(c)(1) of the Act was given by the Commission in Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (1980), rev'd on other grounds sub nom., Consolidation Coal Co. v. Ray Marshall, 663 F.2d 1211 (3d Cir. 1981). Some of the Commission's language pertaining to the burden of proof was temporarily reversed in Wayne Boich d/b/a W. B. Coal Co. v. F. M. S. H. R. C., 704 F.2d 275 (6th Cir. 1983), but thereafter the court vacated its decision reported at 704 F.2d 275, except for its rulings as to back-pay issues, in Wayne Boich d/b/a W. B. Coal Co. v. F. M. S. H. R. C., ___ F.2d ___, Sixth Circuit No. 81-3186, October 14, 1983, leaving intact the Commission's rationale regarding the requirements for proving a violation of section 105(c)(1) of the Act. The test set forth by the Commission in Pasula reads as follows (2 FMSHRC at 2799-2800):

We hold that the complainant has established a prima facie case of a violation of section 105(c)(1) if a preponderance of the evidence proves (1) that he engaged in a protected activity, and (2) that the adverse action was motivated in any part by the protected activity. On these issues, the complainant must bear the ultimate burden of persuasion. 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. On these issues, the employer must bear the ultimate burden of persuasion. It is not sufficient for the employer to show that the miner deserved to have been fired for engaging in the unprotected activity; if the unprotected conduct did not originally concern the employer enough to have resulted in the same adverse action, we will not consider it. The employer must show that he did in fact consider the employee deserving of discipline for engaging in the unprotected activity alone and that he would have disciplined him in any event. [Emphasis in original.]

Johnny Mack White was Young's immediate supervisor and he said that Young may have said something to him about not wanting to ride the No. 1 belt, and about preferring to crawl the initial distance of about four breaks, or approximately 300 feet, that the No. 1 belt extended into the mine. White, however, stated that Young had not mentioned to him that the pull cords for stopping the belts failed to work and White denied that Young had ever mentioned to him anything about measuring the clearance between the belts and the mine roof. White additionally denied that he had reported to any of his superiors any alleged complaints made to him by Young.

Charles Hatmaker was not Young's supervisor, but was just another miner. He thinks he recalls having heard Young say that he was not going to ride the No. 1 belt any more. While one might conclude that Young's expression of fear of riding the No. 1 belt is the same as making a safety complaint, the attitude of White and Hatmaker, as to Young's fear of riding the belt, was considered by them to be more like an expression of a dislike for working in low coal, for example, than an expression of a safety complaint.

Young claimed to have found a sympathetic response to his alleged safety complaints when he discussed them with Luther Green III who was the safety man elected by the Southern Labor Union. Green is the only person who has ever reported having

had an accident while riding the belt, but Green said that his injury was the result of his own negligence, because he was on his knees while riding on the belt and looked behind him to say something to the miner behind him. When Green turned back to face the direction the belt was traveling, he was hit in the face and received a cut on the bridge of his nose which required a few stitches. Green missed the rest of that day at work because of the accident and doesn't consider the accident something that shows an unsafe belt conveyor.

Green, in the capacity of safety man, had not received any complaints from any of the miners as to lack of safety for riding the belts or for any other type of safety problem. Green said that on the Friday following the Thursday when Young was informed that he had been discharged, that Young angrily said to him, "You call yourself a safety director letting men ride these belts?" Green said he felt Young was so upset and argumentative at that time, that he just walked away to get his knee pads and made no attempt to answer Young's allegation.

Randy Evans testified that he told Young that Green was the union safety man on Friday morning, when Young mentioned the belts to him, after Young had been discharged. Evans also stated that the Barn Branch Mine was the safest mine in which he had ever worked. Moreover, Evans stated that Young told him that the real reason Teshon fired Young was that Teshon was afraid that Young would get Teshon's job.

Young contended there was a sign outside the mine to the effect that the belts were not intended to be used for mantrip purposes. Fee, the general manager, said the sign was old and applied at one time when the belt structures and crossbars in the first part of the belt entry did fail to provide 18 inches of clearance. But Fee says the crossbars near the surface were gradually removed until none exist there now and that a low profile 9-inch belt structure was also installed. Teshon additionally stated that they shot out some slag in the mine roof to open up the No. 2 belt so that miners could ride the belts all the way from the mine entrance to the face area, as shown on Exhibit A.

Wilburn Hale was the operator of the Wilcox continuous-mining machine and had run a Wilcox miner for a total of 13 years. Hale said he told the section foreman the motor in the Wilcox miner was burned out and needed replacing. Young was called to work on the machine and Hale was surprised at how little Young knew about checking motors and was especially critical of Young's failure to bring an ohmmeter to test the motor.

Robert Housley was a repairman at the Barn Branch Mine and was a certified foreman. He performed a preshift of all belt

flights on the night of November 17 during his shift, which lasts from 11:45 p.m. to 7:45 a.m. He checked all pull cords and found them to be operative. Housley's testimony rebuts or seriously erodes Young's claim that he tried to stop the No. 2 belt on November 17 by pulling the control cord running along the No. 2 beltline, but that the cord failed to stop the belt.

Sidney Wayne Fee was the safety director for the Barn Branch Mine. On one occasion, while Young was welding on the surface, Wayne Fee observed him and complimented Young for wearing safety glasses. Young agrees that he received a compliment, but Young does not even claim to have taken advantage of that opportunity to express his safety concerns about riding the belt.

My review of the evidence shows that at most, two miners recall that Young expressed a fear of riding the No. 1 belt and expressed a preference for crawling the 250- or 300-foot length of that belt, rather than riding it, because of his belief that there was inadequate clearance between that belt and some cross-bars which still existed along the No. 1 belt at that time.

Therefore, to the extent that Young expressed a fear of riding the No. 1 belt, it may be said that he was engaged in a protected activity and that he may not be discharged for such activity if his discharge was motivated in any way by an expression of fear of riding the No. 1 belt.

When it is considered that the MSHA inspectors found no violations of the mandatory safety and health standards pertaining to transportation of miners on the belts when they made a special investigation at Young's request, it is unlikely that Teshon was motivated by Young's fear of riding the No. 1 belt when Teshon told Young he was being discharged for lack of competence to repair the Wilcox miner, especially since that was the primary reason Fee had hired Young in the first place.

Credibility

Young, of course, claims that Teshon first told him on Thursday he was being discharged because Teshon was afraid he would get hurt riding the belt. Young says that when he told Teshon on Friday morning that Teshon could not fire him for that reason, Teshon changed the basis for Young's discharge to be a claim that Young was not competent to repair the Wilcox continuous-mining machine being used at the mine.

Young claims that he could not find anyone to corroborate his account of the discharge, because all the miners are either afraid to tell what actually happened or they have family relationships which impede their willingness to tell what happened, such as the fact that Hatmaker is married to the general manager's daughter, and that the safety director is the general manager's son.

It is true that witnesses' economic dependency on their employer and kinship are factors to be examined when one is trying to evaluate credibility. Those relationships, however, do not seem to have had an adverse impact upon credibility in this proceeding because Hatmaker agreed that Young had expressed to him a dislike for riding the No. 1 belt and Wayne Fee stated that he had complimented Young for wearing safety glasses. Thus, the two witnesses with the closest kinship ties to the general manager gave favorable testimony in Young's behalf.

It is also true that all the witnesses, except the State inspector, who testified in this proceeding, still work for Terry Glen, but it must be kept in mind that Young only worked for Terry Glen for 8 days, excluding Saturday and Sunday, and the miners necessarily had little contact with Young and were not acquainted with him well enough to have heard his alleged views as to safety discussed in any detail. Therefore, it is understandable that they believed Young was opinionated and that they were aware of few facts which supported his contentions to the effect that his discharge was motivated because of his having made complaints about the hazards associated with riding the belt conveyors.

Moreover, Young's own credibility was eroded by the inconsistent statements he made and the claims he made which were rebutted or shown to be false. Young had a tendency, for example, to state whatever best supported his claims. On page two of the complaint he filed with MSHA, which is Exhibit 9 in this proceeding, he stated that the coal height was 30 to 40 inches in the mine. But at the hearing, he reduced the height to 27 inches.

He stated on page two of the complaint that he noticed the hazards of riding the belt when he first went underground on November 12, 1982, but he stated that he needed the job, so he avoided saying anything to Teshon at that time when Teshon stated to him that it was necessary to be able to ride the belt in order to work in the mines in that part of the country. Since Young only worked 8 days, he undoubtedly continued to need the job as much on the day he was discharged as he needed it on November 12 when he declined to make comments about safety. Therefore, it is more likely than not that Young's complaints about safety were all made after his discharge, rather than before, as most of the miners testified.

On page four of his complaint, Young stated that the clearance between the top of the No. 1 belt and the mine roof was 10 to 12 inches. At the hearing, he claimed to have actually measured the clearance and found it to be from 10 to 15 inches, but Caldwell testified that he was close behind Young

at the very time Young claims to have made the measurements and Caldwell did not see him take any measurements.

Young was inconsistent at the hearing about the time he had finished working in the mine on November 17, the day he helped remove belt structures from the beltline, saying first that he was back outside at 8:30 a.m. after getting his battery torn off and thereafter saying that it might have been 10:30 or 11 a.m. when he got outside.

Although Young did not challenge Teshon's claim that Teshon had given Young an ohmmeter to test the motor on November 16 on the Wilcox continuous-mining machine, Young first said he was not sure he had an ohmmeter and subsequently said that the ohmmeter gave him inaccurate readings and could not be relied on. On the other hand, all the miners working with him said that he did not use one at all, and they were positive he did not have one. In his deposition, Young stated on page 43 that the pull cord to stop the belt was on the right side when one is going into the mine, but at the hearing, he said the cord was on the left side when one was going into the mine. In view of the fact that Young made inconsistent statements about what happened while he worked at the Barn Branch Mine, I find that his credibility is not entitled to be given as much weight as that of Teshon who discharged him because Teshon's testimony is consistent in the details he gave.

I find that the real reason for Young's discharge was Teshon's belief that Young was not competent to repair the Wilcox continuous-mining machine. It is a fact that both Fee and Teshon believed that Young had misled them at the initial interview by telling them that he would have no trouble in adapting to the repair of a Wilcox continuous-mining machine, as he had worked around them and had been associated with them. Young admitted that he was somewhat desperate for a job. Therefore, I believe Fee's and Teshon's claim that Young misled them as to his competency to repair a Wilcox continuous-mining machine is entitled to more consideration than Young's claim that he did not cause them to think he knew more about the Wilcox than he actually did.

For all of the foregoing reasons, I believe that Young engaged in almost no protected activity under the Act while employed by Terry Glen; that even if he did engage in some protected activity, his discharge was in no way motivated by that protected activity; and that the real reason for his discharge was that given by Teshon, namely, that Young did not have the competency needed to repair the Wilcox continuous-mining machine used by Terry Glen at the Barn Branch Mine.

WHEREFORE, it is ordered:

The discrimination complaint filed on February 7, 1983, in Docket No. KENT 83-126-D is dismissed.

Richard C. Steffey
Richard C. Steffey
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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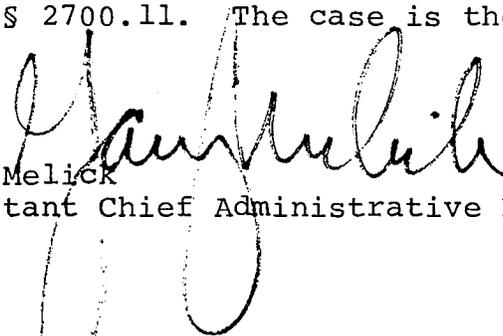
BILLY RAY HARNESS, : DISCRIMINATION PROCEEDING
Contestant :
v. : Docket No. SE 83-52-D
: :
ROYAL JELLICO COAL CO., INC., : MSHA Case No. BARB
Respondent : CD 83-22

ORDER OF DISMISSAL

Appearances: Art Roberts, Jr., Esq., Knoxville, Tennessee,
for Contestant;
Jerome Templeton, Esq., Knoxville, Tennessee,
for Respondent.

Before: Judge Melick.

At hearing, the Complainant requested approval to withdraw his complaint in the captioned case for the reason that the adverse action taken against him (discharge) admittedly occurred before the alleged protected activity (safety complaint). Under the circumstances, permission to withdraw was granted. 29 CFR § 2700.11. The case is therefore dismissed.


Gary Melick
Assistant Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

NOV 30 1983

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 80-142
Petitioner : A.C. No. 42-00081-03011
v. : Docket No. WEST 80-286
 : A.C. No. 42-00081-03014
 : Docket No. WEST 81-85
CO-OP MINING COMPANY, : A.C. No. 42-00081-03022
Respondent :
 : Co-op Mine

DECISION

Appearances: Katherine Vigil, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Petitioner;
Carl E. Kingston, Esq., Salt Lake City, Utah,
for Respondent.

Before: Judge Vail

I. Statement of the Case

The above-captioned civil penalty proceedings were brought pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (hereinafter referred to as "the Act"). The violations were charged in 21 citations issued to respondent following inspections at its Co-op mine located at Huntington Canyon, Utah. Pursuant to notice, a hearing on the merits was held in Salt Lake City, Utah. The parties waived filing post-hearing briefs.

II. Issues

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

III. Settlement Proposals

At the outset of the hearing, the petitioner moved that a settlement agreement entered into jointly by the parties be approved as follows:

Docket No. WEST 80-142

The petitioner contended that a reduction in the amounts of the four proposed penalties in the citations listed below were in order for the reason that upon review of the facts surrounding their issuance, it was found that respondent's negligence was not as great as originally assessed. The parties proposed the following:

<u>Citation No.</u>	<u>30 C.F.R. §</u>	<u>Proposed Penalty</u>	<u>Amended Proposed Penalty</u>
789024	75.1103	\$ 90.00	\$ 72.00
789026	75.604	210.00	168.00
788576	77.202	170.00	136.00
788577	75.1106-3C	130.00	104.00

Docket No. WEST 80-286

The parties stipulated that the respondent had agreed to pay the full amount of the proposed penalties assessed in eight of the twelve citations listed below and that the reason for the petitioner proposing a reduction in the proposed penalties for the remaining four citations is that it was determined that respondent's negligence was less than originally assessed. The respondent agreed to pay the full amount of the proposed penalties in the following citations:

<u>Citation No.</u>	<u>30 C.F.R. §</u>	<u>Proposed Penalty</u>
788834	75.316	\$150.00
788835	75.316	140.00
788837	75.316	66.00
788838	75.316	72.00
788839	75.1715	52.00
788883	75.404	36.00
788885	75.1715	40.00
788886	75.1715	72.00

The parties stipulated and agreed that the penalties for the citations listed below would be amended as follows:

<u>Citation No.</u>	<u>30 C.F.R. §</u>	<u>Proposed Penalty</u>	<u>Amended Proposed Penalty</u>
788831	75.1801	\$ 48.00	\$ 38.00
788832	75.1803	48.00	38.00
788833	75.1806	48.00	38.00
788840	75.1725C	98.00	78.00

IV. Stipulations

The parties also entered into the following stipulations:

1. The Co-op mine produced between 127,300 and 163,671 tons of coal a year and employed approximately 20 people.

2. The mine experienced 143 inspection days in the 24 months preceding the issuance of the citations in WEST 80-142, and received 127 assessed violations.

3. The mine had approximately 123 to 150 inspection days in the 24 months proceeding the issuance of the citations in Docket No. WEST 80-286 and was issued 131 to 138 assessed violations.

4. The assessment of reasonable penalties in the present proceedings would not affect the respondent's ability to continue in business.

Upon due consideration, I conclude that the proposed settlements should be approved. Approval of the settlement proposals are reflected below in the final order.

After settlement of the above citations in these three consolidated cases, there remains five citations alleging violation of safety standards to be resolved. These are as follows: WEST 80-142, Citation Nos. 788573 and 788579; WEST 80-286, Citation Nos. 788884 and 788887; WEST 81-85, Citation No. 1020472.

Discussion

WEST 80-142

Citation No. 788573

Citation No. 788573 alleges a type 104(a) violation of standard 30 C.F.R. § 77.208(e) which provides as follows:

Valves on compressed gas cylinders shall be protected by covers when being transported or stored, and by a safe location when cylinders are in use.

MSHA inspector Dick Jones testified that he issued the above citation during an inspection of the respondent's Co-op Mine after observing two cylinders of compressed gas at the tipple with the

hoses and gauges still attached. The cylinders were secured to one of the supports under the coal preparation plant and were not being used (Tr. 13-14).

The respondent does not dispute the fact that the cylinders were located at the place described by the inspector and without covers. However, Bill Stoddard, superintendent of the mine, testified that the two cylinders were located under the floor of the storage bin and that the bottoms of the cylinders were secured in round containers. The cylinders were further secured by two chains wrapped around the tanks to hold them in place (Tr. 36). Stoddard maintained that this was a permanent installation and that the tanks are protected from anything hitting or falling on them. The cylinders are used by the tippie foreman at different times for maintenance work when he is not busy with duties involving the tippie.

Respondent argues that the cylinders were being used continuously on a daily basis. The tippie foreman at the time of the inspection, had left this area where the tanks were located to go load a truck. It is respondent's contention that when the gas cylinders are in a location where they are being used, they do not fall under the provisions of the standard which provides for the hoses and gauges to be removed and covers put on when being "stored".

The petitioner contends that the inspector observed the two cylinders without covers on and that they were not being used at the time. He argues that under these circumstances they were being "stored" and required that covers be placed on the tops as there was a potential danger of something falling on top of or striking the cylinders and knocking off the gauges or hoses allowing the gas to escape.

The threshold issue here is whether the gas cylinders were being "stored" or "in use" when the inspector observed them. Part 77 of 30 C.F.R. does not define, "stored" or "in use". Webster's New Collegiate Dictionary 1977 Edition defines store (stored) as follows: "to lay away; to place or leave in a location (as a warehouse, library or computer memory): something that is stored or kept for future use."

In Western Steel Corporation, 5 FMSHRC 310 (March 1983), the Commission considered a similar factual situation under the standards for metal and nonmetal underground mines. In that case, the operator of an oxyacetylene torch welder had left the gas valves on the tank while he left the area to secure additional material. The standard cited in this instance stated as follows: "57.4-33 Mandatory. Valves on oxygen and acetylene tanks shall be kept closed when the contents are not being used."

The Commission upheld the Administrative Law Judge's vacation of this citation stating; "It must have been contemplated in the drafting of the standard that some reasonable lapse of time be permitted between the cutting and welding with the torch and closing of the tank valves." The Commission decided that the case required them to construe the meaning of the key phrase, "not being used." They stated that "use" has a temporal meaning because tasks extend over time. The Commission determined that the approximately 20-minute absence from the torch head was of temporary duration and directly related to the continuous performance of the specific welding task. However, in a footnote they stated that the above case did not require them to, and they did not decide whether a temporary laying aside of the torch welder for other work-related reasons or for such purposes as coffee breaks, trips to the lavatory, or the like, would require a different approach.

In light of the foregoing, it may be reasonably inferred that the decision in the Western Steel case can be applied to the facts being considered here. The evidence in this case is not explicit as to how long the tipple operator had been gone from the area where the tanks were located, or for what reason he left. Jones testified that when he arrived at the tipple he observed the two cylinders with the hoses and gauges still attached. Jones stated that he saw a truck loading at the tipple and when the truck left, the miner working at loading the truck came over and identified himself as the tipple foreman. He abated the alleged violation by taking off the gauges and putting on the covers. Jones testified that he did not know how long it had been since someone had used these cylinders (Tr. 18).

After a careful review of all of the evidence of record, I am persuaded that a violation of the cited standard occurred in this case. The respondent failed to identify any task the tipple foreman was performing prior to his loading the truck at the tipple. The thrust of respondent's arguments are that there was not a potential for danger from these tanks because of the location and manner in which they were located at the mine. Even assuming that the potential for an accident had been reduced considerably by reason of described precautions, the fact remains that the standard requires the covers to be placed on the tanks when they are not "in use" and are "being stored." There is no evidence that these tanks were being used by anyone prior to the arrival of the inspector so I am not presented with a factual situation similar to that posed in the Western Steel case. The evidence shows the tanks were kept at this location so that they were available for use by the tipple foreman whenever he had a task to do between his various duties at the tipple. However, when not in use, the standard requires that the covers be placed on these tanks, which the respondent had not done.

I do not find either the negligence or gravity serious in this violation for the tanks were placed in an area where there was some protection from external forces and they were tied down with chains to prevent them from falling over. The likelihood of a serious injury was small and usually only the tippie foreman would be in the area. Further, abatement was achieved immediately demonstrating a good faith effort to achieve rapid compliance. I assess a penalty of \$35.00 for the respondent's violation of § 77.208(e).

Citation No. 788579

During an underground inspection of respondent's Co-op Mine, Inspector Jones issued citation No. 788579 charging a violation of 30 C.F.R. § 75.523 ^{1/} and alleging as follows:

The Joy roof bolter observed being operated in the belt entry of the 2-right working section was not provided with devices (panic bars) that will permit the equipment to be deenergized quickly in the event of an emergency.

Jones testified that he observed two miners roof bolting in the entry outby the face and noticed there were no panic bars or means provided to quickly deenergize the tramming motors on the roof bolting machine in the event of an emergency. Jones asked one of the miners if the equipment could be trammed from where he was standing and the miner answered "yes" (Tr. 22, 23). Jones was accompanied on this inspection by Ron Mattingly, respondent's employee responsible for electrical maintenance. Upon being shown the alleged violation, Mattingly agreed that the machine needed panic bars (Tr. 23).

Evidence shows that the roof bolting machine cited in this case was constructed from a frame originally manufactured by the Joy Manufacturing Company. Two booms manufactured by the Manson Company were attached to the front of the frame for drilling holes for installing roof bolts. Valves are located on each boom to operate the hydraulic pressure to run the drills. The procedure for roof bolting with this two-man bolter is for a miner to stand on each side to operate the controls on the boom. Each miner drills two holes for the roof bolts and then usually the miner on the right side goes to the cage located on that side to tram (move) the machine forward or backwards as needed (Tr. 55). The

^{1/} Electric Face Equipment; deenergization. (Statutory Provision) An authorized representative of the Secretary may require in any mine that electric face equipment be provided with devices that will permit the equipment to be deenergized quickly in the event of an emergency.

testimony of several witnesses explained that the roof bolter was trammed by a hydraulic tramping motor. A pump turned by an electric motor provided pressure necessary to operate the tramping motor to move the machine as well as the drills on the two booms (Tr. 84, 85). The term "tramping motor" is defined in the Bureau of Mines, U.S. Department of Interior, A Dictionary of Mining, Mineral and Related Terms (1968) as follows: "May refer to an electric locomotive used for hauling loaded trips, or it may refer to the motor in a cutting machine which supplies the power for moving or tramping the machine."

Respondent sets forth essentially three arguments germane to the question of whether a violation of § 75.523 occurred. First, that the roof bolting machine had two panic bars installed on the machine, painted fluorescent orange in color, and the inspector failed to see them. Second, that the inspector misunderstood the miner's reply to his question as to whether the machine could be trammed from where he was standing. Third, that the roof bolter could only be trammed from inside the cage on the machine and panic bars were unnecessary (Tr. 170, 171).

The specific issue to be decided is whether the machine cited in this case had devices installed on it which would allow it to be quickly deenergized in the event of an emergency. There is considerable divergent testimony as to whether there were panic bars installed on the machine with the inspector testifying he saw none and the respondent's employees claiming they were there and painted orange. The facts in this case must first be considered in conjunction with the sub parts of 30 C.F.R. § 75.523 which provide the applicable provisions adopted by the Secretary in compliance with the statutory authority of the above regulation. ^{2/} 30 C.F.R. § 75.523-1 provides in part as follows:

Deenergization of self propelled electrical face equipment installation requirements.

- (a) Except as provided in paragraphs (b) and (c) of this section, all self-propelled electric face equipment

^{2/} Although the inspector cited section 75.523, it is clear from both the meaning of the citation and the arguments of counsel for both parties that respondent was alleged to have violated subparts 1(a) and 2 (a)(b)(c) which generally set forth the requirements to comply with the main section. Respondent was charged with not providing devices (panic bars) that would permit the equipment to be deenergized quickly in the event of an emergency. There was never a doubt that respondent was aware of what it had been charged with in this citation.

which is used in the active workings of each underground coal mine on and after March 1, 1973, shall, in accordance with the schedule of time specified in paragraphs (a)(1) and (2) of this section, be provided with a device that will quickly deenergize the tramming motors of the equipment in the event of an emergency. The requirements of this paragraph (a) shall be met as follows:

- (1) On and after December 15, 1974, for self-propelled cutting machines, shuttle cars, battery-powered machines, and roof drills and bolters;
- (2) On and after February 15, 1975, for all other types of self-propelled electric face equipment.^{3/}

Additionally, 30 C.F.R. § 75.523-1(a) must be read in conjunction with the requirements of 30 C.F.R. § 75.523-2(a)(b)(c) which provides as follows:

(a) Deenergization of the tramming motors of self-propelled electric face equipment, required by paragraph (a) of § 75.523-1, shall be provided by:

- (1) Mechanical actuation of an existing push button emergency stop switch,
- (2) Mechanical actuation of an existing lever emergency stop switch, or
- (3) The addition of a separate electromechanical switch assembly.

^{3/} The exceptions set forth at 30 CFR 75.523-1(b) and (c) provide as follows:

"(b) Self-propelled electric face equipment that is equipped with a substantially constructed cab which meets the requirements of this part, shall not be required to be provided with a device that will quickly deenergize the tramming motors of the equipment in the event of an emergency."

"(c) An operator may apply to the Assistant Administrator-Technical Support, Mine Safety and Health Administration, Department of Labor, 4015 Wilson Boulevard, Arlington, Virginia 22203 for approval of the installation of devices to be used in lieu of devices that will quickly deenergize the tramming motors of self-propelled electric face equipment in the event of an emergency. The Assistant Administrator-Technical Support may approve such devices if he determines that the performance thereof will be no less effective than the performance requirements specified in § 75.523-2."

(b) The existing emergency stop switch or additional switch assembly shall be actuated by a bar or lever which shall extend a sufficient distance in each direction to permit quick deenergization of the trammig motors of self-propelled electric face equipment from all locations from which the equipment can be operated.

(c) Movement of not more than 2 inches of the actuating bar or lever resulting from the application of not more than 15 pounds of force upon contact with any portion of the equipment operator's body at any point along the length of the actuating bar or lever shall cause deenergization of the trammig motors of the self-propelled electric face equipment.

Turning to the merits of this case, the undisputed testimony of respondent's own witness shows that a violation of the Act occurred. Ron Mattingly testified that he was familiar with the condition of the panic bars on the day of the subject inspection and that one of the panic bars didn't function because of a faulty internal switch. It had been damaged and would not deenergize the equipment. Mattingly claimed there were two panic bars on the roof bolter, one on each side and that only one was working (Tr. 63, 64).

The thrust of the conflicting testimony in this case is misdirected towards two issues: First, whether the roof bolter could be trammed or moved from a position where the miners normally stood while operating the drills on the two booms. Second, whether there were panic bars on the booms to deenergize the equipment in case of an emergency. Three witnesses testified on behalf of the respondent that the machine could only be driven forward or backwards from the cage located on the right side and that the miner would have to get in the cage to do this. This evidence was uncontroverted.

The same three witnesses also testified that there were panic bars installed on the roof bolter with Mattingly stating that they were painted fluorescent orange. Jones stated that he did not see the panic bars described by the respondent's witnesses.

However, assuming that the roof bolter was equipped with panic bars on each boom and could not be trammed or driven by a miner standing there, the respondent's defense must fail. Respondent's witness and electrical maintenance foreman testified that he knew one of the switches on the boom of the roof bolter used to deenergize the trammig motor was inoperative and that the switch had been on order for approximately two months (Tr. 63, 64).

I find that the lack of a device on one boom of this two man roof bolter is a violation of the standard, specifically that part of section 75.523-2(b) which states in pertinent part as follows: (b) The existing emergency stop switch or additional switch assembly shall ... permit quick deenergization of the tramping motors of self-propelled electric face equipment from all locations from which the equipment can be operated." (emphasis added).

I find that the evidence clearly shows that the roof bolter could be "operated" from the booms. That is, the miners drilling holes turned the valves on the booms to operate the drills for installing roof bolts. It is vital in such a position that each miner be afforded a panic device to turn off the tramping motors powering the equipment in the event of an emergency.

Respondent argues that one of the switches was operative and that this is all the standard requires. I reject that argument for it is imperative that the device be available for quick deenergization of the equipment from both sides and requiring one miner to go around the equipment to the other side to turn off the switch defeats the purpose. Although, I find it unnecessary in this case to resolve the question as to whether there were panic bars on the machine, it is imperative and required by the standard that such bars be installed to give the miner an opportunity to quickly "hit" the switch should an emergency arise.

Penalty

The six criteria for assessing a penalty are set out in 30 C.F.R. § 820(i). The size of the operator is medium. The assessment of reasonable penalties in this case will not affect respondent's ability to continue in business. I find that respondent was negligent in allowing the two man roof bolting machine to be operated with one faulty panic switch. Also, I find that the respondent knew of this faulty switch as its employee responsible for electrical maintenance testified he was aware of this for over a two month period prior to the inspection.

The probability of injury exists as the miner operating the drill was exposed to becoming entangled in the machine and being unable to switch it off. There is a likelihood that the other miner could deenergize the machine with his switch if he became aware of a need to do so, but this could take time. The injury could be serious and cause death. Only one miner at a time would be exposed to the risk. Respondent showed good faith in abatement of the violation. I find \$150.00 is an appropriate penalty in this case.

Citation No. 788884

Citation No. 788884 charges a 104(a) violation of 30 C.F.R. § 75.1725(c) which provides as follows:

Repairs or maintenance shall not be performed on machinery until the power is off and the machinery is blocked against motion, except where machinery motion is necessary to make adjustments.

Inspector Ted Farmer testified that while inspecting the second right section of the first entry in the Co-op mine he observed a continuous miner being repaired while the power was on. The inspector testified that this created a dangerous situation because the employee doing the repairs was positioned under a cutting head containing sharp spikes which could have severely injured the employee had the power come on and the cutting head started running.

Respondent admits the above facts as described by the inspector but denies that a dangerous situation existed. It is respondent's position that even though power was connected to the machine, it was not running and the cutting head was blocked and would not move if the machine started up.

Scott Stoddard, respondent's mine foreman, testified that the conveyor chain was off the cog and he was under the machine trying to get it back on. He stated that the front of the machine was blocked up by a 6 foot crib and the switch to the power was off. He could not conceive of an accident happening because of the block and the switch being off (Tr. 142, 143). Stoddard contends that it was necessary to run the machine at certain times during these adjustments to get the holes in the chain lock to line up with the cog (Tr. 144). Respondent contends that there was no danger here and also that there is a provision in 30 C.F.R. § 75.-1725(c) which provides that power may be on "... where machinery motion is necessary to make adjustments."

I find that the above exception does not apply here. Testimony reveals that in order to complete the process of adjusting the cog to the chain, Stoddard, from his position outside the continuous miner, would direct the operator who was stationed in the cab of the continuous miner to run the cog. After he felt the cog was aligned properly, Stoddard would then go back under the head of the continuous miner to check the cog and chain for alignment (Tr. at 147). At this point, Stoddard would be under the cutting head while another man was in the cab at the controls with the power on. This presents a very dangerous situation. There is no reason why the power to the machine could not be turned off while Stoddard was going back under the head to check the alignment. If the cog required further adjustment, Stoddard could have backed away from the machine, power could have

been turned back on, and the cog rotated by the operator in the cab.

I therefore reject the Company's defense because it was not "necessary" that the power be on while the repairman was under the cutting head to check the alignment of the cog to the chain. The citation is affirmed.

Penalty

I find the respondent was negligent in not enforcing the safety regulation cited in this case and particularly where it is a mine foreman who was performing the alleged dangerous act. The probability and gravity appear high in that the cutting head would inflict serious and possibly fatal injuries to an exposed miner. Also, the machine could easily be activated while the repairs were being performed under the machine. The violation was quickly abated showing good faith on respondent's part. I find \$275.00 is an appropriate penalty in this case.

Citation No. 788887

Citation No. 788887 charges a 104(a) violation of 30 C.F.R. § 75.316. 30 C.F.R. § 75.316 provides as follows:

Ventilation system and methane and dust control plan. [Statutory Provisions].

A ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator and set out in printed form on or before June 28, 1970. The plan shall show the type and location of mechanical ventilation equipment installed and operated in the mine, such additional or improved equipment as the Secretary may require, the quantity and velocity of air reaching each working face, and such other information as the Secretary may require. Such plan shall be reviewed by the operator and the Secretary at least every six months.

The facts related to this citation are not in dispute. In accordance with § 75.316, respondent developed such a plan with the Secretary's approval. That plan required that brattice lines or curtains be installed anytime an entry exceeds fifty feet from a crosscut (Tr. at 134, 135 and P-8). When the inspector made his

inspection he saw an entry which had been mined 113 feet past the crosscut but was not equipped with a brattice line or curtain as the plan requires (P-10). While no brattice line was in place the inspector did observe marks in the roof which would indicate that sometime prior to the inspection a brattice line had been hung. The inspector also noticed some evidence of rib sloughage in the area where the curtain would have been hung. I find the inspector's testimony to be credible and accept these facts.

When an operator departs from his ventilation plan, a violation of 30 C.F.R. § 75.316 occurs. Zeigler Coal Co., 4 IMBA 30 (1975), aff'd. 536 F. 2d 398 (D.C. Cir. 1976). The fact that the brattice line may have only been down for a short time or because of unusual conditions is not a defense. Consolidated Coal Co. 3 FMSHRC 2207 (September 1981). The citation is therefore affirmed.

I find that respondent was negligent in failing to enforce safety regulation § 75.316 mandating brattice curtains in accordance with the operator's ventilation plan.

Concerning citation No. 788887, I find the probability of injury to be moderate, the gravity of the potential injury to be very serious, and the number of employees subject to this danger to be considerable. While the facts do not disclose that a methane explosion was likely, had one occurred the injuries resulting from such an explosion could be fatal or very serious and the number of miners affected would be high. I find \$160.00 is an appropriate penalty in this case.

WEST 81-85

Citation No. 1020472

Citation No. 1020472 alleges a 104(a) violation of 30 C.F.R. § 75.403 which provides in pertinent part as follows:

Maintenance of incombustible content of rock dust. [Statutory Provision]

Where rock dust is required to be applied, it shall be distributed upon the top, floor, and sides of all underground areas of a coal mine and maintained in such quantities that the incombustible content of the combined coal dust, rock dust, and other dust shall be not less than 65 per centum, but the incombustible content in the return aircourses shall be no less than 80 per centum

With respect to this citation, the essential facts are not in dispute. During a general inspection of respondent's Co-op Mine, Inspector Farmer noticed that the coloration on certain areas of the mine were a bit dark. This indicated to Farmer that the percentage of incombustible content of rock dust might be low in this specific area. Farmer took a spot sample of the dust by scraping a rib with a brush, sifting the material through a screen, and sending the sifted material out for chemical analysis. The usual procedure, referred to as band sampling, would be to combine samples from the roof, floor and both ribs. On this occasion, because the floor and roof were too wet, Farmer only took samples from the ribs. The reason for this is that the moisture content of the floor would cause the test to be inaccurate as to the ribs. Farmer noted wet floor condition on the form which accompanied the samples when they were sent for analysis.

Four different samples from different areas were sent out for analysis. A dust sampling report was returned to Farmer with the results as follows: Spot #1 (sample taken from floor and ribs at an intake entry) 76%; Spot #2 (sample taken from ribs at a return entry) 73%; Spot #3 (sample taken from floor and ribs at a return entry) 73%; and Spot #4 (sample taken from ribs at an intake entry) 83% (Exh. P-4).

Co-op argues that the dust sampling report lacks a sufficient foundation because the inspector who testified to its findings had no personal knowledge of the testing procedures used to evaluate the sample. This identical defense was unsuccessfully raised by Co-op earlier in Co-op Coal Co., 3 IMBA 533 (1974), which also concerned admissibility of a dust sampling report on a 30 C.F.R. 75.403 violation. The Administrative Law Judge in that case admitted the report because it had the "earmarks of reliability" and held that such a report can "establish a prima facie case of violation." Co-op Coal, at 539. Dust sample reports have been admitted in several other cases involving alleged violation of § 75.403 without testimony of the person conducting the actual chemical analysis. See Leechburg Mining Co., 1 FMSHRC 632 (June 1979), Itmann Coal Co., 3 FMSHRC 1221 (May 1981); and Old Ben Coal Co., 2 FMSHRC 2806 (Oct. 1980).

Beyond admissibility, Co-op also attacks the credibility of the report on the basis that the testing procedures employed by the inspector were irregular. Such an attack is indeed authorized under Co-op Coal Co., 3 IMBA at 539. It is argued that normal procedure dictated by the MSHA Underground Manual requires band or perimeter sampling. Band sampling entails collecting dust from the floor, roof and both ribs and then combining all the dust in one sample for a single reading.

This was not the method followed by Farmer in gathering the samples which generated the report in this case. Instead, the sample for Spot #2 was gathered only from the ribs and the sample for Spot #3 was gathered from the ribs and floor.^{4/} It is undisputed that the floor at Spot #2 was "wet" within the meaning of 30 C.F.R. § 75.402-1. Where a floor is "wet" there is no danger of combustibility and samples are not necessary. 30 C.F.R. § 75.402. For this reason a floor sample was not included in the total Spot #2 sample. At the same time, it is also clear that moisture content will increase the percentage of incombustible material and must be considered as part of the incombustible content of such material. 30 C.F.R. § 75.403-1. Respondent argues that they have been denied the benefit of the wet floor reading which might have added sufficient incombustible material to the aggregate sample to meet the 80% requirement and give a more accurate reading.

Failure of the inspector to follow his own internal guide lines on gathering dust report samples is not alone reason to discard the sample. Old Ben Coal, at 2809. Dust sampling reports based solely on rib samples have been held sufficiently accurate to support a § 75.403 violation if there are reasonable grounds for the inspector's procedures. Itmann Coal, at 1226.

In the instant matter, the inspector testified that the roof was too high to obtain samples from there and the floor was too wet to sample. On further inquiry, however, the inspector revealed that a sample could have been obtained from the floor but that he felt it was not necessary because there was sufficient water to insure incombustible content over 80% (Tr. at 106). When asked if moisture content was to be included in the sample the inspector answered in the affirmative and added that this is why he noted the wet floor conditions on the form which accompanied the samples (Tr. at 105). However, in making the analysis which generated the 73% figure for Spot #2 I find that the condition of the floor was not factored into the percent reading whatsoever (Tr. at 105). Notwithstanding this, the Secretary bases his penalty solely on the percentage reading from the dust sampling report.

In essence the government is arguing, notwithstanding the clear mandate to include moisture content in its sample, it can take a sample but exclude high moisture content areas because they are clearly in the safe range. The government then proposes to use this data to prove that respondent does not meet the threshold of the safe range. I find this reasoning to be unsound. The Spot #2 reading is unnecessarily inaccurate. Itman coal, at 1226. If

4/ Spots 2 and 3 from return aircourses are the critical samples because they both tested at 73% incombustible content and 30 C.F.R. 75.403 requires 80% for return aircourses. The remaining samples taken from intaking aircourses tested at 76% and 83% which is above the 65% minimum for intakes.

the floor area was indeed too "wet" (as that term is used in 30 C.F.R. § 75. 402-1) and was clearly in the safe zone then that specific area may be exempt from the rock dusting requirement altogether under 30 C.F.R. § 75.402.

However, testimony does support a violation of the section based on sample #3 which did include samples from the floor area as well as the ribs. Co-op has not argued that one sample alone is insufficient to support a violation. Therefore, I find Citation No. 1020472 should be affirmed. Further, I find respondent's failure to maintain a sufficient level of incombustible material constituted negligence as the regulation requires an 80% level and respondent was maintaining a 73% level.

I find the probability of injury as to this violation to be low but the gravity of the injury, should one occur, to be serious. Also a number of employees would be subject to this danger. Two of the four tests showed the operator to be in compliance. However, one of the two tests were unacceptably inaccurate and one test shows the operator to be in violation but only by seven percentage points. I find that \$50.00 is an appropriate penalty in this case.

Conclusions of Law

Based upon the entire record in these consolidated cases including the stipulations of the parties and upon the factual determinations reached in the narrative portions of this decision, it is concluded:

1. That the Commission has jurisdiction to decide these three cases.

2. Based upon the stipulation of settlement entered into between the parties, the following agreed settlements for the designated citations are approved as follows:

Docket No. WEST 80-142:

<u>Citation No.</u>	<u>Proposed Penalty</u>
789024	\$ 72.00
789026	168.00
788576	136.00
788577	104.00
Total	<u>\$480.00</u>

<u>Citation No.</u>	<u>Amended Proposed Penalty</u>
788831	\$ 38.00
788832	38.00
788833	38.00
788834	150.00
788835	140.00
788837	66.00
788838	72.00
788839	52.00
788840	78.00
788883	36.00
788885	40.00
788886	72.00
Total	<u>\$820.00</u>

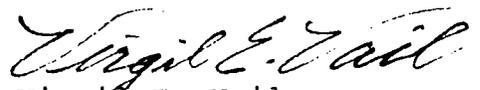
3. That the credible evidence of record establishes as follows: In Docket No. WEST 80-142, Citation No. 788573, respondent violated 30 C.F.R. § 77.208(e) by failing to replace the covers on the tanks of compressed gas when not in use and that an appropriate penalty for this violation is \$35.00. Also, in reference to Citation No. 788579, respondent violated 30 C.F.R. § 75.523, in failing to have a device on one of the booms for deenergizing the trammig motors in the event of an emergency and that \$150.00 is an appropriate penalty in this case.

4. In Docket No. WEST 80-286, Citation No. 788884, the evidence shows that respondent violated safety standard 30 C.F.R. § 75.1725(c) by failing to turn the power off to the continuous miner while a miner was underneath the machine attempting to replace the conveyor chain on the cog. An appropriate penalty in this case is \$275.00. As to Citation No. 788887, respondent violated 30 C.F.R. § 75.316 by failing to follow its approved ventilation plan and an appropriate penalty for this violation is \$160.00

5. In Docket No. WEST 81-85, Citation No. 1020472, I find that the evidence shows that respondent violated 30 C.F.R. § 75.403 by failing to maintain rock dust in sufficient quantities to comply with the requirements set out therein. Although some of the tests were not valid and indicative of a violation, I find that sample #3 supports the petitioner's contention that a violation occurred and that an appropriate penalty is \$50.00.

ORDER

Accordingly, based upon the foregoing findings of fact and conclusions of law, the respondent is ORDERED to pay the total of \$1,970.00 within forty days of this decision.


Virgil E. Vail
Administrative Law Judge

/blc

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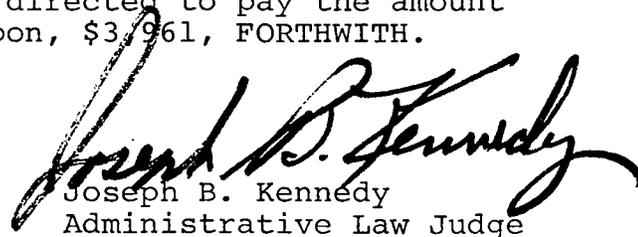
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SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEVA 83-202
Petitioner : A.C. No. 46-01283-03513
v. :
WESTMORELAND COAL COMPANY, : Docket No. WEVA 83-203
Respondent : A.C. No. 46-01283-03514
: Docket No. WEVA 83-204
: A.C. No. 46-01283-03515
: Docket No. WEVA 83-205
: A.C. No. 46-01283-03517
: Hampton No. 3 Mine

ERRATA ORDER

Before: Judge Kennedy

The parties having moved for correction of an arithmetical error of \$130 in my decision of November 7, 1983, it is ORDERED that the same be, and hereby is, GRANTED and the decision corrected to show that the total amount of the settlement approved is \$3,961. It is FURTHER ORDERED that as corrected the decision is confirmed and the operator directed to pay the amount of the settlement agreed upon, \$3,961, FORTHWITH.


Joseph B. Kennedy
Administrative Law Judge

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