NOVEMBER 1986

COMMISSION DECISIONS

ADMINISTRATIVE LAW JUDGE DECISIONS

NOVEMBER

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

Secretary of Labor, MSHA v. Columbia Portland Cement Co., Docket No. LAKE 86-38-M. (Judge Merlin, Default Order vacated, October 3, 1986).

Secretary of Labor, MSHA v. Mohave Concrete & Materials, Inc., Docket No. WEST 86-14-M. (Judge Merlin, Default Order vacated, October 9, 1986).

Dillard Smith v. Reco, Inc., Docket No. VA 86-9-D. (Judge Broderick, October 17, 1986)

Secretary of Labor for John Bushnell v. Cannelton Industries, Docket No. WEVA 85-273-D. (Judge Fauver, October 21, 1986).

Review was denied in the following case during the month of November:

Secretary of Labor, MSHA v. Brown Brothers Sand Company, Docket No. SE 86-11-M. (Judge Merlin, Default Decision, October 3, 1986).

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 5, 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEST 81-186-M
CATHEDRAL BLUFFS SHALE OIL COMPANY	:	

BEFORE: Backley, Doyle, Lastowka and Nelson, Commissioners

ORDER

BY THE COMMISSION:

This civil penalty case is before us on remand from the U.S. Court of Appeals for the District of Columbia Circuit. Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533 (D.C. Cir. 1986). At issue is the liability of a production-operator for a violation of a mandatory safety standard committed by its independent contractor.

Cathedral Bluffs Shale Oil Company is a partnership between Occidental Shale Oil Co. ("Occidental") and Tenneco Shale Oil Co. Occidental contracted with the Gilbert Corporation ("Gilbert") to perform certain construction work at a mine at which Occidental is the operating partner. During an inspection of the mine, an inspector from the Department of Labor's Mine Safety and Health Administration cited Occidental for a violation of a mandatory safety standard committed by Gilbert. Occidental contested the citation and the civil penalty proposed by the Secretary. (Gilbert also was issued a citation for the same violation, but chose to pay the penalty instead of contesting.) Following a hearing on the merits, Commission Administrative Law Judge John J. Morris held the Commission's decision in Phillips Uranium Corp., 4 FMSHRC 549 (April 1982), to be "dispositive", and, "on the authority of Phillips", he vacated the citation. 4 FMSHRC 902 (May 1982)(ALJ).

On review, the Commission agreed with the judge's result. However, the Commission concluded that the judge had read Phillips too broadly and had misapplied it as directly controlling the disposition of the case. 6 FMSHRC 1871 (August 1984). The Commission noted that prior to

citing Occidental for the independent contractor's violation, the Secretary published enforcement guidelines articulating his policy for issuing citations and orders when violations of the Act and mandatory safety and health standards are committed by independent contractors. The Commission concluded that "[T]he appropriate inquiry is whether the record reflects proper application of the Secretary's ... independent contractor enforcement policy." 6 FMSHRC at 1873. Holding that the record did not support a conclusion that the Secretary acted within his enforcement guidelines when he cited Occidental, the Commission affirmed the dismissal of the citation. 6 FMSHRC at 1876-77.

The Secretary appealed, and the court concluded that the Commission improperly viewed the Secretary's enforcement guidelines as a "'legislative (i.e., substantive) rule ... which restricts his enforcement discretion.'" Cathedral Bluffs Shale Oil Co., supra, 796 F.2d at 537. The court stated:

> Because the Commission improperly regarded the Secretary's general statement of his enforcement policy as a binding regulation which the Secretary was required strictly to observe, its decision dismissing the citation of Occidental must be reversed and remanded for further action consistent with this opinion.

796 F.2d at 539.

Accordingly, the matter is remanded to the administrative law judge to determine the liability of Occidental for the violation of its independent contractor in light of the court's opinion. 1/

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

1/ Chairman Ford did not participate in the consideration or disposition of this matter.

Distribution

Barry F. Wisor, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, Virginia 22203

James M. Day, Esq.
G. Lindsay Simmons, Esq.
Cotten, Day & Doyle
1899 L Street, N.W.
Suite 1200
Washington, D.C. 20036

Administrative Law Judge John Morris
Federal Mine Safety and Health Review Commission
333 West Colfax Avenue, Suite 400
Denver, Colorado 80204

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 7, 1986

KENNETH W. HALL	:	
	:	
v.	:	Docket No. VA 85-8-D
	:	
CLINCHFIELD COAL COMPANY	:	

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka, and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This proceeding involves a discrimination complaint brought by Kenneth W. Hall against Clinchfield Coal Company ("Clinchfield") pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982). Mr. Hall's complaint principally alleges that Clinchfield violated section 105(c)(1) of the Mine Act, 30 U.S.C. § 815(c)(1), by denying his request for a transfer from an underground mining position to a surface mining position and by subsequently discharging him. Following a hearing on the merits, Commission Administrative Law Judge James A. Broderick concluded that Clinchfield had not discriminated against Hall and dismissed his discrimination complaint. 7 FMSHRC 1477 (September 1985)(ALJ). We granted Hall's petition for discretionary review, which he prepared without the assistance of counsel. For the reasons that follow, we conclude that the judge's findings are supported by substantial evidence and we affirm his decision.

In September 1981 Hall was hired by Clinchfield to work at its McClure No. 1 underground coal mine as a section foreman in charge of a production crew. Among other duties, Hall's crew was responsible for ventilating the face areas and for bolting the roof of the sections mined by the crew.

The ventilation plan and roof bolting procedures followed at the McClure mine are relevant to Hall's discrimination complaint. In 1982, because of a reduction in the height of the coal seam being mined, Clinchfield began to use line curtains as the primary method of ventilating the mine. Thereafter, as found by the judge, certain procedures were followed routinely while the roof in a section was being bolted. After the coal was cut, the roof bolters installed near the face area a

roof bolt approximately three feet from the rib. During the installation of this roof bolt (referred to as a "rib" bolt), the line curtain was removed to the last row of permanent roof supports. Without such removal, the canopy of the roof bolter would have otherwise forced the line curtain into the rib and would have cut off ventilation to the face. Therefore, when cuts exceeded ten feet, the line curtain was not maintained to within ten feet of the face during the installation of the rib bolt as required by the approved ventilation plan that was in effect at the mine until March 5, 1984. 1/ Once the rib bolt was installed, however, the line curtain was advanced to the rib bolt and the center bolts were then installed. See 7 FMSHRC at 1478-79.

During Hall's first year as a section foreman he questioned then General Mine Foreman Ron Sluss about the practice of removing the line curtain before completion of the roof bolting. Sluss told him that Clinchfield had received permission to use the procedure. Hall's crew continued to follow the procedure outlined above, and Hall did not raise additional questions concerning that procedure until early 1984.

On June 23, 1983, Hall's brother was killed in an explosion at the McClure mine. After this tragedy, Hall took two weeks vacation and subsequently was given another two weeks off with pay. During this time, Hall received treatment at a mental health clinic to help him cope with the death of his brother.

In February 1984, several miners on Hall's crew complained to him about Clinchfield's roof bolting practice. They contended that not enough air was reaching the face and, consequently, air in the affected section was not circulating properly. These complaints led Hall to question Clinchfield's general foreman, Johnny Kiser, about the bolting practice. Mr. Kiser repeated what Sluss had told Hall previously, namely, that Clinchfield had permission to remove the line curtain while rib bolts were being installed. Hall posed the same questions to two inspectors of the Department of Labor's Mine Safety and Health Administration ("MSHA"). According to Hall one inspector believed that the bolting procedure was permissible but the other inspector disagreed.

In late February 1984, a few days after Hall had spoken to Kiser, Clinchfield's safety director, Wayne Fields, met with a number of shift foremen including Hall. The judge found that during this meeting,

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1/ Clinchfield's ventilation plan reflected the provisions of 30 C.F.R. § 75.302-1, a mandatory ventilation standard that addresses the use of line brattice (curtain). Section 75.302-1 provides in part:

> Line brattice or any other approved device used to provide ventilation to the working face from which coal is being cut, mined or loaded ... shall be installed at a distance no greater than 10 feet from the area of deepest penetration to which any portion of the face has been advanced unless a greater distance is approved by the [Department of Labor's Mine Safety and Health Administration] Coal Mine Safety District Manager of the area in which the mine is located.

Fields instructed the foremen not to ask questions about bolting procedures in the presence of MSHA inspectors or union personnel. 7 FMSHRC at 1480. The foremen also were instructed to continue bolting in the usual manner until a formal revision of the mine's ventilation plan could be obtained. The record reflects that in late February 1984 there were contacts between MSHA and Clinchfield officials regarding a revision of Clinchfield's ventilation plan. Tr. 358-59. 2/

Because Hall thought that the bolting process was unsafe and illegal, his crew shortened its cuts to ten feet instead of the usual 15 feet, to avoid the need for the temporary repositioning of the line curtain. Hall's production reports, however, continued to show that his crew was making 15-foot cuts.

Hall's last working day at the mine was March 2, 1984. On that date, he left the mine because of anxiety, hyperventilation, and other emotional problems. 7 FMSHRC at 1480. Hall went to see Richard Light, the mine superintendent, and explained that due to his psychological problems, he could not function as a mine foreman. Hall stated that he intended to see a psychiatrist. Hall also expressed concern about the safety of the roof bolting procedure. The judge found that, "Complainant was concerned about the procedure being followed which he felt was violative of the Mine Safety law ... and claimed [to Mr. Light] that he could not work in part because of that situation." Id. Light instructed Hall to contact him after he had seen a doctor and to inform the company whether he would be returning to work or whether he would be quitting. Hall did not contact Light until after he had filed his discrimination complaint with MSHA in late 1984.

Meanwhile, on March 5, 1984, Clinchfield submitted to MSHA a written request for revision of its ventilation plan so as to permit the temporary repositioning of the line curtain more than ten feet from the face during the installation of rib bolts. This revision was approved by MSHA one day later, on March 6, 1984.

Hall obtained further psychiatric counseling and treatment. Hall was advised by a psychiatric social worker not to return to work at the mine unless he could control his emotional problems. He was also advised to transfer to a surface position. Hall testified that, on that advice,

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2/ The roof bolting procedures required to be followed in a mine are those set forth in the mine's approved roof control plan. The record indicates that Clinchfield, with MSHA's knowledge, changed its procedure regarding placement of line curtains without first obtaining a written revision to its approved plan. Although the revision eventually was formally sought and granted, both Clinchfield and MSHA are well aware of the proper recourse when changed mining conditions necessitate a change in mining procedures and of the consequences that can ensue when such procedures are not followed.

at some point in March 1984, he contacted Joseph Pendergast, Clinchfield's Manager of Industrial Relations, and requested a transfer to an aboveground position. Hall further testified that he was informed that there were no surface positions available to which he could be transferred. Pendergast denied that any such discussion occurred. 7 FMSHRC at 1483.

From the day that Hall left the mine on March 2, 1984, until April 22, 1984, he continued to be paid his salary by Clinchfield. From April 23 through sometime in June 1984 Hall received benefits under Clinchfield's disability insurance program. From June forward, Hall was listed by Clinchfield as an employee on leave without pay. When Hall's disability benefits stopped, he applied to the Commonwealth of Virginia for workers' compensation. On August 29, 1984, his application was denied.

At some point in August 1984, Hall learned that two miners had been transferred by Clinchfield to surface positions. Hall testified that he again contacted Mr. Pendergast who, according to Hall, informed him that he was not qualified for either position. Pendergast denied that such a conversation occurred. 7 FMSHRC at 1483. Because Hall could not find other employment in the area, he and his family moved to Broken Arrow, Oklahoma, where he was employed as a school custodian. Hall remained in Oklahoma until September 30, 1984. He then returned to Virginia, and again contacted Clinchfield concerning a possible tranfer. He received a letter from Pendergast, dated November 7, 1984, informing him that he had been terminated because he had "secured work with another employer."

Subsequently, Hall filed a discrimination complaint with MSHA. MSHA determined that a violation of the Mine Act had not occurred and declined to prosecute a complaint on Hall's behalf. Hall then instituted this proceeding before this independent Commission pursuant to section 105(c)(3) of the Act. 30 U.S.C. § 815(c)(3). Hall's complaint alleged that Clinchfield unlawfully discriminated against him by: (1) causing his psychological problems as a result of ordering him to violate federal law; (2) failing to transfer him to a surface position; (3) terminating him because of his safety complaints; and (4) denying him certain fringe benefits.

After an evidentiary hearing, Administrative Law Judge Broderick concluded that Hall had failed to establish a prima facie case of discrimination. The judge found that while Hall's complaints and inquiries regarding Clinchfield's roof bolting procedures were protected by the Mine Act, his emotional problems stemming from his brother's death "were not the result of his being 'order[ed] to willfully violate federal law.'" 7 FMSHRC at 1482. The judge further found that Clinchfield's refusal to transfer Hall to a surface position, its final decision to discharge him, and the denial of insurance benefits and vacation pay were all adverse actions but were not motivated in any part by Hall's protected activity. 7 FMSHRC at 1482-84. Therefore, the judge dismissed Hall's discrimination complaint.

On appeal, Hall essentially challenges the judge's factual findings and credibility resolutions. The Commission's role in reviewing a judge's decision is to determine whether the judge's findings are supported by substantial evidence and whether the judge correctly applied the law. 30 U.S.C. § 823(d)(2)(A)(ii). After carefully examining the entire record, we conclude that the judge's decision is supported by substantial evidence and is consistent with applicable rulings of the Commission in prior discrimination cases.

In order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, a complaining miner bears the burden of production and proof in establishing that (1) he engaged in protected activity and (2) the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds sub. nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. If an operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action in any event for the unprotected activity alone. Pasula, supra; Robinette, supra. See also Donovan v. Stafford Construction Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983)(specifically approving the Commission's Pasula-Robinette test).

As to the first element of a prima facie case, Clinchfield does not dispute the judge's findings that Hall's questions and complaints about Clinchfield's roof bolting procedures and his actions in shortening his mining cuts for safety reasons enjoyed the protection of the Mine Act. See 7 FMSHRC at 1482. As to the second elememt of a prima facie case the judge determined that the following adverse actions were taken against Hall: (1) the refusal to transfer him to a surface position; (2) his discharge; and (3) the denial of certain fringe benefits. The judge found, however, that these actions were in no part motivated by Hall's protected activity. 7 FMSHRC at 1483. We agree.

Concerning Clinchfield's failure to grant Hall's request for a transfer to a surface position, the record reveals that during August 1984 Clinchfield transferred three miners to certain surface positions. Hall asserts that he should have been transferred to at least one of these positions because he had requested a transfer in March 1984 and was qualified for all three positions. He contends further that because of his safety complaints he was not transferred.

As noted, Pendergast (Manager of Industrial Relations) denied discussing a possible transfer with Hall in either March or August 1984. The judge found that, regardless of whether such conversations occurred, Pendergast had no personal knowledge of Hall's safety concerns and did not refuse to transfer Hall because of those concerns. 7 FMSHRC at 1483. The evidence supports these findings. Further, Pendergast testified that three miners -- Terry Robinson, Doug Ring, Jr., and Bob Harding -- were surface workers who were transferred to different surface positions in August 1984. He further testified that all were more qualified than Hall for these positions. Mr. Robinson, who worked as a billing clerk, was transferred to Clinchfield's Moss 3 Preparation Plant to prepare him to take over as manager of the shipping department. Mr. Ring, also a billing clerk, moved into Robinson's vacated position. This move was a lateral one for Ring, not a promotion. Finally, Mr. Harding, an employee with 30 years of service with Clinchfield, was moved into Ring's position because the position that he had held at the central warehouse was about to be terminated. Harding's move also was considered to be lateral. The proffered reasons for these transfers were not overcome during cross-examination, and we find no reason in the record to regard them as anything other than legitimate, good faith business decisions.

Pendergast testified that Hall had not been excluded from any of these positions as a result of his having engaged in protected activities. Pendergast denied that Hall had discussed his safety concerns with him and denied receiving, prior to Hall's termination, letters prepared by Hall's psychiatric social worker referring to Hall's safety concerns. The judge credited Pendergast's testimony in this regard. As the Commission often has stated, a judge's credibility resolutions cannot be overturned lightly (e.g., Robinette, supra, 3 FMSHRC at 813), and we discern nothing in the present record that would justify our taking this extraordinary step in this matter. We find that the judge's findings on the transfer issue are supported by substantial evidence and are grounded in credibility resolutions that he was in the best position to make.

With respect to Hall's discharge, the judge found that Pendergast had no knowledge of Hall's protected activity at the time he prepared the notice of discharge and that he had not consulted with any other mine officials prior to terminating Hall. 7 FMSHRC at 1483. Again, the record supports these findings. Pendergast testified that he made the decision to discharge Hall after he received a notice, dated November 5, 1984, from Clinchfield's insurance department stating that Hall could not prove his state disability claim and that he was working elsewhere. Pendergast also stated that he made the termination decision without conferring with any other management officials or anyone who knew of Hall's safety concerns. Pendergast further asserted that Clinchfield "routinely terminate[d]" anyone who obtained another job. Tr. 513. As discussed above in connection with the transfer issue, the judge specifically found that Pendergast had no knowledge of Hall's protected activity. This finding is a credibility determination and we find no grounds for overturning the judge's resolution of this question .

We also are persuaded by the fact that when Hall voluntarily left the mine in March 1984, Clinchfield's reaction was supportive, not disciplinary. The record reflects that Clinchfield extended Hall leave with pay and then provided insurance benefits. Moreover, the termination occurred in November 1984 -- nine months after Hall's departure. There is no evidence in this record of hostility towards Hall or of retaliation for his safety concerns. In sum, the judge concluded that Hall left work voluntarily in March and was discharged for legitimate reasons in November. We find no persuasive reasons in this record to disturb the credibility resolutions and findings on which the judge's conclusions are based.

Finally, with regard to Hall's claim that he was denied disability insurance, vacation pay, and benefits, the judge found that Hall's disability insurance payments were discontinued by Clinchfield's insurance carrier on the grounds that Hall could not establish that he was disabled and because he was working in Oklahoma. 7 FMSHRC at 1483. The insurance carrier arranged for Hall to be examined by a physician, who determined that Hall was capable of working and was not disabled. There is no evidence in the record to indicate that Clinchfield requested that its insurance carrier deny Hall benefits because of his prior protected activity. As to the denial of vacation benefits, the judge found that this denial was not motivated by Hall's protected activity. This matter was not litigated in detail, and there is nothing in the record inconsistent with the judge's finding. We affirm the judge's findings on these issues.

In sum, we agree with the judge that Hall failed to carry his evidentiary burden of proving that any of the adverse actions discussed above were motivated by his protected activity.

For the foregoing reasons, the judge's decision dismissing Hall's discrimination complaint is affirmed.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

Distribution

Kenneth W. Hall
1215 West Birmingham Place
Broken Arrow, Oklahoma 74011

Louis Dene, Esq.
206 East Main Street
P.O. Box 1135
Abingdon, Virginia 24210

Administrative Law Judge James A. Broderick
Federal Mine Safety and Health Review Commission
5203 Leesburg Pike, Suite 1000
Falls Church, Virginia 22041

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 10, 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEST 84-48-M
ASARCO, INCORPORATED-NORTHWESTERN MINING DEPARTMENT	:	

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson, Commissioners

DECISION

BY: Backley, Doyle, Lastowka and Nelson, Commissioners

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982)(the "Mine Act"). The issue is whether a miner's violation of 30 C.F.R. § 57.3-22 (1983), a metal-nonmetal underground safety standard regulating ground control, was properly attributed to the mine operator, Asarco, Inc. ("Asarco"). 1/ The administrative law judge found that Asarco violated the standard and assessed a civil penalty of $25. 7 FMSHRC 1714 (October 1985)(ALJ). For the reasons that follow, we affirm.

1/ 30 C.F.R. § 57.3-22 (1983) provides:

> Mandatory. Miners shall examine and test the back, face, and rib of their working places at the beginning of each shift and frequently thereafter. Supervisors shall examine the ground conditions during daily visits to insure that proper testing and ground control practices are being followed. Loose ground shall be taken down or adequately supported before any other work is done. Ground conditions along haulageways and travelways shall be examined periodically and scaled or supported as necessary.

Following the Secretary of Labor's revision of the metal-nonmetal standards in January 1985, this standard is now found unchanged at 30 C.F.R. § 57.3022 (1985).

Asarco's Leadville Unit Mine, an underground metal mine located in Lake County, Colorado, produces lead and zinc concentrates. On September 28, 1983, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") began a two-day inspection of the mine. The inspector, who was accompanied by Asarco's safety engineer, observed miners Alan Lysne and George Naranjo working in stope 15-25-300. (Stopes are excavated areas from which ore is mined in a series of steps.) The inspector determined that the ribs and back of the stope were loose and dangerous. The inspector suggested to the safety engineer that the stope be made safe by barring down 2/ the loose rock and by matting 3/ the area, prior to any further work at the face. The safety engineer instructed the miners to bar down the loose rock and to make the area safe. Neither the inspector nor the safety engineer specifically mentioned barring down loose rock at the face of the stope because at that time the face was covered by muck (i.e., stone and dirt) and consequently was not visible.

After Lysne and Naranjo received their instructions they proceeded to institute ground control measures. They barred down some loose rock and installed mats in areas of the stope away from the face.

Continuing his inspection on the following day, the inspector saw Lysne being carried from the mine on a stretcher. Lysne had been drilling in stope 15-25-300 when rock at the face fell, breaking his foot. The inspector, along with the safety director and the shift foreman, went immediately to the accident scene.

Upon arriving at the stope, the inspector found that although the back of the stope had been secured properly, the face area was unsafe because of the amount of loose rock present. In order to secure the area, the shift foreman proceeded to bar down the stope. The barring-down procedure took approximately thirty minutes and yielded over one ton of loose rock.

The inspector concluded that vibrations from Lysne's drill caused the loose rock to fall from the face. The inspector believed that the accident would not have occurred if the loose rock in the stope had been barred down as ordered the previous day. Consequently, the inspector issued a citation to Asarco alleging a violation of 30 C.F.R. § 57.3-22.

Following an evidentiary hearing the judge concluded that the standard was violated and that Asarco was liable for the violation. The judge held that the face where Lysne was working was plainly unstable,

2/ "Barring down" is defined as: "removing, with a bar, loose rock from the sides and roof of mine workings ... prying off loose rock after blasting, to prevent danger of fall." Bureau of Mines, U.S. Department of Interior, A Dictionary of Mining, Mineral, and Related Terms 83 (1968).

3/ A "mat" is a piece of sheet steel that is used to hold loose ground or to keep ground from getting loose.

that Lysne did not "examine and test" the face "frequently" as required by the standard, and that Lysne ignored the standard's command that "loose rock shall be taken down or adequately supported before any other work is done." 7 FMSHRC at 1716. Stating that "an operator is liable without fault for violations committed by its employees," the judge concluded that Lysne's "omissions must be imputed to Asarco under the strict liability doctrine inherent in the [Mine] Act." 7 FMSHRC at 1716, 1717 (footnote omitted).

In assessing a civil penalty for the violation, the judge made findings regarding all of the statutory penalty criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), but focused his attention primarily upon the criterion of negligence. In his brief to the judge, the Secretary of Labor ("Secretary") stated that "the effectiveness of Asarco's supervision and training is not in issue" and the judge agreed. 7 FMSHRC at 1719. The judge found that barring down loose ground was "an ordinary and almost inevitable phase of the mining cycle" at the mine, and that in this regard Asarco's training and supervision of its miners, particularly of Lysne, were "adequate under all the circumstances." 7 FMSHRC at 1717. The judge noted that Lysne's supervisors had been at the stope on the day prior to the accident and had instructed Lysne specifically to "give his first attention to ground control the next day." 7 FMSHRC at 1718. The judge found Lysne's decision to begin drilling the unstable face "unforeseeable and idiosyncratic." The judge found no evidence of "supervisory dereliction" on Asarco's part and concluded that Asarco was not negligent. 7 FMSHRC at 1718. The judge stated that the other penalty assessment criteria were "overshadowed by the negligence factor" and he assessed a civil penalty of only $25.

On review there is no dispute that Lysne's conduct violated the standard. Asarco contends, however, that under the Mine Act it cannot be held liable for a violation of a mandatory standard when the standard places responsibility for compliance upon the miner. Asarco also contends that it cannot be held liable for a violation because it has taken all practicable measures to prevent the miner from violating the standard. In effect, Asarco is asking the Commission to re-examine the principle that under the Mine Act an operator is liable, without regard to fault, for violations of the Act committed by its employees. See Southern Ohio Coal Co., 4 FMSHRC 1459, 1462 (August 1982).

We have examined the principle of liability without fault in the light of Asarco's arguments, the language and legislative history of the Mine Act, and relevant Commission and court precedent. For the reasons set forth below, we reaffirm that under the Mine Act an operator may be held liable for a violation without regard to fault and, accordingly, we conclude that the judge did not err in holding Asarco liable for the violation of 30 C.F.R. § 57.3-22.

The general principle that an operator is liable for the violations of the Act committed by its employees has been stated frequently. Sewell Coal Co. v. FMSHRC, 686 F.2d 1066, 1071 (4th Cir. 1982); Allied

Products Co. v. FMSHRC, 666 F.2d 890, 893 (5th Cir. 1982); Southern Ohio Coal Co., 4 FMSHRC 1459, 1462 (August 1982); American Materials Corp., 4 FMSHRC 415, 419 n. 8 (March 1982); Kerr-McGee Corp., 3 FMSHRC 2496, 2799 (November 1981); El Paso Rock Quarries, Inc., 3 FMSHRC 35, 38-39 (January 1981). Cf. Ace Drilling Coal Co., Inc., 2 FMSHRC 790-91 (April 1980), aff'd without opinion, 642 F.2d 440 (3rd Cir. 1981)(construing 1969 Coal Act).

Asarco argues, however, that each of these cases can be distinguished because of the peculiar facts in this case and the fact that the mandatory standard at issue here expressly requires compliance by the miner himself. Citing section 104(a) of the Mine Act, 30 U.S.C. § 814(a), Asarco asserts that an operator can be cited for a violation only when an MSHA inspector believes that "an operator has violated [the] Act or any mandatory health or safety standard." (Emphasis added). Asarco notes that section 104(a) is patterned after section 104(b) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976)(amended 1977)(the "Coal Act"), and that section 104(b) read as follows: "[I]f, upon any inspection of a coal mine, an authorized representative of the Secretary finds there has been a violation of any mandatory health or safety standard ... he shall issue a notice of violation to the operator." 30 U.S.C. § 814(b) (1976). Asarco contends that by changing section 104 to require the inspector to issue a citation upon belief that the operator has violated the Act or a mandatory health or safety standard, Congress intended that operators and miners each be responsible for compliance and that an operator be cited only for its own violations. We do not find this argument persuasive.

Section 104(a) sets forth the duties of mine inspectors in enforcing the Act. It does not define the scope of the operator's liability. The liability of an operator is governed by section 110(a), 30 U.S.C. § 820(a), which states: "The operator of a ... mine in which a violation occurs of a mandatory health or safety standard ... shall be assessed a civil penalty...." (Emphasis added). The occurrence of the violation is the predicate for the operator's liability.

Further, section 110(a) of the Mine Act is comparable to section 109(a)(1) of the Coal Act, 30 U.S.C. § 119(a)(1) (1976). ("The operator of a coal mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act ... shall be assessed a civil penalty....") The legislative history of the Coal Act indicates that section 109(a)(1) imposed on the operator liability without fault for violations of the standards or the statute. In relevant part, the legislative history states:

> The Senate bill provided that, in determining the amount of the civil penalty only, the Secretry should consider, among other things, whether the operator was at fault. The House amendment did

> not contain this provision. Since the conference agreement provides liability for violation of the standards against the operator without regard to fault, the conference substitute also provides that the Secretary shall apply the more appropriate negligence test, in determining the amount of the penalty, recognizing that the operator has a high degree of care to insure the health and safety of persons in the mine.

Conf. Rep. No. 761, 91st Cong., 1st Sess. 81 (1969), reprinted in Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Legislative History of the Federal Coal Mine Health and Safety Act of 1969, Part I at 1515 (1975). See also Sewell Coal Co., 686 F.2d 1066, 1071 (4th Cir. 1982); Ace Drilling Coal Co., Inc., 2 FMSHRC at 791; United States Steel Corp., 1 FMSHRC 1306, 1307 (September 1979); Peabody Coal Co., 1 FMSHRC 1494, 1495 (October 1979); Valley Camp Coal Co., 1 IBMA 196, 200-01 (1972). Neither the Mine Act nor its legislative history reveals any indication that Congress sought to disturb the scheme of operator liability without fault as it existed under the Coal Act. S. Rep. 181, 95th Cong. 1st Sess. at 18 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 606 (1978). This Commission and several courts of appeal have interpreted the Mine Act as being consistent with the Coal Act on this issue of operator liability without fault. See Sewell Coal Co., 686 F.2d at 1071; Allied Products Co., 666 F.2d at 893; A.H. Smith Stone Co., 5 FMSHRC 13, 15 (January 1977); Southern Ohio Coal Co., 4 FMSHRC at 1462; American Materials Corp., 4 FMSHRC at 419 n. 8; Kerr-McGee Corp., 3 FMSHRC at 2499; El Paso Rock Quarries, Inc., 3 FMSHRC at 38-39. We find no basis for distinguishing the present case. As the court in Allied Products stated: "If the Act or its regulations are violated, it is irrelevant whose act precipated the violation ...; the operator is liable." 666 F.2d at 894.

As the judge recognized, the operator's fault or lack thereof, rather than being a determinant of liability, is a factor to be considered in assessing a civil penalty. Sewell Coal Co., 686 F.2d at 1071; Southern Ohio Coal Co., 4 FMSHRC at 1464; Kerr-McGee Corp., 3 FMSHRC at 2499; El Paso Rock Quarries, 3 FMSHRC at 38-39. Here, when fixing the penalty the judge gave appropriate weight to Asarco's lack of fault in considering the negligence criterion. 4/

4/ Asarco also argues that imputing the negligence of Lysne to it for purposes of liability violates the equal protection clause of the Fifth Amendment to the United States Constitution. Asarco raises this argument for the first time in its brief on review. Commission Procedural Rule 70(f) states: "If a petition is granted, review shall be limited to the questions raised by the petition." 29 C.F.R. § 2700.70(f). See also section 113(d)(2)(A)(iii) of the Act, 30 U.S.C. § 823(d)(2)(A)(iii). Because the constitutional question was raised improperly, we decline to address it.

Accordingly, the decision of the administrative law judge is affirmed.

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

Chairman Ford dissenting:

Since the primary purpose of the Mine Act is to prevent fatalities, disabling injuries, and other injuries and illnesses among the Nation's miners, 1/ it is appropriate to weigh the disposition of every contested citation in light of this fundamental public policy.

From its inception the Commission has properly focused upon this statutory policy. Here, this policy is better served by a broader consideration of operator safety practices which effectuate this policy than by the majority's reliance on the statutory language of section 110(a) of the 1977 Mine Act and a single legislative reference to the 1969 Coal Act as precluding such consideration. Therefore, I would respectfully suggest that perhaps the Act and case law may not be as constrained as found by the majority with regard to Asarco's defense of "unforeseeable and idiosyncratic employee misconduct."

The defense raised by Asarco has been uniformly recognized as legitimate by OSHRC 2/ and by OSHA appeals bodies under state plans 3/ and has been variously described as "unforeseen employee misconduct,"

1/ Section 2(c) entitled "Findings and Purpose" provides:

> There is an urgent need to provide more effective means and measures for improving the working conditions and practices in the Nation's coal or other mines in order to prevent death and serious physical harm, and in order to prevent occupational diseases originating in such mines;

2/ Standard Glass Co., 1 OSHC 1045 (1972); Jensen Constr. Co., 7 OSHC 1477 (1979). The OSHA Act of 1970, 29 U.S.C. section 651 et seq., does not expressly authorize the unforeseeable employee misconduct defense. The federal circuit courts have, however, uniformly adopted the defense on sound policy and legal grounds. As the Ninth Circuit observed in Brennan v. OSHRC, 511 F.2d 1139, 1145 (1975):

> Fundamental fairness would require that one charged with and penalized for violation be shown to have caused, or at least to have knowingly acquiesced in, that violation. Under our legal system, to date at least, no man is held accountable, or subject to fine, for the totally independent act of another.

Accord: Penn Power & Light Co. v. OSHRC, 737 F.2d 350 (3d Cir. 1984); Daniel Int'l Corp. v. OSHRC, 683 F.2d 361 (11th Cir. 1982); National Realty & Constr. Co. v. OSHRC, 489 F.2d 1257 (D.C. Cir. 1973). Cf. United States v. Park, 421 U.S. 658 (1975)(analogous defense to criminal indictment implied under Federal Food, Drug and Cosmetic Act).

3/ E.g., Davey Tree Surgery Co. v. Occupat. S&H App. Bd., 167 Cal. App. 3d 1232, 213 Cal. Rptr. 806 (1985).

"employee independent act," "employee negligence," and the like. 4/ In finding for or against the employer when such defense is raised, the administrative law judges and appeals bodies have held the employer's evidence to a strict test. This test concentrates on the adequacy of the employer's general safety training program, the adequacy of the subject employee's specific job assignment safety training, the adequacy of the level of supervisory control, the employer's system of discipline and sanctions imposed on employees who contravene the employer's safety rules, the consistency in applying those sanctions, and the employee's knowledge that he or she has deliberately and knowingly contravened the employer's safety requirements. 5/ Where the employee has been

4/ The Fifth Circuit's conclusionary rejection of this operator defense in Allied Products v. FMSHRC, 666 F.2d 890 (1982) fails to adequately consider the identity of enforcement and policy similarities between OSHA and the Mine Act. Both statutes require literal employer compliance with mandatory safety and health standards. Both statutes place primary emphasis upon pre-inspection compliance rather than upon post-accident sanctions as the means of achieving hazard free working conditions. Significantly, both statutes impose compliance responsibilities upon employees. Compare section 5(b) of OSHA with section 2(e) of the Mine Act. In light of these parallelisms, no persuasive legal or policy reason exists for denying mine operators the same defense uniformly recognized under OSHA which regulates excavation and flammable liquid processing work sites as hazardous as some mining activities, particularly, where adoption serves to promote the Mine Act's identical emphasis upon safe work practices by miners as the touchstone for reducing the risk of mine accidents. See S. Rep. No. 181 95th Cong. 1st Sess. at 18 (1977) ("It is the intention of the Committee that [the miner's duty to comply with the Act] will foster the necessary cooperation between miner and operators ... if the nation's mines are to be made truly safe").

5/ Here, Asarco has more than met any burden of showing the adequacy of its safety program. The majority agrees that Asarco's written safety rules, safety procedures with specific emphasis upon ground control, and the training and supervision of its miners were "adequate under all the circumstances." 7 FMSHRC at 1726. The administrative law judge specifically rejected the Secretary's "suggestion that the accident resulted from a supervisory failure." 7 FMSHRC at 1726. Indeed, the administrative law judge found that supervisory dereliction on this record would require a mine operator to provide one to one supervision of all miners at all times. "Nowhere does the Act or the standard in question suggest such a draconean requirement." 7 FMSHRC at 1726. Asarco comprehensively distributed its safety rules to all miners, including Lysne, who signed them acknowledging receipt, and these rules were reviewed in monthly safety meetings attended by all miners and supervisors including Lysne who began working for Asarco in 1972. Moreover, the administrative law judge also found and the majority agrees that Asarco "was not negligent" and that "Lysne's decision to begin drilling on an obviously unstable face must be regarded as unforeseeable and idiosyncratic." 7 FMSHRC at 1726. Neither acts of omission or commission by Asarco contributed in any way to Lysne's accident.

incapacitated by the alleged misconduct, the cases have also turned on other evidence to satisfy this element.

Since the advent of the "unforeseeable employee misconduct defense", there has been a salutary impact on the degree of excellence of employer's safety training programs within the jurisdiction of OSHA. As a result, safety and health compliance in the workplace has benefitted directly by entertaining this defense. An additional benefit has occurred - that is, the credibility factor throughout the employer community with concomitant heightened respect for the law which directly fosters voluntary pre-inspection compliance focused upon the detection and elimination of preventable hazards. 6/ This is because the employer knows that due consideration will be given to his defense under circumstances where he has done everything reasonably possible to insure a safe workplace, yet the act of an employee subjected him to a citation and that act could not be anticipated.

To conclude, as does the majority, that the 1977 Mine Act and emerging case law preclude the raising of Asarco's defense would seem to detract from the fundamental purpose of the Act as noted above. Such preclusion miscasts the Act in a punitive rather than in its intended preventive role. Certainly, it is incumbent upon all operators to comply fully with the training requirements of the Act and MSHA training regulations. But when the operator knows that its training and safety program will come under the strict microscope of administrative and judicial forums if an "employee negligence" defense to an alleged violation is to be entertained, pure logic and history under OSHA, dictates that the operator's safety training program and its worksite application will be vigorously honed to pass muster, thereby directly benefitting the overall safety and health of all miners. It would indeed be a surprise if, notwithstanding these benefits, Congress still intended to find the conscientious operator guilty of any infraction on the mine property entirely outside that operator's control. 7/

6/ Anderson, Buchholz, and Allan, "Regulation of Worker Safety Through Standard- Setting: Effectiveness, Insights, and Alternatives," 37 Lab. L.J. 731 (1986) (creation of self-enforcement incentives better advance work place safety than detailed safety standards).

7/ No provision of the 1977 Act expressly precludes application of the unforeseeable employee conduct defense which had been adopted by the federal courts under OSHA prior to passage of the Mine Act. Here, the plain language of the Mine Act does not bar adoption of the defense. To be sure Congress in section 110(a) eliminated administrative discretion in assessing civil penalties for operator violations. But this is not equivalent to legislating that unforeseeable employee conduct can never be a factor in the violation determination.

The Commission decisions cited by the majority purporting to foreclose the unforeseeable employee misconduct defense on the basis of per se operator liability all involved degrees of operator negligence or

(footnote 7 continued)

With this observation in mind, buttressed by the 1977 legislative changes to the 1969 Coal Act in sections 2(e) and (g) emphasizing the "primary", in place of the "sole", responsibility of the operator to prevent unsafe and unhealthy conditions "with the assistance of the miners ...", coupled with the change in section 104(a) mandating a citation upon the inspector's "belief" rather than a "finding" that the operator has violated the Act or regulations adopted pursuant to the Act, I respectfully feel the statutory latitude exists to entertain and sustain the "unforseeable employee misconduct" defense advanced by Asarco in this case. On the record here, which exhibits not a trace of negligence by Asarco, as found by the majority, I would find no violation of 30 C.F.R. § 57.3-22, and absent a violation within the scope of section 104(a), section 110(a) imposing mandatory civil penalties cannot be reached and therefore no civil penalty can be assessed.

This analysis is consistent with the statutory framework of the 1977 Mine Act. Under sections 104(a) and 105(a), no citation is issued or civil penalty proposed unless the Secretary "believes" a violation has occurred. In making this determination the "belief" standard of section 104(a) contains well within its parameters latitude for reasonable belief and thus for consideration of the "unforeseeable employee misconduct defense." As in any contested case, the Secretary's belief of a violation is not always upheld. And in such cases, the mandatory penalty provision of section 110(a) is inapplicable because no violation has been found. Thus, it follows that the procedural priority accorded sections 104(a) and 105(a) over section 110(a) precludes reliance upon section 110(a) as per se foreclosing a defense raised in response to the Secretary's initial belief that a violation exists, particulary where, as here, such defense is not ruled out by specific statutory language.

In the mining industry there are varying degrees of excellence in mine safety and health training. There are operators who have successfully avoided any disabling miner injuries over literally millions of man hours worked. Yet, when an operator showing far less attention to health and safety matters suffers a tragic accident, the whole industry suffers. Similarly, the United Mine Workers of America, the Steelworkers, and other labor organizations, including independent company unions and employee groups who have earned respect for their excellent safety and health training and miner compliance programs, all strive to ensure that their co-workers do not, through any aberrant act, reflect adversely on these continuing efforts to maintain a safe and healthy workplace.

Footnote 7 end.

acts of omission within the operators control either creating or perpetuating the hazard subject to the citation. In each of these cases that defense, even if entertained, could not be sustained because the operator failed to meet the strict requirement of an adequate safety program. Compare H.B. Zachry Co. v. OSHRC, 638 F.2d 812 (5th Cir. 1981)(defense fails because employee skipped scheduled safety meetings and was given inadequate work supervision).

Permitting the defense of "unforeseeable employee misconduct," measured against the stringent standards required herein, will advance significantly the cause of health and safety in the Nation's mines, and will complement and encourage the legitimate extra efforts of the majority of operators and employee organizations to work towards a hazard free mine environment to the greatest extent possible. In contrast, the lack of recognition of these cooperative efforts integral to the defense put forward here will act to preclude the realization of the additional benefits to mine health and safety noted herein. I would allow and sustain Asarco's defense and, therefore, dismiss the citation. 8/

Ford B. Ford, Chairman

8/ Accordingly, I find it unnecessary to reach Asarco's claim of denial of constitutional equal protection.

Distribution

Earl K. Madsen, Esq.
Bradley, Campbell & Carney
1717 Washington Avenue
Golden, Colorado 80401

Jerald S. Feingold, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, VA 22203

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 13, 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. LAKE 86-38-M
COLUMBIA PORTLAND CEMENT COMPANY	:	

BEFORE: Ford, Chairman; Backley, Doyle, and Lastowka, Commissioners

ORDER

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. section 801 et seq (1982). On October 3, 1986, Chief Administrative Law Judge Paul Merlin issued an Order of Default finding respondent Columbia Portland Cement Company ("Columbia") in default, affirming the citation in issue, and assessing a civil penalty of $2000. Thereafter, Columbia filed a timely petition for discretionary review with the Commission, requesting that the Order of Default and the penalty assessed against Columbia be reversed. On November 4, Columbia filed a supplementary Memorandum in Support of Petition for Discretionary Review specifically addressing its failure to respond to the July 7, 1986 Order to Show Cause which resulted in the October 3, 1986 Order of Default.

Default is a harsh remedy, and if a defaulting party can make a showing of adequate or good cause for a failure to respond to an order, the failure may be excused and proceedings on the merits permitted. M.M. Sundt Constr. Co., 8 FMSHRC 1269 (Sept. 1986). Columbia asserts that its failure to respond to the July 7, 1986 Order to Show Cause is attributable to the mistake or neglect of a former employee. In the interests of justice we conclude that Columbia should have the opportunity to present its position to the judge.

Accordingly, we vacate the Order of Dismissal and remand the case for further proceedings consistent with this Order. Fife Rock Products Co., 8 FMSHRC ___ (October 1986).

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

Distribution

John C. Ross, Esq.
Ross & Robertson
Suite 200, Renaissance Centre
4580 Stephen Circle, N.W.
Canton, Ohio 44718

Marcella L. Thompson, Esq.
Office of the Solicitor
U.S. Department of Labor
881 Federal Building
1240 East Ninth Street
Cleveland, Ohio 44199

Ann Rosenthal, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, VA 22203

Chief Administrative Law Judge Paul Merlin
Federal Mine Safety & Health Review Commission
1730 K St., N.W., Suite 600
Washington, D.C. 20006

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 18, 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEST 86-14-M
MOHAVE CONCRETE AND MATERIALS INCORPORATED	:	

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson, Commissioners

ORDER

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982). On October 9, 1986, Chief Administrative Law Judge Paul Merlin issued an Order of Default finding respondent, Mohave Concrete and Materials, Inc. ("Mohave") in default, for its failure to respond to the judge's August 20, 1986 Show Cause Order, and assessing civil penalties totalling $1,231. Thereafter, on October 22, 1986 Mohave sent a letter to the judge requesting the judge to vacate the Order of Default and to reopen the case. We consider Mohave's letter to the judge to be a timely Petition for Discretionary Review. 29 C.F.R. § 2700.5(b) and 2700.70(a).

Default is a harsh remedy, and if a defaulting party can make a showing of adequate or good cause for a failure to respond to an order, the failure may be excused and proceedings on the merits permitted. M.M. Sundt Constr. Co., 8 FMSHRC 1269 (September 1986). Mohave asserts that its failure to respond to the August 20, 1986 Order to Show Cause is attributable to the mistake or neglect of a former bookkeeper.

Accordingly, we vacate the Order of Default and remand to the judge for such further proceedings as he deems appropriate as to either the sufficiency of the cause asserted or the underlying merits of the case. 1/

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

1/ Commissioner L. Clair Nelson believes that Mohave has not shown good cause for failing to comply with the Chief Administrative Law Judge's Show Cause Order of August 20, 1986, and in the absence of any argument concerning due process in this proceeding he would affirm the judge's order of default.

Distribution

Mr. Quinto Polidori, President
Mohave Concrete & Materials, Inc.
450 Highway 85 North
Lake Havasu City, Arizona 86403

Marshall P. Salzman, Esq.
Office of the Solicitor
U.S. Department of Labor
P.O. Box 36017
San Francisco, California 94102

Chief Administrative Law Judge Paul Merlin
Federal Mine Safety & Health Review Commission
1730 K Street, N.W., Suite 600
Washington, D.C. 20006

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

NOV 6 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF YALE E. HENNESSEE, Complainant	:	DISCRIMINATION PROCEEDING Docket No. CENT 86-151-DM MSHA Case No. MD 86-35 1604 Quarry and Plant
v.	:	
ALAMO CEMENT COMPANY, Respondent	:	

ORDER OF TEMPORARY REINSTATEMENT

Appearances: Frederick W. Moncrief, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Complainant; David M. Thomas and Robert S. Bambace, Esqs., Fulbright & Jaworski, Houston, Texas, for Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns an Application for Temporary Reinstatement filed by MSHA on September 10, 1986, pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, and Commission Rule 29 C.F.R. § 2700.44(a), seeking the temporary reinstatement of the complainant Yale E. Hennessee to his position as an electrician at the respondent's 1604 Quarry and Plant. MSHA has concluded that the complaint of discrimination filed by Mr. Hennessee is not frivolous. In support of this conclusion, MSHA has filed an affidavit executed by Wilbert B. Forbes, Chief of Special Investigations, Metal and Non-Metal Division, MSHA, Arlington, Virginia, a summary of the alleged discriminatory action, and a hand-written statement by Mr. Hennessee in support of his complaint.

The respondent filed a request for a hearing pursuant to 29 C.F.R. § 2700.44(b). By agreement of the parties, a hearing was scheduled for October 15, 1986, but it was cancelled because of certain budgetary constraints. It was subsequently rescheduled and held in San Antonio, Texas, on October 23, 1986, and the parties appeared and participated fully therein.

Issue

The issue presented in this proceeding is whether or not MSHA's complaint on behalf of Mr. Hennessee is frivolous.

MSHA's Testimony and Evidence

Yale E. Hennessee, confirmed that until his discharge on April 17, 1986, he was employed by the respondent as a instrumentation technician or electrician. In his opinion, he was discharged because "I refused to be bullied" into doing something which he believed was unsafe, namely, the removal of a motor from the bottom of clinker dome 2 which was littered with clinker and which presented a slip and fall hazard.

Mr. Hennessee stated that on the afternoon of April 17, 1986, production foreman Frank Garcia requested Damon Smith to repair a burned out motor on a feeder located at the No. 2 clinker dome. Mr. Smith asked him to assist in the repairs, and they took a replacement motor to the area with a hand truck. The motor was taken down a sloping concrete walkway or ramp tunnel which was sloped at approximately 30 degrees. The ramp had handrails on both sides, and Mr. Smith had one hand on the rail and one hand on the truck, as did Mr. Hennessee. The motor weighed approximately 100 to 110 pounds, and the ramp was littered with 8 to 10 inches of clinker ranging from "small marble" size to "golf ball" size.

Mr. Hennessee stated that while taking the motor down the ramp, he and Mr. Smith lost their balance several times because of the clinker, and had some difficulty in transporting the motor down the ramp because of the slippery footing. He stated that the belt had been buried the evening before with spillage, and that the normal practice is to clean up and remove the clinker from the belt.

Mr. Hennessee stated that after the burned out motor was changed out, he and Mr. Smith decided to leave the old motor in the dome and they placed it out of the way. They decided not to take it out because of the trouble they had in bringing it in, and they did not believe that they could have removed it safely. They also considered the fact that there were two other motors in the warehouse, and they did not

believe it was necessary to immediately remove the burned out motor from the area. Mr. Hennessee stated that had the old motor been needed, he would have removed it.

Mr. Hennessee stated that after replacing the burned out motor, he left the dome area to remove his lock-out device from the motor breaker and that the slippery footing condition of the ramp still existed as he exited the area. Mr. Smith remained behind to replace the motor guard and to check out the motor rotation. Mr. Hennessee then called the control room and informed Foreman Homer Zapata that the motor had been repaired and that he should check the feeder belt flow. He did not inform Mr. Zapata that the burned out motor had not been removed.

Mr. Hennessee stated that at approximately 3:45 p.m., he and Mr. Smith were in the shop cleaning up. Their work shift ended at 4:30 p.m. Mr. Garcia came to the shop and informed them that the motor which they had installed was not operating properly, and that they had not replaced the guard or removed the old motor. Mr. Hennessee stated that Mr. Garcia was belligerent and accused them of not doing the job right. He also indicated that Mr. Garcia told them if they could not do the job right he no longer needed them and that they could "punch out." Mr. Hennessee stated that he attempted to explain the situation to Mr. Garcia but that he would not listen.

Mr. Hennessee stated that after the confrontation with Mr. Garcia, he and Mr. Smith went to see their supervisor Bob Pratt. Mr. Garcia and plant manager Ed Pierce were there, and Mr. Hennessee informed Mr. Pierce that he did not have to put up with Mr. Garcia's abuse and harrassment. He also informed Mr. Pierce that unless the dome walkway ramp was cleaned up, he would not remove the old motor. He also informed Mr. Pierce that the walkway ramp was unsafe. Mr. Pierce asked him to "cool off" and advised him that he would go to the dome ramp area to check it out.

Mr. Hennessee stated that Mr. Pierce and Mr. Garcia then left to check out the ramp. Upon their return, Mr. Pierce advised him that he and another employee had removed the burned out motor by carrying it out of the dome by means of a rag placed through the motor eyelet. Mr. Pierce also informed him that the ramp walkway was "totally cleaned" and safe.

Mr. Hennessee stated that Mr. Pratt then told him to go home and "cool off." Mr. Hennessee left the mine and took his tools with him. He did so because he believed his dismissal was "imminent." Mr. Hennessee stated that he advised

Mr. Pratt that he did not remove the old motor because he believed it could not be removed safely.

Mr. Hennessee stated that he later spoke with Mr. Pratt, and he was asked to write a letter stating his position and to meet with Mr. Pratt on April 18, 1986, to discuss the matter further. Mr. Hennessee was then summoned to a meeting on April 22, 1986, and present were Mr. Pratt, Mr. Pierce, and personnel manager Galindo.

Mr. Hennessee stated that when he went to the April 22, meeting he assumed he would be reprimanded. In fact, he was terminated for insubordination because of his refusal to remove the burned out motor.

Mr. Hennessee confirmed that since his termination he has not had regular employment, but has done contract labor and sub-contracting work. He also confirmed that he felt some loyalty to the respondent because they took care of him when he was previously injured on the job. He also indicated that the respondent sent him for training at a G.E. school in Virginia, in January, 1986, and that he was always available and willing to work overtime, and responded to requests to work evenings to solve problems as required by the respondent.

On cross-examination, Mr. Hennessee conceded that in his April 20, 1986, statement to the respondent he did not mention his prior injury or that this was a consideration in his refusal to remove the motor from the dome area. He confirmed that he filed his discrimination complaint with MSHA on April 23, the day following his termination. He confirmed that he was angry on April 17, and that he was "carried away" and "let his mouth get away from him" over the incident with Mr. Garcia. He also confirmed that after his termination, he made up his mind to do what he could to save his job.

Mr. Hennessee reiterated that the dome walkway ramp area was unsafe when he went down with Mr. Smith with the motor, and that it was unsafe when he left the area after changing out the motor. He stated that he did not clean up the ramp area before taking the motor down because he had never been expected to do so in the past.

Mr. Hennessee confirmed that the plant is non-union, and that the respondent has rules requiring persons who perform work to clean up their work areas when the work is completed. He also confirmed that he did not request anyone to clean up the ramp area before he and Mr. Smith took in the replacement motor.

Mr. Hennessee reiterated that Mr. Garcia was belligerent and accused him of failing to repair the motor, failing to replace the motor guard, and failing to remove the old motor. He confirmed that he advised Mr. Pratt that he would not work if he had to take abuse, and would instead quit. He confirmed that Mr. Pierce heard his comments in this regard.

Mr. Hennessee confirmed that he never returned to the ramp area on April 17, after he was told to go home, and could not have known that the area was unsafe. He also confirmed that his prior statement made no reference to running the hand-truck with the motor into the ramp wall, and that he had not notified anyone that he had left the burned out motor in the dome.

MSHA Inspector Paul Belanger confirmed that he conducted the investigation of Mr. Hennessee's complaint. He confirmed that he found no basis for concluding that Mr. Hennessee violated any company rules, and no one related to him that there were other times when equipment was left at work sites after the work was completed.

Mr. Belanger stated that when he inspected the walkway ramp area in question it was in good condition and safe. He confirmed that management personnel seemed to be aware of the fact that the ramp area had spillage problems. He stated that when he walked the ramp he made certain to hold onto the handrail. Although he observed some clinkers on the ramp and lost his footing, the ramp condition did not warrant the issuance of a citation.

Mr. Belanger confirmed that no one from mine management denied the existence of clinker spillage on the walkway ramp in question, nor did they deny Mr. Hennessee's assertions that he believed the condition of the ramp was unsafe. Mr. Belanger also confirmed that his investigation revealed that Mr. Hennessee was an exemplary employee and that he had never refused any work in the past, and had no prior personnel actions taken against him.

Mr. Belanger confirmed that the respondent was cooperative during his investigation and provided access to its employees.

Respondent's Testimony and Evidence

Frank Garcia, production superintendent, confirmed that on April 17, 1986, he assigned Damon Smith the task of changing out a burned out motor on the feeder in the Number 2 clinker dome. Mr. Smith said nothing to him about the condition of the ramp walkway. After completion of the work, Homer Zapata advised him that the walkway ramp had been swept and cleaned and that a "path" had been cleared of clinkers. Mr. Zapata also informed him that the motor guard had been left off, that the old motor had not been removed from the area, and that the feeder motor was still not working properly. Mr. Garcia then confronted Mr. Smith and Mr. Hennessee and told them "if they couldn't do the job right to punch out."

Mr. Garcia stated that he believed that the walkway ramp was safe on April 17, and that the old motor could be safely removed. He confirmed that he did not participate in the decision to terminate Mr. Hennessee from his employment with the respondent.

On cross-examination, Mr. Garcia stated that when he confronted Mr. Smith and Mr. Hennessee they said nothing to him about any safety concerns. He reiterated that the ramp had been cleaned and that there was a clear 3-foot wide "pathway" extending the length of the 4-foot wide ramp.

Mr. Garcia confirmed that when Mr. Pierce brought out the motor, he had to hold onto the walkway railing, and that he did so because he may have considered it unsafe. He expressed agreement with Mr. Pierce's statement of April 17, 1986, including the statement by Mr. Hennessee that he would still not remove the motor the day after it was removed by Mr. Pierce. Mr. Garcia stated that it was his opinion that the walkway ramp was not unsafe on April 17, and that not no slip hazard existed.

Ed Pierce, respondent's works manager, confirmed that he is in charge of all plant production. He stated that Mr. Hennessee was a good employee and that he spoke with him on April 17, at approximately 3:30 p.m. He stated that he encountered Mr. Garcia, Mr. Hennessee, and Mr. Smith at that time and that they were talking at the same time with regard to the motor repairs in question. Mr. Hennessee stated that "you can get someone to punch in for me in the morning," and Mr. Pierce asked him to quiet down. Mr. Garcia was complaining that Mr. Smith and Mr. Hennessee had not done their job of changing out the motor, and Mr. Smith insisted that they

had. Mr. Hennessee stated that he and Mr. Smith did not remove the old motor because they believed it would have been unsafe to do so.

Mr. Pierce stated that he and Mr. Garcia proceeded to the ramp area, and Mr. Pierce observed that a "path" had been cleared on the ramp walkway, and he believed that it was safe. He and another employee brought out the old motor with no problems. Mr. Pierce confirmed that clinker was present under the hand rail on the left side of the ramp, and under the conveyor belt on the right side of the ramp.

Mr. Pierce stated that the motor guard was off, and that the new motor appeared to have been installed properly but was vibrating excessively. After removing the old motor from the area, he returned to the second floor break room, and continued his discussion with Mr. Hennessee. He informed Mr. Hennessee that he considered the ramp to be safe, and Mr. Hennessee informed him that even so, he would not go to the dome area the next day to remove the motor.

Mr. Pierce stated that the decision to terminate Mr. Hennessee was a "group decision" reached on April 21, 1986, by himself, Vice President Jim Gordon, President Hopper, and Mr. Galindo. Mr. Hennessee was informed of the decision on April 22, 1986, when he was issued the "warning" and termination notice (exhibit C-1). Mr. Pierce stated that Mr. Hennessee was terminated for insubordination because of his statement that he would not on the next day remove the motor from the clinker dome area in question. Mr. Pierce confirmed that Mr. Smith was not insubordinate, and no action was taken against him, and he is still employed with the respondent.

Gregory Fuentes, yard supervisor, stated that he was responsible for plant housekeeping. He confirmed that he was aware of the dispute of April 17, between Mr. Garcia, Mr. Hennessee, and Mr. Smith with regard to the replacement of the motor in the clinker dome. Mr. Fuentes stated that at 12 noon on that day he assigned contract employees Davis and Hickey to clean up and sweep the ramp walkway area in question. He stated that they finished this work at 3:00 p.m., and that he went to the area and confirmed that it had been cleaned up. Mr. Fuentes estimated that it took 2 hours to clean up the area. He stated that Mr. Davis and Mr. Hickey cleared a path down the ramp by sweeping the clinker under the belt, and that when the belt was rendered operational again the clinker would have been loaded on the belt and taken out of the area.

By agreement and stipulation, of the parties, respondent's counsel proferred the testimony of electrical supervisor Robert Pratt, Foreman Homer Zapata, and supervisor Rene Chevera.

The parties stipulated that if called to testify, Mr. Pratt would confirm his discussions with Mr. Hennessee concerning the circumstances which prompted his encounter with Mr. Garcia, and Mr. Hennessee's reluctance to remove the burned out motor in question from the clinker dome, including Mr. Hennessee's statement that he would not remove the motor the day following the incident in question on April 17, 1986.

The parties stipulated that if called to testify, Mr. Chevera would confirm that he and Mr. Pierce removed the burned out motor in question after Mr. Hennessee's refusal to do so, and that the dome walkway ramp area was cleaned up and safe to travel.

The parties stipulated that if called to testify, Mr. Zapata would confirm that after being informed by Mr. Hennessee that he and Mr. Smith had completed the job of changing out the burned out motor, Mr. Zapata found that the old motor had not been removed from the work area, that the motor guard was not in place, and that the replacement motor was not operating properly.

Documentary Evidence

The following documents were tendered by the complainant, and received in evidence in this proceeding:

1. The Employee Warning Record and Termination Notice issued to Mr. Hennessee by the respondent terminating his employment on April 22, 1986, for "Insubordination." (Exhibit C-1).

2. A copy of a work order dated April 15, 1986). (Exhibit C-2).

3. Eight copies of Respondent's No. 1 Finish Mill Inspection/Checklists dated April 15, 16, 17, 1986. (Exhibit C-3).

4. Four copies of Respondent's Safety and Health Inspection Checklists dated April 15, 17, 18, 1986. (Exhibit C-4).

5. April 17, 1986, statement by respondent's Works Manager Ed Pierce. (Exhibit C-5).

6. Statement incorporated in exhibit C-1, under "Company Remarks." (Exhibit C-6).

7. Copy of respondent's "Work Rules." (Exhibit C-7).

8. Copy of respondent's safety policy (exhibit R-1).

Findings and Conclusions

As stated earlier, the issue in this limited proceeding at this time is whether or not MSHA had made a reasonable and credible showing that the discrimination complaint filed on behalf of Mr. Hennessee is not frivolous.

Webster's New Collegiate Dictionary defines the term "frivolous" as "of little weight or importance." Black's Law Dictionary, Revised Fourth Edition, 1968, defines the term as follows:

- - - "lacking in legal sufficiency"
- - - "clearly insufficient on its face"
- - - A "frivolous appeal is one presenting no justiciable question and so readily recognizable as devoid of any merit on face of record that there is little prospect that it can ever succeed"

Mr. Hennessee's testimony regarding the existence of clinker spillage material on the walkway ramp at dome No. 2 on April 17, 1986, is corroborated by the respondent's inspection checklist reports (exhibits C-3 and C-4). In addition, in his statement of April 17, 1986, Mr. Pierce admitted that "there was some clinker in the walkway going to the bottom of the dome" (exhibit C-5). Although Mr. Pierce states that the walkway could be travelled safely, he qualified his statement by indicating that it could be safely travelled "if you used the handrails." The statement also reflects that when Mr. Pierce and Mr. Garcia returned to the dome to retrieve the old motor left by Mr. Smith and Mr. Hennessee, Mr. Pierce had to hold on to the handrail so that he would not slip on the clinker. Mr. Pierce's statement contains no assertion that the walkway had been cleaned or swept so as to leave any "pathway" clear of clinker.

Mr. Pierce testified that when he and Mr. Garcia returned to the dome area, he observed that a "path" had been cleared

of clinker. However, he conceded that clinker material still existed under the handrails and the belt.

Although Mr. Garcia testified that the walkway ramp was clear of clinker, he indicated that a "pathway" 3-feet wide had been cleared, but he did not indicate that the entire width of the ramp had been swept or cleared of the clinker. He also indicated that Mr. Zapata informed him that the ramp had been swept clean, but that this information was given to him after the completion of the work by Mr. Smith and Mr. Hennessee.

Mr. Fuentes testified he assigned employees Davis and Hickey to clean the walkway at 12 noon, and that it took them 2 hours to do the work. He stated that the work was completed at 3:00 p.m., when Mr. Fuentes went to the area to confirm that the cleanup had been done. However, Mr. Fuentes confirmed that all of the clinker had not been removed from the ramp, and that only a "pathway" had been provided, and that the clinker had simply been swept under the belt and that it would be completely loaded out when the belt was again operational.

The respondent's safety inspection checklist for April 17, 1986, reflects that upon an inspection of the plant conducted between the hours of 2:00 p.m. and 10:00 p.m., a hazard existed on "ramp to dome No. 2 clinker spillage." The checklist report for April 18, 1986, reflects that an inspection conducted at 3:00 a.m., reflected tripping hazards under Dome No. 2 by the belt feeder, and that scattered clinker may have been present at that same location (exhibit C-4). Another report for the first shift on April 17, 1986, reflects spillage at the L-27 belt, and another report for the 10:00 p.m. shift reflects spills at the L-27 belt, and spillage at Dome No. 2 along the L-27 belt and catwalk (exhibit C-3).

Mr. Hennessee's testimony and his prior statements reflect a consistent belief on his part that his reluctance to remove the burned out motor after the completion of his repair work on April 17, 1986, was based on his belief that the existence of clinker material on the ramp walkway rendered the ramp unsafe to traverse with the motor. Further, Mr. Pierce's statement of April 17, 1986 (exhibit C-5), and his testimony, support Mr. Hennessee's contention that he communicated his safety concerns to Mr. Pierce as the reason why he was reluctant to initially remove the burned out motor from the dome after the completion of the job.

Mr. Garcia's testimony that Mr. Smith said nothing to him about the condition of the ramp walkway is contradicted by Mr. Hennessee's statement to Inspector Belanger during an interview on May 1, 1986. A copy of the interview was reviewed by me in camera, and it contains a statement by Mr. Hennessee that Mr. Smith informed him that he told Mr. Garcia that the walkway was littered with clinker spillage, and that Mr. Smith wanted Mr. Garcia to be aware of this fact in the event that Mr. Hennessee and Smith were held responsible if they were to fall on the ramp.

Mr. Garcia's assertion that he was not made aware of any clinker on the ramp is also contradicted by the narrative "Company Remarks" portion of the warning and termination decision of April 22, 1986 (exhibit C-1). That statement reflects that Mr. Hennessee informed Mr. Garcia that he would not return to take the motor out of the dome because it was unsafe with spilled clinker on the ramp and that he had nearly fallen when he and Mr. Smith went down the ramp to install the new motor earlier.

After careful review of the testimony, evidence, and pleadings filed in this matter, I conclude and find that it raises a viable issue as to whether or not the incident which prompted Mr. Hennessee's termination, that is, his statement to Mr. Pierce that he would not go to the dome and remove the motor, justified his termination, or whether his refusal or reluctance was in any way prompted by his asserted belief that to retrieve the motor in the circumstances then presented, was the result of a reasonable belief on his part that to do so would expose him to an injury, hazard, or danger.

In view of the foregoing, I conclude and find that the complaint filed in this matter has merit and is not frivolous. Accordingly, I further conclude that pursuant to Commission Rule 44, 29 C.F.R. § 2700.44(d), MSHA's application for the temporary reinstatement of Mr. Hennessee pending a final determination of his complaint on the merits should be granted.

ORDER

Respondent IS ORDERED to immediately reinstate Mr. Hennessee to his electrician's position at the prevailing wage rate for that position and with the same or equivalent duties as assigned to him immediately prior to his discharge.

During the course of the hearing, MSHA's counsel stated that MSHA will soon file its discrimination complaint. The respondent will have a full opportunity to respond, and the parties will be afforded an opportunity to be heard on the merits of the complaint. They will be notified further as to the time and place of the hearing.

George A. Koutras
Administrative Law Judge

Distribution:

Frederick W. Moncrief, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified Mail)

David M. Thomas, Robert S. Bambace, Esqs., Fulbright & Jaworski, 1301 McKinney Street, Houston, TX 77010 (Certified Mail)

/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

NOV 6 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. LAKE 85-17 A.C. No. 33-01157-03673
v.	:	Powhatan No. 4
QUARTO MINING COMPANY, Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Broderick

On October 30, 1986, the Secretary filed a motion for approval of a settlement reached by the parties in this case. The violations were originally assessed at $2700 and the parties propose to settle for $800.

Two violations are charged in this Docket, both charging violations of 30 C.F.R. § 70.100(a) because based on dust samples collected, the average concentration of respirable dust in the working environment of two designated occupations exceeded 2 milligrams per cubic meter of air (the first violation charged that the average concentration was 4.9 mg/m3; the second that it was 2.3 mg/m3).

The motion states that the penalty reduction is based on the fact that Respondent was in the process of revising its dust control plan at the time the citations were issued (June 14, 1984). A new plan was submitted in July 1984, and it has been successful in reducing respirable dust violations. Respondent has a favorable history of prior violations at the subject mine. I have considered the motion in the light of the criteria in section 110(i) of the Act, and conclude that it should be approved.

Accordingly, the settlement is APPROVED and Respondent is ORDERED TO PAY the sum of $800 within 30 days of the date of this order.

James A. Broderick
James A. Broderick
Administrative Law Judge

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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NOV 6 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. LAKE 85-24 A.C. No. 33-01157-03680
v.	:	Powhatan No. 4 Mine
QUARTO MINING COMPANY, Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Broderick

On October 30, 1986, the Secretary of Labor filed a motion for approval of a settlement reached by the parties in this case. The violations were originally assessed at $2850 and the parties propose to settle for $1324.

This docket contains two alleged violations, one of 30 C.F.R. § 70.100(a) because the average concentration of respirable dust in the environment of a designated occupation exceeded 2.0 mg/m# (it was 3.3 mg/m3);; the other alleged violation was of 30 C.F.R. § 75.400 because of an accumulation of loose coal along a belt conveyor the first named violation was assessed at $1000; the second at $1850. The settlement agreement reduces them to $424 and $900.

The motion states that the operator was in the process of revising its dust control plan at the time the citation was issued. A revised plan was submitted in July 1984 and it has been successful in reducing respirable dust violations. With respect to the accumulations violation, the motion states that it resulted from intermittent spillage due to a misalighed belt and would be cleaned up in accordance with its clean up plan. Respondent has a favorable history of prior violations.

I have considered the motion in the light of the criteria in section 110(i) of the Act and conclude that it should be approved.

Accordingly, the settlement is APPROVED and Respondent is ORDERED TO PAY the sum of $1324 within 30 days of the date of this order.

James A. Broderick
James A. Broderick
Administrative Law Judge

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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NOV 6 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. LAKE 85-27 A.C. No. 33-01157-03682
v.	:	Powhatan No. 4 Mine
QUARTO MINING COMPANY, Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Broderick

On October 30, 1986, the Secretary of Labor filed a motion for approval of a settlement reached by the parties in this case. The violations were originally assessed at $1000 and the parties propose to settle for $450.

One violation is charged, of 30 C.F.R. § 70.101, because the average respirable dust concentration in the working environment of a designated occupation exceeded. The limit of 1.6 mg/m3 (the dust contained more than 5% quartz). The samples showed an average concentration of 3.4 mg/m3.

The motion states that the operator was in the process of revising its dust control plan at the time the citation was issued. A revised plan was submitted in July 1984 and it has been successful in reducing respirable dust violations.

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

Accordingly, the settlement is APPROVED and Respondent is ORDERED TO PAY the sum of $450 within 30 days of the date of this order.

James A. Broderick
Administrative Law Judge

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NOV 6 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. VA 86-42 A.C. No. 44-06211-03508
v.	:	No. 1 Mine
B D & J COAL COMPANY, Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Broderick

On November 4, 1986, the Secretary filed a Response to my order of October 20, 1986, denying a motion to approve a settlement agreement in this case. With the response, the Secretary renewed its motion to approve settlement. The five violations involved here were originally assessed at $1955. The parties propose to settle for $1755.

With respect to three of the violations, the settlement amount is the amount originally assessed. Each of the other two was originally assessed at $800, and the parties propose to settle for $700 each. The Secretary's response states that after the citations were issued, Respondent's president visited the MSHA Subdistrict Office and discussed the roof control and pillar recovery methods at the subject mine. The section foreman responsible for the section where the violations occurred and two roof bolters were terminated for failure to properly install roof bolts in the section. MSHA's Subdistrict Office has stated that better supervision and the hiring of more competent personnel should result in greater compliance with safety regulations at the mine.

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

Accordingly, the settlement is APPROVED and Respondent is ORDERED TO PAY the sum of $1755 within 30 days of the date of this order.

James A Broderick

James A. Broderick
Administrative Law Judge

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NOV 7 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ex. rel. MICHAEL HOGAN and ROBERT VENTURA, Complainants	:	DISCRIMINATION PROCEEDING Docket No. PENN 83-141-D MSHA Case No. PITT CD 83-3 Emerald No. 1 Mine
v.	:	
EMERALD MINES CORPORATION, Respondent	:	

SUPPLEMENTAL DECISION AND ORDER

Before: Judge Koutras

Statement of the Case

On July 31, 1986, the Commission issued its decision in this matter and reversed my decision of December 20, 1983, dismissing the complaint. Secretary of Labor, et al., v. Emerald Mines Corporation, 8 FMSHRC 1066 (July 1986). At 8 FMSHRC 1075, the Commission noted that "There is no dispute that the five-day suspension of Hogan and Ventura was motivated by the complainants' protected activity," and it remanded the matter to me for determination of appropriate remedies.

In response to my orders issued subsequent to the remand, the parties have filed a stipulation and agreement as to the issues of back pay and other remedies, and they are in pertinent part as follows:

> 1. The parties agree and stipulate herein as to the appropriate amounts of back pay, hearing and litigation expenses and civil penalties. The parties also agree that this stipulation contains any and all remedies which might be considered appropriate, that no further hearings are necessary in this matter and that an order pertaining to Complainants' remedies may be entered.

2. By entering into this stipulation Emerald does not admit any violation of the Act, that it is liable for any penalties or remedies contained herein, or that Messrs. Hogan and Ventura are entitled to any relief as set forth herein. Emerald fully intends to seek review of the Commission's decision finding it liable for such penalties and remedies and enters into this stipulation principally to expedite that process.

3. Michael Hogan would have earned the following amounts of pay for the days he was suspended from work and for days he sought excusal from work pertaining to the litigation of this matter:

Date	Straight Time	Lunch Overtime	Total
December 28, 1982	38.83	9.96	47.79
December 29, 1982	95.58	8.96	104.54
December 30, 1982	95.58	8.96	104.54
December 31, 1982	95.58	8.96	104.54
January 3, 1983	93.18	8.74	101.92
January 4, 1983	93.18	8.74	101.92
January 11, 1983	93.18	8.74	101.92
August 2, 1983	68.78	9.26	78.04
August 23, 1983	101.98	9.56	111.54
August 24, 1983	101.98	9.56	111.54

4. The total amount of back pay for Mr. Hogan is $968.29. Total interest on the back pay through October 31, 1986 is $386.63.

5. In addition, Mr. Hogan incurred expenses of $42.12 for telephone calls.

6. Mileage expenses for Mr. Hogan would be 92 miles for two trips to Washington, Pennsylvania for the hearing and 26 miles for one trip to Waynesburg, Pennsylvania to meet with the MSHA special investigator. The applicable rate of reimbursement at the time was 20.5 cents a mile for a total mileage expense of $24.19.

7. Robert Ventura would have earned the following amounts of back pay for the days he was suspended from work and for days he sought excusal from work pertaining to the litigation of this matter:

Date	Straight Time	Lunch Overtime	Total
December 28, 1982	38.83	8.96	47.79
December 29, 1982	95.58	8.96	104.54
December 30, 1982	95.58	8.96	104.54
December 31, 1982	95.58	8.96	104.54
January 3, 1983	93.18	8.74	101.92
January 4, 1983	93.18	8.74	101.92
January 11, 1983	93.18	8.74	101.92
August 2, 1983	80.52	10.37	90.89
August 23, 1983	107.32	10.07	117.39
August 24, 1983	107.32	10.07	117.39

The total amount of back pay for Mr. Ventura is $992.84. Total interest on the back pay is $394.93.

8. Mileage expenses for Mr. Ventura would be 60 miles for two trips to Washington, Pennsylvania for the hearing and 50 miles for one trip to Waynesburg to meet with the MSHA special investigator. The applicable rate of reimbursement at the time was 20.5 cents per mile for a total mileage expense of $22.55.

9. The parties would agree upon civil penalties in the amount of $100.00.

10. Emerald stipulates that the discipline Mr. Hogan and Mr. Ventura received arising out of this incident will be considered by it to have no future effect and null and void (unless the Commission's decision is reversed by the Circuit Court of Appeals). Emerald will, however, maintain such records of this matter as would be appropriate to any litigation. Any such records will not, however, be contained in the personnel files of Mr. Hogan and Mr. Ventura. The attendance records of each individual will be modified to remove any reference to their suspensions. Emerald also agrees that it will not communicate any information pertaining to the suspensions which Mr. Hogan and Mr. Ventura received and which are the subject of this litigation or any other information pertaining to this litigation to any person who makes inquiry of Emerald concerning employment of Mr. Hogan or Mr. Ventura.

In view of the fact that the stipulations by the parties included interest computations through October 31, 1986, the parties agreed by letter dated October 30, 1986, that interest accrues on the back pay for Michael Hogan at the rate of $0.24 a day and the back pay for Robert Ventura at the rate of $0.25 a day until their awards are paid.

ORDER

In view of the aforesaid stipulations and agreements, IT IS ORDERED THAT:

1. Respondent pay to complainant Michael Hogan back pay in the amount of $968.29, plus interest in the amount of $386.63, through October 31, 1986, and interest in the amount of $0.24 a day thereafter until paid.

2. Respondent pay to complainant Michael Hogan hearing and litigation expenses in the amount of $42.12 for telephone calls, and $24.19 for mileage expenses.

3. Respondent pay to complainant Robert Ventura back pay in the amount of $992.84, plus interest in the amount of $394.93, through October 31, 1986, and interest in the amount of $0.25 a day thereafter until paid.

4. Respondent pay to complainant Robert Ventura mileage expenses in the amount of $22.55.

5. Respondent pay a civil penalty assessment in the amount of $100 for a violation of section 105(c)(1) of the Act.

6. Respondent will forthwith comply with the requirements of Stipulation No. 10 with respect to the personnel records and other matters stated therein concerning the employment status of Mr. Hogan and Mr. Ventura.

IT IS FURTHER ORDERED that all payments of back pay, interest, and miscellaneous expenses noted above be paid to

Mr. Ventura and Mr. Hogan within thirty (30) days of the date of this Supplemental Decision and Order, and that respondent remit to MSHA within this same period the sum of $100 as a civil penalty assessment for the violation in question.

George A. Koutras
Administrative Law Judge

Distribution:

Catherine Oliver Murphy, Esq., Office of the Solicitor, U.S. Department of Labor, Room 14480 Gateway Building, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

R. Henry Moore, Esq., Rose, Schmidt, Dixon & Hasley, 900 Oliver Building, Pittsburgh, PA 15222-5369 (Certified Mail)

/fb

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NOV 10 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 85-144-M A. C. No. 16-00358-05538
v.	:	Cote Blanche Mine
DOMTAR INDUSTRIES, INC., Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Maurer

The above civil penalty case, involving two § 104(a) citations issued subsequent to a fatal accident at the subject mine, is before me upon a petition for assessment of civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq. Petitioner has filed a motion to approve a settlement agreement and to dismiss the case. I have considered the representations and documentation submitted, and I conclude that the proffered settlement is consistent with the criteria in section 110(i) of the Act.

ORDER

WHEREFORE IT IS ORDERED that the motion for approval of settlement is GRANTED and respondent shall pay the approved penalties in the amount of $2,000 within 30 days of this decision. Upon payment, this proceeding is DISMISSED.

Roy J. Maurer
Administrative Law Judge

Distribution:

Allen R. Tilson, Esq., Office of the Solicitor, U. S. Department of Labor, 525 Griffin St., Suite 501, Dallas, TX 75202

Michael G. Durand, Esq., Onebane, Donohoe, Bernard, Torian, Diaz, McNamara & Abel, P. O. Drawer 3507, Lafayette, LA 70502 (Certified Mail)

yh

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NOV 10 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. CENT 86-40
	:	A.C. No. 41-01192-03503
v.	:	
	:	Big Brown Strip
AUSTIN POWER, INCORPORATED, Respondent	:	
	:	
AUSTIN POWER, INCORPORATED, Contestant	:	CONTEST PROCEEDINGS
	:	
v.	:	Docket No. CENT 86-59-R
	:	Citation No. 2339411; 8/20/85
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	
	:	Docket No. CENT 86-60-R
	:	Citation No. 2339412; 8/20/85
	:	
	:	Docket No. CENT 86-61-R
	:	Citation No. 2339413; 8/20/85
	:	
	:	Big Brown Strip

DECISIONS

Appearances: Robert Fitz, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for the Petitioner/Respondent;
Steven R. McCown, Esq., Jenkins & Gilchrist, Dallas, Texas, for the Contestant/Respondent.

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern proposals for assessment of civil penalties filed by MSHA against Austin Power, Inc., pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking civil penalty assessments totalling $10,000, for three alleged violations of mandatory safety standards 77.1607(g), 77.1710(g), and 77.404(a) or 77.205(e). Docket No. CENT 86-40 is the civil

penalty proceeding, and Docket Nos. CENT 86-59-R, CENT 86-60-R, and CENT 86-61-R, are the contests filed by Austin Power challenging the legality of each of the section 104(a) "significant and substantial" (S&S) citations.

Austin Power filed timely answers and contests, and the cases were consolidated for a hearing which was held in Dallas, Texas. The parties filed posthearing proposed findings and conclusions, and the arguments presented therein have been considered by me in the course of these decisions.

Issues

The issues presented in these proceedings are (1) whether the cited mandatory safety standards are applicable to the alleged fact of violations; (2) whether the alleged violations were "significant and substantial;" and (3) the appropriate civil penalties which should be imposed for the violations in question. Additional issues raised by the parties are identified and disposed of in the course of these decisions.

Applicable Statutory and Regulatory Provisions

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

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

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

Stipulations

The parties stipulated to the following (Tr. 8-10):

1. Austin Power, Inc. was incorporated under the laws of the State of Texas on June 10, 1976.

2. Among other things, Austin Power, Inc. has been an independent contractor, engaged in construction at the Big Brown Strip, a surface coal mine owned and operated by Texas Utilities Company in Freestone County, Texas.

3. The Big Brown Strip is a "mine," within the meaning and definition of Section 3(h) of the Federal Mine Safety and Health Act of 1977, hereinafter referred to as the Act.

4. Austin Power, Inc. is an "operator" within the meaning and definition of Section 3(d) of the Act.

5. On Monday, August 19, 1985, Jeff Arent, Kevin Saulsburg, and Steve Smith were employed by Austin Power, Inc. at the Big Brown Strip and were "miners" within the meaning and definition of Section 3(g) of the Act.

6. The products of the Big Brown Strip enter or affect interstate commerce.

7. Citation Nos. 2339411, 2339412, and 2339413 and the modifications thereof, were served upon Sydney Woodson, respondent's superintendent, by authorized representatives of petitioner on the dates and at the times and places stated therein, and may be admitted into evidence for the purpose of establishing that they were so issued, but not for the purpose of establishing the violations alleged therein.

8. The miners employed by respondent worked a total of 41,012 hours in all mining activity in 1985.

9. Respondent demonstrated good faith in attempting to achieve rapid compliance after being notified of the alleged violations.

During the course of the hearing, Austin Power's counsel stipulated that the proposed civil penalties assessed by MSHA for the violations in question will not adversely affect Austin Power's ability to continue in business (Tr. 188).

Discussion

This case concerns a fatal accident which occurred at the Big Brown Strip Mine construction site on August 19, 1985. The mine is a surface coal mine owned and operated by the Texas Utilities Company. Austin Power is an independent contractor subject to the Act who at the time of the accident

was in the process of constructing and erecting a cross-pit spreader at the site for Texas Utilities. The spreader was manufactured by DeMag Company, a German concern, and Austin Power was under contract with that firm for the construction and erection of the spreader at the mine site.

At the time of the accident, three employees of Austin Power were engaged in certain work on a 20-meter boom, an integral part of the spreader. The employees were engaged in work connected with the placement of certain counter weights on the boom and the installation of a wire rope choker on the boom for the purpose of facilitating the movement of the boom in a lateral direction by means of a 518 link belt crane and cherry picker. While performing their work from a walkway or catwalk located on one side of the boom, the boom was subjected to a sudden and unexpected "whiplash" action caused by the failure of an eyelet located at the back end of the boom. The boom raised up and propelled the three employees off the walkway where they were standing in an upward direction into the air, and one employee, Steven Smith, fell to the ground below and suffered fatal injuries. The other two employees managed to come down on the walkway structure which they grabbed as they came down, and they subsequently walked off the boom to safety and were not injured.

MSHA Inspector Donald R. Summers conducted an accident investigation on August 20, 1985, and prepared a report (exhibit P-5). Based on the information received by Inspector Summers during the course of his investigation, he issued a section 107(a) imminent danger order, and three section 104(a), S&S citations. The imminent danger order is not in issue in these proceedings, but the citations are. The narrative description of the cited conditions or practices as stated in the citations issued by Inspector Summers are as follows:

Citation No. 2339411, August 20, 1985, 30 C.F.R. § 77.1607(g). "The Link Belt 518 operator was not notified by signal or other means that all persons were not in the clear before starting or moving equipment in that 3 employees were on the 20-meter cross pit spreader boom which was being moved by the link belt."

Inspector Summers subsequently modified the citation on October 8, 1985, to include the following condition or practice: "The linkbelt 518 operator was not certain that all persons were in the clear before he put his machine into operation. Three (3) employees were on the 20 meter cross

pit spreader boom which was being moved by the linkbelt operator."

Citation No. 2339412, August 20, 1985, 30 C.F.R. § 77.1710(g).

> Three (3) employees were on the 20 meter cross pit spreader boom was (sic) wearing safety belts but the lines was (sic) not tied off. Due to equipment failure the boom flip (sic) upward. The three (3) employees were thrown from the platform, one fell to his death. The two remaining employees managed to grab hand rails and climb (sic) to safety.

Citation No. 2339413, August 20, 1985, 30 C.F.R. § 77.205(e) or 77.404(a).

> The elevated walkway along the left side of the 20 meter boom on the cross pit spreader was not maintained in good condition in that the hold downs for the floor plate had been removed. The boom flip (sic) upward due to equipment failure, the floor plates came loose and fell to the ground. One (1) of the three employees on the walkway fell to his death.

MSHA's Testimony and Evidence

MSHA Inspector Donald R. Summers, testified as to his background and experience, and he confirmed that he conducted an investigation of the circumstances surrounding the fatal accident. He identified copies of the citations he issued as a result of the investigation, and also identified a copy of the investigation report and certain photographs which he took during the investigation (Tr. 15-38). He confirmed that he began the investigation on the morning of August 20 (Tr. 17).

With regard to photographic exhibit P-16, of the cited walkway and the clamps which Mr. Summers claimed were not secured, he conceded that he did not know the condition of the walkway prior to the accident, nor did he know whether the walkway was secured prior to that incident (Tr. 33).

Mr. Summers stated that company representative Woodson accompanied him on a "quick walk through look" of the accident area and explained that the 518 linkbelt crane was connected to the end of the 20 meter boom in order to move

the boom from a westerly direction to an easterly direction to facilitate the loading of certain counter-weights on the machine, and that the machine could not move under its own power (Tr. 40, 44). Mr. Summers confirmed that Mr. Woodson identified the three employees who were on the boom, but he could not state whether Mr. Woodson explained what the three were doing on the boom. Someone else advised him that one of the employees was on the boom securing a choker on the end of the boom, and he pointed out the choker in question in photographic exhibit P-7, in the center, hooked on the right-hand lower corner of the beam on the end of the boom. He was told that the accident victim had secured this choker at the location shown in the photograph (Tr. 41-43).

Mr. Summers was of the opinion that none of the employees should have been on the boom while it was being moved, but he saw no reason why they could not be there prior to its being moved (Tr. 49). He saw no reason why the choker in question could not have been installed while the boom was stationary and not being moved (Tr. 50).

Mr. Summers stated that his investigation revealed that the accident victim was in the process of placing the choker over a brace on the end of the 20-meter boom in order for a cherry picker to receive the boom when it passed under another 70-meter boom. The linkbelt crane could not pass under the 70-meter boom, and another piece of equipment was to be used to connect onto the boom in order to pull it in a westerly direction. Mr. Summers stated further that it was his understanding that the victim was standing on the left-hand walkway at the end of the boom as shown in photographic exhibit P-7, and while he was inside the walkway hand rail, he was leaning over the hand rail connecting the choker. Mr. Summers stated that if the victim was leaning over the hand rail, he should have been tied off by a safety lanyard (Tr. 51-52). Although the investigation revealed that the victim was wearing a safety belt, it was not secured (Tr. 52).

Mr. Summers stated that his investigation revealed that while the boom walkway was secured within the hand rails, sometime during the construction phase of the cross-pit spreader, the left-hand walkway had been removed in order to allow access to the electrical cable located in a tray under the walkway and for painting purposes. The walkway had been removed and not secured back in place (Tr. 52). All of the walkway had clamps removed or either not secured back in place (Tr. 52).

On cross-examination, Mr. Summers confirmed that he has inspected the mine site at least once a month, and that aside from the citations issued in the instant proceedings, he has issued only two prior citations at the site in the past 3 years. He agreed that the company makes a good faith effort to comply with the law. He also confirmed that he had previously inspected the cross-pit spreader and linkbelt crane and never issued any citations for any violations on that equipment. He also observed the crane operators operating the equipment, and had no problem with the manner in which they did their work (Tr. 56-57).

Mr. Summers stated that he issued the citations to Austin Power because it was in charge of the erection site for the cross-pit spreader. He confirmed that the DeMag Company designed the manufactured the spreader and the 20-meter boom, and he could not state whether that company had supervisors on the site to insure that Austin Power was erecting the spreader in compliance with their specifications (Tr. 59).

Mr. Summers stated that the failure of an eyelet used to connect a hydraulic device used to lower and raise the 20-meter boom to the boom's structure was a contributing factor to the accident (Tr. 61). The failure of the eyelet caused the boom counter weight to take over and resulted in the sudden and unexpected raising of the end of the boom. Mr. Summers confirmed that he had previously observed the eyelet before the accident, and saw nothing which caused him any concern. He also confirmed that from his prior inspections of the equipment, including the eyelet, no one could have foreseen that the eyelet would fail (Tr. 63).

The 20-meter boom is one part of the entire cross-pit spreader machine. The boom was described as a conveyor which received dirt that was removed or stripped from the ground. The 70-meter boom also digs dirt from the ground, but from another area of the open pit mine. The excavated materials from both booms are received by the spreader and discharged in other locations. Mr. Summers described the booms as movable conveyor systems which receive the materials which are dug by the bucket wheel escalator part of the spreader. Although the digging apparatus and booms are separate pieces of equipment, they are connected together electrically (Tr. 66). The two cranes in question were simply used to reposition one portion of the 20-meter boom while the counterweights were being loaded (Tr. 65).

Mr. Summers stated that the 20-meter boom has walkways or catwalks on both sides of the boom conveyor. The walkways

are equipped with a standard guard rail consisting of a top rail approximately 42 inches off the walkway surface, and a midrail. It also has a toeboard constructed of angle iron. Although the boom is designed to move up and down and left and right, Mr. Summers was of the opinion that employees should not be on the walkway while the boom is in operation. He believed that a chain should be across the access to the walkway, with a sign indicating that no one should be on the boom while it is in operation (Tr. 69). Mr. Summers confirmed that no one from Austin Power, DeMag, or Texas Utilities ever informed him that employees were not to be on the boom while it was in operation, and that this is simply his opinion (Tr. 71).

Mr. Summers confirmed that the cross-pit spreader moves on tracks, and that when it moves, the 20-meter boom also moves because it is attached to the spreader. He did not know how many employees would be on the spreader while it was in operation, and he assumed that one employee would have to operate the spreader, and two others would have to operate the bucket wheels at the end of the 20 and 70 meter booms (Tr. 72). He described the cross-pit spreader as a structure approximately a half a mile long and 500 to 600 feet high, and the super structure looks "much like a large ship out in the middle of the mine," with catwalks and walkways all over it (Tr. 74).

Mr. Summers stated that on the day of the accident, five counter weights, approximately 24,000 pounds each, were being loaded onto the boom, and the boom did not have any independent power while this was being done because the power had not been connected (Tr. 76-78).

Mr. Summers confirmed that the crane in question was used to lift the boom in order to remove some cribbing from under it, as well as moving it from left to right, or from east to west. The only lifting action of the crane would be for the purpose of removing the cribbing, and once this was done the linkbelt crane was to be used to rotate the 20-meter boom back under the 70-meter boom. Since the linkbelt crane could not move the 20-meter boom completely under the 70-meter boom, a cherry picker was to be used for this task, and he saw nothing wrong with this entire procedure (Tr. 81).

Mr. Summers stated that Austin Power has a safety program, and he confirmed that it has a mandatory policy requiring employees to be tied off if they are in danger of falling. He stated that during the time he has inspected the facility he has never previously cited Austin Power for a

violation of section 77.1710(g). He confirmed that he had been on the same cited 20-meter boom walkway in the past while inspecting the spreader and did not wear a safety belt (Tr. 103). With regard to his application of section 77.1710(g), Mr. Summers stated as follows (Tr. 104-106):

> Q. Thank you. Now, let's take a hypothetical, that you were inspecting the 20-meter boom and you were walking out to the end of the boom, but you weren't performing construction work. Is that right?
>
> A. That is right, sir.
>
> Q. And you didn't have to be tied off in that situation, did you?
>
> A. If I was walking out there, you couldn't tie off and walk down the boom.
>
> Q. Okay, let's say you were walking out there and you were inspecting it and the eyelet failed.
>
> A. Okay.
>
> Q. And you weren't tied off. And the same thing might have happened to you that has happened to Mr. Smith, wouldn't it?
>
> A. If the floor plate and all that hadn't been secured, more than likely would have.
>
> Q. And would you have been, then, in non-compliance with 1710(g)?
>
> A. No, sir.
>
> JUDGE KOUTRAS: Why not?
>
> THE WITNESS: I was travelling from one area to the other. I wasn't performing any work that would be requiring me to be outside the hand-rail.
>
> JUDGE KOUTRAS: So that pre-supposes that this particular individual at the time of the accident was outside the hand-rail?

THE WITNESS: Yes, sir.

MR. MCCOWN: So the point of your issuance of a citation, which I assume that since these other gentlemen, Mr. Cameron and other people -- your supervisors -- aren't here, the whole point on the citation is that a man was outside the hand-rail, and therefore, that was the danger. Right?

THE WITNESS: And performing work at a elevated area.

MR. MCCOWN: So --

THE WITNESS: He should have been tied off.

MR. MCCOWN: So the other two employees that were up there, if they were just standing around, they didn't need to be tied off?

THE WITNESS: They wouldn't have to be tied off, sir.

MR. MCCOWN: But for the fact that they were able to grab hold of the side of the catwalk, they would have been killed just as much as Mr. Smith had, wouldn't they?

THE WITNESS: Rather fortunate.

In response to further questions, Mr. Summers stated that had it not been for the sudden jerking of the boom caused by the eyelet failing the other two employees on the boom were not in danger of falling. He conceded that he issued the citation because of his concern that the three employees were on a piece of moving equipment and his belief that they should not have been there in the first place. Mr. Summers knew of no mandatory standard that specifically prohibits work on a moving piece of equipment. Assuming he saw three employees on a catwalk 36 feet above ground on a moving piece of equipment, he would issue a section 107(a) imminent danger order because of the danger of falling even though they may be protected by a hand rail, because the walkway would be unstable (Tr. 108-109).

Mr. Summers stated that no employees would be required to be on the end of 20-meter boom while the counter weights are being loaded, and that they would be positioned at the

rear of the boom giving hand signals to the crane operator. He conceded that he has never observed counter weights loaded, and assumed that since they cannot be observed from the ground, someone had to be there (Tr. 111). He suggested that no one should be on the end of the boom while it is being moved, and that there would be less of a danger if they were at the rear of the boom because the movement would be slower (Tr. 112). He conceded that at some point in time someone had to go the end of the boom to disconnect the linkbelt crane and hook the cherry picker to the boom in order to move it under the 70-meter boom, and that the eyelet could have failed at that point in time before the boom was moved (Tr. 113).

With regard to the walkway grating citation, Mr. Summers stated that while it was his opinion that section 77.205(e) applies to the condition that he cited, section 77.404(a) and 77.1606 were equally applicable (Tr. 114). He confirmed that he did not issue the amended citation, and still believes that section 77.205(e), is the better standard (Tr. 114). Mr. Summers confirmed that he had nothing to do with the civil penalty assessments in this case, and that he had no communication with anyone in MSHA's office of assessments (Tr. 120). Mr. Summers believed that the conditions he cited as violations were contributing factors to the fatality which occurred in this case (Tr. 123).

With regard to the walkway grating fasteners, Mr. Summers stated that if they were properly connected to the grating, they would have prevented the grate from moving in either lateral or vertical directions. He stated that in photographic exhibits P-15 and P-16, the clamps are not extended all the way under the walkway or under the piece of angle iron, but only halfway. He pointed out that the right-hand walkway was properly secured with the clamps and none of the grating was thrown off or disrupted when the accident occurred. He assumed that the reason that all of the grating on the left side of the boom was not thrown off was the fact that the raising of the boom was less violent at that location (Tr. 124). He confirmed that the 20-meter boom was still under construction at the time of the accident, and that a few adjustments were still to be made before it was placed into operation (Tr. 124).

Mr. Summers confirmed that the location where the eyelet failed was the same side as the walkway on which the accident victim was standing. His investigation revealed that the grate clips or fasteners were not broken off by the force of the eyelet breaking, but were simply loose and unsecured. He had no way of knowing whether the force of the boom moving

because of the failure of the eyelet caused the fasteners to come loose, and that he was informed by Mr. Woodson and Mr. Arent that the floor grating had been removed and not secured back down (Tr. 126). Mr. Summers stated that there was a difference of opinion as to whether the accident victim fell through the openings that were left when the walkway grating flipped up, or whether he went over the top of the hand railing (Tr. 127). Had the walkways been fastened down, the victim could possibly have come down on the walkway when he was catapulted into the air rather than down between the opening (Tr. 127).

Mr. Summers stated that the information he received during his investigation through the interviews with the survivors indicated that the three employees on the 20-meter boom at the time of the accident were instructed to go out on the boom to tie the choker on in order to facilitate the moving of the boom under the 70-meter boom. The breaking of the eyelet had a "whiplash effect," and when the end of the boom flew up and settled back down, six or eight of the walkway plates came out of the channel and fell to the ground (Tr. 129).

Russell Crowell, testified that he is presently employed by Erection and Rigging Inc., White Oak, Texas, and that at the time of the accident in question he was employed by Austin Power at the Big Brown Strip as an iron worker-rigger and crane operator. He stated that he has 9 years of experience as a crane operator, and confirmed that he was operating the 518 linkbelt crane on August 15, 1985. He described what he was doing as follows (Tr. 132-134):

> A. About 10:00 I was instructed to bring the rig up to the 20-meter receiving boom, to tie onto it, and after I tied onto it, we picked it up five, six inches, enough to get the shoring out from underneath it; tracked backwards with the rig, which swung the 20-meter boom from the westerly to the easterly position; stayed in a dogged off position for around five and a half hours, while they loaded counter weights with another crane from the other side.
>
> Q. What time, or can you give us an approximate time that you finished, or that the shoring was removed from the 20-meter boom so you were able to swing it around?

A. That wasn't maybe 45 minutes. It wasn't very long.

* * * * * * *

A. After the fifth counter weight was loaded and into position, I was instructed to slack off, which I slacked the rig off. It was suspended by itself; they checked for movement on the boom; there wasn't any. I was instructed to pick back up enough just to get my chokers taut. The rigging was taut and I walked the rib back into position, just a reverse procedure to what we had done that morning.

And just prior to getting, oh, 30-foot or so from coming up to transferring the rigging from the 518 to cherry picker, the pin failed and the load went up and Steve came down.

Q. Who was giving you the instructions on what to do that day?

A. There were several people involved, among one Alvin, the German; Woody and Pat Patterson. At one time, Jim White may have even relayed signals.

Q. Now, Woody is Sydney Woodson, the job superintendent. Is that right?

A. Yes.

Q. And who is Jim White?

A. At that time was general foreman on the project.

Q. Now, I understand that you were attempting to swing the 20-meter boom under the 70-meter boom so it could be tied onto with a cherry picker. Is that correct?

A. Yes.

Q. Was anybody on the 20-meter boom when you were attempting to swing it around so it could be tied onto the cherry picker?

A. Yes.

Q. Who was on it?

A. Jeff Arent, Kevin Saulsburg and Steven Smith.

Q. Do you know why they were on it?

A. They had work to do out there; they had to be out there to transfer the rigging.

Mr. Crowell stated that he did not actually see the accident, but saw the accident victim Steven Smith in the air. He explained that his view was obstructed by the boom and that Mr. Smith was on the back side of the boom. He confirmed that he was not present when the three employees were told to go up on the boom (Tr. 136).

On cross-examination, Mr. Crowell stated that in addition to instructions by an employee of DeMag Company, he also received instructions from Mr. Woodson with respect to the lifting of the 20-meter boom with the crane for the purpose of removing the cribbing. The boom lifted just enough to remove the cribbing, and he denied that his operation of the crane had anything to do with the failure of the eyelet, or that the crane put any undue stress on the boom (Tr. 140). He experienced no difficulty in moving the 20-meter boom laterally and indicated that it was "free-swinging" (Tr. 141). With regard to the movement which was experienced, he stated as follows (Tr. 141-142):

Q. Now you testified that there was a movement between the loading of the third and the fourth counter weight. At that time, when that happened, did you feel like there was any problem with any part of the construction process that was going on?

A. No, I didn't. I couldn't see what was going on the back side, and at the time of these counter weights being loaded, when they would lower them into the framework, they would bump the counter weight framework that they set in, and I was getting bumps and shocks all day long. But that was when there was counter weights being loaded. And at this time I could tell from the position of the other rig that he wasn't coming in with a

counter weight. He was swung out the other way.

Q. So, this particular movement that you felt was unrelated to a loading of a counter weight. Is that correct?

A. Yes, it was.

Q. And that is the one that you also feel, in your opinion, Mr. Smith noticed, too?

A. Yes, he asked me if I had done anything, was I still dogged off. And I said yes, I am dogged off, I didn't -- haven't touched anything.

Q. Did you report this movement that you felt between the third and fourth counter weight to anyone?

A. No, not until the 20th, in retrospect. We got to thinking about it.

Q. Do you know if Mr. Smith reported it to anyone?

A. No, he did not. He turned around and went right back to loading the counter weights.

Mr. Crowell confirmed that he considered Mr. Smith to be a good and safe worker, and that they worked together as riggers. Mr. Crowell confirmed that when he began to swing the 20-meter boom back into position just before the accident he knew that the three employees in question were still on the walkways, but did not consider them to be in any danger because the boom or load was not freely-suspended, but was pinned to the main frame with the eyelet which failed, as well as by big pins at the fulcrum (Tr. 144). In his view, no part of his crane posed a danger to the three employees who were on the boom. He believed that all three individuals were clear and free from any danger from the boom or the crane he was operating (Tr. 144).

Mr. Crowell stated that when the eyelet failed, and the load went up, he had eye contact with Mr. Smith as he fell to the ground below, and that he noticed Mr. Saulsburg's legs dangling out from "underneath the off side" of the boom (Tr. 145).

In response to further questions, Mr. Crowell confirmed that he had in the past worked on the walkway at the end of the boom in question adjusting chokers or tension on the belt, or doing a number of other things. He confirmed that Mr. Smith was rigging a choker at the end of the boom, and while he could not see the side of the boom where Mr. Smith was working, he assumed he was rigging one of two chokers shown in photographic exhibits P-10 and P-11, but was not certain as to which one he was working on at the time of the accident (Tr. 147). He believed that the choker located at the end of the boom was installed earlier in the day while the boom was still in its original position on the cribbing. Assuming that Mr. Smith installed that particular choker, Mr. Crowell believed that he could have done it while on his hands and knees by reaching through the walkway mid-rail. He believed the other choker could have been installed by pulling up a piece of the grating and wrapping it. He confirmed that he had installed chokers in this fashion in the past, but that he used a safety belt and was tied off. He confirmed that he always tied off "when you stand a chance of falling." He explained that if a piece of grating were removed, there is a chance of falling because "that leaves an open hole, and you are bent over into it" (Tr. 150). When asked why Mr. Smith was not tied off at the time of the accident, Mr. Crowell responded "He felt there was no danger, I am sure. The grating was - must have been in place, or something. I know Steve just wouldn't jump right out there and take a chance" (Tr. 150).

Mr. Crowell believed that the failure of the eyelet was a "freak design," and that he had never experienced this before. He confirmed that he saw some of the grating fly off the walkway and that it hit the ground just prior to Mr. Smith. He stated that "it all happened at once, * * * it was raining grating and one body" (Tr. 150). With regard to the grating in question, Mr. Crowell stated as follows (Tr. 151-152):

> THE WITNESS: It is secured grating. It is in there. The only way that it could have come out would be the way that it -- to have had a pin failure and that thing have such a whip-lash attitude. The grating -- for it to come out of those channels -- had to come straight up, turn on edge and then go through the hole, because the catwalk framework is made out of angle iron that is turned in toward each other.

The only movement of these -- and especially these here are fitted pieces of grating; they are mitered in. So you don't have any clearance left or right in this angle iron frame, and as long as all pieces of grating were in, you have no forward and back movement. The only movement that you could have would be straight up. And when the pin failed, it catapulted everything. It threw the grating straight up.

JUDGE KOUTRAS: Would you have any -- as a rigger, would you have any problem with walking on some grating that wasn't pinned or secured the way it was supposed to be?

THE WITNESS: No, not in that type of design.

* * * * * * *

JUDGE KOUTRAS: Let me ask you this. As a rigger, let's assume -- this is a hypothetical. Let's assume that a couple of pieces of walkway are removed, and you had to go up and walk on the supporting steel structure to do some work, without any walkways under it. Would that cause you any problem.

THE WITNESS: No.

JUDGE KOUTRAS: Why wouldn't it?

THE WITNESS: It is an acceptable risk. Whenever you hire in in this business and putting a rigging belt on, it is high risk. You better know what you are doing.

JUDGE KOUTRAS: Would you be tied off?

THE WITNESS: Not while I was moving, I wouldn't.

JUDGE KOUTRAS: While you were walking along that structure, you wouldn't be tied off?

THE WITNESS: Not while I was moving.

JUDGE KOUTRAS: When would you tie yourself off?

THE WITNESS: When I stopped and got to my work station.

Mr. Crowell stated that he was not familiar with the safety standards cited as violations in this case. When asked to explain his understanding of section 77.1607(g) requiring equipment operators to be certain, by signal or other means, that all persons are clear before starting or moving equipment, he replied as follows (Tr. 154-157):

THE WITNESS: Yes, it is your responsibility not to jump into a rig, crank it up and run over the mechanic that is changing your oil.

JUDGE KOUTRAS: Very well put. Very well put. What kind of instruction do you get with regard to that safety standard?

THE WITNESS: I was flagged to propel the rig.

JUDGE KOUTRAS: Did it ever dawn on you on this day that, with these three people being on that 20-meter boom, that you may have been violating some safety standard by moving that rig while these three fellows were on there?

THE WITNESS: No, it was not a freely-suspended load. Had it been a freely-suspended load, I may have had some thoughts on the matter, but it is not like riding a connector up on a ball, which happens frequently in the construction business. It wasn't that type. It was a main structural component. You know, in retrospect, sure they shouldn't have been there, but then again --

JUDGE KOUTRAS: Why do you say they shouldn't have been there?

THE WITNESS: Well, you know, the accident happened is why. But they could have just as easily have been there, had that pin not failed. It was an acceptable risk to the rigger.

JUDGE KOUTRAS: What do you mean by a freely-suspended load?

THE WITNESS: One where the crane is in total control of it, that I am not pinned off, as I was with that. One end was pinned off. I wasn't applying any lift. I was applying lateral movement, left and right, just swinging.

JUDGE KOUTRAS: Now, what are your instructions as a crane operator to look out for that mechanic that you just mentioned when you defined the standard for me here? If you are lifting a free-load, so to speak, do you stop, look, see if anybody is on it or clear of it before you attempt to move it, or just what procedure there do you do?

THE WITNESS: Yes, you use your years of experience and common sense and judgment call on all lifts. I have shut lifts down in the middle of a lift because I knew it was going to be unsafe. And I am not afraid to. That is part of my responsibility. Had I had any -- had I known my rig would have been in any bind or anything like that, somebody would have definitely known about it.

JUDGE KOUTRAS: How about blind lifts? Have you ever had occasion to lift lifts that were totally out of sight?

THE WITNESS: Yes.

JUDGE KOUTRAS: Well, what procedure did you use there to ascertain whether or not there was anyone --

THE WITNESS: Well, you can either use walkie-talkies, you can use headset with radio/telephone, or you can telegraph signals by hand signals.

JUDGE KOUTRAS: But in this case, you knew three men were up there, right?

THE WITNESS: Yes.

JUDGE KOUTRAS: Because one had signalled to you, Mr. Smith himself?

THE WITNESS: That -- prior to the accident. That was two hours before.

JUDGE KOUTRAS: Oh, I see.

THE WITNESS: It wasn't just before it happened, no. This was two hours earlier, when we were loading between three and four. And we put in four and five.

JUDGE KOUTRAS: Were they up there when you were doing the slight lifting to get the shoring out?

THE WITNESS: No.

JUDGE KOUTRAS: You indicated in response to questions by Mr. Fitz that when you were maneuvering that 20-meter boom, that these three men were out there, and one of your responses was, well, they had to be there because they had some work to do.

THE WITNESS: Uh-huh.

JUDGE KOUTRAS: So you were aware that they were out there doing something?

THE WITNESS: Yes.

JUDGE KOUTRAS: And they were kind of out of your line of sight?

THE WITNESS: They were in the blind on my side, yes. I knew they were up there.

JUDGE KOUTRAS: And you say it is not unusual for there to be this lateral movement with people on it doing work?

THE WITNESS: No, not unusual.

Mr. Crowell stated that he did not know how close he would bring the 20-meter boom to the cherry picker so as to transfer the boom from the 518 crane to the cherry picker and that this would have been a "supervisor's call shot." He

indicated that he would have manuevered his crane as close as possible, and that the choker would have been passed and installed by hand from the boom to the cherry picker. He believed that this could have been done by someone on the walkway while inside the hand rail (Tr. 158).

Jeffrey D. Arent, testified that he no longer works for Austin Power, but was so employed as a helper for approximately 6 months, including August 19, 1985, the day of the accident. He confirmed that he, Mr. Smith, and Mr. Saulsburg had been working on the boom all day installing counter weights. Mr. Smith summoned him to go to the end of the boom to see if it was stable, and they determined that it was and that it had no movement. Mr. Arent confirmed that Mr. Smith placed a choker on the end of the 20-meter boom. He identified photographic exhibits P-7 and P-8 as the boom walkway location where they were located at the time of the accident, and he stated that Mr. Smith was at the end of the boom and that he (Arent) was at the other end where there is a bend in the walkway as shown in exhibit P-8. Mr. Arent stated that he observed Mr. Smith tie the choker onto the end of the boom by bending over the hand rail "not very far out," and he observed that Mr. Smith "wrapped the choker around the beam and put the eye through the other eye." He stated that Mr. Smith "just had his head just barely out and his hands were out there" (Tr. 163).

Mr. Arent stated that he could not recall whether the boom was stationary or was being moved in a lateral direction while Mr. Smith was installing the choker. When the eyelet failed, Mr. Arent stated "all I remember is that I went up and hit my head" and that he came down in that same spot where there was an extra beam. Mr. Arent stated that he hit his head on the overhead walkway roofing, and when asked whether he was aware that the walkway grating was not fastened down before he went there with Mr. Smith, he responded "we didn't pay no attention to it" (Tr. 164). He stated that Mr. Saulsburg was between him and Mr. Smith on the walkway. When the eyelet failed, Mr. Saulsburg also went up in the air and hit his head, but came down and caught himself. He confirmed that he and Mr. Saulsburg were able to come off the boom by walking down the sides. When the eyelet failed, he did not see what happened to Mr. Smith and Mr. Saulsburg because "I was worried about myself" (Tr. 166).

On cross-examination, Mr. Arent examined photograph exhibit P-7, and stated that the choker at the end of the boom which is circled in blue in the photograph was not the one that Mr. Smith was installing at the time of the accident.

He stated that Mr. Smith had installed that choker prior to the accident, and that the one he was installing at the time of the accident was the choker which is shown around the walkway structure outby the end of the boom. Mr. Arent marked an "X" where he believed Mr. Smith was located installing the choker just before the accident. He then stated that the "X" mark is where he observed Mr. Smith putting on the choker that he testified to on direct examination, but then stated that he did not know whether that was the choker "that we are talking about" (Tr. 169). He stated further that he did not observe Mr. Smith install the choker which is circled in exhibit P-7, and explained as follows at (Tr. 167-168):

> A. Well, I don't know. I think he put it up there earlier. He was doing that before he did the other one that was over at -- it should have been out here where he was putting it, though, because that is where he was at, unless he dropped that choker when he -- that he was working on.
>
> Q. So the choker that is circled on P-7 -- did you see him put that choker on?
>
> A. No.
>
> Q. You did not? So the testimony that you gave before about him standing and leaning over the rail or doing anything, that doesn't apply to this particular choker that is circled?
>
> A. No.
>
> Q. If anything, it applies to the one that is --
>
> A. He was out over here.
>
> Q. At the end of the catwalk?
>
> A. Yes, he was out in this area.

Mr. Arent identified a smaller second choker, as shown in photographic exhibit P-8, and confirmed that it appeared to be wrapped around the angle iron on the catwalk. When asked whether this was the choker that Mr. Smith was working on, Mr. Arent replied "Could have been" (Tr. 170). He further explained as follows (Tr. 170-171):

Q. Could it have -- if he was applying it at the end of the -- where you have him marked as an X at P-7, would the fact that it goes around the back side, where you have marked on P-8 -- would that prevent it from being pulled all the way to the end of the --

A. Yes.

Q. It would? So does that mean -- would you agree then, that probably is not the choker that he was putting on?

A. I don't -- it don't seem like that would be the one, because he was out on the end.

Q. And was Mr. Smith kneeling down?

A. Yes.

Q. Was he on all fours?

A. On his knees, not his hands.

Q. Okay. And when you saw him where you have marked on P-7 with an X, was he reaching through the mid-rail, between the mid-rail and the grating, or between the mid-rail -- just -- and the top-rail?

A. Between the middle and the bottom.

Q. He was reaching between the mid-rail and the bottom, where the grating would be, where the toeboard is?

A. Yes.

JUDGE KOUTRAS: Mr. Arent, I thought you said on direct that he was reaching over the top, slightly not too far over it. And now it is the middle and the bottom?

THE WITNESS: Yes.

JUDGE KOUTRAS: What was it?

THE WITNESS: The bottom.

JUDGE KOUTRAS: What moved you to say the top, when asked on direct?

THE WITNESS: I don't know. Just the way the question was asked.

Mr. Arent stated that if Mr. Smith was standing on the grating and reaching over the hand rail there would be a danger of falling because he could lose his balance and go over the top of the railing. If he was reaching over, he should have been tied off, but if he was kneeling, he would be more balanced and did not need to be tied off (Tr. 174). Mr. Arent stated further that when he observed Mr. Smith on his knees reaching through the hand rail, he believed his head was outside the mid-rail, but his shoulder was not (Tr. 173).

Mr. Arent confirmed that he was wearing a safety belt at the time of the accident, but that he was not tied off because he moved around so much and was not tied off all of the time. He would tie off if he had a wrench in his hand and was using it. He also confirmed that he had his lanyard line with him and that it is part of his regular safety equipment, and that Mr. Smith also had his line with him (Tr. 175).

Mr. Arent stated that when he and Mr. Smith were on the boom, Mr. Smith was his supervisor and he would do what Mr. Smith told him. Mr. Arent did not know who Mr. Smith's supervisor was, but he confirmed that general foreman Jim White told him (Arent) where he was to work that morning (Tr. 177). Mr. Arent stated that he was not familiar with the safety standards which are in issue in this case, but confirmed that he knew he was supposed to wear a safety belt and tie off and that he learned this at weekly safety meetings conducted by Mr. White (Tr. 177).

Austin Power's Testimony and Evidence

Inspector Summers was recalled, identified several photographs of the eyelet which failed, and the scene of the accident, and described some of the damage to the eyelet (Tr. 183-184). He also testified as to certain statements and conclusions which appear in MSHA's "narrative assessment" concerning the supervising of the work being done on the boom at the time of the accident, and he confirmed that the statements were not obtained from him (Tr. 185-187).

James C. "Pat" Patterson, testified that he is employed by Austin Power, and was the rigging foreman at the time of the accident. He stated that at the time of the accident he was not aware of any movement of the 20-meter boom between the third and fourth counter weight loading process, but learned about it the following day. Immediately prior to the accident, he was on the ground and approximately 35 to 40 feet from the end of the boom. Mr. Smith was kneeling on the catwalk putting a choker around the framework under the grating. The choker was to be used to lead the boom around with the cherry picker, and his feet were at the place marked with an "X" on exhibit P-7. Mr. Smith was reaching underneath the mid-rail, but Mr. Patterson did not see how much of his body was through the rail. Based on his experience as a rigging foreman, and 30 years of construction experience, Mr. Patterson did not believe that Mr. Smith was in danger of falling (Tr. 197).

Mr. Patterson stated that company policy required Mr. Smith to have his safety belt on at all times he is off the ground, and if he is outside the handrails, he is required to be tied off. The safety belt also serves as a tool belt, and it has a lanyard attached to it. Mr. Patterson did not believe that Mr. Smith was required to be tied off at the location that he was in at the time of the accident (Tr. 197).

Mr. Patterson stated that after Mr. Smith fell to the ground, he saw that he had a head injury, and when he later examined the boom, it was his opinion that Mr. Smith struck his head on a "load cell" located above where his feet had been on the catwalk. Mr. Patterson described the "load cell" as the round white object shown by an arrow on exhibit P-7, and he stated that he observed that the object was bent. That led him to believe that Mr. Smith's head struck it as the boom raised up (Tr. 199).

On cross-examination, Mr. Patterson stated that he did not see Mr. Smith pick up the grating to maneuver the choker under it, and that he could swing the choker under the grating and reach and catch it with his hand on the other side. The choker consists of a wire rope, and he likened it to swinging a piece of rope under the walkway grating. The choker was not in place at the time, and Mr. Smith was preparing to get it in place to attach it to the cherry picker (Tr. 200).

Mr. Patterson stated that he was not aware that the walkway grating was not bolted or clamped down at the time of the accident, but that "I know that it had been at one time." He

was not made aware of the fact that the grating had ever been removed after it was initially installed until discussions which took place after the accident occurred. He stated that the grating could have been removed for numerous reasons, and that a painter, an electrician, or some other craftsman could have done it. Although he could not specifically identify who may have taken up the grating, he stated that it was not unusual to do so (Tr. 201-202). He confirmed that normal procedures, specifications, or verbal directions required that the grating be clamped at each corner and fastened down (Tr. 202).

In response to a question as to whether he believe the walkway grating was in good condition, regardless of whether it was clipped down or not, Mr. Patterson responded that he considered it to be safe to walk on (Tr. 203). Mr. Patterson explained that while he was on the ground before the accident occurred, he was primarily flagging the crane operator and also supervising Mr. Smith's work on the end of the boom. He identified the choking device as the one depicted in photographic exhibits P-10, P-11, and P-14, and confirmed that it appeared to be tied off around the steel member of the catwalk structure in all three photographs. He stated that Mr. Smith had tied the choker on and intended to loop it under the catwalk to the other side and then catch it. He would have then placed the two eyes of the choker onto the crane lifting hook in order to maneuver the boom around. No lifting was required, and the crane would simply lead the boom with a lateral movement.

Mr. Patterson stated that he did not specifically instruct Mr. Smith or the other two men as to what they were to do, and that Mr. Smith knew that the cherry picker would be used to guide the boom around, and knew that a choker was required for this task. The other two men simply followed Mr. Smith out to the end of the boom because "they were naturally eager also." Mr. Patterson stated that Mr. Smith was a journeyman and a good worker, and that he (Patterson) felt "felt completely comfortable as far as any safety aspect" (Tr. 205).

Mr. Patterson was of the opinion that the fact that the grating was not tied down and Mr. Smith was not tied off would not have prevented the fatal accident in question. He stated that by striking his head on the overhead cell, Mr. Smith was not able to grasp the hand rail as he came down after the boom raised, and he pointed out that Mr. Arent caught himself, and Mr. Saulsburg caught himself after falling through the area where the grating was gone and pulled

himself back up. He conceded that had the grating been secured, it probably would not have popped out with the jerking of the boom.

Although he believed that it was conjecture that the walkway on the other side of the boom which did not pop out was subjected to an equal amount of movement when the eyelet failed and the boom raised up, he conceded that it was probably true (Tr. 207). Mr. Patterson could not explain why the other walkway did not pop out when subjected to the "whiplash" movement of the boom when the eyelet failed, and when asked whether anyone speculated that it did not pop out because it was secured, he responded "probably, Yes sir" (Tr. 208).

In response to further questions regarding company policy and the use of safety lines, Mr. Patterson stated as follows (Tr. 208-209):

> JUDGE KOUTRAS: You say that the company policy is that when any employee is required to be off ground-level that he is to have a belt on?
>
> THE WITNESS: At this jobsite, sir, that is project policy by my boss.
>
> JUDGE KOUTRAS: And then if his work has occasion to take him outside of the area of a guard-rail, he is required to be tied off?
>
> THE WITNESS: Yes, sir.
>
> JUDGE KOUTRAS: Is this policy written, or how is it communicated to the employees?
>
> THE WITNESS: Through regular gang box, tool box safety meetings.
>
> JUDGE KOUTRAS: But do you know whether or not it is a written policy of any kind? Do you all have written work rules there?
>
> THE WITNESS: Yes, sir.
>
> JUDGE KOUTRAS: Is it part of the written work rules?

THE WITNESS: Yes, sir. We have written safety books and I don't think it is worded as such in our safety rule book.

JUDGE KOUTRAS: Why isn't it?

THE WITNESS: I don't know. It could be. I couldn't swear that it is or isn't. But at any time you are in an unsafe area, we know that we are supposed to tie off. That is in the book. But as far as wearing a belt when you are off the ground on a catwalk with hand-rails and toeplate, I don't know.

Sidney S. "Woody" Woodson confirmed that he is employed by Austin Power as a project general superintendent, and was so employed at the time of the accident. He was the superintendent of the Big Brown Strip Mine, and approximately 30 employees were employed at this job site. The mine is owned by Texas Utilities and the cross-pit spreader was designed and manufactured by the DeMag Company from Germany. DeMag had a representative on site for the purpose of overseeing Austin Power's erection of the spreader, and Austin Power had a contract with DeMag for this purpose, and not with Texas Utilities. As general superintendent, Mr. Woodson was responsible for compliance with all safety regulations at the site, and he is certified for the safety training courses given by MSHA (Tr. 210-213).

Mr. Woodson identified a copy of the company safety rule book given to all new employees at the job site, and copies of the minutes of 12 "tool box" safety meetings held with employees, including Mr. Smith, during the period June 3, 1985 to August 19, 1985. Mr. Woodson stated that the meetings included a discussion of the use of safety belts and lines, and that the meetings are conducted by company supervisor Jim White. Mr. Woodson stated further that he selects the topics for discussion at the meetings, and that he usually discusses them with Mr. White (Tr. 213-221).

Mr. Woodson reviewed several photographic exhibits, and described the location of certain electrical conduit and boxes located outside the boom walkway. He also identified a recent photograph he took depicting a chain and a sign across the boom walkways installed after the accident. The sign states "Authorized Personnel Only." Mr. Woodson confirmed that he installed the chain, and Texas Utilities installed the sign, but he could not explain who ordered them installed (Tr. 228-231).

Mr. Woodson identified photographic exhibit R-8, as a photograph of the catwalk on which Mr. Smith was working at the time of the accident. He confirmed that he took the pictures several days prior to the hearing, and when asked whether it depicts the condition of the catwalk as it appeared at the time of the accident, he responded as follows (Tr. 232-235):

> Q. Is this the catwalk that Mr. Smith was working on at the time of the accident?
>
> A. Yes, it is.
>
> Q. And was the -- was there any difference in your understanding as to the condition of the catwalk as you found it in your picture last Friday and how it was during the time that the accident happened?
>
> A. The grating is laying inside that framework, identically like it was.
>
> Q. So does it --
>
> A. At the time of the accident, with the exception of maybe a few of these grating clips not being clipped down. I can't honestly tell you how many of them was and how many wasn't.
>
> Q. So R-8 fairly and accurately depicts the way that the grating was laying into the catwalk structure at the time of the accident?
>
> A. Yes, it does.
>
> * * * * * * *
>
> Q. Now, let me direct your attention to Respondent's Exhibit number 8, the photograph. Would you explain to the Judge what Respondent's Exhibit 8 depicts to you, insofar as the four sections of grating that are shown in that catwalk, and how they are installed and secured.
>
> A. Well, of course, being four or however many pieces it is down through there, from

this elevation right here, this catwalk goes off, drops down 90-degrees, bends 90 and takes off again. There is an angle iron frame which is approximately, now, four-inch angle by four-inch angle iron. It is millimeter type, but it approximately that, which makes the framework down this side and across the front and up the other side, which this grating is laying down in there.

Q. So all of the four pieces which are depicted in Respondent's Exhibit 8 at the -- coming from the photograph and looking into the distance, the last four pieces are inside what is in effect a box of angle iron?

A. Well, you could -- you could say a box frame angle iron.

Q. Was the angle iron higher than the grating itself?

A. It is some higher, yes.

Q. Was there any way that that grating, if it was all in place, could move, either left or right or in any way laterally?

A. Not under normal conditions. Just as long as it is laying out there flat, no, it can't come out of there. Something has got to disturb it.

Q. Would you consider, in your opinion and years of experience that you have had in construction industry, for that walkway to be in good condition?

A. Well, in my years of construction, we had let lots of grating like this go unclipped down, because we felt like that it was safe grating. It couldn't come out of that type of framework, because you had to go back there and do work later. Now, we had clipped this grating down at one time because we had extra people that didn't have nothing to do, and we put them and got all the grating clipped down. It is a good policy to get it all clipped down.

Q. Did you consider it unsafe to work on that grating in that particular condition, the day of the accident?

A. No, sir, I didn't.

And, at (Tr. 238):

Q. Mr. Woodson, with regard to the grating, in your opinion was it necessary to have the clips in place for the walkway, the grating, to be in good condition?

A. Not all 100-percent, I wouldn't say. As long as your grating was laying in the box frame and laying all down in there properly and fit down and not any of it pulled up or anything, where it accumulated a tripping hazard or some way you could kick some of it up in the air and cause it to fall. No, not if it was all 100-percent uniform laying in that grating.

Mr. Woodson stated that he was not aware of any movement of the boom between the loading of the third and fourth counter weights until after the accident occurred (Tr. 234).

On cross-examination, Mr. Woodson, testified as follows with regard to the walkway clips (Tr. 238-239):

Q. Mr. Woodson, was it Austin Power's policy to have the grating clipped down on the cross-pit spreader at the Big Brown Strip?

A. To my knowledge, there is not anything in writing that tells you that it is -- needs to be clipped down. It just says grating needs to be proper secured by means of, and it goes -- I think there is some stuff somewhere that tells you, you know, that it needs to be tied down by means of number 9 wire or grating clips. There is some place we tie it down with number 9 wire, sometimes we put it down with grating clips and sometimes we weld it down.

Q. Did you know prior -- did you know on August 19, 1985, prior to the accident that

afternoon, that the grating on what has been referred to as the left side of the 20-foot boom was not clamped down?

A. No, sir. I can't honestly say 100-percent I didn't know that.

Q. Do you know of any reason why the grating would not have been clipped down on the left side of the 20-foot boom, on August 19, 1985?

A. Well, it could have been the painters took the clips up, it could have been anybody that took the clips up. I had been in that area a couple of three days before that and some of this grating was clipped down I know, because I don't recall seeing any of the clips off in that area when I went in there. Of course, I don't think I went plumb to the end of the boom that -- two or three days prior to that.

Mr. Woodson confirmed that the walkway areas are required to be inspected at least daily during the work shift, and he stated that he tries to walk the area at least once a day unless he is busy doing something else (Tr. 241). He confirmed that the walkway grating was required to be secured in order to abate the citation, and in response to additional questions, he stated as follows (Tr. 242-243):

JUDGE KOUTRAS: * * * What I am trying to understand is -- these plates, these walkway plates are put in there with items that secure it down. Isn't that true? There is a reason for having it.

THE WITNESS: Yes, sir, that is true; but the reason for having these on these particular points is because they are moving booms up and down and sideways, and clods and stuff is falling on it during operation that could knock the grating out of there -- that 99-percent of -- or 99 chances out of 1, that there ain't nothing going to fall on it and knock the grating out in that condition as you are erecting.

JUDGE KOUTRAS: Once you get it erected and completely constructed and built and ready to go, are you telling me that you are still not required to have the tie down plates on?

THE WITNESS: No, I am not saying that. I am saying that during erection -- during erection.

JUDGE KOUTRAS: So my question is that once erected and constructed, if inspector Summers walks in there and find one of them not tied down, you are likely to get a citation, aren't you?

THE WITNESS: Yes, sir, that is true.

JUDGE KOUTRAS: You are not maintaining it in good condition, or in safe condition, or whatever.

THE WITNESS: Yes, sir, that is true.

Mr. Woodson agreed with MSHA's assertion that had the walkways been secured, Mr. Smith may not have suffered fatal injuries because when he was thrown in the air he may have been able to land on them and not have continued his fall (Tr. 247-248).

With regard to the citation for moving equipment without insuring that employees are in the clear, Mr. Woodson believed the cited regulation applied to the 518 crane and not the boom of the cross pit spreader, and that the regulation prohibited anyone from being on a load that is being picked up off the ground by the crane and lifted into the air (Tr. 249, 252).

Mr. Woodson stated that after the counter weights were installed he instructed the crane operator to slack off his chokers, and since he had only one foot of clearance between the boom, he had the three employees in question walk out on the boom to see if the boom would "set down anyway." When it didn't he instructed the employees to go to the other end of the boom, and he described what happened next as follows (Tr. 250-253):

* * * Well, we started walking the thing around and we got the thing nearly around there in place, these three people that was out there on the boom, fixing to hook this choker on that cherry picker come down the other side to go out there. They was back here at the back at one time. But they seen that the boom was getting around here close,

that some point you had to go out there and hook it on. Some point you had to go out there. There was no choice.

So they went up this side, which is the right-hand side, went around the back, come down the left-hand side to put this other choker on, to hook on the cherry picker. So they had been out there once before the load started moving and they was instructed to go back. And they went back.

JUDGE KOUTRAS: And then the load started moving again?

THE WITNESS: Then the load started to moving, which he moved the load probably 80-percent of the distance that he was going with it. And Mr. Smith had already been told to put a choker on there, prior to us even start moving the boom back into position. He was told to put the choker on the front of the boom, here, but it ended up around the catwalk there.

JUDGE KOUTRAS: Now, the gentlemen in the back there that operated this particular crane that day saw nothing wrong with people being out there when it was moved. They had some work to do out there.

THE WITNESS: Well, I can't either, because there is conditions you get in where you have no choice. You have to be on it. Now, you don't want to put a man out there where you can see a hazard, but I could not see a hazard at the time that they went out there, because I didn't know that something was going to go wrong. If I had of, I sure wouldn't have sent them boys up on there.

* * * * * * *

JUDGE KOUTRAS: And in this particular case, that 20-meter boom, in your eyes, wasn't being moved?

THE WITNESS: Yes, sir, only on one end. It was rigid on -- I mean, it was fixed on the other end.

JUDGE KOUTRAS: And which end was it being moved on?

THE WITNESS: It was moved out on the live end of it.

JUDGE KOUTRAS: Where the three men were at. Is that true?

THE WITNESS: Part of the time, yes, sir. They was out there part of the time. But at the biggest move of the period, they was not out there. They was out there nearly right at the end of the move.

JUDGE KOUTRAS: Mr. Patterson is sitting there watching these fellows going back and forth?

THE WITNESS: Well, Mr. Patterson seen them walk down this catwalk on one side, yes, sir.

MSHA Arguments

Citation No. 2339411

MSHA argues that as the danger increases, the equipment operator's duty to assure clearance of persons also increases, and the operator must be certain that no one will be endangered by starting or moving equipment. Texas Industries, Inc., v. FMSHRC, 694 F.2d 770 (5th Cir. 1982), 2 MSHC 1915 (1982). MSHA submits that section 77.1607(g) requires that the equipment operator must be certain that all persons both are clear of the equipment and are not on the load before starting the equipment and moving the load. MSHA notes that section 77.1607(k) prohibits persons from working or passing under the buckets or booms of loaders in operation. In the instant case, MSHA concludes that the crane operator knew that three employees were on the far side of the 20-meter boom when he began to swing it under the 70-meter boom.

Citation No. 2399412

MSHA asserts that the facts in this particular case are similar to the facts in BCNR Mining Corporation, 3 MSHC 2015 (1985), where a violation of section 77.1710(g) occurred when a worker, without wearing a safety belt and line, placed his body between the top rail and middle rail on the fourth floor, lost his balance, and fell through the railings to his

death. MSHA submits that a reasonable employer should know there is a danger of falling when an employee is assigned a task which requires him to lean over or between the guard rails on an elevated walkway, Great Western Electric Company, 2 MSHC 2121 (1983); Southwestern Illinois Coal Corporation, 3 MSHC 1066 (1983).

Citation No. 2339413

MSHA submits that the cited elevated walkway was not maintained in good condition since its expanded metal floor plates were not fastened to its frame to prevent them from becoming dislodged if the elevated walkway moved or jumped because of some unexpected external force.

Austin Power's Arguments

Citation No. 2339411

Austin Power contends that mandatory safety standard 30 C.F.R. § 77.1607(g), does not apply to the circumstances which existed at the time of the accident. In support of this argument, Austin Power states that the accident was caused by an unexpected failure of an eyelet on the cross pit spreader which resulted in a quick, unforeseeable movement of the 20-meter boom, and that at the time of the accident, the crane operator was pulling the 20-meter boom because the electricity was not connected to allow the boom to move on its own power. The crane operator was well aware of the fact that the three employees were working on the boom as he was swinging it around. When in operation, the boom is designed to slowly move vertically and horizontally, and it is designed to allow employees to work on the walkways. Austin Power maintains that the inspector's contention that the three employees should not have been on the boom during its operation goes against the design and purpose of the machine.

Austin Power maintains that the crane operator was in fact receiving signals throughout the day, and that the situation presented is not one in which the crane operator backed over an individual because he failed to receive signals that all individuals were in the clear. Austin Power points out that the crane itself posed no danger to the three employees on the 20-meter boom because the crane did not and could not come into contact with the employees. Austin Power argues that MSHA's position that the 20-meter boom was the load of the crane and as such was an extension of the crane is refuted by the evidence and any logical interpretation of section

77.1607(g). The 20-meter boom was a separate piece of equipment which was being "walked around" by the crane, and the crane operator was putting no stress on the boom and his actions had nothing to do with the eyelet failure. Austin Power concludes that the three employees were not "riding the load" at the time of the accident and were clear of the crane, and even if they were, the inspector admitted that there is no prohibition against working on moving equipment or on the boom of machinery.

In response to MSHA's contention that the three employees should not have been working on the boom while it was moving, Austin Power asserts that the equipment was designed to allow employee access at all times, and that the inspector admitted that the failure of the equipment was just as likely to have occurred while the boom was stationary. Austin Power concludes that the fact that the crane operator was moving the boom at the time of the accident is totally irrelevant.

Austin Power argues that the only relevant factor is whether the crane operator failed to receive notification that all persons were in the clear before moving the crane. Austin Power maintains that the evidence specifically shows that the operator knew where the employees were standing and that they were in the clear, the operator was given operating signals from various individuals, and the operator did not put the employees in any danger through the operation and movement of the Link-Belt crane. Therefore, Austin Power concludes that MSHA has failed to establish a violation of 30 C.F.R. § 77.1607(g).

Citation No. 2339412

Citing Southwestern Illinois Coal Corporation, 3 MSHC 1066 (1983), Austin Power states that the phrase "shall be required to wear" found in 30 C.F.R. § 77.1710(g), has been interpreted to require miners to wear safety belts under appropriate conditions, but does not make operators guarantors that safety belts and lines will be worn by its miners. Austin Power also cites Peabody Coal Co., 1 MSHC 2076 (1979), in support of the proposition that mine operators have a duty to establish a clear and understandable safety system designed to assure that employees wear safety belts and lines on appropriate occasions and to enforce the established system with due diligence.

Austin Power argues that the fact that the three employees in question did not secure their lanyards when they were working on the 20-meter boom did not create a hazardous

situation. Austin Power points out that while the citation stated that all three employees were in violation of section 77.1710(g), MSHA acknowledged at the hearing that the two employees who were not applying the choker when the accident occurred did not need to be tied off, and that the inspector in his deposition stated that he based his citation upon his belief that the employees were riding on moving equipment (20-meter boom) and therefore needed to be tied off. However, the inspector acknowledged that there is no standard which prohibits employees from working on a piece of moving equipment.

Austin Power states that MSHA based its case upon the belief that the deceased employee was leaning over a handrail on the walkway of the 20-meter boom while connecting a choker. Austin Power maintains that the evidence clearly established that the deceased employee was not leaning over the rail and was in no danger of falling due to his actions. In support of this conclusion, Austin Power asserts that MSHA's own witness, employee Jeffrey Arent, testified that Mr. Smith was not leaning over the top rail but was kneeling on his knees reaching between the middle and bottom rails while applying the choker, and that he was in no danger of falling.

Austin Power states that the three employees were standing on the 20-meter boom at the time of the accident; the boom was equipped with a standard guard rail which included a top rail, a mid-rail and a toeboard made of angle iron; and the boom was covered by a metal housing. Austin Power points out that in the Southwestern Illinois Coal Corporation case, a violation of section 77.1710(g), was found because no guard rails or protective devices surrounded the employees work area and a danger of falling existed. However, in the instant case, the employees in question were in a protected area and were in no danger of falling. Under the circumstances, Austin Power concludes that section 77.1710(g) is inapplicable to the facts in this case.

Citing Great Western Electric Co., 2 MSHC 2121 (1983), Austin Power points out that in reviewing an analogous standard (30 C.F.R. § 57.15005), the trial judge supplied a test to interpret the phrase "danger of falling." In that case, the Commission applied a "reasonably prudent person" test previously applied in Alabama By-Products Corp., 2 MSHC 1918 (1982), which is as follows:

> [W]e conclude that the alleged violation is appropriately measured against the standard of whether a reasonably prudent person familiar

> with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action within the purview of the applicable regulation. Id. at 2122.

Applying this test to the safety belt standard, the Commission defined the test in terms of whether an informed, reasonably prudent person would recognize a danger of falling warranting the wearing of safety belts and lines. Austin Power suggests that an informed, reasonably prudent person would not have recognized a danger of falling on the protected walkway of the 20-meter boom. Austin Power quotes the crane operator's description of the situation: "They were in a catwalk grating area that was covered with a shed. It would be like sitting in this chair tied off." Austin Power also points to the admission by the inspector that he does not wear a safety belt while inspecting the 20-meter boom, and the fact that these inspections took place in the same area where the same inspector now contends that safety belts are required.

Austin Power argues that the evidence in this case clearly establishes that Mr. Smith was not leaning over the rail while applying the choker, but was crouched on his knees within the handrail. However, Austin Power asserts that at most, Mr. Smith's head was outside the rail, but not his shoulder, and that he was as protected and balanced as the other two employees which MSHA acknowledged did not need to be tied off. Austin Power concludes that since all three employees were in situations in which there was no danger of falling, they did not need to be tied off, and the fact that a "freak accident" occurred does not change the fact that the employees were in a protected area. In further support of its conclusion, Austin Power cites the belief by rigging foreman Patterson that Mr. Smith's injury was caused by a blow to the head from a load cell gauge, and that being the case, a tied-off safety belt would have provided no additional protection from the unexpected equipment failure.

Austin Power argues that in the Southwestern Illinois Coal Corp. case, a danger of falling existed, and the mine operator was found to have violated section 77.1710(g), when it left the decision to wear safety belts largely to the discretion of the miners and failed to offer or cite any specific guidelines and supervision on the presence of actual fall dangers. Austin Power suggests that if no danger of falling is present, then the issue of safety instructions and enforcement is irrelevant. On the facts presented in the instant case,

Austin Power argues that it has proved that it has a clear safety system which insures that its employees are aware of the necessity of safety belts under appropriate circumstances and that it enforces the established system with due diligence. Austin Power concludes that its testimony established that it has a stated and enforced policy that employees are to wear safety belts if they are off the ground and are to tie off with their lanyard if they are outside of the guardrails or in danger of falling.

Austin Power maintains that the determination as to when to wear a safety belt and tie off is not left to the employee's discretion but is specifically set out in its written safety manual and in tool box safety meetings. In this case, Austin Power points out that the minutes of the tool box safety meetings in which safety belts and lines were discussed show that they were signed by Mr. Smith, and that his coworker Crowell, who worked with him on a regular basis, testified that Mr. Smith was an extremely safe and good worker who wore a safety belt and tied off when the situation called for it.

Austin Power asserts that Mr. Smith was killed due to a highy unexpected equipment failure, and that a tied-off lanyard may or may not have protected him under these circumstances. Austin Power concludes that at the time of the accident, there was absolutely no foreseeable danger of falling and that this is the standard by which its actions and policies should be judged.

Citation No. 2339413

Citing Sunbeam Coal Corp., 1 MSHC 2314 (1980), and Peabody Coal Co., 1 MSHC 2422 (1980), Austin Power argues that in order to establish a violation of 30 C.F.R. § 77.205(e) or 77.404(a), MSHA must prove that elevated walkways and stairways are unsafe. A lack of reliable and substantial evidence that an actual equipment defect affecting safety and resulting in an accident justified dismissal of a section 77.404(a) citation, B.S.K. Mining Co., 1 MSHC 2447 (1980).

Austin Power asserts that MSHA failed to establish by a preponderance of the evidence that clips were actually missing from the walkway grates. Assuming the clips were in fact missing, Austin Power maintains that MSHA has not established that the walkway was in an unsafe condition. In support of its arguments, Austin Power states that the evidence merely proved that grating clips were lying on the ground following

the accident, and that the witnesses, including the inspector, admitted that they did not know whether the walkway on the 20-meter boom was clamped prior to the accident. Although rigger foreman Patterson testified that he knew the grating had been clamped at one time, MSHA based its case on an assumption that the walkway was unsecured, and that this belief is based upon speculation rather than fact because no one acknowledged seeing the grating unsecured at any time.

Austin Power asserts that the testimony established that the side of the eyelet which broke was on the left side of the 20-meter boom, the side on which the employers were standing, and that the inspector admitted that he did not know the amount of force involved in the eyelet failure, nor did he know whether the force was evenly distributed on the left and right sides. Further, MSHA offered no evidence to discount the possibility that the failure of the eyelet distributed greater force to the left side of the boom, causing the clips on the left to be knocked loose. It is entirely possible given the facts and circumstances that the force of the accident went down the left side of the boom. The clips are not substantial pieces of equipment and are not designed to withstand the type of force which they were subjected to in this accident.

Alternatively, Austin Power maintains that MSHA has failed to prove that a walkway without clips is unsafe. A finding that the walkway was unsafe is required in order to establish a violation of section 77.205(e) or section 404(a), Sunbeam Coal Corporation and Peabody Coal Co., supra.

Austin Power argues that the standards in issue do not state, and no case has held, that walkways must be clipped; they merely refer to maintaining walkways and machinery in a good, safe condition. In the case at hand, Austin Power points out that there appears to be a dispute between MSHA and the inspector as to the proper standard to apply. Although MSHA amended the citation to allege a violation of section 77.404(a), the inspector believed that section 77.205(e) is the more accurate standard. Austin Power suggests that this confusion and disagreement underscores the inapplicability of the citation to the conduct at hand. As an example, Austin Power states that most cases referring to section 77.404(a) relate to bulldozers and heavy equipment, Peabody Coal Co., 3 MSHC 1404 (1984).

Austin Power asserts that the design of the walkway secured the grating from lateral movement due to the angle iron device which was cut to hold the grates in a tightly

secured position, and that the walkway was of a substantial steel construction, as opposed to cases such as The Hoke Co., 1 MSHC 2455 (1980), in which the walkway was found to violate section 77.205(a) because the guardrail was merely a rope. Further, Austin Power maintains that the testimony established that the only way for the gratings to come out of the channels was from the unforeseeable whiplash effect which occurred from the eyelet failure, and that its employees testified to their belief that the walkway was maintained in a good condition and that no safety concerns existed with walking on unclipped grating given the design characteristics. Additionally, the 20-meter boom was still under construction at the time of the accident, and a highly unlikely effect from a "freak" accident should not be the measure of whether a walkway is maintained in a good condition. Austin Power concludes that the walkway on the 20-meter boom, with or without clips, was maintained in a good, safe condition, thereby meeting the requirements of sections 77.205(e) and 77.404(a).

Austin Power maintains that even if the grates had been clipped down, the evidence suggests that the fatality may still have occurred. First, if clips were affixed to the grates, the clips quite possibly would have come loose upon such a severe impact. Second, MSHA admits that no one knows whether Mr. Smith was flipped over the guardrail or fell through an area where the floor grates were missing. In response to MSHA's assertion that "it is reasonble to assume that he was flipped up and came back down, as did the other two employees," Austin Power points out that no one saw Mr. Smith fall through the handrail. The inspector stated that one witness told him that Mr. Smith went over the top rail. Additionally, Mr. Smith was closer to the end of the boom than the other employees and could easily have been catapulted over the edge. Third, foreman Patterson testified to his belief that Mr. Smith suffered his injury when his head hit the load cell gauge on the 20-meter boom; the gauge was bent upon review after the accident. Under this scenario, Austin Power concludes that secured grating may not have prevented the fatality, and that MSHA has failed to prove that a hazard existed due to the condition of the walkway.

Proposed Civil Penalty Assessments

With regard to MSHA's proposed civil penalty assessments for the alleged violations in question, Austin Power argues that the accident which resulted in the death of Mr. Smith was an unforeseeable failure of an eyelet on the cross pit spreader, and that this totally unexpected failure was so unusual that it goes beyond what is anticipated even by

MSHA's system of liability without fault. Austin Power maintains that it and its employees did not and could not recognize a hazard when trained individuals were working on a well-maintained, guarded walkway outside of the zone of danger from the 518 Link-Belt crane, and that the standards cited are not applicable to the facts and circumstances which existed at the time of the accident. Austin Power concludes that the accident was due to a situation beyond Austin Power's control, and that the facts presented should not have led to the three citations and the accompanying penalties.

Austin Power states that whether it knew or should have known of any unsafe conditions is relevant in determining the appropriate penalty. Peabody Coal Co., 1 MSHC 2215 (1979). It believes that it is apparent that Austin Power had absolutely no notice that the equipment was defective, and that the alleged violations did not contribute to the accident, nor would further actions by Austin Power employees have prevented the accident. Austin Power believes that its lack of negligence is relevant criteria in the assessment of penalties. Peabody Coal Co., 1 MSHC 2422 (1980).

Austin Power takes issue with MSHA's Narrative Findings for a Special Assessment which led to the proposed civil penalty assessments for each of the alleged violations. Austin Power points to the inspector's acknowledgement that he had nothing to do with the narrative findings made by MSHA's Office of Assessments, and that he was not given an opportunity to review those findings prior to the proposed penalty assessments.

Austin Power maintains that the narrative findings do not correlate with the evidence presented at trial in terms of the citations and proposed penalties. Although the narrative findings state that the three citations contributed to the severity of the fatal accident, Austin Power maintains that the evidence has shown to the contrary. In addition, the narrative findings state that the violations resulted from "operator negligence," which has not been established. The findings state that management knew that employees were not in the clear while the 20-meter boom was being moved. Austin Power asserts that the evidence shows that the employees were actually in the clear and the crane operator and supervisors were aware of this fact.

In addition, the findings state that the operator was negligent in allowing the employees to work on the boom without tying off. Austin Power asserts that the evidence shows no negligence on its part, as the employees were working in

an area with standard guardrails which presented no danger of falling. The findings further state that the operator was negligent because it knew or should have known that the walkway floor plates were not secure. Austin Power points out that there was no definitive testimony that the walkway was unclipped. In addition, the evidence established that the walkway with or without clips was of substantial construction and maintained in a good, safe condition. Austin Power concludes that the sole cause of the accident was the defective machinery; any theory to the contrary is unsupported by the evidence.

Finally, Austin Power states that the record is replete with evidence of its extensive safety program and commendable safety history. Additionally, MSHA stipulated to Austin Power's good faith effort toward compliance in relation to the accident and imminent danger order, and the inspector testified to the cooperation he received from Austin Power and the good working relationship he maintains with them. Austin Power points to the fact that it has received only two prior citations at the Big Brown strip mine, neither of which related to a violation of a standard in issue in this case. Austin Power also cites its safety training for employees on a regular basis, including weekly toolbox safety meetings, and concludes that its safety history, good faith effort toward compliance, and cooperation are relevant to the assessment of penalties. It concludes that the proposed penalties are grossly excessive and not supported by the totality of the evidence.

Findings and Conclusions

Fact of Violation - Citation No. 2339411

Austin Power is charged with a violation of mandatory safety standard 30 C.F.R. § 77.1607(g), because the crane operator was not signalled, notified, or certain that the three employees on the 20-meter boom were in the clear before using the crane to move the 20-meter boom in a lateral direction. Section 77.1607(g) provides as follows: "Equipment operators shall be certain, by signal or other means, that all persons are clear before starting or moving equipment."

Although Inspector Summers stated that there was no regulatory standard specifically prohibiting employees working on moving equipment, he also stated that if he ever observed employees on a walkway 36 feet above the ground while a piece of equipment was moving, he would issue a section 107(a) imminent danger order, even though the employees were protected

by a handrail, because there would be a danger of falling from the unstable walkway while the equipment was moving. Further, the fact that the boom design was such as to permit free access to employees while performing work on or from the walkway cannot serve as a defense for failure by the employees to adhere to any applicable mandatory safety standards while at their work stations. By analogy, simply because a conveyor belt drive mechanism is designed to permit free access to an employee while servicing the belt does not absolve an operator from insuring that the drive mechanism is guarded pursuant to the applicable guarding standards.

Superintendent Woodson believed that section 77.1607(g) applied to the crane but not to the boom, and his interpretation of the standard is that it prohibited anyone from being on a load that is lifted off the ground by a crane and into the air. The crane operator was of the same opinion, and stated that at the time of the accident, the boom was being moved laterally left and right, and he was attempting to position it close to the cherry picker.

The crane operator testified that the boom was lifted by the crane some 5 to 6 inches to facilitate the removal of shoring, and that after "tracking it" in a westerly direction, the boom remained "dogged off" for approximately 5 hours while the counter-weights were being lowered in place by another crane. After the loading of the fifth counter-weight, he slacked the crane off and then picked it up again to get his chokers taut.

In referring to the boom, foreman Patterson stated that "I try to keep people off of anything like that, you know, as much as possible" (Tr. 249). Mr. Patterson also indicated that when the boom was lowered after the counter-weights were installed, he instructed the three employees to walk down the walkway on the opposite side of the boom where the accident occurred to check the clearance, and then ordered them back to the end of the boom. The boom was then "walked around" with the crane, and while it was moving, the three men proceeded down the walkway where the accident occurred following their previous instructions to hook the choker to the cherry picker. Mr. Patterson indicated that the three employees "had no choice" but to be there to install the choker.

Austin Power suggests that the crane operator was constantly monitoring the movement of the employees while on the moving 20-meter boom and that he was receiving signals throughout the day. While it is true that the crane operator was receiving instructions, and some hand signals were given

during the course of the day, the crane operator testified that the last signal he received from Mr. Smith was some 2-hours before the accident occurred (Tr. 156). Further, although the crane operator confirmed that he knew the three employees were on the moving boom while he was attempting to swing it around to the cherry picker, he confirmed that his view was obstructed by the boom, and that the employees were on the back side of the boom and out of his line of sight while he was moving the boom with the crane. The crane operator also admitted that he was unfamiliar with any of the safety standards cited in these proceedings, and while conceding in retrospect that the three employees should not have been on the moving boom, he believed that their presence there was an "acceptable risk."

Austin Power's arguments that section 77.1607(g), does not apply to the facts of this case are rejected. I conclude that the standard must be construed to insure the safety of the men while on the moving boom which was being lifted and maneuvered about during the course of the work shift in question. Based on the evidence presented in this case, it seems clear to me that the operator of the crane had the boom under load and under his control while it was being lifted, lowered, and maneuvered about laterally during the performance of the work. Under the circumstances, I conclude and find that the crane operator had a duty under the standard to be certain that the men were clear of the boom which was attached to the crane before he moved it, particularly in this case where the men were out of his line of sight. I also conclude and find that foreman Patterson had a duty to instruct the men to leave the end of the boom before the crane operator proceeded to move it. Mr. Patterson admitted that the men "had been out there once before the load started moving and they were instructed to go back (Tr. 250). Under the circumstances, I believe that Mr. Patterson recognized the hazard presented while the men were on the moving boom, and while it is true that someone had to be there to install the choker, I believe that Mr. Patterson should have instructed the men to remain clear of the boom until it stopped its movement, and then allowed them to walk out to install the choker.

In view of the foregoing, I conclude that MSHA has established a violation by a preponderance of the credible evidence adduced in support of its case, and the citation IS AFFIRMED.

Fact of Violation - Citation No. 2339412

Austin Power is charged with a violation of mandatory safety standard 30 C.F.R. § 77.1710(g), because three

employees who were working on the elevated 20-meter boom walkway some 36 feet off the ground were not tied off with safety lines. Although the evidence establishes that the three employees had safety belts and lines with them, none of them were tied off or secured. Section 77.1710(g), provides as follows:

> § 77.1710 Protective clothing; requirements.
>
> Each employee working in a surface coal mine or in the surface work areas of an underground coal mine shall be required to wear protective clothing and devices as indicated below:
>
> * * * * * * *
>
> (g) Safety belts and lines where there is danger of falling; a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered.

During the course of the hearing, the inspector and MSHA's counsel conceded that the two employees who were not engaged in installing the choker at the time of the accident were not required to be tied off pursuant to sections 77.1710(g). Accordingly, I will confine my findings and conclusions to the circumstances surrounding the positioning of the accident victim on the walkway and whether or not he was in any danger of falling requiring him to be tied off.

Two precedential cases involving the interpretation and application of an identical safety belt standard as that presented in this case (30 C.F.R. § 57.15-5), are relevant in these proceedings. In Kerr-McGee Corp., 3 FMSHRC 2496, 2497 (November 1981), the Commission held that the purpose of the standard is the prevention of dangerous falls. In Secretary of Labor v. Great Western Electric Company, 5 FMSHRC 840 (May 1983), the Commission followed a previously enunciated "reasonably prudent person" test applied in Alabama By-Products Corp., 4 FMSHRC 2128 (December 1982), and U.S. Steel Corporation, 5 FMSHRC 3 (January 1983). In the Great Western Electric Company case, at 5 FMSHRC 841-842, citing Alabama By-Products Corp., at 4 FMSHRC 2129, the Commission stated as follows:

> [W]e conclude that the alleged violation is appropriately measured against the standard of whether a reasonably prudent person familiar

with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action within the purview of the applicable regulation.

The Commission also stated as follows in the Great Western Electric Company case, at 5 FMSHRC 842 and 843:

> Great Western argues that the skill of a miner is a relevant factor in determining whether there is a danger of falling because the miner's skill defines the scope of the hazard presented. We find that such a subjective approach ignores the inherent vagaries of human behavior. Even a skilled employee may suffer a lapse of attentiveness, either from fatigue or environmental distractions, which could result in a fall. The specific purpose of 30 C.F.R. § 57.15-5 is the prevention of dangerous falls. Kerr-McGee Corp., 3 FMSHRC 2496, 2497 (November 1981). By adopting an objective interpretation of the standard and requiring a positive means of protection whenever a danger of falling exists, even a skilled miner is protected from injury. We believe that this approach reflects the proper interpretation and application of this safety standard.
>
> * * * * * * *
>
> We conclude that, under the reasonable person test appropriately applied to the standard, substantial evidence supports the judge's finding of a danger of falling and a violation. The miner was standing on a ladder, his physical center of gravity was shifted to one side and both of his hands were preoccupied with installing a large light fixture. A slight shift in balance or lapse of attention might have resulted in a fall. In that event, the miner would not have been protected. His position twelve feet above the ground presented a substantial height from which to fall.

Although crane operator Crowell believed that the choker located at the end of the boom was installed by Mr. Smith

earlier in the day while the boom was resting on the cribbing, he was not sure which one Mr. Smith was installing when the accident occurred. Assuming Mr. Smith installed the choker at the end, Mr. Crowell believed he could have done it while on his knees reaching through the walkway mid-railing. Assuming Mr. Smith installed the other choker, Mr. Crowell indicated that it could be installed by lifting out the walkway grating and wrapping the choker around the walkway framing. However, if it were done in this fashion, Mr. Crowell believed that there was a chance of falling through the walkway opening left by the removal of the grating, and the person would be bent over into the opening. He confirmed that he had installed chokers in this manner in the past, but used a safety belt which was tied off.

Austin Power cited Mr. Crowell's testimony indicating that the employees on the walkway were protected by a "shed," and that they "would be like sitting in this chair tied off." While it is true tht the walkway had an overhead roof, the fact remains that the employes were not in a "shed" as that term is familiar to me, but were on a walkway 36 feet off the ground protected by a hand-rail which had openings between the railings. With regard to Mr. Crowell's characterization of the positioning of the employees as somewhat akin to sitting in a chair, he also indicated that they would be tied off. He suggested that if one were tied to the hypothetical chair and the leg broke, the fall would not be great because "I would still be tied to it." In the case at hand, the evidence establishes that while the employees were wearing safety belts, none of them were tied off to prevent them from falling off the walkway. As a matter of fact, Mr. Crowell conceded that while he would not tie himself off while simply walking along the boom walkway in question, he would do so once he stopped and reached his work station.

With regard to Austin Power's comments regarding the inspector's admission that he never wore a safety belt while inspecting the boom, the inspector believed that such a belt was only required while one was in danger of falling while performing a particular job task placing himself outside the protective handrails and not while merely walking down the walkway. Under the circumstances, the inspector's admission is not particularly relevant. The issue here is whether the accident victim Smith placed himself in a precarious position, and whether he was in danger of falling while performing work without being tied off or secured with a safety line. Since MSHA has conceded that the other two employees on the walkway were not required to be tied off, my findings and

conclusions here will be limited to the facts and circumstances regarding Mr. Smith.

Foreman Patterson testified that immediately prior to the accident he observed Mr. Smith kneeling on the walkway installing a choker around the walkway framing and under the grating. Mr. Patterson stated that he did not observe Mr. Smith actually lift the walkway grating, but saw him reaching under the mid-railing. He could not state how much of his body was actually through the railing, and he confirmed that company policy requires an employee to be tied off if he is outside the handrails. In these circumstances, and based on his 30 years of experience, Mr. Patterson did not believe that Mr. Smith was in any danger of falling, nor did he believe that he was required to be tied off.

Mr. Arent, one of the employees on the boom with Mr. Smith at the time of the accident, testified for MSHA on direct-examination that he observed Mr. Smith bending over the top of the handrail, with his hands beyond the railing and his head "just barely out," as he was installing the choker on to the end of the boom. On cross-examination, he changed his testimony and indicated that Mr. Smith was on his knees reaching between the middle and bottom handrail while tying another choker around the framing of the walkway inby the end of the boom. Mr. Arent believed that Mr. Smith's head was outside the handrail, but that his head and shoulders were not (Tr. 173). Mr. Arent was of the opinion that Mr. Smith would have been in danger of falling and needed to be tied off if he were leaning over the rail, but if he were on his knees reaching between the handrails he would be better balanced and would not need to be tied off because he would not be in any danger of falling.

A review of Mr. Arent's testimony reflects a degree of uncertainty as to precisely where Mr. Smith was positioned immediately prior to the accident, and his direct testimony that Mr. Smith was at the end of the boom leaning over the railing while installing a choker, is contradicted by his statement on cross-examination by Austin Power that Mr. Smith was at another location on his knees while installing a second choker. Austin Power's counsel attributed Mr. Arent's contradictory testimony to the fact that he was a subpoenaed MSHA witness, that he had never testified in cases of this kind, and that he was nervious. When asked to explain his contradictions, Mr. Arent responded "I don't know. Just the way the question was asked" (Tr. 171). I have reviewed the trial transcript and find that Mr. Arent's initial response

was in answer to a straightforward question asking him to describe what he observed (Tr. 163).

Mr. Arent is a young man who impressed me as a credible witness, and I find nothing in his demeanor to suggest that he lied as to where Mr. Smith was positioned at the time of the accident. Since he no longer works for Austin Power, and only worked there for 6 months, he had nothing to gain by lying. Mr. Arent was extremely nervous during his testimony, and considering the fact that the accident occurred a year or so earlier, I find his uncertainty and confusion understandable. Further, Mr. Patterson's testimony that he observed Mr. Smith on his knees near the choker which was tied to the walkway frame outby the end of the boom corroborates and lends credence to Mr. Arent's belief that Mr. Smith was not at the end of the boom, but at the location further inby where the second choker was tied to the walkway framing. Under the circumstances, I conclude and find that the evidence adduced in this case establishes that at the time of the accident, Mr. Smith was not at the end of the boom leaning over the railing, but was on his knees inby the end of the boom at the location where the choker had been tied to the walkway frame as described by Mr. Arent and Mr. Patterson.

Mr. Patterson testified that Mr. Smith was on his knees installing the choker around the walkway framing and under the grating, but he did not see Mr. Smith actually pick up the grating. Mr. Patterson also observed Mr. Smith reaching under the mid-railing, but could not state whether his body was actually through the railing. Mr. Arent testified that he observed Mr. Smith on his knees and believed that his head was through the railing, but that his shoulders were not. He also confirmed that Mr. Smith had his safety line with him but was not tied off. Crane operator Crowell testified that he often installed chokers in the manner attributed to Mr. Smith, and he indicated that one method of installing the choker would be to lift out the walkway grating. However, if this were done, Mr. Crowell confirmed there would be a danger of falling through the walkway opening and he would be tied off.

In describing the method for installing the kind of choker that Mr. Smith was installing while not tied off on the walkway, Mr. Patterson likened it to the swinging of a piece of rope under the walkway. He stated that Mr. Smith had tied the choker on and intended to loop it under the walkway to the other side and then catch it. He admitted that he was supervising Mr. Smith's work on the boom from ground level, and while he did not give Mr. Smith step-by-step

instructions as to how to go about the task of rigging the choker to the cherry picker, he conceded that Mr. Smith knew that the choker was required to facilitate the movement of the boom.

After careful examination of the photographic exhibits and the testimony in this case, I conclude that Mr. Smith's position on the walkway while in the process of installing the choker in question placed him in danger of falling. While on his knees, Mr. Smith's hands were obviously occupied in attempting to swing or loop the choker cable under the walkway to the other side. Mr. Patterson indicated that Mr. Smith intended to catch the cable on the other side. Mr. Smith would have had to act swiftly to swing the cable over the edge of the walkway and then move quickly to the other side to catch it. The testimony establishes that Mr. Smith was reaching under the middle railing of the walkway and that his head was beyond the railing. Mr. Smith was some 36 feet off the ground while performing the choker task, and I believe one can reasonably conclude that in the course of the work being performed as testified to by Mr. Arent and Mr. Patterson, Mr. Smith's body was partially outside of the railing. Since Mr. Smith was on his knees reaching under the middle railing, I find that the railing afforded him little protection and that he could have lost his balance while attempting to swing the choker under the walkway and fallen to the ground.

Under the circumstances here presented, I believe it should have been clear to a reasonably prudent person that a danger of falling existed and that Mr. Smith should have been tied off. This is particularly true here, where the evidence establishes that Mr. Smith was under the direct observation and supervision of rigging foreman Patterson. I conclude that a reasonable and prudent person in Mr. Patterson's position would have instructed Mr. Smith to tie off while performing the work of installing the choker in question.

Employees Arent and Crowell expressed ignorance of the MSHA safety standards cited in these proceedings. Mr. Arent stated that he knew he had to wear a safety belt and tie off and he learned this from weekly safety meetings conducted by Mr. White. Although Mr. Crowell indicated that he would tie off while at his work station, he further indicted that if he were up on a steel structure walking around without any walkway under him he would not tie off while moving about on the structure (Tr. 152). When asked why, he responded that "it is an acceptable risk." When asked his opinion as to why Mr. Smith was not tied off, Mr. Crowell responded that he was

sure that Mr. Smith did not believe he was in any danger (Tr. 150).

Foreman Patterson testified that company policy dictates that all employees who are required to perform work off ground level must have their safety belts on. However, he was not certain as to whether the policy requires the wearing of such belts while on a catwalk with handrails and toeboards. With regard to any policy requiring an employee to be tied off when his work takes him outside the guardrail, Mr. Patterson stated that this policy is communicated to employees through regular tool box safety meetings. However, he did not know whether this tie-off policy is in writing as part of the company safety rules, but that the policy requires anyone in an "unsafe area" to be tied off.

Superintendent Woodson confirmed that he is responsible for safety compliance at Austin Power's job site, and he identified copies of the tool box safety meetings conducted by company supervisor Jim White, and a copy of Austin Power's safety rules. However, Mr. Woodson confirmed that he does not personally conduct the meetings, and Mr. White did not testify. Although Mr. Woodson generally alluded to the fact that the use of safety belts and lines are discussed at the safety meetings, he offered nothing specific as to what detailed discussions may have taken place, particularly with respect to the circumstances under which employees are instructed to be tied off when working off the ground. A review of the records of the safety tool box meetings conducted by Mr. White simply reflects that safety lines, lanyards, and lifelines were included as topics of discussion.

With regard to the company safety rules (exhibit R-6), references to the use of safety belts and lines are found at the following places indicated:

III A. 3 (pg. 2) - PERSONAL SAFETY EQUIPMENT - Wear safety belt and tie off in elevated areas not protected by guard rails.

VII B. 1 (pg. 14) - SAFETY BELTS are required to be worn and tied off when working on: (g) Generally any elevated work area that is without protection to prevent you from falling.

VII D. 2 (pg. 16) - SCAFFOLDING - Personnel must wear safety belts, properly tied off, on any scaffold platform not equipped with standard handrails or not completely decked.

X E. 1 (pg. 28) - STABILITY CONTROL-PERSONNEL, MATERIALS, and EQUIPMENT. You must insure that your person, your material and your equipment are safe from unexpected movement -- falling, slipping, rolling, tipping, blowing or any other uncontrolled motion. 1. Use Safety belts as required.

I find nothing in the company written safety rules that specifically requires employees to be tied off when they are working outside of handrails on an elevated walkway. As a matter of fact, the rules which require the wearing of safety belts and lines are only applicable in cases where an employee is working in an area not protected by handrails, and while Rule X E. 1 requires an employee to insure that he is safe from falling, it only requires that he use a safety belt as required. No mention is made of being tied off or secured by a lanyard. Further, while Rule E 7 requires the securing of tools, equipment and wrenches against falling when working at heights, the securing of the individual person against falling is not included. When viewed as a whole, I conclude and find that an employee working on an elevated walkway protected by handrails 36 feet off the ground can reasonably conclude that under the company safety rules as published he is not required to be tied off while performing work on the walkway. Since the rules provide no specific requirements that he tie off when his work requires him to lean over the railing or reach through the railing, the decision to tie off in those situations appears to be left to the discretion of the employee.

In view of the foregoing, and on the facts of this case, I find an absence of any specific guidelines or supervision on the part of Austin Power with respect to the subject of actual fall dangers confronting an employee while performing work outside of the confines of the protective railing of the walkway in question. Under the circumstances, I conclude that Austin Power may not avail itself of the defenses noted

in North American Coal Corp., 3 IBMA 93, 107, 1 MSHC 1130, 1134 (1974), and Southwestern Illinois Coal Corporation, 5 FMSHRC 1672 (1983), and its defense in this regard IS REJECTED.

In view of the foregoing findings and conclusions, I conclude and find that section 77.1710(g) is applicable in this case and that MSHA has established a violation. The citation IS AFFIRMED.

Fact of Violation - Citation No. 2339413

In this instance, Austin Power is charged with a violation of mandatory standards 30 C.F.R. § 77.205(e) or 77.404(a), for allegedly removing the 20-meter boom walkway floor plates or grating clips or "hold-downs," thus rendering the walkways in less than good condition. The cited standards provides as follows:

> 77.404(a) Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately. (Emphasis added.)
>
> 77.205(e) Crossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction, provided with handrails, and maintained in good condition. Where necessary toeboards shall be provided. (Emphasis added.)

Superintendent Woodson suggested that during the construction of the spreader in question, the boom walkway grates need not be fastened or secured, but that once construction is completed, they do. In my view, the evidence here has established that the grating clips are necessary to preclude the walkway from popping up or moving out of its track. Mr. Woodson indicated that the grates are normally clipped, wired down, or welded in place to insure against any movement. Under the circumstances, I conclude that any failure to clip or secure the walkway grating may indicate that the walkway is not being maintained in good condition as required by section 77.205(e), notwithstanding the fact that the grates are positioned in a track and held in place laterally by angle iron. By the same token, failure to maintain the walkway grates in a clipped or tied down position could also result in the walkway being maintained in less than a safe operating condition as required by section 77.404(a).

Austin Power's suggestion that the walkway is not "a piece of equipment" within the meaning of section 77.404(a), is not well taken. The 20-meter boom is an integral part of the spreader, and both the spreader and boom fall within the category of "mobile and stationary machinery and equipment." The boom walkways are an integral part of the boom, and they also fall within this broad category as encompassed by the standard.

Austin Power maintains that the walkway grates were inherently safe simply by resting in place within the steel walkway framing protected from movement by angle irons which are an integral part of the framework, and that the lack of hold-down clips did not render the walkways unsafe or in less than good condition. In support of this conclusion, Austin Power cites the collective testimony of all of its witnesses who were of the opinion that even if the walkway grates were not clipped or secured in place, they were nonetheless safe.

Austin Power maintains that MSHA has advanced no credible evidence to support the charge that the clips had been removed, and argues that it was just as likely that the clips were dislodged along with the grates after being subjected to the violent whiplash force of the boom when it suddenly raised up and propelled the men into the air after the eyelet cable failed.

Before reaching any conclusions as to whether or not the lack of grating clips rendered the walkways unsafe or in less than good condition, a determination must first be made as to whether or not MSHA has advanced any probative or credible evidence to support the charge that Austin Power removed the grating clips, and that they were in fact removed and not in place at the time of the accident.

In support of its allegation that the clips were removed by Austin Power, MSHA relies on the testimony of Inspector Summers and the investigation report which he authored. However, the report is not evidence. The inspector's testimony regarding the alleged removal of the walkways and clips, and the alleged failure to resecure them, is based on his recitation of the results of his investigation as found under the "Discussion and Evaluation" portion of his report. Mr. Summers confirmed that he took no written statements from any of the individuals he interviewed during his accident investigation, and simply took notes (Tr. 137-138).

In his deposition of April 25, 1986, Inspector Summers stated that prior to the accident, it was his understanding

that "the walkway grating and the rest of the material that forms the catwalk, angle iron and everthing, were in place" (Dep. Tr. 68). He also confirmed that during his investigation after the accident he found walkway clips on the ground. When asked how he knew that the grates which fell were not clipped prior to the accident, he responded "from looking at the other grating along the left-hand walkway" (Dep. Tr. 75). Referring to deposition exhibit S-7, he then explained that the "other grating" which was not clipped down was the grating located from "the end of the picture back to the pivot point of the machine." He stated that this grating was not totally secured by clips, and while it did not fall to the ground when the accident occurred "some kind of moved out of place" (Dep. Tr. 76).

Referring to his notes, deposition exhibit S-2, Mr. Summers identified the 14 sections of walkway grating after the accident and away from the scene of the accident which either had clips, no clips, or clips which were not secured (Dep. Tr. 105-107). Since the walkway grating on the right side of the boom was clipped and not thrown to the ground, Inspector Summers simply concluded that the walkway grates on the left side of the boom which fell to the ground were not secured by clips (Dep. Tr. 77).

Mr. Summers testified that during his investigation, Mr. Woodson, Mr. Arent, and the third person on the boom, Kevin Saulsburg, told him that the walkway grates at the location where the accident occurred had been removed and not resecured (Tr. 126-127). I have reviewed Mr. Summer's deposition and find no mention of any of these individuls. I have also reviewed the notes incorporated as part of the deposition, and find no mention of any of these individuals. Nor do I find any references as to who may have told Mr. Summers that the walkways and clips had been removed and not resecured, or that they were removed for painting. The only specific reference in the deposition on this question is a statement by Mr. Summers that he was told that the electrical people had removed the walkway or the clips in order to have access to certain electrial equipment under the walkway (Dep. Tr. 76).

Mr. Summers apparently made no effort to identify or contact the individuals who may have done any electrical work or painting, and MSHA's counsel apparently made no effort to call any of these individuals to testify. I find it rather amazing that the best evidence available during the investigation or hearing with respect to the removal of the walkway

grating and the failure to resecure it was not even pursued or developed.

Inspector Summers confirmed that representatives of the designer and manufacturer of the cross pit spreader were available at the site during his investigation, but that he did not interview or discuss the matter with them (Dep. Tr. 47). I assume that these representatives were available for depositions or subpoenas, and their testimony would be relevant to the issues concerning the effectiveness of the grating clips, whether they in fact secured the walkway to the steel framework of the boom or simply tied one piece of walkway grating to the other, and whether or not the force of the accident would have propelled the grating out of its channel, regardless of any clipping. However, none of these representatives were contacted by Mr. Summers during his investigation, and none were called to testify at the hearing.

Neither Mr. Arent or Mr. Woodson testified that they told Inspector Summers that the walkway grates were taken up by electricians or painters and not resecured. Mr. Arent testified that while on the walkway, he paid no attention to the grates and he could not state whether they were tied down or not (Tr. 164, 178). Mr. Patterson alluded to past instances in which the walkway grates may have taken up by electricians or painters, but in the case at hand, he stated that he was not aware that any electricians had any work to do in the accident area, and was not aware that the grates had been taken up (Tr. 201-202). Although he conceded that the grates "probably" would not have popped out if they were secured, and that someone "speculated" that the plates on the other walkway did not pop up because they were secured, he described the breaking of the eyelet cable as a "gigantic whiplash effect, or like a fishing pole" (Tr. 207-208).

Mr. Woodson admitted that during the course of construction, the grates are not always clipped down because ready access is required to complete the construction and the grates are inherently safe while snuggled into the iron framework channels. He also stated that all of the grating in question was clipped down "at one time" by putting extra people on this work and he indicated that "it is good policy to get it all clipped down" (Tr. 235). Mr. Woodson also stated that he was on the walkway 2 or 3 days before the accident and could not recall seeing any of the clips removed. However, he did not walk to the end of the boom at that time (Tr. 239). He indicated that when the grating is lying within its framework "it is just like one of those manholes in the street that you drive across every day" (Tr. 248).

Austin Power's counsel maintained that the grating clips are not designed to withstand major forces such as occurred in this case when the eyelet cable broke. He stated that the clips are not substantial pieces of equipment, and that they "are just to keep the things from moving one way or the other" (Tr. 246-247). He also indicated that no one knows what was clipped and what was not.

Inspector Summers characterized the sudden raising of the boom after the eyelet failed as a "sling shot" which tossed the three men and the walkway plates into the air (Dep. notes, exhibit S-2). He confirmed that he had no idea as to whether the force exerted by the boom was evenly distributed on both sides, and no such determination was apparently made during the investigation of the accident (Tr. 125). When asked why the remaining grating on the left walkway further back from the accident location did not fall to the ground (even though some were clipped down and others were not), he stated that this back area was subjected to a less violent action of the boom when the eyelet failed, and that is why they did not fall out (Tr. 124). This lends credence to Austin Power's argument that the violent action of the boom at the end of the walkway where the accident occurred may have caused the clips to be knocked loose.

After careful review and consideration of all of the testimony and evidence with respect to this citation, I conclude and find that MSHA has failed to produce any credible probative evidence to support the charge that Austin Power removed the walkway clips in question or that the walkways where the accident occurred were not secured by clips immediately before that accident. Under the circumstances the citation IS VACATED.

History of Prior Violations

Exhibit P-4, is a computer print-out listing Austin Power's civil penalty assessment record for the period August 19, 1983 through August 18, 1985. That record reflects that Austin Power paid civil penalty assessments in the amount of $450 for two citations, none of which are for violations of any of the standards cited in these proceedings. I conclude that Austin Power has a good safety compliance record, and I have taken this into account in assessing the civil penalties for the citations which have been affirmed.

Size of Business and Effect of Civil Penalty on Austin Power's Ability to Continue in Business

Superintendent Woodson stated that 30 employees were employed at the mine site in question (Tr. 210), and the parties stipulated that 41,012 man-hours were devoted to Austin Power's mining activities in 1985. Although Austin Power's counsel indicated that 700 employees work for the company, he explained that Austin Power's principal business is the construction of power plants, which is not normally considered "mining activities" under the Act (Tr. 13). Under the circumstances, for purposes of these proceedings, I conclude that Austin Power is a small mine operator, and this is reflected in the civil penalties assessed for the violation in question. Austin Power stipulated that the penalties proposed by MSHA will not adversely affect its ability to continue in business (Tr. 188). I conclude that the penalties assessed by me for the citations which have been affirmed will likewise not adversely affect Austin Power's ability to continue in business.

Good Faith Compliance

The parties stipulated that Austin Power demonstrated good faith in achieving rapid compliance after notification of the violations in question. I adopt this as my finding and conclusion on this issue, and it is reflected in the civil penalty assessments which I have made.

Negligence

I conclude that the violations which have been affirmed resulted from Austin Power's failure to take reasonable care to insure compliance with mandatory safety standard section 77.1607(g) and 77.1710(g), and that this failure on its part constitutes ordinary negligence. With regard to the safety line violation, since Mr. Patterson was supervising Mr. Smith's work on the boom and had him in view while in a position which placed him in danger of falling, Mr. Patterson had a duty to either order Mr. Smith away from his work location or instruct him to tie off.

With regard to the crane operator's failure to insure that the employees were clear of the boom, since the crane operator did not have the employees in view but knew they were on a moving boom performing work, he had a duty to insure that they were clear of the area before attempting to maneuver the boom with his crane. Had Mr. Smith been ordered away from the end of the boom or instructed to tie off his

safety line, he may not have fallen 36 feet and been killed when the eyelet failed.

I am not unmindful of the fact that the accident victim Smith had a safety lanyard with him, but failed to tie off. I am also cognizant of the fact that the accident which resulted in the death of Mr. Smith resulted from an unpredicted and unexpected failure of the eyelet. I have considered all of these factors in mitigating the civil penalties that I have assessed for the violations which have been affirmed.

Gravity

I conclude and find that the failure by Austin Power to insure that Mr. Smith and the other employees were clear of the boom while it was being moved, and to insure that Mr. Smith was tied off before proceeding with his work tasks constitute serious violations of the cited safety standards.

Significant and Substantial Violations

Inspector Summers found that the violations of sections 77.1607(g) and 77.1710(g) were significant and substantial violations. I agree with these findings, and conclude that the violations were significant and substantial. I believe the violations were contributing factors to the fatal injuries suffered by Mr. Smith. Even if the unexpected accident had not occurred, I would still find that the failure to insure that the employees were clear of the boom while it was being moved and the failure of Mr. Smith to tie off while in danger of falling presented a hazard and a reasonable likelihood of serious injuries.

Penalty Assessments

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude that the following civil penalty assessments are appropriate and reasonable in these proceedings:

Citation No.	Date	30 C.F.R. Section	Assessment
2339411	8/20/85	77.1607(g)	$ 2,000
2339412	8/20/85	77.1710(g)	$ 2,500

ORDER

Austin Power IS ORDERED to pay civil penalties in the amounts shown above, and payment is to be made to MSHA within thirty (30) days of the date of this decision. Upon receipt of payment, the civil penalty proceeding is dismissed.

Citation No. 2339413, August 20, 1985, for an alleged violation of 30 C.F.R. § 77.205(e) or 77.404(a), IS VACATED, and MSHA's proposed civil penalty assessment IS DISMISSED. Austin Power's Contest of this citation, Docket No. CENT 86-61-R, IS GRANTED.

Austin Power's Contests of Citation Nos. 2339411 and 2339412, Docket Nos. CENT 86-59-R and CENT 86-60-R, ARE DENIED and DISMISSED.

George A. Koutras
Administrative Law Judge

Distribution:

Robert Fitz, Esq., Office of the Solicitor, U.S. Department of Labor, 525 Griffin Street, Suite 501, Dallas, TX 75202 (Certified Mail)

Steven R. McCown, Esq., Jenkens & Gilchrist, 2200 Interfirst One, Dallas, TX 75202 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 12, 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No.CENT 86-100-M A.C. No. 41-01786-05514
v.	:	
BANDAS INDUSTRIES, INC., Respondent	:	Nolanville Quarry and Plant

DECISION APPROVING SETTLEMENT

Before: Judge Merlin

The parties have filed a motion to approve settlements of five violations involved in this case. The total of the originally assessed penalties was $713. The parties now recommend penalties in the sum of $535.

The motion discusses each violation in light of the six criteria set forth in section 110(i) of the Federal Mine Safety and Health Act of 1977. Citation No. 2662416 was issued for violation of 30 C.F.R. § 56.14011 because of inadequate guarding on the primary plant impact crusher. A reduction in the proposed penalty from $105 to $79 is now recommended because of reduced negligence. The operator believed in good faith that the hazard had been abated. An inspector from the Occupational Safety and Health Administration (OSHA) had observed the same condition and had prescribed a method of abatement. The operator had followed the instructions of the OSHA inspector but these did not meet MSHA's requirements.

Citation No. 2662418 was issued for violation of 30 C.F.R. § 56.9003 because of inadequate brakes on a dump truck. A reduction in the proposed penalty from $168 to $126 is now recommended because of reduced gravity. The conditions under which the brakes were tested were extreme. The truck was loaded greater than it would be in actual practice and it was operated on a steeper grade than it ever was while in service.

Citation No. 2662425 was issued for violation of 30 C.F.R. § 56.14006 because of failure to guard the pinch points of a drive motor on a screen. A reduction in the proposed penalty from $136 to $102 is now recommended because of reduced gravity. Exposure of miners to the hazard was extremely limited.

Citation No. 2662426 was issued for violation of 30 C.F.R. § 56.14001 because of failure to guard the fan blades of a portable generator. A reduction in the proposed penalty from $136 to $102 is now recommended because of reduced gravity. Exposure of miners to the hazard was limited.

Citation No. 2662427 was issued for violation of 30 C.F.R. § 56.15002 because of the failure of some miners to wear hard hats in areas where material may fall. A reduction in the proposed penalty from $168 to $126 is now recommended because of reduced gravity and negligence. The operator had issued hard hats to its employees and had instructed the employees to wear them. The employees who were not wearing hard hats usually did not work in areas where there was a hazard of falling objects, and were seldom exposed to this hazard. I approve the recommendation but the operator should make sure in the future that all affected employees wear hard hats.

The representations and recommendations of the parties are accepted, especially in light of the operator's small size.

Accordingly, the motion to approve settlements is GRANTED and the operator is ORDERED TO PAY $535 within 30 days of the date of this decision.

Paul Merlin
Chief Administrative Law Judge

Distribution:

Jack F. Ostrander, Esq., Office of the Solicitor, U.S. Department of Labor, 525 Griffin Street, Suite 501, Dallas, Texas 75202 (Certified Mail)

Mr. R.F. Bandas, Bandas Industries, Incorporated, P.O. Box 3595, Temple, Texas 76501 (Certified Mail)

/sc

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

NOV 12 1986

CONSOLIDATION COAL COMPANY, Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. WEVA 86-217-R
v.	:	Order No. 2713945; 2/25/86
	:	Docket No. WEVA 86-218-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Order No. 2713946; 2/25/86
	:	Docket No. WEVA 86-219-R
	:	Order No. 2713952; 2/25/86
	:	Docket No. WEVA 86-220-R
	:	Order No. 2713953; 2/26/86
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEVA 86-277
	:	A. C. No. 46-01867-03678
v.	:	Blacksville No. 1 Mine
CONSOLIDATION COAL COMPANY, Respondent	:	

DECISION

Appearances: W. Henry Lawrence, Esq., Steptoe & Johnson, Clarksburg, West Virginia, for Contestant/Respondent;
William T. Salzer, Esq., Office of the Solicitor, U. S. Department of Labor, for Respondent/Petitioner.

Before: Judge Maurer

STATEMENT OF THE CASE

Contestant Consolidation Coal Company (Consol) has filed notices of contest challenging the issuance of four separate orders during February 1986 at its Blacksville No. 1 Mine. The Secretary of Labor (Secretary) has filed petitions seeking civil penalties for the violations charged in the contested orders. The proceedings were consolidated for purposes of hearing and decision.

Pursuant to notice, the cases were heard in Morgantown, West Virginia, on July 22 and 23, 1986.

The general issues before me concerning each of the individual orders and its accompanying civil penalty petition are whether there was a violation of the cited standard, and, if so, whether that violation was "significant and substantial" and caused by the "unwarrantable failure" of the mine operator to comply with that standard as well as the appropriate civil penalty to be assessed for the violation, should any be found.

Both parties have filed post-hearing proposed findings of fact and conclusions of law, which I have considered along with the entire record herein. I make the following decision.

STIPULATIONS

The parties have agreed to the following stipulations, which I accept:

1. The Consolidation Coal Company, Inc., owns and operates the Blacksville No. 1 Mine and is subject to the jurisdiction of the Federal Coal Mine Safety and Health Act of 1977, Public Law 91-173, as amended by Public Law 95-164 (Act).

2. The Administrative Law Judge has jurisdiction over this proceeding pursuant to Section 105 of the 1977 Act.

3. The subject orders (Nos. 2713945, 2713946, 2713952, 2713953) and terminations thereto were properly served by a duly authorized representative of the Secretary.

4. Copies of Order Nos. 2713945, 2713946, 2713952, 2713953 (attached to the Petition for Adjudication of Civil Penalty) are authentic copies of the original orders.

5. The assessment of a civil penalty in this proceeding will not affect respondent's ability to continue in business.

6. The operator has been assessed 852 violations for the two-year period prior to February 25, 1986.

7. 1985 annual production for the Blacksville No. 1 Mine was 1,609,803 tons of coal. 1984 annual production was 1,775,322 tons of coal.

I. DOCKET NO. WEVA 86-217-R; ORDER NO. 2713945

Order No. 2713945, issued pursuant to Section 104(d)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the Act) alleges a violation of the regulatory standard at 30 C.F.R. § 77.205(b) 1/ and charges as follows:

> In the Slurry Pump House, located on the surface facility of the underground mine, the travelways in the housing were not being maintained free of slipping hazards. Water was flowing freely from a pump on to the floor where a sediment had built up over a long period of time approximately 1 1/2 inches in depth. Little or no effort was being made to maintain these work areas. A trough to catch run off from the pumps had its end cut off allowing this material to run onto the floor and across the facility floor and out the door. The work-travel areas were approximately 20' feet in length overall. This condition was obvious and should have been identified by management.

FINDINGS OF FACT

1. The order was issued at 9:40 a.m. on February 25, 1986, by MSHA Inspector Joseph Migaiolo during a "AAA" inspection at the slurry pumphouse located on the surface of the Blacksville No. 1 Mine.

2. The slurry pumphouse is a 15' long x 10' wide building which functions as a recycling facility for coal residue (slurry) emitted from coal cleaning operations.

3. During this aforementioned inspection, Inspector Migaiolo observed water approximately 1/4 inch deep, exiting the front doorway of the pumphouse, at a rate he estimated to be five (5) gallons per minute.

4. Inside the pumphouse, the entire floor was covered with slurry sediment, consisting of fine coal particles, oil shale and water. However, the water and slurry materials were concentrated along the back wall of the pumphouse where the depth of the mixture near Pump No. 4 on Exhibit No. G-5 was three inches. The mixture was one and one-half inches deep at Point "C" on Exhibit No. G-5.

1/ 30 C.F.R § 77.205(b) provides as follows:

> Travelways and platforms or other means of access to areas where persons are required to travel or work, shall be kept clear of all extraneous material and other stumbling or slipping hazards.

5. There was an open-ended water trough on the floor of the pumphouse at Point "C" on Exhibit No. G-5 at which point water was freely flowing onto the floor, adding to the wetness of the slurry sediment mixture as well as completely submerging two insulation mats which were on the floor near two electrical devices. Water was also flowing onto the floor from Pump No. 2 towards the back wall of the pumphouse due to a defective packing around the "drive shaft".

6. I specifically find that this slurry-water mixture created a slipping hazard on the floor of the pumphouse.

7. While the slurry pumphouse is not a high travel area, the facility is inspected on each shift to ensure the proper functioning of the pumps and to detect any existing hazards.

8. The presence of the slurry-water mixture on the pumphouse floor created a reasonably-likely risk of a slip and fall type injury to any employee entering the building or maneuvering around the equipment inside. Furthermore, the presence of the two submerged insulating mats on the floor created a somewhat higher risk of a slip and fall injury in the somewhat less likely event an employee were to step on one of them.

9. The type of injuries that would likely be involved if such an accident occurred would be back injuries, concussions, and/or broken bones.

10. Shift foreman Jack Yost observed water flow from the pumphouse approximately sixteen inches wide and a quarter-inch deep the day before the issuance of the instant order.

11. The operator, through its shift foreman, Yost, had actual knowledge of the condition of the pumphouse at least the day before the instant order was issued and likewise knew or should have known and appreciated the slipping hazard presented by the aforementioned conditions on the floor of the slurry pumphouse.

CONCLUSIONS OF LAW

1. Consol is subject to the provisions of the Act in the operation of the subject mine. I have jurisdiction over the parties and subject matter of this proceeding. [This finding applies to all the orders considered in this proceeding.]

2. The evidence as set out above in the Findings of Fact establishes a violation of 30 C.F.R. § 77.205(b) due to the existence of a slippery slurry-water mixture on the entire floor of the slurry pumphouse including those areas where persons are required to travel and work.

3. The violation was of such a nature as could significantly and substantially contribute to the cause of a coal mine safety hazard, and I accept the testimony of Inspector Migaiolo that there was a reasonable likelihood that that hazard could have resulted in serious injury to a person or persons. I therefore conclude that the violation was significant and substantial and serious. Mathies Coal Company, 6 FMSHRC 1 (1984).

4. I further find that the violation was caused by the "unwarrantable failure" of the operator to comply with the standard. Based on the same evidence, I find that the mine operator was negligent. In Zeigler Coal Company, 7 IBMA 280 (1977), the Interior Board of Mine Operations Appeals interpreted the term "unwarrantable failure" as follows:

> An 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 has failed to abate the conditions or practices constituting such violation, conditions or practices the operator knew or should have known existed or which it failed to abate because of lack of due diligence, or because of indifference or lack of reasonable care.

The Commission has concurred with this definition to the extent that an unwarrantable failure to comply may be proven by a showing that the violative condition or practice was not corrected or remedied prior to the issuance of a citation or order, because of indifference, willful intent, or serious lack of reasonable care. United States Steel Corp. v. Secretary of Labor, 6 FMSHRC 1423 at 1437 (1984). It is not disputed that Mr. Yost's knowledge is attributable to the operator and he knew of the violative condition on the day before the inspector saw it. The failure to correct these conditions reflects indifference to them or a serious lack of reasonable care to see that they are abated.

5. Considering the criteria in Section 110(i) of the Act, I conclude that a penalty of $800, as proposed, is appropriate.

II. DOCKET NO. WEVA 86-218-R; ORDER NO. 2713946

Order No. 2713946, issued pursuant to Section 104(d)(2) of the Act alleges a violation of the regulatory standard at 30 C.F.R. § 77.1104 2/ and charges as follows:

> In the hoist house, located on the surface facility of the underground mine, the drum pit was saturated with a layer of oil. Such area had this condition for a long period of time due to a bucket placed beneath the structure to catch the drippings (3 to 6" in depth). However the portion not collected by the bucket had layered on the metallic structure of the base area. In addition the elevated break reservoir had a leak of oil which had spread over the base structure and was being delivered to the pit area. This condition was obvious and had been previously identified by management as having parts on order and that leaks from the pit metallic oil connections were just a special connection that leaks normally. Accumulations of combustible materials which can start fires are not permitted.

FINDINGS OF FACT

1. The order was issued at 9:20 a.m. on February 25, 1986, by MSHA Inspector Joseph Migaiolo during a "AAA" inspection of the hoist house facility located on the surface of the Blacksville No. 1 Mine.

2. Situated in the hoist house is a 20' long x 15' wide x 7' deep concrete pit, called a "drum-pit" which houses a drum hoist and an electric motor driving a hydraulic pump for the hydraulic brakes which in turn control movement of the drum.

3. A brattice-type cloth was spread over the floor of the pit to catch dripping noncombustible graphite rope dressings. However, due to hydraulic fluid leaks from the various hydraulic connections existent in the pit, two-thirds of the brattice cloth was saturated with hydraulic fluid, and the adjacent floor areas were covered with a thin layer of hydraulic fluid.

2/ 30 C.F.R. § 77.1104 provides as follows:

> Combustible materials, grease, lubricants, paints, or flammable liquids shall not be allowed to accumulate where they can create a fire hazard.

4. Consol was aware of the hydraulic fluid leakage, evidenced by the fact that a five gallon bucket was on the pit floor to catch hydraulic fluid leaks from the hydraulic hose fittings. Further, it is undisputed that the bucket had failed to catch all the leakage and these amounts accumulated on the brattice-type cloth.

5. Consol's management personnel were generally familiar with the leakage, but did not consider it a safety hazard.

6. Before a fire could result from this accumulation of hydraulic fluid, a flame or electrical arc must first reach the brattice cloth. The only possible ignition source was a motor located in the front left-hand corner of the pit.

7. A flame or an electrical arc from this motor could possibly, although not very likely, reach the brattice cloth if it overheated from an overcurrent condition.

8. Most importantly, however, this electric motor was equipped with both circuit breakers and a power suppression system for overcurrent protection. Accordingly, I find it to be unlikely that an ignition source existed in the drum pit. In so holding, I specifically reject Inspector Migaiolo's suggestion that the solenoid located in the pit could be a second potential source of ignition.

9. The possible employee exposure to whatever hazard existed, if any, was very limited. A single employee would visit the hoist house once or twice a day to spend a few minutes inspecting the area.

CONCLUSIONS OF LAW

1. On February 25, 1986, the operator violated 30 C.F.R. § 77.1104 due to the accumulation of combustible hydraulic fluid in the drum pit of the hoist house facility at the Blacksville No. 1 Mine. No matter the likelihood or unlikelihood of a fire actually resulting from this accumulation, the hydraulic fluid was allowed to accumulate where it could create a fire hazard. Therefore, it is a violation of the regulatory standard.

2. The violation was not of such a nature as could significantly and substantially contribute to the cause of a coal mine safety hazard. There was no reasonable likelihood that the presence of the hydraulic fluid on the brattice cloth or the floor of the pit generally would significantly contribute to a fire hazard because there was no reasonably likely ignition source. Further, there was no

showing of a reasonable likelihood, that in the unlikely event of a fire, there would be an injury of any type, let alone an injury of a reasonably serious nature. Mathies Coal Company, supra.

3. The violation was nonetheless caused by an unwarrantable failure to comply with the standard in question. It is uncontroverted that the operator knew the violative condition existed. The operator's belief that the brattice cloth did not create a fire hazard and was not a violation of the mandatory standard cited was in error. My holding herein is that any appreciable accumulation of hydraulic fluid on the floor of the drum pit, regardless of the likelihood of ignition (so long as that likelihood is not absolute zero), can create a fire hazard, and is therefore a violation. That violation is "unwarrantable" if the operator fails to abate a condition that he knew existed, as here. Zeigler Coal Co., supra. In the instant case the violative condition had existed for a long time. A bucket was being utilized to catch some of the fluid drippings, but did not contain all. The brattice cloth that was found saturated by Inspector Migaiolo was purportedly routinely changed when it became saturated. It appears to me that this was a condition management simply had decided to live with rather than repair. This apparent attitude reflects indifference or at least a serious lack of reasonable care to abate. United States Steel Corp., supra. For example, the leakage from the accumulator was eliminated by simply tightening four bolts on the side of the accumulator cylinder subsequent to the issuance of the instant order.

4. Considering the criteria in Section 110(i) of the Act, I conclude that a penalty of $400 is appropriate.

III. DOCKET NO. WEVA 86-219-R; ORDER NO. 2713952

Order No. 2713952, issued pursuant to Section 104(d)(2) of the Act alleges a violation of 30 C.F.R. § 77.205(e) 3/ and charges as follows:

> On the second floor travelways, in the preparation plant on the surface, approximately 75 feet of toe-boards were not provided in these

3/ 30 C.F.R. § 77.205(e) provides as follows:

> Crossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction, provided with handrails, and maintained in good condition. Where necessary toeboards shall be provided.

elevated walkways. In addition a railing was not properly maintained. Such had been cut apart, hinged so as to make an opening. However the hinged door was not bolted together at the middle. Such could cause persons to fall to the main floor approximately 12 feet. These conditions are obvious and should have been identified by management. In addition two other travelways on the same floor had segments of railing missing approximately 36 inches in length.

FINDINGS OF FACT

1. The order was issued at 12:15 p.m. on February 25, 1986, by MSHA Inspector Joseph Migaiolo during a "AAA" inspection of the preparation plant located on the surface of the Blacksville No. 1 Mine. During this inspection, Inspector Migaiolo inspected the second floor travelway of the said plant.

2. The travelway on the second floor of the preparation plant lacked fifty-seven (57) feet of toeboard.

3. Numerous activities taking place on the ground floor of the preparation plant place individuals, at times, underneath the second floor travelways. At any one time, at least two workers may be found on the ground floor.

4. Two storage rooms are located on the second floor and materials and supplies are transported on the second floor travelway. In addition to these storage areas, the company maintains the superintendent's and the shift boss's offices on the second floor.

5. Toeboards are necessary on the second floor travelway because an object being carried or otherwise transported could fall onto the travelway, roll off and strike a worker directly underneath on the ground floor.

6. The operator was aware of the absence of toeboards on the second floor travelway and should have known of the potential danger to its employees working below on the ground floor. Curiously, toeboards were installed on every other floor of the preparation plant except the second floor.

7. The two-door loading gate located on the second floor travelway was satisfactorily constructed. I am satisfied that this gate would open inward, as designed, but would not open outward because of the sturdy construction of the hinges on the gates. In this regard, I specifically credit the testimony of Mr. Gross over that of Inspector Migaiolo.

8. The inspector also cited two 3-foot sections of walkway on the second floor where the operator had not installed handrails. I find that the missing railing located in these areas was situated where crossbeams and vertical I-beams served in place of handrails and adequately served to satisfy the regulatory standard.

CONCLUSIONS OF LAW

1. On February 25, 1986, the operator violated 30 C.F.R. § 77.205(e) by its failure to provide toeboards on fifty-seven (57) feet of travelway on the second floor of the preparation plant at the Blacksville No. 1 Mine.

2. This violation was of such a nature as could significantly and substantially contribute to the cause and effect of a coal mine safety hazard. When the storage room "D" was moved to the second floor, there was a concomitant increase in the amount of foot traffic on the second floor travelway and increased movement of tools and supplies along this travelway in addition to that transported via the elevator. It is therefore, I find, reasonably likely that during the course of this transportation objects can and will be dropped onto the travelway from whence it is likewise reasonably likely that they could have rolled off the travelway in those areas which were unprotected by toeboards. If an item, such as a ballbearing, weighing up to twenty-five pounds, were to fall off the travelway onto the ground floor below, there is the distinct possibility that a worker would be struck. Obviously, such an occurrence could result in a serious injury.

3. The operator knew of the violative condition, i.e., the lack of toeboards, and by serious lack of reasonable care failed to abate that condition. I therefore find that the aforementioned violation constituted an unwarrantable failure to comply with the standard.

4. Those portions of Order No. 2713952 that allege similar violations of the mandatory standard concerning the loading gate and the handrails are vacated for the reasons enumerated above in Findings of Fact Nos. 7 and 8. These conditions, as described in the record, do not constitute a violation of the mandatory standard at 30 C.F.R. § 77.205 (e), or considering the alternative, 30 C.F.R. § 77.204 either.

5. Considering the criteria in Section 110(i) of the Act, I conclude that a penalty of $500 is appropriate for the remaining portion of the order for which I have found a violation.

IV. DOCKET NO. WEVA 86-220-R; ORDER NO. 2713953

Order No. 2713953, issued pursuant to Section 104(d)(2) of the Act, alleges a violation of the regulatory standard at 30 C.F.R. § 77.205 and charges as follows:

> On the third floor of the preparation plant, adequate barriers or handrails were not present to prevent persons who may accidently fall through. An opening divided into two sections by a set of conduit pipes existed: the first opening adjacent to the other was approximately 65 to 56 inches in height, 22 inches in width and 16 inches in depth, the second was 56 inches in height, 50 inches in width and 16 inches in depth. This was a very obvious hazard and should have been detected by management. Similar violations of this type had been cited the previous day on the floor below. No apparent record of this opening was available by management. Persons falling through such opening could fall approximately 12 feet to the floor below.

The petitioner subsequently moved to amend Order No. 2713953 to allege a violation in the alternative of 30 C.F.R. § 77.204 4/ or § 77.205(e). I granted this motion on the record at the hearing of this case and therefore will consider herein whether the record establishes a violation of either of the above standards.

FINDINGS OF FACT

1. The order was issued at 10:00 a.m. on February 26, 1986, by MSHA Inspector Joseph Migaiolo during a "AAA" inspection of the third floor of the preparation plant at the Blacksville No. 1 Mine.

2. During this inspection, Inspector Migaiolo noted two areas on the third floor of the preparation plant which lacked handrailing. One of the areas was approximately 22 inches wide between four steel conduits and a vertical I-beam. For an individual to fall the 12 feet through to the floor below, he would have to first negotiate his way through that 22 inch opening and then through a 16 inch wide opening to the floor. The other area was similar. It was 50 inches wide and 16 inches deep in to the coal chute.

4/ 30 C.F.R. § 77.204 provides as follows:

> Openings in surface installations through which men or material may fall shall be protected by railings, barriers, covers or other protective devices.

3. I find both of these aforementioned areas were adequately protected by a crossbeam which acted as a barrier across the lower portion of the openings and a second crossbeam which acted as an adequate barrier across the upper portion of the openings. This pre-abatement arrangement of I-beams satisfactorily served as railing. I specifically find that no safety hazard existed at either of these openings. My impression after carefully reviewing the record concerning this alleged violation, particularly the photographic evidence submitted, is that it would fairly take an acrobat to fall through either one of these openings.

CONCLUSIONS OF LAW

1. The cited absence of handrails in Order No. 2713953 is not a violation of either 30 C.F.R. § 77.204 or 77.205(e). Accordingly, Order No. 2713953 will be vacated.

ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED:

1. Order No. 2713945, contested in Docket No. WEVA 86-217-R, properly charged a violation of 30 C.F.R. § 77.205(b) and properly found that the violation was significant and substantial and resulted from Consol's unwarrantable failure to comply with the standard involved. Accordingly, Order No. 2713945 IS AFFIRMED.

2. Order No. 2713946, contested in Docket No. WEVA 86-218-R, IS AFFIRMED as a non-S&S violation of 30 C.F.R. § 77.1104. Further, the order properly concluded that the said violation resulted from Consol's unwarrantable failure to comply with the standard involved,

3. Order No. 2713952, contested in Docket No. WEVA 86-219-R, properly charged a violation of 30 C.F.R. § 77.205(e) and properly found that the violation was significant and substantial and resulted from Consol's unwarrantable failure to comply with the standard involved. Accordingly, Order No. 2713952 IS AFFIRMED.

4. Order No. 2713953, contested in Docket No. WEVA 86-220-R, IS VACATED.

5. The Consolidation Coal Company is hereby ORDERED TO PAY a civil penalty of $1,700 within 30 days of the date of this decision.

Roy J. Maurer
Administrative Law Judge

Distribution:

W. Henry Lawrence, Esq., Steptoe & Johnson, Union National Center East, Clarksburg, WV 26301 (Certified Mail)

William T. Salzer, Esq., Office of the Solicitor, U. S. Department of Labor, 3535 Market Street, Philadelphia, PA 19104 (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 12 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEVA 86-287
	:	A.C. No. 46-06646-03505
v.	:	
	:	River Mine
THOMPSON COAL & CONSTRUCTION, INC., Respondent	:	

DECISION

Appearances: Therese I. Salus, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Petitioner;
James W. Thompson, President, Thompson Coal and Contruction, Inc., Clarksburg, West Virginia, pro se.

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding initiated by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking civil penalty assessments in the amount of $84 for two alleged violations of certain mandatory safety standards found in Part 77, Title 30, Code of Federal Regulations.

The respondent filed a timely answer and contest, and a hearing was held in Morgantown, West Virginia, on August 27, 1986. The parties waived the filing of posthearing briefs. However, I have considered their oral arguments made on the record during the course of the hearing.

Issues

The issues presented in this proceeding are as follows:

1. Whether the respondent violated the cited mandatory safety standards, and if so, the appropriate civil penalties to be assessed for those violations based on the criteria found in section 110(i) of the Act.

2. Whether the inspector's "significant and substantial" (S&S) findings concerning the violations are supportable.

3. Additional issues raised by the parties are identified and disposed of in the course of this decision.

Applicable Statutory and Regulatory Provisions

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

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

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

Stipulations

The parties stipulated to the following (Tr. 4-6):

1. The subject mine is owned and operated by the respondent, and the respondent is subject to the jurisdiction of the Act and the presiding judge.

2. The subject citations and terminations were properly served by a duly authorized representative of the Secretary of Labor upon an agent of the respondent on the dates, times and places stated therein. They may be admitted into evidence for the purpose of establishing their issuance, but not for the truthfulness or relevancy of any statement asserted therein.

3. The parties stipulate to the authenticity of the exhibits, but not to the relevance nor to the truth of the matters asserted therein.

4. The alleged violations were abated in a timely fashion.

5. The River Mine produced twenty-one thousand, seven hundred and twelve (21,712) annual production tons in 1985, and Thompson Coal & Construction, Incorporated, also produced twenty-one thousand, seven hundred and twelve (21,712) production tons in that year.

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

With regard to the respondent's history of violations, MSHA's counsel stated that the respondent was issued four section 104(a) "S&S" citations during the 24-month period prior to the issuance of the violations in this case, and that the respondent has paid civil penalties in the amount of $170 for these violations. Counsel agreed that the respondent has a good compliance record (Tr. 7).

Bench Ruling

Respondent proposed and agreed to make full payment in the amount of $42 for contested Citation No. 2706004, January 30, 1986, 30 C.F.R. § 77.410, and stated that it no longer wished to contest the citation. The citation was issued because of an alleged defective backup warning device on an end loader. I treated this proposal by the respondent as a settlement proposal pursuant to Commission Rule 30, 29 C.F.R. § 2700.30, and it was approved from the bench (Tr. 8). Testimony and evidence was then received with respect to the remaining citation.

Discussion

Section 104(a) "S&S" Citation No. 2706002, issued on January 30, 1986, cites an alleged violation of 30 C.F.R. § 77.1605(b), and the condition or practice is described as follows (Exhibit G-1): "The caterpillar front-end loader, Serial No. 25K339 has a defective parking brake due to when the parking brake is set, it will not hold the end loader in place. Located on the job site. Larry Reall is the area foreman."

MSHA's Testimony and Evidence

MSHA Inspector David D. Workman, testified as to his background and experience, and confirmed that he conducted a regular inspection of the respondent's mine on January 30, 1986, and that three miners were there at the time (Tr. 13).

Mr. Workman identified a copy of Citation No. 2706002, and confirmed that he issued it because of a violation of mandatory safety standard section 77.1605(b), which requires that parking brakes be provided on any equipment being operated on the surface areas of strip mines (Tr. 15).

Mr. Workman stated that after beginning his inspection, he observed the cited end loader "setting over to the side," and spoke with the loader operator, a Mr. Bays. Mr. Workman stated that the day was cold and that it had snowed. He described the mine terrain as frozen, but containing ruts and soft mud caused by equipment travelling through the mine surface areas. He stated that work was being done in a pit area, and that the end loader was "parked up and out of the pit area, over to the left." The loader was not in operation, and its bucket was down on the ground (Tr. 16).

Mr. Workman testified that he requested Mr. Bays to start up the end loader so that he could check it for safe operation. Mr. Bays informed him that the parking brake was not functioning properly and that he had reported the condition to foreman Larry Reall, but that the condition was not repaired. Mr. Workman confirmed that the loader was not tagged out, and Mr. Bays started it up, and it was functional and not mechanically disabled. Mr. Workman did not believe that a lowered bucket on such an end loader would serve as a brake in the event it were parked on a grade (Tr. 18).

Mr. Workman confirmed that foreman Reall advised him that he did not make a record of the defective brake condition. Mr. Workman stated that he got into the loader operator's compartment with Mr. Bays. The brake was set, and when Mr. Bays accelerated the machine while in reverse gear, it moved backwards with the brake set (Tr. 19). The machine was removed from service, a record was made of the defective brake, and parts were ordered to repair it. The abatement time was extended because of difficulties in obtaining parts, but once the end loader was repaired, Mr. Workman abated the citation (Tr. 20-22).

Mr. Workman stated that the purpose of the parking brake is to prevent the end loader from drifting if parked on a grade. If the machine drifted, it could run into someone or a piece of equipment. Three employees and a foreman were in the "immediate area," and if the machine drifted and hit someone, it would reasonably be expected to cause injuries or even death. Mr. Workman also believed that it was reasonably likely that the end loader could drift, and that this has

occurred several times in work areas in MSHA District 3 (Tr. 21).

On cross-examination, Mr. Workman testified that while he has operated D-8 and D-9 dozers, he has not operated any larger surface "high lifts" and is not familiar with the mechanics of braking system. He also confirmed that he had no knowledge of the mechanical operation of the particular parking brake in question (Tr. 26-27).

Mr. Workman confirmed that the end loader was not in operation when he cited it, and that it was parked in a level area with the bucket down. He looked at the "daily book" kept by the loader operator, and found no record concerning the parking brake (Tr. 27). He confirmed that except for the parking brake, the rest of the braking system was functioning properly (Tr. 28). Mr. Workman stated that when the loader is not in operation and parked, the parking brake must be set in order to keep the machine from moving in any direction. While the machine bucket lowered and dug into the soft ground would hold a machine pointed downhill, this does not satisfy the law (Tr. 29).

In response to further questions, Mr. Workman stated that he also cited another end loader at the same work site, and when he returned the next day to abate that citation, he had the machine tested on a steep elevated area, and when the parking brake was set with the machine in neutral, it would not move. With regard to the end loader cited in this case, Mr. Workman confirmed that he tested it by having the operator operate the machine in reverse, and then putting it in neutral to see if it would continue to move (Tr. 31).

Mr. Workman confirmed that at the time of the inspection, he did not know whether or not the respondent intended to use the end loader. However, if the machine is not tagged out or dismantled, he assumes that it can be used and will inspect it and issue a citation if he finds any defective conditions (Tr. 32). Mr. Workman conceded that it was unlikely that the machine would move and strike someone from the location where he found it parked. His concern was that the machine would be put in operation with a defective parking brake, and if this were done, one could reasonably expect an accident to occur (Tr. 36).

Mr. Workman confirmed that his inspection of the pit area was his first inspection of that site, and he stated that he was familiar with strip mining operation. He stated that the pit had only enough room for one end loader and a

truck, and that work on the pit was being finished up in order to move to another site. He observed other pieces of equipment which were not operational parked "off to the left," and reiterated that the cited end loader "was sitting on a very flat area, with the bucket down" (Tr. 37). In response to further questions, he stated as follows (Tr. 37-38):

> Q. What I am driving at is: How do you know, or how did you come to the conclusion, that there was a reasonable likelihood here that there would be an accident? Is it based on your experience, generally, about end loaders; that they are sometimes parked in elevated areas and sometimes you have runaways with parking brakes? Or is there something specific about this operation?
>
> A. No, sir. We have had, in the past, in different operations where end loaders were found in areas -- in elevated areas, where they would drift, and come into other equipment. And this is from different work sites, and even surface areas of underground mines. It's not uncommon to find Mack packs or end loaders working in surface areas of underground mines.
>
> Q. Okay.
>
> A. It's quite common toward our inspections.
>
> Q. Now, if Mr. Thompson can establish in this case that he has a nice little tidy parking lot, paved area, where he puts his end loaders all of the time, and if he can establish, for example, that they're never parked in elevated areas or on ramps, and once they have finished their business in the pit, they are simply taken out and parked someplace in a level area, would your opinion change as to whether there would be a likelihood of an injury in this case?
>
> A. No, sir.
>
> Q. Your opinion would be the same?
>
> A. Yes, sir.

Q. Based on your experience?

A. Of accidents that are recorded and accidents that have occurred throughout our industry.

Respondent's Testimony and Evidence

Junior L. Bays testified that he is employed by the respondent as an end-loader operator, and has been so employed for 17 years. He confirmed that he was the operator of the end loader inspected and cited by Inspector Workman on January 30, 1986. He stated that the end loader was not in operation and had been parked for 3-days prior to the inspection. He confirmed that he advised the mine superintendent that the loader had defective brakes and that he also made an entry to this effect in a personal log book. Mr. Bays did not know whether parts had been ordered to repair the machine, and he confirmed that he never attempted to operate the machine after the superintendent told him to park it (Tr. 40-41).

Mr. Bays stated that if the loader engine were shut off, all four wheels will lock and it would be impossibe to move the machine, regardless of whether it were parked on the level or on a slope. He explained that the machine radiator blew one day, and when attempts were made to move the machine while hooked to a dozer with a cable, the machine would not move. Mr. Bays confirmed that he had the keys to the loader in his pocket, and was told not to run it (Tr. 42). He earlier testified that the superintendent said nothing to him about not running it, and simply told him to park it (Tr. 41).

Mr. Bays stated that the most effective braking for the loader occurs when it is operated in the forward mode, and that operating it in reverse "is next to no brakes at all" (Tr. 43). He confirmed that the machine had a good foot brake, and that if left with the engine shut off and the parking brake on, the machine cannot be moved (Tr. 43). He also confirmed that because of the cold day the only piece of equipment operating on the day of the inspection was a "275 Michigan" (Tr. 43).

On cross-examination, Mr. Bays confirmed that on the day in question, he parked the machine on the level with the bucket down, and he had the key in his pocket so that no one else could operate it. He gave his daily log book to Mr. Reall, and confirmed that he had entered a notation "No

parking brake" in the book, but Mr. Reall did nothing about it other than to tell him to park it (Tr. 46).

Mr. Bays stated that the purpose of the parking brake is to serve as a safety device if the loader is parked on a grade. Although the parking brake helps to hold the machine while on a grade, if the machine is on a 10 or 12 percent grade and operated in gear, it will still move, even with the parking brake set (Tr. 47). The machine cannot be moved with the engine off and all four wheels locked, and the foot brake will hold the machine when it travels in reverse (Tr. 49).

In response to further questions, Mr. Bays stated that he first discovered the defective parking brake when he was operating the loader in the pit stripping away the dirt in preparation for loading out the coal. He explained that a buzzer signal device on the machine alerted him to the fact that the parking brake was defective and that this occurred 3 days before the inspection. He further explained that certain disks and plates had to be ordered to repair the parking brake. When he discovered the condition he was told to take the machine out of service and park it, and that is what he did (Tr 50-51). Once the machine was repaired, he intended to use it again (Tr. 52).

Mr. Bays stated that the pit was only large enough to permit the operation of two end loaders, but that no trucks enter the pit while he is there. Once the coal is reached in the pit, it is loaded out by an end loader and loaded onto trucks which are out of the pit. However, a truck would enter the pit if the pit were large enough, but in this instance there was only enough room for one end loader in the pit, and he would not have used the end loader in question in the pit (Tr. 53). At the end of the day, he would fuel the loader, grease it, and take it out of the pit and park it on good solid level ground (Tr. 54).

MSHA's Arguments

In closing oral argument, MSHA's counsel asserted that the evidence adduced in this case establishes that the cited end loader was parked on the respondent's mine site, and had the vehicle been parked on a grade, it could have moved as a result of the malfunctioning parking brake, and could have struck employees working in the area. Counsel asserted that one employee was exposed to this hazard (Tr. 56).

In further support of her case, MSHA's counsel cited a decision by former Commission Judge John Cook in MSHA v.

Middle Kentucky Construction, Inc., 2 MSHC 1044 (1980), 2 FMSHRC 2589, September 12, 1980, in which Judge Cook affirmed a similar violation for a defective parking brake on a truck and an end loader. Judge Cook rejected an affirmative defense advanced by Middle Kentucky, similar to the one in this case, that the cited equipment had been removed from service prior to the inspection. In rejecting this defense, Judge Cook relied on the Commission's decision in Eastern Associated Coal Corporation, 1 MSHC 2209, October 23, 1979, holding that the mere placement of a danger tag on a piece of equipment and permitting it to remain in the mine's active workings, was insufficient to render the machine "removed from service" within the meaning of the Act. In Eastern Associated Coal, the Commission stated as follows at 1 MSHC 2210:

> It is undisputed that the inoperable parking brake was a violation. For a violation such as this, there are two basic ways to abate -- repair or withdrawal from service. Assuming that the jitney could not have been repaired safely in the time set for abatement, the question in this case is whether a danger tag alone constitutes withdrawal from service. We hold that tagging the jitney was not sufficient to withdraw the jitney from service because the danger tag did not prevent the use of the defective piece of equipment. The jitney was still operable and the danger tag could have been ignored. To abate under these circumstances, the jitney should have been made inoperable. There is no suggestion in the record that the jitney could not have been rendered inoperable safely, thus eliminating the danger posed within the abatement period.

On the facts of the instant case, MSHA's counsel pointed out that the end loader was not tagged out, and nothing prevented the actual use of the equipment since the operator had the keys in his pocket. Although the respondent may have established that the operator was directed not to use the end loader, counsel suggested that a breakdown in communication could result in a miner remaining unapprised of respondent's decision to remove the equipment from service. Counsel also pointed out that in the Middle Kentucky Construction case, Judge Cook ruled that the term "parking brake" as used in the standard, referred to a braking system separate and independent from any service or emergency brakes on the front-end loader (Tr. 55-58).

Respondent's Arguments

Respondent argued that the cited end loader was taken out of service and parked 3-days prior to the citation, and that no one but the operator had the key. Respondent asserted that it only works one shift and that Mr. Bays was the only end-loader operator, and he had the key in his possession. He parked the end loader on level ground, and since the automatic braking system he described had taken over, the end loader was rendered unmovable. The respondent also pointed out that any vehicle with the parking brake set will move in reverse if placed in reverse gear, but will not move forward. Assuming it is parked on a down grade, the parking brake will in all probability hold it, but if it were parked so that it could run backwards on the same grade, it probably would not. The respondent also suggested that the cited standard only required that the end loader be equipped with a parking brake, and does not state that it must be an operating parking brake. The respondent also pointed out that the parking systems on trucks are different from braking systems on end loaders and "high lifts" (Tr. 59-60).

Findings and Conclusions

Fact of Violation

The respondent is charged with a violation of mandatory safety standard 30 C.F.R. § 77.1605(b), because of the defective parking brake on an end loader. Section 77.1605(b), provides as follows: "Mobile equipment shall be equipped with adequate brakes, and all trucks and front-end loaders shall also be equipped with parking brakes."

The evidence adduced in this case establishes that the cited end loader was not equipped with an adequate parking brake and that the brake was defective and in need of repair at the time it was inspected and cited by Inspector Workman. Although one may question the validity of testing the effectiveness of the parking brake by operating the machine in reverse gear on level ground, the respondent here concedes that the parking brake was defective because the loader operator was alerted to this fact when the alarm sounded, and he confirmed that certain brake disks and plates needed replacement.

The respondent's suggestion that section 77.1605(b) only requires that an end loader be equipped with a parking brake, without the necessity for maintaining it in a serviceable or

safe condition is rejected. Although the language of the standard implies that brakes other than parking brakes are to be adequate, I believe the clear intent of the standard is to insure that all braking systems on such a piece of equipment be maintained serviceable and functionable so as to insure the margin of safety intended by the installation of these braking systems. Further, since the standard is obviously intended for the protection of the miners, any other interpretation would be contrary to the intent and purposes of the Act. In this case, the loader operator conceded that the purpose of the parking brake is to serve as a safety device when the machine is parked on a grade.

The unrebutted evidence in this case establishes that the respondent took the end loader out of service and parked it on level ground when the operator discovered the defective parking brake condition. The respondent's suggestion that it may avail itself of this voluntary withdrawal of the equipment as a defense to the citation is rejected. The facts reflect that the end loader was not tagged out, nor was it rendered inoperable. Even if it were tagged out, the respondent may not avail itself of this fact as an absolute defense to the citation, and my suggestion during the course of the hearing that it may was in error (Tr. 63-64). The case law as enunciated in the Middle Kentucky Construction and Eastern Associated Coal Corporation cases, supra, is to the contrary. In Eastern Associated Coal, the Commission ruled that even though the equipment was tagged out, it was not rendered inoperable and the danger tag could have been ignored.

Although the facts in the instant case reflect that the end-loader operator was the only person with the key, was clearly aware of the defective brake, and testified that he would not have attempted to use the end loader until it was repaired, the fact remains that the machine was not rendered inoperable until such time as the parts could be ordered and repairs made. The unrebutted evidence establishes that the foreman did nothing to immediately order parts or attempt to repair the machine before the inspector found it. The inspector found no evidence that the machine was dismantled or disabled (Tr. 18). Although the respondent presented unrebutted evidence that the machine, with its engine shut down, effectively resulted in the locking of all four wheels, thus rendering the machine immovable, in light of the Commission's holding in Eastern Associated Coal Corporation, I cannot conclude that this fact rises to the level of rendering the machine inoperable.

In view of the foregoing, I conclude and find that MSHA has established a violation of section 77.1605(b), by a preponderance of the credible evidence adduced in this case, and the violation IS AFFIRMED.

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

On the basis of the stipulations by the parties, I conclude and find that the respondent is a small mine operator and that the civil penalty assessed for the violation in question will not adversely affect its ability to continue in business.

History of Prior Violations

The record establishes that the respondent paid $170 in civil penalty assessments for four section 104(a) citations issued during the 24-month period prior to the issuance of the contested citation in this case. I conclude and find that the respondent has a good compliance record, and this is reflected in the civil penalty assesment for the violation which has been affirmed.

Good Faith Abatement

The parties have stipulated that the violation was abated in good faith by the respondent. I adopt this is my finding and conclusion on this issue, and it is reflected in the civil penalty assessment.

Negligence

There is no evidence in this case that the respondent or the end-loader operator continued to operate the machine once aware of the defective brake condition. The unrebutted testimony by the respondent reflects that the loader operator first became aware of the condition while operating the machine, and that he immediately notified his foreman who instructed him to take the machine out of service and park it. MSHA presented no evidence that the respondent should have been aware of the condition prior to the operator using the machine, or that it failed to inspect or test the brake before allowing the operator to run the machine. Although foreman Reall was made aware of the brake defect after it was discovered, there is no evidence that he had prior knowledge of the defect, nor is there any evidence of any attempts to use the machine after the operator took it out of service. Under the circumstances, I cannot conclude that the respondent was negligent.

Gravity

On the facts of this case, I cannot conclude that the violation in question was serious. MSHA has presented no credible evidence to support its conclusion that one miner was exposed to a hazard resulting from the defective parking brake. Although I agree that if someone is struck by a piece of free rolling equipment he would likely be injured, the record in this case is devoid of any evidence that anyone was ever placed in jeopardy by the defective parking brake.

I take note of the fact that in the Middle Kentucky Construction case, the inspector who cited the truck and end loader for defective parking brakes, found the equipment parked on grades. Judge Cook also found that the equipment was parked in close proximity to other equipment and mine personnel, and that if it moved, it could have rolled down the incline thus exposing miners and other equipment to a hazard. The facts in the instant case establish that the end loader was parked on a level grade and out of the pit with the wheels locked and the engine turned off. The available key was in the pocket of the operator who was aware of the defective braking brake and who took the machine out of service and parked it until it could be repaired. The inspector conceded that from the location where the machine was parked, there was no likelihood of the machine even moving, let alone rolling anywhere and striking someone (Tr. 35). The inspector's conclusion of the existence of a potential hazard was based on his presumption that the equipment would be operational in the pit (Tr. 35).

Inspector Workman conceded that his inspection on January 30, 1986, was the first time he had inspected the site, and that his citation was not based on any specific operational procedures at the site in question (Tr. 37). His conclusion that a hazard existed, or was likely to exist had the machine been in operation with a defective parking brake, was based on his knowledge of other mine sites where equipment on elevated areas were known to drift free and strike other equipment, and from recorded incidents industry wide (Tr. 37-38).

MSHA presented absolutely no credible evidence to suggest that the respondent's end loaders are ever parked on elevated grades in proximity to any equipment or miners. The loader in question was parked on level ground, with its bucket down, with the engine off and all four wheels locked. The loader operator testified that his usual and normal procedure at the

end of the work shift is to take the end loader out of the pit and park it on level ground with the engine off, and MSHA has not rebutted this fact. Further, the loader operator's unrebutted testimony is that no trucks actually enter the pit for loading, and that the end loader comes out of the pit to load the trucks. In the instant case, he testified that the pit was only large enough to accomodate one end loader, and he would not have used his loader in the active pit. The inspector confirmed that this was the case (Tr. 37).

Although Inspector Workman stated that the terrain at the mine included up-and-down grades, he conceded that any conclusion concerning a hazard from a defective parking brake would depend or where the end loader would be operated and where it would be parked (Tr. 20). On the facts of this case, I find no credible evidence to support any conclusion that any of the respondent's end loaders are ever parked, operated, or stopped on grades requiring the use of the parking brake.

Significant and Substantial Violation

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

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

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

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

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

Incorporating by reference my gravity findings, and applying the principles of a "significant and substantial" violation as articulated by the Commission in the aforementioned decisions in terms of continued normal mining operations, and in the absence of any credible evidence or facts to support any conclusion that the defective parking brake in question could contribute to a hazard, I cannot conclude that MSHA has established that there was a reasonable likelihood that an accident or injury would occur. Accordingly, the inspector's "significant and substantial" finding IS VACATED, and the citation is modified to reflect a non-"S&S" violation.

Civil Penalty Assessment

In view of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude that a civil penalty assessment in the amount of $20 is reasonable for the citation which has been affirmed.

ORDER

The respondent IS ORDERED to pay a civil penalty assessment in the amount of $20 for section 104(a) non-"S&S" Citation No. 2706002, January 30, 1986, 30 C.F.R. § 77.1605(b), and a civil penalty assessment in the amount of $42 in settlement of section 104(a) Citation No. 2706004, January 30, 1986,

30 C.F.R. § 77.410. Payment is to be made to MSHA within thirty (30) days of the date of this decision, and upon receipt of payment, this proceeding is dismissed.

George A. Koutras
Administrative Law Judge

Distribution:

Therese I. Salus, Esq., Office of the Solicitor, U.S. Department of Labor, Room 14480 Gateway Building, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

Mr. James W. Thompson, President, Thompson Coal & Construction, Inc., P.O. Box 228, Clarksburg, WV 26301 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

NOV 13 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. CENT 85-61-M
	:	A.C. No. 39-00055-05540
	:	
	:	Docket No. CENT 85-103-M
v.	:	A.C. No. 39-00055-05548
	:	
	:	Docket No. CENT 85-110-M
HOMESTAKE MINING COMPANY, Respondent	:	A.C. No. 39-00055-05549
	:	
	:	Homestake Mine

DECISION APPROVING SETTLEMENT

Before: Judge Lasher

Upon Petitioner's motion for approval of a proposed settlement and the same appearing proper, the settlement is approved.

The terms of the settlement are as follows:

A. Docket No. CENT 85-61-M

Citation No.	Assessment	Settlement
2097485	$3,000	$3,000

B. Docket No. CENT 85-103-M

2097236	$4,000	$2,000

C. Docket No. CENT 85-110-M

2097499	$1,000	Vacated (Unsupportable)

The reduction of the penalty for Citation No. 2097236 in CENT 85-103-M appears justified, even though the violation resulted in a fatality. The parties agree that the degree of Respondent's negligence was "low" rather than "moderate" and that the miner's death resulted from his unanticipated performance of a chore normally accomplished on another shift and that he did such in a way contrary to company policy. Accordingly, this compromise is approved.

Respondent, if it has not previously done so, is ordered to pay to the Secretary of Labor within 30 days from the date hereof the sum of $5,000.00.

Michael A. Lasher, Jr.
Administrative Law Judge

Distribution:

Eliehue C. Brunson, Esq., Office of the Solicitor, U.S. Department of Labor, 911 Walnut Street, Room 2106, Kansas City, MO 64106 (Certified Mail)

Robert A. Amundson, Esq., Amundson, Fuller & Delaney, 203 W. Main, P.O. Box Box 898, Lead, SD 57754 (Certified Mail)

/bls

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

NOV 14 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. PENN 86-123 A.C. No. 36-05018-03605
v.	:	Cumberland Mine
U.S. STEEL MINING CO., INC., Respondent	:	
U.S. STEEL MINING CO., INC., Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. PENN 86-178-R Citation No. 2678489; 4/28/86
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Cumberland Mine

DECISION

Appearances: David T. Bush, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, PA, for Petitioner/Respondent;
Billy M. Tennant, Esq., U.S. Steel Mining Company Pittsburgh, PA, for Respondent/Contestant.

Before: Judge Fauver

After the evidentiary hearing, counsel for the Secretary has moved to withdraw his petition for civil penalty and to vacate Citation No. 2678489.

ORDER

FOR GOOD CAUSE SHOWN, the petition for civil penalty in PENN 86-123 is DISMISSED and Citation No. 2678489 in PENN 86-178-R is VACATED, thereby concluding both proceedings.

William Fauver
William Fauver
Administrative Law Judge

Distribution:

David T. Bush, Esq., Office of the Solicitor, U.S. Department of Labor, Room 14480 Gateway Building, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

Billy M. Tennant, Esq., U.S. Steel Mining Company, Inc., 600 Grant Street, Room 1580, Pittsburgh, PA 15230 (Certified Mail)

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NOV 18 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. YORK 86-11
	:	A.C. No. 18-00621-03553
v.	:	
METTIKI COAL CORPORATION, Respondent	:	
METTIKI COAL CORPORATION, Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. YORK 86-5-R
	:	Citation No. 2701541; 5/5/86
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	"A" Mine

DECISION

Appearances: Susan Chetlin, Esq., and Timothy Biddle, Esq., Crowell & Moring, Washington, DC, for Contestant; Susan M. Jordan, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Respondent.

Before: Judge Melick

These consolidated cases are before me under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," to challenge the issuance by the Secretary of Labor of a citation under section 104(d)(1) of the Act,[1/] and for review of civil penalties proposed by the Secretary for the violation alleged therein.

1/ Section 104(d)(1) provides as follows:

"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."

The general issues before me are whether Mettiki has violated the cited mandatory standard and, if so, whether that violation was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard i.e., whether the violation was "significant and substantial." If a "significant and substantial" violation is found it will also be necessary in order to sustain the citation as a citation under section 104(d)(1) to determine if the violation was caused by the "unwarrantable failure" of the operator to comply with cited standard. Finally if a violation is found it will also be necessary to determine the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act.

The citation at bar, No. 2701541, charges a "significant and substantial" violation of the regulatory standard at 30 C.F.R. § 75.400 and states as follows:

> Float coal dust, coal spillage, rock and a mixture of fire clay, was allowed to accumulate on the back side of the longwall shields. The accumulation [sic] were 0 to 12 inches deep, 1 foot wide and approximately 18 inches in length on all shields. Most of the accumulations were damp and no source of ignition was present. John Morgan, longwall foreman, and John Sisler responsible. The condition found at the B-Portal.

The cited standard provides that "coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein."

Charles Wotring, an inspector for the Federal Mine Safety and Health Administration (MSHA), was conducting a regular inspection of the Mettiki "A" mine on May 5, 1986, accompanied by another inspector, Mine Foreman Dennis Dever and Mine Manager William Pritt. According to Wotring there were coal accumulations around the shields along the entire 650 foot length of the longwall face with the blackest accumulations lying between shields number 83 and 126. Float dust and fine ground-up coal mixed with some coal and rock were also present. Wotring measured several of the accumulations and found them to be 12 inches wide, 18 inches long and "most were" 12 inches deep. Wotring also found float coal dust on the jacks and shields.

The accumulations were admittedly damp and no methane gas or ignition sources were present. Wotring opined that while a methane or dust explosion could trigger an explosion

of even this damp material, there was "little likelihood" of such an explosion. He further acknowledged that the accumulations on shields number 1 to 83 were not hazardous because they were mixed with fire clay to the point of incombustibility.

Mettiki witnesses, Foreman John Morgan and General Mine Foreman Dennis Dever, agreed that there were accumulations around the longwall shields but testified that those accumulations consisted primarily of noncombustible fire clay, soapstone, and slate. These witnesses also acknowledged however that a fine mist of float coal dust appeared on those longwall shields which had not been hosed down before the longwall broke down earlier that morning.

In rebuttal Inspector Wotring observed that the areas depicted in the photographs in evidence (Exhibits C-1 through C-5) indeed contained primarily rock as alleged by Mettiki's witnesses but he pointed out that the area in which he found the violative coal accumulations were not depicted in any of the photographs. Wotring noted without contradiction that the cited accumulations were located in the area depicted in Exhibit C-6 cross-hatched in blue. Within this framework it is clear that coal dust, including float coal dust, loose coal and other combustible materials had not been cleaned up and were permitted to accumulate in violation of the cited standard. Accordingly the violation is proven as charged.

In light of Wotring's admission however that "there was little likelihood of an explosion" I cannot find that the violation was "significant and substantial" or of high gravity. In order for a safety violation to be "significant and substantial" there must be a reasonable likelihood that the hazard contributed to will result in an injury and a reasonable likelihood that the injury will be of a reasonably serious nature. Secretary v. Mathies Coal Co., 6 FMSHRC 1 (1984). Under the circumstances the citation at bar, issued under section 104(d)(1) of the Act, must be modified to a citation under section 104(a) of the Act. The issue of whether or not the violation was caused by the "unwarrantable failure" of the operator to comply with the cited standard is therefore moot. fn. 1 supra.

In evaluating the civil penalty negligence criteria I accept the undisputed testimony of inspector Wotring that from the compactness of the accumulated coal spillage it was reasonable to infer that the accumulations had existed since the previous shift. Accordingly those accumulations should have been discovered during the preshift examination or the onshift examination which had already been conducted that morning by Foreman Morgan. The failure to have removed the accumulations was therefore the result of operator negligence. It is noted that Mettiki easily removed the coal dust accumulations by merely attaching a hose to the water line and washing them down.

In determining the amount of penalty herein I have also considered that the operator is medium in size and has a moderate history of reported violations. The condition was in fact abated in a timely and good faith manner. Accordingly a civil penalty of $250 is deemed appropriate.

ORDER

Citation No. 2701541 is modified to a citation issued under section 104(a) of the Act and, as modified, is affirmed. The Mettiki Coal Corporation is order to pay a civil penalty of $250 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge

Distribution:

Susan Chetlin, Esq., and Timothy Biddle, Esq., Crowell & Moring, 1100 Connecticut Ave., N.W., Washington, DC, 20036 (Certified Mail)

Susan M. Jordan, Esq., Office of the Solicitor, U.S. Department of Labor, Room 1440-Gateway Building, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

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5203 LEESBURG PIKE
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NOV 21 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF JOSEPH G. DELISIO, JR., Complainant	:	DISCRIMINATION PROCEEDING Docket No. PENN 86-83-D MSHA Case No. CD 85-9 Mathies Mine
v.	:	
MATHIES COAL COMPANY, Respondent	:	

DECISION

Appearances: Linda M. Henry, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Complainant;
Carl H. Hellerstedt, Jr., Esq., Volk, Robertson, Frankovitch, Anetakis & Hellerstedt, Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Koutras

Statement of the Proceeding

This proceeding concerns a discrimination complaint filed by the Secretary of Labor (MSHA), on behalf of the complainant pursuant to section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(1). The complainant alleges that the respondent discriminated against him by issuing him a verbal warning threatening possible disciplinary action because of his desire to serve as the designated miner's walkaround representative during Federal inspections of the mine.

A hearing was held in this matter in Pittsburgh, Pennsylvania, and the parties have filed posthearing briefs in support of their respective positions. All of the arguments made by the parties in their briefs, as well as during

the hearing, have been considered by me in the course of this decision.

Issues

The critical issue in this case is whether or not the respondent has interferred with the complainant's right to accompany Federal inspectors during mine inspections as the duly recognized union walkaround representative of the miners. Additional issues raised by the parties are identified and disposed of in the course of this decision.

Applicable Statutory and Regulatory Provisions

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

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

3. Section 103(f) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 813(f).

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

Complainant's Testimony and Evidence

Joseph Delisio, Jr., testified that he is employed by the respondent as a mine examiner, and has worked for the company for 12 years. He has served as the chairman of the union mine safety committee since May, 1983, and is a member of the miner's Political Action Committee. He is registered with the respondent as the miner's safety representative, and has notified mine management of this fact. He indicated that in the event of a Federal mine inspection, if a member of the mine safety committee, of which there are three, were available, he would be the first choice to accompany the inspector as the walkaround representative (Tr. 19-21).

Mr. Delisio stated that he works 1 week on the daylight shift and 1 week on the afternoon shift. He confirmed that since most MSHA mine inspections (95 percent), take place during the day shift, he would generally be performing his duties as a miner examiner if he were working the afternoon shift. While working the day shift, he is the only available member of the safety committee. He confirmed that he works at the Thomas Portal, and that when inspections occur at that portal during his shift, he acts as the miner representative during these inspections. He confirmed that mine management

has never threatened him with any disciplinary action, or attempted to discipline him for acting as the miner walkaround representative at the Thomas Portal. He also confirmed that the Thomas Portal does not produce coal, and that coal production takes place at the Linden Portal which is approximately 5 miles away (Tr. 23).

With regard to the exercise of his walkaround rights at the Linden Portal, Mr. Delisio stated that in June, 1985, he attended a communication meeting with Mine Superintendent Edmund Baker and raised the question concerning his ability to act as the walkaround representative at that portal. Mr. Delisio stated that Mr. Baker "recommended" that he not serve as the walkaround, and "that some type of action may be taken against me" (Tr. 24). Mr. Delisio stated that he again raised the question on July 30, 1985, while on his way to work at the Thomas Portal. He stopped by the Linden Portal, which is on the way to the Thomas Portal, and asked Mine Superintendent George Karazsia if he would allow him to accompany the Federal inspector as the union walkaround representative. With him at the time was Ron Stipanovich, president of the local union, and Federal Inspector Phil Freese. Mr. Karazsia informed him that "he had no problem with me travelling with the inspector, but if I did management would take disciplinary action against me, and I could consider that a verbal warning" (Tr. 24).

Mr. Delisio stated that on the evening of July 29, Mr. Baker telephoned his home, spoke with his wife, and informed her that it was his understanding that he (Delisio) would be at the Linden Portal in the morning to accompany an inspector. Mr. Baker advised his wife that he (Baker) recommended that Mr. Delisio not do that, and if he did, "some type of action would be taken against me" (Tr. 25).

Mr. Delisio stated that he did not accompany the inspector as a walkaround at the Linden Portal on July 30, and he confirmed that no miner representative accompanied the inspector that day (Tr. 26). He also confirmed that on that same day he travelled to the MSHA office in Washington, Pennsylvania, and filed his discrimination complaint (exhibit G-1, Tr. 26).

Mr. Delisio stated that in February, 1986, he was at the Linden Portal in the company of Federal Inspector Francis Wehr. He again asked Mr. Karazsia if he could accompany the inspector on his regular mine inspection as the union walkaround representative, and that Mr. Karazsia informed him

that since his discrimination case was on appeal, he recommended that he wait until the case was heard and decided. Mr. Delisio stated that he then inquired of Mr. Karazsia if there would be a problem in Mr. Delisio reporting to the Thomas Portal and then driving his own car back to the Linden Portal to accompany the inspector, and that Mr. Karazsia responded that since the case was on appeal "they would have a problem if I did that." Mr. Delisio stated that he received the same response when he asked Mr. Karazsia if he could report to the Thomas Portal and then travel underground to meet and accompany the inspector at the Linden Portal (Tr. 27).

Mr. Delisio confirmed that his normal work reporting time at the Thomas Portal during the day shift was 8:00 a.m., and that he offered to report at 7:30 a.m., in order to have time to travel back to the Linden Portal before the inspector would start his inspection at 8:00 a.m. (Tr. 28).

Mr. Delisio stated that there have been occasions when he did not report to his assigned portal without informing mine management of his whereabouts. He cited instances when he had "safety business" at the union international district office or "sudden" safety meetings where he could not contact mine management. On some of these days the local union president would turn in an excuse for him, and on other days when no excuses were turned in, mine management never questioned him or inquired as to his whereabouts. He also stated that management has never disciplined him for not reporting to work or for not informing them of his whereabouts. Mine management never threatened him with disciplinary action or gave him any verbal warnings for not reporting to work on those days (Tr. 29).

Mr. Delisio stated that when he reports for work at the Thomas Portal, the foreman can visually observe his presence, and he does not report in to anyone. He simply changes clothes, gets his equipment, and starts work underground. He does not use any check-in or checkout system, and no time clock is used. Even if he reported to the Linden Portal and called the Thomas Portal, mine management would know of his whereabouts, and during an inspection, a representative of management always accompanys the inspector (Tr. 30).

Mr. Delisio cited several examples of miners using their own vehicles to travel from portal to portal. Motormen have driven from one portal to another when their is a shortage of qualified motormen, miners have driven between portals for

retraining, and safety committeemen have driven between portals when there are problems, accidents, or fires, and this is all on company time (Tr. 32). Forbidding him to drive his own vehicles also precludes his attending mine inspection close-out conferences held at the Linden Portal (Tr 33). In his opinion, the actions taken by mine management in his case have interferred with his ability to act as the miners' walkaround representative (Tr. 34).

On cross-examination, Mr. Delisio confirmed that he is at the Thomas Portal by his own personal choice and that he bid on a job at that location (Tr. 34). If the same job were to become available at the Linden Portal, he would bid on it (Tr. 35). He confirmed that he is the only safety committeeman on the day shift, and that other miners accompany Federal inspectors at the Linden Portal because he is not allowed to accompany them during his shift. The miners that accompany inspectors are designated to do so by the safety committee, but Mr. Delisio believes he is better qualified than those miners (Tr. 36-37). He conceded that the safety committee is satisfied with the qualifications of the miners who accompany the inspectors (Tr. 37). He also conceded that there is another representative who would function in his absence during any close-out conferences (Tr 37), but believes that it is more efficient for the union if he were present if at all possible (Tr. 38).

Mr. Delisio stated that while no other miner walkaround accompanied the MSHA inspector on July 30, 1985, respondent's safety manager Malcom Dunbar did mention that another miner other than Mr. Delisio could accompany the inspector. However, Mr. Delisio asserted that Mr. Dunbar's suggestion was made after the inspector had started his inspection (Tr. 39).

With regard to his absence from the mine on union safety matters, without first notifying mine management, Mr. Delisio could not state how frequently this occurred, and indicated only "several times throughout the year." He indicated that the respondent has an absenteeism policy, but that he has not been subjected to this policy because of his absences (Tr. 41).

With regard to the use of personal vehicles by safety committeemen to travel from portal to portal, Mr. Delisio stated that this occurred when there was a fire, accident, or injury, and that it did not occur too often. The only occasion he would have to travel in a government vehicle with an inspector was when the inspection started at the Thomas Portal and the inspector conducted a surface inspection of the

dumps or the impoundment. This did not happen frequently because the inspectors usually show up at the Linden Portal (Tr. 42).

Mr. Delisio confirmed that the threatened disciplinary action against him amounted to warnings and that he has suffered no loss of pay (Tr. 43). He confirmed that what he was seeking in this case is the following (Tr. 43):

> Q. I will - - I just have, really, one more question, and that is am I incorrect in the impression that what you would want to do is to accompany a Federal Inspector anytime that Federal Inspector is inspecting the mine, as long as that inspection is occurring on your regularly scheduled shift?
>
> A. That is correct.

And, at (Tr. 72-75):

> JUDGE KOUTRAS: Okay. Now, what's - - tell me just in your own words, how you feel that you should be able to do your job there as mine examiner, and also fulfill your obligations as a union walk around? How would you - - if you had your druthers, how would you prefer to do it?
>
> THE WITNESS: I would - - you mean how would I prefer to travel with the Inspector and do my job?
>
> JUDGE KOUTRAS: No, first of all, you're a paid employee by Mathies as a mine examiner, that's your livelihood.
>
> THE WITNESS: Yes, yes.
>
> JUDGE KOUTRAS: And then your also the Chairman of the Safety Committee designated as the walk around.
>
> THE WITNESS: Yes.
>
> JUDGE KOUTRAS: There seems to be some - - -

THE WITNESS: Among - - among other duties, I'm paid as - - for my job as Chairman of the Safety Committee also.

JUDGE KOUTRAS: You're paid by the union for that?

THE WITNESS: Yes. So that's - - that's my job also.

JUDGE KOUTRAS: But, you're a paid employee of Mathies, is that correct?

THE WITNESS: Yes.

JUDGE KOUTRAS: You're not suggesting - - you're not under the control of Mathies as an employee?

THE WITNESS: Yes.

JUDGE KOUTRAS: And, they have the right to tell you, you know, you bid on the job at Thomas, they have the right to say to you that your working hours are such and such to such and such, and these are your duties, and this is where you'll report to work. Is that correct?

THE WITNESS: As far as walk around, I don't - - -

JUDGE KOUTRAS: No, no, no, no, as far as your - - you're wearing two hats. Let's put on the employee hat. As a paid employee of Mathies, do you dispute the fact that the Company has the - - the management has the - - -

THE WITNESS: Right to direct a work force.

JUDGE KOUTRAS: Right to direct it's work force. Tell you where to report for work?

THE WITNESS: Yes.

JUDGE KOUTRAS: Okay. Now, you tell me how you would like to accomodate both things. From what I heard from the opening statements

in this case mine management wants you to report to the Thomas portal and go to work, and then when you're called upon to do the walk around that they more or less according to the Government side of the story here - -

THE WITNESS: I would have no problem going to the Thomas portal. I will go to the Thomas portal and check in there, and then travel to wherever the Inspector is at for his inspection.

JUDGE KOUTRAS: Okay, you're willing to do that - -

THE WITNESS: I have no problem doing that, no.

JUDGE KOUTRAS: You're willing to do that?

THE WITNESS: I'm willing to do that.

JUDGE KOUTRAS: In your own personal vehicle?

THE WITNESS: Yes.

JUDGE KOUTRAS: And, you say the Company management doesn't want you to do that?

THE WITNESS: That's what management has said.

JUDGE KOUTRAS: And, what reasons are they giving you for refusing you to use your own vehicle?

THE WITNESS: Well, at the time that I requested to do that was the second meeting in February, and, at that time Mr. Karazsia said that he just felt I should wait for this particular case to go to a hearing, and let you decide that.

JUDGE KOUTRAS: What about the first time, now, I couldn't understand, once the case is in litigation - - -

THE WITNESS: The first time - - the first time was - - the question wasn't brought up about me using my own vehicle.

JUDGE KOUTRAS: What was brought up then?

THE WITNESS: About me just traveling with the Inspector - - that particular day. And, at that time I was told that action would be taken against me. There was never a question brought up about me reporting to my work portal and then traveling back to the Linden portal. That was brought up at the second meeting.

And, at (Tr. 84-85):

* * * * * * *

THE WITNESS: I believe what you're getting at there is me traveling from Thomas to Linden in my own vehicle, which I stated earlier, I'm willing to do that prior to the shift. I'm willing to do that on my own time, not on company time. I'm willing to take the responsibility to drive my own vehicle, and my liability myself, traveling from the portal to the other portal.

JUDGE KOUTRAS: Once you get there, taking the chance of the Inspector showing up, is that what you're saying? What if he doesn't show up?

THE WITNESS: Well, the Inspector is normally there at 7:30 in the morning. I could easily call - - you're talking about ten minutes difference in traveling time, I could easily call that portal, if the Inspector was there then travel - - - be at that portal before 8:00 a.m., where I would still be on my own time; I wouldn't be on company's time. I could actually leave Thomas portal at a quarter to eight, and be at Linden portal before 8:00 a.m., on my own time where I would not start on company time until 8:00 a.m.

JUDGE KOUTRAS: And, what if the Inspector weren't there, you'd just turn around and come back?

THE WITNESS: Well, I would call to make sure - - if he wasn't there I wouldn't travel to that portal. I mean if I called that portal at twenty to eight, and, no Inspector was there - - the majority of the times the Inspector wouldn't be coming that particular day. Just about in all cases they're there by half past.

Mr. Delisio stated that during 1985 there were approximately 70 different occasions when he missed a partial work shift or left the mine early to attend to union business, and that mine management never objected to his absences or complained that his mine examiner duties could not be performed by anyone else (Tr. 44). He confirmed that on each of these occasions, other union members accompanied the inspectors on their inspection rounds. These walkarounds representatives would either be persons designated by him or the regular walkaround representative at the Linden Portal. He also confirmed that there is a regular union walkaround representative available at the Linden Portal during the shifts that he works at the Thomas Portal (Tr. 45-47). He further explained the circumstances concerning his absences from work as follows (Tr. 59-61):

JUDGE KOUTRAS: Mr. Delisio, let me ask you this question. These times when you have business downtown with the National or International Union, you mean to tell me you simply go, and mine management is totally unaware of it?

THE WITNESS: On occasion.

JUDGE KOUTRAS: About how many occasions? Is it usually your practice to let somebody know at the mine that you're not going to be there so somebody else - -

THE WITNESS: I make an attempt to but, there's occasions when I can't - - -

JUDGE KOUTRAS: How many times are you successful in reaching the mine management to

tell them that you're going to be away on union business? More than the other way?

THE WITNESS: Yes.

JUDGE KOUTRAS: Simply not showing up?

THE WITNESS: More, yes.

JUDGE KOUTRAS: What is your job as a mine examiner what precisely do you do as a mine examiner?

THE WITNESS: I examine an area of the mine for hazardous conditions, for gas - -

JUDGE KOUTRAS: Preshift, that sort of thing?

THE WITNESS: Preshift examination, yes.

JUDGE KOUTRAS: That's a pretty important job right?

THE WITNESS: Yes, it is.

JUDGE KOUTRAS: Now, if you simply don't show up, and go on downtown, where does that put the - - -

THE WITNESS: I really don't know, cause management has never questioned me on it.

JUDGE KOUTRAS: But, what I'm - - the point I'm making, is it true or not true that most of the time that you're away on union business, and mine management is aware of it, it's not simply a situation of your not showing up, and them not doing anything.

THE WITNESS: Yeah, I would say the majority of the time, yes, they would know that. I'm sure the foreman at the start of the shift looks to see if I'm there on occasions when I don't call in, and, he's aware of it then, and that foreman the majority of the time does my job. That particular foreman.

JUDGE KOUTRAS: Well, on those occasions when you are not there, does he naturally assume that you're off on union business, or - - -

THE WITNESS: I don't know. He's never questioned me on it so I really don't know what he assumes.

JUDGE KOUTRAS: When you report back on your next shift do you always have an excuse of some kind, a note or something?

THE WITNESS: No, I don't.

JUDGE KOUTRAS: So, any time you're not there at the mine, mine management just knows automatically that you're off on union business, and they don't say anything to you?

THE WITNESS: I - - I - - I imagine that's what they do, I really don't know how they handle that.

JUDGE KOUTRAS: Okay.

THE WITNESS: I have to say that a lot of those instances, I mentioned 70 cases, a lot of those 70 cases were when I was at the Linden portal on a safety inspection. I do monthly safety inspections where I'm at the Linden portal, and some of those other instances where I would be at the Washington MSHA office, at Manager's conferences. It's not that I'm missing 70 days of work a year, you know, I'm on union business either out there at a conference where managements with me at that time, or I'm at the Linden portal where the prep plant will have you on safety inspections. I don't want you to look at that number and say well, this fellow is missing 70 days of work, or 70 partial days of work a year, you know - - -

Mr. Delisio believes that he is the "most qualified" first choice of the miners at the Linden Portal to accompany inspectors during their inspections because the chairman of the safety committee has always travelled with the inspectors and none of the walkarounds at the Linden Portal have state safety certifications as he does (Tr. 48). MSHA's

counsel conceded that there are no particular "certification requirements" for a miner to serve as a walkaround representatives, and whoever the miners select for this task may serve as their walkaround representative (Tr. 49). Counsel further explained her position as follows at (Tr. 50-52):

> JUDGE KOUTRAS: Well, is he the first choice because he says he's the first choice, or is it because he's on the Safety Committee, or is he the first choice because the miners have said, Mr. Delisio, you as Chairman of the Safety Committee, are the only Safety Representative qualified to accompany a Federal Inspector? How many members are on the Safety Committee? Three?
>
> MS. HENRY: Three.
>
> JUDGE KOUTRAS: How about the other two? What choices would they be, second and third, or - -
>
> MS. HENRY: They're all on different shifts.
>
> JUDGE KOUTRAS: They work on different shifts?
>
> MS. HENRY: Yes, Your Honor. So on the particular time - -
>
> JUDGE KOUTRAS: On the shift that Mr. Delisio works on - - -
>
> MS. HENRY: On the shift that Mr. Delisio works, he would be the only Safety Committee member available to accompany the Federal Inspector.
>
> JUDGE KOUTRAS: I understand that, but - - -
>
> MS. HENRY: And, our point is that - - our contention is that this is the miners first choice as the representative. When the miners go in to elect members of the Safety Committee, as there has been testimony, they are aware that the duties of the members of the Safety Committee is that of walk around. If they wanted somebody else to accompany the

Inspector on a walk around, they would elect that person to the Safety Committee.

JUDGE KOUTRAS: You mean the only reason for someone being on the Safety Committee is that he's available and willing to go as a walk around?

MS. HENRY: Not the only reason, but one of the reasons. And, that management here is attempting, and has been, in numerous cases struck down, attempting to interfere with the miners choice of representative. The plain language of the Statute states that the miners choice must accompany the Inspector, not the most convenient choice for the Company, to accompany the Inspector. And, - - -

JUDGE KOUTRAS: Do you view that right as being absolute?

MS. HENRY: Yes, Your Honor. Definitely. the legislative history - - -

JUDGE KOUTRAS: Well, it's not absolute when he's missing though, and designates somebody else.

MS. HENRY: Yes, Your Honor, but, that is the miners choice, not the Company's choice.

Mr. Delisio stated that in 1980 or 1981, mine management allowed union president Ron Stipanovich to travel from portal to portal in his own car on company time to accompany inspectors during inspections. He confirmed that mine management has never indicated to him that he was not the first choice of miners for purposes of serving as the union inspection walkaround representative (Tr. 54-55). He conceded that the union-management collective bargaining agreement does not specify who may function as the walkaround representative (Tr. 55, 58). Although Mr. Delisio claimed that other miners were permitted to travel from portal to portal, he could not identify them (Tr. 58).

Mr. Delisio confirmed that the mine was shut down for 10 months from June 1982 to May 1983, and that prior to this time the mine employed approximately 600 miners who entered at two production portals. Since that time, the mine employs

approximately 320 miners, and the Linden Portal is the only production portal, while the Thomas Portal only has miners involved in haulage and some construction and maintenance work (Tr. 57, 64).

Mr. Delisio confirmed that when he worked at the Linden Portal, other union members at the Thomas performed the walk-around duties during an inspection at that portal. He also confirmed that at the present time, if he is absent from the Thomas Portal the safety committee may designate other miners as the walkaround representative in his absence (Tr. 65). When asked whether he had ever travelled from the Linden Portal to the Thomas Portal to accompany any inspectors during their inspections, he explained as follows (Tr. 66-69):

> THE WITNESS: Did I ever travel from Linden portal to Thomas portal to go with an Inspector?
>
> JUDGE KOUTRAS: Right.
>
> THE WITNESS: No, I didn't.
>
> JUDGE KOUTRAS: My question is, why didn't you?
>
> THE WITNESS: Because - - I can't answer why I didn't. Because I felt that the Company policy was that I was not allowed to do that - - - the only thing I can say. It's always been told to the Safety Committee by management that we are not allowed to travel from portal to portal, and that's what the Safety Committee - - this Safety Committee had believed until we got an interpretation of the law, or until we found out that we were being denied our rights.
>
> JUDGE KOUTRAS: Who gave you the interpretation that you had a right to go from portal to portal?
>
> THE WITNESS: Well, I don't know whether I got the intepretation myself from reading the Federal law, or whether it came from someone associated with the Federal Government.

JUDGE KOUTRAS: Well, who - - I mean, did somebody suggest to you that - - -

THE WITNESS: I believe I got it looking at cases that were decided on walk around rights.

JUDGE KOUTRAS: What cases?

THE WITNESS: I don't know.

* * * * * * *

JUDGE KOUTRAS: Why wasn't a case brought then?

THE WITNESS: Because there was never - - as I said, I felt that, you know, I was told that I was not allowed to do that, so I just assumed that that was correct.

JUDGE KOUTRAS: Okay. When you went to - - initially with Mr. - - with the Federal Inspector to the Linden portal on the day of July 30th, how did that all come about? Was this - - I'm going to lay it right on the line, was this a test situation? Was this a planned confrontation, or was this - - you just happened to appear at the Linden portal knowing that the Inspector was going to be there?

THE WITNESS: It was a situation that came about in June when I mentioned it at a communication meeting that I was going to stop at Linden portal on my daylight shift and accompany the Inspector. And, that was a Monday, that was my daylight shift and that's exactly what I did. Yes, I guess you could say it was a - - -

JUDGE KOUTRAS: How did you know the Inspector was coming to Linden?

THE WITNESS: Well, I got to the Linden portal roughly around 7:30 and the Inspector was already at the property. If the Inspector was not at the property I would have proceeded to my work portal at Thomas.

JUDGE KOUTRAS: So, you just took a chance that he would be there?

THE WITNESS: Ninety-nine percent of the time they are there. They do regular inspections at the mine.

JUDGE KOUTRAS: Are you familiar with - - well, - -. Ninety-nine of the inspections are done at Linden, and also ninety-nine percent of the inspections are also done on the daylight shift, rather than the afternoon shift, right?

THE WITNESS: Right.

JUDGE KOUTRAS: So, at that particular Mathies operation the mine operator has a pretty good idea on when an Inspector is likely to show up, and where he's expected - - where he's likely to show up, is that the idea?

THE WITNESS: Yes.

Mr. Delisio confirmed that it was the past and present position of the Union that it did not want miners to be in vehicles operated by company personnel and did not want miners using their own personal vehicles for transportation between locations at the mine, and that this position has been communicated to mine management (Tr. 82). However, he stated that the Union has never taken this position with respect to safety committeemen travelling from portal to portal in their personal vehicles for the purpose of accompanying inspectors, and that mine management has never stated the union's position as a reason for not allowing him to use his vehicle to travel from portal to portal for inspection purposes (Tr. 83).

MSHA Special Investigator John Chambers confirmed that he conductd the investigation of the complaint filed by Mr. Delisio in this case, and that he interviewed and took statements from mine management representatives Edmund Baker, George Karazsia, and Malcolm Dunbar. He stated that all three individuals advised him that they were not preventing Mr. Delisio from travelling with the inspector, but wanted him to report to his place of work (Tr. 88).

Mr. Chambers stated that during his investigation, Safety Director Baker confirmed that he had telephoned

Mr. Delisio's home on July 29. Mr. Chambers identified exhibit G-3, as a list of questions asked of Mr. Baker during the investigation, and he read into the record the following question asked of Mr. Baker, and his response (Tr. 89-90):

> Q. Okay. Could you read where I'm pointing, the last question. Could you read that for us for the record?
>
> A. Yes, ma'am. "If Joe Delisio had first reported to his designated work station, then informed management of his desire to change portals, who would - - what would management's position be?" And, do you want the answer?
>
> Q. Yes, please.
>
> A. "Management would not authorize a portal change since the portal is more than - - - since the portal is more than well represented with union walk arounds. With market conditions, and absenteeism as they are, Matnies cannot properly afford the moving of work force from portal to portal."

Mr. Chambers identified exhibit G-2, as a statement taken from Superintendent George Karazsia, and he confirmed that Mr. Karazsia gave Mr. Delisio a verbal warning and indicated that action would be taken if he did not report to his reporting work portal. He also indicated that the statement by Mr. Karazsia reflects that Mr. Delisio was told not to leave the Thomas Portal and go to Linden, or report to Linden before his shift (Tr. 92-93). Mr. Chambers confirmed that he spoke with MSHA Inspector Philip Freese, but that he no longer is employed with MSHA (Tr. 92).

On cross-examination, Mr. Chambers stated that he conducted the investigation alone, spoke to several company officials, but has no notes. He confirmed that his investigation reflected no real dispute concerning the facts and no variation among the statements made by either side of the dispute (Tr. 94). He discussed the procedures he followed in reporting the results of his investigations, and did not believe that there were any undue delays in processing the case (Tr. 95-96). Mr. Chambers stated that the question concerning the use of private automobiles was not raised during his investigation, and that "the thing that came up during the investigation was that they did say if you don't

report to your place of duty, there will be action taken" (Tr. 99).

On recall, Mr. Chambers stated that during the course of his investigation he did not contact any of the miners at the Linden Portal other than Union President Ron Stipanovich. Mr. Chambers confirmed that exhibit G-5 is a list of the miners working at the Linden Portal, and exhibit G-4, is a list of available walkarounds at that portal. Both lists were supplied by mine management during the investigation. Based on these lists, Mr. Chambers confirmed that during the day shift at the Linden Portal there were approximately 12 miners who were familiar with the duties of a walkaround representative, and had served as walkarounds during July and August 1985. He confirmed that he did not interview any of the miners on the lists (Tr. 109-113).

Joseph Tortorea, MSHA Mining Engineer and Senior Special Investigator, stated that his duties include the assignment of cases to special investigators and the review of investigative reports to determine whether or not there is enough evidence to forward the case to MSHA's Arlington, Virginia office for action. Mr. Tortorea stated that his initial review of Mr. Delisio's complaint raised a question of interpretation of what mine management meant by Mr. Delisio "not reporting to his portal." He confirmed that he drafted the questions put to Mr. Baker by Mr. Chambers in exhibit G-3 (Tr. 103).

Mr. Tortorea confirmed that after reviewing Mr. Chambers' final report, he concluded that mine management intended to discipline Mr. Delisio if he did not report to work at the Thomas Portal, regardless of his desire to report to Linden first or to report to Thomas and then travel to Linden (Tr. 105).

On cross-examination, Mr. Tortorea confirmed that the case was not referred to Arlington within 45 days because of the additional work that had to be done by Mr. Chambers. He believed the case was referred to Arlington within 58 or 59 days, and once this was done he had no part in any MSHA subsequent decisions. He also confirmed that while he was not actively engaged in the investigation of the complaint and conducted no interviews, he monitored the case as it progressed, and does so in all cases which he assigns for investigation (Tr. 106). In his opinion, any threat of disciplinary action against a miner by means of a warning would be considered "interference" and "discriminatory" (Tr. 107).

Ronald L. Stipanovich testified that he has been employed by the respondent for over 11 years and is the president of the union local and a member of the mine safety committee. He stated that sometime in 1977 or 1978, he participated in a local union meeting where the miners voted that the safety committee would serve as the walkaround representatives to accompany Federal inspectors during their inspections. Since the chairman of the safety committee was the individual who received the most votes in the election, it was decided that the chairman should be "the first to go if there was an inspector on the property," and Mr. Stipanovich could not recall the actual words "first choice" being used (Tr. 130). This decision was made by a vote of the general membership of the local, and since he became president in April, 1983, no members have expressed any dissatisfaction with the designation of the safety committee as the miner's representatives on walkarounds and the matter has never been brought up again for another vote (Tr. 132-133).

Mr. Stipanovich stated that the union furnishes written lists to mine management indicating the names of the union representatives and the members of the safety committees. The chairman of the committee usually furnishes the names of the individuals who serve as walkaround representatives (Tr. 134). He confirmed that he has served as a walkaround representative, and that prior to 1982, before he became president of the local, and prior to the lay off, there were two instances when he travelled from the Thomas Portal, which was his work station, to the Linden Portal or the preparation plant in his automobile to accompany Federal inspectors on their inspection and there "was no problem." He stated that before 1982, this was a "common practice" (Tr. 135).

Mr. Stipanovich stated that exhibit G-5 is a list of the crew members used by the foremen to ascertain who is on each particular crew. The names of the foremen are "blacked out," and the list is not a list of authorized miner walkaround representatives. He identified exhibit G-4, as a list containing the names of miners who have accompanied Federal inspectors, and he did not regard it as a list supplied by the union to mine management. He alluded to two other lists given to management as "a courtesy" by the union in order to insure that the miners were paid in the event they decided to accompany an inspector during an inspection. He did not regard these lists as definite chosen union walkaround representatives (Tr. 137). He regarded these lists as "substitute lists" of walkarounds to be used when the

safety committee or chairman were not available. He indicated that it was common knowledge and practice that the chairman and the safety committee are the first options to accompany inspectors, and the other miners listed are substitutes (Tr. 138). The lists were never intended as designated "first choices" of miner walkaround representatives (Tr. 139).

Mr. Stipanovich stated that he knew of no instances when the miners have met to select someone other than a safety committeeman or chairman to be their walkaround representative (Tr. 141). He stated that it is reasonable to assume that the miners listed on exhibit G-4, as accompanying inspectors on the dates indicated, did so because the regular safety committeemen were not available on those days (Tr. 144). In order to protect its members, the union makes sure that someone is available to accompany an inspector (Tr. 144).

Mr. Stipanovich stated that at the present time there is usually only one MSHA inspector at the mine, but at least 2 days a week there may be two or three inspectors present. There are times regularly when someone else other than the safety committeemen would need to be available to serve as a walkaround (Tr. 148). He confirmed that he was not always available, and that rotations of individuals serving as walkarounds are necessary as the work shifts rotate (Tr. 148). Mr. Stipanovich stated that it has been his experience that once mine management issues a verbal warning, it usually follows it up with some kind of discipline (Tr. 150).

Mr. Stipanovich stated that on two occasions since February, 1984, he has travelled with company safety escort Kosack from the Linden Portal to the Thomas Portal or the preparation plant in a company car to meet an inspector and management never refused to allow him to do this (Tr. 151). Prior to the layoff there were numerous occasions when he travelled with company safety inspectors from one portal to another in their personal vehicles or his own automobile because company vehicles were not available (Tr. 152-153).

Mr. Stipanovich stated that the question concerning the use of private automobiles on mine property came about primarily as a result of the union's concern with miners transporting 10 to 12 people in the back of their pickups or in their automobiles. The union decided that this was not a safe and good practice, because accidents occurred. He stated that one miner, Jimmy Mills "utilizes his own vehicle a lot" because he begins work at 6:00 or 6:30 a.m. running

the fans and works at the water treatment plant in Mingo (Tr. 154).

On cross-examination, Mr. Stipanovich responded as follows with respect to Jimmy Mills' use of his own automobile (Tr. 157-159):

> Q. Mr. Stipanovich, to pick up something here, this Jim Mills, the individual you named, you left me with the distinct impression that he uses his personal vehicle throughout his work shift to go and check on things like fans and things like that, am I correct in what you're trying to tell me?
>
> A. I say that he doesn't use it everyday, but, he has utilized his own personal vehicle, yes.
>
> Q. Well, isn't it true that he is issued a truck by the Company to make these kinds of stops where he has to go inspect fans or sub-stations?
>
> A. Well, there's a truck there, yes.
>
> Q. Isn't it the fact that what happens is that sometimes on his way to his portal, he'll stop and check one of these locations, and, then when he gets there he uses the Company truck throughout the rest of the day to accomplish his authorized duties?
>
> A. Sometimes that does happen, but, also he has - - I know that he has used his own vehicle.
>
> Q. Well, I'm trying to make it clear when he uses his own vehicle, and, I'm asking if isn't it true that what happens with this individual is that apparently wherever he lives he can stop off on his way to his assigned portal, and, check a fan or something, drive to work, park his car, he'll get in the Company truck and he'll continue to do whatever he's doing in checking above ground facilities. And, that's whats happening with Mr. Mills.

A. Sometimes it does, but, I stated sometimes he uses his own vehicle during the course of his day.

Q. And, how often is that sometimes, do you know?

A. I don't have an average, you know, if you want me to say twice, three times a week, I can't answer that.

Q. You don't know?

A. I know that the fact that he has used his own vehicle.

Q. He has used it, but, you don't know how often?

A. Yes.

Q. Okay. Now, you indicated you were aware that the union and the - - perhaps you individually, had raised the concerns with the Company about the miners use of personal vehicles to transport miners between locations?

A. Yes.

Q. Now, you left me with the distinct impression that the only concern the miners had was getting in the back of open pick up trucks, or something like that?

A. That was the complaint that was issued to management.

Q. Well, I'm going to ask you straight out now, is that the only thing, about people getting in the back of pick up trucks, or, did the miners also let the Company know that they were concerned about miners driving their cars inside automobiles between locations?

A. It was both.

Q. It was both, right. And, when you raise a concern like that to the Company, you expect them to take an interest in it, do you not?

A. Yes, sir, I do.

Mr. Stipanovich stated that prior to 1982, there were many times when two or more MSHA inspectors were on the property and no safety committeeman or chairman was available, he would drive his own car to meet or travel with an inspector. These occurrences varied from one day to 5 days (Tr. 161). He stated that mine management has never directly instituted a policy against the use of private automobiles by miners on mine property, and he has never inquired about any such policy (Tr. 162). He confirmed that since 1984, he has on two occasions been transported by a member of mine management in that individual's private automobile from portal to portal or to the preparation plant for the purpose of accompanying a Federal inspector, and that he has no objection to doing this (Tr. 162).

Mr. Stipanovich identified the members of the safety committee for the period July 9 through August 30, 1985, as Mr. Delisio, chairman, and Ronald Mason and Joe Balluch. He confirmed that he recognizes the names of the 14 miners which appear on exhibit R-1, dated August 9, 1983, and that the document is signed by Mr. Delisio. The list contains the names of Mr. Mason and Mr. Balluch. He characterized the list as a "convenience list," and conceded that it does not designate the "choices" for walkaround purposes (Tr. 165). He did not know whether a current list is in existence (Tr. 167). With regard to exhibit G-4, containing a list of miners who served as walkarounds from July 9 to September 30, 1985, Mr. Stipanovich stated that he knows of no complaints concerning the names on that list (Tr. 169). MSHA's counsel stated that she had no reason to believe that the individuals listed did not accompany the inspectors on the dates indicated on the list in question (Tr. 170).

Mr. Stipanovich confirmed that he was with Mr. Delisio when he informed Mr. Karazsia that he wanted to walk around at the Linden Portal, and that Mr. Karazsia did not question Mr. Delisio's designation as the authorized representative of the miners (Tr. 176). He also confirmed that in the years he has worked at the mine, mine management has never questioned a safety committeeman's designation as the authorized miner representative for walkaround purposes. Prior to Mr. Delisio's case, management never used as a reason for denying a committeeman his walkaround rights the fact that he

would have to travel from portal to portal to accompany an inspector. Management never refused a committeeman the right to accompany an inspector at another portal because he had no means of travel (Tr. 176).

Mr. Stipanovich confirmed that mine management has on occasion attempted to have a miner on "light duty" serve as a walkaround, rather than the designated walkaround who may be busier. He has resisted these efforts by informing management that the designated representative must go, and management has never contested his decision in this regard (Tr. 178-179). Prior to Mr. Delisio's case, management never contested the right of anyone to serve as a walkaround representative (Tr. 179).

Mr. Stipanovich stated that prior to July 30, 1985, the safety committee raised the question of Mr. Delisio's desire to accompany Federal inspectors at the Linden Portal at a regular communications meeting held with mine management, and Mr. Baker was present at that meeting (Tr. 183-184).

Mr. Stipanovich stated that in the event an inspector decides to go to the mine supply yard or the preparation plant to begin his inspection, a miner's representative would not likely walkaround with him because there are only two miners assigned to work at those locations and mine management would not likely excuse them from their duties to accompany the inspector (Tr. 185). In this event, because of management's policy prohibiting miners from travelling from portal to portal to accompany inspectors, no miner representative would accompany the inspector, and only the company escort would go with the inspector (Tr. 185-187). He explained further that the two miners at the supply yard and preparation plant begin work at 7:15 or 7:30 a.m., and quit at 2:15 p.m. By the time an inspector arrives, the men are into their work shift, and management is not likely to excuse them to accompany an inspector (Tr. 187).

With regard to the supply yard and preparation plant, MSHA's counsel made the following assertions (Tr. 188-191).

> MS. HENRY: The Company has a company wide policy. It won't let people travel from portal to portal. It's not just Mr. Delisio travelling from the Thomas portal to the Linden portal. It won't let Mr. Delisio, if he's on duty at the Thomas portal, go from the Thomas portal to the supply yard. Or, it won't let Mr. Delisio, if he's on duty at the

Thomas portal during day shift, go from the Thomas portal to the prep plant. There are occasions, because there are two miners that are working there, and, - - -

JUDGE KOUTRAS: Well, let them go there for what reason, I mean - - -

MS. HENRY: For inspection. For walk around. As a result, there are some occasions where the Inspector walks around in the prep plant and in the supply yard when there is no union representative, because the Company will not allow travel. And, they will not allow the designated representative of the miners to travel. And, what we are saying here today is, whether it's Mr. Delisio's travelling from the Thomas portal to the Linden portal, or whether it's Mr. Delisio travelling from the Thomas portal to the supply yard, whatever, this travel policy of the Company is unreasonable, and designed to impede and interfere with the miner's right to walk around.

JUDGE KOUTRAS: Well, let me ask you this question. How long has this been going on?

MS. HENRY: I don't know how long it's been going on with the supply yard and the prep plant.

* * * * * * *

MS. HENRY: And, it is our contention, although I am sure the Company didn't want to qualify that, it is our contention that that is what occurred. That the Company will not allow the designated representative of the miners, if the designated representative is not already at the supply yard or the prep plant to travel from the Linden portal or the Thomas portal to the prep plant or to the supply yard. It's all part of this general - - - we're not allowing people to travel.

JUDGE KOUTRAS: Did MSHA conduct an investigation about this general - - -

MS. HENRY: We did not find out about that particular event until this morning.

JUDGE KOUTRAS: This morning?

MS. HENRY: Yes, Your Honor. We were - - when we were - - -

JUDGE KOUTRAS: And, why is this this morning, I mean, this case obviously has generated a lot of interest. You've got union people here, probably from the International and the National, and, all of a sudden this morning you find out that the mine operator has not permitted walk arounds at the supply and the preparation plant. I'm surprised that the union hasn't - - -

MS. HENRY: Your Honor - - - I'm surprised - - well, Your Honor we were in all fairness concentrating on Mr. Delisio's specific right in the investigation. We only concentrated on the events of July 30, 1985. Was Mr. Delisio the authorized representative? Was he denied permission to go? MSHA's feeling is that when there is a designated authorized representative, the miner's authorized representative, then he should be permitted to go. And, believing that, and believing that to be true in Mr. Delisio's circumstance, we filed a complaint on Mr. Delisio's behalf against the Company. Why the investigation - - the investigation was not more broad than that, it was concentrating on Mr. Delisio's circumstance. And, there was no inquiry as to whether this particular circumstance might have hampered other individuals, but, MSHA's feeling was that the policy in general was wrong, because it does hamper the efforts of the miner's representative to be at the place where the inspection is. And, whether that inspection is at the Linden portal or at the prep plant or at the supply yard, when the miner's designated representative is not allowed, effectively whether it's through circular reasoning - - well, it's not your reporting, it's not that we think you're going on the walk around we don't like, it's the fact that you haven't reported - - whether it's

that kind of circular reasoning or whether it's simply straight out someone's not going, that that's an interference with the language is unambiguous, the only one that was investigated at the time. Therefore, it was not discovered until this morning that there were - - other than Mr. Delisio's second complaint - - second occurrence of trying to attempting to go to the Linden portal.

In response to further questions, Mr. Stipanovich stated that MSHA inspectors have initiated their inspections at the suppy yard, but he could not be specific as to the dates when this has occurred (Tr. 207).

John R. Schmitt testified that he has been employed by the respondent since May, 1975, and serves as treasurer of the local union. He previously served as chairman of the safety committee from 1976 to 1982, but lost the position because of a layoff. He confirmed that when he served as chairman he was the authorized miner's walkaround representative for purposes of accompanying Federal mine inspectors. He confirmed that he was on the safety committee and present at the time the union membership voted to designate the chairman and members of the safety committee as the authorized walkaround representatives of the miners. He also confirmed that when he served as committee chairman he was the designated authorized walkaround representative by virtue of his office and the vote of the general membership (Tr. 213-214).

Mr. Schmitt stated that when he served as chairman of the committee he was able to travel from portal to portal to accompany inspectors as the union walkaround representative and did so by using his own automobile, and at no time did the respondent ever deny that he was the authorized walkaround representative (Tr. 214-215). Mr. Schmitt stated that he frequently travelled between portals in his own automobile from his normal work location at the Linden Portal. During this time, he accompanied inspectors everyday while on the steady daylight shift (Tr. 216), and he confirmed that three full portals were in operation at that time (Tr. 215).

Mr. Schmitt stated that the respondent never expressed any displeasure with his absences while accompanying inspectors, and he was never threatened in any way for serving as the walkaround representative. Once he determined that an inspector was present at another portal, he would simply

inform mine management that he was going to accompany the inspector and would drive to the portal in his car to walk around with the inspector. He would travel from the Linden Portal to the Thomas Portal in his car and management never prevented him from doing so. During the time he was at the Thomas Portal, other miners were available to serve as walk-arounds, but he went because he was the chairman of the safety committee and had to be present at inspection close-outs, and had to deal with management and the inspectors on behalf of the union. He stated further that the "vote was taken that the chairman of the safety committee be the head man to go" (Tr. 220). Management never questioned the fact that he was the designated union walkaround representative for the portals, the supply yard, or the preparation plant (Tr. 220-221).

Although he is no longer the chairman of the safety committee, Mr. Schmitt confirmed that he has served as a walkaround at his present portal because there is no safety committeeman there. If a member of the safety committee were there, he would recognize the committeeman as the authorized walkaround, even though he himself is qualified to walk around (Tr. 221). No miners have ever questioned the fact that the safety committeemen are their designated representatives (Tr. 222). There have been no suggestions that miners get together on their work shifts and designate anyone other than a safety committeeman as their representative, and it is common knowledge among the miners that the chairman or members of the safety committee act as their walkaround representatives (Tr. 223-224).

On cross-examination, Mr. Schmitt reiterated that in 1976 and 1977 when he served as safety committee chairman he often left his home Gamble Portal to travel to another portal where the inspector would be beginning his inspection, and he did so in his own car. In the event he encountered an inspector at one portal and the inspector decided to go to another mine location for his inspection, he and the company representative would travel with the inspector in the inspector's car (Tr. 226).

Mr. Schmitt confirmed that within the past month or 6 weeks he raised a concern with mine management about the miners riding in or being transported in private vehicles, and he explained the situation as follows (Tr. 227-228):

> A. Yes. In that particular situation we had a - - I forget just what it was - - the miners were not able to go into the mine at

this particular time. Okay, there was a problem with the elevator that - - I think it was the elevator at Linden portal. They brought everybody upstairs and they had a meeting, and, at this meeting they said that they were going to transport everybody to the Gamble portal and enter the mine from there. And, I for one, was listening to what was going on and I decided to raise my hand because my concern is in all honesty that if a group of individuals as ourselves were transported in different cars, my question was who is responsible for the insurance, you know, if something were to happen to, you know, this large amount of people going over to the mine. The Company was accomodating enough to say that we would take people in Company cars, as many as we could. I asked Malcolm Dunbar at that meeting in front of all of management and the union, what about travelling in our own cars over there or are you going to provide Company cars, and Malcolm's answer to me was, that's a good question. I did not get an answer. He said, that was a good question, we'll have to check on that. And, as - - not to create any problems or anything further, we let it go at that, and, I myself rode in the Company car over to Gamble and whatever the other men did I don't know. But, I assume that most of them rode in Company cars.

Mr. Schmitt stated that while safety committeemen are present at the Linden portal, they work different shifts. The one committeeman who works the daylight shift would be the one to accompany an inspector during that shift, but he does not work the same shift as Mr. Delisio. If no committeemen are present, the other miners listed on exhibit G-4, including himself, would serve as the walkaround representative, and they have done so (Tr. 232-234).

Respondent's Testimony and Evidence

Malcolm Dunbar, respondent's safety manager, identified exhibit R-2 as a copy of the Mathies Mine map, and he stated that the Thomas Portal is approximately 5 miles from the Linden Portal, and that the preparation plant is approximately 10 miles from the Linden Portal. Mr. Dunbar stated that on the morning of July 30, 1985, he was at the Thomas

Portal and received a telephone call concerning a discussion between Mr. Delisio and superintendent George Karazsia which was taking place at the Linden Portal. Mr. Dunbar went to the Linden Portal at 8:00 a.m., and learned that Mr. Delisio was there and wanted to accompany a Federal inspector on his inspection rounds. Mr. Dunbar confirmed that Mr. Delisio was advised by Mr. Karazsia that he could not change portals on his own, and that if he insisted on accompanying the inspector at the Linden Portal he could possibly be disciplined for not reporting to his regular duty station at the Thomas Portal. Mr. Dunbar stated that he suggested that Mr. Delisio designate a miner working at the Linden Portal to accompany the inspector as the walkaround representative, but that Mr. Delisio refused and stated that if he (Delisio) was not permitted to accompany the inspector, no one would. Mr. Dunbar confirmed that the inspector conducted the inspection without a walkaround representative (Tr. 244-248).

Mr. Dunbar stated that since Mr. Delisio is assigned to the Thomas Portal, his foreman would expect him to show up at that portal for work. Allowing Mr. Delisio to first report to the Linden Portal would cause confusion since the foreman would not know his whereabouts or when he may be expected for work. With regard to the use of private vehicles, Mr. Dunbar confirmed that since 1982, and upon the recommendation of the union, the respondent has to the extent possible, limited the use of personal vehicles because of liability problems which may occur while a miner is travelling on mine property. Mr. Dunbar pointed out that there are many narrow roads, and the presence of school children in the morning hours on the roads increases the potential liability (Tr. 249).

Mr. Dunbar confirmed that mine training sessions are usually held at the Linden Portal, and since most of the employees are at that portal, no transportation problems exist. For the miners working at the Thomas Portal, the supply yard, and the preparation plant, they are usually notified in advance of any training at the Linden Portal, and they are permitted to initially drive their vehicles to the Linden Portal, and when the training classes are over, they simply drive home from the Linden Portal (Tr. 250). With regard to replacement miners needed to operate the 50-ton locomotives out of the Thomas Portal, Mr. Dunbar confirmed that the company provides them transportation, and that someone with a company car will pick them up at Linden and transport them to Thomas, and will then return them to Linden. However, if a miner requests permission to use his own automobile, the company will permit them to do so. He indicated

that "a lot of them" request to drive their own cars to Thomas so that they may shower, and they then drive home from the Thomas Portal (Tr. 251).

Mr. Dunbar confirmed that during the year 1985, 391 Federal inspectors were at one time or another on the mine property. He also confirmed that the mine worked 250 days that year, and that on any given day, an inspector was at the mine (Tr. 251).

Mr. Dunbar stated that the company has suggested that if an inspector originates his inspection at the Thomas Portal, Mr. Delisio could then travel with him and go wherever he chooses, and management would know where he is (Tr. 252). Mr. Dunbar also confirmed that within the last year, miners have frequently accompanied Federal inspectors in the inspector's government car during travel between different mine locations (Tr. 252). He denied that the company has ever refused a miner the right to walk around with inspectors at the supply yard or the preparation plant. He explained that when inspectors usually show up at these locations, the miners who are working there do not by choice accompany the inspector. However, he indicated that inspectors usually start their inspections at the Linden Portal and have a walkaround with them when they go to the supply yard or preparation plant. The only restriction by the company is to prohibit miners from using their personal vehicles to shuttle between these locations (Tr. 254).

Mr. Dunbar confirmed that in February, 1986, Mr. Delisio again attempted to accompany an inspector on an inspection out of the Linden Portal, and he took the position that he had an MSHA decision which allowed him to do this. Mr. Dunbar stated that he explained to Mr. Delisio that the matter was still in litigation, and that he advised Mr. Delisio that if the inspector would initiate his inspection at the Thomas Portal and pick him up there, he could accompany the inspector (Tr. 255).

Mr. Dunbar stated that allowing Mr. Delisio to travel underground from the Thomas Portal to the Linden Portal would present a problem since there is only one self-propelled jeep that is used by the mine examiner. Due to the complex underground haulage system, the company would have to make special arrangements to transport Mr. Delisio underground, and that the transportation time would be from 20 minutes to an hour underground between portals. Further, due to the fact that underground trips of coal have the right of way, additional problems would be presented in transporting Mr. Delisio back

and forth underground (Tr. 256-258). Mr. Dunbar confirmed that the verbal warning given to Mr. Delisio on July 30, was because of his failure to be at his proper work station, and not because of his wishing to serve as the miners' representative (Tr. 259).

On cross-examination, Mr. Dunbar conceded that if Mr. Delisio were to call his foreman from the Thomas Portal once an inspection started, mine management would know of his whereabouts. He also conceded that underground jeeps are available at the Thomas Portal for the mine examiner, shift foreman, and occasionally the maintenance foreman, and if all three are running, there may be an extra jeep available for Mr. Delisio (Tr. 260).

In response to further questions, Mr. Dunbar testified as follows (Tr. 261-267):

> Q. Okay. And, isn't it true as a result of this statement that you state in that particular piece of information, that even if Joseph Delisio had reported to the Thomas portal, and his foreman knew where he was, and knew that he was at work, he would not be allowed to go to the Linden portal to accompany the inspector from that point, from the Thomas portal? He would not then be allowed to go to the Linden portal?
>
> A. We don't want him to change portals, no.
>
> Q. What you're saying is, once he reports at that portal he cannot go to the Linden portal to accompany the inspector?
>
> A. That's what I said, we don't want him to change portals.
>
> Q. Well, if he reports at his regular portal, is he not in fact there - - he has reported once he's reported to the portal?
>
> A. That's correct.
>
> Q. You know where he is?
>
> A. That's correct.

Q. If he says he's going to the Linden portal do you have any reason -- to accompany the inspector on an inspection, would you have any reason to believe that he wasn't going to the Linden portal to accompany the inspector?

A. No.

Q. And, as you've already stated, once the inspection starts, assuming he was there, you would know at all times where Mr. Delisio was during the course of the inspection -- as much as you could?

A. Yes. Can I add something to that?

* * * * * * *

THE WITNESS: You know, what we're talking about here is you're going to set precedence for something that maybe right now you're talking about a good employee, Mr. Delisio, on a one certain day going to another portal. Well, this opens up where if it's fair for this one individual, if next time we have two inspectors or as the testimony has shown, we've had three or four, I could have people traveling from Thomas portal to the Linden portal, and some leaving from the Linden portal going to the preparation plant, and some leaving from the prep plant going somewhere else. And, this is what's causing the majority of management's control problems is -- you know, everybody talks about an isolated incidence, but, you're opening up a whole precedent setting policy of losing control of a management situation.

BY MS. HENRY:

Q. Mr. Dunbar, isn't it true that under the present circumstances with only the Linden portal in full production that it's highly unusual that you would have this back and forth -- with the three inspectors that you're talking about. At this point in time there's only one inspector generally on the premises.

A. No. Not with three hundred and ninety one inspectors shifts in 1985, no. That's a lot of inspectors.

Q. Yes, but, would you state that that the majority of those inspection shift occur at the Linden portal?

A. Oh, yeah. The majority does.

Q. And, Mr. Dunbar, when Mr. Schmitt was on the Safety Committee and called in to his mine, reported to his mine, and then reported to a different mine, when the mine was in full production -- when all these portals were open; the company did not stop him from using his personal vehicle to go from portal to portal at that point, did they?

A. No. But, again I'd like to add something if I could.

* * * * * * *

THE WITNESS: Whenever Mr. Schmitt gave his testimony, he was Chairman of the Health and Safety Committee at the mine. But, we had a different concept at the mine. We had a lot more employees in the mine, we had almost double the employees that what we have right now. As far as the logistics problem, as far as a replacement problem for Mr. Schmitt, whenever he left the property, it did not exist as bad as it does right now.

BY MS. HENRY:

Q. But, Mr. Dunbar, didn't you just state that one of your concerns is the control of people should the mine come to full production? I mean, you just stated that one of your concerns about allowing Mr. Delisio to use his car is that should the mine come to full production, and there would be more than one inspector there, you wouldn't know where people were going in their cars? Didn't you just say that?

A. Yeah.

Q. Okay, well doesn't that conflict with your statement that the reason you let him do it was because there was more people.

A. No, I --

Q. Why didn't that become a problem when Mr. Schmitt was the Chairman of the Safety Committee?

A. I never said, if the mine becomes full production, I'm saying that the mine has a lot of inspectors, then we have a lot of cross shifting, and a lot of changing. I'm not talking about adding more people, I'm talking about three inspectors, or even two inspectors with the same three hundred and some people we have right now.

Q. But, the -- assume for the moment, Mr. Dunbar, that there is -- it is not possible for Mr. Delisio to travel with the MSHA inspector in the car to get from one portal to another. Would it still be mine management's position at that point that he could not take his own personal vehicle to travel from one portal to another?

A. Yeah. We still don't want him to travel in his own personal vehicle.

Q. Well, if Mr. Delisio was given a warning for not being in his proper work location, and he is not permitted to travel from his work location to the location where the inspector is, aren't you in effect denying him his right to go to the location where the inspector is and accompany the inspector?

A. Not in my opinion because there's other people available that can travel with the inspector.

Q. When you say there are other people available, are you talking about other people who might then go on a walk around should Joseph Delisio be unavailable?

A. I'm talking about people that -- yes, have gone on an inspection a lot of times.

Q. Um-hum. And, during the times that they've gone on these inspections, was Joseph Delisio permitted to travel from his home portal, the Thomas portal to the Linden portal?

A. He never raised that issue prior to July 30, 1985.

Q. Let's talk about post July 30, 1985. That's a lot of what the list and -- particularly the list that is in the Government's Exhibit right now mostly concerns that, and, you will agree that he did raise the question in June -- sometime in June of 1985, generally.

A. Yeah, I don't have personal knowledge, but I believe that the testimony showed that.

Q. Okay. And, the walk around list that has been given starts in July of 1985, so, it starts sometime after he raised the question, but, before he actually went in and talked to Mr. Karazsia on a specific day about a specific inspection.

A. No response.

Q. Would you state that during that time period Joseph Delisio was not permitted to travel by his own personal vehicle once he reported to Thomas portal, from Thomas portal to Linden portal?

A. Once it's in litigation he never attempted but the one time in early '86.

Q. Um-hum. And, was he permitted at any time to travel from the Thomas portal to say, the preparation plant?

A. Not -- not unless the inspection was originated out of there.

Q. And, how about from the Thomas portal to the supply yard, would he have been permitted to travel?

A. Not unless the inspection was originated out of Thomas.

Mr. Dunbar stated that he has no problem with the designation of the safety committeeman as the representative of the miners. He further stated that he was not previously aware of any "pecking order" or formal vote by the miners as to any order in which miners would serve as the walkaround representative. However, he conceded that if the chairman of the safety committee were present at the same time that the other miners were present, the general practice at the mine since the 1970's is that the chairman would be the designated representative (Tr. 268).

Mr. Dunbar confirmed that there are two members of the safety committee working at the Linden Portal, and they would normally accompany an inspector on his inspection. He also confirmed that the union's request for a limitation on the use of private automobiles was not in connection with travel from portal to portal for the purpose of accompanying an inspector (Tr. 269). He further confirmed that if no one at the supply yard was willing to accompany an inspector there during an inspection, a miner would not be permitted to travel there in his personal vehicle or company vehicle in order to accompany the inspector (Tr. 270).

Mr. Dunbar confirmed that prior to 1982, safety committeeman Schmitt was permitted to travel from portal to portal in his own car to accompany an inspector (Tr. 271). Since there are only 10 miners on Mr. Delisio's shift at the Thomas Portal, and since he is the only mine examiner, a replacement would have to be brought in from the Linden Portal for Mr. Delisio, and the policy was established so that management could control the work force (Tr. 272). Even if Mr. Delisio were employed at the Linden Portal, he would still have to be replaced if he were to serve as the walkaround, and mine management would still desire to exercise management control over its workforce (Tr. 272-273).

In response to further questions, Mr. Dunbar stated as follows (Tr. 274-278):

JUDGE KOUTRAS: Well, the other point is, do you feel that the -- you recognize the right of a union walk around to accompany a Federal Inspector, I think that's obvious right?

THE WITNESS: That's correct.

JUDGE KOUTRAS: But, you seem to feel if that right the exercise of that right, entails changing personnel from portal to portal that somehow the right is ended. Or, at least has to be controlled in some way.

THE WITNESS: No. I see what you're saying, but, my only thing with that is the way that we read 103(f) of the Act is -- nowhere in there does it say we have to have special accomodations for people. We're complying with the Act by supplying a representative, but, nowhere does it say we have to go out of our way. Just as MSHA says that they're not bound by the Act to go down and pick him up at that portal; well, in the same respect we're not bound by the Act to do special things to insure that this particular individual goes with them.

JUDGE KOUTRAS: You indicated that your policy on use of private automobiles is limited to the extent possible.

THE WITNESS: That's correct. We try to limit it to -- as much as we could. Now, we can't say absolute that you know, nobody can - - -

JUDGE KOUTRAS: You have no absolute ban against the use of private automobiles?

THE WITNESS: Exactly. Exactly. We do try to limit it.

JUDGE KOUTRAS: What would be the problem with allowing Mr. Delisio to drive to the Linden portal in his own automobile, after he reports to duty at the Thomas portal?

THE WITNESS: Well, the only problem with that is we would have to assume his liability with driving. Assume his liability once he's done at the end of the day driving back to his regular job. And, again, this opens up a precedence that now it's just Mr. Delisio, but I don't know - -

JUDGE KOUTRAS: Why don't you just have an absolute ban on the use of private automobiles on the property?

THE WITNESS: It would be convenient to do that, however, there are times when people for their convenience like to drive down.

JUDGE KOUTRAS: Well, isn't this for his own convenience?

THE WITNESS: It's for that and -- yes, I can see what you're saying.

JUDGE KOUTRAS: What if he signs a waiver of liability? I mean, are there ways that you can accomodate Mr. Delisio exercising his right of being a walk around at the Linden portal?

THE WITNESS: Yeah, there's a real easy way you can accomodate him, if MSHA will come down and just - - -

JUDGE KOUTRAS: And pick him up.

THE WITNESS: Just originate their inspection there.

JUDGE KOUTRAS: Start the inspection at Thomas?

THE WITNESS: Sure.

JUDGE KOUTRAS: Well, what I don't understand -- there's not too much to inspect at the Thomas portal is that right? Most of activity is at the Linden portal?

THE WITNESS: Yes it is.

* * * * * * *

JUDGE KOUTRAS: And, your position here is -- seems to be that you didn't -- if he was threatened, assuming one can come to the conclusion that Mr. Delisio was threatened or chastised or told that he would be subject to disciplinary action, the Company's position is that that threat or that conversation took

place in the context of only because you didn't report to duty, not because you want to exercise your walk around rights?

THE WITNESS: That's exactly correct.

JUDGE KOUTRAS: But, if you put up these barriers to having him carry out his rights as a walk around, you're effectively doing the same thing aren't you? You're precluding him from doing it, if you tell him you can't use the car, you can't do this. We want the MSHA Inspector to start there, you're effectively precluding him from exercising his right.

THE WITNESS: I see what you're saying, yeah.

JUDGE KOUTRAS: Aren't you?

THE WITNESS: I see, yeah.

Edmund R. Baker, respondent's general mine manager, testified that during the summer of 1985, he was the underground mine superintendent at the Mathies Mine. He confirmed that the question of Mr. Delisio accompanying Federal inspectors at the Linden Portal as the union walkaround representative was the topic of conversation at a union/management "communications meeting" which he attended sometime in late June, 1985. Mr. Baker stated that Mr. Delisio indicated that he wanted to go to the Linden Portal to accompany Federal inspectors when they appeared there for their inspections, but that in view of the vacation period, Mr. Delisio was advised not to do so. Mr. Baker stated that he informed Mr. Delisio that he would subsequently contact him to convey management's position, and that he later telephoned his home and spoke with his wife.

Mr. Baker confirmed that Mr. Delisio was advised that the company had no objections to his serving as a union walkaround representative, but that it was management's position that he had to report to his regular duty station at the Thomas Portal and could not use his personal automobile to travel to the Linden Portal for the purpose of accompanying Federal inspectors. Mr. Baker stated that mine management has suggested to Mr. Delisio that he assign miners regularly working at the Linden Portal as the walkaround representative, but that management could not transport him from the Thomas Portal in company vehicles. Mr. Baker confirmed that mine management, through Superintendent George Karaszia,

advised Mr. Delisio on July 30, 1985, that if he insisted on first reporting to the Linden Portal instead of his usual duty station at the Thomas Portal, he could be subject to possible disciplinary action. Mr. Baker confirmed that he is in total agreement with mine management's position in this matter as testified to by safety manager Malcolm Dunbar (Tr. 284-289).

Discussion

Section 103(f) of the Act, commonly referred to as "the walkaround right," provides as follows:

> Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection (a), for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine. Where there is no authorized miner representative, the Secretary or his authorized representative shall consult with a reasonable number of miners concerning matters of health and safety in such mine. Such representative of miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection made under this subsection. To the extent that the Secretary or authorized representative from each party would further aid the inspection, he can permit each party to have an equal number of such additional representatives. However, only one such representative of miners who is an employee of the operator shall be entitled to suffer no loss of pay during the period of such participation under the provisions of this subsection. Compliance with this subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act.

The facts in this case are not in serious dispute. Mr. Delisio is employed at the mine as a "fire boss" or mine examiner, and he also serves as the Chairman of the UMWA Mine

Safety Committee. The mine consists of two portals, a preparation plant, and a supply yard, all of which are inspected by MSHA inspectors. The main coal producing portal is the Linden Portal, and the majority of the work force enters the mine at that location and work there. Virtually all of the mine inspections conducted by MSHA begin at the Linden Portal during the 8:00 a.m. production shift. A small compliment of miners, including Mr. Delisio, work at the second Thomas Portal in construction and transportation functions. The Thomas Portal is approximately 6 miles overland from the Linden Portal, and the preparation plant is approximately 15 miles from the Linden Portal.

Mr. Delisio has in the past accompanied MSHA inspectors at the Thomas Portal in his capacity of safety committeemen and designated miners' representative, and he did so without objection or interference by mine management. Mr. Delisio is the only safety committeeman on the day shift at the Thomas Portal, and two other safety committeemen who work at the Linden Portal, and who are also designated as miners' representatives, do not work the same shifts as he does. The respondent concedes that the safety committeemen are the duly designated representative of miners for walkaround purposes.

The record establishes that in late June, 1985, during a labor/management "communications meeting," Mr. Delisio informed mine management that he wished to accompany MSHA inspectors as the miners' representative when they conducted inspections at the Linden Portal. Subsequently, on July 30, 1985, Mr. Delisio, in the company of the president of his local union and an MSHA inspector, arrived at the Linden Portal shortly before the start of his work shift and requested permission to accompany the inspector on his inspection at that portal. Mine Superintendent George Karaszia purportedly had "no problem" with Mr. Delisio accompanying the inspector, but "verbally warned" Mr. Delisio that if he did not report to his regular work station at the Thomas Portal, he would be disciplined. Mr. Delisio did not accompany the inspector, and he filed his complaint with MSHA that same day.

The record establishes that the question of Mr. Delisio accompanying MSHA inspectors at the Linden Portal arose again in February, 1986, although no additional complaint was filed. At that time, Mr. Delisio appeared at the Linden Portal in the company of an MSHA inspector and requested permission from superintendent Karaszia to accompany the inspector on his inspection at that portal. Mr. Delisio suggested that he either be allowed to first report to the Thomas Portal and

then drive his car to the Linden Portal to meet and accompany the inspector, or the respondent furnish him with underground transportation from the Thomas Portal to the Linden Portal. Mr. Karaszia informed Mr. Delisio that since his discrimination complaint was still pending, he would have "a problem" with Mr. Delisio's suggestion, and advised him that he should await the results of his complaint. Mr. Delisio did not accompany the inspector on this occasion.

MSHA's Arguments

MSHA argues that when Mr. Delisio requested to accompany the MSHA inspector at the Linden Portal, he was engaged in protected activity. MSHA rejects the respondent's suggestion that Mr. Delisio need not be given the opportunity to walkaround with the inspector at this portal, and that the respondent may require Mr. Delisio to select an alternate walkaround representative. MSHA's views the respondent's position in this case as an attempt to force Mr. Delisio to designate an alternative by denying him access to transportation to the Linden Portal from his usual duty station at the Thomas Portal. MSHA concludes that the miners' choice of walkaround representative must be given great deference, and that Mr. Delisio should be permitted to travel from portal to portal as the miners' representative for purposes of MSHA inspections.

In support of its case, MSHA asserts that the statutory right of a miner representative to accompany an inspector is clearly stated in the Act, and the legislative history reflects the Congressional intent that the scope of a miner's protected activities, including the right to participate in mine inspections, be broadly interpreted. In determining what circumstances may excuse a mine operator from complying with this right, MSHA emphasizes that the importance that the Act places on the miner's participation in mine inspections must be considered. MSHA concludes that the legislative history evinces a clear intent to have the miner's participation as an important element in the inspection enforcement scheme. Magma Copper Company v. Secretary, 645 F.2d 694 (9th Cir. 1981), cert. denied, 454 U.S. 940 (1981); Consolidation Coal Company v. Mine Workers, 2 MSHC 1185 (1981).

MSHA cites a decision by Judge Melick in support of its argument that miners have the right to designate anyone of their choosing as their primary representative, despite the existence of others who could act as their representative. In Truex v. Consolidation Coal Company, 7 FMSHRC 1401 (September 20, 1985), a miner, who also served as a member of the mine safety committee, was designated by the local union

president to act as the representative of miners at a section 103(f) post-inspection conference arranged by an MSHA inspector with mine management. The miner requested permission from mine management to be allowed to work until the inspector arrived. Management responded that it was company policy to obtain miners' representative from the area an inspector visits. The miner then asked for permission to work in the "Bottom" so that he could be available for the inspector, but was refused. He then announced that he was on "union business" because he believed that he would otherwise have been unable to attend the conference as the representative of miners. Management thereupon informed him that since he was on "union business," he would not be permitted to perform any work that day. The miner performed no "union business" that day other than attending the conference.

Upon the conclusion of the conference, which lasted 1-1/2 hours, the miner asked to go to work for the remainder of the shift, and he was refused. He was paid his regular rate of pay for only the 1-1/2 hour conference. He then filed a discrimination complaint seeking compensation for the remaining 6-1/2 hours of the shift he would have worked but for his assumption of "union business" and the related refusal of management to allow him to return to work. The mine operator defended on the ground that under the National Bituminious Coal Wage Agreement of 1981, once the complaining miner declared himself to be on "union business" he was no longer under the operator's control or direction and that it therefore had no obligation to pay him for his subsequent activities. The operator further argued that it did not have to accept the miner as a representative of miners on the day in question but could have complied with section 103(f) of the Act by giving any one of the approximately 130 miners then working the opportunity to accompany the inspector during the conference. In rejecting this argument, Judge Melick states as follows at 7 FMSHRC 1403-1404"

> Section 103(f) of the Act provides, as relevant, that "a representative authorized by his miners shall be given an opportunity to accompany the . . . [inspector] . . . during the physical inspection of any coal . . . mine . . . for the purpose aiding such inspection and to participate in pre- or post-inspection conferences held at the mine." [Emphasis added.] Since it is not disputed in this case that the post-inspection conference which Mr. Truex attended was a conference within the meaning of Section 103(f) of the Act it is

> clear from the above language that it is the miners and not the mine operator, who authorize or designate a representative for the purpose of participating in such conference. There is no statutory ambiguity on this point and the plain meaning must prevail. (Emphasis in original).

MSHA further cites a decision by former Commission Judge Steffey in a civil penalty case initiated by MSHA for a violation of section 103(f) of the Act, Leslie Coal Mining Company, 1 FMSHRC 2022, December 9, 1979. In that case, a miner under suspension by the mine operator reported to the mine for the purpose of accompanying an inspector on a regular inspection. The miner was a member of the safety committee, and he was chosen by the committee to serve as the walkaround during the inspection. Mine management refused to permit him to accompany the inspector because he was in suspension status, and instead gathered together five available working miners who selected someone else to accompany the inspector. The MSHA inspector had called his supervisor who apparently took the position that the procedure of selecting the representative in the absence of any other available representative was appropriate. However, when the inspector subsequently returned to his office, his supervisor instructed him to issue a citation for a violation of section 103(f) upon his next return to the mine. Upon his return to the mine, the inspector issued the citation charging the mine operator with a refusal to permit a legally elected representative authorized by the miners to accompany the inspector during his inspection of the mine.

In affirming a violation of section 103(f), Judge Steffey stated as follows at 1 FMSHRC 2026-2027:

* * * * * * *

> It appears to me that the fact the company had suspended Mr. Stiltner for this twenty-four hour period does not give the company the right to interfere with the fact that the representative--that the miners had selected Mr. Stiltner as their representative on that specific day.

* * * * * * *

> Consequently, when mine management declined to let Mr. Stiltner go with the

inspectors on May 26, there was not then available another man to take his place who was still in the same category of a committeeman that was desirable, because these were the three men who were to be selected to accompany the inspectors.

Now, I recognize and I feel that management should have a right to discipline its miners, but in doing so I think that this type of situation could be avoided either by suspending--if they felt Mr. Stiltner was going to accompany the inspector during a period which was still within his suspension period--they could either have anticipated the situation by making it clear to Mr. Stiltner on May 25 that one of the other committeemen should come in on the day shift for the purpose of accompanying the inspectors, or by changing the suspension period in order to permit Mr. Stiltner to make this inspection with the inspectors.

In other words, I believe that the company cannot interfere with the person that the miners choose to accompany the inspectors. As long as he is still an employee and still a member of the safety committee and is still one of the people who is intended to accompany the inspectors, I believe the company must let him do so and must take that into consideration when they are suspending someone. I do not think it is something they can work around.

MSHA argues that Judge Steffey's reasoning is clearly applicable to Mr. Delisio's situation. MSHA asserts that there is no dispute among the miners who testified that Mr. Delisio was the miners' representative on the day in question, and that he was the representative for the entire mine, not simply for a certain section. Further, MSHA maintains that the testimony shows that safety committeemen at the respondent's mine have been designated as the authorized walkaround representatives for the entire mine by a vote of the UMW local. MSHA concludes that while safety committeemen such as Mr. Delisio may designate replacements should they choose not to act as walkarounds, the choice to waive the right to walkaround should not be forced upon them by the respondent, and the respondent cannot "work around" that

selection by claiming that other potential representatives exist.

MSHA maintains that the respondent bears a heavy affirmative burden of demonstrating what, if any, unusual and exigent circumstances would justify excusing the failure to comply with the Act by forcing a miner representative to choose a replacement to act as the walkaround. MSHA asserts that the respondent's alleged concerns with transportation do not meet this burden, and takes the position that section 103(f) imposes on the respondent an implicit duty to arrange its transportation regulations in a manner that will ensure the opportunity of the authorized miners' representative to accompany the inspector. This right would have little meaning if the respondent could void selection by the miners of their representative by enforcing transportation rules which prevent the representative's participation. MSHA concludes that the plain language of section 103(f) demonstrates that an authorized representative such as Mr. Delisio is under no duty to waive his right and select another representative simply because it would be more convenient for management.

MSHA maintains that the walkaround rights granted miners under the statute are broad and far reaching, and the fact that the respondent would assert the degree of influence it presently asserts in the selection of the miners' representative is inconsistent with the purpose of section 103(f). Although Mr. Delisio may designate another representative for his own reasons, management cannot require Mr. Delisio, through selective enforcement of transportation regulations, to authorize another representative. MSHA therefore concludes that it is clear that Mr. Delisio is the miners' representative, and that in requesting permission to accompany the MSHA inspector, he was asserting a right protected by the Act.

MSHA concludes that the respondent engaged in discriminatory activity when it threatened to discipline Mr. Delisio if he acted on his request to accompany the inspector as the walkaround representative of miners. MSHA suggests that the discrimination that is motivated by such protected activity need not be great, and it cites the legislative history which makes it clear that threats of discipline for engaging in protected activity, as well as actual discipline, are prohibited under section 105(c) of the Act. MSHA also cites a decision by Judge Broderick in Curcio v. Keystone Coal Mining Corporation, 3 MSHC 2119, 2120 (1985), where he held that a 1-day suspension was not a de minimis adverse action because

the policy followed by the mine operator could result in discharge, thereby inhibiting or discouraging miners from bringing safety complaints to the union or to MSHA.

On the facts presented in this case, MSHA asserts that Mr. Delisio was given a verbal warning that he would be disciplined if he chose to act as a walkaround, and it concludes that such a warning is a threat of reprisal which is clearly discriminatory activity prohibited by the Act. In response to the respondent's contention that the warning was not motivated by any protected activity, but was issued because Mr. Delisio would not have reported to his regular work portal, MSHA concludes that this "circular argument" is not supported by the evidence. MSHA asserts that mine management has stated that if Mr. Delisio reported to his portal, he would not have been permitted to travel to the portal of inspection, and that management's safety director admitted that the effect of this policy was to prevent Mr. Delisio from travelling from portal to portal to accompany an inspector. MSHA concludes that the verbal warning to Mr. Delisio had the practical effect of preventing his walkaround activities, and that this is impermissible discrimination under the Act.

In response to the respondent's assertion that its transportation policy is not discriminatory because Mr. Delisio would be able to ride from one portal to another in an MSHA inspector's car, MSHA believes that this is irrelevant because the issue concerns the legality of the respondent's conduct, and such a question cannot be decided by the actions of third parties, such as MSHA inspectors.

MSHA maintains that the respondent acted discriminatorily by giving Mr. Delisio a verbal warning of future discipline if he did not report to his work portal, and by refusing to allow him to travel from his work portal to an inspection portal for the purpose of accompanying an MSHA inspector on his regular inspection. MSHA states that the respondent should be ordered to refrain from such discrimination in the future, to post a notice that it will refrain from such discrimination, and to permit Mr. Delisio access either through company transportation or personal transportation to the mine areas where inspections are to be held. MSHA also seeks an appropriate civil penalty assessment against the respondent.

Respondent's Arguments

The respondent states that since the resumption of such smaller operations in May of 1983, after a long shutdown,

including a management change from Consolidation Coal Company to National Mines Corporation, the respondent has maintained a policy that miners must report to their assigned portal at the beginning of their shift and are prohibited from using their personal vehicles to travel between portals during their working shifts. The policy regarding personal vehicles was in part prompted by concerns raised by the Union. The concern was that the Union did not want the miner to expose himself or his vehicle to the risk of having an accident, especially involving third parties, when the personal vehicle was used during his shift.

Respondent asserts that the policy regarding reporting to the assigned portal at the beginning of the shift is based on some obvious, common sense reasons. Reporting to where you work obviously is the best way to know a miner is in fact at work and therefore must be accounted for as being underground. In addition, relying on a miner to call from another portal to report his presence there rather than reporting to his assigned portal has some obvious drawbacks. Phone communications between portals at the busy change-of-shift time are subject to be missed or not promptly communicated to others. Also, it is difficult to maintain accurate verification that an employee is where he says he is by his phone report. An employer does not have to assume that all employees are completely honest all the time.

Respondent states that another factor present in this case is the frequency of inspections. Respondent points out that a Federal inspector was present at the mine during 391 shifts in 1985. With approximately 250 work days during the year, this means a Federal inspector appears at the Linden Portal very frequently. Given Mr. Delisio's status as the only designated miner on shifts which he is working (he rotates 8-4 and 4-12 shifts), Mr. Delisio would be accompanying the inspector most days that he worked the daylight shift, which is the shift when virtually all of the inspections occur. This frequency means that most likely on four (4) out of five (5) work days during his daylight shift, Mr. Delisio would be reporting to the Linden Portal, calling to the Thomas Portal, and using his personal car to drive back to the Thomas Portal at the end of the inspection.

Respondent argues that since Federal inspectors do not give advance warning to the operator as to when they will appear for an inspection, it can only be assumed that Mr. Delisio would either have advance knowledge or simply show up at the Linden Portal on the assumption that a Federal

inspector would appear before the start of the shift. Respondent assumes that if the Federal inspector did not appear for an inspection, Mr. Delisio would call the Thomas Portal sometime soon after the start of the shift and inform management that he would be reporting late for his job at the Thomas Portal. It also assumes that management would have made arrangements to replace Mr. Delisio's fire boss position at Thomas when he did not report at the beginning of his shift. Respondent asserts that the practical effect of Mr. Delisio's argument would be that virtually every daylight shift his fire boss position at the Thomas Portal would be filled by transferring a miner qualified as a fire boss from the Linden Portal at the start of every daylight shift.

Given the frequency of mine inspections, the respondent states that its concerns underlying its management policies are all the more real and relevant, and it points out that there is no evidence that these concerns underlying the policies in question are a pretext by management. Further, respondent advances what it considers to be a simple solution which would permit Mr. Delisio to accompany the Federal inspector anytime he desired. Respondent's solution would have the Federal inspector appear at the Thomas Portal to initiate the inspection. Mr. Delisio could then declare himself to be the designated miner and accompanying the Federal inspector in his vehicle anywhere the Federal inspector wished to travel, including the Linden Portal or the preparation plant. Respondent recognizes that its suggested solution is beyond its control because it cannot require the inspector to initiate inspections at any particular location. Respondent notes that inspectors have apparently frequently used their vehicles to transport miners while conducting their inspections.

The respondent asserts that the factor which makes this case factually unique is that it appears unusual that in a mine of this size, the miners have apparently decided that only a single miner can act as the designated representative during inspections occurring on the shifts when that miner is working. Compounding the problem is the fact that the single designated miner works at a remote portal.

The respondent recognizes the fact that the Act prohibits any interference with the choice of the designated miner or that miner's ability to accompany an inspector on an inspection. However, the respondent maintains that its policies requiring all miners to report to their assigned portal at the start of their shift and prohibiting the use of private transportation to travel between locations during the shift

are neither discriminatory nor do they constitute interference prohibited by the Act.

The respondent asserts that the complainant in this case is in reality requesting that the Act be interpreted to require the respondent to accomodate his unusul circumstances in his proclaimed status as the only miner who can act as the designated miner for inspections. The respondent concludes that the Act does not require the accomodation necessary to allow Mr. Delisio to act as the designated miner the way he desires the inspection process to operate. The respondent concludes further that the complainant's accomodation request is unworkable, and that this can be demonstrated by the following analysis of what would take place if his position were sustained.

Every day Mr. Delisio works the daylight shift (every other week), he would drive to the Linden Portal to see if a Federal inspector was going to conduct an inspection. If the inspector was there, Mr. Delisio would call the Thomas Portal at the 8:00 a.m. change of shift and report that he would be going on an inspection. The respondent would then be required to obtain a replacement for Mr. Delisio's position as fire boss at the Thomas Portal. The fire boss performs preshift inspections for the next shift, so it is essential that the position be filled. The replacement would come from the Linden Portal because of the absence of qualified employees at the Thomas Portal. This assumes that all communications work properly, which is obviously not always the case. Because most inspections end about 12:00 or 1:00 p.m., Mr. Delisio would then drive to the Thomas Portal and report to his regular job. Because the respondent would not know exactly when to expect him, the replacement would have to assume that the replacement would perform the afternoon preshift inspection. Mr. Delisio would thus have to catch up to his replacement underground and relieve him. The replacement would then have to be transported back to the Linden Portal to finish his shift.

If the Federal inspector did not happen to be at the Linden Portal, Mr. Delisio would call the Thomas Portal near the start of the shift and report that he was going to report at Thomas at approximately whatever time it takes to drive the six (6) miles between Linden and Thomas Portals. Mr. Delisio would then drive to the Thomas Portal and report late for his shift. One or another of these two senerios would occur every day that Delisio worked the daylight shift. In addition, Mr. Delisio apparently engages in Union business a great deal of the time. When he engages in Union business,

he does not always report his whereabouts to the respondent. This means that on any given day, the respondent would not know where Mr. Delisio was or whether he was going to be available for his shift until immediately before or soon after the shift started.

The respondent concludes that the policies it has attempted to apply do not violate the Act and that the accomodation and treatment sought by the complainant in this proceeding is an unreasonable accomodation not required by the Act.

Findings and Conclusions

In order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, a complaining miner bears the burden of production and proof to establish (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Company, 2 FMSHRC 2768, (1980), rev'd on other grounds sub. nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3d Cir. 1981); and Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981). Secretary on behalf of Jenkins v. Hecla-Day Mines Corporation, 6 FMSHRC 1842 (1984). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no way motivated by protected activity. If an operator cannot rebut the prima facie case in this manner it may nevertheless affirmatively defend by proving that (1) it was also motivated by the miner's unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Company, 4 FMSHRC 1935 (1982). The ultimate burden of persuasion does not shift from the complainant. Robinette, supra. See also Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983); and Donovan v. Stafford Construction Company, No. 83-1566, D.C. Cir. (April 20, 1984) (specifically-approving the Commission's Pasula-Robinette test). See also NLRB v. Transportation Management Corporation, _____ U.S. ____, 76 L.Ed.2d 667 (1983).

It seems clear to me that Mr. Delisio has a statutory right pursuant to section 103(f) of the Act to serve as the designated walkaround representative of the miners, and the parties do not dispute this fact. The dispute lies in the manner in which Mr. Delisio seeks to exercise this right. Mr. Delisio has advanced several alternatives which he believes would permit him to effectively function as the

miners' representative, and they are: (1) that he be permitted to first report to the Linden Portal to ascertain whether an inspector is there. If he is, Mr. Delisio wishes to accompany the inspector on his inspection rounds after notifying mine management at the Thomas Portal of his whereabouts; (2) Mr. Delisio would report early to his normal work station at the Thomas Portal, and after confirming the presence of an inspector at the Linden Portal, he would drive his car to that portal to accompany the inspector, and then return to work after the completion of the inspection; (3) instead of using his own car for transportation to and from the Thomas Portal to the Linden Portal, the respondent would provide Mr. Delisio with a self-propelled jeep as a means of travelling underground between the two portals in question.

Although recognizing Mr. Delisio's right to act as the designated miner "first choice" walkaround representative, the respondent's position is that it need not accomodate Mr. Delisio on his terms. In defense of its position, the respondent asserts that Mr. Delisio's suggested "solutions" intrude on management's right to direct its own workforce, and is contrary to its policy prohibiting employees to use their personal vehicles while engaged in mine business on mine property. The respondent's alternative "solutions" include a suggestion that the inspectors pick up Mr. Delisio in their government vehicles at the Thomas Portal, and return him there after the inspection is completed. Another alternative is that Mr. Delisio designate other miners who are readily available at the Linden Portal to serve as the walkaround representative as he has often done in his absence or unavailability.

MSHA's position is that the choice of a walkaround representative lies with the miners. Since Mr. Delisio is the recognized "first choice" of miners by virtue of his safety committeeman's position, MSHA takes the position that absent any unusual or exigent circumstances, mine management may not dictate who the representative shall be. MSHA apparently views the respondent's suggestion that other available miners may serve as the walkaround representative as irrelevant, and concludes that the respondent's insistence on applying its transportation policy has effectively interferred with Mr. Delisio's right to serve and function as the designated miners' representative. MSHA does not address the respondent's concern that permitting Mr. Delisio to initially report to work at the Linden Portal before determining whether he will work at the Thomas Portal or accompany the inspector at the Linden Portal is an unreasonable intrusion on management's right to direct the workforce and to insure the whereabouts of

its employees. Rather, MSHA's focus is on the respondent's transportation policy, and it concludes that section 103(f) of the Act implicitly requires the respondent to arrange its policy in such a manner that will insure Mr. Delisio's presence at the Linden Portal as the walkaround representative whenever he chooses to exercise that right during an inspection initiated at that portal. In short, MSHA's position is that Mr. Delisio must be accomodated, notwithstanding the avowed policy in question.

In Beaver v. North American Coal Corporation, 2 MSHC 1417, June 2, 1981, former Commission Judge Cook dismissed a complaint by a miners' representative alleging that he was discriminated against because of the refusal of the operator to compensate him for the time spent as a walkaround on an idle day when he was not scheduled to work and other scheduled miners were available to accompany the inspector. Judge Cook found no evidence that the miner's idle day status permitted the operator to directly or indirectly participate in any manner in the process of selecting a walkaround representative, and there was no indication that the opertor manipulated the miner into an idle day status to discourage his participation in the inspection.

In Ronnie R. Ross v. Monterey Coal Company, 3 FMSHRC 1171 (May 1981), the Commission upheld the dismissal of a complaint by a safety committeeman who alleged that he was discriminated against when a mine contractor performing work at a mine placed a letter in his personnel file limiting his inspection activities to the work areas of the contractor rather than non-contractor mine areas. In affirming the Judge's dismissal of the complaint, the Commission found that the record supported a finding that the letter was issued to protect a legitimate managerial interest in controlling the activities of its workforce, and did not establish that the miner's exercise of any statutory rights was in any way restricted.

In Local Union 1110, UMWA and Robert L. Carney v. Consolidation Coal Co., 1 FMSHRC 338 (May 1979), the Commission held that an operator discriminated against a safety committeeman for disciplining him for leaving his assigned work area to contact an inspector concerning a perceived safety hazard, contrary to the operator's policy that permission by management was necessary before he could leave. The Commission stated that "the Company's policy effectively impedes a miner's ability to contact the Secretary when alleged safety violations or dangers arise." 1 FMSHRC 341.

The Commission found that miner's conduct involved his statutorily protected right to notify the Secretary of any alleged violation or danger.

On appeal of the Truex case, supra, Docket No. WEVA 85-151-D, the Commission on September 25, 1986, affirmed Judge Melick's decision, and at 8 FMSHRC 1298, stated the following:

> The judge found that "it is the miners and not the mine operator, who authorize or designate a representative for the purpose of participating in . . . a [post-inspection] conference. There is no statutory ambiguity on this point and the plain meaning must prevail." 7 FMSHRC at 1404. We agree. The language of section 103(f), providing that "a representative authorized by his miners shall be given an opportunity to accompany the Secretary," unambiguously provides that miners possess the right to choose their representative for section 103(f) inspections and pre- and post-inspection conferences. (Emphasis added). See also Leslie Coal Mining Co. v. Secretary of Labor, 1 FMSHRC 2022, 2027 (December 1979) (ALJ).
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> * * * * * * *
>
> The purpose of section 103(f) is to enhance miner understanding and awareness of the health and safety requirements of the Act. The fact that section 103(f) protects the miner representative, who is also an employee of the operator, from a loss in pay in exercising his section 103(f) rights evidences Congressional recognition that an operator would be required to make modifications in work assignments to permit miner representatives to exercise section 103(f) rights. Here, Consol was aware that an MSHA inspector would be arriving for a meeting to review a hearing conservation plan. Consol was also aware that Truex was familiar with the plan and had been designated by the miners to participate as their representative in the review of the plan. Nevertheless, upon being notified that Truex was the representative of miners, Olzer directed Truex to proceed underground with his

> regular crew. Truex indicated his willingness to do so, but asked that he be notified when the inspector arrived. This request was refused. Olzer further refused Truex's request that he be permitted to work, until the inspector arrived, in an area that would have allowed him to be readily available for the meeting. Under these circumstances, Truex's requests rather than Olzer's responses reflected the reasonable work adjustments required under section 103(f) to fully effectuate that section's participation rights. [Emphasis added.]

Protected Activity

On the facts of this case, it seems clear to me that Mr. Delisio has established that in his capacity as Chairman of the Mine Safety Committee, he is the designated first choice of the miners for purposes of serving as their walkaround representative during MSHA inspections. It is also clear to me that the statutory right of a miner representative to accompany an MSHA inspector during his inspection of the mine is clearly stated in section 103(f) of the Act, and the legislative history reflects that this right should be broadly construed. Any undue interferences with this right by a mine operator constitutes discrimination prohibited by section 105(c)(1) of the Act. Although other miners may be available to accompany an MSHA inspector, the respondent may not unduly or unreasonably interfere with Mr. Delisio's right to accompany an inspector as the designated miner representative.

The respondent does not deny that it issued a verbal warning to Mr. Delisio on July 30, 1985, informing him that possible disciplinary action would follow if he did not report to his normal work station. As a matter of fact, the record establishes that the warning was conveyed to Mr. Delisio's wife on the evening of July 29, by telephone call to his home by a member of mine management. Union President Stipanovich testified that such verbal warnings are usually followed up by some kind of discipline, and the respondent has not rebutted this fact.

The respondent's suggestion that the verbal warning issued to Mr. Delisio was solely because he would not have reported to his regular portal if he chose to accompany the inspection as the designated walkaround representative is not well taken. Given the facts and background of this case, the respondent was well aware of the fact that Mr. Delisio was

seeking some accomodation by the respondent to enable him to effectively function as the walkaround representative. The respondent concedes that it raised the possibility of disciplinary action against Mr. Delisio because of its policies of requiring a miner to report to his assigned portal and its prohibition against miners using their personal automobiles to travel from portal to portal during their work shifts. Further, respondent's Safety Manager Dunbar and Mine Manager Baker candidly conceded that because of its policies, even if Mr. Delisio were to first report to his home portal, he would still be prohibited from changing portals for the purpose of accompanying an inspector during his inspection of the mine. Thus, the practical effect of management's insistence that Mr. Delisio first report to his portal, and its application of its policies, effectively, albeit indirectly, interferred with his right to serve and function as the walkaround representative, an activity which is protected by the Act. Thus, I conclude that the verbal warning, backed up by possible subsequent disciplinary action, constituted a discriminatory threat or interference motivated in part by Mr. Delisio's aborted attempt to serve as the walkaround representative.

The Respondent's Right to Direct its Workforce

The respondent has the inherent and legitimate right to control its own workforce, and is free to implement workplace policies which it believes will permit an efficient and productive mining operation. If the policies are consistently and evenhandedly applied, and are not arbitrary or unreasonable in their application, I would have no basis for concluding that they are discriminatory. In this case, there is nothing to suggest that the respondent's policy requiring an employee to report to his work station is pretexual or is used to circumvent the law. However, in light of the Commission's decision in the Truex case and Judge Steffey's decision in Leslie Coal, a mine operator may have to adjust its work policies on a case-by-case basis in order to avoid any discriminatory result which may occur by the manner in which it applies its policy to any given employee factual situation.

The facts in this case establish that in his capacity as a safety committeeman, and by virtue of his union activities, Mr. Delisio is often away from his job. Mr. Delisio admitted that due to the press of union business, there have been occasions when he did not report to his portal without informing management of his whereabouts, and that this has occurred several times throughout the year (Tr. 29, 41). He also alluded to some 70 different instances when he was away from

his job on inspections in other mine areas, or on union business attending conferences at MSHA's office (Tr. 61).

Mr. Delisio conceded that mine management has the right to expect him to report to work at his usual work station at the Thomas Portal. While it may be true that mine management has never made an issue of his absences, or applied its absentee policy, the fact remains that management has the right to expect Mr. Delisio to report for work, or to at least notify management if he intends to be absent.

In my view, the facts in this case are different from those presented in Truex. In Truex, mine management was aware of the fact that the designated committeeman had arranged a day in advance to meet with an MSHA inspector for a post-inspection conference at the mine for the purpose of reviewing a hearing conservation plan. The committeeman's requests to be allowed to work until the inspector arrived, or to be allowed to work in a particular mine area so that he would be readily available to meet with the inspector were refused, and the basis for the refusal was management's policy of obtaining miners' representative from the area an inspector visits. Further, once refused the right to be available for the inspector, the committeeman was forced to go on "union business" status because he believed he would otherwise have been unable to attend the post-inspection conference, and management refused to allow him to return to work after the conference was over and refused to compensate him for the remaining 6-1/4 hours of the shift he would have worked but for his assumption of "union business" and the related refusal to allow him to return to work.

Unlike Truex, which appears to have emanated from an isolated instance of refusing to accomodate a designated miners' representative who had a pre-arranged meeting with an inspector which was known to management, the respondent here has no policy restricting miners' representatives to mine areas where an inspection is taking place. More importantly, Mr. Delisio's situation does not involve an isolated instance. Mr. Delisio wants to regularly report to work at a portal which is 6 miles from his usual place of work on a day-to-day basis during his day shift every other week to ascertain whether an inspector is present so that he may accompany him. If an inspector is there, Mr. Delisio wishes to telephone his foreman to advise him that he will not report to work. If an inspector is not present, Mr. Delisio would report late for work. Since Mr. Delisio's job as mine examiner requires him to preshift his portal, mine management would be placed in the untenable position of arranging and rearranging for a

suitable replacement to be brought in from another portal to do Mr. Delisio's job frequently and unpredictably.

I cannot conclude that the respondent's policy requiring Mr. Delisio to report to his assigned portal at the beginning of his work shift is arbitrary or unreasonable, and the respondent's arguments in this regard are well taken. Given the fact that Mr. Delisio is the only available qualified mine examiner on the day shift at the Thomas Portal, and the frequency of inspections which have occurred at the mine, I find nothing unreasonable or discriminatory in the application of this reporting policy. From a safety standpoint, the respondent has a duty and obligation to account for all of its employees while they are on the job. From a management point of view, and in order to fulfull its obligations in this regard, the respondent should be free to manage its workforce, and the scenarios presented by the respondent with respect to what will no doubt occur in terms of employee disruptions and replacements between portals in the event Mr. Delisio is allowed to decide when and where to initially report for work are legitimate and real concerns, rather than pretexts to preclude Mr. Delisio from functioning as the designated representative of miners.

Respondent's Private Vehicle Policy

During the course of the hearing in response to Mr. Delisio's "suggestion" that he be permitted to drive his personal vehicle between portals for the purpose of serving as the miners' walkaround representative, the respondent took the position that it does not wish to expose itself to liability or risks to Mr. Delisio or other miners while driving private automobiles on company property while in the course of company business. Respondent's counsel asserts that this concern was voiced by the miners themselves several years ago, and reiterated over time. Counsel pointed out that this concern, both by the miners, and mine management, came about as a result of miners being alerted to the potential liability to third parties, with resulting lawsuits, in the event of their involvement in accidents on mine property while using their private automobiles in the course of their employment (Tr. 10).

Respondent maintains that it has offered a reasonable resolution by suggesting that Mr. Delisio be picked up at his regular Thomas Portal duty station by the inspector conducting the inspection, and be taken along with the inspector during his inspection. Respondent maintains that it has been customary for an inspector to transport miners in their

Government vehicles while conducting inspections, that it has occurred in the past, and the respondent would prefer this procedure to continue (Tr. 11).

Respondent argues that it does not believe that it has discriminated against Mr. Delisio by declining to provide him with company surface or underground transportation from his regular duty portal to another portal where an inspector decides to initiate his inspection, or to permit him to drive his own automobile. With regard to underground travel between the two portals, respondent asserts that while a company jeep is normally available for Mr. Delisio's use while performing his fire boss duties at the Thomas Portal, the availability of underground transportation is determined by production schedules and the necessities of the operation at that portal. Respondent does not believe that it is obligated to provide or schedule "special trips" for Mr. Delisio or any other miner for the purpose of transporting them underground from portal to portal. Making an exception for Mr. Delisio would result in the unavailability of a jeep at the Thomas Portal for safety inspections at that location, and would require the company to replace the jeep with another one while it is gone (Tr. 12).

During the hearing, MSHA agreed that the only accomodation that the respondent seems willing to make in this case is to suggest that the Federal mine inspectors pick up Mr. Delisio in their Government automobile at the Thomas Portal, his regular duty station, and transport him to the Linden Portal, where regular inspections normally begin or end, or transport him to other mine areas where an inspection may take place. MSHA asserts that the Linden Portal is more accessible to everyone in the first instance, and that the respondent's suggestion is totally unacceptable, and would entail a special trip just to pick up Mr. Delisio, would be time consuming in instances where time may be of the essence during an inspection, and would conflict with Government regulations regulating the official use of Government vehicles (Tr. 15-16).

MSHA's position is that if the respondent is unwilling to permit Mr. Delisio to initially report to the Linden Portal to determine whether he will be accompanying an inspector as to the union walkaround, and insists that he must first report to the Thomas Portal, it must accomodate Mr. Delisio by permitting him to use his own automobile to drive to the Linden Portal, or provide him with company transportation. MSHA argues that the respondent cannot have it both ways by taking the position that company policy dictates against the

use of private automobiles on mine property, and that the use of a company vehicle for Mr. Delisio's transportation would effectively deprive the company of the use of that vehicle at the Thomas Portal where it is needed. MSHA maintains that this position by the respondent is discriminatory because there have been other occasions where other miners were permitted the use of their private vehicles on company property, and that on other occasions miners do not report to their regular portal as planned, and no action has been taken against them.

MSHA concludes that the respondent's position can only be viewed as an action against Mr. Delisio for attempting to exercising his rights as the walkaround representative of the miners. Coupled with the respondent's suggestion that other miners working at the Linden Portal can accompany the Federal inspectors as miner walkarounds, MSHA concludes that this is an attempt by the respondent to choose who the miner representative shall be for purposes of inspection walkarounds, and that this is prohibited by the Act (Tr. 17-18). MSHA further concludes that on the facts of this case, the respondent's failure to accomodate Mr. Delisio by permitting him to use his own vehicle, or to provide him with company transportation, interferes with his rights as the miner walkaround representative (Tr. 6).

I take note of the fact that Mr. Delisio's complaint makes no mention of the respondent's policy with respect to the use of private vehicles by miners. Respondent's safety manager Dunbar testified that prior to July 30, 1985, this was never raised as an issue by Mr. Delisio, and MSHA special investigator Chambers confirmed that the question concerning the use of private vehicles was not raised during his investigation of the complaint. MSHA's counsel conceded that she first learned about the transportation policy on the morning of the commencement of the hearing (Tr. 191). Although Mr. Delisio raised the question of the use of his own car to travel from portal to portal in February, 1986, when he again requested permission to accompany the inspector, this came well after the filing of the complaint, and management at that time communicated no decision to Mr. Delisio because his case was still in litigation. Respondent's safety manager Dunbar did suggest, however, that Mr. Delisio arrange to have the inspector pick him up at the Thomas Portal, and that if this were done, there would be no problem (Tr. 255).

Respondent's safety manager Dunbar conceded that the respondent will not permit Mr. Delisio to use his private automobile as a means of travel between the Thomas and Linden

Portals for the purpose of exercising his walkaround rights as the miners' designated representative, and he stated two reasons for this position. The first reason is that company policy precludes the use of private automobiles by miners, and the second reason is that respondent believes there are other miners available at the Linden Portal to serve as the walkaround representative, and they have done so in the past. The respondent further concedes that it raised the possibility of disciplinary action against Mr. Delisio because of its reporting and transportation policies which it enforces at the mine (respondent's proposed finding #6). As stated earlier, the thrust of MSHA's arguments in support of its case is the assertion and suggestion that the application of the travel policy in Mr. Delisio's situation has interferred with his right to accompany an inspector as the duly designated miners' representative. Under these circumstances, the issue concerning the travel policy in question must be addressed.

The respondent produced no evidence to establish that its ban on the use of private automobiles by miners is in writing or absolute, nor has it established any definitive ground rules for the application of the policy. On the facts of this case, it seems clear to me that the policy is not consistently applied, and respondent's safety manager Dunbar candidly admitted that there is no absolute ban on the use of private automobiles by miners, and that the use of automobiles by miners is limited to the extent possible. Mr. Dunbar also admitted that there are times when miners like to drive their automobiles for their own convenience.

The credible testimony in this case establishes that safety committeemen have in the past been permitted to drive their own automobiles from portal to portal for the purpose of accompanying inspectors on their inspection rounds. While it may be true that the union has in the past voiced its objections to the use of private vehicles by miners for travelling between portals, some of the objections apparently resulted from the practice of transporting a number of miners in the back of pickup trucks, or transporting too many miners in one vehicle. There is nothing to suggest that the union intended to preclude committeemen from using their automobiles to perform their duly recognized walkaround duties.

The credible testimony also establishes that miners have been permitted to use their private vehicles for their own convenience while attending training sessions held at the mine. One miner (Jim Mills), who reports to work early and is responsible for the mine fans, has been permitted to use

his private vehicle while checking the fans before he actually reports to his portal. A number of replacement locomotive operators who normally work at the Linden Portal and who may be needed at the Thomas Portal to operate locomotives are permitted to drive their automobiles to the Thomas Portal from the Linden Portal for their own convenience because they shower there and leave directly for home. Consequently, it seems clear to me that the respondent has made exceptions with respect to the use of private vehicles, and it has done so for the convenience of the miners and notwithstanding any liability considerations. Under the circumstances, I conclude that the respondent must also accomodate Mr. Delisio and permit him an opportunity to use his automobile to travel from the Thomas Portal to the Linden Portal for the purpose of accompanying an MSHA inspector as the duly recognized miners' walkaround representative. In the alternative, I further conclude that the respondent must make a reasonable accomodation to Mr. Delisio by providing him with any available underground transportation between the Thomas and Linden Portals for purposes of accompanying inspectors as the walkaround representative of miners. If none is readily available, then Mr. Delisio should be permitted to drive his own automobile between portals.

The credible testimony in this case establishes that by virtue of his position as the chairman of the safety committee, Mr. Delisio is the designated "first choice" walkaround representative, and that other miners who have served as walkarounds in his absence are not the "first choice." Further, respondent concedes that this is the case (respondent's post-hearing proposed findings #8 and #9). Since Mr. Delisio is the "first choice," respondent may not obstruct or impede his right to serve through an unreasonable application of an inconsistent and somewhat nebulous private vehicle policy. By precluding Mr. Delisio from using his private automobile as a means of travel between portals for purposes of exercising his right as the duly designated miners' walkaround representative, the respondent has effectively prevented Mr. Delisio from exercising a right protected by the Act, and has forced him to designate someone other than the miners' "first choice" to perform this function. The result of the respondent's private automobile policy, as applied to Mr. Delisio, is an unreasonable and unwarranted interference with his right to serve as the duly designated representative during his shift.

On the facts of this case, and in light of the foregoing findings and conclusions, I conclude and find that the application of respondent's purported policy of prohibiting the use of private automobiles by miners to Mr. Delisio, has

resulted in discrimination prohibited by section 105(c) of the Act. Given the fact that the respondent has conceded that after first reporting to his regular job at the Thomas Portal, Mr. Delisio would not then be permitted to drive his private automobile to the Linden Portal to accompany an inspector, I further conclude and find that the verbal warning given to Mr. Delisio constituted a discriminatory interference with his right to serve as the walkaround representative. Given these circumstances, I conclude that MSHA has established a violation of section 105(c) by a preponderance of the credible evidence and testimony adduced in this case, and the complaint is therefore AFFIRMED.

Respondent's Request for Dismissal of the Complaint as Untimely

In its answer of March 14, 1986, to the complaint filed by MSHA in this case, the respondent asserted that MSHA's complaint was untimely filed. In its posthearing arguments, respondent reasserts this argument and seeks dismissal of the case. The respondent states that Mr. Delisio filed his complaint with MSHA on July 30, 1985, and that MSHA did not file its complaint with the Commission until February 10, 1986, more than the 90-days required by section 105(c)(3) of the Act.

After due consideration of the respondent's arguments concerning the late-filing of the complaint, they are rejected, and the respondent's request for a dismissal of the complaint on this ground IS DENIED. It has been held that the filing deadlines found in section 105(c) of the Act are not jurisdictional in nature, Christian v. South Hopkins Coal Company, 1 FMSHRC 126, 134-136 (1979); Bennett v. Kaiser Aluminum & Chemical Corporation, 3 FMSHRC 1539 (1981). Further, as remedial legislation, the Act should be liberally construed so as not to unduly prejudice a miner for MSHA's delay in filing its complaint. In this case, I find no protracted delay on MSHA's part, nor can I conclude that the delay has prejudiced the respondent in its ability to present its defense.

Civil Penalty Assessment

MSHA seeks a civil penalty assessment in the amount of $1,200 for the respondent's violation of section 105(c) of the Act, and has submitted information concerning the six statutory criteria for penalty assessments found in section 110(i) of the Act.

On the facts of this case, I do not consider the violation to be egregious. I believe that the respondent's initial verbal warning of possible disciplinary action against Mr. Delisio was made out of a good faith belief by the respondent that it had an inherent right to expect its employees to report to their normal duty station. With regard to the subsequent refusal to permit Mr. Delisio to accompany an inspector, this came after the case was in litigation, and I cannot conclude that given the posture of the case at that point in time, that the respondent acted unreasonably. While it is true that the application of the respondent's transportation policy effectively prevented Mr. Delisio from serving as a walkaround representative, there is no evidence of any pretexual motive on the respondent's part, nor is there any evidence that the respondent has directly or indirectly interferred with Mr. Delisio's activities on behalf of his union. To the contrary, the record here establishes that the respondent has been more than tolerant of Mr. Delisio with respect to his union activities in his capacity as a committeeman, and mine management has not interferred with, or otherwise impeded Mr. Delisio's activities in this regard.

MSHA's proposed civil penalty assessment of $1,200, IS REJECTED. In the circumstances presented in this case, I conclude that a civil penalty assessment of $100 is reasonable and appropriate.

ORDER

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

1. The respondent permit the complainant Joseph Delisio access to the Linden Portal during his work shift for purposes of exercising his walkaround rights to accompany MSHA mine inspectors on their inspection rounds by permitting him to drive his private automobile from his usual reporting place at the Thomas Portal to the Linden Portal for this purpose, or in the alternative, to provide him with underground company transportation between portals for this purpose.

2. The respondent expunge from its personnel or other records any references to the verbal warning given to Mr. Delisio on July 30, 1985, with respect to his request to

accompany an MSHA inspector on that day as the miners' walkaround representative.

3. The respondent post a copy of this decision on the mine bulletin board or other location readily available or accessible to miners.

4. The respondent remit to MSHA a civil penalty assessment in the amount of $100 for its violation of section 105(c) of the Act.

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

George A. Koutras
Administrative Law Judge

Distribution:

Linda M. Henry, Esq., Office of the Solicitor, U.S. Department of Labor, Room 14480 Gateway Building, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

Carl H. Hellerstedt, Jr., Esq., Volk, Robertson, Frankovitch, Anetakis & Hellerstedt, Three Gateway Center, Sixth Floor East, Pittsburgh, PA 15222 (Certified Mail)

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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 24 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. PENN 86-203
	:	A. C. No. 36-05018-03613
v.	:	
	:	Cumberland Mine
UNITED STATES STEEL MINING COMPANY, Respondent	:	

ORDER OF DISMISSAL

Before: Judge Weisberger

Petitioner's Motion to Withdraw civil penalty was filed with the Commission on November 3, 1986. To date respondent has not responded to this motion.

Petitioner in its motion, has alleged, in essence, that the circumstances of the two citations in this case are indistinguishable from prior adverse decisions to peritioner. The citations in this case, cite, in essence, allegations that battery lids were not secured on batteries on a scoop.

It appears that the issue here was decided adverse to petitioner in prior proceedings involving the same parties, Secretary v. U. S. Steel, 6 FMSHRC 1617 (1984) (ALJ); Secretary v. U. S. Steel, 6 FMSHRC 1510 (1984) (ALJ); Secretary v. U. S. Steel 6 FMSHRC 155 (1984) (ALJ).

Accordingly, as the above decisions are Res Judicata (See Secretary v. U. S. Steel 5 FMSHRC 1334 (1983)), the Motion to Withdraw Civil Penalty is GRANTED. Citations Numbers 2683479 and 2683654 are VACATED, and this case is DISMISSED.

Avram Weisberger
Administrative Law Judge
(703) 756-6210

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

NOV 25 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEST 85-142-M
	:	A.C. No. 42-01929-05502
v.	:	Treasure Box
IRON MOUNTAIN ORE COMPANY, Respondent	:	

DECISION

Appearances: Margaret Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Mr. Carlyle Johnson, Iron Mountain Ore Company, Cedar City, Utah, pro se.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, charges respondent with violating safety regulations promulgated under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (the "Act").

After notice to the parties, a hearing on the merits took place in Las Vegas, Nevada on August 27, 1986.

At the hearing the parties waived their right to file post-trial briefs but subsequently respondent filed a letter. The judge considered the letter to be a post-trial submission. The Secretary was given an opportunity to reply to the letter but did not do so.

Issues

The threshold issue is whether respondent is subject to the Act. If this is resolved in the affirmative then issues arise as to whether respondent violated the regulations and what penalty is appropriate.

Evaluation of the Threshold Evidence

A credibility issue arises concerning the activities being conducted at Iron Mountain.

Inspector Wilson described the activities as an above ground "crushing and screening" operation (Tr. 16, 17). He further stated that he "may be corrected later on" but as he recalled Mr. Johnson's company drills and blasts large boulders.

On the other hand, Mr. Johnson states his company picks up iron ore from the surface. The ore itself was mined some 30 years ago. Iron Mountain then crushes, screens and ships the surface material to its customers specifications 1/ (Tr. 97, 98).

I credit Mr. Johnson's version of the manner in which the company functions. As the operator he would be in a position to know. In addition, the inspector's testimony that the company drills and blasts boulders is, at best, vague and hesistant.

The factual situation thus presented is whether respondent is subject to the Act when it merely picks up iron ore from the surface and then crushes and screens it.

Section 3(h) of the Act defines a coal or other mine as follows:

> "(h)(1) 'coal or other mine' means (A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools or other property including impoundments, retention dams, and tailings ponds, on the surface of underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities.

In the unique circumstances involved here I agree with respondent that it did not extract minerals from the land. Hence it is not a mine as defined in (A) of the statutory definition. However, this 30 acre site is land used in the "milling of such minerals". 2/ Accordingly, respondent meets the statutory definition as set forth in paragraph (C).

1/ A 15 x 18 foot jaw crusher reduces the ore to the size of about two-inch pellets (Tr. 65).

2/ Milling is defined, in part, as the grinding or crushing of ore. A Dictionary of Mining, Mineral, and Related Terms, 707, U.S. Department of Interior, 1968.

Respondent further relies on the regulations of the State of Utah (Ex. R1, page 64). These regulations, according to respondent, exclude Iron Mountain as a "mining operation."

Respondent's argument is rejected. The determinative issue is whether respondent is subject to the federal Act, not the State of Utah regulations.

In his evidence respondent also adduced evidence that the company had received other MSHA citations but they were not the subject of the instant appeal.

While the Commission has the authority to grant declaratory relief the granting of such relief is discretionary. Climax Molybdenum Co. v. Secretary of Labor, 703 F.2d 447. Such relief should not be granted in this case because the record is inadequate to determine this issue.

Mr. Johnson also protests the action of the inspector in "terminating" the citations when such authority rests with the Commission.

Mr. Johnson has confused the administrative actions of the MSHA inspector with an adjudication by the Commission. When an inspector, as he did here, terminates a citation he does so because respondent has abated the violative condition. Failure of the inspector to terminate the citation could result in subjecting an operator to additional sanctions as contained in Section 104(d) of the Act, 30 U.S.C. § 814(d). In this case Inspector Wilson correctly, on an administrative basis, terminated the instant citations. The authority of the Commission, on the other hand, rests on an adjudicatory level as provided by Section 113 of the Act.

For the foregoing reasons, respondent's threshold contentions are denied.

Citation 2360842

This citation charges respondent with violating 30 C.F.R. § 48.23 which provides as follows:

> (a) Each operator of a mine shall have an MSHA approved plan containing programs for training new miners, training newly-employed experienced miners, training miners for new tasks, annual refresher training, and hazard training for miners as follows:
> (1) In the case of a mine which is operating on the effective date of this Subpart B, the operator of the mine shall submit such plan for approval within 150 days after the effective date of this Subpart B.
> (2) Within 60 days after the operator submits the plan for

approval, unless extended by MSHA, the operator shall have an approved plan for the mine.
(3) In the case of a new mine which is to be opened or a mine which is to be reopened or reactivated after the effective date of this Subpart B, the operator shall have an approved plan prior to opening the new mine, or reopening or reactivating the mine unless the mine is reopened or reactivated periodically using portable equipment and mobile teams of miners as a normal method of operation by the operator. The operator to be so excepted shall maintain an approved plan for training covering all mine locations which are operated with portable equipment and mobile teams of miners.

Inspector Wilson issued this citation because respondent did not have any plan on file with MSHA (Tr. 19, 20).

The inspector discussed the citation with Mr. Johnson. He was not aware such a plan was required (Tr. 21).

The citation was abated (Tr. 21).

Carlyle Johnson testified that he was unaware that he was subject to MSHA's rules (Tr. 74).

Evaluation of the Evidence

The facts estabish that respondent did not have a plan filed with MSHA. Mr. Johnson failed to establish a defense to the citation.

The citation should be affirmed.

Citation 2360843

This citation charges respondent with violating 30 C.F.R. § 56.18-10, now § 56.18010, which provides as follows:

§ 56.18010 First aid training. Selected supervisors shall be trained in first aid. First aid training shall be made available to all interested employees.

Inspector Wilson issued this citation when he learned that Mr. Johnson had not received formal first aid training in years (Tr. 21). The other employees had received no or little training (Tr. 21-22). The first aid training had not been made available to the employees (Tr. 22). There is no lead time granted for the training of employees in first aid (Tr. 23, 24, 55).

Generally, to be effective first aid training has to be taken every two years (Tr. 55).

The citation was abated (Tr. 22).

Mr. Johnson indicated that he had extensive first aid training at U.S. Steel in the spring of 1984 (Tr. 76).

Evaluation of the Evidence

Mr. Johnson, as a supervisor, was trained in first aid. But such training had not been made available to interested employees.

The citation should be affirmed.

Citation 2360844

This citation charges respondent with violating 30 C.F.R. § 56.15-1, now § 56.15001, which provides as follows:

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

Inspector Wilson did not recall seeing any stretchers or blankets on the mine property but there were a few supplies on hand (Tr. 24, 25, 55). The nearest town was 18 miles away (Tr. 25).

The citation was abated (Tr. 25).

Mr. Johnson testified that there were first aid materials and a stretcher on the job. The stretcher, constructed of pipe and wire, was 400 yards from the work area (Tr. 76, 77). After the company was cited Mr. Johnson brought over the ladder (Tr. 76-77). Additional first aid material was purchased and brought to the site the following morning (Tr. 77).

At the time of the inspection Mr. Johnson had a standard first aid kit available in his trailer (Tr. 77). The witness did not know if blankets were on hand (Tr. 78).

Evaluation of the Evidence

Inspector Wilson's testimony is credible. Accordingly, the first aid materials, stretchers and blankets were not provided at places convenient to the working area. A stretcher 400 yards away was not at a convenient place.

The citation should be affirmed.

Citation 2360845

This citation charges respondent with violating 30 C.F.R. § 56.14-1, now § 56.14001, which provides as follows:

§ 56.14001 Moving machine parts. Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons, shall be guarded.

Inspector Wilson issued this citation when he observed an unguarded jaw crusher flywheel (Tr. 25-27). The flywheel rotates in a circular motion when the jaw crusher runs at a high rate of speed (Tr. 27; Ex. P1, P2).

The condition was accessible. In addition, this condition has been known to kill or maim miners (Tr. 27, 28, 56). This can occur when parts of their bodies or clothing are caught in the unguarded assembly (Tr. 28).

This type of violation could cause a reasonably serious injury (Tr. 30).

The inspector observed tracks around the jaw crusher but he didn't know when they had been made (Tr. 56).

The citation was abated (Tr. 56).

Mr. Johnson testified that no one had to go near the exposed parts involved in Citation 2360845 and 2360846. Cleanup is done when the machinery is shutdown.

There was considerable room around the equipment (Tr. 79; Ex. R8).

Evaluation of the Evidence

The credible evidence adduced by Inspector Wilson establishes a violation of the regulation.

Mr. Johnson's testimony that was "considerable room" around the equipment does not excuse the violative condition.

The citation should be affirmed.

Citation 2360846

This citation charges respondent with violating 30 C.F.R. § 56.14-1, now § 56.14001, cited supra, for unguarded moving machine parts.

Inspector Wilson observed that a flywheel, a "V" belt and the pulley assembly were unguarded (Tr. 31; Ex. P3).

Numerous fatalities and serious injuries have occurred in industry from such conditions (Tr. 32).

The citation was abated (Tr. 32, 80).

Mr. Johnson testified MSHA was right in requiring that this condition be guarded but there was no necessity to get near the area (Tr. 80; Ex. R8).

Evaluation of the Evidence

The testimony of Inspector Wilson establishes a violation. Mr. Johnson does not contradict the evidence that a violation existed.

The citation should be affirmed.

Citation 2360847

This citation charges respondent with violating 30 C.F.R. § 14-1, now § 56.14001, cited supra, for unguarded moving machine parts.

Inspector Wilson issued this citation when he saw an unguarded conveyor belt and "V" belt. The condition, which could cause a serious injury, was adjacent to a walkway (Tr. 33, 36, 37; Ex. P4, P5). This machinery was moving at 100 rpm's or more (Tr. 34).

The inspector considered this to be a significant and substantial violation (Tr. 36).

The condition was abated (Tr. 37).

For illustrative purposes, Mr. Johnson presented at the hearing a two horse motor mounted on a bearing assembly (Tr. 80). The motors go into a 15 to 1 gear reduction and the head pulley turns at a 15th of 1,120 rpms, or about 75 rpms (Tr. 81). Mr. Johnson differed with the inspector's claim that the condition could cause a fatality (Tr. 81, 82).

Evaluation of the Evidence

Mr. Johnson's evidence is credible and persuasive. I agree that this particular unguarded equipment could not cause a serious injury.

However, the violation existed and the citation should be affirmed.

Citation 2360848

This citation charges respondent with violating 30 C.F.R. § 56.12-8, now § 56.12008, which provides as follows:

> § 56.12008 Insulation and fittings for power wires and cables. Power wires and cables shall be insulated adequately where they pass into or out of electrical compartments. Cables shall enter metal frames of motors, splice boxes,

and electrical compartments only through proper fittings. When insulated wires, other than cables, pass through metal frames, the holes shall be substantially bushed with insulated bushings.

Inspector Wilson observed an S.O. cable feeding power to the motor. It was not bushed nor was it provided with an appropriate fitting where it entered the motor makeup box (Tr. 38, 57; Ex. P4, P5).

There was not an appropriate fitting (Tr. 39). The primary purpose of a clamp or a bushing is to prevent the cable from being stressed (Tr. 39-40). It also prevents dirt, dust and rain from entering the box (Tr. 40).

The wires here were rubbing against the edge of the metal (Tr. 40). Normally a bushing citation is a minor violation but the inspector considered this to be serious due to the lack of electrical grounding (Tr. 41).

The hazard here involved electrical shock or electrocution (Tr. 41). The inspector had read of numerous fatalities caused by these conditions (Tr. 41). He believed the citation was significant and substantial because of the amperage and because the plant was not electrically grounded (Tr. 41). The entire conveyor belt frame could have been energized (Tr. 42).

The condition was abated (Tr. 42).

Mr. Johnson testified that the grommet provided by the factory had pulled out. There was no short and the wiring was still intact (Tr. 82).

Evaluation of the Evidence

The regulation requires that cables enter metal frames through proper fittings. Inspector Wilson established the violative condition and Mr. Johnson confirmed it.

The citation should be affirmed.

Citation 2360849

This citation charges respondent with violating 30 C.F.R. § 56.12-25, now § 56.12025, which provides as follows:

All metal enclosing or encasing electrical circuits shall be grounded or provided with equivalent protection. This requirement does not apply to battery-operated equipment.

Inspector Wilson found that the 220 volt AC three phase electrical system was not continuously grounded. However, it was grounded by a copper rod and wire at the box (Tr. 42, 43). In effect, a portion of the electrical system was grounded and portion was not (Tr. 44, 46).

Mr. Johnson told the inspector the equipment was grounded because it was resting on iron ore. In the inspector's view such grounding was inadequate (Tr. 44, 58).

Mr. Wilson discussed various ways the system could be grounded (Tr. 44, 45, 46). But he apparently did not use a meter to test the ground (Tr. 46). The violation was obvious since there was no fourth wire and no bonding (Tr. 47).

In the event of an electrical fault the entire metal conveyor belt frame could be energized. This could cause a fatal electrocution (Tr. 47).

The citation was abated (Tr. 48, 60, 83).

Mr. Johnson testified there was six inches of iron dirt every place you walk. Iron is highly conductive but not as good as copper wire (Tr. 83).

Evaluation of the Evidence

A violation exists in these circumstances. In this connection, I credit Mr. Wilson's expertise that metal resting on iron ore does not constitute adequate grounding.

Citation 2360850

This citation charges respondent with violating 30 C.F.R. § 56.40-24(b), now § 55.4-24(b), which provides as follows:

> § 56.4-24 Mandatory. Fire extinguishers and fire suppression devices shall be: (b) Adequate in number and size for the particular fire hazard involved.

Inspector Wilson found a wooden storage shack containing oil, grease, rags and paper boxes. There were no fire extinguishers in or about the shack which was 50 to 100 feet from the trailer house (Tr. 50, 52, 60-61).

The standard requires fire extinguishers in the vicinity of flammable or combustible material (Tr. 51).

The inspector did not consider the violation to be significant and substantial because the shack was away from the work area (Tr. 53).

The violation was abated (Tr. 53).

Mr. Johnson indicated there was a fire extinguisher 50 feet from the building. There were no grease rags; however, they did store unopened oil cans and five gallon buckets of motor oil, as well as grease and paper boxes containing extra parts (Tr. 83, 84).

Evaluation of the Evidence

The parties agree that a fire extinguisher was 50 feet from the shack. However, a fire among combustibles requires a quick response. Valuable time would be lost in obtaining the fire extinguisher under the circumstances involved here.

The citation should be affirmed.

Civil Penalties

In this case the Secretary has proposed the following penalties:

Citation No.	Subject	Proposed
2360842	MSHA approved plan	$20
2360843	First aid training	20
2360844	First aid materials	20
2360845	Unguarded flywheel	74
2360846	Unguarded pulley	74
2360847	Unguarded conveyor belt	74
2360848	No fitting to metal box	74
2360849	Electrical system ungrounded	74
2360850	No fire extinguisher	20

The statutory criteria to assess civil penalties is contained in Section 110(i) of the Act.

In reviewing the evidence in relation to the statutory criteria it appears that the company has a favorable prior history since it was not previously cited (Tr. 62). The company had only five or six employees. The number of the employees and its gross income of approximately $511,000 causes me to conclude that the company's size is relatively small (Tr. 88). The company must be considered as negligent since the violative conditions should have been known to Mr. Johnson. The assessment of a penalty would severely affect the company if it were still in business.

At the time of the inspection the company had been in operation for three months. In 1985 the company grossed $511,000 but spent $580,000. Mr. Johnson has financed the company by borrowing on property he owns. However, he is "broke" (Tr. 88, 89). Mr. Johnson's bank balance was $328. From this amount he drew out $100 to come to the hearing. In his personal account he has a balance of $197. At the time of the hearing U.S. Steel owed Iron Mountain $5,000 but payment has been delayed due to the fact that the company is on strike. He also has a bill of $8,000 with the Bank of Iron County but he has no way of paying it (Tr. 95). Johnson stopped operating the mine on October 1, 1985 (Tr. 95).

Except for the unguarded moving machine parts, the gravity of all of the violations was minimal.

The company's good faith was apparent in that they fully abated the citations. They also furnished gloves, safety shoes and hard hats. In addition, the company fully cooperated with MSHA.

As a general rule, the text and legislative history of Section 110 of the Act require the Secretary to propose a penalty assessment for each violation and the Commission and its judges to assess some penalty for each violation found. Tazco, Inc., 3 FMSHRC 1895 (1981). In Tazco the Commission ruled that the Commission and its judges do not have the power to suspend penalties. 3 FMSHRC at 1897. But in Tazco the Commission specifically noted that it was not passing on the propriety of nominal penalties, 3 FMSHRC 1898, footnote 4.

Precedent for the assessment of nominal penalties is contained in Potochar and Potochar Coal Company, 4 IBMA 252, 1 MSHC 1300 (1975).

In the instant case the operator abated the violative conditions and fully cooperated with MSHA. The company has ceased operations and there is no indication in the record that the company intends to resume its activities. The company and its owner, Mr. Johnson, have lost a substantial amount of money. In fact, they are essentially bankrupt.

I do not believe that the imposition of more than nominal penalties in these circumstances would serve the purposes of the Act or the best interests of justice.

Accordingly, a penalty of $1 should be assessed for each violation.

Conclusions of Law

Based on the entire record and the factual findings made in the narrative portion of this decision, the following conclusion of law are entered:

1. The Commission has jurisdiction to decide this case.

2. Respondent violated all of the regulations for which it was cited in this case.

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

ORDER

1. Citation 2360842 is affirmed and a penalty of $1 is assessed.

2. Citation 2360843 is affirmed and a penalty of $1 is assessed.

3. Citation 2360844 is affirmed and a penalty of $1 is assessed.

4. Citation 2360845 is affirmed and a penalty of $1 is assessed.

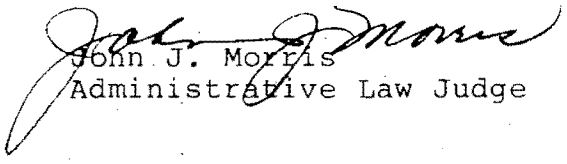
5. Citation 2360846 is affirmed and a penalty of $1 is assessed.

6. Citation 2360847 is affirmed and a penalty of $1 is assessed.

7. Citation 2360848 is affirmed and a penalty of $1 is assessed.

8. Citation 2360849 is affirmed and a penalty of $1 is assessed.

9. Citation 2360850 is affirmed and a penalty of $1 is assessed.



John J. Morris
Administrative Law Judge

Distribution:

Margaret Miller, Esq., Office of the Solicitor, U.S. Department of Labor, 1585 Federal Building, 1961 Stout Street, Denver, CO 80294 (Certified Mail)

Iron Mountain Ore Company, Mr. Carlyle Johnson, P.O. Box 365, Cedar City, UT 84720 (Certified Mail)

/bls

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

NOV 25 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 85-173-M A.C. No. 48-01405-05502
v.	:	Lovell Plant
N.L. BAROID-DIV/N.L. INDUSTRIES, Respondent	:	

DECISION

Appearances: James H. Barkley, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Mr. J.D. Fontenot, NL Baroid/NL Industries, Inc., Houston, Texas
pro se.

Before: Judge Morris

This is a civil penalty proceeding initiated by petitioner against respondent in accordance with the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. The civil penalty sought here was for the violation of 30 C.F.R. § 56.5-1(a), a mandatory standard promulgated pursuant to the Act.

After notice to the parties, a hearing on the merits commenced in Billings, Montana on November 4, 1986. At the hearing petitioner moved to vacate his citation and dismiss his petition.

Pursuant to Commission Rule 11, 29 C.F.R. § 27800.11 and for good cause shown, the motion to vacate is granted.

Accordingly, the case is dismissed.

John J. Morris
Administrative Law Judge

Distribution:

James H. Barkley, Esq., Office of the Solicitor, U.S. Department of Labor, 1585 Federal Building, 1961 Stout Street, Denver, CO 80294 (Certified Mail)

NL Baroid/NL Industries, Inc., Mr. J.D. Fontenot, Manager, Safety & Health, P.O. Box 1675, 2404 S.W. Freeway, Houston, TX 77251 (Certified Mail)

/bls

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

NOV 26 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. SE 86-84-M A.C. No. 09-00024-05501-C5A
v.	:	Georgia Marble
DRILLING AND BLASTING SYSTEMS, INC., Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Broderick

On November 20, 1986, the Secretary of Labor filed a motion for approval of a settlement reached by the parties in this case. The violations were originally assessed at $147 and the parties propose to settle for $85.

The motion states that Respondent is a small independent contractor and has no history of prior violations. The motion states that the gravity and negligence were over evaluated. The alleged violation, which resulted in the death of the son of the President of Respondent, occurred on mine property but 4000 feet from the quarry site, and there is some question of jurisdiction. I accept the allegations in the motion. I have considered the motion in the light of the criteria in section 110(i) of the Act, and conclude that it should be approved.

Accordingly, the settlement is APPROVED and Respondent is ordered to pay the sum of $85 within 30 days of the date of this order, if it has not already done so.

The hearing scheduled for December 7, 1986 in Atlanta, Georgia is CANCELLED.

James A. Broderick
Administrative Law Judge