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NOVEMBER 1988

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

Rochester and Pittsburgh Coal Company v. Secretary of Labor, Docket No. PENN 88-194-R. (Judge Fauver, September 27, 1988).

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

Green River Coal Company v. Secretary of Labor, Docket No. KENT 87-202-R, etc. (Judge Fauver, October 21, 1988).

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 28, 1988

LOCAL UNION 2274, DISTRICT 28, :
UNITED MINE WORKERS OF AMERICA :
v. : Docket No. VA 83-55-C
CLINCHFIELD COAL COMPANY :

BEFORE: Backley, Doyle, Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This compensation proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982)("Mine Act" or "Act"). We previously remanded this matter for further proceedings to determine whether a causal nexus existed between an imminent danger withdrawal order and violations of mandatory standards and, if such a nexus were found, to award specific sums of compensation due miners idled by that order. 8 FMSHRC 1310 (September 1986). On remand, the parties stipulated that such a nexus existed and Commission Administrative Law Judge Gary Melick awarded compensation including prejudgment interest but denied the claim of complainant United Mine Workers of America ("UMWA") for attorney's fees and costs. 9 FMSHRC 1276 (July 1987)(ALJ). We granted petitions for discretionary review filed by both parties. For the reasons that follow, we affirm the judge's award of prejudgment interest on the compensation due and his denial of attorney's fees and costs. We further announce a modification in the method of calculating interest in both compensation and discrimination cases arising under the Mine Act.

I.

Factual and Procedural Background

The compensation claim at issue arose following an underground explosion on June 21, 1983, at the McClure No. 1 underground coal mine of Clinchfield Coal Company ("Clinchfield") located in Dickerson County,

Virginia. On the morning of June 22, 1983, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") issued to Clinchfield a withdrawal order, pursuant to section 103(k) of the Mine Act, 30 U.S.C. § 813(k), affecting the entire mine. Later that same morning, the inspector issued to Clinchfield an imminent danger withdrawal order, under section 107(a) of the Act, 30 U.S.C. § 817(a), also affecting the entire mine. The imminent danger order was terminated on July 18, 1983, and on September 30, 1983, the UMWA filed a complaint for one-week compensation pursuant to the third sentence of section 111 of the Act on behalf of the miners idled due to the imminent danger order. 1/

On March 26, 1984, MSHA issued to Clinchfield one citation and four withdrawal orders pursuant to section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), three of which alleged that the cited violations had resulted in a methane ignition causing the June 21 explosion at the McClure No. 1 Mine.

In a summary decision issued on July 23, 1984, the Commission

1/ In relevant part, section 111 of the Act, as codified, provides:

Entitlement of miners to full compensation

[1] If a coal or other mine or area of such mine is closed by an order issued under section 103, section [104], or section [107], all miners working during the shift when such order was issued who are idled by such order shall be entitled, regardless of the result of any review of such order, to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than the balance of such shift. [2] If such order is not terminated prior to the next working shift, all miners on that shift who are idled by such order shall be entitled to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than four hours of such shift. [3] If a coal or other mine or area of such mine is closed by an order issued under section [104] or section [107] of this title for a failure of the operator to comply with any mandatory health or safety standards, all miners who are idled due to such order shall be fully compensated after all interested parties are given an opportunity for a public hearing, which shall be expedited in such cases, and after such order is final, by the operator for lost time at their regular rates of pay for such time as the miners are idled by such closing, or for one week, whichever is the lesser.

...

30 U.S.C. § 821 (sentence numbers added).

administrative law judge originally assigned to hear the case denied the UMWA's compensation claim. 6 FMSHRC 1782 (July 1984)(ALJ). Despite taking official notice of MSHA's accident investigation report, he regarded as decisive MSHA's failure to actually modify the imminent danger order to expressly allege a violation of a mandatory standard and, accordingly, dismissed the compensation claim. 6 FMSHRC at 1784. The Commission granted the UMWA's petition for discretionary review.

In our decision reversing the judge, we held that: the initial section 103(k) control order did not preclude MSHA's subsequent issuance of the section 107(a) imminent danger withdrawal order and, for purposes of section 111 one-week compensation, the mine was closed "by" and the miners were idled "due to" the imminent danger order; an imminent danger order need not itself allege a violation of a mandatory standard in order to trigger entitlement to one-week compensation; and allegations of violations cited subsequently by MSHA in section 104 citations or orders may supply the required nexus between the imminent danger order and a violation of a mandatory standard. 8 FMSHRC at 1313-14. We noted that Clinchfield had not contested the subsequently issued section 104(d)(1) citation and withdrawal orders and that the UMWA had asserted that the allegations of violation contained therein provided the requisite nexus. 8 FMSHRC at 1314. We remanded for a determination whether such nexus existed and, if so, for award of the specific sums of compensation due the miners idled by the imminent danger order.
Id. 2/

In subsequent proceedings before Judge Melick, the parties stipulated that "a causal nexus existed between the 107(a) order issued to Clinchfield's McClure No. 1 Mine ... and a violation of a mandatory standard in the ... Mine." 9 FMSHRC at 1277. 3/ They also stipulated to a list of miners on whose behalf the UMWA was seeking compensation, their rates of pay as of June 23, 1983, and the amount of compensation sought on behalf of each such miner. Id. The UMWA further requested interest on the compensation award and also sought attorney's fees and costs. In preservation of its appeal rights, Clinchfield repeated the same legal arguments in objection to compensation that it had raised before the Commission during the preceding review of the case.

The judge rejected Clinchfield's objections to compensation as having been disposed of by our first decision in this matter. 9 FMSHRC at 1277. Based on the parties' stipulations, he found that a causal nexus existed between the imminent danger withdrawal order and an underlying violation of a mandatory standard. 9 FMSHRC at 1276-77. Accordingly, he concluded that the miners on the stipulated list were

2/ Our Clinchfield decision was one of three similar cases issued the same date resolving significant compensation issues. The other two decisions were Loc. U. 1889, UMWA v. Westmoreland Coal Co., 8 FMSHRC 1317 (September 1986); and Loc. U. 1609, UMWA v. Greenwich Collieries, Div. of Penn. Mines Corp., 8 FMSHRC 1302 (September 1986).

3/ Because the judge who had originally heard the case had retired from the Commission, the case was reassigned on remand.

entitled to the lost wages set forth in the list. Citing Peabody Coal Co., 1 FMSHRC 1785 (November 1979) and Youngstown Mines Corp., 1 FMSHRC 990 (August 1979), cases arising under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976)(amended 1977)("the 1969 Coal Act"), he granted the UMWA's request for prejudgment interest on the compensation. Id. He ruled that the interest was to be calculated according to the formula established for determining interest on back pay awards in discrimination cases set forth in Secretary on behalf of Bailey v. Arkansas-Carbona Co., 5 FMSHRC 2042 (December 1983). Id. Finally, relying on Alyeska Pipeline Service Co. v. The Wilderness Soc., 421 U.S. 240 (1975), he denied the UMWA's claims for attorney's fees and costs. Id.

Before us the UMWA contests the judge's denial of attorney's fees and costs. The UMWA additionally requests the Commission to modify the method of calculating interest to accord with the revised back pay interest formula of the National Labor Relations Board ("NLRB") announced in New Horizons for the Retarded, Inc., 283 NLRB No. 181, 125 LRRM 1177 (May 28, 1987). Clinchfield reasserts its legal objections to awarding compensation in this matter. It also challenges the judge's award of interest and, in any event, notes that the NLRB's new method of calculating interest has caused the Commission's Arkansas-Carbona formula to become outdated.

II.

Disposition

A. Clinchfield's objections to compensation

Clinchfield has reiterated its basic objections to an award of compensation in this case -- that the miners were not idled due to the imminent danger order because the mine had been closed initially by the section 103(k) control order, and that the imminent danger order cannot trigger compensation because it did not allege on its face a violation of a mandatory standard. These same points were raised, considered, and decided adversely to Clinchfield in our first decision. See 8 FMSHRC at 1313-14. See also Westmoreland, supra, 8 FMSHRC at 1323-30. However, in a letter submitted after its brief and served on all parties in this case, Clinchfield asserts that the intervening decision in Int'l U., UMWA v. FMSHRC, 840 F.2d 77 (D.C. Cir. 1988), rev'g Loc. 5817, UMWA v. Monument Mining Corp., etc., 9 FMSHRC 209 (February 1987), supports its argument that an imminent danger order must allege on its face a violation of a mandatory standard in order to initiate an award of one-week compensation. We disagree.

Int'l U., UMWA involved the distinct issue of an owner-operator's liability for compensation based upon a withdrawal order issued to an independent contractor. In reversing a split opinion by the Commission holding that "the 'operator' responsible for the conditions or violations underlying the section 111 claim is the sole operator responsible for compensating the idled miners" (Monument Mining, supra, 9 FMSHRC at 212), the Court commented upon one of its prior decisions

concerning the compensation provisions of the 1969 Coal Act:

Some of the language in the ... [Commission's Monument Mining] opinion could be read ... to suggest a role for the Administrative Law Judge in the section 111 compensation proceeding in determining whether the cited operator was alone responsible for the underlying violation. Such an interpretation would be in tension with this court's holding (in a case under the Coal Act) that a compensation order could be based only on the withdrawal order "as issued," and not on the underlying facts which might have justified a broader order. District 6, UMWA v. Department of the Interior Bd. of Mine Operations Appeals, 562 F.2d 1260, 1263 (D.C. Cir. 1977).

840 F.2d at 80 n.5 (emphasis added). See also 840 F.2d at 84 n. 14. The District 6 decision cited by the court was an opinion under the 1969 Coal Act affirming Billy F. Hatfield v. Southern Ohio Coal Co., 4 IBMA 259 (1975), which we discussed and distinguished in our Westmoreland compensation decision. 8 FMSHRC at 1328-29 n.5.

In the District 6 proceedings, the D.C. Circuit and the Interior Board of Mine Operations Appeals had rejected the UMWA's claim that it should be permitted to allege and prove in a compensation proceeding that an imminent danger withdrawal order was actually based on conditions that would have justified issuance of a withdrawal order pursuant to 30 U.S.C. § 814(c)(1976)(amended 1977), based on an operator's "unwarrantable failure" to comply with a mandatory health or safety standard. If established, such proof would have supported a claim for one-week compensation. See 4 IBMA at 265-69; 562 F.2d at 1263-68. 4/ As we explained in Westmoreland, we believe that the holding in District 6 was based on the conclusion that the UMWA's attempt to prove unwarrantable failure in pursuit of a larger award of compensation improperly usurped the Secretary's enforcement and prosecutory role in issuing appropriate withdrawal orders. 8 FMSHRC at 1328-29 n.5. Here, however, the Secretary as the enforcer of the Act has issued the requisite imminent danger order capable of supporting a one-week compensation claim under section 111 since such order was issued due to Clinchfield's failure to comply with mandatory safety standards. The UMWA has not been attempting to prove "underlying facts which might have justified a broader order" (Int'l U., UMWA, supra, 840 F.2d at 80 n.5). A District 6 issue would be posed in this matter if the Secretary had issued only the initial section 103(k) control order and, absent an imminent danger order or a section 104 withdrawal order,

4/ Under the Coal Act only a withdrawal order based on the operator's unwarrantable failure could trigger entitlement to one-week compensation. See 30 U.S.C. § 820(a)(1976)(amended 1977). In contrast, under the third sentence of section 111 of the Mine Act (n.1 supra), one-week compensation may be triggered when imminent danger orders are issued under section 107 or withdrawal orders are issued under section 104.

the UMWA had sought to prove, in pursuit of a one-week compensation claim, that the underlying conditions would have justified issuance of an imminent danger order or a section 104 withdrawal order. Thus, the concerns addressed in District 6, and referred to in passing by the court in Int'l U., UMWA, are not present here. 5/

Finally, we reemphasize our view that the argument that a section 107 imminent danger order must allege a violation on its face in order to initiate one-week compensation is at odds with section 111, the purposes of the Act, and the last sentence of section 107(a), 30 U.S.C. § 817(a), which expressly permits the subsequent issuance of a citation for any violation allegedly involved in the imminent danger. See Westmoreland, 8 FMSHRC at 1327-28. As was the case in this matter, imminent danger orders are often issued under urgent circumstances. As stated in Westmoreland:

[T]he overriding purpose of an imminent danger order is the immediate withdrawal of miners.... [D]ue to the dangerous conditions giving rise to the order, inspection or investigation of the area to determine the existence of any underlying violations may be delayed necessarily until long after the order was issued or until the imminent danger no longer exists.

8 FMSHRC at 1328 (emphasis in original).

For the foregoing reasons, and as more fully discussed in our prior decision, we reaffirm our rejection of Clinchfield's objections to one-week compensation in this matter.

B. Award of attorney's fees and costs

The UMWA seeks review of the judge's denial of its request for attorney's fees and costs. The judge based his denial on Alyeska

5/ In this proceeding we have permitted the UMWA to attempt to establish a nexus between the issuance of an imminent danger withdrawal order and an underlying violation of a mandatory standard. However, a showing of nexus -- since stipulated to by the parties -- does not usurp any Secretarial role, because the Secretary fulfilled her role by issuing the imminent danger order and a citation and several withdrawal orders containing allegations of violations of mandatory standards. Section 111 does not require the Secretary to set forth compensation-relevant nexus findings in her withdrawal orders or related enforcement actions. See Westmoreland, 8 FMSHRC at 1327-30. As we made clear recently in a similar context, citations and withdrawal orders issued by the Secretary integrally pertain to the Act's enforcement and civil penalty scheme, while the nexus concept referred to herein arises solely in the compensation sphere. See Loc. U. 2333, UMWA v. Ranger Fuel Corp., 10 FMSHRC 612, 620-21 (May 1988). As the D.C. Circuit observed in Int'l U., UMWA, the Secretary plays no role in compensation proceedings. 840 F.2d at 81-82 & n.6.

Pipeline, supra, in which the Supreme Court endorsed the "American Rule" that attorney's fees are not ordinarily recoverable by the prevailing party in federal litigation in the absence of statutory authorization. See 421 U.S. at 247-71. In decisions issued one month after the judge's decision in this matter, we concluded that private attorney's fees are not awardable under the Mine Act to a complainant who retains private counsel in a discrimination complaint proceeding brought by the Secretary of Labor on the complainant's behalf pursuant to section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2). Odell Maggard v. Chaney Creek Coal Corp., etc., 9 FMSHRC 1314, 1322-23 (August 1987), pets. for review filed, No. 87-1494 (D.C. Cir. September 17 & 21, 1987); John A. Gilbert v. Sandy Fork Mining Co., Inc., 9 FMSHRC 1327, 1339 n.6 (August 1987), pet. for review filed, No. 87-1499 (D.C. Cir. September 21, 1987).

We based our attorney's fees holding in Maggard and Gilbert upon our acquiescence, absent contrary judicial authority, in the Fourth Circuit's decision in Eastern Assoc. Coal Corp. v. FMSHRC, 813 F.2d 639, 643-44 (4th Cir. 1977), reversing the Commission's former policy announced in Secretary on behalf of Robert A. Ribel v. Eastern Assoc. Coal Corp., 7 FMSHRC 2015, 2021-27 (December 1985). The Fourth Circuit generally founded its rejection of private counsel fees and costs in section 105(c)(2) discrimination proceedings upon Alyeska Pipeline's affirmation of the "American Rule." 813 F.2d at 643. The Fourth Circuit discerned no statutory authorization for private counsel fees and costs in connection with a discrimination complaint brought by the Secretary pursuant to section 105(c)(2), and contrasted that situation with section 105(c)'s express allowance of such fees and costs to successful complainants in a section 105(c)(3) proceeding. 813 F.2d at 644. Thus, under the "American Rule" applied to the Mine Act as set forth in the Fourth Circuit's Ribel decision, attorney's fees are not available to prevailing litigants under the Mine Act, except where the Act specifically authorizes such fees.

Neither section 111 nor any other provision of the Mine Act provides for an award of attorney's fees and costs in compensation proceedings. The Act's legislative history is silent on this subject. In the absence of specific statutory authorization, therefore, we follow the "American Rule" in this context and affirm the judge's disallowance of attorney's fees and costs. Alyeska Pipeline, supra; Ribel (4th Cir.), supra; Maggard, supra; and Gilbert, supra.

C. Interest issues

Two major interest issues are presented: whether interest is due on compensation awards under section 111 and, if so, whether prejudgment interest may be allowed; also, if interest is available, how are its rate and amount to be calculated? In cases arising under the Coal Act, the Commission allowed interest on compensation awards, and we perceive no reason to adopt a more restrictive rule under the expanded compensation provisions of the Mine Act.

1. Interest on compensation awards and prejudgment interest

With respect to the first issue, interest is the compensation allowed by law on the use or detention of money (e.g., 45 Am. Jur. 2d, Interest and Usury § 1 (1969)), and reflects the value of money over time. Interest is not a penalty but is merely an appropriate recompense for the loss over time of the use of money. See, e.g., Clark v. Paul Revere Life Ins. Co., 417 F.2d 683, 686 (8th Cir. 1969); United States v. United Drill & Tool Corp., 183 F.2d 998, 999 (D.C. Cir. 1950). As we have analogously determined with regard to the Mine Act's anti-discrimination provisions:

The miner [who has suffered discrimination] has not only lost money when he or she has not been paid in violation of section 105(c), but has also lost the use of the money. As the NLRB has stated with regard to interest on back pay awards under the National Labor Relations Act, "[t]he purpose of interest is to compensate the discriminatee for the loss of the use of his or her money." Florida Steel Corp., 231 NLRB 651, 651 (1977).

Arkansas-Carbona, supra, 5 FMSHRC at 2050.

Section 111 compensation replaces pay that miners have lost as the result of an idlement attributable to the issuance of withdrawal orders specified in section 111. See generally Westmoreland, 8 FMSHRC at 1323-24. See also Int'l U., UMWA, supra, 840 F.2d at 81-82 & n.6; see also S. Rep. No. 181, 95th Cong., 1st. Sess. 46-47 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 634-35 (1978) ("Legis. Hist.") When miners lose pay because of an idling order, they also lose the use of that pay. Thus, interest on a section 111 award operates to compensate miners for the loss of use of their money over a period of time.

Section 111, like its predecessor, section 110(a) of the Coal Act, 30 U.S.C. § 820(a)(1976)(amended 1977), does not expressly provide for interest on compensation. However, as we recognized in approving interest on compensation awards under the Coal Act, we conclude that interest is implied within section 111's remedial pay protection scheme. See Youngstown, supra, 1 FMSHRC at 995-96; Peabody, supra, 1 FMSHRC at 1792. As we observed in Youngstown: "It is well settled that the omission of a mention of interest in [federal] statutes which create obligations does not show necessarily a Congressional intent to deny interest." 1 FMSHRC at 996, quoting Philip Carey Mfg. Co. v. NLRB, 331 F.2d 720, 729 (6th Cir.), cert. den., 379 U.S. 888 (1964). See also, e.g., Int'l Bhd. of Operative Potters v. NLRB, 320 F.2d 757, 760-61 (D.C. Cir. 1963); United Drill & Tool Corp., supra, 183 F.2d at 999-1000.

The principle that a federal statutory obligation may bear interest even though the statute makes no provision for it is rooted in Rodgers v. United States, 332 U.S. 371, 373-74 (1947). Under Rodgers, interest is awardable in such contexts depending upon the purpose of the statute, whether the statutory obligation in question is in the nature

of a debt rather than a penalty, and the interplay of the relative equities involved. 332 U.S. at 373-74. See also Philip Carey Mfg. Co., supra, 331 F.2d at 729-30; United Drill & Tool Corp., 183 F.2d at 999.

As emphasized already, the purpose of section 111 compensation is to replace miners' wages lost as a result of idling orders. Accordingly, the obligation to pay this statutory compensation is in the nature of a debt owed by the operator to the miner. Plainly, compensation under section 111 is not a penalty or fine, upon which an award of interest would be improper. See Rodgers, supra, 332 U.S. at 374-76; see also Legis. Hist., supra, at 634-35. Further, during the period of time that a miner has not been compensated, the operator has retained the use and benefit of that money. As we noted in Youngstown:

It is recognized under our legal system that wage-earners are heavily dependent upon wages, which more often than not constitute the sole resource to purchase the necessities of life from day to day.... Many wage-earners who are deprived of their wages doubtlessly find it necessary to borrow money to sustain themselves and their families, paying rates of interest ... [to do so].

1 FMSHRC at 996, quoting Philip Carey Mfg. Co., supra, 331 F.2d at 730. Thus, we perceive no inequity in requiring a mine operator, liable for section 111 compensation, to repay miners for the time value of their compensable pay. Therefore, we conclude in agreement with the judge that interest may properly be included in a compensation award. See, e.g., Youngstown, supra; Philip Carey Mfg. Co., supra; Int'l Bhd. of Operative Potters, supra; United Drill & Tool Corp., supra. 6/

6/ Courts have allowed interest on a wide variety of federal statutory obligations even though interest was not mentioned in the applicable statutes. For example, such interest has been permitted on: back pay awards under the National Labor Relations Act, 29 U.S.C. § 151 et seq. (1982) ("NLRA"): e.g., Philip Carey Mfg. Co., 331 F.2d at 729-31; Int'l Bhd. of Operative Potters, 320 F.2d at 760-61; Reserve Supply Corp. of L. I. v. NLRB, 317 F.2d 785, 789 (2d Cir. 1963); back pay awards under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (1982): e.g., EEOC v. Wooster Brush Co. Employees Relief Ass'n, 727 F.2d 566, 578-79 (6th Cir. 1984); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 263 (5th Cir. 1974); awards for wage violations of Fair Labor Standards Act, 29 U.S.C. § 201 et seq. (1982): e.g., Marshall v. Hope Garcia Lancarte, 632 F.2d 1196, 1199 (5th Cir. 1980); Hodgson v. American Can Co., 440 F.2d 916, 921-22 (8th Cir. 1971); awards to employees for underpayments by contractors under Walsh-Healey Act, 41 U.S.C. § 35 et seq. (1982): e.g., Mitchell v. Riegel Textile, Inc., 259 F.2d 954, 956 (D.C. Cir. 1958); and compensation awards to returning veterans for wrongful refusals to reemploy under the Veterans Reemployment Rights Act, 38 U.S.C. § 2021 et seq. (1982), and its statutory predecessors: e.g., Hembree v. Georgia Power Co., 637 F.2d 423, 429-30 (5th Cir. 1981); Travis v. Schwartz Mfg. Co., 216 F.2d 448, 456 (7th Cir. 1954).

We reject Clinchfield's argument that because section 105(c) of the Mine Act refers specifically to an award of interest on back pay and section 111 does not expressly provide for interest, interest is unavailable under the latter provision. In enacting the Mine Act, Congress substantially amended the antidiscrimination provisions of the Coal Act (30 U.S.C. § 820(b) (1976)(amended 1977)) to increase the protection afforded miners and expressly permitted interest on back pay. In section 111 of the Mine Act Congress also expanded the compensation that had been available under section 110(a) of the Coal Act (see Westmoreland, 8 FMSHRC at 1324-25, 1328-29 & n.5). Although it did not mention interest in the amended compensation provisions, Congress was addressing two discrete areas of concern in making these revisions. The fact that interest was included in section 105(c) does not necessarily imply its exclusion from section 111 -- particularly in the context of a remedial health and safety statute. See, e.g., Herman & McLean v. Huddleston, 459 U.S. 375, 387 n.23 (1983); Bailey v. Federal Intermediate Credit Bk., 788 F.2d 498, 500 (8th Cir. 1986), cert. den., ___ U.S. ___, 55 U.S.L.W. 3287 (U.S. Oct. 20, 1986)(No. 86-318); Carter v. OWCP, 751 F.2d 1398, 1401-02 (D.C. Cir. 1985).

It is beyond dispute that section 111 "is remedial in nature and was not intended by Congress to be interpreted and applied narrowly." Westmoreland, 8 FMSHRC at 1323. In explicitly recognizing interest on back pay awards under section 105(c), Congress was codifying legal and equitable principles that otherwise would have been implicit (under the Philip Carey line of cases referred to above). It would be perverse to conclude that codification of the right to interest in section 105(c) is a repudiation rather than an affirmation of these legal and equitable principles insofar as section 111 is concerned. See Carter, supra, 751 F.2d at 1402. Further, we find no express indication in the Mine Act's legislative history that Congress considered and intended to exclude interest on compensation or to abrogate the settled doctrine of federal law that interest may be implied under federal statutory provisions dealing with remedial or debtor-creditor relationships. See, e.g., Tri-State Terminals, Inc. v. Jesse, 596 F.2d 752, 755-56 & n.2 (7th Cir. 1979).

In this aspect of its position on review, Clinchfield seeks to interpose the maxim of statutory construction that expressio unius est exclusio alterius ("the expression of one thing is the exclusion of another"). While we agree that this doctrine often plays a useful role in determining statutory meaning, it is nevertheless only an aid to construction and not an invariable rule of law. See, e.g., 2A Sutherland Statutory Construction §§ 47.23 & .25 (Sands 4th ed. 1984 rev.); U.S. Dept. of Justice v. FLRA, 727 F.2d 481, 491 (5th Cir. 1984). All the interpretative considerations discussed above supporting our recognition of interest in section 111 fairly effectuate the Act. Most importantly, we discern in the remedial structure of section 111 a clear congressional purpose requiring full compensation to idled miners within the framework of that section -- a purpose that outweighs application of that particular rule of construction. See, e.g., 2A Sutherland, supra, § 47.25; Carter, supra, 751 F.2d at 1401-02; Tri-State Terminals, Inc., supra, 596 F.2d at 755-56.

The essential reasons underlying our preceding conclusions regarding section 111 interest dictate that it take the form of prejudgment interest accruing from the date that the compensable pay would normally have been paid by the operator until the date that the compensation due is actually tendered. Prejudgment interest is not a penalty but is a necessary element of complete compensation for withheld funds. E.g., *Platora Ltd. v. Unidentified Remains, etc.*, 695 F.2d 893, 906 (5th Cir.), cert. den., 464 U.S. 818 (1983). Indeed, in the absence of compelling equitable considerations to the contrary, prejudgment interest is ordinarily the form of interest awarded on monetary obligations due. E.g., *Stroh Container Co. v. Delphi Indus., Inc.*, 783 F.2d 743, 752 (8th Cir.), cert. den., 476 U.S. 1142 (1986). As the Supreme Court has explained:

Prejudgment interest is an element of complete compensation....

* * *

[I]t serves to compensate for the loss of use of money due as damages from the time the claim accrues until judgment is entered, thereby achieving full compensation for the injury those damages are intended to redress.

West Virginia v. United States, supra, 479 U.S. at 310-11 & n. 2. The cases cited above in n.6 concerning the implication of interest in federal statutes all contemplated generally, or authorized specifically, the award of prejudgment interest. See, e.g., *American Can Co.*, 440 F.2d at 922; *Int'l Bhd. of Operative Potters*, 320 F.2d at 760-61; *United Drill & Tool Corp.*, 183 F.2d at 999-1000. 7/

Here, from the time of the issuance of the imminent danger withdrawal order, Clinchfield has had the use of the compensable pay at issue. See, e.g., *Stroh Container Co.*, supra, 783 F.2d at 752; *American Can Co.*, 440 F.2d at 922. To make the miners whole for the time value of their compensable pay, therefore, we hold in affirmance of the judge that interest is appropriate on sums of compensation due from the date that the compensable pay would have been paid but for the idlement until the date that the compensation due is tendered. This result comports with the interest approach followed in discrimination cases under Arkansas-Carbona. 5 FMSHRC at 2051-53 & n.15.

We disagree with Clinchfield's argument that this outcome is harsh or punitive. Prejudgment interest is an accepted component of just and complete compensation. Clinchfield has not demonstrated any special equitable considerations that might justify an exception in this

7/ We note that 28 U.S.C. § 1961 (1982), authorizing postjudgment interest on monetary judgments in federal civil cases, does not purport to address the subject of prejudgment interest and does not bar its award in appropriate cases. E.g., *Bricklayers' Pension Trust Fund v. Taiariol*, 671 F.2d 988, 989 (6th Cir. 1982).

proceeding. While, as Clinchfield points out, this litigation has followed a protracted course, Clinchfield nevertheless has retained the benefit of the money involved throughout that period. Finally, although we do not question Clinchfield's good faith, its good faith does not preclude assessment of prejudgment interest. E.g., Stroh Container Co., supra; American Can Co., supra.

2. Rate and computation of interest

If interest is to be awarded, both parties urge us to cease applying the interest rate formula set forth in Arkansas-Carbona, supra. We conclude that there should be one interest rate method of computation applicable to both discrimination and compensation cases, and we agree that it is appropriate to modify the interest formula of Arkansas-Carbona.

In Arkansas-Carbona, we approved simple interest on back pay awards under section 105(c) of the Act to provide miners a "full measure of relief" from illegal discrimination or retaliation. 5 FMSHRC at 2049, 2052. In choosing an appropriate rate of interest, we considered "the potential cost to the miner both as a 'creditor' of the operator, and as a potential borrower from a lending institution under real economic conditions." 5 FMSHRC at 2050. In addition, we endeavored to select an interest rate "flexible enough to reflect economic and market realities, but not so complex in application as to place an undue burden on the parties and on judges...." Id. In light of these criteria, we adopted in that case the "adjusted prime rate" announced semi-annually by the Internal Revenue Service ("IRS") under the then applicable version of 26 U.S.C. § 6621 for purposes of fixing interest on overpayment and underpayment of taxes. Arkansas-Carbona, 5 FMSHRC at 2050-51. 8/ In so doing, we followed the practice of the NLRB, which applied the adjusted prime rate as the interest rate on back pay awards under the NLRA. See Olympia Medical Corp., 250 NLRB 146, 147 (1980); Florida Steel Corp., 231 NLRB 651 (1977). At the same time, we adopted the "quarterly method" of calculating the amount of back pay and interest due. 5 FMSHRC at 2051-54.

The Tax Reform Act of 1986, Pub. L. 99-514, 100 Stat. 2085 (1986), however, changed the method by which the IRS computes interest on overpayment and underpayment of taxes, as of January 1, 1987. Use of the adjusted prime rate as determined by the Federal Reserve Board was abandoned, and the IRS now uses the "short-term Federal rate." 26 U.S.C.A. § 6621 (Supp. 1988). This rate is determined by the Secretary of Treasury based on the average market yield on outstanding marketable obligations of the United States with remaining periods to maturity of three years or less. 26 U.S.C.A. § 1274(d)(1)(C)(i) (Supp. 1988). The short-term Federal rate is determined for the first month in each calendar quarter and applies during the first calendar quarter beginning

8/ The adjusted prime rate is a percentage of the average predominant rates quoted by commercial banks to large businesses as determined by the Federal Reserve Board and rounded to the nearest full percent.

after such month. 26 U.S.C.A. § 6621(b) (Supp. 1988). ^{9/} These rates are rounded to the nearest full percent. 26 U.S.C.A. § 6621(b)(3) (Supp. 1988). The overpayment interest rate (paid by the IRS on tax refunds) is the short-term Federal rate plus 2 percentage points and the underpayment rate (paid by the taxpayer on additional taxes) is the short-term Federal rate plus 3 percentage points. 26 U.S.C.A. § 6621(a) (Supp. 1988).

In response to this legislation, the NLRB in May 1987 abandoned its use of the adjusted prime rate and chose the underpayment rate of short-term Federal interest as its interest rate for back pay awards. New Horizons, supra, 283 NLRB No. 181, 125 LRRM 1177. The NLRB concluded that the short-term Federal rate corresponds to private economic market forces, is subject to periodic adjustment, is relatively easy to administer, and, because the rate is determined on a quarterly basis, mirrors the quarterly method of back pay calculation. 125 LRRM at 1178.

We agree and select the short-term Federal rate applicable to underpayment of taxes as the interest rate for compensation awards. The short-term Federal rate, based on average market yields of marketable federal obligations, is influenced by private economic market forces, and captures the "economic and market realities" that a remedial interest rate should embody. Arkansas-Carbona, 5 FMSHRC at 2050. It is periodically adjusted and responds to changing economic conditions. Since the rate is publicly announced well in advance of the effective date, it also offers reasonable notice to parties and our judges and would be relatively easy to administer. Finally, the underpayment rate is reflective of the cost to miners of borrowing money when deprived of a paycheck and, therefore, tends to compensate them more fully for their potential losses as borrowers. See Arkansas-Carbona, supra; Youngstown Mines, 1 FMSHRC at 996.

We note that these same considerations apply with equal force to the award of back pay under section 105(c) of the Act, the context in which Arkansas-Carbona was decided. For that reason, and to enhance the efficiency of the administration of the remedial aspects of the Act, we adopt, for all cases in which decisions are issued after the date of this opinion, the short-term Federal underpayment rate as the interest rate on both compensation and discrimination awards. Because there would have been no major differences between the adjusted prime rate approved in Arkansas-Carbona and the short-term Federal underpayment rate since January 1987, we exercise our discretion to apply the short-term rate retroactively to January 1987. Cf. New Horizons, 125 LRRM at 1178.

The applicable interest rates with their corresponding daily rates for back pay and compensation awards from January 1, 1978, through December 31, 1988, are as follows:

^{9/} For example, the rate determined in April of a given year applies to the months of July, August and September of that year.

January 1, 1978 to December 31, 1979....6% (.0001666 per day)
 January 1, 1980 to December 31, 1981...12% (.0003333 per day)
 January 1, 1982 to December 31, 1982...20% (.0005555 per day)
 January 1, 1983 to June 30, 1983.....16% (.0004444 per day)
 July 1, 1983 to December 31, 1984.....11% (.0003055 per day)
 January 1, 1985 to June 30, 1985.....13% (.0003611 per day)
 July 1, 1985 to December 31, 1985.....11% (.0003055 per day)
 January 1, 1986 to June 30, 1986.....10% (.0002777 per day)
 July 1, 1986 to September 30, 1987.....9% (.0002500 per day)
 October 1, 1987 to December 31, 1987...10% (.0002777 per day)
 January 1, 1988 to March 31, 1988.....11% (.0003055 per day)
 April 1, 1988 to September 30, 1988....10% (.0002777 per day)
 October 1, 1988 to December 31, 1988...11% (.0003055 per day) 10/

As to the computation of interest awards, the Arkansas-Carbona quarterly method has stood the test of time since its announcement in 1983. 5 FMSHRC at 2051-54. Therefore, we retain the quarterly method of remedial award computation based on use of the four calendar quarters and substitute the short-term Federal underpayment rates for the adjusted prime rates from January 1, 1987, forward. For purposes of calculating such awards in the compensation sphere, the explanation and computational example provided in Arkansas-Carbona (5 FMSHRC at 2051-54) supply the needed guidance and are incorporated herein by reference. 11/

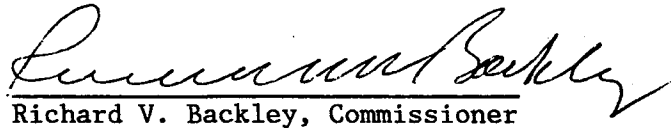
10/ It is necessary to convert the interest rates announced by the IRS to daily rates ("daily interest factors") in order to calculate interest on periods of less than one year. See Arkansas-Carbona, 5 FMSHRC at 2051, 2052-53.

11/ A Federal Register notice summarizing this interest calculation holding will be published. In the future the Commission's Executive Director will timely forward to the Commission's Chief Administrative Law Judge, for dissemination to our judges, appropriate updated lists of the applicable interest rates and the daily interest factors. The public may also obtain the lists of relevant interest rates by submitting written requests addressed to the Commission's Executive Director, 1730 K St., N.W., Washington, D.C. 20006.

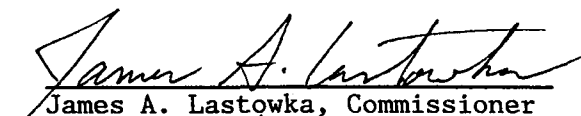
III.

Conclusion

For the foregoing reasons, we affirm the judge's award of compensation, his disallowance of attorney's fees and costs, and his award of prejudgment interest on the compensation due. As announced herein, however, we modify the Arkansas-Carbona interest computation formula by adopting the short-term Federal underpayment rate as the interest rate applicable to both compensation and back pay awards, effective as of January 1, 1987. Accordingly, Clinchfield is directed to pay the complainants the stipulated sums of compensation due bearing interest from the stipulated date (9 FMSHRC at 1278-84), as provided for in this decision. 12/


Richard V. Backley, Commissioner


Joyce A. Doyle, Commissioner


James A. Lastowka, Commissioner


L. Clair Nelson, Commissioner

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

Distribution

John T. Scott, III, Esq.
Crowell & Moring
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004

Edward H. Fitch, Esq.
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, VA 22203

Earl R. Pfeffer, Esq.
UMWA
900 15th St., N.W.
Washington, D.C. 20005

Administrative Law Judge Gary Melick
Federal Mine Safety & Health Review Commission
5203 Leesburg Pike, Suite 1000
Falls Church, Virginia 22041

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 2 1988

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 88-26-M
Petitioner	:	A.C. No. 16-01068-05504
v.	:	
	:	Fleniken Pit
FLENIKEN'S SAND AND GRAVEL,	:	
INCORPORATED,	:	
Respondent	:	

DECISION

Appearances: James A. Wirz, Esq., Office of the Solicitor,
U.S. Department of Labor, Dallas, Texas, for
the Petitioner;
Lyman Fleniken, President, Fleniken's Sand and
Gravel, Clinton, Louisiana, for the Respondent.

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). Petitioner seeks a civil penalty assessment in the amount of \$46 for an alleged violation of mandatory safety standard 30 C.F.R. § 56.15020. The respondent filed a timely answer contesting the alleged violation, and a hearing was convened in Baton Rouge, Louisiana. The parties waived the filing of any posthearing arguments, but I have considered their oral arguments made on the hearing record in my adjudication of this matter.

Issues

The issues presented in this case are (1) whether the conditions or practices cited by the inspector constitute a violation of the cited mandatory safety standard, (2) the appropriate civil penalty to be assessed for the violation, taking into account the statutory civil penalty criteria found

in section 110(i) of the Act, and (3) whether the violation was "significant and substantial." 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, 29 C.F.R. § 2700.1 et seq.

Discussion

Section 104(a) "S&S" Citation No. 2866525, issued by MSHA Inspector Kenneth N. McCleary on September 9, 1987, cites a violation of mandatory safety standard 30 C.F.R. § 56.15020, and the condition or practice is described as follows:

While talking to the dredge operator and loader operator, a life jacket is not worn while performing duties on the dredge boat. The railing around the perimeter of the boat is approximately 36" high, the dredge operator at times works in a kneeling position, therefore could accidentally fall into the water. The water is 25-30 ft. deep and approximately 75 ft. to shore. The dredge boat platform sets about 3 or 4 ft. above the water with no hand holds to help him get out of the water. The dredge operator works alone.

Petitioner's Testimony and Evidence

MSHA Inspector Kenneth N. McCleary, Sr., testified as to his experience and training, and he confirmed that he inspected the respondent's dredge on September 9, 1987, and issued the citation in question. The dredge was located 75 to 100 feet from the shore of a 20-25 foot deep lake where it was pumping sand and gravel through a pipeline into a separator located on shore. Mr. McCleary stated that he motioned to the dredge operator from shore, indicating that he wished to come aboard for an inspection. The operator came down out of his control tower, put on a life jacket, and got into a rowboat and came ashore to pick him up. They went back to the dredge, and the operator took off his life jacket and went back up into the control tower (Tr. 8-13).

Mr. McCleary described the duties of the dredge operator, and stated that they included the changing of engine oil, turning the engine on and off, and keeping the deck clean. The life jacket was kept on a hook at the base of the control tower, and the dredge operator advised him that he did not wear his life jacket at all times while performing duties on the dredge. Mr. McCleary confirmed that his inspection took an hour, and during this time, the operator was in the control tower and was not wearing the life jacket (Tr. 14-15).

Mr. McCleary stated that the metal dredge decks become slick during the rainy season, and a person could possibly fall into the water. If he did, it was doubtful that he could get back to shore in time. Mr. McCleary described the dredge, and stated that it was rectangular in size, resting on pontoons, with two diesel engines on it for pumping sand and gravel. He drew a rough sketch of the dredge, and indicated that one engine was located approximately 2 to 3 feet from the dredge perimeter, and the second engine was no more than 3 feet from the perimeter. He also located the position of the engine start-stop switches on the dredge, and indicated that they were located 3 to 4 feet from the perimeter. There was a 36 inch high cable handrail installed around the perimeter of the dredge deck, and the dredge was situated approximately 3 to 4 feet out of the water, and there were no hand holds on the sides (Tr. 15-2, exhibit G-1).

Mr. McCleary confirmed that the operator performed no work on the deck while he was conducting the inspection, but advised him that his normal duties included the washing down of the deck to remove any excess oil spill, and this would be done once or twice a day on some occasions. Although he made no determination as to whether or not the operator's duties included the changing of engine oil, Mr. McCleary assumed that this would be done since most operators assist maintenance crews in the changing of oil. He did not determine whether the operator in fact changed the oil. The operator would stop and start the engines at the beginning and end of the shift.

Mr. McCleary believed that a wet and slick deck presented a strong possibility that the operator could slip on the deck while washing it down. If he bumped his head or was possibly knocked unconscious, he could fall into the water. He could also slip and fall under the handrail and would have nothing to hold on to. If the operator were in a kneeling position while wiping or cleaning up oil spills, this would expose him even more to the possibility of falling into the water. The hand rail would not prevent the operator from falling overboard because he could slip under it and could not reach it

while slipping into the water. The operator would be positioned between the engines and the dredge perimeter while washing down the deck area around the engines. The barge had no hand holds on its sides so that someone who fell into the water could grab and possibly get back on to the deck. Mr. McCleary confirmed that there are no MSHA standards requiring hand holds (Tr. 22-32).

Mr. McCleary believed that due to the rainy season in Louisiana, barge decks become wet and slick, and it was highly likely that the dredge operator could fall off the barge and into the water, and that his job duties would contribute to a greater hazard exposure. In the event the operator struck his head on the engine, deck, or handrail support poles, he could be knocked unconscious, and without a life jacket on, he would probably drown if he fell overboard. A life jacket would keep him afloat if he were unconscious. Mr. McCleary confirmed that the dredge operator worked alone, and since the engines produce quite a bit of noise, he believed that any cries of help from the operator would not be heard from the shore (Tr. 32-35). Based on all of these considerations, Mr. McCleary believed that the violation was "significant and substantial" (Tr. 36).

Mr. McCleary confirmed that he made a finding of "low negligence" because the respondent had not previously been cited for a violation of section 56.15020, during seven prior inspections conducted during the period October, 1985 through September, 1987 (Tr. 36-37, exhibit G-2).

On cross-examination, Mr. McCleary confirmed that the dredge was clean on the day of his inspection, and he believed that the deck was smooth "on the operator's side." He agreed that a diagram and sketch made by Mr. Fleniken depicting the side view of the dredge, with the positioning of the engines, operator's cabin, pump, handrails, and ladder leading to the cabin was accurate. Although Mr. McCleary stated that he could not recall the positioning of the engines, he had no reason to question the sketch, and Mr. Fleniken confirmed that all of his dredges are constructed as shown (Tr. 46-48).

Mr. McCleary confirmed that the dredge operator was in no danger of falling into the water while in his control booth, and would not be required to wear a life jacket while in the booth. Once the operator left the booth and started down the ladder, he would not be in danger of falling into the water because there was a double handrail on the ladder way. He also confirmed that he issued the citation on the basis of what the dredge operator told him concerning his work duties,

and that the cited standard does not per se require the wearing of a life jacket at all times while work is being performed on the dredge. The standard only requires a life jacket where there is a danger of falling into the water (Tr. 59-60).

In response to a question as to the absence of any danger of falling while the operator was performing duties on the deck of the dredge, Mr. McCleary responded that "the only time that there would be a danger of falling would be performing duties around the perimeter of the dredge" (Tr. 60). Mr. McCleary did not observe the operator walking around the perimeter of the dredge while he was there, nor did he observe him checking the engines. Mr. McCleary believed that if the operator were walking around the deck inspecting the engines, he would be required to wear a life jacket (Tr. 61-62).

Respondent's Testimony and Evidence

Respondent's president, Lyman Fleniken, disputed the location of one of the engines drawn on the sketch by Inspector McCleary, and he indicated that it was positioned parallel to the perimeter of the dredge, rather than perpendicular as shown on the sketch. Mr. Fleniken also stated that the rear engine was located 6 feet from the edge. He drew a sketch of the dredge, with the equipment in place (exhibit R-1, Tr. 42-44). Inspector McCleary confirmed that he made no notes or diagrams at the time of his inspection (Tr. 42-43).

Mr. Fleniken stated that the deck of the dredge is constructed of "diamond plate," and that "it's like perforation up and down the platform that you use so that you do not have a skid. The skid factor is greatly reduced" (Tr. 50). Inspector McCleary confirmed that he could not recall the "diamond plating," and indicated that the deck on the operator's control side was a smooth surface. He described this location as the area near the ladder leading to the control booth. Mr. McCleary also stated that the rest of the deck around the dredge perimeter was "probably rigid is the best I can remember" (Tr. 52).

Mr. Fleniken stated that the operator's cabin is enclosed with a door, and is equipped with a double guard rail. He confirmed that the dredge operator had been instructed to wear a life jacket when he comes down the ladder to the lower deck to adjust the tail and head rope, but he is not requested to wear the jacket while he is involved in duties on the deck itself (Tr. 51). He also indicated that depending on the amount of diesel fuel in the back engine compartment, the dredge would sit deeper in the water. Conceding that someone

could slip under the guardrail, Mr. Fleniken believed that if someone fell into the water, he would only have to reach up 2 feet, rather than 4 feet, to grab the edge of the dredge (Tr. 50).

Mr. Fleniken stated that the dredge was built in components, and that the main decking area containing the engines and pump is 12 feet wide. pontoons are located on both sides of the decking area, and they are 6 feet wide and 38 feet long. The guard rail is positioned all the way around the outside of the dredge. Given the width of the pontoons, a person would be 6 feet from the edge of the water while at one engine location, and 4 feet from the edge at the other engine location (Tr. 53).

Mr. Fleniken stated that he has been inspected four times during the past 2 years and that no other inspector has indicated that he needs an additional guard rail, or that a life jacket was required to be worn if one steps outside the guard rail. He was told that the operator did not have to wear a life jacket while inside the enclosed cabin house (Tr. 51). Mr. Fleniken stated that prior to Mr. McCleary's inspection, no other inspector requested him to install a mid-rail in addition to the existing guardrail, and although Mr. McCleary did not require him to install a mid-rail, he told him to either install a mid-rail or require the dredge operator to wear a life jacket the entire time he is on the lower deck. Mr. McCleary confirmed that this was true, and that the citation was abated by requiring the operator to wear a life jacket while performing duties around the deck of the barge (Tr. 56). Mr. Fleniken confirmed that he has now instructed the operator and maintenance personnel to wear a life jacket while on the lower deck hosing it down, changing oil, or performing maintenance and repair work (Tr. 55).

Inspector McCleary confirmed that in the event the respondent opted to install a mid-rail to the existing hand-rail around the perimeter of the dredge, there would be no requirement for the wearing of a life jacket. He also stated that "there are no standards regulating mid-rails, but we have accepted those in the past" (Tr. 57). Mr. Fleniken believed that the installation of a mid-rail would be a foot and one-half above the dredge decking, and it would be just as likely that someone could slip under that rail (Tr. 58).

Mr. Fleniken pointed out that contrary to Mr. McCleary's sketch, the oil plugs for changing the engine oil are located on the inside of the engines as shown on exhibit R-2, rather than the outside between the dredge perimeter and engines.

Mr. McCleary confirmed that he did not see where the oil plugs were located (Tr. 53-54). Mr. Fleniken also confirmed that the entire dredge deck is diamond plated, even up to the cabin house, and that is the way he constructed the dredge (Tr. 54).

Mr. Fleniken confirmed that the dredge operator's job description includes duties such as keeping the decks clean, and occasionally helping out in changing oil and performing maintenance. He also confirmed that a life jacket was available for the operator, and that he wore it while going back and forth from the dredge to shore in a paddle boat (Tr. 77-78).

Mr. Fleniken confirmed that he personally constructed the dredge approximately 3 or 4 years ago. His employees are not instructed to wear any particular type of shoes while working on the dredge, but that most of them wear "work boots." No employee has ever informed him that they had ever slipped on the dredge, nor have they ever expressed a concern for their safety. A water hose is used to wash down the deck, and it can reach all areas of the deck, including the engines. He conceded that the metal deck of the dredge is slicker when it is wet, and that one has to be careful when it is wet. However, he knows of no one slipping or injuring themselves on the deck, and no oil spills have ever occurred on the deck. Any oil spilled during changes is soaked up by a powder solution, and then hosed down. No one has ever slipped and fallen into the water from the dredge. Although people have slipped into the water from a boat while connecting the pipeline together, life jackets were always worn in these instances (Tr. 85).

Findings and Conclusions

Fact of Violation

The respondent is charged with a violation of mandatory safety standard 30 C.F.R. § 56.15020, which requires the wearing of life jackets or belts where there is a danger of falling into water. In order to establish a violation, the petitioner has the burden of proof to establish by a preponderance of the credible and probative evidence that the cited employee was not wearing a life jacket while performing certain work duties which may have placed him in danger of falling into the water. In this case, the inspector issued the violation on the basis of several assumptions and conclusions which he made through observations of the barge and its equipment, general weather conditions, and a brief conversation with the dredge operator, during which the operator informed

him that he did not wear a life jacket at all times while performing work on the dredge which was located approximately 100 feet from shore on a 20-25 foot deep lake where the dredge was pumping sand and gravel to shore through a pipeline.

The evidence establishes that the dredge was equipped with a life jacket which was hung on a hook at the base of a stairway leading to the dredge operator's control booth. The operator put the life jacket on when he went ashore with a boat to bring the inspector to the dredge so that he could inspect it, but took it off and hung it back at the stairway location after the inspector came aboard. After a brief conversation with the inspector, the operator returned to his control booth without the life jacket and remained there until the inspector completed his inspection. The dredge operator was not called to testify in this case, and the petitioner relies on the testimony of the inspector in support of the alleged violation. The respondent relies on the testimony of its owner and mine operator who designed and constructed the dredge, and who was thoroughly familiar with its operation.

The inspector confirmed that he made no notes or sketches at the time of his inspection. Although he confirmed that he could not recall the positioning of the engines on the dredge, during the hearing he presented a sketch showing the two engines parallel to the handrail which was installed along the perimeter of the deck, and he indicated that that the engine oil changing plugs were located on the outside of the engines 4 feet from the handrail. If this were true, it would place anyone kneeling and changing oil in the area between the engines and the handrail, thus exposing him to a possible hazard if he were to slip or fall under the handrail and into the water.

Mr. Fleniken, who designed and constructed the dredge, testified that one of the engines was perpendicular to the handrail, that the oil change plugs were located to the inside of the dredge engines, and that the dredge rested on pontoons (exhibit R-2). The inspector confirmed that he had no reason to question Mr. Fleniken's testimony, which I find to be more credible and probative than the inspector's. Mr. Fleniken's testimony also refutes the inspector's belief that anyone changing the oil would be in danger of falling into the water if he were to slip or fall while performing this work. In light of the inspector's belief that the only time anyone would be in danger of falling would be while working around the perimeter of the dredge, I find no basis for concluding

that anyone changing or cleaning up oil around the engines would be in danger of falling into the water.

The inspector agreed that the dredge operator would not be in any danger of falling into the water while in his control booth, and would not be required to wear a life jacket while in the booth. The inspector also agreed that no life jacket would be required to be worn when the operator left his booth and started down the access ladder to the dredge deck because there was a double handrail at that location to prevent him from falling overboard. The inspector was concerned about the absence of double, or mid-rails, around the perimeter of the dredge to prevent anyone from slipping under the rail into the water, and the absence of hand-holds on the side of the dredge, which the inspector believed could be grabbed by anyone falling overboard. However, the inspector conceded that MSHA has no standards that require mid-rails or hand-holds to be installed on a dredge. In my view, if MSHA believes that such safety devices are necessary to prevent persons from falling off a dredge operating over water, it should promulgate standards covering this hazard. Requiring a miner operator to comply with a safety jacket standard as a matter of expediency or convenience in order to address what an inspector may perceive to be hazards associated with the lack of hand-holds or mid-rails can only lead to confusing and contradictory enforcement judgments by different inspectors, and gives little guidance or notice to a mine operator as to what may be required for compliance.

In the instant case, the inspector admitted that he required the respondent to either install a mid-rail around the entire perimeter of the dredge, or to require his employees to wear life jackets during the entire time they are on the deck of the dredge performing any work. The citation was abated after the respondent instructed his employees to wear life jackets at all times while working on the deck, notwithstanding the fact that the standard only requires the wearing of a life jacket where there is a danger of falling into the water. Followed to its logical conclusion, and on the facts of this case, it seems obvious to me that the inspector's interpretation of section 56.15020, is that life jackets are to be worn at all times while an employee is working on a dredge deck, regardless of any objective finding as to whether or not the employee is in danger of falling into the water.

I find the inspector's position in this case to be rather contradictory. He conceded that he did not observe the dredge operator walking around the perimeter of the dredge, and did not observe him go near the engines to inspect them, service

them, or change the oil. Yet, he concluded that the operator would be required to wear a life jacket if he were inspecting the engines or changing oil or cleaning up any oil spills, even though he believed that the only time there would be a danger of falling into the water would be when someone would be working around the perimeter of the dredge. In this case, the engines were located on the deck some 6 feet from the perimeter guarded by a handrail, with pontoons on both sides, and with the oil change plugs to the inside of the deck away from the perimeter of the deck.

With regard to the inspector's concern about someone slipping on a wet deck during the "rainy season," and possibly striking their head and falling into the water, this could occur at anytime. However, in this case, there is no evidence that the deck was wet or slick at the time of the inspection, and in fact the inspector confirmed that it was dry and clean. Further, Mr. Fleniken's testimony, which I find credible, reflects that the surface of the entire deck was constructed of "diamond plate," or perforated materials, so as to the reduce the likelihood of any skidding. Mr. Fleniken also indicated that any oil spills are controlled by means of a soaking powder, and that the deck is washed down by means of a water hose which can reach any surface area of the deck. The inspector could not recall the perforated decking material, and believed that part of the decking around the operator's compartment was smooth, and that the rest was "rigid." Since the inspector took no notes when he inspected the dredge, and was unsure as to the construction of the decking, I give more credence to Mr. Fleniken's testimony since he designed and built the dredge himself and he impressed me as a credible and straightforward witness.

After careful review and consideration of all of the testimony and evidence adduced in this case, I cannot conclude that the petitioner has established that the prevailing conditions at the time of the inspection presented a hazard to the operator falling overboard into the water without a life jacket. On the facts of this case, it seems clear to me that the inspector's conclusion that the operator was in danger of falling overboard was based on the inspector's unsupported speculations and assumptions that anyone performing any kind of work on the deck of the dredge would ipso facto be placed in jeopardy of falling overboard. Given the language of the standard, I cannot come to this conclusion. In order to establish a violation, I believe it is incumbent on the petitioner to establish a reasonable credible and probative factual basis to support a conclusion that there was a danger of someone falling into the water. I find no credible evidentiary basis

for such a conclusion in this case. Under the circumstances, I conclude and find that the petitioner has failed to establish a violation, and that the citation should be vacated.

ORDER

In view of the foregoing findings and conclusions, Citation No. 2866525, September 9, 1987, citing an alleged violation of 30 C.F.R. § 56.15020, IS VACATED, and the petitioner's proposed civil penalty assessment is REJECTED. This case IS DISMISSED.


George A. Koutras
Administrative Law Judge

Distribution:

James A. Wirz, Esq., Office of the Solicitor, U.S. Department of Labor, 525 South Griffin Street, Suite 501, Dallas, TX 75202 (Certified Mail)

L. L. Fleniken, Jr., President, Fleniken's Sand and Gravel, Incorporated, Rt. 1, Box 160, Clinton, LA 70722
(Certified Mail)

/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

2 SKYLINE, 10th FLOOR

5203 LEESBURG PIKE

FALLS CHURCH, VIRGINIA 22041

NOV 2 1988

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 87-116-M
Petitioner	:	A.C. No. 40-00049-05508
v.	:	
	:	Docket No. SE 87-132-M
HOOVER INCORPORATED,	:	A.C. No. 40-00049-05509
Respondent	:	
	:	Donelson Pike Quarry & Mill

DECISIONS

Appearances: Michael L. Roden, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner;
James H. Neely, Safety Director, Hoover, Inc., LaVergne, Tennessee, for the Respondent.

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern civil penalty proposals filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking civil penalty assessments for two alleged violations of certain mandatory safety standards found in Part 56, Title 30, Code of Federal Regulations. The respondent filed timely answers contesting the proposed civil penalties and hearings were held in Nashville, Tennessee. The parties waived the filing of posthearing proposed findings and conclusions. However, all oral arguments made by the parties on the record during the course of the hearings have been considered by me in the adjudication of these cases.

Issues

The issues presented in these cases are (1) whether the conditions or practices cited by the inspector constitute a violation of the cited mandatory health standards, (2) the appropriate civil penalty to be assessed for the violation,

taking into account the statutory civil penalty criteria found in section 110(i) of the Act, and (3) whether the violations were "significant and substantial."

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977; Pub. L. 95-164, 30 U.S.C. § 801 et seq.
2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).
3. Commission Rules, 29 C.F.R. § 2700.1 et seq.

Stipulations

The parties stipulated to the following (Tr. 5-8; Pretrial Joint Stipulations):

1. Hoover, Incorporated is a Tennessee corporation which is in the business of surface mining and producing crushed limestone for resale in interstate commerce, and thus is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its administrative law judges.

2. As of June 1987, Hoover, Incorporated operated the Donelson Pike Quarry and Mill in Nashville, Tennessee, which employed 41 men and produced approximately 5,331.33 tons of crushed limestone per day. On October 2, 1987, Hoover, Incorporated closed the Donelson Pike Quarry and Mill and is no longer operating at that site. All of its operations in the State of Tennessee are now located in Rutherford County. From June 1987 through April 1988, Hoover, Incorporated overall has employed 181 men and produced an average of 9,734.64 tons of crushed limestone per day.

3. Lawson Beech was the superintendent of the Donelson Pike Quarry and Mill in June 1987. T. S. Hoover was and is the president and majority stockholder of Hoover, Incorporated.

4. The Donelson Pike Quarry and Mill began operations in 1957, and remained in active operation until October 1987.

5. On June 1, 1987, at approximately 10:30 a.m., during a regular inspection of the quarry site, MSHA Inspector Donald Baker observed an employee sitting on an "I" beam using a hammer to hit a metal chute obstructed by crushed limestone. The employee was not wearing a safety belt or line while performing this task. The beam was approximately 8-1/2 feet above the level ground. It had been raining earlier that morning, and the employee's shoes were wet and muddy.

6. On June 18, 1987, in response to a complaint by a former employee, MSHA Inspector Lloyd Cloyd tested the brakes of a 35-ton Caterpillar truck, No. 505029, owned by Hoover, Incorporated and used at the Donelson Pike Quarry and Mill. The brakes were tested on an inclined road in the quarry, with the truck empty, and the inspector sitting in the seat beside the driver. When the brakes were applied, the truck did not come to a complete stop. The truck was traveling between eight and nine miles per hour when the brakes were applied.

7. The truck was immediately taken to the shop for repairs. A new equalizer, or slack adjuster, was installed.

8. Two days earlier, on June 16, 1987, the brakes on the truck had been worked on by a repairman.

9. The total penalty assessment for both cases of \$147.00 would have a negligible effect on the ability of Hoover, Incorporated to continue in business.

Discussion

The contested citations issued in these proceedings are as follows:

Docket No. SE 87-116-M. Section 104(a) "S&S" Citation No. 3052407, issued on June 1, 1987, by MSHA Inspector Donald R. Baker, cites a violation of mandatory safety standard 30 C.F.R. § 56.15005, and the condition or practice is described as follows:

An employee was observed sitting on an "I" beam using a hammer to hit a metal chute that was hung-up with crushed limestone. The employee wasn't wearing a safety belt and line to prevent a fall to ground level if he slipped off this "I" beam. The "I" beam was wet and muddy. A fall of approximately ten feet to ground level exists at this location. This work was being performed at the primary crushing and screening plant.

Petitioner's Testimony and Evidence

MSHA Inspector Donald R. Baker testified as to his experience and training, and he confirmed that he inspected the subject mine on June 1, 1987. It had rained earlier that morning, and the area around the crusher plant was wet and muddy. The respondent's superintendent Lawson Beech, accompanied him during his inspection. They proceeded to the secondary crusher plant which was down because a chute was "hung up with limestone." Mr. Baker identified exhibit G-1 as a photograph of the secondary plant and bins with the chute in question. As they got out of Mr. Beech's pick-up truck, Mr. Baker observed an employee sitting on an I-beam using a small sledgehammer hitting the metal chute to unclog the chute and to help the material flow. The employee was seated in front of the chute with his legs off to the side, but he was not straddling the beam, and his legs were not resting on anything. Mr. Baker took it for granted that the individual was a maintenance man, and he was not wearing a safety belt. He was located approximately 10 feet off the ground, and Mr. Baker agreed that it could have been 8-1/2 feet as stipulated to by the parties. A pile of rock was located to one side on the ground, and the ground directly under where the man was sitting was level (Tr. 10-21).

Mr. Baker stated that the beam was wet and muddy, but he could not tell whether or not the man's shoes were also wet and muddy. Mr. Baker's shoes were wet and muddy from walking around in the area. Mr. Baker stated that the man used a ladder shown in the photograph to reach the beam, and then walked out on the beam to reach the chute. Mr. Beech climbed the same ladder and went out on the beam to speak with the individual in question for a few minutes. Mr. Baker believed that Mr. Beech also hit the chute with the hammer while he was up on the beam, and then he and the other individual came down. Mr. Baker asked Mr. Beech if any safety lines or belts were

available, and Mr. Beech replied "we don't have any on the property, but I can get some" (Tr. 21-24).

Mr. Baker believed that the individual on the I-beam could have fallen off while seated on the beam, and while walking on it to reach the chute. In the event of a fall to the ground, the individual could have suffered broken bones as a minimum, or a concussion if he fell on his head. Mr. Baker believed that the individual could have tied off on one of the beam braces if he had used a safety belt. Mr. Baker confirmed that he advised Mr. Beech that he was issuing a citation, and served the written citation later (Tr. 24-26; exhibit G-2).

Mr. Baker believed that an accident and injury reasonably likely would occur because of the fact that the individual was sitting on a wet and slippery beam, and since he needed to walk the beam to reach the chute location, there were several places where he could have fallen off (Tr. 27). He also believed that any injury would be a lost work time injury because a broken bone would have required medical attention. Under these circumstances, Mr. Baker concluded that the violation was significant and substantial (Tr. 28). Mr. Baker confirmed that he made a finding of "low negligence" because on prior inspections the respondent had a good compliance record, and he did not believe the respondent realized what the hazard was, and if it did, it would have made a safety belt and line available (Tr. 29).

On cross-examination, Mr. Baker confirmed that he did not see how the individual sitting on the beam got there, but he did observe Mr. Beech climb on the ladder to the walkway, and then cross over the conveyor to the beam (Tr. 30). Mr. Baker estimated that the individual sitting on the beam was approximately 3 feet from the chute, but he did not measure the distance. Mr. Baker stated that he would not argue with Mr. Neely's assertion that the employee was 22 inches from the chute, and Mr. Baker indicated that his estimate was based on his "eyeballing it" from ground level. The individual was not really "stretched out," and he would have been "pretty close" to the chute (Tr. 33). Mr. Baker conceded that there could have been some "buildup" of crushed stone on the ground under the beam, but that "I really never noticed it" (Tr. 37). He confirmed that the distance that the individual had to stretch to reach the chute was a consideration as to the danger involved because "he's leaning forward using a hammer and if he's gong to lose his balance, he could lose his balance that way." He also agreed that a 22-inch stretch would have placed the individual in a dangerous situation (Tr. 37).

Respondent's Testimony and Evidence

James H. Neely, respondent's safety director, testified that he did not believe there was a danger of falling in this case because "with all the framework and braces that were there, you would have had to have pushed the man off almost, tied his hands and pushed him off to have gotten him to fall" (Tr. 41). Referring to a photograph, exhibit R-3, similar to petitioner's photograph, Mr. Neely explained that one could not walk the beam in question without holding on to a beam "because there's not that much room" (Tr. 41).

Mr. Neely stated that his position is that the individual could not have fallen to the ground because there was ample opportunity for him to grasp the braces and framework of the structure shown in the photograph (Tr. 43). He also explained that wet rock was being processed on the day in question, and that when it "got bridged over" a hammer sometimes has to be used to loosen it, but that this does not occur frequently (Tr. 44). If it were an everyday occurrence, a walkway and handrail would have been constructed to provide working access to the chute (Tr. 45). He also believed that tying off on a slick beam would be more difficult than simply sitting on the beam with an arm around a beam (Tr. 45).

On cross-examination, Mr. Neely stated that since the steel beams had two quarter-inch flanges, they would provide a "hand hold" for anyone to grab if he were falling, and this would be true even if the beam were wet. He agreed that any fall would occur "suddenly," but he saw no reason for anyone falling because of the presence of braces for anyone to grab or put their arms around. Referring to photographic exhibit G-1, Mr. Neely stated that the individual was sitting on the bottom beam as shown in the photograph, and that he could have braced his feet against the crusher feed box. However, since he did not observe the individual on the beam when the inspector did, Mr. Neely did not know for a fact that his feet were braced against the box (Tr. 45-52).

Docket No. SE 87-132-M. Section 104(a) "S&S" Citation No. 2862746, issued on June 18, 1987, by MSHA Inspector Lloyd W. Cloyd, cites a violation of mandatory safety standard 30 C.F.R. § 56.9003, and the condition or practice is described as follows:

The 35-ton Caterpillar Truck Co. No. 29 did not have adequate brakes. The brakes were checked on the inclined road in the quarry with the truck empty. When the foot brake was

applied the truck was going between 8 and 9 miles per hour and continued to roll for several feet before stopping. This truck was immediately taken to the shop for repairs.

Petitioner's Testimony and Evidence

In view of the unavailability of MSHA Inspector Lloyd W. Cloyd, his pretrial deposition was taken on June 28, 1988, with the respondent's representative Neely present, and the transcript of Mr. Cloyd's testimony, including two photographic exhibits, were received as part of the record in this matter (Tr. 7; exhibit G-1).

Inspector Cloyd confirmed that he inspected the cited truck on June 18, 1987, and the brakes were tested that day on the haulroad with an approximate grade of 15 percent. He was seated next to the driver while the truck was driven down the road at an approximate speed of 8 or 9 miles per hour, and the truck was empty. Prior to the actual test, the driver advised him that the truck brakes were "fair," and that the truck would stop "sometimes" when the brakes were applied on the incline. The driver applied the brakes while the truck was approximately two-thirds down the inclined road, or approximately 200 to 300 feet down the roadway, at the location shown by an "X" mark which he placed on a copy of a photograph shown on deposition exhibit No. 1. Mr. Cloyd confirmed that he observed the driver apply the brakes to the fullest extent possible by raising up off the seat and applying pressure to the brake pedal, and when he did, the truck slowed, but continued to roll for approximately 30 to 40 feet before coming to a stop. After it stopped, Mr. Cloyd checked the emergency brake, and found that it was in working order (Tr. 6-15).

Mr. Cloyd stated that after completing his inspection of the truck, Mr. Neely advised him that work was performed on the truck brakes on the Tuesday prior to his inspection on Saturday, June 18, 1987, but Mr. Neely did not advise him as to why the brakes needed work and did not identify any particular problem. Mr. Cloyd confirmed that he had received two prior complaints about the brakes from the operator who stated that "the brakes worked perfect most of the time, but sometimes he would mash on the pedal and have nothing" (Tr. 16). Mr. Cloyd further confirmed that repair work was done on the brakes after the citation was issued, and that the Caterpillar Company was immediately called to do the repairs. Mr. Neely informed him that a new equalizer or slack adjuster was installed on the truck, and that the purpose of the equalizer was to provide equal air pressure to all of the wheels, and

the lack of such pressure would hinder the brakes from stopping the truck. The only reason for replacing the equalizer would be to replace one that is defective (Tr. 15-18).

Inspector Cloyd stated that he classified the violation as "significant and substantial" because of the steepness of the inclined roadway, and the fact that there was a 90 degree curve at the bottom of the roadway, with a solid limestone wall in front of it. He also considered the fact that the past history of the cited truck indicated that there had been previous problems (Tr. 18-19). Inspector Cloyd confirmed that after the truck was repaired, he checked it while it was loaded at the dump, and found that the brakes "worked perfect." He did not test the truck with a load before repairs were made because he saw no reason to load it up with 30 tons of rock, and he believed that a load would have further hindered it from stopping. Mr. Cloyd confirmed that the citation was abated on June 19, 1987, after the repairs were made, rather than September 19, as previously noted (Tr. 24).

At the hearing, petitioner's counsel introduced a copy of a work invoice indicating certain work which was done on the truck brakes on June 15, 1987, and this work included the installation of a hose to the left front wheel, two pistons on the slack adjuster or equalizer, and a diaphragm on the parking brake valve (Tr. 11; exhibit G-4).

Respondent's Testimony and Evidence

Safety Director James H. Neely, introduced a statement executed by William E. Reeves, the mechanic who inspected the truck and performed the work on it after it was removed from service on June 18, 1987. Mr. Reeves states that the brakes "were in good working order," and that "the retarder and parking brake were also working well." Mr. Reeves also stated that "I could find no indication that the brakes were unsafe. As a preventive maintenance measure, I did replace two pistons in the slack adjusted at the time of this brake check (Exhibit R-5).

Mr. Neely asserted that the slack adjuster installed by Mr. Reeves was installed "so that we could put the truck back in operation, because I wouldn't attempt to take it after the inspector would leave--take the truck back down there and put it in operation without doing something" (Tr. 13-14). Mr. Neely confirmed that shortly after Mr. Reeves arrived to inspect the truck, they drove the truck around the shop area, checked the hand brakes and retarder, and found that they both worked and would stop the truck (Tr. 15).

Mr. Neely stated that the 30-40 feet within which the truck stopped after being tested by Inspector Cloyd was just a fraction over the actual length of the truck itself, and an unloaded 80,000 ton truck going down a 15-degree grade on a loose rock road cannot be expected to stop any quicker than that distance. Mr. Neely explained the operation of the compressed air truck brakes, and indicated that the stopping distance of 30-40 feet for the truck when the brakes are applied is normal (Tr. 17). Mr. Neely also pointed out that given the fact that work started at 6:00 a.m. on the day of the inspection, and the truck was inspected by Mr. Cloyd at 9:00 a.m., the truck operator must have made 10 or 12 trips with the truck, loaded and unloaded, and did not report any problems with the brakes (Tr. 17).

Mr. Neely stated that mine management was aware of the fact that the quarry was 410 feet deep, and presented dangerous conditions, and that was the reason why they had the truck repaired. He stated that "we had it fixed at that time because it was just too dangerous to take a chance" (Tr. 17). He confirmed that after the repairs, there was no reason to know that there was anything wrong with the brakes, and when they were checked, "there wasn't anything wrong with them," and all three brake systems were working (Tr. 18).

On cross-examination, Mr. Neely confirmed that he was not at the mine site on June 18, 1987, when Mr. Cloyd conducted his inspection. Mr. Neely confirmed that when he and Mr. Reeves tested the truck after it was cited at the same location while travelling 8 to 9 miles an hour, the speed at which trucks are allowed to operate on the incline, the truck travelled approximately 30 feet after the brakes were applied before it stopped. He reiterated that this was the normal stopping distance for an empty truck of its size, but if it were loaded, it would have rolled for 3 or 4 feet before stopping because the added weight would give it more traction (Tr. 20-22).

Mr. Neely confirmed that mechanical problems were encountered with the cited truck, as well as the other trucks, prior to the inspection by Mr. Cloyd, and that driving up and down hills 12 hours a day does wear on the trucks. He also confirmed that prior complaints were made about the cited truck in question, but they would be taken care of immediately. He described the complaints as "the brakes weren't working adequate, or maybe the wheels would grab it before the other one would." He also confirmed that the complaints indicated that "the brakes were erratic and sometimes they would work

and sometimes they wouldn't." When asked how long before the inspection of June 18, the complaints were made, he responded "it might be two weeks or it might be six months. You never know when those things occur. It's just like any other piece of machinery, you don't have any warning." Mr. Neely stated that the complaints were not made regularly, and "no more than the rest of them were," and since the cited truck was used primarily to haul from the quarry to the crusher, "it got more wear" than the other trucks which were not using their brakes as much (Tr. 22-24).

Mr. Neely stated that although the operable hand brake and retarder would have stopped the truck, he conceded that they were not the principal means for stopping the truck, and that the first thing a driver would do to stop a truck would be to apply the foot brakes (Tr. 25). Mr. Neely confirmed that he was not with Inspector Cloyd when he tested the truck after the brakes were repaired, but it was his recollection that the truck was not tested at the same location where it was cited or under the same conditions (Tr. 31).

Mr. Neely stated that management had no knowledge that the cited truck had a problem until the morning of June 18, when Inspectors Cloyd and Daugherty came to the mine in response to complaint made by an employee who had been discharged. Mr. Neely confirmed that the repairs made on the truck on June 15, were made in response to the truck operator's statement that one wheel was locking before the other one while going downhill, causing the truck to slide, and the operator was concerned that he might "wind up over against the buffer over the hill." In light of this, "we took corrective action right then" (Tr. 41).

Mr. Neely stated that his truck maintenance and service records would show that similar conditions could be found for all of the trucks from time-to-time, and in each instance, the repair company would be called to the mine to make the necessary repairs (Tr. 42). In the case at hand, Mr. Neely did not believe the citation was justified because all of the information available to management did not indicate any braking problems with the cited truck (Tr. 42-43).

Mr. Neely confirmed that the quarry site where the citation was issued has been shut down and is no longer in operation, and petitioner's counsel agreed that with the exception of the citation in issue in this case, the respondent had not previously been cited for inadequate braking condition on any of its trucks (Tr. 44-45).

Findings and Conclusions

Docket No. SE 87-116-M

Fact of Violation

In this case the respondent is charged with a violation of mandatory safety standard 30 C.F.R. § 56.15005, which requires the use of safety belts and lines when persons are performing work where there is a danger of falling. The credible un rebutted testimony of Inspector Baker establishes that an employee was sitting on an I-beam approximately 10 feet off the ground banging on a metal chute with a hammer while attempting to free up some material which had clogged the chute. The employee was not wearing a safety belt or line, nor was he tied off in any manner. He was seated on the beam in front of the chute with his legs off to one side, and he had to reach approximately 2 to 3 feet to strike the chute with his hammer. The inspector was concerned that the employee could have fallen from the beam while seated on it and striking the chute, or when he walked on the beam to reach his work location.

The respondent agreed that the employee in question was not using a safety belt or line, and its defense is based on its belief that the employee was in no danger of falling because of the presence of the steel framework of the structure in question. Respondent believed that the employee could have grabbed the beam flange as a "hand hold" in the event of a fall, and also argued that the employee could not have fallen while walking the beam because he could have held onto the steel braces.

Respondent's Safety Director, James Neely, confirmed that he did not observe the employee sitting on the beam without a safety belt or line as did the inspector. Based on the credible testimony of the inspector who confirmed his observations of the employee sitting on the beam and striking the metal chute with a hammer, I conclude and find that a violation has been established. The position of the employee on the beam 10 feet off the ground with a hammer in one hand striking the metal chute without using a safety belt or otherwise being tied off and secured to one of the nearby braces supports a reasonable conclusion that he was in a precarious location which clearly exposed him to a falling hazard. Such falls are usually unexpected and may occur at any time while an employee is preoccupied with his work. Mr. Neely conceded that any fall could occur suddenly, and the fact that the employee could have reacted by attempting to grab part of the structure

on which he was seated while performing his work is not in my view a reasonable defense to the violation. Under the circumstances, the citation IS AFFIRMED.

Docket No. SE 87-132-M

Fact of Violation

In this case the respondent is charged with a violation of mandatory safety standard 30 C.F.R. § 56.9003, for having inadequate brakes on one of its haulage trucks. Section 56.9003 requires powered mobile equipment to be provided with adequate brakes. Inspector Cloyd cited the truck after he had the foot brakes tested by the driver while the truck was being operated downhill and empty on an inclined haul roadway while travelling at approximately 8 or 9 miles an hour. The inspector was seated next to the driver while the test was performed, and his un rebutted testimony reflects that when the truck was approximately 200 to 300 feet down the haulroad, the driver applied the foot brakes to their fullest possible extent by raising up on his seat, but the truck continued to roll for approximately 30 to 40 feet before coming to a stop. In Mr. Cloyd's opinion, the incline where the truck was tested was not such as to present a problem for a truck with brakes in proper working order from coming to a complete stop when the brakes were applied (Deposition (Tr. 8)). Mr. Cloyd also believed that an empty truck travelling at 8 or 9 miles an hour should have no problem in stopping once the brakes were applied, and that the road conditions where the truck was tested would not have made stopping the truck a problem (Tr. 10-11).

In addition to the actual testing of the brakes, Inspector Cloyd confirmed that the driver advised him that the brakes were "fair," and that the brakes would stop the truck "sometimes" when the foot brakes were applied. Mr. Cloyd also confirmed that he had received prior complaints from the truck operator who advised him that while the brakes worked most of the time, there were times when he applied the brakes and "had nothing." Since the driver was not called to testify in this case, Inspector Cloyd's testimony regarding the comments of the driver are un rebutted.

The evidence establishes that after the truck was cited, it was immediately taken out of service and repairs were made by the installation of a brake equalizer or slack adjuster which provided equal pressure to all of the truck wheels, and Inspector Cloyd confirmed that the only reason for replacing the equalizer would be to replace one that was defective. A

statement by the mechanic who performed the repair work on June 18, 1987, reflects that two pistons in the brake adjuster were replaced as "a preventative maintenance measure" (Exhibit R-5).

The respondent asserts that repairs were made on the truck brakes prior to the time of the inspection and the issuance of the citation, and the record establishes that this was the case. In view of these prior repairs, respondent maintains that it had no reason to believe that the brakes were in other than operable condition, and that when the brakes were tested by the mechanic after the citation was issued, he found them to be in good working order and could find nothing to indicate that they were unsafe.

In defense of the violation, the respondent relies on the written statement by the mechanic expressing his opinion that the brakes were in good working order and not unsafe. However, the mechanic did not testify at the hearing, and neither he nor Mr. Neely were present when the inspector had the brakes tested in his presence under actual driving conditions. Consequently, I have given little weight to the mechanic's statements.

I take particular note of the fact that the mechanic did in fact replace some pistons in the brake slack adjusters, and Mr. Cloyd's testimony is that the slack adjusters served as a means of providing equal air pressure to all of the truck wheels, and would not be replaced if they were not defective. Given the fact that the driver had to raise up on his seat while applying full foot pressure to the brake pedal while they were being tested under actual driving conditions, I believe one can reasonably conclude that the failure of the truck to stop when the brakes were applied, and its continuing to roll, was the result of a lack of adequate and available air pressure on the foot brakes. Although Mr. Neely stated that the truck hand brakes and retarder were operable and would stop the truck when it was tested by the mechanic, he conceded that the retarder and hand brake were not the principal means for stopping the truck, and that the first thing a driver would do to stop the truck would be to apply the foot brakes. Mr. Neely also conceded that the cited truck was subjected to more brake wear than other trucks, and like other pieces of equipment, failures are unpredictable and can occur without warning.

Respondent's second defense is that the 30 to 40 foot rolling distance that the truck travelled after the driver applied the foot brakes was "normal." However, absent any indication that Mr. Neely is a brake expert, and lacking any

evidence as to the manufacturer's brake specifications or other credible evidence reflecting the actual "normal" stopping distances for an empty truck driving at 8 to 9 miles an hour, I find no basis for Mr. Neely's unsupported conclusion as to the "normal" stopping distance for the truck, and I have given it little weight. Further, I reject Mr. Neely's suggestion that the repairs made to the brakes after the citation was issued were made simply to abate the citation or to facilitate placing the truck back into operation. I believe that the repairs were made because they were needed, and the mechanic confirmed that he replaced the parts as a preventive measure. Inspector Cloyd confirmed that once these repairs were made, the brakes "worked perfect" when the truck was tested under a load.

In several reported cases interpreting the meaning of the term "adequate brakes," such determinations were made by the inspectors through their inspections of the braking systems where certain defects were noted, or by tests conducted on the trucks by operating them on inclines to determine their braking or stopping capability.

In Concrete Materials, Inc., 2 FMSHRC 3105 (October 1980), and Medusa Cement Company, 2 FMSHRC 819 (April 1980), Judge Melick and Judge Cook affirmed violations for inadequate brakes on haulage trucks based on tests conducted by the drivers by driving the trucks on inclines to determine their braking and stopping capability. In the Medusa Cement case, an MSHA inspector defined the term "adequate" as "capable of stopping and holding a loaded haul unit on any grade on the mine property." Judge Cook found that the test conducted by the inspector and his interpretation of the results obtained sufficiently established a prima facie case for inadequate brakes.

In Minerals Exploration Company, 6 FMSHRC 329, 342 (February 1984), Judge Morris affirmed an "inadequate brake" violation based on an inspector's observation that the cited water truck was "pulling very hard to the right." Testimony by the operator's foreman reflected that the brakes on the truck had been relined 2 weeks before the citation was issued.

In Turner Brothers, Inc., 6 FMSHRC 1219, 1259 (May 1984), and 6 FMSHRC 2125, 2134 (September 1984), I affirmed violations of section 77.1605(b), for inadequate parking brakes on a coal haulage truck and an endloader based on tests which consisted of parking the equipment on an incline and setting the brakes to determine whether they would hold. In both instances, the brakes would not hold the equipment, and I concluded that the brakes were inadequate.

In Greenville Quarries, Inc., 9 FMSHRC 1390, 1430 (August 1987), I affirmed a violation for inadequate brakes on two haulage trucks based on tests conducted on an incline which indicated that the brakes would not hold the truck and that they were "slow to stop" when the brakes were applied. Upon visual inspection of one of the trucks, the inspector found that the rear brake fluid cylinder was empty, and that on a second truck, the fluid cylinder was also empty, and the brake hoses were disconnected. He also found that 50 percent of the rear braking system on one truck was inoperative.

On the facts of the instant case, while it is true that the inspector did not physically inspect the brakes or find any specific defects, he nonetheless concluded that the empty trucks travelling at a slow rate of speed should have been capable of coming to a complete stop without rolling 30 to 40 feet after the foot brakes were applied by the driver, or without the necessity of the driver raising up on his seat to apply all of the available foot pressure to the brake pads. Coupled with the fact that repairs were made to replace a mechanism which controlled the air pressure for the foot braking system, and my conclusion that the lack of adequate air pressure to the brakes could reasonably have prevented the truck from coming to a complete stop sooner than 30 or 40 feet, I conclude and find that the petitioner has established by a preponderance of the available credible evidence that the cited truck foot brakes were in fact inadequate. Accordingly, the citation IS AFFIRMED.

Significant and Substantial Violations

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).

The question of whether any particular violation is significant and substantial must be based on the particular facts surrounding the violation, including the nature of the mine involved, Secretary of Labor v. Texasgulf, Inc., 10 FMSHRC 498 (April 1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987).

With regard to Citation No. 3052407, I conclude and find that the failure by the employee sitting on a wet and muddy I-beam in question to wear a safety belt or line where there was a danger of falling constituted a significant and substantial violation of section 56.15005. In the event of a fall, I believe it would be reasonably likely that the employee in question would have suffered injuries of a reasonably serious nature. I agree with the inspector's finding, and IT IS AFFIRMED.

I also agree with the inspector's significant and substantial finding with respect to Citation No. 2862746, concerning the inadequate brakes on the No. 29 Caterpillar truck. The

respondent did not dispute the fact that the inclined haulage road over which the truck normally traveled during the course of the working shift had a 90-degree curve at the bottom, with a solid wall in front of it. The respondent also did not dispute the fact that the depth of the quarry adjacent to the haulage road, as shown in the photograph exhibits G-2 and Deposition exhibit No. 1, posed a hazard, and Mr. Neely confirmed that the repairs made on the truck brakes on June 15, 1987, were in response to the concerns of the driver that one wheel was locking while going downhill, causing the truck to slide towards the edge of the roadway adjacent to the open pit below.

Given the fact that the inadequate brakes allowed the cited truck in question to roll some 30 or 40 feet before coming to a stop, I believe that one can reasonably conclude that the condition of the brakes posed a discrete hazard of the truck colliding with the wall at the foot of the haulage road or running off the roadway to the pit below in the event the driver applied his brakes while approaching the bottom of the hill while making the right turn. Inspector Cloyd confirmed that during the testing of the brakes he had the driver apply the brakes before reaching the curve at the bottom of the road at a pre-determined location out of concern for the curve in the road, as well as the wall, and he did so to allow an additional margin of safety in the event the driver was unable to completely stop the truck. The inspector confirmed that he based his "S&S" finding on the fact that the haulage road was steep and the presence of a 90-degree curve at the bottom with a solid limestone wall in front of it. He also considered the fact that the cited truck had a history of brake problems. Under the circumstances, I conclude and find that the inspector's finding was reasonable, and IT IS AFFIRMED.

History of Prior Violations

An MSHA computer print-out reflects that for the period October 1, 1985 through September 30, 1987, the respondent paid civil penalty assessments in the amount of \$903 for 26 violations, twenty (20) of which are "single penalty" \$20 assessed violations (exhibit G-3). For an operation of its size, I cannot conclude that the respondent's compliance record warrants any additional increases in the civil penalty assessments which have been made for the violations which have been affirmed in these proceedings.

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

The record reflects that the subject limestone quarry and mill operated by the respondent at the time the citations were issued is not in operation and was closed on October 2, 1987. During its operation, the respondent employed 41 miners at that location and the facility produced 5,331.33 tons of crushed limestone per day. From June 1987 through April 1988, the respondent employed 181 miners in all of its operations and produced an average of 9,734.64 tons of crushed limestone per day. I conclude and find that the respondent is a medium-to-large mine operator, and the parties stipulated that the payment of the proposed assessed civil penalty assessments for the violations in question would have a negligible effect on the respondent's ability to continue in business. I adopt this stipulation as my finding and conclusion on this issue.

Good Faith Compliance

The record establishes that the cited truck was immediately taken out of service and taken to the shop for repairs, and a new equalizer, or slack adjuster, was installed. With regard to the safety belt citation, the record reflects that when the employee was observed sitting on the eye beam without a safety belt or line, the respondent's quarry superintendent spoke to the employee and ordered him off the I-beam, and the respondent provided two safety belts and lanyards for use by its employees in the primary crusher area. I conclude and find that the respondent exercised good faith compliance by timely and rapidly abating both of the violations.

Negligence

I conclude and find that both of the violations which have been affirmed resulted from the respondent's failure to exercise reasonable care, and the negligence findings made the inspector's with respect to both violations, ranging from "low" to "moderate," are affirmed.

Gravity

On the basis of my findings and conclusions affirming the significant and substantial findings made by the inspectors, I conclude and find that both of the violations which have been affirmed in these proceedings were serious.

Civil Penalty Assessments

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

Docket No. SE 87-116-M

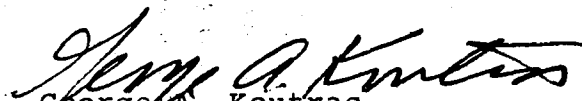
<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. Section</u>	<u>Assessment</u>
3052407	06/01/87	56.15005	\$ 42

Docket No. SE 87-132-M

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. Section</u>	<u>Assessment</u>
2862746	06/18/87	56.9003	\$105

ORDER

The respondent IS ORDERED to pay the civil penalties assessed in these proceedings within thirty (30) days of these decisions and order. Upon receipt of payment by the petitioner, these cases are dismissed.


George A. Koutras
Administrative Law Judge

Distribution:

Michael L. Roden, Esq., Office of the Solicitor, U.S.
Department of Labor, 2002 Richard Jones Road, Suite B-201,
Nashville, TN 37215 (Certified Mail)

Mr. James H. Neely, Safety Director, Hoover, Incorporated,
1205 Bridgestone Parkway, P.O. Box 1700, LaVergne, TN
37086-1700 (Certified Mail)

/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 2, 1988

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 88-244
Petitioner	:	A.C. No. 46-01318-03819
v.	:	
	:	Robinson Run No. 95 Mine
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Joseph T. Crawford, Esq., Office of the Solicitor,
U.S. Department of Labor, Philadelphia,
Pennsylvania, for Petitioner;
Michael R. Peelish, Esq., Consolidation Coal
Company, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Merlin

This case is a petition for the assessment of three civil penalties filed by the Secretary of Labor against Consolidation Coal Company. At the hearing, the parties advised that they had reached settlements in all three orders and were prepared to make their recommendations on the record. As appears herein, this was done. This hearing took place at the same time as other cases involving the parties were heard on the merits.

Order No. 2897149 was issued for a violation of 30 C.F.R. § 75.400 because combustible material had accumulated along the No. 1 mother belt conveyor and loose coal had accumulated under and along the belt at intermittent locations. The original assessment was \$1100 and the parties recommended a settlement of \$850. The Solicitor reported at the hearing that negligence was not as high as had originally been thought. He stated that at the time the order was issued the operator already had individuals in the process of cleaning up. There had been an intermittent but recurring problem with the belt which was constantly being repaired causing spillage to occur. However, the operator was attempting to deal with the problem. Operator's counsel pointed out that this was a very long belt which could become unaligned very quickly and when the operator attempted to realign the belt, spillage happened. The violation admittedly was serious. I accept the representations of counsel and based

thereon approve the recommended settlement which remains a substantial amount.

Order 2897348 was issued for a violation of 30 C.F.R. § 75.1403 because a left track switch had a missing barrel, making it unsafe to throw the switch. The order was based upon a prior safeguard which required all track switches be provided with switch throws, bridle bars and barrels. The original assessment was \$1000 and the parties recommended a settlement of \$650. Here again, the Solicitor advised at the hearing that negligence was not as high as had originally been thought. According to the Solicitor, the condition was first observed between one a.m. and three a.m. on Sunday morning. The mine was idled on the Sunday day shift and there was no repair crew available to make the correction on that shift or on the subsequent evening shift. The first repair crew did not operate until the next morning on the 12 a.m. to 8 a.m. shift. That crew was en route on the next morning to repair the missing barrel when they found a broken rail which had to be immediately replaced. While the crew was repairing the rail, the inspector cited the subject condition. In any event, the cited condition was corrected within fifteen minutes of the time it was discovered by the inspector. The crew caught up to the inspector and abated the condition forthwith. The violation was serious. I accept the representations of counsel and based thereon, approve the recommended settlement which remains a substantial amount.

Order 2897200 was issued for a violation of 30 C.F.R. § 75.200 because the approved roof plan was not being met with respect to pillar blocks. The plan required that prior approval be obtained from the district manager before splitting the pillar blocks. The operator failed to obtain approval. The original assessment was \$700 and the proposed settlement is for this amount. The Solicitor represented that although a violation existed, it was not significant and substantial because occurrence of an adverse event was unlikely. At the hearing I rejected this rationale and found that the violation was serious, pointing out that gravity is not synonymous with significant and substantial. I approve the recommended settlement because it is consonant with a serious violation.

In light of the foregoing, it is Ordered that the recommended settlements be Approved.

It is further Ordered that the operator pay \$2200 within 30 days from the date of this decision.

A handwritten signature in black ink that reads "Paul Merlin". The signature is fluid and cursive, with the first name "Paul" and last name "Merlin" clearly distinguishable.

Paul Merlin
Chief Administrative Law Judge

Distribution:

Joseph T. Crawford, Esq., Office of the Solicitor, U.S.
Department of Labor, 3535 Market Street, Philadelphia, PA 19104
(Certified Mail)

Michael R. Peelish, Esq., Consolidation Coal Company, 1800
Washington Road, Pittsburgh, PA 15241 (Certified Mail)

slk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

NOV 4 1988

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 88-19-D
ON BEHALF OF DENNIS WAGNER,	:	NORT CD 87-8
Complainant	:	
v.	:	McClure No. 1 Mine
	:	
CLINCHFIELD COAL COMPANY,	:	
Respondent	:	

ORDER APPROVING SETTLEMENT AND DISMISSING PROCEEDING

Before: Judge Broderick

On February 12, 1988, the Secretary of Labor (Secretary) filed on behalf of Dennis Wagner, a complaint alleging that Respondent violated Section 105(c)(1) of the Act, when it suspended and discharged Wagner because he reported a safety violation to a federal inspector.

The Secretary sought an order directing Respondent to pay interest on lost wages (Wagner was paid the wages he lost as a result of an arbitration decision), an order directing Respondent to reimburse complainant for private attorney fees incurred as a result of the discrimination, an order directing Respondent to comply with section 105(c), an order assessing a civil penalty, and an order directing Respondent to post a notice at the mine that it will not violate section 105(c).

Complainant Wagner intervened in this proceeding pursuant to 29 C.F.R. § 2700.4(b)(2). He also filed a separate proceeding against Respondent Clinchfield, Pittston Coal Group, three employees of Clinchfield or Pittston, the Secretary of Labor, the Mine Safety and Health Administration (MSHA), and two employees of MSHA. That proceeding was docketed as VA 88-21-D, and is presently before the Review Commission which directed the case for interlocutory review.

On October 17, 1988, the Secretary filed a motion to approve a settlement agreed to by the Secretary and Respondent Clinchfield. The settlement provides that Clinchfield will pay complainant Wagner interest at the adjusted prime rate on all wages lost as a result of his suspension; that Clinchfield agrees

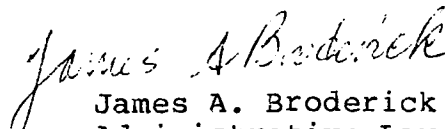
that it will comply with section 105(c), and will not discriminate against Wagner in violation of section 105(c); that Clinchfield agrees that its employees have the right to make safety complaints to MSHA, and that it will neither institute nor enforce any policy that requires such complaints be first made to Respondent; that Clinchfield will post a notice at the mine stating that it will not violate section 105(c) of the Act; that Clinchfield will expunge from its records all adverse statements concerning events leading up to, resulting in, or following Wagner's June 26, 1987, suspension; that Respondent will pay a civil penalty of \$700 to MSHA. Respondent does not, by agreeing to the settlement, admit that it violated the act.

The complaint in this case was filed by the Secretary. I must determine whether the proposed settlement is in the public interest, that is, whether it furthers the purposes of section 105(c) of the Act. One factor to be considered is whether the complainant on whose behalf the case was filed approves the settlement. But more important that his approval or disapproval is a consideration of what the complaint sought, and a comparison of what was sought with the result if the Secretary were to prevail in a contested case.

The settlement proposal achieves all the Secretary's prayer for relief except (1) a finding of discrimination and (2) reimbursement of complainant's private attorney's fees. Under recent case law, attorneys fees are not authorized in cases where the Secretary filed the complaint pursuant to section 105(c)(2). Eastern Associated Coal Co. v. FMSHRC, 813 F.2d 639 (4th Cir. 1987); Maggard v. Chaney Creek, 9 FMSHRC 1314 (1987).

I conclude that the proposed settlement substantially achieves what the complaint sought and is in the public interest.

Therefore, the settlement agreement is APPROVED, and, subject to Respondent carrying out its terms, this proceeding is DISMISSED.


James A. Broderick
Administrative Law Judge

Distribution:

Craig W. Hukill, Esq., U.S. Department of Labor, Office of the
Solicitor, 4015 Wilson Blvd., Rm. 516, Arlington, VA 22203
(Certified Mail)

Jerry O. Talton, II, Esq., 222 East Main Street, Front Royal, VA
22630 (Certified Mail)

W. Challen Walling, Esq., Box 2009, Bristol, VA 24203 (Certified
Mail)

slk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 7, 1988

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 88-54-M
Petitioner	:	A. C. No. 33-03990-05521
	:	
v.	:	Jonathan Limestone Mine
	:	
COLUMBIA PORTLAND CEMENT	:	
COMPANY,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT
ORDER TO PAY

Before: Judge Merlin

This case is a petition for the imposition of civil penalties for 20 violations originally assessed at \$20 each for a total of \$400. The proposed settlements are for the original amounts. On June 30, 1988, the Solicitor submitted a motion for approval. On September 7, 1988, I issued an order approving one settlement (Citation No. 3058715) and disapproving the remaining nineteen because the motion contained insufficient information. On October 18, 1988, the Solicitor submitted an amended motion with additional information.

Citation No. 3058714

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.14006, because the guard for the self-cleaning tail pulley on the No. 9 auxiliary belt conveyor was not securely in place while the machine was in operation. I originally disapproved this settlement because the Solicitor failed to support his conclusions. In his amended motion the Solicitor explains that the probability of contacting the unguarded pulley was unlikely since the belt conveyor was not in motion. He further advises that the area near the belt conveyor was not a regular travelway or walkway.

Based upon the foregoing additional information, I approve the \$20 settlement.

Citation No. 3059190

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.12025, because the conduit used as a grounding conductor for the stop switch on the No. 9 auxiliary

feed belt in the finishing mill was broken in two places. I originally disapproved this settlement because the Solicitor failed to support his conclusions. In his amended motion the Solicitor explains that the probability of a ground fault happening was unlikely since it would have to occur on the stop switch or conduit simultaneously with an employee making contact with the switch. He further advises that the conduit was in an area not readily accessible to employee contact.

Based upon the foregoing additional information, I approve the \$20 settlement.

Citation No. 3059192

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.12032, because the junction box cover for the tailing screw beside the No. 2 elevator in the basement of the baghouse was missing, exposing the conductors to damage. I originally disapproved this settlement because the Solicitor failed to support his conclusions. In his amended motion the Solicitor explains that the junction box was in a location that was not a regular travelway or walkway.

Based upon the foregoing additional information, I approve the \$20 settlement.

Citation No. 3059193

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.12025, because the 120 volt fan located at the loading dock door of the bag storage room was not equipped with a grounding conductor. I originally disapproved this settlement because the Solicitor failed to support his conclusions. In his amended motion the Solicitor explains that the probability of a ground fault occurring was unlikely since the fan was not plugged in. Also, no employees worked in the area. Finally, he advises that before an injury could happen, a ground fault would have to occur simultaneously with an employee contacting the fan.

Based upon the foregoing additional information, I approve the \$20 settlement.

Citation No. 3059194

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.12025, because the conduit on the alarm switch at the No. 5 packer station in the baghouse was broken. The citation recites that the condition put added strain on the connections in the switch. I originally disapproved this settlement because the Solicitor failed to support his conclusions. In his amended motion the Solicitor explains that the probability of a ground fault occurring was unlikely since the

alarm switch was not readily accessible to employee contact. He further advises that before an injury could happen, a ground fault would have to occur on the alarm and conduit simultaneously with an employee making contact with the conduit.

Based upon the foregoing additional information, I approve the \$20 settlement.

Citation No. 3059196

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.12025, because the conduit holding the light outside the car shop was broken. I originally disapproved this settlement because the Solicitor failed to support his conclusions. In his amended motion the Solicitor explains that the probability of a ground fault occurring was unlikely since the light was not readily accessible to employee contact. He further advises that before an injury could happen, a ground fault would have to occur on the conduit simultaneously with an employee making contact with it.

Based upon the foregoing additional information, I approve the \$20 settlement.

Citation No. 3058720

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.11001, because a spill of limestone had accumulated on the first landing below the top floor of the raw mill building. The citation recites that the condition put excess weight on the floor. I originally disapproved this settlement because the Solicitor failed to support his conclusions. In his amended motion the Solicitor explains that no employees were working in the area below the spill of material and that the area in question was not a regular travelway.

Based upon the foregoing additional information, I approve the \$20 settlement.

Citation No. 3059385

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.12028, because the continuity and resistance of the grounding system for the plants and mine had not been tested on an annual basis. I originally disapproved this settlement because the Solicitor failed to support his conclusions. In his amended motion the Solicitor explains that the probability of a ground fault occurring was unlikely since the grounding system was in good condition at the time of the inspection, even though more than one year had passed since the last test.

Based upon the foregoing additional information, I approve the \$20 settlement.

Citation No. 3059386

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.12034, because the 110-volt light bulb on the extension light in the machine shop was not guarded. I originally disapproved this settlement because the Solicitor failed to support his conclusions. In his amended motion the Solicitor explains that the probability of an employee contacting the light bulb was unlikely since no work was being done in the area.

Based upon the foregoing additional information, I approve the \$20 settlement.

Citation No. 3059388

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.12008, because the 440-volt cables did not enter the metal frame of the No. 3 motor control center through proper bushings and fittings. The motor control center was located on the fourth floor of the raw mill. I originally disapproved this settlement because the Solicitor failed to support his conclusions. In his amended motion the Solicitor explains that the probability of the cables coming loose was unlikely since the motor control center was mounted in a stationary position. No strain was being put on the cables and no vibrations were noted.

Based upon the foregoing additional information, I approve the \$20 settlement.

Citation No. 3059422

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.4201(a)(1), because the fire extinguishers located in the raw mill were not inspected on a monthly basis. I originally disapproved this settlement because the Solicitor failed to support his conclusions. In his amended motion the Solicitor advises that the extinguishers were found to be in working order when tested.

Based upon the foregoing additional information, I approve the \$20 settlement.

Citation No. 3059392

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.12020, because an insulation mat was not provided for the disconnect switches and breaker controls located in the basement of the packhouse. I originally dis-

approved this settlement because the Solicitor failed to support his conclusions. In his amended motion the Solicitor explains that the probability of an injury happening was unlikely since a ground fault would have to occur and energize the switches and breaker controls simultaneously with an employee making contact with the controls.

Based upon the foregoing additional information, I approve the \$20 settlement.

Citation No. 3059393

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.12034, because guards were not provided for two light bulbs in the west tunnel of the packhouse. I originally disapproved this settlement because the Solicitor failed to support his conclusions. In his amended motion the Solicitor explains that the probability of an employee contacting the light bulbs was unlikely since the light bulbs were not readily accessible to employee contact.

Based upon the foregoing additional information, I approve the \$20 settlement.

Citation No. 3059394

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.12025, because the grounding conductor on the motor for the fan in the packhouse was not adequately affixed. I originally disapproved this settlement because the Solicitor failed to support his conclusions. In his amended motion the Solicitor explains that the probability of an accident happening was unlikely since a ground fault would have to occur on the motor simultaneously with an employee making contact with it.

Based upon the foregoing additional information, I approve the \$20 settlement.

Citation No. 3059397

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.12020, because an insulation mat was not provided on the concrete floor in the motor control center for the precipitator building. I originally disapproved this settlement because the Solicitor failed to support his conclusions. In his amended motion the Solicitor explains that the probability of an injury happening was unlikely since a ground fault would have to occur on the motor simultaneously with an employee making contact with it.

Based upon the foregoing additional information, I approve the \$20 settlement.

Citation No. 3059398

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.12030, because the conduit for the motor for the No. 5 side gather up screw conveyor was broken in two places. I originally disapproved this settlement because the Solicitor failed to support his conclusions. In his amended motion the Solicitor explains that the probability of a ground fault occurring was unlikely since the screw motor was not readily accessible to employee contact. He further advises that before an injury could happen, a ground fault would have to occur on the motor simultaneously with an employee making contact with it.

Based upon the foregoing additional information, I approve the \$20 settlement.

Citation No. 3059423

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.4102 because of an accumulation of oil on the floor of the compressor room in the basement of the packhouse. I originally disapproved this settlement because the Solicitor failed to support his conclusions. In his amended motion the Solicitor explains that the electrical components were some distance off the floor. He further advises that nobody was working in the area and that a fire extinguisher and two exits were in the area.

Based upon the foregoing additional information, I approve the \$20 settlement.

Citation No. 3059424

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.17001, because illumination was not sufficient to provide safe working conditions in the east tunnel of the packhouse. I originally disapproved this settlement because the Solicitor failed to support his conclusions. In his amended motion the Solicitor explains that no work was being conducted in the area at the time in question.

Based upon the foregoing additional information, I approve the \$20 settlement.

Citation No. 3059404

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.12032, because the cover plate on the junction box at the head pulley of the coal incline belt was missing. The citation recites that the condition exposed conductors on the junction box to damage. I originally disapproved

this settlement because the Solicitor failed to support his conclusions. In his amended motion the Solicitor explains that the probability of damaging the conductors was unlikely since the junction box was not readily accessible to employee contact.

Based upon the foregoing additional information I approve the \$20 settlement.

Conclusions and Order

As set forth above, the proposed settlements for the remaining nineteen citations in this docket are Approved.

However, the parties are cautioned that a number of the citations herein appears to be a rather generous use of the single penalty assessment. Also, the parties are reminded that, as stated in my prior Order of Disapproval, penalty assessments are de novo before the Commission which is not bound by the MSHA's proposed assessments or penalty regulations. Bearing this in mind, in the future before the Solicitor submits any proposed settlement, he should review it in light of the statutory criteria set forth in section 110(i), 30 U.S.C. § 820(i). Finally, it should be a matter of concern to MSHA that within a very short period of time this operator was cited for 72 violations. See also Docket Nos. LAKE 88-55-M, LAKE 88-56-M, LAKE 88-58-M, LAKE 88-59-M, and LAKE 88-62-M.

It is further ORDERED that the operator pay \$380 within 30 days from the date of this decision.



Paul Merlin
Chief Administrative Law Judge

Distribution:

Christopher J. Carney, Esq., Office of the Solicitor, U. S. Department of Labor, 881 Federal Office Building, 1240 East Ninth Street, Cleveland, OH 44199 (Certified Mail)

Michael M. Roman, Vice President, Industrial Relations, Columbia Portland Cement Company, P. O. Box 1531, Zanesville, OH 43702 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 7, 1988

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 88-55-M
Petitioner	:	A. C. No. 33-03990-05522
	:	
v.	:	Jonathan Limestone Mine
	:	
COLUMBIA PORTLAND CEMENT	:	
COMPANY,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT
ORDER TO PAY

Before: Judge Merlin

This case is a petition for the imposition of civil penalties for 20 violations originally assessed at \$20 each for a total of \$400. The proposed settlements are for the original amounts. On June 30, 1988, the Solicitor submitted a motion for approval. On September 7, 1988, I issued an order approving four settlements (Citation Nos. 3059430, 3059431, 3059434, and 3059439) and disapproving the remaining sixteen because the motion contained insufficient information. On October 18, 1988, the Solicitor submitted an amended motion with additional information.

Citation No. 3059412

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.12008, because the feed cable for the portable reducing transformer located on the burner floor did not enter the metal frame through proper bushings and/or fittings. I originally disapproved this settlement because the Solicitor failed to support his conclusions. In his amended motion the Solicitor explains that the probability of the feed cable coming loose was unlikely since the transformer was stationary and not vibrating. He further advises that there was no strain on the connections.

Based upon the foregoing additional information, I approve the \$20 settlement.

Citation No. 3059413

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.12025, because the grounding jumper

around the flexible conduit on the motor of the No. 5 separator in the finishing mill was not connected to the frame of the motor. I originally disapproved this settlement because the Solicitor failed to support his conclusions. In his amended motion the Solicitor explains that the probability of a ground fault occurring was unlikely since there was limited access to the motor. He further advises that before an accident could happen, a ground fault would have to occur simultaneously with an employee making contact with the motor.

Based upon the foregoing additional information, I approve the \$20 settlement.

Citation No. 3059414

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.12008, because the 440-volt feed cable for the portable welder in the car shop did not enter the metal frame of the welder through proper fittings and/or bushings. I originally disapproved this settlement because the Solicitor failed to support his conclusions. In his amended motion the Solicitor explains that the probability of the cable coming loose was unlikely since the cable was in good condition and there was no strain on the connections.

Based upon the foregoing additional information, I approve the \$20 settlement.

Citation No. 3059432

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.14006, because the guard was not in place for the coupling between the motor and chain drive for the gyp belt feeder for the No. 7 mill. I originally disapproved this settlement because the Solicitor failed to support his conclusions. In his amended motion the Solicitor explains that the probability of contacting the coupling was unlikely since the coupling was not readily accessible to employee contact. He further advises that an employee could contact the hazard only through an intentional act.

Based upon the foregoing additional information, I approve the \$20 settlement.

Citation No. 3059435

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.14006, because the guard for the sawblade for the electrical saw located in the car shop was not in place. I originally disapproved this settlement because the Solicitor failed to support his conclusions. In his amended motion the Solicitor explains that the probability of contacting

the sawblade was unlikely since the saw was not in operation and no employees were working in the car shop.

Based upon the foregoing additional information, I approve the \$20 settlement.

Citation No. 3059418

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.12020, because the breaker and control box for the pump at the settling pond was not provided with a dry wooden platform or insulation mat. I originally disapproved this settlement because the Solicitor failed to support his conclusions. In his amended motion the Solicitor explains that the probability of a ground fault occurring was unlikely since the area was dry and the controls were seldom used. He further advises that no employees were in the area.

Based upon the foregoing additional information, I approve the \$20 settlement.

Citation No. 3059436

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.11001, because the ladder used to climb in and out of a haulage truck did not constitute a safe means of access. I originally disapproved this settlement because the Solicitor failed to support his conclusions. In his amended motion the Solicitor explains that a ladder was in fact provided, but was not positioned on the truck in such a way so as to provide the safest means of access into the truck cab. He further advises that although placement of the ladder was not the best, the probability of an accident happening was unlikely even the way it was placed.

Based upon the foregoing additional information, I approve the \$20 settlement.

Citation No. 3059441

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.12020, because a wooden platform or insulation mat was not provided for the controls at the 3 inch water pump. I originally disapproved this settlement because the Solicitor failed to support his conclusions. In his amended motion the Solicitor explains that the probability of a ground fault happening was unlikely since it would have to occur on the control panel simultaneously with an employee making contact with the controls.

Based upon the foregoing additional information, I approve the \$20 settlement.

Citation No. 3059442

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.12025, because the grounding conductor was not connected to the frame of the portable light located in the underground shop. I originally disapproved this settlement because the Solicitor failed to support his conclusions. In his amended motion the Solicitor explains that the light was not readily accessible to employee contact. He further advises that before an accident could happen, a ground fault would have to occur on the light frame simultaneously with an employee making contact with the light frame.

Based upon the foregoing additional information, I approve the \$20 settlement.

Citation No. 3059445

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.12020, because a dry wooden platform or insulation mat was not provided for the controls on the #3250 portable water pump. I originally disapproved this settlement because the Solicitor failed to support his conclusions. In his amended motion the Solicitor explains that before an accident could happen, a ground fault would have to occur on the control panel simultaneously with an employee making contact with the panel.

Based upon the foregoing additional information, I approve the \$20 settlement.

Citation No. 3059446

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.12020, because a wooden platform or insulation mat was not provided for the controls at the high pressure wash bay located at the underground wash station. I originally disapproved this settlement because the Solicitor failed to support his conclusions. In his amended motion the Solicitor explains that before an accident could happen, a ground fault would have to occur on the control panel simultaneously with an employee making contact with the panel.

Based upon the foregoing additional information, I approve the \$20 settlement.

Citation No. 3059448

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.12030, because the 440-volt feed cable to the main exhaust fan located at the underground crusher station was damaged and had a conductor showing through. I originally disapproved this settlement because the Solicitor

failed to support his conclusions. In his amended motion the Solicitor explains that the probability of contacting the cable was unlikely since the cable was not readily accessible to employee contact. He further advises that employees were not in the area.

Based upon the foregoing additional information, I approve the \$20 settlement.

Citation No. 3059450

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.12025, because the conduit used as a grounding conductor for the 110-volt light in the walkway of the underground bin conveyor was broken. I originally disapproved this settlement because the Solicitor failed to support his conclusions. In his amended motion the Solicitor explains that the probability of a ground fault occurring was unlikely since the light was not readily accessible to employee contact. He further advises that before an accident could happen, a ground fault would have to occur simultaneously with an employee making contact with the light frame.

Based upon the foregoing additional information, I approve the \$20 settlement.

Citation No. 3059452

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.12025, because the conduit used for a grounding conductor for the 110-volt outlet at the top landing for the underground man lift was broken. I originally disapproved this settlement because the Solicitor failed to support his conclusions. In his amended motion the Solicitor explains that the probability of a ground fault happening was unlikely since it would have to occur simultaneously with an employee using the outlet.

Based upon the foregoing additional information, I approve the \$20 settlement.

Citation No. 3059453

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.12020, because the cover plate for the junction box located near the walkway for the 4A belt was missing, thereby exposing the conductor to damage. I originally disapproved this settlement because the Solicitor failed to support his conclusions. In his amended motion the Solicitor explains that the probability of a ground fault occurring was unlikely since the conductor was not damaged. He further advises that before an accident could happen, a ground fault on

the conductor would have to occur simultaneously with an employee making contact with the conductor.

Based upon the foregoing additional information, I approve the \$20 settlement.

Citation No. 3059454

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.12025, because the conduit used as a grounding conductor was broken on the 4A underground belt conveyor. I originally disapproved this settlement because the Solicitor failed to support his conclusions. In his amended motion the Solicitor explains that before an accident could happen, a ground fault would have to occur on the motor for the conveyor simultaneously with an employee making contact with the conveyor.

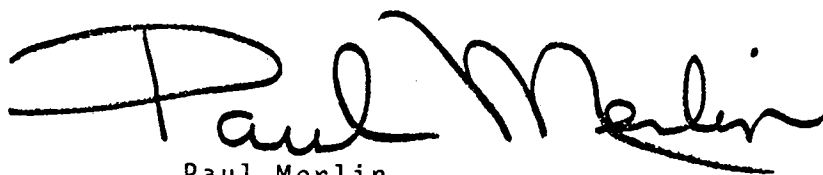
Based upon the foregoing additional information, I approve the \$20 settlement.

Conclusions and Order

As set forth above, the proposed settlements for the remaining sixteen citations in this docket are Approved.

However, the parties are cautioned that a number of the citations herein appear to be a rather generous use of the single penalty assessment. Also, the parties are reminded that, as stated in my prior Order of Disapproval, penalty assessments are de novo before the Commission which is not bound by MSHA's proposed assessments or penalty regulations. Bearing this in mind, before the Solicitor submits any proposed settlement, he should review it in light of the statutory criteria set forth in section 110(i), 30 U.S.C. § 820(i). Finally, it should be a matter of concern to MSHA that within a very short period of time this operator was cited for 72 violations. See also Docket Nos. LAKE 88-54-M, LAKE 88-56-M, LAKE 88-58-M, LAKE 88-59-M, and LAKE 88-62-M.

It is further ORDERED that the operator pay \$320 within 30 days from the date of this decision

A handwritten signature in black ink, appearing to read "Paul Merlin". The signature is fluid and cursive, with a large initial "P" and "M".

Paul Merlin
Chief Administrative Law Judge

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

November 7, 1988

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 88-58-M
Petitioner	:	A. C. No. 33-03990-05524
	:	
v.	:	Jonathan Limestone Mine
	:	
COLUMBIA PORTLAND CEMENT	:	
COMPANY,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT ORDER TO PAY

Before: Judge Merlin

This case is a petition for the imposition of civil penalties for 20 citations which were originally assessed at \$2,603. On June 30, 1988, the Solicitor submitted a motion to approve settlements in a reduced total amount of \$1,463.80. On September 7, 1988, I issued a Decision Disapproving Settlements and Order To Submit Information. On October 18, 1988, the Solicitor submitted an amended motion to approve settlements. The amended motion abandons the attempt to reduce the original assessments and instead recommends settlements for these amounts.

The circumstances of each citation in this case are set forth in my decision and order of September 7, 1988. There is no need to repeat them here since the amended motion sets forth no new facts or considerations, but merely repeats what is in the citations and based thereon returns to the original assessments. I stated in my prior order that the original assessments are modest and upon further examination in light of the amended motion, I adhere to that view. However, I conclude that these amounts may be approved in this instance.

The parties are reminded that as I previously pointed out, penalty assessments are de novo before the Commission which is not bound by MSHA's proposed assessments, original or otherwise. An original assessment may prove too high or too low. Bearing this in mind, before the Solicitor submits a proposed settlement to a Commission administrative law judge, he should review it in light of the statutory criteria set forth in section 110(i), 30 U.S.C. § 820(i), most particularly gravity and negligence. Finally, it should be a matter of concern to MSHA that within a very short period of time this operator was cited for 72

violations. See also Docket Nos. LAKE 88-54-M, LAKE 88-55-M, LAKE 88-56-M, LAKE 88-59-M, and LAKE 88-62-M.

It is ORDERED that proposed settlements be APPROVED and that within 30 days of the date of this decision the operator pay \$2,603.

A handwritten signature in black ink, appearing to read "Paul Merlin". The signature is fluid and cursive, with a large initial "P" and a long, sweeping underline.

Paul Merlin
Chief Administrative Law Judge

Distribution:

Christopher J. Carney, Esq., Office of the Solicitor, U. S. Department of Labor, 881 Federal Office Building, 1240 East Ninth Street, Cleveland, OH 44199 (Certified Mail)

Michael M. Roman, Vice President, Industrial Relations, Columbia Portland Cement Company, P. O. Box 1531, Zanesville, OH 43702 (Certified Mail)

/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 7, 1988

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 88-59-M
Petitioner	:	A. C. No. 33-03990-05525
	:	
v.	:	Jonathan Limestone Mine
	:	
COLUMBIA PORTLAND CEMENT	:	
COMPANY,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT
ORDER TO PAY

Before: Judge Merlin


This case is a petition for the imposition of civil penalties for six citations which were originally assessed at \$831. On June 30, 1988, the Solicitor submitted a motion to approve settlements in a reduced total amount of \$467.50. On September 7, 1988, I issued a Decision Disapproving Settlements and Order To Submit Information. On October 18, 1988, the Solicitor submitted an amended motion to approve settlements. The amended motion abandons the attempt to reduce the original assessments and instead recommends settlements in these amounts.

The circumstances of each citation in this case are set forth in my decision and order of September 7, 1988. There is no need to repeat them here since the amended motion sets forth no new facts or considerations, but merely repeats what is in the citations and based thereon returns to the original assessments. I stated in my prior order that the original assessments are modest and upon further examination in light of the amended motion, I adhere to that view. However, I conclude that these amounts may be approved in this instance.

The parties are reminded that as I previously pointed out, penalty assessments are de novo before the Commission which is not bound by MSHA's proposed assessments, original or otherwise. An original assessment may prove too high or too low. Bearing this in mind, before the Solicitor submits a proposed settlement to a Commission administrative law judge, he should review it in light of the statutory criteria set forth in section 110(i), 30 U.S.C. § 820(i), most particularly gravity and negligence. Finally, it should be a matter of concern to MSHA that within a

very short period of time this operator was cited for 72 violations. See also Docket Nos. LAKE 88-54-M, LAKE 88-55-M, LAKE 88-56-M, LAKE 88-58-M, and LAKE 88-62-M.

It is ORDERED that proposed settlements be APPROVED and that within 30 days of the date of this decision the operator pay \$831.

A handwritten signature in black ink, reading "Paul Merlin". The signature is fluid and cursive, with the first name "Paul" and last name "Merlin" clearly distinguishable.

Paul Merlin
Chief Administrative Law Judge

Distribution:

Christopher J. Carney, Esq., Office of the Solicitor, U. S. Department of Labor, 881 Federal Office Building, 1240 East Ninth Street, Cleveland, OH 44199 (Certified Mail)

Michael M. Roman, Vice President, Industrial Relations, Columbia Portland Cement Company, P. O. Box 1531, Zanesville, OH 43702 (Certified Mail)

/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 7, 1988

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 88-62-M
Petitioner	:	A. C. No. 33-03990-05526
	:	
v.	:	Jonathan Limestone Mine
	:	
COLUMBIA PORTLAND CEMENT	:	
COMPANY,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT
ORDER TO PAY

Before: Judge Merlin

This case is a petition for the imposition of civil penalties for five violations. Two of the violations were originally assessed at \$20 each and the remaining three violations were originally assessed at \$371. On June 30, 1988, the Solicitor submitted a motion for approval advising that the operator agreed to pay the originally assessed amounts for the two \$20 violations and proposed settling the remaining three violations for \$208.70.

On September 7, 1988, I issued an order approving one of the \$20 violations (Citation No. 3059478) and disapproving the remaining four violations because the motion contained insufficient information. On October 18, 1988, the Solicitor submitted an amended motion with additional information with respect to the \$20 violation. The amended motion also abandons the attempt to reduce the original assessments for the other three.

According to the Solicitor, Citation No. 3060312 was issued for a violation of 30 C.F.R. § 56.12025, because the equipment grounding conductor for the west screw in the basement of the packhouse was broken off the drive motor. I originally disapproved this settlement because the Solicitor failed to support his conclusions. In his amended motion the Solicitor explains that before an accident could happen a ground fault on the drive motor would have to occur simultaneously with an employee contacting the motor or screw.

Based upon the foregoing additional information, I approve the \$20 settlement.

The circumstances of the three remaining citations in this case are set forth in my decision and order of September 7, 1988. There is no need to repeat them here since the amended motion sets forth no new facts or considerations, but merely repeats what is in the citations and based thereon returns to the original assessments. I stated in my prior order that the original assessments are modest and upon further examination in light of the amended motion I adhere to that view. However, I conclude that these amounts may be approved in this instance.

The parties are reminded that as I previously pointed out, penalty assessments are de novo before the Commission which is not bound by MSHA's proposed assessments, original or otherwise. An original assessment may prove too high or too low. Bearing this in mind, before the Solicitor submits any proposed settlement to a Commission administrative law judge, he should review it in light of the statutory criteria set forth in section 110(i), 30 U.S.C. § 820(i). Finally, it should be a matter of concern to MSHA that within a very short period of time this operator was cited for 72 violations. See also Docket Nos. LAKE 88-54-M, LAKE 88-55-M, LAKE 88-56-M, LAKE 88-58-M, and LAKE 88-59-M.

It is ORDERED that proposed settlements be APPROVED and that within 30 days of the date of this decision the operator pay \$391.

A handwritten signature in black ink, appearing to read "Paul Merlin". The signature is fluid and cursive, with a large initial "P" and "M".

Paul Merlin
Chief Administrative Law Judge

Distribution:

Christopher J. Carney, Esq., Office of the Solicitor, U. S. Department of Labor, 881 Federal Office Building, 1240 East Ninth Street, Cleveland, OH 44199 (Certified Mail)

Michael M. Roman, Vice President, Industrial Relations, Columbia Portland Cement Company, P. O. Box 1531, Zanesville, OH 43702 (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 15 1988

SOUTHERN OHIO COAL COMPANY,	:	CONTEST PROCEEDINGS
Contestant	:	
v.	:	Docket No. WEVA 88-6-R
	:	Order No. 2894708; 9/3/87
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEVA 88-7-R
ADMINISTRATION (MSHA),	:	Order No. 2894711; 9/4/87
Respondent	:	
	:	Martinka No. 1 Mine
	:	Mine ID No. 46-03805
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 88-88
Petitioner	:	A. C. No. 46-03805-03831
v.	:	
	:	Docket No. WEVA 88-104
SOUTHERN OHIO COAL COMPANY,	:	A. C. No. 46-03805-03835
Respondent	:	
	:	Martinka No. 1 Mine
	:	

DECISION

Appearances: David M. Cohen, Esq., Southern Ohio Coal Company, Lancaster, Ohio, for the Operator;
Evert H. VanWijk, Esq., Office of the Solicitor, U. S. Department of Labor, Philadelphia, Pennsylvania, for the Secretary.

Before: Judge Weisberger

Statement of the Case

In these consolidated cases, the Operator (Respondent) sought to challenge the following Citations/Orders issued to it by the Secretary (Petitioner):

2894708	alleged violation of 30 C.F.R. § 75.316
2894711	alleged failure to timely abate Citation 2892710
2894510	alleged violation of 30 C.F.R. § 77.400(c)
22894518	alleged violation of 30 C.F.R. § 75.1403.

The Secretary sought civil penalties for alleged violations by the Operator of the above cited sections except Order No. 2894711.

On February 22, 1988, Respondent filed a Motion for a Summary Decision concerning Docket No. WEVA 88-6-R (Order No. 2894708). This Motion was denied by Order dated June 3, 1988. On March 3, 1988, the Parties were notified that Docket Nos. WEVA 88-88, WEVA 88-6-R, and WEVA 88-7-R would be called for hearing on March 28, 1988, in Falls Church, Virginia. Subsequently, based upon a request from Counsel for both Parties, these cases were rescheduled for March 30, 1988, in Pittsburgh, Pennsylvania. On March 28, 1988, in a telephone conference call between Counsel for both Parties and the undersigned, Counsel for Petitioner requested an adjournment on the ground that one of its witnesses had to investigate a fire in a mine on the date the hearing was scheduled. The hearing set for March 30, 1988, was subsequently rescheduled for June 7, 1988, in Pittsburgh, Pennsylvania. On May 17, 1988, pursuant to Petitioner's Motion which was not opposed by Respondent, Docket No. WEVA 88-104 was consolidated for hearing with Docket Nos. WEVA 88-6-R, 88-7-R, and 88-88. Subsequently, pursuant to a request by Counsel for both Parties, the above cases scheduled for hearing on June 7, 1988, in Pittsburgh, Pennsylvania, were rescheduled and heard on that date in Morgantown, West Virginia. Homer W. Delovich, Joseph Gary Pastorial, David C. Workman, and James A. Tennant testified for Petitioner. Wesley H. Hough, James W. Latham, III, James David Gump, John Metz, Glenn Spitznogle, Ira McDaniel, and William Robert Laird testified for Respondent.

Petitioner filed its Post Hearing Memorandum and Proposed Findings of Fact on August 26, 1988, and Respondent filed its Post Hearing Briefs on August 25, 1988. A Reply Brief was filed by Respondent on October 4, 1988.

Findings of Fact and Conclusions of Law

Order No. 2894708 (WEVA 88-6-R)

On September 3, 1987, MSHA Inspector Homer W. Delovich issued a section 104(d)-2 Order alleging that Respondent had not complied with its ventilation plan in the D-3 longwall section, alleging, as pertinent, ". . . in that a check stopping curtain was not installed outby the longwall face at the tailgate entry to deflect or direct the air to the bleeder system along the gob and to the bleeder tap. . . ."

Delovich testified that, in general, in a longwall mining operation, when retreating, the procedure is to knock out the stopping between Entries 1 and 2, and then erect a curtain in the return entry immediately outby the crosscut in which the stopping had been knocked down. He testified, in essence, that when he

inspected the D-3 longwall section of Respondent's Martinka Mine No. 1 on September 3, 1987, he walked down the tailgate Entry No. 1 outby the face, and at a crosscut approximately 650 feet from the face, observed that there was no stopping between Entries 1 and 2. He indicated that no curtain had been installed outby this crosscut. He considered this to be a violation of the ventilation plan and issued Citation/Order 2894708. In support of its position, Petitioner submitted a diagram entitled Typical Longwall Ventilation, which was indicated to be part of Respondent's ventilation plan in effect on September 3, 1987, (Government Exhibit 2). This diagram indicates a curtain was placed in the No. 1 tailgate entry immediately outby a crosscut between Entries No. 1 and 2 without any stopping in the entry. Delovich indicated that MSHA had not approved any plans with regard to the ventilation of the working face since the last inspection in February 1987. Delovich, in essence, testified that prior to inspection, a review of the ventilation plan revealed no changes to the ventilation of the D-3 working face. Delovich further testified that on September 3, 1987, Respondent's Superintendent, Wesley Hough, told him that Respondent had submitted a revised plan for the swag area, but that the plan was not in effect as they were not yet in the swag area.

Joseph Gary Pastorial, a union fire boss employed by Respondent, indicated that he performs weekly examinations of the intake and return entries, and also is Chairman of the Union's Health and Safety Committee. He indicated that when the operator proposes revisions to a ventilation plan, the Safety Committee is notified. He indicated that in approximately 1978, the ventilation plan was revised to require that a curtain be built 500 feet outby the face, at a point outby a crosscut in which the stopping had been knocked down. He said that this revision was made as there was a dust problem. He said that this revision was in effect on September 3, 1987, and he was not aware of any revision to this plan. He said that a revision to the ventilation plan in order to cure a geological problem was submitted to him and was approved, but was limited to the D-1 and D-2 Sections.

In contrast, Wesley Hough, who indicated that he is responsible for Respondent's ventilation plan, testified that he told Delovich on September 3, that a revised ventilation plan for the D-3 Section had been approved on July 25, 1986. He indicated that the revision was submitted because there was a geological problem, and thus it superseded the typical longwall ventilation diagram (Government Ex. 2) for the D-3 Section. SOCCO Exhibit 1 documents that, on July 25, 1986, MSHA approved Respondent's proposed ventilation plan for longwall Panel D-3 as well as D-2 and D-4. Hough further indicated that a diagram of its proposed ventilation plan had been submitted to MSHA for its approval. This diagram shows the ventilation of the longwall

Panel D-3 and does not indicate any curtain in the tailgate Entry No. 1 outby the crossing between Entries 1 and 2 for which there is no stopping. (SOCCO Ex. 2) I find that Petitioner's evidence is insufficient to contradict a plain reading of SOCCO Exhibits 1 and 2, that the Phase II Ventilation Plan, including the D-3 longwall panel, was approved by MSHA on July 25, 1986. I also found Hough's testimony to the same effect to be persuasive.

The diagram of the plan (SOCCO Ex. 2), does not depict any curtain outby a crosscut not containing a stopping. Inasmuch as SOCCO Exhibit 2 is clearly labeled to pertain to the longwall Panel D-3, and had been approved on July 25, 1986, I find that it had the effect of amending the typical longwall ventilation (Government Ex. 2). As such, I find that on September 3, 1987, the approved ventilation plan (SOCCO Ex. 2) did not require the placement of a curtain immediately outby the face at the tailgate entry as alleged in the citation in issue. Accordingly, I find that it had not been established that the ventilation plan was not being complied with, and therefore, Citation No. 2894708 should be vacated, and the Petition of Assessment of Civil Penalty (WEVA 88-88) is dismissed.

Citation No. 2894711 (WEVA 88-7-R)

On September 3, 1987, at approximately 10:30 a.m., Delovich issued Citation No. 2894710 citing Respondent for having black coal float dust deposited on the floor of the return entry on the D-3 longwall section, approximately 600 feet from spad No. 34 + 20 to 28 + 20. In essence, Delovich said that after issuing the Citation, he met with Respondent's employees Hough, Jim Latham, Pastorial, Dave Workman, and Rick Flint and told them to abate the Citation, that 600 feet needed to be rock dusted by 4:00 p.m. that day. Delovich said that when he returned to the section on September 4, at 12:30 a.m., he observed that outby the curtain, that was being erected at the Entry No. 1 to 28 + 20, the floor was still black. Delovich said that he came upon crosscut 34 + 40 on the section, and asked two men who were building a stopping whether they were going to rock dust, and they said "no, we were just told to rock dust up to the stopping" (WEVA 88-7-R, Tr. 15). Delovich said that no request had been made to extend the time to abate the Citation, and he issued Citation No. 2894711 citing the Respondent as follows:

"Little effort was made to abate the Citation No. 2894710 statement time was 1600 hours on 09-03-87, at 0130 hours on 09-04-87 only 200 feet of the 600 feet of coal float dust in the tailgate return of the D-3 longwall section was abated. The company rock dusted 200 feet over top the coal float dust outby the tailgate and then build a permanent stopping closing off the remaining 400 feet which still existed in the tailgate return." (sic.)

James David Gump, Respondent's Assistant Mine Supervisor, testified, in essence, that after the original citation had been issued, Delovich had indicated that approximately 600 feet had to be rock dusted, but that Delovich asked him why Respondent does not build a stopping in the entry to cut down the dust. Gump and John Metz, Respondent's General Supervisor, testified that after discussing the conversation that Gump had with Delovich with regard to abatement, the men presently working on the shift were told to rock dust as far as they could by the end of the shift, and then build a stopping across the entry.

I find that Delovich had indicated that in order for the original citation to be abated, approximately 600 feet would have to be rock dusted. The evidence establishes that when observed by Delovich at 12:30 a.m. on September 4, 1987, the area outby the stopping that was being erected to spad 28 + 20 had not been rock dusted. It is clear that abatement was not satisfied by erecting a curtain and not rock dusting outby that curtain. In this connection, I note that upon cross-examination, Gump agreed that Delovich had not said to just rock dust until the stopping. Also Metz acknowledged, upon cross-examination, that in the area outby the stopping, coal would have been a hazard if it was not rock dusted. Metz also indicated that it was intended subsequent to installing the curtain to rock dust outby that curtain, but that he was concerned with complying with the time limit to abate the citation.

When observed by Delovich on September 4, 1987, the violation previously cited on September 3, had not been totally abated, in that the area had not been completely rock dusted as previously directed by Delovich. Further, I find that Respondent had not requested an extension to fully rock dust the area. Indeed, I note that the workers, observed by Delovich on September 4, told him that they were just told to rock dust up to the stopping. Based on these circumstances, I can not conclude that Delovich acted unreasonably in not unilaterally extending the time to abate. Accordingly, I conclude that Order No. 2894711 was properly issued in that Citation No. 2894710 had not been abated within the time limits set in that Citation, and there was no unreasonableness in not extending the time to abate.

Order No.2894510 (WEVA 88-104)

On September 10, 1987, David C. Workman, a Mine Safety and Health Administration Inspector, inspected Respondent's Preparation Plant at the Martinka No. 1 Mine and cited Respondent for a violation of 30 C.F.R § 77.400(c). Workman alleged that "The guard is

missing off the head drum roller, river side, exposing the head roller and belt on the ninth floor of the Preparation Plant." Respondent acknowledges that the guard was not in place, but maintains that the violation herein was not the result of its unwarrantable failure, nor was it significant and substantial.

James A. Tennant, Respondent's Preparation Plant Mechanic, testified that approximately 1 to 2 weeks prior to the date the citation herein was issued on September 10, 1987, he was completing work on the belt brake or back stop which had been started the shift before. Tennant indicated, in essence, that the guard that had been taken off to perform the repairs was leaning against a tank. He was asked whether the guard was in plain sight or hidden behind the tank and answered that it was out in front between the tank and belt drum (WEVA 88-104, Tr. Vol I, P. 41). According to Tennant, before he had an opportunity to replace the guard, his foreman, Ira McDaniel, ordered him to go to another work assignment. Tennant did not indicate to his supervisor that the guard had not yet been replaced nor did he later on check to see if it had been replaced. Tennant further testified that a day or two before the citation was issued, he was in the area and saw the guard still on the floor, but did not replace it. Nor did he tell his supervisor that it still had not been replaced. David C. Workman, MSHA Investigator, entered Respondent's Preparation Plant on September 10, 1987, in response to a section 103(g)(i) complaint that various employees of Respondent had mentioned to Respondent's managers and supervisors that the guard in question had not been replaced. However, there is no documentary evidence or testimony which would indicate that any of Respondent's supervisors or managers knew that the guard in question was not in place. According to Tennant, the belt had to be shut down in order to replace the guard, and that shutting down the belt line was the responsibility of the supervisor. Glenn Spitznogle, Respondent's day shift foreman, and Ira McDaniel, Respondent's foreman, both testified that they did not know that the guard in question was not in place.

When Tennant was asked whether it was obvious that the guard was missing, he indicated that if one walked through the area and saw the guard on the ground ". . . you'd wonder where it went" (WEVA 88-104, Tr. Vol I, P. 46). However, Workman indicated that it was not obvious to him that the guard belonged where it did on the back stop. Although Spitznogle indicated on cross-examination that in the 2 years prior to July 1988, possibly he was on the 9th floor of the plant hundreds of times, he stated that he is not there daily, and specifically did not notice that the guard was missing from the cited area. It was McDaniel's testimony, in essence, that he never saw the guard up against the tank and did not know it belonged at the location from where it was missing. I

conclude that neither Spitznogle nor McDaniel actually knew that the guard in question was not in place. However, based upon the testimony of Tennant, and taking into account the size of the guard (estimated by Tennant to be 2 - 2 1/2' X 3'), I find that they each should have observed the guard in the area and should have realized that it was not in its proper place. Clearly Tennant was remiss in not reporting to his supervisor the fact that the guard had not been replaced, especially after he saw it again a day or two before the citation was issued, and approximately a week after he performed work on the belt. I find under the circumstances of this case, taking into account all the above, that Respondent's malfeasance herein amounted to an aggravated conduct. As such, I conclude that the violation resulted from Respondent's unwarranted failure. (See Emeory Mining Corp., 9 FMSHRC 1997 (Dec 1987)).

In essence, it was Workman's testimony that maintenance persons or others coming into the area could trip or fall with the risk of their hand or other limb being inserted in the area, unprotected by the guard, causing the whole body to be dragged in or causing the person to suffer bruises and the loss of a finger or limb. The unguarded area was located on a platform approximately 2 1/2 feet from the edge of the platform. Spitznogle admitted that one could get one's foot caught and trip on the edge of the 1 foot high platform. Also the platform is hosed daily, and the water is not cleared up as it is allowed to drain and evaporate. Spitznogle also indicated that oil has leaked from the gear case in the past. However, according to Workman there was neither an accumulation of oil or grease, nor were there stumbling hazards in the immediate area. Moreover, it has not been established that in the normal operations persons would climb up the platform. The only person regularly working on the 9th floor (the level where the cited condition is found) is a plant attendant. The evidence indicates merely that his job is to check the equipment, but there is no evidence establishing that in the normal course of his duties he would be in close proximity to the unguarded area. Nor has it been established that one hosing the platform would stand or walk on the platform. I further find the following facts, as set forth in Respondent's Brief at pages 11-12: (1) people fire boss the area and gas checks are needed to be taken somewhere on the 9th floor, but not necessarily at the location specified in the Order; (2) once every month or two the grease canister needs to be refilled and occasionally the oil needs to be changed in a gear box, but both the grease canister and the gear box are on the opposite side of the head roller from the location of the missing guard; (3) light bulbs might need to be changed, but these are not done in the immediate vicinity of the location in which the guard was missing.

Accordingly, I conclude that although there was a possibility of the violation herein of an unguarded area contributing to the hazard of some one falling or stumbling and being injured, I conclude that there was not a reasonable likelihood that the hazard contributed to would result in an injury, as it has not been established that it was reasonably likely for a hazard to occur. As such, the violation herein is not significant and substantial. (c.f. Mathies Coal Company 6 FMSHRC 1 (January 1984)).

I find that Respondent herein was negligent to a high degree in that Tennant knew of the missing guard and did not communicate this to his supervisor, and that the latter should have known the guard was missing. Also I find that the gravity herein was moderately serious (although not significant and substantial), as in the event of a person inadvertently coming in contact with the unguarded portion of the belt, a reasonably serious injury could have resulted. Taking into account the remaining factors of section 110(i) of the Act, as stipulated to by the Parties, I conclude that a penalty herein of \$200 is appropriate.

Order No. 289518 (WEVA 88-104)

On September 7, 1987, Inspector David Workman was told by Miner's Representative Pat Grimes of the existence of a broken switch on the 12-left track haulage of the North Mains. Upon arriving at the 12-left track, Inspector Workman noted that the barrel to the switch was disconnected, the bottom ear of the female joint C-bolt was broken, and the connecting bolt was lying in the adjacent dirt. Workman opined, in essence, that in light of the area being highly traveled by personnel carriers, locomotives, and jitneys, it was very likely that with the rail not being secured, vibrations could dislodge the alignment causing a derailment.

Workman testified that the miners' representative told him that he had reported this condition to three individuals who are a part of mine management. Workman said that he talked to two of these three individuals.

William Laird, Respondent's foreman on the midnight shift, testified that on October 5, 1987, 2 days before the date of the issuance of the Order, he signed a preshift report stating that the switch throw was broken and then corrected by installing the bolt in the switch barrel.

Laird said that on October 5, 1987, he also reported to the dispatcher the need for new ears or possibly a new barrel, and that on October 6, 1987, he repaired the switch. At the time he made the repairs, he checked at least five times to see if the switch would operate correctly and determined that it did.

Laird testified that he had repaired the broken switch by placing the bolt back through the barrel and that he did not observe a nut to be placed on the bottom of this bolt. It was his opinion that most of the track haulage switches do not have nuts that go with such bolts, but he conceded that most C-bolts do not have a broken C piece.

On October 7, 1987, Workman issued Order No. 2894518 which provides that "The 12-left track haulage switch in North Mains was found to be disconnected from the barrel, one ear was broken off the barrel, and the bolt and nut was found laying down under the throw part of the switch"

This Order essentially was issued based on Safeguard 814335 dated February 7, 1979, which states as follow:

The track haulage set out switch for the superintendent's jitney is not properly aligned, causing track haulage equipment passing over it to whip sideways. This is a notice to provide safeguards requiring that all track haulage at this mine shall be properly maintained and aligned.

Respondent has challenged the validity of the instant safeguard upon which the Citation in question was issued. Respondent argues that the safeguard was improperly issued as its requirements should have been the subject of rule making. Subsequent to the hearing, the Parties, in a telephone conference call, initiated by the undersigned, on September 2, 1988, were allowed to file Supplemental Briefs on the applicability to the issues herein, of the recent Commission decision in Secretary v. Southern Ohio Coal Co., 10 FMSHRC 963, (August 1988). Briefs were filed by the Parties. Respondent filed a Reply Brief; none was filed by Petitioner.

In essence, it is Petitioner's position that the lack of maintenance of the equipment in question created a hazard that was not covered by mandatory standards, but which is addressed by the safeguard herein. In contrast, Respondent maintains that the safeguard requiring all track haulage to be properly maintained is of general applicability, and as such, is invalid as it was not promulgated pursuant to section 101(a) of the Act.

The Commission in Secretary v. Southern Ohio Coal Co., *supra*, at 967, noted that the Court of Appeals of the District of Columbia Circuit in Zeiglar Coal Co. v. Kleppe, 536 F2d 389 (D.C. Cir. 1976) "has recognized that proof that ventilation

requirements are generally applicable, rather than mine-specific, may provide the basis for a defense with respect to alleged violations of mandatory ventilation plans." The Commission in Southern Ohio, supra at 967 further analyzed Zeigler as follows:

. . . [T]he court considered the relationship of a mine's ventilation plan required under section 303(o) of the Act, 30 U.S.C. § 863(o), to mandatory health and safety standards promulgated by the Secretary. The court explained that the provisions of such a plan cannot "be used to impose general requirements of a variety well-suited to all or nearly all coal mines" but that as long as the provisions "are limited to conditions and requirements made necessary by peculiar circumstances of individual mines, they will not infringe on subject matter which could have been readily dealt with in mandatory standards of universal application." 536 F.2d at 407; See also Carbon County Coal Co., 6 FMSHRC 1123, 1127 (May 1984) (Carbon County I); Carbon County Coal Co., 7 FMSHRC 1367, 1370-72 (September 1985) (Carbon County II).

In Southern Ohio, supra, the Commission did not resolve the question of whether a defense to a safeguard may be based on its being generally applicable, as it found that there was no evidence of whether the safeguard was general or mine-specific. In contrast, in the case at bar, I find the following evidence in the record, as summarized by Respondent in its Brief at page 3: "The inspector estimated that he had been in over 100 underground mines and that approximately 80% have tracks and track haulage switches. Further, the inspector testified that the problem with track haulage switches not being maintained did not pose a greater hazard or safety problem in the Martinka Mine than in other mines that have track haulage switches, that the associated hazards would be the same at other mines as in the Martinka Mine, and that there was no reason why the contents of the Safeguard would be more applicable to the Martinka No. 1 Mine than to other mine" (sic). In contrast, Petitioner did not offer any proof with regard to the circumstances under which the safeguard was issued, the specific need for the safeguard at the subject mine, or whether similar safeguards had been issued for other mines.

I find that generally, in allocating the burden of proof, one factor taken into account is which Party has the best knowledge of the particular disputed facts (Lindahl v. Office of Personnel Management 776 F2d 276 (Fed. Cir. 1985)). The burden is not placed upon a Party to establish facts particularly within the knowledge of its adversary. In this connection, it appears that Respondent would have particular knowledge as to the circumstances under which the safeguard was issued, and the existence

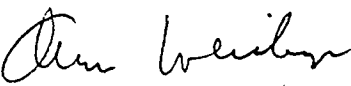
or need of similar safeguards at other mines (See Southern Ohio, supra, at 967-968. In addition, it has been held that generally MSHA has the burden of putting forth a prima facie case of a violation (Miller Mining Co, Inc. v. Federal Mine Safety and Health Review Commission 713 F2d 487 (9th Cir 1983) See also Old Ben Coal Corp. v. IBMA 523 F2d 25, 39 (7th Cir. 1975)). As such, it had the burden of establishing all elements of the citation including the validity of the underlying safeguard.

I thus conclude, based on all the above, that Petitioner has failed to establish that the safeguard in issue was mine-specific to the subject mine. As such, based on the rationale of Ziegler, supra, that I find applies with equal force to the case at bar, I conclude that because it has not been established that the safeguard was mine-specific, it therefore is invalid as it was not promulgated pursuant to the rule making procedures of section 101 of the Act. Accordingly, I find that the Order herein, should be dismissed inasmuch as it was predicated upon an invalid safeguard.

ORDER

It is ORDERED that:

1. The Notice of Contest, Docket No. WEVA 88-6-R is SUSTAINED.
2. Citation No. 2894708 be VACATED.
3. Docket No. WEVA 88-88 be DISMISSED.
4. Order No. 2894710 was properly issued.
5. Notice of Contest, Docket No. WEVA 88-7-R be DISMISSED.
6. Order No. 2894510 be AMENDED to reflect the fact that is is not significant and substantial.
7. Order No. 289518 be VACATED.
8. Respondent shall pay, within 30 days of this Decision, the sum of \$200 as a Civil Penalty for the violation found herein.


Avram Weisberger
Administrative Law Judge

Distribution:

David M. Cohen, Esq., Southern Ohio Coal Company, American
Electric Power Service Corporation, P. O. Box 700, Lancaster, OH
43130 (Certified Mail)

Evert H. VanWijk, Esq., Office of the Solicitor, U. S. Department
of Labor, 14480-Gateway Building, 3535 Market Street,
Philadelphia, PA 19104 (Certified Mail)

dcp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

2 SKYLINE, 10th FLOOR

5203 LEESBURG PIKE

FALLS CHURCH, VIRGINIA 22041

NOV 17 1988

ROCHESTER & PITTSBURGH COAL
COMPANY,

Contestant

v.

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

CONTEST PROCEEDINGS

Docket No. PENN 88-152-R
Order No. 2885050; 2/25/88

Docket No. PENN 88-153-R
Citation No. 2885051; 2/25/88

Greenwich Collieries No. 2 Mine
Mine I.D. No. 36-02404

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

v.

ROCHESTER & PITTSBURGH COAL
COMPANY,

Respondent

CIVIL PENALTY PROCEEDINGS

Docket No. PENN 88-188
A. C. No. 36-02404-03707

Docket No. PENN 88-189
A. C. No. 36-02404-03708

Greenwich Collieries No. 2 Mine

DECISION

Appearances: James Culp, Esq., Office of the Solicitor, U.S.
Department of Labor, Philadelphia, Pennsylvania
for the Secretary of Labor;
Joseph A. Yuhas, Esq., Pennsylvania Mines
Corporation, Ebensburg, Pennsylvania for
Rochester & Pittsburgh Coal Company.

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 five
citations and one imminent danger withdrawal order issued by
the Secretary of Labor against the Rochester and Pittsburgh
Coal Company (the Company) and for review of civil penalties
proposed by the Secretary for the related violations.

Citation No. 2879226 alleges a "significant and substantial" violation of the regulatory standard at 30 C.F.R. § 75.1707 and charges as follows:

The designated intake escapeways for the Maint, T-6, T-4, T-1, and P-9 active working sections were not separate from the Main P and Main T belt haulage entry. Air readings were taken in the belt entries of Main T, T-6, T-4, T-1 and P-9 for a total air quantity of 60,236 cfm air readings taken at the intake regulator 2x-cuts in by the portal between the belt and track entry together with an air reading take [sic] at the second overcast in the belt entry out by the portal resulted in 14,591 cfm of air available to ventilate the belts. Subtracting this total from the total air on the belts indicates 45,645 cfm air entering the belt entries from the intake escapeways.

The cited standard provides as follows:

In the case of all coal mines opened on or after March 30, 1970, and in the case of all new working sections opened on or after such date in mines opened prior to such date, the escapeway required by this section to be ventilated with intake air shall be separated from the belt and trolley haulage entries of the mine for the entire length of such entries to the beginning of each working section, except that the Secretary or his authorized representative may permit such separation to be extended for a greater or lesser distance so long as such extension does not pose a hazard to the miners.

The parties do not disagree that in the context of the above regulatory requirement (that the "intake air shall be separated from the belt and trolley haulage entries") it is understood in the mining industry that the separation need only be "reasonably airtight" (See Exhibit 0-2 page 2). The disagreement in this case concerns the definition of the term "reasonably airtight". The Secretary maintains that based upon the undisputed volume of air entering the belt entry from the intake, calculated by MSHA Inspector and ventilation specialist Samuel Brunatti at 45,645 cubic feet per minute (cfm), the separation was not "reasonably airtight". The Secretary's experts, Brunatti and supervisory MSHA Inspector James Biesinger (formerly a ventilation specialist himself) support this view. While the Company does not dispute the calculations of air "leakage" it argues that 45,645 cfm of

air entering the belt entry from the intake does not prove that the separation was not "reasonably airtight". Not surprisingly the testimony of its experts, Paul Eney and Michael Ondeco, both graduate mining engineers with significant underground mining experience, support the Company's view.

To further muddy the waters, the Secretary acknowledges that she has not established any standard of measurement of air leakage for determining whether a separation is "reasonably airtight". Moreover there is significant divergence of opinion, even between the MSHA experts, as to the amount of air leakage necessary to show that a separation is not reasonably airtight".

Within this framework it appears that even reasonably prudent persons familiar with the mining industry widely disagree over what constitutes a "reasonably airtight" separation. See Alabama By-Products, 4 FMSHRC 2128 (1982) and U.S. Steel Corp., 5 FMSHRC 3 (1983). Accordingly there is no standard of air leakage by which a violation herein may be measured. I have also observed that none of the 155 stoppings within the affected area were found not to be "reasonably air tight". Indeed the Company had examined each of these stoppings applying inspection standards accepted by the Secretary in reaching this conclusion.

Finally, I note that in abating this citation the Company was not required, and did not need, to alter any of the stoppings separating the intake and belt entries and was permitted to actually increase the "leakage" of air onto the belt entry by further opening an air regulator. Under all the circumstances I cannot find that the Secretary has sustained her burden of proving a violation of the cited standard. Citation No. 2879226 is accordingly vacated.

Citation No. 2885015 was the subject of a Motion for Settlement filed in this proceeding in which a reduction in penalty from \$168 to \$120 was proposed. As grounds for the reduction the Secretary stated as follows:

Further investigation has revealed that the operator's negligence in this matter should be reduced from moderate to low. This bar [for deenergizing the motor on a was regularly tested during weekly electrical equipment examinations and had been tested the previous week. There was no indication in the electrical examination books that the bar would not deenergize the motor. The chief electrical engineer has explained that the bar did

in fact depress the button (stop switch) which would deenergize the motor. Immediately after the citation was issued, he depressed the bar and the bar hit the button which deenergized the motor. He was able to do this without a lot of pressure. It is undisputed that in view of the inspector's test, that the bar would not hit the button fully when hit at certain angles. The bar did have the capacity to work, however it is uncertain how often it would not fully operate. It appears as though there was a judgment call as to the capacity of this bar to work. In view of the foregoing the operator's negligence should be reduced to very low.

I have considered the representations and documentations submitted with respect to this proposed settlement and I conclude that it is appropriate under the criteria set forth in section 110(i) of the Act.

Dockets No. PENN 88-189, PENN 88-152-R and PENN 88-153-R

Citation No. 2885051 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.1722(a) and charges as follows:

Observed Robert Coy (UMWA) working under the Main T No. 1 belt conveyor (near the belt head) along the Main T belt/track entry. The belt conveyor was in motion exposing Mr. Coy to possible injury if contacted in that a guard was not provided for the bottom belt conveyor. The clearance between the bottom of the belt and the coal accumulation on the mine floor is 64 inches. This citation was one of the factors that contributed to the issuance of Imminent Danger Order No. 2885050 dated 02-25-88; therefore, no abatement time was set.

The cited standard, 30 C.F.R. § 75.1722(a), provides as follows:

Gears; sprockets; chains; drive, head, tail, and take-up 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.

According to Gerry Boring, an MSHA coal mine inspector, the unguarded moving machine part here at issue was the

moving belt coal conveyor. Boring was concerned that the subject miner in proceeding beneath the exposed moving belt might be struck if the belt should break or that he might be dragged into a roller by a bad splice. The evidence shows that this miner was about 67 inches tall and that the belt was between 72 to 79 inches above the solid mine floor, considering the 8 to 15 inches of wet accumulations on the floor beneath the belt and that it was 64 inches from the top of these accumulations to the bottom of the belt.

The Company maintains that the cited conveyor belt was not a "similar exposed moving machine part" within the meaning of 30 C.F.R. § 75.1722(a) and that therefore there was no violation of that standard. In Secretary of Labor v. Mathies Coal Co., 5 FMSHRC 300 (1983), the Commission observed that this regulatory standard applies to the specific machine parts listed plus other exposed moving machine parts similar to those listed. In the Mathies case the Commission found that an elevator cage did not meet the definition of "similar" within the scope of the standard. It quoted the definition of the word "similar" as "1) having characteristics in common; very much alike... 2) alike in substance or essentials... 3a) having the same shape; differing only in size and position...." citing Webster's Third New International Dictionary at p. 2120 (unabridged 1971).

Applying this definition to the conveyor belt at issue I observe that although a conveyor belt has a common characteristic with the enumerated items i.e. motion, it is not "very much alike", "alike in substance or essentials" or of the "same shape" as the others. Indeed a conveyor belt clearly does not resemble, in form or function, those machine parts specifically listed in the standard. Under the circumstances I must agree with the Company that the conveyor belt at issue is not a "similar exposed moving machine part" under 30 C.F.R. § 75.1722(a) and that therefore there was no violation of that standard in this case. The citation is accordingly vacated.

Related Order of Withdrawal No. 2885050, issued pursuant to section 107(a) of the Act, reads as follows:

Observed Robert Coy (UMWA) standing under the operating Main T No. 1 belt conveyor (near the belt head). The clearance between the bottom of the belt and the coal accumulation on the mine floor is 64 inches. Mr. Coy had been repairing a water line and was retrieving a block from underneath said belt when observed. Exposed machine parts which

may be contacted by persons, and which may cause injury to persons shall be guarded, 30 C.F.R. 75.1722(a).

Section 107(a) of the Act provides in part as follows:

If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons except those referred to in section 104(c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused the imminent danger no longer exist.

Section 3(j) of the Act defines "imminent danger" as the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." The limited issue herein is whether such a condition or practice existed at the time this order was issued.

According to MSHA Inspector Boring, the imminent danger order was issued because of a "condition" in which he observed coal miner Robert Coy proceed beneath the belt conveyor and retrieve a cement block. Inspector Boring maintained that this "condition" constituted an "imminent danger" because the belt might break and slap the miner, a defective splice in the belt might catch the miner and drag him into the rollers or belt structure, the miner might contact the belt (presumably by extending an arm) and break a finger or be knocked against a wall and sustain serious eye injuries from debris falling off the belt. While there is no evidence in this case that the belt was worn or otherwise likely to break or that any of the splices were deficient, I nevertheless find that the other hazards were such that the cited condition "could reasonably be expected to cause serious physical harm" if not discontinued. Accordingly I find that there was an imminent danger and affirm Order No. 2885050.

Citation No. 2885053 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.1713-7(c) and charges as follows:

The first-aid supplies being maintained along the R-1 intake entry near survey station No. X1710 in the active T-4 (011) working section are not being kept sanitary, dry and clean. The metal box housing the first-aid supplies is wet (1/4 inch deep water near middle with the remainder of the floor damp and dirty).

The cited standard provides that "[a]ll first-aid supplies required to be maintained under the provisions of paragraphs (a) and (b) of this section 75.1713-7 shall be stored in suitable, sanitary, dust tight, moisture proof containers and such supplies shall be accessible to the miners".

It is undisputed that splints are first-aid supplies under section 75.1713-7(b)(12). It is also undisputed that the cited metal box housing the first-aid supplies had water inside and that the inflatable splints inside the box were also wet. It may therefore reasonably be inferred that first aid supplies required to be maintained by section 75.1713-7 were not stored in a moisture proof container. The violation is accordingly proven as charged.

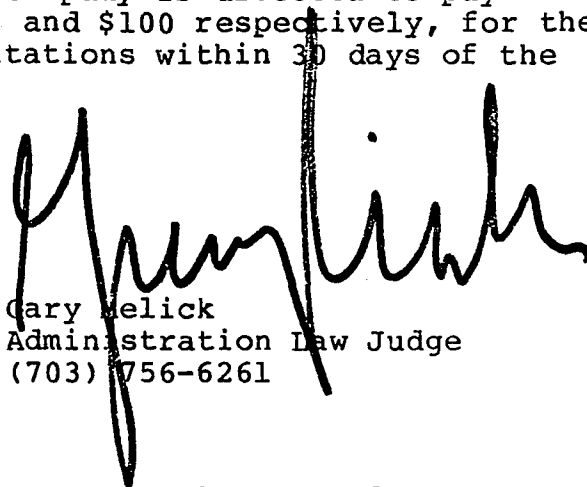
The Secretary has failed however to sustain her burden of proving that the violation was "significant and substantial". At best Inspector Boring could conclude only that the wet splints, if used over an open wound "could have led to the possibility of infection". The mere "possibility" of infection does not meet the test of reasonable likelihood that the wet splints could result in injuries of a reasonably serious nature. See Mathies Coal Co., 6 FMSHRC 1 (1984). In any event I find it highly unlikely that a splint would be applied directly upon an open wound where clean and dry bandages are available. Under the circumstances the contemplated hazard of infection would be too remote to warrant a "significant and substantial" finding herein.

I also find that the violation was the result of but little negligence. Inspector Boring observed that there is no regulatory requirement that first-aid supplies be regularly examined or inspected and it is not a part of the face boss examination to check such supplies. Under the circumstances a penalty of \$100 is appropriate.

At hearing the parties agreed to a settlement of Citation No. 2884901 proposing a reduction in penalty from \$259 to \$205. I have considered the representations and documentation submitted concerning that citation and I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act.

ORDER

Citation No. 2885051 is vacated and Contest Proceeding Docket No. PENN 88-152-R is granted. Order No. 2885050 is affirmed and Contest Proceeding Docket No. PENN 88-153-R is dismissed. Citation No. 2879226 is vacated. Citations No. 2885015, 2884901 and 2885053 are affirmed and the Rochester and Pittsburgh Coal Company is directed to pay civil penalties of \$120, \$205, and \$100 respectively, for the violations charged in those citations within 30 days of the date of this decision.



Gary Melick
Administration Law Judge
(703) 756-6261

Distribution:

Joseph A. Yuhas, Esq., Rochester & Pittsburgh Coal Company,
P.O. Box 367, Ebensburg, PA 15931 (Certified Mail)

James E. Culp, Esq., Office of the Solicitor, U.S. Department
of Labor, Room 14480-Gateway Building, 3535 Market Street,
Philadelphia, PA 19104 (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 23 1988

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 88-193
Petitioner	:	A.C. No. 46-05907-03574
v.	:	
	:	Shawnee Mine
U.S. STEEL MINING CO., INC.,	:	
Respondent	:	

DECISION

Appearances: Mark R. Malecki, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia,
for the Secretary of Labor (Secretary);
Billy M. Tennant, Esq., Pittsburgh, Pennsylvania,
for the Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

The Secretary seeks civil penalties for two alleged violations of the mandatory standard in 30 C.F.R. § 75.1102 which requires that underground belt conveyors be equipped with sequence switches. It is the Secretary's position that in the 3 Right Section of the subject mine two sequence switches, one on the 8 left belt, the other on the North Mains 3 belt were inoperative. Respondent contends that the switches were in fact operative, and the Secretary's method for testing the switches was faulty. Pursuant to notice, a hearing was held in Charleston, West Virginia on October 18, 1988. Gerald L. Smith and Junior Farmer testified on behalf of the Secretary; Peyton Lee Hale, Gaines Davis, and Henry Sessions testified on behalf of Respondent. Both parties waived the right to file post hearing briefs. I have considered the entire record and the contentions of the parties, and make the following decision.

FINDINGS OF FACT

At all times pertinent hereto, Respondent was the owner and operator of an underground coal mine in Wyoming County, West Virginia known as the Shawnee Mine.

On January 27, 1988, Gerald L. Smith, a Federal Coal Mine electrical inspector, conducted an electrical spot inspection at the subject mine. He was accompanied by regular inspector Junior Farmer, and by K.T. Miller, a representative of the United Mine Workers union. A management representative did not accompany the inspection party. Among other things, inspector Smith inspected sequence switches on conveyor belts. Sequence switches are designed to cause the shutting down of the "inby" belt when the "outby" or "mother" belt stops. Their purpose is to avoid coal spillage which would necessarily occur if the inby belt continued operating after the outby belt stopped.

In the subject mine, the belts were shut down every day from about 3:30 p.m. until about 5:00 p.m., between shifts. It was Respondent's practice to test the switches at that time by shutting down the main belt, and to grease the bearings, etc., as part of its belt maintenance program. In late 1987 and early 1988, Respondent's maintenance foreman and chief electrician discussed the question of testing sequence switches with Inspectors Smith and Farmer. The inspectors requested that Respondent fashion a metal plate to insert between the sensor and the switch box in accordance with the instruction manual of the Appalachian Electronic Company which manufactured the switches: according to the manual, the insertion of such a metal plate should stop the inby belt if the switch is operating properly. The switch operates by means of a sensor which generates a magnetic field which in turn produces a pulse, and if the pulse is blocked or reduced the controlled device will stop. The testing procedure, by interjecting ferrous metal between the magnets and the sensor, blocks the entire magnetic field.

During the January 27, 1988 inspection, Inspector Smith tested the sequence switch at the tail of the 8 left belt by using the metal plate which Respondent provided. He inserted the plate between the sensor and the roller. The 3 right belt (the inby belt) did not stop. The switch was a hybrid, however. It consisted of a control box manufactured and supplied by Appalachian Electronics and a sensor called "Hawkeye" from a different supplier, American Mine Resources. Henry Sessions, Executive Vice President of Appalachian Electronics, who devised the testing procedure in Appalachian's manual, testified that he could not state whether the hawkeye switch was compatible with the Appalachian control box. There were substantial accumulations of loose coal, coal dust and float dust on the mine floor near the junction of the belts. Inspector Smith testified that these accumulations most likely resulted from the fact that the sequence switch did not operate properly, that is, it did not stop the 3 right belt when the 8 left belt stopped. There was no evidence of other possible causes of the accumulations, such as misaligned belts, large pieces of rock on the belts, etc.

Inspector Smith then tested the switch at the North Mains No. 3 belt in the same manner. The 8 left belt (inby the North Mains #3) failed to stop. The entire switch system, including the control box and the sensor, was supplied by Appalachian Electronics. Again, there were accumulations of loose coal, coal dust and float dust on the mine floor. Again, there was no evidence of misaligned belts or large rocks on the belt. Inspector Farmer testified that the union representative tested the switch by stopping the North Mains No. 3 belt. This resulted in the 8 left belt stopping. Inspector Smith denied that such a test was made. He stated that after he completed his test using the metal plate, he asked the union representative to shut down both belts. The union walkaround representative was not called to testify at the hearing. I find as a fact that the switch was not tested by shutting down the outby belt during this inspection. I accept Inspector Smith's testimony, and believe that Inspector Farmer's testimony was in error.

The citation involving the North Mains No. 3 belt switch was abated by adjusting the cut out speed in the control box. Following this, Inspector Smith tested the switch by inserting the metal plate between the sensor and the magnetic wheel, and the inby belt began to shut down immediately. Inspector Smith was not present when the citation involving the 8 left belt switch was abated, but he terminated the citation upon checking the switch following the same procedure as on the North Mains No. 3 belt switch.

Citations were issued to Respondent for the accumulations of loose coal and coal dust described above. They are not part of this proceeding.

ISSUES

1. Were the cited sequence switches in operable condition on January 27, 1988?
2. If violations were established, were they significant and substantial?
3. If violations were established, what are the appropriate penalties?

CONCLUSIONS OF LAW

Respondent is subject to the provisions of the Mine Safety Act in the operation of the Shawnee Mine, and I have jurisdiction over the parties and subject matter of this proceeding.

The Secretary has the burden of establishing that the sequence switches were not properly operating on January 27, 1988, that is, they were not shutting down the inby belt when the outby belt stopped operating. There was considerable testimony as to the best way to test the operation of the switches. The issue, however, is not the proper test, but the functioning of the switch. Shutting down the outby belt is a valid, and probably the best way to test the switch. However, if the manufacturer's instructions concerning testing are properly followed a functioning switch should stop the inby belt when the metal plate is inserted between the sensor and the magnetic wheel. Therefore, I conclude that the test performed by Inspector Smith on the sequence switch on the North Mains No. 3 belt established that it did not operate properly to stop the 8 left belt. The citation no. 2736047 is therefore affirmed. However, the evidence does not establish that the switch on the 8 left belt was not operating properly. There is some evidence to support such a finding, namely, the existence of coal accumulations. The test of the switch, however, based on the manufacturer's (Appalachian) suggestion, was not a conclusive test since the switch had components from two different manufacturers, and there is no evidence as to the validity of the test in such a case. I conclude therefore that the Secretary has failed to carry her burden of proof with respect to citation no. 2736042.

The failure of a sequence switch to operate properly will cause coal spillage and ultimately accumulations of loose coal, coal dust and float dust. This in turn can result in the danger of a mine fire. Shawnee Mine experienced such a fire three or four years prior to the citation. I conclude that the violation was serious, and was likely to result in serious injury. Therefore it was significant and substantial under the Commission's test in Cement Division, National Gypsum, 6 FMSHRC 1 (1984).

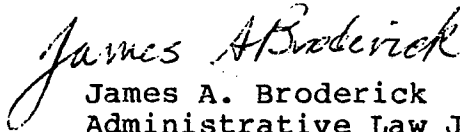
Respondent's witnesses testified that they tested the switches daily, when the belts were shut down between the first and second shifts. The violation here was cited at 12:07 p.m. I conclude that Respondent's testing procedure was a valid one. Therefore its negligence is reduced. However, the accumulations of loose coal on the mine floor around the belt should have alerted Respondent to the problem.

Respondent is a large operator. Its history of prior violations was moderate. The abatement of the violation was timely and carried out in good faith. I conclude that an appropriate penalty for the violation is \$50.

ORDER

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

1. Citation 2736042 issued January 27, 1988 is VACATED.
2. Citation 2736047 issued January 27, 1988 is AFFIRMED,
including the findings that the violation charged is significant
and substantial.
3. Respondent shall within 30 days of the date of this
decision pay a civil penalty in the amount of \$50 for the
violation found herein.


James A. Broderick
Administrative Law Judge

Distribution:

Mark R. Malecki, Esq., U.S. Department of Labor, Office of the
Solicitor, 4015 Wilson Blvd., Rm. 516, Arlington, VA 22203
(Certified Mail)

Billy Tennant, Esq., 600 Grant Street, Rm. 1580, Pittsburgh, PA
15219-4776 (Certified Mail)

slk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

NOV 28 1988

MARION DOCKS, INC.,	:	CONTEST PROCEEDINGS
Contestant	:	
v.	:	Docket No. WEVA 88-169-R
	:	Order No. 2896051; 3/1/88
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEVA 88-170-R
ADMINISTRATION (MSHA),	:	Citation No. 2896052; 3/1/88
Respondent	:	
	:	Docket No. WEVA 88-171-R
	:	Citation No. 2896053; 3/1/88
	:	
	:	Docket No. WEVA 88-172-R
	:	Order No. 2896054; 3/1/88
	:	
	:	Docket No. WEVA 88-173-R
	:	Order No. 2896055; 3/1/88
	:	
	:	Docket No. WEVA 88-174-R
	:	Order No. 2896056; 3/1/88
	:	
	:	Docket No. WEVA 88-175-R
	:	Order no. 2896057; 3/1/88
	:	
	:	No. 1 Mine
	:	Mine ID 46-06904

DECISIONS

Appearances: W. Henry Lawrence IV, Esq., Steptoe & Johnson,
Clarksburg, West Virginia, for the Contestant;
Joseph T. Crawford, Esq., Office of the
Solicitor, U.S. Department of Labor,
Philadelphia, Pennsylvania, for the Respondent.

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern Notices of Contest filed by the
contestant pursuant to section 105(d) of the Federal Mine
Safety and Health Act of 1977, challenging the legality of the

captioned citations and orders issued pursuant to the Act. The contestant takes the position that its Marion Docks loading facility is not a mine within the statutory definition of that term as found in 30 U.S.C. § 802(h)(1). The record reflects that the contestant did not contest or seek review of the civil penalty assessments made by MSHA with respect to the contested citations and orders. Contestant's counsel confirmed that the contests which are the subject of these proceedings are based on the contestant's jurisdictional arguments, and assuming an adverse decision with respect to this issue, counsel confirmed that the contestant will pay the proposed civil penalty assessments and will not contest the fact of each violation or the amounts of the civil penalty assessments (Tr. 5-7).

The respondent filed timely answers to the contests, and it takes the position that the loading facility in question is a mine within the statutory definition at 30 U.S.C. § 802(h)(1), and that the contestant is subject to MSHA's enforcement jurisdiction. A hearing was conducted in Fairmont, West Virginia, and the contestant has filed posthearing arguments in support of its jurisdictional position. The respondent filed no posthearing brief, and relies on its pretrial jurisdictional arguments filed in its Memorandum in response to the contestant's motion for summary decision, which I previously denied. I have considered all of the arguments made by the parties in these proceedings, including those made on the record during the course of the hearing.

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

Issue

The issue presented in these proceedings is whether or not the contestant's Marion Docks loading facility is a mine subject to MSHA's inspection and enforcement jurisdiction.

Discussion

The contested citations and orders, which include "significant and substantial" (S&S) findings, were all issued by MSHA Inspector Homer W. Delovich during the course of an inspection which he conducted on March 1, 1988, and they are as follows:

Section 104(d)(2) Order No. 2896051 cites an alleged violation of mandatory safety standard 30 C.F.R. § 77.1102(d), and the condition or practice is described as follows:

At the diesel fuel tank storage, coal and coal dust was accumulated and completely covered up the backside of the 12 foot tank to the top and halfway up both ends. Condition of the tank was due to the coal storage pile loaded too high and against the tank. Presents a fire hazard and hazard to the workmen when walking and putting fuel in the tank. Tom Visnans, foreman of this shift, and tank stored next to the office and weight house where (sic) readily visible and condition has existed for a period of time. No one working to clean around the tank when observed. Tank holds 400 to 500 gallons of fuel.

Section 104(a) Citation No. 2896052 cites an alleged violation of mandatory safety standard 30 C.F.R. § 77.1104, and the condition or practice is described as follows: "Combustible materials of grease, oil and coal are accumulated on the frame, motor housing inside, radiator and sides of the Beckwith 966 Front End Loader. Tom Visnans foreman."

Section 104(a) Citation No. 2896053 cites an alleged violation of mandatory safety standard 30 C.F.R. § 77.1104, and the condition or practice is described as follows: "Combustible materials of grease, oil and coal dust were accumulated in the frame, motor housing inside, radiator and sides of the 980 Front End Loader. Tom Visnans, foreman."

Section 104(d)(2) Order No. 2896054, cites an alleged violation of mandatory safety standard 30 C.F.R. § 77.205(b), and the condition or practice is described as follows:

The walking platform at the outer side and front of the slate picker's platform and at the bottom of the ladder landing to the crusher platform and area of between the two ladders were obstructed by coal spillage accumulations over the toe boards of approximately 12 to 18 inches in height across the walkway platforms. For a distance of 15 feet at the slate picker's platform and 8 feet at the crusher platform. Conditions present a trip and stumble hazard. Rick Love-slate picker laborer and Tom Visnans foreman.

Section 104(d)(2) Order No. 2896055 cites an alleged violation of mandatory safety standard 30 C.F.R. § 77.1104, and the condition or practice is described as follows:

Combustible materials of oil, grease and coal dust were accumulated and caked on the front, back and sides of the 4 foot x 6 1/2 foot crusher housing and coal dust was covering the floor of the platform housing the crusher. Tom Visnans, foreman. Conditions present an ignition and fire hazard.

Section 104(d)(2) Order No. 2896056 cites an alleged violation of mandatory safety standard 30 C.F.R. § 77.205(b), and the condition or practice is described as follows:

The elevated stacker belt ramp walkway was obstructed at the entrance by piles of coal, accumulation of coal approximately 2 feet high on the ramp at the entrance for approximately 9 feet and coal lumps inby up the ramp to the top. Condition presents a stumbling and tripping hazard. Tom Visnans, foreman.

Section 104(d)(2) Order No. 2896057 cites an alleged violation of mandatory safety standard 30 C.F.R. § 77.202, and the condition or practice is described as follows:

The roller drum and bottom belt for approximately 5 feet were turning and running in accumulations of coal dust, the roller drum and pillar bearings were completely engulfed in coal dust. Condition presents an ignition and fire hazard. Tom Visnans, foreman. Conditions of coal and coal dust were at the roller drum and bottom belt of the Stacker Belt.

Respondent's Testimony and Evidence

MSHA Inspector Homer W. Delovich confirmed that he conducted an inspection of the contestant's dock facility on March 1, 1988, and that this was his first inspection there. However, from a review of MSHA's "mine profile," which includes information concerning past violations, respirable dust and noise sampling, training, and the mine legal identification information, he learned that the facility had previously been inspected by MSHA twice a year since 1985 (Tr. 17-22, exhibits R-1 through R-3). Mr. Delovich confirmed that the Mine ID

information reflects that the facility is a coal or barge loading facility, and he described the operation as follows at (Tr. 22-23):

Q. Well, coal/barge loading facility. What do they do there, do you know?

A. Yes, sir. They load coal, they weigh it, they blend it, they crush it, and they convey it into barges, across the road to the river. They have two draw-off tunnels that we inspect.

Q. I'm sorry. That was two draw-off what, sir?

A. Draw-off tunnels underneath the coal bins when they dump it which we inspect for methane and stuff. We have three conveyor belts. We have a crusher. We have a weight house. We have two endloaders there and, plus, we have the fuel tanks and scale house.

Q. When you conducted your inspection, did you have a chance to observe the operation?

A. Yes, sir.

Q. How is the operation performed from the time the coal comes in, do you know?

A. The coal is brought in by a truck and weighed at the scale house. That is where the foreman has his office. Then it is taken either -- if they are dumping into the barges, it is taken to the barges by dumping into the coal bin. That is if they have barges available to load. If they don't, then they stock the coal in a pile and blend it that way.

Mr. Delovich stated that he has observed coal being cleaned and crushed, and through conversations with superintendent Frank Miller, Mr. Sorbello, Mr. Bealko, and Mr. John Markovich, he learned that coal was also blended at the facility. Mr. Delovich explained that Mr. Sorbello, Mr. Bealko, and presumably Mr. Miller, buy coal, and also produce coal from mines which they own and operate. He identified them as the Deconder Mine, M & J Coal, Wasco Fuels, and a new mine which he identified as the Manley Mine, and confirmed that they are all located in West Virginia (Tr. 25). Mr. Delovich

stated that he met Mr. Miller, Mr. Sorbello, and Mr. Bealko through his inspections at the M & J Coal Company. He also stated that the coal produced at these mines is brought out of the mines by conveyor belts, dumped and loaded onto trucks, and then transported to the contestant's loading facility.

Mr. Delovich stated that he has inspected three other coal mines which sell or contract coal from the Sewickley and Pittsburgh seams to Mr. Sorbello, Mr. Bealko, and Mr. Miller, and he identified them as "the LaRosa Fuels on the Meredith job, the Patterson Brothers, and Thompson, the river mine" (Tr. 27). Mr. Delovich explained that the Sewickley coal is high in ash and "dirtier coal," and that the Pittsburgh coal "is probably the best Pittsburgh coal in the United States as far as sulphur content is and the cleanliness of it" (Tr. 27). In order to fill its orders, and to keep the coal below a certain ash content, Mr. Delovich believed that the contestant blended the Pittsburgh low sulphur coal with the Sewickley coal, and he confirmed that he learned this through conversations with the company and other inspectors (Tr. 28).

Mr. Delovich stated that while he was present at the M & J Coal Company mine for 10 or 12 days in connection with the sealing of a mine fire area, he spoke with Mr. Sorbello, Mr. Miller, and Mr. Bealko, and they were concerned that they needed to have the mine in operation because the coal was low in sulphur and ash and they had to blend it with their other coal in order to sell it at the Marion Docks. Mr. Delovich confirmed that Mr. Miller is the superintendent at the Marion Docks facility (Tr. 29). In response to a question as to whether he had ever observed blending being done at the Marion Docks, Mr. Delovich responded as follows (Tr. 29):

A. I was talking to Frank Miller and them when we was writing their notices and the trucks was coming in, and if the truck comes in from one company and it is the type of coal they need to put in, you know, they load so much trucks from one outfit and then they loaded so much and then they dump it in there and they try to blend it. When they stock it, they probably try to blend it that way.

Q. But you saw the trucks coming in.

A. Yes, sir, I saw the trucks coming in. I didn't know where they were coming from but that is how it was done.

Mr. Delovich confirmed that he has observed coal crushing taking place at the Marion Docks facility. He stated that crushing was required "because of the large size of coal coming through," the need to get rid of the large lumps of pyrite coal which will not sell or ruin the crusher. He described what he observed as follows (Tr. 30):

THE WITNESS: The coal is dumped in a bin and goes down in the draw-off tunnel and comes up the chute where they have a man cleaning and picking slate. Then, underneath it, it drops into a crusher and then comes out and falls onto the belt and it takes it up to another pile which goes to another draw-off tunnel and to the river barge it is conveyed to.

Mr. Delovich believed that the coal shipped from the Marion Docks facility goes to the Willow Island Electric Power Company located at Parkersburg, West Virginia, and that it is transported along the Monongahela, Allegheny, and Ohio Rivers. The power company burns the coal to furnish electrical power, and he learned that Willow Island was one of the contestant's customers through conversations with Mr. Miller and Mr. Bealko. In addition, one of the employees, John Martin, advised him that Willow Island had returned some barges of coal "because of dirty coal and that at that time that is why they had to watch how they blended their coal" (Tr. 31). He also learned this from another company who sells coal to the electrical company (Tr. 32).

Mr. Delovich stated that he observed two endloaders, two draw-off tunnels, and three conveyor belts at the Marion Docks facility, and he described the function of the draw-off tunnels as follows (Tr. 32-33):

THE WITNESS: Well, we dump coal into a bin on the first draw-off tunnel and it goes down underneath the ground. Then the belt is down there and it dumps onto the belt and it comes up where the slate picker is and then it drops into the crusher and then the crusher drops it out onto a little conveyor belt that takes it up and drops it into a pile and then they push it into a draw-off tunnel -- again, another one -- which goes over across the road and to the river to the barges.

In clarifying his previous testimony that some of the coal transported to the facility is trucked and dumped directly

into a barge if it were readily available for loading, or stockpiled if there was no barge available, (Tr. 24), Mr. Delovich again confirmed that this was the case, but explained that "they don't dump it in the barge. They dump it into the coal chutes . . ." (Tr. 34). When again asked whether the coal is taken directly to the barge, he replied as follows at (Tr. 34-35):

THE WITNESS: With the truck. It is taken to there and then -- well, I don't know how they determine which coal they are blending. Now, of course, if it comes from one mine, I know we have two trucks coming out of M & J Coal and I have talked to those men. When I talked to the truck drivers there up at the mine, the M & J, they told me they needed the coal real bad. And, Mr. Markovich told me he has got to mine coal so that they can blend it or they can't sell their coal.

Mr. Delovich identified a copy of the MSHA Mine Identification Number (ID), assigned to the M & J Coal Company, and confirmed that it is part of the mine profile maintained in MSHA's records for that mine (exhibit R-4, Tr. 37-38). He confirmed that Charles Sorbello is listed as the President of M & J Coal Company, and that he is also shown as the Secretary-Treasurer of Marion Docks in MSHA's legal identification file (Tr. 38, exhibit R-1).

Mr. Delovich confirmed that he has previously inspected the M & J Mine, and he estimated that it is 5 miles from the Marion Docks facility. He confirmed that it is still operational, and was operational at the time he inspected Marion Docks in March, 1988 (Tr. 40). He also confirmed that Marion Docks has never previously questioned MSHA's jurisdiction to inspect its facility (Tr. 41). In addition to the M & J Mine, Mr. Delovich believed that Mr. Sorbello has an ownership interest in the No. 2 Williams Mine, which he understands leases the mine to the "DeConder brothers," who sell the coal to Mr. Sorbello. Mr. Delovich also believed that Mr. Sorbello has an ownership interest in the Wasco Mine, which reclaims gob coal through a tipple and ships it to Marion Docks (Tr. 42-43). Mr. Delovich did not believe that Wasco Coal was controlled by Marion Docks, but that Mr. Sorbello is an officer in both companies (Tr. 45). Mr. Delovich later stated that he has no knowledge that Wasco, which is also known as Wash Fossil Fuels, actually ships coal to Marion Docks, but that the Williams and M & J mines do (Tr. 47).

Mr. Delovich stated that in his prior conversations with Marion Docks superintendent Miller concerning MSHA's enforcement jurisdiction, questions were raised about two other dock loading facilities across the river, and he identified them as the Seccuro and Agerwald facilities. Mr. Delovich stated that Seccuro loads gravel and is under OSHA jurisdiction, and that Agerwald was conducting "test trial runs" at its loading facility to determine whether it was working properly (Tr. 41).

On cross-examination, Mr. Delovich confirmed that there are three other loading facilities operating in the vicinity of Marion Docks, and he identified them as Seccuro, Agerwald, and Preston Energy. He stated that Seccuro is the only one which has not been inspected by MSHA. He explained that although Seccuro loads coal at its dock, it also loads gravel, and that MSHA's legal identification information for that facility reflects that it is under OSHA enforcement jurisdiction and is inspected by that agency and not by MSHA (Tr. 49). Although Seccuro has one conveyor belt and one loading bin for loading coal on barges, since it also loads other rock minerals, the jurisdictional interpretation communicated to him (Delovich), is that Seccuro is subject to OSHA, rather than MSHA, jurisdiction (Tr. 50). Mr. Delovich confirmed that he has never inspected the Seccuro facility, although he has visited the site to observe the operation, and he stated that "from what I understand, they load rock too. I have no jurisdiction" (Tr. 50).

With regard to the Agerwald loading facility, Mr. Delovich stated that when he visited that site to conduct an inspection, he was informed that coal was being loaded "for a trial run." Upon return to his office after that visit, Mr. Delovich stated that Agerwald apparently called the MSHA district office, and that office advised him (Delovich) that "they said something about a trial run and that he was not under our jurisdiction and that in all probability he wouldn't be under our jurisdiction because he did not fit into the guidelines of what a barge loading facility would be" (Tr. 52). When asked about any MSHA guidelines concerning jurisdiction, Mr. Delovich responded "If they are loading other things such as rock or anything or don't own a mine" (Tr. 52). He confirmed that the Marion Docks facility loads only coal, while Agerwald loads coal, rock, and lime, and other minerals. When asked whether the kinds of minerals which are loaded is the determining factor as to whether OSHA or MSHA jurisdiction applies, Mr. Delovich responded ". . . it is not for me to determine. I question it too" (Tr. 53). He also stated that ". . . we are told that if they size the coal, blend the coal or clean the coal--that is under our jurisdiction" (Tr. 54).

In response to a bench inquiry of MSHA's counsel as to any applicable MSHA guidelines for determining jurisdiction, counsel responded as follows (Tr. 53):

MR. CRAWFORD: No, there were no guidelines other than the case law, Your Honor, but it has been my understanding that because there were other facilities and they were loading lime and other materials, it was felt that they didn't fall under the jurisdiction, plus they were not treating in the same manner.

Mr. Delovich stated that it was his understanding that MSHA Inspector Ron Myer was dispatched to the Agerwald loading facility to obtain the information for a determination of jurisdiction, and that the information was taken back to the MSHA district office for a determination by district manager Ron Keaton (Tr. 55). Mr. Delovich confirmed that he has never discussed the Marion Docks case with Mr. Keaton, and that he did not report the fact that Marion Docks was loading coal to Mr. Keaton. Mr. Delovich did not know who may have made such a report. Mr. Delovich identified his supervisor as Steve Kuretza, from MSHA's Fairmont field office, and confirmed that he has never discussed the jurisdictional question concerning Marion Docks with Mr. Kuretza (Tr. 57). He also confirmed that he has never seen a copy of a March 9, 1988, letter from Marion Docks counsel Lawrence to Mr. Kuretza questioning MSHA's enforcement jurisdiction (Tr. 57). Mr. Delovich stated that since the issuance of the contested orders of March 1, 1988, he has inspected the Marion Docks facility for respirable dust compliance and has done so as part of his regular inspection assignments by Mr. Kuretza (Tr. 58).

Mr. Delovich could not identify by name the trucking companies which have transported coal to the Marion Docks facility, and he surmised that they were independent trucking companies. He confirmed that he has inspected these trucks for brakes and back-up horns once they enter the Marion Docks property, but has no jurisdiction to inspect them while on the highway in transit (Tr. 60). He also confirmed that MSHA has inspected Marion Docks since it first started its operation in 1985, and that the mine ID information for that facility was filed with MSHA by Marion Docks. Marion Docks also filed its training program information with MSHA (Tr. 61-62).

Contestant's Testimony and Evidence

Kevin J. Bealko, President, Marion Docks, testified that his company is a coal loading facility which was constructed "to tipple coal for various producers here in Marion County because the main reason being that the B & O Railroad was putting us out of business up here and we wanted to get on the river and stay active in the coal fields" (Tr. 74). He confirmed that the corporate officers consist of himself as president and one-third owner, and co-owners Charles Sorbello and Frank Miller. He stated that the dock is used solely as a means of accommodating 15 different mine operators that haul coal to the facility for the purpose of selling it. Marion Docks does not take title to the coal, has no direct sales contracts with any of the utility companies, and all of the sales are handled through brokers. Marion Docks owns no coal mines or coal reserves, conducts no mining operations, and has no connection with any mines. Its sole occupation is that of a dock facility (Tr. 75-76).

Mr. Bealko stated that Marion Docks does not purchase the coal that is shipped to the dock by the producers, but does have an "agent account" whereby brokers act as agents for Marion Docks for the purpose of handling the coal for the utility customers who purchase it from the brokers. Marion Docks has no direct sales contracts with any utility customers, but it does have sales agreements with brokers who in turn have utility sales contracts. In further explanation of these broker-customer arrangements, Mr. Bealko stated as follows (Tr. 76-77):

Q. Okay. So, then is it correct that the broker has the contract with the utility or with the customer, the ultimate customer?

A. Right, correct. They order up our barges and they tell us what spec as you have to hit in any coal that you load at any place, whether you are Consol or little Marion Docks. You have to hit a certain specification. That may be size or that may be ash or that may be sulphur or it may be all three. Our brokers notify us when the barges are coming and what specification we have to meet on those barges, as anyone does, like Consol or Island Creek or Peabody or no matter who you are, or Seccuro or Agerwald. They have got a spec they have to hit. That is just the nature of the coal business. You just don't load a coal from a

particular job that hits that spec. It is a spec that may fit one job but when you are loading three different types of orders that we have, you have got to do it over a period of 15 jobs to make it all work through the course of a month.

Mr. Bealko confirmed that upon arrival of the coal at its site, it is weighed, and if it is oversized and does not meet the broker's specifications, it is processed and crushed through belt hoppers and bar grizzlies that take out all of the coal fines. Approximately 10 percent of the larger coal of more than 4 inches goes to picking tables and crushers. He confirmed that the larger coal sizes cannot pass through the tipples or the bucket unloaders at the utility power plants, and that the utilities do not like any coal sized larger than "four by zero" (Tr. 78).

Mr. Bealko also confirmed that his facility receives coal which is already sized at "four by zero." This coal, which amounts to 10 percent of each load, is taken directly to the surge hopper without crushing, and is dumped into the barges by means of conveyor belts. The coal under 4 inches never crosses the picking table or the crusher (Tr. 79). No coal washing or cleaning takes place, and only 4 percent of the coal ever "gets picked" at the picking table, and most of it goes to the crusher (Tr. 80).

Mr. Bealko stated that his facility uses equipment such as belt conveyors and front-end loaders, but it does not have cyclones, washer plants, or scalpers to remove different pyritic impurities, and he described the equipment which is used as follows (Tr. 80-81):

A. We have two high-lifts. We have the facility itself which is two bins that goes onto a belt that goes up to this bar grizzly that takes the fines away and that goes up to a radial stacker that drops into this surge hopper that goes over to the barges. The other part is the product that doesn't cross the grizzly that goes on to the picking table and goes into the crusher and at that point it winds up on the radial stacker and it goes up into the stockpile to the surge hopper that goes into the barges.

Mr. Bealko confirmed that his company does not own the barges that transport the coal from his facility, or the

trucks that haul coal to the site. The truckers are independent contractors who "order up their trucks depending on what coal they have to haul" (Tr. 82). With regard to the inspector's reference to the Willow Island power plant, Mr. Bealko denied that his company has ever shipped coal to that utility. He confirmed that it does load coal for the Pleasants power plant, and other plants as determined by the coal brokers (Tr. 83).

Mr. Bealko confirmed that Mr. Sorbello owns one-half of the M & J Coal Company, a deep coal mine producing low sulphur coal, and that the majority of that coal comes to Marion Docks, and constitutes one-sixth of all coal production that comes to the dock from all mines. Mr. Markovich is also an owner of that mine. Mr. Bealko stated that he and Mr. Miller have no ownership interest in any coal mines, either as stockholders or corporate officers (Tr. 84).

Mr. Bealko stated that prior to the design and construction of the Marion Docks facility, he operated tipples on the B & O railroad. The Bell Mining Company and other coal companies loaded coal at that facility, and he was aware of the fact that since coal was tipped at this facility, it was subject to MSHA's jurisdiction. Since his Marion Docks plant was the "same type of plant" as Bell Mining Company, and since MSHA inspectors advised him that Marion Docks would be inspected when it became operational, he took great pains to insure that his facility would be approved by MSHA and stay in compliance with MSHA's safety requirements. For these reasons, he filed for an MSHA mine ID number and operated for 2-1/2 years loading coal and being inspected by MSHA. However, when he learned from MSHA inspectors that three other docking facilities in his area who operated facilities similar to his were not being inspected by MSHA, he then began to question MSHA's jurisdiction over his facility because "our identity and our dock is no different from any identity over any of the other docks up in our area (Tr. 85-86).

Mr. Bealko indicated that with the exception of the Seccuro Dock, which also loads stone, the other docks do precisely what his does. He stated that the R. P. Agerwald Dock only crushes and loads coal from independent coal producers, and "comingles it to hit certain specs just like we have to do, and he puts it in barges which are ordered up from brokers just like we have to do" (Tr. 87).

Mr. Bealko explained that the operator of the Agerwald Dock retained an attorney who contacted Inspector Delovich's supervisor, Mr. Kuretzka. As a result of this, Inspector

Delovich inspected the Agerwald operation and reported to Mr. Kuretzka "that there were many problems with that facility as far as coming under MSHA to be approved, and Mr. Kuretzka said, hey, leave it alone; we got a phone call from their attorney that says they are not under our jurisdiction, they are under OSHA, which I know is not pertinent to our situation but maybe it is because he is right across the river from us tippling coal just like we are" (Tr. 89).

On cross-examination, Mr. Bealko stated that the coal broker is the customer who provides the coal specifications to Marion Docks, and Marion Docks provides the coal according to those specifications. He confirmed that Marion Docks has never had any of the coal which it has loaded for shipment ever rejected because it did not meet the required specifications. He indicated that the "specifications" concern the size of the coal for unloading purposes, as well as the quality of the coal in terms of ash and low and high sulphur content, "as all specifications do," and that Marion Docks brings in coal to meet those specifications (Tr. 93-94).

Mr. Bealko stated that "the broker kind of orders the coal from the mine. All we do is wait for the coal to show up on the dock and then we put that coal in the barges for those producers" (Tr. 94). Marion Docks knows that the coal which is shipped meets the required specification, and it receives payment from the broker and not the utility, and the broker takes title to the coal when it is shipped from the dock. Marion Docks is aware of the locations where the coal is shipped to in accordance with the specifications from the brokers who ordered the barges, and Mr. Bealko stated that "we have to in order to, you know, hit that specification that they are calling for." The receiving plant transmits its required specifications through the broker to the coal producer, and Marion Docks handles the coal at the dock for the producer so that it meets the specifications before it leaves the dock (Tr. 95).

Mr. Bealko confirmed that Mr. Sorbello, one of his partners in Marion Docks, is the only shareholder who holds an ownership interest in the M & J Coal Company and the Bell Mining Company, a soft surface mine. Mr. Bealko also confirmed that Marion Docks accepts coal for shipment from the M & J mine, and at times from the Bell mine (Tr. 96-97).

Mr. Bealko confirmed that only 10 percent of the coal received at the Marion Docks for shipment goes to a picking table, and only 3 or 4 percent of that ever gets picked. Picking is done to prevent big rocks and roof bolts from

accidentally reaching and ruining the crusher, or causing problems when it is off-loaded at a plant (Tr. 97). In the event the specifications call for the crushing of the coal, it is crushed by Marion Docks, but only 10 percent of the coal that reaches the picking table is crushed. The reason for the crushing is to meet a particular specification or to insure that it can be loaded in the barge and off-loaded at the plant. He further explained as follows (Tr. 99-100):

A. Well, specifications are one thing. That is an analytical point of view on moisture, ash, sulphur, BTU. Sizing is something else. That is a whole separate specification, if you want to call it. It is a sizing specification versus an analytical specification.

Q. Do you have to consider both when you load?

A. For particular orders, yes. Some yes and some no.

JUDGE KOUTRAS: Well, he has got to consider what the broker orders up, don't you?

THE WITNESS: Exactly.

JUDGE KOUTRAS: If a broker orders up all crushed coal, fines, from a customer, then you are going to have to ship it, aren't you?

THE WITNESS: Well, like I say --

JUDGE KOUTRAS: Or else reject the broker and tell the broker to find some other shipper.

THE WITNESS: Somebody else to load it, right. But most of our coal is a four by zero product for our particular plants that our coal winds up to.

JUDGE KOUTRAS: But the point is that you have to deliver and load coal that is specifically to the specifications of the customer who goes to the broker who, in turn, tells you, hey, this is the coal that has to go to customer "A" isn't that true?

THE WITNESS: Correct.

Mr. Bealko confirmed that Marion Docks ships coal from 15 different coal producers who truck coal to the facility, and in response to a question as to whether or not he tests the coal for BTU, ash, and sulphur content, or rejects any coal and sends it back to the producers, Mr. Bealko stated as follows (Tr. 102-103):

A. We have a general understanding of what mines are coming in. The broker takes most of the samples out in the field at the mines prior to coming into the loading facility. We know at that point what coal goes on what order because the broker is more or less handling the sample. They have their own lab and everything. As far as Marion Docks actually doing any of the sampling, it is out of our hands because the broker handles most of that. What we know is that coal company "A" is hauling in and it is at a certain spec and that is what it is supposed to hit. We put it into the barge. You know, it is up to the broker and the producer to make sure that that happens. All we are doing is sizing the coal and putting it into the barge.

And, at (Tr. 120-122):

A. The broker organizes the sampling of the coal as it goes into the barges.

Q. Well, he organizes, but where is it done physically? Where is the sampling done? Is it done there at the dock?

A. It is done at the plant but they do a preliminary sampling when the coal is being loaded into the barges periodically to make sure the coal is being loaded, you know, prior to going to the customer correctly.

Q. What plant are you talking about?

A. The power plant. In other words, the coal gets sampled at the plant. It is done through an automatic sampler.

Q. Okay.

A. On occasion, most brokers will spot check the coal being loaded at the docks.

Q. Okay.

A. So, they will come in with an independent lab that goes in and samples the barges prior to it being shipped down river so they know the specification of the coal prior to it going to the plant, so they can represent to their customer that here is what we have loaded and here is what is coming to you.

Q. And, Marion Docks is not involved in that at all.

A. No, no, we leave that strictly up to the broker. That is their connection with the plant. All we do is, like I say, the handling of the coal that goes into that barge.

Mr. Bealko confirmed that all of the coal shipped from Marion Docks goes to utility companies in the "tri-state area," and in some circumstances the coal is shipped out of state (Tr. 105). In the event barges are unavailable for a shipment of coal which has been ordered to a particular specification, the coal is stock piled at Marion Docks. If a barge is available, the coal is processed through the facility, and is sized. If it is already sized, it is taken to a surge hopper, dumped in a bin, and transported by a conveyor belt to the barge. Some of the coal which has been previously sized, screened, or washed at the mine, goes directly to the barge (Tr. 107). In response to a question as to what would occur if coal is trucked to Marion Docks from different coal producers and no barges are readily available for immediate shipment, Mr. Bealko responded as follows (Tr. 108-110):

JUDGE KOUTRAS: And, what happens to them? Are they stockpiled in 15 different piles?

THE WITNESS: No. Normally in our plant right there, we can crush coal or size coal or stockpile coal ahead of the barges getting there.

JUDGE KOUTRAS: Okay. Knowing what the customer's needs are.

THE WITNESS: Exactly. We will know from the broker which barge is ordered up, and we can go

ahead and crush or size or just place coal over the bin on five to six barges prior to the barges showing up.

JUDGE KOUTRAS: So, you do, in fact, then, if you pardon the expression, and it might bring a twinge to counsel over there at the table, Mr. Lawrence, but you do custom blending, don't you, loosely stated?

THE WITNESS: Or we use one particular coal for one order and one particular coal for another order and some of it gets stockpiled and some of it gets processed for the barges coming in.

JUDGE KOUTRAS: But depending on what the broker tells you, theoretically you could --

THE WITNESS: Load what -- there is not one particular coal for a particular order that comes in down there.

JUDGE KOUTRAS: That's what I'm saying. So, you crush and blend and size and stockpile awaiting the barge to the specification of the customer, of a customer; isn't that true?

THE WITNESS: In most circumstances.

* * * * *

THE WITNESS: We are just more or less the loader.

JUDGE KOUTRAS: I know but in order for you to ship the right coal, the right blend of coal --

THE WITNESS: Oh, we have to know the specifications.

JUDGE KOUTRAS: -- you have to know the specs, don't you?

THE WITNESS: Exactly.

JUDGE KOUTRAS: And, you do, in fact, do the blending process, don't you?

THE WITNESS: If the coal needs to be blended, we do it.

JUDGE KOUTRAS: If it needs to be done, you do it.

THE WITNESS: We do it, right.

JUDGE KOUTRAS: And, if it doesn't --

THE WITNESS: Right.

JUDGE KOUTRAS: In other words, if all of this was done prior to coming to Marion Docks, all of the sizing and the blending and the washing, and it is just ready to be shipped, then it will simply go from the mine, already processed, to truck and to the barge, right?

THE WITNESS: Exactly.

JUDGE KOUTRAS: There wouldn't be any need to go through this intermediary stop.

THE WITNESS: Exactly.

In support of its motion for summary decision, the contestant submitted the affidavit of Charles J. Sorbello, Marion Docks Vice-President, and it states in relevant part as follows:

1. Marion Docks is a privately-owned West Virginia corporation. It is not a subsidiary or division of any other corporation, nor is it the parent or holding company for any corporation.
2. Marion Docks owns and operates a coal loading facility and dock located on the Monongahela River in Fairmont, West Virginia. It does not own or lease any other real property.
3. At this loading facility, Marion Docks receives coal which is trucked on to its site and loads such coal onto river barges. The coal that is received at the site is transported from deep and surface mines not owned or leased by Marion Docks. When the coal arrives

at the Marion Docks' site, it is dumped and stockpiled on pads. The coal is then loaded into a tipple where the coal is crushed and then loaded into river barges. Marion Docks does not own or operate a washing or preparation plant, nor does it blend the coal before loading it onto barges.

4. Marion Docks does not own the coal which it receives for shipment.

5. Marion Docks' facility is not located on land from which minerals are extracted, nor is it appurtenant to such a mining area.

6. Marion Docks' facility is not a facility used in conjunction with the work of extracting minerals from the ground.

Contestant's Arguments

In support of its assertion that its Marion Docks loading facility is not a mining operation within the meaning of the Act, the contestant advanced the following factual and legal arguments.

Marion Docks is a privately-owned West Virginia corporation. It is not a subsidiary or a division of any other corporation, nor is it the parent or holding company for any corporation. Marion Docks owns and operates a coal loading facility and dock located on the Monongahela River in Fairmont, West Virginia. It does not own or lease any other real property.

At its loading facility, Marion Docks receives coal which is trucked on to this site. The coal which is received at the site is transported from deep and surface mines not owned or leased by Marion Docks. The coal is hauled by independent operators, not employed by Marion Docks. In addition, the trucks driven by such operators are not owned or leased by Marion Docks.

When the coal arrives at the barge loading facility, it is dumped and stockpiled on loading pads. The coal is then loaded into a tipple where it is loaded into river barges. Marion Docks does not own or operate a washing or preparation plant nor does it blend the coal before loading it onto barges. Marion Docks does not take title to the coal which it receives for shipment.

The Marion Docks facility is not located on land from which minerals are extracted nor it is appurtenant to such a mining area. Marion Docks' facility is not a facility used in conjunction with the work of extracting minerals from the ground.

Marion Docks owns no coal reserves or coal leases. Marion Docks' customer is a coal broker with a contract for supplying coal to a utility located along the Ohio River. The broker is a separate corporate entity unrelated to Marion Docks. Neither the broker, nor Marion Docks, share common officers, shareholders, or directors. The broker orders the coal directly from one of a dozen mines which ship coal to Marion Docks. The broker also schedules delivery and arrival of the coal trucks to Marion Docks. The coal broker also arranges for arrival of river coal hauling barges at the Marion Docks facility. The broker is aware of the mineral and Btu qualities of the coal produced by each of the mines trucking coal to the Marion Docks facility. Marion Docks does not conduct tests to determine the specifications of any coal delivered to it. The broker either checks the specifications at the mine or at the Marion Docks facility.

The loading facility used by Marion Docks consists of a tipple facility comprised of moving conveyor belts. In the tipping process, the coal is crushed to pieces smaller than 4 inches square for ease of loading and unloading onto the river barges. In addition, the coal is passed over sizing screens thereby allowing all coal of the proper dimensions to pass onto a conveyor belt for direct loading onto the barges. Approximately 10 percent of the material does not drop through the sizing screens but is conveyed onward to a picking table for removal of rocks, bolts, other metal, and oversize chunks. This function serves a dual role of protecting the loading and unloading equipment and removal from the coal of nonspecific materials.

Inspector Delovich testified that he is informed by his superiors that a loading facility is subject to MSHA jurisdiction if it sizes, blends or cleans coal. He believed that Marion Docks sized and blended coal at its loading facility, although he agreed that the coal was not cleaned at the facility. Inspector Delovich also indicated that he has been instructed that if a loading dock is engaged in the loading of materials other than coal (e.g. gravel) then that facility is not subject to MSHA jurisdiction. He referred to a loading facility located adjacent to the Marion Docks facility which

loaded both coal and gravel and indicated that to his knowledge MSHA had not exercised jurisdiction over that facility because of the gravel loading operations.

Contestant concludes that its Marion Docks facility does not fall within the statutory definition of the term "coal or other mine" because it is not "an area of land from which minerals are extracted" nor is it the "private ways and roads appurtenant to such areas" as provided for in the geographic parameters of a mine as defined in 30 U.S.C. § 820(h)(1). With regard to the functional definition of a mine facility used in the extraction or preparation of coal, contestant asserts that it is the term "work of preparing the coal" as defined in 30 U.S.C. § 802(i) which provides that Marion Docks is not subject to the jurisdiction of the Act. Contestant points out that this definition defines coal preparation as "the breaking, crushing, sizing, cleaning, washing, drying, mixing, storing, and loading of bituminous coal, lignite, or anthracite, and such other work of preparing such coal as is usually done by the operator of the coal mine." (Emphasis added.)

In support of its argument that it is not subject to MSHA's enforcement jurisdiction, contestant cites the case of Secretary of Labor v. Oliver Elam, Jr., Company, Inc., 4 FMSHRC 15 (1982), a case in which the Commission affirmed a Judge's decision that Elam's loading facility was not a "mine" subject to the Act. Contestant points out that in Elam the Commission indicated that the proper inquiry should focus on the nature of the operation and not solely upon whether or not one or more of the activities listed in section 802(i) of the Act was performed. Contestant argues that the Commission focused on several factors which are also present in its case, including the fact that the loading dock did not contract with either the mine operators from whom it received the coal nor with its customers to whom it delivered the coal, and concluded that although the coal was loaded through a tipple facility which included a hopper, crusher and conveyor belts, those facilities were used for loading the coal rather than for preparing it to meet market specifications.

In addition to the Elam case, contestant cites a decision by the United States District Court for the Southern District of Indiana, Donovan v. Inland Terminals, Inc., 3 MSHC 1893 (March 1985), in which the court found that MSHA lacked enforcement jurisdiction over a loading facility whose operator had no contracts directly with the coal operators from whom it received the coal nor with the customers who used the

coal, and where the breaking, crushing and loading of coal was done to facilitate the loading operation.

Contestant maintains that its case is similar to the Elam and Inland Terminals cases, and dissimilar from the cases cited by MSHA in support of its jurisdictional argument, namely, Little Sandy Coal Sales, Inc. v. Secretary of Labor, 7 FMSHRC 891 (June 1985), and Secretary of Labor v. Mineral Coal Sales, Inc., 7 FMSHRC 615 (May 1985). In Little Sandy Coal Sales, Inc., the Commission found jurisdiction because the facility purchased raw coal from local mines, custom processed it, sized it to meet market specifications depending upon customer demands, and then loaded it onto barges for delivery to users. In Mineral Coal Sales, the Commission affirmed my jurisdictional finding that the "operation carried out by Mineral includes the custom blending and loading of coal to meet the . . . specifications and needs of its brokers and customers," and found that the various operations taking place at the Mineral Sales single site, when viewed as a collective whole, indicated that the facility was a mine. In essence, the Commission found no distinction between the loading facility and the broker who arranged such shipments and sales, and oversaw the custom blending. Contestant views this fact as a critical distinction from its case "where the Marion Docks facility is owned and operated primarily by Kevin Bealko, who has no interest in either the broker or any of the mines which ship coal through the facility."

Findings and Conclusions

The Jurisdictional Question

Section 4 of the 1977 Mine Act, 30 U.S.C. § 803, states: "Each coal or other mine, the products of which enter commerce . . . shall be subject to the provisions of this Act."

Section 3(h)(1) of the Act, 30 U.S.C. § 802(h)(1)(C), defines "coal or other mine" in relevant part as: "(C) lands, . . . structures, facilities, equipment, machines, tools, or other property . . . used in, or to be used in, or resulting from . . . the work of preparing coal or other minerals, and includes custom coal preparation facilities."

Section 3(i) of the Act, 30 U.S.C. § 802(i), defines the term "Work of preparing the coal" as follows: "'[W]ork of preparing the coal' means the breaking, crushing, sizing, cleaning, washing, drying, mixing, storing, and loading of bituminous coal, lignite, or anthracite, and such other work

of preparing such coal as is usually done by the operator of the coal mine."

The critical issues in this case are whether or not the loading operations taking place at the Marion Docks facility involve the "work of preparing the coal," and whether or not that facility is a "mine" subject to MSHA's inspection and enforcement jurisdiction. Contestant relies on the decisions in Secretary of Labor v. Oliver Elam, Jr., Company Inc., 4 FMSHRC 5 (January 1982), and Donovan v. Inland Terminals, Inc., 3 MSHC 1893 (March 1985), in support of its argument that MSHA lacks jurisdiction in this case. MSHA relies on the decisions in Little Sandy Coal Sales, Inc., v. Secretary of Labor, 7 FMSHRC 891 (June 1985), and Secretary of Labor v. Mineral Coal Sales, Inc., 7 FMSHRC 615 (May 1985), in support of its argument that MSHA has jurisdiction in this case. An examination of these precedent decisions involving coal loading and preparation facilities engaged in activities similar to those by Marion Docks follows below.

The Elam case concerned a commercial dock operator whose loading facility loaded steel, ingot cars, pipe, tar pitch, and coal onto barges. Approximately 40 to 60 percent of the tonnage loaded at the dock was attributable to coal which was shipped to the customers of coal brokers who paid Elam to load the coal for shipment to customers designated by the brokers. Elam also owned construction equipment such as cranes, trucks, and bulldozers which it leased to others, and its employees were used interchangeably in its dock and equipment rental operations. The coal which was crushed by Elam was essentially crushed to one size solely to facilitate the barge loading process, and Elam did not prepare coal to market specifications or for any particular use, nor did it separate waste from coal or add any material to it.

In Elam, the Commission held that inherent in any determination as to whether an operation is properly classified as "mining" is an inquiry not only into whether the operation performs one or more of the activities listed in section 3(i) of the Act, but also into the nature of the activity performing such activities. Upon examination of Elam's activities with respect to its "work of preparing the coal" to make it "suitable for a particular use or to meet market specifications," the Commission concluded that Elam's handling of the coal, which included storing, breaking, crushing, and loading, was done solely to facilitate its loading business and not to meet customer's specifications or to render the coal fit for any particular use. 4 FMSHRC, at 7-8 (January 1982).

The Inland Terminals case was before the Court on a motion by the Secretary of Labor for a preliminary injunction enjoining Inland from denying entry to MSHA inspectors who sought to inspect Inland's operations. The facts in that case, as found by the court, reflect that Inland was a commercial dock operator who in addition to loading coal onto barges for its coal broker customers, also engaged in the business of repairing, rigging, and cleaning barges for any customers requiring such services. Upon instructions from its coal broker customers, to load a certain amount and type of coal, Inland ran the coal through its crushers, and occasionally blended different types of coal based upon the specifications which the broker customers found necessary to fulfill its contracts. Of the four crushers used by Inland to facilitate its loading operation, only one had the capability to separate coal from rock or other waste materials, and approximately 10 percent of the coal loaded bypassed the crushers and was loaded directly onto the barges. Notwithstanding the fact that Inland on occasion blended coal to customer specifications, the Court, relying on the Commission's Elam decision, found that Inland was not a mine covered by the Act, and stated as follows at 3 MSHC 1895:

The Court recognizes that certain factors in this case are distinguishable from the facts in Elam. However, based upon the facts presented at the hearing the Court concludes that, like Elam, the nature of Inland's operation militates more strongly toward a finding that Inland is a shipping or loading facility that handles coal and is not a "mine."

In the Mineral Coal Sales, Inc., case, the cited operator owned a facility known as Mineral Siding, which handled solely coal, and the facility consisted of a railroad siding, a storage yard, and a trailer that housed laboratory equipment for testing coal. Equipment at the site included a truck scale, a mobile tippie that crushed coal and conveyed it to railroad cars, a stationary tippie, grading tippie, and front-end loaders used to transfer coal from various stockpiles to the tipples. Mineral Coal Sales extracted no coal itself and was not affiliated with any producing mine or transportation company. The coal handled at its facility was purchased by coal brokers from producing mines or independent truckers. The brokers arranged for delivery of coal by truck to Mineral Siding and, after loading, for delivery by rail to the various customers of the brokers. Mineral Coal Sales charged the brokers a flat rate per ton of coal loaded onto the railroad cars.

Coal trucked to Mineral Siding was weighed on a truck scale by an employee of Hubbard Enterprises, a coal broker operating at Mineral Siding. Coal of substantially the same quality was stockpiled together, and once the coal was stockpiled, Hubbard tested it to determine BTU, ash, and sulphur content, and its free swelling index. When coal was ready to be loaded for shipment to a customer, Hubbard informed Mineral Sales as to how many scoops of coal should be taken from particular stockpiles in order to fill the appropriate number of railroad cars comprising the order. Mineral Sales would then draw off the proper number of scoops from the stockpiles and dumped them into the hopper of the mobile tippie. A Mineral Sales employee operated the tippie and oversaw the loading of the railroad cars. The coal passed from the tippie hopper into a crusher unit where it was crushed to a uniform size. The coal then traveled on the tippie conveyor belt for loading into the railroad car. Once the car was loaded, Hubbard again sampled and tested the coal to ensure that the load met the specifications of the respective order. A stationary grading tippie was also present at the Mineral Siding facility. Coal passed over various sizing screens to separate "lump," "egg," and "stoker" coal, and the tippie was used primarily to produce coal for domestic consumption.

In contesting MSHA's enforcement jurisdiction, Mineral Coal Sales maintained that it was not a mine operator and that its Mineral Siding facility was not a mine. In my decision at 6 FMSHRC 809 (April 1984), I rejected both arguments, and found that unlike the operation involved in the Elam case, the coal loading process carried out at the Mineral Siding facility included a procedure and practice whereby the coal which was ultimately loaded and shipped to the customers of the broker (Hubbard) was mixed to their specifications and standards. I further found that the operation carried out by Mineral Coal Sales included the custom blending and loading of coal to meet the specifications and needs of Hubbard's customers. 6 FMSHRC at 840.

Upon review of my decision, the Commission affirmed my jurisdictional findings and conclusions, and stated as follows at 7 FMSHRC 620:

[W]e have no difficulty concluding that the business engaged in at Mineral Siding constitutes "mining" under the Act. At this facility coal is stored, mixed, crushed, sized, and

loaded--all activities included in the statutory definition of coal preparation. Furthermore, an examination of the nature of the Mineral Siding operation reveals that, unlike the commercial loading dock in Elam at which was coal crushed merely to facilitate loading and transportation on barges, at Mineral Siding all of the above listed work activities are performed on the coal to make it "suitable for a particular use or to meet market specifications." . . . Thus, coal preparation occurs at Mineral Siding and MSHA properly asserted its inspection authority over the facility.

In response to Mineral Sales' contention that its employees at the Mineral Siding facility merely loaded coal from two or three different stockpiles under the direction and control of the broker Hubbard, a separate entity, the Commission ruled that the operations taking place at a single site must be viewed as a collective whole. Given the active presence and control exercised by Mineral Sales at the site, including the intermingling of personnel and functions among the various entities at the site, and the operation and supervision of the site by Mineral Sales after it terminated the various lease arrangements, the Commission concluded that Mineral Sales was properly found to be the operator of the mine.

Little Sandy Coal Sales, Inc. concerned a coal processing plant which purchased coal from local mines and processed it for household and commercial sales. Judge Melick relied on the Mineral Coal Sales decision in finding jurisdiction, and concluded that the storing, mixing, crushing, sizing, and loading of coal by Little Sandy to make it "suitable for a particular use or to meet market specifications," constituted a mining operation, and that MSHA properly asserted its inspection authority over the facility.

The facts in this case show that the contestant operates a coal loading tipple facility which loads and ships coal by river barges to several utility customers who purchase the coal from brokers. The brokers arrange for the purchase and sale of the coal which is produced at several mines and then shipped to Marion Docks by independent truckers. The contestant's president, Kevin Bealko, confirmed that he had previously operated coal tipple facilities on the B & O Railroad, and that he loaded and shipped coal produced at several local mines from that facility. Upon construction of the Marion Docks facility, which Mr. Bealko characterized as the "same

type of plant" as the previous tipple facility, and believing that MSHA would begin inspecting the new facility "just like any other tipple that they inspected," the contestant filed for and received an MSHA Mine ID number. The facility was then inspected on a regular basis by MSHA for a period of 2-1/2 years, and the inspections have continued to the present. Mr. Bealko confirmed that his jurisdictional question was raised when he recently learned that other similar dock facilities in close proximity to his are not inspected by MSHA. Mr. Bealko identified one in particular, the R. P. Agerwald Dock, and he claimed that it is identical to his operation, but is not inspected by MSHA because of an asserted lack of jurisdiction.

The evidence adduced in this case establishes that the Marion Docks facility handles and processes coal which is trucked there from approximately 15 producing mines. The facility is equipped with a scale house, endloaders, hoppers, crushers, conveyor belts, chutes, draw-off tunnels, picking tables, bar grizzlies, stackers, bins, and hi-lifts, all of which are used to process and prepare coal for loading and shipment to utility customers. Although the coal is not washed, some of it is conveyed to picking tables where slate and other debris is "picked" from the coal. Some of the coal which has been sized or crushed at less than 4 inches before its arrival at the facility may be taken directly to a barge for loading, if one is readily available. If not, the coal is stockpiled. Coal which is larger than 4 inches and cannot pass through the loading tipple or the bucket loaders which receive it at the utility is conveyed to the crushers and picking tables, and coal which does not meet the broker's specifications is processed through hoppers and bar grizzlies which remove all of the coal fines.

The thrust of the contestant's jurisdictional argument is that it has no ownership interest or connection with any of the producing mines which ships coal to its facility, has no connection with the coal brokers, and that the coal processed through its facility is processed solely for the purpose of facilitating the loading of the coal at the dock, and the unloading of the coal at the point of destination. The contestant denies that it is engaged in any "custom coal blending," and it takes the position that none of its activities in connection with the "work of preparing the coal" involves the preparation of coal to meet customer market specifications.

While it is true that there is no evidence that the contestant, as a corporate entity, has any ownership interest in any of the producing mines which ship coal to its facility, one of

its corporate officers, Charles Sorbello, has an ownership interest in at least two mines which sells and ships coal through the contestant's facility. However, I cannot conclude that these facts are particularly critical to any jurisdictional determination in this case. The fact that a coal preparation facility may have no connection with the coal extraction process or the mine operators who extract the coal is irrelevant to the question of whether or not jurisdiction attaches under the Act. See, e.g., Marshall v. Stoudt's Ferry Preparation Co., 602 F.2d 589 (3d Cir. 1979), cert. denied, 444 U.S. 1015 (1980); Marshall v. Tacoma Fuel Co., No. 77-0104-B (W.D. Va. June 29, 1981); Secretary v. Carolina Stalite Company, 6 FMSHRC 2518 (Nov. 1984); Secretary v. Alexander Brothers, Inc., 4 FMSHRC 541 (April 1982).

With regard to the question as to whether or not the contestant's coal processing activities include custom blending of coal to meet customer or market specifications, I take note of Mr. Sorbello's affidavit in which he denies that any coal blending is done before the coal is loaded for shipment. I also take note of the fact that Mr. Sorbello did not testify in this case, and that Mr. Bealko was the only witness called by the contestant in support of its case.

Inspector Delovich testified that he observed coal being weighed, cleaned, crushed, stockpiled, and loaded at the Marion Docks facility. Although he observed no blending taking place, Mr. Delovich stated that in conversations with Mr. Bealko, Mr. Sorbello, Mr. Markovich, and other inspectors, he learned that blending was done at the facility. Mr. Delovich believed that low sulphur Pittsburgh coal was being blended with the high ash Sewickley coal, and that this was done as it was dumped and stockpiled. Mr. Delovich testified that during an inspection at the M & J Coal Company mine in connection with a mine fire, Mr. Bealko, Mr. Sorbello, and Marion Docks superintendent Frank Miller all expressed their concern in keeping the mine open because of the need to blend its low sulphur and ash coal with the other coal handled at the facility in order to sell it.

During a bench colloquy with the contestant's counsel regarding his motion for summary decision at the close of Mr. Delovich's testimony, counsel conceded that the contestant engaged in some of the activities connected with the breaking, crushing, sizing, cleaning, washing, drying, mixing, storing, and loading of coal (Tr. 70). Except for the washing and drying of coal, it seems clear to me that the evidence in this case supports a conclusion that the contestant's facility engaged in the other enumerated activities.

With regard to any custom coal mixing or blending activities, contestant's counsel agreed that Mr. Delovich's testimony reflects that the coal processed at the facility is subjected to some kind of a mixing process before it is loaded for shipment. In the context of coal blending, counsel stated that "I think it is nothing more than taking a scoop from one pile and a scoop from another. To the extent that the loading facility does something other than that, there has been no testimony to that" (Tr. 69).

Mr. Bealko testified that all of the coal handled and processed at the Marion Docks facility must meet the customer's specifications before it is loaded for shipment. At several points during the course of his testimony, Mr. Bealko alluded to the fact that his facility does mix and blend coal to meet the specifications of a particular customer. For example, he stated that any coal which arrives at the facility which does not meet the broker's specifications is crushed and processed in order to meet those specifications (Tr. 78). Brokers who "order up barges" also inform Marion Docks as to the particular coal specifications which must be met before the coal is loaded for shipment, and these specifications may include the size of the coal, and its ash or sulphur content (Tr. 77). Marion Docks must insure that the coal meets the customer's specifications before it leaves the dock (Tr. 95). Although crushing and sizing may be done to meet the customer's coal size specification to facilitate the loading and unloading of the coal, some particular customer orders include analytical specifications to insure that proper moisture, ash, sulphur, and BTU content are met (Tr. 99).

Conceding that MSHA had jurisdiction over a prior coal tipple loading operation which he operated prior to the construction of his Marion Docks facility, Mr. Bealko characterized his prior operation as the "same type of plant" as the Marion Docks facility (Tr. 85). In explaining the coal loading and crushing operation carried out by the R. P. Agerwald Dock operating near his facility, Mr. Bealko stated that it "comingles it to hit certain specs just like we have to do, and he puts it in barges which are ordered up from brokers just like we have to do" (Tr. 87) (emphasis added).

Although Mr. Bealko confirmed that some of the coal which is received at the Marion Docks facility is already sized and prepared for shipment directly to a customer, he also confirmed that if a barge is not readily available for loading, coal is crushed and sized according to the customer's needs and then stockpiled while awaiting the arrival of a barge for

loading (Tr. 108-109). Mr. Bealko candidly admitted that in most circumstances, the coal processed at the facility is crushed, sized, and blended at that facility in accordance with the customer's specifications (Tr. 109). In response to a direct question as to whether or not his facility is engaged in the blending process, Mr. Bealko responded "if the coal needs to be blended, we do it" (Tr. 110) (emphasis added).

After careful review and consideration of all of the testimony and evidence adduced in these proceedings, I conclude and find that the activities carried out at the contestant's Marion Docks facility constitutes "mining" under the Act, and that those activities place the contestant within its jurisdiction. The evidence establishes that the sole product handled at the facility in question is coal which is mixed, crushed, sized, stored, and loaded. All of these activities fall within the statutory definition of "coal preparation," and brings the contestant within the Act's jurisdiction. I reject the contestant's contention that its handling and processing of coal is merely to facilitate its loading and unloading. To the contrary, while it is true that some of the coal is processed for this purpose, the testimony and evidence adduced reflects that coal is also in fact custom blended, mixed, crushed, and sized at the facility in order to meet a particular customer's needs and specifications.

I reject the contestant's reliance on the Elam and Inland Terminals decisions. Those decisions were based on facts which indicated that the "work of preparing the coal" was accomplished solely to facilitate the coal loading process, rather than rendering the coal fit for any particular customer's needs or specifications. In my view, the facts presented in the instant proceedings are more akin to those presented in Mineral Coal Sales, Inc., supra, where my finding of jurisdiction was affirmed by the Commission.

Fact of Violations

As stated earlier, the contests were filed by the contestant for the purpose of contesting MSHA's jurisdictional claims, and the contestant confirmed that in the event of an adverse decision and rejection of its jurisdictional arguments, it will not contest the violations further and will pay any proposed civil penalty assessments for the violations in question. Under the circumstances, and in view of my rejection of its jurisdictional claims, all of the aforementioned contested citations and orders issued by Inspector Delovich on March 1, 1988, ARE AFFIRMED as issued.

ORDER

In view of the foregoing findings and conclusions, the Notices of Contest filed by the contestant in these proceedings ARE DENIED AND DISMISSED. The previously filed motions by the contestant for summary decisions in its favor ARE LIKEWISE DENIED, and the contested citations and orders are all AFFIRMED.


George P. Koutras
Administrative Law Judge

Distribution:

W. Henry Lawrence IV, Esq., Steptoe & Johnson, Union National
Center East, P.O. Box 2190, Clarksburg, WV 26302-2190
(Certified Mail)

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

/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

COLONNADE CENTER
ROOM 280, 1244 SPEER BOULEVARD
DENVER, CO 80204

NOV 28 1988

LOCAL UNION 9958, DISTRICT 22, : COMPENSATION PROCEEDING
UNITED MINE WORKERS OF :
AMERICA, : Docket No. WEST 87-186-C
Complainant :
v. : Sunnyside No. 1 Mine
KAISER COAL CORPORATION, :
Respondent :

DECISION

Appearances: Brad Rayson, Esq., United Mine Workers of America,
Denver, Colorado,
for Complainant;
John A. Macleod, Esq., Crowell & Moring,
Washington, D.C.,
for Respondent.

Before: Judge Cetti

Introduction

The United Mine Workers of America, Local 9958, District 22, (UMWA) pursuant to Section 111 of the Mine Safety and Health Act 30 U.S.C. § 821, (Mine Act), filed this action seeking one week compensation for miners at Kaiser Coal Corporation's (Kaiser's) Sunnyside No. 1 Mine, for the period of time in 1987 during which they were idled, allegedly as a result of a Section 104(d)(1) withdrawal order issued on March 27, 1987 (and subsequently vacated), by the Mine Safety and Health Administration (MSHA).

Issue

The primary issues are whether all or only some of the miners are entitled to compensation and the period of time for which the miners are entitled to compensation.

Conclusion

After careful consideration of the facts and the law I have determined that (1) all the miners working on the 21st left and 20th left longwall section were idled as a result of the Section 104(d)(1) Order issued on March 27, 1987; (2) that they are entitled to up to a shift and a half of compensation at their

regular rate of pay under the first two sentences 1/ of Section 111 of the Mine Act but are not entitled to a week's compensation under the third sentence 2/ of Section 111 because the Order never became final.

STIPULATIONS

At the hearing the parties entered into stipulations as follows:

1. A closure order was issued under Section 104(d)(1) of the Mine Act at the Sunnyside mine at 8:00 a.m. on March 27, 1987 (Ex. 1).

2. All miners working the day shift at the Sunnyside mine on March 27, 1987 were paid for the balance of the shift. The shifts at the Sunnyside mine run from 7:00 a.m. to 3:00 p.m.; 2:00 p.m. to 10:00 p.m. and midnight to 8:00 a.m.

3. Kaiser contested the closure order under Section 105 of the Mine Act. The case was docketed as WEST 87-116-R and

1/ The first two sentences states:

If a coal or other mine or area of such mine is closed by an order issued under section 103, section 104, or section 107, all miners working during the shift when such order was issued who are idled by such order shall be entitled, regardless of the result of any review of such order, to full compensation by the operator at their rates of pay for the period they are idled, but for not more than the balance of such shift. If such order is not terminated prior to the next working shift, all miners on that shift who are idled by such order shall be entitled to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than four hours of such shift.

2/ The third sentence of Section 111 provides:

If a coal or other mine or area of such mine is closed by an order issued under section 104 or section 107 of this title for a failure of the operator to comply with any mandatory health or safety standards, all miners who are idled due to such order shall be fully compensated after all interested parties are given an opportunity for a public hearing, which shall be expedited in such cases, and after such order is final, by the operator for lost time at their regular rates of pay for such time as the miners are idled by such closing, or for one week, whichever is the lesser.
(emphasis added)

assigned to Administrative Law Judge Melick. The United Mine Workers of America intervened in that proceeding.

4. The closure order was modified by MSHA a number of times to allow mining to continue under specified conditions while settlement negotiations in the contest proceeding were ensuing (Ex. 2). The modifications were issued pursuant to negotiations between Kaiser and MSHA.

5. The contest proceeding was ultimately settled by Kaiser and MSHA by a Memorandum of Understanding dated April 24, 1987. Paragraph four of the Memorandum of Understanding states in part, "Upon the granting of the petition for modification or the completion of the development of the 21st left section which ever occurs first, MSHA shall vacate the order under contest in Docket No. WEST 87-116-R. Until the order is vacated it shall remain in effect subject to the terms of the modification issued by MSHA on April 24, 1987, incorporating the requirements set forth in attachment A to this agreement."

6. Kaiser sought leave to withdraw its notice of contest on April 29, 1987. Administrative Law Judge Melick granted leave and dismissed the proceeding with prejudice (Ex. 3).

7. The United Mine Workers of America did not seek Commission review of Administrative Law Judge Melick's dismissal of the contest proceeding.

8. MSHA subsequently sought to assess a civil penalty against Kaiser based on the closure order (Ex. 4).

9. Kaiser contested the imposition of a civil penalty, contending before Administrative Law Judge Merlin in WEST 87-228, that since the order was to be vacated, there was no violation to which any civil penalty could attach (Ex. 5).

10. By Order dated October 19, 1987, Administrative Law Judge Merlin dismissed the civil penalty proceeding (Ex. 6).

11. The UMWA did not seek Commission review of any of MSHA's Orders modifying that closure order of March 27, 1987.

12. In accordance with the settlement agreement, the closure order issued March 27, 1987 was vacated by MSHA. The action vacating the Order was taken by MSHA inspector Bruce Andrews at 8:45 a.m. on February 16, 1987 (Ex. 15).

13. April 1st (1987) was a contractual holiday and the miners were paid for that day.

Statement of the Case

Kaiser at its Sunnyside No. 1 Mine was developing the 21st left section in the mine to accommodate longwall mining. In this development Kaiser was driving only two entries and was using one of these entries as both a belt haulageway and as an air course. On March 27, 1987, at 8:00 a.m., MSHA Inspector Larry Rameriz issued a Section 104(d) (1) Order citing an alleged violation of 30 C.F.R. § 75.326 because "[t]he belt haulage entry in the 21st left section was not separated and was being used as a [sic] air course" (Exhibit 1). The Order did not expressly require any miners to be withdrawn from the 21st left section or from any other part of the mine. The Order by its terms applied only to the 21st left conveyor belt. However, since that conveyor belt was the only economically feasible means to transport the coal mined in the 21st left section to the surface, the Order did effectively preclude further development of that section. Consequently, after the Order was issued Kaiser withdrew all the miners working on the section and directed them to complete their shifts working on the surface.

The only other section that was being mined at the time of inspection was the adjacent 20th left section which was being mined with longwall equipment. When the March 27, 1987 Order was issued Kaiser withdrew the miners on the 20th left longwall section and directed them to complete their shifts on the surface. Thus, all miners working the day shift in both sections completed their shifts working on the surface and at the end of the day shift the miners working on both sections were told to not report back to work until the mine reopened.

When the miners working the afternoon shift reported for work on the day the withdrawal order was issued, Kaiser also directed the miners working on the 21st left and the 20th left longwall section to work on the surface. No one went underground. After working four hours Kaiser sent the miners on the afternoon shift home with the same instruction it gave the miners working on the day shift. Kaiser told them not to report back to work until the mine reopened.

The miner working on the 21st left and 20th left were idled until they returned to work when the mine reopened at 6:23 p.m. on April 7, 1987.

The only reason given to the miners for their idlement was the action taken by MSHA on March 27, 1987 when it issued the 104(d)(1) withdrawal order. The testimony presented indicates that prior to the issuance of the withdrawal order both sections were working 3 shifts a day, six days a week and there had been no discussion by the miner's supervisors about curtailing operations. They had in fact been talk about expanding the work forces and claimant asserts that this in fact was done after the mine resumed operations.

Kaiser contends that any compensation awarded under Section 111 must be limited to those miners who were working on its 21st left section. It points out that this withdrawal order by its terms applied only to the 21st left section. Kaiser contends that its withdrawal of miners working on the 20th left longwall section was an independent business decision. In support of its contention it offered into evidence the transcribed testimony of former Kaiser President, Charles McNeil, given during the contest proceeding in Docket No. WEST 87-116-R before Judge Melick. Mr. McNeil on direct examination by Kaiser's counsel John A. Mcleod, starting on page 108, line 14 of the transcript, testified as follows:

Q. Now, let me call your attention to the Sunnyside mine, Mr. McNeil. How many active sections do you have in the Sunnyside mine?

A. Two sections, a longwall section a continuous miner development section.

Q. What is the designation of the longwall section?

A. Twentieth left.

Q. Twentieth left?

A. Hm-hmm.

Q. And that is on retreat, is it not?

A. Yes, it is.

Q. Taking out the longwall panel?

A. Yes, it is.

Q. What is the designation of the development section?

A. That is 21st left.

Q. What's the relative proximity of that section to the longwall section?

A. It is one panel down from the 20th left longwall panel. And the continuous miner development section, 21st left, is developing the adjoining panel for the next longwall panel.

Q. When you say it's developing for the next longwall panel, does that mean it's framing out the panel?

A. Yes. It's blocking out a block of coal that will be roughly 500 foot face and about 5,000 foot long. Roughly a mile long.

Q. As it's doing its development work, what type of mining equipment is utilized?

A. We have a continuous miner with a shuttle car and a rough boulder and then, also, belting in that entry, in those sections.

Q. It's a continuous mining operation, driving two entries?

A. Yes.

Q. All right. Is coal actually mined in the process of that development effort?

A. Yes, it is.

X X X X X X X

Q. Is there a relationship, a timing relationship, between the work being done on the development section and the work being done in the longwall section?

A. Yes, we're very critical, right now, in our development as far as the fact that we have to retreat-- for every one foot of retreat we have to advance our development section at 1.7 feet, otherwise we will be at the point where the longwall will be completed on its panel and we will have not completed development for the next panel and, therefore, would not be able to move the longwall and the mine would be shut down while we completed development for that next panel on 21st left.

Q. What do your present projections show in terms of when the mining of the longwall panel would be completed?

A. We have roughly 86 days left on the longwall panel. And, right now, assuming we can maintain the productivity we are projecting them, the development panel, we have 85 days to get it completed.

Q. Mr. McNeil, you are familiar with the Order that's involved in this case?

A. Yes.

Q. Are you aware, sir, that by its terms, it closes down the 21st left section?

A. Yes.

Q. What is the reason that the 20th left section is closed down as well?

A. Right now it's a case of, as I mentioned, we either shut down now or shut down later. If we don't keep the development sections advanced at the rate that is of that ratio I just mentioned, that the longwall panel will be shut down later. We do have adequate inventory, right now, in our stockpile, where we can make our shipments during this period of time. And later on we will not have that inventory so it's a decision that we're better off to take the shut down now because it will occur anyway if you're not in the development process.

Q. Did the timing of miner's vacation enter into that decision at all?

A. Yes, we're trying to structure that around our longwall move would coincide with miners' vacation. And the extent you run the longwall, again, without continuous development on the development section, we will be in a position where we will not be able to move over miners' vacation.

Q. What is the current bank account that Kaiser enjoys?

A. Roughly, within Kaiser Coal, we have roughly \$3 million.

Q. And when you're in a situation, with Sunnyside shut down, as you have been this past week, what are the costs associated with operating the mine?

A. Right now, in our idled mode, we're running at a cost of about \$200,000 a week, of the continued monitoring of the mine from the fire boxing standpoint, the pumping of the mine, the ventilation of the mine, and continuing of our salaried work force.

Q. Mr. McNeil, have you given any thought to the implications of a continuation of the Closure Order that we're talking about here in terms of Kaiser's legal status?

A. Yes, the main concern, as I see it, would be the fact that we do run out of cash at a point that in two or three months it forced Kaiser Coal into the Chapter 7, which would shut the mines down and the Company would be liquidated, which would ultimately cause the liquidation of Kaiser Steel.

THE REQUIRED NEXUS WAS ESTABLISHED

The evidence presented demonstrates a sufficient causal relationship between the issuance of the withdrawal order and the idlement of the miners working on the 20th left longwall section (as well as on the 21st left section) to constitute the causal nexus required to entitle the miners to compensation under the first two sentences of Section 111.

Furthermore, it appears to me that the essential question is whether Kaiser would have shut down the 20th left section during the week in question but for the issuance of the March 27, 1988 withdrawal order. The evidence clearly demonstrates that the work on both sections of mine would have continued through the period of idlement in question but for the 104(d)(1) withdrawal order.

THE WITHDRAWAL ORDER WAS VACATED AND NEVER BECAME FINAL

Kaiser is correct in its contention that it challenged the validity of the withdrawal order and it never became a final Order. On March 27, 1987, the same day that the Order was issued, Kaiser filed a Notice of Contest and Request for Expedited Hearing contending that the Order was improper because the safety standard cited, 30 C.F.R. § 75.326, was expressly inapplicable to Kaiser's Sunnyside No. 1 Mine. After notice to the parties there was a hearing on April 7, 1987, before the Commission's Administrative Law Judge Melick in Docket No. WE 87-116-R. The UMWA, represented by Mr. Earl Pfeffer, intervened and was a party to that proceeding. There were settlement discussions and negotiations. By agreement of the Order was modified on April 7, 1987, to permit the 21st left conveyor belt to resume operations subject to a number of conditions.

On April 24, 1987, Kaiser and MSHA entered into an agreement to settle the contest proceeding. One aspect of that settlement was the express understanding that the Order would be vacated by MSHA either when the 20th left section, the longwall, was mined out or when Kaiser's then pending Petition for Modification was granted, whichever occurred first. Kaiser contends that based upon MSHA's commitment to vacate the Order, Kaiser filed a motion to withdraw its Notice of Contest. Without objection by the UMWA or any other party Judge Melick granted that motion and dismissed the proceeding with prejudice on April 29, 1987.^{3/} The parties stipulated that the withdrawal order was vacated by MSHA on February 16, 1988 (Ex. 15).

3/ Kaiser also points out that Chief Administrative Law Judge Merlin on October 19, 1987, dismissed the related civil penalty proceeding in Docket No. WEST 87-228 on the grounds that MSHA's decision to vacate the Order eliminated any violation for which a penalty could be assessed.

DISCUSSION

It is a fundamental principle of statutory construction that courts must start with the plain language of the statute. Rubin v. United States, 449 U.S. 424, 430 (1981). Where Congress has addressed an issue, "the plain meaning of the statute decides the issue presented." FERC v. Martin Exploration Management Co., 108 S. Ct. 1765, 1768 (1988)(citations omitted).

In this case, Congress has spoken directly to the issue. In enacting Section 111, it established a graduated scheme of compensation entitlement triggered incrementally by the gravity of an operator's conduct. See UMWA v. Westmoreland Coal Co., 8 FMSHRC 1317. Thus, the first two sentences of Section 111 provide that miners who are idled by an order are entitled to full compensation "for the period they are idled, but not for more than the balance of [their] shift . . . [or for] more than four hours of [the next working] shift." (Emphasis added.) The third sentence, however, is expressly predicated upon the existence of an actual violation; that is, it applies only where, after an opportunity for a public hearing, the closure order is "final."

Miners are to be paid up to a shift and a half by an operator even where the operator is innocent of wrongdoing; to receive a week's compensation by the operator, however, requires a showing of culpability on the operator's part -- a showing, after he had an opportunity to defend himself at a public hearing, that he had committed a violation which caused the miners to be idled. The requirement of a "final order" after an "opportunity for a public hearing" plainly confirms Congress' intent to limit the availability of third sentence compensation. As a Third Circuit held in Rushton Mining Company v. Morton, 520 F.2d 716, 720 (3rd Cir. 1975):

[I]t is clear that in drafting § 820 (a) [the predecessor to Section 111 of the Mine Act] Congress understood the difference between an order which is ultimately upheld and one which is ultimately vacated, that in [the third sentence] Congress intended to compensate miners only where the order is ultimately upheld, but that in [the first two sentences] . . . Congress intended to compensate miners even where the order is ultimately vacated.

REIMBURSEMENT OF COST, EXTRA EXPENSE AND ATTORNEY'S FEES ARE DENIED

Kaiser contends that the UMWA should be required to pay Kaiser its reasonable expenses, including attorney's fees,

"occasioned by UMWA's misconduct." This contention is rejected. Section 111 does not provide for recovery of costs or attorney's fees in compensation proceedings and furthermore on review of the record as a whole it is determined that it would be unjust in this case to award Kaiser such expenses under Federal Rule 37. Kaiser Motion for reimbursement is denied.

Likewise Kaiser's motion to dismiss UMWA's claim for lack of prosecution and "gross noncompliance with Commission's rules is denied.

A third motion taken under submission was Kaiser's motion to dismiss UMWA's claim for a week's compensation under the third sentence of Section 111 of the Mine Act. This motion is moot in view of my findings and conclusion of law that the miners are entitled to compensation only under the first two sentences of Section 111.

The parties agreed that it would not be necessary to indicate in the first instance individual amounts for individual miners if the rulings were sufficiently specific to indicate in general terms the miners working on which shifts, and in which section or sections of the mine are entitled to compensation. If there are disagreements over whether individual miners might have been scheduled to work, jurisdiction is reserved to resolve those matters.

It is concluded that all the miners working both day and swing shift on the 21st left and 20th left longwall section of Kaiser's Sunnyside No. Mine were idled as a result of the Section 104(d)(1) Order (Order No. 3043010) issued March 27, 1987; said miners are entitled to compensation at their regular rate of pay for the period of time provided in the first two sentences of Section 111 of the Mine Act.

ORDER

Kaiser Coal Corporation, if it has not already done so, is directed to pay compensation to the miners working the day and swing shift on the 20th left and 21st left sections of Kaiser's Sunnyside No. Mine, at the miners regular rate of pay for the period of their idlement by Withdrawal Order No. 3043010 not to exceed the period of time provided by the first two sentences of Section 111 plus interest calculated in accordance with the formula set forth in Secretary v. Arkansas Carbona Co., and Walker, 5 FMSHRC 2042 (1986), within 30 days of the date of this decision.


August F. Cetti
Administrative Law Judge

Distribution:

Brad Rayson, Esq., United Mine Workers of America, 1563 Gilpin Street, Denver, CO 80218 (Certified Mail)

John A. Macleod, Esq., Crowell & Moring, 1001 Pennsylvania Avenue, N.W., Washington, D.C. 20004-2505 (Certified Mail)

/bls

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

COLONNADE CENTER
ROOM 280, 1244 SPEER BOULEVARD
DENVER, CO 80204

NOV 28 1988

ROGER THOMPSON, UNION PRES., : DISCRIMINATION PROCEEDING
ON BEHALF OF :
PAUL LUCE, : Docket No. CENT 88-157-DM
Complainant, : MD 87-60
v. : Silica Sand Plant
UNIMIN CORPORATION, :
Respondent :

DECISION

Before: Judge Lasher

By letter dated November 15, 1988, counsel for Complainant, Paul Luce, indicated that Mr. Luce "has decided not to pursue the above cause of action." Attached to the letter is a document entitled Discontinuance of Discrimination Complaint signed by Mr. Luce which is construed to be a withdrawal of the Complaint herein. Pursuant to Commission Rule 11 (29 C.F.R. 2700.11) a party may withdraw such pleading at any time with the approval of the Commission or the Judge. Such approval is here granted since it appears that the withdrawal is voluntary. Accordingly, this proceeding is dismissed with prejudice.

Michael A. Lasher, Jr.
Michael A. Lasher, Jr.
Administrative Law Judge

Distribution:

Ben Hill Turner, Esq., 2 East Chambers, Cleburne, TX 76031
(Certified Mail)

Mr. Paul Luce, 704 South Robinson, Cleburne, TX 76031 (Certified Mail)

George J. Kalapos, Jr., Esq., Unimin Corporation, 258 Elm Street, New Canaan, CT 06840 (Certified Mail)

/ot

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 28, 1988

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 88-176
Petitioner	:	A. C. No. 46-01453-03803
	:	
v.	:	Humphrey No. 7 Mine
	:	
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Joseph T. Crawford, Esq., Office of the Solicitor, U. S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner Michael R. Peelish, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Merlin

Statement of the Case

This case is a petition for the assessment of a civil penalty filed by the Secretary of Labor against Consolidation Coal Company for an alleged violation of 30 C.F.R. § 50.10. A hearing was held on October 18, 1988.

The subject citation reads as follows:

A roof fall accident - unintentional fall of roof above the anchorage zone of roof bolts which interfered with passage of persons - occurred at the face of the 2 southwest longwall section, 043-0 MMU, at approximately 2:00 PM on 11-13-87. This accident was not reported to MSHA until 3:58 PM 11-13-87.

30 C.F.R. § 50.10 provides:

If an accident occurs, an operator shall immediately contact the MSHA District or Subdistrict Office having jurisdiction over its mine. If an operator cannot contact the appropriate MSHA District or Subdistrict

Office it shall immediately contact the MSHA Headquarters Office in Washington, D.C., by telephone, toll free at (202) 783-5582.

30 C.F.R. § 50.2(h) states in pertinent part:

(h) "Accident" means.

* * * *

(8) An unplanned roof fall at or above the anchorage zone in active workings where roof bolts are in use; or, an unplanned roof or rib fall in active workings that impairs ventilation or impedes passage;

At the hearing the parties agreed to the following stipulations:

(1) the operator is the owner and operator of the subject mine;

(2) the operator of the mine is subject to the Federal Mine Safety & Health Act of 1977;

(3) the administrative law judge has jurisdiction in this case;

(4) the inspector who issued the subject citation was a duly authorized representative of the Secretary;

(5) a true and correct copy of the subject citation was properly served;

(6) copies of the subject citation and termination of the violation in this proceeding are authentic and may be admitted into evidence for purposes of establishing their issuance, but not for the purpose of establishing the truthfulness or relevancy of any statements asserted therein;

(7) imposition of a penalty will not affect the operator's ability to continue in business;

(8) the alleged violation was abated in good faith;

(9) the operator's history of prior violations, as shown on the printout which was subsequently admitted as a government exhibit, is correct;

(10) the operator's size is large; and

(11) the roof fall which occurred in this case was an unplanned roof fall within the purview of 30 C.F.R., Section 50.2(h)(8).

Discussion and Analysis

The inspector testified that during his investigation on November 16, 1987, the Monday following the accident, the mine superintendent told him that at the time of the roof fall in the belt entry at the headgate, production was ceased and that the miners in the area were evacuated through the tailgate (Tr. 18). The inspector further stated that the superintendent told him the normal route of travel through the headgate was blocked (Tr. 18-19). The operator's safety supervisor, the company official responsible for notifying MSHA, acknowledged that at 2:00 p.m. he was informed of the roof fall and was told that the men were retreating through the tailgate (Tr. 32, 35, 53, 55).

After being so advised, the safety supervisor went underground to investigate (Tr. 35). The safety supervisor explained that the roof had fallen in on the crusher which was located in the entry at the headgate (Tr. 44, 48). Immediately behind the crusher was the stage loader (Op. Exh. No. 1). There was a 3' to 3½ foot clearance on each side of the crusher, but debris 2' to 2½ feet deep had fallen on each side (Tr. 49, 50). The supervisor said that it would have been hard to get through on the left side because the roof had fallen down there (Tr. 43). The supervisor expressed the opinion that if necessary men could crawl over the top of the crusher or over the debris (Tr. 49, 53). He further testified that as soon as he arrived on the scene he and all others present immediately began timbering the area to make it safe (Tr. 40, 42-43).

The longwall coordinator who had called the accident out to the mine superintendent on the surface, testified that he did not specifically report passage was impeded, but that he did say the men were coming out through the tailgate, that he needed someone to give them a ride and that he needed help in timbering the headgate side of the fall (Tr. 67).

The first question to be resolved is whether this roof fall constituted an "accident" within the purview of 30 C.F.R. § 50.2(h), quoted supra. I conclude it did. The evidence clearly shows that passage was impeded. There is no dispute that instead of using the headgate which was the normal route of travel, miners in the area exited through the tailgate. The roof had fallen in on the crusher and there was debris 2-2½ feet high on both sides of it. Moreover, after the fall, the remaining roof was unsecured and dangerous which was why everyone on the scene immediately started timbering. Under these circumstances I reject the opinions of the operator's witnesses that men could climb over the crusher or the debris. Even assuming this were physically possible, such action would have been a violation of

the mandatory standards and extremely dangerous because the men would have had to go under unsupported roof. The operator's safety supervisor himself stated he would not want the men to go under unsupported roof and that for all practical purposes the headgate was impassable until the roof was supported (Tr. 54). Based upon the foregoing, I find passage was impeded.

The next issue is whether there was immediate notification. The fall occurred at 2:00 p.m. The inspector testified that the mine foreman became aware of the fall at 2:30 p.m. (Tr. 15, 16). However, the safety supervisor who, as already noted, is the company official responsible for notifying MSHA testified that he first had knowledge of the fall around 2:00 p.m. close to immediately after it happened when he was told by the safety escort. He further testified that the safety escort learned of the fall from the mine foreman and that he was informed of the fall within zero to five minutes (Tr. 32, 33). ^{1/} As already set forth, the safety supervisor was told men were retreating through the tailgate (Tr. 35, 53, 55). He then went underground to investigate (Tr. 35). He stated that it is the operator's policy to investigate falls before reporting them to MSHA unless there happens to be definite information that passage is impeded (Tr. 37). Under the circumstances of this case I find the procedures followed by the safety supervisor and other management officials failed to satisfy the requirements of the regulations. The longwall coordinator advised the mine superintendent that men were exiting through the tailgate which was not the normal route of travel (Tr. 67). He also asked for help in timbering (Tr. 67). This information was sufficient to alert mine management to inquire and seek more specifics about the fall. Indeed, no company official above ground in the long chain of communication from the mine superintendent, who received the longwall coordinator's call, to the safety supervisor, who made the decision when to call MSHA, asked those questions which would have enabled them to decide whether or not immediate notification of MSHA was required. Although the safety supervisor asked about injuries and whether

^{1/} - The safety supervisor's statement that he learned of the fall almost immediately after it happened is supported by his chronology of subsequent events. He stated that it took him approximately 30 minutes to reach the section (2:30 p.m.) and an additional three to five minutes to reach the fall area (2:35 p.m.) (Tr. 38, 39). He then spent 45 minutes conducting an investigation of the area (3:20 p.m.) and an additional 20 to 25 minutes to return to the surface (3:45 p.m.) from where he called MSHA (3:58 p.m.) (Tr. 50, 52). Based upon, these time frames it appears that the safety supervisor knew of the roof fall at approximately 2:00 p.m. rather than 2:30 p.m. as the inspector testified. I so find.

people were stuck at the face (Tr. 35), he otherwise relied upon what he was told him and did not attempt to ascertain the facts upon which he could have made an informed decision on immediate notification. If the safety supervisor or others had taken the moment or two necessary to ask the obvious questions, they would have known immediate notification was required and so would have called MSHA before going underground.

I recognize that the fall created a stressful situation for all concerned. But the requirements of the regulations are clear and mine management must remain sensitive to them even while it copes with other aspects of the situation. The time lapse from 2:00 p.m. (or even 2:30 p.m. under the inspector's version), when the supervisor found out about the fall, until 3:58 p.m., when the fall was reported, was much too long to constitute immediate notification. See Western Fuels-Utah, 10 FMSHRC 832, 842-844 (June 1988). The argument in the operator's brief (p. 7) that the operator must have an opportunity to conduct a "reasonable" investigation before notification cannot be accepted as a justification for its conduct in this case. Here with minimum effort, the facts necessary to determine the propriety of immediate notification would have been readily available to management officials. Adoption of the operator's position in this case would mean that instead of being "immediate", notification would be virtually the last thing to be done and accorded little, if any, priority.

In this connection it also must be noted that even after his investigation, the operator's safety supervisor waited until he was above ground to notify MSHA although he could have telephoned MSHA from below ground 20 or 25 minutes earlier (Tr. 52, 56). On this basis as well, the regulation was violated.

The inspector testified that the violation was not serious (Tr. 19). The Solicitor expressed the same view (Tr. 23). The position that this reporting violation is not serious is wholly at odds with the views the Secretary expressed in other reporting cases involving this operator. In Consolidation Coal Company, 9 FMSHRC 727, 733-734 (April 1987), I accepted the Secretary's view that Part 50 violations are serious, stating:

" * * *, it is clear that the settlement motion is on strong ground in asserting the violations involved a high degree of seriousness and negligence. Gravity cannot be doubted in view of the fact that Part 50 is the cornerstone of enforcement under the Act. Since Part 50 statistics provide the basis for planning, training and inspection

activities, accurate reporting is essential. Moreover, failure accurately to report could have extremely dangerous consequences by concealing problem areas in a mine which should be investigated by MSHA inspectors. In short, without proper compliance by the operator under Part 50, the Secretary could not know what is going on in the mines and, deprived of such information, he would be unable to decide how best to meet his enforcement responsibilities. * * * "

The violation in this case was serious. The inspector explained that the purpose of this reporting requirement is to afford MSHA the opportunity to send an inspector to the scene as quickly as possible to determine the cause of the roof fall and prevent future occurrences (Tr. 20, 21, 25). Failure to immediately notify MSHA frustrates this important policy. Accordingly, the Secretary's position in this case that the violation was not serious, is wrong and negates effective enforcement of the reporting regulations.

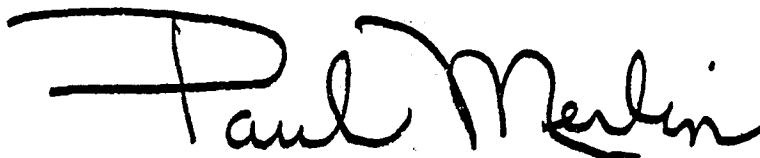
I find the operator was guilty of ordinary negligence and reject the inspector's finding of high negligence as contrary to the evidence. There is nothing in the record indicating recklessness, willfulness or any other such conduct which would justify a higher degree of fault.

I have reviewed the briefs filed by counsel. To the extent that the briefs are inconsistent with this decision, they are rejected.

As already noted, the stipulations regarding the remaining criteria under section 110(i) of the Act, have been accepted.

In light of the foregoing it is ORDERED that a penalty of \$500 be assessed for this violation.

It is further ORDERED that the Operator Pay \$500 within 30 days from the date of this decision.

A handwritten signature in black ink, reading "Paul Merlin". The signature is stylized with a large, sweeping initial "P" and a cursive "Merlin".

Paul Merlin
Chief Administrative Law Judge

Distribution:

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

Michael R. Peelish, Esq., Consolidation Coal Company, 1800 Washington Road, Pittsburgh, PA 15241 (Certified Mail)

Mr. Larry Hull, Vice President, Consolidation Coal Company, P. O. Box 100, Osage, WV 26543 (Certified Mail)

Michael H. Holland, Esq., UMWA, 900 15th Street, N.W., Washington, DC 20005 (Certified Mail)

/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

NOV 29 1988

GREEN RIVER COAL COMPANY, INCORPORATED, Contestant v.	:	CONTEST PROCEEDINGS
:	:	:
:	:	Docket No. KENT 88-13-R
:	:	Order No. 2836161; 10/19/87
:	:	:
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Respondent	:	Docket No. KENT 87-243-R
:	:	Order No. 2835472; 9/2/87
:	:	:
:	:	Docket No. KENT 87-244-R
:	:	Order No. 2836053; 9/10/87
:	:	:
:	:	No. 9 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA) Petitioner v.	:	CIVIL PENALTY PROCEEDINGS
:	:	:
:	:	Docket No. KENT 88-63
:	:	A. C. No. 15-13469-03635
:	:	:
:	:	Docket No. KENT 88-92-B
:	:	A. C. No. 15-13469-03643
GREEN RIVER COAL COMPANY, INCORPORATED, Respondent	:	:
:	:	Docket No. KENT 88-98
:	:	A.C. No. 15-13469-03645
:	:	:
:	:	Green River No. 9 Mine

DECISION

Appearances: Joseph B. Luckett, Esq., Office of the Solicitor
U.S. Department of Labor, Nashville, Tennessee
for the Secretary of Labor;
Flem Gordon, Esq., Gordon & Gordon, P.S.C.,
Owensboro, Kentucky and B. R. Paxton, Esq., Paxton
& Kusch, P.S.C., Central City, Kentucky, on the brief
for Green River Coal Company, Inc.

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 citations and
withdrawal orders issued by the Secretary of Labor against the
Green River Coal Company, Incorporated (Green River) and for

review of civil penalties proposed by the Secretary for the related violations.

Docket No. KENT 88-98

Order No. 2844181, issued pursuant to section 104(d)(2) of the Act, alleges a "significant and substantial" violation of the mine operator's roof control plan under the regulatory standard at 30 C.F.R. § 75.316 and charges as follows:^{1/}

The ventilation system and methane and dust control plan was not being followed in the working section in entries left off Northwest parallel (No. 1 unit 001) in that (1) There was no perceptible movement of air reaching the end of the line curtain in No. 6 entry (used smoke to determine velocity) (2) Only 675 cubic feet of air a minute was reaching the end of the line curtain in No. 5 entry (used smoke). Methane was detected in the faces of these places. Methane content 1.4 percent. The plan requires that at least 1,200 cubic feet of air be reaching the end of line curtain in all faces except those being cut, loaded and/or drilled.

^{1/} Section 104(d) of the Act provides as follows:

- (1) If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

In relevant part the ventilation plan (Exhibit G-2) provides that "all other working faces shall have a line brattice (wing curtain) installed within 15 feet of the face with a minimum of 1,200 c.f.m. when measured at the end of the wing curtain."

It is undisputed that Inspector Louis Stanley of the Federal Mine Safety and Health Administration (MSHA) found on October 2, 1987, no perceptible air movement at the end of the line curtain at the No. 6 entry and only 675 cubic feet per minute (cfm) at the end of the line curtain at the No. 5 entry--locations where 1,200 cfm is required. 1.4 percent methane was also found in each of the cited entries and, according to Stanley this methane concentration would be expected to increase without proper ventilation. Stanley also observed that the roof bolter was expected to operate in the cited areas "fairly quickly" in the mining sequence thereby providing a potential ignition source for the methane. Under these circumstances Stanley opined that a methane explosion was "highly likely" and the ten miners working on the section would be seriously injured. Within this framework of credible evidence I conclude that the violation is proven as charged and was "significant and substantial". See Mathies Coal Company, 6 FMSHRC 1 (1984).

In order to sustain the order under section 104(d)(2) of the Act the Secretary has the burden of proving inter alia that the violation charged therein was caused by the "unwarrantable failure" of the mine operator to comply with the cited standard.^{fn1/} supra. "Unwarrantable failure" means aggravated conduct constituting more than ordinary negligence, in relation to a violation of the Act. Emery Mining Corp., 9 FMSHRC 1997 (1987), appeal filed January 1988 (D.C. Cir. No. 88-1019) In the Emery case the Commission compared ordinary negligence as

fn1/ (cont'd)

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

conduct that is "inadvertent" "thoughtless", or "inattentive" with conduct constituting an unwarrantable failure, i.e. conduct that is "not justifiable" or "inexcusable". According to Inspector Stanley the violation at issue was the result of "high negligence" and, presumably "unwarrantable failure" because the section foreman "should have known" of the insufficient air and that the foreman was working in the nearby No. 3 entry. This testimony is clearly not sufficient to meet the stringent standards for unwarrantability set forth in the Emery decision.

In addition Assistant Mine Superintendent and General Mine Manager Thomas Morris testified that after the instant order was issued he discovered that a roof fall in an entry located 20 to 25 crosscuts from the unit at issue had crushed a stopping impeding the air entering the unit. After the stopping was repaired and the roof timbered the ventilating air was then increased to the required amount. In addition, according to an out-of-court statement by Section Foreman Steve Jones, Jones had "made his faces" indicating that he had completed his on-shift examination before the order was issued. According to that statement Jones arrived on the unit at 8:30 a.m. and took an air reading at the intake at 8:45 a.m. where he found 12,150 "feet of air". According to the statement, Jones found 3,360 "feet of air" behind the wing curtain at the face of the No. 4 entry at around 9:30 that morning and 3,420 "feet" behind the wing curtain of the face at the No. 3 entry at around 9:45 that morning. The order at bar was issued at 10:00 a.m. and according to Jones' statement he learned that the intake air was lost at 9:50 a.m. This undisputed evidence further supports a finding that the violation was the result of ordinary negligence and not conduct that was "not justifiable" or "inexcusable". Accordingly, the order at bar must be modified to a citation under 104(a) of the Act.

Order No. 2844183, also issued pursuant to section 104(d)(2) of the Act, alleges a violation of the regulatory standard at 30 C.F.R. § 75.1306 and charges as follows: "[t]he magazine used for storage of explosives for the working section and entries left off Northwest parallel (No. 1 Unit 001) was sitting [sic] in the No. 1 entry about 20 feet from the face with two doors open and two boxes of explosives half in and half out of the magazine".

The cited standard, 30 C.F.R. § 75.1306, provides in relevant part that "when supplies of explosives and detonators for use in one or more working sections are stored underground, they shall be kept in section boxes or magazines of substantial construction"

- It is undisputed that the cited magazine was constructed with sliding doors from which 250 pound boxes of explosives were protruding "halfway out". The violation has accordingly been proven as charged. Inspector Stanley opined that the explosives would not likely be run into or set off because there were no ignition sources nearby nor traffic in the cited entry. The violation was therefore not of high gravity. He believed however that the violation was the result of "high negligence" and presumably "unwarrantable failure" because the section foreman "knew or should have known of the location of the explosives magazine". Again however the proof does not support the allegations.

The evidence does not show that acts of, or omissions by, the section foreman were the result of more than ordinary negligence or that they were "not justifiable" or "inexcusable". In addition, according to Assistant Safety Director Grover Fischbeck, the section foreman first inspects the faces upon arriving on the section before directing the miners to their duties. Fischbeck theorized that the foreman may have seen the magazine with its doors closed and that later the shot firer may have removed some explosives leaving other explosives halfway outside. In support of this theory Fischbeck noted that the "shooter" did in fact have explosives in his possession at the time the violation was cited. In any event it is clear that the Secretary has not met her burden of proving the high degree of negligence required to support a finding of "unwarrantable failure". The order must accordingly be vacated and modified to a citation under section 104(a) of the Act.

Order No. 2844182, also issued pursuant to section 104(d)(2) of the Act alleges a "significant and substantial" violation of the standard 30 C.F.R. § 75.304 and charges as follows:

The on-shift examination for hazardous conditions was not adequate on the working section in entries left off Northwest parall [sic] (No. 1 unit 001) in that (1) Only 5,760 cubic feet a minute of air was present at the last stopping on the intake side of the section; (2) Methane at a concentration of 1.2 percent to 1.4 percent was detected in all six of the working faces; (3) The air volume at the end of the line curtain in two of the six working places was less than the minimum required by the ventilation system and methane and dust control plan. The working section had power on equipment and equipment was working in the face; (4) The explosive magazine for the working section was sitting in the No. 1 entry about 20 feet from the face with the doors open and two boxes of

explosives half in and half out of the magazine. A sample of the atmosphere at the face of the No. 5 entry was taken 10 feet from the face 6 feet from the rib and 1 foot from the roof.

The cited standard, 30 C.F.R. § 75.304, provides in part that "at least once during each coal producing shift, or more often if necessary for safety, each working section shall be examined for hazardous conditions by certified persons designated by the operator to do so".

According to Inspector Stanley, the existence of the four conditions cited in the order was evidence per se that the working section was not being examined sufficiently. According to Stanley even though an onshift examination had been performed at 8:30 that morning ongoing examinations should have been made to discover any violations subsequently occurring.

While it is not disputed that the conditions existed as alleged, it is noted that the two former conditions cited in the order were not violations of any statute, regulation or policy. The latter two violations charged in the order were identical to the violations affirmed in this decision in Order Nos. 2844181 and 2844183.

While evidence of the existence of a number of violative conditions can raise an inference that a violation of the cited standard has occurred, See e.g. Secretary v. Manalapan Mining Co., 9 FMSHRC 355 (1987) and Secretary v. Peabody Coal Co., 4 FMSHRC 678 (1982), the evidence in this case does not raise such an inference. Two of the four conditions cited in the order were admittedly not violations of any regulation or statute and the remaining two conditions were found not to be the result of significant negligence. These two conditions could have arisen rapidly following the onshift examination performed by section foreman Jones between 8:30 a.m. and the time the section was energized at 9:25 a.m. Indeed the first orders citing problems in the section were issued at 10:00 a.m. There was also credible evidence that the ventilation problem may have arisen suddenly shortly after Jones' onshift examination that morning when a stopping became crushed as a result of a roof fall short-circuiting the ventilation. Under the circumstances I do not find that the Secretary has sustained her burden of proof. Accordingly, Order No. 2844182 must be vacated.

Order No. 2836279, also issued pursuant to section 104(d)(2) of the Act alleges a "significant and substantial" violation of the operator's roof control plan under the regulatory standard at 30 C.F.R. § 75.200 and alleges that "the

approved roof control plan was not being followed as the No. 5 entry on the No. 7 unit was 27 feet wide at the third row of roof bolts outby the face area." The operator's roof control plan provides in relevant part that "the entry width cannot exceed 20 feet maximum" (Exhibit B-3).

As MSHA Inspector Allan Head entered the No. 4 entry on December 4, 1987, he observed that ribs had been "rounded out". He measured the width with a 50 foot fiberglass tape and found it to be 27 feet to 23 feet wide over 7 to 10 feet linear distance. Head concluded that without additional support over this span there was the danger of slate falling on miners working in the area. Head also concluded that the violation was result of high negligence because the condition was "very obvious" and that the next cut beyond the widened area was "narrower". According to Head, rock from the roof only three inches to six inches thick falling upon a miner could cause disabling injuries. Head estimated that mining had occurred in the entry from 4:00 p.m. until 10:00 p.m. the night before his inspection and he opined therefore that the face boss should have seen the excessive width. Indeed, according to Head, even with the wing curtain on one side of the entry in place the entry was "obviously" in excess of the required 20 foot width. Head acknowledged however that the violation could have resulted from "inattentiveness".

Within this framework of evidence I find that the violation is proven as charged. The Secretary has failed however to sustain her burden of proving that the violation was "significant and substantial" or was the result of high negligence or "unwarrantable failure". Inspector Head conceded that the violation may have been the result of mere "inattentiveness". See Emery Mining Corp., supra. The order is therefore modified to a citation under Section 104(a) of the Act.

ORDER

Order No. 2844182 is vacated. Order Nos. 2844181, 2844183 and 2836279 are modified to citations under section 104(a) of the Act and Green River Coal Company, Inc., is directed to pay civil penalties of \$500, \$300, and \$200 respectively, within 30 days of the date of this decision.

Docket No. KENT 88-63 and KENT 87-244-R

Order No. 2835472, issued pursuant to section 104(d)(2) of the Act, alleges a "significant and substantial" violation of the operator's ventilation plan under the regulatory standard at 30 C.F.R § 75.316 and charges as follows:

The old No. 5 unit set up was not being ventilated properly as to keep methane from accumulating in the old dead end heading. There was 1.3 percent CH₄ present at the last row of roof bolts in the left breaks between No. 6 and 5 entries. There was no perceptible movement of air at the end of the line brattice (curtin) [sic] in this heading when checked with a smoke tube. Also the block curtain [sic] between No. 6 and 5 entries the second crosscut outby the faces was down on the mine floor.

The ventilation plan provides in relevant part that "all dead-end places shall be ventilated, and when practical, crosscuts will be provided at or near the face of each entry room before the place is abandoned". (Exhibit B-2).

According to Inspector Head, beginning on August 31, 1987, and continuing on September 1, and on September 2, he found methane exceeding one percent in the cited area. On the latter date and when the order was issued, he discovered 1.3 percent methane and found no air movement. According to Head, methane could build-up in the cited area and should there be an ignition from a roof fall there could be an explosion or fire. The explosions or fire could extend the 200 to 300 feet to the active sections where eight workers would be exposed to burns and "broken ear drums". He observed that the mine was also known as a "gassy mine" with two-million cubic feet of methane liberated every 24 hours. He concluded therefore that it was likely to have methane build up to explosive levels.

Head concluded that the violation was the result of high negligence because the same type of violation was found for three consecutive days. On August 31, and on September 1, he had issued section 104(a) citations for the same violation. In mitigation Dave Harper testified on behalf of the operator that a ventilating curtain was found lying on the mine floor and speculated that it may have been dislodged by a scoop cleaning up the area. Such speculation can however provide but little mitigation under the circumstances of this case.

Within this framework of evidence I conclude that the violation was the result of high negligence and of the "unwarrantable failure" of the operator to comply with the cited standard. The repeated violation of the same standard at the same location for three consecutive days clearly warrants a finding that the violation was a result of conduct that was "not justifiable" and "inexcusable". See Youghiogheny and Ohio Coal Co., 9 FMSHRC 2007 (1987). Based on the undisputed evidence of Inspector Head I also conclude that the violation was "significant and substantial". See Mathies Coal Company, supra.

At hearing the parties agreed to a proposal for settlement of Order No. 2836053 in which Green River agreed to pay the proposed penalty of \$600 in full. I have considered the documentation and representations in support of the motion and I conclude that it comports with the requirements of section 110(i) of the Act. Accordingly the motion is accepted.

ORDER

Contest proceedings Docket Nos. KENT 87-243-R and KENT 87-244-R are denied. Order No. 2835472 is affirmed. Order No. 2836053 is also affirmed and Green River Coal Company, Inc., is directed to pay civil penalties of \$900 and \$600, respectively within 30 days of the date of this decision.

Docket No. KENT 88-92-B

At hearing the parties move to approve a settlement agreement with respect to the two citations at issue in this proceeding, Citation Nos. 2836161 and 2836172. Green River has agreed to pay the proposed civil penalties of \$900 and \$800, respectively, in full. I have considered the representations and documentation submitted in this case and I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act.

ORDER

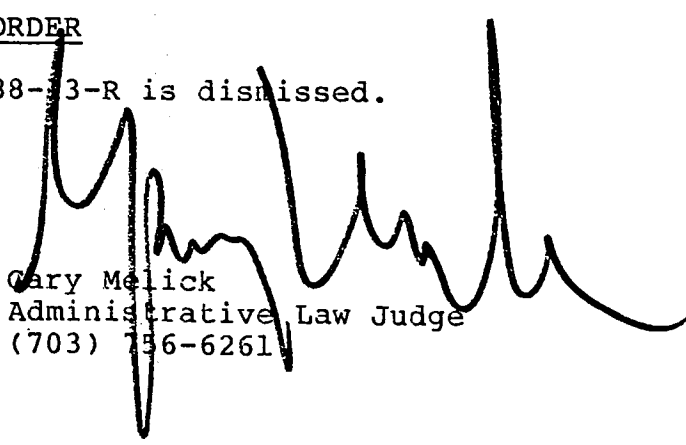
Green River Coal Company, Inc., is hereby directed to pay civil penalties of \$1,700 within 30 days of the date of this decision.

Docket No. KENT 88-13-R

Green River withdrew its contest of this proceeding at hearing in conjunction with the proposed settlement of the citation at issue in Civil Penalty Proceeding Docket No. KENT 88-92.

ORDER

Contest Proceeding KENT 88-13-R is dismissed.


Gary Melick
Administrative Law Judge
(703) 756-6261

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

COLONNADE CENTER
ROOM 280, 1244 SPEER BOULEVARD
DENVER, CO 80204

NOV 29 1988

ERNIE L. BRUNO,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEST 88-157-D
v.	:	DENV CD 88-07
	:	
CYPRUS PLATEAU MINING	:	Starpoint No. 2 Mine
CORPORATION,	:	
Respondent	:	

DECISION

Appearances: Gregory J. Sanders, Esq., Kipp & Christian,
Salt Lake City, Utah,
for Complainant;
Kent W. Winterholler, Esq., Parsons, Behle &
Latimer, Salt Lake City, Utah,
for Respondent.

Before: Judge Morris

This case involves a discrimination complaint filed pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq.

The applicable portion of the Mine Act, Section 105(c)(1), in its pertinent portion provides as follows:

**Discrimination or interference prohibited;
complaint; investigation; determination; hearing**

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this [Act] because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this [Act], including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine 30 U.S.C. § 815(c)(1).

After notice to the parties a hearing on the merits was held in Price, Utah on September 13, 1988.

Complainant filed a trial brief and respondent filed a post-hearing brief.

Applicable Case Law

The general principles of discrimination cases under the Mine Act are well settled. In order to establish a prima facie case of discrimination under Section 105(c) of the Act, a complaining miner bears the burden of production and proof in establishing that (1) he engaged in a protected activity, and (2) the adverse action complained of was motivated in any part by that particular 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 Eastern Assoc. Coal Corp. v. FMSHRC, 813 F.2d 639, 642 (4th Cir. 1987); 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). Cf. NLRB v. Transportation Management Corp., 462 U.S. 393, 397-413 (1983) (approving nearly identical test under National Labor Relations Act).

Issues

The issues are whether the complaint herein was timely filed; whether complainant was engaged in a protected activity at the time of the alleged discrimination and whether the operator would have taken adverse action in any event against complainant irrespective of any protected activity.

Filing of Complaint

The discharge of Ernie L. Bruno, on December 12, 1983, generated two lawsuits. The initial lawsuit was filed in the State of Utah District Court some 19 months after the termination. Bruno had instructed his attorney to get his job back because "he was judged on a different basis than anyone else". Bruno's claim was denied in the Utah trial court as well as on appeal (Tr. 43, 44, 76, Ex. R-5).

After talking to another miner Bruno learned for the first time that he had a right to file a complaint with MSHA. Such a complaint was filed and after its investigation MSHA concluded that no violation of Section 105(c) had occurred. Bruno filed a statement disagreeing with MSHA and on March 28, 1988, he filed a pro se complaint with the Commission. The basis of his complaint was that he had been fired for being in a fight. Specifically, he had been treated differently than any other employee. (The Judge agrees that fighting may be unsafe, but it is clearly not an activity protected under the Act), Hollis v. Consolidation Coal Company, 6 FMSHRC 21 (1984).

Subsequently, on April 18, 1988, Bruno filed additional information with the Commission setting forth allegations involving coal float dust and giving this as the real reason for his dismissal. Bruno states that if he had known about his Section 105(c) rights in 1983, he would have immediately filed with MSHA. But he had never seen a poster advising him of such rights. ^{1/} (Tr. 32, 41-42, 46, Ex. R-10).

Witness Stan Warnick, Manager of Human Resources for Cyprus Plateau Mining Company, was not involved in the decision to terminate Bruno (Tr. 278-279). Paul Kelley and Bill Bergamo investigated a fighting incident between Bruno and Steve Stoker. Their decision to terminate was confirmed by their supervisor, Larry Rodriguez (Tr. 279-280). The company's investigation revealed that Bruno assaulted Steve Stoker, a fellow worker. The assault occurred in the company kitchen. He was discharged for that reason (Tr. 281).

^{1/} I credit the operator's evidence that there were many MSHA posters in prominent places in the mine. If there had not been such informational posters, an MSHA inspector would have issued a citation to the operator. No such citation was ever issued. (Tr. 224-227, 255, R-11A through I). Further, Bruno's witnesses Marchello, O'Herron and Lander confirm that the posters were present (Tr. 116, 117, 166, 168, 188).

Bergamo, the underground superintendent, is no longer with the company and lives in California. Kelley is no longer with the company and lives in the Salt Lake City area. Rodriguez does not have a current position with Cyprus Plateau Mining Company and Warnick understood that he was with Texaco (Tr. 281-283). Warnick did not know how to reach Rodriguez. However, he supposed he could find Bergamo but he had not made any attempt to find Kelley (Tr. 292-293).

Discussion

The Commission has held that the time limitations contained in Section 105(c) of the Act were not intended to be jurisdictional and dismissal of a complaint for late filing is justified only if the operator shows a material legal prejudice attributable to the delay. Secretary ex rel. Hale v. 4-A Coal Company, Inc., 8 FMSHRC 905 (1986); Herman v. Imco Services, 4 FMSHRC 2135 (1982).

In this case such material legal prejudice exists: the individuals who investigated and determined that Bruno should be fired are no longer with the company. In addition, after a delay of over four years, it is questionable whether these individuals would have a present recollection of the events surrounding Bruno's alleged discrimination and termination. This is particularly true inasmuch as the uncontroverted evidence shows that the persons involved in the decision to terminate Bruno for fighting had not been advised of any alleged protected activity involving the float coal dust.

For these reasons I conclude that the complaint filed herein, more than four and one-half years after the incident, was not timely filed.

However, it is appropriate to review the case on the merits.

Protected Activity

In December 1983, Bruno was working a normal workweek running a shuttle car and he was part of a nine-man crew. Roger Skaggs was the face foreman.

Bruno's duties required him to operate his shuttle car in an unsafe area. In particular, one of the entries was "clear

full" of float coal dust. ^{2/} Some of it was suspended and about a foot deep in some places. This condition plugged up his nose and his visibility was impaired (Tr. 25). The first day when he started running his car through the area he told Skaggs about it (Tr. 45-47). Skaggs said he would check with the material man who was responsible for watering down the roadways and maintaining them (Tr. 27). The situation remained the same. When Skaggs was again approached on the subject, he explained that the material man had not gotten to the problem (Tr. 28). After five days the condition remained the same, so Bruno shut down his buggy and went over and watered down the area. The watering took 15 to 20 minutes (Tr. 30-31). The same day that he had watered the area down, Skaggs asked him if he had shut down the shuttle car. When he confirmed that he had shut it down, Skaggs started "screaming and yelling" and told him never to shut down the shuttle car. ^{3/} If he did he would be taken off of the buggy (Tr. 31). Bruno replied that he should have the right to shut down the shuttle car and water the float coal dust (Tr. 32).

Several days after the conversation about shutting down the shuttle car Skaggs told Bruno that it was Steve Stoker who had told him that Bruno had shut down the car. (Stoker had been Bruno's helper for many years.) (Tr. 33). When Bruno confronted him, Stoker denied having made such a statement. Bruno told Stoker not to make any more trouble (Tr. 33-35).

2/ The Secretary's regulation, 30 C.F.R. § 75.400 provides as follows:

[Statutory Provision]

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.

3/ Skaggs admits he "got on" Bruno for shutting down production but not for watering the entry (Tr. 209). A continuous miner will not operate without water (Tr. 79).

Ten days to two weeks later, about December 8, 1983, Bruno again became irritated with Stoker. This arose because some miners were not wearing safety glasses; Stoker thought the company should know about it (Tr. 35-36).

When Bruno went to lunch that day he was relieved by fellow worker Ron Dalton who described Stoker as a "troublemaker". Bruno was upset. As he went to the lunchroom he thought about Stoker and slowly came to a "boiling point" (Tr. 37).

Stoker came into the lunchroom. Bruno immediately got up and approached him. Bruno said Stoker was nothing but a troublemaker. He then struck him a couple of times. Stoker didn't hit back; he had a bloody nose. The incident lasted five or six seconds (Tr. 37-38, 104-105).

Bruno then apologized for hitting him and they talked to each other and then went back to work (Tr. 39). Bruno finished the shift and went home. He later received a call from Paul Kelley, head of the Human Resources Department. At a conference with Bruno, Bill Bergamo, and Rulen White, the men asked Bruno about the fight and he was asked if he had struck Stoker. When he admitted it he was told to call back to learn of the committee's decision. On December 12, 1983, Bruno was told to choose between being fired or resigning. Bruno decided to resign because he was going to be fired (Tr. 40-42, 65, 76, Ex. R-4).

Bruno instructed his original attorney that he wanted to be reinstated (Tr. 72, 73). The float coal dust incident was not raised in the earlier State of Utah lawsuit (Tr. 77).

Discussion

The threshold matter to consider here is whether Bruno's affirmative action of self help in watering down the entry was an activity protected under the Act.

In Robinette, supra, the Commission observed that occasions will arise where mere ceasing of work will not eliminate or protect against hazards while adjusting or shutting off equipment will do so. In such cases such affirmative action may represent the safest and most responsible means of dealing with the hazard. Robinette, 3 FMSHRC at 808; Wiggins v. Eastern Associated Coal Corporation, 7 FMSHRC 1766 (1985).

It could be argued that Bruno's act of shutting off the continuous miner and watering down the entry was not an integral part of a protected work refusal. However, on the authority of Robinette and Wiggins, I assume that the activities of Bruno in shutting down the miner and watering down the entry were protected under the Act.

Accordingly, it is necessary to further evaluate the evidence.

The Commission has previously observed that direct evidence of motivation is rarely encountered in a discrimination case and that motivation may be drawn from circumstantial evidence showing such factors as knowledge of the protected activity, coincidence in time between the protected activity and the adverse action and disparate treatment. Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508 (November 1981), rev'd on other grounds, 709 F.2d 86 (D.C. Cir. 1983); Schulte v. Lizza Industries, Inc., 6 FMSHRC 8 (1984). It is, accordingly, appropriate to analyze the evidence concerning these cardinal features.

Knowledge of Protected Activity

The face boss, Roger Skaggs, knew Bruno had shut down the miner to water the entry. But Skaggs did not relay this information to anyone else. Skaggs' testimony on this point is both credible and uncontroverted. Skaggs neither participated in the decision to fire Bruno and the float coal dust incident was never reported to the committee that considered the discipline for the Bruno/Stokes fight (Tr. 206). This view of the evidence is further confirmed by Bruno who agrees he didn't have an opportunity to say anything about the float coal dust incident when he was fired (Tr. 76). Nor was it raised in the earlier State of Utah law suit (Tr. 77). In addition, Bruno admits the company was first made aware of his discrimination claim in June 1988 (Tr. 84).

Coincidence in Time

I do not find any coincidence in time between Bruno's protected activity and his discharge. Approximately ten days to two weeks elapsed from the protected activity and the fight in the lunchroom between Bruno and Stoker. No adverse action was taken during this period. On the other hand, it was only a few days from the time of the lunchroom fight until Bruno was discharged. This indicates Bruno was fired because of his fight with Stoker.

Disparate Treatment

A review of the evidence concerning disparate treatment is necessary since Bruno claims he received disparate treatment. Specifically, other miners had engaged in fights and had not been terminated. (This was Bruno's contention when he originally filed his case in Utah District Court.)

The evidence shows that Bruno had observed other fights in the mine (Tr. 46). He had observed a fight between Chad Tabor and Larry Mardoch (Tr. 50). He was also present on three different occasions when altercations occurred. Two of them were in the section where he was working and one was in the bathhouse (Tr. 50). In addition, fighting has always gone on and it was a common occurrence at the mine (Tr. 84). Bruno had never had a fight with any supervisory personnel or any other fellow employee at the mine (Tr. 105). However, on a previous occasion, Bruno admits he was involved in an incident with fellow employee, Meade. This occurred when Meade swore at Bruno on two different occasions. On the second occasion, Bruno pushed him and told him not to talk to him like that (Tr. 109). According to Bruno it was not a fight (Tr. 110). However, at the time of the termination interview with Bergamo, Bruno was asked about the Meade incident (Tr. 111).

Witness EARL MARCHELLO had observed fighting on the company's premises. Particularly he recalled Bob Bennett and Ben Darling (Tr. 117). The Bennett fight occurred underground and it was after Bruno had been terminated. Skaggs was a supervisor of the crew but did not see the fight (Tr. 117-121).

Witness IVAN GAGON had seen a fight between Chad Tabor and Bud Weaby where blows were exchanged. The men were not terminated for fighting. The witness also heard of other fights over the years but was not aware of any employee dismissed for fighting (Tr. 128-130). However, both men were called in and were "talked to" by Bergamo and Snyder (Tr. 133).

Witness KEVIN WOODS had seen three or four fights over the years at the mine. He had seen a foreman present at those fights on two occasions. The witness himself was involved in one altercation and received a letter of reprimand from the company in May 1984. Woods was not dismissed but he did receive time off (Tr. 137-139). Bruno was the only one terminated for fighting (Tr. 140). The witness was not aware of anyone terminated for fighting (Tr. 146).

The witness was involved in a fight in the mine with Daniel Gagon (Tr. 148). The fight occurred at the Twenty-Mile Coal Mine in Colorado managed by Plateau and still owned by it. A letter of reprimand was issued (Tr. 151) (Ex. R-13). As a result of the fight Gagon received a similar letter (Tr. 151). Both men were suspended for three days (Tr. 152).

Witness MAYO O'HERRON had observed four or five fights over the years and been involved in fights himself. In 1979 he received three days off without pay and he was told if he lost his temper again he would be fired (Tr. 163). O'Herron was not aware of anyone who had been terminated for fighting in the mine (Tr. 164).

Witness ERNEST PRETTYMAN had a fight about five years ago on the mine premises with John Haughter. Prettyman was not terminated because the other party "had it coming". Prettyman knew it was against company policy to fight on the premises (Tr. 170, 173).

Witness VOPEL LANDER had seen fights, one involving a company official who took off his miner's hat and belt and called on the entire crew to fight him. This was in 1981 or 1982. The company official was Cary Jensen (Tr. 182-183). The witness also broke up the fight between Chad and Buddy Weaby. The face foreman witnessed this fight and Weaby quit rather than go back into the mine (Tr. 184-185). He also saw a fight between Chad Tabor and Randy Mabbutt (Tr. 185). The Tabor-Mabbutt fight was in 1977 but no company officials were present (Tr. 186). He also heard about Bruno's altercation as well as Prettyman's altercation (Tr. 187).

Respondent's witness ROGER SKAGGS indicated the committee stated they had to make an example of Bruno and it was hoped the fighting would quit on the property (Tr. 206-207). Bruno was terminated for fighting (Tr. 207).

Witness DAVE DONALDSON, Human Resources Representative for the respondent, has been so employed for three and one-half years (Tr. 217). In 1983 it was against company policy to fight underground and you could be terminated if you were caught fighting (Tr. 219-220).

The standards of conduct at the Getty Oil Company prohibited fighting (Tr. 221).

Donaldson started working at this site in 1981 for the then operator, United Nuclear Company. The next owner-operator was Getty Oil in 1982 and the subsequent operator (in 1984) was Texaco (Tr. 242-243). Cyprus Minerals Company acquired the property in March 1986. Plateau Minerals is the parent company of Cyprus Plateau Mining Company (Tr. 244).

The Getty booklet contains a prohibition against fighting or horseplay. The booklet states that disciplinary action may be taken. It may include discharge (Tr. 248).

Witness ARNOLD SHAW, Director of Safety for Plateau Mining, described how safety complaints are handled at the company. The witness had never had a complaint about float coal dust (Tr. 250-254).

Witness STAN WARNICK, Manager of Human Resources for respondent, felt that the discharge of Bruno was consistent with company policy concerning assaults or fights. Company policy stated that discipline would be invoked if it appeared appropriate for the incident (Tr. 281). As a result of the altercation with Bruno and Stoker, Stoker received a written warning that any further involvement would result in further discipline. There are two sets of rules relating to fighting: one is a safety guideline that prohibits it, and the second is Getty's standards of conduct that prohibit it. Both documents state that discipline could be imposed depending upon the circumstances (Tr. 286).

According to the company's records three employees have been terminated for fighting. One was Bruno and the others were Buddy Weaby and Dennis Craig who was terminated in April 1982 (Tr. 287). There has always been some form of discipline when management was aware that the fighting had taken place. The company's policy remains the same (Tr. 288).

In the witness's view, Bruno was terminated for assaulting another employee. An assault is more serious than a fight (Tr. 300). However, there is nothing in the company guidelines that distinguishes assault from any other kind of a fight (Tr. 300-301).

Evaluation of the Evidence

In evaluating the evidence concerning disparate treatment I credit the operator's evidence. Bruno's witnesses, as to fighting on the premises, would no doubt know the circumstances under which a particular fight occurred. However, Warnick, as manager of Human Resources would be in a position to know whether employees who have engaged in fights known to the company had been terminated. He testified that Weaby and Dennis Craig (and Bruno) were terminated (Tr. 287, 288).

Further, I am not persuaded by Bruno's arguments that he received disparate treatment: it is not necessary to distinguish whether the Stoker incident was an assault or a fight but, in any event, Bruno was clearly the aggressor. In whatever fashion the incident is categorized, the Stoker fight was not Bruno's first incident. Bruno indicates the event involving Leroy Meade was "not a fight" (Tr. 110). However, it was a fact discussed during Bruno's termination interview with Bergamo (Tr. 111).

In sum, if Bruno had established that he was terminated in part because of protected activity, I would nevertheless conclude that respondent was motivated by unprotected activities and would have taken the adverse action for the unprotected activities alone; i.e., Bruno's fight with fellow worker Stoker in the lunchroom.

For the foregoing reasons, I conclude that complainant has not established that respondent discharged or otherwise discriminated against him in violation of Section 105(c) of the Act.

ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED that the complaint and proceedings herein are dismissed.


John J. Morris
Administrative Law Judge

Distribution:

Gregory J. Sanders, Esq., Kipp & Christian, City Centre I, #330,
175 East 400 South, Salt Lake City, UT 84111-2314 (Certified
Mail)

Kent W. Winterholler, Esq., James M. Elegante, Esq., Parsons,
Behle & Latimer, 185 South State Street, Suite 700, P.O. Box
11898, Salt Lake City, UT 84147-0898 (Certified Mail)

/ot

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

NOV 29 1988

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 88-167
Petitioner	:	A.C. No. 46-06557-03539
v.	:	
	:	Oneida Mine No. 11
ONEIDA COAL COMPANY, INC.,	:	
Respondent	:	

DECISION

Appearances: Anita D. Eve, Esq., U.S. Department of Labor,
Office of the Solicitor, Philadelphia,
Pennsylvania, for the Petitioner;
W. T. Weber, Jr., Esq., Weston, West Virginia,
for the Respondent.

Before: Judge Maurer.

STATEMENT OF THE CASE

This case is before me upon a petition for assessment of civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq., the "Act," in which the Secretary has charged the Oneida Coal Company (Oneida) with two violations of the mandatory safety standards. Prior to the commencement of taking testimony in this case, however, the parties moved to settle that portion of the case concerning § 104(d)(1) Order No. 2901009, alleging a violation of 30 C.F.R. § 75.400 and proposing a \$1000 civil penalty. There was no reduction in the assessed penalty proposed and based upon the representations made at the hearing and in the record, I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act.

The remaining section 104(d)(1) citation, alleging a violation of the mandatory safety standard found at 30 C.F.R. § 75.200 and proposing to assess a civil penalty of \$950 was tried before me at a scheduled hearing on July 15, 1988, at Slatyfork, West Virginia.

The general issues before me are whether Oneida violated the cited regulatory 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 is "significant and substantial." 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. An additional issue in this case is whether the inspector's "unwarrantable failure" finding should be affirmed.

DISCUSSION

Citation No. 2700376 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.200 and specifically charges as follows:

There was a violation of the approved roof control plan, in that only 5 breaker post and no turn post were installed in the No. 2 block pillar split, A-5 panel section, where coal was being mined by continuous miner. Dan Matz, was the Section Foreman. The approved plan requires eight (8) breaker post and four (4) turn post be installed prior to taking the first cut from the pillar split. The Foreman knew or should have known of this requirement.

Oneida does not dispute the factual allegations set forth in the citation at bar nor does it dispute that such allegations constitute a violation of its roof control plan and therefore the cited standard. Oneida maintains, however, that the violation was neither "significant and substantial" nor caused by its "unwarrantable failure" to comply with its roof control plan.

Inspector Veith testified that the operator's roof control plan required that they have eight breaker posts and four turn posts installed prior to starting the pillar split. He observed five breaker posts installed and no turn posts. He asked the continuous miner operator if he knew what the roof control plan required and the miner ostensibly replied that yes, he did, but he did not have any posts available.

The inspector further opined that every time you split a pillar block, you increase the chance of a roof fall and therefore the chance of serious injury. The risk of serious injury in this case being to the miner operator who was right beside the machine even though this particular continuous miner had remote control capability.

It was also the inspector's opinion that this violation was "unwarrantable" because the section foreman knew or should have known that this miner operator was going to start mining in the

affected area before the roof control plan had been complied with. He testified at (Tr. 30):

It's the section foreman's responsibility to see to that, and he should have known. It should have been checked to be sure that the proper amount of roof support had been installed. That's part of his responsibility.

Mr. Bauer, Director of Safety and Training for Oneida, also testified. He stated that he investigated this incident and found by interviewing Randell Mullins, the continuous miner operator, that he (Mullins) had moved the miner to the number two block and was mining there for approximately five to ten minutes when the inspector came up and issued the citation. He further stated that Danny Matz, the section foreman, knew about the roof control plan requirements.

Danny Matz also testified. He stated that before the inspector arrived he personally had checked the area around the number two block and at that time all the breaker posts were in and standing. Later, he returned to the area with Inspector Veith and observed that three of the eight breaker posts had been knocked down by falling material. He acknowledged, however, that there were no turn posts in number two, either earlier or when he came back with the inspector, which was okay as long as no mining was taking place there.

Foreman Matz maintains that he did not instruct the miner operator to make a pillar split or cut on the number two block and he did not know that the miner operator would be mining on the number two block without his prior approval. He states the miner operator should have let him know that there were no "timbers" in there prior to starting that pillar cut. However, on cross-examination he admitted that he would not have routinely had to be there for the miner operator to start cutting on the number two block and he would ordinarily just assume the miner operator would put up the required turn posts.

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).

I conclude and find that a violation of the cited standard did occur as alleged in Citation No. 2700376, and as admitted by Oneida. Furthermore, a discrete safety hazard in the form of an increased danger of a roof fall was contributed to by the violation. Additionally, I accept and find credible the inspector's opinion that there was a reasonable likelihood that the hazard contributed to could result in a reasonably serious type injury, which is usually the case in a roof fall type accident. I therefore conclude that the violation was "significant and substantial," and serious.

The Unwarrantable Failure Issue

The Secretary further urges that this violation was caused by the operator's "unwarrantable failure" to comply with the mandatory standard, and I agree.

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). And more recently, in Emery Mining Corp. v. Secretary of Labor, 9 FMSHRC 1997 (1987), the Commission stated the rule that "unwarrantable failure" means aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act.

In this case, Foreman Matz testified and I specifically find that testimony to be credible, that when he inspected the area all eight of the required breaker posts were then in place. However, none of the required turn posts were installed. At this point in time, Matz knew the turn posts were not installed and he also knew that the number two block was scheduled to be cut on that shift. Now theoretically, the miner operator was supposed to tell Matz that he was going to start cutting on the number two block and this would have given Matz the opportunity to make sure the required turn posts were installed, as both he and the continuous miner operator knew they should be prior to the start of any mining. For whatever reason, this did not happen and as Matz candidly admitted, this did not completely surprise him. In effect, Matz totally relied on and expected the miner operator to install the turn posts before he started cutting. I find this to be an abdication of Matz' responsibilities as the section foreman, and a serious lack of reasonable care on his part to see that the standard was complied with. This negligence is clearly

imputable to the operator. Accordingly, I conclude and find that that portion of the violation pertaining to the missing turn posts was an "unwarrantable failure" to comply with the standard cited. With regard to the missing breaker posts, I accept the operator's explanation that three of the eight posts had been knocked down since Matz had earlier that shift observed them standing in place. This last finding is reflected in the civil penalty assessed by me for this violation.

Civil Penalty Assessment

In assessing a civil penalty concerning this citation, I have also considered the foregoing findings and conclusions and the requirements of section 110(i) of the Act, including the fact that the operator is small in size and does not have a significant history of violations. Under these circumstances, I find that a civil penalty of \$750 is appropriate.

ORDER

Citation No. 2700376 and Order No. 2901009 ARE AFFIRMED, and Oneida Coal Company is hereby directed to pay a civil penalty of \$1750 within 30 days of the date of this decision.


Roy J. Maurer
Administrative Law Judge

Distribution:

Anita D. Eve, Esq., U.S. Department of Labor, Office of the Solicitor, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

W. T. Weber, Jr., Esq., 208 Main Avenue, Weston, WV 26452
(Certified Mail)

slk

ADMINISTRATIVE LAW JUDGE ORDER

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 4, 1988

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. LAKE 88-122-M
Petitioner : A.C. No. 11-00070-05507
v. :
: Romeo Quarry
MATERIAL SERVICE CORPORATION, :
Respondent :

ORDER DENYING PROPOSED SETTLEMENT NOTICE OF HEARING

On August 11, 1988, the Secretary of Labor filed a petition for assessment of a civil penalty before this Commission proposing a penalty of \$8,000 for one violation of the mandatory standard at 30 C.F.R. § 56.9054. The citation charges as follows:

An employee was fatally injured on October 27, 1987 when the Euclid R-50 co.#54-6929 haulage truck he was operating went over the edge of the live stockpile and fell approximately 50 feet overturning and landing upside down on the Quarry floor. Berms, bumper blocks, safety locks, or similar means to prevent overtravel and overturning was not provided at this dumping location at the time the incident occurred.

In a motion to approve settlement filed with this Commission on September 12, 1988, the Secretary sought to reduce the proposed penalty to \$5,000 and, as grounds therefore, stated as follows:

- 1) A high degree of gravity is involved in the present citation because the event that the cited standard is trying to prevent actually occurred.
- 2) A high degree of negligence is present in this citation because the mine operator knew or should have known that an adequate berm or a similar type of device was required to prevent overtravel and overturning at the dumping location. On September 2, 1988, the undersigned attorney discussed this case with Michael J. Bernardi,

Director of Safety for the Material Service Corporation. Mr. Bernardi stated that during the afternoon prior to the date of the accident a berm had been constructed at the cited location. However, at the time of the accident the material that was removed from the berm had not been totally replaced leaving a berm that was not adequate to prevent an accident.

3) The mine operator demonstrated its good faith by abating the cited condition within the time granted the MSHA inspector.

4) The mine operator had no assessed violations during the 24 month period preceding the issuance of the present citation. See copy of Proposed Assessment Data Sheet, marked as Exhibit A, attached hereto and made a part hereof.

5) During the calendar year preceding the issuance of the present citation the mine involved in this case accumulated a total of 128,522 hours of work and the controlling entity had a total of 1,687,359 hours of work during the same period.

6) Payment of the penalty agreed to in this settlement will not affect the mine operator's ability to remain in business.

Section 110(k) of the Act provides that "no proposed penalty which has been contested before the Commission under section 105(a) shall be compromised, mitigated, or settled except with the approval of the Commission." Penalty proceedings before the Commission are de novo. Neither the Commission or its Judges are bound by the Secretary's proposed penalties. Rather, they must determine the appropriate amount of penalty, if any, in accordance with the six criteria set forth in section 110(i) of the Act. Secretary v. Phelps Dodge Corp., 9 FMSHRC 920 (Chief Judge Merlin 1987); Sellersburg Stone Co. v. FMSHRC, 736 F.2d 1147 (7th Cir. 1984).

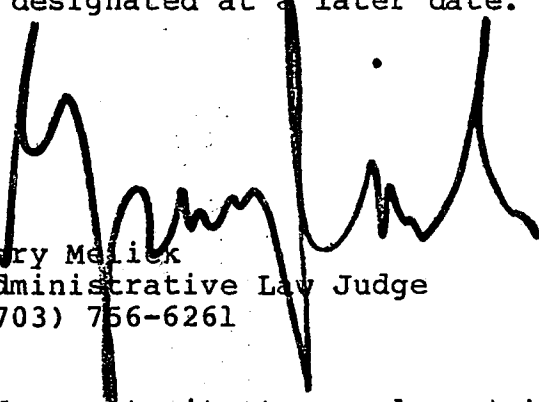
The Commission recently reaffirmed these principles in Secretary v. Wilmot Mining Co., 9 FMSHRC 684 (1987):

Settlement of contested issues and Commission oversight of that process are integral parts of dispute resolution under the Mine Act. 30 U.S.C. § 820(k); see Pontiki Coal Corporation,

8 FMSHRC 668, 674 (May 1986). The Commission has held repeatedly that if a Judge disagrees with a penalty proposed in a settlement he is free to reject the settlement and direct the matter for hearing. See e.g. Knox County Stone Company, 3 FMSHRC 2478, 2480-81 (1981). A judge's oversight of the settlement process "is an adjudicative function that necessarily involves wide discretion." Knox County, 3 FMSHRC at 2479.

In this case the citation at bar sets forth a serious regulatory violation leading to a fatality. The settlement motion also confirms that the fatality was the result of a "high degree" of negligence and the purported excuse or justification for reducing the level of negligence is incomprehensible. In addition the other grounds advanced do not justify the proposed reduction.^{1/}

Accordingly the Motion is denied and this case is set for hearing on the merits at 9:00 a.m. on December 13, 1988, in St. Louis, Missouri. The specific courtroom in which the hearing will be held will be designated at a later date.



Gary Melick
Administrative Law Judge
(703) 756-6261

^{1/} The Secretary was afforded opportunity to supplement her Motion in this case to furnish additional information to justify her proposed reduction in penalty but declined.