NOVEMBER 1989

COMMISSION DECISIONS

ADMINISTRATIVE LAW JUDGE DECISIONS

ADMINISTRATIVE LAW JUDGE DECISIONS (continued)

ADMINISTRATIVE LAW JUDGE ORDERS

NOVEMBER 1989

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

Secretary of Labor, MSHA v. O'Neal Machine and Repair, Docket No. WEVA 89-150. (Chief Judge Merlin, Default Order of September 20, 1989)

Secretary of Labor, MSHA v. Rochester & Pittsburgh Coal Company, Docket No. PENN 88-284-R, 285-R, PENN 89-72. (Judge Maurer, October 4, 1989)

Harry Ramsey v. Industrial Constructors Corporation, Docket No. WEST 88-246-DM. (Judge Morris, October 10, 1989)

Secretary of Labor, MSHA v. Blue Circle Atlantic, Inc., Docket No. YORK 89-45-M. (Chief Judge Merlin, Default Order of October 26, 1989)

Secretary of Labor, MSHA v. A.H. Smith Stone Company, Docket No. YORK 89-46-M. (Chief Judge Merlin, Default Order of October 24, 1989)

Southern Ohio Coal Company v. Secretary of Labor, MSHA, Docket No. WEVA 89-124-R, 89-204. (Judge Broderick, October 17, 1989)

Secretary of Labor, MSHA v. Southern Ohio Coal Company, Docket No. WEVA 88-144-R, WEVA 88-212. (Judge Maurer, October 16, 1989)

Rochester & Pittsburgh Coal Company v. Secretary of Labor, Docket No. PENN 88-309-R, 88-310-R. (Judge Weisberger, October 17, 1989)

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

Secretary of Labor, MSHA v. Lyon Washed Sand & Gravel, Docket No. LAKE 89-28-M. (Judge Broderick, September 28, 1989)

Secretary of Labor, MSHA v. A.H. Smith Stone Company, Docket No. VA 89-28-M. (Chief Judge Merlin, September 29, 1989)

Kenneth Howard v. B & M Trucking Co., Docket No. KENT 89-2-D. (Judge Melick, October 6, 1989)

Secretary of Labor, MSHA v. Green River Coal Company, Docket No. KENT 89-126. (Judge Broderick, October 20, 1989)

Secretary of Labor, MSHA v. Eastern Associated Coal Corporation, Docket No. WEVA 89-192, Petition to Reconsider Interlocutory Review denied.

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 8, 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEVA 89-150
O'NEAL MACHINE & REPAIR, INC.	:	

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

ORDER

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982). On September 20, 1989, Commission Chief Administrative Law Judge Paul Merlin issued an Order of Default finding O'Neal Machine & Repair, Inc. ("O'Neal") in default for failure to answer the Secretary of Labor's Petition for Assessment of Civil Penalty and the judge's Order to Show Cause. The judge assessed a civil penalty of $5,300, the amount proposed in the Secretary's penalty petition. By letter to the Secretary of Labor dated September 25, 1989, O'Neal asserted that it had previously sent to the Department of Labor's Mine Safety and Health Administration ("MSHA"), within the time permitted for answering a penalty proposal, a written "reply to the penalties assessed against us." A copy of a certified mail return receipt, enclosed with O'Neal's September 25 letter, indicates that its May 11, 1989, reply was received in MSHA's Arlington, Virginia offices on May 15, 1989. O'Neal's September 25 correspondence was subsequently forwarded to the Commission by the Secretary. We deem O'Neal's September 25 letter to constitute a request for review. See, e.g., L&L Gravel, 11 FMSHRC 803-04 (May 1989). For the reasons discussed below, we reopen this proceeding, grant O'Neal's request for review, vacate the judge's default order, and remand for further proceedings.

It appears from the record that O'Neal, acting pro se, attempted to file its answer to the Secretary's civil penalty petition within the 30-day period of time prescribed for replying to a penalty proposal (see 29 C.F.R. § 2700.28). Although the document was mistakenly sent to MSHA, and was not filed with this Commission, an adjudicatory agency separate and independent from the Department of Labor and MSHA, as required (see 29 C.F.R. §§ 2700.5(b) & .28), O'Neal appears to have been attempting in good faith to comply with its filing responsibilities.

Under the circumstances, we conclude that O'Neal should be afforded the opportunity to explain its filing attempts to the judge, who shall determine whether final relief from default is appropriate. See, e.g., El Paso Sand Products, Inc., 10 FMSHRC 960 (August 1988).

For the foregoing reasons, we vacate the judge's default order and remand this matter for further proceedings. O'Neal's attention is directed to the requirement that all further papers submitted in this proceeding must be filed with the Commission and copies of all such documents served on the Secretary of Labor. 29 C.F.R. §§ 2700.5(b) & .7. */

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

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*/ Commission Procedural Rule 5(b) states:

> Where to file. Until the Judge has been assigned to a case, all documents shall be filed with the Commission. After a Judge has been assigned, and before he issues a decision, documents shall be filed with the Judge, except for documents filed in connection with interlocutory review, which shall be filed with the Commission. After the Judge has issued his decision, documents shall be filed with the Commission. Documents filed with the Commission shall be addressed to the Executive Director and mailed or delivered to the Docket Office, Federal Mine Safety and Health Review Commission, 1730 K Street, N.W., Sixth Floor, Washington, D.C. 20006.

29 C.F.R. § 2700.5(b).

Distribution

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 14, 1989

CLINCHFIELD COAL COMPANY	:	
	:	
v.	:	Docket No. VA 89-67-R
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	
and	:	
	:	
UNITED MINE WORKERS OF AMERICA (UMWA)	:	

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

DECISION

BY: Ford, Chairman; Backley and Doyle, Commissioners

In this contest proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982) ("Mine Act" or "Act"), Clinchfield Coal Company ("Clinchfield") seeks review of a withdrawal order issued by the Department of Labor's Mine Safety and Health Administration ("MSHA"), pursuant to section 104(b) of the Mine Act, 30 U.S.C. § 814(b), at Clinchfield's McClure No. 1 Mine. The withdrawal order alleges that Clinchfield failed to abate a violation of 30 C.F.R. § 75.326 (the application of which had previously been modified by the Secretary of Labor at the McClure No. 1 Mine) by permitting air in excess of 300 feet per minute ("fpm") to be coursed over the belt conveyor systems for ventilation of working places. In its contest, Clinchfield seeks, inter alia, vacation of the withdrawal order and extension of the time for abating the violation until completion of proceedings before the Department of Labor, conducted pursuant to section 101(c) of the Act, 30 U.S.C. § 811(c), concerning Clinchfield's separate petition for further modification of section 75.326, as applied at the McClure No. 1 Mine, to remove the 300 fpm limitation. Along with its contest, Clinchfield also seeks from the Commission temporary relief from the withdrawal order pursuant to section 105(b) of the Act, 30 U.S.C. § 815(b).

In expedited proceedings on Clinchfield's contest, Commission Administrative Law Judge James A. Broderick permitted the United Mine Workers of America ("UMWA") to intervene. In his written decision in this matter, issued on August 30, 1989, 21 days after completion of a three-day evidentiary hearing, the judge denied Clinchfield's request for temporary relief on the grounds that he was then prepared to rule on the merits of the operator's contest. He vacated the section 104(b) withdrawal order and extended the time for abatement of the violation until commencement of the next hearing scheduled before the Department of Labor with respect to Clinchfield's pending petition for modification. 11 FMSHRC 1568 (August 1989)(ALJ). We granted petitions for discretionary review ("PDR") filed by Clinchfield and the UMWA and granted Clinchfield's request for expedition and oral argument. Following completion of briefing pursuant to an expedited briefing schedule, we heard oral argument on November 8, 1989. For the following reasons, we affirm the judge's vacation of the withdrawal order and his extension of the time for abatement but modify the terms of that extension as explained below.

I.

Factual and Procedural Background

Clinchfield's McClure No. 1 Mine is an underground coal mine located near McClure, Virginia, and has been in operation since 1979. The mine is a gassy mine, liberating more than four million cubic feet of methane per 24-hour period. 1/

Pursuant to a modification petition filed by Clinchfield on December 21, 1979, under section 101(c) of the Mine Act, MSHA, in October 1980, modified the application of 30 C.F.R. 75.326 at the mine by granting Clinchfield permission to use air coursed through belt conveyor entries to ventilate working places. 2/ MSHA's approval, contained in an amended proposed decision and order issued on January 29, 1981, which became effective by operation of law (i.e., was not opposed), did not limit the velocity of air coursed through the belt

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1/ There was a serious explosion in a combined belt/track entry of the mine in 1983. Since 1983 the mine also has been evacuated a number of times because of excessive methane.

2/ 30 C.F.R. 75.326 states in pertinent part:

> In any coal mine opened after March 30, 1970, the entries used as intake and return air courses shall be separated from belt haulage entries, and each operator of such mine shall limit the velocity of the air coursed through belt haulage entries to the amount necessary to provide an adequate supply of oxygen in such entries, and to insure that the air therein shall contain less than 1.0 volume per centum of methane, and such air shall not be used to ventilate active working places. ...

haulage entries for purposes of ventilating working places. MSHA imposed various conditions, including the installation of an early warning fire detection system based on monitoring carbon monoxide (the "CO system"). 3/

On August 21, 1986, Clinchfield, in a proposed amendment to the modification, requested that the alarm levels of the CO system be raised because its system was having problems with false alarms. MSHA granted the request in a proposed decision and order issued February 10, 1987, which became effective by operation of law. The modification was subject to a number of conditions, however, including a limit of 300 fpm on the velocity of air coursed through the belt entries to ventilate working places.

On July 1, 1987, Clinchfield filed another proposed amendment to the modification, requesting that the maximum velocity limit be increased from 300 fpm to 1,200 fpm. As justification, it indicated that there were large quantities of methane trapped in the coalbed of the mine and that large quantities of air were required to dilute and carry off the methane liberated during mining and from mined surfaces after mining. Clinchfield alleged that the 300 fpm restriction would allow methane to accumulate and result in a diminution of safety. MSHA investigated the request and granted the petition on September 14, 1988, in a proposed decision and order with conditions. No maximum velocity limit was prescribed in the proposed decision and order.

On October 13, 1988, the UMWA filed a request with the Department of Labor for a hearing on the proposed decision and order, challenging elimination of the 300 fpm air velocity limit. The modification proceeding was assigned to a Department of Labor administrative law judge, and a hearing was scheduled to begin in that case on November 13, 1989.

On June 5, 1989, almost two years after Clinchfield had filed its proposed amendment to increase the 300 fpm maximum velocity limit, MSHA inspector James Baker issued a citation to Clinchfield alleging a violation of 30 C.F.R. 75.326, as modified. The citation alleges that the velocity of air being coursed over the belt entries was in excess of 300 fpm. Clinchfield was given until June 30, 1989, to abate the violation alleged in the citation and was subsequently given an extension to July 31, 1989. MSHA extended the abatement time set in the citation on condition that Clinchfield request an expedited hearing on the section 101(c) modification petition seeking the increase in air velocity in the belt conveyor entries. On June 21, 1989, Clinchfield requested an expedited hearing on the section 101(c) petition.

By August 1, 1989, Clinchfield had failed to abate the violation. Inspector Baker then issued an order of withdrawal under section 104(b) of the Mine Act. Specifically, this order prohibited activity in any

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3/ The terms of MSHA's January 29, 1981 decision and order were not implemented until 1983, some time after the 1983 explosion referred to in n. 2, supra.

working place that was ventilated with belt air velocities exceeding 300 fpm.

On August 2, 1989, Clinchfield filed its contest of the section 104(b) withdrawal order, challenging the validity of the order of withdrawal, arguing that compliance with the order's terms would result in a diminution of safety to miners, and requesting expedited proceedings. In addition, Clinchfield argued that the time set for abatement of the order was unreasonable. On August 3, 1989, Clinchfield filed a Motion for Temporary Relief from the withdrawal order, pursuant to section 105(b) of the Mine Act, requesting extension of the time set for abatement until the issues presented in the contest proceeding were resolved. The judge subsequently granted the request for expedition and the UMWA's request to intervene.

At the hearing before the judge on August 7-9, 1989, Clinchfield took the position that compliance with the withdrawal order would result in a diminution of safety. Clinchfield's independent consultant Donald Mitchell testified that the 300 fpm ceiling represented an unacceptable hazard to the health and safety of the miners in the mine. I Tr. 162, 177; III Tr. 127, 135. Clinchfield also argued before the judge that lifting the 300 fpm ceiling would enhance safety since dilution of methane would be facilitated. Accordingly, in Clinchfield's view, the abatement time was unreasonable under the circumstances and should be extended at least until the section 101(c) proceeding could be heard.

The Secretary took the position that the 300 fpm ceiling may result in a diminution of safety at the mine and that lifting the ceiling would not adversely affect the safety of the miners. MSHA inspector Baker testified that the 300 fpm velocity would not dilute the methane liberated in the mine's belt entries to a safe amount, and that to enforce the 300 fpm velocity "would pose a hazard." I Tr. 44, 51, 53. Baker also testified that additional velocity was necessary to ventilate the faces. I Tr. 60. Baker stated that MSHA officials who worked with him, including his immediate supervisor, subdistrict manager, and district manager, agreed that the 300 fpm ceiling posed a hazard. I Tr. 51-52. Additionally, MSHA District Manager/Supervisory Mining Engineer Robert Elam testified that abatement of the violation would result in diminution of safety to the miners in the mine, indicating that the 300 fpm ceiling was inadequate to move methane out of the mine and to dilute and render it harmless. I Tr. 79-80, 108, 116-17. Thus, in Elam's view, the 300 fpm ceiling diminished safety. I Tr. 110, 126. See also III Tr. 61-62. Elam further testified that increased velocity would help in methane dilution and benefit the mine. I Tr. 124.

The Secretary introduced an affidavit by Jerry L. Spicer, MSHA Administrator for Coal Mine Safety and Health, which states his belief "that the safety of miners at the McClure Mine is enhanced by removing the 300 fpm belt entry air velocity" MSHA-X 4. The Secretary stated that the Commission could: (1) determine, pursuant to section 105(d) of the Act, that the length of the abatement period was unreasonable and modify or vacate the period; or (2) grant temporary relief from the withdrawal order under section 105(b) of the Mine Act.

The UMWA took the position that the 300 fpm ceiling did not result in a diminution of safety at the mine but that lifting the 300 fpm ceiling would. The UMWA submitted that the 300 fpm ceiling was adequate to dilute the methane, especially in conjunction with other alternatives. UMWA international representative Thomas Rabbitt testified that the 300 fpm ceiling could dilute and render harmless methane in the most inby areas in the mine. II Tr. 93, 132-33. While the UMWA implicitly conceded that increasing the air velocity would reduce methane in the working sections, it argued that the adverse effects resulting from the increase in velocity would, nevertheless, result in a diminution of safety to the miners. Rabbitt testified that greater air flow increases the oxygen available to fan a fire, and UMWA Deputy Administrator for Safety Robert J. Scaramozzino agreed that high air velocities would cause quick propagation of a fire. II Tr. 101, 155, 168. The UMWA's witnesses also emphasized that float coal dust involving conveyor belt entries is one of the major fire and ignition sources in a coal mine, and that high air velocities will pick the dust up, suspend it in the air, and disperse it through the entry, thereby aggravating the hazard. II Tr. 155-56, 163, 241, 249; III Tr. 23, 124. UMWA Deputy Administrator in the Department of Occupational Health James Weeks testified that a higher air velocity has the tendency to pick up respirable dust. II Tr. 206-208, 220. UMWA witnesses also testified that higher air velocity would dilute the carbon monoxide necessary to activate the CO system and, as a result, a larger fire would be needed to generate the necessary carbon monoxide, delaying the operation of the sensing and warning system. I Tr. 221-22, 230-31, 249-50; II Tr. 102.

The UMWA also argued that there were a number of alternative methods of methane control available to Clinchfield. These proposals included increasing the number of entries, point feeding, increasing the velocity in the intake entries, drilling degassification holes, putting the track and belt in the next entry, changing the design for developing longwall panels, staggering crosscuts involving roof support, and inducing water into the coal seam.

The Secretary's witnesses rebutted the UMWA's positions by pointing out that all mines are required to control respirable dust and float coal dust, and that if control is inadequate enforcement activities can be instituted by the Secretary. See 30 C.F.R. §§ 70.100, 75.316, and 75.400. II Tr. 218-19; III Tr. 35-36, 44, 56. It was also stated that studies by the Bureau of Mines of the United States Department of Interior indicate no expanded propagation of mine fires when air velocities are increased to as much as 800 fpm. Tr. 107, 119; II Tr. 154; MSHA-X 6. There was also testimony that the higher velocity would actually lead to a more efficient CO detection system because the product combustion would pass more quickly from one sensor to the next. Tr. 118; III Tr. 117, 120, 121. Moreover, the Secretary's witnesses also stated that increasing the number of entries would cause roof control problems in the mine. Tr. 90, 113; III Tr. 59. Finally, the Secretary's and Clinchfield's witnesses tesified that the other alternative methods of methane control proposed by the UMWA were either impractical or ineffective.

After the presentation of concluding oral argument by the parties,

Judge Broderick issued a bench decision, which he incorporated in his written decision issued on August 30, 1989. Initially, the judge indicated that, because he had heard "the entire testimony on the merits," he was denying the motion for section 105(b) temporary relief. 11 FMSHRC at 1569. The judge noted that Clinchfield did not deny that the alleged violation existed. 11 FMSHRC at 1570. Rather, Clinchfield's argument that the time set for abatement was unreasonable and should be further extended was based upon its assertion that complying with the standard would create a diminution of safety in the mine. The judge stated that Clinchfield and the Secretary had submitted a substantial amount of evidence that enforcement of the 300 fpm limit would result in a serious danger of a methane fire or explosion and that the UMWA had presented a substantial amount of evidence that exceeding the 300 fpm limit would result in a serious danger of propagating any belt fires and increasing float coal dust and respirable dust. 11 FMSHRC at 1571. The judge stated, however, that he did not have jurisdiction to determine whether the belt entry air velocity requirements should be increased or kept at the same level and that the question before him was whether to affirm, vacate, or modify the contested order. Id. The judge indicated:

> ... I am not in any way discounting or minimizing the substantial safety issues raised by the Intervenor, the United Mine Workers of America. Neither am I attempting to weigh the evidence on either side of the issue, which is the responsibility of the authorities charged with deciding the Petition for Modification.

Id. However, the judge concluded as follows:

> On the bases of the substantial evidence submitted by [Clinchfield] Contestant and the Secretary, and particularly that submitted by the Mine Safety and Health Administration, which is the government agency charged with enforcing the Act in the interests of the safety of miners, and because there is a pending petition for modification which is intended to resolve the conflicting views relative to safety and hazards presented by the belt entry air velocity, I hereby order that [the section 104(b)] Order of Withdrawal ... is DISSOLVED.
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> * * *
>
> I am ... ruling that in view of the Secretary's position and the evidence introduced in support of it, that complying with the contested citation and order may result in a diminution of safety, and in view of the pending petition for modification, relief should be granted. I am granting it from the terms of the order until this matter is submitted for decision on the Petition for Modification.

Id.

Accordingly, the judge vacated the contested withdrawal order and modified the underlying citation by extending the time for its abatement until "the date the hearing commences on the pending Petition for Modification." 11 FMSHRC at 1572. As noted, we subsequently granted the PDRs filed by both Clinchfield and the UMWA and heard oral argument.

The UMWA argues in its PDR that the judge erred by failing to make the findings necessary to support his conclusion that the time for abatement should be extended. The UMWA also asserts that even if the judge did enter the necessary findings, substantial evidence does not support them. UMWA PDR at 3-4. Accordingly, the UMWA requests that the decision be reversed and the withdrawal order reinstated.

Further, noting that the effect of the judge's decision is to allow Clinchfield temporary relief from the requirements of section 75.326, the UMWA contends that the decision violates UMWA v. MSHA, 823 F.2d 608 (D.C. Cir. 1987), which, according to the UMWA, prohibits temporary relief from the application of a standard, pending a decision on a petition for modification. UMWA PDR at 5.

In its PDR, Clinchfield argues that the judge's decision does not go far enough. First, the relief granted is inadequate, in that the judge should have extended the abatement period until a final order is issued in the modification proceeding. In the alternative, the Commission should recognize a diminution of safety defense to the alleged violation, find that Clinchfield established that defense, and vacate the citation and order. C. PDR at 7-8.

Second, Clinchfield asserts that the decision is inconsistent with the purposes of the Act because it does not protect the miners from the hazards of compliance once the abatement period ends. Therefore, the Commission should declare invalid the Secretary's policy of refusing to extend further the abatement period and should grant Clinchfield declaratory relief to that effect. C. PDR at 8-13.

In its brief on review, the UMWA primarily argues that the judge's decision must be reversed because the judge failed to make the findings of fact and conclusions of law necessary to support his vacation of the withdrawal order and his conclusion that the time for abatement should be extended. The UMWA asserts that although the judge concluded, in vacating the order, that complying with the contested citation and order may result in a diminution of safety, he made no factual findings to support that conclusion. UMWA Br. at 3-4. The UMWA alternatively argues that, in any event, substantial evidence does not establish that compliance with the cited standard will diminish safety because the record contains testimony regarding ways Clinchfield can comply with the 300 fpm requirement without adversely affecting safety and because there is testimony that non-compliance increases the danger to miners in other areas of the mine. UMWA Br. at 5, 8-10. Therefore, the UMWA contends that the effect of the judge's decision is to grant temporary relief without complying with the statutory requirements of section 105(b), which requires a specific finding that if relief is granted, the health

and safety of miners will not be adversely affected. See 30 U.S.C. § 815(b)(2)(C). UMWA Br. at 10-11.

In its briefing to the Commission, Clinchfield first asserts that the relief awarded by the judge is inadequate to protect the health and safety of the miners. Clinchfield argues that in light of the judge's finding that limiting the belt air velocity to 300 fpm may create a diminution of safety, it is illogical not to extend the abatement time for the underlying citation until a final order is issued in the modification case. C. PDR (designated as main brief) at 7. Clinchfield also argues that the Commission should recognize a diminution of safety defense to an alleged violation when the defense is necessary to avoid subjecting miners to the greater hazards caused by compliance. C. PDR at 8.

Finally, Clinchfield argues that, because the judge set the termination date of the citation to coincide with the commencement of the modification hearing, the probable result of his decision is that Clinchfield will be faced with another closure order "and the parties' attention will be refocused in the Review Commission forum." C. PDR at 9. To end the threat of duplicative litigation in separate forums, the Commission should grant Clinchfield declaratory relief. Such relief is not prevented by UMWA v. MSHA, supra, which only addresses the validity of the Secretary's procedure for interim relief in a modification proceeding under 30 C.F.R. § 44.16. C. PDR at 10. Therefore, Clinchfield requests that the Commission: (1) extend the abatement period until a final order is issued in the section 101(c) modification proceeding; (2) vacate the underlying citation on the grounds that a diminution of safety is a defense to the violation; or (3) grant temporary relief until a final order is issued in the modification proceeding.

The Secretary in her brief asserts that in a contest proceeding, the Commission may consider safety in determining whether an abatement period is reasonable and, further, that the Commission may extend the abatement time if it finds, based on the evidence before it, that compliance will likely diminish safety. Sec. Br. at 9. However, once a petition for modification proceeding commences, the Secretary's position appears to be that the operator ought to seek interim relief in that proceeding. The Secretary argues that MSHA did not err in refusing to extend the abatement time because to do so would be, effectively, to give Clinchfield temporary relief without the procedural safeguards insisted upon by the Court in UMWA v. MSHA. Sec. Br. at 8.

However, the Secretary goes on to note that while the D.C. Circuit in UMWA v. MSHA held that the Mine Act does not authorize the granting of interim relief in a modification proceeding based upon a finding that such relief will not adversely affect the health or safety of miners and without providing the procedural safeguards required by section 101(c), the Court specifically stated that it was not deciding whether the Secretary has the authority to grant interim relief when there is a possibility that application of the standard will increase the danger to miners. Sec. Br. at 5, citing 823 F.2d at 616 n. 6. The Secretary points out that, following UMWA v. MSHA, the Assistant Secretary ruled

in Utah Power and Light Co., slip op. at 8-9 (No 86-MSA-3, August 14, 1987), that MSHA has authority to grant interim relief where application of a standard will result in diminution of safety to miners, provided there is an opportunity for a hearing and/or appeal and provided interim relief is of a limited duration. Sec. Br. at 5-6. Thus, Clinchfield may seek interim relief in the section 101(c) proceeding in accordance with the UP&L guidelines, but the Secretary notes that the operator has not yet done so. Sec. Br. at 7.

It is also important to note that the Secretary states that before the judge, MSHA offered evidence that application of the mandatory standard of the mine would diminish safety. However, the Secretary now avers that she "takes no position on that issue." That question remains to be litigated and decided by the Secretary in the course of the pending section 101(c) modification proceedings. Sec. Br. at 8 n. 2.

II.

Disposition of Issues

We cannot improve upon the introductory observation in Judge Broderick's decision that "the overriding value in the Mine Act is the health and safety of the miners, and all Commission decisions interpreting the Mine Act have to keep that overriding value foremost." 11 FMSHRC at 1569. See 30 U.S.C. § 801(a). With that statutory objective as our guide, we conclude that the Commission possesses jurisdiction, in appropriate circumstances, to extend the time for abatement of a cited violation, upon reasonable terms and conditions, while a petition for modification of the cited standard is being considered by the Secretary pursuant to section 101(c) of the Act. We further determine that the Secretary also possesses ample enforcement discretion to extend the time for abatement under such circumstances. Finally, we conclude that substantial evidence supports the judge's decision to extend the time for abatement in this matter, although we modify the terms of that extension as set forth below.

We turn first to the jurisdictional question. We note that the Secretary, whose interpretations of the statute, if reasonable, are entitled to deference, takes the position that the Commission has jurisdiction to extend the time for abatement under the kind of circumstances presented by this case. We also note that the UMWA has not asserted that we lack such jurisdiction.

In a contest of a section 104(b) withdrawal order issued for failure to abate a cited violation, the operator, as here, may challenge the reasonableness of the length of time set for abatement or the Secretary's failure to extend that time. See, e.g., Old Ben Coal Co., 6 IBMA 294, 306-307 (1976); U.S. Steel Corp., 7 IBMA 109, 116 (1976); Youghiogheny & Ohio Coal Co., 8 FMSHRC 330, 338-39 (March 1986)(ALJ) ("Y&O"). A considerable body of precedent, arising under the 1969 Coal Act and continuing under the Mine Act, has recognized that in such contests, the degree of danger that any extension of abatement time would cause miners is a relevant factor to be assessed in judicially approving such an extension. See, e.g., Y&O, supra. In a similar vein,

under the 1969 Coal Act, the Interior Board of Mine Operations Appeals ("Board") held that an operator's filing of a petition for modification "should be a major consideration in determining the reasonableness of the time set for abatement of any alleged violation which relates to the ... standard sought to be modified." Reliable Coal Corp., 1 IBMA 97, 113 (1972). The Board indicated that the time set for abatement of an alleged violation could be extended in an enforcement contest during the pendency of a separate modification proceeding upon a showing by the operator, inter alia, that the petition for modification was filed in good faith, and not for the purpose of postponing or avoiding abatement, and that during the period of the abatement extension "the health and safety of the miners will be reasonably assured." Reliable, supra.

This precedent focuses primarily on the dangers of continued non-compliance with a cited standard during a period of abatement and not, directly at least, on the related question of whether compliance with the cited standard may pose hazards to miners. The latter subject lies at the heart of any petition for modification based on a claim that "application of [a] standard to [a particular] mine will result in a diminution of safety to the miners in such mine." 30 U.S.C. § 811(c). We also recognize that Reliable arose under the 1969 Coal Act, when both enforcement and modification jurisdictions were held within the same governmental Department. Nevertheless, we find it a reasonable construction of the relevant statutory language and an appropriate harmonizing of the modification and enforcement processes under the Mine Act to conclude that a challenge to the reasonableness of abatement time may be grounded upon the relative hazards to miners stemming from either immediate or deferred compliance with a cited standard.

Specifically, where an operator has filed a modification petition premised upon diminution of safety with respect to application of a standard, we conclude that the broad concept of the "reasonableness" of the time set for abatement of the violation of the cited standard may appropriately encompass in a contest proceeding an assessment of the relative hazards to miners of immediate compliance or an extension of abatement time. In this regard, we assign considerable weight to the construction of the Act urged on review by the Secretary. See, e.g., Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533, 537 (D.C. Cir. 1986), citing Donovan v. Carolina Stalite Co., 734 F.2d 1547, 1552 (D.C. Cir. 1984). In her brief the Secretary aptly states:

> An operator does have a right ... to contest before the Commission a section 104(b) failure to abate withdrawal order and reasonableness of the abatement time set in a section 104(a) citation. In such a contest, a full record hearing is afforded the parties, with the right of appeal to the Commission and the courts.
>
> It is the Secretary's position that in adjudicating the reasonableness of abatement time in a case where the operator also has a modification petition pending with the Secretary under section 101(c), the Commission may appropriately extend the

> abatement time if it finds from the record evidence before it a likelihood that safety of miners would be diminished by compliance with the cited mandatory standard. The purpose of the Mine Act is to protect miners. In determining whether an abatement period is reasonable, it is certainly proper for the Commission to take into account miner safety and provide adjudicatory relief accordingly under section 105(d). In so doing, the Commission will be acting upon record facts developed after a full opportunity for a hearing to all parties, including those opposing the relief, with rights of any aggrieved party to seek administrative and judicial review. Action by the Commission in this regard would not, therefore, be contrary to otherwise expressed congressional intent.

Sec. Br. at 8-10 (footnotes omitted).

This approach is a sensible harmonizing of the separate enforcement and modification processes in the Mine Act. Although the Mine Act allocates to the Secretary the judicial authority to hear and decide modification petitions, it reserves to the Commission the judicial authority to resolve enforcement contests involving the reasonableness of abatement time. Where a modification petition has not been finally decided, a situation may arise -- and, as explained below, we conclude that this case presents that situation -- where, because of the hazards posed by immediate compliance, extension of abatement time is called for in order to protect the safety of miners. Given the Act's bifurcated structure in this area, this conclusion represents, in our judgment, a logical extension of the Reliable doctrine.

This conclusion does not conflict with the Commission's decisions in Sewell Coal Co., 5 FMSHRC 2026 (December 1983), and Penn Allegh Coal Co., 3 FMSHRC 1392 (June 1981). In those decisions, the Commission held, in general, that diminution of safety may not be raised as a defense to violation in an enforcement proceeding unless the Secretary has first entered a finding of such diminution in a modification proceeding. See Sewell, 5 FMSHRC at 2029. These decisions stand for the general proposition that the proper forum for raising and resolving the issue of diminution of safety is a modification proceeding. The two decisions also manifest a view that the Commission must not infringe upon the Secretary's jurisdiction in a section 101(c) modification proceeding. However, Sewell specifically left open resolution of whether a diminution of safety defense ought to be recognized in "the situation where an enforcement proceeding has been heard before the petition for modification has been finally resolved...." 5 FMSHRC at 2030 n.3. While these two decisions preclude any purported resolution in an enforcement proceeding of a modification petition based upon diminution of safety per se, we do not view them as barring the Commission from weighing the hazards to miners of compliance vs. non-compliance within the context of an extension of abatement time contest.

The Mine Act also clearly contemplates in its enforcement

structure that situations may arise where temporary or other appropriate relief from a withdrawal order is warranted in furtherance of safety and health. Thus, section 105(b)(2), 30 U.S.C. § 815(b)(2), permits an operator to seek "temporary relief" from any order issued under section 104 based upon a showing, in part, that "such relief will not adversely affect the health and safety of miners." To similar effect, section 105(d) of the Act, 30 U.S.C. § 815(d), permits the Commission, in deciding contests of citations and orders, to "direc[t] other appropriate relief." These provisions are congruent with the result reached today.

Therefore, taking particular account of the Secretary's views in this case, we hold that an operator may challenge the reasonableness of the time fixed for abatement, and the Commission may, in appropriate instances, extend it, upon a showing that: (1) the operator has, in good faith, filed a petition for modification of the cited standard based on its belief that application of the cited standard will diminish the safety or health of miners; and (2) the hazards of immediate compliance outweigh any hazards associated with deferral of the time for abatement. We emphasize that it is not the Commission's province to attempt any determination of the central issue in the modification proceeding, namely, whether application of the standard in the particular mine will result in a "diminution of safety." Plainly, the inquiry we approve today will involve similar issues, but the context here pertains only to the enforcement question of whether a particular time for abatement may reasonably be extended in light of the relative hazards posed to miners. In view of the general teaching of Penn Allegh and Sewell, we further hold that any extension of abatement time must be of reasonable duration and must not infringe upon the orderly procedures of the modification process. We do not read any provision of the Mine Act as specifically prohibiting this result. Rather, we conclude that, as a matter both of reasonable statutory construction in an area in which the Act is silent and of our development of sound policy under the Act (see 30 U.S.C. § 823(d)(2)(A)(ii)(IV) & (B)), this determination best effectuates miner health and safety and harmonizes the separate modification and enforcement processes.

The UMWA argues that UMWA v. MSHA prohibits any Commission action that, in effect, amounts to modification of a mandatory standard outside section 101(c) channels. We disagree. First, that decision expressly left open the question of the Secretary's power in modification proceedings to grant interim relief from application of a mandatory standard "when there is a possibility that application of the standard will increase ... danger to the miners" or when an emergency situation obtains. 823 F.2d at 616 n. 6. The modification decision of the Assistant Secretary of Labor in Utah Power & Light Co., No. 86-MSA-3 (petition for modification proceeding)(August 14, 1987)("UP&L"), holds that, indeed, the Secretary may provide such interim relief in the context of a diminution of safety resulting from compliance or in an emergency situation, so long as appropriate procedural due process safeguards are provided for all parties. We would go further for we believe that the Secretary, under these circumstances, has an obligation to grant "interim relief" and not compel compliance even when, as in this case, the operator fails to seek interim relief in the modification

proceeding. 4/ Consistent with both UMWA v. MSHA and UP&L, Clinchfield continues to have the opportunity to seek interim relief in the pending modification proceeding and the Secretary has authority to grant such relief as may be appropriate in the modification forum.

Second, and more to the point, UMWA v. MSHA does not purport to address the power of the Commission to consider an extension of the time set for abatement in a citation or, pursuant to section 105(b) of the Act, temporary relief from a section 104(b) withdrawal order. We conclude that UMWA v. MSHA, by itself, does not preclude the Commission from considering hazard-of-compliance issues in the context of an abatement time contest. The central concern of the Court in that case was what it viewed as the lack of due process attendant upon interim relief in the modification forum. See 823 F.2d at 617-19. Here, by way of contrast, any extension of the time for abatement in the enforcement forum would occur only after notice and adjudicative hearing with appeal rights to the Commission and courts of appeals.

All that we have said leads to a concomitant conclusion that the Secretary also possesses enforcement discretion to extend the time for abatement if she believes it reasonable in light of the relative hazards posed to miners. Indeed, the Secretary exercised that discretion by initially allowing 25 days for abatement and then extending the abatement period by an additional 31 days. The Act specifically reserves to the Secretary the power to set initially a reasonable time for abatement. 30 U.S.C. §§ 814(a) & (b). UMWA v. MSHA does not address this matter, and upon the same grounds articulated above, we hold that, in appropriate cases, the Secretary may extend abatement time to permit the orderly disposition of related modification proceedings. We are puzzled as to why the Secretary departed from that path in the present case. We also note that any such action may be contested by the appropriate representative of miners. Upon a showing that the hazards of any extension outweigh any hazards of compliance, the extension would be subject to disapproval by the Commission.

We now apply these principles to review of the judge's decision. We concur with the judge's refusal to grant Clinchfield section 105(b) temporary relief because we are prepared to rule on the merits of Clinchfield's challenge to the reasonableness of abatement time. The judge properly premised his actions upon Clinchfield's filing of a modification petition. 11 FMSHRC at 1571. He also appropriately declined to advance any purported resolution of the underlying merits of Clinchfield's modification petition. 11 FMSHRC at 1570-71. While the judge spoke in terms of diminution of safety, it is clear from his decision that he examined the relative hazards of immediate compliance vs. extension of abatement time.

It is true that at one point, the judge stated that he was refusing to weigh the evidence on the safety question. 11 FMSHRC at 1571. That statement, however, must be read in proper context. The

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4/ Clinchfield has also utterly failed to explain adequately why it never sought interim relief in the pending modification proceeding.

judge had already indicated that he was not purporting to resolve the underlying merits of Clinchfield's modification petition, and we read his "refusal to weigh" language as an extension of that position. He did conclude, however, that "in view of the Secretary's position and the evidence introduced in support of it, ... complying with the contested ... order may result in a diminution of safety, and in view of the pending petition for modification, relief should be granted." 11 FMSHRC at 1571. While we disapprove the formulation of this result in diminution of safety terms, we conclude that the judge did, in fact, weigh the relative hazards and determine that an extension of abatement best promoted safety in this case.

Although the judge's failure to identify more specifically the evidence of the hazards upon which he relied is troubling, the evidence in question, presented by both the operator and the Secretary, has been summarized above. In essence, it shows that permitting Clinchfield a higher fpm ceiling will result in improved methane dissipation and that enforcement of the 300 fpm ceiling could fail to achieve necessary methane dilution. We have carefully examined the record and conclude that the evidence of the operator and Secretary in this regard affords substantial support to the judge's ultimate disposition.

Like the judge, we also acknowledge the UMWA evidence showing a level of hazard associated with any raising of the 300 fpm ceiling. However, the nature of the judicial inquiry in this context involves a weighing of the relative hazards. We are not prepared to conclude that the judge erred in assigning decisive weight to the evidence of the Department of Labor, the agency charged with the responsibility of enforcing the Act and protecting the safety and health of miners.

Finally, we conclude that the extension of time for abatement shall run until the Department of Labor administrative law judge presiding in the modification proceeding rules upon the diminution of safety issue. In our judgment, this approach to extension best respects the separate modification jurisdiction of the Secretary and best facilitates prompt resolution of the major issue dividing the parties -- a determination in the modification forum of whether application of the cited standard at Clinchfield's mine will result in a diminution of safety.

III.

Conclusion

For the foregoing reasons and on the foregoing bases, the decision of the judge is affirmed. The time for abatement of the cited violation is hereby extended as explained above. 5/

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

5/ Commissioner Nelson did not participate in the consideration or disposition of this case.

Commissioner Lastowka, concurring in part and dissenting in part:

This Commission has jurisdiction over Clinchfield Coal Company's contest of the withdrawal order issued by the Secretary of Labor for Clinchfield's failure to abate a violation within the period of time set in a previously issued citation. 30 U.S.C. § 815(d). The Commission lacks jurisdiction, however, over the question of whether application of the cited standard at Clinchfield's mine results in a diminution of safety to the miners at the mine. 30 U.S.C. §811(c). That question is expressly reserved by the Mine Act to the Secretary of Labor. Id. Because the administrative law judge and the majority, under the guise of reviewing the reasonableness of the abatement period set by the Secretary, effectively resolve the diminution of safety issue raised by Clinchfield and thereby improperly thrust themselves into the modification proceedings ongoing before the Department of Labor, I must dissent.

I. The Reasonableness of the Abatement Period

Section 104(a) of the Mine Act provides that a citation issued by the Secretary "shall fix a reasonable time for the abatement of the violation" alleged in the citation. 30 U.S.C. § 814(a) (emphasis added). Section 104(b) provides that if on subsequent inspection the Secretary finds:

> (1) that a violation described in a citation issued pursuant to subsection (a) has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall ... promptly issue an order requiring the operator ... to immediately cause all persons ... to be withdrawn ... until ... the Secretary determines that such violation has been abated.

30 U,S.C. § 814(b) (emphasis added).

In the present case the Secretary issued a citation charging a violation of 30 C.F.R. § 75.326, as modified by the Secretary. The citation charged that the air velocity in Clinchfield's belt entry exceeded the 300 feet per minute (fpm) limit imposed on Clinchfield by the Secretary in conjunction with a previously granted modification of section 75.326. As issued, the citation provided a 25 day period in which compliance with the 300 fpm limit was to be accomplished. The Secretary subsequently extended the abatement period to provide an additional 31 days in which Clinchfield was to abate the violation. Upon expiration of the extended period for abatement set by the Secretary, the violation was found to still exist and the Secretary proceeded to issue a failure to abate withdrawal order pursuant to section 104(b). This withdrawal order is the order contested by Clinchfield and in issue before the Commission.

Where a mine operator contests a failure to abate withdrawal order, the Secretary must prove: 1) the existence of a previously issued citation charging a violation of a mandatory standard, 2) that a reasonable time for abatement of the violation had been provided, 3) the time for abatement had expired, and 4) the violation had not been abated. In the hearing before the administrative law judge the Secretary proved, indeed it was undisputed, that Clinchfield failed

to comply with the applicable standard (element 1), the time set by the Secretary for abatement had passed (element 3), and the violation had not been abated (element 4). As to the reasonableness of the period of time fixed in the citation for abatement of the violation (element 2), however, the Secretary's witnesses testified that it was their belief, and that of their supervisors, that abatement of the violation would create a hazard to miners. Thus, far from attempting to establish that the period of time set for abatement of the violation was reasonable, the totality of the Secretary's evidence was that Clinchfield's compliance with the standard would create a hazard, and that in the interest of safety abatement should not occur.

Thus, at the hearing on Clinchfield's contest of the withdrawal order the position of the Secretary, as presented by her witnesses and as summarized by counsel (III Tr. 137-40), was that although MSHA cited Clinchfield for a violation of the standard and shut the mine's operations down because the violation was not abated, Clinchfield's compliance with the order issued by the Secretary will actually threaten the safety of miners.

At this juncture, one might logically ask why MSHA, charged with the duty to enforce the Mine Act for the protection of miners, would nonetheless proceed to initiate enforcement action that MSHA believes will, in and of itself, create a serious safety hazard. MSHA's answer is that it is required to do so, that it is powerless to do otherwise, and, in effect, that this Commission must step in, as did the judge, to save MSHA, Clinchfield and the miners from the deleterious consequences of MSHA's enforcement actions.. I must reject this anomalous result and the theories that underpin it.

The Commission is a creature of statute and its adjudicatory powers are derived from Congress' grant of authority to it. Kaiser Coal Corp., 10 FMSHRC 1165, 1169 (September 1988). Congress has empowered the Commission with authority to adjudicate various types of enforcement disputes arising among the Secretary of Labor, mine operators and miners. One type of dispute over which the Commission has jurisdiction concerns whether the period of time the Secretary has provided for abatement of a violation is reasonable. Mine operators as well as miners may contest the period for achieving compliance with a standard as being unreasonably short or unreasonably long. 30 U.S.C. §815(d). Conversely, Congress empowered the Secretary, not the Commission, with the authority to determine whether the terms of a mandatory standard adopted by the Secretary should be modified insofar as the standard applies to the operations at a particular mine. 30 U.S.C. § 811(c); Penn Allegh Coal Co., 3 FMSHRC 1392 (June 1981) (disallowing diminution of safety defense in enforcement proceeding where modification petition would have been appropriate but had not been filed); Sewell Coal Co., 5 FMSHRC 2026 (December 1983) (recognizing diminution of safety defense in an enforcement proceeding where Secretary had concluded modification proceedings and had granted modification).

In the present case, at the hearing before the Commission the parties framed the issue presented by Clinchfield's contest of the withdrawal order as being a challenge to the reasonableness of the 56 day period prescribed by the Secretary for abatement of the violation of 30 C.F.R. § 75.326. Clinchfield argued that the abatement period should be extended because compliance would create a hazard to miners. III Tr. 141-42. The Secretary shared Clinchfield's

concern that abatement would diminish safety and indicated that, if the judge were to find that the abatement period set by the Secretary should be extended, the Secretary would not oppose the judge's action even though MSHA would not extend the period itself. III Tr. 137-40. The UMWA, on the other hand, argued that the question of diminution of safety is to be decided only in a section 101(c) modification proceeding before the Secretary. Tr. 37. The UMWA further argued that abatement of the violation would be safe and that the abatement period set by the Secretary was reasonable. III Tr. 143.

In his decision the judge recognized the Department of Labor's jurisdiction over the issue of whether the standard should be modified but, in view of the Secretary's evidence and assertions before him, concluded that an extension of the abatement period was warranted. Thus, by necessary implication the judge found the abatement period prescribed by the Secretary in the citation to be unreasonable. Also, in light of his extension of the abatement period the judge vacated the failure to abate withdrawal order. The majority here affirms the judge's extension of the abatement period and vacation of the withdrawal order.

The judge and the majority err in granting relief in this case on the purported basis that the Commission is exercising its authority under section 105(d) to review the reasonableness of the abatement period set by the Secretary. The problem with this basis for granting relief is that the actual dispute between the parties most assuredly is <u>not</u> over whether the Secretary provided Clinchfield with a reasonable opportunity to abate the violation by bringing its mine into compliance with the cited standard. Quite to the contrary, as the record clearly reflects, Clinchfield's sole argument, not opposed by the Secretary, is that compliance with the standard, whether within the 56-day period provided by the Secretary or some greater period of time, would result in creation of a hazard and, therefore, compliance should not be required at all.

Thus, rather than being a dispute as to whether the period of time fixed by the Secretary for "totally abat[ing]" the violation (30 U.S.C. § 814(b)) is reasonable, what Clinchfield and the Secretary have presented to the Commission is the entirely different question of whether compliance with the standard would diminish safety. This is a pure section 101(c) modification issue within the jurisdiction of the Secretary, not the Commission, rather than a properly founded challenge under section 105(d) to the reasonableness of the abatement period. By "weighing the relative hazards" of compliance versus noncompliance and concluding that an extension of the abatement period is warranted, the majority improperly resolves the diminution of safety issue.[1] Therefore, insofar as the majority affirms and modifies the judge's extension of the abatement period, I dissent.

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[1] What's in a name? That which we call a rose
By any other name would smell as sweet.

Shakespeare, *Romeo and Juliet*, Act II, Scene ii.

II. The Secretary's Authority

Before us the Secretary identifies two factors purportedly forcing MSHA to seek Commission relief from the undesirable safety effects caused by its enforcement actions, rather than acting on its own to rectify the problem. First, and primarily, it is claimed that the opinion of the U.S. Court of Appeals for the District of Columbia Circuit in Intern. Union, UMWA v. MSHA, 823 F.2d 608 (D.C. Cir. 1987), forecloses MSHA from itself presently providing Clinchfield any relief in order to avoid the danger caused by compliance with MSHA's order. Second, the Secretary asserts that she is constrained by the Mine Act itself to proceed precisely as she has in the present case. As discussed below, the Secretary's reliance on UMWA v. MSHA as justification for MSHA's actions is misplaced. That decision did not address the situation now before us and does not foreclose action by the Secretary. Further, the Secretary's reliance on MSHA's duties under the Mine Act as explanation for its actions also deserves careful consideration before the anomalous result it leads to is endorsed.

A. The Decision in UMWA v. MSHA

In UMWA v. MSHA, the D.C. Circuit concluded that, under the facts of the case before it, the procedures the Secretary had followed in granting indefinite interim relief from enforcement of a mandatory standard during the pendency of a petition for modification of the application of a mandatory standard exceeded the Secretary's statutory authority under section 101(c) of the Mine Act. 30 U.S.C. §811(c). The court stated:

> The real issue in this case is whether the Secretary may grant a modification of a mandatory safety standard, without regard to the requirements of section 101(c) of the Mine Act, without an opportunity for a hearing, upon three days' notice to the affected miners, over the opposition of those miners, on the basis of a one-paragraph explanation which does nothing more than paraphrase the challenged regulation, and with no provision for a right to appeal that decision. We think not.

823 F.2d at 617. The court was careful, however, to explain the limits of its holding concerning the Secretary's ability to provide interim relief during the pendency of a petition for modification:

> We do not decide ... whether the Secretary would have authority to grant interim relief from a mandatory safety standard when there is a possibility that application of the standard will increase the danger to the miners. Nor do we decide whether the Secretary would have this authority in an "emergency" situation. Because the basic purpose of the Mine Act is to protect the miner ... this type of situation would present a more difficult issue. Section 44.16(c), however, by its terms is not meant to address this type of

> situation. The only finding regarding the safety of the miner that is required by § 44.16(c) is that "the requested relief will not adversely affect the health or safety of miners in the affected mine."

823 F.2d at 616 n.6. The court further observed, "[a]gain, we do not decide whether the Secretary has inherent power to grant interim relief if essential to further the purposes of the Mine Act or under other compelling circumstances." Id. at 619 n.8.

Thus, by the express terms of its decision the D.C. Circuit did not rule that the Secretary lacked the ability to grant interim relief in compelling circumstances, not presented by the case before it, including situations where, due to particular conditions existing at a specific mine, enforcing a standard would increase the danger to miners. Before the Commission, the Secretary has acknowledged the court's limitation of its holding concerning the Secretary's authority to grant interim relief. Sec. Br. at 5. Furthermore, the Assistant Secretary for Mine Safety and Health has ruled, subsequent to the court's decision in UMWA v. MSHA, that MSHA still possesses authority to grant interim relief in "cases where the application of the standard would result in a diminution of safety to miners , or in emergency situations." Sec. Br. at 6, quoting Utah Power & Light Co., 86-MSA-3 (August 14, 1987), slip op. at 8-9. The Assistant Secretary stated:

> Regarding the UMWA's challenge to the validity of the Agency interim relief rules, the D.C. Circuit's decision in the Kaiser and UP&L cases has caused the Agency to reevaluate its interim relief procedures. *** The Court specifically did not address the question of "whether the Secretary would have authority to grant interim relief when there is a possibility that application of the standard will increase the danger to the miners," ... or "in an emergency situation." I have concluded that the Agency has authority to grant interim relief in such circumstances so long as appropriate procedural safeguards are provided for all parties. While noting the issue of the authority of the Secretary in emergency situations was not fully addressed by the Court, this conclusion ensures that prudent and timely relief will be available in instances where the safety of miners is in jeopardy.

UP&L, supra, slip op. at 7-8 (footnotes omitted).

Here, in July 1987 Clinchfield requested that the Secretary modify the cited standard on the ground that compliance would diminish miner safety. In September 1988, the Administrator for Coal Mine Safety and Health approved the modification.[2] The UMWA contested the Administrator's decision in October 1988.

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[2] The Administrator's decision makes no reference to the diminution of safety grounds advanced by Clinchfield in support of its petition for modification. Instead, the Administrator stated that the alternative method of compliance approved in the modification "will at all times guarantee no less than the same measure of protection afforded by the standard." Ex. U-2. As the

Almost two years after Clinchfield's assertion that compliance would diminish safety, and nine months after the Administrator's decision to grant the modification, MSHA nevertheless proceeded to issue a citation for failure to comply with the disputed standard, and a withdrawal order for failure to abate the violative condition.

Although the reason for MSHA's decision to issue a citation at this juncture is unexplained, its motivation for issuing the withdrawal order is clearly set forth in the record. In presenting oral arguments to the judge below, counsel for the Secretary explained:

> As has been testified by our witnesses, and also stated by Mr. Jerry Spicer, the Administrator for Coal Mine Safety and Health, in an affidavit that was submitted in evidence, he felt he could go no further as far as extending the abatement period on that citation. That is under the decision of [UMWA v. MSHA] that to do so would amount to interim relief of a petition for modification.
>
> So therefore, it was his decision and he made that decision known to the district level ... that he had no authority to continue any abatement period on that citation, even though it was recognized by the inspector and district manager and Mr. Spicer in his affidavit indicated, that to go higher than the three hundred feet per minute would not pose a threat to the safety of the miners. As was stated by the testimony here by our witnesses and other witnesses, in fact, there could be a diminution of safety to the miners if that velocity cap is not lifted.

III Tr. at 138. The affidavit of the Administrator for Coal Mine Safety and Health referred to by counsel states:

> *** 7. I did not authorize a further extension of abatement time because to do so would have been tantamount to unilaterally granting Clinchfield interim relief from the responsibility to comply with the 300 fpm belt entry air velocity limit specified by the granted petition for modification. In making this decision, I was aware of legal advice I have received concerning the decision in UMWA v. MSHA et al., 823 F.2d 608 at 618, and the temporary relief provisions of section 105(b)(2) of the Act, 30 U.S.C. 815(b)(2). See also UMWA v. MSHA, supra at 618.

Secretary's witnesses made clear at the hearing before the Commission judge, however, compliance with the cited standard would be hazardous. Tr. 44, 51-53, 79-80, 108-10, 116-17; see also III Tr. 61-62. Consequently, granting a modification on the basis that the alternative method is at least as safe as the present method makes little sense when that method is dangerous. Therefore, the Administrator's decision is more sensibly read to accord with the views of the Secretary's witnesses and the position expressed by counsel for the Secretary at the hearing before the judge that compliance with the cited standard would diminish safety. See, e.g., III Tr. at 138.

*** 9. As evidenced by the proposed decision and order of September 14, 1988 [the Administrator's decision granting modification], and supporting technical information, I believe that the safety of miners at the McClure No. 1 Mine is enhanced by removing the 300 fpm belt entry air velocity limit.

MSHA Ex. 4.

Thus, the express reason and seemingly sole motivation for MSHA's issuance of the disputed withdrawal order is that MSHA was precluded from doing otherwise by the court's opinion in UMWA v. MSHA. Because by its express terms that decision in fact does not so constrain the Secretary, the basis of MSHA's order requiring Clinchfield to comply with a standard that MSHA believes will create a hazard is removed, and the order therefore was improperly issued, constitutes an abuse of discretion and, accordingly, must be vacated.

B. The Requirements of the Mine Act

The Secretary also suggests that issuance of the underlying citation and the withdrawal order was required because the operator was in noncompliance with the terms of a mandatory safety standard and had failed to abate the violation within the time provided. Sec Br. at 6-7. Therefore, even though the inspector characterized the violation as "technical" in nature (Tr. 44), and found that the violation was not "significant and substantial" i.e., it was not reasonably likely to result in an injury of a reasonably serious nature, the Secretary insists that under the Mine Act MSHA was required to initiate enforcement proceedings to achieve compliance even though to do so would result in the creation of a more serious hazard.

Although the Secretary usually is not reticent to claim that the Commission and the courts must give wide latitude to MSHA's enforcement discretion, she disavows here any possibility of even a limited amount of discretion enabling MSHA to refrain from taking enforcement actions that it believes threatens those whose safety MSHA is charged with protecting. I find it difficult to accept that the Mine Act must be interpreted in such a counterproductive manner. As has been stated:

> It has been called a golden rule of statutory interpretation that unreasonableness of the result produced by one among alternative possible interpretations of a statute is reason for rejecting that interpretation in favor of another which would produce a reasonable result. It is a "well established principle of statutory interpretation that the law favors rational and sensible construction." It is fundamental, however, that departure from the literal construction of a statute is justified when such a construction would produce an absurd and unjust result and would clearly be inconsistent with the purposes and the policies of the act in question.

2A Sutherland Statutory Construction § 45.12 (4th ed. 1984) (footnotes and citations omitted).

I recognize that the Mine Act by its terms does not give the Secretary broad discretionary authority to selectively enforce mandatory standards. Indeed, section 104(a) provides that if "the Secretary ... believes that an operator ... has violated this Act ... he shall ... issue a citation to the operator." 30 U.S.C. § 814(a). Nevertheless, even though a decision by MSHA to refrain from citing an operator for a violation may not be the type of determination "committed to agency discretion by law" (5 U.S.C. § 701(a)(2); see Heckler v. Chaney, 470 U.S. 821 (1985)), it may still be appropriate, in extremely narrow circumstances, to recognize a carefully bounded discretion permitting the Secretary to consider the adverse safety effects on miners that would result from rote enforcement of a particular standard. See UMWA v. MSHA, 823 F.2d at 615 n.5, 616.

For example, in the circumstances of the present case where the mine operator has filed a petition for modification based on diminution of safety, the Secretary's enforcement personnel and technical experts agree that enforcement of the standard will diminish safety, the Administrator has granted a modification from the standard's application and expedited proceedings in review of that determination are being conducted, MSHA should not be compelled to force the operator to take the very action that MSHA believes will create a hazard to miners.

Recognition of such a carefully limited authority is particularly compelling in light of the standard at issue here. The 300 fpm velocity requirement in dispute was not mandated by Congress or promulgated by the Secretary through rulemaking. Rather, the 300 fpm requirement was unilaterally imposed on Clinchfield by the Administrator as part of a prior modification of 30 C.F.R. § 75.326 granted in February 1987. From January 1981 up until that time, no velocity ceiling had been imposed. Further, under the Administrator's presently proposed decision no velocity limit would be imposed in the future. Thus, the very condition that MSHA presently believes threatens miner safety is the result of unilateral action taken by MSHA in the first instance. Surely, MSHA must have the power to act in this circumstance to provide relief from the hazard its prior action has caused

I recognize that the Assistant Secretary for Mine Safety and Health has ultimate responsibility for determining whether to grant or deny Clinchfield's petition for modification after all parties, including the UMWA who strenuously opposes the petition, have been given an opportunity to be heard. A decision to not enforce an MSHA-imposed condition now believed by MSHA to be unsafe pending resolution of the expedited modification proceedings would not prejudice the Assistant Secretary's responsibilities in the modification context. Under the Mine Act the Assistant Secretary has enforcement as well as modification duties and both of these responsibilities must be exercised so as to protect the health and safety of miners.

III. Conclusion

For these reasons, I conclude that the real basis for Clinchfield's request for relief is not section 105(d)'s grant of authority to the Commission for review of the reasonableness of the abatement period set by the Secretary, but section 101(c)'s grant of authority to the Secretary to modify a standard

that diminishes the safety of miners. Therefore, I dissent from the majority's affirmance of the administrative law judge's extension of the abatement period.

I concur in result, however, with the majority's affirmance of the judge's vacation of the failure to abate withdrawal order. In my view, under the circumstances of this case, the withdrawal order was improperly issued given the Administrator's erroneous belief that he was compelled to initiate enforcement action despite his belief that to do so would create a danger to miners.

I recognize and do not view lightly the UMWA's argument that compliance with the present standard, rather than the proposed modification, best protects the safety of the miners at the McClure No. 1 mine. The proper forum for weighing the conflicting evidence in this regard, however, is the Department of Labor, not the Commission. In light of the serious safety question at issue, I encourage the expedited resolution of the pending modification proceeding.

James A. Lastowka
Commissioner

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WASHINGTON, D.C. 20006

November 20, 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. YORK 89-45-M
BLUE CIRCLE ATLANTIC, INC.	:	

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

ORDER

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982) ("Mine Act"). On October 26, 1989, Commission Chief Administrative Law Judge Paul Merlin issued an Order of Default finding respondent Blue Circle Atlantic, Inc. ("Blue Circle") in default for failure to answer the Secretary of Labor's civil penalty proposal and the judge's order to show cause. The judge assessed the civil penalty of $900 proposed by the Secretary. By letter dated November 13, 1989, addressed to Judge Merlin, Blue Circle requests that this matter be reopened on the grounds that a settlement has been negotiated with the Secretary reducing the civil penalty to $600. Attached to the letter is Blue Circle's Motion to Reopen Default and to Approve Settlement. We deem Blue Circle's November 13th letter and attached motion to constitute a timely petition for discretionary review of the judge's default order, we grant the petition, and we remand this matter to the judge for further proceedings.

The judge's jurisdiction in this proceeding terminated when his default order was issued on October 26, 1989. 29 C.F.R. § 2700.65(c). Under the Mine Act and the Commission's procedural rules, once a judge's decision has issued, relief from the decision may be sought by filing with the Commission a petition for discretionary review within 30 days of the decision. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). Here, Blue Circle's November 13 letter to Judge Merlin and accompanying motion seek vacation of, and relief from, the judge's default order and we will treat them as constituting a timely filed petition for discretionary review. See, e.g., Middle States Resources, Inc., 10 FMSHRC 1130 (September 1988).

It appears from the record that Blue Circle may have raised a colorable explanation for its failure to respond to the judge's show cause order in that the parties have been engaged in settlement negotiations. The Commission will afford relief from default upon a showing of inadvertence, mistake, or excusable neglect. E.g., Amber Coal Co., 11 FMSHRC 131, 132 (February 1989).

We are unable, on the basis of the present record, to evaluate the merits of Blue Circle's assertions but, in the interest of justice, we will permit Blue Circle to present its position to the judge, who shall determine whether appropriate grounds exist for excusing its failure to timely respond. E.g., Perry Drilling Co., 9 FMSHRC 377, 380 (March 1987). If the judge determines that final relief from default is appropriate, he shall also take appropriate action with respect to the parties' settlement agreement. 30 U.S.C. § 820(k).

Accordingly, we grant Blue Circle's petition for discretionary review, vacate the judge's default order, and remand this matter for proceedings consistent with this order.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 20, 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. YORK 89-46-M
A. H. SMITH STONE COMPANY	:	

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

ORDER

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982). On October 24, 1989, Commission Chief Administrative Law Judge Paul Merlin issued an Order of Default finding respondent A.H. Smith ("Smith") in default for failure to answer the Secretary of Labor's civil penalty complaint and the judge's subsequent order to show cause. The judge assessed civil penalties of $1,903, as proposed by the Secretary. By letter dated November 2, 1989, addressed to Judge Merlin, Smith asserted that the order to show cause had been misfiled and therefore overlooked. We deem Smith's November 2 letter to constitute a timely petition for discretionary review of the judge's default order. See e.g., Middle States Resources, Inc. , 10 FMSHRC 1130 (September 1988); Mohave Concrete & Materials, Inc., 8 FMSHRC 1646 (November 1986). We grant the petition and summarily remand this matter to the judge for further consideration.

It appears from the record that Smith, proceeding without benefit of counsel, may have raised a colorable excuse for its non-response to the judge's order. See e.g., Columbia Portland Cement Co., 8 FMSHRC 1644 (November 1986)(non-response attributable to mistake or neglect of a former employee); Mohave Concrete, 8 FMSHRC at 1646 (failure to respond attributable to mistake or neglect of a former bookkeeper). The Commission has previously afforded such a party relief from final orders of the Commission where it appears that the party's failure to respond to a judge's order and the party's subsequent default are due to inadvertence, mistake, or excusable neglect. Amber Coal Co., 11 FMSHRC

131, 132 (February 1989); Kelley Trucking Co., 8 FMSHRC 1867 (December 1986); M.M. Sundt Construction Co., 8 FMSHRC 1269 (September 1986). Under these circumstances, we will accept Smith's letter as a petition for discretionary review and grant the petition.

Since we are unable, on the basis of the present record, to evaluate the merits of Smith's assertion in this case, we will permit Smith to present its position to the judge, who will determine whether sufficient grounds exist for excusing Smith's failure to timely respond. Perry Drilling Co., 9 FMSHRC 377, 380 (March 1987), citing Kelley, supra, 8 FMSHRC at 1869.

Accordingly, the judge's default order is vacated and this matter is remanded for proceedings consistent with this order.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

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November 21, 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket Nos. VA 88-09
	:	VA 88-10
GARDEN CREEK POCAHONTAS COMPANY	:	VA 88-11

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

DECISION

BY: Ford, Chairman; Backley, Lastowka and Nelson, Commissioners

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (1982)("Mine Act"), the issue is whether Garden Creek Pocahontas Company ("Garden Creek") violated 30 C.F.R. § 50.20(a), a standard requiring the reporting of occupational injuries occurring at a mine. 1/ The

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1/ 30 C.F.R. § 50.20(a) states in part:

> Each operator shall maintain at the mine office a supply of MSHA Mine Accident, Injury, and Illness Report Form 7000-1.... Each operator shall report each accident, occupational injury, or occupational illness at the mine. The principal officer in charge of health and safety at the mine or the supervisor of the mine area in which an accident or occupational injury occurs, or an occupational illness may have originated, shall complete or review the form in accordance with the instructions and criteria in §§ 50.20-1 through 50.20-7.... The operator shall mail completed forms to MSHA within

Secretary of Labor ("Secretary") asserts that Garden Creek violated the standard by failing to report to the Secretary's Mine Safety and Health Administration ("MSHA"), fourteen injuries, including one eye injury, for which medical treatment was administered to miners. The Secretary and Garden Creek agree that the injuries occurred at Garden Creek's No. 6 underground coal mine and that various medications were prescribed to treat the injuries. They also agree that if the injuries are reportable, they are reportable only "as a result of the use of a prescription medication and not for any other medical reason." Stipulation 16.

Commission Administrative Law Judge Gary Melick held that under the standard "medical treatment" includes the use of prescription medications for the treatment of eye injuries, and, consequently, only an eye injury for which prescribed medication is used constitutes a reportable "occupational injury." Because thirteen of the injuries for which medications were prescribed were not eye injuries, the judge concluded they were not reportable. 10 FMSHRC at 1099. Regarding the one eye injury, although the Secretary established that a prescription for medication was written, the judge found that the miners' use of the medications was not proven. The judge concluded that use of the prescribed medication could not be inferred from the mere fact that medication had been prescribed. The judge therefore held that the Secretary had failed to prove a violation of section 50.20(a). 10 FMSHRC at 1099-1100.

The material facts are not disputed. Garden Creek owns and operates the Virginia Pocahontas No. 6 Mine, an underground coal mine located in Buchanan County, Virginia. From January through September 1987, a number of miners suffered minor injuries at the mine and were issued prescriptions by their attending physicians. The medications prescribed typically were pain relievers and muscle relaxants. These injuries were not reported to MSHA by Garden Creek.

On September 30, 1987, MSHA inspector Richard Blankenship issued 18 citations to Garden Creek under section 104(a) of the Act, 30 U.S.C. § 814(a), alleging violations of section 50.20(a) for failing to report the injuries to MSHA. The Secretary filed a complaint proposing the

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> injury occurs or an occupational illness is diagnosed....

30 C.F.R. § 50.2(e) defines "occupational injury" as:

> Any injury to a miner which occurs at a mine for which medical treatment is administered, or which results in death or loss of consciousness, inability to perform all job duties on any day after an injury, temporary assignment to other duties, or transfer to another job.

(Emphasis added). The regulatory meaning of "medical treatment" is explained in 30 C.F.R. § 50.20-3, which regulation contains criteria differentiating between medical treatment and first aid.

assessment of civil penalties for the alleged violations. Subsequently, the judge approved a settlement of four of the violations. 11 FMSHRC at 1093. The remaining fourteen alleged violations are the subject of this case. The key issue is the meaning of the phrase "occupational injury" as used in the Secretary's reporting regulations.

30 C.F.R. § 50.20(a) provides that "occupational injuries" be reported to MSHA. "Occupational injuries" are defined in section 50.2(e), in part, as "any injury to a miner which occurs at a mine for which medical treatment is administered." The term "medical treatment" is further defined by way of example and contrast in section 50.20-3, which contains criteria exemplifying the differences between "medical treatment" and "first aid."

Section 50.20-3(a) states in part:

> Medical treatment includes, but is not limited to, the suturing of any wound, treatment of fractures, application of a cast, or other professional means of immobilizing an injured part of the body, treatment of infection arising out of an injury, treatment of bruise by the drainage of blood, surgical removal of dead or damaged skin (debridement), amputation or permanent loss of use of any part of the body, treatment of second and third degree burns.... First aid includes any one-time treatment and follow-up visit for the purpose of observation, of minor injuries such as, cuts, scratches, first degree burns and splinters. Ointments, salves, antiseptics, and dressings to minor injuries are considered to be first aid.

30 C.F.R. § 50.20-3(a). Following this general statement of the differences between medical treatment and first aid, the criteria of sections 50.20-3(a)(1)-(a)(8) differentiate between medical treatment and first aid in the treatment of specific injuries including abrasions, bruises, burns, cuts and lacerations, eye injuries, inhalation of toxic or corrosive gases, foreign objects, and sprains and strains. In the case of eye injuries, "medical treatment" is described as involving "removal of imbedded foreign objects, use of prescription medications, or other professional treatment." 30 C.F.R. § 50.20-3(a)(5)(ii) (emphasis added). Use of prescription medications is not otherwise included in the description of "medical treatment" for any other type of injury.

In December 1986, MSHA issued instructional guidelines to assist operators in understanding the reporting requirements of Part 50. MSHA Report on 30 C.F.R. Part 50, Gov. Ex. 16. The 1986 guidelines replaced guidelines issued by MSHA in 1980. Information Report on 30 C.F.R. Part 50, Gov. Ex. 15. The 1980 guidelines and the 1986 guidelines both state that medically treated injuries are reportable, while first aid treated injuries are not reportable, "provided there is no lost workdays, restricted work activity or transfer because of the injury." Gov. Ex. 15 at 9; Gov. Ex. 16 at 9. The 1986 guidelines also provide, "any use

of prescription medication normally constitutes medical treatment" and, in listing general procedures considered medical treatment, includes the "use of prescription medications other than a single dose or application given on a first visit for the relief of pain." Gov. Exh. 16 at 10. In distinguishing medical treatment from first aid for specific types of injuries, however, the guidelines parallel the regulatory criteria and refer only to the use of prescription medications for treatment of eye injuries. Gov. Exh. 16 at 11.

Before the judge, the Secretary maintained that the 1986 guidelines are consistent with section 50.20-3(a) and are entitled to deference. The judge rejected this argument. He noted that the regulations at section 50.20-3 explicitly set forth only one type of injury for which the use of prescription medication constitutes "medical treatment." He stated that "by specifically mentioning in her regulations that the treatment of eye injuries by use of a prescription medication constitutes 'medical treatment' for purposes of Part 50 reporting requirements, the Secretary has implicitly excluded the treatment of all other injuries by use of prescription medicine alone from the term 'medical treatment' under Part 50." 10 FMSHRC at 1099. He concluded that the Secretary's attempt to expand the regulations through the guidelines to include any use of prescription medication for injuries was erroneous and inconsistent with the regulations. 10 FMSHRC at 1099.

On review, the Secretary again argues that the interpretation of "medical treatment" set forth in the guidelines is consistent with the language of the regulations and is entitled to deference. Sec. Br. 9. Like the judge, we disagree.

While the Commission has recognized that in certain circumstances guidelines, policy memorandums, manuals or similar MSHA documents may "reflect a genuine interpretation or general statement of policy whose soundness commends deference and therefore results in the [Commission] according it legal effect," we have declined to do so where the interpretation or policy statement is inconsistent with the plain language of the standard. King Knob Coal Co., 3 FMSHRC 1417, 1420 (June 1981). See also Western Fuels-Utah Inc., 11 FMSHRC 278, 285-86 (March 1989); United States Steel Corp., 5 FMSHRC 3, 6 (January 1983). In the latter circumstances, the Commission has concluded that "the express language of a ... regulation unquestionably controls." King Knob, 3 FMSHRC at 420. Here, the guidelines not only are inconsistent with the relevant language of Part 50, they are themselves internally inconsistent. Therefore, we decline to give them effect.

The guidelines' statement that "any use of prescription medication normally constitutes medical treatment" is not even remotely alluded to in the language of Part 50. The Secretary did not include the use of prescription medication in the general regulatory description of "medical treatment" in section 50.20-3(a). To the contrary, as the judge properly noted, the Secretary designated the use of prescription medication as constituting medical treatment only in the case of eye injuries. 30 C.F.R. § 50.20-3(a)(5)(ii).

The Secretary contends, however, that section 50.20-3(a) is not all inclusive but rather provides illustrative examples. The Secretary particularly notes that section 50.20-3(a) begins "[m]edical treatment includes, but is not limited to" and argues that because the criteria that follow this language illustrate examples of "medical treatment," use of prescription medication for types of injuries other than those to the eye may constitute medical treatment.

The Secretary's argument is at odds with regulatory structure of section 50.20-3. Section 50.20-3(a) lists specific procedures that are to be classified as medical treatment and reported to MSHA, such as the suturing of wounds, the treatment of infections and the treatment of fractures. This regulation also states that medical treatment is not limited to such procedures. Thus, other procedures of a like kind not specifically listed must be reported by mine operators as medical treatment. The familiar rule of statutory construction, ejusdem generis, provides that where general words are followed by specific examples in a statutory provision, the general words are construed to embrace only objects similar in nature to the specific examples. 2A Sutherland Stat. Constr. § 47.17 (4th ed). Therefore, the question is whether the general words of this regulation ("medical treatment") can fairly be read to include the use of the prescription medications at issue in this case, given the nature of the specific examples used in the regulation. We think not. The use of the medications prescribed in this case bears little similarity to the suturing of wounds, the treatment of fractures, or the other procedures specifically enumerated in the regulation.

In addition, as discussed above, section 50.20-3(a)(5)(ii) provides that an injury to the eye is classified as medical treatment whenever prescription medications are used, but none of the other specifically listed occupational injuries designate the use of prescription medications as medical treatment. A regulation cannot be applied in a manner that fails to inform a reasonably prudent person of the conduct required. Mathies Coal Company, 5 FMSHRC 300, 303 (March 1983). For the reasons set forth above, we believe that the Secretary's regulation failed to inform Garden Creek that it was required to report the thirteen non-eye injuries involved here, and we affirm the judge's ruling that Garden Creek's failure to report them did not violate section 50.20-3(a).

In concluding that Garden Creek had not violated section 50.20-3(a) in connection with the one eye injury, the judge found that although the Secretary proved that the miner suffered an eye injury for which a physician prescribed medication, the Secretary failed to prove that the miner used the medication. 10 FMSHRC at 1099-1100. The judge rejected the Secretary's contention that use of the medication should be inferred from the fact that it was prescribed, holding that the necessary causal connection did not exist to support the inference. 10 FMSHRC at 1110. Again, we agree with the judge.

The Mine Act imposes on the Secretary the burden of proving the violation the Secretary alleges by a preponderance of the evidence. See Consolidation Coal Co., 11 FMSHRC 966, 973 (June 1989). The Commission

has recognized that in certain circumstances the Secretary may establish a violation by inference. Mid-Continent Resources, 6 FMSHRC 1132 (May 1984). Any such inference, however, must be inherently reasonable and there must be a rational connection between the evidentiary facts and the ultimate fact inferred. Mid-Continent Resources, 6 FMSHRC at 1138. Here, the required connection is lacking because common experience teaches the use of medication does not always follow its prescription. Although a prescription may be written, its use may become unnecessary because a transitory medical condition has abated. Also, intervening factors, such as a decrease in the severity of an injury, the disappearance of symptoms may cause the patient to forego the filling of a prescription or the use of a prescribed medication.

Moreover, recognition of an inference is largely influenced by the difficulty of obtaining the direct evidence necessary to establish the fact to be inferred. See e.g., Mid-Continent, 6 FMSHRC at 1138. Here, the record does not establish that proof of the use of the medication was unavailable to the Secretary or was unreasonably difficult to obtain. Compare FMC v. Svensea American Union, 390 U.S. 390 U.S. 238, 248-49 (1968). Indeed, the inspector testified that he spoke with some of the miners regarding their prescriptions, and the parties stipulated that in three instances involving non-eye injuries the prescribed medication was taken. Stipulation 12. The Secretary did not explain why similar information was not elicited from the miner who suffered the eye injury.

Thus, we are hard pressed to give credence to the Secretary's assertion that requiring proof of the use of the prescribed medications would be "unduly burdensome." The litigation process requires the parties to obtain the evidence necessary to prove their allegations. Should the Secretary truly find that proving the use of a prescription medication is onerous, the Secretary should revise her regulation to make the prescription of medication, rather than its use, a determinative factor of "medical treatment." 2/

2/ Indeed, MSHA currently is reviewing the regulations in Part 50 to improve illness, injury and accident reporting under the Mine Act. Of particular relevance here, the Secretary has solicited comments and information on how the current regulatory definition of "occupational injury" should be revised and what the term "medical treatment" should include. 53 Fed. Reg. 45878 (1988). The Secretary has a similar effort underway regarding reporting requirements under the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 et seq., ("OSHAct"), under which employers also must record occupational injuries requiring medical treatment. 29 C.F.R. § 1904. One suggested revision of the OSHAct regulations would require any medication prescribed for use for more than 48 hours to be considered "medical treatment" and therefore reportable. This proposal comes from "the Keystone National Policy Dialogue On Work-related Illness and Injury Recordkeeping," January 31, 1989, The Keystone Center, Keystone, Colorado at 32.

Accordingly, we hold that the judge properly vacated the fourteen citations at issue, and we affirm the judge's decision.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

Commissioner Doyle, concurring in part and dissenting in part:

In this case, the Secretary of Labor ("Secretary") cited the operator, Garden Creek Pocahontas Company ("Garden Creek"), for its alleged failure to report fourteen instances in which medical treatment had been rendered to miners. In each instance, the medical treatment consisted entirely of the use of prescription medication by the injured miner. The majority, in affirming the administrative law judge, concludes that the use of prescription medication comprises medical treatment only when that use is in conjunction with the treatment of eye injuries. The majority also concludes that the Secretary has not proven actual use of the prescription medication in the one case involving an eye injury. While I concur with the majority in its determination that the Secretary has failed to prove actual use of the prescription medication in the eye injury case, I must respectfully dissent from their determination that the use of prescription drugs does not constitute "medical treatment" of injuries other than eye injuries.

As noted by the majority, 30 C.F.R. §50.20-3(a) sets forth a general definition of "medical treatment," prefaced by the words "includes, but is not limited to..." Listed within that definition are a number of medical procedures with respect to fairly serious injuries that may occur in mines, such as fractures, amputations, loss of use of bodily parts, wounds, infections arising out of injuries, and second and third degree burns, as well as bruises requiring blood drainage. Following this definition of "medical treatment," the regulation provides a general definition of "first aid" that includes one-time treatment of minor injuries such as cuts, scratches, first degree burns and splinters, as well as follow-up observation of those injuries.

Following these definitions, there is set forth in 30 C.F.R. §50.20-3(a)(1)-(8) a list of eight categories of injuries, the treatment of which may involve either "medical treatment" or "first aid." For the most part, these categories do not include injuries listed in the general definition of "medical treatment." 1/ The Secretary contends that the categories in section 50.20-3(a) are not all-inclusive but, rather, set forth illustrative examples. I agree.

The doctrine of ejusdem generis, relied on by the majority to reach its determination that treatment of injuries by use of prescription drugs is not included in the definition of "medical treatment," is inapplicable to the standard in issue. That rule of statutory construction is used when there is "an incompatability

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1/ The exceptions are burns, which, if they are second or third degree, fall within the general definition of injuries requiring "medical treatment," and cuts, which, to the extent they are wounds requiring sutures, also fall within that definition.

between specific and general words so that all words in a statute... can be given effect, ..." Sutherland Stat. Const. §47.17 (4th ed.). (emphasis added.) There is no incompatability between the general and specific words in section 50.20-3(a)'s description of medical treatment.

More importantly, the doctrine is inappropriate in this case because the regulation specifically does not restrict itself to the terms listed, but instead provides that the general term, medical treatment, "includes, but is not limited to," the specific examples that follow. (emphasis added.)

Of more relevance to the issue at hand is the rule of construction with respect to definitions. A definition that uses the term "includes" is "more susceptible to extension of meaning by construction" than a definition that uses the term "means." Sutherland Stat. Const. §47.07 (4th ed.) The "word 'includes' is usually a term of enlargement, and not of limitation... It, therefore, conveys the conclusion that there are other items includable, though not specifically enumerated..." id.

The regulation itself contains other indications that use of prescription medication as a form of "medical treatment" is not limited to eye injuries. Within the eight categories of section 50.20-3(a), three categories make specific reference to prescription or non-prescription medication. Category (5), "Eye Injuries," lists use of non-prescription medication as "first aid" and use of prescription medication as "medical treatment." Category (3), "Burns, Thermal and Chemical," lists use of non-prescription medication as "first aid" but makes no reference to the use of prescription medication in the description of "medical treatment." Category (7), "Foreign Objects," also lists application of non-prescription medication as "first aid" and makes no specific reference to prescription medication in the description of "medical treatment." As this language indicates, one form of "first aid" is the use of non-prescription medication. By defining "first aid" to include the use of non-prescription medication, I believe it can reasonably be inferred that the use of prescription medication falls within the definition of "medical treatment." 2/

2/ The use of prescription medication could also be inferred to constitute medical treatment in at least two additional categories. Category (6), "Inhalation of Toxic and Corrosive Gases," limits "first aid" to the removal of the miner to fresh air and the one-time administration of oxygen. "Medical treatment" is described as any professional treatment beyond "first aid." Category (8), "Sprains and Strains," limits "first aid" to soaking, compresses, and bandages. "Medical treatment" includes "other professional treatment."

In addition, I believe that the common meaning of the words "including, but not limited to," would put a reasonably prudent person on notice that the list is not all-inclusive.

I also find that the Secretary's interpretation, to the effect that "medical treatment" includes the use of prescription medication except where a "single dose or application is given on the first visit merely for relief of pain," is a reasonable one, consistently held and fully consonant with the purposes of the Mine Act. Information Report on 30 C.F.R Part 50, (1980), Gov. Ex. 15, MSHA Report on 30 C.F.R. Part 50, (1986), Gov. Ex. 16. It is thus entitled to deference by the Commission. Bushnell v. Cannelton Indus., Inc., 867 Fed. 2d. 1432, 1438 (D.C. Cir. 1989).

For the foregoing reasons, I would reverse the administrative law judge's determination that the Secretary, by specifically mentioning the use of prescription medication only in the eye injury category, has thereby excluded the treatment of all other injuries by use of prescription medication alone from the definition of "medical treatment." Accordingly, I would find a violation in those instances where the judge found that prescription medication was actually used.

Joyce A. Doyle

Joyce A. Doyle, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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November 22, 1989

ROCHESTER & PITTSBURGH COAL COMPANY	:	
	:	Docket No. PENN 88-152-R
v.	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	

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

DECISION

BY THE COMMISSION:

This proceeding was brought under section 107(e)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq (1982)(the "Mine Act") by Rochester and Pittsburgh Coal Company ("R&P") to review an imminent danger withdrawal order issued by an authorized representative of the Secretary of Labor ("Secretary") at R&P's Greenwich No. 2 Mine. 1/ Commission Administrative Law Judge Gary Melick found that an imminent danger existed and upheld the withdrawal order. For the reasons that follow, we affirm.

1/ Section 107(e)(1) provides in pertinent part:

> Any operator notified of an order under this section or any representative of miners notified of the issuance, modification, or termination of such an order may apply to the Commission within 30 days of such notification for reinstatement, modification or vacation of such order. The Commission shall forthwith afford an opportunity for a hearing (in accordance with section 554 of title 5 but without regard to subsection (a)(3) of such section) and thereafter shall issue an order, based upon findings of fact, vacating, affirming, modifying, or terminating the Secretary's order.

30 U.S.C. § 817(e)(1).

On February 25, 1988, Robert L. Coy, a plumber at R&P's Greenwich No. 2 Mine was assigned to repair a leaking, six-inch water pipe. With the assistance of other miners, he repaired the pipe with a new O-ring and other parts. The pipe was parallel to and directly underneath the Main T Number 1 coal conveyor belt (the "belt"). The repair crew started the belt after the repairs were completed.

After the belt was started, Coy noticed that the pipe was sagging at one location. He walked underneath the moving belt to pick up a concrete block to place under the sagging pipe. At that location, the pipe was supported by a 52-inch high concrete block wall that was under and perpendicular to the belt. As Coy was placing the block on this wall under the pipe, Gerry I. Boring, an inspector of the Secretary's Mine Safety and Health Administration (MSHA), observed Coy under the moving belt in a stooped position. Inspector Boring asked Coy what he was doing and Coy replied that he was retrieving a block. The inspector immediately issued an imminent danger withdrawal order pursuant to section 107(a) of the Mine Act requiring that Coy be immediately removed from under the moving belt. 2/ Inspector Boring observed that the mine floor in that location was covered with wet, soupy accumulations of coal and other material that ranged between eight and fifteen inches in depth. After Coy came out from under the belt, Inspector Boring measured the height of the belt near where he observed Coy. The distance from the top of the accumulations to the edge of the belt was 64 inches.

Inspector Boring issued the imminent danger order because Coy was working under a moving belt that was a short distance above him and the inspector believed that a danger of contact was present. The inspector required that Coy immediately be removed from the danger and instructed

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2/ Section 107(a) provides in pertinent part:

> If, upon any inspection or investigation of a coal or other mine which is subject to this chapter, 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 814(c) of this title, 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 such imminent danger no longer exist.

30 U.S.C. § 817(a).

as to the hazards of working under a moving belt. 3/ The inspector also issued a citation under section 104(a) of the Mine Act, 30 U.S.C. § 814(a), alleging a violation of 30 C.F.R. § 75.1722(a), a mandatory safety standard requiring that exposed moving machine parts on mechanical equipment be guarded. 4/

The belt carried coal from various working sections of the mine to the main P belt, its dumping point, which was located outby Coy. The belt was supported by chains attached to the mine roof and was tilted at an angle in Coy's work area as it approached the main P belt. The inspector observed Coy under the moving belt approximately three to four feet inby the concrete block wall that supported the water pipe. Because the belt was at an angle in relation to the mine floor, the distance between the floor and the belt would increase if Coy approached the concrete block wall and would decrease if he walked inby away from the wall. Coy is 67 inches tall. Administrative Law Judge Melick determined that at the location Coy was observed, the belt was between 72 and 79 inches above the solid mine floor, considering the eight to fifteen inches of wet accumulations and the 64 inches between the accumulations and the bottom belt. 10 FMSHRC 1580. These findings were not contested by R&P and are supported by substantial evidence.

At the hearing, Inspector Boring testified that Coy's presence under the belt presented four hazards. First, he stated that the belt could break, strike Coy, knock him down and possibly drag him back through the bottom roller that was inby Coy. Second, the inspector was concerned that a defective belt splice lacer could hang down, catch Coy and drag him. (A splice lacer is a metal device that resembles a three-

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3/ In the withdrawal order, the inspector stated:

> 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).

Gov. Exh. 6. The inspector stated that the order was immediately terminated because:

> Mr. Coy removed himself from under the belt immediately. Joe DeSalvo, safety inspector, instructed Mr. Coy about hazards involved with working under moving belts. Gov. Exh. 6.

4/ The administrative law judge vacated the citation and the Secretary did not seek review before the Commission.

inch long staple that is riveted to the belt and is used to interlock sections of belt.) The third hazard of concern to the inspector was that Coy could sustain an eye injury from the fine coal that falls from the underside of the belt. Finally, Inspector Boring was concerned that Coy's arm or hand could come in contact with the belt if he slipped in the wet accumulations on the mine floor. The inspector testified that if he touched the bottom of the moving belt he could be knocked over and sustain a serious head, arm or hand injury.

Coy and another miner, Dennis Kopp, testified that they did not consider it hazardous to go under the moving belt at that location because they believed the clearance was sufficient. Coy stated that for the entire eight to ten seconds he was under the belt he was stooped over. Paul Enedy, a mining engineer employed by R&P, testified that the belt was unlikely to break because it was in good condition and that if it did break it would likely break at the top without a risk of injury to Coy. He also testified that it is uncommon for belts to break or become defective at a splice.

The administrative law judge upheld the inspector's finding of an imminent danger and affirmed the withdrawal order. He determined that although there was "no evidence in this case that the belt was worn or otherwise likely to break or that any of the splices were deficient, ... the other hazards were such that the cited condition 'could reasonably be expected to cause serious physical harm' if not discontinued." 10 FMSHRC 1581. Thus, it is apparent that the judge relied upon the inspector's testimony that Coy could have been seriously injured if he came in contact with the belt or if debris fell off the belt into his eyes.

R&P's challenge to the administrative law judge's decision is a narrow one. In its petition for discretionary review, R&P raises two issues. First, it argues that the judge failed to recognize that the condition (Coy's presence under the moving belt) was an isolated event that would not have continued or recurred. It maintains that the judge improperly assumed that the condition would continue when he held that harm could result from the condition "if not discontinued." 11 FMSHRC 1581. R&P emphasizes that it is undisputed that it is the normal practice at the mine to deenergize a belt whenever work is to be performed under it. Thus, it contends that the judge failed to decide the case on the basis of the precise facts presented.

Second, R&P argues that the condition cited by the inspector could not reasonably be expected to cause death or serious physical harm. It contends that the evidence shows that the likelihood of a serious injury resulting from Coy's presence under the belt was too remote to constitute an imminent danger.

The Secretary argues that if an inspector encounters a condition that he reasonably determines to present the potential of death or serious physical harm, he is required to issue a section 107(a) order of withdrawal. She maintains that if the inspector's conclusion that an imminent danger existed was reasonable at the time it was made, the order should be upheld. She argues that Inspector Boring's

determination was reasonable and substantial evidence supports the judge's affirmance of the order.

The Mine Act defines an 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." Section 3(j) of the Mine Act; 30 U.S.C. 802(j). This definition was not changed from the definition contained in the Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976)(amended 1977)(the "Coal Act").

In analyzing this definition, the U.S. Courts of Appeals have eschewed a narrow construction and have refused to limit the concept of imminent danger to hazards that pose an immediate danger. See e.g., Freeman Coal Mining Co. v. Interior Bd. of Mine Op. App., 504 F.2d 741 (7th Cir. 1974). Also, the Fourth Circuit has rejected the notion that a danger is imminent only if there is a reasonable likelihood that it will result in an injury before it can be abated. Eastern Associated Coal Corp. v. Interior Bd. of Mine Op. App., 491 F.2d 277, 278 (4th Cir. 1974). The court adopted the position of the Secretary that "an imminent danger exists when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated." 491 F.2d at 278 (emphasis in original). The Seventh Circuit adopted this reasoning in Old Ben Coal Corp. v. Interior Bd. of Mine Op. App., 523 F.2d 25, 33 (7th Cir. 1975).

Applying this precedent to the first issue raised by R&P, the question is whether, given the continuation of normal mining operations, the condition could have seriously injured Coy at any time before the dangerous condition was eliminated. Contrary to R&P's contentions, it was proper for the judge to consider the hazards presented by the condition if normal mining operations were allowed to continue before Coy was removed from under the moving belt. The Secretary has consistently interpreted the definition of imminent danger to exclude consideration of abatement time and, as discussed above, this interpretation has been supported by the courts. Thus, the judge was correct to analyze the hazards without assuming that the condition would have been quickly discontinued.

Whether Coy's presence under the moving belt could reasonably be expected to cause physical harm is a question of fact. We must affirm a judge's finding of fact if it is supported by substantial evidence. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." Consolidation Edison Co. v. NLRB, 305 U.S. 197, 229 (1938). In assessing whether a finding is supported by substantial evidence, the record as a whole must be considered including evidence in the record that "fairly detracts" from the finding. Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951). Measured against this standard, we find substantial evidence in the record to support the judge's findings. R&P offered little evidence to rebut the two hazards relied upon by the judge to affirm the order. The judge determined that the miner might

(1) "contact the belt (presumably by extending an arm) and break a finger or be knocked against a wall" and (2) "sustain serious eye injuries from debris falling off the belt." 10 FMSHRC at 1581. On review, R&P simply argues that the chance of either of these two events occurring is remote. The judge determined otherwise and his findings are supported by the record.

In addition, R&P's focus on the relative likelihood of Coy being injured while under the moving belt ignores the admonition in the Senate Committee Report for the Mine Act that an imminent danger is not to be defined "in terms of a percentage of probability that an accident will happen." S. Rep. No. 181, 95th Cong., 1st Sess. 38 (1977), reprinted in Senate Subcommittee on Labor of the Committee on Human Resources, 95th Cong., 2nd Sess, Legislative History of the Federal Mine Safety and Health Act of 1977 at 626 (1978). Instead, the focus is on the "potential of the risk to cause serious physical harm at any time." Id. The Committee stated its intention to give inspectors "the necessary authority for the taking of action to remove miners from risk." Id.

R&P's argument also fails to recognize the role played by MSHA inspectors in eliminating imminently dangerous conditions. Since he must act immediately, an inspector must have considerable discretion in determining whether an imminent danger exists. The Seventh Circuit recognized the importance of the inspector's judgment:

> Clearly, the inspector is in a precarious position. He is entrusted with the safety of miners' lives, and he must ensure that the statute is enforced for the protection of these lives. His total concern is the safety of life and limb.... We must support the findings and the decisions of the inspector unless there is evidence that he has abused his discretion or authority. (emphasis added).

Old Ben, supra, 523 F.2d at 31.

Applying this rationale, the question is whether Inspector Boring abused his discretion when he determined that Coy could be seriously injured while working under the moving belt. The hazards of working under a moving belt are well known as evidenced by R&P's policy against such a practice. Inspector Boring observed a miner working under a moving belt, where the clearance was tight, picking up a concrete block and placing it on a wall to support a pipe located less than a foot below the moving belt. While he was primarily concerned with what might happen if the belt or a belt lacer broke, the inspector also believed that the miner could be seriously injured if he contacted the belt. The evidence demonstrates that the floor was covered with wet, soupy accumulations, that Coy's hands were close to the belt when he placed the block under the pipe and that Coy could have slipped and inadvertently contacted the moving belt. The fact that the belt was not parallel to the floor and the accumulations made walking difficult, increased the chance that Coy could come in contact with the belt. Finally, the inspector testified that if Coy contacted the belt he could have fallen and seriously injured himself. Based on this evidence and

the findings of the administrative law judge, we cannot conclude that the inspector abused his discretion.

We thus conclude that the judge's finding of an imminent danger is supported by substantial evidence. Accordingly, we affirm the judge's decision.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 30, 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of JUAN G. PENA	:	
v.	:	Docket Nos. CENT 85-47-DM 85-68-DM
EISENMAN CHEMICAL COMPANY	:	

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

ORDER

BY THE COMMISSION:

Juan G. Pena has filed with the Commission a letter requesting that this discrimination proceeding be reopened and a previously approved settlement be set aside. For the reasons that follow, Pena's request is denied.

On April 15, 1985, the Secretary of Labor filed a discrimination complaint on behalf of Pena alleging that Eisenman Chemical Company ("Eisenman") unlawfully discriminated against Pena in violation of section 105(c) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815(c). Eisenman denied the allegation, and the matter was assigned to Commission Administrative Law Judge Roy Maurer.

On December 18, 1985, at an evidentiary hearing, the Department of Labor attorney representing Pena and counsel for Eisenman stated to the judge that the parties agreed to settle the matter. Tr. 2. Counsel for Pena read the proposed settlement into the record, and the attorneys jointly moved the judge to approve the settlement. The judge asked Pena if he agreed to the settlement as stated, and when Pena answered "yes," the judge granted the motion and stated that upon receipt of the transcript he would issue an order incorporating the terms of the settlement, requiring compliance therewith, and dismissing the case. Tr. 5.

Subsequently, the judge issued a written decision, approving the settlement. 8 FMSHRC 142 (January 1986)(ALJ). In his decision the judge repeated the settlement agreement, which, in pertinent part, required Eisenman to pay the sum of $13,000 "in full and complete satisfaction of back wages," and which stated that "[t]he intent ... is to settle all claims Complainant may be due under the provisions of Section 105(c) of the Act." 8 FMSHRC at 143 (quoting Tr. 3). The judge stated, "I conclude and find that [the settlement] reflects a reasonable resolution of the complaint. Further ... all of the parties, including Mr. Pena personally, are in accord with the agreed upon disposition of the complaint." 8 FMSHRC at 143. The judge ordered Eisenman to fully comply with the terms of the agreement and dismissed the complaint. 8 FMSHRC at 142, 144.

On October 30, 1989, the Commission received a letter from Pena requesting that the matter be "re-open[ed] for trial because of breach of contract on the settlement concerning my claim." Pena letter 1. Pena states that although Eisenman paid him $13,000, the company did not pay "taxes, withholding, and etc.," as promised. Id. 1, 2. Pena alleges that he has been "defrauded ... by my representatives from the U.S. Dept[ment] of Labor and [by my] ex-employer," and Pena requests "triple damages for fraud, and breach of contract at my new trial." Id.

Pena did not file a timely petition for discretionary review of the judge's decision approving the settlement within the 30-day period prescribed by the Mine Act. 30 U.S.C. § 823(d)(2)(A)(i). See also 29 C.F.R. § 2700.70(a). Nor did the Commission direct review on its own motion within this 30 day period. Thus, by operation of statute the judge's decision became a final decision 40 days after its issuance. 30 U.S.C. § 823(d)(1). Under these circumstances, Pena's submission must be construed as a request for relief from a final Commission order. 29 C.F.R. § 2700.1(b) (Federal Rules of Civil Procedure apply in absence of applicable Commission rules); Fed. R. Civ. P. 60 (Relief from Judgment or Order). See Danny Johnson v. Lamar Mining Co., 10 FMSHRC 506, 508 (April 1988); Kelley Trucking Co., 8 FMSHRC 1867, 1868-69 (December 1986).

Relief from a final judgment or order on the basis of fraud, misrepresentation, or other misconduct is available to a movant under Fed. R. Civ. P. 60(b)(3) and Fed. R. Civ. P. 60(b)(6).

To the extent that Pena is claiming that Eisenman, the adverse party, defrauded him, the motion is seriously untimely. Pena's submission was received by the Commission almost four years after the settlement was agreed to and the decision was issued. Rule 60(b)(3) states that a motion for relief due to fraud, misrepresentation or misconduct by an adverse party must be made within a reasonable time and must be made not later than "one year after the judgment." This limit is an extreme limit, and a motion made under clause (3) must be denied as untimely if made more than one year after judgment regardless of whether the delay was reasonable. The limit may not be extended. C. Wright & A. Miller, Federal Practice and Procedure § 2866 at 233-234 (1973).

Under either clause (3) or (6) of Rule 60(b), a movant must establish by clear and convincing evidence that the alleged fraud or misconduct occurred. Pena fails to meet this test. Pena's submission contains only his unsupported allegation of fraud. The record contains no evidence of fraud or misconduct by the attorneys representing the parties. At the hearing, counsel representing Pena stated that the parties agreed that Eisenman's payment of $13,000 to Pena would represent "full and complete satisfaction of back wages" and that the intent of the agreement was to "settle all claims [Pena] may be due under the provisions of section 105(c) of the Act." Tr. 3. When asked by the judge if he understood the settlement, if it was in accord with what he had been told, and if he agreed to it, Pena responded affirmatively and without constraint. Tr. 4-5

Accordingly, the motion to reopen this proceeding is denied.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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NOV 1 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. CENT 89-67-M
	:	A.C. No. 23-00199-05503
v.	:	
	:	Jasper #15 Mine
MIDWEST MINERALS, INC., Respondent	:	

DECISION

Appearances: Charles W. Mangum, Esq., Office of the Solicitor, U.S. Department of Labor, Kansas City, Missouri for Petitioner; Alan Stotz, Midwest Minerals, Incorporated, for Respondent.

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et. seq., the "Act," charging Midwest Minerals, Inc. (Midwest) with four violations of the regulatory standard at 30 C.F.R. § 56.9002. The general issue before me is whether Midwest violated the cited regulatory standard and, if so, the appropriate civil penalty to be assessed in accordance with Section 110(i) of the Act.

The four citations, issued pursuant to Section 104(a) of the Act alleged, as amended, "significant and substantial" violations and charged as follows:

Citation No. 3273075

> The R22 Euclid Haul truck company number 854, did not have a [sic] operating grade retarder. The truck is used to stockpile crushed limestone and travels on the level most of the time except when it is on top of a stockpile. At the time the violation became apparent, the truck was parked and in response to questions it was learned that the retarder didn't work.

Citation No. 3273076

> The grade retarder on the R22 Euclid, company number 855, was not working. The truck was not in operation when this information was learned, but came to lite [sic] when company personnel was [sic] questioned about the operation of the truck. The truck is used to stockpile crushed limestone and runs on the level most of the time except when it is on top of the stockpile.

Citation No. 3273077

> The grade retarder on the R22 Euclid haul truck, company number 851, was not operating. The truck was not in operation when the violation was learned and came to lite [sic] when company personnel was [sic] questioned about the operation of the truck. The truck is used to stockpile crushed limestone and runs on the level most of the time, except when it is on top of the stockpile.

Citation No. 3273078

> The grade retarder on the R22 Euclid (Company No. 859) was unhooked. The truck was parked when this information came to lite [sic] while company personnel were being questioned about the operation of the truck. The truck is used to stockpile crushed limestone and runs on the level most of the time except when it is on the top of a stockpile.

The cited standard, 30 C.F.R. § 56.9002, provides that "equipment defects affecting safety shall be corrected before the equipment is used."

The Secretary's evidence is not disputed. Robert Earl, an inspector for the Federal Mine Safety and Health Administration (MSHA) testified that he was familiar with the Midwest Jasper No. 15 Mine since he had formerly worked there and had previously conducted a compliance (courtesy) inspection at the mine. A courtesy inspection is designed to advise the operator of potentially violative conditions at his mine without being penalized or cited. At the courtesy inspeciton Earl provided about a month before the instant citations were issued he advised mine supervisor Crumpecker that non-functioning grade retarders on the Euclid haul trucks would be cited if not repaired. Grade retarders are

designed for trucks with automatic transmissions to reduce speed to 3 1/2 miles per hour without the use of brakes. The R22 Euclid haul trucks were capable of hauling 20 to 25 tons of rock and had a net weight of about 20 tons.

On August 11, 1988, Inspector Earl returned to the Jasper No. 15 Mine for a routine regular inspection and found that the grade retarders had not been repaired on the cited haul trucks. Earl accordingly issued the citations now at issue.

It is not disputed that the cited trucks were available for service and were used to stockpile crushed limestone. According to the undisputed testimony of Inspector Earl a ramp is built onto the stockpile and over which these trucks operate. Eventually the ramp would be developed with a 15 percent grade and up to 35 feet long. According Earl it is the industry practice for the grade retarders to be used to reduce speed and it was a particularly important safety device on the Euclid trucks which had "notoriously bad brakes". It is not disputed moreover that the trucks here cited were also operating in a congested area. Earl opined that it was therefore likely that the trucks might be involved in an accident implicitly causing serious injuries to one or both drivers.

Within the above framework of evidence it is clear that the violations are proven as charged that the violations were "significant and substantial". Particularly in light of the undisputed evidence that these haul trucks would be operating in a congested area on a 15 degree ramp and had "notoriously bad breaks" it is clear that the violations involved a discreet safety hazard, that there was a reasonable likelihood that the hazard contributed to would result in an injury from a truck accident and there was a reasonable likelihood that the injuries would be of a reasonably serious nature. Secretary v. Mathies Coal Co., 6 FMSHRC 1 (1984); Secretary v. Consolidation Coal Co., 8 FMSHRC 890 (1986). Under the circumstances I also reject Midwest's proffered defense that grade retarders are not safety devices or subject to the cited regulation. The fact that grade retarders may also be used to reduce brake wear, as Midwest maintains, only serves to underline the fact that grade retarders are indeed safety devices.

I further find that Midwest is chargeable with high negligence. It is undisputed that several weeks before these citations were issued Inspector Earl advised Midwest

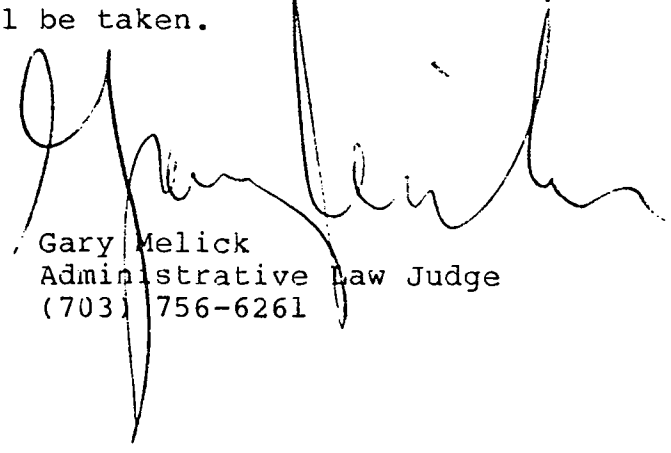
officials at a courtesy inspection that the grade retarders must be functioning or citations would be issued. There is no evidence that Midwest then disputed MSHA's position that grade retarders were "safety devices" subject to the provisions of 30 C.F.R. § 56.9002. In any event the failure of Midwest to have repaired the defective grade retarders before the inspection at bar and the continued use of the trucks without grade retarders therefore constitutes high negligence.

It is also undisputed that as of the date of hearing the grade retarders had still not been repaired. Moreover apparently to avoid making the repairs the cited trucks were moved out of the MSHA district in which they had been cited. Indeed the evidence shows that they had been moved to the State of Kansas under the jurisdiction of the MSHA Topeka District office. According to the testimony of Midwest official Alan Stotz those trucks have since been inspected within that MSHA district and have not been cited for failure to have grade retarders. It is not clear however whether that MSHA office had knowledge of the non-functioning grade retarders. In any event the evidence is clear that the cited violations have not been abated and the mine operator is making conscious efforts to avoid abatement. Accordingly I reject the stipulation by the parties (Joint Exhibit No. 1) that "the Respondent demonstrated good faith in abating the alleged violation".

The penalty assessment in this case must appropriately reflect the findings on these important criteria as well as the size and history of violations. Under the circumstances I find that civil penalties of $300 for each violation are appropriate.

ORDER

Midwest Minerals, Inc., is directed to pay civil penalties of $1,200 within 30 days of the date of this decision. The Secretary of Labor is directed to report to the undersigned within 30 days of the date of this decision as to whether the violations herein have been abated and, if not, what further action will be taken.



Gary Melick
Administrative Law Judge
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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NOV 6 1989

WARREN CLYDE TEETS, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. YORK 89-15-D
METTIKI COAL COMPANY, Respondent	:	MORG-CD-88-16
	:	Prep Plant

DECISION

Appearances: Thomas W. Rodd, Esq., for the Complainant;

Ann R. Klee, Esq., for the Respondent.

Before: Judge Fauver

This proceeding was brought by Complainant under § 105(c) of the Federal Mine Safety and Health Act of 1977, 30 C.F.R. § 801 et seq., alleging a discriminatory discharge.

Having considered the hearing evidence and the record as a whole, I find that a preponderance of the substantial, reliable, and probative evidence establishes the following Findings of Fact and additional findings in the Discussion below:

FINDINGS OF FACT

1. The Mettiki Preparation Plant is owned and operated by Mettiki Coal Corporation.

2. Complainant was a miner and an employee of Mettiki Coal Corporation from October 2, 1978, until his discharge on June 21, 1988, when he was working at the Preparation Plant.

3. On June 21, 1988, about 9:00 p.m., Complainant was observed by his supervisor at the time, Harold Upole, carrying a case of sealant from the Preparation Plant Warehouse.

4. Mr. Upole watched Complainant walk from the Preparation Plant Warehouse to the Upper Road where he turned in a westerly direction towards Table Rock Road.

5. At about 11:20 p.m., at the end of the shift, Mr. Upole observed Complainant walking from the direction of Table Rock Road carrying a case of sealant to his personal vehicle. When questioned by Mr. Upole, Complainant stated that he had received permission from the Preparation Plant Superintendent, John Laughton, to take the sealant home for his personal use.

6. When Mr. Upole telephoned Mr. Laughton to verify Complainant's claim, Mr. Laughton stated that he had not given Complainant authorization to take sealant home. Mr. Laughton then spoke with Complainant on the telephone. Complainant again claimed that he had received permission from Mr. Laughton at some time previously to take the sealant home. Complainant told Mr. Laughton that he was going to use the sealant to seal his steps at home. Mr. Laughton then spoke to Mr. Upole again, and told him to discharge Complainant for stealing company property.

7. The Mettiki Employee Manual states that employees will be discharged for theft of company property. All Mettiki employees, including Complainant, were given copies of this Manual.

8. Mettiki officials held a meeting with Complainant and others on June 22, 1988, to discuss further the incident leading to Complainant's discharge. At that meeting, Complainant stated again that he had received permission to take sealant home for his personal use. Alternatively, he suggested that someone else might have placed the case of sealant in his personal vehicle. Neither Complainant nor anyone else observed any person place a case of sealant in Complainant's vehicle. Complainant did not suggest at that time that he had been discharged for raising safety complaints with his supervisors.

9. After consideration of Complainant's explanation on June 22, 1988, as well as the statements of Mr. Upole and others, Mr. Laughton affirmed the discharge of Complainant for theft of company property.

10. Complainant subsequently filed a discrimination claim with the Mine Safety and Health Administration against Mettiki. Complainant alleged, among other things, that he had been discharged for making safety complaints. The MSHA Office of Technical Compliance and Investigation conducted an investigation of the incident leading to Complainant's discharge. MSHA concluded that Complainant had not been discharged for engaging in protected activity under section 105(c) of the Act.

11. After a state evidentiary hearing on the events leading to Complainant's discharge, the Maryland Unemployment Insurance Benefits Office found that Complainant had been discharged for theft of company property and was guilty of gross misconduct. As a result, he was disqualified from receiving unemployment insurance benefits.

12. Complainant did not notify either Mr. Upole or Mr. Laughton of any alleged hazards or health or safety violations at the Preparation Plant at any time prior to his discharge on June 21, 1988.

13. If Complainant notified other Mettiki supervisors of alleged dangers or safety or health violations, neither Mr. Upole nor Mr. Laughton - - the Mettiki officials who directed and implemented his discharge - - was aware of it. Nor did Mr. Upole or Mr. Laughton have knowledge that Complainant may have spoken with an MSHA inspector regarding an alleged ice hazard in the Preparation Plant nine months before his discharge.

14. Mr. Laughton decided to discharge Complainant for theft of company policy, and for no other reason.

DISCUSSION WITH FURTHER FINDINGS

Section 105(c) of the Mine Act provides in relevant part that:

> 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 right of any miner . . . because such miner . . . has filed or made a complaint under or related to this chapter, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine . . . or because such miner has instituted or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding, or because of the exercise by such miner . . . on behalf of himself or others of any statutory right afforded by this chapter.

In order to establish a violation of § 105(c), a complainant must prove that he engaged in protected activity within the scope of § 105 and that the action taken against him was motivated at least in part by that activity.

To rebut a prima facie case, an operator must show that no protected activity occurred or that the adverse action was in no part motivated by protected activity. If the operator cannot rebut the prima facie case in this manner, it may nevertheless affirmatively defend by proving that (1) it was also motivated by the miner's unprotected activity and (2) it would have taken the adverse action in any event for the unprotected activity alone. The operator bears the burden of proof with regard to the affirmative defense; the ultimate burden of persuasion that discrimination has in fact occurred does not shift from the miner. Secretary on behalf of Robinette v. United Castle Co., 3 FMSHRC 803 (1981).

Complainant has not proved by a preponderance of credible evidence that he was engaged in protected activity that had any temporal or causal nexus with his discharge.

On the contrary, the credible evidence shows that Complainant was considerably less active than other employees in expressing safety concerns or complaints and other employees, who were active in safety complaints, were not disciplined or given adverse treatment because of their safety activities.

Complainant has not made a prima facie case of discrimination.

On the other hand, Respondent has proved by a preponderance of the credible evidence that Complainant was discharged because of theft of company property and for no other reason.

Respondent's written policy provided for the discharge of any employee caught stealing company property. This policy was given effect at Mettiki. The testimony revealed, for example, that Rodney Bird, another Mettiki employee caught stealing company property, was promptly discharged by his supervisor, Tom Shrout, and the Vice-President of Operations, Fred Polce. Complainant's discharge followed company policy and precedent.

Mr. Upole testified clearly and consistently as to the events that led to Complainant's discharge. He stated that he first observed Complainant leaving the Preparation Plant Warehouse and walking toward a path to the Northwest of the Warehouse on the evening of June 21, 1988, about 9:00 p.m. (See Ex. R-1 (Map)). At the time, Mr. Upole was driving up the Warehouse Road towards the Maintenance Shop. When Complainant saw Mr. Upole, he stopped at a pipe rack located 60-70 feet to the Northwest of the Warehouse. Tr. 593-601. Mr. Upole's suspicions were aroused because Complainant was carrying a case of sealant, a product not generally used by production shift employees because of its extended setting time (Tr. 188; 265,

401; 561-565) and because Complainant had no business at the pipe rack which was located in the opposite direction from the Preparation Plant.

Mr. Upole then parked his truck and, from the Maintenance Shop door, observed Complainant walk down the Warehouse Road toward the Preparation Plant. Tr. 595-597. Complainant did not go back to the Preparation Plant with the case of sealant. Instead, he turned to the right when he reached the Upper Road and walked toward Table Rock Road and the Storage Area, away from the Preparation Plant. 1/

After Complainant was out of sight, Mr. Upole went to the Warehouse to verify that Complainant had checked out a case of sealant (which he had done) and then attempted unsuccessfully to search for the sealant on the property. Complainant, in the interim, returned to the Preparation Plant and was working there at about 9:30 p.m. when Mr. Upole arrived to pick up the production reports for Mr. Laughton. When Mr. Upole telephoned Mr. Laughton to report the production numbers, he also told him about his observations and his suspicion that Complainant was stealing. Mr. Laughton directed Mr. Upole to investigate the incident and report any developments. Tr. 612-613; Tr. 846-848; Ex. R-5; Ex. R-9.

In accordance with these directions, at about 10:55 p.m., Mr. Upole positioned himself in the woods to the north of the Storage Area. From there he observed Complainant leave the bathhouse at about 11:20 p.m., cross Table Rock Road and walk along the path toward the Storage Area. When Complainant was out of sight, Mr. Upole walked across Table Rock Road to the laboratory from which he could see Complainant's vehicle in the parking lot. In about five minutes, Mr. Upole observed Complainant walking toward his vehicle carrying a case of sealant on his shoulder. The parking lot was well lighted and Mr. Upole had a clear view of Complainant walking towards his vehicle.

1/ At the direction of the judge, a site visit was conducted by counsel for both parties with Complainant and Mr. Upole, on June 29, 1989. The observations there confirmed Mr. Upole's physical description of the area and the relative locations of the Warehouse, Maintenance Shop, pipe rack and Storage Area. The site visit and careful tests and photographs at the site confirmed that Mr. Upole could -- despite Complainant's contrary allegations at trial -- have seen Complainant turn onto the Upper Road from the Maintenance Shop. Supp. Ex. I at 4; Joint Statement Regarding June 29, 1989 Site Visit; Supp. Ex. II Annotated Map.

Before Complainant reached the driver's door of his vehicle, Mr. Upole stepped out and greeted Complainant from a distance. Complainant immediately tried to conceal the case of sealant by putting it under his truck behind the wheel on the driver's side. When Mr. Upole questioned him about the package, Complainant stated that it was sealant and that Mr. Laughton had given him permission to take it home. Based upon his previous conversation with Mr. Laughton, Mr Upole suggested that he and Complainant go inside and call Mr. Laughton together to verify Complainant's claim. Complainant was visibly nervous, but agreed.

Mr. Laughton confirmed over the phone to both Mr. Uphole and Complainant that he had not given Complainant authority to take home a case of sealant. During the conversation, Complainant stated that he was taking the sealant home to seal his steps. In concluding the phone conversation, Mr. Laughton directed Mr. Upole to discharge Complainant for theft, and Mr. Upole did so. The decision to discharge Complainant was solely Mr. Laughton's.

Members of Mettiki Management, including Mr. Laughton and Mr. Upole, met with Mr. Upole and two of his co-workers the next day to discuss the circumstances of Complainant's discharge. At that meeting, Complainant admitted again that he had planned to take the sealant home to seal his front steps and claimed he had received permission to do so. Mr. Laughton affirmed his decision to discharge Complainant for theft.

I credit management's evidence summarized above and find that Complainant was discharged for theft of company property and for no other reason. This is not a case of a miner who actively pursued concerns about the safety of his workplace and was discharged for expressing those concerns. Complainant was caught stealing by his supervisor, and was fired for that reason.

The record and the law do not permit, in these circumstances, a finding of a violation under § 105(c) of the Mine Act.

CONCLUSIONS OF LAW

1. The judge has jurisdiction over this proceeding.

2. Complainant failed to prove a violation of § 105(c) of the Act

ORDER

The Complaint is DISMISSED.

William Fauver
Administrative Law Judge

Distribution:

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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 7 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF WILLIAM J. BROCK, Complainant	:	DISCRIMINATION PROCEEDING Docket No. CENT 89-24-DM MSHA Case No. MD 88-10 Tulsa Plant
v.	:	
BLUE CIRCLE, INC.,	:	

DECISION

Appearances: E. Jeffery Story, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for the Complainant;
Mark A. Lies, II, Esq., Seyfarth, Shaw, Fairweather & Geraldson, Chicago, Illinois, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a discrimination complaint filed by the Secretary of Labor (MSHA), on behalf of the complainant pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). The complainant alleges that the respondent discriminated against him by giving him a verbal and written warning for taking too long at work breaks and lunch, a written disciplinary warning for unsatisfactory job performance, and a 1-day suspension with pay for calling a supervisor at 2:00 a.m., to inform him that he was going on a work break, and that it did so because of his reporting safety violations to mine management and calling MSHA to address these violations. MSHA requests a finding that the respondent discriminated against the complainant in violation of section 105(c) of the Act, an order directing the respondent to expunge the complainant's employment records of all references to the aforesaid disciplinary actions, an order directing respondent to pay to the complainant all expenses occasioned by these adverse actions, with interest, and it seeks a civil penalty assessment against the respondent in the amount of $2,000, for the alleged violation.

The respondent filed a timely answer to the complaint denying that it has discriminated against the complainant. Respondent asserts that the disciplinary actions taken against the complainant were justified on their merits and were unrelated to the filing of any safety complaints. A hearing was held in Tulsa, Oklahoma, and the parties appeared and participated fully therein. The parties filed posthearing briefs, and I have considered their arguments in my adjudication of this matter.

Applicable Statutory and Regulatory Provisions

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

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

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

Issues

The critical issue in this case is whether or not the disciplinary actions taken against the complainant by the respondent were motivated by the respondent's desire to punish him, or otherwise retaliate against him, because of his safety complaints to management and MSHA. Additional issues raised by the parties are identified and disposed of in the course of this decision.

Stipulations

The parties stipulated to three documents which reflect the disciplinary action taken against Mr. Brock, and they are as follows (Tr. 5):

> 1. A memorandum from Mr. Jim King to Mr. Brock, dated August 28, 1987, concerning a verbal warning given to Mr. Brock on August 17, 1987, "for taking too long at breaks and lunch" (Exhibit C-1).
>
> 2. A memorandum from Mr. Jim King to Mr. Brock dated September 18, 1987, and titled "Disciplinary Letter-Unsatisfactory Job Performance" (Exhibit C-2).
>
> 3. A memorandum dated September 29, 1987, from Mr. Jim Hicks, addressed to Mr. Brock and others, as well as his "personnel file," concerning a disciplinary meeting held on September 28, 1987, to discuss Mr. Brock's "work performance and conduct" (Exhibit C-3).

The parties also stipulated to the respondent's history of prior civil penalty assessments for the period August 17, 1987 through August 16, 1987 (Tr. 6, exhibit C-4).

Complainant's Testimony and Evidence

Complainant William J. (Jerry) Brock, testified that he has worked for the respondent for approximately 19 years, and that he is classified as a repairman-welder working in the maintenance department under the supervision of Mr. Jim King. Mr. Brock confirmed that he serves as the vice-president of his local union, International Brotherhood of Boilermakers, and also serves as the miner's representative, and member of the safety committee. His duties in this regard include safety matters, and accompanying MSHA inspectors on their mine inspections. He confirmed that he received a safety complaint on or about August 11, 1987, concerning some roofing work being done by independent contractors at the plant. He explained that he pursued the complaint with several management officials at the mine, including Mr. King, and that he was permitted to go to the area where the work was being performed to look into the complaint, and that he subsequently contacted MSHA to report the matter. He stated that the respondent's safety and employee relations manager Bob McCormick informed him that the contractor personnel were non-union and "they were none of my business." Mr. Brock confirmed that MSHA inspectors came to the mine in response to his complaint, and that he subsequently met with them at the mine on August 14, 1987. However, since the contractors were not working that day, he was informed by the inspectors that "there wasn't anything they could do about it" (Tr. 9-18).

Mr. Brock identified exhibit C-1 as a "verbal warning" he received on August 17, 1987, from Mr. King for taking long lunch and other breaks, and he confirmed that he discussed the matter with Mr. King and asked him to be more specific, but that Mr. King was unable to tell him the specific days and times that he took too long for lunch or breaks (Tr. 19). Mr. Brock also identified a memorandum dated September 18, 1987, from Mr. King concerning his unsatisfactory work performance in connection with work which he performed on two sliding gates and two screws on the No. 2 clinker/cooler dust collector (Tr. 20).

Mr. Brock stated that the verbal warning was not justified because all of the miners took their allotted lunch hour and breaks together and "that when its time to go everybody just kind of gets up and goes" (Tr. 22). Mr. Brock stated that all lunches and breaks are taken together in the same room, and that the normal allotted time for lunch is 35 minutes, from 12 to 12:35, and that the normal breaks are for 15 minutes each, at 9:30 and 2:00 (Tr. 25).

Mr. Brock explained the work that he and a trainee performed on the dust collector in question on September 16, 1987. He confirmed that after he requested Mr. King to explain his statement that he was spending too much time away from his work on personal business, Mr. King gave him a written explanation "a couple of days to a week" after he received the memorandum of September 18, 1987, and informed him that anything not related to his job was considered to be "personal business." Mr. King did not give him any specific instances of "personal business" on that particular day (Tr. 27-30).

Mr. Brock identified exhibit C-3 as a memorandum concerning a September 28, 1987, meeting with maintenance manager John Bayliss and plant manager J. R. Hicks over an incident which occurred on September 25, 1987. Mr. Brock explained that on that day, he was rinsing off his face and hands during the day shift at 11:40 or 11:45 a.m., before the lunch hour, after working in a dusty hopper. Mr. Bayliss accused him of washing up early, and instructed him that before taking any future breaks he was to call him (Bayliss) before taking a break. Mr. Brock stated that he requested Mr. Bayliss to give him a letter confirming that he was to call him before taking any breaks, and Mr. Bayliss then informed him that he was to call him, or supervisors Jim King or Frank Vargas before he washed up for any breaks (Tr. 33).

Mr. Brock stated that he worked the midnight shift on September 25, 1987, and that following Mr. Bayliss' instructions, he called Mr. Bayliss at his home at 2:00 a.m., to inform him that he was washing up before taking a break. Mr. Brock stated that he called Mr. Bayliss because Mr. Vargas and Mr. King were not working the shift. The meeting in question was called to discuss this call, and Mr. Brock was suspended for 1 day with pay, and was told "that I was to take the day off and think about whether I wanted to continue working for Blue Circle or not" (Tr. 35). Mr. Brock understood that he was given the day off because of his call to Mr. Bayliss, and he believed that the disciplinary actions taken against him were the result of his calling MSHA (Tr. 36-37). Mr. Brock stated that his last disciplinary action occurred approximately a year and a half prior to the verbal warning of August 17, 1987 (Tr. 37).

On cross-examination, Mr. Brock confirmed that he had permission from Mr. Bayliss to observed the work of the contractors on August 11, but that he (Brock) had no knowledge as to the respondent's policy concerning its dealing with contractors. Mr. Brock confirmed that prior to this time he had brought a number of safety matters to the attention of management during monthly safety meetings and no action was ever taken against him by the respondent for doing this. Mr. Brock could not recall that Mr. King spoke with him a week prior to the verbal warning of August 17, concerning his leaving his job too early to wash up

for lunch and that he was going to the shop too early to wash up to leave work before the regular quitting time (Tr. 38-43).

Mr. Brock testified to the work that he and a trainee performed on the slide gate. Mr. Brock stated that Mr. King was upset with him because he told him that he did not know whether the gate was opened or closed, and that Mr. King told him that his workmanship on the gate in question was not satisfactory (Tr. 43-49).

Mr. Brock confirmed that at the time he received the letter from Mr. King concerning his verbal warning for being away from his job on personal business, Mr. King said nothing about MSHA or the roofing contractor, and said nothing about his safety complaint (Tr. 50). With regard to the washing-up incident, Mr. Brock confirmed that Mr. Bayliss told him he was washing up too early, and that he was to contact him before he took his break or when he was washing up to take a break so that he would know when he was starting his break. Mr. Brock denied that Mr. Bayliss advised him that same afternoon that he was to contact his shift supervisor and tell him that he was taking his breaks, and he stated that Mr. Bayliss told him to contact Mr. King or Mr. Vargas (Tr. 52).

Mr. Brock confirmed that he telephoned Mr. Bayliss at his home at 2:00 a.m., and advised him that he was calling to inform him that he was going to wash up before taking his break, and that Mr. Bayliss responded "Is this some form of harassment" (Tr. 52). Mr. Brock confirmed that he tried calling Mr. Bayliss again at 6:00 a.m. that same morning but his line was busy, and that he did so because "He never changed his orders" (Tr. 53).

Mr. Brock confirmed that at the meeting of September 29, his prior disciplinary letters which were in his personnel file, as well as his phone calls to Mr. Bayliss, were discussed. He also confirmed that plant manager J. K. Hicks, who was in charge of the meeting, informed him that his personnel file did not reflect a good work record or attitude, and that Mr. Hicks informed him that he would be given a day off to think about whether he wanted to continue working for the company. Mr. Brock confirmed that he took the day off with pay, and upon his return, he continued to serve as a union officer and miner's representative, and that the respondent has taken no action against him because of any safety complaints since his return to work (Tr. 56).

Mr. Brock identified certain documents from his personnel file, exhibits R-1 through R-7, as copies of prior disciplinary warnings he received from 1978 up to and including September 1987, regarding attendance, absenteeism, and tardiness (Tr. 56-57). In response to a question concerning prior ongoing counseling given to him and all others in his maintenance department concerning timely breaks and lunch hours, Mr. Brock stated

that "Mr. King would just say watch your breaks and stuff like that, you know, to everybody. Kind of a general statement" (Tr. 58).

Mr. Brock confirmed that Mr. King became his supervisor on approximately January 1, 1987, and that he (King) had previously served as president of the union local. Mr. Brock did not know whether or not Mr. King had also served as the miner's representative, and he could not recall whether Mr. King began counseling all employees in his department in 1987 about lunch hours and breaks because Mr. Hicks was "leaning on him" about these matters (Tr. 58).

In response to further questions, Mr. Brock stated that he believed that the safety of contractor employees, even though they are non-union, fall within his safety duties as long as they are on mine property, and that if he observes such employees in his work area without proper safety equipment, he will speak with them. He stated further that "most of the time" he will seek management's permission before leaving his job to speak with contractor employees, and that when Mr. Hertzog advised him that contractor employees "wasn't any of my business," this was the first time he had been told this (Tr. 64).

Mr. Brock confirmed that when he received the safety complaint concerning contractor employees, he did not seek out the employees or speak with them, but he did speak with Mr. Bayliss about it before calling MSHA. Mr. Brock stated that he did not know whether Mr. Hicks or others in management were aware of the fact that he had called MSHA (Tr. 65). He also confirmed that he had previously called MSHA inspectors about "general questions" and complaints. He believed management knew that he had called MSHA because "I went and asked Mr. King if I could use the phone to call them" (Tr. 66).

Mr. Brock stated that he got along "fair-to-middling" with Mr. King, and that "I've had better relationships but I've had worse too." He confirmed that when he called Mr. Bayliss at 2:00 a.m., he "guessed" that he woke him up, and he stated that Mr. Bayliss sounded "sleepy" and "agitated" (Tr. 69). Mr. Brock stated that after the meeting concerning this call, he was instructed to call the supervisor who was on duty, rather than Mr. Bayliss, when he was going to take a break, and he confirmed that Mr. Bayliss never put these instructions in writing (Tr. 70). Mr. Brock confirmed that after attempting to call Mr. Bayliss again at 6:00 a.m., he informed production foreman Jake Barber that Mr. Bayliss's phone was busy and that he was going to take his break (Tr. 71).

Mr. Brock stated that the complaint concerning the contractor employees and roofers was the only time he made a safety complaint to management, and he believed that the verbal warning,

disciplinary letter, meetings, and Mr. Bayliss' instructions concerning lunch and other breaks were all the result of management's punishing him for calling MSHA. In support of this conclusion, Mr. Brock stated that he had not previously been counseled by management "on anything of that nature," and that Mr. King had previously informed him that "I was twice as productive as I used to be" (Tr. 72).

Mr. Brock stated that as a result of his call to MSHA, two inspectors came to the mine and met with him and Mr. Bayliss and Mr. Hicks, to discuss the contractors' use of safety glasses and hard-toed shoes, but that no violations were issued because no contractors were working that day. Although no one from management discussed his call to MSHA, Mr. Brock stated that he was under the "general impression" by the "way they were acting" and their "general tones," that "they weren't too happy about it" (Tr. 74-75).

Robert Joe Thompson, respondent's lab technician, testified that he previously worked as a maintenance welder repairman, and that he serves as president of the local union at the mine. He confirmed that he attended the September 28, 1987, meeting with Mr. Brock and management concerning his work performance, and that Mr. Brock's telephone call of 2:00 a.m. to Mr. Bayliss was discussed. Mr. Thompson stated that Mr. Bayliss told him that he had given Mr. Brock a direct order to call him, Mr. Vargas, or Mr. King, before washing up for any breaks. Mr. Thompson also stated that he repeatedly asked Mr. Hicks for instructions as to who Mr. Brock was to call in the future, but received no answer, and Mr. Hicks kept referring to Mr. Brock's work record and attitude, and indicated that "he should act as an adult" (Tr. 79).

Mr. Thompson stated that on August 11 or 12, 1987, Mr. Brock requested him to call MSHA because contractors were working on a roof without wearing safety equipment. He confirmed that he did not tell management about the call, and management did not indicate that they knew he (Thompson) had called. However, Mr. Hertzog stated to him that there was no sense in Mr. Brock calling MSHA because such matters should be handled "in-house" (Tr. 80).

Mr. Thompson stated that he knew of no one being previously suspended with pay and he explained the procedures for employee breaks, and stated that while working in the maintenance department, he observed employees abusing the time for breaks and lunch, that it happens "everyday" (Tr. 84). When asked how management addresses these abuses, Mr. Thompson replied "it depends on who you are, how much brown nosing you do with the foreman. If the superintendent don't like you, you're going to take 2 or 3 minutes to get to break, take a break and get back to work. If they like me I can take 30, 45, an hour" (Tr. 85).

Mr. Thompson believed that Mr. Brock was being treated differently from other employees because "right after they thought he made this call to MSHA, he got into a big argument with Mr. Hertzog and Mr. McCormick" (Tr. 86). He also believed that the respondent intends to fire Mr. Brock, and is awaiting the outcome of this proceeding to do so (Tr. 87). He also stated that the respondent did not know until his testimony in this hearing that it was he who called MSHA, and that Mr. Hertzog suspected that Mr. Brock had called (Tr. 88).

Mr. Thompson confirmed that he serves as an alternate on the mine safety committee, and while he believed he had the authority to ask a contractor employee about wearing a hard hat, he has always contacted management and requested it to insure that contractor employees wear hard hats or safety glasses (Tr. 89). Mr. Thompson disagreed with management's position that the safety of contractor employees is within management's prerogative, and is of no business of the regular safety committee. Mr. Thompson stated that he did not know whether contractor employees are union or non-union (Tr. 93).

Mr. Thompson stated that he gets along fine with Mr. King, but that everyone does not get along "fine" with each other, that there is a lot of "chain pulling" going on, and although he does not sometimes tell management how to run the mine, management sometimes tells him to "mind his own business" (Tr. 94). Mr. Thompson believed that management was "fed up" with Mr. Brock when they thought he called MSHA after telling him that "it was none of his business" (Tr. 96). Mr. Thompson was not aware of any other employee being disciplined over breaks or lunch time, and that prior to Mr. Brock's case, he was never called in to any management meetings about such matters (Tr. 100).

On cross-examination, Mr. Thompson confirmed that his conversation with Mr. Hertzog concerning the handling of safety complaints "in-house" took place in October or November of 1987 in the conference room when Mr. Hertzog came to the mine to explain insurance benefits to mine employees (Tr. 107-108). Mr. Thompson stated that Mr. Hertzog was referring to the meeting between Mr. Brock, Mr. Hertzog, and Mr. McCormick when he made the statement that it was not Mr. Brock's business, and the fact that he believed Mr. Brock had called MSHA (Tr. 109).

Mr. Thompson confirmed that he checked no company records to support his statement that no other employees have ever previously been suspended for a day with pay. He also confirmed that Mr. Brock filed a grievance over the suspension, and that it is still pending (Tr. 111).

Arthur Wayne Roache, repairman/welder, confirmed that he has worked for the respondent for 21 years, and that he attended the September, 1987, meeting in Mr. Bayliss' office as a witness on

behalf of Mr. Brock. Mr. Roache stated that the meeting concerned Mr. Brock's telephoning Mr. Bayliss during the night, and that at the meeting, Mr. Brock requested Mr. Bayliss to put in writing his instructions as to who he was supposed to call before taking any breaks. Mr. Roache stated that Mr. Bayliss told Mr. Brock that he did not have to put it in writing, and after the meeting got "a little heated," Mr. Bayliss stated that Mr. Brock was to call him, Mr. King, or Mr. Vargas before taking any breaks (Tr. 113).

Mr. Roache confirmed that he worked the same hours as Mr. Brock, but on different jobs, and that they took their breaks at the same time. When asked whether he (Roache) had ever gone beyond the normal break hours, Mr. Roaches responded "I've took more; I've took less." He also stated that it was not unusual for other employees to take more time, and that "sometimes you get in later and go later," and that "sometimes the clocks will be a little different or whatever, and it will be some that go earlier." He admitted that lunch and break hours have been abused, and that "sometime last week I probably abused it. I probably went early," and that he had "probably" done this during August or September of 1987, but received no verbal or reprimands for doing so (Tr. 117). He identified miner Bob Clark as one who "went down 2 or 3 minutes early," and he stated that "all of us do it. Everybody is going to exceed it a little," and he confirmed that this was an ongoing practice during August and September of 1987, as well as "today." He further stated that "we have a whistle. Sometimes it works; sometimes it doesn't" (Tr. 118).

Mr. Roache confirmed that Mr. King was his main supervisor in August and September of 1987, and that Mr. Bayliss and Mr. Vargas also served as his supervisor. He confirmed that he was aware of the fact that Mr. Brock had received disciplinary warnings for exceeding lunch or break times, but knew of no other employees who have received any such actions. He stated that "we're generally called together as a group and told to watch our breaks and lunches," and that he was not aware of any other occasions that Mr. Brock was singled out over this issue (Tr. 119). He confirmed that he was not aware of the prior disciplinary actions taken against Mr. Brock, although he did recall that "they was on him over being late," but did not recall the time frame (Tr. 120).

Mr. Roache confirmed that he has been the subject of disciplinary action by management for being late or missing work, and has been counseled over missing too much work (Tr. 120). He explained management's absentee policy and program which was established by Mr. Bayliss, and he confirmed that employees were aware of it. He also confirmed that he had been called to Mr. Bayliss' office and counseled about missing too much time from work, but that nothing further happened to him (Tr. 121).

On cross-examination, Mr. Roache confirmed that nothing was said about employee health and safety at the meeting he attended with Mr. Brock, and there was no discussion about MSHA. He believed the meeting lasted 10 minutes, and he did not hear Mr. Bayliss tell Mr. Brock to call the supervisor who was on duty before taking a break. He confirmed that the respondent has had an absentee program in effect since he has worked at the mine, that management monitors attendance and absenteeism, and that once an employee is in the program he is subject to further discipline. He believed that Mr. Brock was placed in this program, but did not know when, and he explained that when management decides that an employee has missed too much work "they call you in and you start through the steps." He stated that he has never been "singled out" and counseled about his breaks or lunch, and that this is always done as a group. He was aware of one employee who was counseled "one-on-one" about his absenteeism, but could not recall the details (Tr. 127). He confirmed that he has attended meetings when Mr. Bayliss has talked about "tightening up on going to breaks, coming from breaks, and same time periods in going to lunch and coming back from lunch," and that Mr. Bayliss holds meetings on this subject "when he thinks it's needed" (Tr. 127). Mr. Roache confirmed that "counseling" is the first step leading to further discipline, and that following counseling, written or verbal warnings may be issued (Tr. 129).

David Mike St. John, accounts payable clerk, and member of the local union, testified that his office is in the general area of Mr. Hicks' office. He confirmed that he was at work when the two MSHA inspectors came to the mine on August 13, 1987, and met with Mr. Hicks and Mr. Bayliss just outside of Mr. Hicks' office door. Mr. Brock was not present then, but was called in later. Mr. St. John stated that he asked Mr. Bayliss what was going on, and that Mr. Bayliss was agitated and stated "that god damn Brock called MSHA on us." Mr. St. John stated further that he overheard a conversation that same afternoon or the next day when Mr. Brock, Mr. Hertzog, and Mr. McCormick were meeting "with the MSHA people," and heard Mr. Hertzog tell Mr. Brock that "this was a family matter and he didn't have any business calling MSHA, and that would Jerry (Brock) like for him to call the IRS on him" (Tr. 132). Mr. St. John stated that Mr. Hertzog appeared agitated.

On cross-examination, Mr. St. John confirmed that he had never previously heard Mr. Bayliss swear, and that he is a very soft spoken individual. He confirmed, however, that he "didn't use soft words at that time" and that Mr. Bayliss made the statement as he was passing through the hallway (Tr. 134). He was not sure of the time this was said, and stated that "I just know that they were talking about Jerry calling MSHA," and that he overheard the second conversation while he was passing through the hallway coffee shop (Tr. 135).

Mr. St. John confirmed that he was serving as the elected union secretary/treasurer in August of 1987, and still serves in that capacity. He confirmed that he recalled Mr. Hertzog's statement because he considered it a threat to Mr. Brock and told him that "you'd better look out." Mr. St. John stated that Mr. Brock responded that "we have to do what we have to do" (Tr. 138).

Anthony Rodney Sutherland, laborer, confirmed that he has worked for the respondent for over 8 years, and that he previously worked in the maintenance department for about 5 months, including August and September, 1987, on the evening shift. Mr.King was his supervisor at that time, and Mr. Brock was working the day shift. Mr. Sutherland confirmed that on one occasion, he was on a break with Mr. King and other members of the work crew, and that the break lasted for 25 minutes. He confirmed that he and the other maintenance employees did not receive any verbal or written warnings for taking excessive breaks, and that he has occasionally exceeded the allotted 15 minute break period for "a minute or two," and that he has observed other employees doing the same thing (Tr. 144). He confirmed that Mr. King was aware of the fact that he took a 25 minute "that one night," but that he was not aware of the other instances when this has occurred (Tr. 144).

On cross-examination, Mr. Sutherland stated that he could not recall the date that he took the 25-minute break with Mr. King, but confirmed that it occurred during a shutdown period when maintenance was being performed and when the work schedule was a "little bit" different (Tr. 146). He confirmed that this was the only time during his 8 years at the mine that Mr. King took an extended break. He also confirmed that he has attended meetings where Mr. King has talked "about attendance and keeping your break times to what they should be and your lunch times to what they should be," and that he has heard Mr. King state "Watch your breaks. Don't come in early. Don't leave early. Take a 15-minute break" (Tr. 147).

In response to further questions, Mr. Sutherland stated that Mr. Hicks was the plant manager and Mr. King's supervisor at the time of the extended break. He did not know whether Mr. Hicks was aware of the extended break, and confirmed that Mr. Hicks would not be in a position to know when employees took breaks unless someone were to tell him (Tr. 149). Mr. Sutherland confirmed that he has never been counseled for being late (Tr. 149).

Maurice Lamar Harris, laborer, stated that he has worked for the respondent for 15 years, and that on September 26, 1987, he was working in the maintenance department as a trainee. He confirmed that he worked with Mr. Brock for 3 days during this time, and that Mr. Vargas had instructed them to repair the gates

on the No. 2 dust collector at the "west end." There were four or five different gates in the area, and Mr. Vargas did not specify the particular gate in need of repair, and after searching for the equipment required to make the repairs, he and Mr. Brock went to the area and proceeded to take one of the gates apart. While they were working, Mr. King arrived in the area and asked them what they were going, and that he explained to Mr. King that they were taking the gate apart. Mr. King advised them that it was the wrong gate and instructed them to put it back together, and that this took an hour or two to finish. Mr. King then pointed out the correct gate which was in need of repair, and the work was finished by 3:00 p.m., a half-hour before the shift had ended (Tr. 150-156).

Mr. Harris stated that Mr. Vargas had come to the area where he and Mr. Brock were working on the gate before Mr. King did, and that Mr. Brock had gone to have his blood pressure checked at that time and was not there. Mr. Harris stated that he and Mr. Brock took the normal 15-minute break and 35-minute lunch hour that day. However, Mr. Harris confirmed that on other occasions, he and other employees had taken more than their allotted time for breaks, and that he was never reprimanded for doing this (Tr. 157). Although Mr. Harris believed that he and Mr. Brock had done a good job in repairing the gate, Mr. King informed them that the work was "shoddy," and Mr. Harris stated that the latex caulking would come out at the edges when it is pressed down, but that the gate was working when they finished the job (Tr. 158).

On cross-examination, Mr. Harris stated that the work on the gate in question was the first time he had ever worked on such a gate, that Mr. Brock was showing him how to repair it, and that they received the work assignment at 7:00 a.m. He confirmed that Mr. Brock pointed out the gate which they believed needed to be repaired, and he explained the time spent on gathering up the needed tools to do the job. He stated that Mr. King showed up before 9:30 a.m., and after informing him that they were working on the wrong gate, he proceeded to reinstall the gate bolts which he had removed, and Mr. King left the area. Mr. Brock returned 3 or 4 minutes later, and was there before 8:00 a.m. Mr. Harris stated he informed Mr. Brock that Mr. King had been by and informed him that they were working on the wrong gate, and that Mr. Brock had been gone for about 15 minutes to get his blood pressure check, but was back at 10:15 or 10:30 a.m. The wrong gate had been repaired and reinstalled before the lunch break (Tr. 166).

Mr. Harris stated that after lunch, Mr. Brock went to see Mr. McCormick, and returned to work on the gate at 1:00 p.m., or shortly thereafter (Tr. 167). Mr. King returned again in the afternoon, and discussed the work being performed on the gate with him, and Mr. Harris heard Mr. King use the term "shoddy" in

referring to the work he and Mr. Brock were performing on the gate (Tr. 169). Mr. Harris stated that he could not recall he and Mr. Brock sitting in the storeroom laughing and talking with another employee when Mr. King came in and told them "You're ten minutes past the break. It's time to get back" (Tr. 169). He did recall Mr. King coming to the storeroom while he and Mr. Brock were there, but did not hear Mr. King's statement (Tr. 170). Mr. Harris confirmed that another crew was working on gates nearby, but did not know how many gates they had completed, and that he did go to the area to borrow a tool from the other crew (Tr. 171). He confirmed that he and Mr. Brock discussed Mr. King's comment about the "shoddy" work, and that Mr. Brock told him "Don't even worry about it" (Tr. 174). He also confirmed that although Mr. Brock spent some time looking for a welder, there was no need for any welding work on the second gate which they repaired (Tr. 175). He also confirmed that Mr. Brock went to get his blood pressure checked because that was the only time the mine nurse was available, and that this was part of a routine check available to employees (Tr. 177).

Robert A. Clark, repairman/welder, confirmed that he has been employed by the respondent for 21 years, and that on approximately September 16, 1987, he was performing work on some dust collector slider gates adjacent to the area where Mr. Brock and Mr. Harris were working. He confirmed that he began work on this job a week or so prior to this time, and that on September 16, he repaired "two, maybe three" gates, and he explained the work he performed, and the amount of time required to do the work. He confirmed that after completing his work, he helped Mr. Brock and Mr. Harris repair the gate they were working on because they had some alignment problems (Tr. 179-184).

Mr. Clark confirmed that he and other employees have taken more than the allotted 15 minutes for breaks, and that he has taken more than 35 minutes for lunch and that Mr. King, Mr. Vargas, and Mr. Bayliss were aware of it because "they may be present when I come in to wash up early. Or, if it's getting back late, they may be present when I get back to the job." He could not recall that he or any other employee were ever given any oral or written reprimands for taking excessive break or lunch times (Tr. 185).

On cross-examination, Mr. Clark confirmed that he observed Mr. King and Mr. Vargas "coming and going" in the area where Mr. Brock and Mr. Harris were working on the gate, and that they were working approximately 35 feet from where he was working. He confirmed that the subject of overextending lunch periods and breaks has been discussed with the people in the maintenance department periodically at safety meetings (Tr. 188). He confirmed that he has observed Mr. Brock stop and "chit-chat" with people around the workplace, and has observed him being slow in

coming back from breaks and lunch because he's talking to people (Tr. 189-190).

Mr. Clark identified exhibit C-1, the memorandum concerning the August 17, 1987, meeting between Mr. King and Mr. Brock, and although the document reflects that he was present, Mr. Clark could not recall being at the meeting (Tr. 191). Mr. Clark confirmed that he was aware of the fact that Mr. Brock was a member of the safety committee, that he has approached him with safety complaints, that it was possible that Mr. Brock was discussing safety matters and union business when he stops and talks to people, and that he has been present when this has happened (Tr. 192).

Respondent's Testimony and Evidence

James R. King, maintenance supervisor, testified that he has been employed by the respondent since 1972, and he confirmed that he served as the elected president of the local union from 1975 to 1977, and again from 1979 to 1984, and served as vice-president in 1978. He also confirmed that he served as the miner's representative for each of the years that he served as president of the union, with the exception of 1975. He also confirmed that he was familiar with the Act and the employee's rights under the Act, that he was involved in reporting health and safety complaints on behalf of employees while a member of the union, and that he was never discouraged from doing so by the respondent. He stated that during the time he served as union president and representative of miners, he was not aware of any miners ever being disciplined by the respondent for calling MSHA, that he himself has called MSHA, but was never disciplined for doing so (Tr. 199).

Mr. King stated that he accepted a management position with the respondent in February, 1986, and became the maintenance supervisor in January, 1987, and he described his duties. He confirmed that during his tenure with the union, he received "group counselling" from the respondent regarding the proper time periods for lunch periods and morning and afternoon work breaks from time-to-time, and that when he became the maintenance supervisor, he conducted such counselling for the employees he was responsible for. He explained that he did this at safety meetings, and that Mr. Brock was present when this was done. He confirmed that he also conducted "one-on-one" talks with each employee in his department with respect to what he expected on the subject of breaks, and that after his initial counseling he still had problems with Mr. Brock, and employees Bill Hobbs and Dean McKellips. He explained that his individual talks with Mr. Hobbs and Mr. McKellips took place on the same day that he spoke with Mr. Brock, and that Mr. Hobbs and Mr. McKellips responded to his talks and improved their work habits and break practices (Tr. 199-205).

Mr. King confirmed that he spoke with Mr. Brock concerning his breaks and he explained what transpired at the meeting as follows (Tr. 205-208):

> Anyway, I told Jerry that he was taking too long on breaks, that I'd been--you know, I'd been paying particular attention to the breaks. They all knew I had been. Jerry's response was, "Give me a specific instance and time." And I said, "Jerry, for the last week, you've been late every break, every lunch during the past week." I said, "You come in too early, you leave too late on each and every of fifteen occasions that I've watched you."
>
> Jerry said, "well, I don't believe I have. Give me a specific example." I said, "Jerry, I'm telling you, each and every time, you're the last one back to the shop. You're the first one to come in. This deal with going to break in the afternoon and taking a 30-minute shit after the break has got to stop." Jerry said, "That's just a normal function of mine." And I said, "If it is, I'd be thinking about clocking out." And that was the words I used to do that. Jerry said he didn't feel like he was abusing it. I said, "Well, this is a verbal warning because I feel like you are. I want to document it, so I'm giving you a verbal warning." And that was the results of that meeting.
>
> * * * * * * *
>
> Q. And the week that you were referring to that you had observed him. You said you observed him for a week before you gave him this warning. Was that the week of August 10th, 1987?
>
> A. Yes, I assume. Yes, sir.
>
> Q. And you said that you had observed him at all the breaks. How were you able to do that? Was he coming into the shop near you, or how were you--
>
> A. I was being back in the shop at the time the guys were coming to and from their breaks and their lunch period. I was making a point to be in the shop to watch everybody, because they come in from all different placed.
>
> And secondly, the way we assign our jobs, everybody is not out for the day. Some guys may be coming back in. They may be through with their jobs at ten or fifteen minutes till break, and at that time, it's time

to reassignment them and communicate with them what you want. There's no sense in trying to send them out; they don't have time to get back to the job. But it's the best time to communicate with everybody how the jobs are going because I can't be on all the jobs at once.

Mr. King confirmed that a week prior to Mr. Brock's receipt of his verbal warning, Mr. Brock spoke to him about his belief that contractor employees were not following MSHA's guidelines on safety equipment. Mr. King stated that he informed Mr. Brock that he would look into the matter, and that he immediately checked on the contractor employees and spoke with them about wearing hard-toed shoes, hard hats, and safety glasses, but could not recall whether he informed Mr. Brock that he had done so. Mr. King denied that the verbal warning had anything to do with Mr. Brock's complaint concerning contractors or with MSHA, and that this was never brought up. He stated that at the time of the verbal warning to Mr. Brock, he had no information that Mr. Brock called MSHA. He also confirmed that the decision to issue the verbal warning was his (Tr. 209-210).

Mr. King explained the circumstances under which Mr. Brock and Mr. Harris were assigned to do some work on the slide gates on September 16, 1987, and he confirmed that the work assignment was made at 7:00 a.m., and that barring any problems, he would have expected the work to be completed by 1:00 p.m. He stated that he checked the progress of the work at 9:30 a.m., 11:50 a.m., and 3:00 p.m., and also visited the shop and waited there until the employees came back from their break. During his initial visit to the work area, Mr. King confirmed that Mr. Brock was not there, and that he advised Mr. Harris that he was working on the wrong gate, and asked about Mr. Brock's absence. Mr. Harris stated "I don't know. He went to use the bathroom or something" (Tr. 213). Mr. King later visited the storeroom at the conclusion of the 2:00 p.m., break, and Mr. Harris was there, but Mr. Brock came in later and he and Mr. Harris talked until 2:27 p.m., and then "kind of casually" returned to their work (Tr. 214). At the conclusion of the work shift, he found Mr. Brock back at the shop at 3:17 p.m., standing by his locker ready to go home, and he confirmed that normal "wash-up" time starts at 3:20 p.m., and that Mr. Brock was cleaned up and ready to leave at 3:17 p.m. (Tr. 216).

Mr. King stated that when he returned to the slide gate area, the gate was still stuck, and that he had previously told Mr. Brock about this and that it needed to be corrected. Mr. King stated that he assigned a night shift repairmen, M. U. Taylor, to fix the gate and he stayed until the work was completed. He confirmed that the repairs took approximately 20 minutes (Tr. 217). Mr. King confirmed that as a result of

Mr. Brock's work performance with respect to the gate in question, he took disciplinary action against Mr. Brock, and he explained as follows (Tr. 217-220):

> A. What I said to him was that I felt like, you know, the entire job that day was entirely wasted because he hadn't applied himself. And the basic problem we had that day was Brock wasn't on the job. The only time I found Brock on the job was at three o'clock when I came back.
>
> The other times where I looked up on the job or I went up on the job, he wasn't there. And he told me that he had seen Mr. Hicks and that he had went down to take his blood pressure and saw Mr. Hicks in the console, and he had talked to him for 30 minutes or so, one time. At this meeting, that's what he told me.
>
> And I knew that he had been to see Mr. McCormick at--right after lunch. They had to finish a safety meeting or something. But that didn't take very long, as it turned out. It just took 30 minutes or-- He was supposedly back on the job by 1:00.
>
> Q. Were you the person that made the determination to issue this disciplinary letter, sir?
>
> A. Yes.
>
> Q. And did your issuance of this disciplinary letter have anything to do with the fact that Mr. Brock had told you about the outside contractors not wearing personal protective equipment?
>
> A. No, didn't have anything to do with it.
>
> Q. And did the issuance of this disciplinary letter have anything to do with any discussions that Mr. Brock may have had on September 16th with Mr. McCormick about the safety committee?
>
> A. I wouldn't have known what those were. That conversation was . . .
>
> Q. Now, in the letter or in the warning, you talk about "taking care of personal business." What did you mean by that?
>
> A. Taking-- Well, he'd been down to get his blood pressure checked. Any time any of the employees leave the job to be gone, anything other than job-related trips such as to get parts or go find equipment or

something, and they're going to be gone for any period of time over like five minutes, they're supposed to tell me.

He had been gone 30, 45 minutes, and he hadn't notified me. Which puts me in a spot because if my supervisor or the plant manager asks me, "What's he doing over there?" I'm supposed to know. I'm supposed to know where he's at unless he's looking for-- I'm assuming it's needed tools unless . . . .

Mr. King reiterated that his disciplining of Mr. Brock had absolutely nothing to do with anything he may have done with MSHA, and while he knew that Mr. Brock was a committeeman, he stated that "I had no idea of anything he was doing with MSHA" (Tr. 221).

Mr. King stated that he issued no warning to Mr. Harris about his work activities of September 17, 1987, and while he assumed that he had previously spoken with him about breaks at one of his meetings, he could not recall doing so. He explained that Mr. Harris was a probationary employee, and he identified exhibit R-8 as a copy of a probationary work report concerning Mr. Harris, including his notations that he warned Mr. Harris about taking excessively long breaks on September 16, 1987, and October 7, 1987 (Tr. 222-223). He explained that he spoke with Mr. Harris about his break of September 16, but did not formally "warn" him under the applicable disciplinary procedure, and that he simply observed him taking an excessive break on October 7, but could not recall talking to him about it (Tr. 224).

Mr. King confirmed that he was at work on September 25, 1987, and that he was seated at his desk in Mr. Vargas' office, approximately 10 feet away from where Mr. Bayliss and Mr. Brock were discussing Mr. Brock's breaks. Mr. King explained what transpired as follows (Tr. 225-227):

A. John had called Jerry in to the office. He had told me at the lunch period he was aggravated because Jerry was continually in too early to wash up, and every time he asked him, he always had a reason. And he had just asked him what he was doing in at fifteen till or approximately that. And Jerry said he had dust in his eyes. He was just washing his face. And he was going to warn Brock about doing that. So, they were in the office, and John's first statement was, "I want you to tell me any time you go to break, to wash up or go to break." And Jerry says, "You want me to tell you?" And John said, "I want you to tell your supervisor any time you leave."

Q. There's no question in your mind that Mr. Bayliss indicated that Mr. Brock should call his supervisor?

A. No, there's no question because I was listening to it, and it caught my ear when John said, "call me." And I thought, no, he don't want him to do that. And John changed it to "call your supervisor," which is first of all, myself, Frank Vargas, and when we're not present due to the normal operations of the plant, it's the shift foreman that is on charge.

Q. So that on the morning of September 26th of 1987 at about two o'clock in the morning, there would have been what? A shift supervisor or someone there for Mr. Brock--someone at the plant--

A. That's correct.

Q. --for Mr. Brock to call and tell him that he was going on break.

A. Mr. Brock had asked to come in that day at midnight. We had offered overtime to everybody on that Saturday. Jerry had come to me and said, "I would like to come in at midnight instead." And I was granting his wish. And that is the reason he was working at that hour, some--only twelve hours after this conversation with John.

On cross-examination, Mr. King confirmed that Mr. Brock spoke with him about independent contractors working on the roof, and that at the end of the day, Mr. Brock stated to him that "I'm not getting any results. I want to call MSHA" (Tr. 229). Mr. King also confirmed that a company nurse is available for routine blood pressure checks, and that many employees wash up three or four minutes early. He also confirmed that he did not issue a formal warning to Mr. Harris because he was on probation and stated that "If he don't make it, he doesn't stay" (Tr. 229).

Mr. King confirmed that in May, 1987, he began to try and "crack down" on excessive use of break time and lunch times, and that during the week of August 10, 1987, he observed Mr. Brock using excessive time. He confirmed that he was in the break room observing employees, and that he also watched them coming back to the maintenance shop from his office. He confirmed that he kept no notes on the exact times Mr. Brock was "going in and coming back out," and stated that "He was the first one in and the last one out" (Tr. 231).

In response to further questions, Mr. King stated that when Mr. Brock asked to use the phone to call MSHA, it was close to the end of the work shift and that he asked Mr. Brock to wait

until the shift was over, and that he responded "Okay" (Tr. 241). Mr. King confirmed that he had no personal knowledge that Mr. Brock in fact called MSHA (Tr. 231). He also confirmed that Mr. Brock had never previously asked his permission to call MSHA, and that he asked him to wait because it was a busy time in his office, and since the shift was almost over, he did not believe that it made any difference for Mr. Brock to wait (Tr. 233). If Mr. Brock had asked him to use the phone at the start of the shift, he would have allowed him to do so (Tr. 233).

Mr. King explained that he spoke to the contractor employees in response to Mr. Brock's concerns, and informed them about the need to wear hard hats and safety glasses. Mr. King assumed that Mr. Bayliss was responsible for the contractor employees, and that he discussed the matter with him at a later time. Mr. King could not recall whether Mr. Brock had previously discussed contractor employees with him (Tr. 234-239).

Mr. King confirmed that he had no knowledge of the disciplinary meeting between Mr. Brock and Mr. Hicks, and was not present at this meeting because he was not asked to attend and was not involved in the incident concerning Mr. Brock's calls to Mr. Bayliss at his home. Mr. King did not know whether Mr. Hicks was aware of his prior verbal and written warnings to Mr. Brock at the time of the meeting, and he confirmed that Mr. Hicks and Mr. Bayliss never discussed Mr. Brock's calling MSHA inspectors with him at any time (Tr. 238-241).

John Bayliss, maintenance manager, stated that he has worked for the respondent for 3 years, and that Mr. King and Mr. Vargas are two of seven maintenance managers who work under his supervision. He stated that employee breaks and lunch hours have been an "ongoing problem," and that "it manifests itself in Mr. Hicks noticing the maintenance department that the laborers are taking too long breaks, and he instructs me to tighten up." Mr. Bayliss confirmed that he "passed the word" to Mr. King in 1987 to "tighten up on the break times and the lunch times." He also confirmed that he was aware that Mr. Brock was the miner's representative, and he explained the functions of the safety committee, and explained that safety complaints concerning mechanical and electrical matters are assigned to each of those departments for corrective action. He stated that the respondent has never prevented any employee from making complaints to MSHA, and has never taken any disciplinary action against any employee for doing so (Tr. 242-245).

Mr. Bayliss confirmed that he received a call from Mr. Robert McCormick on August 10, 1987, concerning a roofing contractor who was doing some work at the mine. Mr. McCormick informed him that he had received a complaint that contractor employees were not wearing safety equipment, and that he went to the job site with union repairman and welder Durst as a witness

to verify that he was pursuing the complaint. Mr. Bayliss stated that he spoke with the contractor employees and they advised him that someone else had been there earlier, and that they explained to Mr. King that they did not wear safety shoes on the roof because they would damage the roofing membrane material, and that the wearing of hard hats on the roof presented a problem. Mr. Bayliss stated that he informed the contractor employees to wear hard hats when they came down from the roof, and they accepted this instruction. Mr. Bayliss stated that he met with Mr. Brock later that day in the maintenance shop and informed him that he had visited the roof and did not believe that the employees working on the roof needed to wear hard hats, but that Mr. Brock disagreed and stated that "they have to wear hats all the time the same as we do" (Tr. 248). Mr. Bayliss later saw Mr. Brock without a hard hat in the maintenance shop, and when he asked him about it, Mr. Brock responded "If they don't have to wear a hat, I don't have to wear a hat." After Mr. Bayliss pointed out to Mr. Brock that a crane was above them and it was essential that he wear a hard hat, Mr. Brock "started wearing his hat" (Tr. 249).

Mr. Bayliss confirmed that he attended a meeting in Mr. Hick's office on August 13, 1987, and that two MSHA inspectors were present. Inspector Lavell informed him that Mr. Thompson had called MSHA about a roofing contractor, and Mr. Bayliss informed the inspector that the contractor was not working that day. The inspector then told Mr. Bayliss that he wanted to discuss the matter, and Mr. Brock was called to the meeting. Mr. Bayliss stated that at this time, the MSHA inspectors said nothing about Mr. Brock calling MSHA, and only Mr. Thompson was identified as the person who made the call. Mr. Bayliss stated that since the contractor was not working that day, everyone present went to lunch together, including the inspectors, Mr. Brock, Mr. Hicks, and himself, and that they discussed "MSHA in general, and the new political situation and administration in Washington" (Tr. 251). Mr. Bayliss stated that some 6 months after this meeting, MSHA began issuing citations to contractors working at the mine (Tr. 249-252).

Mr. Bayliss denied that he ever made the statement that "That god damn Brock called MSHA on us." He stated that he considers such language to be blasphemous, and while he sometimes used "flowery language," Mr. Bayliss stated that "that is not a word I ever use." Since the inspector informed him that Mr. Thompson had made the call to MSHA, Mr. Bayliss stated that he had no intention of saying anything about Mr. Brock making the call, and that he would have been surprised if Mr. Brock had made the call, but not surprised that Mr. Thompson made it because he felt that Mr. Thompson didn't know what was going on, and "so he called them" (Tr. 254-255).

Mr. Bayliss stated that he had nothing to do with the disciplinary letters issued by Mr. King to Mr. Brock. He confirmed that he observed Mr. Brock washing up too early before the lunch break on September 25, 1987, and remarked that "it was too early to get washed up." Mr. Brock informed him that he was getting dust out of his eyes and intended to go back to work, and Mr. Bayliss remarked "Well, I hope you are because you're always looking for specific instances of taking breaks or lunches, and this is one that I'm going to tell you about." Mr. Brock then stated that he was going back to work, and Mr. Bayliss said nothing to him at that time about Mr. Brock's need to tell him before taking any breaks (Tr. 256).

Mr. Bayliss stated that at approximately 2:00 p.m. on the afternoon of September 25, 1987, he met with Mr. Brock in the maintenance office, and that Mr. King was in the office. Mr. Bayliss stated that the following conversation took place with Mr. Brock (Tr. 257-258):

> A. I said to him that before--that he's got to be careful and that before he goes on breaks, he should tell me before he goes on breaks. And then, I realized that I was going to fall into a trap here because I'm never--or, very rarely in the vicinity of where he might be able to find me. So, I said, "You better don't call me, call your supervisor that's responsible for you at that time." And I meant either Jim or Frank or the shift foreman.
>
> Q. Now, would a shift foreman be the-- Strike that. The individuals you named, as well as the shift foreman, that would be someone that would be on duty basically 24 hours a day, so that if he were working an off shift, he'd have somebody to report to; is that right?
>
> A. And that's why I restated my position on this. Because he--
>
> Q. And what did he say after you told him that?
>
> A. He wanted it in writing what he's supposed to do.
>
> Q. All right. And what did you say?
>
> A. I didn't want to give it to him in writing.
>
> Q. And why didn't you want to give it to him in writing?
>
> A. Because we're in a real dynamic situation out there, and it's terribly difficult to cover every

eventuality for what a guy should do when he's going on breaks or leaving a job.

Mr. Bayliss stated that on the day following his meeting of September 25, 1987, with Mr. Brock, Mr. Brock telephoned him at his home at 2:00 a.m. in the morning and said "This is Jerry. I'm ready to go on break. Is that okay." Mr. Bayliss confirmed that the call woke him, but that he was not angry and was a light sleeper. He stated that he told Mr. Brock "Jerry, this is harassment. You understand what I mean, And let's talk about it tomorrow" (Tr. 258). Mr. Bayliss stated further that Mr. Brock was friendly and was not abusive, and said "Okay," and that he then took the phone off the hook, and subsequently learned that Mr. Brock tried to call him again at 6:00 a.m. (Tr. 259).

Mr. Bayliss confirmed that a meeting was held with Mr. Brock and others on Monday, September 28, 1987, to discuss the telephone calls by Mr. Brock, and he identified exhibit C-3 as a memorandum concerning that meeting. He stated that Mr. King was not present at the meeting because Monday was a busy day and that enough people were present to take care of the matter. Mr. Bayliss confirmed that he participated in the decision to give Mr. Brock a one-day suspension with pay, and that there were no discussions at the meeting concerning Mr. Brock's involvement with the roofing contractor, his safety activities, or his activities involving MSHA. Mr. Bayliss also stated that Mr. Brock's disciplinary history with the respondent was completely reviewed during the meeting, and that the suspension had nothing to do with any MSHA related activities. Mr. Bayliss also confirmed that the matter concerning Mr. Brock's reporting in to anyone before taking a break was discussed at the meeting, and he explained what transpired as follows at (Tr. 261-262):

Q. Was there a complete review on that date of Mr. Brock's disciplinary history with the company?

A. Yes.

Q. Now, did Mr. Brock ask, during the course of this meeting, whether he should continue reporting in to anyone regarding when he was going on break?

A. Yes, he did.

Q. And what was said to him at this meeting regarding that?

A. We said that he should tell his supervisor when he's going on break, and he wanted it written down exactly what we were saying, how he should do it, what he should do, and we declined that.

We felt like-- Or, I felt that he'd been there seventeen years. He knew the chain of command. He knew that his first-line supervisor was the first guy he should call. If he wasn't there, the second guy or myself. Or, if nobody was there, the shift foreman. He knew who was responsible for the plant, and we felt like, after seventeen years, he should know how to behave.

Q. Do you know whether the company has a policy of having the supervisory management people issue written orders to every employee about how they're supposed to do their job or when they're supposed to do their job?

A. We don't have a written order.

On cross-examination, Mr. Bayliss stated that he presumed that Mr. Hicks summoned Mr. Brock to the August 13, 1987, meeting with the MSHA inspectors because Mr. Brock was the miner's representative. He confirmed that Mr. Brock never contacted him directly about any problems with contractors, and it is his understanding that Mr. Brock contacted Mr. McCormick in this regard. Mr. Bayliss stated that he told no one about Inspector Lavell's telling him that Mr. Thompson had called MSHA because he didn't feel that it was important to do so (Tr. 264).

Mr. Bayliss confirmed that he never directed any other employee to call his supervisor before taking a break, and he explained that when Mr. King discussed the letter he had sent to Mr. Brock concerning his breaks, Mr. King told him that Mr. Brock was the only employee who did not accept the fact that he was taking long breaks and this was why Mr. King gave him the letter. Mr. Bayliss also confirmed that he told Mr. Brock that he was to contact Mr. King or Mr. Vargas because all other employees accepted this as the "chain of command," and that Mr. Brock "chose to say that he didn't know what the chain of command was" (Tr. 265).

In response to further questions, Mr. Bayliss confirmed that when he met with Mr. Brock about his calling him in the morning, he was aware of the fact that Mr. King had previously issued him verbal warnings concerning his work performance. When asked why he did not specifically discuss these prior matters with Mr. Brock, Mr. Bayliss stated that he believed the letters were in Mr. Brock's file and that there "were general discussion about his file. We just went over everything in his file" (Tr. 266). Mr. Bayliss denied that there was any friction between Mr. Brock and mine management, and stated as follows at (Tr. 270-271):

A. Some guys, if you give them a letter for a tardy or you give them, like I did with Wayne Roache, I counselled him on absenteeism, he just said, "Thanks.

I'm sorry I've done it," and go on. He don't write a grievance against me for doing that. Brock will never accept, "Thanks, I'm going to go on." So, whenever we get a situation involving Brock, and not anybody else, he will grieve that discipline.

* * * * * * *

A. I think that we--I feel like we try to be really creative in our punishment. Our punishments at Blue Circle--I've been there only three years, but we're extremely creative. We try to give a punishment that does not hurt the guy at all. We try to be just as fair and as positive as we can. We're not trying to run people off. In fact, we never run people off. I've never seen a guy, in three years, run off here. And we try to make a good employee out of a questionable one. And that's my whole object in discipline.

My discipline is not a situation--And I think that you can see our disciplines are not vindictive, nasty, I'm going to hurt you for what I consider to be kind of silly stuff. We're going to give you a day off to think about things and try to work with you to make you into a nice employee who's got a positive outlook on the company. That's what we try to do.

J. K. Hicks, operations manager, stated that he is in charge of the entire plant and has served in that position for 5 years. He stated that under no circumstances have any employees been disciplined for making safety complaints to MSHA or cooperating with MSHA. He confirmed that no action has ever been taken by the respondent against a miners' representative for performing his duties in connection with MSHA. He also confirmed that he is involved in the selection of contractors, and that company policy requires contractors to comply with MSHA's regulations while on mine property. He identified a copy of the respondent's safety and work rules, exhibit R-10, and confirmed that he was not aware of any employee ever being disciplined for reporting safety hazards, and that in many cases, employees have been thanked for reporting unsafe incidents (Tr. 275-278).

Mr. Hicks confirmed that he has observed some employees being tardy in coming to and from lunches and breaks, and that he discussed it with Mr. Bayliss in 1987, as well as with other managers and supervisors, and requested that they bring employees back to their normal time limits. He also confirmed that in August, 1987, he became aware of a complaint concerning a roofing contractor, and that he attended a meeting on August 13, 1987, when this was discussed. He stated that he summoned Mr. Brock to the meeting after the MSHA people advised that they were there in response to a complaint about the contractor. Mr. Hicks stated

that he was aware of a problem with contractor personnel wearing hard hats and had discussed it with Mr. Bayliss, and was informed that the matter had been resolved. Mr. Hicks stated that Mr. Thompson's name was mentioned during the meeting, and that he never heard Mr. Bayliss make any statement that "That god damn Brock called MSHA on us," had never heard Mr. Bayliss use such language, and that he would have been surprised if he made any such statement (Tr. 278-282).

Mr. Hicks stated that the respondent never took any disciplinary action against Mr. Brock because of any involvement with a complaint about contractors, and that he would strongly disapprove of any such action (Tr. 283). Mr. Hicks confirmed that he issued the September 29, 1987, memorandum concerning Mr. Brock's call to Mr. Bayliss after the meeting which was held to discuss that matter, and that Mr. Bayliss had discussed the matter with him earlier in the day before the meeting. Mr. Hicks confirmed that the disciplinary letter in question was his idea, and that the meeting with Mr. Brock had nothing to do with Mr. Brock's involvement in calling MSHA, and that other than knowing that Mr. Brock accompanied inspectors as the miner's representative, he had no knowledge that Mr. Brock called MSHA (Tr. 284).

Mr. Hicks explained what took place at his meeting with Mr. Brock as follows (Tr. 285-287):

> A. Well, basically, in the meeting we reviewed the personnel file of Mr. Brock and made him aware that he had quite a number of disciplinary incidents in his file, and he had recently been disciplined for some-- some events-- incidents which we regarded as pretty serious. Such things as he was getting into an area where we may not have any choice but to take further, very negative discipline to him. And we did not want to do that.
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> * * * * * * *
>
> A. I told him that his file was disturbingly getting more disciplinary letters and disciplinary actions against him in it and that he was getting to the point in his career where he needed to make a decision, that the decisions of his own which led to his getting those disciplines were his decisions. There weren't his supervisor's or mine or anyone else's. They were his decisions. And if he continued to make decisions to do things which would lead to further discipline and he knew the rules, he had the book, and we had had enough other with him-- "We" being his supervisors and other personnel in the plant. --that he was coming to the point in his career when he needed to decide if he

wanted to continue to be a member of our organization or not. And that we could take further discipline against him at that time, such as, days off or further discipline, and we had elected not to do that, that we had thought that he needed to consider very carefully what his future would be with the company and we were going to give him a day to do that with pay. At the end of that day, he was to come back and his actions would tell us what kind of decision he had come up with. We proceeded with that situation, and to my knowledge, Jerry has responded very positively.

Mr. Hicks stated that the disciplinary action he took against Mr. Brock was in compliance with the provisions of the applicable labor-management agreement, exhibit R-11, and he confirmed that he had not previously given a similar disciplinary suspension to any other employee, and explained as follows (Tr. 288):

A. Not precisely. We have tried to tailor disciplines to meet the matter at hand. We have given other disciplines, we believe, of a similar, positive disciplinary nature to other employees, again which we tailor to their particular situation.

Q. Do you feel that this discipline in any way singled Mr. Brock out?

A. No, I do not.

Q. Why do you say that, sir?

A. I believe we-- that Mr. Brock, in regard to his previous disciplinaries over a period of a number of years, was coming to the point where he was walking a tightrope as far as his future with the company, and I believed that the man had a lot of good in him and that it was up to us to try to figure out a way how to get that out of him.

On cross-examination, Mr. Hicks confirmed that all of the documents concerning prior disciplinary actions against Mr. Brock were reviewed by him prior to the September 18, 1987, meeting with Mr. Brock, and were considered at that meeting. He confirmed seeing a statement in Mr. Brock's file concerning a commendation to him from Mr. Bayliss for excellent attendance, and stated that "we try to give credit when its due" (Tr. 289-292).

Mr. Hicks confirmed meeting with MSHA Inspector Jim E. Jones, during his investigation of Mr. Brock's discrimination

complaint, but stated that he did not know it was a discrimination complaint, and did not recall Mr. Jones mentioning Mr. Brock's name. He also did not recall telling Mr. Jones that management assumed that Mr. Brock had called MSHA because its inspectors were raising the same issues that Mr. Brock had raised (Tr. 293).

In response to further questions, Mr. Hicks identified copies of prior disciplinary actions taken against Mr. Brock on April 13, 1986, May, 1986, and December 31, 1984. With regard to the April action, he stated that Mr. Brock could have been suspended for 4 days without pay, but was only suspended for 3 days. He confirmed that these actions, as well as the others found in exhibits R-1 through R-7, were in his file and considered at the time he took his disciplinary action against Mr. Brock (Tr. 293-295).

Mr. Hicks stated that he had no reason to believe that Mr. Brock had any involvement in contacting MSHA about any complaints, and that Mr. King and Mr. Vargas never advised him that Mr. Brock may have called in the inspectors. He confirmed that MSHA inspectors have been called in before and that no action has been taken against anyone for doing this, and he recognized the right of employees to call MSHA or their union representative as required (Tr. 298).

Robert Kenneth McCormick, industrial relations manager, stated that safety related matters fall within his job duties. He confirmed that in December, 1986, MSHA Inspector Jim Smeerz came to the mine in response to a complaint concerning three mine areas, and that he had a list of employee names who apparently had some knowledge of the complaint. Mr. McCormick stated that all of the employees in question and their miners' representative Nick Adams were allowed to communicate with the inspector, and no action was ever taken by the respondent against any of these employees for participating in the investigation of the complaint. Mr. McCormick also mentioned another MSHA complaint earlier this year, concerning an aluminum additive, and that Mr. Harris took samples of the material and no action was taken against any employee who participated in the inspection (Tr. 301-302).

Mr. McCormick confirmed that he was aware that Mr. King had disciplined Mr. Brock because the documents came to him to be placed in Mr. Brock's personnel file. He confirmed that he was at the meeting conducted by Mr. Hicks concerning Mr. Brock's calls to Mr. Bayliss, and that everything in Mr. Brock's file was reviewed at that meeting (Tr. 302). He confirmed that mine supervisory personnel do not report to him, and that he does not spend time watching employees to see whether they are taking long breaks. He also stated that each individual supervisor handles any "problem" employees working for them and that each supervisor

is responsible for disciplining their employees as needed (Tr. 304).

On cross-examination, Mr. McCormick stated that in August, 1987, Mr. Brock indicated that he had received complaints from employees concerning contractors, and that Mr. Brock told him that he was going to call MSHA. Mr. McCormick stated that subsequent to this time he believed that Mr. Brock had called MSHA, and stated that "He told me he was going to so I believed him" (Tr. 304). When asked whether he shared this with other management officials, Mr. McCormick stated "I don't know whether I did or not. It's not anything out of the ordinary" that someone would call MSHA. He denied that he told Mr. King at any time before he (King) disciplined Mr. Brock that he thought Mr. Brock had called MSHA (Tr. 305).

Mr. Maurice Lamar Harris was recalled by the court, and confirmed that Mr. King had spoken to him about taking long breaks in September, 1987. He stated that Mr. King told him that "I'm going to get you away from Brock because it will get you in trouble," and Mr. Harris assumed that Mr. King made this statement because "I guess, because they were watching Brock" (Tr. 307). Mr. Harris could not recall that Mr. King spoke to him on September 16, and October 7, about taking excessive breaks, and he stated that he only had two meetings with Mr. King "about my progress as a repairman." He stated that the only time Mr. King said anything to him about long breaks was when he and Mr. Brock were taking their breaks together (Tr. 308). Mr. Harris also stated that when he and Mr. Brock completed their work on the gate, it was working properly, that they both tested it and found it operable, but that he did not hear all of the conversation between Mr. Brock and Mr. King when Mr. King was there (Tr. 309).

MSHA's Arguments

MSHA asserts that after receiving a complaint concerning independent contractors at the plant who were not wearing safety equipment, Mr. Brock presented these concerns to mine management, including the maintenance supervisor and the industrial relations manager, and that through Mr. Brock's efforts, the matter was subsequently investigated by MSHA. MSHA concludes that the reporting of what Mr. Brock perceived to be safety violations concerning the independent contractors is clearly protected activity within the meaning of the Act.

MSHA asserts that subsequent to Mr. Brock's safety complaint to management on August 11, 1987, and the MSHA investigation of August 13, 1987, the following adverse actions were taken against Mr. Brock by the respondent:

1. August 17, 1987 - Brock received a verbal warning for taking too long at breaks and lunch.

2. August 28, 1987 - The verbal warning of August 17, 1987, was memoralized in writing.

3. September 18, 1987 - Brock was issued a written disciplinary warning for unsatisfactory job performance. The disciplinary specifically referenced a job Brock was assigned to on September 16, 1987. The disciplinary stated that Brock had spent entirely too much time away from the job on breaks and taking care of personal business. Also, it was stated that the assigned job had not been done properly.

4. September 25, 1987 - Brock was ordered to report to certain supervisors prior to going on breaks.

5. September 25, 1987 - A disciplinary meeting was held to discuss Brock's having called a supervisor at 2:00 a.m., to inform the supervisor that he was going on break. Brock was given a one day suspension and was to consider if he wanted to continue working for respondent.

In response to the respondent's assertions that the actions taken against Mr. Brock were for non-protected activities (abuse of break time and poor job performance), and the respondent's reliance on evidence of prior disciplinary actions taken against Mr. Brock, MSHA points out that these actions were taken years prior to the subject adverse actions, and that the most recent disciplinary action against Mr. Brock prior to August 17, 1987, was taken on May 22, 1986. MSHA further points out that Mr. Brock was commended by maintenance manager John Bayliss on January 9, 1987, for his excellent attendance record in 1986, and for his contribution to the department. MSHA concludes that such a commendation is inconsistent with the respondent's contention that the actions taken against Mr. Brock were for non-protected activities.

MSHA argues that the evidence in this case establishes that the respondent suspected that Mr. Brock had reported safety violations to MSHA and that its belief that he had done so was the motivating factor in taking the adverse actions against him. MSHA asserts that the abuse of break and lunch periods was an age old problem at the plant, and although employees testified that they had exceeded established time limits for breaks and lunch on various occasions, Mr. Brock was the only employee disciplined for abuse of break time. MSHA concludes that the respondent cannot claim ignorance of violations of break and lunch times by other employees because the evidence establishes that respondent's management observed such violations on occasion.

MSHA asserts that consideration should be given to the statements attributed to Mr. Bayliss, "one of the key players" in the disciplinary actions. MSHA points out that Mr. St. John testified that Mr. Bayliss commented "that god damn Brock called MSHA on us," and that Mr. St. John also testified that industrial relations manager Hertzog told Mr. Brock that "this was a family matter and he didn't have any business calling MSHA, and that would Jerry like for him to call the IRS on him" (Tr. 132). MSHA points out that Mr. St. John felt that this statement was a threat and told Mr. Brock "you'd better look out."

MSHA concludes that where adverse action closely follows protected activity, an illicit or discriminatory motive is established, and that in this case, the first adverse action against Mr. Brock was taken on August 17, 1987, only 6 days after he engaged in protected activity. Together with the failure of management to treat other employees' abuse of break time in the same manner as Mr. Brock, and the statements attributed to management officials, MSHA further concludes that Mr. Brock's engagement in protected activity was the motivating factor for the adverse actions taken against him.

Respondent's Arguments

Respondent argues that there is no nexus between the respondent's actions in this case and Mr. Brock's protected activity. Respondent asserts that the verbal warning to Mr. Brock on August 17, 1987, was given by maintenance supervisor Jim King, who made the sole determination with respect to this action. Respondent maintains that Mr. King was completely unaware at this time that Mr. Brock had called MSHA, and that his action had nothing to do with the complaint about roofing contractors. Respondent asserts that Mr. Brock's assumption that Mr. King knew that he had called MSHA is based on Mr. Brock's mentioning to Mr. King the use of a telephone for that purpose. Respondent points out that Mr. Brock testified that he did not really know for a fact that Mr. King, or any other management official, were aware of his call, and that Mr. King's credible denial is more reliable than Mr. Brock's supposition.

Respondent confirms that Mr. King was also responsible for giving Mr. Brock the written warning on September 16, 1987, for unsatisfactory work performance. However, respondent maintains again that Mr. King was unaware that Mr. Brock had called MSHA at the time of this action, and that Mr. King's action had nothing to do with the complaint about roofing contractors or any other of Mr. Brock's safety activities. Respondent asserts that Mr. King disciplined Mr. Brock because of his job performance and taking too much time away from the job.

Respondent confirms that Mr. Bayliss was responsible for having Mr. Brock report to his supervisor before washing up for

breaks or lunch beginning on September 25, 1987. Respondent asserts that the action taken by Mr. King was in response to Mr. Brock's abuse of break and lunch times, and that contrary to any suggestion that Mr. Bayliss knew that Mr. Brock had called MSHA, Mr. Bayliss in fact believed that it was Mr. Thompson who was responsible for the MSHA inspectors coming to the mine to look into the contractors' violations. With regard to the statement attributed to Mr. Bayliss by Mr. St. John, respondent asserts that Mr. Bayliss and Mr. Hicks testified that such a comment is wholly inconsistent with Mr. Bayliss' character.

Respondent further confirms that Mr. Hicks was responsible for the disciplinary meeting and 1-day suspension of Mr. Brock on September 28, 1987, for calling Mr. Bayliss at his home at 2:00 and 6:00 a.m., the previous Saturday morning. However, respondent maintains that Mr. Hicks was unaware of Mr. Brock's prior call to MSHA.

Respondent concludes that none of the management personnel who disciplined Mr. Brock between August 17, 1987 and September 29, 1987, knew that Mr. Brock had called MSHA, and that those individuals who concerned themselves with the matter thought that Mr. Thompson had called. Respondent maintains that confirmation of this fact lies in Mr. Brock's own testimony that he had no knowledge as to whether or not mine management in fact knew that he had called MSHA (Tr. 65). Respondent concludes that under the circumstances, MSHA has failed to show a nexus between the disciplinary actions and any protected activity by Mr. Brock.

As an affirmative defense, the respondent maintains that the evidence establishes that the disciplinary actions taken against Mr. Brock were motivated by unprotected activity and would have been taken in any event because of this unprotected activity. In support of its argument, the respondent asserts that each warning Mr. Brock received was warranted by, and a direct result of, his unprotected activity. Respondent points out that over the course of the week before the August 17, 1987, verbal warning, Mr. King observed Mr. Brock taking extended breaks and lunches at every opportunity, and that the warning was given after Mr. Brock had received group counselling and Mr. King had tried to convince him through individual counseling to willingly conform to company policy. Respondent further points out that Mr. Brock filed a grievance concerning this action and that it was summarily denied by an arbitrator on May 1, 1989.

With regard to the September 18, 1987, disciplinary warning for unsatisfactory job performance, the respondent asserts that the record clearly demonstrates that this warning was justified, and that this conclusion is reinforced by an arbitrator's decision of May 2, 1989, denying Mr. Brock's grievance with respect to this unsatisfactory job performance warning.

With regard to the instruction by Mr. Bayliss to Mr. Brock on September 25, 1987, to call his supervisor before washing up, respondent argues that Mr. Bayliss' response to Mr. Brock's "rebellious" attitude with regard to break and lunch time restrictions, was a constructive effort to foster Mr. Brock's cooperation, and that the warning was given after Mr. Bayliss observed Mr. Brock washing up early.

With regard to the September 29, 1987, disciplinary meeting and 1-day off with pay given to Mr. Brock by Mr. Hicks, respondent asserts that it was provoked specifically by Mr. Brock's calls to Mr. Bayliss in the middle of the night, and was the culmination of many disciplinary problems that Mr. Brock had recently created, as well as those he had been continually having since coming to work for the respondent. Respondent concludes that all of the disciplinary actions in question were in response to unprotected activity brought on by Mr. Brock himself, and that his combativeness with management and his disregard for his work responsibilities are unprotected activities, regardless of his involvement with safety or his safety concerns. Respondent further concludes that the Act simply does not protect an unsatisfactory worker, and that the instant case has nothing to do with safety in the workplace.

Findings and Conclusions

In order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, a complaining miner bears the burden of production and proof to establish (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Company, 2 FMSHRC 2768 (1980), rev'd on other grounds sub nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981); Secretary on behalf of Jenkins v. Hecla-Day Mines Corporation, 6 FMSHRC 1842 (1984); Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510-2511 (November 1981), rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no way motivated by protected activity. If an operator cannot rebut the prima facie case in this manner it may nevertheless affirmatively defend by proving that it was also motivated by the miner's unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Company, 4 FMSHRC 1935 (1982). The ultimate burden of persuasion does not shift from the complainant. Robinette, supra. See also Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983); and Donovan v. Stafford Construction Company, No. 83-1566 D.C. Cir. (April 20, 1984) (specifically-approving the Commission's

Pasula-Robinette test). See also NLRB v. Transportation Management Corporation, ____ U.S. ___, 76 L.ed.2d 667 (1983), where the Supreme Court approved the NLRB's virtually identical analysis for discrimination cases arising under the National Labor Relations Act.

Direct evidence of actual discriminatory motive is rare. Short of such evidence, illegal motive may be established if the facts support a reasonable inference of discriminatory intent. Secretary on behalf of Chacon v. Phelps Dodge corp., 3 FMSHRC 2508, 2510-11 (November 1981), rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983); Sammons v. Mine Services Co., 6 FMSHRC 1391, 1398-99 (June 1984). As the Eight Circuit analogously stated with regard to discrimination cases arising under the National Labor Relations Act in NLRB v. Melrose Processing Co., 351 F.2d 693, 698 (8th Cir. 1965):

> It would indeed be the unusual case in which the link between the discharge and the [protected] activity could be supplied exclusively by direct evidence. Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence. Furthermore, in analyzing the evidence, circumstantial or direct, the [NLRB] is free to draw any reasonable inferences.

Circumstantial indicia of discriminatory intent by a mine operator against a complaining miner include the following: knowledge by the operator of the miner's protected activities; hostility towards the miner because of his protected activity; coincidence in time between the protected activity and the adverse action complained of; and disparate treatment of the complaining miner by the operator.

In Bradley v. Belva Coal Company, 4 FMSHRC 982, 993 (June 1982), the Commission stated as follows:

> As we emphasized in Pasula, and recently re-emphasized in Chacon, the operator must prove that it would have disciplined the miner anyway for the unprotected activity alone. Ordinarily, an operator can attempt to demonstrate this by showing, for example, past discipline consistent with that meted to the alleged discriminatee, the miner's unsatisfactory past work record, prior warnings to the miner, or personnel rules or practices forbidding the conduct in question. Our function is not to pass on the wisdom or fairness of such asserted business justifications, but rather only to determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed.

Protected Activity

It is clear that Mr. Brock enjoys a statutory right to voice his concern about safety matters or to make safety complaints to mine management or to MSHA or one of its inspectors without fear of retribution or harassment by management. Management is prohibited from interfering with such activities and may not harass, intimidate, or otherwise impede a miner's participation in these kinds of activities. Secretary of Labor ex rel. Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981), and Secretary of Labor ex rel. Robinette v. United Castle Coal Co., 3 FMSHRC 803 (April 1981). Baker v. Interior Board of Mine Operations Appeals, 595 F.2d 746 (D.C. Cir. 1978); Chacon, supra.

Unprotected Activity

The respondent asserts that the disciplinary actions taken against Mr. Brock for poor work performance and for abusing lunch and work breaks were justified. Respondent also asserts that the disciplinary meeting resulting in Mr. Brock's being given a day off with pay was prompted by Mr. Brock's calling his supervisor in the middle of the night to obtain permission to cleanup and was indicative of his combative attitude and disregard for his work responsibilities. If the acts and conduct attributed to Mr. Brock which resulted in the disciplinary actions in questions are true, I conclude and find that they may not be considered protected activities under the Act.

The Alleged Disparate Treatment of Mr. Brock

While it is true that other employees may not have been formally disciplined pursuant to the applicable labor-management rules and procedures, the fact is that other employees have been counseled and talked to by supervisors with respect to their abuses of work and lunch breaks. Given the graduated disciplinary punishment scheme for offenses, I can only conclude that all employees are equally at risk for repeat offenses which may lead to suspension or discharge.

Mr. Thompson confirmed that employees abuse their break times, and Mr. Roache, who also worked for Mr. King, confirmed that he had been counseled for missing too much work. He explained that the respondent's absentee policy and program includes a graduated disciplinary plan which begins with counseling, and then moves to a letter, time off from work, and termination (Tr. 120-121). Mr. Sutherland confirmed that Mr. King has counseled employees at various meetings about taking extended breaks (Tr. 147). Mr. Clark testified that he has observed Mr. Brock "chit-chatting" with people at the workplace,

and has observed him coming back "slow" from his lunch and work breaks because he would stop and talk with people (Tr. 190).

Mr. King testified that he spoke with employee Maurice Harris about taking excessively long breaks on September 16, 1987, but did not formally "warn" him under the disciplinary rules. He also observed him taking another long break on October 7, 1987, but said nothing to him. Mr. King explained that Mr. Harris was not issued a formal warning because he was a probationary employee and that if he did not successfully complete his probation, he would not be retained (Tr. 229). The record shows that Mr. Harris did not satisfactorily complete his probationary period because of his failure to perform adequately, and was not accepted in the position of repairman welder (Arbitrator's decision of May 2, 1989, pg. 4, Appendix B to respondent's brief).

Mr. King also testified that during his prior tenure as an hourly employee and union official and miners' representative, he was counseled by the respondent about the use of lunch and work breaks. He confirmed that during this time he was unaware of any employee being disciplined for calling MSHA, and he stated that he had called MSHA and was never disciplined for doing so (Tr. 199).

Mr. King confirmed that after he became a supervisor, he continued his "one-on-one" counselling with his employees concerning lunch and work breaks, including Mr. Brock and two other employees, all of whom had "problems" with their breaks. Mr. King confirmed that Mr. Hicks informed him that there was a need to "tighten up" the lunch and work breaks by his employees and that this would be one of his priorities. He confirmed that sometime in May, 1987, he began counselling his employees in group sessions, and found that Mr. Brock, and employees Bill Hobbs and Dean McKellips were still having problems with their lunch and work breaks. He spoke with Mr. Hobbs and Mr. McKellips during the same day in August 1987, when he spoke with Mr. Brock concerning their long breaks, and that Mr. Hobbs and Mr. McKellips acknowledged they were taking too long on their breaks and agreed to improve. Under these circumstances, Mr. King believed that his talks with these two employees was all that was necessary, and that they responded and showed improvement in their work (Tr. 205).

Mr. King stated that when he met with Mr. Brock and his union representative on August 17, 1987, to discuss his extended lunch and work breaks, Mr. Brock took the position that he was not abusing his breaks and asked him for more specific information. Mr. King informed Mr. Brock that he had personally observed his comings and goings during the prior week, and that on at least 15 separate occasions he observed that he was late for every break. Mr. King confirmed that on the basis of his

personal observations as stated to Mr. Brock he concluded that Mr. Brock was abusing his break times and he decided to give him a verbal warning in order to document his conclusion and action (Tr. 206).

Industrial relations manager Robert McCormick confirmed that the disciplining of individual employees is left to the discretion of their supervisors. Operations manager Hicks testified that individual disciplinary actions are tailored to the particular circumstances concerning each employee. He did not believe that Mr. Brock was singled out for disciplinary action. He confirmed that Mr. Brock's previous disciplinary record over a number of years of his employment with the respondent was considered and discussed with him at the time he disciplined him on September 29, 1987, and that Mr. Brock had reached the point where "he was walking a tightrope as far as his future with the company" was concerned (Tr. 288).

Mr. Brock denied receiving any counseling from management prior to the disciplinary actions in question (Tr. 71-72). However, the record reflects the following prior disciplinary actions taken by the respondent against Mr. Brock for violations of company rules and policies:

May 22, 1986. Disciplinary suspension for 3 days for lost time accident. In lieu of the suspension, Mr. Brock was required to prepare a job safety analysis. (Exhibit R-14).

December 31, 1984. Verbal warning for a safety rule infraction.

July 27, 1984. Supervisory warning for excessive time in the use of toilet facilities.

September 21, 1984. Supervisory warning for reading newspaper in the toilet for thirty minutes (exhibit R-7).

July 27, 1984. Supervisory counseling for leaving job without foreman's permission, and for leaving job early to go home. (Exhibit R-6).

March 17, 1983. Supervisory counseling for leaving job early repeatedly. (Exhibit R-5).

April 23, 1982. Disciplinary warning for tardiness. The warning noted that Mr. Brock had been counseled on August 25, 1981, and given a written warning on September 16, 1981, for tardiness. (Exhibit R-4).

September 16, 1981. Disciplinary warning and reprimand for leaving work without foreman's permission. (Exhibit R-3).

April 3, 1986. Five day suspension without pay for failing to follow supervisor's safety instructions and failing to take steps to insure his (Brock's) safety in connection with an accident in which Mr. Brock broke his foot. (Exhibit R-13).

September 25, 1979. Disciplinary warning and five day suspension for sleeping on the job. The warning noted that Mr. Brock had been previously disciplined for sleeping on the job. (Exhibit R-2).

February 1, 1978. Supervisory counseling for excessive tardiness. (Exhibit R-1).

I find no credible or probative evidence to establish or suggest that Mr. King, Mr. Bayliss, and Mr. Hicks conspired to reach out and isolate or treat Mr. Brock any differently from other employees because of his safety activities or involvement with the MSHA visit concerning the complaint about independent contractors. The record establishes that each of the disciplinary actions in question were taken independent of each other, and were based on the facts then known to management. Further, Mr. Brock's record reflects a consistent application of its disciplinary rules by the respondent in each instance where such action was warranted. The record establishes that Mr. Brock was put on notice by the respondent that he would be subject to more severe disciplinary sanctions for repeat offenses, and absent any evidence to the contrary, I can only conclude that what set Mr. Brock apart from other employees was his record of non-compliance with company work rules over a rather extended period of time. The fact that he serves as a union official and member of the safety committee does not insulate Mr. Brock from legitimate managerial business-related non-discriminatory personnel actions. UMWA ex rel Billy Dale Wise v. Consolidation Coal Company, 4 FMSHRC 1307 (July 1982), aff'd by the Commission at 6 FMSHRC 1447 (June 1984); Ronnie R. Ross, et. al v. Monterey Coal Company, et al., 3 FMSHRC 1171 (May 1981).

MSHA's conclusions that the commendation letter given to Mr. Brock by Mr. Bayliss on January 9, 1987, is inconsistent with the respondent's contentions that the disciplinary actions taken against Mr. Brock were for non-protected activities is rejected. The letter in question recognized Mr. Brock's excellent attendance record in 1986. The individual actions in question had nothing to do with Mr. Brock's attendance per se. They deal with conduct which took place while Mr. Brock was at work, and concern separate and distinct violations of work rules and policies.

Mr.Hicks acknowledged the letter and commented that he believed in "giving credit where credit is due," and he confirmed that he saw the letter when he considered Mr. Brock's overall employment record at the time of his disciplinary action of September 29, 1987.

The Disciplinary Actions Taken Against Mr. Brock

As noted earlier, Mr. Brock's grievances concerning the August 17, 1987, verbal warning for taking long work and lunch breaks, and the September 18, 1987, disciplinary action for unsatisfactory job performance, were both denied and the arbitrators who heard those cases found ample cause for the actions taken against him. Although I am not bound by decisions of arbitrators, I may nonetheless consider such decisions. Chadrick Casebolt v. Falcon Coal Company, Inc., 6 FMSHRC 485, 495 (February 1984); David Hollis v. Consolidation Coal Company, 6 FMSHRC 21, 26-27 (January 1984); Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981).

With regard to the August 17, 1987, verbal warning for abusing break times, I take note of the arbitrator's findings that there was sufficient evidence that Mr. Brock was guilty of taking excessive breaks and lunch periods and gave no indication to management that he would improve, and that management had good cause to issue the verbal warning. I also take particular note of the arbitrator's comments at page 8 of his decision, that while it was true that two other employees did not receive verbal warnings for similar offenses, they both indicated to their supervisor that they recognized the problem and would correct their abuse of break times. I agree with the arbitrator's findings. I further find and conclude that the preponderance of the evidence adduced in the instant case establishes that Mr. Brock abused his break privileges, and given the fact that he had been previously counseled in this regard, I further conclude and find that Mr. King's action was clearly justified and warranted.

With regard to the September 18, 1987, written disciplinary warning for unsatisfactory job performance, I take note of the arbitrator's findings that Mr. Brock was away from his work excessively on the day in question, was inattentive in the manner in which he performed the work, that his work productivity and performance on that day was below what was expected by management, and that he was shirking his duty and avoiding work. Although the arbitrator took into account the union's assertions that Mr. Brock was being punished because of certain union activities, for allegedly reporting some unspecified "alleged discrimination" to a government agency, and that management accorded him disparate treatment, the arbitrator nonetheless concluded that these factors did not account for Mr. Brock's

overall lack of productivity and most of his absences from his assigned work place in question, and that this incident was not an isolated one and indicated a course of conduct on the part of Mr. Brock which had been carried on over a period of time about which he had been warned repeatedly (Arbitrator's decision, pgs. 9-10).

I also take note of the credibility findings by the arbitrator with respect to Mr. King. The arbitrator concluded that Mr. King, who was shortly removed from the union ranks before he became a management supervisor, could not have had the motivations attributed to him in the area of "union discrimination" (Arbitrator's decision, pg. 10). The arbitrator also found that Mr. King was a credible witness and was sincere in disciplining Mr. Brock for his unsatisfactory job performance, and had no axes to grind since his past history with the union indicated that he would have a good understanding of Mr. Brock's perspective in the grievance case (Arbitrator's decision, pg. 8).

Although I am in agreement with the arbitrator's findings, on the basis of my own independent observations of Mr. King during the course of the hearing, I conclude and find that he is a credible witness. With regard to the merits of Mr. King's conclusions that Mr. Brock's work performance on the day in question was less than adequate, I find that his testimony and assessment of Mr. Brock's work performance on the day in question supports the actions taken by him and was clearly within his managerial authority and discretion. Mr. King testified that he assigned the work in question to Mr. Brock and his helper at 7:00 a.m., and he expected the work to be normally completed by at least 1:00 p.m. Mr. King stated that he made occasional visits to the work area, and when he visited the area at 11:50 a.m., Mr. Brock was absent, and Mr. King found that the helper, who was a trainee probationary employee, was working on the wrong gate. When asked about Mr. Brock's absence, the trainee informed Mr. King that he did not know where Mr. Brock was, and speculated that he had gone to use the rest room. Mr. King later visited the storeroom area at the conclusion of the 2:00 p.m. break, and found the helper there, and Mr. Brock walked in later and spoke with the helper before they both "casually" walked back to their work area. Mr. King later found Mr. Brock at his locker cleaned up and ready to go home 3 minutes before the normal "wash-up" time.

Mr. King testified that Mr. Brock had wasted the entire day because he did not apply himself to the job to which he was assigned. Mr. King indicated that the only time he found Mr. Brock on the job was at 3:00 p.m., when he visited the area. He further stated that Mr. Brock informed him that he had left the job to get his blood pressure checked, visited with Mr. Hicks for approximately 30 minutes, and had attended a safety meeting which took another 30 minutes. The helper, Mr. Harris, confirmed

that Mr. Brock left the work area several times, and that when Mr. King found them in the store room, he ordered them back to work because they had overstayed their break time by 10 minutes. Mr. Harris also confirmed that when he advised Mr. Brock about Mr. King's assessment of their "shoddy work," Mr. Brock told him "not to worry about it."

After careful consideration of all of the testimony concerning Mr. Brock's work performance which led to the disciplinary warning of September 18, 1987, including Mr. Brock's and Mr. Harris' versions of the incident, I believe Mr. King's version of the events which led him to issue the disciplinary action, and I conclude and find that it was warranted and justified.

With regard to Mr. Bayliss' order of September 25, 1987, to Mr. Brock instructing him to report to his supervisors before taking a break, I find nothing unusual about this action, nor do I find that it rises to the level of an adverse disciplinary action. Given Mr. Brock's record of abuse of break times, I believe that it was well within Mr. Bayliss' supervisory authority to instruct Mr. Brock to report to a supervisor before taking breaks. The fact that the respondent has no written policy authorizing supervisors to do this, and the fact that other employees may not have been similarly instructed is irrelevant. It seems obvious to me from the record, that management has had an ongoing problem with Mr. Brock in that he does not appear to accept or recognize the fact that he abused his break times, while other employees do and agree to improve their work habits. This attitude by Mr. Brock sets him apart from the other employees who were counseled about their break times, acknowledged their abuses, and promised to improve. Under these circumstances, I find nothing discriminatory about the instructions given to Mr. Brock by Mr. Bayliss.

Mr. Bayliss testified that Mr. Hicks had informed him to "tighten up" on maintenance department employees taking extended lunch and work breaks, and that after observing Mr. Brock washing up early before his lunch break on September 25, 1987, he discussed it with him, and that Mr. Brock informed him that he was simply washing dust out of his eyes. Mr. Bayliss stated that he met with Mr. Brock at 2:00 p.m., that same day and initially instructed him that he was to tell him (Bayliss) before taking any breaks, but after realizing that this may be a problem because Mr. Brock may not be able to find him, he instructed Mr. Brock to contact his responsible supervisor. Mr. Bayliss stated that he had in mind the shift foreman, or Mr. King, or Mr. Vargas, as the supervisors to be contacted.

Mr. King testified that he was present when Mr. Bayliss instructed Mr. Brock to inform his supervisor before taking a break. Mr. King acknowledged that Mr. Bayliss first told

Mr. Brock to contact him (Bayliss), but then told him to call his supervisor. Mr. King confirmed that he and Mr. Vargas were Mr. Brock's normal shift supervisors, but that the shift in question when the phone call was made was a midnight Saturday shift and was not Mr. Brock's normal work shift. The company had offered overtime for anyone willing to work that day, and Mr. Brock had requested to work the midnight shift, and Mr. King allowed him to do so.

Mr. Brock testified that Mr. Bayliss instructed him to call him (Bayliss), or Mr. King or Mr. Vargas before washing up for breaks. Since Mr. Vargas and Mr. King were not present during the midnight shift in question, Mr. Brock confirmed that he telephoned Mr. Bayliss at his home, and that he did so because he was simply following his instructions. Mr. Brock confirmed that he called Mr. Bayliss at 2:00 a.m., and that he sounded "sleepy and agitated." He also acknowledged that he attempted to call him again at 6:00 a.m., but that the phone was busy. He then informed shift foreman Jake Barber that Mr. Bayliss' phone was busy and that he was informing Mr. Barber that he was taking a break.

Mr. Bayliss testified that the phone call by Mr. Brock woke him up, but that he was not angry, that Mr. Brock was friendly and not abuse, and that after the call, he took the phone off the hook. Mr. Bayliss further testified that he informed Mr. Brock that he considered the call as harassment and that he would discuss the matter with him the next day.

Mr. Hicks testified that he made the decision to initiate the disciplinary meeting of September 29, 1987, and to give Mr. Brock a day off with pay to consider his future with the company. Mr. Hicks confirmed that he took the action because of the call made to Mr. Bayliss, and because of Mr. Brock's record of disciplinary incidents and actions. He also confirmed that the action taken was in compliance with the applicable labor-management agreement, and that after this action was taken, Mr. Brock has responded "very positively" (Tr. 287).

Mr. Brock acknowledged that when he called Mr. Bayliss at 2:00 a.m., Mr. Bayliss informed him that he believed he was being harassed. Notwithstanding this initial conversation, Mr. Brock again called Mr. Bayliss at 6:00 a.m., and found that the phone was busy. (Mr. Bayliss had taken it off the hook). Mr. Brock's explanation for not contacting Mr. Vargas or Mr. King was that they were not at work. I find this to be a rather weak excuse, since Mr. Bayliss also was not at work. Mr. Brock could have called Mr. Vargas or Mr. King at their homes, but instead, he chose to call Mr. Bayliss. Mr. Brock also chose not to initially speak to the foreman who was at work on the same shift, and only spoke with him to inform him that he was taking a break after he could not reach Mr. Bayliss at 6:00 a.m. In my view, if

Mr. Brock truly believed that he was required to contact only Mr. Bayliss before he could take a break, the prudent thing for him to have done was not to take his 6:00 a.m. break since he could not reach Mr. Bayliss at that time. Instead, he informed the foreman who was on the shift and took his break.

Given the fact that Mr. Bayliss had spoken with Mr. Brock on two occasions the day before the phone calls, and the fact that Mr. Brock attempted to again call Mr. Bayliss after he had awakened him in the middle of the night knowing full well that Mr. Bayliss considered the initial call to be harassment, I believe that Mr. Bayliss' conclusion in this regard has a ring of truth about it. I further believe that Mr. Brock's calls to Mr. Bayliss were prompted by Mr. Brock's prior encounters with Mr. Bayliss about his abuse of break times, Mr. Bayliss' refusal to put his instructions in writing, and Mr. Brock's obvious disagreement that he was abusing his break privileges. I also believe that Mr. Brock wished to "make his point" by calling Mr. Bayliss in the middle of the night. Although Mr. Brock may have made his point, he also precipitated the disciplinary action taken against him. Under all of these circumstances, I conclude and find that this action was justified and warranted.

Respondent's Knowledge of Mr. Brock's Safety Complaint to MSHA

Mr. Brock confirmed that in his capacity as a safety committeeman, he has on past occasions called and spoken with MSHA inspectors concerning safety complaints and "general questions" (Tr. 65). I find no evidence that the respondent has ever inhibited Mr. Brock from performing his safety duties in this regard. As a matter of fact, Mr. Brock confirmed that upon his return to work after his 1-day suspension with pay for having called Mr. Bayliss in the middle of the night, the respondent took no action against him because of his involvement with mine safety matters (Tr. 56).

Mr. Hicks testified that he recognized the right of an employee to call MSHA or their union to the mine, and that MSHA inspectors have been called to the mine in the past and no action has ever been taken by management against anyone for doing so (Tr. 298). He also confirmed that no action has ever been taken by management against any miners' representative for performing any MSHA related safety activities (Tr. 275-278). Mr. Bayliss testified that the respondent has never prevented any employee from making complaints to MSHA, and that no disciplinary action has ever been taken against any employee for doing so (Tr. 242-245). I find Mr. Hicks and Mr. King to be credible witnesses, and the record is devoid of any evidence that the respondent has ever prevented or inhibited any employee or safety committeeman from exercising their safety rights.

Mr. McCormick testified that an MSHA inspector came to the mine in December, 1986, in response to employee safety complaints, and that the miners' representative was permitted to meet with the inspector and that no action was taken against any of the miners for making the complaint. He also mentioned another recent complaint by an employee which resulted in an MSHA inspection, and confirmed that no action was taken against the complaining miner.

The crux of MSHA's case lies in its belief that mine management, and in particular Mr. King, Mr. Hicks, and Mr. Bayliss, believed that Mr. Brock had called MSHA to come to the mine to look into a complaint concerning certain alleged violations by independent contractors and that the disciplinary actions taken against Mr. Brock were taken to retaliate against him for calling MSHA to the mine.

Mr. Brock testified that he was under the "impression" that mine management was not too happy about his calling MSHA about the independent contractors. When asked the basis for this impression, he responded "the way they were acting and just general tones" (Tr. 74). He confirmed that at no time during his disciplinary meetings with Mr. King, Mr. Bayliss, and Mr. Hicks did anyone say anything to him about his calling MSHA (Tr. 74-75).

Mr. King testified that at the time he issued the verbal warning of August 17, 1987, he had no information that Mr. Brock had called MSHA about the independent contractors. However, he acknowledged that a week earlier, Mr. Brock spoke to him about his belief that contractor employees were not following MSHA's safety equipment guidelines. He also acknowledged that Mr. Brock told him that he was not getting any results concerning his contractor complaint and wanted to call MSHA, and that he (King) asked Mr. Brock to wait until the end of the shift before using the phone to call. I take note of the arbitrator's comments in his decision of May 1, 1989, that the respondent in that proceeding acknowledged that Mr. King told Mr. Brock to go ahead and call MSHA when he got off work (Arbitrator's decision, pg. 6).

Although Mr. King denied that he had any personal knowledge that Mr. Brock had called MSHA about the independent contractors, his own testimony supports a conclusion that he knew that Mr. Brock was concerned about the contractors, expressed his dissatisfaction with what he perceived to be management's inaction, and that he specifically notified Mr. King that he wanted to call MSHA. Further, Mr. King told Mr. Brock that he could use the office phone to call, but to wait until the end of the shift to place the call because of pressing business in the office. Under all of these circumstances, I conclude and find that there is a strong inference that Mr. King either knew or

suspected that Mr. Brock had called MSHA about the complaint concerning the roofing contractor.

With regard to the statement attributed to Mr. Bayliss by Mr. St. John, having viewed Mr. St. John during the course of his testimony, I find him to be a credible witness. Notwithstanding Mr. Bayliss' denials to the contrary, and taking into account his admission that he sometimes uses "flowery language," I believe that he made the statement in question. Aside from the statement, I believe that there is other sufficient evidence to support a reasonable inference that Mr. Bayliss also knew or suspected that Mr. Brock was responsible for the MSHA inspectors coming to the mine to follow up on the complaint concerning the contractors.

Mr. Bayliss acknowledged that he was first informed about the complaint concerning the contractors on August 10, 1987, and that he discussed the matter with Mr. Brock later that same day. The testimony establishes that Mr. Bayliss and Mr. Brock had a difference of opinion concerning the contractors' wearing of hard hats, and Mr. Bayliss admonished Mr. Brock for not wearing his hard hat.

Mr. Bayliss contended that one of the MSHA inspectors who came to the mine in response to the contractor complaint informed him that Mr. Thompson had called MSHA, and Mr. Brock was summoned to the meeting simply because he was safety committeeman. The inspector who was named did not testify in this case, and I have given no weight to Mr. Bayliss' hearsay testimony that the inspector revealed the name of the informant. I have serious doubts that an inspector would divulge the name of any informant and place himself at risk for disciplinary action for doing so.

Although there is no direct evidence that Mr. Bayliss knew for a fact that Mr. Brock was responsible for the call which brought the MSHA inspectors to the mine to look into the complaint concerning contractors, I conclude and find that the aforementioned circumstances concerning Mr. Bayliss' knowledge about Mr. Brock's concern for contractor safety violations, and his discussions with Mr. Brock concerning the matter, support a reasonable inference that Mr. Bayliss was not totally oblivious to Mr. Brock's involvement in the complaint and that he more than likely suspected that the visit by the inspectors was the result of some action on the part of Mr. Brock.

Mr. Hicks denied any knowledge of Mr. Brock's "involvement with MSHA," and he also denied any knowledge that Mr. Brock may have called MSHA about the contractor complaint. However, Mr. Hicks confirmed that prior to the August 13, 1987, meeting with the MSHA inspectors, which was held just outside his office, he was aware of the complaints concerning the roofing contractors, and that Mr. Bayliss told him that he had discussed the

matter with Mr. Brock (Tr. 279, 281). Mr. Hicks had previously visited the area where the roofing contractors were working to ascertain whether or not they were wearing the required safety equipment, and I believe that he did this in response to Mr. Brock's concerns to Mr. Bayliss. Mr. Hicks confirmed that during the meeting with the inspectors, he explained to them, as well as to Mr. Brock, the actions taken by management to insure contractor compliance with the safety regulations. Under all of these circumstances, I believe that Mr. Hicks also either knew or suspected that Mr. Brock was responsible for the inspectors' visit to the mine.

The fact that the respondent may not have known as a fact that Mr. Brock had called MSHA is immaterial. In Moses v. Whitley Development Corporation, 4 FMSHRC 1475 (1982), the Commission held that a complaint may establish a prima facie case by proving that (1) the operator suspected that he had engaged in protected activity, and (2) the adverse action was motivated in any part by such suspicion. See also: Judge Broderick's similar holding in Larry Brian Anderson v. Consol Pennsylvania Coal Company, 9 FMSHRC 413 (March 1987).

In view of the foregoing, I conclude and find that there is sufficient probative circumstantial evidence to support a reasonable inference that the three management official's who disciplined Mr. Brock in this case, either knew or suspected that he was responsible for the MSHA inspectors coming to the mine to look into the complaint concerning roofing contractors. Mr. King's verbal warning to Mr. Brock came a few days after the visit by the inspectors, and the subsequent actions taken by Mr. King, Mr. Bayliss, and Mr. Hicks followed within the next 45 days or so. These disciplinary actions, which fairly closely followed an MSHA inspection which I believe was prompted by Mr. Brock's complaint, coupled with what I believe was knowledge or suspicions by these officials that Mr. Brock was responsible for the inspection visit, raises an inference that the disciplinary actions were prompted in part by Mr. Brock's protected activity, and sufficiently establishes a prima facie case.

On the facts of this case, even though the complainant may have established a prima facie case, I conclude and find that the respondent has successfully rebutted any inference or prima facie showing of illegal discrimination. I conclude and find that the respondent has established by a preponderance of the evidence that the independent disciplinary actions taken by Mr. King, Mr. Bayliss, and Mr. Hicks, were clearly warranted and justified on their merits. Coupled with the lack of any probative evidence that the respondent was guilty of any disparate treatment of Mr. Brock, the lack of any probative evidence of animus, harassment, or other acts by the respondent inhibiting Mr. Brock from exercising his safety rights under the Act, I simply cannot conclude that Mr. Brock has made out a case. To the contrary, I

conclude and find that the disciplinary actions taken by the respondent's management personnel were motivated by unprotected factors alone, namely, Mr. Brock's abuse of work and lunch breaks, his unsatisfactory job performance, and his calling of a supervisor on the phone at his home in the middle of the night.

ORDER

In view of the foregoing findings and conclusions, and on the basis of the preponderance of all of the credible and probative evidence adduced in this case, I conclude and find that the complainant has failed to establish that the respondent discriminated against him. Accordingly, the complaint IS DISMISSED, and the complainant's claims for relief ARE DENIED.

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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NOV 7 1989

SIDNEY COAL COMPANY, Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. KENT 89-80-R
	:	Citation No. 3158690; 1/12/89
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	No. 1 Mine
	:	Mine ID 15-07082
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. KENT 89-133
	:	A.C. No. 15-07082-03575
v.	:	
	:	No. 1 Mine
SIDNEY COAL COMPANY, Respondent	:	

DECISION

Appearances: G. Elaine Smith, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee for U.S. Department of Labor;
Lynn M. Rausch, Esq., and Michael Heenan, Esq., Smith, Heenan and Althen, Washington, D.C. for Sidney 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 one citation issued by the Secretary of Labor against the Sidney Coal Company (Sidney) and for review of civil penalties proposed by the Secretary for the violation alleged therein.

The citation at bar, No. 3158690, alleges a "significant and substantial" violation of the mandatory standard at 30 C.F.R. § 75.400 and charges as follows:

> Accumulations of float coal dust deposited on dry, damp rock dusted surface, is present in the No. 1, No. 2, and No. 3 conveyor belt entry's [sic] and connecting crosscuts ranging in depth from paper thin to 1/8 inch (approximately) from dark gray to black in color, beginning at the No. 1 head drive

and extends inby to the No. 3 tail roller. The distance of (approximately) 3,350 feet.

The cited standard provides as follows:

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.

According to Inspector Charles Skeens of the Federal Mine Safety and Health Administration (MSHA) the cited conditions were found during his inspection on January 12, 1989. The alleged float coal dust was purportedly dark gray to black in color and was purportedly located on the ribs, floor and roof of the Nos. 1, 2, and 3 belt entries. Skeens opined that the substance was indeed float coal dust because of its coloration and the fact that the material then being transported on the beltline included coal as well as rock.

According to Skeens there had been a roof fall on the 001 section and the fall material was then being removed on the beltline. The area of the mine being cleaned had also been previously mined with blocks of coal some 50 feet square remaining. Coal from the ribs was being put through the crusher thereby, according to Skeens, contributing to the coal dust. According to Skeens no Sidney official requested him to take any coal samples and he therefore did not take any samples.

Underground Mine Foreman Arthur Maynard accompanied Skeens during his inspection and was present at a later closeout conference. According to Skeens, Maynard did not protest the citation when it was issued. Skeens also testified that Maynard did not challenge the existence of the cited float coal dust nor challenge the citation at the time of the closeout conference. John Barnes an MSHA Electrical Inspector was also present at the closeout conference on March 6, 1989. According to Barnes, Maynard acknowledged that he agreed with the citation.

Maynard testified that in June 1988, Sidney began rehabilitating the No. 1 Mine by cleaning up abandoned areas including the clean up of a large roof fall in order to put in a belt line. (See Exhibit R-1). When the citation was issued they were transporting rock from the roof fall via scoop to the conveyor. According to Maynard the pile consisted of 6 to 8 feet of flaky dark shale, 4 to 6 feet of hard blue sandstone, and below that 6 feet of softer dark shale. Maynard maintains that the cutting of the rock with a

special bit was causing float rock dust. He denied that there was any float coal dust present.

Maynard also claimed at hearing that when he learned that Skeens was about to issue a citation for float coal dust he requested that Skeens take a sample. Skeens purportedly responded that he needed equipment in his truck outside the mine to obtain a sample. Skeens never in fact did obtain a sample. When they arrived at the surface, Mine Superintendent Lavender purportedly asked Skeens if he had taken a sample. Maynard testified that the dust in the mine was rock dust some of which was gray but none was black.

Maynard testified that it was standard company procedure to request coal sample tests when issued citations for float coal dust. Maynard did not deny however that Sydney was cited the previous November 1988 for coal dust and no request was made for sampling. Maynard further testified that he was present at the March 1989 closeout conference and, contrary to the testimony of both MSHA inspectors, protested the instant citation.

Finally, Maynard testified that rock dusting was performed at the No. 1 Mine only to help underground vision and not for the purpose of protecting from float coal dust. Danny Casey a rock duster for an independent contractor agreed that rock dusting was done at the No. 1 mine only for appearance and not because of coal dust. Casey testified that he had not seen any accumulations of coal dust on any of the rock dusted services.

Whether I find that there was a violation in this case depends on my assessment of witness credibility. On the one hand there is the testimony of Inspector Skeens--a coal mine inspector having seven years experience as an inspector and having 30 years experience in the coal mining industry. His visual observations are clearly sufficient, standing alone, to establish the violation. See Exhibit No. R-3, p.49. No motivation has been shown to discredit the testimony of this highly qualified and experienced man.

While Respondent attempts to discredit this testimony by alleging that Skeens failed to take dust samples even upon the request of its underground mine foreman (an allegation denied by Skeens), the Respondent certainly had the opportunity to take its own samples. Indeed since Respondent maintained at trial that it has always vigorously denied the existence of any float coal dust, it would be reasonable to expect under the circumstances that it would have taken its own samples to establish its innocence. In any event I cannot infer under the circumstances, even assuming Skeens did not take samples after being requested to do so, that Skeens' observations were deficient.

In addition I find the testimony of underground mine foreman Arthur Maynard to be less than credible. Maynard testified for example that it was the uniform practice at Sidney to request coal dust sampling when float coal dust citations have been issued. The evidence shows however that only a few months before the instant citation was issued Maynard himself was presented with a float coal dust citation and according to the issuing inspector, Maynard never requested a coal dust sample. While Maynard denies that he was then present, there is no dispute that, contrary to Maynard's testimony, none of Sydney's employees asked for coal dust sampling.

In addition, the existence of a citation for coal dust only a few months before the one at bar lends doubt to Maynard's (as well as Casey's) claim that coal dust simply did not exist in the mine (only rock dust) while the mine was being rehabilitated. The additional evidence of more recent citations, including one issued the same day as the citation at issue, for loose coal and coal dust further discredits this claim. The Respondent's claim that coal dust simply did not exist in its coal mine is in itself also patently incredible.

Finally, I note the failure of Sidney to have called a key witness, former mine superintendent Charles Lavender, regarding the the alleged practice of challenging float coal citations and his purported request to Skeens for coal sampling. It was not shown that Lavender was unavailable for trial and no effort was apparently made to contact Lavender although his area of residence was known. I infer from the failure of Respondent to have produced this essential witness under the circumstances that the testimony would not have been favorable to Respondent in this regard. See Karavos Compania, Etc., v. Atlantic Export Corp. 588 F.2d 1 (2nd Cir. 1978); Midland Enterprises Inc., v. Notre Dame Fleeting & Towing Service, Inc., 538 F.2d 1356 (8th Cir. 1976). Under all the circumstances I find the Secretary's case to be the most credible and that float coal dust did indeed exist as charged. The violation is accordingly proven as charged.

The testimony of Inspector Skeens that the violation was "significant and substantial" is not challenged[1]/. Skeens noted that within the cited area there were electrical power cables providing a potential ignition source. He also observed that the automatic fire extinguishing system was not then functioning. A permanent overcast was also then

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[1]/ Respondent denied the existence of any float coal dust but failed to provide evidence to alternatively defend against the "significant and substantial" and "negligence" findings.

defective and allowed intake air to enter the belt entries. Further, the mine had a history of high levels of methane. Skeens opined that under these circumstances it would be reasonably likely for the eight miners then working to suffer fatal injuries presumably from fire, smoke, suffocation or explosion. Within this framework of evidence I find that the violation was of high gravity and indeed was "significant and substantial". Mathies Coal Co., 6 FMSHRC 1 (1984).

I further find that the violation was the result of operator negligence. It is undisputed that company officials walked and inspected the belt lines on a daily basis. It may reasonably be inferred that the float coal dust should have been discovered. The failure to have discovered this condition and either have it rock dusted or removed was therefore the result of negligence.

Considering these and the other criteria under section 110(i) of the Act I find that the proposed civil penalty of $126 is appropriate in this case.

ORDER

Citation No. 3158690 is affirmed and the Sidney Coal Company is directed to pay a civil penalty of $126 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge
(703) 756-6261

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
COLONNADE CENTER
ROOM 280, 1244 SPEER BOULEVARD
DENVER, CO 80204

NOV 7 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. WEST 88-96-M A.C. No. 05-03920-05502
v.	:	Docket No. WEST 88-142-M A.C. No. 05-03920-05503
WALSENBURG SAND & GRAVEL COMPANY, INCORPORATED, Respondent	:	Vezzani Pit

DECISION

Appearances: Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, For Petitioner;
Ernest U. Sandoval, Esq., Walsenburg, Colorado, For Respondent.

Before: Judge Cetti

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act", for the alleged violation of three regulatory standards.

The Secretary charges the operator of the Vezzani Pit, Walsenburg Sand & Gravel Company, Inc. (Walsenburg), with the violation of 30 C.F.R. § 50.30, § 56.9032, and § 56.14001.

Walsenburg filed a timely appeal from the Secretary's proposal for penalty. After notice to the parties the matter came on for hearing before me at Pueblo, Colorado. Oral and documentary evidence was introduced and the matter was submitted for decision without the filing of post-hearing briefs.

The general issues before me are whether Walsenburg Sand & Gravel violated the cited regulatory standards, whether or not the violations were significant and substantial, and, if violations are found, what is the appropriate civil penalty to be assessed in accordance with Section 110(i) of the Act.

The federal mine inspector, Lyle K. Marti, testified he inspected the Vezzani Pit and found it to be a small intermittent seasonal operation. It consisted of a pit, a crusher with screening facilities, a maintenance shop and a hot plant. Raw material is extracted from the earth and processed. The product produced is used in asphalt paving and road construction.

The parties stipulated the operation was a small one. When the pit is open only three employees on average operate the facility. On the day of the inspection the plant and crusher were not running and only one employee was at the site.

Docket Number WEST 88-96-M

Citation No. 3065794

When Inspector Marti arrived at the mine office, the first thing he did was review the required records. One of the required records is a quarterly employment report, MSHA Form 7000-2, which states the number of hours worked and the average number of employees who work at that pit during the quarter. This report must be submitted quarterly to the Health Analysis Center in Denver within 15 days after the end of the quarter. The inspector found the first and second quarter reports were timely submitted but the third quarter report due by October 15th had not been submitted as of November 4th, the date of his inspection.

Inspector Marti informed Evelyn Vezzani, Secretary-Treasurer and wife of Louis P. Vezzani, the President of the corporation, that Walsenburg was in violation of 30 C.F.R. § 50.30 since the third quarter report had not been submitted in time to arrive at the Denver center by October 15th. Mrs. Vezzani told him the report had been overlooked. She explained that they were closing-out their business at the pit so they had a lot of different reports to get out and the third quarterly report was just overlooked.

The inspector testified that the citation was abated before he arrived at the pit the next day, by Respondent's mailing the required report to the center in Denver.

Louis P. Vezzani, Respondent's President, testified that the failure to send in MSHA Form 7000-2 within 15 days of the end of the third quarter was "strictly a clerical oversight" on the part of his wife.

The undisputed testimony clearly established a violation of 30 C.F.R. § 50.30. Citation No. 3065794 alleging a violation of 30 C.F.R. § 50.30 for failure to submit the third quarterly report, MSHA Form 7000-2, to the MSHA Health and Safety Analysis Center within 15 days after the end of the third calendar quarter, is affirmed.

The Secretary originally characterized the violation as not significant and substantial and proposed a penalty of $20. At hearing counsel for the Secretary contended that the negligence was high and proposed to increase the penalty from $20 to $100.

In determining the appropriate penalty for this violation I have considered the statutory criteria set forth in section 110(i) of the Act including the operator's small size. I credit the undisputed testimony that the failure to submit the report in a timely manner was due only to a clerical oversight. I see no basis for determining negligence to be high enough to warrant the higher penalty proposed. I find the appropriate penalty for this violation is the $20 penalty originally proposed by the Secretary.

Citation No. 3065796

This citation alleges a violation of 30 C.F.R. 56.9032, which provides:

> "Dippers, buckets, scraper blades, and similar moveable parts shall be secured or lowered to the ground when not in use."

Approximately 110 feet from the west side of the crusher Inspector Marti observed a Caterpillar road grader that had a 12 foot long blade. The road grader was parked unattended with the blade in a raised position. The blade was not secured or lowered to the ground as required by the cited safety standard.

The blade had not been lowered to the ground because the grader might have to be pulled a few feet in order to start it. The grader could not be "pull-started" with the blade on the ground.

Inspector Marti testified that he was concerned that there could be a mechanical or a hydraulic failure that could accidentally cause the blade to come down. If someone were working with their foot under the blade when it came down it could cause a permanent disabling injury.

Mr. Louis Vezzani testified that without starting and running the motor of the road grader, there was "no possible way" that the blade could fall or come down. The engine has to be running in order to mechanically power the blade up or down. The blade lift is mechanically gear driven. It is not a hydraulic mechanism. Consequently, there is no possibility that there could be a release of hydraulic pressure that would drop the blade. The operator has to start the engine and mechanically lower the blade. Mr. Vezzani has used the road grader since 1961 to maintain the pit access road and there has never been an injury involving that equipment.

Inspector Marti stated that the violation was abated during the afternoon of the day of his inspection by an operator who started the engine of the road grader and lowered the blade.

This citation, No. 3065796, was originally marked and issued as a non-S&S violation. At the hearing counsel for the Secretary stated that she believed the evidence would show that the violation was significant and substantial and that the negligence was very high. Counsel proposed to amend the assessed penalty from $20 to $200.

The Commission has stated that 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." 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.

In Mathies Coal Company, 6 FMSHRC 1, 3-4 (January 1984), the Commission further 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.

On review and evaluation of the evidence I find that a preponderance of the evidence fails to establish the third element of the Mathies Coal formula. A preponderance of the evidence fails to establish a reasonable likelihood that the hazard contributed to will result in an injury. This finding is consistent with the low exposure to the hazard and the history of no injury involving the road grader since it was acquired by the operator in 1961.

Considering the criteria set forth in section 110(i) of the Act, it is found under the particular facts surrounding this violation, that the Secretary's original proposed penalty of $20 is appropriate for the violation.

Docket WEST 88-142-M

Citation No. 3065797

This citation reads as follows:

> "The fan blade on the motor-grader (CAT.- NO 12 SN: 8T16519) was not guarded against personal contact."

The citation alleges a significant and substantial violation of 30 C.F.R. § 56.14001 which provides as follows:

> § 56.14001 Moving machine parts
>
> Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons, shall be guarded.

Inspector Marti testified that the same Caterpillar road-grader cited for failure to lower the blade was also cited for a violation of 30 C.F.R. § 56.14001 because he believed the blade of the engine fan was exposed to personal contact. He testified it had no guard that would prevent accidental finger contact. The engine had no side panels. If the motor had side panels, Inspector Marti would have considered this adequate protection from the hazard of the fan blade and would not have issued the citation. Contact with the blade could cause serious injury such as loss of a finger.

Respondent presented evidence that the road grader was used only to maintain the access road to the pit. It was manufactured in 1951 without any side panels. Its engine fan had and still has, a shroud which is a semi-covering around the fan blade. The shroud covers and thus guards half the blade. Respondent has owned the road grader for the last 27 years and there has never been an accident or injury involving that piece of equipment.

There has been no one working at the pit site since October 15, 1987, approximately 20 days before the inspection. Before that date the work at the pit had been seasonal and intermittent. At the end of the access road leading to the site is a gate that was kept locked except when someone was working at the pit. When the pit was open and working an average of three men operated the facility. Consequently, exposure to the hazard of the partially guarded fan blade was low.

Louis Vezzani testified that after the inspection he abated the alleged violation by removing the equipment from the mine site. Except for purposes of abatement the equipment was last used at the mine site on October 15, 1987, which was approximately 20 days before the November 4th inspection. No work had been done at the mine site since October 15, 1987.

Inspector Marti testified that he never returned to the pit after his inspection, but on the basis of information given to him by respondent, all violations were abated within the extended time he allowed for abatement.

A preponderance of the credible testimony established a violation of 30 C.F.R. § 56.14001 in that the revolving fan blade was inadequately guarded.

The Secretary originally assessed a penalty of $54 for this violation. At the beginning of the hearing counsel for the Secretary stated that "primarily due to the lack of abatement of the violation" the proposed penalty should be increased to $400. I find, however, that the unrebutted testimony of Mr. Vezzani and the testimony of Inspector Marti clearly shows there was an abatement of the violation.

The Secretary has the burden of proving that a violation is significant and substantial. Under Mathies Coal the Secretary of Labor must prove all four elements of the Mathies formula. The third element is "a reasonable likelihood that the hazard

contributed to will result in an injury." A "reasonable likelihood" is more than just a possibility. The evidence in this case established that the revolving blade of the fan was partially guarded by a shroud, that the road grader was used only to maintain the access to the pit, and that only three people seasonally and intermittently worked at the site. Exposure to contact with the fan blade of the motor was very limited. Upon evaluation of the actual circumstances surrounding this violation I find that a preponderance of the evidence established a possibility that the hazard contributed to will result in an injury but not a likelihood. Therefore, I find that the violation was not significant and substantial.

Considering the statutory criteria set forth in section 110(i) of the Act and the circumstances surrounding this violation, I find the appropriate penalty for the violation is $40.

For the foregoing reasons I enter the following:

ORDER

1. Citation No. 3065794 and the Secretary's original assessment of a $20 penalty is affirmed.

2. Citation No. 3065796 and the Secretary's original assessed penalty of $20 is affirmed.

3. Citation No. 3065797 is modified to strike the characterization of the violation as significant and substantial and a civil penalty of $40 is assessed.

The respondent is directed to pay to the Secretary of Labor a civil penalty in the sum of $80 within 30 days of the date of this order.

August F. Cetti

August F. Cetti
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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NOV 9 1989

JOHN DIXON HACKER, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. KENT 89-1-D
	:	MSHA Case No. BARB CD 88-57
BLACK STREAK MINING, Respondent	:	No. 1 Mine

DECISION

Appearances: John C. Carter, Esq., Harlan, Kentucky, for the Complainant;
Otis Doan, Jr., Esq., Harlan, Kentucky, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a discrimination complaint filed by Mr. Hacker with the Commission on October 4, 1988, against the respondent pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977. Mr. Hacker initially filed his complaint with the Secretary of Labor, Mine Safety and Health Administration (MSHA), at its District 7 Field Office on August 15, 1988, and in a statement executed by him on that day on an MSHA complaint form, Mr. Hacker made the following complaint statement:

> At the end of our shift I ride the belt outside. On 07/25/88 while riding the belt to the surface I observed a rock fall on the belt and where the fall was the belt was cribbed on both sides. When I jumped off the belt I hit one of the cribs and it threw me back into the belt structure. As of this date I have received no workman compensation. I have been told that I no longer have a job at this company.
>
> I want my job back with backpay. Also I want the workman's compensation due me and all my medical bills paid.

In a statement given to an MSHA Special Investigator on August 19, 1988, in the course of an investigation into his

complaint, Mr. Hacker stated that mine management instructed him to ride the belt into the mine, that riding the belt was illegal, and had he refused, he would not have a job. He stated that approximately a week prior to his alleged injury he informed an MSHA inspector who was at the mine that he rode the belt into the mine and that the belt stop cord was inoperative, and that the inspector issued several violations to the respondent. He further stated that he received medical treatment for his alleged injuries, was hospitalized for 9 days, and that when he contacted mine management on August 16, 1988, to inquire whether he still had a job, management informed him that he had quit and would not be given his job back. During the course of the hearing, Mr. Hacker alleged for the first time that he was discharged by the respondent for speaking with the inspector, and he suggested that he was fired because his conversation with the inspector resulted in violations being issued to the respondent. He also asserted that the respondent retaliated against him for informing the inspector about his riding the belt and the inoperable stop cord.

After the completion of its investigation of Mr. Hacker's complaint, MSHA advised him by letter dated September 15, 1988, that on the basis of the information gathered during the course of its investigation, a violation of section 105(c) of the Act had not occurred. Mr. Hacker pursued his complaint further with the Commission, and in a letter dated September 26, 1988, which accompanied his complaint, Mr. Hacker stated in relevant part as follows:

> I have lost my job due to an injury that I received while being employed by Black Streak Mining. I have filed a workmen's compensation claim. I have yet to receive workmen's comp. or anything due to this injury. I want to know from you all is it right to lose your job while under a doctor's care? I have doctor's statements and X-rays due to this condition, and I also have witnesses stating verification of getting treated by a doctor at the emergency room in Pineville at the hospital.

The respondent filed an answer to the complaint denying that it discriminated against Mr. Hacker, denying that he was injured in any mine accident, and asserting that Mr. Hacker quit his job because he did not return to work on July 26, 1988, and did not supply a valid reason for not returning to work.

A hearing was held in Kingsport, Tennessee, and the parties appeared and participated fully therein. The parties filed posthearing briefs, and I have considered their arguments, as well as the arguments made by counsel during the course of the hearing.

Issues

The issues presented in this proceeding are (1) whether or not Mr. Hacker was discharged or voluntarily quit or abandoned his job; (2) whether or not his alleged discharge or voluntary termination was motivated or otherwise prompted by his engaging in any protected safety activity; and (3) whether or not the respondent retaliated or otherwise discriminated against Mr. Hacker by either discharging him or forcing his termination because of his engaging in any protected safety activities.

Applicable Statutory and Regulatory Provisions

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

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

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

Complainant's Testimony and Evidence

Complainant John Dixon Hacker testified that on July 25, 1988, at the end of his shift, he rode the conveyor belt out of the mine, and when he observed a rock on the belt in an area which had been cribbed, he jumped off the belt to avoid the rock and he was thrown back against the belt structure. He then waited until fellow miners Joe Stapleton and Mark LeMasters came into the area and he advised them that he was "all right." Mr. LeMasters returned to the outside to get a bar to break down the rock, and Mr. Hacker reversed the belt and went back to the belt head to obtain a hammer. He then rode the belt back to the location of the rock and helped Mr. LeMasters and Mr. Stapleton break down the rock. After they finished, they all left and exited to the outside (Tr. 11-14).

Mr. Hacker stated that he left the mine after the incident in question because he was "shook up pretty good" and "was pretty well scared and everything and I didn't think I was hurt that bad." When he arrived home he "was hurting bad" and could not get out of his car. His wife called the mine in an effort to contact the mine operator about taking him to the hospital but no one answered the phone. His wife then called mine operator Darrell Middleton's wife at a store which they operate and she told his wife to take him to the emergency room. Mr. Hacker stated that the calls were made by his wife because he wanted to report the accident, and in order for someone to verify for the hospital that he worked at the mine for workmen's compensation purposes (Tr. 15-17).

Mr. Hacker confirmed that Windell Middleton is the company vice-president and was his supervisor, and that his brother Darrell Middleton was the president. He stated that the lack of belt clearance where the rock was located contributed to his injuries, and that he had to turn his head sideways to clear the rock while riding the belt. He also confirmed that the belt was equipped with pull ropes but they were inoperative (Tr. 18).

Mr. Hacker stated that approximately a week before he was injured he spoke with MSHA Inspector Chaulk Myers "about the belts and stuff" and "the belt in general" (Tr. 20). He stated that he informed Mr. Myers that he rode the belt into the mine and that Mr. Myers advised him that he was not supposed to do this because there was no belt clearance. Mr. Hacker stated further that sometime between July 14 and 17, 1988, Mr. Myers was at the mine to conduct an electrical inspection and asked him to call the base to shutdown the belt so that he could inspect it. However, no one would answer the phone, and Mr. Myers waited an hour and a half before the belt was shutdown. Mr. Myers then told Mr. Hacker that he was "going to get him" for interfering with an inspection for not shutting the belt down (Tr. 23).

Mr. Hacker stated that he did not shut the belt down because he lacked the authority to do so and he was specifically told that if he ever shutdown the belt he would lose his job. He explained that shutting down the belt while it was loaded would make it difficult to restart and could result in belt damage (Tr. 24).

When asked whether the inspector issued any citations as a result of his riding the belt and the inoperative pull ropes, Mr. Hacker answered "to my knowledge, there was." When asked how he knew that citations were issued, he stated that the outside man, Johnny Brooks, informed him that the inspector was mad when he left the mine and that he wrote up a violation "for interfering with the inspector's job and for the belt. There were several violations on the belt." Mr. Hacker stated that this occurred a week to a week and a half prior to his injury (Tr. 25).

Mr. Hacker stated that he rode the belt to and from his work station and that it was illegal for him to do so. He explained that it was illegal because of the lack of clearance and the inoperative pull cords. He also stated that if the cords were operational, it would have been legal to ride the belt, but that the cords have never been operational for as long as he worked at the mine (Tr. 26-27).

Mr. Hacker stated that he rode the belt to his work station because that was the only way to reach the belt head to turn it on in order to transport the coal out of the mine. He also stated that Windell Middleton required him to ride the belt.

Mr. Hacker confirmed that he had previously quit his job at the mine when "I was starting to get scared," and that he was rehired (Tr. 28). He also confirmed that he did not inform Mr. Middleton that it was illegal to ride the belt because "if I would have complained to Mr. Middleton about the belt he would have first replaced me and got somebody else" (Tr. 29).

Mr. Hacker stated that after getting out of the hospital he spoke to Darrell Middleton on approximately August 9, 1988, and that Mr. Middleton "told me that he'd like to handle it more or less under the table and that, come on back to work." Mr. Hacker stated that he did not return to work because he was under a doctor's care at that time and that he so informed Mr. Middleton (Tr. 31-32).

Mr. Hacker stated that after filing his complaint with MSHA, the MSHA investigator suggested that he call Mr. Middleton and ask for his job back (Tr. 33). Mr. Hacker stated that he filed the complaint "because of the job and everything. And the injury. They was stating that nothing happened and stuff" (Tr. 34).

Mr. Hacker stated that he was never told he did not have a job, but that Mr. Middleton told his wife that he did not have a job because nothing happened to him. He also stated that Windell Middleton informed him on August 16, 1988, that nothing had happened "and for me to sue him" and that "I no longer had a job there" (Tr. 36).

When asked for his opinion as to why he no longer had a job with the respondent, Mr. Hacker replied as follows (Tr. 36-38):

> A. If I was to give my opinion, I'd say that I was starting to be a heartache for them.
>
> Q. Okay, why were you a heartache?
>
> A. Well, they try to do the best they can running coal and stuff and the people goes to, you know, talking and everything, and stuff like that, they don't like that, and stuff.
>
> * * * * * * *
>
> Q. And you think that you, specifically, however, you're a heartache to them? You said you thought you was a heartache to them?
>
> A. By, like, talking to that mine inspector and stuff. And it got right back over to them that, over that. And they know that . . .

You know, some of the people take a lot of stuff, and I'm the type of feller, I won't take too much of anything.

Respondent's counsel stated that Mr. Hacker's workmen's compensation claim filed against the respondent has been settled and that Mr. Hacker will receive $12,000 from the respondent's insurance carrier as an "out of court settlement" for his injury claim (Tr. 39-41).

Mr. Hacker confirmed that he has not been employed since he left the respondent's employ, and although he is able to work, he has not looked for work because of his pending workmen's compensation claim (Tr. 41).

On cross-examination, Mr. Hacker confirmed that the respondent disputed his claimed injury and workmen's compensation claim. He also confirmed that Inspector Myers told him that he was going to ride the belt out of the mine, but that he never observed him doing so (Tr. 44). Mr. Hacker further confirmed that he has no copies of any of the violations allegedly issued by MSHA, that he did not subpoena Mr. Myers to testify in this case, and that the only evidence he has to support his contention that violations were issued was based on what someone may have told him (Tr. 45).

Mr. Hacker confirmed that no one else was present when he spoke to Inspector Myers about the belt and that he did not tell either of the Middleton brothers that he had complained to the inspector about the belt (Tr. 46). He also confirmed that he was injured about a week after speaking with Mr. Myers, and that during that week his job status was not changed, and that he still worked as a belt headman and received the same pay. He also confirmed that Windell Middleton "has never jumped on me," and that although Darrell Middleton "has chewed on us a little bit," this occurred prior to speaking to the inspector and his injury, and that during the week after he spoke to the inspector, the Middleton brothers never "jumped on him for anything" (Tr. 47).

Mr. Hacker stated when he rode the belt into the mine to his work station on July 25, 1988, he observed a rock hanging down on the belt and reported it. At the end of the shift, while riding the belt out of the mine, he jumped off the belt to avoid the rock which he knew was there and was hurt when he hit a crib and was thrown back into the belt structure. He confirmed that after this occurred, he helped take down the rock by using a sledge hammer while he was bent down, and that this job took approximately 30 to 45 minutes (Tr. 61).

Mr. Hacker stated that after the rock was taken down, he and the other two men who helped do the work rode the belt out of the

mine. His brother-in-law Johnny Brooks was outside, and Mr. Hacker stated that he told Mr. Brooks that "I took a pretty good jolt" but did not tell him that he was hurt or needed to go to the hospital. Mr. Hacker stated that after coming out of the mine, and before leaving to go home, he told no one that he had been hurt and had to go to a doctor, and that the Middleton brothers were not present at that time (Tr. 63).

Mr. Hacker confirmed that the Middleton brothers never told him that he had been fired, that he "got along good with them," that "they were good men to work with and work for," that "payday was always there," and that they never gave him "a hard time" (Tr. 66). Mr. Hacker denied that his dispute with the Middleton brothers arose because of his workmen's compensation case, and when asked why the dispute arose, he responded as follows (Tr. 66-67):

> THE WITNESS: Well, mainly the dispute arised because my wife was trying to get a hold of Darrell Middleton and she kept, or he kept on putting her off and he put her off for like three or four days and then the following week she had called back again and then they finally told her that nothing had happened and he wasn't going to do nothing, and that's why the dispute arised, sir.
>
> JUDGE KOUTRAS: So, that all had to do with your compensation claim, doesn't it?
>
> THE WITNESS: Sir?
>
> JUDGE KOUTRAS: You claimed you were injured in the mine and they kept denying it.
>
> THE WITNESS: Yes, sir.
>
> JUDGE KOUTRAS: And is that why the dispute arose?
>
> THE WITNESS: Well, no, not really. I mean, the dispute rised because there was a lot of unsafe working conditions there.
>
> Q. You never, but you never filed any injury complaints?
>
> A. No.
>
> Q. And you never complained to them prior to the time this dispute arose over this workers' compensation case, did you?
>
> A. I just quit once.

And, at (Tr. 68-70):

Q. Maybe I'm not explaining it right. What I'm saying is, prior to the time you say you got hurt and you filed your worker's compensation case, you never filed any complaints with MSHA, you never complained to these fellows.

You say they were good men to work for and then after you filed this worker's compensation case, and they disputed notice, then's when all this problem came up, isn't it?

A. No, when I, like what I say, when I was dazed and everything, when I talked to Windell and stuff there, and then he's the one that brought it all out.

Q. But I'm talking about, that happened and you say . . . .

A. Because I wasn't getting nowhere.

Q. Okay, let me ask you this. You said, you just testified that the week from, that you talked to the inspector about a week before you got hurt and up until July 25th, you say you didn't, they didn't harass you. You didn't have any problem with them and they didn't fire you?

A. Right.

Q. And a week has passed and the reason you left work was because you say you got injured, isn't that right? They never fired you or ran you off or anything? Did they?

A. Well, what is it when . . .

Q. No, just answer my question.

A. No, okay.

Q. Did they?

A. Did they what?

Q. Did they fire you or run you off? Prior to your date of injury, July 25th?

A. No, sir.

In response to bench questions concerning his discrimination claim, Mr. Hacker stated as follows (Tr. 83-85):

JUDGE KOUTRAS: Now, let me ask you this question, why do you believe you were discriminated against here?

THE WITNESS: Why do I believe I was?

JUDGE KOUTRAS: Yeah?

THE WITNESS: I, to my knowledge, I just say that, you know, with me talking to the mine inspector and stuff like that, I believe that they don't, they didn't really take too good to that.

JUDGE KOUTRAS: Take too good to what?

THE WITNESS: To me, you know, talking to them and everything. Because the mine inspector, Chaulk Myers, told me, he said, anything that you say and everything, he said, they can't use against you and stuff like that.

The mine inspector had told me this himself and he said, you know, they can't get rid of you on your job and stuff and he said, answer it honestly.

JUDGE KOUTRAS: How did this conversation come up with this inspector a week before you were injured?

THE WITNESS: How did it?

JUDGE KOUTRAS: Yeah, how did the subject come up about your riding the belt and all that business?

THE WITNESS: Well, the man had . . . See, my job, my job consists of doing nothing but watching my belt. Do you understand what I'm saying? I watch the belt and make sure that the coal's running right and then do little odd jobs and stuff like that. Okay, what it consists of is not too much of anything. Just being there and making sure that the belt runs right. Okay, I had this free time while this inspector was in there trying to do his job. Okay, he didn't get to do his job, so we just sat there and chit-chatted, is what it amounted to. You know, just talked. And, you know, he was talking, asking me questions and, you know, I asked him a few and you know, we just chit-chatted, is what I'm trying to say.

JUDGE KOUTRAS: What do you mean, he couldn't do his job?

THE WITNESS: Well, he told me to shut the belt down and I was told not to shut the belt down.

And, at (Tr. 95-97):

JUDGE KOUTRAS: Now, I'm going to ask you up front, did somebody suggest to you, well, listen, in addition to your compensation claim, maybe you can say that you talked to the inspector and that the company fired you because you talked to the inspector and suggested to you that you file a discrimination complaint?

THE WITNESS: When I was more or less fired that's when I took further action. That's when it was.

JUDGE KOUTRAS: Yeah, but you never raised any issue then that you were fired for talking to the inspector. Are you trying to convince me that the Middleton's fired you for talking to an inspector, or wouldn't give you a job back because you complained to an inspector?

THE WITNESS: That, more or less, that's what a lot of it amounted it. I mean, they wouldn't give me my job back because of the accident. That's the whole main thing right there.

JUDGE KOUTRAS: Because of the accident.

THE WITNESS: But a lot of things, it's because they work illegal in the mine and then they get away with it.

JUDGE KOUTRAS: Have you ever reported their illegal activity?

THE WITNESS: No, sir, I have not.

JUDGE KOUTRAS: Why not?

THE WITNESS: Well, if you report it you wont' have a job there.

JUDGE KOUTRAS: But how do they know you're going to report it. You know, you can pick up the telephone and make anonymous complaints.

THE WITNESS: Okay.

JUDGE KOUTRAS: Can't you do that? Can't you call up the, you know where the MSHA district office is in your neighborhood or in your local where you live?

THE WITNESS: Yeah, I know where it's at.

JUDGE KOUTRAS: Do you know who the inspectors are?

THE WITNESS: I just, I know that Chaulk Myers and, no, I don't know him personally, no.

Mr. Hacker confirmed that during his 8 months of employment at the mine he never reported any safety violations to MSHA, and when asked to identify the alleged "illegal things" at the mine, Mr. Hacker stated "I just soon not comment on it" (Tr. 101). He stated that he had informed the Middletons about the existence of the rock over the belt, but nothing was done about it (Tr. 102). He confirmed that he had quit his job in the past because "the top was bad" and because he was scared to work under the top (Tr. 105). He also confirmed that he told Windell Middleton that the top was bad and needed to be taken care of (Tr. 114).

Mr. Hacker stated that when he last quit his job at the mine because he was scared he had never worked in a mine before and that "it was all new to me" (Tr. 120). Mr. Hacker confirmed that he never told the Middleton's about his conversation with Inspector Myers, and he has no proof that Mr. Myers told them about their conversation (Tr. 120). He also confirmed that he never spoke to any other inspectors during the time that he worked at the mine (Tr. 121).

Mrs. Virginia Hacker, complainant's wife, stated that she was at the mine on July 25, 1988, and observed her husband come out at 5:30 p.m. Her husband told her that "his back was bothering him." Present at this time was her brother John Brooks, and miners Joe Stapleton and Mark Masters (sic). Mrs. Hacker stated that after arriving home, her husband informed her that his back "was hurting rather bad" and she called the mine to see about taking him to the Pineville Hospital. There was no answer at the mine, and she placed a call to Darrell Middleton's wife, Mary Lynn, at a local store which they operate, and Mrs. Middleton instructed her to take Mr. Hacker to the doctor. Upon arrival at the hospital, Mrs. Hacker stated that someone from the hospital emergency room called Mrs. Middleton to verify Mr. Hacker's employment (Tr. 125-132).

Mrs. Hacker stated that on July 27, 1988, Mr. Hacker returned to the doctor at the hospital because "he was hurting real bad," and that she called the mine that day and spoke to Windell Middleton about filing an accident report, and that Mr. Middleton informed her that he would have to talk with his brother about the matter. Mrs. Hacker stated that she called again, and then went to the mine to pick up her husband's check, and that Windell Middleton advised her that he had spoken to his brother and that no accident had occurred and no accident report

would be made. Mrs. Hacker stated that she informed Mr. Middleton that she would see a lawyer and that he told her "that would be the thing for you to do." She confirmed that she has not spoken to the Middleton brothers since that time, and nothing was said about her husband returning to work (Tr. 132-134).

On cross-examination, Mrs. Hacker stated that when her husband came out of the mine on the belt he did not need any help in getting off the belt, and she did not hear her husband tell anyone else that he had been hurt. He only told her that "his back was hurting" (Tr. 134). Mrs. Hacker stated that her husband attended work regularly and had never been suspended or fired during his approximate 8 or 9 months of employment with the respondent, but that he had previously quit his job at the mine, and then returned to work there again (Tr. 137).

Mrs. Hacker stated that her husband had complained to her about the rock while he was employed at the mine and that "he was scared of it because he was not used to coal mining" (Tr. 146). She also stated that her husband "was all the time talking about the belt and the rock," and that "they wanted him to cut the belt off and he wouldn't cut it off because he was afraid he'd lose his job over it" (Tr. 149). She had no knowledge of any specific conversations that her husband may have had with any inspectors about the belt or rock, but that they discussed the mine "all the time" (Tr. 149). She believed that riding the belt was illegal, and that her husband had informed her that the belt pull cord was not working (Tr. 153). She confirmed that she had ridden the belt when she was employed at the mine when it was operated by another company, and that the only information she had about the respondent's operation of the mine is that which she received from her husband (Tr. 156-157).

Robert G. Hunley, stated that he has never worked for the respondent, but that he has worked in an underground mine for a couple of years. He stated that he knew Mr. Hacker for a couple of years and took him to the doctor on July 27, 1988, and then to the hospital emergency room where he was admitted. When asked about his knowledge of the case, Mr. Hunley stated that "all I know is, was he got hurt in the mines" and that he learned this from Mr. Hacker (Tr. 160). Mr. Hunley stated that Mr. Hacker informed him that "there was a rock hanging over the belt about to fall," but that he gave him no advice as to how to proceed with this case (Tr. 161). He stated that Mr. Hacker had complained to him about the rock hanging over the belt for a month or so before he was injured (Tr. 161).

Mr. Hunley stated that he had worked in low coal seams, and that some mines have problems with the top in low coal, and that it is an inherent condition of mining. He agreed that a mine is

a "scary place" for a young man on the job a few months (Tr. 162). He stated that his conversations with Mr. Hacker concerning the mine took place while he was eating at a restaurant operated by Mr. and Mrs. Hacker, and that he told Mr. Hacker that the rock may or may not be dangerous depending "on what it looked like." He could not recall any comments by Mr. Hacker in this regard, and that from what he knew the rock problem was only at one location over the belt (Tr. 164). Mr. Hunley denied that he suggested to Mr. Hacker to call a mine inspector about the rock, and that this conversation never came up (Tr. 165).

Mr. Hacker's counsel made a proffer that Mr. Hacker's sister, Russella Horner, was present at the mine on July 25, 1989, with Mrs. Hacker, and that if called to testify, she would state that she was present when Mr. Hacker complained to his wife about his back on that day. Respondent's counsel accepted the proffer and Mrs. Horner was not called to testify (Tr. 167).

John Brooks, stated that he works for the respondent and that he is married to Mr. Hacker's sister, and that Mr. Hacker is married to his sister. Mr. Brooks stated that he works at the mine as an outside man taking care of the outside and the No. 1 belt, back to the No. 2 belt. He confirmed that he worked at the mine during the entire time that Mr. Hacker was employed there, and that he was at work on July 25, 1988. He stated that Mr. Hacker, Mr. LeMasters, and Mr. Stapleton came out of the mine at the same time at the end of the shift, and that Mr. Hacker said nothing to him about being injured. Mr. Brooks explained that Mr. LeMasters and Mr. Stapleton had come out earlier, but went back in after Mr. Hacker called out (Tr. 171-175).

Mr. Brooks stated that at 11:30 p.m., the evening of July 25, 1988, Mr. Hacker came to his home and informed him for the first time that he had injured his back when he jumped off the belt to avoid a rock. Mr. Hacker informed him that he would not be at work the next day, and gave him a doctor's excuse. Mr. Brooks said that he did not look at it, and laid it on the night stand next to his bed. The next day, he called Windell Middleton and informed him that he would need someone for the belt head that day, but Mr. Brooks was not sure whether he explained the reason for needing someone that day. Mr. Brooks could not recall what he did with the doctor's slip that Mr. Hacker had given him, but he confirmed that he did not give it to Windell or Darrell Middleton. He confirmed that he later informed the Middleton's that Mr. Hacker would not be coming to work because he injured his back, and he believed that he advised them of this within 2 days of the accident (Tr. 175-177).

Mr. Brooks stated that he and Mrs. Hacker have discussed Mr. Hacker's working at the mine, and that Mrs. Hacker did not want her husband working there because "he didn't like the idea

of working in them, underground, . . . and he said he didn't like riding under the rock on the belt and stuff" (Tr. 178).

On cross-examination, Mr. Brooks confirmed that Mr. Hacker said nothing to him about being injured when he came out of the mine on July 25, 1988, and that he jumped off the belt after exiting the mine and said nothing about going to the hospital (Tr. 178-182). Mr. Brooks stated that he has observed MSHA Inspector Myers riding the belt in question, and that there are pull cords on the belt. The purpose of the cords is to stop the belt in the event of any problems (Tr. 183).

Mr. Brooks stated that Mr. Hacker "was skittish" about working in the mine, and that he (Brooks) has had no problems working for the Middletons and that they have never harassed him (Tr. 185). He confirmed that Mr. Hacker could crawl to his work station at the belt head, but that "it would be a long crawl" (Tr. 185). Mr. Brooks further confirmed that Windell Middleton instructed him to keep the pull cords working, and he was not aware of any violations being issued on the pull cords. He was aware of a violation concerning inadequate crawl space next to the belt. The condition was created when the belt was cribbed, and the space needed to be widened, and Windell Middleton instructed the crew to correct the problem (Tr. 187).

In response to further questions, Mr. Brooks stated that the belt in question was approximately 3,500 feet long, and he was not aware of any citations issued by Inspector Myers for the failure of the respondent to cooperate with him in shutting the belt down. He confirmed that he had no knowledge of any citations which may have been issued at the mine, and he explained that any citations would be posted in another mine area from where he works (Tr. 190).

Mr. Brooks stated that the pull cords on the No. 1 belt in question were operational on July 25, 1988, and that the No. 2 belt is not equipped with a pull cord because it is not an authorized mantrip. Mr. Brooks confirmed that when Mr. Hacker called out and told him about the rock on the belt, the Middletons were not present, and that he sent Mr. LeMasters and Mr. Stapleton in to see about the problem. Mr. Hacker had advised him earlier about the rock, but told him that "he was going to stop and get it on his way out" (Tr. 193-195).

Mr. Brooks stated that at the time Mr. Hacker came to his home on the evening of July 25, 1988, he lived 25 miles away, and drove to his home with his wife. Mr. Hacker woke him up, informed him that he had hurt his back and would not be at work the next morning. Mr. Brooks also confirmed that Mr. Hacker gave him a "pink slip," but he did not look at it and just put it on his night stand. Mr. Brooks stated that on his way to work that morning, he stopped and called Windell Middleton and informed him

that Mr. Hacker would not be at work, but he did not explain why. When asked why he did not explain to Windell Middleton the reason for Mr. Hacker's inability to report for work, Mr. Brooks stated "I don't really know" (Tr. 198). When asked if Mr. Middleton sought any explanation from him as to why Mr. Hacker would not be able to come to work, Mr. Brooks responded "this has been over a year, and I don't remember" (Tr. 199). Mr. Brooks confirmed that his wife misplaced the slip that Mr. Hacker had given him, that it never got to Mr. Middleton, and when Mr. Hacker informed him that he could get a copy, Mr. Brooks did not search for the slip (Tr. 200). When asked if he knew what the instant case was all about, Mr. Brooks responded "not for sure, . . . I'm not clear on whether its compensation or disability, . . . I don't know what, really" (Tr. 202).

Mr. Brooks explained the operation of the belt, and he stated that it is normally started and stopped from the outside by a switch, and that the pull cords are only to be used in an emergency. He confirmed that he started and stopped the belt from the outside on July 25, 1988, and that Mr. Hacker informed him by telephone that "he had a rock on a belt and he was going to have to bust it up" (Tr. 205).

Mr. Brooks stated that he was not aware of any safety complaints made by Mr. Hacker to the Middleton's or anyone else, but that Mr. Hacker has stated to him (Brooks) that he did not like riding the belt under the rock, and did not like being that far back underground. Mr. Brooks did not agree that the Middleton's were not concerned about safety or the lack of operational cords on the belt, or that anyone who did not ride the belt would be out of a job (Tr. 207). Mr. Brooks confirmed that he has never been cited for any violations on the Number 1 belt or any other equipment that he is responsible for (Tr. 208).

Mr. Brooks stated that Mr. Hacker informed him that he had spoken to Inspector Myers about a week before he was injured, but Mr. Brooks could not recall what was said, and he confirmed that he did not speak with the inspector (Tr. 209). Mr. Brooks explained that in the event the number 1 belt is loaded and needs to be shutdown, he was instructed to contact someone to make sure the belt was empty before it was shutdown, and he could not recall receiving any calls from anyone to shut the belt down on the day that the inspector was there. However, he confirmed that he was aware of the fact that someone was trying to contact the face area where coal was being run to stop loading coal so that the belt could be stopped, but that the face area was a long distance away and "we have phone trouble every once in a while." Mr. Brooks stated that the inspector did not like the fact that the belt wasn't stopped, but said nothing to him about it. He confirmed that the inspector shut the belt down from the outside because he wanted to check the smoke roller test switches, and that he inspected the belt. Mr. Brooks recalled that he had to

clean some dirt off one of the mats in front of the belt switch box (Tr. 210-210).

Mr. Brooks confirmed that the number 1 belt pull cord was broken, but denied that it was broken during all the time that Mr. Hacker worked at the mine. Mr. Brooks stated that he had worked on the cords three or four times at locations "where it was old," and that he conducts the inspections on the belt. He stated that while Mr. Myers was inspecting the belt, he (Brooks) was inspecting it to make sure that the cord switches were all working (Tr. 216). He confirmed that the inspector shut the belt down because of a smoke roller slippage switch, but could not recall whether he worked on the belt before or after the inspection (Tr. 219).

Mr. Brooks stated that as far as he knew, Mr. Hacker got along with the Middleton's, and that although Mr. Hacker told him (Brooks) several times that he did not like working at the mine, he never said anything to him about safety violations, rocks falling on the belt, or that the Middleton's did not care about safety and were intimidating mine inspectors. Mr. Brooks stated that he has never heard the Middleton's intimidating any inspectors (Tr. 226).

Jimmy Joe Stapleton testified that he now works at another mine company owned by the Middleton's, but worked for Black Streak on July 25, 1988. Mr. Stapleton stated that a day or two later, Windell Middleton asked him if Mr. Hacker had been injured at the mine on July 25, 1988, and Mr. Stapleton informed him that he had no knowledge of any injury. Mr. Stapleton stated that he was working on the number 1 belt "running fire sensor line," and that he had to crawl into the mine because he was working on the belt. He confirmed that he and Mr. LeMasters went back into the mine that same evening to help Mr. Hacker break up a rock. He stated that he crawled out of the mine, but was not sure whether Mr. LeMasters rode the belt out because he was already outside when he came out, and they waited until Mr. Hacker came out (Tr. 233).

On cross-examination, Mr. Stapleton stated that he never observed anything "illegal" at the mine, that "it was in fair shape" and "safe to me," and that he had worked in the mines for 14 years and would not work in any unsafe faces (Tr. 234). He explained the roof timbering, cribbing, and roof bolting work which was done at the mine pursuant to the roof-control plan, and confirmed that the number 1 belt was cribbed on both sides "almost all the way from outside to in" (Tr. 235). He confirmed that the mine was "low seam" with a 34-40 inch seam, and that "rock will fall every now and then" because of weather changes (Tr. 236).

Mr. Stapleton confirmed that Mr. Hacker helped him and Mr. LeMasters break up the rock in question and that Mr. Hacker used a sledge hammer on the rock while he and Mr. LeMasters were throwing the pieces out of the way. He also confirmed that Mr. Hacker said nothing to him about being hurt or going to the hospital, and if he had, he would have reported it. Mr. Stapleton stated that to his knowledge, the belt pull cords were operational (Tr. 237).

Mr. Stapleton stated that when he came out of the mine after working on the belt sensor line on July 25, 1988, he saw no reasons why anyone could not ride the belt out, and that "there was plenty of height over it" (Tr. 238). He confirmed that when he went back in to help Mr. Hacker break up the rock, he rode the belt in, and rode it back out after taking care of the rock (Tr. 239). He was not aware of any violations on the belt that day, and the only other violations he was aware of were "maybe rock dust or something like that" (Tr. 240).

Mr. Stapleton stated that he knows Inspector Myers and has observed him at the mine two or three times, and that he was aware of no problems on the belt in question, or any problems with Mr. Myers stopping the belt. He confirmed that Windell Middleton has instructed him and Mr. Hacker not to shut the belt off when it is loaded with coal because it will not start up again (Tr. 241). Mr. Stapleton stated that he has worked for the Middleton's for 2 years and that "they're good people to work for." He has never known them to make any miners work in unsafe conditions (Tr. 241).

Mark LeMasters confirmed that he has worked at the mine for 18 months, and although he knew Mr. Hacker worked as a belt headman, he never worked closely with him. He recalled that on or after July 25, 1988, when Mr. Hacker did not come back to work, he was assigned to do his work on the belt head (Tr. 247). Mr. LeMasters stated that he performed this work for several days, and that he was then replaced by Rusty Ledford. He confirmed that he did work with Mr. Hacker making belt splices, and that he could recommend him for this work (Tr. 249).

Mr. LeMasters stated that he observed no one get hurt while he and Mr. Stapleton were helping Mr. Hacker break up and load out the rock in question. Mr. Hacker was using an 8 or 10 pound sledge hammer to break up the rock, and said nothing to him about being hurt or that he had to go to the hospital. Mr. LeMasters stated that the mine was safe, and that he had never observed the Middleton's "harass Mr. Hacker or do anything out of the way to Mr. Hacker." He confirmed that he filled in 4 or 5 days doing Mr. Hacker's job after he failed to return to work (Tr. 252).

Mr. LeMasters stated that he had once quit working at the mine, but came back at a later time. He has never observed

anything illegal going on at the mine, and had plenty of supplies to work with. He did not know whether his replacement Rusty Ledford worked at any other mine operated by the Middleton's (Tr. 255).

Mrs. Mary Lynn Middleton, confirmed that she is Darrell Middleton's wife, and that she knows Mrs. Hacker, but does not know Mr. Hacker. She could not recall speaking with Mrs. Hacker on July 25, 1988, and did not recall Mrs. Hacker calling her that day. She also could not recall anyone calling her from a doctor's office or from a hospital to inquire as to any workmen's compensation insurance coverage at the mine (Tr. 256-257).

On cross-examination, Mrs. Middleton stated that she operates a grocery store, is not employed at the mine, has no authority to clear workmen's compensation, and that she is not familiar with everyone working for her husband (Tr. 258).

Respondent's Testimony and Evidence

Windell Middleton, testified that he and his brother Darrell operate the mine as a partnership, and have operated it since October, 1987. Mr. Middleton stated that he is the mine superintendent and served as Mr. Hacker's supervisor. He confirmed that the number 1 belt is a designated man-trip and is equipped with functional pull cords, and that they were working in July, 1988. He confirmed that he advised the belt headman not to shut the belt down if it is loaded except if there is an emergency, and he explained that if the belts are shutdown while loaded, they will usually break if the belt is started again while still loaded with coal (Tr. 263).

Mr. Middleton stated that Mr. Hacker could either ride the belt into the mine to his work station, or crawl in along a crawl space adjacent to the belt. He described the belt cribbing used for roof support, and the prevailing roof conditions, and he stated that bad top is always taken down when detected (Tr. 264).

Mr. Middleton confirmed that he hired Mr. Hacker as a belt headman, and that he had previously quit his job because "he was scared over a piece of rock . . . beside the belt." Mr. Middleton stated that the rock was taken down, but Mr. Hacker quit and was hired back after calling him for 2 weeks asking for his job back. Mr. Middleton confirmed that Mr. Elijah Myers is an MSHA inspector known as "Chaulk," and that he has inspected the mine 8 or 10 times since it was opened. He also confirmed that a state inspector is at the mine at least once every 2 months conducting inspections (Tr. 266-267).

Mr. Middleton stated that he has no knowledge of Mr. Hacker speaking with Inspector Myers prior to his complaint. He was aware of the fact that Mr. Myers visited the belt head where

Mr. Hacker was working on one occasion, but he has no idea as to what they may have talked about (Tr. 268). Mr. Middleton stated that the citations he received in July of 1988 from Mr. Myers were citations for rock dust on the belt line, and a safeguard on the belt dealing with inadequate crawl space. He confirmed that the safeguard was complied with, and as long as the pull cords were working, adequate crawl space was not required, and that the safeguard only provided for an additional precaution. He confirmed that the violations were all abated (Tr. 270).

Mr. Middleton stated that he first learned that Mr. Hacker was not coming to work when Mr. Brooks called him and informed him that he would need someone to watch the number two belt head. Mr. Brooks informed him that Mr. Hacker came to his home at 11 or 12 p.m. on July 25, 1988, and told him that he was not going back to work at the mine because "he was scared of the mines and that he was going to tell us that he got his back hurt, cleaning that rock up" (Tr. 271). Mr. Middleton stated that he never saw a doctor's excuse for Mr. Hacker's absence from work and that no one ever mentioned such an excuse to him (Tr. 271).

Mr. Middleton stated that after Mr. Hacker failed to report for work he assigned Mark LeMasters to watch the belt for 4 or 5 days, and since Mr. Hacker had quit his job before, Mr. Middleton believed that he would call him again and ask for his job back. Mr. Middleton stated that he waited 2 weeks to hear from Mr. Hacker before hiring Rusty Ledford to replace him, and when Mr. Hacker called him and informed him that he was ready to come back to work, Mr. Middleton told him that he thought he had quit and had hired someone else to replace him. Mr. Middleton stated that Mr. Hacker never called to inform him that he had been hurt, and that he has never seen a medical excuse of any kind. He confirmed that he made an inquiry into Mr. Hacker's alleged injury, and that Mr. Brooks and Mr. LeMasters told him that they had no knowledge of any injury sustained by Mr. Hacker, observed no injury, and that Mr. Hacker "didn't act like he was hurt" when he used a sledge hammer to break up the rock and throw it out of the way (Tr. 273).

Mr. Middleton stated that he operates a safe mine, has never threatened any mine inspectors, and he believed that Mr. Hacker filed the discrimination complaint because "he's too lazy to work and he wants somebody to hand him out something" (Tr. 273). Mr. Middleton confirmed that the company disputed Mr. Hacker's workmen's compensation claim, and that he had never harassed Mr. Hacker "or done anything out of the way to him" (Tr. 274).

On cross-examination, Mr. Middleton stated that Mr. Brooks called him at the beginning of the shift on the morning of July 26, 1988, and informed him that he needed to have someone else watch the belt head because Mr. Hacker claimed that he hurt his back. Mr. Middleton confirmed that during his 9 or 10 months

of employment, Mr. Hacker had the same job and could have ridden the belt to his work station or crawled in for a distance of 3,500 feet to his work station. He stated that the belt head area where Mr. Hacker was assigned was at the end of the number 1 belt line, and that this belt was the only permissible belt which could be ridden (Tr. 278).

Mr. Middleton stated that Mr. Hacker had previously worked for him for 5 months before he quit, and that after returning, he worked for an additional 4 or 5 months. He stated that Mr. Hacker did his work "most of the time," but that he complained about his difficulty in loading the belt and did not want to "muck the belt line." Mr. Middleton stated that Mr. Hacker required assistance when making belt splices, and that he assigned Mr. Brooks to help him. When asked if Mr. Hacker ever complained about rock, Mr. Middleton responded "he didn't have to complain about it. All he had to do was tell us if he saw a loose piece of rock and we would go in there and take it down" (Tr. 279). Mr. Middleton stated further that "I don't think there was a man at the mine that liked him. Or liked to work with him or around him," including his brother-in-law John Brooks, who Mr. Middleton stated tried to talk him out of rehiring Mr. Hacker after he had quit his previous job at the mine (Tr. 281).

Mr. Middleton confirmed that he also received a violation for the water dilute system on the belt head that Mr. Hacker was responsible for, and he explained that the safeguard required additional shoveling of a crawl space to be used in the event the pull cords were not working. He confirmed that there were times when the cords were not working, but that they were always repaired when they broke down (Tr. 285).

Mr. Middleton could not recall the date Mr. Hacker called him, but confirmed that when he called approximately a month after he last worked, that was the first time he had spoken with him about the matter (Tr. 285). Mr. Middleton explained further as follows at (Tr. 285-286):

> Q. And you had told him at that time that as far as you was concerned he had quit and that he didn't have his job?
>
> A. Well, that's what I had thought he had done. Like he done the first time. And I also told him, he started raving about his compensation. I told him, if he had just told me that he got hurt the day before he left work, we would have filled out an accident report on him, regardless whether he got hurt or not and he could have been drawing his compensation.

Mr. Middleton stated that the number 1 belt line is a legal belt line and has been a designated mantrip with pull cords since the mine opened. He also stated that the MSHA inspector rides the same belt, and no inspector has ever advised him that the belt may not be ridden (Tr. 288). He stated that Mr. Hacker has never complained to him about any safety violations, and whenever he said anything to him about loose rock, "we always tried to take it down" (Tr. 289). Mr. Middleton also stated that when Mr. Hacker complained about dusty conditions at his belt head, he was permitted to leave the mine, and the belt would be shutdown at the face, and he would then return to his work station if he wanted to come back and would ride the belt back into the mine (Tr. 289). Mr. Middleton stated that his work rules require an employee to inform him about any injury before he leaves the mine, and he explained as follows at (Tr. 291-292):

> Q. The day Mr. Hacker left in July of 1988 were you mad at him about anything?
>
> A. No, I wasn't.
>
> Q. Okay.
>
> A. I thought everything was all right. I mean, I didn't know he was . . . . I didn't know that he was mad at us or whatever.
>
> Q. And the first conversation you had with him, after he left the mines on July 25th of 1988 was August the, around August 16th, of 1988, almost a month later?
>
> A. Yes. I guess, I don't know what date it was.
>
> Q. If he'd came back to work on the 26th or 27th, would his job been available, of July?
>
> A. Well, if he'd just told me that he'd got hurt, you know.
>
> Q. What would you have done if he had told you he got hurt?
>
> A. I'd of filled out an accident report. He could have been drawing his comp. or whatever. Just like I told him on the phone when he called.
>
> Q. What's your normal procedure when you do have a man get hurt? What do you do?
>
> A. Well, I usually, we, you know, we've got signs up to report all injuries and accidents before you leave the work. You know, before leaving work.

And, at (Tr. 296-297):

> JUDGE KOUTRAS: So, you're saying that had Mr. Hacker told you before leaving the mine that afternoon that, you know, I fell off the belt and hurt my back and might not be back to work tomorrow, that he would probably then have said, yeah, well, we'll see how it is or . . .
>
> THE WITNESS: No, there wouldn't been any probably about it. I would have filled an accident report out on him, then, and we would have turned it in so he could have got his benefits.
>
> JUDGE KOUTRAS: Well, an accident report, a reportable accident has to result in some injury, doesn't it?
>
> THE WITNESS: Yes. But I would have went ahead and filled out an accident report.
>
> JUDGE KOUTRAS: You ever had occasion to do that in the past? Fill an accident report on employees that are knocked about or get hurt?
>
> THE WITNESS: Yes, we have.

Mr. Middleton believed that Mr. Hacker concocted his claim of injury, and that Mr. Hacker had previously advised him that he had sued someone over a back injury resulting from an automobile accident (Tr. 295). Mr. Middleton also believed that Mr. Hacker quit his job because he was afraid to work in the mine (Tr. 298).

Mr. Middleton denied that anyone ever required Mr. Hacker to ride the belt into the mine, and that Mr. Hacker had the option of riding the belt or crawling into the mine to reach his work station. He confirmed that there is no prohibition against anyone stopping the belt when its empty, and that he has instructed Mr. Hacker not to turn off the belt if it is loaded except in an emergency (Tr. 300). Mr. Middleton denied any knowledge of Inspector Myers having any difficulty with the belt or getting someone to shut it down, and that this never came to his attention. He also denied ever being cited for his failure to cooperate with an inspector or for obstructing any inspection (Tr. 303).

Darrell Middleton testified that he is the president and part owner of the company, but that his brother oversees the operation of the Black Streak Mine "mostly on his own" (Tr. 310). Mr. Middleton stated that he was familiar with the number 1 belt, and he confirmed that it is a designated mantrip which the belt headman may use to reach his work station. He stated that the

belt headman could also crawl to his work station, "or go around to the other side of the mountain and ride the scoop and crawl the other belt" (Tr. 311). Mr. Middleton stated that the mine is preshifted by his brother, and that all reports are kept at the mine office located on the "Flatland side" of the mine (Tr. 312).

Mr. Middleton stated that he was not present at the mine on July 25, 1988, when Mr. Hacker was reportedly injured, and that during an inquiry into the matter, he spoke with Mr. Stapleton, Mr. LeMasters, and Mr. Brooks, and when they could not confirm that Mr. Hacker had been injured, no accident or compensation report was made (Tr. 313). Mr. Middleton denied that he ever threatened any mine inspector, and that apart from a dust violation on the number 1 belt, he was unaware of any other violations on the number 1 belt. He confirmed that training is provided for all of the miners, and he believed that Mr. Hacker filed his discrimination complaint "when we objected to him being on compensation" (Tr. 314). He confirmed that the company has never had any prior discrimination claims filed against it (Tr. 314).

On cross-examination, Mr. Middleton confirmed that he spoke with Mr. Hacker's wife a week or two after July 25, 1988, and that she initiated the call. He stated that he spoke with her two or three times and that she wanted to know about compensation for her husband. Mr. Middleton stated that the only time he spoke with Mr. Hacker was when he called to inquire how he would respond to his discrimination claim, and that he never spoke with him about his compensation. Mr. Middleton confirmed that he discussed Mrs. Hacker's calls with his brother, and after speaking with the other individuals who were present on July 25, 1988, when Mr. Hacker claimed he was injured, they decided not to fill out any accident report in order to protect their compensation so that their costs would not be increased (Tr. 316).

Mr. Middleton questioned the reason for Mr. Hacker's attempting to ride the belt back out of the mine knowing the existence of the rock which he encountered while riding the belt in to work, and stated that he and his brother concluded that Mr. Hacker had ridden the belt out of the mine so that he could claim that he was hurt. Mr. Middleton believed that Mr. Hacker should have called the outside man to shutdown the belt and have the rock taken down before attempting to ride the belt out of the mine (Tr. 318). Mr. Middleton stated that he later learned of Mr. Hacker's pre-existing back injuries, and that the respondent decided to settle his compensation claim rather than to pay a lawyer to dispute it (Tr. 320).

Mr. Brooks was recalled by the court, and he stated that when he informed Windell Middleton about Mr. Hacker's claimed back injury, he did not believe that he told him that Mr. Hacker would claim that he was hurt, but told him that Mr. Hacker said

that he had hurt himself, and that he (Brooks) had no knowledge that Mr. Hacker had been injured (Tr. 332-333).

Mr. Hacker was recalled by the court, and he confirmed that the only thing he told Mr. LeMasters and Mr. Stapleton was that "I took a pretty good jolt," and that he did not tell them that he had jumped off the belt to avoid the rock (Tr. 336). Mr. Hacker confirmed that he had a pre-existing back injury which occurred in January, 1982, when he was in a truck accident and that he had a fusion done on his lower back. Mr. Hacker was not sure whether he disclosed this injury on his application form when he applied for work with the respondent, but stated that he informed the Middleton's about his prior surgery and that they knew about it (Tr. 338).

Mr. Hacker explained that he took the doctor's slip to Mr. Brooks so that he could take it to work with him, and he confirmed that he did not call the mine or Mr. Middleton the day following his injury, and that his wife did the calling (Tr. 340-341).

Findings and Conclusions

In order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, a complaining miner bears the burden of production and proof to establish (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Company, 2 FMSHRC 2768 (1980), rev'd on other grounds sub nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981); Secretary on behalf of Jenkins v. Hecla-Day Mines Corporation, 6 FMSHRC 1842 (1984); Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510-2511 (November 1981), rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no way motivated by protected activity. If an operator cannot rebut the prima facie case in this manner it may nevertheless affirmatively defend by proving that (1) it was also motivated by the miner's unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Company, 4 FMSHRC 1935 (1982). The ultimate burden of persuasion does not shift from the complainant. Robinette, supra. See also Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983); and Donovan v. Stafford Construction Company, No. 83-1566 D.C. Cir. (April 20, 1984) (specifically-approving the Commission's Pasula-Robinette test). See also NLRB v. Transportation Management Corporation, ____ U.S. ___, 76 L.ed.2d 667 (1983), where the Supreme Court approved the NLRB's virtually identical

analysis for discrimination cases arising under the National Labor Relations Act.

Direct evidence of actual discriminatory motive is rare. Short of such evidence, illegal motive may be established if the facts support a reasonable inference of discriminatory intent. Secretary on behalf of Chacon v. Phelps Dodge corp., 3 FMSHRC 2508, 2510-11 (November 1981), rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983); Sammons v. Mine Services Co., 6 FMSHRC 1391, 1398-99 (June 1984). As the Eight Circuit analogously stated with regard to discrimination cases arising under the National Labor Relations Act in NLRB v. Melrose Processing Co., 351 F.2d 693, 698 (8th Cir. 1965):

> It would indeed be the unusual case in which the link between the discharge and the [protected] activity could be supplied exclusively by direct evidence. Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence. Furthermore, in analyzing the evidence, circumstantial or direct, the [NLRB] is free to draw any reasonable inferences.

Circumstantial indicia of discriminatory intent by a mine operator against a complaining miner include the following: knowledge by the operator of the miner's protected activities; hostility towards the miner because of his protected activity; coincidence in time between the protected activity and the adverse action complained of; and disparate treatment of the complaining miner by the operator.

Mr. Hacker's Protected Activity

It is clear that Mr. Hacker enjoys a statutory right to voice his concern about safety matters or to make safety complaints to a mine inspector without fear of retribution or harassment by management. Management is prohibited from interfering with such activities and may not harass, intimidate, or otherwise impede a miner's participation in these kinds of activities. Secretary of Labor ex rel. Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981), and Secretary of Labor ex rel. Robinette v. United Castle Coal Co., 3 FMSHRC 803 (April 1981). Baker v. Interior Board of Mine Operations Appeals, 595 F.2d 746 (D.C. Cir. 1978); Chacon, supra.

In his posthearing brief, Mr. Hacker's counsel asserts that the respondent discharged Mr. Hacker after he was injured on July 25, 1988, and that the respondent's refusal to hire him back was based on the fact that approximately a week prior to his

injury, Mr. Hacker spoke to an MSHA inspector who was at the mine conducting an inspection and complained to the inspector about the working conditions and safety at the mine. Counsel argues that the respondent retaliated against Mr. Hacker for complaining to the inspector by not hiring him back.

In response to the respondent's contention that Mr. Hacker failed to return to work on July 26, 1988, after his purported injury, and failed to notify mine management that he was injured and would not be returning to work, counsel asserts that Mr. Hacker produced medical evidence to support his injury, and that the evidence establishes that Mr. Brooks informed management that Mr. Hacker would not be returning to work on July 26, 1988, because he was complaining to have been injured and that the wife of one of the co-owners of the mine gave her approval for the hospital treatment of Mr. Hacker's injury. Counsel concludes that this supports a conclusion that the respondent was aware that Mr. Hacker had been injured and would not be returning to work because of those injuries, and that its denials to the contrary were made in order to avoid the fact that Mr. Hacker was discharged for complaining to the inspector.

The record in this case establishes that Mr. Hacker failed to call Inspector Myers to testify in this case, and also failed to obtain his pretrial deposition. I take particular note of the fact that at the time Mr. Hacker filed his complaints with MSHA and with the Commission, he did not allege that he was discharged because of any protected activities. The thrust of both complaints focused on the failure by the respondent to acknowledge Mr. Hacker's purported injury and to agree to pay him workmen's compensation. Mr. Hacker's contention that the respondent fired him, or refused to rehire him, was raised during the course of the hearing when Mr. Hacker first suggested that the respondent discharged him because he informed Inspector Myers that he rode the belt into the mine to his work station, and that the belt stop cord was inoperable. Mr. Hacker asserted that the inspector issued several violations on the belt, including violations for riding the belt and the inoperative cord, and that the inspector also accused him of impeding his inspection for not shutting the belt down to facilitate the inspection. Mr. Hacker suggested further that the respondent was aware of his conversation with the inspector and discharged him because his complaints to the inspector resulted in violations being issued to the respondent because of the illegal belt conditions revealed by Mr. Hacker to the inspector.

I find no credible or probative evidence in this case to establish that Mr. Hacker's conversation with the inspector amounted to a safety complaint. The inspector did not testify, and there were no witnesses to the conversation. Mr. Hacker conceded that he did not inform the Middletons about his conversation with the inspector, and there is no evidence that the

inspector ever spoke to management about the encounter with Mr. Hacker. Further, Mr. Hacker admitted that he had never filed any safety complaints with MSHA or management, had never reported any safety violations to MSHA, and had never spoken to any inspectors other than Mr. Myers.

Mr. Hacker testified that his conversation, or "chit chat" with Mr. Myers was about the belt "in general," and that when he informed the inspector that he rode the belt into the mine, the inspector informed him that he should not do this because of the lack of clearance. Mr. Hacker also alluded to the fact that the inspector was angry at him for not shutting the belt down so that it could be inspected. Mr. Hacker believed that the inspector issued a violation for interfering with his inspection, and also issued some violations for certain belt conditions. Mr. Hacker also believed that riding the belt was illegal, and he contended that the belt stop cords had never been operational during the entire time that he worked at the mine.

Windell Middleton, who was Mr. Hacker's immediate supervisor, denied any knowledge of Mr. Hacker's conversation with the inspector, and there is no evidence that his brother Darrell was aware of any such conversation. As the mine superintendent, Windell Middleton exercised day-to-day supervision of the mining activities, and he confirmed that the No. 1 belt in question was a designated mantrip, and that the belt was equipped with operating stop cords. Mr. Middleton acknowledged that Inspector Myers issued some citations for certain belt conditions, but denied being cited for impeding any inspections or because of anyone riding the belt illegally.

Mr. Hacker's counsel submitted copies of all citations issued by MSHA inspectors at the mine from October, 1987, through July 25, 1988. Included in these submissions are several section 104(a) citations issued by Inspector Myers on July 13, and 18, 1988. Some of the citations were issued on the Nos. 2, 3, and 4 belts, and two were issued on the No. 1 belt because of the lack of water sprays and a slippage switch at the belt conveyor drive. I find no indication that any of the citations were issued because of the respondent's purported interference with the inspector's inspection, or because of the respondent's purported illegal use of the belt as a mantrip. Further, in each instance, Inspector Myers noted that the mine was not in production during his inspections of July 13 and 18, 1988, and he extended the citations. All of the citations were ultimately terminated after the respondent abated the conditions.

Mr. Hacker's brother-in-law, John Brooks, confirmed that he was not aware of any pull cord violations, or any violations by Inspector Myers because of the lack of cooperation by the respondent during an inspection. Mr. Brooks confirmed that Mr. Hacker told him he did not like riding the belt under the rock, but that

he was unaware of any safety complaints made by Mr. Hacker to management or anyone else.

Mr. Brooks stated that Mr. Hacker never complained to him about any safety violations, never indicated to him that management did not care about safety, and that Mr. Hacker got along well with management.

Miners Jimmy Stapleton and Mark LeMasters, testified that they were unaware of any "illegal" activities at the mine. Mr. Stapleton was not aware of any problems on the belt or with Inspector Myers. He believed that mine management were "good people to work for" and he has never known management to assign miners to work in unsafe conditions. Mr. LeMasters stated that he has never known management to harass Mr. Hacker or "do anything out of the way" to him.

After careful consideration of all of the testimony and evidence adduced in this case, I cannot conclude that Mr. Hacker filed any safety complaint with Inspector Myers. Even assuming that one could conclude that Mr. Hacker's conversation with the inspector amounted to a safety complaint, I find no credible or probative evidence to establish, or even suggest, that the Middletons were aware of any such conversation, or that the citations issued by Mr. Myers resulted from any safety complaints lodged by Mr. Hacker. According to the MSHA "type of inspection" code found in item 19 on the face of the citations (CBA), Mr. Myers was conducting a regular electrical inspection of the entire mine, and I can only conclude on the basis of the evidence presented in this case that he issued the citations in the normal and routine course of his inspections after observing the cited conditions independent of any conversations that he may have had with Mr. Hacker.

Mr. Hacker testified that after speaking with the inspector, his pay and job status were not affected, and that the respondent displayed no anger towards him. He also agreed that management never told him that he was being fired, that he got along well with management, was always paid his wages on time, and that the Middletons never gave him a "hard time." Mr. Hacker confirmed that Windell Middleton hired him back after he had previously quit his job at the mine. I find no evidence that the Middletons ever harassed, threatened, or intimidated Mr. Hacker because of any safety matters or protected activity, or that they treated him any differently from other employees. Mr. Hacker conceded that the Middletons "were good men to work with and work for" (Tr. 66).

On the basis of all of the evidence and testimony adduced in this case, I agree with the respondent's contention that the dispute in this case between Mr. Hacker and the Middleton brothers arose as a result of the respondent's challenge to

Mr. Hacker's workmen's compensation claim in connection with his purported injury of July 25, 1988. Mr. Hacker admitted as much several times during the course of his testimony, and his consistent claim prior to the hearing focused on the respondent's refusal to acknowledge that his injury was job related and that he was entitled to any compensation for his purported injury. The record reflects that the respondent settled the compensation claim on the day before the hearing in this case (see copy of agreement award submitted by Mr. Hacker's counsel). Mr. Hacker testified that although he is able to work, he did not look for any work after his injury because of his pending compensation claim. This raises a strong inference that Mr. Hacker did not want to return to work for fear of jeopardizing his workmen's compensation claim.

The record establishes that Mr. Hacker's last day of work was July 25, 1988, when he claimed that he injured his back. Darrell Middleton testified that Mr. Hacker never communicated with him again until he called to find out how he (Middleton) would respond to his discrimination complaint. Mr. Middleton confirmed that he spoke with Mrs. Hacker several times after July 25, 1988, and that the conversations focused on Mr. Hacker's compensation claim for his injury. Mrs. Hacker's testimony reflects that any conversations that she had with the Middleton brothers were in connection with her husband's claimed injury and his compensation claim, and she conceded that nothing was ever said about her husband returning to work at the mine. As a matter of fact, Mrs. Hacker's brother, John Brooks, testified that Mrs. Hacker did not want Mr. Hacker working underground because of his fear of the belt and the rock. Mr. Brooks confirmed that Mr. Hacker had told him on several prior occasions that he did not like working underground, and Mrs. Hacker confirmed that her husband always complained about the rock because he "was not used to coal mining."

Windell Middleton testified that he heard nothing further from Mr. Hacker concerning his claimed back injury and has never seen any medical excuse attesting to his claimed injury. Mr. Middleton confirmed that when Mr. Hacker failed to report for work after July 25, 1988, he assigned his job duties to Mr. LeMasters for 4 or 5 days, believing that Mr. Hacker would contact him and ask for his job back as he had done on a prior occasion when he quit his job. After waiting for 2 weeks to hear from Mr. Hacker, Mr. Middleton hired someone else to replace him, and when Mr. Hacker finally called on the advice of an MSHA inspector who was looking into his discrimination complaint, Mr. Middleton informed Mr. Hacker that he thought he had quit his job and that someone else had been hired to replace him. Mr. Hacker admitted that his first contact with Mr. Middleton about his job came on August 16, 1988, approximately 3 weeks after he claimed injury, and he conceded that neither Windell or

Darrell Middleton ever said anything to him to indicate that he had been fired.

All of the witnesses who were working with Mr. Hacker on the evening of his claimed back injury were consistent in their testimony that Mr. Hacker showed no visible physical signs of any injury, and that he never complained to them about any injury or the need for any medical attention. I believe that Windell Middleton's doubts concerning Mr. Hacker's claimed back injury, and his reluctance to agree to the workmen's compensation claim, were based on the information given him by these witnesses, and the fact that Mr. Hacker failed to promptly and directly communicate with him regarding his asserted injury. I also believe that Mr. Middleton's doubts were influenced by the fact that Mr. Hacker had previously abandoned or quit his job because of his fear of underground mining, that he had sued someone in the past over a back injury received in a traffic accident, and Mr. Middleton's view that Mr. Hacker was "too lazy to work" and was looking for a "handout."

Having viewed the Middleton brothers during the course of their testimony in this case, I find them to be straightforward and credible individuals. I find no credible or probative evidence to establish, either directly or indirectly, that the refusal by Windell Middleton to give Mr. Hacker his job back after he finally contacted Mr. Middleton was motivated in any way by Mr. Hacker's conversation or contact with MSHA Inspector Elijah "Chaulk" Myers, the filing of any complaint with Mr. Myers, or any other protected activity on the part of Mr. Hacker.

I find no credible or probative evidence in this case to establish that Mr. Hacker was either directly or indirectly discharged by the respondent. To the contrary, I conclude and find that on the facts here presented, Windell Middleton had a reasonable and plausible basis for concluding that Mr. Hacker voluntarily quit his job as he had done before, and that the hiring by Mr. Middleton of another individual to replace Mr. Hacker was not illegal or discriminatory under the Act. In short, I conclude and find that Mr. Hacker has failed to make out a case of discrimination.

ORDER

In view of the foregoing findings and conclusions, and on the basis of the preponderance of all of the credible and probative evidence adduced in this case, I conclude and find that the

complainant has failed to establish that the respondent discriminated against him. Accordingly, the complaint IS DISMISSED, and the complainant's claims for relief ARE DENIED.

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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NOV 9 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF MICHAEL A. CARRANO, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. YORK 89-47-DM
	:	MD 88-79
v.	:	
BLUE CIRCLE ATLANTIC, INC., Respondent	:	

DECISION APPROVING SETTLEMENT

This proceeding was brought by the Secretary of Labor in behalf of Michael A. Carrano, under § 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq, for certain corrective relief to undo the effects of alleged discrimination against him, and for a civil penalty for an alleged violation of § 105(c) of the Act.

The parties have moved for an order approving a proposed settlement. I have considered the representations and documentation submitted and I conclude that the proferred settlement is consistent with the criteria in §§ 105(c) and 110(i) of the Act.

ORDER

WHERFORE IT IS ORDERED that:

1. The motion for settlement is GRANTED.

2. Respondent shall comply with all the terms of the settlement herein.

3. Respondent shall pay a civil penalty of $400 within 30 days of this Decision.

4. Subject to full compliance with the above, this proceeding is DISMISSED.

William Fauver
William Fauver
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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NOV 13 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF FRED BARTLEY, Complainant	:	DISCRIMINATION PROCEEDING Docket No. KENT 89-102-DM Jenkins Quarry
v.	:	
ADAMS STONE CORPORATION, Respondent	:	

SUPPLEMENTAL DECISION

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Complainant; David Adams, Esq., Vice-President, Adams Stone Corporation, Pikeville, Kentucky, for Respondent.

Before: Judge Broderick

On October 18, 1989, I issued a decision on the merits in the above case in which I determined that the layoff of Fred Bartley by Respondent on March 29, 1988, was in violation of section 105(c) of the Mine Act. I ordered that he be paid back wages from the date of the layoff to the date of his reinstatement with interest thereon computed in accordance with the Commission decision in UMWA v. Clinchfield Coal Co., 10 FMSHRC 1493 (1988), as well as other benefits to which he was entitled and which were withheld during the time of his layoff. I directed that Respondent be given credit for the amount paid as back wages following the arbitrator's decision which reinstated him to his position as crusher operator. I directed the parties to attempt to agree on the amount due under my order, failing which, I directed the Secretary to submit a statement, within 20 days of the date of the decision, of the amount due. Respondent was given 10 days thereafter to reply. On October 23, 1989, the Secretary filed a statement of the amount claimed as back wages. Respondent has not replied to the statement.

I have considered the Secretary's statement, and the record in this proceeding, and on the bases thereof, IT IS ORDERED:

1. The findings, conclusions and orders of the decision issued October 18, 1989, are REAFFIRMED.

2. Respondent shall, within 30 days of the date of this Supplementary Decision, pay to Complainant the sum of $4,770.45 representing back wages still owing, vacation pay still owing and interest to October 16, 1989. From October 16, 1989 until the total amount is paid, Respondent shall pay 1.10 per day interest.

3. Respondent shall, within 30 days of the date of this Supplementary Decision pay to the Secretary a civil penalty in the amount of £1000 for the violation of section 105(c) of the Act.

4. This decision is FINAL.

James A. Broderick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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NOV 13 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. PENN 89-152
	:	A.C. No. 36-00840-03681
v.	:	
	:	Cambria Slope No. 33
BETH ENERGY MINES, INC., Respondent	:	

DECISION APPROVING SETTLEMENT

Appearances: Paul D. Inglesby, Esq., U.S. Department of Labor, Office of the Solicitor, Philadelphia, Pennsylvania, for Petitioner;
R. Henry Moore, Esq., Buchanan Ingersoll, Pittsburgh, Pennsylvania for Respondent.

Before: Judge Melick

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 (the Act). At hearing Petitioner has filed a motion to approve a settlement agreement and to dismiss the case. A reduction in penalty from $3,147 to $297 was proposed. 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.

WHEREFORE, the motion for approval of settlement is GRANTED, and it is ORDERED that Respondent pay a penalty of $297 within 30 days of this order.

Gary Melick
Administrative Law Judge
(703) 756-6261

Distribution:

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NOV 13 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), on behalf of DAN NELSON, RONALD SONEFF, TOMMY BOYD, STANLEY ODOM, CARROLL JOHNSON, Complainants	:	DISCRIMINATION PROCEEDING
	:	Docket No. SE 89-63-D
	:	Case No. OTC&I-CD-88-01
	:	Mine No. 7
and	:	
UNITED MINE WORKERS OF AMERICA: Intervenor	:	
v.	:	
JIM WALTER RESOURCES, INC., Respondent	:	

DECISION AND ORDER OF DISMISSAL

Appearances: Colleen Geraghty, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Complainants;
Patrick K. Nakamura, Esq., Longshore, Nakamura, and Quinn; Birmingham, Alabama, for United Mine Worker of America;
David M. Smith, Esq., Maynard, Cooper, Frierson and Gale; Birmingham, Alabama, for Petitioner.

Before: Judge Melick

Complainant requests approval to withdraw her Complaint in the captioned case on the grounds that the parties have reached a mutually agreeable settlement of the underlying issue. Under the circumstances herein, permission to withdraw is granted. 29 C.F.R. § 2700.11. This case is therefore dismissed.

Gary Melick
Administrative Law Judge
(703) 756-6261

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEVA 89-52
	:	A.C. No. 46-01318-03850
v.	:	
	:	Robinson Run No. 95 Mine
CONSOLIDATION COAL COMPANY, Respondent	:	

DECISION

Appearances: Ronald Gurka, Esq., Office of the Solicitor, U. S. Department of Labor, Arlington, Virginia, for the Secretary;
Michael R. Peelish, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Weisberger

Statement of the Case

On December 30, 1988, the Secretary (Petitioner) filed a petition for assessment of civil penalty, alleging a violation by the Operator (Respondent) of 30 C.F.R. § 75.1725(a). Respondent filed an Answer on January 30, 1989. On April 7, 1989, this case was reassigned to the undersigned and pursuant to notice, the case was heard on August 9 - 10, 1989, in Morgantown, West Virginia. Bretzel W. Allen and Stephen G. Sawyer testified for Petitioner. Bernard W. Koleck, Kenny Henline, and Larry D. Patts testified for Respondent. Post Hearing Briefs were filed by Respondent and Petitioner, respectively, on October 16, and 18, 1989.

Stipulations

1. The Parties have stipulated that Consolidation Coal Company is a large coal mine operator.

2. The Parties have stipulated that Robinson Run No. 95 Mine is a large mine.

3. The Parties have stipulated that the history of previous violations reveals a total of 997 assessed violations and 1,016 inspection days in a 24-month period preceding the order at issue in this case for a ratio of .98 violations per inspection day.

4. Parties stipulate that assessment of a civil penalty in this case would not affect Consolidation Coal Company's ability to continue in business.

5. The Parties stipulate that a withdrawal order pursuant to section 104(d) of the Mine Act had been issued within the 90-day period preceding the issuance of the order at issue in this case.

Findings of Fact and Conclusions of Law

On August 29, 1988, Bretzel W. Allen, an MSHA Inspector, observed "excessive wear" on both ends of a wheel axle on a belt tension unit. He issued a section 104(2)(d) Order (Order No. 3117715) alleging a violation of 30 C.F.R. § 75.1725(a).

The belt tension unit in question has two axles, each of which has two wheels, which ride on tracks or I beams. The unit is attached to the belt line and controls the pressure on the belt line. The tension on the belt line is adjusted by an hydraulic jack which is attached to the belt tension unit by a tension rope. This rope allows the tension unit to ride back and forth on the I beams, thus adjusting the tension on the belt line to which it is connected. The belt tension unit is equipped with vertical guide rollers to prevent the wheels and carriage from moving in a lateral direction.1/

Section 75.1752(a), in essence, requires that mobile and stationary equipment and machinery shall be maintained in "safe" operating condition and if, "in unsafe condition," the equipment shall be removed from service immediately. The axle in question had been, according to the uncontradicted testimony of Allen, worn at both ends. At one end (Exhibit J-3, J-5) it had been worn from an original diameter of 30.5 millimeters to a diameter of 21 millimeters. Allen opined that the axle was unsafe due to the amount of wear, and its color observed by him to be a shiny silver to deep blue, which indicated that it was over-heated and

1/ Petitioner's evidence is insufficient to establish that the subject unit did not have such rollers as depicted in Joint Exhibit 4, Section E-B. Allen's statement, that he did not recall seeing these vertical guide rollers when he issued the Order in question, does not negate their existence.

that its temper had changed.[2] According to Allen, the amount of wear on the axle and the color, which indicated that the temper had changed, led him to conclude that the axle could fail at any time.

Respondent's witnesses did not deny the amount of wear on the axle, as testified to by Allen, but opined that it nonetheless was safe. Larry D. Patts, Respondent's Assistant Vice President in charge of safety, opined that the axle, made out of 1020 steel, is ductile, and that accordingly, with continued wear, would bend before it would break. Not much weight was accorded his opinion as he indicated on cross-examination that ductile material can fail in a brittle fashion.

Koleck presented mathematical calculations as to the maximal principal stress (or actual applied load) to which the axle in question is subjected. He indicated that this figure takes into account shear stress, which is based on the weight of the cart and tension of the belt, and the bending stress, which is based on the weight of the carriage and the force of the belt. By dividing the minimum strength of the material of the axle (as set forth by manufacturers of the steel) by the maximal principal stress, he arrived at a safety factor of 1.27. Essentially, according to Koleck, a safety factor of 1.27 indicates that the axle was safe, as bending would occur if the safety factor was less than 1.

Petitioner presented a rebuttal witness, Stephen G. Sawyer, who did not contradict Koleck's calculations. However, Sawyer indicated that Koleck's calculations did not take into account the effect of fatigue, i.e., the stress on the axle caused by repeated loading and unloading the belt, which would be between 40 and 60 percent of the manufacturer's figure for tensile strength.[3]

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[2] Although the axle was covered by a wheel and washer, that protruded from the wheel approximately a quarter of an inch, and extended from the axle approximately 1 inch, Allen indicated that he observed the the color of the axle which he indicated was not entirely covered by the wheel. In this regard, Bernard W. Koleck, Respondent's Senior Maintenance Engineer, indicated that some wear could be seen without taking off the wheel. Further, no witnesses contradicted Allen's description of the color of the axle at the time of the citation. I thus accept his testimony.

[3] Although on cross-examination it was elicited that when calculated, 60 percent of tensile strength approximates the figure that Koleck arrived at for maximum principle stress. I can not conclude that Koleck took into account the fatigue or yield stress, as that is not explicitly referred to in his testimony or in his calculations (Respondent's Exhibit R-1). Nor was Koleck recalled to rebut Sawyer's testimony, although Respondent was given the opportunity to call rebuttal witnesses.

Sawyer opined that, in essence, should the axle fail, fatigue strength would be the governing mode, not yielding strength, and it would fail from fatigue in a sudden and brittle fashion. Also, Sawyer explained that, due to galling (see the ridges and bumps on Exhibit J-5), caused by two metals rubbing together, the fatigue strength can be reduced by up to 90 percent. According to Sawyer, the effect of the abrupt change in the diameter of the axle due to its wear (see the parallel lines in Exhibit J-5), was ignored by Koleck. Although this change was compensated for by Koleck, the effect of the change "is very critical" in estimating fatigue strength (Tr. 399). Sawyer also indicated that, according to current prudent engineering practice. a safety factor should not be less than 1.5.

Although Patts and Koleck are engineers, and the former has a Bachelor's degree in metallurgy and has expertise in failure analysis, I find Sawyer, who is a professional engineer, to be the more reliable expert witness. In this connection, I place considerable weight on Sawyer's educational background which includes Masters and Doctorate Degrees, with a specialty in fracture mechanics. I found his testimony to be well reasoned. For these reasons I accept his testimony.

The Order in question alleges a violation herein of 30 C.F.R. § 75.1725(a), which, in essence, requires that equipment be maintained in a safe condition, and that unsafe equipment shall be immediately removed. Webster's Third New International Dictionary, 1986 Edition, (Webster's) defines "safe" as "1. free from damage, danger, or injury, secure. . . ." Webster's defines "free from" as "(a) lacking; without." "Danger" is defined in Webster's as "3. liability to injury, pain, or loss: PERIL, RISK. . . ." I find that the axle in question had worn from a diameter of 38.5 to 31 millimeter (Joint Exhibit 3). Considering this degree of wear, as well as the effect of galling, the abrupt change in the axle diameter caused by the wear, as well as the impact of fatigue stress, as set forth in Sawyer's testimony that I accept, I find that there was a risk of the axle failing. As such, applying the common uses of the the term "safe," as defined in Webster's, infra, I conclude that the axle was not safe. Thus, I find that Respondent herein violated section 75.1725(a), supra.

II.

According to Allen, the axle had overheated as evidenced by its blue color, and was "a definite ignition source for coal dust (Tr. 61). Essentially he indicated that there was a "possibility" (Tr. 61) of a fire, as it is normal to have some coal dust on carriage parts and the coal dust on the carriage was not wet. He indicated that should a fire occur, it would be

dangerous to the miner who normally works approximately 22 feet from the carriage. He also indicated that if the axle would break, it would cause a sudden stopping of the belt which would cause the belt to break. According to Allen, in that event a person could be injured, from the whipping action of the belt or from material flying off the belt. In such an event a person walking alongside the belt, such as a preshift examiner or a belt cleaner, could be injured seriously or killed. In essence, Allen opined that in the event of the axle breaking, the belt would lockup. According to Allen, the excessive wear on the top of the axle, which he observed, indicates that pressure was being applied in an upward fashion. Thus, he indicated that if the axle would break, the carriage would be lifted upward. Allen indicated that he was "sure" that if the axle would break, the carriage would lockup (Tr. 149). In essence, according to Allen, if the rollers and belt locked up, it would "definitely" break the belt (Tr. 150). He explained that this would occur based on the fact that the belt was "relatively large, long, heavy," and was driven by two 250 horsepower motors. He also stated that if the axle would break, the carriage could drop, as it would be supported by only one axle at that point, and it could get wedged in the broken axle so as to cause the belt to lockup. He also stated that if the axle would break, a wheel could get stuck between two frames, also causing the belt to lockup. He opined that at a minimum, in the event of an axle breaking, there would be friction between two pieces of metal, and that it would be impossible for the belt to operate. He indicated, essentially, that in the event of a lockup, extra stress or tension would be created on the belt, which could cause the motor to overload, creating heat which could create a fire hazard.

In essence, he opined that with additional wear the axle would break, and not bend. He said that in the event that it would bend, it would apply more tension to the carriage, which could possibly cause the system to overload allowing the carriage to loosen the belt, which would then slip into drive, creating heat which could create a fire hazard.

The record does not indicate that the testimony of Allen, with regard to the likelihood of a hazard occurring as a consequence of the worn axle, was based upon either his observation or investigation of incidences where similar axles have failed. Indeed he indicated on cross-examination that he did not know of any situation where a broken axle has lead to a belt being broken. In evaluating the likelihood as to whether there was a reasonable likelihood of the worn axle contributing to the hazard of an injury, I relied more on the opinions of the engineers who testified, due to their expertise based on their educational background and work experience.

Joint Exhibit 4, as explained by Respondent's witnesses, indicates that the carriage wheels of the tension unit rolled on I beams, and that movement of the wheel upward and downward was

limited by a frame, shaped as a reverse C, and whose lower horizontal member over-lapped the lip of the I beam. Accordingly, should the axle break, due to excessive wear, as explained by Respondent's witnesses, downward movement of the axle and wheel would be limited by a maximum of 5/8 of an inch, which is the distance the diagonally opposite axle and wheel would rise, until it would be caught by the upper horizontal member of the overlapping frame.[4]/

Koleck opined that if the axle would bend and not break, pressure would force the wheel upward to rub against the frame, but would not have any effect upon the operation of the carriage. Patts indicated that in such a situation, there would be an increase in friction which would "slightly" effect its efficiency, "but not the operation" (Tr. 345). In contrast, Allen opined that with bending, there would be friction of such a degree as to possibly create fire due to the presence of dust. However, his testimony did not establish the amount of such dust, and specifically its precise location in relation to the wheel and axle. Also, although the testimony of Allen was to the effect that the wear on the axle occurred in the area facing down, which would indicate that the axle was subject to pressure from above, all other expert witnesses, including Petitioner's expert Sawyer, indicated that the axle, while in normal operation, is subject to an upward pressure. Due to their expertise, and well-reasoned opinions, I accept their testimony in this regard. Thus, if the axle would bend, it would be pushed upward against the underside of the frame. The record does not establish specifically that coal dust

[4]/ Sawyer opined that the carriage could possibly go higher than 5/8 of an inch if the overlap would be compromised by the movement of other parts in the system or other conditions. However, Sawyer indicated that he did not make a close inspection of belt tension units. He conceded that, with regard to "how the components work and shift together," he does not know the tension unit as well as Patts, Koleck or Henline (Tr. 402). Thus, his opinion with regard to the functioning of the unit is not accorded sufficient weight to offset the testimony of Respondent's witnesses.

Similarly, the effect of the I beam in preventing further movement of the carriage, depends upon the distance the frame overlaps the I beam. Patts indicated on cross-examination that this distance is "approximately" 1 1/2 to 2 inch (Tr. 347), and guessed that the minimum distance may be 1/2 inch. I find that there is insufficient evidence to conclude that there was a likelihood, in the event of the axle breaking, of the amount of the overlap being as small as a 1/2 inch. Also, there is insufficient evidence to establish that a 1/2 inch overlap would not suffice to capture the frame and prevent its further movement.

was present in that area. Also, I find it significant that, as established by the uncontradicted testimony of Kenny Henline, Respondent's maintenance foreman, approximately 4 months after the belt tension unit in question was installed in July 1985, the axle, which was not welded to the frame, came loose, and a wheel dropped off. He indicated on cross-examination that there would have been more friction to the belt and it would have slowed down, but it is most significant to note that according to his testimony, the belt operated normally and nothing locked up or jammed.

Taking into account all the above, I conclude that it is possible, as outlined by Allen, that in the event of the axle bending, there could be friction to such a degree as to cause a fire which could cause a hazard to an employee working 22 feet away. Also, it is clear that there was a possibility of the axle breaking, which could cause the belt to stop, causing injury as a result of material on the belt or the belt itself being thrown at persons in the vicinity and injuring them. However, due to the presence of vertical rollers, and especially, the maximum of 5/8 of an inch clearance between the I beam and the frame, I find that it has not been established by the weight of the evidence that there was a reasonable likelihood that the hazard of the axle breaking or bending would result in an injury of a reasonably serious nature. As such, it has not been established that the violation herein was significant and substantial. (See, Mathies Coal Company, 6 FMSHRC 1 (January 1984).

III

According Allen, it is difficult to determine the amount of time it took to wear the axle down to the point where it was observed by him. He indicated, however, that a representative of the miners, Nelson Starcher, told him that the condition had been in existence for 30 days. Allen said that Starcher said that the Company did not want to shut down the longwall to repair it. He said that Starcher and another miner, Richard Moats, had asked the Company to repair it. Henline, who was responsible for the operation of the belt line, indicated that about a week to 10 days prior to the issuance of the Order in question, a greaser, who has the responsibility for weekly greasing the unit, in essence, informed him of the wear. Henline indicated essentially that he could only see "very slight" wear of the axle before taking off the washer, but with the washer off, he had observed that it was "worn" (Tr. 272), but he did not feel it would cause any safety problems. He indicated that he did not feel at that time that it was necessary to shut down production to replace the axle. Henline then ordered a new axle, two wheels, washers, and cotter pins which were delivered 2 days later, and were placed near the belt tension unit.

In order to establish that the violation herein was the result of Respondent's unwarrantable failure, Petitioner must establish the existence of "aggravated conduct." (See, Emery Mining Corporation, 9 FMSHRC 1997 (1987)). In this connection, it is significant to note, as discussed above, infra, that Henline already had the experience of having a wheel fall off the unit in question, with the result that the belt had continued to operate in a normal fashion. Further, the existence of the vertical guide rollers, as well as the frame which overlapped the I beam, would tend to mitigate to a significant degree, the consequences of a broken axle. Given these circumstances, I conclude that it has not been established that the violation herein was as a result of Respondent's unwarrantable failure.

IV

Respondent had on hand, in close proximity to the belt tension unit, replacement parts for a wheel and axle, for approximately a week prior to the issuance of the Order in question. I conclude that it acted with a moderately high degree of negligence in not replacing the worn axle which it had known about for at least a week prior to the Order. Primarily due to the presence of the vertical guard rollers, and the effect of the overlapping frame on the amount of movement that could reasonably be expected from the carriage in the event of an axle breaking, I conclude that the gravity of the violation herein was only moderately serious. Taking into account the other statutory factor, as stipulated to by the Parties, I conclude that a penalty herein of $800 is appropriate for the violation found herein.

ORDER

It is ORDERED that Order No. 3117715 issued August 29, 1988, be amended to a section 104(a) Citation, and be further amended to reflect the fact that the violation therein is not significant and substantial. It is further ORDERED that Respondent shall, within 30 days of the Decision, pay a civil penalty of $800 for the violation found herein.

Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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NOV 15 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF JAMES S. TERRY, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEVA 89-105-D
	:	HOPE CD 89-02
v.	:	Mudlick No. 1
TIMBERLINE ENERGY, INC. and Randy W. Burke, personally and as President of TIMBERLINE ENERGY, INC., Respondents	:	

DECISION

Appearances: Charles M. Jackson, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Complainant;
Paul O. Clay, Jr., Esq., Conrad and Clay, Fayetteville, West Virginia, for Respondents.

Before: Judge Maurer

This case is before me upon the Complaint by the Secretary of Labor on behalf of James S. Terry under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act", alleging that Mr. Terry was discharged by the respondents on October 27, 1988, in violation of section 105(c)(1) of the Act. The Secretary seeks reinstatement, back wages and interest for Mr. Terry as well as civil penalties against the respondents. Respondents maintain that Terry was not discharged in violation of the Act, but rather was discharged for his failure to adequately perform his duties as a section foreman.

Pursuant to notice, an evidentiary hearing was held at Morgantown, West Virginia on May 4, 1989. Subsequently, both parties have filed post-hearing proposed findings of fact and conclusions of law which I have considered along with the entire record and considering the contentions of the parties, make this decision.

STIPULATIONS

The complainant and respondents stipulated to the following:

1. Pursuant to Section 113 of the Act, 30 U.S.C. § 823, the Federal Mine Safety and Health Review Commission has jurisdiction over the subject matter of this case.

2. At all times relevant herein, Complainant James S. Terry worked at Respondent Timberline Energy, Inc.'s Mudlick No. 1 Mine and was a miner as defined in Section 3(g) of the Mine Safety and Health Act of 1977. 30 U.S.C. § 802(g).

3. Timberline Energy, Inc., Respondent, is a corporation incorporated under the laws of the state of West Virginia, and is engaged in the operation of coal mine facilities and is therefore an "operator" as defined in Section 3(d) of the Act, 30 U.S.C. § 802(d).

4. The subject Mudlick No. 1 Mine, which is located near Bergoo, in Webster County, West Virginia, has products that enter commerce or has operations or products that affect commerce, and therefore is a "mine" as defined in Section 3(h)(1) of the Act, 30 U.S.C. § 802(h)(1).

5. On or about October 28, 1988, Complainant James S. Terry filed a complaint with the Secretary alleging discrimination.

6. James S. Terry was employed as a miner for Timberline Energy, Inc., from October 14, 1988, to October 26, 1988.

7. Randy W. Burke is, and was at all pertinent times, President of Timberline Energy, Inc.

8. Randy W. Burke owns, and at all pertinent times owned, fifty percent (50%) of Timberline Energy, Inc.

9. Randy W. Burke is an operator as defined in Section 3(d) of the Act, 30 U.S.C. § 802(d).

10. Randy W. Burke is a person as defined in Section 3(f) of the Act, 30 U.S.C. § 802(f).

11. The shareholders of Timberline Energy, Inc., are Randy W. Burke, who owns fifty percent (50%) of the shares, and Eric Meador, who owns fifty percent (50%) of the shares.

12. Randy W. Burke was the person from Timberline Energy, Inc., who managed the Mudlick No. 1 mine for Timberline Energy, Inc.

13. Randy W. Burke played a role in making decisions about business activities for Timberline Energy, Inc., at the Mudlick No. 1 mine.

14. Randy W. Burke had at least some responsibility for setting wage rates for Timberline Energy, Inc., at the Mudlick No. 1 mine

15. Randy W. Burke took part in the hiring of employees for Timberline Energy, Inc., at the Mudlick No. 1 mine.

16. Randy W. Burke has, and at all pertinent times had, the authority to hire employees for Timberline Energy, Inc., at the Mudlick No. 1 mine.

17. Randy W. Burke has, and at all pertinent times had, the authority to lay off employees for Timberline Energy, at the Mudlick No. 1 mine.

18. Randy W. Burke has, and at all pertinent times had, the authority to reinstate employees for Timberline Energy, Inc., at the Mudlick No. 1 mine.

19. Complainant James S. Terry earned a straight time salary of $2,800.00 per month while an employee of Timberline Energy, Inc.

20. Complainant James S. Terry worked an average of 44 hours per week while an employee of Timberline Energy, Inc.

21. Complainant James W. Terry was covered by a hospitalization plan while employed at Timberline Energy, Inc.

22. Timberline Energy, Inc., produced approximately 44,775 tons of coal at its Mudlick No. 1 mine during the period from June 1, 1988, to December 31, 1988.

23. Timberline Energy, Inc., had approximately 18 employees at any one time during the period from June 1, 1988, to December 31, 1988.

24. Order No. 2728486 and Citations Nos. 2728485 and 2728487 were issued on October 27, 1988, by Mine Safety and Health Administration Inspector Paul E. Hess, and were served on Timberline Energy, Inc., or its agent as required by the Act.

FINDINGS OF FACT

Having considered the record evidence in its entirety, I find that a preponderance of the reliable, substantial and probative evidence establishes the following findings of fact:

1. The complainant, James S. Terry, was employed for approximately twenty-eight years in and around coal mines prior to his employment with Timberline Energy, Inc., on October 14, 1988.

2. Terry was employed as a section foreman for Timberline Energy, Inc. from October 14, 1988, to October 26, 1988, on the evening shift.

3. When Terry began working at Timberline, he felt the working conditions at the Mudlick No. 1 Mine were "good". His opinion changed, however, within the next few days as the condition of the top became adverse.

4. On October 17, 1988, Terry encountered top at the No. 2 entry which showed signs of breaking along the ridge, making noises characteristic of bad top. He drilled test holes in the affected areas which did not show any separation of the top but rather showed that the top was soft. Terry "dangered off" that particular area and recorded his action in his book on the surface.

5. On October 18, 1988, the top fell in the No. 2 entry.

6. On October 25, 1988, Terry was supposed to keep his crew after the regular shift to change the belts on the No. 2 conveyor belt. However, he did not change them because he noticed that the No. 3 entry had begun that day to show the characteristics of bad top. Accordingly, Terry instead took his bolt crew and, for approximately four to five hours after their shift, set fifty to sixty additional six foot bolts to supplement the four foot bolts that had already been placed in that area.

7. Timberline took no adverse action against Terry for his decision to set additional roof bolts rather than change belt as he had been instructed to do, other than to question him as to why he had made that decision.

8. When Terry arrived at the mine on October 26, 1988, he was told by the miners on the day shift that they were having trouble with the top and to be careful. He went underground with his crew and found that the mine foreman, Randy Key, was already underground with one of the men (Hubert Key) from the evening

shift building cribs for additional support in the crosscut left-handed off the No. 3 entry. Terry was advised by Randy Key that they had built cribs in other areas of the mine, that they had used all of the crib blocks that were in the mine, and that the mine was safe to work at that time in his opinion. While the men began moving the equipment into the face area, Terry and Randy Key went down the No. 3 entry to talk. Randy Key advised him that there was additional support material outside being loaded onto the scoop by the outside man and that, when the scoop batteries were charged, the material would be brought down if he needed it.

9. Within a few minutes after his discussion with Terry in the No. 3 entry on October 26, 1988, Randy Key went outside. Shortly thereafter, the crew shut off their equipment while moving it to the face area to get it in place to mine coal. In the silence, they heard the top "working" again. Terry then instructed his crew to bring the equipment back out and called Randy Key on the surface to advise him that the top was again causing trouble.

10. There were insufficient crib blocks on hand at the mine site, inside or outside, to adequately support the roof.

11. Timbering is in the opinion of some equivalent to placing cribs if you set the timbers in a cluster and there were sufficient timbers outside to do the job, although some or all of these timbers would have had to first be cut to size. Terry was of the opinion, however, that the only sure method of making that roof safe to work under that evening was to build cribs and the material to build those cribs was not available that night.

12. When Terry returned to his crew after talking to Randy Key, he told them that the outside man would be bringing in some roof support material when the scoop was recharged. While waiting, the crew listened to the roof "working" and decided among themselves to go outside. By this time, Randy Key had left the mine site.

13. Terry then returned to the telephone to again attempt to talk to Randy Key, but was advised that he was already gone. At this point, Terry "dangered off" the area and with his crew, moved the mining equipment out of the affected area and taking their personal equipment, returned to the surface.

14. Upon returning to the surface of the mine with the evening crew on October 26, 1988, Terry called Randy Key's home and left a message with Mrs. Key that Randy Key should return his call as soon as he arrived. He recorded in the mine book that the area had been "dangered off" and waited in vain for the

return telephone call from Randy Key. At 7 p.m., having heard nothing back from Randy Key, he let the crew go home. At approximately 9:00 p.m., Terry returned below and preshifted the mine for the night crew. The top was still working at that time. He then returned to the surface, filled out the preshift reports, and departed the mine site when the night crew arrived.

15. MSHA Inspector Paul E. Hess arrived at the mine site and went underground with the night crew at approximately 11 p.m. on October 26, 1988. At that time, he could not hear the top "working". However, he noticed numerous indications that the top had been "working" in the No. 3 entry and face, the No. 3 to 2 crosscut, the No. 3 to 4 crosscut, and the No. 4 entry up toward the face, including cutters, slips, and loose, broken roof that had gapped down. He thereupon advised the foreman of the night crew that he was issuing an Imminent Danger Order on the affected sections and placed red tags at the No. 3 entry and the No. 4 entry.

16. Upon returning to the mine on the evening of October 27, 1988, Inspector Hess observed that approximately twenty cribs and three or four headers had been placed in the areas containing the bad top. The material to place this amount of additional roof support had not been available to Terry the previous evening.

17. Randy Key had made the impression on Terry that the clear priority for the evening of October 26, 1988, was to mine coal in Nos. 2, 3 and 4 entries. Key, however, specifically denies telling Terry that he must run coal on this shift or he and his men would be terminated. No other witnesses corroborated Terry's assertion that this statement was made and nobody was in fact fired, except Terry. My sense of what transpired is that Randy Key left no doubt in Terry's mind that he expected some coal to be mined that night, but I do not believe that he specifically threatened Terry's job or the jobs of the men if it could not be for some reason.

18. On October 25, 1988, Randy Key and Terry had discussed changing out some 500 feet of rubber on the No. 2 belt. Terry was supposed to keep his men after their regular shift to do the job. Instead of changing the rubber out, however, Terry elected to set additional roof bolts that particular evening because he felt the top needed more support.

19. On October 26, 1988, Randy Key and Terry again spoke about the belt change. Key asked if the men could stay after that shift to do the job since it had not gotten done the night before. Terry replied that his men were tired as they had stayed over the night before, and asked if it could not be done the following night instead. Key agreed.

20. Subsequent to encountering bad top on October 26, 1988, Terry nevertheless did not have his crew change out the rubber on the belt line that night despite the fact that there was no safety related reason that his crew could not have done so. The belt line was outside of the area of bad top.

21. Randy W. Burke made the decision to terminate the Complainant, James S. Terry, from his employment with Timberline Energy, Inc.

22. Terry was fired shortly after he arrived at the Mudlick No. 1 mine on October 27, 1988. He met with Randy Key and Randy W. Burke. When he walked into the office, Randy Key said to him, "I guess you know why you are cut off." When Terry asked why, Randy Burke gave the reply: "How does incompetence sound? It is obvious you don't know top; you can't make a judgment on top to work men under it." Burke then asked Terry why he did not put in the belt if he was afraid of the top. Terry replied that he did not feel that he could make that kind of decision and that he believed that he was "going to get fired anyway...." Burke testified that "I didn't really get any good answer out of him."

DISCUSSION AND CONCLUSIONS

In order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, a complaining miner bears the burden of production and proof to establish (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Company, 2 FMSHRC 2768 (1980), rev'd on other grounds sub nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981); Secretary on behalf of Jenkins v. Hecla-Day Mines Corporation, 6 FMSHRC 1842 (1984); Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510-2511 (November 1981), rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no way motivated by protected activity. If an operator cannot rebut the prima facie case in this manner it may nevertheless affirmatively defend by proving that it was also motivated by the miner's unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Company, 4 FMSHRC 1935 (1982). The ultimate burden of persuasion does not shift from the complainant. Robinette, supra. See also Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983); and Donovan v. Stafford Construction Company, No. 83-1566 D.C. Cir. (April 20, 1984) (specifically approving the Commission's Pasula-Robinette test). See also NLRB v. Transportation

Management Corporation, 462 U.S. 393, 76 L.Ed.2d 667 (1983), where the Supreme Court approved the NLRB's virtually identical analysis for discrimination cases arising under the National Labor Relations Act.

A miner's "work refusal" is protected under section 105(c) of the Act if the miner has a good faith, reasonable belief in the existence of a hazardous condition. Miller v. FMSHRC, 687 F.2d 194 (7th Cir. 1982); Robinette, supra. Proper communication of a perceived hazard is also an integral component of a protected work refusal and the responsibility for the communication of a belief in a hazard underlying a work refusal lies with the miner. See Dillard Smith v. Reco, Inc., 9 FMSHRC 992 (1987).

I find that Terry was engaged in protected activity when he and his men withdrew from the mine because of his concerns about hazardous roof conditions. Terry's belief was reasonable and in good faith. The reasonableness of Terry's concerns and his withdrawal from the mine is corroborated by the fact that a federal mine inspector shortly thereafter issued an Imminent Danger Withdrawal Order under Section 107(a) of the Act. Terry also made every effort to communicate with his boss, Randy Key, to inform him of what he was doing, and what he perceived to be a hazardous condition.

Unquestionably, Terry's firing by Randy Burke, on the day following his withdrawal, was motivated at least in part by his having withdrawn from the mine, and therefore, I find that the complainant has made out a prima facie case of discrimination under the Mine Act. I also find that the operator is unable to rebut this prima facie case by showing that no protected activity occurred or that the adverse action was in no way motivated by the protected activity. The preponderance of the evidence is clearly to the effect that Terry engaged in protected activity and that his firing was motivated at least in part by that protected activity.

The remaining question is the most difficult. Respondents may affirmatively defend by showing that this was a "mixed motives" case and that Terry's unprotected activity was in and of itself sufficient motivation for taking the adverse action against him. The argument goes that even if Terry was justified in withdrawing himself and his crew from the section because of the hazardous roof conditions he encountered, he should have accomplished some other work in a non-hazardous area of the mine rather than allow the entire crew to simply go home. Respondent's position is that this unprotected activity alone provided the primary and a sufficient basis for Terry's discharge.

From the totality of the record herein, I find that there were a myriad of reasons that led to Terry's firing. To start with, Terry had been out of the mining industry for sometime and had been working for Timberline for less than two weeks when he was terminated. Prior to the night of October 26, 1988, Key and Burke had already been discussing Terry's termination for unrelated matters which Key felt had not been properly handled by Terry. On the particular night in question, Key and Burke were unhappy that Terry's crew didn't mine coal as they had expected, but were even more unhappy that he and his crew left the mine instead of supporting the roof. They believed, with some justification I think, that if in Terry's judgment, the roof needed additional support, he should have provided it. Moreover, it appears that Terry abdicated control of the situation and his crew, allowing them to go home when there was belt work he knew had to be accomplished that was outside of the area of bad top. Even if in his judgment, he believed that the proper materials to support the roof were not available, he could have at the least had his crew accomplish the belt change. His only justification for not doing so seemingly was his belief that he was going to be fired in any event because Key had told him to run coal.

As a management employee, Terry has to be charged with the exercise of some degree of judgment and supervisory ability in directing the work force. As a foreman, he has to be charged with the awareness that there is always "dead work" to be done when coal cannot be mined for some reason. In this case, he specifically knew of the belt that had to be moved. I find that the operator's termination of Terry could reasonably and justifiably have been done because of Terry's extremely poor judgment in not directing his crew to perform any work whatsoever. More specifically, I find that his failure to at least make the belt move that he had been asked to make after the shift that night, was unprotected activity and could reasonably have served as a completely independent basis for his discharge.

It appears to me that Mr. Terry was placed in a position of authority and responsibility for which he was ill-equipped to deal with when the roof conditions became adverse. A fair reading of the entire record herein, particularly his own testimony and that of Hubert Key indicates to me that he abandoned control over his men and the job when he encountered the adverse roof conditions described herein. When he could not get ahold of Randy Key for further guidance, he completely gave up his authority and his responsibility. Notably, he did not direct his men to go home, they simply left.

I conclude that although complainant established a prima facie case of discrimination, the operator has established that the adverse action was substantially motivated by an unprotected

factor, namely, his failure to engage his crew in productive work activity after the roof conditions became too adverse to mine coal. It is certainly reasonable to expect your line supervisors to supervise and make decisions concerning the direction of the work force. I thus further conclude that the operator might reasonably and justifiably have taken the adverse action complained of for this unprotected factor alone.

Therefore, complainant has failed to establish that respondents discriminated against him in violation of the provisions 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 of discrimination be DISMISSED.

Roy J. Maurer
Administrative Law Judge

Distribution:

Charles M. Jackson, Esq., Office of the Solicitor, U.S. Department of Labor, Room 516, 4015 Wilson Blvd., Arlington, VA 22203 (Certified Mail)

Mr. James S. Terry, Route 3, Box 72, Webster Springs, WV 26288 (Certified Mail)

Paul O. Clay, Jr., Esq., Conrad and Clay, 215 West Maple Avenue, P.O. Box 958, Fayetteville, WV 25840 (Certified Mail)

/ml

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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NOV 15 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF JOHN L. JONES, JR., Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEVA 89-227-D
	:	HOPF CD 89-07
v.	:	Mine No. 4
VIRGINIA CARBON, INC.; DAVID CLEVENGER, Individually and as operator of Virginia Carbon, Inc.; EVERETT DELANEY, Individually and as operator of Virginia Carbon, Inc.; MARSHALL KEEN, Individually and as agent of Virginia Carbon, Inc.; CARLOS KEEN, Individually and as agent of Virginia Carbon, Inc., Respondents	:	

DECISION APPROVING SETTLEMENT

The Secretary brought this case in behalf of John L. Jones, Jr., under § 105 (d) of the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq., alleging a discriminatory discharge in violation of § 105(c) of the Act.

The Secretary has moved for approval of a settlement agreement. I have considered the representations and documentation submitted and I conclude that the proffered settlement is consistent with the purpose of the Act.

ORDER

WHEREFORE IT IS ORDERED that:

1. The motion to approve the proffered settlement is GRANTED.

2. Respondent shall pay the agreed settlement amount within 30 days of this Decision and upon such payment this proceeding is DISMISSED.

William Fauver
Administrative Law Judge

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Lawrence F. Morhous, Esq., Hudgins, Coulling, Brewster, Morhous and Cameron, 418 Bland Street, P.O. Box 529, Bluefield, WV 24701-0529 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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NOV 17 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. PENN 89-40 A.C. No. 36-00840-03665
v.	:	Cambria Slope No. 33
BETH ENERGY MINES, INC., Respondent	:	

DECISION

Appearances: Paul D. Inglesby, Esq., Office of the Solicitor U.S. Department of Labor, Philadelphia, Pennsylvania for Petitioner;
R. Henry Moore, Esq., Buchanan Ingersoll Professional Corporation, Pittsburgh, Pennsylvania for Respondent.

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," charging Beth Energy Mines, Inc., (Beth Energy) with three violations of its Ventilation System and Methane and Dust Control Plan (Ventilation Plan) under 30 C.F.R. § 75.316. The general issue before me is whether Beth Energy violated the Ventilation Plan as charged and, if so, the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act.

The three citations at bar allege similar violations of the operator's Ventilation Plan. Citation No. 2887804 alleges a "significant and substantial" violation and charges as follows:

> The approved ventilation system and methane and dust control plan was not complied with in that the air lock at the 7 Right between numbers 6 track and 7 intake entries were not properly installed. Both doors would open outby away from each other and a proper air lock was not provided.

Citation No. 2887805 charges a "significant and substantial" violation and charges as follows:

> The approved ventilation system and methane and dust control plan was not complied with in that the airlock doors at the 8 Right between the Nos. 6 track and 7 intake entries were not properly installed. Both doors would open outby away from each other and a proper air lock was not provided.

Citation No. 2887807 charges a "significant and substantial" violation and charges as follows:

> The approved ventilation system and methane and dust control plan was not compled with in that the airlock doors used at the 8 Left supply station were not properly installed. Both doors would open outby away from each other and a proper air lock was not provided.

In relevant part the Ventilation Plan provided as follows:

> Equipment doors .... shall be in pairs to form an air lock where permanent stoppings are replaced by doors separating return air entries from intake air entries.

As explained at hearing the Secretary's theory of violations in these cases is that the cited doors did not provide an "air lock".[1/] There is no disagreement that in order to constitute an "air lock" within the meaning of the Ventilation Plan the doors need only be "reasonably air tight". More particularly the Secretary argues that the pairs of equipment doors here cited did not form an airlock because the opening of one set of doors caused the second set of doors to open automatically.

1/ Contrary to the Respondent's claims this theory was indeed set forth with sufficient particularity in the citations at bar. In any event Respondent declined the opportunity for continuance in trial to prepare any additional defense of the charges. No legal prejudice has been shown.

Citation No. 2887804

According to the testimony of MSHA Inspector and Ventilation Specialist Michael Bondra an air lock was not provided at the double sets of doors at the 7 Right section between the Nos. 6 track and 7 intake entries on September 9, 1988. According to Bondra when the doors adjacent to the track entry were opened one of the second set of doors also opened about 12 to 18 inches at the top because of the pressure differential. He accordingly issued Citation No. 2887804.

Steve Olexo, a Beth Energy safety inspector, accompanied Bondra on his September 9, 1988, inspection. Olexo acknowledged that the door had problems--the rubber seal at the top was worn and the nail holding the seal had come loose. Olexo also conceded that the left side of the door had a slight warp allowing the door to remain open some 6 to 7 inches and allowing some air movement toward the No. 7 entry.

Within this framework it is apparent that the cited door was indeed not "reasonably air tight". It admittedly had a gap of at least 6 inches allowing air to pass toward the No. 7 entry and therefore could not form an "air lock" within the meaning of the Ventilation Plan. The violation is accordingly proven as charged.[2/]

In order to find that a violation is "significant and substantial" however, the Secretary has the burden of proving not only the existence of an underlying violation of a mandatory standard but also the existence of a discrete hazard (a measure of danger to health or safety) contributed to by the violation, a reasonable likelihood that the hazard contributed to will result in an injury, and a reasonable likelihood that the injury in question will be of a reasonably serious nature. Mathies Coal Co., 6 FMSHRC 1 (1984).

While Inspector Bondra acknowledged that he did not test for air movement or pressure differential at the cited doors, he testified that he "could feel it". According to

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2/ Beth Energy alleges in its post hearing brief that the Secretary failed to prove that the No. 7 intake was an escapeway. I disagree. This may reasonably be inferred from the testimony of Inspector Bondra.

Bondra if there had been any smoke emanating from the track entry, that smoke would therefore contaminate the intake escapeway upon opening the track-side door. He thought it was "very likely that the track-side door would be left open allowing the track air to pass into the escapeway through the gapped second door. He estimated that up to two work crews of eight miners each could have been affected.

On cross-examination Bondra conceded however that neither of the potentially affected sections were then active and that apparently the only reason for the continued existence of the cited doors was to permit removal of some machinery left from active mining i.e. a battery charger and some longwall equipment. According to Mine Foreman William Radebach, at the time the doors were cited the 7 Right section was indeed inactive and the doors were only rarely used. It is also undisputed moreover that while there had been a fire on September 1, in the track entry contaminating the entire track entry the smoke from that fire never entered the No. 7 air course.

Under all the circumstances I cannot find that the Secretary has sustained her burden of proving that the violation charged in Citation No. 2887804 was "significant and substantial" or of high gravity. I observe however that Inspector Bondras' finding of "moderate negligence" is not challenged by Beth Energy.

Citation No. 2887805

Bondra testified that the set of air lock doors at the 8 Right section between the No. 6 track and No. 7 intake entries was also not properly installed and that similarly upon opening the first set of doors the second set of doors would also open about 6 to 8 inches allowing the air to pass from the track entry directly into the intake escapeway. Bondra also testified that no one accompanied him when he observed these conditions. He acknowledged however that he had been unable to locate his notes taken at the time he issued the citation. Mine Inspector Steve Olexo disagreed with Bondra and testified that he was in fact present when Bondra examined this set of doors. Olexo testified moreover that upon opening the first set of doors the second set did not open at all. I find the testimony of Olexo to be entitled to the greater weight. No deficiencies in Olexo's recollection were elicited at hearings and Inspector Bondra admitted that he was unable to locate his contemporaneous notes that would support his testimony. Under the circumstances I find that the Secretary has failed to sustain

her burden of proving the violation charged in Citation No. 2887805. The Citation must accordingly be vacated.

Citation No. 2887807

Inpector Bondra testified that he found that the set of air lock doors at the 8 Left supply station were not properly installed in that upon opening the first set of doors at the track entry side the second set of doors automatically opened about 8 inches. Bondra claims that he felt air flowing from the track entry into the intake escapeway. There is no evidence that the doors were otherwise defective. It is not disputed that no one was present with Inspector Bondra at the time of his observation of this condition. It is also undisputed that the 8 Left doors were used more frequently than the other doors cited in these cases in that supplies were moved through those doors onto the section. I find that the violation is proven as charged. The undisputed evidence of a gap in the second set of doors of 8 inches upon the opening of the first set of doors is sufficient to show that the doors were not "reasonably air tight" and therefore did not form a proper "air lock."

Bondra relied upon his testimony in regard to the prior violations in support of his "significant and substantial", gravity and negligence findings herein. For the reasons already stated I find that the instant violation was likewise not "significant and substantial" nor of high gravity. The unchallenged findings of "moderate negligence" are accepted.

In determining the appropriate civil penalties in these cases I have also considered the stipulations concerning the operator's size, history of violations and good faith abatement.

ORDER

Citation No. 2887805 is vacated. Citations No. 2387804 and 2887807 are affirmed as non-"significant and substantial" citations and Beth Energy Mines, Inc., is directed to pay civil penalties of $75 each within 30 days of the date of this decision for the violations charged therein.

Gary Melick
Administrative Law Judge
(703) 756-6261

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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NOV 17 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. PENN 89-184 A.C. No. 36-00840-03682
v.	:	
	:	Cambria Slope No. 33
BETH ENERGY MINES, INC., Respondent	:	

DECISION

Appearances: Paul D. Inglesby, Esq., U.S. Department of Labor, Office of the Solicitor, Philadelphia, Pennsylvania, for Petitioner;
R. Henry Moore, Esq., Buchanan Ingersoll, Pittsburgh, Pennsylvania for Respondent.

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," charging Beth Energy Mines, Inc., (Beth Energy) with two violations of regulatory standards. The general issues before me are whether Beth Energy violated the cited regulatory standards and, if so, the appropriate civil penalty to be assessed in accordance with Section 110(i) of the Act.

At hearing the Secretary filed a Motion to Approve a Settlement Agreement with respect to Citation No. 2888987 proposing a reduction in penalty from $329 to $255. I have considered the representations and documentation submitted in the case and conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act. Accordingly an appropriate order will be incorporated as part of this decision setting forth the terms of payment for the noted penalty.

The citation remaining at issue, No. 2887802, alleges a "significant and substantial" violation of the mine operator's Ventilation System and Methane and Dust Control Plan under 30 C.F.R. § 75.316 and charges as follows:

> The approved Ventilation System and Methane and Dust Control Plan was not complied with in that the airlock installed in the seven left chute

area, between the tractor trolley No. 6 Entry and intake escapeway No. 4 Entry was not properly installed. Both doors were installed to open outby away from each other and a proper airlock was not utilized. This citation was revealed during a mine fire accident that occurred in the seven left chute area on 9-1-88.

At the conclusion of the Secretary's case-in-chief counsel for Beth Energy moved for an involuntary dismissal for insufficient evidence. The motion was granted in a bench decision. That decision is set forth below with only nonsubstantive corrections:

> All right. I must say it's a nice try by the Government but the evidence really is not sufficient to support the citation. The citation, of course, does state, and I will read from the citation:
>
> > The approved ventilation plan system and methane and dust control plan was not complied with in that the air-lock installed in the number seven chute area between the track trolley, number six entry, and the intake escapeway, number four entry, was not properly installed. Both doors were installed to open outby away from each other and a proper air-lock was not utilized.
>
> The violation alleged was that the system of doors here cited did not provide a reasonably airtight air-lock as set forth in the ventilation plan, Exhibit G-2(A). The Government does concede through the testimony of Inspector Bondra that the ventilation plan does not require any particular construction for these doors, only that they must be reasonably airtight to form an air-lock. So the doors (and this is again conceded by the Government) need not have a latch, they need not close automatically and they need not in themselves open in certain directions. That in itself is not a violation. The Government also acknowledges that when the doors here cited (the three and four and one and two doors that were designated on Court Exhibit Number One) were closed, they were, in fact, admittedly reasonably airtight and formed an air-lock.
>
> The Government also acknowledges that it did not test the cited doors number three and four when doors one and two were opened to determine whether,

in fact, they would remain reasonably airtight upon the opening of doors one and two. The Government would have this Court infer from tests on other doors that the cited doors would open, that is, doors number three and four would open upon the opening of doors one and two. But there has not been sufficient evidence of the similarities between the previously tested doors and the untested doors here at issue for me to draw such an inference.

The evidence is clear that the ability of the doors to seal would vary depending on the contour of the roof and floor, the condition of the rubber belt edging contacting the floor and roof, etc. Thus the amount of air it would take to open the numbers three and four doors upon the opening of the numbers one and two doors could vary widely. So I cannot infer from tests on other doors, the conditions of which may vary considerably, that the same air velocity would also open the doors at issue here. Therefore, I cannot find that the government has met its burden of proving that the numbers three and four doors here would have opened upon the opening of the number one and two doors from the difference in air pressure alone.

Now if the Government had in fact tested these doors and found that they did open that's a different case. But the tests were not performed here and without those tests there is simply not sufficient proof in my mind to support the allegations in the citation. Therefore, I'm going to vacate the citation and grant the motion to dismiss.

ORDER

Citation No. 2888987 is affirmed and Beth Energy Mines, Inc., is directed to pay a civil penalty of $255 within 30 days of the date of this decision. Citation No. 2887802 is vacated.

Gary Melick
Administrative Law Judge
(703) 756-6261

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

NOV 17 1989

BETH ENERGY MINES, INC., Contestant	:	CONTEST PROCEEDING
	:	Docket No. PENN 90-2-R
v.	:	Order No. 2892059; 9/27/89
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Cambria Slope Mine No. 33
	:	Mine ID 36-00840

DECISION

Appearances: Paul D. Inglesby, Esq., U.S. Department of Labor, Office of the Solicitor, Philadelphia, Pennsylvania, for Petitioner;
R. Henry Moore, Esq., Buchanan Ingersoll, Pittsburgh, Pennsylvania for Respondent.

Before: Judge Melick

This contest proceeding is before me upon expedited hearings pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," and Commission Rule 52, 29 C.F.R. § 2700.52, to challenge a withdrawal order issued by the Secretary of Labor against Beth Energy Mines, Inc., (Beth Energy).

The Order at issue, No. 2892059, charges as follows:

> The approved ventilation and methane and dust control plan was not being complied with in the 4 West Main 8 Right area of the mine in that an intake regulator had been constructed in No. 3 intake entry of 8 Right without prior approval of the District Manager. It was explained to this operator on several previous occasions that prior approval must be granted by the District Manager before installing an intake overcast.

Following the presentation of the Secretary's case, counsel for Beth Energy filed a Motion to Vacate the order for lack of evidence. The motion was granted at hearing in a bench decision. That bench decision is set forth below with only nonsubstantive corrections:

All right. Well I'm compelled to grant the motion to vacate. I don't have any choice. The Government's expert, Mr. O'Rourke, has indeed testified that there is not sufficient information in the record presented to him (and indeed, the Government was even given an opportunity after it concluded its case-in-chief to present such information, but declined to do so) from which he could determine whether the device at issue here was indeed a regulator. Since the Government could not, in fact, prove that the device was a regulator, then, of course, it cannot be shown that the device was in any event such a device that required any kind of approval in the Ventilation, Methane and Dust Control Plan or in any of the attendant submissions required under 30 C.F.R. section 75.316. Therefore the Government's case must fail. The order must be vacated and the contest is granted.

ORDER

Order No. 2892059 is vacated and this Contest is granted.

Gary Melick
Administrative Law Judge
(703) 756-6261

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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NOV 17 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, on behalf of DAN NELSON Complainant	:	DISCRIMINATION PROCEEDING Docket No. SE 89-107-D OTC&I CD - 88-01(2)
and	:	Mine No. 7
UNITED MINE WORKERS OF AMERICA: Intervenor	:	
v.	:	
JIM WALTER RESOURCES, INC., Respondent	:	

AMENDED DECISION

Appearances: Colleen Geraghty, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia, for Complainants;
Patrick K. Nakamura, Esq., Longshore, Nakamura, and Quinn; Birmingham, Alabama, for United Mine Worker of America;
David M. Smith, Esq., Maynard, Cooper, Frierson and Gale; Birmingham, Alabama, for Petitioner.

Before: Judge Melick

Pursuant to Commission Rule 65(c), 29 C.F.R. § 2700.65(c) the decision attached hereto is hereby substituted for the decision issued in this case on November 13, 1989, for purposes of clarification.

Gary Melick
Administrative Law Judge
(703) 756-6261

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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November 17, 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, on behalf of DAN NELSON	:	DISCRIMINATION PROCEEDING
	:	Docket No. SE 89-107-D
	:	OTC&I CD - 88-01(2)
Complainant	:	
and	:	Mine No. 7
UNITED MINE WORKERS OF AMERICA	:	
Intervenor	:	
v.	:	
JIM WALTER RESOURCES, INC.,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT AND ORDER OF DISMISSAL

Appearances: Colleen Geraghty, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Complainants;
Patrick K. Nakamura, Esq., Longshore, Nakamura, and Quinn; Birmingham, Alabama, for United Mine Worker of America;
David M. Smith, Esq., Maynard, Cooper, Frierson and Gale; Birmingham, Alabama, for Petitioner.

Before: Judge Melick

At hearing Complainant requested approval of a settlement agreement in the captioned case proposing a penalty of $2,000. I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the relevant criteria set forth in Section 110(i) of the Act.

WHEREFORE, the settlement is approved and it is ORDERED that Respondent pay a penalty of $2,000 within 30 days of this order. The case is accordingly 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 20 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 88-274-M A.C. No. 05-04057-05505 K2M
v.	:	Gold King Mine
L.E.L. CONSTRUCTION, Respondent	:	

DECISION

Appearances: Robert J. Murphy, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Russell E. Yates, Esq., Yates & Davies, Durango, Colorado, for Respondent.

Before: Judge Lasher

This matter was commenced by the Petitioner's filing of a Proposal for Penalty on August 29, 1988, seeking assessment of civil penalties for two alleged violations (T. 91) described in two Citations (numbered 2636419 and 2636420) issued by MSHA Inspector Royal B. Williams on April 12, 1988.

At the close of hearing on June 21, 1989, Petitioner moved to withdraw its prosecution of Citation No. 2636420 (alleging Respondent's alteration of a fatal roof-fall accident scene in violation of 30 CFR § 50.12) and such motion was granted on the record (T. 218-220). Accordingly, this Citation will be vacated by subsequent order herein.

The remaining Citation, No. 2636419, as modified, was issued pursuant to Section 104(d)(1) of the Federal Mine Safety and Health Amendments Act of 1977, 30 U.S.C. Section 801, et seq., and charges Respondent with an infraction of 30 CFR § 57.3200, as follows:

> On March 13, 1987, a fatality occurred from a fall of ground in the Gold King No. 7 drift. Shortly after this fatality two supervisors took a miner into the area for the sole purpose of retrieving a rock drill and jackleg

to prevent it from being caved on. The supervisors were aware that the fatality had occurred from a fall of ground. The roof where the rock drill and jackleg was, had not been barred down or supported after the fatality. Supervision knew that the condition created an imminent danger to themselves and the miner. This is an unwarrantable failure to comply with a mandatory standard.

30 CFR § 57.3200, pertaining to "Correction of Hazardous Conditions," provides:

> Ground conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitted in the affected area. Until corrective work is completed, the area shall be posted with a warning against entry and, when left unattended, a barrier shall be installed to impede unauthorized entry.

BACKGROUND

Shortly after the fatal accident, MSHA issued two enforcement documents to Respondent, Order No. 2634865 and Citation No. 2639864. These two violations were the subject of an earlier proceeding and a Decision approving the parties' settlement thereof - with penalties totalling $6,020.00 - was issued October 21, 1988, by another Judge (See Ex. C-1). The record indicates that during the original MSHA investigation following the accident there was no indication that anyone had re-entered the mine following the fatality (T. 50-53, 134; Ex. P-2).

Thereafter, and some 9 or 10 months following the accident, MSHA initiated a second-special-investigation pursuant to Section 110(d) of the Act to determine if a wilful violation had been involved (T. 75). MSHA Special Investigator Benjamin M. Johnson conducted this investigation (T. 71, 74, 76). While Mr. Johnson was unable to interview Supervisor Boyd L. Hadden or miner Jody Booker (T. 76-80), he did conduct a tape-recorded interview and obtain the statement of Fred M. "Ted" Yates (T. 76).

In this interview, apparently for the first time, Yates made - according to Mr. Johnson - the following disclosure:

> A. In my interview with Mr. Yates, he disclosed to me that after the fatality had occurred, at approximately 1400 hours, that he and Boyd Hadden and Jody Booker had returned to the mine to remove the jackleg and drill that was at the accident site.
>
> (T. 76-77)

Based on his Section 110 investigation, Special Investigator Johnson recommended the issuance (by Inspector Williams) of the two enforcement documents involved in this proceeding (T. 80, 82, 89, 90). Since, as above noted, Mr. Johnson was unable to interview Mr. Hadden because of Mr. Hadden's refusal to be interviewed, and was unable to locate Jody Booker or to interview Mr. Larry Luzar, the owner of Respondent (T. 77-78), it thus appears that the determination to issue these two Citations was primarily based on information submitted by Mr. Yates approximately one year after the accident occurred (T. 76-80, 82, 83, 95).

ISSUES AND CONTENTIONS

Citation No. 2636419 charges that two supervisors [1/] took a miner [2/] into the area where a fatality (to miner Donald Goode) had occurred from a ground fall for the "sole purpose" of retrieving a rock drill and jackleg "to prevent it from being caved in on." The Citation also charges that the roof in this area had not been barred down or supported after the fatality and that supervision knew that the condition created an imminent danger to themselves and to the miner.

1/ Identified in the record as Fred M. "Ted" Yates, leadman on the shift preceding the accident, and Boyd L. Hadden, supervisor. It is subsequently concluded that only Yates, a supervisor went back in the mine with a miner.

2/ Identified in the record as Jody Booker, a miner. Mr. Booker was not available to testify.

Respondent contends in its post-hearing brief that an entry into the mine by Yates was contrary to the direct order of the mine owner, Larry Luzar, and thus unknown to management, thus raising the question whether a violation (if one occurred) by shift boss Yates is attributable to Respondent.

A second matter important to determination of this case is resolving a conflict of testimony between Yates and Hadden as to Hadden's participation in the alleged violation and assessing the degree of weight and reliability to be attributed to their accounts of critical happenings.

FINDINGS

On March 12, 1988, the day before the accident, Fred M. "Ted" Yates, who has a total of 32 years prior mining experience, was working as "lead miner" with two other miners, Grady Colby and Jody Booker on the 4 p.m. to midnight (swing) shift (T. 27, 29-30, 210). After the shift, Mr. Yates left a note in the shop (a van truck) outside for the morning shift advising them to watch the left rib as it was peeling (T. 30, 31, 205). According to Yates, the condition was "bad" meaning the rib "was peeling, slabbing, some small rocks was falling" (T. 29-31, 35).

The following day, March 13, 1988, the day of the accident at approximately 3:15 p.m. (T. 37) Yates and Jody Booker, a miner, stopped at the home of the mine owner, Larry Luzar, for the following stated purpose:

> "We was going to talk to him to see what he wanted to do, what we was going to do there that night, because we figured that we was -- didn't want to work there without timbering it or bolting it, or something to secure it."
> (T. 32)

Luzar was not home and Mrs. Luzar advised Mr. Yates and Jody Booker that there had been an accident at the mine. Yates and Booker proceeded toward the mine where, approximately 5 miles therefrom they encountered the ambulance to which Donnie Goode was being transferred (T. 36-37, 209-211). Mr. Goode was in a stretcher beside the ambulance and was being administered CPR by Mr. Luzar. Mr. Luzar and Grady Colby, one of the swing shift crew, then left together with Mr. Goode in the ambulance to proceed to Durango (T. 37-38).

Yates' Version of the Violation. Although Mr. Yates, as lead miner, was paid at the same rate as regular miners (T. 30), it nevertheless appears that he was in charge of the 4 p.m. to midnight shift, and that he made necessary management decisions and told the crew what to do (T. 30, 178, 205, 210-211). According to MSHA Investigator Johnson:

> "During the interview with Mr. Yates, he told me that he was in a lead miner position, and that he supervised individuals on the night shift. He had the responsibility of instructing them where to work and how to work, he had the responsibility to see that they put in a full shift."
>
> (T. 83)

It is concluded that Mr. Yates, at material times, was a supervisor.

According to Yates, and the subject of important disagreement in the record, he, Jody Booker - and Boyd Hadden - went back to the mine after the accident "to pick up the outside man." (T. 38). The "outside man" was identified in the record as Jody Morris (T. 67). Mr. Yates testified that "All three of us decided to go in and look and see what happened. I wanted to go in and see what had happened." 3/ (T. 39). This was at approximately 5 p.m.

Using Exhibit C-2, a drawing of the mine he rendered during the hearing to depict the accident scene, Mr. Yates gave his version of what constituted the alleged violation:

> A. Yes, where the work was going on. Okay, and I seen that the rock that had killed Donnie was laying there, it was right approximately two feet from the left rib of the old drift.
>
> Q. Okay.
>
> A. The machine was laying approximately five feet back, laying down in the bottom of the drift.

3/ This appears to be Mr. Yates' motivation for the violative conduct.

Q. Five feet back from the rock?

A. Yes, from the rock.

Q. And what machine was that?

A. That was a jackleg.

Q. Okay. And was there a drill nearby or a jack leg --

A. Of course it's all hooked together. The leg and the machine is all together, and the hoses are hooked to the machine.

Q. Okay.

A. And at that time Boyd picked the machine up and set it against the left rib, approximately five feet back.

Q. So he picked up the machine?

A. We never unhooked the hoses or nothing. And me and Jody Booker was right here, to the right rib of the -- of where the machine was, right there.

Q. How close was the machine to where the actual spot where Mr. Goode was killed?

A. It was three to four feet, it was right there.

Q. And how close did you come to that spot?

A. Probably 15 feet, me and Jody Booker stood right over here on the right rib.

Q. You were on the right rib?

A. Yes.

Q. About 15 feet?

A. Uh-huh.

Q. And what did Mr. Hadden do?

A. He moved the machine from -- picked it up out of the drift and set it up against the rib, back from -- about five feet back.

Q. Did he tell you why he was doing this?

A. To keep from getting buried right there.

Q. Do you recall what he said to you?

A. To keep it from getting hit.

Q. Okay. Now, what did Mr. Hadden do then?

A. We left the mine.

Q. Okay. How long were you actually in the mine at that time?

A. Just the time it took to walk 2,600 feet, and we was in there probably 10 to 15 minutes, and then went back out.

Q. Did either you or Mr. Jody Booker lend any assistance in moving this machine?

A. No, we didn't.

Q. Can this machine be moved by one person?

A. Yes. It's a one-person machine.

Q. All right. And approximately how many feet did he move the machine?

A. I'd say five feet." 4/ (T. 40-42)

Hadden's Version. Boyd Hadden, who was actually present in the capacity of supervisor (T. 165-167) when the ground fell on Mr. Goode, denied later returning to the accident scene with Mr. Yates and Jody Booker (T. 175, 190).

After describing the accident itself in some detail (T. 167-172), and the trip from the mine in a Suburban to the place in

---

4/ See also T. 68-69.

the road where Mr. Goode was transferred to the ambulance, Mr. Hadden gave this account of what happened:

Q. Okay. Did Ted Yates appear on the scene?

A. Yes, he did.

Q. When did that happen?

A. This was shortly after the ambulance showed up.

Q. And did you have any discussion with Ted Yates, or did Mr. Luzar, in your presence?

A. The only thing I remember saying to Ted was he asked me what happened, and I said, "A rock fell on him." His partner jumped in the ambulance, he was -- he --

Q. Who was his partner?

A. Grady Colby.

Q. Okay.

A. He offered -- he just volunteered himself without really speaking, he jumped in and went to work on Donnie Goode. Larry was still there working on him even after he was transported from the ground into the ambulance.

They was working on him, but Larry had told Ted and Jody Booker to go shut down the fans, lock it up, and go home. Gary Woggen and I had the Suburban, and I was the number one driver of the Suburban. I took care of it, I was the mechanics on the job, I was also the bus driver, I drove the Suburban.

Q. Were you present then when Larry Luzar gave that order?

A. Yes, I was.

Q. Okay. Now, what did you do after that -- I assume the ambulance left with Donnie Goode?

A. Yes.

Q. And then what did you do?

A. I took Gary Woggen home in the Suburban. I dropped him off at his house, I turned around at his house, and headed across town, Doug Taylor stopped me at the Bengal Trailer Park, asked me what had happened, I said, "Donnie Goode got hit in the head with a rock." He said, "How bad?" And I said, "It didn't look very good."

And I was upset, and I went straight home.

Q. Did you go back to the mine?

A. No, I didn't.

Q. Did you move the jack leg?

A. No, I didn't.

Q. Did you order anyone else to go in the mine?

A. No, I didn't.

Q. Why did Ted Yates -- do you know why --

A. Ted Yates went in that mine on his own, him and Jody Booker, just to look to see the scene. What happened there, there, I don't know.

Q. How do you know that? How do you know he went in there?

A. He told me first off, he had told me that he had gone in and looked at it -- this was later -- he had told me that they had gone in and looked at it.

Not only that, <u>there was a loader outside that they had taken under and they had parked in the entryway of that new drift</u>. That was one dry drift that didn't have a lot of copper arsenic leaking in it, which eats still up the loaders, and that will eat them up. They took that loader and parked it in there. And whenever we come back the loader was right there." (Emphasis supplied)

(T. 172-176)

Credibility Resolutions. In determining whether Mr. Hadden returned to the accident scene with Mr. Yates and Jody Booker, it is to be noted that neither Mr. Booker, Gary Woggan (mentioned by Mr. Hadden in his testimony), or Jody Morris (a part-time mechanic who was left at the mine after the accident) were available as witnesses at the hearing to break the deadlock between Mr. Hadden and Mr. Yates. Thus, determination of the issue rests on whether Mr. Yates' or Mr. Hadden's testimony should be given the greater weight. On this record, it is concluded that Mr. Hadden's testimony that he was not present when Mr. Yates and Booker went back in the mine should be credited. Mr. Yates' recollection of events is subject to some question since there was a significant inconsistency in his testimony. Thus, he denied speaking with owner Larry Luzar on the road when Mr. Goode was transferred to the ambulance (T. 44-45). Yet, in the written statement given to Investigator Johnson (Ex. R-1), he indicated that Luzar told him, Booker and Hadden "to return to the mine, lock up the mine and bring the outside man, Jody Morris, down from the mine." (Ex. R-1; T. 44-46, 66-67, 214-215).

Also, Mr. Yates, at the bottom of his written statement (R-1) saw fit to give a qualifying wrap to his rendition of the events constituting the violation:

> "It has been a long time since the accident happened and this is as close to the way I remember it. I am being truthful in this statement as I can rember (sic) it, I am not trying to cause any problems for anyone."

On the other hand, Mr. Hadden's testimony is more convincing and emphatic, and is more consistent even though he was subjected to a higher degree of cross-examination at hearing (T. 189-201). Accordingly, it is concluded that only one supervisor (Mr. Yates) and Mr. Booker returned to the accident scene. The question next arises whether the ground conditions they traveled under created a hazard and whether such had been supported after the accident.

Ground Condition. The accident occurred on a Friday. On the following Tuesday, March 17, 1987, Dennis J. Tobin, an experienced MSHA inspector, while making an inspection - and as he approached the accident site approximately 2,500 feet into the drift near the intersection of the old drift - encountered "a drastic change in ground conditions." (T. 126). He observed "several intersecting cracks" in the ground conditions and "there was considerable evidence of fractured ground, not only on the left-hand rib but overhead." (T. 127). The ground conditions

were so dangerous that Inspector Tobin issued a withdrawal order which included not only the area of the accident scene but also included an additional area of 150 feet of ground up to the area in issue (T. 130-131, 133, 135, 140).

In his accident report (Ex. P-2) Inspector Tobin described the subject area as follows:

> There was evidence of several ground failures the full length of the new drift. There was an estimated 3-tons of loose piled rock in the vicinity where Goode was injured. The air and water hose to the jackleg drill also had been partially buried for a distance of about 10 feet. This area was still spalling rock when the investigation team was examining the scene. There was no evidence there had been any attempt to support the ground for the entire 150 feet of the new drift and fault area. Luzar stated that no one had been in the mine since the accident.

With respect to the condition of the ground in the subject area, Mr. Yates testified that when he went back into the area shortly after the accident he was concerned that other ground might fall and that "it was dribbling a little." (T. 68). This, of course, follows on the heels of the fatal ground fall as well as Mr. Yates' considerable concern (described above) immediately before the accident that the conditions were "bad."

Supervisor Hadden, also made the concession that in the 4-6 hours following the accident, the ground conditions would not have improved:

> Q. And did you do anything to improve the ground conditions in that mine in the next four days?
>
> A. Absolutely not.
>
> Q. Okay.
>
> A. We wasn't working there.
>
> Q. So the ground conditions were serious enough to kill Mr. Goode at approximately 2:45 on March 13, 1989; is that not correct?
>
> A. Yes, sir.

Q. Okay. So you would agree with me then that those conditions are not going to improve in the next four to six to eight hours; is that not right?

A. Absolutely not.

Q. So in the event that Mr. Yates is telling the truth, and that people actually did go into that accident site, they went into an accident site where ground conditions were dangerous.

If what he says is true, you would have to assume that, would you agree with me on that?

A. I can't agree with you there, sir, because I don't agree with what Mr. Yates said to begin with.

Q. I said "assume" that just for the purpose of my question.

A. If Mr. Yates went in there then the conditions wasn't any better, I'll agree.

(T. 182-184)

CONCLUSIONS

Occurrence. It is therefore concluded from the foregoing evidence that when Mr. Yates and Jody Booker entered the mine and went to the affected area after the fatal ground fall that, in terms of the standard, ground conditions were present there that created a ground fall hazard (T. 86) which had not been taken down or supported (T. 87). This constitutes a violation of the regulation cited. Respondent's contention (Respondent's Brief, Pgs. 4, 6, 7) that no violation occurred because Mr. Luzar was unaware that Mr. Yates and Booker went back in the mine and that such entry was contrary to his instructions is rejected as a defense. Mr. Yates is a supervisor and Respondent is bound by his actions, and in any event a mine operator is liable without regard to fault for the occurrence of a violation. Sec'y. v. Southern Ohio Coal Company, 4 FMSHRC 1459 (August 1982); Western Fuels Utah, Inc., 10 FMSHRC 256 (March 1988).

Significant and Substantial. I further conclude that the violation was significant and substantial (S & S).

A violation is properly designated S & S "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 (1984), the Commission listed four elements of proof for S & S violations:

> 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 the United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129 (1985) the Commission expounded thereon 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, 1968 (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

It has been previously found that a violation occurred. On the basis of prior findings I also conclude that a measure of danger to safety was contributed to by the violation and there existed a reasonable likelihood that the hazard contributed to would result in a serious injury or fatality. Thus, not only was the inspector's opinion as to the "significant and substantial" nature of the violation (T. 85-87) left largely unrebutted, but the evidence demonstrates that the exposure of two miners to the hazardous conditions present occurred within approximately 2 hours of a fatal fall. Further, the unsafe conditions were shown to exist after the fall, and that there had been no barring down (T. 93, 112) or supporting the ground (T. 182) at the time of or before the exposure of these two miners, Yates and Booker, to serious injury or death (T. 86-87, 183). Finally, Mr. Hadden conceded that the conditions would not have been any better when Yates and Booker re-entered the area than they were when the fatal fall occurred (T. 183-184). The four prerequisite burdens of the Mathies formula are thus found to have been met by the Petitioner.

Unwarrantable Failure. In connection with his opinion that the violation resulted from an "unwarrantable failure" of Respondent to comply with the standard, Inspector Johnson testified:

> "Your Honor, I designated this as an unwarrantable failure violation because information given to me proved that company officials knew -- had reason to know that a violation had existed, that a hazard was imminent, and they chose to ignore those conditions, thus endangering the lives of three more employees." (T. 87)

In Emery Mining Corp., 9 FMSHRC 1997, 2004 (December 1987), appeal dism'd per stip., No. 88-1019 (D.C. Cir. March 18, 1988), and Youghiogheny & Ohio Coal Co., 9 FMSHRC 2007, 2010 (December 1987), the Commission held that "unwarrantable failure means aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act." This conclusion was based on the ordinary meaning of the term "unwarrantable failure," the purpose of unwarrantable failure sanctions within the Mine Act, the Act's legislative history, and judicial precedent. Whereas negligence is conduct that is "inadvertent," "thoughtless," or "inattentive," unwarrantable failure is conduct that is "not justifiable" or is "inexcusable."

From Mr. Yates testimony, we see quite clearly that although he was deeply concerned about the safety of the ground conditions before the fatal accident and that even though after the accident he had received instructions from the owner, Luzar, to lock up the mine and go home, he nevertheless either took or accompanied a rank-and-file miner, Booker, into the hazardous area. Further, knowing that the ground was dangerous and that a serious accident had just occurred, no precautions such as barring down or putting up support were taken. This conduct was inexcusable and I see no basis for not imputing to the mine operator this aggravated conduct of its supervisor, Yates. See Southern Ohio Coal Company, supra; Quinland Coals, Inc., 10 FMSHRC 705 (June 1988) (where mine foreman's awareness of dangerous roof conditions was chargeable to the mine operator). It is therefore concluded that the conduct of Mr. Yates was properly cited under Section 104(d)(1) as aggravated, and beyond mere negligence, and that Respondent's non-compliance with the standard was the result of this unwarrantable failure.

PENALTY ASSESSMENT

This small non-coal mine operator (Ex. C-1, T. 203) had a history of 2 violations (Ex. P-5) prior to the occurrence of the subject violation. Petitioner makes no contention that the violative condition (practice) was not immediately abated (T. 146) and Respondent makes no contention that payment of a penalty even at the level initially proposed by Petitioner ($1000) would jeopardize its ability to continue in business (T. 146).

I have previously found that this was a significant and substantial violation which resulted from an unwarrantable failure on the part of Respondent to comply with the standard cited. Therefrom it is concluded that this violation was of a relatively high degree of seriousness which resulted from a high degree of negligence (unwarrantable failure) on the part of Respondent's supervisor. In addition to the exposure of the supervisor himself to the hazard of serious injury or death from a ground fall, a rank-and-file miner was also exposed to such hazard, thus removing the so-called Nacco defense, 3 FMSHRC 848 (April 1981) from applicability to this situation where the conduct of the supervisor (Yates) was unforseeable. Wilmot Mining Company, 9 FMSHRC 684 (April 1987); Southern Ohio Coal Company, supra, fn. 7. In mitigation of the amount of penalty to be found appropriate, the record indicates that this is a small mine, that the owner of the mine immediately after the accident directed that the mine be shut down, that the supervisorial employee for some reason disregarded such instruction, and that apparently all concerned were significantly shaken up by the trauma of the tragic event. It also appears that the culpability of the violation was less than originally gauged by the investigating agency. Thus, contrary to the charge in the Citation, 2 supervisors did not take a miner into the area of hazard for the purpose, much less the sole purpose (T. 46, 61-62) of equipment retrieval. Respondent has previously paid significant penalties arising out of the fatal accident itself. In consideration of the foregoing, a penalty of $400.00 is found appropriate and here assessed.

ORDER

Citation No. 2636420 is VACATED.

Citation No. 2636419, including the special findings of "unwarrantable failure" and "significant and substantial" designated thereon, is AFFIRMED except for the modifications noted in the "Penalty Assessment" section hereinabove.

Respondent, within 30 days from the date hereof, shall pay to the Secretary of Labor the sum of $400.00 as and for a civil penalty for Citation No. 2636419.

Michael A. Lasher, Jr.
Administrative Law Judge

Distribution:

Robert J. Murphy, Esq., Office of the Solicitor, U.S. Department of Labor, 1585 Federal Building, 1961 Stout Street, Denver, CO 80294 (Certified Mail)

Russell E. Yates, Esq., L.E.L. Construction, P.O. Box 3522, Durango, CO 81302 (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 21 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. CENT 89-69-M
	:	A.C. No. 34-01287-05507
v.	:	
	:	Haskell County Pit & Plant
HASKELL COUNTY GRAVEL CO., INC., Respondent	:	

DECISION APPROVING SETTLEMENT

Appearances: Robert A. Fitz, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for the Secretary of Labor; Jerry Dick, Esq., Oklahoma City, Oklahoma, for Respondent.

Before: Judge Broderick

Pursuant to notice, the above case was called for hearing in Tulsa, Oklahoma, on November 14, 1989. On the record, the Secretary reviewed her motion to approve a settlement in the amount of $5000, which I had denied by order issued October 30, 1989. The record included a written statement from the owner of Haskell County Gravel, and copies of the company's income tax returns for 1986, 1987, and 1988.

Haskell County is a small operator. It employs 14 or 15 persons and operates a single facility. Since it began business in 1983, it has operated as a loss. The tax returns for 1986 show a loss of $118,521; for 1987 a loss of $111,290; and for 1988 a loss of $171,516. The owner states that Respondent's performance will improve somewhat in 1989, but it could still operate at a loss. The evidence submitted shows that the proposed penalty may have an adverse effect on Respondent's ability to continue in business.

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

Accordingly, the settlement is APPROVED and, Respondent is ORDERED TO PAY the sum of $5000 within 30 days of the date of this order.

James A. Broderick
Administrative Law Judge

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

NOV 21 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. PENN 88-287
	:	A.C. No. 36-05466-03654
v.	:	
	:	Emerald No. 1 Mine
CYPRUS EMERALD RESOURCES CORPORATION, Respondent	:	

DECISION

Appearances: Susan M. Jordan, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Petitioner;
R. Henry Moore, Esq., Buchanan Ingersoll, Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a proposal for assessment of civil penalty 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 a civil penalty assessment of $105 for an alleged violation of mandatory safety standard 30 C.F.R. § 75.517, as stated in a section 104(a) "S&S" Citation No. 3096605, issued on May 27, 1988. The respondent filed a timely answer and notice of contest, and a hearing was held in Washington, Pennsylvania. The parties filed posthearing briefs, and I have considered their arguments in the course of my adjudication of this matter.

Issues

The issues presented in this proceeding are (1) whether the condition or practice cited by the inspector who issued the citation constitutes a violation of the cited mandatory safety standard, (2) the appropriate civil penalty assessment for the violation, taking into account the civil penalty criteria found

in section 110(i) of the Act, and (3) whether the violation was "significant and substantial" (S&S). An additional issue of interpretation raised by the respondent concerns the meaning of the phrase "shall be insulated adequately and fully protected" as stated in the cited standard section 30 C.F.R. § 75.517.

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. 30 C.F.R. § 75.517.

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

Stipulations

The parties stipulated to the following (Tr. 4-7):

1. The subject mine is owned and operated by the respondent, and it is subject to MSHA's jurisdiction.

2. The presiding judge has jurisdiction to hear and decide this matter.

3. The citation was properly served on the respondent by a duly authorized MSHA representative.

4. The respondent's annual coal production is approximately 1.8 million tons, and the respondent is a large mine operator.

5. The respondent's history of prior violations is stated in an MSHA computer print-out, (exhibit G-5).

6. The proposed civil penalty assessment for the alleged violation will not adversely affect the respondent's ability to continue in business.

7. The alleged violation was timely abated in good faith by the respondent within 5 minutes of the issuance of the citation.

Petitioner's Testimony and Evidence

MSHA Inspector Charles Pogue confirmed that he inspected the mine on May 27, 1988, and issued the citation citing a violation of section 75.517, because the power cable for the light switch block indicator was not protected at the point where the power cable crossed over the trolley wire. Mr. Pogue explained that

the respondent had put a piece of conduit over the cable where it crossed the trolley wire, but for some unexplained reason the conduit had slipped down the cable away from the trolley wire, thus resulting in a lack of protection for the cable at the location where it crossed over the trolley wire.

Mr. Pogue stated that the cable in question was located on the main track haulage used to transport crews into the mine working sections, and that supply trips, the safety department, and maintenance and ventilation jeeps also used the haulageway. The cable in question was used to supply power to the signal lights used to control vehicle traffic using the haulageway (Tr. 13-16).

Mr. Pogue described the cable as a four-conductor cable approximately one-half inch in diameter which was hung on insulators as it exited the non-metallic switch box and crossed over the trolley wire to the coal rib. He confirmed that the cable was protected by an outer insulating jacket, and that each power conductor inside the cable was individually insulated. The outer insulating jacket was approximately one-sixteenth of an inch thick (Tr. 17).

Mr. Pogue stated that he cited a violation of section 75.517 because the conduit placed over the insulated cable was away from the point where the cable crossed over the trolley wire. He confirmed that the cable met MSHA's insulation specifications, but since the conduit which served as a guarding device had slipped away, he did not consider the cable to be "fully protected" as required by section 75.517. The citation was abated by simply rotating the conduit guarding so that it covered the cable where it crossed over the trolley wire (Tr. 18).

Mr. Pogue described the conduit guarding as plastic insulating material approximately 3 inches in diameter, and stated that it slid down the cable for a distance of 6 to 12 inches away from the point where the cable crossed the trolley wire (Tr. 19).

Mr. Pogue stated that section 75.517 requires the cable to be fully protected, and that MSHA's policy manuals require that power cables crossing a trolley wire has to have additional guarding over the cable to prevent damage to the outer jacket (Tr. 19, exhibits G-2 through G-4). He confirmed that the policy requirement has been in effect since he began inspecting mines in 1975, and probably earlier (Tr. 21). The purpose of this requirement is to provide additional protection to the cable and to prevent damage from equipment passing under it (Tr. 22).

Mr. Pogue stated that he was concerned over a possible electric shock or electrocution hazard presented by contact with the energized power cable, and that these are the type of accidents or injuries that he would expect from the cited condition

(Tr. 22). This could occur if a trolley pole on a piece of haulage equipment such as a transportation jeep passing under the cable came off the trolley wire and struck the cable and possibly cutting the outer cable insulation or conductors. If this occurred, and the damaged cable fell on the energized trolley wire, it could cause the electrical light block circuit to become energized. Even though the light block had short circuit protection, if someone were performing maintenance work on the circuit control box he could come in contact with energized power wires as a result of the cable touching the trolley wire (Tr. 23-24).

Mr. Pogue stated that the likelihood of an accident such as the one he described would be increased because the main haulageway is a highly traveled area, and the frequency of trolley poles hitting the cable would be increased. Mr. Pogue explained the various ways that a trolley pole could come off the wire and strike the cable. He described the equipment using the haulageway, and indicated that 7 out of 10 vehicles passing under the power cable in question would be equipped with trolley poles. Based on his experience, trolley poles frequently come off the trolley wire, and this could be caused by excessive vehicle speed, a bend in the trolley wire, or inadequate spring pressure on the pole. He confirmed that the trolley wire and power cable in question were both energized at the time he observed the cited condition (Tr. 25-29).

On cross-examination, Mr. Pogue stated that the power cable crossed straight across the trolley wire, and that one would normally slow down in order to reach up and turn the light on or off. He confirmed that the distance from the mine floor to the roof was 8 feet, and that abatement was simply achieved by sliding the protective conduit back over the cable. The power cable was an MSHA approved cable, and there was no damage to the outer sheath (Tr. 31-32).

Mr. Pogue stated that MSHA's policy only requires that a power cable be guarded above the trolley wire, and there is no policy guideline as to the distance that such a power cable must be protected on either side of the trolley wire (Tr. 34). He confirmed that the cable in question was provided with fuse protection, and that the outer cable insulated jacket, as well as the insulating material around the four interior cable conductors, would have to be damaged in order to present a shock hazard. Further, if this damage were to occur, someone would have to reach up and over the trolley wire and grab the cable in order to be exposed to a shock hazard. If someone were working on the light, they may be able to see if the cable is touching the trolley wire (Tr. 34-35).

In response to a question as to whether the policy language which states "in some locations metal or non-metallic conduit may be necessary for additional protection against damage," indicates

some discretion rather than an absolute requirement, Mr. Pogue responded "not on my part" (Tr. 40).

Mr. Pogue confirmed that the conduit did not cover the entire length of the power cable from the trolley wire to the electrical light, and even though a trolley pole coming off the trolley wire could damage the cable between the electrical light box and the end of the protective conduit, he nonetheless in his judgment believed that the conduit which was on the cable sufficiently protected it (Tr. 41).

Mr. Pogue stated that the hazards he described assumes that anyone working on the signal light will not notice the power cable in contact with the trolley wire, and that while working on the energized circuit, the person doing the work will not turn on the light switch to see whether it was energized or not (Tr. 42). He also confirmed that it is possible that a trolley pole will never come off the trolley wire while equipment is travelling along the entire haulageways, and that the area where the light was located was reasonably flat (Tr. 44).

In response to further questions, Mr. Pogue stated that the power cable was approximately 6 inches above the trolley wire at the point where it crossed over the wire, and that the power cable voltage was 12 volts, and the trolley wire 300 volts (Tr. 45).

Mr. Pogue believed that each of the examples stated in MSHA's policy with respect to protection for power cables crossing over trolley wires are mandatory and that he has no discretion to make individual judgments to determine whether or not any particular circumstances would require such additional guarding (Tr. 48-49).

Mr. Pogue surmised that the conduit slipped down the power cable because of equipment vibration or equipment striking the cable. He conceded that the cable was protected before the conduit slipped, and that the respondent made an effort to guard the cable (Tr. 54-56).

Respondent's Testimony and Evidence

Gary W. Bochna, respondent's safety representative, confirmed that he accompanied Inspector Pogue during his inspection. He stated that the distance from the mine floor to the roof at the cited location was 7-1/2 to 8 feet, and that the trolley wire was approximately 12 inches below the roof. He confirmed that he observed no damage or abrasions to the cable, and that the track haulage area in question was mostly level (Tr. 57-59).

Mr. Bochna explained the function of the signal light and located it on the mine map. He also explained the direction of

the haulageways, and the haulage equipment passing through the location of the cited cable (exhibit R-1, Tr. 60-63).

Mr. Bochna stated that it would be impossible for someone to contact the power cable "unless you reached up to it," and that someone would likely contact the trolley wire before reaching the power cable. He conceded that trolley poles occasionally come off the trolley wire, but believed that the pole would have to strike the cable "almost straight on" with a considerable amount of force in order to damage it to such an extent that the insulating wires inside the outer sheath would be penetrated. He did not believe that the pole would damage the cable by simply rolling over it (Tr. 64-65).

On cross-examination, Mr. Bochna agreed that a trolley pole could cause an abrasion or minor damage to a cable, and that it was possible for a trolley pole to pull a power cable down if it jumped the trolley wire. He also agreed that if a power cable was damaged to the extent that the outer jacket and inner insulation were damaged, the cable could become energized through the live trolley wire if the cable were laying on the wire (Tr. 67-68). He confirmed that the mine has a practice of providing additional protective conduit in the places where the cable passes over the trolley wire "because we've been cited on it before" and "to keep from getting citations" (Tr. 68).

In response to further questions, Mr. Bochna stated that if a trolley pole came off the trolley wire it could just as well strike the protective conduit guarding, and the pole could also hook the guarding as well as the cable. He stated that in his driving experience "I don't have that much problem of them coming off for me" (Tr. 71).

Terry W. Coss, electrical engineer, stated that he has worked for the respondent in this capacity for 11 years, and that he is a certified electrician, and has a degree in electrical engineering from Ohio University, as well as MSHA certifications as a qualified electrician and electrical instructor. He also serves on an advisory committee for the Pennsylvania State Department of Environmental Resources, which includes the director of MSHA's Bruceton Research Center, an MSHA District Manager, and a representative from Penn State University, Consolidation Coal Company, the UMWA, and the Pennsylvania director of the Bureau of Deep Mine Safety. The purpose of the committee is to advise this bureau on electrical and non-electrical problems (Tr. 78-80).

Mr. Coss confirmed that he was familiar with the citation issued by Mr. Pogue, as well as the power cable in question, and he described the cable, its insulation features, and its functions. He confirmed that the cable is rated for 600 volts, and since it was only handling 300 volts, it was designed to handle

more voltage than it was actually being used for. He also confirmed that the insulation on each of the individual cable conductors is rated for 600 volts, and that the outer cable jacket is approximately three-sixteenths of an inch thick. The jacket provides protection for the insulated conductors and it is constructed of a tough neoprene rubber compound (Tr. 80-83).

Mr. Coss stated that the light switch in question has a 3 amp fuse short circuit protection which provides more protection than MSHA's 20 amp fuse protection requirement. He confirmed that the power cable is located 7 feet above the mine floor, and that one would have to reach up to contact it (Tr. 84).

Mr. Coss stated that if the outer cable sheath were damaged and the individual inner wire conductor insulation was not, there would be no shock hazard to someone contacting the cable. Similarly, if the cable contacted the trolley wire, nothing would happen because the conductors are rated at 600 volts and the trolley wire is only 300 volts (Tr. 84-85).

Mr. Coss confirmed that he has operated trolley vehicles underground, and that the height of the trolley wire would affect the force exerted on the pole striking the cable. If the cable is high, the trolley pole would strike it with lesser force than if it were lower (Tr. 86). He did not believe that it was likely that anyone on the ground would contact the cable above the trolley wire, and based on his experience, the outer cable sheath provides adequate protection for the power wires within the cable where it crosses over the trolley wire because it is a tough compound, and the likelihood of striking it is remote (Tr. 88).

Mr. Coss stated that the additional conduit is not required to provide full protection to the cable where it crosses over the trolley wire, and that the reason conduit is provided at the mine is "to keep from getting wrote up" (Tr. 88). He confirmed that he has observed a conduit protected cable which was struck by a trolley pole, and that it pulled out the wires at the switch rather than cutting the cable (Tr. 89).

Mr. Coss stated that the power cable safety ground wire is tied to the haulage track and the frame of the light switch. If any of the other wires were to touch the switch frame, it will ground and remove the power or blow the fuse (Tr. 89-90).

On cross-examination, Mr. Coss stated that the trolley poles are 5-1/2 to 6 feet long and are mounted on different places on the track equipment (Tr. 90). With respect to MSHA's position in this case, Mr. Coss stated as follows (Tr. 96):

> THE WITNESS: If you put conduit on here, there's less a chance of it getting damaged. Now, if you put a

four-inch I-beam across there, there's even less of a chance of getting damaged. But, you know, to what point do you go, and I don't feel that the extra protection that the conduit gives you is necessary, weighing the fact of the jacket and the possibility of it happening.

JUDGE KOUTRAS: Do you think that particular jacket that's inherently a part of that cable as manufactured, protects it against physical damage that conceivably could happen where it's hung in the mine?

THE WITNESS: Yes, sir.

Discussion

The contested section 104(a) "S&S" Citation No. 3096605, issued by Inspector Pogue on May 27, 1988, citing an alleged violation of 30 C.F.R. § 75.517, states as follows (Exhibit G-1): "The light switch power cable was not adequately protected where such cable passed over the energized trolley wire at the No. 1 haulage Bohan Blvd. light switch."

Mandatory safety standard 30 C.F.R. § 75.517, provides as follows: "Power wires and cables, except trolley wires, trolley feeder wires, and bare signal wires, shall be insulated adequately and fully protected."

MSHA's policy interpretation and application for the insulation and protection of power wires and cables is stated in pertinent part in its underground manuals of March 9, 1978, June 1, 1983, and July 1, 1988, (exhibits G-2 through G-4), as follows:

> Any ungrounded power conductor extending from the track entry for any purpose shall be insulated. In addition, power wires and cables shall be installed under well supported roof and far enough away from any moving equipment to prevent damage; however, in some locations, metal or nonmetallic conduit may be necessary for additional protection against damage. Examples of these locations include: where power wires or cables other than trolley feeder wires cross the trolley wire; where power wires or cables pass through doors or stoppings; where power wires or cables are installed along supply storage areas; where power wires or cables are installed on tight corners with insufficient clearance; or other areas where power wires or cables cannot be isolated sufficiently to afford protection. (Emphasis added).

The facts in this case establish that the cited light switch power cable was provided with an additional protective conduit

which was installed over the outer jacket of the cable where it passed over the trolley wire. The conduit had slipped off to one side, and the citation was abated within 5 minutes when the conduit was rotated back and over the cable.

Respondent's Arguments

Respondent disputes the petitioner's contention that mandatory standard 30 C.F.R. § 75.517 requires additional power cable protection, such as a conduit, beyond that provided by the outer jacket of the cable. Respondent takes the position that on the facts of this case, no protection beyond that afforded by the outer jacket of the power cable is necessary. Respondent points out that section 75.517, does not specify the meaning of the term "fully protected," and that section 75.517-1 and 75.517-2, which help to define the term "adequate insulation," provide no guidance as to the meaning of "full protection." Respondent takes the position that since it is unclear whether a different level of protection is to be provided because of the use of the adjective "full" as opposed to "adequate, it may rely on the principle of statutory construction that one term may be defined by terms it is associated with, and that the use of "full" is equivalent to the use of "adequate." Respondent notes that if a different meaning of "full" is determined to be intended, it clearly would mean protection of the cable over its full length. In such an instance, respondent suggests that no violation would exist because there is no dispute that the cited power cable was protected along its entire length by the outer cable jacket provided by the manufacturer.

In support of its case, the respondent cites the Commission's decisions in Homestake Mining Co., 4 FMSHRC 146 (February 1982), and Climax Molybdenum, 4 FMSHRC 159 (February 1982). The Homestake Mining case concerned an issue as to whether a metal/non-metal standard (57.12-82), could be construed to require additional insulation beyond that provided by the manufacturer. The standard required that "power lines shall be well separated or insulated from waterlines, telephone lines, and air lines." Despite the fact that an MSHA interpretative memo had interpreted the standard to require insulation beyond the jacket provided by the manufacturer, the Commission held that a blanket requirement of additional insulation was not appropriate, and it stated as follows at 4 FMSHRC 148-149:

> We recognize that enforcement of the standard would be simpler if an inspector merely has to visually determine whether extra insulation has been added where power cables and pipelines meet. We fail to see, however, how this superficial examination bears any relationship to the purpose of the standard. Rather, in order to make a bona fide determination that insulation adequate to prevent the transmission of current to

adjacent pipelines is present, the adequacy of the added insulation must be evaluated, and this determination must be based on the objectively determinable character of the powerline and the existing insulation. In order to achieve the purpose of the standard, enforcement should not turn on the subjective evaluation of an inspector, without the objective evaluation of whether a hazard is or may be present. Further, section 57.12-82 does not state that "additional insulation" must be placed between "powerlines" and pipelines; it merely requires separation or insulation.

In the instant case, the respondent points out that Inspector Pogue issued the citation based solely upon his observation that the conduit previously installed over the power cable where it passes over the trolley wire had slipped off to one side of the trolley wire and upon his belief that MSHA's policy manuals imposed a mandatory duty on operators to provide additional protection against physical damage to power lines which pass over trolley wires in all circumstances. Respondent maintains that the inspector's interpretation of the MSHA manuals as imposing a mandatory obligation to provide additional protection when power cables cross over trolley wires is incorrect. In support of its argument, respondent cites the following language found in MSHA's manual policy: "[I]n some locations metal or nonmetal conduit may be necessary for additional protection against damage." (Emphasis added).

Respondent argues that the cited policy language clearly does not describe a mandatory duty to have the additional protection of a conduit in all cases since the policy states that conduits may be necessary in some locations. Thus, respondent concludes that MSHA's official policy interpretation would appear to be similar to that expressed by the Commission in Homestake Mining and Climax Molybdenum.

Respondent takes the position that there is no mandatory requirement under the Act that conduit be used in all cases, and since MSHA's policy manuals do not impose such a mandatory obligation, respondent argues that it was incumbent upon MSHA in this case to prove that the power cable was not fully or adequately protected. Respondent asserts that MSHA failed to put on any evidence to establish that the power cable was not adequately protected from physical damage. Instead, it relied solely upon Inspector Pogue's interpretation that the policy manuals require additional protection in all cases. Respondent notes that the inspector was not an electrical inspector and offered no testimony of a particular expertise or training in this area.

Respondent maintains that it presented credible and unrebutted testimony that the cited power cable is adequately protected from physical damage by the manufacturer. It points

out that the cable is enclosed in a Neoprene rubber outer jacket approximately three-sixteenths of an inch thick, and that Neoprene rubber is a tough compound. Respondent also cites the testimony of its electrical engineer, who has 11 years experience at the mine, who testified that the Neoprene outer jacket of the cable, as manufactured, protects the cable against physical damage that conceivably could occur where it is used in the mine.

The respondent argues that in this case, because of the remote possibility that a trolley pole will come off the trolley wire where the power cable crosses it and cause some damage to the cable, there is no need for any additional cable protection other than the manufacturer's outer cable jacket. Respondent states that damage to the power cable by a trolley pole is unlikely because vehicles traveling on the tracks in this area must move slowly or stop in order to operate the light switch connected to the power cable making it less likely that the pole would come off the wire, the floor of the mine is relatively flat in this area, and trolley poles are less likely to come off the trolley wire in flat areas. Respondent further points out that there are no bends in the trolley track in this area, which again reduces the possibility of the trolley pole coming off the trolley wire, the roof is high in the area, which means there would be less tension on the trolley pole, which would result in a less severe impact if the pole were to jump off the trolley wire and strike the roof or the power cable. Respondent also points out that since the end of the trolley pole is blunt, it is unlikely that it would cut the neoprene outer jacket of the power cable if the pole should strike the cable.

Additionally, respondent points out that the track in question does not lead to active areas of the mine, and that traffic past the power cable is relatively light. Considering all of the aforementioned factors, including the fact that the outer jacket of the cable is designed by the manufacturer to provide protection from physical damage, the respondent concludes that it is obvious that additional protection from physical damage to the cable is not necessary.

Respondent argues further that its position that the cable outer jacket is adequate to provide protection from physical damage is also supported by MSHA's policy manuals, which provide as follows: "The outer jacket of a cable is intended to protect the internal conductors from cuts, abrasion moisture, etc., and must be intact for the cable to be <u>fully protected</u> as required by Section 75.517." (G-3, p. 3, G-4, p. 4; Emphasis added.)

Respondent concludes that the cited policy statement evidences MSHA's own interpretation that the "fully protected" requirement of section 75.517 can be satisfied by an undamaged outer jacket, and it points out that the outer jacket of the power cable in question was not damaged.

Respondent finds further support for its position that the undamaged outer jacket of the power cable satisfies the requirement of full protection in MSHA's Underground Electrical Inspections Manual (Exhibit G-4), which explains when a violation should be cited under section 75.517. The manual states as follows:

> The outer jacket of a cable is intended to protect the internal conductors from cuts, abrasion, moisture, etc., and must be intact for the cable to be fully protected as required by Section 75.517. Therefore, if an inspector observes a cable with a damaged outer jacket, even though the insulation on the conductors has not been damaged, he should take appropriate action under Section 75.517 stating that the cable was not fully protected.
>
> * * * * * * *
>
> When Section 75.517 is cited, the inspector should specify one of the following in the citation:
>
> 1. The insulation was not adequate (i.e., the insulation on the conductor is either damaged or missing);
>
> 2. The cable was not fully protected (i.e., the outer jacket on the cable is either damaged or missing); or
>
> 3. Both conditions exist on the cable.

Respondent maintains that the quoted manual policy statement clearly indicates that MSHA considers a power cable to be fully protected by the manufacturer's outer jacket if it is undamaged. Although recognizing the fact that MSHA's policy manuals do provide that additional protection may be required in some cases, the respondent argues that in this case the petitioner has failed to present evidence sufficient to establish that additional protection was required for the cited cable in question, and has therefore failed to establish a violation of section 75.517.

Petitioner's Arguments

Petitioner concedes that the cited light switch power cable was adequately insulated. However, it takes the position that the cable was not "fully protected" as required by the cited mandatory standard, 30 C.F.R. § 75.517, and MSHA's policy interpretations of this standard.

Petitioner argues that it has consistently interpreted section 75.517, to require protective conduit or guarding on power cables where it passes over trolley wires because cables in this position are subject to abuse from the different kinds of equipment travelling down the haulageway. Petitioner asserts that its primary concern is the prevention of damage from the trolley poles of equipment using the haulageway, and that the additional guarding requirement prevents damage to the cable from trolley poles which are known to jump off the trolley wire because of the spring tension on the pole. The guarding also provides protection against cable abuse which occurs over time through abrasions or the striking of the cable by trolley poles and other large pieces of equipment.

Recognizing the fact that the express language of a promulgated regulation would control over its inspection manual, petitioner nonetheless argues that its manual interpretation of "fully protected" is consistent with the broad language found in section 75.517, and absent other available guidance regarding the term "fully protected," it takes the position that its policy interpretation should be accorded deference and legal effect.

Petitioner finds no merit in the respondent's argument that section 75.517, applies only to electrical and not physical protection. Petitioner argues that the obvious purpose of the standard is to protect miners against shock, electrocution, and fire that could result from inadequate insulation or protection of the power cable, and that in order to protect against these hazards, a cable must be protected electrically and physically. Petitioner points out that since the standard does not distinguish between electrical and physical protection, and since no other standard specifically addresses physical protection, it applies to protection in general, including both physical and electrical protection.

Recognizing the fact that the "may be necessary" language contained in its policy statements suggests discretion as to the location where additional conduit protection should be provided, and that Inspector Pogue testified that he believed he had no discretion insofar as the location examples listed in the policy are concerned, petitioner submits that the examples listed would also fall within the locations where "metal or nonmetallic conduit may be necessary." Petitioner concludes that the listed examples are clearly locations where power cables are more likely to be subject to abuse, and they are therefore strong statements that extra care needs to be taken in these locations to guard against cable damage and injuries to miners. Given the fact that the cited cable passed over trolley wire in a highly travelled haulageway used by miners and equipment going into and out of the working sections, petitioner submits that the cited location is one where cable conduit protection is necessary, rather than one where it "may be necessary."

Findings and Conclusions

Fact of Violation

Inspector Pogue confirmed that the cited power cable was adequately insulated, met the requirements of MSHA's standards for such cables, and that it complied with the "adequate insulation" requirement found in section 75.517. The parties are in agreement that this was the case. However, in view of the fact that the additional protective plastic conduit placed over the cable had slipped down and away from the cable at the point where it crossed over the track trolley wire, the inspector found that the cable was not "fully protected" as required by section 75.517. Although the inspector's original description of the cited condition on the face of the citation stated that the cable was not "adequately protected," I find that his explanation as to why he issued the citation provides sufficient notice to the respondent to enable it to defend the citation, and the respondent has not suggested that the citation is deficient or otherwise unclear.

The cited mandatory section 75.517, which is a statutory standard, does not explicitly require the use of any additional conduit protection over the protective outer cable jacket provided by the cable manufacturer. This additional requirement has been imposed by MSHA through its policy interpretations published in a general policy manual, as well as in the instructional policy guidelines found in the inspection manuals (Exhibits G-2, G-3, and G-4). Although the mandatory standards that follow section 75.517, sections 75.517-1 and 75.517-2, help to define the term "adequate insulation," they provide no guidance with respect to the meaning of "fully protected, and MSHA's policy guidelines are likewise devoid of any meaningful guidance.

The respondent's assertion during the hearing that the requirement that power cables be "fully protected" refers only to electrical protection rather than protection from physical damage is rejected. I take note of the fact that section 75.517, does not distinguish between electrical and physical protection. It simply requires that power cables be adequately insulated and fully protected. In my view, the intent of the standard is to require protection for power cables in order to preclude those electrical hazards normally associated with inadequate cable insulation, i.e., shock, electrocution, and fires, as well as protection from these same hazards which may result from the exposure of such cables to potential physical damage or abuse by virtue of the location where such cables may be installed and used. In my view, although an adequately insulated power cable may afford protection against such hazards, and be in compliance with the "adequate insulation" requirement found in section 75.517, if it is located in a mine area, or installed and used in

such a manner as to expose it to potential damage and abuse from equipment, thereby destroying its insulating qualities, it may not be in compliance with the "fully protected" requirement found in section 75.517.

I conclude and find that section 75.517, applies to power cable protection in general, including both electrical and physical protection. I further conclude and find that the standard imposes two requirements for the protection of power cables. The first requirement is that the cable be "adequately insulated" as that term is defined in sections 75.517-1, 75.517-2, or as required by any other applicable power cable insulation standard. The second requirement is that a power cable be "fully protected" against any physical damage which may result in the course of the use of the cable at the particular location where it may be installed.

If MSHA believes that additional cable protection is required at certain specified locations in an underground mine where the cable may be exposed to physical damage by equipment, it should promulgate an appropriate mandatory standard clearly defining those areas. In my view, the "examples" noted in the policy are intended to make an inspector aware of certain restricted and confined mine areas where the location of a power cable would most likely expose it to potential damage and abuse by being struck by a piece of equipment. The policy also includes a statement which implies that additional conduit protection would not be necessary if the power cable were sufficiently isolated to afford it protection. Although the policy contains no explanation as to why the particular examples in question are cited, I assume that a power cable passing through doors or stoppings may expose the cable to chaffing or cutting, that a cable installed along supply storage areas will expose it to damage from the materials stored in such areas, and that cables installed on tight corners with insufficient clearance will expose it to damage passing through such areas. However, in each of these instances, I believe it is incumbent on MSHA to establish through credible and probative evidence that a cited power cable located in any of these locations is <u>in fact</u> exposed to physical damage and is not fully protected against such damage.

I take note of the fact that MSHA's policy declarations found in the March 9, 1978, inspection manual, exhibit G-2, contain no explanation as to why a trolley wire location was included among the locations cited as examples where additional conduit protection may be required. The stated policy indicates that such additional conduit protection is required where a power cable crosses a trolley wire <u>or</u> where a power cable is installed within 12 inches of a trolley wire. The "12 inches" policy interpretation does not appear in MSHA's policy manual of July 1, 1988, or in the inspection manual of June 1, 1983, exhibits G-3

and G-4, and the interpretation simply refers to a power cable crossing a trolley wire. Although the inspection manuals contain rather detailed instructions to an inspector as to how to go about issuing citations for violations of section 75.517, because of inadequate insulated power cables, they contain no guidance concerning the question of "fully protected," and simply cite examples of locations where additional conduit protection may be required, with no explanations.

Insofar as trolley wire locations are concerned, I find nothing unreasonable in MSHA's desire to insure that a power cable located in close proximity to a trolley wire is protected against any physical damage which may result from a trolley pole coming off the trolley wire and striking the cable. As a matter of fact, respondent's safety representative Bochna conceded that depending on the force exerted by a trolley pole in striking a power cable, it was possible to penetrate the outer protective sheath of the cable. He also confirmed that a trolley pole striking a cable could cause cable abrasions or "minor damage," and that in the event the cable was damaged to the extent that the outer jacket and inner insulation were damaged, the cable could become energized through the live trolley wire if the cable was in contact with the trolley wire. He also confirmed that a trolley pole could pull a power cable down if it jumped the trolley pole. Respondent's electrical engineer Coss confirmed that with the additional conduit protection, the chances of cable damage would be lessened, and he stated that he was aware of an incident where a power cable protected by conduit was struck by a trolley pole, and although the cable was not cut, the wires at the switch box were pulled out by the striking action of the pole against the cable.

Although it may be true that a properly insulated power cable provided with a tough neoprene outer protective jacket may provide adequate protection against normal "wear and tear" and physical contact with equipment or other objects in an underground mining environment, it is not unusual for such cables to be subjected to cuts, scuffing, abrasions, etc., which may or may not be readily visible, or to internal damage which may not be readily observable by a cursory inspection. If such damage were to occur over time, and remained undetected, it could conceivably damage the integrity of the cable and render the insulation qualities of the outer neoprene protection jacket useless, thereby presenting a potential electrical hazard. In such a situation, I believe that one may reasonably conclude that the cable was not fully protected. However, in order to support a violation of section 75.517, it would be incumbent on MSHA to advance some credible and probative evidence to support such a finding, and it may not simply rely on the fact that an inspector found a power cable crossing over a trolley wire.

Although I agree with the respondent's analytical analysis of the Commission's holdings in the cited Homestake Mining Company and Climax Molybdenum Company, decisions, supra, I take note of the fact that in the Homestake Mining Company case, the policy interpretation relied on by MSHA imposed a blanket mandatory requirement that additional powerline insulation other than that required by the cited standard in question be used. The policy included a finding by MSHA that the protective powerline jacket provided by the manufacturer was inadequate per se, and it also included MSHA's own policy definition of the additional insulation required for compliance, which the Commission found to be essentially meaningless. In the instant case, MSHA's policy statements are a veiled attempt to impose a mandatory blanket requirement for additional protective conduit in all cases where a power cable crosses over a trolley wire, and the inspector obviously construed the policy as a mandate to issue a citation for a violation of section 75.517, in all instances where he may find a power cable crossing over a trolley wire. I agree with the respondent's assertion that MSHA's policy statements that additional conduit may be necessary in some locations does not impose a mandatory obligation or duty to have the additional conduit protection in all cases. I find that this language is discretionary and permissive, rather than mandatory, and that the prevailing circumstances should dictate whether or not additional cable protection may be necessary to satisfy the "fully protected" requirement found in section 75.517.

I conclude and find that in order to support any finding that a power cable is not fully protected in violation of section 75.517, an inspector must, on a case-by-case basis, make an objective evaluation of all of the circumstances presented, including the use to which the power cable is being put, its condition, the location and distance from equipment or other physical objects which may reasonably expose it to physical damage, its proximity to miners who are required to work or travel in the area, and any other relevant factors which may support a reasonable conclusion that the cable is located and utilized in such a manner as to expose it to physical damage. Reliance by an inspector on the mere location of the cable listed among unexplained policy "location examples" is insufficient, in my view, to establish a violation. If an inspector followed the literal language of MSHA's policy, as the inspector did in this case, without any evaluation of all of the circumstances presented, he could issue a citation simply because the power cable crossed over a trolley wire, even though the cable passed any number of feet over the trolley wire and could never conceivably come into contact with the trolley wire. Such an interpretation and application does little to foster mine safety, and simply encourages litigation.

The respondent is correct in its assertions that MSHA's own section 75.517 policy statements and interpretive guidance for

its inspectors to follow clearly indicates that MSHA considers an undamaged power cable to be "fully protected" pursuant to this standard. However, the respondent's suggestion that a power cable is inherently fully protected by the manufacturer's outer protective tough neoprene jacket and meets the "fully protected" requirement of section 75.517, in all cases and in all circumstances where the cable may be located is rejected. As noted earlier, I have concluded that such cables are subject to damage and that any determination as to whether or not they are fully protected must be made on the basis of all of the facts presented and not simply the location of the cable.

The petitioner takes the position that the cable at issue in this case passed over a trolley wire at a highly travelled haulageway used by miners and equipment going into and out of working sections, and that this fact makes the location one where conduit is necessary for additional protection, rather than a location where conduit may be necessary. Respondent takes the position that the inspector based the citation on his observation of the power cable passing over the trolley wire, and his belief that MSHA's policy manuals imposed a mandatory duty on him to issue a citation in all cases where such a cable is not protected by additional conduit. Respondent also takes the position that it has presented credible evidence that the facts and circumstances presented in this case support a finding that the cable was fully protected against any possible physical damage, and that MSHA's own policy interpretations of "fully protected" have been satisfied.

The evidence in this case establishes that the inspector issued the citation because he believed he was compelled to do by MSHA's policy directives. He admitted that he believed that each of the location examples stated in the policy with respect to power cables passing over trolley wires were mandatory requirements obligating an operator to provide additional conduit protection in all cases at such locations in the mine and that he had no discretion to determine whether or not any particular circumstances would require such additional guarding.

The inspector conceded that the power cable in question was in good condition and undamaged, and that it met all of MSHA's cable insulation requirements. He also agreed that the cable was hung on an insulator, and that the exterior of the cable was protected by an insulating jacket, and that each power conductor inside the cable was individually insulated. He agreed that the cable was provided with short circuit and fuse protection, that the outer and inner portions of the cable would have to be damaged in order to present any shock hazard, and that in the event such damage was present, a person would have to reach up and over the trolley wire and grab the cable in order to be exposed to a shock hazard. He also agreed that in the event the cable was dislodged and lying across the trolley wire, anyone

performing work on the light switch would be able to observe the cable in that position.

The inspector expressed concern that a possible shock hazard would exist if a trolley pole from one of the vehicles passing under the cable came off the trolley wire and struck and damaged the cable. If such damage were to occur, and the cable were to fall on the energized trolley wire, the inspector believed that the electrical light block circuit would become energized and pose a shock hazard to anyone contacting the wire or cable. The evidence establishes that the inspector was not an electrical inspector and had no particular expertise in such matters. Although he confirmed that the conduit which was in place, but had slipped away from the cable location immediately over the trolley cable, would not protect the cable from damage if the trolley pole were to strike it in the unprotected area between the light switch box and the end of the protective conduit, he nonetheless concluded that the conduit in place over the cable would sufficiently protect the cable if it had not slipped.

The inspector's belief that a trolley pole would likely come off the trolley wire and strike the cable in question was based on "his experience" that trolley poles frequently come off the trolley wire, and that the likelihood of this occurring would be increased by the fact that the haulageway in question was a highly traveled area which would increase the frequency of a trolley pole striking the cable. The inspector agreed that it was possible that a trolley pole would never come off the wire while travelling the haulageway and that the haulageway area in question was a reasonably flat area. Although the inspector believed that the reasons for a trolley pole "frequently" coming off the trolley wire included excessive vehicle speed, a bend in the trolley wire, or inadequate spring pressure on the pole, there is no evidence in this case that these conditions existed. The inspector confirmed that he did not visually inspect the cable in question, and he could not recall specifically looking for any cable damage. He also confirmed that he observed no bends in the trolley wire (Tr. 32, 42, 45).

The inspector confirmed that a vehicle approaching the area where the cable in question was located would have to slow down in order to activate the light switch (Tr. 30). Respondent's witness Bochna, who was familiar with the area, agreed that the area in question was congested, but he stated that the traffic is not heavy, and that a vehicle approaching the location of the light switch cable would have to slow down or stop in order to activate the traffic light switch in question before proceeding further, and that in his driving experience he has had no problem with a trolley pole coming off a trolley wire (Tr. 60-63, 71).

The testimony in this case establishes that the height of the mine roof off the floor was approximately 8 feet. Mr. Bochna

testified that the trolley wire was located approximately 12 inches from the mine roof, and the inspector testified that the power cable was located approximately 6 inches above the trolley wire. Respondent's witness Coss, who is an electrical engineer and a qualified MSHA certified electrician and electrical instructor, and who regularly observed the equipment operating underground and has operated the equipment himself, testified that the trolley poles are approximately 5-1/2 to 6 feet long, and that they are mounted at different locations on the equipment, at heights varying from 3 to 4 feet. He confirmed that there would be less tension on a trolley pole in a high roof area, and that in the event the pole came off the trolley wire in such an area, there would be less of an impact on the cable if the pole were to strike it (Tr. 85-86). Conceding that a trolley pole does occasionally come off the trolley wire in the mine, in view of the fact that the mine has approximately 10 miles of trolley wire, and the fact that a vehicle must slow down to activate the signal switch, he believed that the likelihood of a trolley pole coming off a trolley wire at the location of the cited cable would be remote. Even if this occurred, he further believed that a blunt trolley pole would not damage the cable by striking it while it was hanging up (Tr. 88).

I conclude and find that there is no evidence in this case to establish the existence of any of the factors or conditions alluded to by the inspector to support his belief that trolley poles frequently come off a trolley wire. There is no evidence in this case of excessive vehicular speed, bends in the trolley cable, inadequate spring pressure or any of the trolley poles, or unusual haulage road conditions. Further, there is no evidence that the respondent has experienced any problems in the mine with trolley poles coming off a trolley wire and striking or damaging power cables. During the course of the hearing, and in response to my bench questions concerning 10 prior citations for violations of section 75.517, the respondent's counsel confirmed that three of the citations were issued for lack of adequate insulation or protection for power cables passing through stoppings, one of the locations listed in MSHA's policy "examples" where additional cable protection is required. Counsel confirmed that he "settled" these citations after the petitioner's solicitor who was handling the cases agreed to vacate the citations. The parties could offer no further information with respect to the facts and circumstances surrounding these violations, and they did not know whether or not the remaining citations concerned power cable crossing over trolley wires (Tr. 71-77). The respective posthearing briefs filed by the parties do not further address my bench inquiries concerning these prior citations.

While it may be true that the petitioner has established that it is undisputed that MSHA has consistently interpreted section 75.517 to require protective conduit or guarding on power cables where they pass over trolley wires, I have rejected the

petitioner's position that such a policy may impose a mandatory blanket requirement that additional protective conduit be provided at all such locations "across the board" without any objective consideration of the prevailing facts and circumstances. I also reject any notion that MSHA may make such a broad sweeping unsupported policy determination that the lack of such additional conduit protection constitutes something less than the "fully protected" language found in section 75.517.

On the facts of this case, and after careful consideration of all of the evidence presented, I conclude and find that the petitioner has failed to establish that the cited power cable in question was not fully protected as required by the cited mandatory safety standard 30 C.F.R. § 75.517. Accordingly, the contested citation IS VACATED.

ORDER

On the basis of the foregoing findings and conclusions, section 104(a) "S&S" Citation No. 3096605, issued on May 27, 1988, citing an alleged violation of 30 C.F.R. § 75.517, IS VACATED, and the petitioner's proposal for assessment of a civil penalty for the alleged violation IS DENIED AND DISMISSED.

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

NOV 2 1 1989

JEFFREY BROWN, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. PENN 89-228-D
	:	MSHA Case No. PITT CD 89-17
BETH ENERGY MINES, INC., Respondent	:	Livingston Portal 84 Complex

ORDER OF DISMISSAL

Before: Judge Koutras

Complainant's motion received on November 20, 1989, to withdraw the complaint filed in this matter IS GRANTED, and this case IS DISMISSED.

George A. Koutras
Administrative Law Judge

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NOV 21 1989

ASARCO, INCORPORATED, Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. SE 88-82-RM Citation No. 3252969; 7/16/88
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. SE 88-83-RM Citation No. 3252970; 7/16/88
	:	Immel Mine Mine ID 40-00170
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. SE 89-67-M A. C. No. 40-00170-05520
v.	:	Immel Mine
ASARCO, INCORPORATED, Respondent	:	

ORDER OF DISMISSAL

The procedural history of this case, with regard to discovery, has been set forth in previously issued Orders.

On October 23, 1989, Petitioner filed a Response to the Order of October 16, 1989. In its Response, Petitioner stated, inter alia, that it continues to decline to produce certain documents which were required to be produced by previous orders. Petitioner further stated as follows: "Given the inefficacy of first complying with and then appealing from the Administrative Law Judge's Discovery Order, the proper procedure is for the Administrative Law Judge either to follow the procedure set forth in Commission Rule 74(a)(1) (29 C.F.R. 2700.74(a)(1)) or to dismiss this action so that the Secretary may have this Order reviewed by the Commission." (Emphasis added).

On October 27, 1989, Respondent filed a Renewed Motion to Dismiss, requesting dismissal of this case based on Petitioner's refusal to comply with the Discovery Orders.

Based on the history of this case, wherein Petitioner's position has been clearly stated, and particularity based upon the above language quoted from Petitioner's Response of

October 23, 1989, I conclude that to issue a show cause order at this point, pursuant to 29 C.F.R. § 2700.63(a), would only serve to unduly delay a disposition of this case. I conclude, based on Petitioner's continued refusal to comply with the Discovery Orders previously issued, that dismissal of this case is warranted. Therefore, Respondent's Renewed Motion to Dismiss is GRANTED.

It is ORDERED that the above case be DISMISSED.

Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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NOV 2 1 1989

JOSEPH G. DELISIO, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. PENN 89-8-D
	:	MSHA Case No. PITT CD 88-25
MATHIES COAL COMPANY, Respondent	:	Mathies Mine

DECISION

Appearances: Michael J. Healy, Esq., for the Complainant

Richard R. Riese, Esq., for the Respondent

Before: Judge Fauver

Complainant alleges a violation of § 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

The issue is whether Respondent violated § 105(c) by refusing to compensate Complainant the difference between his regular daily wage of $126.52 and his statutory witness fee of $30 paid by MSHA for the day he appeared at a hearing. Complainant was subpoenaed by MSHA to testify against Respondent in a hearing before a Commission judge.

The parties have stipulated the facts and submitted the case for decision without an evidentiary hearing.

Respondent operates a coal mine where Complainant is a miner, the chairman of the local union safety committee, and a "representative of miners" within the meaning of the Act.

On July 21, 1988, in Mathies Coal Company, PENN 88-36-R, a hearing was held before a Commission judge to try a contest filed by Respondent concerning a citation issued at the mine, which charged a violation of a safety standard.

MSHA subpoenaed Complainant to appear at the hearing and paid him a statutory witness fee of $30. The United Mine Workers of America paid Complainant the difference between his daily miner's pay and the statutory witness fee paid by MSHA.

The hearing was held in a courthouse, not at the mine. Complainant did not work at the mine on the day he testified.

Respondent refused to pay Complainant the difference between the wages he would have earned at the mine that day, $126.52, and the witness fee of $30 paid by MSHA. However, Respondent called its own mine employee witnesses at the hearing on July 21, 1988, and compensated them at the pay rate they would have received had they worked at the mine that day. The witnesses called by Respondent were salaried employees, not hourly employees.

DISCUSSION

Section 105(c)(1) of the Act provides:

> (1) No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this chapter because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this chapter, 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, because such miner, representative of miners or applicant for employment is the subject of medical evaluation and potential transfer under a standard published pursuant to section 811 of this title or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding, under or related to this chapter or has testified or is about to testify in any such proceeding or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this chapter.

The issue here -- whether § 105(c) prohibits a mine operator from withholding wages from a miner witness who testifies against the operator at a Commission hearing while compensating other employee witnesses who testify on behalf of the operator -- appears to be one of first impression. However, this issue has been considered under other statutes.

In Carpenter v. Miller, 325 S.E. 2d 123 (WV 1984), the West Virginia Supreme Court of Appeals interpreted an anti-discrimination law similar to § 105(c). The state law provided in part:

> No person shall . . . in any . . . way discriminate against . . . any miner . . . by reason of the fact that he believes or knows that such miner . . . has testified or is about to testify in any

proceeding resulting from the administration or enforcement of the provisions of this law. [West Virginia Code § 22-1-21(a) (3) (1981 Replacement Vol.).]

The UMWA and several miners brought a mandamus action against the West Virginia Department of Mines to prevent the practice of mine operators withholding compensation from miners who were subpoenaed to testify in hearings before the Department. The two operators named in the proceeding had paid the employee witnesses who testified on their behalf, but refused to pay their employees who testified against them. The court held that the withholding of compensation from the miners who testified against the operators constituted discrimination in violation of the state statute.

In UMWA v. Miller, 291 S.E. 2d 673 (WV 1982), the court held that withholding compensation from a miner who accompanied a state mine inspector during a mine safety inspection was discrimination in violation of the above state statute.

In NLRB v. Western Clinical Laboratory, Inc., 571 F.2d 457 (9th Cir. 1978), the court upheld an NLRB ruling that the employer violated § 8(a)(4) of the National Labor Relations Act 1/ by requiring an employee to use vacation time for his attendance under subpoena at an NLRB hearing despite the employee's desire to take leave without pay for those days.

In Electronic Research Co. [I], 187 NLRB 733 (1971), the Board held that an employer's denial of a perfect attendance award to an employee because he was absent from work while testifying against the employer in a Board hearing violated § 8(a)(4), where the employer granted such an award to employees who appeared at the same Board hearing at the employer's request. However, in Electronic Research Co. [II], 190 NLRB 773 (1971), the Board held that the employer did not violate the NLRA when it refused to pay for time lost from work by three employees who had been subpoenaed by the union as witnesses at a Board hearing, even though it paid regular pay to employee witnesses called by the employer. The Board found that the hearing was an adversary hearing in which each side subpoenaed or called its own witnesses

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1/ Section 8(a)(4) provides:

"(a) It shall be an unfair labor practice for an employer --

"* * *

"(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter * * *."

and compensated them for their time, and the union's witnesses were not monetarily disadvantaged since the union had paid union witness fees that exceeded their wages.

In a later case, General Electric Company, 230 NLRB 683 (1977), a majority opinion of the Board comented on the opposite results in the two Electronic Research, Co. cases, supra. It stated that the Board was "distinguishing between those situations where the employer's actions are directed at the employment relationship, as in the perfect attendance award . . . , and those where they were not, as in the witness fee situation" (emphasis supplied). The majority opinion thus concluded:

> There is nothing unlawful in an employer using the wages of witnesses as the measure of his compensating them for witness fees while not also paying employees called by other parties . . . , since the employer's actions are not directed at the employment relationship. [Fn. omitted.] However, if an employer distinguishes between its employees on the basis of whether they were summoned as witnesses by it or by the opposition, it acts unlawfully.

Then-Chairman of the NLRB Fanning dissented on the ground that the employer's denial of wages to opposition employee witnesses "was disparate treatment based on whether the testimony was on behalf of or against Respondent's interest" - - and this was "discrimination within the meaning of Section 8(a)(4)."

The distinction relied upon by the majority opinion in General Electric -- between (1) discrimination as to a perfect attendance award or the use of vacation time and (2) discrimination as to wages -- appears to me to artificial and in any event distinguishable from Mine Act cases. The broad protection of § 105(c) of the Mine Act prohibits "any manner" of discrimination.

I conclude that Respondent violated § 105(c) of the Act by refusing to pay Complainant the difference between his regular daily wages, $126.52, and the witness fee of $30 paid by MSHA. Because of Respondent's discriminatory treatment of witnesses in a Mine Act proceeding, i.e., refusing to pay wages to Complainant who was an opposition witness but paying the wages of the witnesses who appeared on its behalf, no further examination of discriminatory motive is necessary.

CONCLUSION OF LAW

1. The judge has jurisdiction over this proceeding.

2. Respondent violated § 105(c) of the Act as found above.

ORDER

1. The parties are directed to confer within 15 days of this Decision in an effort to stipulate the amount of Complainant's back pay, with accrued interest computed according to the Commission's decisions, and Complainant's litigation expenses, including a reasonable attorney's fee.

2. Within 30 days of this Decision, Complainant shall file either a stipulated proposed order awarding monetary relief signed by both parties 2/ or, if there is no stipulation, Complainant's proposed order awarding monetary relief. If there is no stipulation, Respondent shall have 10 days after the proposed order is filed to file a response. If appropriate, a hearing will be scheduled to resolve any issues of fact as to monetary relief.

3. This Decision shall not become final until an order is entered awarding monetary relief and declaring this Decision to be final. The judge will retain jurisdiction of this proceeding until such an order is entered.

William Fauver
William Fauver
Administrative Law Judge

2/ Respondent's stipulation of a proposed order awarding monetary relief will not limit its right to seek review of a final Decision and Order entered in this proceeding.

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NOV 27 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 89-122-M A.C. No. 23-00746-05514 A
v.	:	
	:	Sullivan Plant
WILLIAM D. LONG, Employed by K. R. WILSON CONTRACTING, INC., Respondent	:	

DECISION APPROVING SETTLEMENT

Appearances: Oscar Hampton, Esq., Office of the Solicitor, U.S. Department of Labor, Kansas City, Missouri, for Petitioner;
Frederick H. Schwetye, Esq., Union, Missouri, for Respondent.

Before: Judge Melick

This case is before me upon a petition for assessment of civil penalty under Section 110(c) of the Federal Mine Safety and Health Act of 1977 (the Act). At hearings Petitioner filed a motion to approve a settlement agreement and to dismiss the case. A reduction in penalty from $1,300 to $900 was proposed. I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the relevant criteria set forth in Section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is GRANTED, and it is ORDERED that Respondent pay a penalty of $900 within 30 days of this order.

Gary Melick
Administrative Law Judge
(703) 756-6261

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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NOV 27 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 89-27-M A.C. No. 23-00746-05512
v.	:	
	:	Sullivan Plant
K. R. WILSON CONTRACTING, INC., Respondent	:	

DECISION APPROVING SETTLEMENT

Appearances: Oscar Hampton, Esq., Office of the Solicitor, U.S. Department of Labor, Kansas City, Missouri, for Petitioner;
Frederick H. Schwetye, Esq., Union, Missouri, for Respondent.

Before: Judge Melick

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 (the Act). At hearings Petitioner filed a motion to approve a settlement agreement and to dismiss the case. A reduction in penalty from $2,719 to $2,634 was proposed. 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.

WHEREFORE, the motion for approval of settlement is GRANTED, and it is ORDERED that Respondent pay a penalty of $2,634 within 30 days of this order.

Gary Melick
Administrative Law Judge
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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NOV 27 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 89-126-M A.C. No. 23-00746-05516-A
v.	:	
KENNETH R. WILSON, Employed by K. R. WILSON CONTRACTING, INC., Respondent	:	Sullivan Plant

DECISION APPROVING SETTLEMENT

Appearances: Oscar Hampton, Esq., Office of the Solicitor, U.S. Department of Labor, Kansas City, Missouri, for Petitioner;
Frederick H. Schwetye, Esq., Union, Missouri, for Respondent.

Before: Judge Melick

This case is before me upon a petition for assessment of civil penalty under Section 110(c) of the Federal Mine Safety and Health Act of 1977 (the Act). At hearings Petitioner filed a motion to approve a settlement agreement and to dismiss the case. A reduction in penalty from $1,600 to $1,100 was proposed. I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the relevant criteria set forth in Section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is GRANTED, and it is ORDERED that Respondent pay a penalty of $900 within 30 days of this order.

Gary Melick
Administrative Law Judge
(703) 756-6261

Distribution:

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

Frederick H. Schwetye, Esq., 8a South Church Street, P.O. Box 499, Union, MO 63084 (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 28 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. LAKE 89-36-M
	:	A. C. No. 11-01896-05503
v.	:	
	:	Vandalia Sand & Gravel
VANDALIA SAND & GRAVEL, Respondent	:	

DECISION

Appearances: Maria P. Peterson, Esq., Office of the Solicitor, U. S. Department of Labor, Chicago, Illinois, for the Secretary;
Mr. Mike Themig, Vandalia Sand & Gravel, Vandalia, Illinois, for the Respondent.

Before: Judge Weisberger

Statement of the Case

In this case, the Secretary (Petitioner) seeks a civil penalty for the alleged violation by the Operator (Respondent) of 30 C.F.R. § 56.15001. Pursuant to notice, a Hearing has held in St. Louis, Missouri, on October 3, 1989. Jerry Spruell testified for Petitioner, and Respondent did not present any witnesses.

At the Hearing, the Parties entered into the following stipulations:

1. The Federal Mine Safety and Health Commission has jurisdiction over these proceedings.

2. Respondent's wife owns and operates the sand and gravel pit at Vandalia known as Vandalia Sand and Gravel, and that Mr. Mike Themig is the manager of the same gravel and sand pit.

3. The Respondents have worked 4,980 man-hours between December 23, 1987, through December 23, 1988.

4. The Respondent does not have any prior violations with MSHA.

Issues

The issues before me are whether Respondent violated 30 C.F.R. § 56.15001, and the penalty to be imposed on Respondent if such a violation did occur.

Regulation

30 C.F.R. § 56.15001, as pertinent, provides as follows: "Adequate first-aid materials, including stretchers and blankets, shall be provided at places convenient to all working areas."

Findings of Fact and Discussion

Inasmuch as Respondent did not present the testimony of any witnesses at the Hearing, the factual findings that I have made in this case were based upon the testimony of Jerry Spruell, an MSHA Inspector, who testified for Petitioner.

On October 3, 1988, Spruell went to Respondent's sand and gravel operation to perform a semiannual inspection. He met with Mike Themig and asked him if he had a stretcher, blankets, and first-aid materials at the property, and Themig indicated that he did not, but that "if someone got hurt he would merely call the hospital" (Tr. 14). On October 6, 1988, Spruell returned to the site, and at that time was shown a stretcher which was folded up. The side support braces of the stretcher were broken, and Spruell opined that due to its condition it would not be able to carry a person. He indicated that in his opinion, a stretcher is "adequate" if it is capable of transporting the largest person employed on the site.

According to Webster's New Collegiate Dictionary (1979 edition), (Webster's) a "stretcher" is defined as "a litter (as of canvas) for carrying a disabled or dead person." Webster's defines "adequate" as ". . . lawfully, and reasonably sufficient." Inasmuch as the stretcher in question has support braces that were broken, I find that it was inadequate to carry disabled persons.

According to Spruell's notes made on October 7, 1988, on October 3, 1988, Themig had indicated that a blanket was ". . . in his truck." When Spruell was at the site on October 4, 1988, the pickup truck was not at the site. On October 17, 1988, when Spruell again returned to the site, a blanket was taken from a welding truck and placed in the scale house.

Based upon the above, and considering that Respondent did not contradict or rebut Themig's statement to Spruell, on October 3, 1988, that he did not have a blanket, I conclude that a blanket was not provided at any place convenient to the working areas on October 3 - 4, 1988.

Respondent had on the site, two first-aid kits which had the following materials: ten 3/4 inch band-aids, 1.8 ounces first-aid cream, six antiseptic cleansing wipes, one roll of cloth tape, one roll of gauze, two burn cream packs, two nonstick pads, two extra large bandage strips, one pair scissors, and a first-aid guide. According to Spruell, the first-aid materials were inadequate as they did not contain any splints.

Inasmuch as the support braces for the stretcher were broken, and the evidence tends to indicate that a blanket was not provided at the site on October 3 - 4, I find that Respondent did violate section 56.15001, supra.

Spruell indicated that on October 4, 1988, Themig had told him that if an employee would suffer a neck or back injury, the instructions were to call for emergency medical help from the hospital. A map submitted by Respondent indicates that an emergency vehicle from the hospital can reach Respondent by going down 8th Street for 10 blocks, and then turning right on St. Louis Avenue out to Respondent's site. There is no evidence with regard to any hazard occasioned by the lack of having a blanket at the site. The first-aid kit was, as indicated by Spruell, adequate for very minor wounds. I find the violation to be of a low level of gravity.

Respondent had not abated the condition by the date stipulated to on the citation, October 11, 1988. According to Spruell, Themig had indicated that in the past other MSHA Inspectors had accepted the stretcher, and there was no need for any splints as the first-aid materials were adequate. Eventually after a discussion with Spruell, who had discussed the possibility of issuing a section 104(b) Order, the violative conditions were abated by Themig, by nailing two 2 x 4s to a plywood board, and labeling it a stretcher, taking wooden lathes and marking them splints, and placing these in the scale house along with the blanket. Taking all the above into account I conclude that the penalty proposed by Petitioner, of $20, is appropriate for the violation found herein.

ORDER

It is ORDERED that, within 30 days of this Decision, Respondent pay $20 as a civil penalty for the violation found herein.

Avram Weisberger
Administrative Law Judge

Distribution:

Maria P. Peterson, Esq., Rafael Alvarez, Esq., Office of the Solicitor, U. S. Department of Labor, 230 South Dearborn Street, 8th Floor, Chicago, IL 60604 (Certified Mail)

Mr. Mike Themig, Vandalia Sand and Gravel, P. O. Box 391, Vandalia, IL 62471 (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 28 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. SE 89-93
	:	A. C. No. 01-01401-03748
v.	:	
	:	No 7 Mine
JIM WALTER RESOURCES, INCORPORATED, Respondent	:	

DECISION

Appearances: William Lawson, Esq., Office of the Solicitor, U. S. Department of Labor, Birmingham, Alabama, for the Secretary;
R. Stanley Morrow, Esq., Jim Walter Resources, Incorporated, Birmingham, Alabama, for Respondent.

Before: Judge Weisberger

Statement of the Case

In the proceeding, the Secretary (Petitioner), pursuant to a Petition for an Assessment of Civil Penalty, filed on May 15, 1989, seeks a civil penalty for an alleged violation by the Operator (Respondent) of 30 C.F.R. § 75.312. Respondent filed its Answer on May 19, 1989. Pursuant to a telephone conference call with counsel for both Parties, on September 5, 1989, the matter was set for hearing on September 13, 1989, in Birmingham, Alabama. At the hearing, Don Greer testified for Petitioner and Greg Franklin testified for Respondent. Post hearing Proposed Findings of Fact and Memorandum of Law were filed on October 6, 1989. Respondent filed its Reply Brief on October 13, 1989, and Petitioner filed its Reply Brief on October 16, 1989.

Stipulations

1. Jim Walter is the owner and operator of the No. 7 Coal Mine.

2. The Commission has jurisdiction to hear this proceeding.

3. Jim Walter Resources is a large-sized operator for purposes of the Act.

4. Payment of a penalty which may result out of this litigation would not affect its ability to continue in the business.

5. The violation alleged was abated in good faith.

6. The history of violations at Respondent's No. 7 Mine is average for an operation of that size.

Findings of Facts and Discussion

The 92 longwall section, at Respondent's No. 7 Mine, is a longwall operation whereby coal is extracted by a shear which cuts the coal from the approximately 850 foot wide coal face. The shear cuts from the tailgate to the headgate (Entry No. 4). The face is ventilated by air from the adjacent No. 4 Entry and No. 3 Entry, with most of the air coming from the No. 3 Entry. In the longwall mining cycle, the working or coal face advances in an outby direction, i.e., towards the entrance.

On February 14, 1989, at approximately 12:45 a.m., the longwall panel was inspected by Don Greer, an MSHA Inspector. At that time, he noted that the shear was cutting the working face outby crosscut A, but that the face was being ventilated by air from Entry No. 3 which passed through crosscut A to the face. He indicated that the roof in crosscut A was supported by bolts, and accordingly, it would not be a violation of the roof control plan for a miner to be in crosscut A. However, he did not enter crosscut A as he "perceived," (Tr. 38), that it was dangerous, inasmuch as a "tremendous" amount of rock and material, (Tr 39), as a result of the normal mining procedure, was being supported by shields. He indicated, essantially, that there also was a build up of rock in a gob area. This material was located approximately 20 feet to the right of a coal pillar, which abutted crosscut A inby. He indicated that he was concerned that this material had created pressure on the roof of crosscut A. He indicated that the area to the right of crosscut A was unsupported except for the shields. According to Greer, as the shields advanced outby, in the normal mining process, there would be increased pressure on the roof of crosscut A due to the normal falling of the roof.

Greer issued a section 104(a) Citation, alleging a violation of 30 C.F.R. § 75.312, supra, which provides, as pertinent, that "Air that has passed through an abandoned area or area which is inaccessible or unsafe for inspection shall not be used to ventilate any working place in any mine." Thus, in order to prevail, petitioner must establish that the air ventilating the face passed through either an "abandoned" area or one that is "unsafe for inspection."[1/]

[1/] No argument is made by Petitioner that the area in question was inaccessible. Nor does the evidence support such a finding.

30 C.F.R. § 75.2(h) defines an abandoned area as an area that is ". . . not ventilated and examined in a manner required for working places under subpart D of this part 75." The evidence is unequivocal that crosscut A was ventilated. According to a plain reading of section 75.2(h), supra, an area is abandoned if it is not ventilated and examined. Inasmuch as the 75.2(h), supra, uses these two conditions in the conjunctive, if one condition has not been met, i.e., if the area has been ventilated, as here, it can not be considered abandoned.[2]/

Although Greer did not inspect the roof in crosscut A, I find that the record does not contradict his opinion, that the roof therein is subject to pressure from the falling roof as part of the normal ore mining process. Indeed Greer testified that he observed some crumbling from the pillar abutting crosscut A. Franklin also essentially agreed that the advance of the longwall extraction, which causes the roof to fall, does transmit pressure on the pillar abutting crosscut A. As such, I find based upon the testimony of Greer that crosscut A was unsafe for inspection. Accordingly, inasmuch as air passed through crosscut A on its way to the face, Respondent herein did violate 30 C.F.R. § 75.312, supra.[3]/

According to Greer, as the normal longwall mining process retreats outby, there is increased pressure on crosscut A due to the build up of materials in the gob areas adjacent to it. However, although a hazard of a roof fall in crosscut A is thereby created, Petitioner has not established the manner in which the violation herein, i.e., air passing through that area on the way to the face, contributes to a hazard of the rib or roof falling in crosscut A. Greer also indicated that it is likely that there would be methane in the gob area as the seam "is a known gassy seam of coal" (Tr. 54). He testified that as the air passes

[2]/ I also find that it has not been established that the area in question was not examined. Greer opined that he would not inspect crosscut A. His opinion is clearly not probative of whether in fact that area was actually examined by Respondent in the manner required for working places. Testimony from Respondent's witnesses similarly does not establish that the area was not examined. According to Greg Franklin, Respondent's ventilation engineer, he was told by Paul Phillips, a foreman, that on the date in question miners used crosscut A as a dinner hole, and that men traveled through that area. He indicated that crosscut A was to be inspected.

[3]/ I reject Respondent's argument, as set forth in its Brief, that Petitioner must show that the air contained .25 percent of methane to establish a violation of section 75.312, supra. I find that the second sentence in section 75.312, supra, does not qualify or modify the first sentence. Inasmuch as the evidence establishes that the terms of the first sentence were violated, I find that Respondent was in violation of section 75.312, supra.

through the gob, there is a potential for it to pick up methane and transport it to the face. Greer indicated that, on the day he was present, in the normal mining process the face would have retreated another 12 to 15 feet that shift, thus increasing the likelihood of methane arriving at the face. In this connection, he indicated that the night foreman had told him that, in general, it is his policy to let the following shift, the day shift, make any ventilation changes.[4]/ Greer indicated that methane reaching the face could cause an ignition or explosion, which could be initiated by problems with electrical equipment at the face, or by sparks generated by the tops of the bits of the shear. He indicated that in the event of a fire or explosion, he would expect miners present in the working section to suffer burns or fatalities in the severest of cases. However, He indicated, in cross-examination, that no gas was found in crosscut A, and that gas samples taken an hour after he issued the citation were within the legal limits. He also indicatedthat it was his "perception" that while an accident "could occur" he did not "foresee" it happening before the violation could be corrected (Tr. 60). Further, the evidence has not established that air traveling through crosscut A results in a greater likelihood of its passing through the gob area and picking up methane, as opposed to air traveling up the headgate entry and then on to the face. Hence, I conclude that it has not been established that there was a reasonable likelihood that the violation herein contributed to the hazard of fire or explosion. Accordingly, I find it has not been established that the violation herein was significant and substantial. (See, Mathies Coal Co., 6 FMSHRC 3-4 (1984)).

In assessing a penalty herein, I adopt the stipulations of the Parties with regard to the factors set forth in section 110(i) of the Act. I further find that the violation herein was of a moderate degree of severity. The evidence herein is not very persuasive that there was a significant hazard occasioned by coursing the air through crosscut A as opposed to the hazard to one present in crosscut A occasioned by the condition of the roof and rib there. I find that Respondent herein was moderately negligent. Considering all of the above, I conclude that Respondent shall pay a penalty of $75 for the violation found herein.

4/ I place more weight on the statement of policy, given by the foreman of the night shift, the actual shift in question, rather than the general statement of Franklin that it is policy to make ventilation changes as they are needed.

ORDER

It is hereby ORDERED that Respondent shall, within 30 days of this Decision, pay $75 as a penalty for the violation found herein. It is further ORDERED that Citation 3012364 be amended to reflect the fact that the violation therein is not significant and substantial.

Avram Weisberger
Administrative Law Judge

Distribution:

William Lawson, Esq., Office of the Solicitor, U. S. Department of Labor, 2015 Second Avenue North, Suite 201, Birmingham, AL 35203 (Certified Mail)

R. Stanley Marrow, Esq., Jim Walter Resources, Incorporated, P. O. Box 830079, Birmingham, AL 35283-0079 (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 28 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. KENT 89-192
	:	A.C. No. 15-11548-03572
v.	:	
	:	No. 22 Mine
LEECO, INCORPORATED, Respondent	:	

DECISION

Appearances: G. Elaine Smith, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee for Petitioner;
Martin J. Cunningham, III, Esq., Reece, Lang, Aker & Breeding, P.S.C., London, Kentucky for Respondent.

Before: Judge Melick

This case is before me upon the petition for civil for penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," charging Leeco, Incorporated (Leeco) with one violation of its Roof Control Plan under the regulatory standard at 30 C.F.R. § 75.220 and seeking a civil penalty of $7,000. The general issue before me is whether Leeco violated the cited regulatory standard and, if so, the appropriate civil penalty to be assessed in accordance with Section 110(i) of the Act.

At hearing Leeco filed a motion to dismiss which was granted at hearing in a bench decision. That decision is set forth below with only non-substantive corrections:

> I'm going to grant the motion. The motion is essentially one to dismiss for failure to charge a violation of law as charged in the citation. Ordinarily, such a motion should of course be made before trial, but under the circumstances here there was some ambiguity in the citation itself as to what precise provisions of the Roof-Control Plan actually were alleged to have been violated. Under the circumstances the delay is understandable and I

will allow the motion to be made at this time now that the specific charges are known.

The citation before me, Citation No. 3030482 states as follows:

> The temporary supports installed in the area of the accident were not in compliance with the approved Roof-Control Plan, in that the inby row of three had been installed eight to nine feet inby the first row of four. The approved plan requires temporary supports in rows of four, not more than five feet apart.

Now clearly that citation charges a violation of the Roof-Control Plan and nothing else, and as stated at hearing by the Secretary's Counsel the violation alleged is that on Page 24 of the Roof-Control Plan which is Government Exhibit No. 1 [attached hereto as Appendix I]. As clarified further at hearing the specific charge of a violation of the Roof-Control Plan appears to be that the second row of temporary supports, that is, the temporary supports identified as No. 6 and 7 on the diagram, Government Exhibit 2, [attached hereto as Appendix II] were set in excess of 5 feet from the first row of supports.

As an aside I also note that the specific testimony related to that allegation also differs significantly from the allegation of the citation. The testimony by the Inspector who wrote the citation is that the No. 6 temporary support was 6 feet inby the nearest first row support, and the No. 7 temporary support was 6 1/2 feet from the nearest first row support, whereas it is charged in the citation that these temporary supports were 8 to 9 feet inby the first row of supports.

Be that as it may, as pointed out by Mr. Cunningham, counsel for the operator, the Plan on its face does not require more than one row of temporary supports where the cut at issue is less than 24 feet deep. It is conceded by the Government that the cut at issue was indeed less than 24 feet deep. It is also admitted by the Government that the second row of temporary supports was not even required by the Plan, but was in excess of the Plan's requirements. The fact

that the second row of temporary supports does not comply with other provisions of the plan is therefore immaterial as far as I can see. As another aside here, they have not shown that having those additional second row of temporary supports even though they perhaps may have been on greater than 5 foot centers, were less safe than not having them at all.

In any event, under the circumstances of this case, I cannot find that there has been a violation of the Roof-Control Plan. I do not agree with the Government's representations that the violation charged in this citation was also a violation of some other part of the standard at 30 C.F.R. § 75.220. I believe the Government's representation was that the alleged violation in this case also represented a failure on the part of the mine operator to have taken additional precautions if there were unusual hazards. It seems to me that even if that were charged the fact that the operator did erect additional temporary supports, even though perhaps in excess of the 5 foot requirement, does show that some additional protection was provided.

The Government also maintains that once having made the decision to install additional supports the mine operator must then comply with the 5 foot center requirement of the Plan. I cannot read any such requirement into the Plan and I therefore reject that contention. Under the circumstances, I'm going to grant the Motion to Dismiss and vacate the citation.

ORDER

Citation No. 3030482 is VACATED and this Civil Penalty Proceeding is DISMISSED.

Gary Melick
Administrative Law Judge
(703) 756-6261

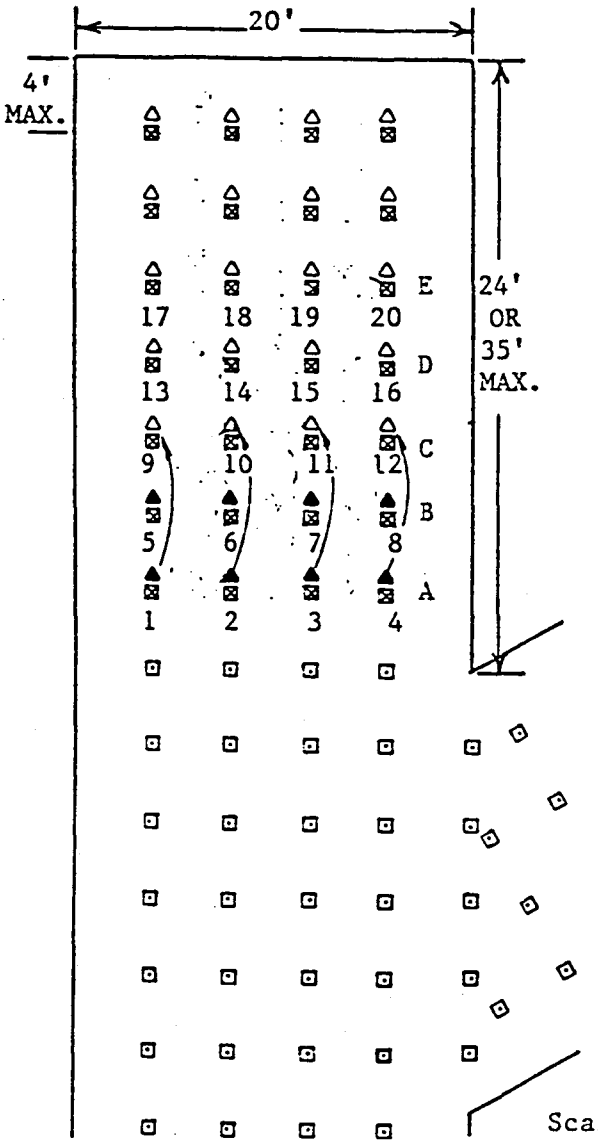
SUPPORT SPACING AND PATTERN

APPENDIX I

4 Ft. Centers - 24 Ft. and 35 Ft. Cuts

NOTE: Cuts exceeding 24' in depth shall have a double row of temporary supports installed and advanced. One row on 24' or less deep cuts.

Areas where corners are rounded off additional roof bolts to be installed as necessary.

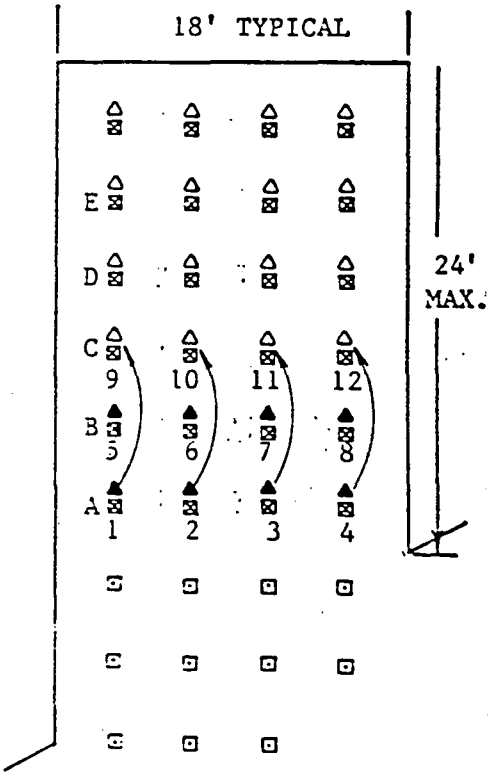


ROOM PLAN

#4 Rider Seam: Cuts-1, 2, 4, 5, 8, 9, 15, 16, 17, 18, 21, 22
#4 Seam, Option 1: Cuts-1, 2, 3, 6, 11, 12
#4 Seam, Option 2: Cuts-1, 2, 4, 5, 8 9, 15, 16, 17, 18, 20, 21
Entry Plan-All Cuts

ROOM PLAN

#4 Seam, Option 2: Cuts-6, 10



LEGEND:

- ⊡ Roof Bolts Installed
- ⊠ Roof Bolts To Be Installed
- ▲ Temporary Supports Installed
- △ Temporary Supports To Be Installed

Scale 1"=10'

Temporary supports to be installed before first bolt and advanced as each row of roof bolts is installed.

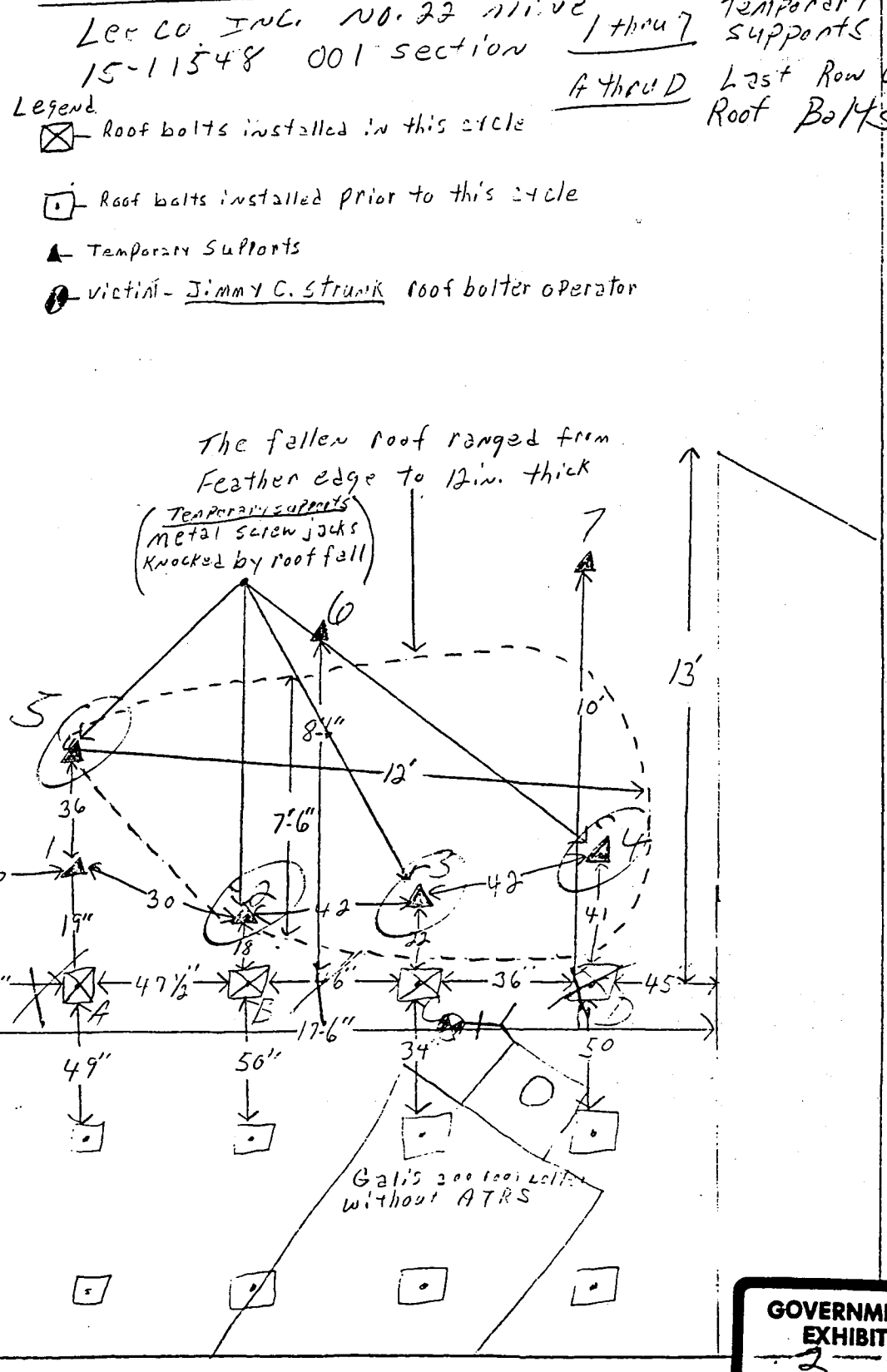
Temporary Supports A to be installed before roof bolting commences. Temporary Supports B, C, D and E installed as roof bolting progresses. Temporary supports are on 5' centers. The remote controls of the continuous miner shall not advance in by the second row of roof bolts from the face. No person shall advance in by the miner controls while miner is mining coal. Roof bolts on 4' centers maximum.

APPENDIX II

The area in the no.1 entry where the Fatal accident occurred.

not to scale - approximate measurements

Lee Co Inc. No. 22 mine 15-11548 001 section 1 thru 7 Temporary supports A thru D Last Row of Roof Bolts



GOVERNMENT EXHIBIT 2

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

NOV 28 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. KENT 89-137-M
	:	A. C. No. 15-15676-05513
v.	:	
	:	Staton Mine
MOUNTAIN PARKWAY STONE, Incorporated Respondent	:	

DECISION

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor, U. S. Department of Labor, Nashville, Tennessee, for the Secretary;
Jeffrey T. Staton, Mountain Parkway Stone, Incorporated, Stanton, Kentucky, for the Respondent.

Before: Judge Weisberger

Statement of the Case

In this case the Secretary (Petitioner) seeks, by way of a Proposal for Assessment of Civil Penalty filed on May 15, 1989, civil penalties for alleged violations by the Operator (Respondent) of various mandatory safety standards found in Volume 30 of Code of Federal Regulations, and generally referred to in the Proposal. Respondent filed its Answer on June 9, 1989. Subsequent to a telephone conference call with both Parties, initiated by the undersigned on August 22, 1989, the Parties agreed that this matter could be set for Hearing on August 31, 1989. The case was heard in Richmond, Kentucky, on August 31, 1989. At the commencement of the Hearing, after the Parties were provided with time to discuss the alleged violations in issue, the Parties advised that Citation Nos. 3253524 and 3253525 were settled. Subsequently, during the course of the Hearing, the Parties indicated that a settlement had been reached in Citation Nos. 3253322 and 3253523.

At the Hearing Gary Manwarring and Vernon Denton testified for Petitioner. Bobby Brewer and Charles Williams testified for Respondent.

Proposed Findings of Fact and Memorandum of Law were filed on October 27, 1989, by Petitioner, and on October 1, 1989, by Respondent. A Joint Motion for Approval of Settlement was filed on November 6, 1989.

Stipulations

The Parties have stipulated to the following:

1. Mountain Parkway Stone, Inc. is a Kentucky corporation engaged in the extraction and preparation of crushed and broken limestone for resale in interstate commerce.

2. Mountain Parkway Stone, Inc. has operated an underground mine in Powell, Kentucky since July 11, 1986.

3. Mountain Parkway Stone, Inc. is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its Administrative Law Judges.

4. Mountain Parkway Stone, Inc. produced 59,552.44 tons of limestone in 1987, 54,906.49 tons in 1988, and 14,227.43 tons from January through August 1989.

Findings of Fact and Discussion

I. Citation No. 3253320

Respondent operates a limestone mine known as the Staton Mine. On March 1, 1989, Gary Manwarring, an MSHA Inspector, inspected the subject underground mine. At that time a front-end loader was present at the face, loading rock onto a haul truck. There was only one escapeway, at the portal, and there were no refuges. Respondent's operation was not involved in exploration at that time.

Manwarring issued a section 104(a) Citation alleging a violation of 30 C.F.R. § 57.11050(a), which, in essence, provides that every mine shall have at least two separate escapeways to the surface, but that a second escapeway is not required during exploration ". . . or development of an ore body." (Emphasis added). Thus, the prime issue for consideration is whether or not Respondent was involved in "development" when the citation was issued.

Manwarring offered his opinion that Respondent was in production, not development, as it was removing limestone, its product. Vernon Denton, a supervising inspector employed by MSHA, indicated essentially that in a limestone mine there is not any "development" inasmuch as soon as the overburden is stripped away, access is obtained directly to limestone, and the mine is then in production. Neither of Respondent's witnesses, its employees Bobby Brewer and Charles Williams, offered any definition of the term "development."

The main drift of the mine, from the entrance to the point where the face existed on March 1, 1989, is somewhat circuitous (Joint Exhibit 1), but is the only feasible way from the entrance to the point where the second portal or escapeway was eventually broken through. As such, it appears to be Respondent's position that the approximately 945 feet of the main drift, on March 1, 1989, was "development," as the drift was proceeding by the only path possible to the point where the second portal would be broken out.1/ Respondent apparently also relies on the testimony of Brewer and Williams to the effect that on March 1, 1989, Denton indicated that he had told Jeffery Staton that, in essence, he would be allowed to go 1000 feet, without the necessity of a second escapeway, in order to reach the point of a breakthrough to a second escapeway.2/

Respondent did not rebut the testimony of Petitioner's witnesses as to the meaning of the term "development." Nor did Respondent affirmatively present any evidence to establish a definition of that term different from that espoused by Petitioner's witnesses. Further, I note that the Dictionary of Mining, Mineral, and Related Terms, defines "development" as follows: "a. To open up a coal seam or ore body as by sinking shafts and driving drifts, as well as installing the requisite equipment. b. Work of driving openings to and in a proved ore body to prepare it for mining and transporting the ore . . . ."

1/ Manwarring indicated on cross-examination, that the main drift was the only way to go from the entrance portal to the eventual breakthrough.

2/ I do not find any merit in Respondent's position. In determining whether Respondent violated section 57.11050(a), supra, Respondent's mining operation must be analyzed. In this analysis it is not relevant to consider whether Respondent was proceeding in accord with statements made to it by Denton. This issue is discussed, infra, wherein Respondent's negligence is discussed.

On March 1, 1989, Manwarring observed Respondent loading limestone at the face, and the production reports, for 1987 through August 1989, indicated the various amounts of production tonnage for that period. Hence, Respondent was beyond the stage of opening up the ore body or preparing it for mining, as it was already engaged in mining. Respondent has not adduced any evidence which would tend to establish that its sole purpose in establishing the drift from the portal to the face was for development of the second escapeway, rather than for the production of limestone. Hence, I conclude that on March 1, 1989, there was no "development" of an ore body as the mine was engaged in production. Inasmuch as the subject mine had only one escapeway on March 1, 1989, I conclude that it has been established that Respondent herein violated section 57.11050.

The citation in question alleges that the violation herein is significant and substantial. Neither Manwarring nor Denton offered their opinion on this issue. According to Manwarring, in the event of the escapeway being blocked at the portal, the miners would be trapped. This could occur if there would be a fire, roof fall, gas, or water between the area where the miners would be working and the escapeway portal. He indicated that there were five trucks underground, either gas or diesel, and there was a possibility of the trucks igniting due the presence of flammable material. Denton indicated that if a truck would catch fire it would get so hot that it would be impossible to traverse the area, and that toxic gases would be emitted from burning tires and upholstery. He also opined that in the event of a fire there would be oxygen depletion.

He described the trucks as old and in need of some maintenance work, and indicated that the electrical wiring was deteriorating due to the fact that it contained older materials. He indicated that he saw wires with broken insulation. However, neither Denton nor High indicated specifically what wires did not have proper insulation, the length of the improper installation, what trucks these wires were located on, and their specific location. Denton indicated that there was accumulation of fuel and grease present, but he did not describe its specific location or quantity. It is clear that the risk of injury to miners at the mine as the consequence of a fire certainly is contributed to by the lack of a second escapeway. However, although the evidence indicates that a fire could have occurred, there is insufficient evidence to conclude that there was a reasonable likelihood of such occurring. It is clear that a blockage of the escapeway portal could have occurred, but there is insufficient evidence to conclude that this event was reasonably likely to occur. Accordingly, it must be concluded that Petitioner has not established that the violation herein was significant and substantial. (See, Mathies Coal Co., 6 FMSHRC at 3-4 (1984)).

According to Denton, there was a "sort of an agreement" (Tr. 73) that Respondent would be allowed to have the drift go from the entrance for about 100 feet, then go to the right between 400 to 500 feet, and then go to the right again for about 100 feet until it broke out to the surface to create a second portal. He indicated that a second escapeway parallel to the main drift was not ordered, as there was not enough room along the side of the hill, where the main portal was located, to create another portal entrance. According to Denton, he indicated to Jeffery Staton that the drift to the surface was to be a main priority. He indicated that in 1987, he visited the mine and advised Staton that, essentially, he was concerned with the number of headings off the main drift, and asked Staton to consider mining from the surface down to the drift in order to create an escapeway. He indicated that Staton told him that he started at another point on the hill to open up a portal to go down to the drift. According to Denton, in February or March 1988, he returned to the mine and Staton advised him that he had not had enough time to complete the drift. Denton indicated that he told Staton to stop driving the other headings, and instead go out to the surface. He said that Staton had told him that he felt he was entitled to a full 1000 feet of drift.

Manwarring indicated that when he inspected the mine on November 2, 1988, there was a discussion with Staton with regard to the requirement of a second escapeway, and Staton indicated that he was in the process of driving a heading to the outside to establish an escapeway. Manwarring indicated that he returned six more times, and on each visit he discussed the escapeway, and Staton indicated that he was working towards it, and would be breaking out in a short period of time. Brewer and Williams both indicated that in a discussion on March 1, 1989, in essence, Staton asked of Denton whether he had previously allowed Staton 1000 feet of drift, and Denton answered in the affirmative.

Respondent did not rebut Manwarring's testimony with regard to the numerous contacts, prior to March 1, 1989, that he had with Staton with regard to the escapeway. Respondent did not proffer the testimony of any person in management responsible for decisionmaking with regard to any circumstances which would excuse Respondent from having failed to have a second escapeway or to make one. Accordingly, it is concluded that Respondent herein acted with a high degree of negligence in not having a second escapeway.

I find that the lack of a second escapeway, with three miners working underground, is a moderately serious violation. Further, Respondent herein acted with a high degree of negligence. Taking these factors into account, as well as the remaining factors in section 110(i) of the Act, as stipulated to by the Parties, I conclude that penalty herein of $200 is proper.

II. Citation Nos. 3253522, 3253523, 3253524, and 3253525

On November 6, 1989, a Joint Motion for Approval of Settlement was filed concerning the above Citations. The Joint Motion proposes a reduction in penalties from $199 to $145. 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

It is ORDERED that Citation No. 3253320 be amended to reflect that the violation therein is not significant and substantial. It is further ORDERED that Respondent shall pay, within 30 days of this Decision, $345 as a civil penalty for the violations found herein.

Avram Weisberger
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 29, 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. YORK 89-45-M A. C. No. 30-00006-05527
v.	:	Blue Circle Atlantic
BLUE CIRCLE ATLANTIC, INC., Respondent	:	

ORDER ACCEPTING SETTLEMENT MOTION
DECISION APPROVING SETTLEMENT
ORDER TO PAY

Before: Judge Merlin

This case is before me pursuant to the Commission's order dated November 20, 1989, to determine whether good cause exists to now accept the late filed settlement motion.

In his motion to reopen filed November 14, 1989, operator's counsel advises that he and the Solicitor had been engaged in extensive settlement negotiations regarding this case. He also states that from November 3 to November 11 he had been engaged in litigation matters outside his office and away from Chicago and therefore did not become aware of the default order until November 11, 1989. In a telephone conference call on November 13, 1989, operator's counsel and the Solicitor previously advised me of the foregoing circumstances and I told them that under the present state of Commission regulations I was without jurisdiction to determine whether relief from the default was warranted until the Commission treated the request for relief as an appeal and remanded the matter back to me. This has now occurred. In view of the ongoing settlement negotiations and the absence of operator's counsel from his office and city on other professional matters, I conclude that relief is warranted and that the filing of the settlement motion should be accepted.

The subject citation was issued for a violation of 30 C.F.R. § 56.9003 because a haulage truck was not provided with adequate brakes. The penalty was originally assessed at $900 and the proposed settlement is for $600. The settlement motion represents that negligence is less than originally thought because the truck in issue had been inspected shortly before citation was

issued. In light of this circumstance and because the proposed settlement remains a substantial amount, I conclude it should be approved.

In light of the foregoing, it is ORDERED that late filing of the settlement be APPROVED.

It is further ORDERED that the motion for settlement be APPROVED.

It is further ORDERED that the operator PAY $600 within 30 days from the date of this decision.

Paul Merlin
Chief Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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NOV 30 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. CENT 88-118-M A.C. No. 03-01551-05502
v.	:	
	:	Malvern Minerals South Mine
MALVERN MINERALS COMPANY, Respondent	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINSITRATION, (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. CENT 88-129-M A.C. No. 03-01551-05501 D9M
v.	:	Malvern Minerals South Mine
S E C O INCORPORATED, Respondent	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. CENT 88-130-M A.C. No. 03-01551-05501 W6C
v.	:	Malvern Minerals South Mine
GARRETT EXCAVATING, INC., Respondent	:	

DECISION

Appearances: Robert A. Fitz, Esq., Office of the Solicitor, U. S. Department of Labor, Dallas, Texas for Petitioner;
R. Henry Moore, Esq., Buchanan Ingersoll, Professional Corporation, Pittsburgh, Pennsylvania for Respondent Malvern Minerals Company;
Mark Moll, Esq., Jones, Gilbreath, Jackson & Moll, Fort Smith, Arkansas for Respondent SECO, Inc.,
J.E. Sanders, Esq., Wooton, Glover, Sanders & Slagle, Hot Springs, Arkansas for Respondent Garrett Excavating, Inc.

Before: Judge Melick

These consolidated civil penalty proceedings are before me upon separate petitions filed by the Secretary of Labor against the named Respondents pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act." The petitions allege violations developed from an investigation by the Secretary of a fatal highwall failure at the Malvern Minerals Company (Malvern) South Mine on October 2, 1987. The general issue before me is whether there have been any violations of the cited regulatory standards and, if so, the appropriate civil penalties to be assessed in accordance with Section 110(i) of the Act.

Background

On October 2, 1987, at about 11:10 a.m., Phil Keeton, a backhoe operator employed by Garrett Excavating Inc. (Garrett), and Bill Williams, a self employed driller, were killed when a highwall collapsed. The evidence shows that Keeton had been employed by Garrett for about 3 1/2 years as a backhoe operator and for the latter 1 1/2 years as a crew leader. He had a total of 40 years mining experience with about one year at the South Mine. Williams had 27 years mining experience with about 3 weeks experience at the South Mine.

The Malvern South Mine is a novaculite quarry located near Hot Springs, Arkansas. Bill Williams was contracted by Malvern to perform the drilling, SECO, Inc., (SECO) was contracted to load and detonate explosives in the drilled holes and Garrett was contracted to load and haul the broken ore and rock. Malvern directed the overall mining sequence.

The mine operated intermittantly, producing for about 4 months with a 2 month period during which the mill continued to process stockpiled ore. When the mine was producing it employed one Malvern employee and 6 contract employees on one shift of 10 hours a day 6 days a week. Mining was performed by drilling and blasting a highwall creating a single bench. The bench would then be removed as mining progressed.

The South Mine contains three stratigraphic units sloping approximately 43° to the northwest. These units have been overturned and are, therefore, stratigraphically upside down. The topmost unit, the Lower Novaculite, is a bed of hard, brittle novaculite. Underlying this is the Middle Novaculite unit--a shale unit containing about 3% graphite. The lowest unit, approximately 30 feet thick, is the Upper Novaculite. According to the record this unit consists of a soft tripolitic novaculite.

Mining had initially progressed from the southwest end of the pit to the northeast to a depth of about 450 feet when the direction was reversed. In October 1987 mining operations were again being conducted in the southwest end of the pit. The pit had been deepened to 80 feet at the time of the accident. On the first pass a bench had been lowered about 50 feet by October 2nd along a distance of about 150 feet. The highwall in the immediate accident area ranged from 80 to 90 feet high and was sloped back at an angle of about 63°.

Docket No. CENT 88-118-M

In this case the Secretary maintains that she has charged Malvern under Citation No. 2659481 with three violations of the regulatory standards. In proposing a civil penalty the Secretary separated the citation into three parts. Under Part A the Secretary purports to charge a violation of the standard at 30 C.F.R. § 56.3200 and seeks a penalty of $10,000. Under Part B the Secretary purports to charge a violation of 30 C.F.R. § 56.3130 and seeks a penalty of $4,000. Finally, under Part C the Secretary purports to charge a violation of 30 C.F.R. § 56.3401 and seeks a penalty of $1,000.[1]/

On the face of the subject citation the Secretary charges a violation of the standard at 30 C.F.R. § 56.3200 and alleges as follows:

> Two employees of contractors to Malvern Minerals were fatally injured when an unplanned slope failure occurred. Several thousand tons of large boulders and loose materials from the approximately 70 foot pit highwall fell completely burying and crushing the operator of a track drill and the operator of a track mounted backhoe. Management of Malvern Minerals and associated contractors and equipment operating personnel of the contractors had observed and were concerned about the highwall condition including a cap rock overhang (the large boulders mentioned above) which protruded approximately 8 feet out from the highwall and was approximately 16 feet thick by 100 feet long.

---

[1]/Malvern presents persuasive arguments in its post hearing brief that the citation herein failed to comport with the Section 104(a) particularity requirements and that the Secretary has improperly proposed penalties in excess of $10,000 for what is arguably only one violation. In light of the disposition of the citation(s) herein there is no need to address these issues.

A tension crack varying from 3-7 inches wide exists back from the brow of the highwall running from the area of failure, angling NNE, back from the highwall for a distance of approximately 150-200 feet to a point north-east of the area of failure 35 feet back from the highwall.

The cited standard provides as follows:

Ground conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitted in the affected area. Until corrective work is completed, the area shall be posted with a warning against entry and, when left unattended, a barrier shall be installed to impede unauthorized entry.

The cited standard clearly presupposes that the ground conditions that create a hazard have manifested themselves so that they can be discovered by appropriate examination of the ground (as required by the standard at 30 C.F.R. § 56.3401) and so that they can be corrected. The purpose of the regulation is to require elimination of hazardous conditions. It is not to make the operator a guarantor protecting against unforeseeable or hidden hazards. If indeed an appropriate examination, performed as required under section 56.3401 would not have revealed a hazardous ground condition it may reasonably inferred that there could be no violation of section 56.3200.

Inasmuch as I have found, infra, that examination of ground conditions above the highwall was not required under 30 C.F.R. § 56.3401 I cannot find that there was any violation of 30 C.F.R. § 56.3200. In sum, since I have found that Malvern performed the required examination of ground conditions by "persons experienced in examining and testing for loose ground" and those persons did not upon such examination discover any ground conditions that created a hazard "before other work or travel [was] permitted in the affected area", there was in any event no violation of the standard at 30 C.F.R. § 56.3200.

The Secretary, in her post hearing brief, maintains in particular that a crack in the ground above the highwall existed for several weeks before October 2nd and that it should have been discovered and corrected. This argument is predicated however upon the inference that because the crack existed after the highwall collapsed it also existed before the collapse. Any such inference must however be inherently reasonable and there must be a rational connection between the evidentiary facts and the ultimate fact inferred. Here the required nexus is absent. See Mid-Continent Resources, 6

FMSHRC 1132 (1984), Garden Creek Pocahontas, 11 FMSHRC ____ November 21, 1989.

In this regard I note that the crack in the ground above the highwall was not even discovered until October 5, three days after the highwall failure and a period of time during which additional ground movement could have been triggered by the initial failure. Moreover Irvin Garrett was in the immediate vicinity of the failure area the day before the failure and testified credibly that he saw no sign of a crack. Even the Secretary's witnesses conceded that the crack could have developed at the time of the highwall failure.

The persuasive expert testimony of Mssrs. Steuart and Blancke also convinces me that the Secretary's proferred inference that the crack existed before the highwall collapse is based on unreliable speculation. The proferred inference is accordingly rejected. For this additional reason the alleged violation has not been proven and Part A of Citation No. 2659481 must be vacated.

Part B of Citation No. 2659481 purports to charge a violation of the standard at 30 C.F.R. § 56.3130 and alleges as follows:

> The slope failure was induced because the bench was removed from the area of failure resulting in the highwall being too steep for the existing rock structures. The company failed to use safe mining practices including the proper use of benching which had been discontinued for economic concerns.

The cited standard provides as follows:

> Mining methods shall be used that will maintain wall, bank, and slope stability in places where persons work or travel in performing their assigned tasks. When benching is necessary, the width and height shall be based on the type of equipment used for cleaning of benches or scaling of walls, banks and slopes.

The Secretary charges in this part of the citation that Malvern failed to construct appropriate benches on the highwall. The cited standard requires benching however only when "necessary". Since the determination of when benching is "necessary" within the meaning of the cited standard is subjective, the standard must appropriately be measured, in order to pass constitutional muster, against the standard of whether a reasonably prudent person familiar with the factual circumstances surrounding the allegely hazardous condition, including any facts particular to the mining industry, would

recognize a hazard warranting corrective action within the purview of the regulation. Alabama By-Products Corporation, 4 FMSHRC 2128 (1982); Canon Coal Co., 9 FMSHRC 667 (1987); Ozark-Mahoning Co., 8 FMSHRC 190(1986)

In this case it is undisputed that before the rock fall here at issue the superintendent of the South Mine, Charles Steuart, sought approval from the District Office of the Federal Mine Safety and Health Administration (MSHA) in Little Rock, Arkansas to discontinue the practice of benching. Steuart submitted his proposal to Billy Richie, the MSHA District Manager having inspection authority over the South Mine, in 1979. According to the unchallenged testimony of Steuart, Richie verbally approved this method of mining for the South Mine. The evidence further shows that in spite of both State and Federal inspections since that date (until the citation at bar) Malvern had never been cited for failure to utilize benches at the South Mine although the practice of mining without benches was continuously followed.

While in hindsight several of the Secretary's witnesses concluded at trial that the practice of benching should have been followed at the South Mine the evidence is clear that preceding the accident, all persons familiar with the conditions at the mine, including MSHA officials, had approved of the practice of mining without benching. I cannot therefore find that the standard as applied in this case did indeed require "benching" at the South Mine prior to the date of the accident. Accordingly there was no violation as alleged. Part B of Citation No. 2659481 must therefore also be vacated.

Part C of the citation alleges a violation of the standard at 30 C.F.R. § 56.3401 and charges as follows:

> A contributing factor to the injuries resulting from the ground failure was the fact that supervisors or other designated persons had not examined the top of the pit highwall for hazardous ground conditions at least weekly. The absence of inspection and examination precluded the discovery of the tension crack existing in the ground behind the highwall. The pit had ceased operation in June 1987 and reopened September 3, 1987. The last known examination of the area behind the highwall occurred in June 1987 when survey flags were placed above the brow. No cracks were observed during this examination. Highwall failure occurred along the line of survey stakes placed during the June examination.

The cited standard, 30 C.F.R. § 56.3401, provides as follows:

> Persons experienced in examining and testing for loose ground shall be designated by the mine operator. Appropriate supervisors or other designated persons shall examine and, where applicable, test ground conditions in areas where work is to be performed prior to work commencing, after blasting, and as ground conditions warrant during the workshift. Highwalls and banks adjoining travelways shall be examined weekly or more often if changing ground conditions warrant.

At hearing the Secretary narrowed the charges to a failure by "appropriate supervisors or other designated persons" to have tested ground conditions in "areas where work is to be performed prior to work commencing". In particular the Secretary now maintains that the area above the pit highwall should have been included as part of the required examination.

Because of the imprecision and subjectivity of the regulatory language requiring examinations in "areas where work is to be performed" this regulation too must appropriately be measured against the standard of whether a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts particular to the mining industry, would recognize a hazard warranting corrective action within the purview of the applicable regulation. Alabama By-Products Corporation, supra.

The Secretary offered no evidence in this case to show that in the mining industry an examination of the work area would ordinarily include the ground above the highwall. Indeed the MSHA inspector responsible for inspecting the South Mine before this accident acknowledged that he did not, as part of his inspections of the mine, examine the area above the highwall nor did he require such inspections by the mine operator. The practice was to examine the highwall by standing back from the base and visually observing the exposed face.

Moreover the expert witnesses produced by Malvern, Dudley Blancke and Charles Steuart, testified that it was not the industry practice to examine the ground above the highwall. Within this framework of evidence I cannot conclude that the area above the highwall was an area subject to the testing of ground conditions under the cited regulatory provisions. Accordingly that part of Citation No. 2659481 alleging a violation of 30 C.F.R. § 3401, must also be vacated.

ORDER

Citation No. 2659481 (A) (B) and (C) is hereby vacated and Civil Penalty Proceeding Docket No. CENT 88-118-M is dismissed.

Docket No. CENT 88-129-M

In this case the Secretary has charged SECO Incorporated (SECO) in Citation No. 3063001 with one violation of the standard at 30 C.F.R. § 56.3401. The citation alleges as follows:

> On October 2, 1987 a massive highwall failure fatally injured one employee of each of two contractors other than SECO. The lone SECO employee assigned to this mine was not knowledgeable or experienced in examining and testing for loose ground conditions. This resulted in the absence of any examination of ground conditions on top of the pit highwall. This employee narrowly escape being buried by the highwall failure.

At hearing the Secretary charged that the only employee of SECO assigned to the mine was neither properly "designated" by the mine operator nor "knowledgeable or experienced in examining and testing for loose ground conditions" within the meaning of the cited standard. On the face of the citation however the Secretary did not allege that the SECO employee was not properly designated but only that he was "not knowledgeable or experienced in examining and testing for loose ground conditions." She is accordingly limited to only those allegations charged in the citation.

In addition the Secretary cites no evidence in her post hearing brief to support this charge and, to the contrary, the overwhelming uncontradicted evidence is that the lone SECO employee was indeed "knowledgeable" and "experienced" in examining and testing for loose ground. This employee, Glen "Buzz" Brown, had 3 years experience in the mining industry and was a certified blaster. He testified that on the date of the accident he followed his practice of visually examining the face of the highwall before commencing work and found no dangerous conditions.

Moreover since I have found that examination of ground conditions in the area above the highwall was not required by established MSHA and industry practices before this accident I cannot infer from the failure of Brown to have examined the area above the highwall that he was not qualified to perform the examinations required. Under the circumstances the citation must be vacated.

ORDER

Citation No. 3063001 is vacated and Civil Penalty Proceeding Docket No. CENT 88-129-M is dismissed.

Docket No. CENT 88-130-M

The Secretary charges Garrett Excavating Inc. (Garrett) under Citation No. 2659482 with one violation of the regulatory standard at 30 C.F.R. § 56.3401 and charges as follows:

> The lead person of the crew of the contractor was fatality injured when a massive ground/slope failure occurred. This person was not properly experienced in testing and examining loose ground conditions, resulting in the absence of an examination of the top of the pit highwall. The lead person was designated to insure the safe working conditions surrounding the crew.

The essence of the Secretary's allegations here is that because the designated person failed to examine the ground above the pit highwall that person was therefore not "properly experienced in testing and examining loose ground conditions". However for the reasons already cited in regard to the disposition of similar charges against Malvern Minerals and SECO in this decision I also vacate this citation. Lack of experience in testing cannot be inferred from the failure to have examined above the pit highwall since the established industry and MSHA practice did not include such examinations.

ORDER

Citation No. 2659482 is vacated and Civil Penalty Proceeding Docket No. CENT 88-130-M is dismissed.

Gary Melick
Administrative Law Judge
(703) 756-6261

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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NOV 30 1989

KATHLEEN I. TARMANN Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. LAKE 89-56-DM
INTERNATIONAL SALT COMPANY, Respondent	:	MD 89-10
	:	Cleveland Mine

ORDER OF DISMISSAL

On November 6, 1989, Complainant's Attorney advised my Secretary that the matters in dispute in this case had been settled by the Parties.

On November 15, 1989, a Show Cause Order was issued which provided as follows:

> Accordingly, Compainant shall, within 10 days of this Order, show cause why this case shall not be dismissed. Failure of Complainant to respond to this Order shall result in this case being dismissed pursuant to 30 C.F.R. § 2700.62(a).

Complainant has not filed any response to the Show Cause Order.

Accordingly, pursuant to 30 C.F.R. § 2700.62(a), it is ORDERED that this case be DISMISSED

Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 30, 1989

FREDRICK J. BOUCHER, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. PENN 89-248-D
	:	PITT CD 89-18
v.	:	
	:	Svonavec Strip Mine
SVONAVEC COAL INC., Respondent	:	

ORDER OF DISMISSAL

Before: Judge Merlin

On July 28, 1989, you filed with this Commission a complaint of discrimination under section 105(c) of the Federal Mine Safety and Health Act of 1977. On October 4, 1989, a show cause order was issued directing you to provide information regarding your complaint or show good reason for your failure to do so. You were specifically told that if you did not comply with the order your complaint would be dismissed. The show cause was mailed to you certified mail, return receipt requested and the file contains the receipt card indicating you received the show cause order. You have however, not responded and complied with the show cause order.

Accordingly, this case is DISMISSED.

Paul Merlin
Chief Administrative Law Judge

Distribution:

Mr. Frederick Boucher, R.D. #3, Rockwood, PA 15557 (Certified Mail)

Svonavec Coal Inc., 140 West Union Street, Somerset, PA 15501 (Certified Mail)

/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
COLONNADE CENTER
ROOM 280, 1244 SPEER BOULEVARD
DENVER, CO 80204

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 89-86-M A.C. No. 05-03998-05513 NYO
v.	:	Summitville Mine
INDUSTRIAL CONSTRUCTORS CORPORATION,	:	

DECISION APPROVING SETTLEMENT

Before: Judge Morris

This is a civil penalty proceeding initiated by the petitioner against respondent in accordance with the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. The civil penalties sought here are for the violation of mandatory standards promulgated pursuant to the Act.

Prior to a hearing the petitioner filed a motion seeking to settle the case. Correspondence filed with the settlement indicated respondent has been appraised of the proposal. The citations, the original assessments and the amended civil penalties, are as follows:

Citation No.	Assessment	Disposition
2876658	$98.00	$20.00
2876656	20.00	20.00

In support of their motion to approve the settlement the parties have submitted information relating to the statutory criteria for assessing penalties as contained in 30 U.S.C. § 820(i).

I have reviewed the proposed settlement and I find it is reasonable and in the public interest. It should be approved.

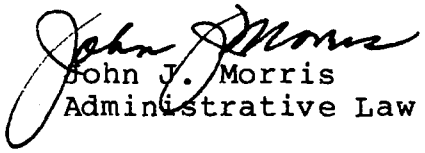
Accordingly, I enter the following:

ORDER

1. The settlement agreement is approved.

2. The foregoing citations and civil penalties, as amended, are affirmed.

3. Respondent has paid the $20 assessment for Citation No. 2876656. Accordingly, respondent is ordered to pay the petitioner the sum of $20 for the violation of Citation 2876658 within 40 days of the date of this decision.



John J. Morris
Administrative Law Judge

Distribution:

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Mr. Dave Ohler, Washington Corporations, 101 International Way, P.O. Box 8182, Missoula, MT 59807 (Certified Mail)

/ot

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
COLONNADE CENTER
ROOM 280, 1244 SPEER BOULEVARD
DENVER, CO 80204

November 3, 1989

RICHARD R. MAYNES, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. CENT 89-132-DM
v.	:	
	:	MD 89-35
PHELPS DODGE CORPORATION, Respondent	:	

ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY DECISION

Complainant, by written Response filed herein on November 1, 1989, has responded to Respondent's Motion for Summary Decision which was filed on September 11, 1989. Complainant's response is found to have merit and it and the exhibits attached thereto are incorporated herein as the initial portion of my decision on this issue. It is further noted that Respondent neither alleged or established that Complainant's initial delay in filing with MSHA prejudicially deprived it of a meaningful opportunity to defend itself in this matter. There is no allegation of specific prejudice or even of general prejudice. See Schulte v. Lizza Industries, Inc., 6 FMSHRC 8 (January, 1984). The delay of Complainant Maynes in filing with the Secretary - approximately 27 days - is not of a duration where one might infer unavailability of or loss of memory of critical witnesses.

It is also specifically held, absent further Commission precedent, that the time limitations of Section 105(c) of the Act insofar as such pertain to individual complainants are not jurisdictional. Secretary v. 4-A Coal Company, Inc., 8 FMSHRC 905 (June, 1986); Buelke v. Thunder Basin Coal Company, 11 FMSHRC 240 (February, 1989). To hold individual complainants to a higher standard of filing compliance than the Secretary of Labor would not seem logical or justified in view of the disparity in educational background, legal and business experience, and experience in and familiarity with mine safety processes and requirements. Accordingly, Respondent's motion for summary judgment is denied.

The parties, and their counsel, are directed to forthwith comply with the requirements of my Prehearing Order of September 27, 1989.

Michael A. Lasher, Jr.
Administrative Law Judge

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

November 16, 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEVA 89-103
	:	A.C. No. 46-07310-03501 AUJ
v.	:	
	:	Logan County No. 1 Mine
2 K LEASING, Respondent	:	

ORDER DENYING MOTION TO APPROVE SETTLEMENT

On November 13, 1989, the Secretary filed a motion to approve a settlement in this case. The docket involves a single alleged violation originally assessed at $2000. The motion proposes that it be reduced to $1000.

The citation involved herein alleges a violation of 30 C.F.R. § 77.1605(b) because a coal haulage truck was not provided with adequate brakes. The motion states that the brake defect was a partial cause of a coal haulage accident which resulted in the truck driver being fatally injured. The motion states that the reduction in the penalty is justified because Respondent's business is very small and "the penalty threatened to reduce its ability to continue in business." No factual justification for this conclusion was provided. The size of Respondent's business and its favorable history of prior violations were presumably considered in assessing the penalty originally. The effect of a penalty on its ability to continue in business, if relied upon to reduce the penalty, must be supported by factual data.

Accordingly, the motion to approve the settlement agreement is DENIED.

IT IS FURTHER ORDERED that unless additional factual support for a renewed motion is submitted, the parties shall respond by December 8, 1989, to paragraph 2 of the Prehearing Order of July 25, 1989, and advise me of any dates in January or February 1990 which would pose scheduling difficulties.

James A. Broderick
James A. Broderick
Administrative Law Judge

Distribution:

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