

NOVEMBER 1990

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NOVEMBER 1990

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

Wyoming Fuel Company v. Secretary of Labor, MSHA, Docket No. WEST 90-112-R,
etc. (Judge Morris, October 22, 1990)

Secretary of Labor, MSHA v. Shamrock Coal Company, Inc., Docket No.
KENT 90-60. (Judge Weisberger, October 17, 1990)

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

Secretary of Labor, MSHA v. Puerto Rican Cement Co., Inc., Docket No.
SE 90-26-M. (Judge Melick, October 11, 1990)

COMMISSION DECISIONS

manufacturing facility located in Trident, Montana. In its cement manufacturing process, Ideal uses a tubular kiln that is approximately 300 feet long, 12 feet wide, and lined with 4 by 8 inch brick. Ideal produces "clinker" in the kiln by heating raw materials to approximately 3000 degrees.² When the brick lining of the kiln wears out, the kiln is shut down in order to remove the worn brick.

For a time, Ideal removed the brick by hand and then began using a modified 1835 Case Uni-loader. A uni-loader (sometimes referred to in the transcript as a "bobcat") is a piece of equipment that is typically used to scoop up, transport, and dump loose materials. Ideal modified the uni-loader by removing the bucket attachment and substituting in its place a jackhammer attachment, removing the side screens of the operator's compartment, replacing the uni-loader's standard wheels with high-pressure, narrow tires, lowering the Rollover Protective Structure ("ROPS"), and placing a screen and a plywood shield in the front of the operator's compartment. Ideal left it within the operator's discretion to remove or install the uni-loader's side screens, as the operator deemed appropriate. Tr. 88, 103.

The modified uni-loader was operated by raising the jackhammer, which was attached to the sidearms, and using it to chip off the worn brick lining of the kiln ceiling. The jackhammer attachment was then replaced by a bucket attachment, which was used to scoop up the broken brick. Because the kiln was too narrow for an employee to turn the uni-loader around, the uni-loader was then backed out of the kiln and the kiln was rotated so that the section of the kiln that had been the ceiling became the floor. Finally, the uni-loader was driven into the kiln in order to repeat the chipping and cleaning process.

On October 20, 1987, at approximately 2:30 a.m., Tom Bertagnolli, an Ideal employee, was involved in a fatal accident while operating the uni-loader, without side screens, inside the kiln. Although there were no eyewitnesses to the accident, two Ideal employees, Steve Livingood and Stanley Veltkamp, prepared written statements, shortly after the accident, setting forth their recollection of events that had occurred. In his statement, Mr. Veltkamp stated:

When I first saw Tom he was leaning out the right side of the bobcat. He was over ... the arms and the cylinder. He then moved back into the seat,

² Clinker is the product that results when clay and limestone are fused together as the first stage in the manufacture of cement. Webster's Third New International Dictionary (Unabridged) 361 (1986).

shut off the air to the jackhammer. Then he crawled out of the left side of the bobcat. The machine was idling. The arms were down. Tom started walking down the kiln. He staggered and fell to his right. When I saw him fall I ran to him and asked him if something was wrong. He said yes he had been crushed....

Exh. P-21 (emphasis added).³ Bertagnolli was subsequently transferred to a stretcher and transported to the hospital, where he was later pronounced dead.

On October 20, 1987, Arlene Sherman, then acting as Ideal's Safety and Personnel Supervisor, completed an MSHA accident report form and a workers' compensation form regarding the accident. She had spoken with employees who had been present at the time of the accident and had viewed the accident site. At the time that she completed the forms, however, her investigation had not yet been completed. On each form, Ms. Sherman stated that Bertagnolli was removing brick from the kiln when he leaned out of the right side of the uni-loader cab with the hydraulic arms raised. She stated that the right uni-loader arm had dropped and crushed him against the frame. Exhs. P-23, P-28.

MSHA Inspector Darrel Woodbeck and a state of Montana inspector, Robert Stinson, investigated the accident. The inspectors concluded that Bertagnolli must have been standing up or leaning over the side arms, that he had been crushed between the lifting arms of the bucket and the ROPS, that the uni-loader must have been running for the arms to raise, and that Bertagnolli must not have been wearing his seat belt. Tr. 357, 375-76.⁴ Stinson and Woodbeck also stated that, if the side

³ Veltkamp's written statement differed from his testimony at trial and from the content of an affidavit that he gave on August 25, 1988, some ten months after the accident. In the written affidavit, Veltkamp stated that he did not see Mr. Bertagnolli lean out of the uni-loader. Exh. R-1. At trial, Veltkamp testified that he could not remember if Bertagnolli leaned out of the uni-loader. Tr. 182-86. The judge credited the content of the written statement that Veltkamp prepared soon after the accident. 11 FMSHRC at 1779, n.4.

⁴ The inspectors' investigation resulted in, among other things, the following findings and opinions: (1) the written specifications for a Case 1835-B Uni-Loader, published in 1984, depicted attachment of the side screens on the uni-loader (Tr. 324-326; Exh. P-25); (2) the formal method of ingress-egress to and from the uni-loader had been blocked by the plywood and screen barrier placed in the front of the uni-loader, although the inspectors did not test the degree of effort required to remove the

screens had been in place, it would not have been possible for Bertagnolli to have placed himself in a position to be so injured. Tr. 257, 357.

On October 22, 1987, Inspector Woodbeck issued Ideal a citation, alleging a violation of section 56.9002:

On October 20, 1987 at approximately 0230 the Case Uni-Loader model 1835, manufactured in 1982 was involved in an accident that resulted in a fatality. The side shields (guards) that prevent the operator from leaning out over the bucket were removed. This allowed the operator to lean out over the top of the bucket lifting arms and get crushed between the top of the (ROPS) and the bucket lifting arms. This was also being used as the primary access to the operator's compartment because the front access had been blocked off by a piece of plywood and a section of wire mesh screen.

The inspector further found that the violation was of a significant and substantial nature, because he believed that the absence of the side screens substantially contributed to the likelihood of an accident and the severity of any such accident. Woodbeck also concluded that Ideal was negligent in allowing the condition to exist. Woodbeck told Bill Springman, the plant manager, to replace the side screens before the uni-loader was put back into operation. On October 22, when Woodbeck served the citation on Ideal, he observed that the side screens had been replaced and he abated the citation.

In his decision, Judge Morris vacated the citation issued to Ideal because, in essence, he found that section 56.9002 did not give Ideal adequate notice that the absence of side screens would constitute an "equipment defect affecting safety." 11 FMSHRC at 1788. Citing Diamond Roofing v. Occupational Safety and Health Review Commission, 528 F.2d 645, 649-50 (5th Cir. 1976), the judge stated:

The law is clear that a safety regulation that imposes civil penalties for its violation must give an employer fair warning of the conduct it prohibits or requires and must further provide a reasonably clear standard of culpability to circumscribe the discretion of the enforcing authority and its agents.

barrier (Tr. 250, 371, 464-65); and (3) when the sidearms of the uni-loader were raised with the jackhammer in place, the backing plate to which the jackhammer was attached prevented the operator from seeing the drilling point of the jackhammer. (Tr. 254-55.)

11 FMSHRC at 1783. The judge concluded that Ideal could not have anticipated in advance that MSHA required side screens on the equipment. He rejected the Secretary's reliance on such evidence as that "relating to the lowered ROPS, the make-shift plywood screen, the probability that Bertagnolli leaned out and was crushed by the arms, the improvised jackhammer, and, in general, the restricted work area" as putting Ideal on notice of such a requirement. 11 FMSHRC at 1786-87. The judge also dismissed as hindsight the inspectors' views that the absence of the side screens caused Bertagnolli's death. 11 FMSHRC at 1787.

Citing Allied Chemical Corp., 6 FMSHRC 1854 (August 1984), the judge also determined that the missing side screens did not fall within the coverage of section 56.9002. Although acknowledging that equipment defects within the scope of the standard are not limited solely to those in components affixed to the equipment and may take the form of missing components, the judge maintained that Allied Chemical, *supra*, stood for the proposition that a defect affecting safety must adversely affect actual functioning or operation of the equipment. 11 FMSHRC at 1785. The judge distinguished the present case from Allied Chemical on the grounds that there was no evidence in this case that the side screens themselves were defective or that "the lack of side screens adversely affected the operation of the uni-loader, rendered it defective, inadequate, or presented functional problems in its operation as a loader." *Id.*

II.

On review, the Secretary contends that the judge erred in vacating the citation because, according to her interpretation of the standard, the absence of the side screens from the uni-loader constituted a defect affecting safety. The Secretary maintains that the judge misconstrued the standard when he held that it is violated only when a "safety component present on the machine [is] in a defective state," or when "a safety component related to the successful operation of the machine in its assigned purpose" is missing. S. Br. at 5. The Secretary contends that the standard is aimed "not only at safety defects which may also affect the operational ability of the equipment in question" but at "any defect which 'affects safety,' whether or not that defect also affects operational ability." *Id.* The Secretary asserts that her interpretation of the standard is consistent with the broad purpose of the standard and is reasonable and, therefore, is entitled to deference. S. Br. at 5-6.

The Secretary further maintains that her interpretation of section 56.9002 and its application to the uni-loader do not deprive Ideal of adequate notice. S. Br. at 7. The Secretary urges application of the test of "what a reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have provided in order to meet the

protection of the standard," and argues that, in this case, it is clear that a reasonable person would have recognized that the removal of the side screens would adversely affect safety. S. Br. at 7. The Secretary relies upon evidence that the screens were provided by the manufacturer as a safety component, that Ideal's personnel understood that the side screens were designed to keep the uni-loader operator's body within the uni-loader, and that Ideal's safety manual provides that guards shall not be removed from equipment except when making repairs. S. Br. at 8.

We first examine the question of whether the absence of the side screens constituted an equipment defect. We agree with the Secretary that the judge erred in construing the standard to support a finding of a violation only when a component related to the operation of the equipment is defective or missing. In Allied Chemical, construing identical regulatory language in a parallel standard, the Commission stated that "in both ordinary and mining industry usage, a 'defect' is a fault, a deficiency, or a condition impairing the usefulness of an object or a part." Allied Chemical, 6 FMSHRC at 1857, citing, Webster's Third New International Dictionary (Unabridged) 591 (1971); Bureau of Mines, U.S. Department of Interior, A Dictionary of Mining, Mineral, and Related Terms 307 (1968). Allied Chemical held, in part, that missing bolts in longwall roof support units were "equipment defects" (6 FMSHRC at 1857), and made clear that, in appropriate contexts, a missing component, as well as a defective one, could constitute an "equipment defect" within the meaning of section 56.9002. Although Allied Chemical focused on a relatively common type of equipment defect -- one affecting the functioning of the equipment -- we have no difficulty in concluding that the term "equipment defect" can also extend to a defective or missing component that does not affect the operation of the equipment.

Section 56.9002 must be construed in light of its underlying purpose -- the protection of miners operating the equipment or exposed to the equipment's use. That purpose was plainly set forth in the Secretary's statement of purpose and scope of the Part 56 standards, which provided: "The purpose of these standards is the protection of life, the promotion of health and safety, and the prevention of accidents." 30 U.S.C. § 56.1 (1987). (Section 56.1 has been carried forward unchanged in the Secretary's present Part 56 regulations.) Any overly narrow or restrictive reading of the scope of section 56.9002 cannot be reconciled with that statement of purpose or with the fundamental protective ends of the Mine Act itself, as set forth in section 2 of the Mine Act. See 30 U.S.C. § 801(a), (d), & (e).

Thus, section 56.9002, which relates to the performance of equipment used in mines, must be interpreted and applied in a manner fostering the basic aim of protecting the health and safety of miners. The integrity of a machine is not defined

solely by its proper functional performance but must also be related to the protection of miners' health and safety. If section 56.9002 were interpreted solely to emphasize the functional performance of equipment, it would, in effect, derogate from the importance of protecting the safety of miners and thereby disregard the fundamental mandate of the Mine Act. Such a construction would run counter to the underlying purposes of the Part 56 standards. In short, the proper focus of section 56.9002 encompasses the safety of miners, not merely the proper performance of equipment.

We find reasonable the Secretary's interpretation that "the gravamen of the provision [is] safety of persons," and that a missing equipment component may be as much a "defect" as a malfunctioning operational component because, in either case, the miners are deprived of the enhanced safety that the component is designed to provide. S. Br. at 5-6. In this regard, we note that the United States Court of Appeals for the District of Columbia has accorded special weight to the Secretary's reasonable interpretations of her own regulations. E.g., Secretary on behalf of Bushnell v. Cannelton Indus., Inc., 867 F.2d 1432, 1435 (D.C. Cir. 1989). We therefore hold that, under section 56.9002, missing as well as defective components may constitute "equipment defects" and thereby satisfy the first element of the two-pronged analysis of whether a condition constitutes an "equipment defect" that "affect[s] safety." In the present case, it is undisputed that the side screens were absent from the uni-loader at the time of the accident and, hence, were missing equipment components. We thus conclude that the absence of the side screens amounted to an equipment defect within the meaning of section 56.9002 and we reverse the judge's conclusion to the contrary.

We next address whether the absence of the side screens affected safety. We note preliminarily that the language "affecting safety" has a wide reach and that "the safety effect of an uncorrected equipment defect need not be major or immediate to come within that reach." Allied Chemical, 6 FMSHRC at 1858. In addition, given the broad wording of this standard intended to be applied to myriad factual contexts, we agree with the Secretary that it is appropriate to evaluate the evidence in light of what a "reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have provided in order to meet the protection intended by the standard." See, e.g., Canon Coal Co., 9 FMSHRC 667, 668 (April 1987); Quinland Coal, Inc., 9 FMSHRC 1614, 1617-18 (September 1987). Although the judge properly recognized that adequate notice of the conduct prohibited by section 56.9002 must be afforded an operator, he did not apply the "reasonable person test" set forth above, which is the analytical approach that the Commission has approved in order to evaluate the fairness of application of broad standards to particular factual settings.

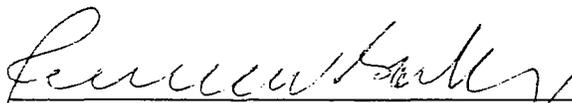
Apparently, the judge found that Ideal did not have adequate notice of the conduct prohibited by section 56.9002 because Ideal had not received explicit prior notice that the standard required attachment of the side screens to the uni-loader. Although the judge noted evidence bearing on the safety effects of the missing side screens, he summarily disposed of it, apparently because he believed that it fell short of demonstrating explicit notice to Ideal that side screens were required by MSHA for conformance with the standard. We fully appreciate that in order to afford adequate notice and pass constitutional muster, a mandatory safety standard cannot be "so incomplete, vague, indefinite or uncertain that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application." Alabama By-Products Corp., 4 FMSHRC 2128, 2129 (December 1982)(citations omitted). However, in interpreting and applying broadly worded standards, the appropriate test is not whether the operator had explicit prior notice of a specific prohibition or requirement, but whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard.

Because the judge did not make the requisite findings of fact with regard to the issue of whether the absence of the side screens affected safety, we therefore remand this matter to the judge. He shall consider whether a reasonably prudent person, familiar with the mining industry and the protective purpose of section 56.9002, would have recognized that the missing side screens on the uni-loader "affect[ed] safety" within the meaning of the regulation and, accordingly, would have remedied that defect prior to any further use of the equipment.

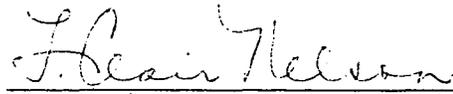
The judge should examine the evidence in the context of the modified condition in which the uni-loader was being used at the time of the accident. The judge should examine and set forth findings and conclusions based on the evidence of record including, but not limited to: (1) the testimony of the Ideal employees and the inspectors regarding whether operating the uni-loader in the kiln without side screens affected safety, taking into account the proximity of the side arms to the operator's cab; (2) any evidence regarding whether the presence of the side screens impeded the equipment operator's vision with respect to the work area; (3) any evidence regarding whether Ideal's safety policies prohibited removal of the screens; and (4) any evidence of industry or manufacturer's policy regarding the removal of the side screens and the circumstances, if any, under which the side screens could be removed without impairing safety. We express no views as to the findings to be made or the conclusions to be drawn by the judge.

III.

Accordingly, we vacate that portion of the judge's decision dealing with the issues of whether the missing side screens were an equipment defect that affected safety and remand this matter to the judge for further consideration of the issues raised above.


Richard V. Backley, Acting Chairman


Joyce A. Doyle, Commissioner


L. Clair Nelson, Commissioner

⁵ Pursuant to section 113(c) of the Mine Act, 30 U.S.C. § 823(c), we have designated ourselves a panel of three Commissioners to exercise the powers of the Commission in this matter.

Commissioner Holen assumed office after this case had been considered at a Commission decisional meeting and took no part in the decision of the case. Under the circumstances, she elected not to participate in the disposition of this case. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary and is not required for the Commission to take official action.

the prima facie case of discriminatory discharge under the "as applied" theory. UMWA Br. 22, 23-27.

JWR filed a motion to strike Part III of the UMWA's brief on the grounds that the "as applied" issue was not within the scope of the Commission's Direction for Review. In this motion, JWR did not request that, in the event the Commission were to deny the motion to strike, it be allowed to brief the merits of the issue raised by the UMWA. The UMWA and the Secretary filed oppositions to the motion to strike.

The Commission reserved ruling on the motion to strike and scheduled oral argument in this case. Shortly before the argument took place, the Commission voted to deny JWR's motion to strike. Chairman Ford announced that determination at the outset of oral argument.¹ During the ensuing oral argument, counsel for JWR and for the UMWA argued a number of "as applied" issues relevant to the affirmative defense (see Tr. Oral Arg. 21-27 (JWR argument); 53-56 (UMWA argument) and Commissioners asked questions pertaining to the affirmative defense. JWR's counsel did not, at that time, request leave to file written argument on the merits of the "as applied" issues. Further, at no time during the period between notification on December 6, 1989, that the motion to strike had been denied and the issuance of the Commission's decision on August 20, 1990, did JWR seek leave from the Commission to file a reply brief in response to the issues raised in Part III of the UMWA's brief.

In its decision, the Commission concluded that JWR's Drug Program was not facially discriminatory in violation of section 105(c)(1) of the Mine Act, and reversed Judge Broderick's conclusion to the contrary. 12 FMSHRC at 1531-33. As indicated at oral argument, the Commission also held that it could properly entertain the "as applied" affirmative defense issue raised by

¹ The Chairman stated:

Before we begin the arguments, I would advise the parties at the outset that the Commission has carefully considered both JWR's motion to strike a portion of the UMWA's brief and the other parties' oppositions to that motion. The Commission has decided to deny JWR's motion to strike.

I'm informing you of this now so that in the limited time available for argument the parties may focus their attention on the other issues in this case, including the merits of Judge Broderick's conclusion that the JWR's drug program was not discriminatorily applied to complainants Price and Vacha.

You may address that, if you wish, Counsel Spotswood [JWR's counsel].

Tr. Oral Arg. 4-5 (emphasis added).

the UMWA, and denied JWR's motion to strike. 12 FMSHRC at 1528-29. As to the merits of the "as applied" issues, the Commission affirmed on substantial evidence grounds the judge's conclusion that the complainants had established a prima facie case of discriminatory discharge. 12 FMSHRC at 1533-34. However, the Commission vacated the judge's conclusion that JWR had affirmatively defended against the prima facie case and remanded that issue to the judge for further findings and analysis. 12 FMSHRC at 1534-36. The Commission stated: "On remand, the judge shall provide all parties with the opportunity to brief the merits of the issues being remanded." 12 FMSHRC at 1536.

The thrust of JWR's present motion is that the Commission should reconsider its prior action vacating the judge's determination on the "as applied" theory and remanding the affirmative defense issue to the judge. JWR argues further that the Commission should "allow JWR to brief the issue of discriminatory application ... before [the Commission] makes a final determination to remand the affirmative defense issue to the ALJ." Motion at 3.

As argued by the Secretary and the UMWA in their oppositions to JWR's Motion for Reconsideration, JWR had ample opportunity -- both at the time that it submitted its motion to strike and following denial of that motion -- to submit a request for leave to file a reply brief in response to Part III of the UMWA brief. JWR chose not to do so.

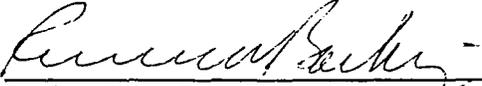
As noted above, at oral argument, the Commission specifically denied JWR's motion to strike and permitted argument of "as applied" issues. This made clear the Commission's intention to consider those issues in its disposition of this case. Under these circumstances, JWR's failure, either at oral argument or at any time prior to issuance of the Commission's decision, to submit a briefing request was tantamount to waiver of any right to file a reply brief. JWR's present request for reply briefing after the Commission decision remanding this matter to the judge for further proceedings is untimely and inconsistent with orderly judicial process. We emphasize that the Commission's prior decision expressly affords JWR the right to brief the affirmative defense issue on remand. Nor is this a hollow opportunity because it affords JWR the right to focus on the issues raised in Part III of the UMWA brief and to respond in light of the Commission's broad observations concerning the evidence. See 12 FMSHRC at 1534-36. We further note that in its prior decision the Commission did not reach or resolve the ultimate merits of the affirmative defense issue.

Indeed, the Commission based its remand of the affirmative defense issue, in large part, on a determination that the judge had not completely examined and evaluated all evidence relevant to the merits of JWR's affirmative defense. See 12 FMSHRC at 1534-36. The Commission's remand therefore contemplates reanalysis of the evidence and factual resolutions by the judge. To grant JWR's motion at this point would enmesh the Commission in the necessity of fact finding and evidentiary analysis, which is best performed by the judge.

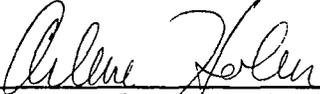
Finally, the Commission's decision in this case, given its remand to

the judge, is not final Commission action. JWR and the other parties will have the right, following the judge's decision on remand, to petition the Commission again for discretionary review of any and all issues in this case, whether by way of a request for reconsideration of any of the Commission's prior holdings or by way of appealing the judge's determinations on remand. In view of this consideration, and the others discussed above, we are satisfied that JWR has not been deprived of any due process and has had, and will continue to have, adequate opportunity to plead its case to the Commission.

Accordingly, for the foregoing reasons, JWR's motion for reconsideration is denied.²


Richard V. Backley, Acting Chairman


Joyce A. Doyle, Commissioner


Arlene Holen, Commissioner


L. Clair Nelson, Commissioner

² Commissioner Holen assumed office after this case had been considered at a Commission decisional meeting. A new Commissioner possesses legal authority to participate in pending cases, and such participation is discretionary. Commissioner Holen elects to participate in the disposition of this matter.

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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NOV 6 1990

LAWRENCE A. BROUSSARD, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. CENT 90-118-DM
: :
AKZO SALT INCORPORATED, : SC MD 90-13
Respondent :
: Avery Island Mine
:

ORDER OF DISMISSAL

On September 6, 1990, Respondent filed a Motion to Dismiss. On October 2, 1990, a Show Cause Order was issued which contained the following language:

"[I]t is ORDERED that Complainant shall, by October 15, 1990, file a Response to the Motion to Dismiss. Failure to file such a response, shall result in the entry of a Default Judgment in favor of Respondent, and the Dismissal of this case."

To date, Complainant has neither filed a response to the Motion to Dismiss nor filed a response to the Show Cause Order. Accordingly, it is found that Complainant is in default.

It is ORDERED that a Default Judgment shall be entered in favor of Respondent, and it is further ORDERED that this case be DISMISSED.



Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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NOV 8 1990

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), :
Petitioner : Docket No. KENT 90-161-M
v. : A.C. No. 15-16075-05510
SATURN MATERIALS, INC., :
Respondent : Saturn Materials, Inc.

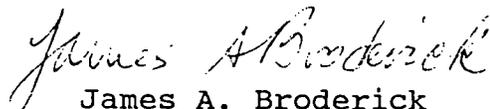
DECISION

Appearances: Mary Sue Taylor, Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville, Tennessee,
for the Secretary of Labor (Secretary);
Talbert Ball, President, Saturn Materials, Inc.,
Belfry, Kentucky, for Respondent (Saturn).

Before: Judge Broderick

This proceeding involves seven alleged violations of 30 C.F.R. § 56.14107 charged in section 104(a) citations issued February 21, 1990, because of inadequate guarding on moving machinery parts. Saturn filed an answer by its agent Ike Khosla. Pursuant to notice, the case was called for hearing in Prestonsburg, Kentucky, on October 31, 1990. Before testimony was taken, Saturn's President, Talbert Ball stated that he did not contest the violations and agreed to pay the amount originally assessed, \$1393. The Secretary described the violations, and moved that the proposed settlement be accepted. 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 \$1393 within 30 days of the date of this order.


James A. Broderick
Administrative Law Judge

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NOV 8 1990

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), :
Petitioner : Docket No. SE 90-66
v. : A.C. No. 40-00520-03720
: Matthews Mine
CONSOLIDATION COAL COMPANY, :
Respondent :

DECISION

Appearances: Mary Sue Taylor, Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville, Tennessee,
for the Secretary of Labor (Secretary);
Walter J. Scheller, III, Esq., Pittsburgh,
Pennsylvania, for Respondent, Consolidation
Coal Company.

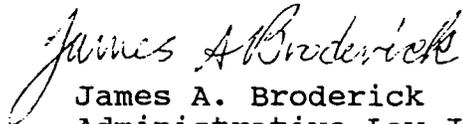
Before: Judge Broderick

This proceeding involves a single alleged violation of 30
C.F.R. § 75.604(b) charged in a section 104(a) citation issued in
January 31, 1990.

Pursuant to notice the case was called for hearing in
Knoxville, Tennessee, on October 30, 1990. Federal coal mine
inspector John J. Sipos was called as a witness by the Secretary.
Following inspector Sipos' testimony, and a discussion off the
record between counsel, the Secretary moved to approve a
settlement agreement. Counsel stated that the violation was not
significant and substantial; that it was unlikely to result in
injury and was the result of low negligence. Consol agreed to
pay and the Secretary agreed to accept a penalty of \$20 for the
violation which was originally assessed at \$206.

On the basis of the inspector's testimony and considering
the criteria in section 110(i) of the Act, I stated on the record
that I would approve the settlement.

Accordingly, the settlement agreement is **APPROVED**; the citation is **MODIFIED** to delete the significant and substantial classification and Respondent is **ORDERED** to pay the sum of \$20 within 30 days of the date of this order.


James A. Broderick
Administrative Law Judge

Distribution:

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Walter J. Scheller, III, Esq., Consolidation Coal Company, Consol Plaza, 1800 Washington Road, Pittsburgh, PA 15241 -1421 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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NOV 9 1990

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. CENT 90-109-M
Petitioner : A.C. No. 23-00762-05507
v. :
: Dresden Farm Quarry
W.J. MENELEE CONSTRUCTION CO., :
Respondent :

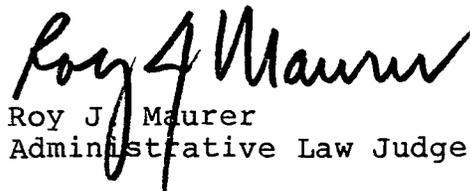
DECISION APPROVING SETTLEMENT

Appearance: Evert H. Van Wijk, Esq., U.S. Department of Labor,
Office of the Solicitor, Kansas City, Missouri, for
the Petitioner.

Before: Judge Maurer

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 the hearing, petitioner filed a motion to approve a settlement agreement and to dismiss the case. A reduction in penalty from \$315 to \$187 is 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 \$187 within 30 days of this order, if it has not already done so.


Roy J. Maurer
Administrative Law Judge

Distribution:

Evert H. Van Wijk, Esq., U.S. Department of Labor, Office of the Solicitor, 911 Walnut Street, Room 2106, Kansas City, MO 64106 (Certified Mail)

Jack L. Arnold, Safety Officer, W.J. Menefee Construction Co., P.O. Box 998, Sedalia, MO 65301 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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NOV 9 1990

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 90-136
Petitioner	:	A.C. No. 46-03805-03956
v.	:	
	:	Martinka No. 1 Mine
SOUTHERN OHIO COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Glenn M. Loos, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Secretary of Labor (Secretary); Rebecca J. Zuleski, Esq., Furbee, Amos, Webb and Critchfield, Morgantown, West Virginia, for Southern Ohio Coal Co. (SOCCO).

Before: Judge Broderick

STATEMENT OF THE CASE

The Secretary seeks in this proceeding a civil penalty for an alleged violation of the mandatory safety standard in 30 C.F.R. § 75.902. The violation was charged in a section 104(d)(2) order of withdrawal issued November 1, 1989, because an approved fail-safe ground check monitoring system was not provided for the grounding circuit for two cooling motors in the No. 3 Main belt conveyor drive unit. Both parties engaged in pretrial discovery. Pursuant to notice, the case was called for hearing on September 19, 1990, in Morgantown, West Virginia. Virgil Brown, Dennis Cain, and Stanley Shelosky testified on behalf of the Secretary; John Randolph Cooper, Kenneth G. Moore, and Paul McKinney testified on behalf of SOCCO. Both parties filed post hearing briefs. I have considered the entire record and the contentions of the parties and make the following decision.

FINDINGS OF FACT

I

At all times pertinent to this proceeding, SOCCO was the owner and operator of an underground coal mine in Marion County, West Virginia, known as the Martinka No. 1 Mine. SOCCO is a

large operator. Between November 1, 1987 and October 31, 1989, 1,010 violations were assessed and paid during 965 inspection days at the subject mine. One was a violation of 30 C.F.R. § 75.902. This history is not such that a penalty otherwise appropriate should be increased because of it.

II

On October 31, 1989, Federal coal mine inspector, electrical specialist, Virgil Brown, while conducting a regular electrical inspection at the subject mine, received a written complaint from a miner under section 103(g) of the Act. The complaint (dated October 22, 1989) stated that the ground monitor packages on the No. 3 54 inch belt drive cooling pumps were not working on both pumps.

III

On November 1, 1989, Inspector Brown, accompanied by a mine foreman and a union representative, proceeded to the No. 3 belt. The belt drive was energized and had been in operation. The controller box was opened, disclosing two pump motors, one a 10 horsepower motor, the other 15 horsepower. The ground monitors had a jumper wire between the No. 3 and No. 4 tabs on the unit. The wire had been put on in lieu of a ground monitor circuit package which apparently had been installed but was not operative. Because the ground monitor circuit package was inoperative, the jumper wire was needed in order that the pumps continue running.

IV

The belt drive is powered by two 300 horsepower motors on a common frame with the cooling pumps. The cooling pumps must be operative for the belt drive to run. There are grounds on the belt drive, and while the belt drive is running, the entire system including the cooling motors is adequately grounded.

V

Inspector Brown issued an order of withdrawal under section 104(d)(2) of the Act because of the absence of a ground monitor on the grounding circuit for the two cooling motors. Although the violation was originally designated as significant and substantial, it was later modified to delete this designation, and the inspector concluded that an injury was unlikely to result from the violation. He concluded that it resulted from Respondent's unwarrantable failure because the equipment had been allowed to operate for approximately three weeks without ground monitors for the cooling motors. The pump motors can be made to operate with the "jog button," even though the ground for the

large 575 volt frames is disconnected. Such a situation would occur if the cooling motors were replaced or tested.

The evidence establishes that the jumper wire was inserted at the direction of John Randolph Cooper, general maintenance superintendent of the subject mine. Cooper believed that the many parallel grounding pads on the belt drive, and the fact that there was a common frame between the cooling controls and the acceleration control satisfied the standard. Inspector Brown agreed that as long as the belt drive was operating, the entire system was ground monitored. However, when work is being done on the pumps or pump motors, the belt system is required to be deenergized, and the ground monitor system would be inoperative. If the pump motors are started with the jog button, they would not be ground monitored, unless they had a separate operative ground monitoring package. I accept the inspector's testimony on this issue.

IV

The violation was abated by extending the monitor from the belt starter box up to the pump motors by attaching a length of wire. This took from 30 minutes to one hour. This method of abatement was permitted by the inspector to avoid a long shut down of the belt, and the order was terminated. Subsequently, operative ground monitor packages were installed on the pump motors.

REGULATION

30 C.F.R. § 75.902 provides in part:

On or before September 30, 1970, low- and medium-voltage resistance grounded systems shall include a fail-safe ground check circuit to monitor continuously the grounding circuit to assure continuity which ground check circuit shall cause the circuit breaker to open when either the ground or pilot check wire is broken . . .

ISSUES

1. Whether the evidence establishes a violation of 30 C.F.R. § 75.902?
2. If so, whether the violation resulted from Respondent's unwarrantable failure to comply with the standard?
3. If a violation is established, what is the appropriate penalty therefor?

CONCLUSIONS OF LAW

I

Respondent was at all times pertinent to this case subject to the provisions of the Mine Act in the operation of the subject mine, and I have jurisdiction over the parties and subject matter of this proceeding.

II

On November 1, 1989, and for some weeks prior thereto the No. 3 Main belt cooling motors in the subject mine were not provided with a ground monitor check circuit. This was a violation of 30 C.F.R. § 75.902.

III

The violation was not serious in that it was unlikely to result in injury to a miner. This was so because the system was adequately grounded while the belt was in operation. The weekly electrical examination of the circuit breakers and the electrical equipment is conducted by visual examination without stopping the belt. The ground monitors are examined only on a monthly basis.

IV

Unwarrantable failure means aggravated conduct, constituting more than ordinary negligence. Emery Mining Corp., 9 FMSHRC 1997 (1987); Southern Ohio Coal Company, 12 FMSHRC 1498 (1990). "While negligence is conduct that is 'inadvertent,' 'thoughtless', or 'inattentive', conduct constituting an unwarrantable failure is conduct that is 'not justifiable' or is 'inexcusable'." SOCCO, 12 FMSHRC at 1502.

Respondent here attempted to install the ground monitor packages in the cooling motors, but was unable to make them operational. It then intentionally by-passed the ground monitors in order to continue running the belt. Respondent believed in good faith that the many grounds and ground monitor systems on the belt drive itself provided a fail-safe ground monitor for the cooling motors. I do not accept this conclusion, but cannot conclude that it therefore constitutes inexcusable or aggravated conduct. The violation did not result from Respondent's unwarrantable failure to comply with the standard.

V

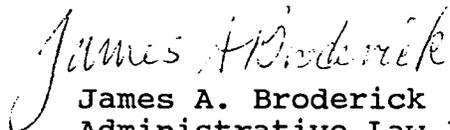
Respondent is a large operator with an average history of prior violations. The violation here was not serious. It resulted from Respondent's negligence. It was promptly abated in

good faith. Based on the criteria in section 110(i) of the Act, I conclude that an appropriate penalty for the violation is \$250.

ORDER

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

1. Order No. 3111547 is **AMENDED** to a section 104(a) citation. The finding of unwarrantable failure is **DELETED**.
2. As amended, the citation is **AFFIRMED**.
3. Respondent shall, within 30 days of the date of this decision, pay the sum of \$250 as a civil penalty for the violation found herein.


James A. Broderick
Administrative Law Judge

Distribution:

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Rebecca J. Zuleski, Esq., Furbee, Amos, Webb & Critchfield, Suite 4, 5000 Hampton Center, Morgantown, WV 26505 (Certified Mail)

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NOV 13 1990

GREEN RIVER COAL COMPANY, : CONTEST PROCEEDING
Contestant :
v. : Docket No. KENT 90-95-R
: Order No. 3420071; 1/25/90
SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH : No. 9 Mine
ADMINISTRATION (MSHA), :
Respondent : Mine ID 15-13469
SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 90-133
Petitioner : A.C. No. 15-13469-03741
v. :
: No. 9 Mine
GREEN RIVER COAL COMPANY, :
Respondent : Mine ID #15-13469

DECISION

Appearances: B. R. Paxton, Esq., Paxton & Kusch, P.S.C.,
Central City, Kentucky, for the Contestant/
Respondent;
William F. Taylor, Esq., U.S. Department of
Labor, Office of the Solicitor, Nashville,
Tennessee, for the Respondent/Petitioner.

Before: Judge Maurer

STATEMENT OF THE CASE

Contestant, Green River Coal Company, Inc., (Green River), has filed an application for review challenging the issuance of Imminent Danger Withdrawal Order No. 3420071 at its No. 9 Mine. The Secretary of Labor (Secretary) has also filed a petition seeking civil penalties in the total amount of \$2400 for the violations charged in Citation Nos. 3420072 and 3420073, which were issued in conjunction with the aforementioned imminent danger order.

The general issue in a contest case concerning an imminent danger order is whether the cited condition could reasonably be expected to cause death or serious physical harm. The limited issue herein is whether such a condition existed at the time the subject order was written.

An issue more specific to this case raised by Green River is to what extent the existence of a functioning CO monitoring system that will give an immediate fire warning will ameliorate what would otherwise undoubtedly be an imminent danger condition.

The general issues in the civil penalty proceeding are whether the citations were properly issued, i.e., whether there was a violation of the cited standard, and, if so, whether that violation was "significant and substantial", as well as the appropriate civil penalty to be assessed for the violation, should any be found.

Pursuant to notice, these cases were heard in Owensboro, Kentucky on June 14, 1990. The parties each declined to file post-hearing proposed findings of fact and conclusions of law but rather orally argued on the trial record. I have considered the entire record herein and make the following decision.

I. Docket No. KENT 90-95-R; Order No. 3420071

Order No. 3420071, issued pursuant to section 107(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the Act), charges as follows:

The following condition of which collectively constitutes an imminent danger was observed in the 1B-Belt entry. 30 CFR 75.0400. Accumulation of loose coal and Float Coal dust, 30 CFR 75.1725 - 23 bad or damaged belt rollers. The belt was running on the ground in 2 different locations loose coal underneath, for a total distance of 210 feet.

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

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

Section 3(j) of the Act defines "imminent danger" as the existence of any condition or practice in a coal or other

mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated.

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).

Mr. Michael McGregor, Safety Director for Green River was called and testified, initially at the behest of the Secretary. He furnished Belt Examiner's Reports for the days and weeks just prior to the issuance of the imminent danger order at bar. Suffice it to say that there were a multitude of reports concerning bad rollers and the belt running on the ground, as well as coal accumulations noted.

Federal Coal Mine Inspector Ronald Oglesby then testified that he arrived at the mine at about 10:00 a.m. on January 25, 1990, and proceeded underground, accompanied by Mr. McGregor. When they started to walk the 1B-Belt Entry, he found accumulations of loose coal and coal dust. There were also bad rollers and places where the belt was running in coal on the bottom. The bottom belt was running on top of the ground. The rollers had been damaged and destroyed to the point that they were no longer operable. The inspector found the belt running on the ground in two different locations and a situation where some of the belt rollers were warm and in some instances, even the coal surrounding them was already warm.

More particularly, the inspector found 23 bad rollers. However, subsequently 28 were replaced to abate the condition. They were in varied condition. In some of these rollers, the bearings were completely gone, creating a fire hazard from the heat of friction. In others, not only were the bearings gone on the rollers, but the rollers themselves had spun until they had broken the rod running through the roller.

This condition likewise presents a source of friction and heat and therefore is a fire hazard.

The inspector also testified that there was combustible material present in the same areas where the heat was being generated from the bad rollers. The entire beltline had accumulations of coal dust, float coal dust and other loose coal. These accumulations were from two to six inches deep generally. The belt itself was on the ground, running in loose coal, two to six inches deep, for a length of 150 feet at two points along the 1B-Belt line. Additionally, there were two major areas of float coal dust extant, one near the head, and the other near the tail.

The credible evidence in this record establishes that accumulations of black coal dust was deposited on top of previously rock dusted surfaces along the belt conveyor system at the locations described by the inspector. Furthermore, float coal dust was deposited on the ribs, the floor and the belt structure itself. These accumulations were located in belt conveyor areas which included potential sources of ignition, i.e., the overheating damaged belt rollers.

The inspector believed the mine hazard presented by the accumulation of coal dust was a fire. Since sixteen miners worked on the No. 1 unit and were in by the belt, he was justifiably concerned that they would be exposed to fire and smoke hazards, and possible entrapment. Moreover, I conclude and find that the inspector's credible testimony establishes that the float coal dust accumulations in question which I believe one may assume were combustible and were located in areas where potential ignition sources were present, presented a fire and smoke hazard as well and also possibly an explosion hazard.

The existence of accumulations of coal dust and float coal dust along a rather extended area of the belt line along with the number of damaged and overheating rollers that were present to provide a ready source of friction heat could also propagate any fire that got started. In defending this case, the respondent put a lot of emphasis on the existence of a carbon monoxide monitoring system on the belt line that picks up any kind of smoke that contains carbon monoxide. There are sensors located along the belt line at each header and tail piece and at each 2000 foot interval. The system alarms outside and the outside person can then determine where the problem is located. He thereupon calls on the mine phone to the foreman underground and he will go to the suspected location and find out what the problem is. Within five minutes, someone is in the alarmed area to investigate. Therefore, respondent's theory is that as long as this monitoring system is working there can be no imminent danger

because to have a fire large enough to cause serious injury would take longer than five minutes to build up. By that time, it would be discovered and corrective action begun.

However, the decision the inspector had to make on the scene was whether the condition he found could reasonably be expected to cause death or serious physical harm to the miners working in that area. The focus is on the "potential of the risk to cause serious physical harm at any time." The legislative history of the Act states the intention of Congress to give inspectors "the necessary authority for the taking of action to remove miners from risk," and 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).

The focus is clearly and properly on the potential of the risk involved and I find that there was plenty of potential for a mine fire here given the conditions the inspector found. All the ingredients were present: accumulations of combustible materials and nearby ignition sources.

Respondent's argument 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.

Old Ben Coal Corp. v. Interior Bd. of Mine Op. App., 523 F.2d 25, 31 (7th Cir. 1975).

For all the reasons enumerated earlier in this decision, I find that the inspector did not abuse his discretion in this instance; an imminent danger did exist at the time he wrote the order. Furthermore, in my opinion, the presence of the monitoring system does nothing to change the basic situation the inspector found. There was still a danger of a mine fire starting that could produce a significant amount of smoke and/or fire before that condition could be abated.

Accordingly, I find that there was an imminent danger and affirm Order No. 3420071.

II. Section 104(a) Citation Nos. 3420072 and 3420073

These two section 104(a) citations were issued in conjunction with the imminent danger order discussed earlier in this decision.

Citation No. 3420072 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.1725 and charges as follows:

A violation was observed in the 1B-Belt entry in that there were 23 bad or damaged rollers. The rollers were damaged to the extent some were cut into, some half missing from center rods, some completely missing from stands.

(This citation was one of the factors that contributed to the issuance of imminent danger Order No. 3420071, dated 1/25/90 therefore, no abatement time was set.)

Citation No. 3420073 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.0400 and charges as follows:

A violation was observed in the 1B-Belt entry in that [an] accumulation of loose coal and float coal dust was present on previously rock dusted surfaces. The loose coal was present between No. 19 and No. 20 crosscut, from No. 7 to No. 9 crosscut, and from No. 3 to No. 2 crosscut. The loose coal was from 2 to 6 inches in depth. 4 ft wide under the belt. The belt was running in loose coal in two of the places. The loose coal was deposited on both sides of the belt. The total distance of loose coal was 280 ft. Float coal dust was present on previously rock dusted, starting at the first overcast inby the 1B-header and extending for 4 crosscuts in the 1B-Belt entry, the second place float coal dust was present was starting at the 1C-Belt header and extending 5 crosscuts outby. The float coal dust was deposited on the floor, ribs, timbers, and belt structure. Total distance both locations was 630 feet.

(This citation was one of the factors that contributed to the issuance of imminent danger Order No. 3420071 dated 1/25/90 therefore, no abatement time was set.)

Respondent admits the violation of the mandatory standard in both citations, but disputes the "significant and substantial" findings contained therein.

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

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

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

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

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

The question of whether any particular violation is significant and substantial must be based on the particular facts surrounding the violation, including the nature of the

mine involved. Secretary of Labor v. Texasgulf, Inc.,
10 FMSHRC 498 (April 1988); Youghiogeny & Ohio Coal Company,
9 FMSHRC 2007 (December 1987).

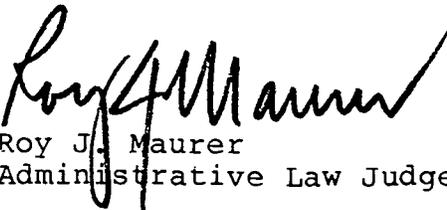
I have previously recited the pertinent facts earlier in this decision. The same conditions that caused the violations of the two mandatory standards at bar were also the basis for the imminent danger withdrawal order that the inspector issued at the same time. Since I have previously found an imminent danger existed, that is, a condition "which could reasonably be expected to cause death or serious physical harm" it follows that these are "significant and substantial" violations as well under the test announced by the Commission in Mathies, supra.

If a fire were to occur, it would be reasonably likely that the miners would be exposed to smoke and fire hazards and suffer disabling injuries of a reasonably serious nature, even given the presence of the operable CO monitoring system. By the time the fire could be finally extinguished, it is reasonably likely that serious injuries would have already occurred.

Considering the criteria in section 110(i) of the Act, I conclude that an appropriate civil penalty for each of the above violations is \$1000.

ORDER

1. Section 107(a) Order No. 3420071 IS AFFIRMED.
2. Section 104(a) Citation Nos. 3420072 and 3420073 ARE AFFIRMED.
3. Green River Coal Company, Inc., is ordered to pay the sum of \$2000 within 30 days of the date of this decision as a civil penalty for the violations found herein.


Roy J. Maurer
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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NOV 16 1990

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 90-193
Petitioner	:	A.C. No. 15-15251-03541
v.	:	
	:	Wallins No. 3 Mine
DAN-DEL COALS, INC.,	:	
Respondent	:	

DECISION AND ORDER OF DEFAULT

Appearances: Mary Sue Taylor, Esq., U.S. Department of Labor, Office of the Solicitor, Nashville, Tennessee, for the Petitioner;
No appearance on behalf of Respondent.

Before: Judge Maurer

Pursuant to notice, a hearing was held in the captioned matter on October 16, 1990, in London, Kentucky. The Secretary appeared and presented the testimony of two witnesses; Howard Scott and Robert Blanton, both MSHA employees. No one appeared on behalf of the respondent, nor was any contact made by respondent with my office to cancel or continue this hearing.

At the conclusion of the petitioner's testimony, she moved for a default decision. I took the motion under advisement on the record and when I returned to my office issued an Order to Show Cause to the respondent to show cause why it should not be defaulted for failing to appear at the scheduled hearing.

Respondent filed a timely response, indicating that they did try to call the Courthouse in London and Mrs. Taylor's office to say they could not make the hearing. The letter does not say when these calls were made, but presumably the morning of the hearing itself. The letter went on to state that the company is no longer in operation and has not been since July 27, 1990. All their employees have been laid off and have scattered.

I do not find good cause in the respondent's explanation for their non-appearance. It is very expensive for the government to conduct these hearings. Four government employees and a court reporter traveled to this hearing site and conducted an evidentiary hearing in the absence of the party who originally requested it. Respondent could at the very least have requested cancellation of the hearing a week or even a few days beforehand. Had this been done, it could have been re-scheduled for another time when the company was better able to defend its position.

Accordingly, petitioner's motion is granted and the respondent is found to be in default. The penalty of \$1162 proposed by the Secretary in this case must therefore be paid within 30 days of the date of this decision.


Roy J. Maurer
Administrative Law Judge

Distribution:

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/ml

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

NOV 16 1990

UNITED MINE WORKERS OF AMERICA, : DISCRIMINATION PROCEEDING
ON BEHALF OF :
FILBERT ROYBAL, : Docket No. WEST 90-118-D
Complainant : DENV CD 90-01
: :
v. : Golden Eagle Mine
: Mine I.D. 05-02821
WYOMING FUEL COMPANY, :
Respondent :

DECISION

Appearances: Susan J. Tyburski, Esq., Denver, Colorado
for Complainant;
Timothy M. Biddle, Esq., Washington, D.C.
for Respondent.

Before: Judge Morris

This case involves a discrimination complaint filed against Wyoming Fuel Company ("WFC"), pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq.

The applicable portion of the Mine Act, Section 105(c)(1), in its pertinent portion provides as follows:

Discrimination or interference prohibited;
complaint; investigation; determination; hearing

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this [Act] because such miner, representative or miners or applicant for employment has filed or made a complaint under or related to this [Act], including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine
30 U.S.C. § 815(c)(1).

After notice to the parties, a hearing on the merits commenced in Denver, Colorado, on July 25, 1990.

Both parties filed post-trial briefs.

APPLICABLE CASE LAW

The general principles of discrimination cases under the Mine Act are well settled. In order to establish a prima facie case of discrimination under Section 105(c) of the Act, a complaining miner bears the burden of production and proof in establishing that (1) he engaged in a protected activity, and (2) the adverse action complained of was motivated in any part by that particular activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 802, 817-818 (April 1981). The operator may rebut the prima facie case by showing no protected activity occurred or the adverse action was in no part motivated by protected activity. If an operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action in any event for the unprotected activity alone. Pasula, supra; Robinette, supra. See also Eastern Assoc. Coal Corp. v. FMSHRC, 813 F.2d 639, 642 (4th Cir. 1987); Donovan v. Stafford Construction Co., 732 F.2d 954, 958-959 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F.2d 194, 195-196 (6th Cir. 1983) (specifically approving the Commission's Pasula-Robinette test). Cf. NLRB v. Transportation Management Corp., 462 U.S. 393, 397-413 (1983) (approving nearly identical test under National Labor Relations Act).

ISSUE

Was WFC's suspension of Complainant, with intent to discharge, motivated in any part by the exercise of rights protected under Section 105 of the Act.

STIPULATION

At the commencement of the hearing, the parties filed a written stipulation providing as follows:

1. The Federal Mine Safety and Health Review Commission has jurisdiction over the parties and subject matter of this case under §§ 105(c) and 113 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815(c) and 823 ("Act").

2. At all times relevant to this case, Complainant Filbert Roybal worked at Respondent Wyoming Fuel Company's ("WFC's") Golden Eagle Mine as a miner, as defined in § 4(g) of the Act, 30 U.S.C. § 802(g).

3. On November 1, 1989, Mr. Roybal was suspended with intent to discharge by WFC.

4. On November 13, 1989, Mr. Roybal filed a complaint with the Mine Safety and Health Administration, alleging that WFC discriminated against him in violation of § 105(c) of the Act, 30 U.S.C. § 802(g).

5. In a letter dated January 12, 1990, the Mine Safety and Health Administration informed Mr. Roybal that its investigation of his November 13, 1989, complaint did not reveal any violation of § 105(c) of the Act.

6. By a January 16, 1990, Order of an Arbitrator in a grievance proceeding under the collective bargaining agreement, Mr. Roybal was reinstated as an employee of WFC, retroactive to December 1, 1989, and continues in the employment of WFC at the same wage rate as he earned before his suspension.

7. On February 16, 1990, Mr. Roybal filed a complaint against WFC under § 105(c)(3) of the Act, 30 U.S.C. § 815(c)(3).

SUMMARY OF THE EVIDENCE

Complainant Filbert Roybal has worked for WFC since 1984. He has performed numerous jobs (Tr. 69).

ROYBAL'S EXPERIENCE AND DUTIES

Roybal was first employed in the mining industry in 1971 and held a variety of jobs, including as a continuous miner operator for CF&I, WFC's predecessor as the operator of the Golden Eagle Mine. He had also worked as a helper to a continuous miner operator. (Tr. 68-69, 81). His employment application showed that his last job with CF&I was in such a classification. (Tr. 123). When Roybal applied for a job as a continuous miner operator with WFC, there were no such positions available, so Roybal was hired in 1984 as a shuttle car operator. (Tr. 103). However, since Roybal was an experienced miner operator, he was assigned periodically to fill in for regular continuous miner operators who were absent from work. (Tr. 70, 103).

In October 1989, a continuous miner operator position became available and Roybal bid for it. (Tr. 70, 103-104). He was awarded the job and became a full-time continuous miner operator beginning on October 9, 1989. (Tr. 71, 104-105).

On that date, Roybal reported for work on the afternoon shift. (Tr. 71, 181). His foreman was Jerry Romero, a miner with 14.5 years underground coal mining experience. (Tr. 71, 181). Romero and his crew - which included Roybal - were assigned to continue development of the longwall panel headgate entries of the Northwest Tailgate section. (Tr. 181). Roybal was the continuous miner operator on the shift; his helper was Donald Valdez. (Tr. 181-182). When the crew arrived on the section, Romero "task trained" both Roybal and Valdez because Roybal was starting a new job and federal regulations require task training under those circumstances; further, Valdez was filling in as a helper from his normal job as a mechanic. (Tr. 73, 105).

PRE-ACCIDENT ACTIVITIES

Romero took Roybal and Valdez to the continuous mining machine. He asked Roybal whether he wanted to read the company's task-training guidelines (Ex. C-10) or whether he wanted Romero to read them to him. (Tr. 73, 183). Roybal asked Romero to read them to him while he (Roybal) looked over the mining machine. (Tr. 73, 105, 183). Romero read the task-training guidelines to Roybal and pointed out the various controls with which Roybal was already familiar, since he had operated similar machines many times in the past. (Tr. 105, 183, 205-206). After he read the task-training guidelines to Roybal, Romero told Roybal to start the machine and operate it while Romero watched. (Tr. 73, 183). The pump for the rotating cutter head on the mining machine had lost its prime, and Roybal could not restore it, so Romero did it for him. (Tr. 73-74, 185). ^{1/} Once the cutter head was fully operational, Roybal operated the continuous miner without difficulty. Romero stayed to watch Roybal run it for 45 minutes. (Tr. 106, 184). ^{2/} Romero testified that, based on his observa-

^{1/} The need to prime a pump on a mining machine does not indicate there might be a throttle problem. (Tr. 355).

^{2/} Romero did not witness any problems with the controls of the mining machine prior to the accident, nor did Roybal report any problems with the controls to Romero. (Tr. 185).

tions of Roybal's handling of the mining machine, he had no concern about Roybal's ability to operate it safely. (Tr. 184). In addition, Romero did not see any problems with the way Valdez worked with Roybal. (Tr. 185).

THE ACCIDENT

Filbert Roybal testified that on the day of the accident, about six hours into his shift, he started to cut the left side of the No. 2 Entry. Before the accident occurred, Valdez moved the continuous miner cable and Roybal backed up the miner. He then cleaned the right side of the entry, backed up, and then cleaned the center. His last intended move was to again clean the left side. At that point, he saw Valdez in a cross-cut; he was out of the way. Roybal turned to his left, centered the tail, and started moving the equipment to the face. He then heard some coal "dripping" on the tin covering the light. When he looked to his right, he saw Valdez and he knew what had happened. Roybal had not seen Valdez walk up on his blind side. (Tr. 76-78; Exs. R-1 and C-11 are drawings of the scene.)

After he saw Valdez in the crosscut, Roybal looked away, to keep the ventilation tubing in his vision. (Tr. 79).

Valdez had not signaled Roybal to indicate he was going to move. (Tr. 81-82).

After the accident, Roybal gave statements to foreman Jerry Romero as well as to Mark Boyes, general foreman. He also participated in the investigation that followed the next day. (Tr. 82). He met with Robert Butero and Mike Romero, Union safety officials at the home of Artie Maestas. (Tr. 83, 84). At the home meeting, Roybal explained how the accident happened. (Tr. 85). Later, he explained to MSHA officials how the accident had happened. (Tr. 86). On October 16, company representative Huey notified him he would be on "load out" until further notice. He later received a "blue slip." (Tr. 88, 89; Ex. C-2).

No one threatened him about participating in the investigation. (Tr. 109, 110).

Michael Romero was in an entry adjacent to the one where Roybal was operating the mining machine. He heard a crew member yelling that Valdez was pinned against the rib and needed help. (Tr. 106, 190). Romero immediately went to the entry where Roybal had been operating the machine and found Valdez seriously hurt. (Tr. 190). He learned that Valdez had been crushed against the rib by Roybal's mining machine. (Tr. 190).

Mr. Romero and other crew members administered emergency first aid and notified appropriate officials. (Tr. 191). Valdez was taken out of the mine alive, but he died in the hospital early in the morning on October 10. (Tr. 190, 290).

Shortly after the accident occurred, Mr. Romero asked Mr. Roybal what had happened. He told Mr. Romero that the throttle stuck while he was pivoting the machine, causing the mining machine to pin Valdez, crushing him against the rib. (Tr. 190, 203-204). Mr. Roybal later told Mr. Romero that he had been backing up the mining machine to reposition it in the entry and that he had not known that Valdez was beside him next to the rib. (Tr. 199-200, 203-204). On the night of October 9, Mr. Romero filled out a company form entitled "Foreman's First Report of Accident" in which he summarized his understanding of the nature and cause of the accident. (Tr. 194-195; Ex. R-2). He included Roybal's explanation of the stuck throttle in the report. (Tr. 196). Later that same night, Mr. Romero completed another form entitled "Colorado Employee Personal Injury or Accident Report," which also provided information about the accident and its cause. (Tr. 197; Ex. C-6). That form essentially repeated information that was on the foreman's first report. Notwithstanding the information he provided on these forms, Mr. Romero had doubts that the throttle on Roybal's mining machine had been stuck, since he witnessed Mr. Roybal pivot the machine immediately after the accident and the throttle did not stick. (Tr. 193, 199). Mr. Romero also began to doubt that Mr. Roybal knew where Valdez was located when he pivoted the machine. (Tr. 199-200). Mr. Romero discussed his doubts with the company's accident investigators. (Tr. 199-200). After he talked with Mr. Roybal about the cause of the accident in the mine right after it happened, Romero had no further contact with him. (Tr. 201-202).

PRELIMINARY INVESTIGATION

The company's investigators, accompanied by a federal inspector, quickly arrived on the scene and interviewed Mr. Roybal and the other members of the crew. (Tr. 222). Mr. Roybal gave the company's investigators essentially the same account he had given Mr. Romero, including his claim that the throttle on the machine had stuck. (Tr. 228-229). The company's investigators took notes of each person's story. (Tr. 222). These notes were turned over to senior management, including Mr. Callor and Dave Huey, WFC's Manager of Mine Operations. (Tr. 223, 225-226).

In addition to interviewing eye-witnesses, Frank Perko, WFC's Safety Supervisor, and Mel Shively, the local MSHA inspector, conducted an inspection of the accident scene. (Tr. 31,

221, 228). Mr. Shiveley reported the results of the preliminary investigation to Mr. Callor. (Tr. 227-228). Mr. Shiveley told Mr. Callor they couldn't find anything wrong with the mining machine throttle when the machine was tested. (Tr. 31).

On the morning of October 10, Mr. Callor met with UMWA International Safety Representative Robert Butero and UMWA Local President Mike Romero. (Tr. 229). Based on the reports he had received from the company investigators, Mr. Callor briefed them on what he understood to be the sequence of events leading to the accident and its cause. (Tr. 229).

THE FEDERAL INVESTIGATION

The afternoon of October 10, MSHA and state investigators arrived at the mine and examined the accident scene underground with WFC and UMWA officials and the witnesses to the accident. (Tr. 230-231). The throttle on the continuous miner was not checked at that time. (Tr. 235-236).

After the MSHA and state investigators completed their underground investigation, they interviewed Mr. Roybal and the other miners on his crew. (Tr. 233). During his interview, Mr. Roybal continued to claim that the mining machine throttle had stuck and that Valdez had been positioned well behind him immediately prior to his backing up the mining machine. (Tr. 233, 308-309). Tom Hay, however, was 30 to 40 feet away from the accident site and the noise from his shuttle car and a nearby auxiliary fan would have made it difficult to hear whether a throttle stuck. (Tr. 206, 297-298, 298, 308-309). ^{3/} As a result of that testimony, Mr. Callor decided that the mining machine throttle should be checked more carefully. (Tr. 233-234). Mr. Callor conferred with Archie Vigil, the supervisor of the MSHA field office in Trinidad, and they decided an MSHA expert should examine the throttle. (Tr. 234). Accordingly, Mr. Vigil made arrangements for an MSHA hydraulics expert to come to the mine from Denver to tear down the throttle valve. (Tr. 32, 234).

^{3/} Mr. Romero testified that, at the time of the accident, Mr. Hay should have been sitting in his shuttle car which was located 30-40 feet from the scene of the accident. (Tr. 210; Ex. R-1 location of the shuttle car in relation to the continuous miner.) Mr. Callor testified that noise from a 60-horsepower fan and the engines of the shuttle car and the continuous miner would have made it difficult to hear whether the miner's throttle stuck. (Tr. 298, 352-353).

Late in the day on October 11, Mr. Huey decided it would be best to remove Mr. Roybal from further operation of a mining machine and transferred him to another job. (Tr. 321). Mr. Huey made that decision because, as a result of the accident, he did not believe Mr. Roybal was in a state of mind to safely operate a mining machine; that transfer was not meant to be disciplinary action. (Ex. C-12). Accordingly, Mr. Roybal was informed on October 12 that he was being removed from his new job as a mining machine operator at least until MSHA's accident investigation was over. (Tr. 43).

On the morning of October 12, Mr. Huey and MSHA officials, including Stanley Kretoski, the MSHA District 9 Special Investigator, as well as the MSHA hydraulics expert, re-entered the mine to check the continuous miner. (Tr. 32-33, 236, 315). Under the supervision of the MSHA officials, Huey tested the miner, but found no operating problems and no stuck throttle. (Tr. 33, 315-316). The throttle mechanism and the hydraulic valves were then disassembled underground under MSHA supervision and removed to the surface where they were taken apart and examined by MSHA's hydraulics expert and Leonard Carnavale, a maintenance expert at the mine, who also serves as a UMWA Local official. (Tr. 236-237, 316). No problems were found with the throttle mechanism or valve. (Tr. 34-35, 236-237, 316-317). In fact, the MSHA investigator commented that the valves were extremely clean. (Tr. 317). At that point, Mr. Callor doubted that the throttle had stuck; he began to believe that the accident had been caused by Mr. Roybal's negligence in not assuring himself that he knew where Valdez was when he backed up the mining machine. (Tr. 237). The MSHA officials agreed that there was no problem with the continuous miner and that the accident must have been caused by human error, i.e., Valdez put himself in a dangerous position and Mr. Roybal failed to check Valdez's location before pivoting the machine. (Tr. 237).

Between October 9 and 11, Charles McGlothlin, WFC's Vice-President for Operations, had been briefed regularly on the course of the accident investigation and the company's search for the cause of the accident. (Tr. 366-368). ^{4/} Mr. Callor and

^{4/} McGlothlin is the senior on-site company official for WFC operations, including the Golden Eagle Mine. He has final authority on personnel decisions. (Tr. 362-363, 373).

witnessed the valve tear-down; Mr. Callor reported the results to Mr. McGlothlin. (Tr. 316, 326-327, 370). Both Callor and Huey began to suspect that Mr. Roybal's claim that a stuck throttle caused the accident was not true. Mr. Roybal was persisting in that claim. (Tr. 373). Messrs. Callor and Huey told Mr. McGlothlin of their suspicions. (Tr. 372-373).

INVESTIGATION FINDINGS

On October 12, MSHA conducted a conference at the mine to review the accident investigation up to that time. (Tr. 239, 318-319). ^{5/} Chief Investigator Kretowski gave company and UMWA representatives his preliminary conclusions about what caused the accident. (Tr. 239, 318-319). His conclusion was that the accident had been caused by Roybal's failure to know where his helper was when he backed up the machine. (Tr. 240). ^{6/} At that conference, Union representative Butero was critical of MSHA's investigators for failing to address the time it took to remove Valdez from the mine and in relation to the number of blankets on the section and the adequacy of the task-training provided Mr. Roybal. (Tr. 149, 163). Mr. Kretowski told Mr. Butero that the evacuation time and the blankets were not connected with the cause of the accident. (Tr. 163). Mr. Butero followed up his criticisms of the MSHA investigation with a letter in mid-October to the MSHA District 9 Manager. (Tr. 147-149). Although Mr. Butero had privately told Mr. Kretowski before the October 12 conference started that he intended to write such a letter, no one from WFC saw the letter until after Mr. Roybal was suspended with intent to discharge. (Tr. 149, 164, 243, 402).

After the conference with MSHA, WFC officials discussed on several occasions whether Mr. Roybal should be fired.

^{5/} Although this conference was called a "closeout" conference, it was not the close of MSHA's accident investigation. The MSHA accident investigation did not end until October 31, according to those conducting it. (Tr. 36-37, 256).

^{6/} Leonard Carnavale, the UMWA representative who assisted in the valve tear-down, agreed with Mr. Kretowski that the accident was the result of human error. The human error consisted of Valdez's placing himself in a bad position and Mr. Roybal's not knowing where Valdez was. (Tr. 239-240).

(Tr. 377). Both Messrs. Callor and Huey recommended to Mr. McGlothlin that Mr. Roybal be fired for (1) negligence, (2) for lying during the company's and MSHA's accident investigations ^{7/} and (3) for conspiracy, because of testimony given by Mr. Roybal and other miners during the investigation who, in management's view, were trying to lay blame for the accident on the equipment, not Roybal. (Tr. 61, 252, 324-325, 372). Mr. McGlothlin, however, was not willing to take any action with respect to Mr. Roybal until MSHA's accident investigation was completed. (Tr. 377, 388-90). Mr. McGlothlin thought that more information, including any mitigating circumstances, might result from the continuing MSHA investigation. (Tr. 377, 390).

On October 17, Colorado State mine safety regulatory officials presented WFC with their written report about the cause of the accident. (Tr. 44, 248, 323, 376). The primary cause of the accident, according to the state investigator, was "[Roybal] was not aware of where his helper was ... " when he backed up the equipment. (Tr. 45, 249; Ex. R-8 at 3).

Concerned about the effect of the collective bargaining agreement between WFC and the UMWA with respect to any disciplinary action against Mr. Roybal, Mr. McGlothlin discussed the Roybal matter with the president of KNEnergy, WFC's parent company, as well as with a labor consultant used by WFC for contract interpretation purposes and with outside legal counsel. (Tr. 392). By that time, Mr. McGlothlin had talked extensively with Messrs. Callor and Huey, who had explained to him Mr. Roybal's degree of negligence, as evidenced by the position of the mining machine when the accident occurred. (Tr. 46, 61, 329-330).

UNION REPRESENTATIVES

Mike J. Romero, President of Local Union 9856, District 15, has represented Mr. Roybal since 1979.

Prior to this accident, Mr. Roybal had a very good work and safety record. (Tr. 124, 125).

Mr. Romero received a copy of the blue slip (Ex. C-2) on the day it was served on Mr. Roybal, namely, November 1, 1989. (Tr. 127).

^{7/} Making false statements during accident investigations is a violation of Rule 7 of WFC's Rules of Conduct. Mr. Roybal was aware of and had acknowledged receipt of a copy of such Rules. (Tr. 216-217; Exs. R-3, R-4).

Company representative Huey stated to Mr. Romero that they were "tired of the community accusing WFC of the fatality and blaming WFC." Mr. Romero denied Mr. Huey's assertions.

The next day, again in Mr. Huey's office, Mr. Callor said "they were tired of being hammered" and "tired of people going to Arlington." (Tr. 129).

Robert Dale Butero also testified. He is an international representative of the International Union of the United Mine Workers of America. He is assigned to the Union's Department of Occupational Health and Safety. (Tr. 130).

Mr. Butero went to the Golden Eagle Mine when he was notified of the accident. (Tr. 133). After talking to company representatives, he wanted to talk to the crew. As a result, a meeting was held at Art Maestas's house. No company representatives were present. Mr. Butero told those present they were going to give statements to MSHA; he advised them to give true statements. (Tr. 136-138, 162).

The crew were later questioned in the presence of the witness, an MSHA investigator, a state inspector, and company representatives. At that time, Mr. Roybal stated the throttle had stuck. (Tr. 140).

Mr. Butero stated he didn't believe the task training given to Mr. Roybal complied with MSHA's regulation. At that point, it became very combative. (Tr. 141). In the course of the meeting, Mr. Butero raised several issues: task training, failure to have proper blankets, inadequate transportation from the mine (whether the miner died of shock or injuries). (Tr. 142-147). Mr. Butero agreed no citations were issued for the areas about which he was concerned. (Tr. 163).

MSHA said they were also going to have an MSHA Tech support man check the throttle valve. This was done the following day. (Tr. 147).

Mr. Butero also wrote to John DeMichiei, MSHA district manager. In his letter, he complained about the investigation and he expressed his concerns. (Tr. 129, 149). 8/

8/ The letter to Mr. DeMichiei was not in evidence.

On October 31, 1989, after writing to Mr. DeMichiei, MSHA reviewed the company's training records. About that time, Mr. Butero had a lengthy discussion with WFC's attorney Larry Corte. Mr. Corte was wondering why the union was "hammering" them through the investigation. (Tr. 152, 153). Mr. Butero explained why he wrote the letter to MSHA and he gave him a copy. Mr. Corte replied, "You're hammering us and stuff. If you don't quit, we're going to have some action." Then he said, "We're starting a good safety program here." (Tr. 154). Mr. Butero didn't know exactly what he meant. (Tr. 155).

On November 1 or 2, Mr. Butero learned Mr. Roybal had been suspended with intent to discharge. (Tr. 156).

In a mining community when a fatality occurs, people choose sides. Some blame the company, others blame the union. (Tr. 157).

Later Mr. Butero recommended that a 105(a) complaint be filed. Mr. Roybal agreed. (Tr. 160, 161).

Mr. Butero wrote the discrimination complaint. In pursuing the case, Mr. Butero talked to Linda Raisovich-Parsons in Washington and told her the facts of the case. (Tr. 164-166).

Mr. Butero agrees it was fair for the company to conclude that Mr. Roybal had performed an unsafe act resulting in a fatality; further, there was some basis for the company to believe someone wasn't telling about the stuck throttle "as it happened" and several miners agreed that they would identify the cause of the accident as the machine. (Tr. 168-170).

The State of Colorado report was not issued by October 12. (Tr. 174).

DECISION TO DISCHARGE

On October 31, MSHA investigators completed the last part of their accident investigation by auditing WFC's training records, including those of Roybal and Valdez. (Tr. 37, 256, 379-380, 396). No violations were found. When the audit had concluded, the MSHA investigators told Mr. Callor that the Valdez fatality investigation was over. (Tr. 163-164, 256).^{9/} Messrs. Callor and Huey reported to Mr. McGlothlin that MSHA had completed its investigation.

^{9/} MSHA issued a written accident investigation report, but not until December 1989; it was received into evidence as Exhibit R-9. (Tr. 262-263).

(Tr. 380). Shortly thereafter Messrs. Callor and Huey met with Mr. McGlothlin to make a decision about Mr. Roybal. (Tr. 256-257, 326). Since no new facts had come to light during MSHA's investigation, Mr. McGlothlin decided to accept Mr. Callor and Mr. Huey's recommendation and he approved Mr. Roybal's suspension with intent to discharge. (Tr. 379-380, 397). ^{10/} Messrs. McGlothlin, Huey, and Callor drafted a Notice of Suspension with Intent to Discharge that day. (Tr. 256-257, 326, 397). Mr. McGlothlin gave it to his secretary for typing and instructed Mr. Huey to issue it to Mr. Roybal the next day, November 1. (Tr. 257, 328, 331, 397).

Huey gave Mr. Roybal the notice on the afternoon of November 1 in the presence of Mr. Roybal's UMWA representative. (Tr. 328, 330-331). The Notice informed Mr. Roybal that the company believed he had engaged in an unsafe act which resulted in the Valdez fatality, had violated company safety rules, had misrepresented the facts to investigators, and had engaged in a conspiracy to blame the company for the Valdez accident. (Tr. 326-328; Ex. C-2). The next day the UMWA filed a grievance under the collective bargaining agreement contesting Mr. Roybal's suspension, and WFC and the UMWA began the grievance procedure steps under the collective bargaining agreement. (Tr. 332, 398).

THE § 105(c) ACTIONS

On November 13, the UMWA filed a § 105(c) complaint on Mr. Roybal's behalf. (Tr. 161-162, 164; Ex. C-1). On February 16, 1990, Linda Raisovich-Parsons, a UMWA official in Washington, filed the § 105(c)(3) complaint at issue here. (Tr. 113). Mr. Roybal said he never saw the second complaint and, indeed, testified that the allegation in the complaint that he had been "discriminated against because he had participated in an MSHA

^{10/} After Mr. McGlothlin accepted the recommendations of Messrs. Callor and Huey, and after consultation with counsel for WFC, Mr. McGlothlin reported WFC's conclusions concerning the cause of Valdez's death to local law enforcement authorities. (Tr. 383-384, 399). A meeting was held in late November between Messrs. McGlothlin, Lawrence J. Corte, WFC counsel, and the county district attorney and county sheriff. (Tr. 383-384). The district attorney informed Mr. Roybal in January 1990 that no criminal charges against him were contemplated. (Ex. C-15).

dent investigation" was not true. (Tr. 114) ^{11/} Mr. Roybal admitted that no one from WFC discussed the MSHA accident investigation with him. (Tr. 109-110). ^{12/}

COLLECTIVE BARGAINING AGREEMENT

In the meantime, Mr. Roybal's grievance was being processed in accordance with the collective bargaining agreement. (Tr. 173, 260-262). Unable to resolve the grievance through the informal negotiations provided for in the contract, Mr. Roybal's grievance was heard by an arbitrator. After the hearing, the arbitrator decided that Mr. Roybal had been negligent but that the company's decision to discharge him was too severe. Accordingly, the arbitrator ordered WFC to reinstate Mr. Roybal effective December 1, 1989, but upheld the company's suspension of Mr. Roybal for the period of November 1, 1989, to November 30, 1989. WFC reinstated Mr. Roybal as required, paid him continuous miner operator wages, but did not allow him to operate a mining machine. (Tr. 114-115, 218-219, 261-262). At the time of the hearing in this proceeding, Mr. Roybal was employed by WFC as a belt cleaner being paid miner operator wages.

DISCUSSION

Under the Mine Act, a complaining miner bears the burden of proving that he was engaged in a protected activity, and that the adverse action complained of was motivated in any part by that activity.

In this case, it is conceded that Mr. Roybal engaged in a protected activity by participating in the MSHA fatality investigation. It is further conceded that WFC took adverse action against Mr. Roybal by suspending him with intent to discharge.

However, Mr. Roybal has failed to show the adverse action was motivated in some part by the protected action. The record

^{11/} There was no testimony that WFC had interfered with Mr. Roybal's participation in MSHA's accident investigation in any way.

^{12/} The WFC personnel responsible for ordering Mr. Roybal's suspension with intent to discharge agreed with Mr. Roybal's testimony on this point. (Tr. 36, 201, 224, 241, 320, 371).

fails to show any such motivation. In the second complaint ^{13/} filed here, Mr. Roybal alleges he had been "discriminated against because he had participated in an MSHA investigation." However, at the hearing he asserted this was not true. (Tr. 114). Further, there was no evidence that WFC had interfered with Mr. Roybal's participation in MSHA's accident investigation in any way.

Finally, Mr. Roybal admitted that no one from WFC discussed the MSHA accident investigation with him. (Tr. 109-110). In addition, WFC witnesses Callor, Romero, Huey, and McGlothlin ^{14/} corroborated Mr. Roybal's testimony. (Tr. 36, 201, 241, 320, 371).

In addition to the foregoing, the evidence establishes that WFC's decision to suspend Mr. Roybal was based on a valid business judgment. These reasons, stated in WFC's notice (Ex. C-2) were (1) Mr. Roybal's failure to comply with standard operating job procedures, (2) unsafe act resulting in fatality, (3) misrepresentation of facts, (4) conspiring with fellow employees against Wyoming Fuel Company.

The first two reasons are amply supported by the uncontroverted evidence. The third factor is also apparent: during the period of the investigation, Roybal blamed the accident on the stuck throttle. However, the evidence indicates the throttle was not defective. At the hearing, Roybal did not refer to the throttle in any manner. The fourth facet of WFC's discharge, conspiring with fellow employees, was not established in the evidence. However, the Commission's function is not to pass on the wisdom or fairness of the operator's business justification, but rather only to determine whether they are credible, and whether they could have motivated the particular operator as claimed. Bradley v. Belva Coal Co., 4 FMSHRC 982, 993 (1982); Secretary on behalf of Brock Blue Circle, Inc., 11 FMSHRC 2181, 2214 (1989) (Koutras, J). I find the company's motivations to be credible and they motivated the operator to proceed as it did.

Mr. Roybal's witness Mr. Butero believed the company's views of the accident were erroneous. However, he testified that WFC has a reasonable basis to reach such conclusions. I agree. (Tr. 167-170).

^{13/} It is not necessary to explore the activities involving the filing of the complaints in this case. (Tr. 161-162, 164; Ex. C-1).

^{14/} These are the WFC personnel responsible for ordering Mr. Roybal's suspension with intent to discharge.

In sum, Mr. Roybal has failed to establish that the adverse action taken against him was for any protected activities.

Mr. Roybal argues that WFC's activities establish a discriminatory intent. Specifically, he claims WFC discriminated against him because of his Union's protected activities during the investigation ^{15/} as well as Mr. Butero's letter to MSHA's District 9. ^{16/}

As to the initial facet, Mr. McGlothlin testified that allegations concerning first aid safety, transportation, training, and recordkeeping did not relate to Mr. Roybal. He indicated the misrepresentation of facts "has to do with the throttle valve that he alleged malfunctioned and caused the accident." (Tr. 389).

Further, Mr. McGlothlin was not aware of the Butero letter until after Mr. Roybal was suspended. (Tr. 154, 382).

Mr. Roybal also relies on the Corte and Callor statements to establish discriminatory motive.

The witnesses in this case all showed considerable partisanship. I consider the Corte statements (Tr. 153, 154), as related by Mr. Butero, to be hesitant and inconclusive. In analyzing the statement Mr. Butero himself stated "it didn't dawn on me that it might be action against Mr. Roybal." (Tr. 155). I agree it would be speculative to conclude that the Corte statement established discriminatory intent.

In addition, there is no evidence that Mr. Corte had any involvement in Mr. McGlothlin's decision to suspend Mr. Roybal, nor is there any evidence that any WFC management official was aware that Mr. Corte had talked to Mr. Butero. (Tr. 397).

The Callor statements (Tr. 292-294) were made during a grievance meeting concerning Mr. Roybal's suspension. The meeting was after Mr. Roybal had been suspended. In any event, the

^{15/} Mr. Butero complained to MSHA about task-training, inadequate blankets, and evacuation methods. (Tr. 149, 163) MSHA's representative told Mr. Butero that these factors were not connected to the cause of the accident, hence not related to the investigation. (Tr. 163).

^{16/} The Butero letter was not in evidence.

main thrust of Mr. Callor's statements was that it was seeking advice whether it could counter what it saw as the Union's disruption of the MSHA investigation. An operator is entitled to seek expert advice as to what its rights are without being in violation of Section 105(c) of the Mine Safety Act.

Further, Mr. Roybal claims WFC's contact with the Las Animas County District Attorney (Colorado) was an apparent attempt to persuade the District Attorney to file charges against him.

The uncontroverted evidence shows the contact between WFC and the District Attorney occurred because WFC officials believed that the evidence uncovered during the accident investigation indicated there may have been a negligent act that resulted in the death. (Tr. 383).

Company attorney Corte felt there was an obligation to report the fatality to the authorities. (Tr. 383).

No doubt, the contact with the District Attorney was to have him file charges. Given the circumstances involved, this conduct does not establish a discriminatory intent against Mr. Roybal within the meaning of the Mine Act.

Finally, Mr. Roybal perceives a discriminatory inference in WFC's delay until October 31 before taking adverse action against him.

The decision to suspend Mr. Roybal was made following MSHA's review of WFC's training records. The event marked the conclusion of the MSHA accident investigation. (Tr. 379-380, 396). The management's communications with legal counsel and a Labor Relations consultant were made for the purpose of identifying what actions could be taken against Mr. Roybal. (Tr.392-396).

WFC's delay was not inappropriate, since MSHA's investigation could have disclosed additional facts, including mitigating factors, which might indicate that suspension was inappropriate. (Tr. 390). Further, given the potential for litigation, WFC's consultations with legal counsel and a labor expert, were not inappropriate.

In support of its position, Mr. Roybal relies on Phelps Dodge Corporation, 3 FMSHRC 2508 (1981), rev'd on other grounds sub nom, Donovan ex rel. Chacon v. Phelps Dodge Corp., 709 F.2d 86 (D.C. 1983); Borch v. Federal Mine Safety & Health Review Com'n, 719 F.2d 194 (6th Cir. 1983) citing NLRB v. Transportation Management Corp., 51 U.S.L.W. 4761 (U.S. June 15, 1983); Eastern

Associated Coal Corp., 7 FMSHRC 1766 (1985), aff'd in part and rev'd in part Eastern Associated Coal v. Federal Mine Safety & Health Review Com'n, 813 F.2d 639 (4th Cir. 1987); and Secretary of Labor, Mine Safety & Health Administration (MSHA) on behalf of Bobby Gooslin v. Kentucky Carbon Corp., 4 FMSHRC 1 (1982). However, these cases are not inopposite the views expressed herein.

For the foregoing reasons, the complaint herein is DISMISSED.


John J. Morris
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

NOV 16 1990

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 90-86-DM
ON BEHALF OF	:	MSHA Case No. MD 90-03
ALONZO WALKER,	:	
Complainant	:	Selma Mine
v.	:	
	:	
DRAVO BASIC MATERIALS COMPANY,	:	
INC.,	:	
	:	
AND	:	
	:	
R & S MATERIALS, INC.,	:	
Respondents	:	

ORDER

Before: Judge Fauver

Complainant has filed a satisfaction of order, stating that the relief provided in the order of September 28, 1990, has been fully accorded.

WHEREFORE IT IS ORDERED that the decision of August 10, 1990, and the order of September 28, 1990, constitute a final disposition of this proceeding.



William Fauver
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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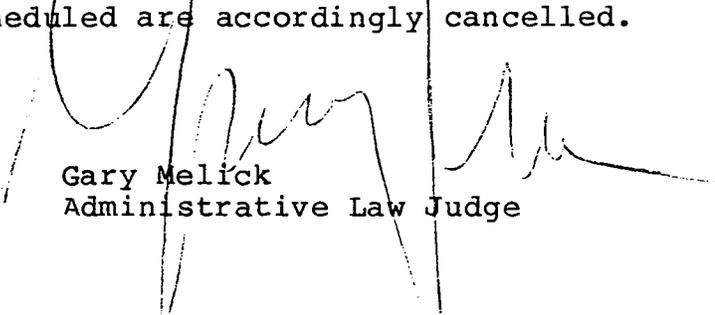
NOV 16 1990

CURTIS R. PICKEL, : DISCRIMINATION PROCEEDING
Complainant :
v : Docket No. LAKE 90-114-D
: :
B & LS CONTRACTING, INC., : VINC CD 90-05

ORDER OF DISMISSAL

Before: Judge Melick

Complainant Curtis Pickel, requests approval to withdraw his complaint in the captioned case for the reason that "we have reached an agreement between ourselves". Under the circumstances herein, permission to withdraw is granted. 29 C.F.R. § 2700.11. This case is therefore dismissed and the hearings previously scheduled are accordingly cancelled.



Gary Melick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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NOV 20 1990

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 89-108
Petitioner : A.C. No. 48-00732-03503 ZC7
 :
v. : Belle Ayr Strip
 :
THE INDUSTRIAL COMPANY OF :
WYOMING (TIC), :
Respondent :

DECISION

Appearances: S. Lorrie Ray, Esq., Office of the Solicitor, U.S.
Department of Labor, Denver, Colorado,
for Petitioner;
Sharp & Casson, P.C., Steamboat Springs, 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 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the "Act"). The Secretary charges the Industrial Company of Wyoming (TIC) with a 104(d)(1) significant and substantial violation of 30 C.F.R. § 77.204.

TIC filed a timely answer to the Secretary's proposal for penalty, denying the alleged violation. After notice to the parties, an evidentiary hearing on the merits was held before me at Steamboat Springs, Colorado. Oral and documentary evidence was introduced. Both parties have filed post-hearing briefs which I have considered, along with the entire record in making this decision.

STIPULATIONS

1. The decedent, Jeffrey Rosenau, sustained fatal injuries when he fell through a 6-foot, 6-inch square opening at the top of the Fluid Dryer Bin Chamber at Level 183 of the dryer building.

2. The decedent fell approximately 44 feet.

3. The decedent was wearing a safety belt with a lanyard, but the lanyard was not tied off at the time of the fall.

4. The printout of the history of respondent's violations (Ex. A) is accurate.

5. Although respondent denies that it committed any violation and denies that any penalty should be imposed, the proposed \$2,000 penalty would not affect the respondent's ability to continue in business.

6. The Mine Safety and Health Administration has no written or published guidelines, standards, or policies regarding the structural steel construction or steel erection practices in the construction industry.

7. Respondent immediately abated the alleged violation in good faith.

I

STATEMENT OF FACTS

Respondent, The Industrial Co. of Wyoming (TIC), is a medium-size heavy industrial construction company. The majority of its activity and service involves structural steel erection. At the time of the Accident, the steel erection project at which respondent was working was located near Gillette, Wyoming, at the Belle Ayr Mine, owned by AMAX Coal Company. The prime contractor, McNally-Pittsburgh, Inc., had contracted with AMAX to design and erect certain structures and machinery in the modernization of the Belle Ayr Mine. McNally subcontracted to Respondent, TIC, the structural steel erection involved in the construction of the coal dryer building.

Mr. Jeffrey Rosenau was an experienced iron worker who had worked high in the air for several years before he was hired as an iron worker by TIC. At the Belle Ayr site, Mr. Rosenau first worked on the construction of various steel structure components and trusses. He worked on the ground and up to 30-40 feet in the air. Later, at his request, he was transferred to work as a connector on the erection of the coal dryer building. He worked under Kevin Kelly, the iron worker lead man for TIC.

On the day of the accident, Mr. Rosenau and Jessie Thomas were working as connectors installing steel beams on the coal dryer building, at level 183, which was 83 feet above the ground.

Iron workers operating as connectors usually work at the highest level of the structure being erected. The steel beams were hoisted up to them by a crane located on the ground next to the building. The connectors working high in the air positioning each beam while still attached to the crane into a pre-designated position, putting sufficient bolts in each end of the beam to secure it in place.

The accident occurred at approximately 5 o'clock on June 3. Just prior to the accident, Mr. Rosenau and Mr. Thomas were connecting and bolting up steel beams over the surge bin, a large, open, uncovered structure approximately 18 feet by 30 feet deep, which had been installed the previous day. This bolting-up procedure followed the reinstallation of a steel beam which had inadvertently been installed backwards. Mr. Rosenau apparently ran out of bolts, got up from where he was working directly over the surge bin, and walked in the direction of the bolt bag about 28 feet away. The bolt bag was located near the opening to the dryer bin on Level 183 of the coal dryer building. It is not known for certain precisely what route Mr. Rosenau took from the surge bin to the bolt bag or how the accident occurred. There were no eye witnesses to the accident. However, Mr. Rosenau did pass through the opening of the dryer, as he fell through space. The opening was surrounded by structural steel beams located just above the opening. These are the beams, which would eventually support the decking or floor at Level 183. These beams were not yet squared and the bolts holding them in place were not fully tightened and thus the beams were not in final place. Mr. Rosenau received fatal injuries after falling approximately 44 feet to the bottom of the dryer bin. Mr. Thomas did not see Mr. Rosenau fall, but did hear what sounded to him like tools bouncing off the steel structure.

The Department of Labor, Mine Safety and Health Administration (MSHA) investigated the accident and, in its report received in evidence, summarized how the accident occurred as follows:

Jeffery Rosenau, age 26, Iron Worker, fell from a beam he was traveling on through a 6-foot, 6-inch square opening at the top of the Fluid Dryer Bed Chamber. The victim fell about 44 feet, receiving fatal injuries. Rosenau was wearing a safety belt with lanyard, but the lanyard was not tied off because he was moving from one location to another.

MSHA stated in the body of its report:

Work progressed normally until about 4 p.m. While installing steel beams, it was determined that a steel beam had been installed incorrectly. The steel beam was attached to a Bucyrus Erie Crane used for hoisting and positioning steel, unbolted, turned around, repositioned in the correct direction, and secured in place. Bolts used to attach other beams to the installed beam were located approximately 28 feet from the beam to be installed in the immediate work area.

About 5 p.m., Rosenau unlatched his safety lanyard and began walking a W 10 by 22-wide flange I-beam 10.17 inches deep with a flange width of 5.75 inches. He apparently gathered enough bolts from where the bolts were located, and started back to the work area. The beam he was traversing was located above the dryer chamber adjacent to where the top unit of the chamber was to be installed. A 6-foot, 6-inch square opening in the top of the chamber was located south of the I-beam he was traversing. Rosenau lost his footing and fell through the opening.

MSHA's Narrative Findings for a Special Assessment described the accident as follows:

The injuries were caused when the victim slipped or stumbled as he was walking on an I-beam with a 5.75-inch flange; and he fell 43 feet, 8 inches. The victim was wearing a safety belt with lanyard, but because of his movements, he was not able to tie off to prevent a fall.

Based upon the record, I find that this fatal fall-of-person accident occurred when the 26-year old steel erection worker slipped or stumbled as he was walking on an I-beam on his way back to his immediate work area after obtaining additional bolts he needed to complete the steel beam connecting erection work he was performing at the 183 level of the dryer building. In accordance with the usual and customary practice of connectors in the steel erection industry, he was walking on the 5.75-inch wide flange of an I-beam when he slipped or stumbled and fell from the beam. As he fell into space, he fell through the 6 x 6'6" opening of the dryer bin and landed on the bottom of the bin. The victim was wearing a safety belt with lanyard, which he used, as is the custom and practice of connectors in steel erection to prevent fall-of-person injuries. Undoubtedly, he unlatched the end of the lanyard so he could travel across the steel gridwork

at Level 183 where the bolt bag was located, approximately 28 feet away. Thus decedent was not tied off at the time of the accident because he was traveling to an area beyond the length of the lanyard.

The parties stipulated that MSHA has no written or published guidelines, standards, or policies regarding the construction of structural steel or steel erection practices in the construction industry. Four witnesses - Kevin Kelly, Lee Dessnar, Steve Johnson, and Melvin Cox - all experienced in the steel-erection industry - testified regarding the construction methods utilized by Respondent in the construction of the coal dryer building and about the standards, customs, and practices used in the structural steel erection industry generally. Each of these four witnesses testified that the methods and practices utilized by TIC in the construction of the coal dryer building were consistent with those standards, customs, and practices.

Kevin Kelly, who has been an iron worker for more than six year and who has worked on approximately 20 structural steel buildings similar to the coal dryer building during that time period, testified that the standard and customary sequence of construction of a building of this type is to set the vertical columns, set the steel beams in what will eventually be a horizontal floor, set any equipment or machinery that may come up through that floor, put bolts in the ends of the steel beams, tighten the bolts and square the structure, and then install the flooring and cover all holes which would not otherwise be covered by flooring or filled with machinery. Lee Desner, who has been and iron worker for eight to ten years, and who has worked on approximately 30 structural steel buildings during that time period, testified to the same standard and customary sequence of construction followed both in the structural steel erection industry generally and by Respondent in the construction of the coal dryer building. Steve Johnson, who has been involved in instructural steel construction for 20 years, and who was the construction manager for Respondent at the Belle Ayr Mine, also testified to the standard and customary fashion in which a structural steel building such as the coal dryer building is erected, and that the coal dryer building was constructed in the standard and customary fashion. Melvin Cox, who was the project superintendent at the Belle Ayr Mine for McNally-Pittsburgh, Inc., and who has 19 years of experience in the structural steel erection industry, participating directly in the construction of over 100 structural steel buildings, testified that the sequence of construction of a structural steel building always follows a standard sequence of standing the vertical steel columns, installing any equipment which will pass up through the building, installing

the steel beams which will eventually support a horizontal floor, one layer at a time, bolting the beams in place, "rattling" or squaring and tightening the beams, and then installing the flooring and covering all openings which will not be covered by flooring or immediately filled by equipment or machinery. He further testified that the standard sequence and methods of construction of structural steel buildings are always the same no matter what the design or ultimate function of that building, and that Respondent constructed the coal dryer building and Level 183, the site of the accident, in conformance with the standards and customs of the structural steel erection industry.

All of the witnesses who testified at the hearing stated that Level 183, the site of the accident, was an open gridwork of steel beams with numerous openings through which men or materials could fall and that the dryer bin opening was but one of many such similar openings. The photographs (Exhibits 5, B, D, E, F and G) received into evidence, also clearly depict the state of construction of Level 183 and the open gridwork of steel beams, containing approximately 46 openings through which men or materials could have fallen the same or a similar distance as through the dryer bin opening.

Jessie Thomas, Lee Dessner, Steve Johnson and Melvin Cox, all testified without exception that, given the stage of construction existing at Level 183 of the coal dryer building at the time of the accident, the dryer bin opening would not have been covered; they would not have covered it and they would not have expected it to be covered. Further, those witnesses testified that the dryer bin opening would have been covered in the standard and customary sequence of construction always followed in the structural steel erection industry and that there was no reason to deviate from that standard sequence.

MSHA inspector Caughman testified that the highest floor below Level 183 was a completed floor and, as such, it had no uncovered openings in it.

Jessie Thomas, Lee Dessner, Steve Johnson and Melvin Cox also testified without exception that, as experienced iron workers, they did not consider the dryer bin opening to be any different or more hazardous than any of the approximately forty-five other similar openings present a Level 183 at the time of the accident and that they did not recognize it as a hazard which needed protection.

Kevin Kelly and Steve Johnson both testified that, at the stage of construction existing at the time of the accident, the

dryer bin cover was not installed because to install it out of the standard and customary sequence would have created a construction problem; that since the cover was to be attached to both the bin top and to the surrounding steel beams, it could not be installed until the steel beams had been installed, squared and tightened, which had not yet occurred; and that, in fact, it had to be moved again in order to complete the construction of Level 183.

MSHA Inspectors Ferguson called by the Secretary admitted that, if Mr. Rosenau had fallen in any other direction through an opening of a similar nature for a similar distance, MSHA would not have cited Respondent for any violation of 30 C.F.R. § 77.204. Mr. Cox testified that falls through the openings to the south and the north of the dryer bin opening, as well as through most of the openings at Level 183 would have involved a fall of the same distance as through the dryer bin opening.

MSHA Inspectors Ferguson and Caughman also testified that MSHA did not require the covering or protecting of any of the other forty-five similar openings at Level 183, that MSHA considered the area safe for resumption and completion of normal structural steel construction activities after the dryer bin opening had been covered, and that MSHA did not cite Respondent for any violations for the other forty-five openings in this incomplete structure with its steel gridwork of openings through which men or materials could have fallen.

II

MSHA, after investigating the fatal accident, issued a citation alleging TIC violated the provisions of 30 C.F.R. § 77.204 which read as follows:

§ 77.204 Openings in surface installations;
safeguards.

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

The Secretary's position appears simple and straightforward. The decedent obviously fell through an opening through which men or material could fall. Nevertheless, the application of this regulation to the facts of this case strikes me as being an inappropriate wooden application of this regulation.

TIC asserts that 30 C.F.R. § 77.204 is unenforceably vague as applied to the facts of this case because it does not give fair warning to TIC, or any other structural steel erection contractor, that the conduct complained of--lack of a cover or barrier over the dryer bin opening--is prohibited by the terms of that regulation. TIC asserts that to pass constitutional muster, the regulation must provide adequate notice to TIC of the precise parameters of its responsibility and that 30 C.F.R. § 77.204 of 30 C.F.R. especially in light of the introduction to Part 77 contained in § 77.200, does not provide such adequate notice and fair warning.

TIC contends that whether the regulation provides constitutionally adequate warning and notice is measured by the standards, practices and customs of the industry at issue, i.e., the structural steel erection industry. Measured by the standards of conduct followed in that industry, § 77.204 fails to provide the adequate notice and fair warning, because those customs, practices and standards, as adhered to by TIC in this construction project, do not expect or require the covering of this one opening among approximately forty-six similar openings at the stage of construction existing at the time of the accident. Further, when measured against the reasonable man in the industry standard used by the courts to determine if a person engaged in the structural steel erection industry would have recognized this one opening among forty-six similar openings as a hazard and protected against it, the evidence is clear and undisputed that such an opening in the incomplete, open and unexisting at Level 183 on the day of the accident would not have been covered or otherwise protected.

TIC asserts an employer cannot be cited and penalized where his conduct is not specifically addressed by a regulation, as has been admitted by MSHA in this case, and where that conduct complained of, conforms to the common practice and customs of those engaged in the structural steel erection industry.

By its express terms, 30 C.F.R. § 77.204 does not specifically apply to ongoing, incomplete construction of structural steel buildings at the stage of construction existing at the time of the accident. TIC asserts a building, especially one level in that building under construction and incomplete, cannot be "maintained" and "repaired" pursuant to § 77.200, and the obvious intent of § 77.204 is to require the covering or other protection of an opening in an otherwise completed building or completed floor of a building.

TIC argued that given the stage of construction existing at Level 183 of the building being erected, the condition complained of by MSHA was not foreseeable, and therefore, cannot form the basis of a citation and a penalty. TIC correctly points out that the testimony is clear and uncontroverted that it was not foreseeable that this one opening among forty-six similar openings posed any problem or hazard different from the others existing at Level 183 at the time of the accident and for which MSHA has admitted it did not and would not cite Respondent.

At the hearing, I heard evidence regarding important facts from witnesses experienced in the matters at issue. I also heard opinion testimony from MSHA inspectors who admitted they have no experience in the steel erection industry. Thus many of the facts, as established by Respondent's witnesses were uncontroverted. The matters established by Respondent--and left uncontroverted by Petitioner--relate to the customs, standards and practices of the structural steel erection industry and the fact that at the stage of construction that existed at the time of the accident, one opening among forty-six similar openings did not create a different or more hazardous condition than the other openings, and would not have been covered at that stage of the construction.

Elaborating on the constitutional argument TIC contends that 30 C.F.R. § 77.204 is unenforceably vague as applied on due process grounds because in the factual circumstances presented by this case. It does not give fair warning to TIC, in light of the common understanding and commercial practices applicable to the structural steel erection industry, that the conduct complained of is proscribed by its terms.

TIC in its post-hearing brief states the following:

A. Where the imposition of penal sanctions is at issue in a proceeding brought by an enforcing administrative agency, the due process clause of the United States Constitution requires that the regulation sought to be enforced give "fair warning" of the conduct it prohibits or requires, and if it does not, it is unenforceable. United States v. L. Cohen Grocery Co., 255 U.S. 81, 41 S.Ct. 298, 65 L.Ed. 516 (1921). The United States Supreme Court and the Circuit Courts of appeal have consistently held that regulations sought to be enforced must clearly describe what conduct

is required or prohibited, and if the regulation is too broad or general and does not provide that specificity, it is unconstitutionally vague and unenforceable. "[B]ecause we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S.Ct. 2294, 2298, 33 L.Ed.2d 222 (1972), quoted in Diebold v. Marshall, 585 F.2d 1327, 1335 (6th Cir. 1978). The principle to be applied is the due process requirement of fundamental fairness and, "[e]ven a regulation which governs purely economic or commercial activities, if its violation can engender penalties, must be so framed as to provide a constitutionally adequate warning to those whose activities are governed." Diebold, Inc. v. Marshall, *supra* at 1335-36. See also, e.g., Phelps Dodge Corporation v. FMSHRC, 681 F.2d 1189, 1193 (9th Cir. 1982); Kropp Forge Co. v. Secretary of Labor, 657 F.2d 119, 122-24 (7th Cir. 1981); B & B Insulation, Inc. v. OSHRC, 583 F.2d 1364, 1367-71 (5th Cir. 1978). "Regulations must 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited'." Phelps Dodge Corporation v. FMSHRC, 681 F.2d 1189, 1193 (9th Cir. 1982); Kropp Forge Co. v. Secretary of Labor, 657 F.2d 119, 122-24 (7th Cir. 1981); B & B Insulation, Inc. v. OSHRC, 583 F.2d 1364, 1367-71 (5th Cir. 1978). "Regulations must 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited'." Phelps Dodge Corporation v. Federal Mine Safety, Inc. v. United States, *supra* at 1194, quoting Lloyd C. Lockrem, Inc. v. United States, 609 F.2d 940, 943 (9th Cir. 1979). This "reasonable opportunity" requires that a regulation give those to whom it purportedly applies "adequate notice . . . of the exact contours of his responsibility." Dravo Corporation v. OSHRC, 614 F.2d 1227, 1234 (3rd Cir. 1980), quoted in Kropp Forge Co. v. Secretary of Labor, *supra* at 122. Obviously, an alleged violation of 30 C.F.R. § 77.204 exposes Respondent to penalties, and these principles of law apply in this case.

B. The question whether a regulation provides such "adequate notice" is to be answered "in the light of the conduct to which [the regulation] is applied." United States v. National Dairy Products Corp., 372 U.S. 29, 36, 83 Sup. Ct. 594, 600, 9 L.Ed.2d 561 (1963), quoted in Diebold, Inc. v. Marshall, supra at 1336. "[T]he constitutional adequacy of the warning given must be measured by common understanding and commercial practice'." Diebold, Inc. v. Marshall, supra at 1336, quoting United States ex rel. Shott v. Tehan, 365 F.2d 191, 198 (6th Cir. 1966). In other words, the "common understanding and commercial practice" to which these standards of analysis apply is that of the practices, customs and procedures that establish the standards of conduct in the industry in which the employer participates. See Diebold, Inc. v. Marshall, supra at 1336-37, and Cape and Vineyard Division v. OSHRC, 512 F.2d 1148, 1152-53 (1st Cir. 1975). Such standards of conduct are those of "a reasonable prudent employer" in that industry. See B & B Insulation, Inc., supra at 1370. "[A]n appropriate test is whether a reasonably prudent man familiar with the circumstances of the industry would have protected against the hazard." Cape and Vineyard Division, supra at 1152. This "reasonable man standard" is used by the courts to determine if a reasonable person engaged in the industry in question would have recognized the hazard and protected against it. B & B Insulation, Inc., supra at 1369-70. This Court must look to persons whose conduct would be subject to judgment by that reasonable man standard, *i.e.*, employers engaged in the steel erection industry.

The conduct of the reasonably prudent employer is established by reference to industry custom and practice. Cape and Vineyard Division, supra at 1152.

The standards, customs and practice of the steel erection industry were established through the undisputed testimony of Kevin

Kelly, Lee Dessner, Steve Johnson and Melvin Cox, persons experienced in the structural steel erection industry, and those witnesses testified without contradiction that the dryer bin opening was not a recognizable hazard, given the stage of construction existing on June 3, 1988, and would not have been covered or otherwise protected by a reasonable employer in the industry.

Diebold, Inc., supra at 1336, sets forth certain factors which in combination deprived the employer in that case of constitutionally adequate warning as to what conduct was prohibited by the regulation at issue. Examination of similar factors in this case leads to the same result. 30 C.F.R. § 77.200, the introductory and definitional section to Subpart C of § 77, states as follows:

All mine structures, enclosures, or other facilities (including custom coal preparation) shall be maintained in good repair to prevent accidents and injuries to employees.

First, an employer could conclude from from this general language that buildings under construction, which by their very nature cannot be "maintained" or "repaired" until they are completed, were exempted from the broad, general requirements of that section, as well as of § 77.204.

Second, the undisputed "common understanding in commercial practice" relating to the erection of structural steel buildings as testified by Kevin Kelly, Lee Dessner, Steve Johnson and Melvin Cox, do not require the covering of an opening such as that for which Respondent was cited in this case at the stage of construction which existed at the time of the accident. Those witnesses testified that structural steel erection always follows a standard and customary sequence, which is the only way such buildings can be constructed, and that that sequence was followed with respect to the construction of the dryer building in which the dryer bin opening was located.

From that, this Court must conclude that TIC, as an average employer in the structural steel erection industry, was unaware that § 77.204 required the covering of one opening at the stage of construction existing on June 3, 1988, while approximately 45 other openings of similar or identical nature were not required to be covered. Therefore, whether TIC or any other employer in the structural steel erection industry looked to § 77.200 and § 77.204 or to industry customs and practices, it would have been led to the conclusion that the dryer bin opening at issue in this case was exempted from the requirement of a covering or other protective measures at the stage at which the construction existed on June 3, 1988.

Petitioner has also recognized that Respondent's conduct in this case must be measured by "the stage of construction that an opening existed" and the particular "nature of the construction" involved, i.e., open structural steel erection. (Section 4.b of Petitioner's Response to Pre-Hearing Order). Petitioner has thus recognized and admitted that the standards, customs and practices of the steel erection industry provide the benchmark by which Respondent's conduct is to be measured. The testimony presented by Respondent at the hearing in this matter clearly established--without refutation by Petitioner--the standard and customary sequence of construction in the structural steel erection industry and the methods and procedures used to accomplish that construction.

The constitutional adequacy of the conduct mandated or prohibited by § 77.204 must be measured by those standards and customs, as presented by witnesses Kevin Kelly, Lee Dessner, Steve Johnson and Melvin Cox. Diebold, Inc. v. Marshall, supra at 1336-37. Respondent complied with the standards and customs of conduct of "a reasonable prudent employer" in the steel erection industry, B & B Insulation, Inc., supra, and measured by those standards and customs, § 77.204 clearly fails to provide constitutionally adequate warning.

Where an employer's conduct is not addressed by a detailed and precise regulation and that conduct conforms to the common practice and customs of those similarly situated in the industry, the employer cannot be cited and penalized. B & B Insulation, Inc., supra at 1371.

C. The testimony was clear and uncontroverted that if Mr. Rosenau had fallen to either side of the dryer bin opening or in almost any other of the numerous openings existing in Level 183 on June 3, 1988, he would have fallen almost as far as he fell through the dryer bin opening (T. 300-04). MSHA Inspectors Ferguson (T. 103, lines 14-19) and Caughman (T. 190, lines 4-B, p. 210, lines 4-8) both stated unequivocally that had Mr. Rosenau fallen in any other direction for the same distance, MSHA would not have cited the Respondent for a violation of 30 C.F.R. § 77.204. Witnesses Kelly, Dessner, Johnson and Cox all clearly testified that the dryer bin opening was no different from nor more hazardous a condition than any of the other forty-five openings existing on Level 183 at the time of the accident. (See pages 6-7 of this Brief for relevant citations to the record).

Section 77.204 does not require the covering or protecting of bin openings while providing that all other openings of a similar nature through which men or materials may fall a similar distance with a similar result need not be covered or protected. However, this is now the arbitrary interpretation which MSHA wishes to have this Court give to § 77.204. The law is clear, however, that MSHA and the Secretary of Labor cannot construe § 77.204 to mean what it does not adequately and clearly express, even if the foregoing was intended by that agency. Phelps-Dodge Corp., supra at 1193, and Gates & Fox Co., Inc., supra at 156. To allow otherwise would result in arbitrary, subjective and inconsistent interpretations of the unclear regulation. The rule-making procedures of the Administrative Procedures Act may not be supplemented by ad

hoc adjudicatory proceedings based on an MSHA inspector's subjective interpretation. NLRB v. Wyman-Gordon Co., 394 U.S. 759, 564, 89 S.Ct. 1426, 22 L.Ed.2d 709 (1969). Further, MSHA and the Secretary of Labor would apparently assert the authority to decide what a reasonable prudent employer would do under the circumstances and state of construction existing in this case on June 3, 1988, even though the uncontroverted testimony clearly established that none of the experienced witnesses would have followed the course of action which MSHA and the Secretary of Labor would now attempt to dictate. MSHA and the Secretary of Labor may not disregard this demonstrated and uncontroverted industry custom and practice which was followed by Respondent in this case. B & B Insulation, Inc., supra at 1370-71. As stated above, only by reference to industry customs, practices and standards can the conduct of the "reasonable prudent employer" be established, and Respondent's conduct in this case must be measured by those industry customs, practices and standards. Id.; Cape and Vineyard Division, supra at 1152. Petitioner has wholly failed to prove that a reasonable prudent employer familiar with the customs, practices and standards in the structural steel erection industry would have recognized the dryer bin opening as a hazard and, therefore, covered or otherwise protected this one opening among forty-six similar openings.

D. Specific standards of conduct are desirable so that the goal of reducing industrial accidents can be reached by employer compliance through elimination of specifically identified safety and health hazards by specifically prescribed remedial measures. "Preventive goals are obviously not advanced where broad standards are extended to encompass every situation which gives rise to an unlikely accident." B & B Insulation, Inc., v. OSHRC, supra at 1371. Thus, in the case at hand, the Secretary of Labor bears the burden of clearly demonstrating that a reasonable structural steel erection employer at the stage of construction existing on June 3,

1988, would have recognized the dryer bin opening to be a hazard and, therefore, required the use of "railings, barriers, devices" to protect open gridwork that is necessarily created as steel beams are lowered in place by a crane and bolted to pre-existing framework in a building under construction at a level not yet prepared for installation of covers, machinery and flooring. See B & B Insulation, Inc. v. OSHRC, supra at 1372. Petitioner's own witnesses stated that such openings need not be covered and, as a result, Petitioner has not met his burden of proof.

II. 30 C.F.R. § 77.204 does not apply to ongoing, incomplete construction of structural steel buildings.

30 C.F.R. § 77.204 appears in Subpart C of Part 77, 20 C.F.R., Chapter 1. Subpart C is entitled "Surface Installations." The general requirement of Subpart C appears in § 77.200 which states: "All mine structures, enclosures or other facilities (including custom coal preparation) shall be maintained in good repair to prevent accidents and injuries to employees." Section 77.204 states: "Openings in surface installations through which men or material may fall shall be protected by railings, barriers, covers or other protective devices." Neither of these provisions gives specific fair warning that they apply to the erection of structural steel framework and the procedures and processes necessary thereto, as presented by the facts and circumstances specific to this case.

First, § 77.200 refers to "structures, enclosures, or other facilities" which "shall be maintained in good repair", thereby strongly implying that § 77.200 is to apply to completely constructed "structures, enclosures, or other facilities" which can be "maintained in good repair." Buildings under construction cannot be "maintained" and "repaired". (T. 272, lines 7-21). Second, § 77.204 refers to "openings" in such "structures, enclosures, or

other facilities," requiring them to "be protected by railings, barriers, covers or other protective devices." The basic purpose of these provisions, fairly fairly read, is to require protection by "railings, barriers, covers, or other protective devices" of "openings" in completed structures, such as floor openings in completed floors or roof openings in completed roofs, and neither § 77.200 nor § 77.204 can, in fundamental fairness, be applied to ongoing, incomplete construction of structural steel beam frameworks in which open spaces between beams are necessarily created and existing as construction progresses.

The only case involving 30 C.F.R. § 77.204 of which Respondent is aware is Secretary of Labor v. Pittsburg & Midway Coal Mining Co., 3 MSHC 1637 (Central Dist. 1984). That case involved the issuance of several citations to the operator, one of which was a § 77.204 citation for failing to provide a railing at the opening of a loading dock in a warehouse. That case involved a completed building, and the Court held that the definition of a surface installation in § 77.200 was broad enough to include a loading dock, an opening in and being used in a completed structure. Common sense and fairness do not allow a reading of § 77.204 to require "maintenance" and "repair" of an ongoing, incompletely constructed structural steel building.

III. The condition complained of by MSHA was not foreseeable, and, therefore, cannot form the basis of a citation and penalty.

The testimony presented at the hearing clearly established that there were approximately forty-six similar gridwork openings at Level 183 and that such openings are inherent in the construction of structural steel buildings at the stage of construction present at Level 183 on June 3, 1988. The construction was still in progress, and ironworkers continued to move across all of the open grids to perform their work in the construction of the

dryer building before the accident on June 3, 1988, during the investigation and abatement process, and after the investigation during the completion of the dryer building project. (T. 49, lines 10-21; p. 108, lines 10-25; p. 109, lines 1-25; p. 110, line 1; p. 197, lines 11-14; p. 230, lines 11-25; p. 231, lines 1-9).

Respondent's witnesses testified that it was not foreseeable that this one open area in relation to the other forty-five open areas would or could be a problem at that stage of construction. (T. 272, lines 22-25; p. 273, lines 1-8; see pages 6-7 of this Brief for further relevant citations to the record). They further testified that they did not deem that opening any different a condition or hazard than any of the other openings necessarily present and inherent in the construction of structural steel buildings. (See pages 6-7). In the case of Pyro Mining Company v. FMSHRC, 3 MSHC 2057 (6th Cir. 1986), the Court found that where a condition claimed by MSHA to be properly the subject of a citation was not foreseeable to the operator, that condition could not be the basis for a finding of negligence and issuance of a citation. In the case at hand, only with the benefit of hindsight and by ignoring the clear and uncontroverted testimony of Respondent's witnesses can a finding be made that the open area complained of and the resulting accident involving that open area were foreseeable to the Respondent. The condition of Level 183 was standard and customary for the stage of construction existing on the date of the accident, and given the unforeseeability of this condition, it cannot be the basis for a valid citation.

III

The purpose of the safety standard § 77.204 is to protect against fall-of-person injuries. The section states several specific ways this can be done and concludes with the phrase "or other protective devices." It can be argued that the decedent was wearing and using whenever practical a "device" (safety belt and lanyard) to prevent a fall-off-person accident even

though at the time of his fall he was not able to "tie off." He was not able to "tie off" because he was moving to a location beyond the length of his lanyard. It is also noted that there is no evidence that anyone worked at Level 183 other than the two steel erection workers (connectors) positioning and bolting beams hoisted up to them by a crane. There is no evidence these connectors did not use their safety belts and lanyards to prevent fall-of-persons accident whenever it was practical to do so. The decedent and his fellow connectors were working together to bolt in place the steel beam that would support the decking or flooring at the level. It should be noted that there was undisputed evidence from the inspector and others that the highest completed floor below the 183 Level had no uncovered or unprotected openings.

It can also be noted that what caused the accident in this case was not the opening in the bin but the fact that this ironworker slipped or stumbled and fell while traversing on a beam in the customary manner of steel erection work while connecting. It was only after falling into space that he fortuitously passed through the opening in the top of the dryer bin rather than falling in another direction which would have resulted in the same tragic result but no citation.

The crucial question, as I see it, is the applicability of 30 C.F.R. § 77.204 to the facts of this case given the nature of steel erection which involves positioning and bolting together steel beams hoisted into the air by a crane to create a steel gridwork of many openings.

The opening involved in this case was not an opening in a floor, a walkway, or an work platform which in my opinion would clearly come within the perview of the cited safety standard even in an unfinished building under construction. Under the circumstances and facts of this case I find and conclude that at the stage of construction that existed at the time of the accident that there was no violation of 30 C.F.R. § 77.204.

ORDER

1. Citation No. 3226562 is VACATED and its related proposed civil penalty SET ASIDE.

2. Docket No. WEST 89-108 is DISMISSED.


August F. Cetti
Administrative Law Judge

Distribution:

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/ek

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

NOV 20 1990

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 90-87
Petitioner	:	A.C. No. 15-16162-03542
v.	:	
	:	Docket No. KENT 90-88
BEECH FORK PROCESSING, INC.,	:	A.C. No. 15-16162-03525
Respondent	:	
	:	Docket No. KENT 90-89
	:	A.C. No. 15-16162-03526
	:	
	:	Beech Fork Mine No. 1

DECISION APPROVING SETTLEMENT

Before: Judge Broderick

On November 9, 1990, the parties filed a Joint Motion for approval of a settlement reached by the parties in these cases. The violations were originally assessed at \$10,123 and the parties propose to settle for \$8000.

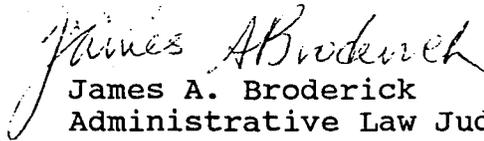
The penalties for the twenty violations in Docket No. KENT 90-87, the agreement proposes to reduce from \$5704 to \$4288; the penalties for the fourteen violations in Docket No. KENT 90-88 from \$3315 to \$2608; for the penalties for the five violations in Docket No. KENT 90-89, originally assessed at \$1104, the parties agree that the amount originally assessed will be paid.

The settlement is based on Respondent's inability to pay the amounts originally assessed. The motion states that Respondent is suffering financial difficulties, and might be forced to cease operation if it were required to pay the full penalties.

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 \$8000 as follows:

\$1000 on December 1, 1990, and \$1000 per month thereafter until the \$8000 is paid in its entirety.


James A. Broderick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
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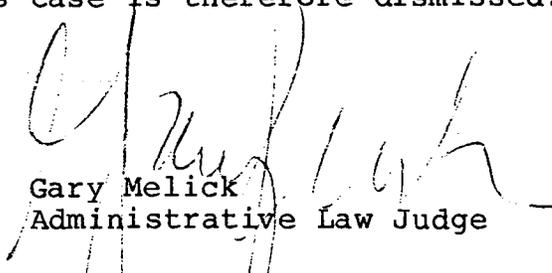
ARCH OF KENTUCKY, INC., : CONTEST PROCEEDING
Contestant :
v. : Docket No. KENT 90-395-R
: Citation No. 3384541; 7/17/90
SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH : No. 37 Underground Mine
ADMINISTRATION (MSHA), :
Respondent : Mine ID 15-04670

ORDER OF DISMISSAL

Appearances: Marco M. Rajkovich, Jr., Esq., Wyatt, Tarrant,
and Combs, Lexington, Kentucky, for Contestant.
Mary Sue Taylor, Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville, Tennessee,
for Respondent

Before: Judge Melick

At hearing, following modification by the Secretary of the subject citation from one issued under section 104(d)(1) of the Federal Mine Safety and Health Act of 1977 to one issued under section 104(a), Contestant requested approval to withdraw its Contest in the captioned case. Under the circumstances herein, permission to withdraw was granted. 29 C.F.R. § 2700.11. This case is therefore dismissed.


Gary Melick
Administrative Law Judge

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

NOV 26 1990

RICHARD R. MAYNES, : DISCRIMINATION PROCEEDING
Complainant :
 :
v. : Docket No. CENT 89-132-DM
 :
 : MD 89-35
PHELPS DODGE CORPORATION, :
Respondent :

DECISION

Appearances: Michael J. Keenan, Esq., Ward, Keenan & Barrett,
Phoenix, Arizona,
for Complainant;
Michael D. Moberly, Esq., Ryley, Carlock & Apple-
white, Phoenix, Arizona,
for Respondent.

Before: Judge Lasher

This proceeding arises under Section 105(c)(3) of the Fed-
eral Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et
seq., (1982) (herein "the Act"). Complainant's initial complaint
with the Labor Department's Mine Safety and Health Administration
(MSHA) was dismissed. Both parties were well represented at the
hearing. 1/

CONTENTIONS OF THE PARTIES

Complainant contends that when he became unit chairman for
the Steelworkers Union in 1988, he became involved in efforts to
resolve a dispute over certain protective equipment at the Ivan-
hoe concentrator and that, because of this and his engaging in
various safety-related issues as well as non-safety related is-
sues which he engaged in as a union representative, he was reta-
liated against by Respondent. (I-T. 22-23). Specifically, Com-
plainant alleges that the disciplinary action (discharge) taken
by Respondent against him was due to his pursuit of an MSHA
complaint over safety equipment, various safety complaints he
lodged in his capacity as union representative, and his pur-
suit of safety-related grievances. (I-T. 24).

1/ The hearing was held on four hearing days over a two-term
hearing period, i.e., February 7, 8, and 9, 1990, and May 8, 1990.
For each of the four days of hearing there is a separate tran-
script beginning with page one. Accordingly, transcript cita-
tions will be prefaced with "I", "II", "III", and "IV" for
February 7, 8, and 9, and May 8, respectively.

Respondent contends that it is engaged in a dangerous mining operation and has concern for the safety of its employees and that in furtherance thereof it has implemented a rule that an employee may be discharged for reporting to work under the influence of alcohol. Respondent points out that it has implemented a specific drug and alcohol policy which includes testing of employees who are suspected of being under the influence. Specifically, Respondent contends that when Complainant Maynes arrived at work on November 23, 1988, his supervisor Israel T. Romero suspected him to be under the influence because of his actions, his characteristics, his appearance, and the fact that he was chewing a large wad of chewing gum. According to Respondent, Mr. Romero asked a fellow supervisor Monty Wilson to confirm his conclusion and Mr. Wilson stepped close to the Complainant and smelled alcohol on the Complainant's breath. After Mr. Wilson reported this to Mr. Romero, Romero contacted his supervisor who shortly thereafter questioned Mr. Maynes and also observed unusual behavior and smelled alcohol.

Respondent contends (1) Mr. Maynes was asked to undergo a drug and alcohol test at this point, in accordance with its policy; (2) Mr. Maynes, after initially agreeing to take the test, refused to take the test; and (3) Maynes was thereafter discharged on two independent grounds, first for refusal to submit to the drug and alcohol test, and secondly for reporting to work under the influence. (I-T. 25-31; II-T. 223; III-T. 13; Ex. R-6).

FINDINGS

Respondent's mine is located at Santa Rita, New Mexico, where it operates an open pit operation together with a concentrator and a smelter (I-T. 33) with a total payroll of 1600 employees. In November 1988, 125 employees were employed at the concentrator where Maynes primarily worked. (II-T. 98, 104, 166). Respondent has a collective bargaining agreement with the Steelworker's Union, as well as with other unions. (I-T. 34).

Complainant, a 16-year employee of Respondent and Steelworkers member, was a concentrator maintenance mechanic since approximately 1983. (I-T. 114, 115, 117; II-T. 98). Complainant, who worked around "moving parts" and electricity (I-T. 116), described his work functions this way:

Besides compressors, I have worked on mobile equipment, operating mobile equipment, preventive maintenance, lubrication, which I would--I would

get oil samples. I perform--change oils on the bearing units in the pump, bearing units in various conveyors, working on conveyors and feed pumps, water pumps. (I-T. 116).

Mr. Maynes conceded at the hearing that his job had the potential to be dangerous. (II-T. 73, 74). 2/

Complainant engaged in various mine safety (protected) activities prior to his discharge:

1. In early 1988, he assisted Manuel T. Serna, a Steelworkers' Safety Committeeman and MSHA designated representantive, to obtain the signatures of other employees in the mechanical department on a petition initiated by the Steelworkers and filed with MSHA regarding Respondent's alleged failure to provide safety equipment (protective clothing). (I-T. 34, 37, 39-42, 46, 120-121). 3/

2. One of Mr. Mayne's union positions (which he assumed on August 24, 1988) was that of unit chairman. (I-T. 122). Samuel Silva, who like Maynes was a maintenance mechanic, held at different times the union positions of shop steward and unit chairman. Mr. Silva described the duties of unit chairman as follows:

A unit chairman is the person responsible for all of the stuff that goes on within the union. That means appointing safety reps, job evaluation, shop stewards, grievance committees, setting up grievance committees, setting up safety meetings,

2/ In the summer of 1988, several months before Maynes was discharged, Respondent had a fatal accident at its Tyrone plant, which resulted in its receiving a penalty of approximately \$6000 from MSHA for allowing an employee to operate equipment while under the influence. (II-T. 196-197). Respondent also established, relevant to the necessity for its drug/alcohol testing policy, that it had a high accident rate in its concentrator maintenance department where Mr. Maynes was employed (II-T. 146, 167-168). I infer, as Respondent contends, that it would have been sensitive to enforcement of its alcohol policy on November 23, 1988, as a result of those two factors.

3/ Other miners circulated these petitions without being discharged or disciplined. (I-T. 51, 95-96).

educating people on safety, just over all, you know, the people that are there, that work for him. (I-T. 55).

3. In September 1988, Complainant, as Unit Chairman, participated in processing grievances (Exs. C-8, C-9,; I-T. 57) involving safety matters, which activity was known to Respondent's management personnel. At one of the meetings held with company management attended by Tony Altringham, General Superintendent of the Ivanhoe concentrator (I-T. 41, 64), Mr. Maynes mentioned that he had contacted MSHA with respect to the matter. (I-T. 60-63).

Respondent concedes that Complainant participated in making safety complaints (Respondent's Brief, p. 26). The record is clear, and I infer from the public nature of Mr. Maynes' activities, that Respondent was aware that Maynes held a position with the Steelworkers (II-T. 109), that he engaged in various mine safety activities and voiced safety concerns. (I-T. 66-69, 120, 124, 126; II-T. 4, 7-10, 15-18, 20, 24, 40, 147).

On November 23, 1988, Mr. Maynes' shift was to commence at 7:30 a.m. (II-T. 117). His immediate supervisor was Israel T. Romero, maintenance supervisor at the Chino concentrator. (II-T. 92, 98, 105, 165). Romero customarily met with his crew in the lunchroom shortly before 7:30 a.m. each day to give them their assignments. At this time, Sam Bencomo, a pipefitter in the maintenance department, told Romero that Maynes wanted him (Romero) to know that he (Maynes) was going to be a few minutes late. Maynes was not in the lunchroom when Romero gave out the work assignments. Romero then waited a few minutes in his office and started to leave when he observed Maynes coming toward him. Maynes came up to Romero and tried to stand next to him. (II-T. 118-119, 166). Maynes told Romero at about 7:40 a.m. (II-T. 124) that he was late because he had forgotten his keys and then said that, if it was okay with Romero, he wanted to leave early that afternoon to go check his children out of school and get them hunting licenses. (I-T. 119; II-T. 78).

Romero noticed something wrong with Maynes, stating in his testimony that ". . . I was attempting to face him and he kept sort of turning away from me." (II-T. 119). Maynes had a "big wad of gum" in his mouth. Romero observed that Maynes' face was "kind of flushed," or semi-swollen, and that his eyes were quite red. Romero also detected the smell of alcohol on him. (II-T. 120). Romero credibly testified that this was the "smell of fresh alcohol." (II-T. 121-125, 148, 150, 151, 152). Romero, although concerned, gave Maynes his work assignment but then,

because he had so many prior problems with Maynes, started to look for another supervisor to confirm his suspicion that Maynes was either very hung over or still drunk. (II-T. 120-124). He asked Monty Wilson, a front-line foreman, i.e., concentrator maintenance foreman (II-T. 165, 179), to talk to Maynes and come back and tell him what he thought. Romero did not tell Wilson the nature of his suspicion, i.e., alcohol. (II-T. 123-124, 173). Wilson then approached Maynes, who was in the locker room, and noticed that Maynes had a "wild expression" on his face, his "eyes were big," his face "was red and flushed," and that he had an enormous wad of gum in his mouth. (II-T. 174, 183-186). Wilson also detected the strong smell of alcohol on Maynes' breath. (II-T. 175-176, 184).

Wilson then returned a short time later and told Romero:

I think you have a problem with Richard Maynes. I think he's under the influence, and I think, for his sake and everybody's sake, you better do something. (II-T. 124). See also II-T. 153, 176, 186.

Wilson testified that he had the impression that Romero was going to do something about the situation and that, if he had not had such impression, he "would have definitely called Richard in the office right then on the spot." (II-T. 178).

Romero then proceeded to the office of his supervisor, maintenance Superintendent Jim Crowley, and advised him of the problem. (II-T. 125). Crowley told Romero to get Maynes and take him to his (Romero's) office. (II-T. 126). Romero did so. Maynes still had the wad of gum in his mouth and he had a can of soda in his hand. (II-T. 128). When they arrived at Romero's office, Tony Mendoza, the Respondent's plant safety inspector (II-T. 189), was there. (II-T. 203-206; III-T. 6). At this point, Mr. Mendoza had no knowledge that Maynes had made safety complaints or that he initiated safety grievances. (II-T. 203). Mendoza observed that Maynes' face was flushed and that he was ravenously chewing a large wad of gum. (II-T. 204-205). Maynes would look away from Mendoza when Mendoza asked him questions. (II-T. 205-206). Mendoza could smell alcohol even through the odor of the chewing gum. (II-T. 206). Maynes was also smoking heavily, according to Mendoza, and drinking "a lot of soda pop." (II-T. 207). Mendoza felt that Maynes was trying to mask the smell of alcohol (II-T. 207, 208, 231-232). Maynes, in his testimony, denied he was under the influence. (III-T. 63).

Mendoza conducted a conversation with Maynes, who admitted drinking a six-pack the night before (II-T. 50, 130, 157, 205). Maynes said he had the last one at 1:30 in the morning. (Maynes' version of what he had to drink on the evening of November 22, 1988, is set forth at II-T. 40-43, 52). Mendoza asked Maynes if he would submit to an alcohol and drug test and Maynes said that he would. (II-T. 50, 131, 206, 208). Mendoza went out to his van to obtain a consent form (II-T. 207). Maynes asked Romero if he could use the phone and asked for Tony Trujillo's number. Trujillo is Respondent's Personnel Safety Supervisor. Romero gave him the number of Gwen Hansen, industrial relations representative, who works for Trujillo. Mendoza walked back into the office and he gave Maynes Mr. Trujillo's phone number. Maynes told Trujillo in Spanish that he was being asked to take a drug and alcohol test and that Romero was harassing him again (II-T. 51, 131-133, 207, 234; III-T. 5). Trujillo advised Maynes to take the test after Maynes admitted drinking the night before. Trujillo advised Maynes the penalty for not taking the test was "probable termination." (III-T. 7, 38).

Romero, being needed elsewhere, left his office a few minutes after 8 a.m. At this juncture, as far as Romero knew, Maynes was going to take the test (II-T. 133-134, 165).^{4/} Mr. Maynes then made another phone call, apparently to his union president and, after hanging up, he requested to see his shop steward, Samuel Silva, who was summoned. Silva and Maynes stepped out of the office and conferred. After five minutes, Mendoza called Maynes back in (II-T. 207-209).

Mr. Mendoza then produced the drug and alcohol consent form. (Ex. C-5) and read and explained it to Mr. Maynes.

Mr. Mendoza persuasively testified as to the efforts he then went through to advise Mr. Maynes concerning the test and, after Maynes protested, concerning the effect of taking the test "under protest,"

^{4/} Romero had no further involvement with Maynes on November 23, 1988, and he testified that, other than testifying at a subsequent hearing, he had nothing to do with any decision in connection with Maynes (II-T. 134), specifically indicating he played no part in the decision to discharge Maynes either by recommending such, or by being consulted with regard to such (II-T. 164).

I began reading this authorization, explaining the program as I was reading it. When we got down to the last two lines where it states, 'I voluntarily submit to the test and desire those results to be released to Chino Mines security personnel,' he asked me how much alcohol a person had to have in his system to come out positive. I advised him it depended on several areas. How much sleep, how much food and liquids, and I advised him I was in no position to make a determination on his case.

I advised him, by submitting to the test, that it was not going to incriminate if it was negative. If his test was negative, he would be returned to work with no loss in pay or benefits. At that point, he indicated that he would take the test, but under protest.

I advised him that the standing rule in the medical community is, if an employee, an individual, goes into a clinic for any type of service and he protests it, that the medical community will not withdraw the sample or subject him to any type of treatment in that respect.

He again indicated that he would protest it. I explained the program again. I advised him, essentially three times, if he fails to submit to the test, he would be suspended pending a hearing or probable termination.

- Q. Do you recall saying that to him on three occasions?
- A. Yes, sir.
- Q. Why so many times?
- A. I like Richard. I didn't want him to get in that situation.
- Q. Do you recall explaining to him taking the test under protest was the same as a refusal?
- A. Yes, sir.
- Q. How many times did you explain that?
- A. At least three times.

Q. For the same reason?

A. Yes, sir. And he continued his statement about taking it under protest. Finally, I just advised Mr. Maynes, I said, "Well, if you would not take it voluntarily, then it's under protest, and I have no choice but to suspend you, pending a hearing for termination."

He said, "Well, that's fine. I understand." I said, "For your sake and my sake, indicate that you--you're protesting it." At that point, he made his statement, "I, Richard R. Maynes, protest--."

Q. Okay. You're reading, when you say this statement, you are referring to the handwritten notation on the consent form?

A. Yes, sir.

Q. He wrote that in your presence?

A. Yes, he did. (II-T. 210-212). (Emphasis supplied).

It is clear, and I find that (1) Tony Mendoza, Respondent's Plant Safety Manager, advised Complainant at the meeting on the morning of November 23, 1988, that Complainant could not take the alcohol test "under protest" because it would not be administered, and that "under protest" was the same as refusal. (I-T. 87-88, 106; II-T. 54, 219-212, 222); (2) Mendoza told Complainant at this meeting that if he refused the test he would be suspended pending a hearing to determine what further discipline would be implemented (I-T. 106; II-T. 211-212, 222), and (3) Complainant refused to take the alcohol test (I.T. 87-89, 105, 106, 107; II-T. 54, 71, 210-212; IV-T. 15). ^{5/}

After Maynes refused to take the test, he was suspended (II-T. 216) by Mendoza (II-T. 225). ^{6/} The procedure implemented

^{5/} Mr. Maynes wrote on the consent form (Ex. C-5; II-T. 71) as follows: "I Richard R. Maynes, protest takeing (sic) this test and refuse to take it. Because I am working under protest with foreman I.T. Romero."

^{6/} While Mr. Mendoza made the decision to request that Maynes take the drug and alcohol test and the decision to suspend Maynes, he played no part in the subsequent decision to discharge Maynes (II-T. 225). Such decision, after a hearing on November 28, 1988 (II-T. 225-226), is more fully detailed subsequently herein.

by Mendoza, of which Mr. Maynes was specifically advised, was consistent with Respondent's drug and alcohol policy and rules of conduct. (Exs. R-2 and R-4; II-T. 216, 230-231, 247).

After being suspended by Mendoza, Mr. Maynes was driven home by Steven Escobar, a security guard for Burns Security Service, who was employed at the mine. (II-T. 56). 7/

At approximately 11:15 a.m., Mr. Maynes went to the Grant County Sheriff's Department and took a breathalyzer test; the test results were negative - there was not a detectable amount of alcohol in Mayne's system. (E. C-7; II-T. 58-62). Maynes then drove to the Gila Regional Medical Center for a blood test, which was administered at approximately 12:12 p.m. (Ex. C-6; II-T. 62-66), the results of which were also negative (II-T. 64-65). These tests were administered approximately 3.5 to 4 hours after Maynes was asked to take the test by Respondent (II-T. 69), were arranged for by Maynes, on his own, and were not taken pursuant to Respondent's drug and alcohol policy (II-T. 69).

On November 28, 1988, a hearing was held at which management and union representatives, among others, were present. (III-T. 8-10). Both sides were permitted to present evidence and to ask questions. (I-T. 66-67; III-T. 9-11).

After the hearing was concluded, Mr. Trujillo, Jim Crowley, Concentrator General Maintenance Superintendent, and John Strahan, mechanical superintendent, jointly concluded that Mr. Maynes should be discharged (III-T. 11, 12, 45) 8/ and presented their recommendation on November 29, 1988, to Duke Milovich, manager of the mine (III-T. 11, 12) who concurred in the decision to discharge Maynes. (III-T. 12-13).

7/ Escobar did not testify during the Commission hearing. He did testify at an arbitration hearing to the general effect that he did not smell alcohol on Maynes or detect other indications that Maynes was under the influence (Court Ex. 1, pp. 162-170).

8/ At the hearing, Mr. Maynes presented the breathalyzer results from the sheriff's office and admittance report from the Gila Regional Center. Trujillo's view was, "I really wasn't interested in those documents. The fact remained, as was discussed during that hearing, that he had refused the company drug and alcohol test and the merits of his going out four - five hours later and taking that test on his own had no merit, as far as I was concerned, in accepting those documents." (II-T. 41). (Emphasis added).

By letter dated December 1, 1988, from Mr. Crowley, Maynes was advised of his discharge. (Ex. R-6; III-T. 13).

Mr. Maynes was discharged for two separate and independent reasons:

1. For reporting to work under the influence of alcohol, and
2. For failure to comply with Respondent's drug/alcohol policy. (Ex. R-6; II-T. 81; III-T. 13, 14, 15, 44; IV-T. 15).

One of various contentions raised by Complainant is that Respondent had no "formal" drug and alcohol testing program (Complainant's Brief, p. 4). The record clearly reveals, however, that Respondent had in place on November 23, 1988, clear-cut rules and policy (1) prohibiting a miner's reporting to work under the influence of intoxicants and (2) requiring an employee suspected of being under the influence to submit to "medical" testing under penalty of disciplinary action for refusal. Thus, its Rules of Conduct (Ex. R-4; II-T. 230-231; III-T. 14-16) provide inter alia

COMPLIANCE WITH RULES OF CONDUCT

The company expects all employees to observe common sense rules of conduct based on honesty and common decency. Employees who violate these widely accepted industrial rules of conduct may be disciplined including discharge, depending upon the seriousness of the offense. Following are examples of the most frequently encountered violations of the rules of conduct.

1. Insubordination.
2. Drinking, possession, or furnishing drugs to others.
3. Unlawful possession, use of, or furnishing drugs to other employees.

9/ Agreeing to take the test "under protest" is the same as refusal to take the test. (II-T. 54-56; IV-T. 9, 10, 11, 15, 28, 46, 50).

4. Reporting to work under the influence of intoxicants or drugs.

* * * * *

Respondent's drug and alcohol policy (Ex. R-2; II-T. 191-196) provides in part:

DRUGS/ALCOHOL ABUSE

During the 1985 calendar year, Chino has experienced an increase of apparent drug usage. There have been several occasions when marijuana has been found on the property.

To assure all employees a safer working area and to be in complete compliance with MSHA Standard 56.2001, which states intoxicating beverages and narcotics shall not be permitted or used in or around mines, persons under the influence of alcohol or narcotics shall not be permitted on the job.

The Chino Mines Rules of Conduct lists the following violations:

* * * * *

4. Reporting to work under the influence of intoxicants or drugs.

THE FOLLOWING STEPS WILL BE IMPLEMENTED TO CURB SUSPECTED USAGE OF ILLICIT DRUGS AND ALCOHOL

Searches

- a. Change Rooms: Dogs trained to detect drugs will be utilized to conduct searches in the change rooms. Employees will not be required to be present during this tour. If detection occurs, then the employee will be required to open his/her locker and allow a search of his/her locker and allow a search of his/her belongings. If the employee is not at work and cannot be reached, his personal lock will be removed and replaced with a Company lock. This Company lock will remain in place until such time as the employee is physically present to conduct a search of the locker contents. (A shop steward, if requested by the employee, may be present.) The Company will replace locks that it re-

moves at no cost to the employee. If an employee refuses to allow a search of his/her locker, the lock will be cut off (and replaced) by the Company. Refusal to open a locker will be considered a disciplinary matter.

- b. Lunchboxes: As employees are entering the clock station, they may be asked to open lunchboxes, purses, bundles, etc. If an illicit substance is found, the employee will be escorted to a neutral area for further investigation. Failure to comply will be considered under the disciplinary policy.
- c. Testing: If the Company has reasonable cause to suspect an employee is under the influence of drugs or alcohol, that employee will be requested to submit himself/herself to a medical test. If the employee refuses to take such a test, appropriate action will be taken.

The record establishes that Mr. Maynes, prior to November 23, 1988, knew or should have been aware of these rules and policies (II-T. 191, 193, 194-196; III-T. 14).

In an effort to establish that Respondent's application of its drug/alcohol policy to Maynes was disparate and thus discriminatory, Complainant introduced evidence that another employee, Robert Maldonado, who was involved in a truck accident in June 1987, and also completed his testing authorization form "under protest" was not discharged. (Ex. C-17; III-T. 48). The form first executed by Maldonado on June 20, 1987 (Ex. C-17), was altered to strike through the printed phrase: "However, I voluntarily submit to the test and desire those results be released to Chino Mines Security personnel," and initialed by Maldonado. Also, after Maldonado's signature appear the words "Under Protest." (III-T. 59; IV-T. 57).

Respondent, however, established that Maldonado subsequently authorized release of the test results to the Respondent without indication of protest. (Ex. R-8; III-T. 49; IV-T. 7-9, 21-24, 29, 46, 48). He passed the test (III-T. 60; IV-T. 49).

The record is not contradictory that, if the authorization form indicates that an employee is taking the test under protest, that neither testing facility, Gila Regional Medical Center or Med Square, would both perform the test and release the results to the Company. (II-T. 54; III-T. 49, 59; IV-T. 10-13, 22-24, 51, 52, 70).

DISCUSSION AND ADDITIONAL FINDINGS

In order to establish a prima facie case of mine safety discrimination under Section 105(c) of the 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 Co., 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981); and Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-818 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. If an operator cannot rebut the prima facie case in this manner it may nevertheless affirmatively defend by proving that (1) it was also motivated by the miner's unprotected activities, and (2) it would have taken the adverse action in any event for the unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Co., 4 FMSHRC 1935, 1936-1938 (November 1982). The ultimate burden of persuasion does not shift from the complainant. Robinette, 3 FMSHRC at 818 n. 20. See also Boich v. FMSHRC, 719 F.2d 194, 195-196 (6th Cir. 1983); Donovan v. Stafford Const. Co., 732 F.2d 954, 958-959 (D.C. Cir. 1984) (specifically approving the Commission's Pasula-Robinette test); and Goff v. Youghioghney & Ohio Coal Company, 8 FMSHRC 1860 (December 1986).

In terms of the required prima facie case in discrimination, Complainant clearly established the first elements thereof, i.e., that he had engaged in protected safety activities and that Respondent's management was aware thereof prior to the time he was suspended on November 23, 1988, and subsequently discharged.

The first of the two decisive issues posed are whether the adverse action taken by Respondent against Complainant was "in any part" motivated by Complainant's protected activities.

The affirmative defense provided under the Commission's discrimination formula raises the second issue: Even assuming arguendo that Respondent was in part motivated by Complainant's protected activities, was it also motivated by his unprotected activities and would it, in any event, have discharged him for his unprotected activities alone.

Under the 1977 Mine Safety Act, discriminatory motivation is not to be presumed but must be proved. Simpson v. Kenta Energy,

Inc. and Jackson, 8 FMSHRC 1034, 1040 (1986). Here, the Complainant, in order to carry his burden of establishing discriminatory motivation, seeks to have an inference thereof drawn from various circumstantial factors.

Respondent's management witnesses, however, have convincingly testified that they were not motivated by Complainant's protected activities in discharging, or recommending the discharge of, Mr. Maynes.

The evidence introduced by Complainant to establish a motivational nexus between the allegedly discriminatory adverse action (discharge) taken against him and his mine safety activities was not convincing. ^{10/} For example, Mr. Maynes contended that his supervisor, I.T. Romero, was harassing him because Romero once told him that he'd be "watching him." Romero's explanation, however, was plausible:

Mr. Maynes had been working in the crusher the day before and had an accident, if I remember correctly, he had strained his back. The next morning, he came to work for me and I told him, in front of the mechanics, I told the other mechanic to watch out for him, and I told him I would be watching him. It was out of concern for the injury that he had before, not because I was harassing him. (II-T. 136-137).

Mr. Maynes also complained that, at certain five-minute safety meetings, he had been prohibited from raising specific safety concerns. Romero, satisfactorily explained what had occurred:

- Q. With respect to the five-minute safety meeting, you heard Mr. Maynes testify he had occasionally been precluded from raising specific concerns in some of those meetings. Do you remember that testimony?
- A. Yes, I recall that testimony.

^{10/} Complainant's contention that the Respondent's handling of Mr. Maynes' "under protest" alcohol testing situation was disparate and discriminatory when compared to the Robert Maldonado situation has been evaluated previously herein and is rejected.

Q. Do you remember any incident of that nature?

A. No. I recall having told Mr. Maynes that, when it came to safety malfunctions out there, okay, that I expected him to go out into my area, and if he's found something like that, I expected him to come and report it to me on that day or then; that I did not want somebody coming into my five-minute talks and trying to report to me something that he discovered three or four days earlier. Because it's a safety concern we need to address it then.

Mr. Maynes, on a couple of occasions, wanted to do exactly that, and so I repeated myself to him. (II-T. 115).

The testimony of Respondent's witnesses was credible and convincing in establishing that the various management personnel who observed Maynes on November 23, 1988, were reasonable in their belief that his unusual behavior was due to his being under the influence. Thus, in addition to the smell of alcohol on his breath and the various types of unusual behavior described in detail above, Mr. Maynes had come in late that morning and immediately asked to leave early. I find no basis in the evidentiary record in this matter, including the non-authorized breathalyzer and alcohol tests obtained by Mr. Maynes on his own several hours after he reported to work, to conclude that Mr. Maynes was not under the influence within the meaning and proscription of Respondent's Rules of Conduct. The tests obtained by Mr. Maynes himself later in the day do not excuse his refusal to take the tests required by the Respondent's alcohol/drug policy. Respondent established by the clear preponderance of the credible evidence that a miner's agreement to take such tests "under protest" is equivalent to refusal and Mr. Maynes was so advised and given every opportunity to take the tests required under the company's policy.

As Respondent points out in its Brief:

No one from the Company told Maynes that he was free to undergo an alcohol test several hours later at a place of his own choosing and have that test satisfy his obligation to undergo an alcohol test pursuant to the Company's drug and alcohol policy. The Company was entitled to a timely alcohol test performed by its carefully selected medical facility that was certified to perform such tests. If the Company cannot require its employees under circumstances such as those present here to undergo an

alcohol test when requested to do so, and discharge those employees who refuse to take the test, then the Company's ability to comply with regulations promulgated under the Act, to insure that its employees are not under the influence of alcohol, and to promote the safety of its employees and operations, is severely damaged, if not destroyed. Cf., Mullen v. Jim Walter Resources, Inc., 3 MSHC (BNA) 1635, 1636 (1984) (reasonable for company to require employees to submit to prompt alcohol test at medical facility of the company's choice because, by refusing and later obtaining a test from a private physician on her own, employee "caused a lower showing of blood alcohol content").

Direct evidence of actual discriminatory motive is rare. Short of such evidence, such illegal motivation may be established if the facts support a reasonable inference thereof. 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 (D.C. Cir. 1983); Sammons v. Mine Services Co., 6 FMSHRC 1391, 1398-1399 (June 1984). The weight of the evidence in this record is not probative that Respondent was illegally motivated in whole or in part, nor is there support for drawing an inference of such discriminatory intent.

In reaching the conclusion that Complainant failed to establish that his suspension and discharge were discriminatorily motivated, consideration also has been given to the fact that the instant record does not reflect a disposition on the part of Respondent's management personnel, individually, or collectively, to engage in such conduct. A history of, or contemporary action indicating, antagonism or retaliatory reaction to the expression of safety complaints, was not persuasively shown. Complainant points out several instances of what he considered hostile words or action taken by management personnel toward him. Yet, such were not demonstrated to be beyond normal workplace occurrences or, more to the point, were not shown to be attributable to his protected activities. There was no evidence of retaliation against other employees who had engaged in safety activities or who expressed safety complaints. Thus, other employees besides Maynes handled safety grievances and were not disciplined or discharged. For example, Samuel Silva, as shop steward, did so. (I-T. 51, 95-96; II-T. 135; III-T. 25-26). Further, other employees of Respondent who either refused to take the required blood alcohol test or failed it were terminated. (II-T. 216, 217, 223-224, 236-239, 241; IV-T. 9, 21, 28, 32, 35, 58).

CONCLUSIONS

Respondent's motivation in suspending and then discharging Complainant was for his two independent unprotected activities (reporting to work under the influence and refusing to comply with Respondent's drug/alcohol policy) and the decision to take such adverse actions was justified. These adverse actions were not wholly or in part discriminatorily motivated. Thus, Complainant has failed to establish a prima facie case of discrimination under Section 105(c) of the Mine Act.

Even assuming arguendo, that it were established by a preponderance of the reliable probative evidence, that Complainant's suspension and discharge were motivated in part by his protected activities, Respondent established by a clear preponderance of such evidence that it was also motivated by Complainant's unprotected activities and that it would have taken the adverse action in any event for such. 11/

ORDER

Complainant, having failed to establish Mine Act discrimination on the part of Respondent, the Complaint herein is found to lack merit and this proceeding is DISMISSED.

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

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/ek

11/ See Gravelly v. Ranger Fuel Corp., 6 FMSHRC 799 (1984).

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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NOV 26 1990

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEVA 90-141
Petitioner : A.C. No. 46-03805-03961
v. :
SOUTHERN OHIO COAL COMPANY, : Martinka No. 1 Mine
Respondent :

DECISION

Appearances: Glenn M. Loos, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia,
for the Secretary of Labor (Secretary);
David M. Cohen, Esq., Lancaster, Ohio and
Joseph S. Beeson, Esq., Robinson & McElwee,
Charleston, West Virginia, for Southern Ohio
Coal Company (SOCCO).

Before: Judge Broderick

STATEMENT OF THE CASE

The Secretary seeks a civil penalty for an alleged violation of 30 C.F.R. § 75.1725(c) charged in a citation issued August 8, 1989. The citation resulted from the investigation of an accident occurring on May 5, 1989, and concluded that SOCCO was not following safe work procedures involving tagging and locking out machinery when workers are exposed to moving parts. Both parties conducted pretrial discovery. Pursuant to notice, the case was heard in Morgantown, West Virginia on September 19 and 20, 1990. James Young, John S. Guido and Louis DeRosa testified on behalf of the Secretary; William Laird and Randolph Ice testified on behalf of SOCCO. Both parties have filed posthearing briefs. I have considered the entire record and the contentions of the parties and make the following decision.

FINDINGS OF FACT

I

At all times pertinent to this proceeding, SOCCO was the owner and operator of an underground coal mine in Marion County, West Virginia known as the Martinka No. 1 Mine. SOCCO is a large operator. In the 24 months prior to the violation alleged in

this proceeding, SOCCO had a history of 1049 paid violations in a total of 971 inspection days. None of these was a violation of 30 C.F.R. § 75.1725(c). This history is not such that penalties otherwise appropriate should be increased because of it.

II

On August 8, 1990, Federal Coal Mine Inspector James Young, when he arrived at the subject mine site, was given a written request by two union representatives to investigate an accident which had occurred at the mine on May 5, 1989. The request stated the miner Sam Guido was injured when the No. 5 conveyor belt was turned on while Guido was working on it. Inspector Young interviewed Martinka foremen William Laird and John Gowers, and miners Louis DeRosa, Frank Renick, and Dempsey McHenry. He did not interview Sam Guido who was not at work that day.

III

Following his investigation Inspector Young issued a section 104(a) citation for a violation of 30 C.F.R. § 75.1725(c) because Respondent was not following safe work procedures involving tagging and locking out machinery when miners were exposed to moving parts. The inspector determined that the violation was significant and substantial and was the result of SOCCO's moderate negligence.

IV

On May 5, 1989, a crew working under belt supervisor Laird was engaged in extending the 5-54 inch belt during the midnight shift. The section had advanced and the belt had to be extended by one block. The top rollers were installed, and bottom rollers had still to be installed. Laird travelled to the headgate to take up the slack in the belt. He was unable to take up the entire slack with the take-up device so he called foreman Gowers to tell him he was going to start the belt. Gowers did not tell Guido and DeRosa who were working on the belt that the belt was going to be started. Neither did Laird tell them before he went to the headpiece. Guido had returned to the belt after having urinated and his gloves were on the belt. He intended to finish setting the top roller using a "come-along" (also called a "red devil"), when the belt was turned on. Guido was an experienced beltman. DeRosa was about 10 feet from Guido and had gone to the tailpiece to get some additional cribs. He heard the belt "bump" once or twice, and heard Guido yelling after the belt started. The come-along bounced along the belt after it was started. Dempsey McHenry shut off the belt. Guido claimed that he sustained injuries to his leg.

Guido has had a substantial number of prior work connected injuries at Martinka. He also has a history of absenteeism.

SOCCO has attacked Guido's credibility and suggests that his testimony is influenced by the fact that he has a pending personal injury suit against SOCCO arising out of the accident. However, the testimony of DeRosa alone establishes that the belt was started without warning when miners were working on or near it.

REGULATION

30 C.F.R. § 75.1725(c) provides as follows:

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

ISSUES

1. Whether the evidence establishes a violation of the standard as charged?

a. Whether extending a belt constitutes repairs or maintenance on machinery?

b. If so, whether motion of the belt was necessary to make adjustments?

2. If a violation is established, whether it was significant and substantial?

3. If a violation is established, what is the appropriate penalty therefor?

CONCLUSIONS OF LAW

I

SOCCO was at all times pertinent to this proceeding subject to the provisions of the Mine Act in the operation of the Martinka mine. I have jurisdiction over the parties and subject matter of this proceeding.

II

I conclude that the action in extending the belt described in finding of fact IV constitutes maintenance on machinery as that term is used in the regulation 30 C.F.R. § 75.1725(c). The term maintenance may mean preserving a thing in proper condition,

or it may include continuance, extension or prolongation. It is defined in the American Heritage Dictionary of the English Language (New College edition 1976) as "1.a The act of continuing, carrying on, preserving or retaining something 3. The work of keeping something in proper condition." The Synonym Finder, J.I. Rodale (1978) lists the following synonyms for maintenance: "1. preservation, upkeep, annual upkeep, keeping up; 2. continuance, continuity, extension, prolongation; perpetuation, persistence, perseveration, repetition." (p.697) A belt move includes adding belt to an existing belt system, adding rollers, taking up the belt slack, and placing blocks to support the belt tail piece. All of these functions are necessary to produce coal as the face advances. The belt system is or includes machinery. Extending it involves adding and adjusting activities which constitute maintenance.

III

The evidence establishes that power was resumed on the belt; it was "bumped" once or twice before being started while miner Guido was performing maintenance work on the belt. There is conflicting evidence as to exactly what he was doing and whether he was actually on the belt when it started. I am not the proper forum to decide whether and to what extent Guido was injured as a result of the belt being turned on. I only have to decide whether a violation occurred. The evidence however, is clear that neither Guido nor DeRosa were informed that foreman Laird was going to start the belt. Although motion of the belt is necessary to make adjustments, it obviously cannot safely be accomplished while the belt is being worked on. All the affected miners must be informed if a belt which has been locked out is going to be started up. This was not done here. I conclude that a violation of 30 C.F.R. § 75.1725(c) has been established.

IV

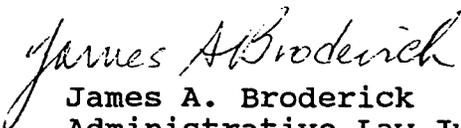
Making repairs or adjustments on a belt while the belt is moving is a serious violation. This is so whether or not the injury Guido complains of resulted from the violation. Such a violation is reasonably likely to result in serious injury. Therefore it was appropriately designated as significant and substantial. Foreman Laird believed that he had informed the miners working on extending the belt that he was going to start the belt to take up the slack. In fact he informed foreman Gowers, and Gowers failed to notify Guido and DeRosa. I conclude that the injury resulted from SOCCO's negligence.

Based on the criteria in section 110(i) of the Act, I conclude that an appropriate penalty for the violation is \$300.

ORDER

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

1. Citation 3118169 issued August 8, 1989, is **AFFIRMED**.
2. Respondent shall within 30 days of the date of this decision pay the sum of \$300 for the violation found herein.


James A. Broderick
Administrative Law Judge

Distribution:

Glenn Loos, Esq., U.S. Department of Labor, Office of the
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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 26 1990

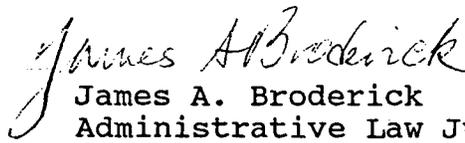
DENNIS WAGNER, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. VA 88-21-D
PITTSTON COAL GROUP, :
CLINCHFIELD COAL COMPANY, :
JACK CRAWFORD, :
MONROE WEST, :
WAYNE FIELDS, :
Respondent :

ORDER OF DISMISSAL

Before: Judge Broderick

On October 26, 1990, I issued an order to Complainant to show cause within 20 days why the remaining allegations of the complaint should not be dismissed because such allegations were also charged in the case of Secretary/Wagner v. Clinchfield Coal Company, Docket No. VA 88-19-D. Complainant has not responded to the order to show cause.

Therefore, the above proceeding is **DISMISSED**.


James A. Broderick
Administrative Law Judge

Distribution:

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

W. Challen Walling, Esq., Penn, Stuart, Eskridge & Jones, 306
Piedmont Avenue, P.O. Box 2009, Bristol, VA 24203 (Certified
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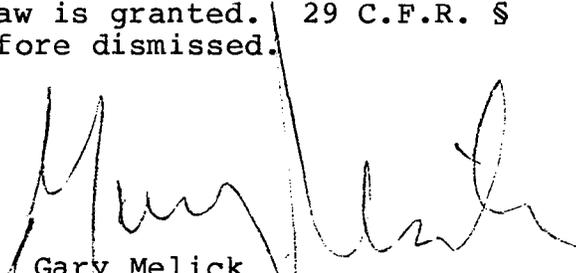
NOV 26 1990

LARRY E. SWIFT, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. PENN 90-233-D
: PITT CD 90-31
CONSOLIDATION COAL COMPANY, :
: Dilworth Mine

ORDER OF DISMISSAL

Before: Judge Melick

Complainant requests approval to withdraw his complaint in the captioned case for the reason that the issues underlying the Complaint were "substantially resolved" through a grievance settlement. 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

Distribution:

Mr. Larry E. Swift, Chairman, UMWA, Local Union 1980, Health and Safety Committee, 206 S. Walnut St., Masontown, PA 15461 (Certified Mail)

Walter J. Scheller III, Esq., Consolidation Coal Company, Consol Plaza, 1800 Washington Road, Pittsburgh, PA 15241-1421 (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 1990

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 90-34-DM
ON BEHALF OF	:	
BOB WAYNE HUBENAK,	:	MD 89-56
Complainant	:	
v.	:	Bayer Alumina Plant
	:	
ALUMINUM COMPANY OF AMERICA,	:	
Respondent	:	
	:	

DECISION

Appearances: Janice L. Holmes, Esq., Office of the Solicitor,
U. S. Department of Labor, Dallas, Texas, for the
Complainant;
Linda F. Schneider, Esq., Aluminum Company of
America, Pittsburgh, Pennsylvania, for the
Respondent.

Before: Judge Weisberger

Statement of the Case

This case is before me, based on a Complaint filed by the Secretary (Complainant), on behalf of Bob Wayne Hubenak, alleging that the Operator (Respondent) violated Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2) (the Act). Pursuant to notice, the case was scheduled for hearing on May 15, 1990. On April 25, 1990, Respondent filed a Motion for Continuance, and the hearing was rescheduled to commence on June 26, 1990. On June 22, 1990, Complainant filed a Motion for Continuance, and the case was rescheduled to commence on October 10, 1990.

On July 12, 1990, the case was reassigned to the undersigned. The hearing was rescheduled and subsequently heard in Corpus Christi, Texas, on September 10-11, 1990. Bob Wayne Hubenak, Robert W. White, Harry Elrod, Kerry Keller, and Jim Isaac Simmons, Jr. testified for Complainant. Charles F. DiMascio, Jeffrey Alan Shockey, Johnny Palmer, Jr., Thomas G. Russell, Harry Elrod, and Kerry Keller testified for Respondent.

Proposed Findings of Fact and Memorandum of Law were filed on November 6, 1990. Respondent filed a Response on March 14, 1990, and a Response was filed by Complainant on November 15, 1990. Respondent also filed a Joint Motion to Amend Pretrial Stipulations and this motion is granted. Complainant's Motion, filed November 15, 1990, for Leave to Amend its Proposed Findings of Fact, is granted.

Stipulations

The Parties entered into the following stipulations:

1. Jurisdiction over this action is conferred upon the Federal Mine Safety and Health Review Commission under Section 105(c)(2) and Section 133 of the Act.
2. Respondent's Bayer Alumina Plant, referred to as Point Comfort Operations, located in Calhoun County, Texas, is a mine as defined in Section 3(n) of the Act, the products of which affect commerce under Section 4 of the Act.
3. At all relevant times Respondent, Aluminum Company of America ("Alcoa"), did business and operated its Point Comfort facility in production of alumina, and therefore is an operator within the meaning of Section 3(d) of the Act.
4. Bob Wayne Hubenak was hired by Alcoa, at its Point Comfort Operations, in March 1969.
5. In April 1969, Mr. Hubenak was assigned to work in the Precipitation Department and has worked in the department since that time.
6. At all times relevant to this case, Mr. Hubenak held the position of "Area Operator" or "tank pumper" in the Precipitation Department and was therefore a miner within the meaning of Section 3(g) of the Act.
7. On or about March 24, 1989, some overhead pipeline which was suspended by several broken metal pipe hangers fell to the ground. The area was barricaded to prevent access to the area.
8. Following this incident, Company management inspected all pipe hangers in the area.

9. Company management directed the Engineering Department to initiate a detailed inspection of pipe hangers and pipe supports in the Precipitation Department.
10. After Mr. Hubenak learned that two MSHA inspectors would be inspecting the lights in his work area, he reported the broken pipe hangers to MSHA inspector Robert White.
11. Upon learning of the condition of the pipe hangers, Alcoa barricaded the area to prevent others from walking under the pipes.
12. A citation was issued to Alcoa by the MSHA Inspector for a violation of 30 C.F.R. § 56.20011. Alcoa did not contest the citation and promptly abated the condition.
13. Hubenak engaged in protected activity by reporting a hazardous condition to an MSHA Inspector.
14. On or about May 4, 1989, Mr. Hubenak was given a 5 day disciplinary suspension.
15. On or about May 24, 1990, Mr. Hubenak was also advised that he would receive an additional 25 day suspension, but the suspension was not given.
16. Hubenak's complaint to the Secretary was filed on June 1, 1989.
17. After an investigation, the Secretary filed her complaint, on Hubenak's behalf, with the Commission on December 20, 1989.
18. Hubenak's damages are equal to five (5) days pay at the rate he was receiving in May 1989, or \$532.52, together with interest at the short-term Federal rate applicable to the under-payment of taxes in accordance with Local Union 2274, District 28, United Mine Workers of America v. Clinchfield Coal Co., 10 FMSHRC 1943, aff'd, 895 F.2d 773 (10th Cir. 1989).
19. Paul Ernest Kelm was the Miner's Representative for Local 4370 of the United Steelworkers of America at Alcoa's Point Comfort Operations at all times pertinent hereto. Prior to March 27, 1989, Kelm informed Hubenak that he would not represent him concerning safety complaints.

Findings of Fact and Conclusion of Law

Bob Wayne Hubenak is a miner employed by the Operator as a tank pumper in the Precipitation Department of its Point Comfort Operation. During the period in question, Hubenak worked in the area known as R-45, which contains approximately 6,000 pipe hangers spread over 200 acres. In the pertinent period at issue, Hubenak worked the 4:00 p.m. to midnight shift on March 24, 25, 26, and 27, 1990. In the R-45 area, sometime during the shift that Hubenak worked on March 24, some overhead pipeline that had been suspended by several broken metal hangers, fell to the ground. According to Hubenak at approximately 7:30 p.m. on March 27, he came by the control room in the R-45 area. He said that the operators in the control room were talking about the incident of a 150 foot section of pipe that had fallen on March 24. Hubenak went to check his work area to see if there were any broken hangers. According to Hubenak, he saw one or two broken hangers. Hubenak then went to the supervisor's office. In essence, he said that he asked his supervisor and the MSHA Inspectors who were present whether he could get in trouble by making a safety complaint to the Inspectors, and was told that he could not. According to Hubenak, while in the supervisor's office, in the presence of Kerry Keller, Paul Kelm, Bernard Gaash, and J. B. Steamer, he told the MSHA Inspectors, while looking at the former, that he had observed broken pipe hangers. He then went with the Inspectors, along with the others who were present, to inspect the broken hangers.

According to Hubenak, approximately 2 weeks later, Harry Elrod, who was the area superintendent for precipitation during the period in question, asked him what happened the night of March 27, and advised him that he should have first informed his supervisor of the broken hangers that he observed, and that accordingly, he (Elrod) was contemplating taking disciplinary action. Hubenak indicated that on May 4, Elrod again asked him what happened on March 27, and he (Hubenak) informed the latter that he told the MSHA Inspectors of the condition of the hangers, ". . . because I could get something done before somebody got hurt."(Tr.35) Elrod informed him that he was giving him a 5 day suspension.

The Commission, in a recent decision, Goff v. Youghiogheny & Ohio Coal Company, 8 FMSHRC 1860 (December 1986), reiterated the legal standards to be applied in a case where a miner has alleged acts of discrimination. The Commission, Goff, supra, at 1863, stated as follows:

A complaining miner establishes a prima facie case of prohibited discrimination under the Mine Act by proving that he engaged in protected activity and that

the adverse action complained of was motivated in any part by that activity. Pasula, 2 FMSHRC at 2797-2800; Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). The Operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was not motivated in any part by protected activity. Robinette, 3 FMSHRC at 818 n. 20. See also Donovan v. Stafford Constr. Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission's Pasula-Robinette test).

There is no conflict in the record with regard to the fact that on March 27, 1989, Hubenak informed MSHA Inspector Robert W. White of the existence of broken pipe hangers in the R-45 area. As such, Hubenak was clearly engaged in protected activities. Further, the record establishes that Hubenak suffered adverse action, namely, a 5 day suspension. Thus, the key issue for resolution, is whether the Secretary has established a prima facie case by proving that the 5 day suspension was "motivated in any part" by Hubenak's having reported the condition of broken pipe hangers to the MSHA Inspector (protected activity). (Robinette, supra, at 817-818). In essence, it is the Secretary's position that Hubenak was suspended because he chose to report the unsafe condition to the MSHA Inspector, rather than to his supervisor. As such, it is argued that Respondent has interfered with Hubenak's right to report an unsafe condition to an MSHA Inspector. Further, the Secretary argues that Respondent has not, up to this point, disciplined any of its employees for failure to report an unsafe condition to a supervisor. I did not find merit to these arguments for the reasons that follow.

Jim Isaac Simmons, Jr., who worked for Respondent for 28 years as an area operator or tank charger in the R-45 Area, testified that he was not aware of any of Respondent's employees who had been disciplined for not turning in a safety violation to a supervisor. Also in this connection, Elrod testified that in the 3 years that he was in charge of the R-45 Area, he did not discipline any miner for failure to report a safety violation to a supervisor. I find that these statements of Simmons and Elrod do not establish any discriminatory action against Hubenak. To establish that Hubenak received disparate treatment, it must first be proven that there were situations where other employees were aware of safety violations or hazardous conditions, but did not report them to their supervisors. It next must be established that Respondent knew of these situations and did not discipline the employees in question. The record does not contain any evidence that Respondent was aware that there were other employees who had knowledge of unsafe conditions, but did

not report them to their supervisors. Nor does the record contain evidence that there were any incidents, aside from the situation in issue, wherein Respondent's employees knew of hazardous conditions or safety violations, and did not report them to their supervisors. Accordingly, evidence that no other employees were disciplined for not reporting safety violations does not, per se, establish that Hubenak was discriminated against.

Nor does the record contain sufficient evidence to predicate an inference that Respondent's action, in suspending Hubenak, was motivated in any part by his having reported unsafe conditions to the MSHA Inspector. Any inferences in the record from which this conclusion might be drawn, have been successfully rebutted by Respondent. The only evidence of record that would tend to establish that Respondent manifested or harbored a negative attitude towards miners making safety complaints, is found in the testimony of Hubenak and Simmons. Simmons, in essence, testified that "supervisors" consider it "nitpicking" and give extra work, if a miner turns in a lot of safety complaints or repeats a safety complaint (Tr. 153). I do not place much weight upon this testimony of Simmons, as he did not cite the date or nature of any specific incidents. Also, it is significant to note that Simmons was not in Hubenak's work crew in the period in question, and there is no evidence that he was supervised at any time by Steamer, who was Hubenak's supervisor, during the period in question.^{1/}

Hubenak related that on one occasion, in June or July 1989, when he inquired of his Supervisor Ed Savalla as to how the latter checked belts, the latter indicated "... you just griping. You just don't want to work. Go up there and put that belt on and go to work, clean that secondary." (sic) (Tr.45). Hubenak indicated that on another occasion when he complained for the second time that a "blind" had not been placed in the correct position, Savalla said ". . . look like you never make no mistakes." (sic) (Tr. 48). Inasmuch as Savalla was not Hubenak's supervisor during the period in question, and there was no evidence that Savalla in any way had participated in the decision to suspend Hubenak, I do not place much weight on this testimony of Hubenak. Further, Elrod, who suspended Hubenak, was the individual fully responsible for taking such an action.

^{1/} On cross-examination Hubenak indicated that he did not have any problems with Steamer, and specifically was not afraid that the latter would take any action against him, if he turned in a safety complaint.

There is no evidence that Elrod had ever manifested any animosity toward Hubenak or other miners making complaints to MSHA Inspectors or to management. On the contrary, the Secretary has not contradicted the testimony of Elrod, Charles F. DiMascio, Respondent's Director of Safety and Industrial Hygiene, Jeffrey Alan Shockey, who was the Safety and Industrial Hygiene Manager at Point Comfort Operation during the period in question, and Johnny Palmer, Jr., Production Manager, Alumina, all of whom described Respondent's strong policy of requiring employees to report safety and health hazards.

It appears to be the Secretary's position that, in actuality, Hubenak's suspension by Respondent was motivated, in part, by the fact that Hubenak chose to report a hazardous condition to the Inspector rather than a supervisor. On the other hand, it is Respondent's position that the only motivation for its suspension of Hubenak, was because the latter had not reported, to his supervisor, a hazardous condition which he had known about for more than 2 days. In essence, for the reasons that follow, I find the evidence establishes that a good faith reasonable belief that Hubenak did not report to his supervisor the hazardous conditions which he had known of for a few days, was the only basis for the determination by Elrod to suspend Hubenak. According to Hubenak, on the evening of March 27, he went to inspect for broken hangers, and discovered one or two. He did not seek out his supervisor, but decided to report instead to the MSHA Inspector, "because I could get something done before somebody got hurt," (Tr. 35). According to Elrod, when he confronted Hubenak a few days after March 27, he asked him why he had not notified management if he had known, for a couple of days, of the existence of broken hangers. The latter did not say that he had just discovered the hangers on March 27, but, he made this assertion the first time when he was confronted again on May 4 when he was suspended. Further, Elrod indicated that he was told by Keller that Hubenak had found the broken pipes after the 150 length of pipe had fallen on the night of March 24. Accordingly, Elrod concluded that Hubenak had known of the hazardous condition when he worked over the weekend, March 24-26, and had not reported it to his supervisor in violation of Company policy.^{2/}

^{2/} In this connection, the Secretary did not rebut the testimony of Respondent's witnesses that it was standard operating procedure to have placed guidelines dated April 20, 1988, on a bulletin board, which set forth, as pertinent, as follows: "The employee who believes that safety or health hazard exists shall notify his supervisor, discuss the situation, and try to resolve the problem. . . ." (Exhibit R-5). Also, the Secretary did not rebut the evidence of Shockey that all employees are provided with a copy of the Safety Code of Conduct. Further, the personnel file of Hubenak contains notes indicating "went through" the safety book on various dates in 1977, (Exhibit R-12, page 000306).

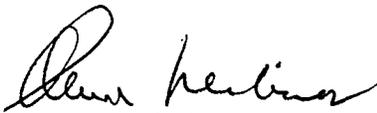
Company policy is embodied in the Safety Code of Conduct, which provides, as pertinent, as follows: "5. Be alert for unsafe conditions and report them immediately to your supervisor." (Exhibit R-3, page 000031).

I specifically find that there was a reasonable basis for Elrod to conclude that Hubenak had known about the broken hangers since the weekend commencing March 24, and had not reported this to his supervisor. Hubenak did not testify to rebut Elrod's testimony, that when he asked Hubenak a few days after March 27, why he did not inform management if he had known, for a few days, about the broken hangers, and he (Hubenak) did not maintain that he first learned of the conditions on March 27. Further, Elrod based his conclusion as to Hubenak's actions upon information provided him by Keller. This was corroborated by Keller, who indicated that Hubenak had told him that over the weekend (March 24-26) he had inspected for broken pipes and found some on a pipeline, although he (Hubenak) did not indicate exactly when this occurred. Hubenak did not rebut this testimony of Keller. Accordingly, I find that Elrod had good cause to conclude that Hubenak had known of the existence of broken hangers over the weekend, and had failed to report this condition to his supervisor. According to Elrod, he concluded that is "totally intolerable" if employees who are aware of unsafe conditions, fail to report them (Tr. 336).

I thus conclude that Respondent's action in suspending Hubenak was motivated solely by his failure to inform his supervisor, or other management officials, of the existence of broken hangers, which Respondent reasonably believed Hubenak had known about since the weekend of March 24, 1989. I thus conclude that Respondent has successfully rebutted the Secretary's case, and that the Secretary has failed to establish a prima facie case, i.e., that Hubenak's suspension was motivated, in any part, by protected activities. Accordingly, the Complaint shall be dismissed.

ORDER

It is hereby ORDERED that the Complaint filed on December 26, 1989, be DISMISSED.


Avram Weisberger
Administrative Law Judge

Distribution:

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dcp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

NOV 28 1990

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. PENN 90-52
Petitioner : A.C. No. 36-07783-03515
v. :
: Slope No. 1 Mine
HICKORY COAL COMPANY, :
Respondent :

DECISION

Appearances: Susan M. Jordan, Esq., Office of the Solicitor,
U.S. Department of Labor, Philadelphia,
Pennsylvania, for the Petitioner;
Mr. William Kutsey, Owner, Hickory Coal Company,
Pine Grove, Pennsylvania, pro se, for the
Respondent.

Before: Judge Fauver

This is an action for civil penalties under § 105(d) of the
Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et
seq.

The case came on for hearing at Harrisburg, Pennsylvania, on
November 1, 1990. After extensive testimony and the admission of
documentary evidence, a settlement conference was held between
the parties and before the judge. Based upon the conference, a
settlement was reached and approved by the judge.

ORDER

WHEREFORE IT IS ORDERED that:

1. The parties' oral motion to approve a settlement
agreement is GRANTED.
2. Respondent is ASSESSED a civil penalty of \$100 for each
of the two citations involved herein and shall pay such penalties
of \$200 within 30 days of this decision.

3. Citation No. 267748 and Order No. 2677021 are AFFIRMED.

4. Citation No. 2676999 is AFFIRMED.

5. Order No. 2677042 is MODIFIED to provide that: "The Michigan front-end loader, Model No. 55a, is permitted to be used for loading run of mine coal only; and all use of the front-end loader shall be confined to the loading area." As so modified, Order No. 2677042 is AFFIRMED.


William Fauver
Administrative Law Judge-

Distribution:

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

Mr. William Kutsey, Owner, Hickory Coal Company, R.D. #1, Box 479, Pine Grove, PA 17963 (Certified Mail)

/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

NOV 30 1990

SECRETARY OF LABOR, : DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), :
ON BEHALF OF : Docket No. LAKE 90-78-DM
WILLIAM A. MARSHALL, :
Complainant : Quality Pit & Mill
v. :
QUALITY READY MIX, INC., :
:

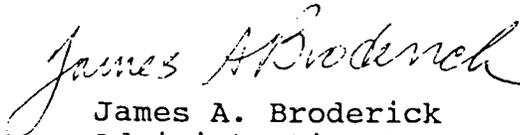
**DECISION APPROVING SETTLEMENT
AND DISMISSING PROCEEDING**

Before: Judge Broderick

On November 21, 1990, the Secretary submitted a settlement agreement executed by Complainant William Marshall and by counsel on behalf of the Secretary and Respondent. The agreement provides that Respondent shall pay William Marshall the sum of \$4500 in settlement of his claim against Quality Ready Mix, that Marshall's personnel file shall reflect that he was separated from Respondent's employ by mutual agreement of the parties. It further provides that the Secretary withdraws her demand for a civil penalty against Respondent in this proceeding. I have considered the agreement in the light of the purposes of the Act and conclude that it should be approved.

Accordingly, the settlement agreement dated November 18, 1990, by and among the Secretary of Labor, William M. Marshall and Quality Ready Mix is **APPROVED**.

IT IS ORDERED that the terms of the settlement agreement including the payment by Respondent to Marshall of the sum of \$4500 shall be carried out within 30 days of the date of this order. Upon compliance with this order, this proceeding is **DISMISSED**.


James A. Broderick
Administrative Law Judge

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

November 8, 1990

JOHN A. GILBERT, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. KENT 86-49-D
: BARB CD 85-61
SANDY FORK MINING COMPANY, :
Respondent : No. 12 Mine

SECRETARY OF LABOR, : DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION, (MSHA), : Docket No. KENT 86-76-D
on behalf of : BARB CD 85-61
JOHN A GILBERT :
Complainant : No. 12 Mine
v. :
: SANDY FORK MINING COMPANY, :
Respondent :

DECISION

Appearances: Tony Oppgard, Esq., Appalachian Research and Defense Fund of Kentucky, Inc., Hazard, Kentucky, for John A. Gilbert;
Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Secretary of Labor;
Ronald E. Meisburg, Esq., and C. Gregory Ruffenach, Esq., Smith, Heenan and Althen, Washington, D.C., for Sandy Fork Mining Company, Inc.

Before: Judge Melick

These cases are before me upon remand by the United States Court of Appeals for the District of Columbia Circuit in John A. Gilbert v. FMSHRC, 866 F.2d 1433 (1989) and upon subsequent direction by the Commission on June 28, 1990, to resolve several specific issues.

The facts and procedural history of these cases are set forth in detail in previous decisions. See 9 FMSHRC 1427 (1987) and 12 FMSHRC 177 (1990). In brief, following an initial evidentiary hearing, this judge determined that Sandy Fork Mining Company, Inc. (Sandy Fork) had not violated Section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act". 8 FMSHRC 1084 (1986). That decision was affirmed by the Commission but was subsequently

reversed by the Court of Appeals which remanded the cases for resolution of several specific questions. The Court explained:

On the record as we understand it, it is plain that Gilbert made a good faith attempt to communicate his reasonable fears to management. What is not clear, however, is whether management addressed Gilbert's concerns in a way that his fears reasonably should have been quelled. In other words, did management explain to Gilbert that the problems in his work area had been corrected? Or did management indicate to Gilbert that he would be assigned to another area in the mine that was free of safety problems? Or did management indicate to Gilbert that the situation was unsettled, and that he should wait five hours (until the start of his assigned shift) before inquiring further about safety conditions in his area? These questions must be answered by the Commission in order for it to determine whether the management at Sandy Fork reasonably addressed Gilbert's fears on the morning of August 7. If management effectively "stonewalled" Gilbert in responding to his inquiries on the 7th, then his continued fears regarding work hazards were reasonable, and his refusal to return to work cannot be viewed as either unreasonable or in bad faith. On remand, the commission will be required to make the necessary factual findings to address these issues.

These specific questions all relate to the larger issue of whether Gilbert's refusal to appear for work on August 7, was supported by the requisite good faith, reasonable belief in a hazard--an issue on which the Complainant bears the burden of proof. Secretary on behalf of Pasula v. Consolidation Coal Company 2 FMSHRC 2786 (1980) rev'd on other grounds sub nom. Consolidation Coal Company v. Marshall 663 F.2d 1211 (3rd 1981); Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981).

In its initial decision following remand of this case the Commission reviewed the applicable discrimination law cited by the Circuit Court:

We note initially that the court endorsed several important principles of Commission discrimination law. Citing Secretary on behalf of Bush v. Union Carbide Corp., 5 FMSHRC 993, 997 (June 1983) and Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803 (April 1981), the Court agreed with the Commission that section 105(c) of the Act "protects a miner's right to refuse work under conditions that he reasonably and in good faith believes to be hazardous." 866 F.2d at 1439. The Court subscribed as well to the

Commission's view that in analyzing whether a miner's fear is reasonable, the perception of a hazard must be viewed from the miner's perspective at the time of the work refusal. 866 F.2d at 1439, citing Secretary on behalf of Pratt v. River Hurricane Coal Company, 5 FMSHRC 1529, 1533-34 (September 1983) and Haro v. Magma Copper Co., 4 FMSHRC 1935, 1944 (November 1982). The Court also approved Commission holdings that to be accorded the protection of the Act in engaging in a work refusal, a miner need not objectively prove that an actual hazard existed and, further, that a good faith belief simply means an honest belief that a hazard exists. Id., citing Secretary on behalf of Hogan & Ventura v. Emerald Mines Corp., 8 FMSHRC 1066, 1072-73 (July 1986); Pratt, supra, 5 FMSHRC at 1533-39, Haro, supra, 4 FMSHRC at 1943-44; and Robinette, supra, 3 FMSHRC at 810.

To determine whether substantial evidence supported the Commission's conclusion that Gilbert's August 7 work refusal lacked the required basis of a good faith, reasonable belief in a hazard, the Court adopted Commission guidelines for assessing a miner's "good faith". 866 F.2d at 1440. First, the court indicated that, where reasonably possible, a miner refusing work should ordinarily communicate or attempt to communicate to some representative of the operator his belief in the safety or health hazard at issue and, second, when a miner has expressed a reasonable, good faith fear in a hazard, the operator has a corresponding obligation to address the perceived danger. 866 F.2d at 1440, citing, Secretary on behalf of Dunmire & Estle v. Northern Coal Co., 4 FMSHRC 126, 133 February 1982); Bush, supra, 5 FMSHRC at 997-98; Secretary v. Metric Constructors, Inc., 776 F.2d 469 (11th Cir. 1985); Hogan and Ventura, supra, 8 FMSHRC at 1074. Applying these principles, the Court found that the record did not support the Commission's determination that on August 7 Gilbert did not entertain a good faith, reasonable belief that he would be required to work in a hazardous area. 866 F.2d at 1440-41.

The Commission, in its initial decision on remand also reviewed the Court's evaluation of the evidence:

The Court presented its view of the evidence. Among other things, the court noted that Gilbert was working in an area of the mine in which it appeared to him that the prevailing roof conditions placed his safety in jeopardy; that he left work on August 6 with management's permission; that when he returned to work on the morning of August 7 he learned from other

miners of a roof fall that had occurred overnight in the area where he had been working; and that when he inquired of management representatives what had been done to address the unsafe conditions, they "refused to address his concerns." 866 F.2d at 1440-41. The Court found that Gilbert's "initial fears" on August 6 were reasonable and that on August 7 "he made a good faith attempt to communicate his reasonable fears to management." 866 F.2d at 1441.

The Court, however, stopped short of outright reversal of the Commission's decision, stating that it was not "clear" whether "management addressed Gilbert's concerns [on the morning of August 7] in a way that his fears reasonably should have been quelled." 866 F.2d at 1441. See also 866 F.2d at 1441 n.11. The Court explained:

In other words, did management explain to Gilbert that the problems in his work area had been corrected? Or did management indicate to Gilbert that he would be assigned to another area in the mine that was free of safety problems? Or did management indicate to Gilbert that the situation was unsettled, and that he should wait five hours (until the start of his assigned shift) before inquiring further about safety conditions in his area? These questions must be answered by the Commission in order for it to determine whether the management at Sandy Fork reasonably addressed Gilbert's fears on the morning of August 7. If management effectively "stone-walled" Gilbert in responding to his inquiries on the 7th, then his continued fears regarding work hazards were reasonable, and his refusal to return to work cannot be viewed as either unreasonable or in bad faith. 866 F.2d at 1441.

The parties now before me on remand requested to submit these issues on the existing record without further evidentiary proceedings. The essential existing evidence in this regard was summarized by the Commission in its February 16, 1990, decision:

There is no question on this record that mine management was aware of the roof problems in the area where Gilbert was working and was taking steps to address the problems. As the judge found, and as we noted, when Gilbert brought the conditions that he perceived to be hazardous to the attention of his section foreman on August 6, the foreman responded

that he would add more cribs to support the roof and that he would stand by and watch while coal was cut. 8 FMSHRC at 1089; 9 FMSHRC at 1330. Gilbert then went outside the mine and repeated his concerns to the general mine foreman, who told Gilbert that he would not insist that he resume work and that Gilbert should go home and return the next day to meet with Phipps, the general manager, and Begley, the mine superintendent.

When Gilbert returned on August 7, Phipps and Begley were underground conducting an examination of the roof, and Gilbert was told by another miner that a roof fall had occurred in the mine during the night. After Phipps and Begley emerged from the mine, Gilbert talked separately with each of them.

Gilbert talked first with Phipps. Both Gilbert and Phipps testified that Gilbert told Phipps that he was afraid of the roof. Tr. I 39-40; III 89-92. Gilbert asked Phipps what management was going to do about the roof and how the roof would be supported. Tr. II 39-40. Gilbert testified that Phipps responded that "they [were] supporting what they could." Tr. I 39-40. Similarly, Phipps stated that "primarily" he told Gilbert that the mine roof was all the top that the mine had. Tr. II 127. Both Phipps and Gilbert testified that Phipps asked Gilbert if he had any ideas for dealing with the roof (Tr. I 40; III 91), and Gilbert testified that he offered a few suggestions (Tr. I 40). Phipps further stated that he did not try to "convince" Gilbert that the roof was safe and that, although management was pursuing several approaches for alleviating the roof problems, he did not discuss those initiatives with Gilbert at that time. Tr. III 127-28.

Gilbert then engaged Begley in a similar brief conversation. Gilbert and Begley also agreed that Gilbert told Begley that he was afraid of the roof. Tr. I 40-41; II 109. Gilbert testified that Begley replied that "that's all they can do ... that's all the top they [had]." Tr. I 41. Begley stated that he did not recall telling Gilbert anything about the top on the morning of August 7. Tr. II 111-12. Begley's recollection was that he and Gilbert discussed Gilbert's possible job transfer rather than roof problems. Id. After these two conversations, Gilbert left the mine.

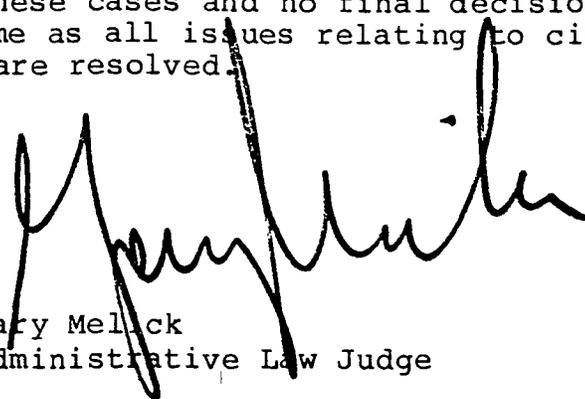
The Court rejected the judge's and Commission's determinations that in leaving the mine at this point, some five hours before his shift was scheduled to

begin and before he had been told the specific area of the mine to which he would be assigned, Gilbert acted precipitately and unreasonably. 866 F.2d at 1140. Instead, the Court has directed us to determine whether management explained to Gilbert that the problems in his general work area had been corrected, or had indicated that he would be assigned to another area of the mine free of safety problems, or had suggested that the situation was unsettled and that he should wait until the start of his assigned shift before inquiring further about safety conditions in his area. 866 F.2d at 1441.

Within the limited scope of review on this remand and considering the uncontradicted and credible evidence it must be concluded that Gilbert's safety concerns were indeed not addressed in a manner sufficient to reasonably quell his fears at the time of his meetings with Phipps and Begley on August 7 five hours before the beginning of his shift. To paraphrase the Commission in its February 16, decision, given the Court's belief that Gilbert did not act precipitately and its finding that he entertained a good faith, reasonable belief in a hazard, I feel similarly constrained to conclude that Gilbert's departure from the mine and decision not to return for the beginning of his work shift on August 7, constituted a constructive discharge in violation of section 105(c)(1) of the Act.

ORDER

Sandy Fork Mining Company, Inc. discharged Complainant John A. Gilbert on August 7, 1985, in violation of Section 105(c)(1) of the Federal Mine Safety and Health Act of 1977. Accordingly the appropriate parties hereto are directed to attempt to reach stipulations regarding the criteria for assessing civil penalties under section 110(i) of the Act and damages and costs including attorneys fees, within 20 days of the date of this decision. If the appropriate parties are unable to reach stipulations as to these issues, hearings will be held on the remaining issues on December 11, 1990 at 11:30 a.m. in London, Kentucky. The courtroom in which the hearings will be held will be designated at a later date. This is not a final decision in these cases and no final decision will be issued until such time as all issues relating to civil penalties costs and damages are resolved.



Gary Mellick
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 15, 1990

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), :
Petitioner : Docket No. WEST 90-289-M
 : A. C. No. 02-01738-05516
 :
v. : Bagdad Millsite
 :
CYPRUS BAGDAD COPPER :
CORPORATION, :
Respondent :

DECISION DISAPPROVING SETTLEMENT
ORDER TO SUBMIT INFORMATION

On July 19, 1990, a copy of the operator's notice of contest of the civil penalty was received by the Commission. On September 21, 1990, the Solicitor orally advised my law clerk that a settlement had been reached and that a settlement motion would be filed in lieu of a penalty petition. On October 29, 1990, the parties filed a joint motion to approve settlement of the one violation involved in this case.¹ The originally assessed penalty was \$2,500 and the proposed settlement is \$250.

Citation No. 3467683 was issued for a violation of 30 C.F.R. § 56.14107(a) because guards for the primary and secondary drive pulleys for the Nos. 3 and 4 transfer belts were not adequate. The Narrative Findings adopted by MSHA to support its original assessment set forth that one miner was fatally injured as a result of an accident in which he placed himself on the belt just prior to the start-up of the conveyor system. The Narrative Findings further recite that the violation was a contributing factor to the fatality because the guardrails were not secured so as to prevent an employee from simply lifting the guard and because the distance between the guards was wide enough to permit an individual to go inside. This is apparently what happened here as the Findings state that the miner was pulled into the pulley by the belt. The operator was found negligent on the basis that it is the duty of management to see that all moving parts are adequately guarded at the worksite.

The settlement motion advises that the Secretary now believes that insufficient evidence exists to support the degree of negligence initially asserted. Actually, the citation only found

¹ The parties attached to the motion a copy of the MSHA assessment sheet, narrative findings for special assessment and the citation.

moderate negligence. The settlement motion now says there was no negligence and that the Secretary no longer asserts that the violation caused the accident. However, the motion fails to discuss any of the salient facts which have led the Secretary to conclude that the operator was not at fault and, even more importantly, why the cited violation which was first thought to be a cause of the accident, now has nothing to do with it.

It is well established that the Commission and its Judges bear a heavy responsibility in settlement cases pursuant to section 110(k) of the Act, 30 U.S.C. § 820(k). See, S. Rep. No. 95-181, 95th Cong., 1st Sess., 44-45 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 632-633 (1978); Wilmot Mining Company, 9 FMSHRC 684 (April 1987). Further, it is the Commission's responsibility to determine the appropriate amount of penalty, in accordance with the six criteria set forth in section 110(i) of the Act. 30 U.S.C. § 820(i). Sellersburg Stone Company v. Federal Mine Safety and Health Review Commission, 736 F.2d 1147 (7th Cir. 1984). Consolidation Coal Company, 11 FMSHRC 1935 (October 1989).

The Commission's obligation to oversee the propriety of recommended settlements is particularly pronounced in a case such as this which presents a fatality. The parties must provide the precise circumstances which they believe support their present views and justify the suggested 90% reduction in the penalty amount. The Commission cannot accept a settlement motion in any case on faith alone, much less in a matter such as this.

In light of the foregoing, it is **ORDERED** that the proposed settlement be and is hereby **DISAPPROVED**.

It is further **ORDERED** that within 21 days from the date of this order the parties **SUBMIT** information sufficient to support their settlement recommendations. Otherwise the case will be set for hearing.



Paul Merlin
Chief Administrative Law Judge

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