NOVEMBER 1991

COMMISSION ORDERS

ADMINISTRATIVE LAW JUDGE DECISIONS

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

Secretary of Labor, MSHA v. Cyprus Tonopah Mining Corporation, Docket No. WEST 90-202-M, etc. (Judge Lasher, September 23, 1991).

Roy Farmer and Others v. Island Creek Coal Company, Docket No. VA 91-31-C. (Judge Melick, Interlocutory Review of September 27, 1991 Order).

Contests of Respirable Dust Sample Alteration Citations, Docket No. 91-1. (Interlocutory review of Judge Broderick's October 7, 1991 Order).

Gatliff Coal Company, Inc., v. Secretary of Labor, MSHA, Docket No. KENT 89-242-R. (Judge Melick, October 10, 1991).

Air Products and Chemicals, Inc. v. Secretary of Labor, MSHA, Docket No. PENN 91-1488-R. (Judge Melick, October 16, 1991).

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

Secretary of Labor, MSHA v. JVAL Incorporated, Docket No. WEST 90-201-M, etc. (Judge Morris, October 11, 1991).

Willie Williams, Jr. v. Jim Walter Resources, Inc., Docket No. SE 91-95-D. (Judge Koutras, October 16, 1991)

COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 13, 1991

IN RE: CONTESTS OF RESPIRABLE DUST :
SAMPLE ALTERATION CITATIONS : MASTER DOCKET NO. 91-1
:
:
:

DIRECTION FOR REVIEW
ORDER GRANTING STAY

On October 21, 1991 the Secretary of Labor filed a Petition for Interlocutory Review of the October 7, 1991 Order of the administrative law judge, insofar as it orders the Secretary to produce six specific documents sought by respondents in discovery.

On October 25, 1991 contestants represented by Jackson & Kelly filed a Petition for Interlocutory Review of the September 13, 27 and October 7, 1991 Orders of the administrative law judge, insofar as the Orders upheld the Secretary's claim of privilege with respect to forty-eight documents sought in discovery.

Both parties assert that their respective petitions raise issues that satisfy the requirements of Commission Rule 74, 29 C.F.R. § 2700.74. Upon inspection of the petitions, we conclude that the parties have raised controlling questions of law, and that our review of the relevant orders may materially advance the final disposition of the proceeding.

Accordingly, the petitions for interlocutory review are hereby granted. The parties are directed to comply with the briefing requirements set forth in Rule 74, 29 C.F.R. § 2700.74 with the exception that the filing time available to each petitioner shall be ten days after service of this order. In all other respects the requirements of Rule 74 obtain.

For good cause shown, the judge's Order to produce the six documents for which the Secretary has sought protection is hereby stayed pending further notice.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

L. Clair Nelson, Commissioner

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

NOV 4 1991

SOUTHERN OHIO COAL CO., Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. WEVA 91-337-R
	:	Order No. 3116688; 3/18/91
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Martinka No. 1 Mine

DECISION

Appearances: David M. Cohen, Esq., American Electric Power Service Corporation, Lancaster, Ohio, for the Contestant;
Glenn M. Loos, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a Notice of Contest filed by the contestant pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, challenging the legality and propriety of a section 103(k) order issued at the mine. A hearing was held in Morgantown, West Virginia, and the parties appeared and participated fully therein. They waived the filing of posthearing briefs, but they presented oral argument at the close of the hearing, and I have considered their arguments in the course of my adjudication of this matter.

Issues

The principal issue in this case is whether or not the contested order was justified and properly issued, or whether the inspectors acted unreasonably and arbitrarily in issuing the order. Additional issues raised by the parties are identified and disposed of in the course of this decision.

Applicable Statutory and Regulatory Provisions

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

2. Section 103(k) of the Act, 30 U.S. § 813(k).

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

Stipulations

The parties stipulated to the following (Tr. 7).

1. The contestant is the owner of the Martinka No. 1 Mine, and it is subject to the Act.

2. MSHA Inspectors Tom May and David Workman are authorized representatives of the Secretary of Labor.

3. The contested section 103(k) order was issued on March 18, 1991, and a copy was served on the contestant.

Discussion

The contested section 103(k) Order No. 3116688, issued at 11:50 p.m., on March 18, 1991, states as follows:

> A roof fall has occurred in front of the Nos. 1-2-3-4 and 5 shields located at the head gate of the B-12 longwall section. The roof fell above the bolts and impedes passage from the stageloader area to the face. This order is issued for the safety of the miners. The following persons are allowed to enter the area; state mine inspectors, U.M.W.A. reps, and company reps.

The "area or equipment" affected by the order is shown on the face of the order as the "B-12 longwall section", and the order reflects that it was terminated at 3:00 a.m., March 19, 1991, after the completion of an investigation.

MSHA's Testimony and Evidence

MSHA Inspector David E. Workman testified that he conducted a regular AAA inspection of the mine on Monday, March 18, 1991, and that he arrived at 7:30 a.m., and left at 5:30 p.m. He confirmed that he received no reports of any roof falls on that day except that at approximately 4:00 p.m., while in the safety department office with Inspector May, and a company and union representative, company safety representative Dan Conoway informed him that a roof fall had been reported to him but that he did not know whether it was a "reportable fall". Mr. Conoway told him that he was not aware that anyone was injured and that he was going underground to investigate the matter. Mr. Workman informed Mr. Conoway that if he determined that the fall occurred above the anchorage zone and was impeding passage to call out and

let him know and that he would go in and investigate the matter if it was a reportable fall. (Tr. 22).

Mr. Workman stated that state inspector Albert Lacara was also present when Mr. Conoway informed him of the fall, and Mr. Lacara informed him that he would go in and look the area over. Mr. Workman stayed at the mine until 5:30 p.m., and no one provided him with further information about the fall. He left the mine to return to his office and no one from management called him there or at home to report any fall. However, at approximately nine or ten p.m. that evening he received an anonymous call at home informing him of "a massive roof fall" on the B-12 longwall headgate area. He called his supervisor and informed him of the call, and then proceeded to the mine. He also contacted Mr. May and invited him to the mine to help him investigate the fall (Tr. 23-25).

Mr. Workman arrived at the mine at approximately 11:30 p.m. on Monday, March 18, 1991, and spoke with shift foreman Jim Keener. Mr. Keener confirmed that a fall had occurred on the longwall headgate but that he had not seen it, and that it was reportably 20 to 30 feet high. Mr. Keener also confirmed that the longwall was not in operation and that debris was being removed so that the face could be advanced to pull the shields in under the fall area. Mr. Workman then proceeded to interview three miners who had worked on the previous 12:00 a.m. to 8:00 a.m. shift on Monday morning.

Mr. Workman stated that stage loader operator Duke Willard told him that the roof was working throughout most of his shift in front of the No. 1 through 3 shields and that it fell toward the stage loader sometime between 7:30 and 8:00 a.m. on Monday morning, and that 2 roof bolts and fallen roof materials were laying in the stage loader. General laborer Roger Hutchinson informed him that the fall occurred in front of the shields on the headgate side, and that he saw roof bolts still hanging. He placed the fall at approximately 7:45 a.m. Mechanic Robbie Robinson informed him that the fall occurred in front of the No. 1 through 5 shields outby the stage loader at approximately 8:00 a.m, and that roof bolts and roof material fell into the stage loader conveyor chains. Foreman Ed Lane instructed him to call out and report the fall, and he did. He also reported it to the longwall superintendent (Tr. 26-28).

Mr. Workman was of the view that the roof fall as described to him by the three miners should have been reported to him or to Mr. May during the day of their inspection on Monday, March 18, and that someone on the shift should have known whether or not the roof fell above the anchorage and impeded passage and reported it as a reportable unplanned fall. Under the circumstances, he notified Mr. Keener at 11:50 p.m. that he was under a section 103(k) order and that he would be making an

investigation. Mr. Workman explained that he issued the order in order to withdraw people from the area until an investigation was completed to evaluate the conditions and determine the corrective action needed (Tr. 29). In this instance, he also found an order necessary to insure the safety of miners because the information he received from the three miners that the roof bolts came down would indicate that the fall was above the roof bolts and that the adverse roof conditions could cause injury if anyone were hit by the falling roof. The roof bolts laying in the stage loader would indicate a fall above the roof bolt anchorage zone and a potential hazard to miners. He confirmed that he was upset because the roof fall had not been reported (Tr. 30-31).

Mr. Workman confirmed that after issuing the order he did not immediately go underground to the area where the fall had occurred. He spent time reviewing records and speaking to others, and management personnel were on their way to the mine. After Mr. May, the company safety manager, and the mine superintendent arrived, they all went underground and arrived at the section at 2:30 a.m., Tuesday morning, March 19. All work had ceased and people had been withdrawn because of the order. He looked over the area and observed that a fall had occurred rib-to-rib and approximately 20 feet to the top of the roof cavity. He described what he saw, confirmed a sketch of the scene, and indicated that the fall should have been reported as a reportable roof fall (Tr. 36). He discussed with management the corrective action required, including installing bars across the brow at the edge of the fall to prevent it from falling out, and the fall was still present (Tr. 38). The fall had existed for approximately 14 hours without being corrected, and the order was terminated at 3:00 a.m., after the area was supported and cleared out (Tr. 39).

Mr. Workman confirmed that management was doing a good job of recovering the fall, and it was directing the work force properly. Everyone was aware of the conditions and proper planning procedures were in place. He terminated the order after concluding his investigation and determining that the health and safety of the miners was no longer in danger (Tr. 41).

On cross-examination, Mr. Workman confirmed that at the time Mr. Conoway informed him about the fall he stated that he was unsure as to whether it was reportable or not, but that he was letting him know that a fall had occurred. Mr. Workman further confirmed that inspector May and the state inspector were also present at that time, but that he and Mr. May did not go to the section to look into the matter because "I didn't know that it was a reportable fall under Part 50, as to whether it would require an investigation under 103(k) of the Act" (Tr. 42). The state inspector informed him that he would go to the area, but he did not call the inspector to determine what he may have found, and he did not know whether any state violations were issued

(Tr. 41-45). Mr. Workman confirmed that when there is a fall above the anchorage area it must be reported to MSHA as a reportable roof fall and MSHA will then inform the operator that it will investigate the matter (Tr. 46). He indicated that not all reportable falls require the closing of a portion of the mine to insure the safety of miners, nor do they require the immediate attention of MSHA (Tr. 48).

Mr. Workman stated that he based his order on the information he received from foreman Keener that a roof fall had occurred, and the interviews with the three miners on the 12:00 a.m. to 8:00 a.m. Monday morning shift. He acknowledged that Mr. Keener told him "he didn't know that much about what was going on up there", and that he would not know what happened between 8:00 a.m. and the time he issued the order at 11:50 p.m. Mr. Workman confirmed that management was working during the day to remove the fallen roof material and was following proper cleanup procedures (Tr. 51). He also confirmed that the information from the anonymous caller that there had been "a massive roof fall" was exaggerated.

Mr. Workman stated that it was necessary to issue the order in order to determine whether the fallen roof area was properly supported to prevent the fall from continuing to fall down the entry, whether the edge of the fall was properly supported, the type of supports which were present in the area, and the maintenance of the equipment (Tr. 57). He also considered the fact that the fall was still present after 14 hours after it happened and that it was reported to be 20 to 30 feet high, and "that gives me a lot of reason to go in and look at it for the health and safety of the people" (Tr. 59).

Mr. Workman confirmed that other than speaking to shift foreman Keener, he did not inform the safety department that he was going to conduct interviews with the three miners in question. However, Mr. Keener and another foreman were present during the interviews. Mr Workman also confirmed that he told the company safety representative that it was basically his investigation and that he was not to ask any questions while he was interviewing the miners (Tr. 63-64). Mr. Workman conceded that he could have gone underground immediately after issuing the order at 11:50 p.m., and that a union and company safety representative were present at that time. He explained that he did not do so because "I didn't feel there was an imminent danger situation", but that based on the information he received during the three interviews "I felt that a policy order, such as a 103(k), is issued to make an investigation, which is what I done" (Tr. 67). He further explained as follows at (Tr. 68):

> Q. But you didn't look at the conditions and then issue the order. You issued the order, then waited a few

hours and then looked at the conditions. Is that correct?

A. Yes, it is.

Q. It appears to me that the reason why a order was issued was largely due to you being upset about not being told about the roof fall. Is that a fair statement?

A. That is a very fair statement. Yes, sir, it is.

Q. So then if the roof fall would have been reported, you may not have issued the (k) order?

A. I would have investigated and may not have issued a (k) order. That is exactly right.

Mr. Workman stated that after he and Mr. May went to the fall area, he found that the crosscuts had been supported properly and that cribs were installed in the entry. However, the brow at the edge of the fall needed to be supported, and after discussing it with management, it was supported and he was then able to terminate the order within a half an hour (Tr. 74). He agreed that the best course of action to take when there is a roof fall at the headgate longwall area is to mine through the area as quickly as possible. He conceded that his order stopped all mining, but since 14 hours had already been wasted, "I didn't think a couple more hours was going to hurt that much" (Tr. 76).

Mr. Workman confirmed that roof falls above the anchorage zone have occurred in the past at the mine, and they have been reported by management. He did not believe that the mine has a history of trying to hide them from MSHA (Tr. 77). He further justified his order with the following explanation at (Tr. 90-91):

> After I gained the knowledge and the aspects of the particular occurrence of that fall on the B-12 longwall, I made the determination at that time as a Federal Coal Mine Inspector that I needed to issue a 103(k) order because of the length of time that the condition existed; because of the lack of communication, of properly reporting; not knowing whether any injuries had occurred or were reported to me to have occurred; or a potential of other conditions existing that could have caused injuries to individuals.

Mr. Workman confirmed that the fact that 14 hours had passed did not indicate that management was not trying to do anything about the roof conditions, and he explained what was being done (Tr. 98).

MSHA Inspector Thomas W. May confirmed that he inspected the mine on March 18, 1991, with Mr. Workman and that they were there from 7:30 a.m. until 5:30 p.m. He stated that at approximately 4:15 p.m., he received a report from Mr. Conoway who informed him and Mr. Workman that there was a roof fall at the longwall headgate but that he did not know whether it was reportable or not and that he was going to investigate. Mr. Workman informed Mr. Conoway to notify him if the roof fall was reportable, and if it was, he and Mr. May would go back underground. Mr. May stated that he and Mr. Workman left the mine at 5:30 p.m., and no one called them further about the fall (Tr. 107-111).

Mr. May stated that Mr. Workman called him late on the evening of March 18, and informed him of the fall. Mr. Workman advised him that someone had called him and reported that the fall was above the anchorage level. Mr. May then went to the mine and arrived there shortly after 1:00 a.m., Tuesday, March 19. Mr. Workman had already issued the section 103(k) by the time he arrived at the mine (Tr. 112). Workman told him he issued the order "for the health and safety of the miners" and that he had been informed that the headgate had fallen in above the anchorage level and that there was a problem with the passageway to the longwall face. Mr. May confirmed that he signed the order and agreed with it (Tr. 113).

Mr. May stated that upon investigation of the fall area, he found that the roof had fallen above the roof bolt anchorage in the headgate entry, and that cribs and posts were set in response to the fall. He stated that the operator was trying to mine out from under the fall, and discussions and recommendations took place with management in order to find a way to get the shields under the supports in order to mine out of the area (Tr. 113-114). Mr. May confirmed that he spoke with the headgate operator (Duke Willard) who informed him that the fall occurred at approximately 7:00 a.m. on his previous midnight shift and that bolts had fallen out and were in the pan (Tr. 115).

Mr. May believed that the order was justified to protect the health and safety of miners because of the roof conditions and impeded headgate passageway, and the fact that he and Mr. Workman were not modified of the fall in a timely manner so they could investigate it. He believed that miners faced a danger of additional fall of roof while going to and from the face. He believed that Mr. Workman had acted properly in issuing the order to insure that the recovery procedures were adequate to insure that no one was injured (Tr. 117). Mr. May stated that the purpose of the investigation was to find out what was going on underground in the section (Tr. 118). He confirmed that the order was in effect from approximately midnight, March 18, to 3:00 a.m., March 19, and he did not believe that this was a long time for an accident investigation (Tr. 119).

On cross-examination, Mr. May confirmed that he did not believe it was necessary to go back into the mine after Mr. Conoway initially reported the fall because a state inspector was there and he indicated that he would look at the fall. However, Mr. May did not follow up and speak with the inspector because he "felt no need" to do so. Mr. May also considered the fact that two other MSHA inspectors were in the mine and that "If they had a reportable fall and there was a hazard, they would surely have reported it to someone during the day" (Tr. 122). Mr. May further confirmed that if the fall were reportable under Part 50 of MSHA's regulations, he would have gone back into the mine. However, absent other circumstances, if the fall is not reportable, there would be no need to go back in (Tr. 122).

Mr. May stated that he first learned that Mr. Workman had issued the order when he arrived at the mine, and that they did not previously discuss the order. Mr. May confirmed that the order was initially verbally issued and it was issued in writing "after everything was taken care of". Mr. May explained why the order was issued, and he indicated that the fall area had not been moved through and was not supported to facilitate passage. The area must be properly supported before it is mined through (Tr. 130-132).

Mr. May confirmed that he was involved in the examination and investigation of the fall area, including some discussions with miners who were working on the shift when the fall occurred (Tr. 137-138). MSHA's counsel pointed out that Mr. Workman issued the section 103(k) order verbally at 11:50 p.m., as noted on the face of the written order. Counsel confirmed that Mr. May did not participate in the miner interviews conducted by Mr. Workman, and that Mr. Workman made his own decision to issue the order based on his interviews with the miners (Tr. 137-139).

Mr. May conceded that he did nothing about the fall from the time it was initially reported at 4:00 p.m, March 18, by Mr. Conoway, and the time he went to the fall scene on the morning of March 19, because "it had not been reported as a reportable roof fall" (Tr. 139). However, he indicated that one of the purposes of a section 103(k) order is to "preserve the site". He denied that doing nothing was contrary to the safety interests of miners. He explained that work continued for 16 hours before the order was issued and the area still had not been mined through. Under the circumstances, he believed "there is something wrong with the procedure that they're using" (Tr. 141).

Mr. May explained his reasons for not going to the fall area when it was initially reported at 4:00 p.m., March 18, by Mr. Conoway, and he relied on the fact that there was no report of any safety problem and management had not reported that the roof fall was in fact a reportable fall pursuant to MSHA's Part 50

regulations (Tr. 143). He confirmed that he does not always go to an area first to check it out before issuing a section 103(k) order. He did not do so in this case because "we wanted to investigate the area before further work was done" (Tr. 144).

Mr. May confirmed that within a half hour or more after he and Mr. Workman reached the site of the fall, "a good bit of work" was done so that the area could be immediately mined through. He also confirmed that upon reaching the scene, the roof had not as yet been adequately supported enough to mine through (Tr. 146).

Roger D. Vandergrift, general laborer, testified that he worked the midnight shift which ended at 8:00 a.m., on March 18, 1991, but he did not hear any reports of any roof falls until he returned to work on the midnight shift on March 19. He arrived at work at 10:30 p.m. that evening and served as the miners' walkaround representative accompanying Inspectors Workman and May. He confirmed that Mr. Workman interviewed three miners who were working at the time of the roof fall trying to find out what had occurred. Referring to his notes which he made during the interviews (exhibit R-5), Mr. Vandergrift indicated that one of the miners told Mr. Workman that the top was "dripping and working a little bit most of the shift," and that after the roof fell roof bolts were observed in the pan line (Tr. 149-152).

Mr. Vandergrift stated that a second miner told Mr. Workman that he wasn't sure how high the fall was and did not go under it to look, and that the third miner, mechanic Robbie Robinson, called out and reported the fall to Joe Verges, the communication man. Foreman Ed Lane had instructed Mr. Robinson to report the fall (Tr. 153). Mr. Workman also spoke with management personnel about the fall, but superintendent Wes Hoag was the only individual to say anything about the fall. Mr. Workman then informed shift foreman Jim Keener that he was issuing a section 103(k) order and that there was not to be any work done until he arrived. Mr. Workman stated that he was issuing the order "for the safety of the miners" (Tr. 154-155).

Mr. Vandergrift believed that an investigation was justified after Mr. Workman interviewed the miners because the fall occurred above the anchorage point and "it had to be checked to find out what happen" (Tr. 155). A fall above the anchorage is a reportable fall pursuant to the roof control plan, and "You have no support to hold the top" (Tr. 155).

Mr. Vandergrift confirmed that he travelled to the fall site with the inspectors after Mr. Workman issued his verbal order and he described what he observed. He stated that the area had not been mined through and that the only work which had been done was to run the pan line and clean out the rock. Mr. Workman and company personnel then discussed what was needed to correct the

fall and to help work their way out of the fall area, including work to support the brow with crossbars and boards (Tr. 157).

On cross-examination, Mr. Vandergrift confirmed that Mr. Workman did not tell him that the roof fall was an urgent matter, but that he did issue the order for the safety of the miners who were going to be in the fall area. Mr. Vandergrift agreed that based on the miner interviews conducted by Mr. Workman, the order was justified (Tr. 160). He confirmed that Mr. Hoag had stated that "not much work had been done since the midnight shift on March 18" (Tr. 164). Mr. Vandergrift stated that the additional brow supports were significant in allowing mining to continue and to prevent the fall from continuing outby (Tr. 165).

Respondent's Testimony and Evidence

Daniel Conoway, safety and health manager, and former afternoon shift foreman, stated that he first learned of the roof fall at 4:15 p.m., on March 18, 1991, but that superintendent Wesley Hoag informed him at 10:00 a.m. that morning that "we had some bad conditions on the B-12 headgate". Mr. Hoag also informed him that the fall was not reportable but that he would send some people in to evaluate the situation and report back to him. During the shift change, general superintendent John Metz informed Mr. Conoway that "conditions had deteriorated on the B-12 face and that I should report to MSHA that we have had a fall" (Tr. 169). Prior to this time, Mr. Conoway knew that "we had some bad top conditions", but he did no know the extent of the fall. As soon as he received this information, Mr. Conoway informed MSHA Inspectors Workman, May, and state inspector Albert Lacara that he had received conflicting information about the fall, and that he was first informed in the morning about "some had top", but was then notified "that we do have a reportable fall". Mr. Conoway stated that he had no knowledge of any of the details of the fall, but informed the inspectors that "for the sake of argument, I'm reporting to you that we have a fall" (Tr. 172).

Mr. Conoway stated that after informing the inspectors of the fall, Mr. Workman asked him to let him know when he found out more of the details, and state inspector Lacara stated that he would inspect the area and asked Mr. Workman if he wished to be called. Mr. Workman stated that he did not. Mr. Conoway then informed Mr. Workman that "we're going in and look at it", and Mr. Conoway stated that his intent was to learn the details of the fall and to make measurements so that he could submit the information on an MSHA Form 70001. Mr. Conoway confirmed that there was a question in his mind as to whether or not the fall was reportable "because I had not seen it or no one in the safety department had seen it", but that "for the sake of argument, I

wanted to report it" (Tr. 173). Mr. Conoway explained the work that is generally done to take care of a roof fall (Tr. 174-175).

Mr. Conoway stated that he returned to the mine at approximately 12:30 a.m., March 19, and Mr. Workman informed him that he had conducted an investigation of the fall with some of the people who were there and determined that it had occurred at 7:30 or 8:00 a.m., the previous morning and that he had issued a section 103(k) order (Tr. 176). Mr. Conoway stated that he was concerned that the order was issued because "you're just setting there basically letting the conditions worsen and not taking any corrective measures" (Tr. 178). When he and the inspectors reached the longwall face, Mr. Conoway and the group observed the top from under supported roof, and Mr. Conoway believed that sufficient cribs had been set at the headgate entry where the fall had occurred. He also indicated that the fall was somewhere in the neighborhood of twenty feet above the mine floor, which made it "seven, maybe eight feet from the roof". He further confirmed that the fall was "from rib to rib", and that some shields and the pontoons were covered with "quite a bit of loose rock and material". No one was voicing any safety concerns about the cleanup work, and Mr Workman made some recommendations to support the brow and reposition some cribs, and this was done. Mr. Conoway believed that the place was adequately supported without the additional work which was done, but he could not state that the additional work did not enhance safety (Tr. 181).

Mr. Conoway stated that the operator had never been cited for not reporting a longwall roof fall, and that if the roof is broken above the bolts, it is reported. He confirmed that Mr. Workman's order was the first time the mine had received a section 103(k) order for a roof fall, and that on prior occasions inspectors have asked to review the operator's report of a fall, and that depending on the location of the fall, they would not go to the fall area (Tr. 182).

On cross-examination, Mr. Conoway confirmed that he first learned of "bad top" at 9:30 or 10:00 a.m, March 18, 1991, and that he spoke with Mr. Metz at 4:00 p.m. He stated that he did not know why it took six hours to determine the extent of the fall, and he explained that "part of the problem was to make sure the conditions were such that people could work, that we had a plan of attack developed" (Tr. 184). He confirmed that telephones are located in the underground section, and when asked how difficult it would be for someone underground to determine the extent of the fall, he stated "if they were there, it would not be that difficult" (Tr. 185). He confirmed that he did not go underground at 4:00 p.m., on March 18, but that he did go to the fall area with the inspectors after 11:00 p.m. (Tr. 186).

Mr. Conoway stated that he informed the inspectors at 4:00 p.m., March 18, that "I do not have any facts, but for the

sake of argument, I'm telling you it's a reportable roof fall" (Tr. 187). He confirmed that he did not ask the inspectors to go to the section, that he did not definitely tell them "there is a reportable fall", and that he did not formally report it under section 50.10 of MSHA's regulations (Tr. 187). However, by reporting it and stating "for the sake of argument", he believed that he was in technical compliance with the law (Tr. 188).

Mr. Conoway stated that he did not exactly know what measures were being taken during the period after the fall, and that he could "just speculate". He explained that the cleaning up of the fallen rocks and debris was a slow process, and he confirmed that he never informed Inspectors Workman or May at 4:00 p.m., about any corrective work that was being done (Tr. 190). Mr Conoway stated that "sometimes the roof begins to drip or work or rip down one side; conditions deteriorate rather slowly. However, there are other times when it drops to the roots" (Tr. 191).

Ernest L. Weaver, longwall supervisor, confirmed that he was the supervisor on the B-12 longwall section on March 18, 1991, on the 8:00 a.m. to 4:00 p.m. day shift. He stated that when he arrived on the section that morning the midnight shift foreman advised him that "the top on the headgate was getting worse", and that when they went to look, they observed that the top was deteriorating and that "parts of the roof bolts were showing where rock had fell out" (Tr. 200). Mr. Weaver then informed his crew to set additional timbers and cribs if needed to insure their safety to and from the face. Mr. Weaver identified certain "call-out sheets" (exhibits C-1 though C-3), reflecting some of the work done with respect to the roof fall. One of the reports was his call-out which reflected that "we tried to advance the headgate as many times as we could possible, but due to the rock and the bad top conditions, we weren't able to advance like we wanted to" (Tr. 204).

Mr. Weaver confirmed that after the call-outs, production stopped, and the section was idled. He explained the ensuing work to address the fall conditions (Tr. 204-205). He confirmed that during the attempts to advance and drop the roof support shields, "the top deteriorated to the point where it fell in" and as attempts were made to move the shields forward, more roof materials were falling between the shields. When asked if he saw any hazards associated with not doing anything, he responded "the rule of thumb is you do not let a longwall set in bad top" (Tr. 206).

On cross-examination, Mr. Weaver confirmed that during the time measures were taken to clean out the fall area, the brow of the fall was not supported with bars or boards. He also confirmed that he did not inform any MSHA personnel of the measures being taken to address the fall. He stated that he

called outside at noon during his shift on March 18, and told Pat Zuchowski that "it was a reportable fall" (Tr. 207). Mr. Weaver confirmed that he was not present with the inspectors when the brow was supported, and that the shields in the fall area were never up under supported roof during his shift (Tr. 208). Mr. Weaver further explained as follows at (Tr. 209):

> Now, Ed Lane encountered a bad top during this shift, and by us going in there and trying to advance it, we more or less, in a sense, made it worse. But you had to make it worse in order to make it better, if you can understand what I mean.
>
> Simply by loading the shields up and down, that makes it worse, but you have to do that to try to advance them forward. And if you have a lot of loose material up above you, naturally, when you keep doing this, it's going to fall. And that is what happened. It finally did all fall in.

Randolph K. Ice, accident prevention officer, stated that he worked the midnight shift of March 18, 1991, which ended at 8:00 a.m. that morning, and that he had learned nothing about any roof fall on that shift by the time he left the mine at 9:00 or 9:30 a.m. He next returned to the mine at 10:45 p.m. that same evening in preparation for going to work on the midnight shift of March 19. Upon arrival at his office he learned that Inspector Workman had issued a section 103(k) order. He then proceeded to the longwall office and found Mr. Workman interviewing a miner who worked on the midnight shift, and Mr. Workman confirmed to him that he had issued the order and was conducting an investigation. Mr. Workman informed him that he could stay in the room during the interviews, but that it was his investigation, and that miners would have to stay outside as long as he needed them (Tr. 214-215). Mr. Ice did not believe the order was justified, and it was his opinion that Mr. Workman issued it because "he was mad, very upset". Mr. Ice further stated that he assumed that someone had called Mr. Workman and filed a complaint.

Contestant's Arguments

The contestant argues that it is undisputed that the roof fall in question was reported to the MSHA inspectors at the end of the day shift at approximately 4:00 p.m., on March 18, 1991. However, the inspectors chose not to view the location of the fall, and issued the section 103(k) order at 11:50 p.m., that same evening without the benefit of first viewing or inspecting the fall location. Contestant maintains that the order forced it to discontinue work to alleviate the dangers associated with the roof fall and that it was not necessary to insure the safety of the miners, and in fact did not promote the safety of the miners.

Under these circumstances, contestant concludes that the issuance of the order was unreasonable and an abuse of the inpsectors' discretion, and that it should be vacated.

The contestant concedes that it would be appropriate to close down a section of the mine by issuing a section 103(k) order for an accident investigation when it is necessary to insure the safety of the miners. However, the contestant takes the position that the inspectors should have understood that it was not necessary to close the section down to insure the safety of miners, and that based upon what inspector Workman should have reasonably known at the time he issued the order, the order should not have been issued. The contestant points out that at the time the state inspector indicated that he would go to the fall location to determine the existing conditions, the MSHA inspectors declined to go with him. The state inspector issued no violations, and management was attempting to support the roof as necessary and to mine through the area, which everyone concedes is the proper procedure in the circumstances. This was a time consuming process, and the contestant's efforts continued throughout the day on March 18.

The contestant asserts that upon his return to the mine on the evening of March 18, Inspector Workman did not speak with the state inspector, and spoke to one who was really knowledgeable about the fall conditions, and there is no evidence that the three miners who he interviewed considered the conditions in the fall area particularly dangerous. Contestant further points out that Inspector Workman testified that he saw no urgency with regard to the roof and indicated that it had been that way for 14 hours and that "a few more hours wouldn't hurt". Yet, he still issued the order without first going to the fall location to observe the conditions, and that by doing so, the order resulted in an increase, rather than a decrease, of any danger resulting from the fall.

The contestant further points out that even after he issued the order, Mr. Workman waited several hours before going to the fall location. Contestant suggests that the obvious inference from this is that the inspectors knew there were no dangerous conditions at the fall location, and that any irritation by the inspectors because they were not notified earlier about the fall does not justify the issuance of the order.

MSHA's Arguments

MSHA asserts that the inspectors were first informed of bad top or a possible reportable roof fall at the end of the day shift on March 18, at approximately 4:15 p.m. The inspectors informed management officials that they would be at the mine for another hour, and invited them to inform them if further details were known or if the fall was a reportable fall pursuant to

MSHA's reporting requirements. Since no further reports were forthcoming, the inspectors left the mine, but returned later that evening after Mr. Workman received an anonymous phone call informing him of a reportable fall. After interviewing three miners who had knowledge of the fall, Inspector Workman verbally issued the section 103(k) order and subsequently put it in writing, and it was co-signed by Inspector May who concurred in its issuance. The inspectors subsequently went to the location of the fall to conduct an investigation.

MSHA agrees that the issue presented in this case is whether or not the inspectors abused their discretion and acted unreasonably in issuing the order. Rochester and Pittsburgh Coal Company, 11 FMSHRC 2159 (November 1989). MSHA's position is that in determining whether or not the inspector acted reasonably, the only relevant fact is the knowledge available to him when he decided to issue the order, and not what he subsequently learned when he went underground to actually view and inspect the location of the fall. In support of this argument, MSHA cites a decision by former Commission Judge Virgil Vail in a compensation proceeding resulting from the issuance of a section 103(k) order. Homestake Mining Company, 4 FMSHRC 1829 (October 1982). In that case, in upholding the order, Judge Vail stated in part as follows at 11 FMSHRC 1839-1840:

> A reasonable assessment of the facts known by Homestake at 6:30 a.m. prompted management to withdraw the miners from the Ross shaft that morning. Further, as late as 10:00 a.m. when the inspectors arrived, Homestake management had not made a positive determination as to the cause of the CO and smell of wood smoke in the shaft. Based on these facts, it is reasonable for the inspectors to believe there were grounds to issue the 103(k) order for the health and safety of the miners. If subsequent investigation revealed that the condition causing the CO and smoke in the shaft had abated, this would not make the original decision wrong.
>
> * * * * * * *
>
> It is clear to me that section 103(k) of the Act clearly authorized the inspectors to issue the order of withdrawal on June 21, 1979. The plain language of this provision of the Act and related regulations authorizes representatives of the Secretary to issue such orders as they deem necessary to protect the health and safety of the miners. As the conditions existed at the time of the inspectors arrival at the mine, a prudent reading of the potential perils warranted the action taken in issuing the order and conducting the subsequent inspection of the affected area. Until the inspectors could be assured there was

no further danger to the miners from a fire or CO, the issuance of the 103(k) order was valid and proper.

MSHA asserts that the situation presented on March 18, indicated that a roof fall occurred in the morning, or as late as the afternoon on that day, and that there was confusion among mine management as to what was going on. Given the variety of the reports communicated to the inspectors, including the lack of any definitive information from management regarding the fall, and the miscommunication as to whether or not management was going to investigate the fall after 4:00 p.m. when it was reported to the inspectors, MSHA concludes that it is difficult to say what the inspectors should have done at that time. However, after receiving the anonymous call and returning to the mine, the inspector spoke to miners who were working on the section when the fall occurred and a supervisor, and he learned that roof bolts were down. The inspector also knew that the fall had occurred 16 hours earlier, and except for the anonymous call, no one told him anything about the fall. In these circumstances, MSHA concludes that it was natural for the inspector to be suspicious, and at that point in time, he issued the order and went underground to the fall location. Simply because mine management believes that the inspector should have done something else and disagrees with his decision to issue the order does not support any conclusion that the inspector abused his discretion.

Findings and Conclusions

Section 103(k) of the Mine Act authorizes a mine inspector, in the event of an accident which occurs in a coal or other mine, to "issue such orders as he deems appropriate to insure the safety of any persons" in the mine. MSHA's regulations at 30 C.F.R. Part 50 provides several definitions of an "accident". The relevant definition for purposes of this case is the definition found in section 50.2(h)(8), which defines an accident as "An unplanned roof fall at or above the anchorage zone in active workings where roof bolts are in use; or, an unplanned roof or rib fall in active workings that impairs ventilation or impedes passage".

Section 103(k) orders are typically issued by MSHA inspectors to secure the scenes of accidents, to insure the continued safety of mine personnel, to preserve evidence, and to facilitate the investigation of accidents. See: Miller Mining Company Co., Inc., 4 FMSHRC 1509 (August 1982), aff'd at 3 MSHC 1017 (9th Cir. 1983); Itmann Coal Company, 1 FMSHRC 1573 (October 1979); Harman Mining Corporation, 3 FMSHRC 45 (January 1981); Lancashire Coal Company, 12 FMSHRC 272 (February 1990; Homestake Mining Company, Supra.

Section 103(k) authorizes an inspector to issue such orders as he deems appropriate to insure the safety of miners. Thus,

the issuance of such an order by an inspector is discretionary. If an inspector believes that an operator has the situation well in hand, and that the safety of miners is insured, he need not issue any orders at all. On the other hand, if the inspector is in doubt, or has insufficient information to enable him to make a judgment as to the severity of the situation, or the hazard exposure to miners, I believe he must be afforded the latitude to act according to the wisdom of his discretion and experience, particularly in accident situations involving an unplanned roof fall. In my view, in order to successfully respond to such situations, an inspector must be able to do what he believes is appropriate according the to the facts as they are known to him, or as they appear to exist, at the time he makes the decision to act. Viewed in this context, I believe that the issue in this case is whether the facts and circumstances known to Inspector Workman at the time he decided to act warranted the issuance of the section 103(k) order. If the order was routinely issued, without regard to the safety or health or miners, then I believe it should be vacated. If, on the other hand, it was issued in order to insure the safety or health of the miners, it should be affirmed.

In this case, Inspector Workman testified that he issued the order out of consideration for the health and safety of the miners working in the location of the fall. He also testified that he decided to issue the order after he learned more about the fall through interviews with three miners who gave him information about the roof fall and roof conditions. Mr. Workman also took into consideration the length of time the roof conditions had existed, the lack of communication and more detailed information from mine management in properly and promptly reporting the fall, and his lack of any specific knowledge as to the existence of potentially hazardous conditions which could have resulted injuries to miners (Tr. 90-91).

Inspector May, who arrived at the mine after Mr. Workman had issued the oral order, countersigned the order when it was reduced to writing and he expressed agreement with the order and Mr. Workman's reason for issuing it. Mr. May confirmed that Mr. Workman told him that he issued the order out of concern for the health and safety of the miners, and that he had been informed that the roof had fallen above the roof bolt anchorage and that there was a problem with the passageway to the longwall face. Mr. May believed the order was properly issued in order to facilitate the investigation, and to insure that proper recovery procedures were being followed to preclude any injuries.

The miner's walkaround representative, Rodger Vandergrift, testified that one of the miners who Mr. Workman interviewed shortly before he issued the order told Mr. Workman that the roof had been "dripping and working" most of the shift, and that after the roof fell, roof bolts were observed in the longwall pan line.

Mr. Vandergrift indicated that when there is a roof fall above the roof bolt anchorage there is no support to hold the top, and he believed that the order and investigation which followed Mr. Workman's interviews with the miners was justified in order to check out the situation. Mr. Vandergrift also indicated that Mr. Workman informed shift foreman Keener that he was issuing the order for the safety of the miners. Mr. Keener was not called to testify, and Mr. Vandergrift's testimony, which I find credible, stands unrebutted.

Foreman Conoway, who admitted that he knew about the bad top conditions early on Monday morning, March 18, but who disclaimed any knowledge of any of the details, nonetheless indicated that the roof conditions were continually deteriorating as the day went on before the inspectors return to the mine. He also indicated that a "working or dripping" roof may sometimes deteriorate slowly, but at other times it may "drop to the roots". Under the circumstances, it would appear that all of these potential hazards were present prior to the issuance of the verbal order by Inspector Workman, and the fact that the order may have resulted in the cessation of further work to mine through the area is irrelevant. Indeed, the existence of those hazards lends support to the action taken by the inspector.

I am not persuaded by the contestant's arguments that the work stoppage which resulted from Mr. Workman's verbal order at 11:50 p.m. increased the level of potential hazards to miners. The work to clear the fall was apparently taking place throughout the day shift of March 18, after the fall was initially reported out, and it apparently continued during part of the evening before the inspectors returned to the mine. Longwall supervisor Weaver testified that difficulties were encountered in advancing through the fall area because of the bad top conditions, and that during the attempts to advance and drop the shields, roof materials were falling between the shields, and that the top deteriorated further to the point where it fell in.

I take note of the fact that Mr. Conoway, who initially reported the fall to the inspectors at the end of the March 18, day shift, could only speculate as to the measures being taken to address the fall. He, like the inspectors, did not go to the fall location after he reported it to them. I quite frankly have difficulty comprehending why the inspectors, a shift foreman, union walkaround representative, and company safety representatives, all of whom apparently had some knowledge at the end of the shift that a roof fall occurred, chose not to go to the fall area to investigate. Although I understand the lack of knowledge as to whether or not the fall was "reportable" under MSHA's regulatory definition of a "reportable accident", as I stated during the course of the hearing, a roof fall, technically "reportable" or not, can injure and kill people. Under the circumstances, I believe that the inspectors, and mine management

as well, had an obligation to timely follow up on the fall and to communicate with each other to ascertain the extent of the fall and the necessary corrective action. Since they failed to do so, I am not persuaded by their respective "finger pointing" and attempts to lay blame.

The contestant's assertions that the inspectors should have reasonably known that closing down the section by a section 103(k) order was not necessary to protect the health and safety of miners, and in fact exacerbated the situation because it delayed the mining through of the area are rejected. While it is true that Inspector Workman did not immediately go to the fall area upon his return to the mine on Monday evening before he issued his verbal order, I find nothing in section 103(k), or in MSHA's policy, that requires him to do so. While I agree that a view of the scene before the issuance of the order may have enabled the inspector to make a more precise and informed judgement with respect to the prevailing conditions, the fact that he relied on the information supplied by the three miners does not warrant a conclusion that the order was improperly issued. Further, I believe that mine management had more than ample time and opportunity to communicate with the inspectors and to inform them of the measures being taken to address the fall. If they had promptly done so, the order may not have issued. Since management failed to communicate further with the inspectors after the 4:00 p.m. informal and rather equivocal notice by shift foreman Conoway, it is in no position to complain.

After careful consideration of all of the testimony and evidence in this case, I conclude and find that the facts and circumstances concerning the roof fall, as known to the inspector at the time he verbally issued the order, warranted the action which he took and reasonably support his judgment that the order was necessary to insure the health and safety of the miners until he was able to go to the fall location and complete his investigation of the roof fall incident. I further conclude and find that the inspector acted properly and that the issuance of the order was not an unreasonable or arbitrary abuse of his authority and discretion. Accordingly, the contested order IS AFFIRMED.

ORDER

In view of the foregoing findings and conclusions, the contested section 103(k) Order No. 3116688, issued on March 18, 1991, IS AFFIRMED, and the Notice of Contest filed by the contestant IS DENIED and DISMISSED.

George A. Koutras
Administrative Law Judge

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NOV 4 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION on behalf of JOSEPH CULP, Complainant	:	DISCRIMINATION PROCEEDING Docket No. WEST 91-160-D
v.	:	Dutch Creek Mine
MID-CONTINENT RESOURCES, INC. Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Cetti

This is a proceeding based on a complaint of discrimination filed under Section 105(c) of the Federal Mine Safety and Health Act of 1977 (Mine Act).

The complaint was based upon Complainant's employment termination resulting from Complainant's refusal to work underground at the Dutch Creek Mine because of his fear of a prolonged methane fire in the 211 Longwall tailgate return.

In an earlier litigated proceeding before me, the Complainant, Joseph C. Culp, was temporarily reinstated to his former position by my order of December 18, 1990. Subsequently, on January 25, 1991, substantially all miners including Mr. Culp were laid off at the Dutch Creek Mine. Mr. Culp accepted new employment for a different mining company in Western Pennsylvania on August 26, 1991, and no longer seeks permanent reinstatement at Mid-Continent Resources, Inc. (Mid-Continent) but does claim back pay from the time he was suspended without pay allegedly in violation of Section 105(c) on August 23, 1990, to the time he was temporarily reinstated pursuant to my order at the Dutch Creek Mine on December 19, 1990. Mr. Culp's monthly salary was $3,468. During the time period of his discharge from late August 1990 until mid-December 1990, Mr. Culp received state employment benefits amounting to $2,522. The total amount of back pay claimed by Mr. Culp in this proceeding was $11,332.92 plus the legal rate of interest on such back pay.

Mid-Continent asserts, in part, the following:

1. That Complainant's actions of August 22 and 23, 1990, constitute a voluntary termination of his employment status with Mid-Continent and that his work refusal was not made in good faith.

2. That the work refusal justification of Complainant was not reasonably predicated. None of the nearly 100 Mid-Continent employees active during the 211 longwall gob fire nor any MSHA inspectors or employees refused to enter the Dutch Creek Mine and perform tasks assigned to them during the course of the 211 longwall gob fire.

3. That given the occupational duties of Complainant and the tasks assigned and performed by him during the initial stages of the 211 longwall gob fire, outby pumping duties several hundred feet removed from the actual fire site, the work refusal of Complainant was not reasonably predicated.

4. That Complainant's concerns, if any and if in fact held in good faith, were not adequately communicated to invoke protection of the Federal Mine Safety and Health Act of 1977.

5. That the conditions surrounding the methane fire in the 211 longwall gob did not constitute what could be genuinely and in good faith regarded as a hazardous condition, particularly to persons engaged in outby occupations which placed them a significant distance from the fire location and the firefighting activities. Every underground activity conducted by Mid-Continent from and after August 16, 1990, and during the entire course of the 211 longwall gob fire, including the duties assigned Complainant, was specifically approved by MSHA and subject to its direct supervision and control.

6. That it is legally impossible for an unsafe activity to be conducted at a mine while under the control of MSHA such as this mine was by virtue of Section 103(k) and 107(a) orders and the massive physical presence of MSHA official inspectors and technicians.

The Secretary on behalf of the Complainant states that preparation for trial has revealed that since the time of my reinstatement order, Mid-Continent has ceased operation and is preparing to file bankruptcy. Mid-Continent is unable to pay the amounts due to Mr. Culp as calculated by the Secretary, and Mid-Continent has a very large secured debt that will leave nothing for unsecured creditors.

Accordingly, Complainant and Respondent have agreed that the Secretary will reduce its request for monetary relief to the amount of $2,000.00, contingent on Mid-Continent paying that sum prior to a final order in this case. Under the facts and circumstances in this case, the Secretary upon payment of the $2,000.00 to Complainant withdraws its request for a civil penalty.

After careful review and consideration of the entire record including the arguments and submissions in support of the proposed settlement of this case, I conclude and find that the proposed settlement disposition is reasonable, appropriate and in the public interest. I am advised by the Secretary that the approved amount of $2,000.00 has been paid to the Complainant. Accordingly, the settlement is **APPROVED** and Respondent having paid it, this proceeding is **DISMISSED.**

August F. Cetti
Administrative Law Judge

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NOV 5 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. PENN 91-160
	:	A.C. No. 36-01892-03515
v.	:	
	:	Porter Tunnel
KOCHER COAL COMPANY, Respondent	:	
	:	Docket No. PENN 91-1349
	:	A.C. No. 36-01891-03505
	:	
	:	Kocher Breaker
	:	
	:	Docket No. PENN 91-1032
	:	A.C. No. 36-03304-03501
	:	
	:	Lincoln Stripping Mine

DECISION APPROVING SETTLEMENT

Appearances: Joseph T. Crawford, Esq., Anthony G. O'Malley, Jr., Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Petitioner;
Allen Shaffer, Esq., Millersburg, Pennsylvania, and Mr. Steven D. Shrawder, Valley View, Pennsylvania, for the Respondent.

Before: Judge Melick

These cases are before me upon petitions for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). Petitioner's initial motions to approve settlement agreements were denied. At hearings, amended motions were filed and supportive evidence submitted. In particular with respect to Citation No. 2934266, charging Respondent with failing to notify the Secretary that it had reopened a mine, the proposed penalty in settlement of $20 can now be approved. There is a reasonable question as to whether, in its reclamation work, Respondent was engaged in activity subject to MSHA inspection authority.

A reduction in penalty from $1221.00 to $665.50 has now been proposed with respect to the remaining citations. I have

considered the representations and documentation submitted in these cases, 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 $685.50 within 30 days of this order.

Gary Melick
Administrative Law Judge

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NOV 5 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF JOSEPH A. SMITH, Applicant	:	APPLICATION FOR TEMPORARY REINSTATEMENT
	:	Docket No. PENN 92-15-D
v.	:	PITT-CD 91-11
HELEN MINING COMPANY, Respondent	:	Homer City Mine

ORDER OF TEMPORARY REINSTATEMENT

Appearances: Gretchen M. Lucken, Esq., Tana M. Adde, Esq., Office of the Solicitor, U. S. Department of Labor, Arlington, Virginia, for the Secretary; Michael Klutch, Esq., Thomas A. Smock, Esq., Polito & Smock, P.C., Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Maurer

On October 7, 1991, the Secretary of Labor (Secretary) filed an application for an order requiring Respondent Helen Mining Company (Helen) to reinstate Joseph A. Smith to the position which he held immediately prior to his July 2, 1991, discharge, or a similar position at the same rate of pay, and with the same or equivalent duties assigned to him. The application was supported by an affidavit of Lawrence M. Beeman, who is the Chief, Office of Technical Compliance and Investigations, Coal Mine Safety and Health, Mine Safety and Health Administration (MSHA) and by a copy of the original complaint filed by Smith with MSHA.

On October 11, 1991, Helen filed a responsive pleading, denying that the Secretary is entitled to the requested Order of Temporary Reinstatement and denying that it violated the Mine Act in discharging Smith. Helen proposed to economically reinstate Smith as of the date on which a temporary reinstatement hearing would otherwise be held and until such time as a decision on the merits of the discrimination complaint is subsequently rendered. Alternatively, Helen requested a hearing on the Secretary's application.

Smith, as is his right to do, rejected the offer of economic reinstatement. Therefore, the requested hearing was held pursuant to notice on October 31, 1991, in Indiana, Pennsylvania.

The relevant scope of this hearing, at this preliminary stage of the proceedings, is limited to a determination of whether the miner's complaint is being frivolously brought. I stated on the record at the hearing and will reiterate here that I am not at this time determining the merits of Smith's discrimination complaint, but only whether that complaint is frivolous, as that word is commonly used.

The Secretary has produced evidence to the effect that Smith was Chairman of the UMWA Safety Committee at the Homer City Mine at the time of his discharge and was actively so engaged. Furthermore, between June 18, 1991, and the first of July, he filed three section 103(g) complaints with MSHA. MSHA investigated those complaints and as a direct result issued several section 104(a) citations as well as a section 107(a) Imminent Danger Order. Mine management was aware that it was Smith who was filing the 103(g) complaints according to the inspector who investigated them. Additionally, Smith has filed four section 105(c) discrimination complaints against Helen in the last 12 months, two of which are still active files that are reportedly at the complaint stage of pleading, wherein he is also being represented by the Secretary.

With regard to the immediate sequelae that led to Smith's discharge, the Secretary sponsored evidence that Smith was sick with flu-like symptoms on June 30, 1991, and had taken a "sick day". Then on Monday night, July 1, 1991, Smith went to work intending to perform his normal job as a shearer operator on the longwall. He testified that he still felt "sick," but he thought he could perform that function for his shift. However, upon arrival at the mine, he was told that his work assignment that night would be to "fireboss." The shift supervisor informed him that if he was still there at the start of the shift at 12:01 a.m., he would be given a direct order to "fireboss."

Smith testified that he did not feel that he was physically up to firebossing that night because of the extensive walking that would be required. The company attributes other motives to Smith's reluctance and apparently there has been a long-standing dispute over whether or not the company can order a rank and file miner who has the papers to fireboss against his will.

Smith then in rapid succession stated to his supervisor that: (1) he was going home sick or taking a sick day; (2) he would fireboss if the shift supervisor would write out the assignment and finally (3) he would take an "illegal day," intending to get a medical excuse the next day, thus converting the unexcused absence to an unpaid sick day. There is also a

substantial dispute between the parties as to whether this latter is a viable option under the union contract.

The next day, Smith did in fact go to the hospital emergency room and was diagnosed as having "gastroenteritis" and advised to take a couple of days off by the treating physician. However, Smith was overtaken by events in this regard in that Superintendent Hofrichter called him at home on July 2, 1991, to advise that he was suspended with intent to discharge for insubordination because he refused the firebossing assignment.

It is the respondent's position that this insubordination was the only reason for Smith's discharge. Respondent goes on to point out numerous prior instances of disciplinary action taken by it against Smith for various and sundry transgressions, most, if not all of which appear to be grounded in fact.

I note that the record contains a great deal more relevant evidence than is recited or dealt with herein, including some evidence that tends to rebut or refute portions of the Secretary's evidence. However, at this stage of the proceedings I do not need to weigh the evidence or make findings on the ultimate issues. At this time I am only required to determine if Smith's complaint was frivolously brought.

I have carefully considered the entire record of this proceeding in that light and I conclude that Smith's complaint is not clearly without merit, fraudulent or pretextual in nature. Therefore, I conclude that Smith's complaint is not frivolously brought.

ORDER

Respondent is ORDERED to immediately reinstate Joseph A. Smith to the position from which he was discharged on or about July 2, 1991, or to an equivalent position, at the same rate of pay and with the same or equivalent duties.

Roy J. Maurer
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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NOV 7 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. WEVA 91-178
	:	A.C. No. 46-01453-03946
v.	:	
	:	Humphrey No. 7 Mine
CONSOLIDATION COAL COMPANY, Respondent	:	
	:	Docket No. WEVA 91-193
	:	A.C. No. 46-01455-03821
	:	
	:	Osage No. 3 Mine

DECISION

Appearances: Charles M. Jackson, Esq., Caryl Casden, Esq., and Tana Adde, Esq., U.S. Department of Labor, Arlington, Virginia for Petitioner; Walter J. Scheller, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania for Respondent.

Before: Judge Weisberger

Statement of the Case

These cases are before me upon petitions for assessment of civil penalty filed by the Secretary of Labor (Petitioner). Subsequent to notice, the cases were heard in Morgantown, West Virginia on July 31, 1991. George H. Phillips, Merven Knotts, Dale R. Dinning, and John R. Cox, testified for Petitioner. Samuel O. Statler, and Joseph Frank Mlinarchik, Jr., testified for Respondent. On September 23, 1991, the parties each filed proposed findings of fact and a brief.

Findings of Fact and Discussion

I. Docket No. WEVA 91-193;
A. Citation No. 3308030
1. Alleged Violation

On October 16, 1990, Respondent was engaged in the extraction of coal in the No. 5 Butt section by a longwall mining system. According to Respondent's roof control plan, upon completion of mining in the No. 5 Butt section, a longwall mining would commence in the adjacent No. 6 Butt section. The roof

control plan provides, in essence, that as the No. 5 panel is being mined, cribs should be maintained in the headgate (neutral) entry, which will become the tailgate entry once mining commences in the adjacent No. 6 section.

Respondent does not contest the observations of MSHA Inspector George A. Phillips that, on October 16, 1990, cribs had not been placed in an approximately 100 foot long section in the future a longwall tailgate entry (i.e. the tailgate entry of the No. 6 Butt section) in violation of the roof control plan. Accordingly I find that Respondent did violate its roof control plan, and hence did violate 30 C.F.R. § 75.220 as alleged in the citation issued by Phillips.

2. Significant and Substantial

Petitioner alleges that the violation herein is significant and substantial. For the reasons that follows I conclude that the record fails to establish that the violation was significant and substantial.

Phillips noted that in the area in question, at Spad 9223, the roof was good and he was not concerned about any danger. According to Phillips the No. 5 Butt is bolted and supported properly. In the same fashion, Mervin Knotts an MSHA Geologist testified that there was no danger of a roof fall in the cited area. Essentially, the record does not establish that, in the normal mining cycle of the No. 5 Butt section, there was created any hazard of a roof fall in the cited area. However, according to Phillips, once mining has been completed in the No. 5 Butt section and mining has commenced in the No. 6 Butt section, abutement pressure increases as the face advances. According to Mervin Knotts a geologist who works in an MSHA roof control section, abutement pressures have been measured 1,000 outby the face.

According Phillips and Knotts, if the area in question is not cribbed, assuming the continuation of the normal mining process, a point would be reached in the No. 6 Butt section where the advancing face would create sufficient pressure on the area in question to cause a roof fall. Further, according to Phillips and Knotts, such an event is reasonably likely to occur given the normal mining cycle of the advancing face in the No. 6 Butt section. According to Phillips, it becomes "critical" (Tr. 65, 83) to support the cited area, when the longwall panel approaches within 200 feet. Knotts testified that the face would have to be within 25 feet of the cited area for there to be a reasonable likelihood of a roof fall occasioned by frontal abutment pressures. Due to Knotts' expertise I accept his testimony.

Phillips opined that should a roof fall occur, it would be reasonably likely for miners to be seriously injured if they would be in the area of the roof fall. Also, according to Phillips, in the event of a mine fire, which he indicated was always a possibility, miners might have to use the entry in question as an emergency escapeway, should the two regular escapeways not be passable. Phillips opined that in such an event, miners could be seriously injured should there be a roof fall of such a nature as to block or impede ventilation in the entry in question.

In analyzing whether the facts herein establish whether the violation is significant and substantial, I take note of the recent decision of the Commission in Southern Ohio Coal Company, 13 FMSHRC 912, (1991), wherein the Commission reiterated the elements required to establish a significant and substantial violation as follows:

> We also affirm the judge's conclusion that the violation was of a significant and substantial nature. A violation is properly designated as significant and substantial "if, based on the particular facts surrounding that 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:
>
> > In order to establish that a violation of a mandatory standard is significant and substantial under National Gypsum the Secretary 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.

See also Austin Power Co. v. Secretary, 861 F.2d 99, 103-04 (5th Cir. 1988), aff'g, 9 FMSHRC 2015, 2021 (December 1987) (approving Mathies criteria). 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)), and also that the likelihood of injury be evaluated in terms of continued normal mining operations (U.S. Steel Mining Co., Inc. 6 FMSHRC

1573, 1574 (July 1984); see also Halfway, Inc., 8 FMSHRC 8, 12 (January 1986)." (Southern Ohio, supra at 916-917)

In the instant case the first element set forth in Mathies, supra has been met, in that it has been established that Respondent herein did violate a mandatory standard. Also, the evidence establishes that the lack of the cribs in the cited area did contribute to the hazard of a fall occurring at a future date when the No. 6 Butt section would be developed to the point where the face would advance close enough to the area in question to create sufficient pressure so as to create a hazard of a roof fall. The key element for resolution is thus whether it has been established that there was a reasonable likelihood that the hazard of an unsupported roof, contributed to by the lack of cribs in the future tail gate return entry will result in a roof fall causing an injury (See U.S. Steel Mining Co., supra, 1836).

Phillips indicated on cross-examination that it would take approximately 13 months from the date the citation herein was issued, (October 16, 1990) for the face in the No. 6 Butt section to advance to the point where the roof conditions in the cited area would be critical. In this connection, Samuel O. Statler, Respondent's longwall coordinator, whose responsibilities include maintaining the longwall panel and setting up the next panel, testified that, at the date of the hearing, 15 months subsequent to the date of the citation was issued, the longwall face in the No. 6 Butt section had not yet advanced to within 200 feet of the cited area.

According to Statler, cribs to build blocks were placed in the neutral entry of the No. 5 Butt section (the future tailgate return entry for the No. 6 Butt section) the weekend prior to the issuance of the citation on Tuesday, October 16. Statler indicated that Respondent commenced to install cribs. That weekend it was subsequently noted that there were insufficient crib blocks to fill in the approximately 100 foot void that was subsequently cited by Phillips on October 16. Statler testified that, on Saturday, cribs were brought up the No. 2 entry (intake) to the crosscut near spad 9224, in order to fill in the void. According to Statler, it was intended to build cribs as soon as there would be down time, which he thought was going to occur within the next week. Statler stated specifically that he would not have allowed the No. 5 Butt section to be mined out and retreated beyond the area of the void in the cribbing, without having first placed cribs in that area.

In rebuttal, Phillips testified that it would take about 6 or 7 bundles of cribs to fill the uncribbed cited area. He said that each bundle is "... at least 4 feet by probably four feet three, 3 1/2 feet high" (Tr. 144-145), and accordingly, the bundles should have been seen by him on October 16, if they were

in the area. He testified on cross-examination that he does not have any image of seeing these bundles, and does not remember having seen them.

I find Statler's testimony more persuasive, and conclude that the testimony of Phillips on rebuttal is not sufficient to have impeached it. Hence, based on the testimony of Statler, I conclude that, had the void (i.e. the uncribbed area) not been cited by Phillips, it would have been filled in with cribbing within a week or so. Further, there was no hazard to miners when the area was cited. Any hazard would have occurred only if the area would have remained unsupported by cribs, at the time when the face had approached within 200 feet as testified to by Phillips, or 25 feet as testified to by Knotts. It was estimated by Phillips that it would have taken approximately 13 months subsequent to October 16, for the face to have reached that point. I find, that had the area not been cited, the void would have filled in by Respondent long before there would have been any hazard of a roof fall due to the advancing of the face.

Accordingly, for all the above reasons I find that it has not been established that the violation herein was significant and substantial.

Although Respondent was aware of the violation I find the degree of its negligence to have been low, inasmuch as it intended to have the situation cured as soon as it was feasible, and long before the creation of a hazard of a roof fall. Considering the remaining statutory factors set forth in Section 110(i) of the Act, I find that a penalty of $100 is appropriate for the violation found herein.

B. Citation Nos. 3307218, 3308021, 3308022, 3308037, and 3307804

Subsequent to the hearing, on October 4, 1991, Petitioner filed a motion to approve a settlement agreement with regard to Citation Nos. 3307218, 3308021, 3308022, 3308037, and 3307804. A reduction in penalty from $1,124 to $774 is proposed. I have considered the representations and documentation submitted in this Motion, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act. Accordingly the motion for approval of settlement is granted.

II. Docket No. WEVA 91-178

A. Citation No. 3314318

1. Alleged Violation

On October 4, 1990, Dale Dinning an MSHA

inspector, inspected Respondent's Humphrey No. 7 mine. He noted that in the 13 east main return, at 4 overcasts a ladder was placed leaning up against the sides of the overcast, to enable a person to climb up to the overcast, cross over, and then climb down. None of these ladders were secured to the overcast. He issued a citation alleging a violation of 30 C.F.R. § 75.305. In that "a safe means of travel across the 4 overcasts in the main return to Kirby shaft just outby 13 East Regulator is not being provided".

It is Petitioner's position that, in essence, there is an "implied duty to provide safe passage" under section 75.305 supra.[1] In essence, according to Petitioner this duty is breached where the means of conducting an examination pursuant to section 75.305, supra, is hazardous, i.e., the hazardous conditions of the 8 ladders in issue which were placed on each side of the 4 overcasts in the main return.[2] I do not find merit in Petitioner's argument for the reasons that follow.

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[1]In its brief the Petitioner cites 30 C.F.R. § 75.1704-1(c)(2) (which requires ladders in underground mine escapeways to be anchored securely) and 30 C.F.R. § 77.206, (which requires that in surface mines ladders shall be anchored securely), for the proposition that the "Mine Act recognizes that unsecured ladders are hazardous." However the issue presented herein is not whether ladders that are unsecured are hazardous per se, but rather whether the condition of the ladders herein violated section 75.305 supra for which Respondent was cited. As such, the other standards cited by Petitioner are not relevant in disposing of the issues herein presented.

[2]Respondent has not contradicted or impeached the testimony of Dinning that at least once a week an examiner would be in the area in question. Neither did it contradict or impeach the testimony of John Cox a union walkaround who, when asked who is required to cross the ladders, answered as follows:

> A. Anybody that would be walking that area. We have a --- it has to be traveled at least once a week. And any work that would be done in that area, people would have to travel across them in order to go and do the work. (Tr. 53)

However no evidence in the record sets out in any detail any facts which tend to establish that, in making an examination pursuant to section 75.305 supra it is necessary to traverse the overcasts in the main return.

2. Discussion

a. Condition of the ladders

According to Joseph Frank Mlinarchik, Jr., Respondent's safety inspector the ladders were purchased from a carpenter who made them, and they are of substantial construction. The ladders are 10 feet high, 24 inches wide. They were leaning against the overcast and resting between two metal rails approximately 36 inches apart. The rails protruded horizontally from the tops of the overcast between 6 to 8 inches.

Dinning described the hazard posed by the unsecured ladders as follows:

> Without these ladders being secured and with the equipment you got to carry over top of them, you always have a chance of this ladder sliding along the wall. You're going down the other side, the ladder could kick out on the bottom and cause you to fall." [sic] (Tr. 29)

In the same fashion, John Cox, a walkaround who accompanied Dinning, described the hazard as follows:

> The hazard is that the person can go ahead and lose their balance. And the ladder gives you the sense, if the ladder's secured, if you lose your balance you grab something secured it's going to at least protect you from your fall or curtail you from a free fall. [sic] (Tr. 58)

Cox also indicated that the unsecured ladders "... may rock back or slip when an individual would be climbing up or down the ladders because of them being able to get hurt or an accident to occur." [sic] (Tr.44)

Essentially, according to Dinning and Cox, the hazard posed by the unsecured ladders is contributed to by the use of metatarsal boots, metacarpal gloves, and various equipment worn by a miner. Also according to Petitioner's witnesses, the lack of hand rails on the ladders, and the fact that the area in question is illuminated only by cap lights contribute to the hazard.

According to Cox when he climbed the ladder at the first overcast and reached the top it was "wobbly" (Tr.57). He said that in climbing down he had to swivel around, and reach out with his leg to go around a protruding rail. He indicated that he then had to bend down to hold on to the ladder, inasmuch as it protruded over the top of the overcast only 6 to 8 inches. He testified that some of the rails protruded from the overcast up

to 18 inches, which would make it more difficult swivel around from the top of the overcast to reach the ladder to climb down.

According to Dinning, the base of the ladders were not as far away from the bottom of the overcasts, as they should have been, and he indicated that the ladders were positioned "pretty well straight up and down" (Tr.20). Cox testified that the ladders were two to three feet back from the base of the overcasts, and extended 6 to 8 inches over the top of the first 2 overcasts that were approximately 8 feet high. However, neither Dinning nor Cox measured the horizontal distance between the bottoms of the ladders and the bottom of the overcasts. In contrast, Mlinarchik measured that distance and indicated that the bottom of one ladder was 4 feet in a horizontal distance from the base of an overcasts that was 8 feet high, and that the horizontal distance of a ladder from the bottom of a 6 foot high overcast was 3 feet. I accept Mlinarchik's testimony with regard to the distance the base of the ladders extended from the overcasts inasmuch as it was based upon actual measurement.

Dinning was asked to describe "the ground conditions surrounding the overcast" (Tr.20), and he responded as follows: "Well, in any underground coal mine you have uneven pavement or bottom. You're going to have coal sluffage, rock, other debris laying around. So, it's uneven bottom." (Tr. 20-21) He did not specifically describe the ground conditions in the areas at issue.

Cox indicated on direct examination that, in essence, there were old cement blocks around and under the ladders, and "there were several large rocks at the bottom" (Tr.51). However on cross-examination, it was elicited from Cox that the walkways were clear, and that the blocks that he referred to on direct examination were at the base of the overcasts, and the ladders were not set on blocks and crushed wood.

Cox on rebuttal testified that only the edge points of the bases of the ladders were dug in the ground, and that the ground was not smooth. However, earlier he was asked by me whether, in his opinion the surfaces that the ladders rested on were even, and he said "I believe so" (Tr.63).

Mlinarchik, indicated that he climbed all the ladders in question. He testified that he weighs "probably 250 pounds" (Tr.77), and that he did not detect any motion in the ladders, and that the bases of the ladders were even, and on solid ground. He opined that if a ladder would slide, the protruding rails would prevent it from sliding further.

I accept Milanarchiks testimony with regard to the stability by the ladders, as Cox indicated that the ground was even, a fact not rebutted by Dinning. Also there is no evidence that the

surface that the ladders rested on was not flat, or that it contained objects the would upset the balance of the ladders. Further, neither Dinning nor Cox, indicated that the ladders were not sturdy. Nor did they indicate there were any defects in the construction of the ladders.

b. Applicability of Section 75.205 supra

Section 75.305 supra provides as follows:

> In addition to the preshift and daily examinations required by this subpart D, examinations for hazardous conditions, including tests for methane, and for compliance with the mandatory health or safety standards, shall be made at least once each week by a certified person designated by the operator in the return of each split of air where it enters the main return, on pillar falls, at seals, in the main return, at least one entry of each intake and return aircourse in its entity, idle workings, and, insofar as safety considerations permit, abandoned areas. Such weekly examinations shall be made before any other miner returns to the mine. The person making such examinations and tests need not be made during any week in which the mine is idle for the entire week, except that such examination shall place his initials and the date and time at the places examined, and if any hazardous condition is found, such condition shall be reported to the operator promptly. Any hazardous condition shall be corrected immediately. If such condition creates an imminent danger, the operator shall withdraw all persons from the area affected by such condition to a safe area, except those persons referred to in section 104(d) of the Act, until such danger is abated. A record of these examinations, tests, and actions taken shall be recorded in ink or indelible pencil in a book approved by the Secretary kept for such purpose in an area on the surface of the mine chosen by the mine operator to minimize the danger of destruction by fire or other hazard, and the record shall be open for inspection by interested persons.

A plain reading of the words of Section 75.305 supra. reveals that there is no explicit provision for safe travel across overcasts. Nor does Section 75.305 supra contain any language mandating the manner in which ladders are to be used. Such a requirement, which goes beyond the scope of the explicit plain language of Section 75.305, may accordingly not be imposed based only on an implied duty to provide safe access (see, Consolidation Coal Co., 2 FMSHRC 1809, 1817 (1980) (ALJ Merlin); Riverside Cement Co., 1 FMSHRC 2057, 2059 (1979) (ALJ Merlin). Further there is nothing in the legislative history of the

statutory provisions of Section 303(f) of the Federal Mine Safety and Health Act of 1977,[3] and the parallel language in the 1969 Act (Public Law 91-173) indicative of a legislative intent that this section shall encompass a duty to provide safe access.

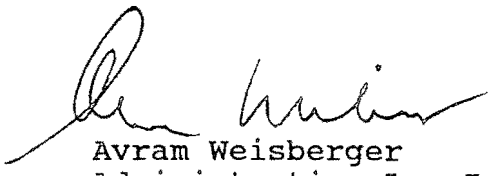
Hence, for all the above reasons, I conclude that it has not been established that Respondent violated Section 75.305, supra.

B. Citations 3307246, 3307836, 3307837, 3307251 and 3307255.

At the hearing Petitioner indicated that the parties had reached a settlement with regard to Citation Nos. 3307246, 3307836, 3307837, 3307251 and 3307255. On October 2, 1991, Petitioner filed a Motion to Approve a settlement agreement with regard to this Citations and proposed a reduction and in penalty from $1,295 to $1,059. I have considered the representations and documentation submitted in the motion, and I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act. Therefore, the Motion to Approve Settlement is granted.

ORDER

It is **ORDERED** that: (1) Citation Nos. 3307804, and 3307836 be modified to allege a violation that is not significant and substantial; (2) Citation No. 3314318 be vacated, and (3) Respondent pay within 30 days of this decision $1,933 as a civil penalty.



Avram Weisberger
Administrative Law Judge

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[3]Section 75.305, supra repeats the language of Section 303(f), supra

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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NOV 8 1991

JAMES N. BOYD, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. KENT 91-239-D
	:	MSHA Case No. PIKE CD 91-08
TROJAN MINING COMPANY, Respondent	:	Trojan Mine

ORDER OF DISMISSAL

Before: Judge Melick

Complainant requests approval to withdraw his complaint in the captioned case. Under the circumstances herein, permission to withdraw is granted. 29 C.F.R. § 2700.1. This case is therefore dismissed, and the hearings previously scheduled for November 8, 1991, are accordingly cancelled.

Gary Melick
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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NOV 8 1991

KEITH STURGILL, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. KENT 91-973-D
	:	MSHA Case No. PIKE CD 91-10
SOUTH EAST COAL COMPANY, Respondent	:	No. 404 Mine

ORDER OF DISMISSAL

Before: Judge Melick

Complainant requests approval to withdraw his complaint in the captioned case. 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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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NOV 8 1991

DRUMMOND COMPANY, Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. SE 91-10-R
v.	:	Citation No. 3020151; 10/4/90
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Docket No. SE 91-11-R
	:	Citation No. 3020153; 10/4/90
Respondent	:	Mine I.D. 01-00821

DECISION ON REMAND

Before: Judge Weisberger

On January 14, 1991, I issued a Decision with regard to these consolidated cases and, with regard to Docket 91-10-R, found inter alia that the violation cited therein was not the result of Drummond's unwarrantable failure. On September 20, 1991, the Commission vacated the finding of no unwarrantable failure, and remanded the matter for reconsideration of the issue of Drummond's unwarrantable failure. (Drummond Company Incorporated, 13 FMSHRC _____, Docket Nos. SE 91-10-R and SE 91-11-R, slip op., September 21, 1991). On September 25, 1991, arrangements were made by the undersigned to convene a telephone conference call with counsel of both parties on October 2, 1991. On October 2, 1991, the telephone conference call was held, and the parties were given an opportunity to submit a brief with regard to the issues raise by the Commission's remand. Time was allowed until October 21, 1991, for the parties to submit their briefs. Each party filed its submission on October 21, 1991, and these were received by the Commission on October 24, 1991.

In vacating the finding of no unwarrantable failure that I made in my initial Decision, and remanding for reconsideration, the Commission provided as follows:

> On remand, the judge, in determining whether the violation arose as a result of Drummond's unwarrantable failure, should weigh the evidence in light of Drummond's actions in the context that it had reason to know of the accumulations, not in the context of actual knowledge.

> On remand the judge should also consider whether Drummond's mitigation efforts were sufficient to deal effectively with the accumulation problems given the undisputed evidence that the belt was actually running in contact with the accumulations and over a portion of the metal frame where a roller was missing, and whether the miner could have completed the necessary abatement in an expeditious manner. He should consider these efforts in light of his pervious findings that Drummond lacked due diligence in inspecting for accumulations that accumulations remained during preshift examinations. (Drummond, supra, slip op., at 8)

In compliance with the directives of the Commission to reconsider Drummond's actions with regard to the issue of its unwarrantable failure, I note the Commission's finding, "... that Drummond knew or had reason to know of the accumulations." (Drummond, supra, slip op., at 7). Also, I take cognizance that in its directive to consider the sufficiency of Drummond's mitigation efforts to deal effectively with the accumulation problems, the Commission placed emphasis upon "... the undisputed evidence that the belt was actually running in contact with the accumulations and over a portion of the metal frame where a roller was missing, ..." (Drummond, supra at 8) Further, the Commission directed consideration of "whether the miner could have completed the necessary abatement in an expeditious manner." (Drummond's supra slip op., at 8). Evidence adduced at the hearing, summarized in my initial Decision (13 FMSHRC at 74), established that Drummond made "some efforts to clean up the accumulation." (13 FMSHRC 74). In this connection Capps who was present at the time, indicated that a miner who had been assigned by Don Clark, the evening foreman, to shovel on the beltline started to do this work at the beginning of the shift on October 4. Capps also indicated that he (Capps) was involved in cleaning the accumulations, and that it took approximately 20 minutes to completely remove them. However, I note that the miner assigned to shovel cleaned areas under the belt, (Tr.234) but there is no evidence that any cleaning was performed under the drive and take-up rollers. In order to clean these area it is necessary first to shut off the belt, and remove certain guards. Neither of these actions had been taken prior to the issuance by Deason of the citation at issue. Further, Busby testified, in essence, that although Clark informed him that he (Clark) assigned a miner to shovel in the area, Clark told him that he"... turned him (the miner doing the shovelling) loose and let him go off the beltline to another area." (Tr. 328) Also, Busby, who was the evening shift safety inspector and was responsible for making daily inspections, indicated that normally he would have had the accumulation inside the guarded area corrected a few hours later during the owl shift (Tr. 377-378). Hence, the evidence indicates that it is doubtful that the miner could have completed the necessary abatement in an "expeditious

manner". Also, as directed by the Commission, upon reconsideration the mitigation efforts by Drummond are reconsidered in light of my previous findings that "... Drummond lacked diligence in inspecting for accumulations and that accumulations remained during preshift examinations". (Drummond supra, slip op., at 8).

Therefore for all the above reasons, upon reconsideration, and following the directives of the Commission, I conclude that it has been established that the violation herein resulted from Drummond's unwarrantable failure.

Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

NOV 15 1991

CONSOLIDATION COAL COMPANY, Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. WEVA 91-145-R
	:	Citation No. 3315925; 1/22/91
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Arkwright No. 1 Mine
	:	Mine ID 46-01452
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEVA 91-1597
	:	A.C. No. 46-01452-03783
v.	:	
	:	Arkwright No. 1 Mine
CONSOLIDATION COAL COMPANY, Respondent	:	

DECISION

Appearances: Walter J. Scheller III, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania for Consolidation Coal Company;
Charles M. Jackson, Esq., U.S. Department of Labor, Office of the Solicitor, Arlington, Virginia for U.S. Department of Labor.

Before: Judge Weisberger

These cases are before me based on a petition for assessment of civil penalty filed by the Secretary (Petitioner) alleging violations by the operator (Respondent) of various mandatory safety standards set forth in volume 30 of the Code of Federal Regulations. Pursuant to notice the cases were scheduled for a hearing, and were subsequently heard in Morgantown, West Virginia on October 9, 1991. At the commencement of the hearing counsel indicated that the issues raised by Citation Nos. 3315924, 3308078, and 3307876 were resolved by a settlement that had been agreed to by the parties.

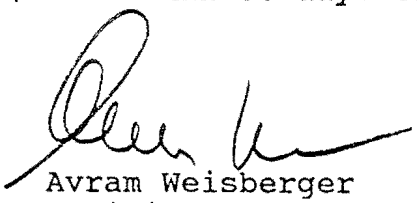
On October 25, 1991, Petitioner filed a Motion to Approve Settlement with regard to these citations. In its motion, Petitioner indicates that Respondent has agreed to pay $667, the full amount which had been proposed by Petitioner as a penalty for the violations alleged in these citations. I have considered

the representations set forth in Petitioner's Motion to Approve Settlement, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Federal Mine Safety and Health Act of 1977 (the Act).

On October 9, 1991, at the hearing concerning Citation No. 3315925, subsequent to the conclusion of Respondent's case, Petitioner requested a continuance in order to respond to certain aspects of the testimony adduced by certain of Respondent's witness. The motion was granted, and the parties were granted until November 6, 1991, to engage in discovery and to present additional testimony. In its motion to approve settlement, Petitioner indicates that a settlement has been reached between the parties with regard to Citation No. 3315925. In essence, Petitioner represents that subsequent to an investigation into the facts of the violation, the evidence is not likely to show "a reasonable likelihood of serious injury existed if normal mining operations had continued", and accordingly it agrees that the facts do not set forth a conclusion that the violation cited was significant and substantial. This agreement is consistent with the evidence presented at the hearing on October 9, 1991. In addition, Petitioner indicates that the degree of Respondent's negligence is only low because of the existence of considerable mitigating circumstances. The representations in the Motion are consistent with the evidence presented at the hearing on October 9. In its motion, Petitioner indicates that the parties proposed a reduction in penalty from $213 to $150 for this violation.

I have considered the representations submitted in this motion, along with the evidence adduced at the hearing on October 9, 1991 and I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act.

Wherefore it is ORDERED that the motion for approval of settlement is granted. It is further ORDERED that: (1) Citation No. 3315925 is modified to allege a violation that it is not significant and substantial, and which reflects a low degree of negligence on the part of Respondent; (2) Respondent is to abide by the terms and conditions agreed to by the parties, and defined in the motion to approve settlement; (3) Respondent shall pay a total penalty of $817 within 30 days of the date of this decision.



Avram Weisberger
Administrative Law Judge

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DENVER, CO 80204

NOV 18 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 91-12 A.C. No. 29-00845-03537
v.	:	York Canyon Surface Mine
PITTSBURG & MIDWAY COAL MINING COMPANY, Respondent	:	

DECISION

Appearances: Ernest Burford, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner;
John W. Paul, Esq., Englewood, Colorado, for Respondent.

Before: Judge Cetti

This case is before me upon a petition for assessment of civil penalties under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. the "Act". The Secretary of Labor, on behalf of the Mine Safety and Health Administration, (MSHA), charges the operator of the York Canyon Surface Mine with two violations of mandatory regulatory standards, 30 C.F.R. § 77.2058 and 30 C.F.R. § 71.101.

The operator filed a timely answer contesting the alleged violations, and the appropriateness of the proposed penalties.

Pursuant to notice, a hearing on the merits was set before me on September 19, 1991, along with other cases involving the same parties and attorneys.

Stipulations

At the hearing, the parties negotiated and read into the record the following stipulations:

1. The Pittsburg and Midway Coal Company is engaged in the mining and selling of coal in the United States and its mining operations affect interstate commerce.

2. Pittsburg and Midway Coal Company is the owner and operator of York Canyon surface mine, MSHA ID No. 29-00845.

3. Pittsburg and Midway Coal Company is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

4. The administrative law judge has jurisdiction in this matter.

5. The subject citation was properly served by a duly authorized representative of the Secretary upon an agent of Respondent on the date and place stated therein and may be admitted into evidence for the purpose of establishing its issuance, and not for the truthfulness or relevancy of any statements asserted therein.

6. The exhibits to be offered by Respondent and the Secretary are stipulated to be authentic, but no stipulation is made as to their relevance or truth of the matters asserted therein.

7. The proposed penalty will not affect the operator's abilities to remain in business.

8. The operator demonstrated good faith in abating the violations.

9. Pittsburg and Midway Coal Company is a large operator of a coal mine with 600,000 tons of production in 1990. A certified copy of the MSHA assessed violation history accurately reflects the history of this mine for the two years prior to the date of the citation.

After entering the stipulations in the record, the parties while off the record negotiated and reached a settlement of all issues. The parties on the record stated that upon the basis of the new evidence received the day of the hearing, the Petitioner agreed and moved to delete the S&S designation in Citation No. 3241483 and to reduce the proposed penalty to $80.

With respect to Citation No. 3241318, the S&S characterization of the citation had previously been removed at conference and the parties agreed to reduce the penalty to $317.25.

After careful review and consideration of the pleadings, arguments, and submissions in support of the proposed settlement

of this case, I conclude and find that the proposed settlement disposition is reasonable, appropriate, and in the public interest. Accordingly, the settlement agreement is approved.

ORDER

1. Citation Nos. 3241483 and 3241318 are modified to allege violations that are not significant and substantial and, as so modified both citations are **AFFIRMED.**

2. Respondent **SHALL PAY TO** MSHA a civil penalty of $397.25 within thirty (30) days of this decision.

August F. Cetti
Administrative Law Judge

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NOV 18 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 91-113-M A.C. No. 05-00516-05545
v.	:	Black Cloud Mine Leadville Unit
ASARCO, INCORPORATED, Respondent	:	

DECISION

Appearances: Robert J. Murphy, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Earl K. Madsen, Esq., BRADLEY, CAMPBELL, CARNEY & MADSEN, Golden, Colorado, for Respondent.

Before: Judge Lasher

In this proceeding the Secretary of Labor (MSHA) seeks assessment of penalties for four violations (described in four Citations) pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 US.C. § 820(a) (1977).

Upon commencement of hearing in Leadville, Colorado, on October 22, 1991, the parties concluded settlement of the entire matter calling for modification and reduction of penalty as to two of the Citations and payment in full of MSHA's proposed penalties for the remaining two Citations. The settlement was proposed on the record at the hearing and my bench decision approving such appears in the transcript and is here **AFFIRMED.** The terms of the agreed resolution (including the two modifications) and my assessment of penalties appear both on the record and in the Order effectuating the settlement which follows:

ORDER

1. Citations numbered 2643174 and 2643176 are **MODIFIED** to change paragraph 10 B thereof pertaining to "Gravity" from "Fatal" to "Lost Workdays or Restricted Duty," and are otherwise **AFFIRMED.**

2. Respondent, if it has not previously done so, **SHALL PAY** to the Secretary of Labor within 40 days from the date of this decision the total sum of $270.00 as and for the civil penalties here assessed as follows: $115.00 each for Citations numbered 2643174 and 2643176 and $20.00 each for Citations numbered 3450558 and 3452313.

Michael A. Lasher, Jr.
Administrative Law Judge

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NOV 18 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 91-230-M A.C. No. 05-01780-05503
v.	:	
	:	September Morn
MENDISCO MINING, Respondent	:	

DECISION

Appearances: Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner.

Before: Judge Lasher

This matter arises upon the filing of a proposal for penalty by the Petitioner (MSHA) on April 15, 1991, seeking assessment of civil penalties ($200 each) against Respondent for four violations described in four Citations which were issued pursuant to Section 104(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) (1977).

At the hearing in this matter in Grand Junction, Colorado, on October 24, 1991, Petitioner, as above indicated, was represented by legal counsel. Respondent, which the record shows received actual notice of the hearing (a Postal Service green card attached to the notice of hearing in the Commission's official case file reflects its receipt of the notice of hearing by certified mail on September 17, 1991), neither appeared nor advised the presiding Judge or counsel for Petitioner of its intent not to appear. Indeed, it clearly appears that Respondent repeatedly ignored various orders of this tribunal and efforts of Petitioner's counsel to communicate with it.

At hearing, a full exposition of Respondent's repeated failures was made and after determination of the facts and examination of the case file, it was determined that:

1. Respondent had abandoned its position and interest in this proceeding;

2. Respondent had become incommunicado; and

3. Respondent had failed to appear at the hearing, even though it had received more than adequate notice and despite efforts of counsel (at my direction) to personally contact it regarding its intentions.

Accordingly, by decision issued from the bench on the record, the default of the Respondent was entered and the penalties initially proposed by MSHA were ordered assessed as final. That decision is here **AFFIRMED.**

ORDER

Respondent **SHALL** within 30 days from the date of this decision **PAY** to the Secretary of Labor the total sum of $800 as and for the civil penalties previously assessed ($200 each for Citations numbered 3631073, 3631077, 3631078, and 3631075).

Michael A. Lasher, Jr.
Administrative Law Judge

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NOV 19 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. WEVA 91-109
	:	A. C. No. 46-01452-03756
v.	:	
	:	Docket No. WEVA 91-138
CONSOLIDATION COAL COMPANY, Respondent	:	A. C. No. 46-01452-03765
	:	
	:	Arkwright No. 1 Mine

DECISION

Appearances: Charles M. Jackson, Esq., Office of the Solicitor, U. S. Department of Labor, Arlington, Virginia, for the Secretary;
Walter J. Scheller III, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Maurer

These consolidated cases are before me based upon petitions for assessment of civil penalty filed by the Secretary alleging violations of various mandatory standards set forth in Volume 30 of the Code of Federal Regulations.

Pursuant to a notice of hearing, these cases were heard on June 20, 1991, in Morgantown, West Virginia. At that hearing, the parties proposed to settle two of the citations at issue in Docket No. WEVA 91-138. The motion requested approval of the respondent's agreement to pay $213, the full amount of the proposed penalty, for Citation No. 3307843. The motion also requested approval of the respondent's agreement to pay $128 of the proposed civil penalty of $213 for Citation No. 3307844, as well as the issuance of an order modifying this citation to a non-"significant and substantial" violation. I granted the motion on the record, based on the Secretary's representations and the criteria contained in Section 110(i) of the Mine Act. The terms of this settlement motion will be incorporated into my order at the end of this decision.

There remained for trial three Section 104(a) citations: Citation Nos. 3307841 and 3307842 contained in Docket No. WEVA 91-138 and assessed for $213 each; and Citation No. 3314450, contested in Docket No. WEVA 91-109 and also assessed for $213.

Both parties have filed post-hearing proposed findings and conclusions and/or briefs, which I have considered along with the entire record in making the following decision.

Docket No. WEVA 91-109

Citation No. 3314450

This citation alleges a "significant and substantial" violation of the mandatory standard found at 30 C.F.R. § 77.505[1]/ and charges as follows:

> Insulated bushings were not provided where the power wires entered the metal fitting of the control box on the No. 8 jitney operating in the yard area.

The operator does not contest the existence of the violation of the cited standard in this instance, but rather submits that the citation was improperly designated as being "significant and substantial."

The No. 8 jitney is an electrically powered rail car that runs as a trolley on the 300 volts direct current it receives from the trolley wire. The cited control box was located directly in front of the jitney operator, slightly beyond his knees and reaching at most to the height of the operator's knees. Inspector Baniak noted that the operator of the jitney that day was a mine foreman. Accordingly, he concluded that management knew or should have known of the violative condition because the wires were only "a couple of inches away from the man's knee and his hands," and he therefore found a moderate degree of negligence on the part of the operator.

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).

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[1]/ 30 C.F.R. § 77.505 provides as follows: Cables shall enter metal frames of motors, splice boxes, and electric compartments only through proper fittings. When insulated wires, other than cables, pass through metal frames, the holes shall be substantially bushed with insulated bushings.

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 Secretary contends that the hazards presented by the violation, i.e., the enhanced measure of danger to safety, are electrical shock and burn injuries. Inspector Baniak opined that there was a "great possibility" that such a shock and burn hazard could occur and that a serious injury could result because the vibration of the jitney would cause vibration of the wires, which would in turn wear through the wire at the two metal areas at the end of the connections or where the wire enters the control box. He further testified that the insulation on these wires was of the solid rubber type, which easily becomes bare when rubbed against metal through vibration. Basically, he was concerned that a wire would, or at least could become bare and create an electric shock or burn hazard that would be reasonably likely to result in an injury that would in turn result in at least lost work days or restricted duty.

However, the Secretary must also establish a reasonable likelihood that the hazardous condition will eventuate in the first instance. There is only a shock and or burn hazard if the wire becomes bare. It was not bare at the time the inspector cited it, so the Secretary bears the burden of proving that there

was a reasonable likelihood that it would become so with continued normal usage in the mining operation. This burden has not been carried. The inspector's opinion in this regard is grounded more in speculation than in fact. He admitted on cross-examination that the two wires in question come straight out of the bottom of the control box, and that there was a lot of slack in the wires; they were dangling loose. He also observed that they were not touching the metal frame. He further admitted that he has not driven this jeep and does not know how much the control box vibrates, even through he knows the jitney itself "vibrates very much." My reading of the inspector's testimony as a whole is that he moved directly from the vibration occurring on the jitney generally to the shock hazard of a bare wire without adequately considering how the wire that was then insulated was going to get bare in the first place.

I therefore find that the instant violation does not meet the "S&S" criteria because it is unlikely that any injury to anyone would occur as a result of this violation, and the citation will be so modified.

In assessing a civil penalty in this case, I have considered the foregoing findings and conclusions and the requirements of section 110(i) of the Act. I concur with the inspector's negligence finding of "moderate." Under these circumstances, I find that a civil penalty of $100 is appropriate.

DOCKET NO. WEVA 91-138

Citation No. 3307841

This citation alleges a "significant and substantial" violation of the mandatory standard found at 30 C.F.R. § 77.1802(a)[2]/ and charges as follows:

> The energized trolley wire was not guarded for approximately a 6 foot distance at the first cut-out switch near the rotary dumps where locomotives are coupled to empty mine cars.

At 8:55 a.m., on November 27, 1990, Inspector Baniak was in the area of the rotary dump facility conducting a regular inspection at respondent's Arkwright No. 1 Mine when he noticed an area of unguarded trolley wire, approximately 6 feet in

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[2]/ 30 C.F.R. § 77.1802(a) provides as follows: Trolley wires, trolley feeder wires, and bare signal wires should be adequately grounded:

> (a) At all points where men are required to work or pass regularly under the wires.

length, and approximately 25 feet from the dump building in the direction of the mine entrance. Because he observed a motorman working under the unguarded trolley wire, he issued the subject citation on the spot.

At the time, the motorman was turning the trolley pole in preparation to reverse his direction and go back into the mine. In order to reverse the direction of travel of the trolleys used at the Arkwright No. 1 Mine, the trolley pole must be reversed so that the harp at the end of the pole will be at an angle toward the rear of the trolley.

After conducting a mini-investigation into the subject, the inspector was able to ascertain that the procedure for bringing the coal up to the rotary dump in the trolley cars, dropping off the cars, and pulling away the empties was repeated by the motormen from 14 to 20 times per day. Each time, the motormen passed under and stopped in the same general area where the trolley wire was unguarded. Because the number of cars pulled by the trolley locomotive at each point in its daily routine rarely fluctuated, the motormen regularly turned their trolley poles at the cited location where the trolley wire was unguarded.

The importance of this fact seems lost on the respondent. Mr. Smith, who is a mine escort for respondent, sees no difference between turning the trolley pole in the cited area and turning the trolley pole in various other areas in the mine where the wire is unguarded. But the obvious difference is that the trolley pole is repeatedly turned in consistently the same area that was cited day after day, all day long (14 to 20 times per day) whereas elsewhere in the mine when the wire is unguarded the trolley pole is only irregularly changed. It is the frequency and regularity of the function that the mandatory standard speaks to.

The inspector also noted on more than one occasion that while the motor operator turns the pole in the cited area, a substantial portion of his body is underneath the trolley wire with only approximately 18 inches of clearance.

The motormen are not the only workers exposed to the electrical shock and resultant burns from inadvertently contacting the unguarded trolley wire, although they are clearly who the inspector had in mind when he issued the citation. Mr. Donald Keener, a mechanic for respondent and a safety committeeman, testified that he has personally observed greasers greasing the mining cars in the same general vicinity as the cited area for 2 weeks every spring, and another 2 weeks every fall. While Mr. Keener did clearly state that the greasers would not be standing under the unguarded trolley wire while they were

greasing cars, he also testified that he has seen people walking under the wire in the cited area for reasons unknown to him, but nevertheless exposing themselves to the hazards presented.

Accordingly, I find that a violation of 30 C.F.R. § 77.1802(a) existed as the inspector cited it. Furthermore, I also believe the violation was "significant and substantial." In order to make an "S&S" finding, the Secretary must prove a violation, a discrete safety hazard, a reasonable likelihood that the hazard will result in injury, and that the injury will be of a reasonably serious nature. Mathies Coal Co., supra.

Herein, I have already found the violation, and I accept as credible the opinion testimony of Inspector Baniak to the effect that the respondent's failure to provide a trolley wire guard at the cited location created an enhanced measure of danger to safety, i.e., electric shock or serious burns if inadvertent contact with the unguarded trolley was made. I also concur with his opinion that in the normal course of continued mining operations, it would be reasonably likely that a motorman would accidently contact the unguarded wire. The cited area is an active location, with motormen turning their trolley poles 14 to 20 times per day at this particular spot. Finally, I take administrative notice that a shock or burn from a 300 volt wire could reasonably result in a serious injury if it in fact occurred.

I also concur with the inspector that the appropriate level of negligence established by inference in the record is ordinary or moderate negligence.

Considering the criteria in section 110(i) of the Act, I conclude that an appropriate civil penalty for the violation is $213, as originally proposed by the Secretary.

Citation No. 3307842

This citation alleges a "significant and substantial" violation of the mandatory standard found at 30 C.F.R. § 77.202[3]/ and charges as follows:

> Dry coal dust (black in color) ranging up to 2 inches in depth was accumulated on structures throughout the second floor area under the Rotary Dump Facility.

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[3]/ 30 C.F.R. § 77.202 provides as follows: Coal dust in the air of, or in, or on the surfaces of structures, enclosures, or other facilities shall not be allowed to exist or accumulate in dangerous amounts.

At 9:08 a.m., on November 27, 1990, Inspector Baniak entered the second floor of the rotary dump facility during the course of a regular "AAA" inspection at respondent's Arkwright No. 1 Mine. He observed very dusty conditions in the room, which measured approximately 30 feet by 30 feet, with dry coal dust throughout the area having accumulated up to 2 inches on the structures in the room. He measured the coal dust accumulations with a ruler, at the least at four locations, noting that it varied from less than 1 inch to 2 inches in depth and he concluded that, relying on his experience and demonstrations that he had observed, there was 20 to 30 times the amount of dust needed to actually cause an explosion or a flash burn. He also noted that coal dust is easily ignited if an ignition source is present and the dust is in suspension, and he testified that the dust was fine, black, and dry, and could easily be put into suspension by persons walking in the area. In this regard, he further noted that all persons, including management personnel, who desired to enter the bottom floor of the facility had to pass through the cited area. Furthermore, due to the placement of the facility, high on a hill, the coal dust accumulations could be placed in suspension by breezes and drafts passing through the open grate ceiling.

The ignition sources which the inspector identified were inter alia: lights, electrical components, switches, and welding that might be done in that area.

The inspector opined that, because of the explodability of the coal dust accumulations and the amount of dust present, combined with the many potential ignition sources, it was "very reasonably likely" and "very possible" that the coal dust would be ignited during the ongoing mining process if the cited conditions had not been corrected. I concur in his analysis and find this violation established and furthermore agree with his "S&S" special finding. Mathies, supra.

The closer issue in this case that arose in connection with this citation is that of merger with another citation that was written 18 minutes earlier in the same dump facility citing the same section of the standards for accumulation of coal dust. The only difference being that the citations were written for two different floors of the facility. Citation No. 3307540 is presently being contested in Docket No. WEVA 91-1550. Importantly, the inspector admitted that the only reason he did not include the second floor accumulations in Citation No. 3307540 was because he found them a short time (18 minutes) after the accumulations on the top floor. He testified that while he would normally have issued only one citation for both floors, he did not on this occasion because of the lapse of time between discovery of the accumulations on the two floors. Even more importantly however, I find that inasmuch as the instant citation and its docket are not consolidated for hearing or

decision with Citation No. 3307540 and its Docket No. WEVA 91-1550, and the penalty for Citation No. 3307540 has not been adjudicated or paid, Citation No. 3307842 is properly before me for disposition on its own merits.

Considering the criteria in section 110(i) of the Act, I conclude and find that an appropriate civil penalty for the violation is $213, as originally proposed by the Secretary.

ORDER

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

1. Citation Nos. 3307843, 3307841, and 3307842 **ARE AFFIRMED.**

2. Citation Nos. 3307844 and 3314450 **ARE MODIFIED** to delete the significant and substantial finding and, as modified, **ARE AFFIRMED.**

3. Consolidation Coal Company shall pay a civil penalty in the amount of $867 within 30 days of the date of this decision.

Roy J. Maurer
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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NOV 2 0 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. VA 91-565
	:	A.C. No. 44-01656-03530D
v.	:	
	:	Docket No. VA 91-566
LAMBERT COAL COMPANY, Respondent	:	A.C. No. 44-05654-03539D
	:	
	:	Docket No. VA 91-567
	:	A.C. No. 44-05210-03543D
	:	
	:	Docket No. VA 91-568
	:	A.C. No. 44-05831-03552D
	:	
	:	Docket No. VA 91-569
	:	A.C. No. 44-06582-03507D
	:	
	:	Mines 14, 43, 44, 47, 48

DECISION APPROVING SETTLEMENT

Before: Judge Broderick

On November 1, 1991, the Secretary and Respondent filed a motion to approve a settlement in the above cases. The above five dockets contain 10 alleged violations of 30 C.F.R. § 70.209(b) in each of which the Secretary alleged that Respondent altered the weight of a respirable dust sample submitted by Respondent as part of its sampling requirements. The Secretary contends that the violations resulted from a deliberate act; the operator denies that it deliberately tampered with or altered any of its dust filter media.

Each violation was originally assessed at $1100, for a total penalty of $11,000. The settlement proposes that each penalty be reduced to $825, for a total penalty of $8250, the reduction based on a dispute between the parties as to the degree and existence of negligence.

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, **IT IS ORDERED:**

1. The settlement agreement is **APPROVED.**

2. Respondent shall within 30 days of the date of this order pay the sum of $8250 as a civil penalty for the alleged violation.

James A. Broderick
James A. Broderick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

NOV 2 0 1991

WYOMING FUEL COMPANY, Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. WEST 91-365-R Citation No. 9858159; 4/4/91
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. WEST 91-366-R Citation No. 9858160; 4/4/91
	:	Docket No. WEST 91-367-R Citation No. 9858161; 4/4/91
	:	Docket No. WEST 91-368-R Citation No. 9858162; 4/4/91
	:	Golden Eagle Mine Mine I.D. 05-02820
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 91-519 A.C. No. 05-02820-03589D
v.	:	Golden Eagle Mine
WYOMING FUEL COMPANY, Respondent	:	

DECISION APPROVING SETTLEMENT
ORDER OF DISMISSAL

On October 28, 1991, the Secretary of Labor (Secretary) and Wyoming Fuel Co. (Wyoming) filed a Motion to Approve Settlement and to Withdraw Notice of Contest. The Secretary asserts that the violations alleged resulted from a deliberate act of tampering with dust filter media. Wyoming denies that it deliberately tampered with or altered any of the dust filter media. The parties agree to a settlement wherein Wyoming agrees to pay the amount of the proposed civil penalties, $5200 for 4 alleged violations, within 30 days of the entry of an order approving settlement. The settlement agreement provides that it shall not be deemed an admission of or used for any purpose except for civil matters arising under the Act. It is not to be used in any criminal or private civil litigation. However, the

Secretary is not precluded from including the citations in the operator's history of violations and considering such violations in proposing civil penalties pursuant to 30 U.S.C. § 820(i). Wyoming agreed to withdraw its notices of contest.

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, **IT IS ORDERED:**

1. The settlement reached between the parties is **APPROVED.**

2. Wyoming shall, within 30 days of the date of this order, pay the sum of $5200 as civil penalties for the violations alleged in the four citations contested herein.

3. The contest proceedings, Docket Nos. WEST 91-365-R through WEST 91-368-R are **DISMISSED.**

James A. Broderick
Administrative Law Judge

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NOV 2 0 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. VA 91-564 A.C. No. 44-01717-03566D
v.	:	
	:	Raven No. 1 Mine
KOCH CARBON, INC. - KOCH RAVEN DIVISION, Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Broderick

On November 1, 1991, the Secretary and Respondent filed a motion to approve a settlement in the above case. The docket involves a single alleged violation of 30 C.F.R. § 71.209(b) in which the Secretary alleged that Respondent altered the weight of a respirable dust sample submitted by Respondent as part of its sampling requirements. The Secretary states that the violation resulted from a deliberate act; the operator denies that it deliberately tampered with or altered any of its dust filter media.

The motion states that the parties agree to settle the case by reducing the proposed penalty from $1200 to $960 based on a dispute between the parties as to the degree and existence of negligence.

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, **IT IS ORDERED:**

1. The settlement agreement is APPROVED.

2. Respondent shall within 30 days of the date of this order pay the sum of $960 as a civil penalty for the alleged violation.

James A. Broderick
Administrative Law Judge

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NOV 27 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEVA 91-292
	:	A.C. No. 46-04370-03575
v.	:	
	:	Rowland No. 9 Mine
CONSOLIDATION COAL COMPANY, Respondent	:	

ORDER OF DISMISSAL

Appearances: Robert S. Wilson, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Petitioner;
Walter J. Scheller III, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Melick

Petitioner in essence requests approval to now withdraw her Petition in the captioned case for the reason that upon further analysis she believes no violation of the cited standard has occurred. Under the circumstances herein, permission to withdraw is granted. 29 C.F.R. § 2700.11. The citation is accordingly vacated and this case is therefore dismissed.

Gary Melick
Administrative Law Judge

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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NOV 18 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 91-1988 A. C. No. 46-07178-03501
v.	:	Red Warrior Mine
EL DORADO CHEMICAL COMPANY, Respondent	:	

DECISION DENYING MOTION TO APPROVE SETTLEMENT

Before: Judge Fauver

This case is a petition for assessment of a civil penalty under § 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § et seq.

Petitioner has moved for approval of a settlement to reduce the alleged violation from "significant and substantial" to non-S&S and to reduce the penalty to $20.

The Meaning of a "Significant and Substantial" Violation

The Commission has held that a violation is "significant and substantial" if there is "a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." U. S. Steel Mining Co., Inc., 7 FMSHRC 327, 328 (1985); Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (1981); Mathies Coal Co., 6 FMSHRC 1, 3-4 (1984). This evaluation is made in terms of "continued normal mining operations." U. S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1574 (1984). The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. Texasgulf, Inc., 10 FMSHRC 498 (1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 1007 (1987).

Analysis of the statutory language and the Commission's decisions indicates that the test of an S&S violation is a practical and realistic question whether, assuming continued mining operations, the violation presents a substantial possibility of resulting in injury or disease, not a requirement that the Secretary of Labor prove that it is more probable than not that

injury or disease will result. An illustration of this point is U. S. Steel Mining Co., Inc., supra, in which the Commission affirmed an S&S finding by a Commission judge. the judge found that:

> * * * [A]n insulated bushing was not provided where the insulated wires entered the control box for a water pump. The insulation on the wires was not broken or damaged. The water pump's electrical system was protected by two fuses - one a 30 amp fuse on the cable, and one a 10-30 amp control fuse inside the box. When it is operating, the pump vibrates, and the vibration could cause a cut in the insulation of the wire in the absence of a bushing. This could result in the pump to become the ground and, if the circuit protection failed, anyone touching the pump could be shocked or electrocuted. * * * [5 FMSHRC at 1791 (1983); emphasis added.]

As found by the judge, injury from the missing-bushing violation could result if the insulation wore through to metal and the circuit protection system failed to operate. However, one may observe that circuit protection devices are not presumed to be "reasonably likely" to fail unless they are found to be defective. There was no finding of defective fuses in the U. S. Steel case. The violation presented a substantial possibility of injury, not proof that injury was more probable than not. The effective meaning of the Commission's term "reasonably likely to occur" as applied in cases such as U. S. Steel is to find an S&S violation if the violation presents a substantial and significant possibility of injury or disease, not a requirement that injury or disease is more probable than not. This meaning harmonizes with the statute, which does not use the phrase "reasonably likely to occur" or "reasonable likelihood" in defining an S&S violation, but states that an S&S violation exists if the "violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard" (§ 104(d)(1) of the Act; emphasis added). In contrast, the statute defines an "imminent danger" as "any condition or practice . . . which could reasonably be expected to cause death or serious physical harm before [it] can be abated" [1] and expressly classifies S&S violations as less than imminent dangers. [2]

Proposed Settlement

Citation 3503706 alleges an unsafe steering section on a truck

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[1] Section 3(j) of the 1969 Mine Act, unchanged by the Federal Mine Safety and Health Act of 1977.

[2] Section 104(d)(1) limits S&S violations to conditions that "do not cause imminent danger . . ."

used to haul explosives, in violation of 30 C.F.R. § 77.1606(c). The inspector observed that the steering section was loose and moving sideways about one-half inch. He concluded that this condition could cause the bolts to break, resulting in loss of steering capability, and that a serious vehicle accident was reasonably likely.

The motion seeks to reduce the charge to non-S&S and the penalty to $20 on the grounds that:

> Because the driver of the truck regularly performs routine maintenance on the vehicle which includes tightening the bolts . . . and because the driver may have been able to feel the steering coming loose prior to any effect on the actual steering of the truck, a reasonable likelihood of serious injury did not exist if normal mining operations had continued.

The motion misconstrues the term "normal mining conditions." This term refers to continued mining operations assuming the violation is not abated. It would render the Act and safety and health regulations a hollow mechanism if violations were to be redesignated as non-S&S violations on the ground that the operator might detect and correct the violation before an accident occurs.

The proposed penalty of $20 trivializes the alleged violation, which the inspector found to be serious based on his on-site observations.

ORDER

The motion to approve settlement is DENIED.

William Fauver
Administrative Law Judge

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