NOVEMBER 1993

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

Secretary of Labor, MSHA v. Pyramid Mining Incorporated, Docket No. KENT 93-184. (Judge Weisberger, September 23, 1993).

Secretary of Labor, MSHA v. Drillex Incorporated, Docket No. SE 92-130-M. (Judge Barbour, September 23, 1993).

Secretary of Labor, MSHA v. Wyoming Fuel Company, Docket Nos. WEST 92-340, WEST 92-384, WEST 93-186. (Judge Morris, September 27, 1993).

Secretary of Labor, MSHA v. Daniel Lee Coal Company, Docket No. KENT 91-187. (Chief Judge Merlin, June 10, 1992, Order of Remand/Dismissal not previously published).

Secretary of Labor, MSHA v. Joy Technologies Inc., Docket No. WEST 93-129. (Judge Melick, October 14, 1993).

Secretary of Labor, MSHA v. Cedar Lake Sand & Gravel Company, Inc., Docket No. LAKE 93-64-M. (Default Decision of Chief Judge Merlin, August 27, 1993, previously unpublished).

Secretary of Labor, MSHA v. S & H Mining Incorporated, Docket Nos. SE 93-9, SE 93-10, SE 93-98. (Judge Feldman, October 22, 1993).

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

Secretary of Labor, on behalf of James W. Miller v. Mettiki Coal Corporation, Docket No. YORK 93-155-D. (Judge Feldman, Interlocutory Review of October 8, 1993 Order).

Secretary of Labor, MSHA v. United Energy Services, Inc., Docket No. WEVA 92-916, etc. (Judge Koutras, September 30, 1993).

Jim Walter Resources v. Secretary of Labor, MSHA, Docket No. SE 93-56-R, etc. (Judge Melick, Interlocutory Review of August 23, 1993 Order).

Secretary of Labor, MSHA v. C & B Mining Incorporated, Docket No. PENN 92-531. (Judge Barbour, May 25, 1993 - Docket No. was incorrectly listed as PENN 92-351).

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 5, 1993

JIM WALTER RESOURCES, INC.,	:	
	:	
Contestant	:	
	:	
v.	:	Docket No. SE 93-56-R
	:	
SECRETARY OF LABOR,	:	Docket No. SE 93-132
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
	:	
Respondent	:	
	:	
UNITED MINE WORKERS OF	:	
AMERICA,	:	
	:	
Intervenor	:	

ORDER

In this proceeding, Jim Walter Resources, Inc., ("JWR") has filed a petition seeking interlocutory review by the Commission of a pretrial order issued on August 23, 1993, by Administrative Law Judge Gary Melick. JWR's petition, filed "pursuant to 29 C.F.R. § 2700.74," erroneously refers to the Commission's previous procedural rule for interlocutory review. The Commission's procedural rules were revised, effective May 3, 1993. 58 Fed. Reg. 12158 (March 3, 1993). The new rule regarding interlocutory review, found at § 2700.76, to be codified at 29 C.F.R. § 2700.76 (1993), provides that review cannot be granted unless: the judge has certified, either on his own or as the result of a party's motion, that his interlocutory ruling involves a controlling question of law and that, in his view, immediate review will materially advance final disposition of the matter; or that the judge has denied a party's motion for certification of the interlocutory ruling, and review is sought within 30 days of the denial.

JWR filed its petition directly with the Commission. Thus, JWR's petition for interlocutory review was not filed in conformance with the Commission's current rules. Nevertheless, because the Commission's rules have only recently been revised and in the interest of judicial economy, we have reviewed the petition.

Having fully considered the petition of JWR, we conclude that it does not establish a basis for granting interlocutory review and we deny its request.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 9, 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of DONALD L. GREGORY, Petitioner and NATIONAL LABOR RELATIONS BOARD, Intervenor v. THUNDER BASIN COAL COMPANY, Respondent	:	Docket No. WEST 92-279-D
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of LOY D. PETERS, Petitioner and NATIONAL LABOR RELATIONS BOARD, Intervenor v. THUNDER BASIN COAL COMPANY, Respondent	:	Docket No. WEST 92-280-D

BEFORE: Holen, Chairman; Backley, Doyle, and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)("Mine Act" or "Act"), involves discrimination complaints brought by the Secretary of Labor ("Secretary") against

Thunder Basin Coal Company ("Thunder Basin") on behalf of Donald L. Gregory (Docket No. WEST 92-279-D) and Loy D. Peters (Docket No. WEST 92-280-D). The issue is whether Administrative Law Judge Michael A. Lasher, Jr., in his order reported at 14 FMSHRC 1391 (August 1992)(ALJ), erred in dismissing the two complaints because of the Secretary's failure to comply with the judge's orders compelling discovery. The Secretary had declined to disclose certain information sought during discovery on the grounds that it was protected by the informant's privilege and that it involved documents under the control of another federal agency, the National Labor Relations Board ("NLRB").

The Commission granted the Secretary's petition for discretionary review of the judge's order and granted the NLRB's motion to intervene in support of the Secretary's position. The Commission also permitted amicus curiae participation by the American Mining Congress and the National Coal Association ("industry amici") in support of Thunder Basin. For the reasons set forth below, we reverse and remand for further proceedings.

I.

Factual and Procedural Background

Thunder Basin owns several coal mines, including the non-union Black Thunder Mine in Wyoming.[1] In 1990, pursuant to the Secretary's regulations at 30 C.F.R. Part 40 ("Part 40"), some Black Thunder miners designated agents of the United Mine Workers ("UMWA"), who did not work at the mine, as their representatives for purposes of the Mine Act, including "walkaround" rights under section 103(f) of the Act, 30 U.S.C. § 813(f). Both Gregory and Peters, maintenance technicians at the Black Thunder Mine, were designated as alternate miners' representatives.

On March 11, 1991, Thunder Basin filed a suit against the Department of Labor's Mine Safety and Health Administration ("MSHA") in the United States District Court for the District of Wyoming to enjoin MSHA from enforcing its Part 40 regulations against Thunder Basin. Gregory and Peters testified at depositions on behalf of MSHA. Peters also testified at the subsequent court hearing.[2]

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[1] There has been no hearing in this case. Background information is based on the parties' pleadings and briefs and the judge's orders.

[2] In an unpublished order of March 21, 1991, the District Court issued a preliminary injunction enjoining the Secretary from enforcing Part 40 against Thunder Basin. The Court concluded that the UMWA was improperly using the miners' representative process under the Mine Act as a tool for union organizing purposes. On July 21, 1992, the United States Court of Appeals for the Tenth Circuit vacated the District Court's judgment and remanded the case to the lower court with instructions to dismiss the proceeding for lack of subject matter jurisdiction. Thunder Basin Coal Co. v. Martin, 969 F.2d 970. The Supreme Court granted Thunder Basin's petition for writ of certiorari seeking review of the Tenth Circuit's decision. Thunder Basin Coal Co. v. Reich, No. 92-896 (March 8, 1993). The case was argued in the Supreme Court on October 5, 1993.

In November and December 1991, Peters and Gregory filed discrimination complaints with the Secretary, pursuant to section 105(c) of the Mine Act, 30 U.S.C. § 815(c).[3] After investigating the complaints, the Secretary, on February 24, 1992, filed discrimination complaints on behalf of Gregory and Peters, alleging that Thunder Basin had discriminated against them because of their cooperation with MSHA in the Thunder Basin litigation. According to the complaints, Peters had been reprimanded and given a negative performance appraisal, while Gregory had been subjected to several instances of harassment. The complaints also asserted that Thunder Basin had refused to recognize Gregory and Peters as alternate miners' representatives. Thunder

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[3] Section 105(c) provides in pertinent part:

> Discrimination or interference prohibited; complaint; investigation; determination; hearing
>
> (1) No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this [Act] because such miner ... has instituted or caused to be instituted any proceeding under or related to this [Act] or has testified or is about to testify in any such proceeding, or because of the exercise by such miner ... on behalf of himself or others of any statutory right afforded by this [Act].
>
> (2) Any miner or applicant for employment or representative of miners who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate.... If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission, with service upon the alleged violator and the miner, ... alleging such discrimination or interference and propose an order granting appropriate relief. The Commission shall afford an opportunity for a hearing ... and thereafter shall issue an order, based upon findings of fact, affirming, modifying, or vacating the Secretary's proposed order, or directing other appropriate relief. Such order shall become final 30 days after its issuance.

Basin answered on March 16, 1992, denying that it had discriminated against the complainants. The complaints were consolidated for hearing.

In the meantime, the UMWA filed an unfair labor practice charge with the NLRB on January 30, 1992, alleging that Thunder Basin had discriminated against Peters and six other miners in order to discourage their membership in the UMWA in violation of sections 8(a)(1) and (a)(3) of the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 158(a)(1) and (a)(3) (1988). On April 29, 1992, the NLRB issued a complaint alleging that Thunder Basin had committed various unfair labor practices in an attempt to discourage Thunder Basin employees from supporting the UMWA. Among other things, the complaint alleged that Thunder Basin had given Peters a negative performance appraisal due to his union activities. The complaint did not mention Gregory by name.

In deposition notices in the Mine Act proceeding, directed to both Gregory and Peters and filed with the judge on May 18, 1992, Thunder Basin requested the complainants "to produce ... the originals and all non-conforming copies of all notes, memoranda, [and] written statements given to any governmental agency ... which in any way relate to [complainants'] allegations in this action...." On June 9, 1992, Thunder Basin deposed Gregory.

Counsel for Thunder Basin asked Gregory whether he had "any statements, notes or memoranda" that he may have given to a government agency relating to his Mine Act complaint, and Gregory responded that he did not. Dep. Tr. 10-11. Gregory was asked whether he had given any such statements and replied that he had not. Dep. Tr. 11. Counsel asked Gregory whether he was aware of "any other notes or letters or other written documents that may be in existence that relate to [his] claims in this action." Id. Gregory asked to speak with the Secretary's counsel. Id. The Secretary's counsel stated that Gregory was not obligated to provide information regarding "anything he's given to the NLRB." Id. Thunder Basin's counsel then asked Gregory whether he had given any statements about his treatment by Thunder Basin to anyone else and the Secretary's counsel again objected. Dep. Tr. 12-14. Counsel also asked Gregory whether he believed that any of the alleged mistreatment he had received was tied to any union activities, and the Secretary's counsel instructed Gregory not to answer the question. Dep. Tr. 130-31.

On June 24, 1992, Thunder Basin filed a motion to compel discovery. It requested the judge to direct a response to questions relating to any oral or written statements that Gregory may have given to any other governmental agency regarding his treatment by Thunder Basin, to require production of any such written documents, and to permit inquiry into whether Gregory believed that any alleged mistreatment he had received was tied to his union activities. Thunder Basin argued that such information was relevant for evaluation of whether the alleged mistreatment stemmed from the exercise of Mine Act rights or from union activities protected under the NLRA, and for purposes of impeachment. Motion to Compel at 3. The Secretary opposed the motion, asserting that the information sought was protected by the informant's privilege.

The judge, on July 8, 1992, issued an order granting Thunder Basin's motion to compel. The judge found that the requested information could reveal inconsistencies, thus providing impeachment material for the forthcoming trial. July 8 Order at 1-2. The judge directed the Secretary to make Gregory available for deposition on such matters but only "for the limited purposes indicated in the Motion...." July 8 Order at 2 (emphasis in original).

The Secretary filed a motion for reconsideration and, on July 20, 1992, the judge issued a second order, "affirming" his prior order. The judge emphasized that the discovery authorized in his prior order was "limited to questions and/or documents leading to impeachment material (prior inconsistent statements made by [Gregory]) which may also be relevant to the anticipated 'motivation' issue." July 20 Order at 3. The judge stated:

> [A]s Respondent contends, to "the extent Mr. Gregory may have told (the NLRB) a different story, whether with regard to the ways in which he believes he was mistreated or the reasons for that mistreatment" [such areas] may be inquired into on discovery, and if inconsistent to his testimony in this action, be admissible at hearing.

Id. The judge also prohibited Thunder Basin from using the deposition to learn the identity of other informants. Id.

The Secretary, on August 6, 1992, filed a Notice Regarding Discovery on behalf of Gregory and Peters, indicating that he would not comply with the directed discovery. The Secretary relied on the informant's privilege and also stated that he did not have custody or control of any document or information that the complainants may have provided to another agency. Anticipating that the judge would rule consistently as to Peters, the parties, on August 7, 1992, filed a stipulation requesting the judge to enter an identical discovery order with respect to Peters. On that date, Thunder Basin also moved for sanctions and dismissal of both cases on the basis of the Secretary's refusal to comply with the judge's earlier discovery orders. On August 11, the judge issued an order compelling discovery in the Peters case.

On August 14, 1992, the judge, citing Secretary on behalf of Logan v. Bright Coal Co., 6 FMSHRC 2520 (November 1984), issued his decision and order dismissing both complaints because of the Secretary's failure to comply with his orders compelling discovery. The judge indicated that any statements that the complainants may have given to other government agencies "are either in the possession of Complainants or can be obtained by them," that production of any such documents was thus proper, and that their availability "was glossed over [by] the Secretary...." 14 FMSHRC at 1392. The judge found that the material sought was "plainly relevant" and emphasized that his orders contained "protective language." Id. He reiterated his view that any such material could be useful for impeachment purposes. Id. He noted that "[i]n view of the information already contained in the Commission files, I find the Secretary's assertion of informant's privilege a transparency." Id.

At the time the judge issued his August order, the NLRB unfair labor practice proceeding was pending, with a hearing scheduled for October 1992.

II.

Disposition of Issues

A. Parties' Arguments on Review

The Secretary argues that the informant's privilege protects the complainants from having to disclose whether they were NLRB informants and from having to produce any confidential statements that they may have given the NLRB as part of its unfair labor practice investigation of Thunder Basin. The Secretary and the NLRB contend that the release of any such protected material would impede the NLRB's enforcement of the NLRA. The Secretary further argues that, having found the material relevant, the judge failed to apply the principles announced by the Commission in Bright to determine whether the informant's privilege attached and, if so, to balance whether the operator's need for the material was greater than the Secretary's need to maintain the privilege in the public interest.

The NLRB asserts that application of the Bright test would show that the public interest in efficient enforcement of the NLRA, and an informant's right to be protected against retaliation, outweigh Thunder Basin's need for any statements that the complainants may have given the NLRB. The NLRB states that it has a vital interest in maintaining confidentiality of witnesses' identity and statements in order to assure continued reporting of violations. The Secretary and NLRB contend that Thunder Basin's need for the information is not great because it is based only on the surmise that the information may be inconsistent with the complainants' Mine Act statements. Moreover, the materials sought are extraneous because Thunder Basin has obtained from the Secretary the material related to the Mine Act proceeding.

The NLRB also maintains that the "official information" privilege applies to its materials, as they would be contained in governmental investigation files. NLRB Br. 14-16.

Thunder Basin argues that the judge properly ordered discovery because the information sought was clearly relevant to the complainants' statements about their alleged discriminatory treatment. The operator sought discovery from the complainants, not from MSHA or the NLRB and consequently the informant's privilege is not properly invoked by those agencies. The operator and the industry amici argue that the informant's privilege does not apply because the identities of Gregory and Peters were disclosed in the NLRB proceeding and the underlying purpose of the privilege precludes its application where the informant's identity has been revealed. The operator and amici assert that, even if the informant's privilege is applicable, Thunder Basin's need for the material outweighs any public interest under a Bright balancing test. They also contend that the official information privilege may not be invoked on review because it was not raised before the judge and, even if it has now been properly raised, the privilege does not apply to the materials sought. In reply, the NLRB argues that the official

information privilege was properly raised for the first time in its motion to intervene because it had not been a party before the judge.

B. Applicable General Principles

The essential question presented on review is whether a complainant represented by the Secretary may be required to disclose whether he was also an informant in an NLRB unfair labor practice investigation and, if so, to produce any statements he gave to the NLRB. The Secretary provided Thunder Basin with copies of Gregory's MSHA statements; the general availability of a complainant's statements to MSHA is not in dispute. See Bright, 6 FMSHRC at 2520.

In reviewing claims that a judge erred in a discovery dispute, the Commission cannot merely substitute its judgment for that of the judge. Asarco, Inc., 12 FMSHRC 2548, 2555 (December 1990)("Asarco I"). A Commission judge is granted wide discretion in discovery matters. In Re: Contests of Respirable Dust Sample Alteration Citations, 14 FMSHRC 987, 1005 (June 1992)("Dust Sample Cases"). The Commission's role is to determine whether the judge's factual determinations are supported by the record and whether he correctly interpreted and applied the law or otherwise abused his discretion. Asarco I, 12 FMSHRC at 2555. See also Asarco, Inc., 14 FMSHRC 1323, 1327-28 (August 1992)("Asarco II").

Commission Procedural Rule 61, 58 Fed. Reg. 12158 (March 3, 1993; effective May 3, 1993), to be codified at 29 C.F.R. § 2700.61, provides that, "except in extraordinary circumstances," a judge "shall not ... disclose or order a person to disclose to an operator or his agent the name of an informant who is a miner."[4] The informant's privilege is based on the Supreme Court's discussion in Roviaro v. United States, 353 U.S. 53 (1957). The informant's privilege is the right of the government to withhold from disclosure the identity of persons furnishing information on violations of the law to law enforcement officials. Bright, 6 FMSHRC at 2522-23. In general, the privilege protects against the disclosure of an informant's identity and against the release of those portions of written statements that could reveal an informant's identity. The Commission has emphasized -- and all parties to the present proceeding agree -- that the privilege is qualified. Where disclosure is essential to the fair determination of a case, the privilege must yield or the case may be dismissed. Bright, 6 FMSHRC at 2523.

In Bright and subsequent cases, the Commission has set forth a framework for analysis of whether an informant's identity and statements should be disclosed. First, the judge must determine whether the information requested is relevant. See Asarco II, 14 FMSHRC at 1327; Asarco I, 12 FMSHRC at 2553. Second, if the judge concludes that the material is relevant, he must determine whether it is privileged; the burden of proving facts necessary to support the privilege rests with the government. See Asarco I, 12 FMSHRC at 2553; Bright, 6 FMSHRC at 2523. Third, if the qualified privilege exists, the

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[4] The present Commission rule carries forward unchanged the Commission's prior informant's rule, 29 C.F.R. § 2700.59 (1992).

judge should conduct a balancing test.

The Commission described this test in Bright:

> Recognizing that the informer's privilege is qualified, if the judge concludes that the privilege is applicable, he should next conduct a balancing test to determine whether the respondents' need for the information is greater than the Secretary's need to maintain the privilege to protect the public interest. Drawing the proper balance concerning the need for disclosure will depend upon the particular circumstances of [the] case, taking into account the violation charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors. Among the relevant factors to be considered are the possibility for retaliation or harassment, and whether the information is available from sources other than the government.
>
> The burden of proving facts necessary to show that the information is essential to a fair determination rests with the party seeking disclosure. Hodgson v. Charles Martin Inspectors of Petroleum, Inc., 459 F.2d [303] at 307 [(5th Cir. 1972)]. In this regard a demonstrated, specific need for material may prevail over a generalized assertion of privilege. Black v. Sheraton Corp. of America, 564 F.2d [531] at 545 [(D.C. Cir. 1977)]. Some of the factors bearing upon the issue of need include whether the Secretary is in sole control of the requested material or whether the material which respondents seek is already within their control, and whether respondents had other avenues available from which to obtain the substantial equivalent of the requested material.

6 FMSHRC at 2526.

C. Informant's Privilege

Applying the principles of Bright, we agree with the judge's threshold determination that the information sought was relevant in the context of Commission discovery. 14 FMSHRC at 1392. See Commission Procedural Rule 56(b), 58 Fed. Reg. 12158 (March 3, 1993; effective May 3, 1993), to be codified at 29 C.F.R. § 2700.56(b)(discovery permitted of any relevant matter that is admissible evidence or appears likely to lead to the discovery of admissible evidence).

We disagree, however, with the judge's determination that a qualified informant's privilege did not attach to the information sought by the operator. The judge concluded that Gregory had apparently been identified as an informant because he was named as a discriminatee in the NLRB proceeding

and, thus, any claim of privilege had been waived. July 20 Order at 3. In fact, as discussed below, Gregory was not named in the NLRB complaint. Presumably, the judge reached an identical conclusion as to Peters, who was actually named in the NLRB complaint.

In general, an individual's claim to the protection of the informant's privilege may be waived if he is identified or otherwise revealed as an informant. See generally Roviaro, 353 U.S. at 60 & n.8. The Commission's decisions, however, have recognized the importance of this privilege. See Asarco II, 14 FMSHRC at 1327; Bright, 6 FMSHRC at 2522-25. Further, our Procedural Rule 61 permits disclosure of an informant's identity only in "extraordinary circumstances." Accordingly, we will not consider that an informant has been identified or the privilege waived except where there is an express identification of an individual as an informant or an express waiver of that individual's claim of privilege. See, e.g., Dole v. Loc. 1942, IBEW, 870 F.2d 368, 375 (7th Cir. 1989).

Here, the UMWA, not Gregory or Peters, was the charging party in the NLRB proceeding. Although the judge indicated that Gregory had been named as a discriminatee in the NLRB's unfair labor practice complaint, Gregory is not mentioned in that complaint. While Peters is included therein as a discriminatee, as the NLRB notes, such inclusion is not tantamount to disclosure of Peters as an informant. See NLRB Reply Br. at 5-6. Other sources of information regarding Peters were available to the NLRB, and we hold that, in the circumstances presented, Peters' inclusion in the NLRB complaint does not, in itself, constitute identification of him as an informant or a waiver of the privilege.

Accordingly, we conclude that neither Gregory nor Peters has been expressly identified as an NLRB informant and that the informant's privilege has not been waived as to either individual. Therefore, we hold that a qualified privilege exists as to whether either Gregory or Peters gave an oral or written statement to the NLRB. We reverse as legal error the judge's determination to the contrary.

We remand this matter to the judge so that he may carry out the required balancing of competing interests pursuant to Bright.[5] The privilege protects information that would disclose whether the complainants gave statements to the NLRB and is to be balanced against the operator's need for that information.

The judge shall permit the NLRB, as the custodian of any such statements, to be heard on its need to maintain the privilege to protect the public interest and its own enforcement responsibilities under the NLRA. The judge shall evaluate Thunder Basin's need during discovery for information that would disclose whether complainants were NLRB informants and whether that need cannot be satisfied adequately at trial, if either complainant is called to

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[5] While some language in the judge's orders suggests balancing, his conclusions appear to rest on his determination that the privilege had been effectively waived.

testify. See Asarco I, 12 FMSHRC at 2561 n.3.

If the judge determines in his analysis pursuant to Bright that the information is not discoverable, the judge may at trial order disclosure of informants' statements. See generally Jencks v. United States, 353 U.S. 657, 667-69 (1957); 18 U.S.C. § 3500 (1988)(Jencks Act). We note that the NLRB itself turns over at trial, for cross-examination purposes, a witness's prior statements relative to the subject matter of his testimony. 29 C.F.R. § 102.118(b)-(d)(NLRB "Jencks" procedure).

We reject the argument raised by Thunder Basin and industry amici that the informant's privilege cannot be invoked by the Secretary because the operator sought the information directly from the complainants and not from the government. The Secretary here, in representing the alleged discriminatees, is carrying out his enforcement responsibilities under section 105(c)(2) of the Mine Act. The informant's privilege is essentially the government's right to withhold certain information to protect individual informants. Bright, 6 FMSHRC at 2522-23.

If the judge concludes on remand that the informant's privilege outweighs the operator's need for the information during the discovery phase, he need not reach the official information privilege and shall order this case to proceed. If he finds that the informant's privilege should yield, he shall resolve the official information privilege issue before directing disclosure of the information sought.

D. Official Information Privilege

The NLRB argues that any statements given to it by Gregory and Peters are protected by the official information privilege. As the operator and industry amici assert, this issue is raised for the first time on review and was not presented to the judge. Section 113(d)(2)(A)(iii) of the Mine Act, 30 U.S.C. § 823(d)(2)(A)(iii), bars the Commission, unless good cause is shown, from considering questions upon which a judge had not been afforded an opportunity to pass. We conclude that, in the unusual circumstances presented, good cause has been shown. This matter was dismissed during the discovery stage. We believe that the NLRB, as a practical matter, could not have been expected to intervene prior to the judge's dismissal order. Therefore, we will permit the NLRB and the other parties to be heard on remand regarding this issue.

The official information privilege protects governmental investigative files. Friedman v. Bache Halsey Stuart Shields, Inc., 738 F.2d 1336, 1341 (D.C. Cir. 1984). This privilege prevents the unwarranted disclosure of documents from law enforcement investigatory files as well as testimony about that information. In re Sealed Case, 856 F.2d 268, 271 (D.C. Cir. 1988). The reason for protecting investigative files is similar to that for the informant's privilege: the need for free disclosure to the government. In general, this privilege may be invoked in Mine Act proceedings. See Dust Sample Cases, 14 FMSHRC at 1008-09. We remand so that the judge may determine if this privilege has been properly invoked and is applicable in this case. See Sealed Case, 856 F.2d at 271; Dust Sample Cases, 14 FMSHRC at 999-1001,

1009. The official information privilege, like the informant's privilege, is qualified and is subject to a similar balancing of the government's interest in non-disclosure and the operator's need for the information prior to hearing. Sealed Case, 856 F.2d at 272. On remand, the judge shall determine and apply the appropriate factors for a balancing analysis.

E. Additional Discovery Protection

In the event the judge determines that neither privilege outweighs the operator's need for information now, he shall order disclosure. We concur with the other protections set forth by the judge in his discovery orders. Should disclosure be ordered, the Secretary shall protect against the disclosure of the names of other informants. The operator is entitled to pursue only the specific information previously recognized by the judge in his discovery orders.[6] See 14 FMSHRC at 1392.

[6] The operator and industry amici contend that sustaining the Secretary's claim of privilege would conflict with the Memorandum of Understanding executed by the Secretary and the General Counsel of the NLRB (45 Fed. Reg. 6189 (January 25, 1980))("MOU"), which states that the NLRB should "defer or dismiss" an unfair labor practice charge whenever a complaint related to the same factual matters is also brought under section 105(c) of the Mine Act. The record contains no evidence that the two sets of complaints are factually identical. In any event, we conclude that the MOU is not binding on either agency. See generally Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533, 536-37 (D.C. Cir. 1986).

III.

Conclusion

For the foregoing reasons, we vacate the judge's July and August 1992 discovery orders and his dismissal order of August 14, 1992. This matter is reinstated and is remanded to the judge for further proceedings consistent with this opinion.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 16, 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. KENT 91-187
DANIEL LEE COAL CO., INC.	:	

BEFORE: Holen, Chairman; Backley, Doyle and Nelson, Commissioners

ORDER

BY THE COMMISSION:

Chief Administrative Law Judge Paul Merlin has referred to the Commission the Secretary of Labor's Motion to Correct Clerical Error in an order he issued on June 10, 1992. The judge's order became a final order of the Commission 40 days after its issuance. 30 U.S.C. § 823(d)(1). Under Commission Procedural Rule 69(c), 58 Fed. Reg. 12158, 12171 (March 3, 1993), to be codified at 29 C.F.R. § 2700.69(c)(1993), a judge may correct clerical errors in a final order with leave of the Commission. Upon consideration of the Secretary's motion, it is granted. We reopen the case, remand the matter to the judge, and grant him leave to correct the error.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
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November 17, 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. CENT 91-202
PITTSBURG & MIDWAY COAL MINING COMPANY	:	

BEFORE: Holen, Chairman; Backley, Doyle, and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)("Mine Act" or "Act"). The issue is whether a violation of 30 C.F.R. § 77.400(a)[1] by Pittsburg & Midway Coal Mining Company ("P&M") was of a significant and substantial ("S&S") nature.[2] Administrative Law Judge John J. Morris concluded that the violation was not S&S. 14 FMSHRC 1941 (November 1992)(ALJ). The Commission granted the Secretary's petition for discretionary review of that finding.[3]

---

[1] Section 77.400(a) requires:

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

[2] The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious in nature any violation that "could significantly and substantially contribute to the cause and effect of a ... mine safety or health hazard...."

[3] In his decision, the judge ruled on two other citations issued to P&M. Because the citations were issued in different areas of the mine, involved different facts, and alleged dissimilar violations of the Secretary's safety standards, we have issued a separate decision for each citation.

For the reasons that follow, we vacate the judge's conclusion that the violation was not S&S and remand for further proceedings.

I.

Factual and Procedural Background

On March 27, 1991, Donald Jordan, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA"), inspected P&M's preparation plant at its York Canyon Mine in Colfax County, New Mexico. A 36-inch wide metal grating walkway was 12 to 18 inches from the feeder slide. The walkway handrail was approximately 40 inches high on the side closest to the feeder slide; a concrete wall was on the other side. Jordan determined that the feeder slide was not guarded in conformance with section 77.400(a) to prevent persons from contacting its moving parts. Jordan issued a section 104(a) citation to P&M for its failure to guard the feeder slide, and designated the violation S&S.

Before the judge, P&M conceded the violation but contested the S&S designation. In concluding that the violation was not S&S, the judge found that there was not a reasonable likelihood that the hazard contributed to would result in an injury. 14 FMSHRC at 1948. The judge reasoned that, if a person were to slip on the walkway, he would most likely steady himself on the adjacent handrail. Id.

II.

Disposition

A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981). In Mathies Coal Co., 6 FMSHRC 1 (January 1984), the Commission explained:

> In order to establish that a violation of a mandatory safety standard is significant and substantial ..., 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.

6 FMSHRC at 3-4. See also Austin Power, Inc. v. Secretary, 861 F.2d 99, 103-04 (5th Cir. 1988), aff'g 9 FMSHRC 2015, 2021 (December 1987)(approving Mathies criteria). The Commission has held 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)(emphasis in

original). In finding that the violation was not S&S, the judge concluded that the Secretary had failed to prove the third element of the Mathies test. 14 FMSHRC at 1948.

On review, the Secretary contends that the judge's conclusion is not supported by substantial evidence in the record.[4] He argues that the judge failed to consider evidence that maintenance or repair workers, through inattention or carelessness, could contact the slide's moving parts while working on or near the unguarded machinery. According to the Secretary, the judge failed to consider that the walkway is only 36 inches wide,[5] is often wet or dusty, and is flanked on the other side by a concrete wall.

P&M argues that the Secretary did not carry his burden of establishing the reasonable likelihood of an injury and submits that a generalized concern that maintenance workers may work around unguarded equipment does not by itself support an S&S designation.

We agree with the Secretary that the judge's decision did not address the hazards facing maintenance and repair workers. The judge focused solely on the hazard of miners slipping on the walkway and contacting the slide's moving parts. Inspector Jordan testified that the violation was S&S because someone reaching toward the unguarded feeder slide to grease or clean it could become entangled in the moving parts and be seriously injured. Tr. 32-33. P&M's safety manager, Michael Kotrick, acknowledged that a miner is assigned to clean around the feeder slide one to three times each shift and that a repairman may also work on the feeder slide as needed. Tr. 77.

The judge determined that the adjacent handrail would most likely provide support to a slipping miner. 14 FMSHRC at 1948. Kotrick conceded, however, that the handrail, consisting of a single metal pipe, did not provide much of a physical barrier. Tr. 79. In addition, the judge failed to consider the hazard to miners carrying objects, in which case the handrail might not provide protection.

Accordingly, we agree that the judge failed to address adequately the Secretary's evidence when he determined that it was not reasonably likely that the hazard contributed to by the violation would result in an injury. A judge must analyze and weigh the relevant testimony of record, make appropriate findings, and explain the reasons for his decision. Anaconda Co., 3 FMSHRC 299, 299-300 (February 1981). The substantial evidence standard of review requires the Commission to weigh all probative evidence and to examine the

---

[4] The Commission is bound by the terms of the Mine Act to apply the substantial evidence test when reviewing an administrative law judge's decision. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." Rochester & Pittsburgh Coal Co., 11 FMSHRC 2159, 2163 (November 1989), quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938).

[5] The Secretary, in his brief, states that the walkway was only 30 inches wide. The evidence in the record establishes the width at 36 inches. Tr. 77.

fact finder's rationale in arriving at the decision. See Universal Camera Corp. v. NLRB, 340 U.S. 474, 487-88 (1951).

Because we are unable to evaluate the judge's rationale in light of the Secretary's evidence, we vacate his conclusion that the violation was not S&S and remand for further analysis of that issue. If the judge finds that the violation is S&S, he should reconsider the appropriate civil penalty.

III.

Conclusion

For the foregoing reasons, we vacate that part of the judge's decision in which he found that P&M's violation of section 77.400(a) was not S&S. We remand this case for further proceedings consistent with this decision.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
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November 17, 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. CENT 91-197-A
PITTSBURG & MIDWAY COAL MINING COMPANY	:	

BEFORE: Holen, Chairman; Backley, Doyle, and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq (1988)("Mine Act" or "Act"). The issue is whether Pittsburg & Midway Coal Mining Company ("P&M") violated 30 C.F.R. § 77.410(a)(1990)[1] and, if so, whether the violation was significant and substantial in nature ("S&S").[2] Administrative Law Judge John J. Morris found that P&M violated section 77.410(a) and that the violation was S&S. 14 FMSHRC 1941 (November 1992)(ALJ). The Commission granted P&M's petition for

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[1] Section 77.410(a) requires, as pertinent:

> (a) Mobile equipment such as front-end loaders, forklifts, tractors and graders, and trucks, except pickup trucks with an unobstructed rear view, shall be equipped with a warning device that--
>
> (1) Gives an audible alarm when the equipment is put in reverse; ....

[2] The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious in nature any violation that "could significantly and substantially contribute to the cause and effect of a ... mine safety and health hazard...."

discretionary review, which challenges both these findings.[3] For the reasons that follow, we vacate the judge's decision and remand for further proceedings.

I.

Factual and Procedural Background

On February 25, 1991, Inspector Donald Jordan of the Department of Labor's Mine Safety and Health Administration ("MSHA") inspected P&M's York Canyon surface mine in Colfax County, New Mexico. Jordan inspected an explosives supply truck around which miners were working. Jordan determined that the audible alarm, which sounds when the truck is in reverse (the "backup alarm"), was not working. As a result, Jordan issued a citation to P&M under section 104(a) of the Mine Act, 30 U.S.C. § 814(a), charging P&M with a violation of section 77.410(a). Jordan designated the violation S&S.

Because he found that the truck had an inoperative backup alarm, the judge affirmed the citation. 14 FMSHRC at 1945. He also found the violation to be S&S because miners work in close proximity to the truck and because a truck backing into a miner would cause reasonably serious injuries or a fatality. Id.

II.

Disposition

P&M argues that, because the vehicle is a pickup truck, a backup alarm is not required if there is an unobstructed rear view and here the judge found a relatively clear rear view. See 14 FMSHRC at 1945. In challenging the judge's S&S finding, P&M asserts that the judge erred in failing to address whether the violation presented a reasonable likelihood of injury and in failing to address how the relatively clear rear view would bear upon the risk of injury.

The Secretary concedes that, because the judge applied an outdated standard, the case should be remanded for further analysis. The Secretary argues, however, that, because the truck did not have an unobstructed rear view, P&M violated the standard and the violation was S&S.

We agree that the standard applied by the judge was not in effect when the citation was issued. See 14 FMSHRC at 1944 n.2; 30 C.F.R. § 77.410 (1988). Effective September 18, 1989, an exception was provided to the backup alarm requirement for "pickup trucks with an unobstructed rear view." 54 Fed. Reg. 30515, 30517 (July 20, 1989).

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[3] In his decision, the judge ruled on two other citations issued to P&M. Because the citations were issued in different areas of the mine, involved different facts, and alleged dissimilar violations of the Secretary's safety standards, we have issued a separate decision for each citation.

Because the judge relied upon an outdated standard, he did not determine whether the exception provided in section 77.410(a) should be applied. We remand this case to the judge for that determination. If the judge finds that P&M violated the standard, he should determine whether the violation was S&S and assess an appropriate civil penalty.

III.

Conclusion

For the foregoing reasons, we vacate that part of the judge's decision in which he found that P&M violated section 77.410(a) and that the violation was S&S. We remand this case for further proceedings consistent with this decision.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 17, 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. CENT 91-197-B
PITTSBURG & MIDWAY COAL MINING COMPANY	:	

BEFORE: Holen, Chairman; Backley, Doyle, and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)("Mine Act" or "Act"). The issue is whether Pittsburg & Midway Coal Mining Company ("P&M") violated 30 C.F.R. § 77.1104,[1] and, if so, whether the violation was significant and substantial in nature ("S&S").[2] Administrative Law Judge John J. Morris concluded that P&M had not violated section 77.1104. 14 FMSHRC 1941 (November 1992)(ALJ). The Commission granted the Secretary's petition for discretionary review of that finding.[3] For the reasons that follow, we vacate the judge's decision and remand for further proceedings.

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[1] Section 77.1104 requires:

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

[2] The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious in nature any violation that "could significantly and substantially contribute to the cause and effect of a ... mine safety or health hazard...."

[3] In his decision, the judge ruled on two other citations issued to P&M. Because the citations were issued in different areas of the mine, involved different facts, and alleged dissimilar violations of the Secretary's safety standards, we have issued a separate decision for each citation.

I.

Factual and Procedural Background

On February 25, 1991, Donald Jordan, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA"), inspected a building housing a coal transfer point at P&M's York Canyon surface mine in Colfax County, New Mexico. Jordan observed accumulations of float coal dust mixed with oil on the flat metal surfaces of two 460-volt A.C. energized motors. Float coal dust and oil had also accumulated on the floor surrounding the motors.

Jordan determined that the accumulations violated section 77.1104 and issued a citation under section 104(a) of the Mine Act, 30 U.S.C. § 814(a). Jordan designated the violation S&S.

The judge held that, in order to prove a violation, the Secretary was required to show that a fire hazard had been created by the accumulations of combustible materials. 14 FMSHRC at 1946. The judge concluded that the Secretary did not prove a violation because he failed to establish the presence of an ignition source and fuel to support a fire. 14 FMSHRC at 1947. Accordingly, the judge vacated the citation. Id.

II.

Disposition

The Secretary argues that the judge applied an erroneous legal analysis in determining whether a violation had occurred. The Secretary asserts that, under section 77.1104, he need only prove that a hazard could arise, not that the hazard probably would arise and result in an injury. The Secretary asks the Commission to remand the case to the judge to apply the proper standard of proof in determining whether a violation occurred and to determine whether the violation, if found, was S&S.[4] In response, P&M argues that the Secretary did not carry his burden of proving that the materials observed by the inspector violated the safety standard.

The judge relied upon the Commission's decision in Texasgulf, Inc., 10 FMSHRC 498 (April 1988), in which the Commission analyzed whether a "confluence of factors" created a fire hazard that was S&S. 14 FMSHRC at 1946. The judge stated that he relied upon Texasgulf because it contained "an analytical approach useful for determining the reasonable likelihood of a combustion hazard resulting in an ignition or explosion." Id. The judge credited the testimony of P&M's safety manager, Michael Kotrick, who testified

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[4] A violation is properly designated as S&S "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).

as to the conditions necessary for a fire and the flammability of the accumulations. Id.

Section 77.1104 prohibits accumulations that "can create a fire hazard." The Secretary states that he is required "to prove that a hazard could arise" and that the "cited conditions created a possibility of fire." S. Br. at 5, 6 (emphasis in original). In considering whether P&M violated the regulation, the judge essentially required the Secretary to prove that an ignition or explosion was reasonably likely to occur. Thus, we agree with the Secretary that the judge erred in his analysis in imposing on the Secretary a greater burden of proof than is required by the standard. However, the Secretary has failed to set forth what he believes is necessary to establish a violation.

Because the Secretary provides little additional guidance beyond repeating the language of the standard, we are unable to evaluate the merits of his position. Accordingly, we remand this proceeding to the judge to allow the parties to supplement their briefs concerning the meaning and scope of section 77.1104. The judge should then determine whether P&M violated that section; if so, he should consider whether the violation was S&S and assess an appropriate civil penalty.

III.

Conclusion

For the foregoing reasons, we vacate that part of the judge's decision in which he found that P&M did not violate section 77.1104. We remand this case for further proceedings consistent with this decision.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 30, 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. LAKE 93-64-M
CEDAR LAKE SAND & GRAVEL COMPANY, INC.	:	

BEFORE: Holen, Chairman; Backley, Doyle, and Nelson, Commissioners

ORDER

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)("Mine Act"). On August 27, 1993, Chief Administrative Law Judge Paul Merlin issued an Order of Default to Cedar Lake Sand & Gravel Co., Inc. ("Cedar Lake") for failing to answer the civil penalty proposal filed by the Secretary of Labor or the judge's June 24, 1993, Order to Show Cause. The judge assessed a civil penalty of $100 as proposed by the Secretary. For the reasons that follow, we vacate the default order and remand the case for further proceedings.

In a letter to the judge dated September 1, 1993, Cedar Lake sought relief from the default order. It asserted that it had timely responded to the judge's show cause order in that it had sent a letter on June 29, 1993, to the Office of the Regional Solicitor of the Department of Labor. Cedar Lake enclosed a copy of that letter.

The judge's jurisdiction over this case terminated when his decision was issued on August 27, 1993. Commission Procedural Rule 69(b), 58 Fed. Reg. 12171 (March 3, 1993), to be codified at 29 C.F.R. § 2700.69(b)(1993). Due to clerical inadvertence, the Commission did not act on Cedar Lake's letter of September 1, 1993, within the required statutory period for considering requests for discretionary review and the judge's decision became a final decision of the Commission 40 days after its issuance. 30 U.S.C. § 823(d)(1). On November 3, 1993, Cedar Lake again wrote to the judge seeking relief from the default order.

Relief from a final Commission judgment or order on the basis of inadvertence, mistake, surprise or excusable neglect is available to a party under Fed. R. Civ. P. 60(b)(1). See 29 C.F.R. § 2700.1(b)(Federal Rules of

Civil Procedure apply "so far as practicable" and "as appropriate," in absence of applicable Commission rules). Lloyd Logging, Inc., 13 FMSHRC 781, 782 (May 1991). We reopen this proceeding and consider Cedar Lake's September 1 letter as a timely filed Petition for Discretionary Review, which we grant.

On the basis of the present record, we are unable to evaluate the merits of Cedar Lake's position. In the interest of justice, we remand the matter to the judge, who shall determine whether default is warranted. See Hickory Coal Co., 12 FMSHRC 1201, 1202 (June 1990).

For the reasons set forth above, we reopen this matter, vacate the judge's default order and remand this matter for further proceedings.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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NOV 1 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. WEVA 92-1050
	:	A.C. No. 46-01968-04015
v.	:	
	:	Blacksville No. 2 Mine
CONSOLIDATION COAL COMPANY, Respondent	:	
	:	Docket No. WEVA 92-1156
	:	A.C. No. 46-01452-03873 R
	:	
	:	Arkwright No. 1 Mine

DECISIONS

Appearances: Wanda Johnson, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Petitioner;
Daniel E. Rogers, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking civil penalty assessments for several alleged violations of certain safety standards found in Part 75, Title 30, Code of Federal Regulations. The respondent filed timely answers and contests and hearings were conducted in Morgantown, West Virginia. The parties filed posthearing briefs, and I have considered their arguments in the course of my adjudication of these matters.

Issues

The issues presented in these cases are (1) whether the conditions or practices cited by the inspectors constitute violations of the cited mandatory safety standards, (2) whether the alleged violations were "Significant and Substantial" (S&S), (3) whether the alleged violations were the result of an unwarrantable failure by the respondent to comply with the cited standards, and (4) the appropriate civil penalties to be assessed

for the violations, taking into account the civil penalty assessment criteria found in section 110(i) of the Act.

Stipulations

The parties stipulated as follows in these matters (Tr. 10-12).

1. The presiding judge has jurisdiction to hear and decide this matter.

2. The subject coal mine is owned and operated by the respondent, and the mine is subject to the Act.

3. The inspector who issued the contested violations was acting in his official capacity as an MSHA inspector.

4. The contested violations were properly served on the respondent's agents.

5. The cited conditions and practices were timely abated by the respondent in good faith.

6. The maximum civil penalty assessments for the violations will not affect the respondent's ability to continue in business.

7. MSHA's computer print-outs with respect to the respondent's history of prior violations for the two-year period shown may be admitted in these proceedings.

The parties agreed that there is no issue with respect to the section 104(d) "chain" and I conclude and find that the issuance of the disputed orders was procedurally correct insofar as the underlying section 104(d) citation is concerned (Tr. 13).

Discussion

Docket No. WEVA 92-1156

This case concerns proposed civil penalty assessments for nine (9) alleged violations of certain mandatory safety standards found in Part 75, Title 30, Code of Federal Regulations, and they are as follows:

Citation/Order No.	Date	30 C.F.R Section	Assessment
3314179	8/23/90	75.403	$192
3113921	9/6/90	75.514	$329
3314293	9/6/93	75.1722(a)	$213
3314297	9/7/90	75.1003(a)	$213
3307182	9/10/90	75.512	$625
3314299	9/10/90	75.1722(a)	$213
3308049	10/11/90	75.202(a)	$213
3306265	10/17/90	75.400	$178
3307787	10/16/90	75.400	$616

In the course of several prehearing conference with the parties, they advised me that settlements were reached with respect to six (6) of the contested citations. Pursuant to the proposed settlement, the respondent agreed to pay the full amount of the proposed assessments for Citation Nos. 3314293, 3307182, 3314299, and 3306265, in settlement of the violations. With respect to Citation No. 3314179, the petitioner agreed to delete the "S&S" designation and the respondent agreed to pay a reduced penalty of $115 in settlement of the violation. With regard to Citation No. 3314297, the petitioner agreed to delete the "S&S" designation, and the respondent agreed to pay a reduced penalty of $128 in settlement of the violation. The parties further advised me that the three (3) remaining violations could not be settled during their prehearing negotiations and a hearing would be required. Insofar as the proposed settlements are concerned, after review of the pleadings and available information concerning the civil penalty criteria found in section 110(i) of the Act, the settlements were approved in the course of the pretrial conferences, and my decisions in this regard are herein reaffirmed.

In the course of the hearing in this matter, the parties further advised me that they proposed to settle Section 104(a) "S&S" Citation Nos. 3308049 and 313921. Under the terms of the settlement, the respondent agreed to accept Citation No. 3308049, as issued and to pay the full amount of the proposed penalty assessment of $213. With respect to Citation No. 3113921, petitioner's counsel asserted that if this violation were to proceed to trial, the evidence would not support the "S&S" finding, and that under the circumstances, she agreed to modify the citation to non-"S&S", and the respondent agreed to pay a reduced penalty of $197, in settlement of the violation (Tr. 21-22). The proposed settlements were approved from the bench, and my decisions in this regard are herein reaffirmed. The parties informed me that they were unable to settle the remaining violation, Section 104(d)(2) Order No. 3307787, and it proceeded to trial.

Section 104(d)(2) "S&S" Order No. 3307787, issued on October 26, 1990, cites an alleged violation of mandatory safety standard 30 C.F.R. § 75.400, and the cited condition or practice states as follows:

> Combustible material in the form of dry float dust has been permitted to accumulate in varying thickness on the roof and ribs and a line brattice in the 10 left belt return air entry to the regulator, a distance of approximately 300 feet, and outby the regulator through the intersection and down the 1st Main Butt entry for approximately 1,000 feet on the roof, ribs, and mine floor.

Docket No. WEVA 92-1050

Section 104(d)(2) "S&S" Order No. 3312960, issued on March 19, 1992, cites an alleged violation of mandatory safety standard 30 C.F.R. § 75.1700, and the cited condition or practice states as follows:

> The operator failed to comply with item number one of the procedures for cutting through a plugged well. The 060-025 longwall shearer intersected and cut into the steel casing of well #B2-196 on day shift at approx. 1420, 19 March 1992. The engineering spads in the head and tail entries indicate the well to be approx. 7 feet deeper in the block then it actually was.
>
> The operator shall submit additions to the cut through plan which will eliminate the likelihood of a reoccurrence to the MSHA Dist. Manager prior to termination of this citation.

Section 104(d)(2) "S&S" Order No. 3718887, issued on May 11, 1992, cites an alleged violation of 30 C.F.R. § 75.400, and the cited condition or practice states as follows:

> Combustible material in the form of dry black float coal dust has been permitted to accumulate in the 14M longwall tailgate entry as follows: A thick layer of dry black float coal dust was permitted to accumulate on the mine floor and on rib sloughudge (sic) and on roof support cribs from 7+60 outby to 3+50. A medium layer of dry black float coal dust on floor-rib sloughage-2nd cribs 3+50 to 0+100. A medium layer of dry black float dust from the regulator outby for 50 feet and outby for 2 blocks. A total of approximately 1,000 feet.

In the course of the trial, the parties advised me that they proposed to settled Order No. 3312960. In support of the

settlement, the petitioner's counsel took note of the fact that the order had been modified numerous times. She stated that if the order were to proceed to trial, the evidence would not support the unwarrantable failure finding. Counsel explained that the evidence would show that the cited well was inadvertently cut and that once the respondent became aware of this, it immediately notified MSHA, and MSHA went to the mine to investigate. Counsel asserted further that the violation was not significant and substantial as originally determined, and that the order should be modified to a section 104(a) non-"S&S" citation, with a penalty reduction from $1,400, to $550. The parties agreed to this settlement disposition of the matter, and the respondent agreed to pay the $550 penalty in settlement of the violation (Tr. 179-183). The proposed settlement was approved from the bench, and my bench decision is herein reaffirmed. The parties confirmed that they were unable to settle the remaining contested order in this docket, and it proceeded to trial.

Petitioner's Testimony and Evidence

Docket No. WEVA 92-1156

MSHA Inspector Lynn A. Workley confirmed that he conducted a mine inspection on October 26, 1990, and issued the order after finding the cited float coal dust accumulations deposited over previously rock dusted surfaces on the mine floor in a return air course, including the coal ribs, and mine roof, and on a line brattice and mine ribs and floor at the cited belt conveyor intersection (Tr. 23-26). As a result of these observations, he issued a closure order on the ten left belt (Exhibit P-1).

Mr. Workley confirmed that at the time of his inspection the ten left conveyor belt and section were operating (Tr. 28). He stated that he found the weekly examiner's initials and the date for two days prior to his inspection noted on a crib, and he believed the initials "D.F." were those of David Fazio. Mr. Workley stated further that "he left footprints in the float coal dust which appeared white to pale grey on a black background where he walked up to the crib and dated up" (Tr. 28-29).

Mr. Workley stated that he issued the order because the float coal dust "was very obvious" and the footprints indicated that the float coal dust was present when the examiner made his examination two days earlier. Mr. Workley stated that the float dust posed a hazard to the miners, and that the left conveyor belt was running and presented an ignition source. Further, the float coal dust presented "a generous fuel supply", and there was available air and oxygen in the area, "the three things necessary for a fire" (Tr. 29).

Mr. Workley stated that the float coal dust accumulations covered an area of 1,000 feet, and most of the area was black in color, and the dust was dry and powdery. He confirmed this by patting the dust with his hand at various locations or blowing on it with air from his mouth, and "it blew up into a cloud in the air" (Tr. 30). He believed that the dry and powdery coal dust, suspended in the air, contributed greatly to an explosion hazard (Tr. 30).

Mr. Workley believed that the accumulations had been present for several weeks because "it doesn't all accumulate at once" and he stated that the dust is generated by the ten left longwall belt conveyor and is carried down the return air course. The dust accumulates more each shift, and part of the coal dust was there for at least two weeks (Tr. 31).

Mr. Workley believed that the violation was "significant and substantial" because the accumulations were adjacent to an active conveyor belt which contained ignition sources such as bottom rollers and bearings which can get hot when they wear out and rub the roller. Mr. Workley believed that it was reasonably likely that a serious mine fire or potential explosion would occur and that this would result in serious injuries to one or more miners. In addition, if the conveyor belt were to run to one side it would rub against the belt brackets and it could spark, and the belt splices could also spark with "steel striking steel". Mr. Workley indicated that the inby end of the float coal accumulations were within five feet of the edge of the conveyor belt, but there were no ignition sources in the main return air course. If there were a hot belt roller, or the belt was rubbing, it could cause a fire. If a fire were to occur he believed it was reasonably likely that it would ignite the float coal dust. If a belt spark were to occur, he believed it was reasonably likely that it would ignite the fine coal dust. If an ignition were to occur in the belt line, it would propagate into the main return and through the regulator. If the float coal dust were to ignite, there was nothing to suppress it from spreading to these areas because there was no fire suppression system in that area (Tr. 31-34).

Mr. Workley was not positive that he examined the preshift books at the time of his inspection, but he stated that he "probably did" and normally does. He did not believe that he noted any recorded hazards in the preshift books, and he stated that he would normally make a note of any reported hazards (Tr. 35). He confirmed that he has issued prior float coal dust accumulation citations or orders on the section, and believed that he issued one at the ten left transfer area three days prior to his inspection (Tr. 35).

Mr. Workley confirmed that he made a finding of "high negligence" for the following reasons (Tr. 35-36):

A. The coal company management is well aware that operating coal conveyor belts produce float coal dust and it is carried by the air current, down the return air course.

A person, certified person, was assigned the job by the operator to make a weekly examination two days prior to me finding the accumulation. And his footprints were evident in the float coal dust, proving it was there when he walked down through there, and he took no action to correct it.

Q. Now, I believe you said that the footprints where pale gray.

A. Pale gray to white.

Q. Pale gray to white.
And based on that, you could tell, you could make a decision that someone had been through there?

A. That is correct.

Q. Let's say if no one had been through there, what would it have looked like?

A. The float coal dust would have been uniform and black throughout the entire area.

Mr. Workley stated that the respondent was not taking any action to eliminate the accumulations prior to the issuance of his order. He confirmed that abatement was achieved in three days. It took two hours to abate an area of 400 feet, and he modified the order to allow the belt to start running again and bulk dusting machines were brought in to apply additional rock dust to the main return entry, and six to eight employees did this work (Tr. 37).

On cross-examination, Mr. Workley stated that the minimum legal times for examination of the cited return is seven days between examinations. He confirmed that the area had been examined two days prior to his inspection, and this was noted by the date, time, and initials on the crib, and an entry had been made on the weekly examination book attesting to the examination. The examiner did not note any problems in the return in the book, and Mr. Workley did not personally know the examiner, David Fazio (Tr. 37-38).

Mr. Workley confirmed that he did not know who made the foot prints, and that he saw no other foot prints. He did not believe that other foot prints could have been in the return after the float coal dust accumulated, and did not believe that any one else walked in the return. He did not cite a violation for any inadequate examination of the return, but believed that he had cited the respondent for such a violation in the past (Tr. 39).

When asked what he would have expected of the respondent, Mr. Workley stated as follows at (Tr. 40):

> A. Provide the margin of safety for the miners working in that area of the coal mine which should be provided for them to keep that return free enough of float coal dust so that a fire and explosion hazard did not exist.
>
> Q. Isn't it true that you feel that this particular return should be examined more often than once every seven days. Isn't that correct?
>
> * * * * * * * *
>
> THE WITNESS: I believe that the operator of the mine -- If I were the operator of the mine and I knew that I had a source that generated float coal dust or some other hazard to the extent that I needed to make examinations more frequently than every seven days to make sure that a serious hazard did not exist, I would do so.
>
> Q. That is not required by the regulations.
>
> A. No, it's not.

Mr. Workley confirmed that the accumulations in the entry were not in the same entry as the belt, and they extended from "approximately five feet from the edge of the belt line to about 1,000 feet away from the belt line" (Tr. 41). He confirmed that he found two-tenths of one percent of methane at the regulator, and that he detected no hot rollers or any heat caused by the belt rubbing. He described the fire detection and suppression systems installed on the cited beltway (Tr. 42-43).

Mr. Workley stated that he concluded that there was two weeks of accumulations in the entry, and that he based this conclusion on "my experience". He confirmed that the float coal dust "was not in depths that could be measured at that location", and that it was less than one-sixteenth of an inch thick

Tr. 43). He described the degree of darkness with respect to the accumulations at various locations (Tr. 43-44). He confirmed that the belt entry itself was well rock dusted and that the mine floor had been "freshly drug" (Tr. 45).

In response to further questions Mr. Workley stated that although section 75.305, provides for a minimum of seven-day examination intervals, it also provides for more frequent examinations if needed. He believed that based on the amount of accumulations, he would make more frequent examinations if he were the mine operator (Tr. 46).

Although Mr. Workley stated that he has found collapsed rollers with missing bearings, steel to steel friction, belts cutting into the stands, and belts riding to one side when he has inspected other conveyor belts at the subject mine and other mines, he found no such conditions on the day of his inspection (Tr. 47). He also conceded that he was not positive about the "more frequent examinations if needed" requirement in section 75.305, and was not sure if this was covered by the regulation, but "it does not say you can't examine it every day if you need to" (Tr. 49).

In response to certain bench question, Mr. Workley confirmed that the cited conditions did not constitute an imminent danger even though the three conditions necessary for a fire or explosion were present because "the ignition source has to be present at the instant the other two, the fuel and the air, are present". He stated that he could not take the time to inspect the belt to determine if there was an ignition source and an imminent danger because he was obligated to the miners to shut the belt down so that the accumulations could be taken care of immediately. Mr. Workley confirmed that he contacted the examiner who he believed made the footprints in the dust, and the examiner offered no excuse, did not state that the accumulations were not present when he examined the area, and was reluctant to speak with him. Mr. Workley believed that the examination book showed "no hazards", and he confirmed that Mr. Fred Morgan accompanied him during his inspection, but he could not recall any comments made by Mr. Morgan (Tr. 49-51).

Respondent's Testimony and Evidence

Fred D. Morgan, mine respirable dust and noise foreman, testified that he accompanied Inspector Workley during his inspection on October 26, 1990, and he described the areas that they visited by referring to a mine map and Mr. Workley's notes and citation, and he agreed that the accumulations constituted a violation of section 75.400 (Tr. 59-67).

Mr. Morgan believed that the closest distance between the belt and the accumulations cited by Mr. Workley was approximately

70 to 90 feet. Mr. Morgan confirmed that he observed no hot belt rollers and that a person is stationed at the belt transfer point to watch for spillings and other occurrences. He also described the belt fire suppression and detection devices. He saw no part of the belt rubbing on the conveyor structure, saw no electrical equipment sparking or arcing, or any ignition sources. Methane checks reflected one-tenth of one percent (Tr. 68-69).

Mr. Morgan stated that the examination book for the week ending October 28, 1990, reflects that the cited area was examined two days prior to the inspection by Mr. Workley and that no hazards were noted on October 14, 1990. He confirmed that he knows the examiner David Fazio, and that he is a certified examiner. He stated that Mr. Fazio was acting in the capacity of fire boss (Tr. 73-74).

Mr. Morgan explained the routine followed with respect to "dragging" certain mine areas, and he believed that the coal dust came from the belts that fed into the returns and that the dry mine atmosphere dries the dust and it accumulates faster (Tr. 76-78). Mr. Morgan did not believe the violation was "S&S" because it was not reasonably likely to lead to death or serious injury to a miner (Tr. 78).

On cross-examination, Mr. Morgan stated that the belt "was in good shape" and that it was "white with rock dust and well rock dusted" (Tr. 79). He stated that he visually observed the belt area while walking next to it, and he confirmed that the belt is subject to "wear and tear" if it is rubbing the belt structure. He confirmed that he was outside of the mine prior to accompanying Inspector Workley, and that he went underground to accompany him. He confirmed that he did not examine the belt rollers and only made "a visual walk through" in the area. He did not believe that the violation was "S&S" because the nearest ignition source would have been the 50 to 75 foot belt line leading to the crosscut and it was "heavily rock dusted and in good shape" (Tr. 82). Mr. Morgan did to recall any coal accumulations on the ribs, but he did observe accumulations "up the chute and on the line curtains" (Tr. 84).

Mr. Morgan stated that his primary duties are to do noise surveys, collect dust samples, and check belt lines and water sprays. He stated that a running belt can accumulate coal dust and get on the coal ribs. He indicated on a sketch where he observed coal dust and float coal dust (Tr. 85-87). He confirmed that in the course of mining, coal dust can accumulate if the belt is shut down or the water sprays plug up (Tr. 88).

In response to further questions, Mr. Morgan confirmed that he observed coal dust on the rib in the area cited by the inspector and he described the area as the "return area". However, he did not observe coal dust on the ribs at the crosscut

leading over to the return. He stated that the crosscut was well rock dusted, "but they had float dust accumulated on top" (Tr. 88-89).

Mr. Morgan was recalled by the petitioner's counsel, and he reiterated that he observed no float coal dust in the crosscut leading over to the belt recovery chute. He confirmed that in order to abate the violation, the area outby the recovery chute had to be dragged "to knock the dust off the curtain", and that the area from the chute to the regulator had to be swept in order to remove the float coal dust from the ribs, and he described the areas where he observed accumulations (Tr. 91-94). He reiterated that the accumulations he observed "were at the end of the crosscut, up the line curtain and in that chute, back to the regulator" (Tr. 94). He confirmed that he did not observe the abatement work the entire time and could not state exactly what was done to abate the violation (Tr. 95). Mr. Morgan believed that the nearest potential ignition source was the belt line 50 to 70 feet away from the accumulations, and he disagreed with the inspector's belief that the ignition sources were five feet away because "the crosscut that the inspector walked through was clean" (Tr. 96).

Inspector Workley was recalled by the petitioner's counsel, and he described in detail the areas that were cleaned and swept to abate the violation and remove all of the cited accumulations. He confirmed that he abated the violation in two intervals. He modified the order to allow the belt to run again, and he gave the respondent additional time to bring in the bulk rock dust equipment to rock dust the main return. Referring to a mine map sketch, Mr. Workley again described the area where he found the cited accumulations (Tr. 98-102). In response to several bench questions, Mr. Workley stated as follows at (Tr. 108-110):

BY JUDGE KOUTRAS:

Q. You heard the testimony of Mr. Morgan, correct?

A. Yes, I did, your honor.

Q. He put the potential ignition sources further away than you did. Is there an explanation for that, why there is such a disparity in the testimony when you were both there looking at the same thing?

A. As I tried to explain before, Your Honor, the existence of float coal dust varies from pale gray through pitch black. What is recognized by one

person to be a hazardous accumulation of float coal dust may not be recognized by another person to be a hazardous accumulation of float coal dust.

Mr. Morgan and I agreed that the areas where the line curtain and the rib were black was a hazardous accumulation of float coal dust. Apparently, we did not agree about the ribs in the crosscut extending from the belt entry to the recover chute.

Q. Now, if he was correct that there was no float coal dust in the crosscut, his testimony that the potential ignition source would be a seventy-foot distance, would that be an accurate statement?

A. Yes, it would, Your Honor.

Q. But your contention is that that area in there was float coal dust and you put it within two feet of a potential ignition source. Is that correct?

A. Approximately five feet.

Q. Five feet, rather. Is that correct?

A. Yes.

Q. And the potential ignition source being what, now, again?

A. Any stuck rollers, hot rollers, rollers with the bearings out on the belt line, the belt rubbing metal structure, metal to metal friction.

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MSHA Inspector Lynn A. Workley confirmed that in the course of an inspection on May 11, 1992, he examined the tailgate entry of the 14-M longwall section which was in the process of mining coal. He entered the tailgate entry near the regulator through a man door from the 13-M supply track area, and when he come into the tailgate entry he encountered float coal dust on the mine roof, ribs, and floor. He proceeded toward the 14-M longwall section tail and the float coal got darker and thicker as he

proceeded toward the tail. He identified a copy of the order that he issued (Tr. 115, Exhibit P-1).

Mr. Workley stated that he issued the order because of the extent of the float coal dust accumulations and their proximity to the active longwall. He believed these conditions posed a serious hazard to all of the miners working the six north area of the mine, and that the conditions were obvious to an observer (Tr. 115).

Mr. Workley stated that all of the accumulations were black in color, and they were fine, dry, and powdery and would be dispersed in the air when patted with his hand (Tr. 116). He confirmed that the accumulations were located in the tailgate section that was required to be inspected at least once each week, at maximum seven-day intervals (Tr. 116-117). He believed there are times when it should be inspected more often than once a week, and he indicated that float coal dust tends to accumulate at frequent intervals at the longwall tailgate entry which is a return air course (Tr. 117).

Mr. Workley stated that an additional reason for issuing the order was the fact that the certified examiner Charles Underwood told him that he had examined the entry on May 4, 1992, and walked and dragged it on May 5 and 6, but was off for three days. Mr. Underwood also told him that he dragged the entry every shift because it got dirty and needed dragging every shift (Tr. 118, 119, 121).

Mr. Workley stated that it is not unusual for float coal dust to accumulate rapidly each shift because of the way the longwall is mined (Tr. 121). He believed that the mine cleanup program required rockdusting the tailgate after each pass at the longwall face (Tr. 121). When asked if the failure to do this would constitute a violation of the cleanup plan, Mr. Workley responded as follows (Tr. 121-122);

> JUDGE KOUTRAS: If that doesn't happen, then they would be susceptible to a violation of their cleanup plan?
>
> THE WITNESS: It's not MSHA's policy. MSHA's policy has never been to allow inspectors to write violations of the cleanup program.
>
> JUDGE KOUTRAS: Why not?
>
> THE WITNESS: I don't know, Your Honor.
>
> JUDGE KOUTRAS: You hit them with unwarrantable failure orders. That gets their attention more than citing them for the cleanup plan. I don't understand. They're required to have a cleanup plan, aren't they?

THE WITNESS: Yes, your honor.

JUDGE KOUTRAS: And if they don't clean up as the cleanup plan requires, then why not issue violations for that?

THE WITNESS: I do not know, Your Honor.

JUDGE KOUTRAS: Is that a policy?

THE WITTNESS: That is a policy.

Mr. Workley stated that he reviewed the weekly examination books and saw no indication of any accumulations in the cited area (Tr. 123). Based on his "experience", he believed that portions of the accumulations existed for "a shift or two", and that portions had existed for "several weeks" (Tr. 124). He described the areas cited in the order where he believed the accumulations had existed for weeks (Tr. 124-125).

Mr. Workley stated that the tailgate entry could be used as an emergency escapeway in the event of a fire or emergency (Tr. 126). He explained his "S&S" finding as follows at (Tr. 126-128):

A. Each time that the shear cuts to the tail, you have the bits on the shearing machine which are high carbon steel, carbide, cutting coal and hitting stone that is imbedded in the coal or in the mine roof or in the floor can create sparks. So you have an ignition source from that right at the corner of the tailgate entry.

You have nine hundred ninety-nine volts ac running to the tail conveyor motor and other electricity coming to the lighting circuits and to the electrics on the shield.

Q. And you said this is when the shear is operating and cuts over to the tailgate?

A. That is correct. It comes right to the tail, right where the float dust accumulation started.

Q. And approximately how many feet would you say there is between where the float coal dust started and where the shear comes down to the tailgate?

A. Less than a foot.

Q. And in the normal course of mining, how likely is it that you would have had an ignition source or that one of these sources you had mentioned would have produced a spark?

A. At least reasonably likely, in my opinion.

Q. And why is that?

A. Anytime the bits on the mining machine strikes rock in the coal face or the mine roof or the mine floor fire flies off the bits. Those sparks are hot enough to ignite a methane and air mixture. They're also hot enough to initiate an explosion if you have enough float coal dust in the air. Huge amounts of coal dust are generated when they're cutting.

Mr. Workley confirmed that it was not unusual for dust to generate when the shear is cutting the longwall face, and although water sprays are available to control the dust, they can go off at any time. He stated that if a fire or explosion were to occur, seven or eight people on the longwall section would be exposed to injury. If float coal dust were ignited and propagated an explosion or serious injuries or death would result (Tr. 129).

Mr. Workley explained the basis for his "unwarrantable failure" finding as follows at (Tr. 129-130):

A. Management of the mine is well aware that the float dust generating source is there. They are aware of the mining laws requiring that the float dust be kept to a minimum, cleaned up, rock dusted over top of, not allowed to accumulate, and they didn't do it.

Q. Does that requirement excuse an operator from fulfilling more requirements till they become necessary?

A. No, it does not.

Q. And in your opinion, in this situation, more care would have been required than a regular weekly examination?

A. That is correct.

Mr. Workley confirmed that the order was abated in approximately two hours and that eight people assisted in abating

the order (Tr. 130). He described the rock dusting work that was done to abate the order (Tr. 131-133).

On cross examination, Mr. Workley stated that float coal dust will not ignite unless it is "agitated, put up in the air". He confirmed that he did not see much dust in the air when he inspected the tailgate. He also confirmed that he tested for methane and found "zero at shield ten, two-tenths of one percent at the tail," and that the explosive concentration of methane is 5 to 15 percent (Tr. 135).

Mr. Workley stated that the regulations do not require that a longwall tailgate entry be examined more than once a week. He confirmed that an examination was made on May 4, and that he conducted his inspection May 11. He confirmed that he met Ron Neeley in the tailgate entry shortly after he issued the order and that Mr. Neeley was in the process of conducting the weekly examination in the tailgate area.

In response to a question as to whether he would have issued a (d) order if he had arrived on the section after Mr. Neeley and found him conducting his examination Mr. Workley responded "it would depend on what action Mr. Neeley had taken" (Tr. 137). Mr. Workley confirmed that his belief that "more care is required than a weekly examination on tailgate entries" is not a part of any regulation. The regulation requires a weekly examination as a minimum requirement (Tr. 138).

Mr. Workley believed that the accumulations had existed "for weeks", and he described the areas where the float coal dust was an eigth of an inch thick and believed that it had existed for "two or three weeks". The area described as containing a "medium thick" layer of float coal dust existed for "a week", and the area containing a "thin layer" existed for "a couple of days" (Tr. 140-142). He stated that he returned to the cited area the next day after abatement and that the area was "white to very pale gray" with no appreciable accumulation of float coal dust (Tr. 143).

Mr. Workley stated that the thickness of the float coal dust would be "probably the most determining factor" as to how long it had existed (Tr. 144). He confirmed that he reviewed the weekly examination book before his inspection and found the initials of Charles Underwood (Tr. 145).

In response to further questions, Mr. Workley stated that the quantity of coal dust generated is not strictly a measure of time, and that other conditions, including increased production, could generate a lot of dust (Tr. 146-147).

Mr. Workley confirmed that the cited standard says nothing about a "minimum" requirement and says "at least once each week,

maximum seven-day intervals". He stated that the regulation does not require examinations more than once a week and that he confused it with section 75.304 (Tr. 148). He confirmed that he was unaware of any ignitions every occurring at the longwall face (Tr. 153).

Ronald E. Thomas, mine safety escort, testified that he accompanied Mr. Workley during his inspection on May 11, 1992. They walked the 750 foot entry, and Mr. Workley informed him that he was issuing an order due to the float coal dust conditions (Tr. 158-159). He stated that Mr. Workley cited an area of 350 feet. He conceded that the tailgate entry had float dust on it and that "it needed some attention", and that "we were mining and there was still being float dust dispersing through this return air" (Tr. 159-160).

Mr. Thomas stated that he observed no ignition sources as they walked across the longwall face. Although Mr. Workley cited a loose light fixture at the 1/13 shield, Mr. Thomas did not believe it was an ignition source because it was "low rated voltage. It's essentially a safe voltage" (Tr. 161).

Mr. Thomas stated that the dust generated by the longwall shear is rock dusted periodically down the entry and that persons are not permitted inby the shear where the dust is generated (Tr. 161). He also indicated that a bantam duster is operated during the shift at the mouth of the tailgate entry to control the dust (Tr. 162-164).

Mr. Thomas stated that the weekly examination is conducted from Monday through Monday. He confirmed that while he was with Mr. Workley, they encountered the weekly examiner, Ron Neeley, but the order had already been issued at that time (Tr. 165-166).

On cross-examination, Mr. Thomas confirmed that he did not personally see the rock dusting taking place after the shear had taken a cut at the longwall (Tr. 166). He confirmed that Mr. Neeley noted in the examination book that "the area needed to be drug", but Mr. Thomas did not believe that a sweep down was necessary (Tr. 169). In response to further questions, Mr. Thomas identified copies of the examination book entries for May 4, and 11, 1992 (Exhibits R-1 and R-2). Mr. Underwood's entry shows "no violations, no hazardous conditions" for May 4, and Mr. Neeley's notation shows "needed drug" for the 14-M left tailgate entry return (Tr. 171).

Inspector Workley was recalled, and he stated as follows at (Tr. 178-179):

> Q. Would you please clarify for us why you said that you walked down a certain side versus the side that Mr. Thomas stated that he walked?

A. This order was issued a little over a year ago. My memory is not that good, but I did write details, naturally, the best I could write on the day that the inspection was conducted. And I do have the notes in front of me.

And they clearly indicate that I examined the longwall face, down to the tailgate; went back to one/fourteen shield; waited while the mechanic repaired the light cord on the shield; went back across the face; entered the intake air escapeway; walked to cotton shaft; walked the supply track, back to 14-M mouth; then walked back down to 13-M, and entered the tailgate entry on the 13-M side; and examined from there toward the 14-M tailgate.

Q. And you say that is written in your notes?

A. Yes, it is.

Q. Now, also, the fact that the presence of these accumulations was not recorded in the weekly book, does that necessarily establish that the area was clean?

A. No, it does not.

Q. And the reason for that, would it be because maybe the person just didn't see it or maybe they just didn't feel it necessary to note it?

A. I wouldn't know what reason. It could be either one of those or various other reasons.

Findings and Conclusions

Docket No. WEVA 92-1156

Fact of Violation. Section 104(d)(2) "S&S" Order No. 3307787, October 26, 1990, 30 C.F.R. § 75.400.

The respondent admitted and conceded that the coal accumulations cited by the inspector in the course of his inspection did in fact exist in the entries cited by the inspector and that the cited accumulations constituted a violation of the requirements found in mandatory safety standard 30 C.F.R. § 75.400 (Tr. 9 Posthearing brief). Under the circumstances, I conclude and find that the respondent's admission, coupled with the credible testimony and evidence presented by the inspector, establishes the violation and IT IS AFFIRMED.

The Unwarrantable Failure Issue

The governing definition of unwarrantable failure was explained in Zeigler Coal Company, 7 IBMA 280 (1977), decided under the 1969 Act, and it held in pertinent part as follows at 295-96:

> In light of the foregoing, we hold that an inspector should find that a violation of any mandatory standard was caused by an unwarrantable failure to comply with such standard if he determines that the operator involved has failed to abate the conditions or practices constituting such violation, conditions or practices the operator knew or should have known existed or which it failed to abate because of a lack of due diligence, or because of indifference or lack of reasonable care.

In several decisions concerning the interpretation and application of the term "unwarrantable failure," the Commission further refined and explained this term, and concluded that it means "aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act." Energy Mining Corporation, 9 FMSHRC 1997 (December 1987); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987); Secretary of Labor v. Rushton Mining Company, 10 FMSHRC 249 (March 1988). Referring to its prior holding in the Emery Mining case, the Commission stated as follows in Youghiogheny & Ohio, at 9 FMSHRC 2010:

> We stated that whereas negligence is conduct that is "inadvertent," "thoughtless" or "inattentive," unwarrantable conduct is conduct that is described as "not justifiable" or "inexcusable." Only by construing unwarrantable failure by a mine operator as aggravated conduct constituting more that ordinary negligence, do unwarrantable failure sanctions assume their intended distinct place in the Act's enforcement scheme.

In Emery Mining, the Commission explained the meaning of the phrase "unwarrantable failure" as follows at 9 FMSHRC 2001:

> We first determine the ordinary meaning of the phrase "unwarrantable failure." "Unwarrantable" is defined as "not justifiable" or "inexcusable." "Failure" is defined as "neglect of an assigned, expected, or appropriate action." Webster's Third New International Dictionary (Unabridged) 2514, 814 (1971) ("Webster's"). Comparatively, negligence is the failure to use such care as a reasonably prudent and careful person would use and is characterized by "inadvertence," "thoughtlessness," and "inattention." Black's Law

Dictionary 930-31 (5th ed. 1979). Conduct that is not justifiable and inexcusable is the result of more than inadvertence, thoughtlessness, or inattention. * * *

Petitioner's Arguments

Citing Secretary of Labor v. Peabody Coal Company, 14 FMSHRC 125, 1261 (August 1992), the petitioner asserts that the violation was the result of a high degree of negligence on the part of the respondent. In support of this conclusion, the petitioner states that the respondent was aware that operating coal conveyor belts produce float coal dust and that the certified person assigned to conduct a weekly examination of the area left his foot prints in the float coal dust, which proves that the examiner had walked in the area and took no corrective action. Since the cited area generated float coal dust, the petitioner believes that more frequent examinations than every seven days should have been conducted.

The petitioner concludes that the respondent's failure to remove the cited coal dust accumulations on the 10 left return air entry to the regulator was the result of an unwarrantable failure to comply with the cited standard section 75.400. In support of its conclusion, the petitioner asserts that allowing the accumulations to continue to exist constitutes aggravated conduct because the presence of the pale gray-to-white footprints on the mine floor indicated that the float coal dust was present when the weekly examiner, Dave Fazio, had conducted his examination. The petitioner contends that although Mr. Fazio certified that he had conducted an adequate examination of the area for hazards, he failed to record the accumulations in the weekly examination book "even after he had literally stopped in the accumulations".

The petitioner states that the accumulations had been present for several weeks prior to the issuance of the order, the area had not been cleaned up or inerted, and the respondent offered no explanation as to why the cited accumulations had not been removed. Given the fact that it took two to three days and six to eight miners to abate the conditions, the petitioner concludes that the conditions had existed for several weeks. Further, the petitioner assets that the respondent had been placed on notice that greater efforts were necessary for compliance with the requirements of section 75.400, especially since the same inspector had just issued another citation or order at the same mine on the 10 left transfer section three days prior to the October 26, 1990, date of the violation in this case.

Respondent's Arguments

The respondent asserts that pursuant to 30 C.F.R. § 75.305, return air entries are only required to be examined by a certified mine examiner no less often than every seven days for hazards and violations of mandatory standards. The respondent contends that it should not be charged with aggravated misconduct for failing to discover and correct the dust accumulations found by the inspector because it was under no such obligation except to the extent that any float coal dust accumulations are prohibited ab initio. The respondent takes the position that dust accumulations in returns should be considered unwarrantable only if the company's weekly examiner fails to make note of such accumulations or if mine management fails to take prompt action to correct such accumulations once they are noted by the examiner or some other responsible manager. Under any other circumstances, the respondent believes that such accumulations should be considered ordinary violations not subject to the severe sanctions reserved for aggravated conduct.

The respondent points out that the purpose of air returns is to receive all of the dust, methane, and other air impurities that are generated by the mining and transportation of coal, and that they are bound to accumulate coal dust over time. The respondent states that "It is one of the more prominent anomalies of the Mine Health and Safety Act that such accumulations are absolutely prohibited from occurring, even though everyone knows that such accumulations cannot be avoided, and even though the Act does not require that air return entries be examined for accumulations and other such violative conditions more often than once each week."

The respondent asserts that the inspector found the violation to be unwarrantable because he assumed that the footprints he detected on the floor of the entry were those of examiner Fazio, indicating to him that Mr. Fazio was the last examiner to pass through the area and walk through the accumulations that the inspector observed on October 26, 1990, and had failed to report those accumulations. The respondent points out that the inspector did not issue any violation because of any inadequate weekly examination of the cited entry, and it believes that the inspector over-reacted, and by the next day or two after speaking with Mr. Fazio, be no longer viewed the cited condition as such a serious, unwarrantable violation. The respondent concludes that Mr. Fazio's failure to offer any excuse for the accumulations was perhaps due to the fact that he had done nothing which required an excuse, or that the return entry was not in bad condition when he examined it on October 24.

The respondent further observes the reticent and inconsistent testimony of the inspector with respect to his contacts with Mr. Fazio, and it points to the fact that the

inspector first indicated that he knew Mr. Fazio's last name, but did not know him personally, and later testified that he might have spoken to Mr. Fazio,but was not sure (tr. 38, 50). Still later, the inspector testified that he had spoken to Mr. Fazio, but that Mr. Fazio was reluctant to speak with him (Tr. 51). Since the respondent believes that the inspector charged it with an unwarrantable failure based entirely on his assessment of Mr. Frazio's competence or honesty, (Tr. 35-36), the respondent finds it strange that the inspector was so hesitant in recalling anything about his discussions with Mr. Fazio.

I am not convinced that a mine operator's prior history of accumulations citations may per se justify an unwarrantable failure finding. In my view, prior history of any violation must be taken in contest, and is but one of any number of facts that a judge may rely on in considering whether a violation is the result of aggravated conduct amounting to an unwarrantable failure. In the Peabody Coal Company case, relied on by the petitioner, supra, the judge focused on the fact that the cited accumulations had been noted in approximately seven of the preceding preshift reports, and that only one miner had been assigned to clean up the affected along with other assigned duties.

In Drummond Company, Inc., 13 FMSHRC 1362 (September 1991), the Commission vacated and remanded a judge's decision that an accumulations violation of section 75.400, was not the result of unwarrantable failure. The Commission took particular note of the fact that the operator had been cited for the same type of violation in the three days prior to the date of the contested citation in question and that this should have put it on "heightened alert" to clean up the cited accumulations before the inspector found them, 13 FMSHRC at 1368.

The petitioner's assertion that the respondent was placed on notice that greater efforts were necessary for compliance with section 75.400, because the same inspector issued another violation at the 10 left transfer section three days prior to his October 26, 1990, is lacking in any credible proof. The inspector testified that he had issued several accumulations violations at the mine and "believed" that he had issued one on the 10 left transfer section three days earlier. However, none of these citations are a matter of record in this case, and the petitioner did not produce copies of any prior citations or orders. The inspector's notes made at the time the order was issued (Exhibit P-2), do not reflect the issuance of any prior accumulations violations. Further, the petitioner's computer print-out listing the respondent's prior violations history for the two-year period up to October 26, 1990, does not include section 75.400, violations three days prior to October 26, 1990. The latest citation of section 75.400, prior to October 26, 1990, the day the cation in this case was issued, was on October 17,

1990, when two violations of 75.400, were issued. One was a section 104(a) non-"S&S" which was contested with the Commission, and the other one is a section 104(a) "S&S" citation for which the respondent paid a penalty assessment of $213. None of these prior violations are further explained.

The inspector testified that his belief that the cited accumulations had existed for two weeks was based on his "experience". However, I take note of his further testimony that the float coal dust that had accumulated was less than one-sixteenth of an inch thick, and could not be measured. Given the fact that the inspector agreed that the longwall belt conveyor generates a lot of coal dust as it is carried down the return air course, I have difficulty understanding why the dust that he observed was not of more substantial thickness. I also note the inspector's testimony that the belt entry itself was well rock dusted and that the mine floor had been "freshly drug". This leads me to conclude that the respondent addressed the accumulations at that location.

I find no credible evidence to support the petitioner's assertion that the accumulations had existed for several weeks prior to the issuance of the violation in this case. The fact that abatement took two or three days utilizing six or eight miners must be viewed in context. The evidence shows that it took two hours to abate an area of 400 feet, after which the inspector permitted production to resume and allowed the belt to be turned back on. The inspector also afforded the respondent additional time to bring in rock dusting machines and rock dust, and I am not convinced that the actual abatement consumed two or three <u>total</u> days as the petitioner would have me believe.

Although the petitioner suggest that examiner Fazio conducted an inadequate weekly examination because he failed to record the accumulations observed by the inspector in his examination book, the fact is that the inspector issued no violation for any inadequate examination. Further, although the inspector indicated that he "normally" examines the preshift books at the time of an inspection, and "probably did" in this case, he was not positive that he did so, and produced no notes. Further, he did not believed that he noted any hazardous conditions recorded in the preshift books because he would have made a note of any recorded hazards.

I have given little weight to the inspector's testimony concerning his contacts with examiner Fazio. The burden of proof is on the petitioner, and it occurs to me that a critical witness such as the examiner who apparently observed the accumulations and placed his initials on the crib two days before the inspection, indicating that he had examined the area, would be the individual in the best position to testify first-hand about events that took place three years ago. The record reflects that

Mr. Fazio is still employed with the respondent, but he was not called to testify and his deposition was not taken.

On the basis of the foregoing findings and conclusions, and after careful review of all of the evidence and testimony adduced in this case, I conclude and find that the petitioner has failed to establish by a preponderance of any credible evidence that the violation resulted from the respondent's aggravated conduct and unwarrantable failure to comply with the requirements of section 75.400. Accordingly, the inspector's finding in this regard IS VACATED, and the contested order IS MODIFIED to a section 104(a) citation.

The Significant and Substantial (S&S) Violation Issue

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

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

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

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

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

must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

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

Petitioner's Arguments

In support of the inspector's "S&S" finding, the petitioner states that it has established a violation of section 75.400, and that given the fact that the 10 left conveyor belt was running while the accumulations were located within five feet of the edge of the belt, a discrete safety hazard existed. The petitioner further argues that in the normal course of mining operations, it was reasonably likely that a belt roller would have become hot enough to produce sparking that would have ignited the float coal dust accumulations located within five feet of the belt. If a fire had started in the belt line, it would have propagated into the main return through the regulator and a fire suppression system would have been ineffective in putting out the fire. Petitioner concludes that it was reasonably likely that an ignition would have occurred, and that an explosion or fire would have also occurred when the float coal dust was placed in the air and became ignited by an electrical spark. If an explosion or fire had occurred, petitioner further concludes that at least one miner would have been seriously injured, and at the time that the order had been abated, at least six to eight miners could have been seriously injured.

Respondent's Arguments

The respondent asserts that the violation was not "S&S" because the third and fourth elements necessary to establish such a violation, as enunciated by the Commission in its Mathies Coal Company and Cement Division, National Gypsum Company decisions, are missing in the case of the contested order. In support of its position, the respondent states that the only ignition source identified by the inspector that might have been "likely" to ignite the coal dust in the return entry was the 10 left coal conveyor belt in the entry adjacent to the return. Although the inspector described how belt rollers can wear and cause heat and friction, and how the belt structure itself can run out of line and rub against the steel structural framework, the respondent points out that the inspector confirmed that there were no hot rollers or belt rubbing problems that he could detect anywhere in the area, and that the methane content of the air in the area was

well below the explosive concentration level. Under the circumstances, the respondent does not believe that it was reasonably likely that there would be an ignition of the coal dust in the return entry resulting in serious injuries or death. The respondent believes that in the normal course of mining it was far more likely that the conveyor belt would have continued to run normally, that dust from the belt would have continued to be drawn down the return, and that the next weekly examination of the return would have resulted in the routine dragging and rockdusting of the entry.

The respondent maintains that there is a considerable dispute as to the proximity of any float coal dust to the end of the 10 Left coal conveyor belt, the potential ignition source identified by the inspector. The respondent states that the inspector testified that float coal dust was deposited on the ribs and roof of the crosscut leading from the belt ever to the return, and that this crosscut was included in his order. However, the respondent points out that there is a distinction between the "longwall recovery chute" and the crosscut that the inspector testified about. The respondent concedes that the longwall chute and the line curtain hung in that chute had accumulations of coal dust, but it insists that the crosscut testified to by the inspector was not included in his order, and that a sketch included as part of his order, as well as the abatement activity, do not reflect or mention any accumulations in the crosscut leading over to the conveyor belt entry.

After careful consideration of all of the evidence in this case, as well as the arguments advanced by the parties, I conclude and find that the respondent has the better part of the argument and that the petitioner has failed to establish that an ignition or fire was reasonably likely to occur as a result of the accumulations cited by the inspector.

The inspector testified that the accumulations in the return air entry were not in the same entry as the belt, and he confirmed that there were no ignition sources in the return air course (Tr. 32, 41). He also confirmed that he made a methane measurement and found two-tenths of one percent methane at the regulator (Tr. 41). Although the inspector believed that the float dust could be ignited by a hot roller or the belt rubbing, and that an electrical arc could have ignited the float coal dust if it were suspended in the air, he confirmed that he observed no hot rollers, and did not detect any belt rubbing that would cause surface heating (Tr. 42). He further confirmed that the belt entry was well rock dusted and that the mine floor had been "freshly drug" (Tr. 45). When asked to explain the likelihood of a roller getting hot, the inspector stated that in the course of other mine inspections, he has found defective rollers and the belts cutting into the steel belt frames causing friction, but he conceded that during the inspection on the day he issued the

violation he did not find any of these potential ignition sources present (Tr. 47). The inspector offered no testimony with respect to the source of any electrical arc, and he confirmed that he did not, and could not, take the time to inspect the belt to determine if there was an ignition source (Tr. 50).

The inspector estimated the distance of any accumulations to the edge of the belt that he considered a potential ignition source to be five feet. Foreman Morgan, who accompanied the inspector, estimated the closest distance of any accumulations to a potential ignition source to be 50 to 70 feet, and the inspector conceded that if there were no accumulations in the crosscut extending from the belt entry to the "recovery chute", Mr. Morgan's estimated distances would be accurate (Tr. 95-96, 109). I take note of the fact that the disputed order was issued close to three years ago, and I find merit in the respondent's arguments concerning the inconsistency in the inspector's hearing testimony, and the absence of critical and specific information in his notes and sketch, as well as his order, with respect to the existence of any float coal dust in the crosscut that the inspector claimed was in close proximity to the belt that the considered an ignition source.

Mr. Morgan testified credibly that he observed no hot belt roller, no rubbing of the belt against the support structure, and no electrical equipment that may have been sparking or arcing. He confirmed that he observed no ignition sources of any kind connected with the belt (Tr. 68-69). Petitioner's counsel conceded that none of these conditions were present at the time of the inspection (Tr. 83), and the inspector identified no electrical equipment or components, other than the belt, that he considered a source of arcing, sparking, or other ignitions. Under all of these circumstances, and in the absence of any credible evidence to establish the existence of any ready sources of ignition, or that the cited accumulations were in close proximity to any such sources of ignition, I cannot conclude that an ignition or fire was reasonably likely to occur. Under the circumstances, I cannot conclude that an "S&S" violation has been established, and the finding of the inspector in this regard IS VACATED, and the violation IS MODIFIED to reflect a non-"S&S" violation.

Docket No. WEVA 92-1050

Fact of Violation. Section 104(d)(2) "S&S" Order No. 3718887, May 11, 1992, 30 C.F.R. § 75.400.

The respondent admitted and conceded that the coal accumulations cited by the inspector in the course of his inspection did in fact exist at the cited longwall tailgate entry locations described by the inspector and that the cited

accumulations constituted a violation of the requirements found in mandatory safety standard 30 C.F.R. § 75.400 (Tr. 113, Posthearing Brief, pg. 1). Under the circumstances, I conclude and find that the respondent's admission, coupled with the testimony of the inspector and the respondent's witness (Morgan), establishes the violation, and IT IS AFFIRMED.

The Significant and Substantial (S&S) Violation Issue.

In its posthearing brief, the respondent concedes that because of the proximity of the cited coal accumulations to the mining face, the violation was properly designated a significant and substantial (S&S) violation. Under the circumstances, the inspector's "S&S" finding IS AFFIRMED.

The Unwarrantable Failure Issue

Petitioner's Arguments

Citing Secretary of Labor v. Peabody Coal Company, 14 FMSHRC 1258, 1261 (August 1992), the petitioner asserts that the violation was the result of a high degree of negligence on the part of the respondent. In support of this conclusion, the petitioner states that the respondent was aware at the time of the violation that the longwall shearer generated float coal dust and knew that the area should have been cleaned up or rock dusted after each production shift, and the fact that the area was required to be examined once a week did not excuse the respondent from its obligation to exercise more care in examining the area for accumulations more than once a week.

The petitioner concludes that the respondent's failure to remove the cited float coal dust accumulations from the longwall tailgate entry was the result of its unwarrantable failure to comply with the requirements of section 75.400. In support of this conclusion, the petitioner asserts that allowing the accumulations to continue to exist constitutes aggravated conduct because the presence of the accumulations in the tailgate entry was brought to the respondent's attention on May 4, to May 6, and had existed for some time prior thereto, and had not been cleaned up or rendered inert by May 11, 1992, when the inspector conducted his inspection.

The petitioner argues that the respondent knew that the tailgate area of the longwall section accumulated float coal dust very quickly and needed to be dragged each shift. The petitioner contends that the respondent's examiners had a practice of not reporting accumulations in the weekly examination reports unless told to do so, and that one of the examiners, Charles Underwood, who dragged the entry the previous Monday, Tuesday, and Wednesday, May 4, 5, and 6, 1992, knew that the area required dragging each shift. Although the accumulations of float coal

dust were present on Monday, May 4, and Mr. Underwood placed his initials on the crib that day, indicating that he had conducted an examination of the area, the accumulations had not been reported in the weekly examination book. The petitioner states that the accumulations were actually noted in the weekly examination book on May 11, 1992, after the inspector issued the order that day, and after Mr. Thomas instructed examiner Ron Neely to enter the accumulations in the book.

The petitioner asserts that although Mr. Thomas testified as to the respondent's standard operating procedure regarding removal of coal dust, he did not actually observe the miners following the procedures and applying rock dust after each pass of the shearer during mining operations. Petitioner further contends that Mr. Thomas testified inconsistently as to whether rock dust is applied during each shift, or periodically (Tr. 161-162, 167).

The petitioner concludes that given the extent of the float coal dust, and the fact that it took two hours and eight miners to remove the accumulations, the conditions had existed for several weeks. The petitioner also concludes that since the respondent had been placed on notice that greater efforts were necessary for compliance with section 75.400, its failure to remove the accumulations was the result of its unwarrantable failure to comply with the requirements of the cited mandatory standard.

Respondent's Arguments

The respondent asserts that the inspector cited the violation as an unwarrantable failure violation because he believed that the entry in question should have been examined more often than once every seven days, when in fact he knew that the entry was examined more frequently than that. The respondent believes that it is apparent from the inspector's testimony that he believed the violation was unwarrantable because there were dust accumulations on coal sloughage along the ribs, outside the passageway between the cribs, and on the cribbing ties themselves, which had not been removed or covered over, while the center passageway itself had been "dragged" repeatedly since the prior weekly examination on May 4. The respondent concludes that since this routine-but-not-required housekeeping had not resulted in the complete removal of all accumulations which, in the inspector's estimation, would have been noticed by the persons dragging the entry, the inspector decided to charge the respondent with unwarrantable aggravated conduct, even though he did not identify any of the persons who supposedly had seen the accumulations and failed to correct them.

The respondent states further that its most telling argument is the inspector's testimony that he would not have cited the

violation as an unwarrantable failure if the weekly examiner (Neeley), had arrived on the scene before the inspector got there and had taken action with regard to the accumulations. The respondent concludes that Mr. Neeley's arrival a few minutes after the inspector apparently made all the difference to the inspector between an unwarrantable and an ordinary violation. The respondent suggests that the Mine Act should not be subject to such capricious enforcement decisions by MSHA inspectors, and that the violation was either unwarrantable or it was not, and that the arrival time of the examiner should have nothing to do with that determination.

Former section 75.305, now codified and renumbered as section 75.364, does not require "more frequent examinations", as the inspector believed, and simply requires examinations in those areas covered by the regulation "at least every 7 days". Although the respondent may not be cited for a violation of section 75.364, for not conducting examinations more frequently than every 7 days, I find nothing to preclude an inspector from citing it for an accumulations violation pursuant to section 75. 400, a totally separate standard that requires cleanup and removal of coal accumulations. Further, it would appear to me that in light of the Commission's decision in Drummond Coal Inc., supra, at 13 FMSHRC 1367-68, reaffirming its decision in Eastern Associated Coal Corp., 13 FMSHRC 178, 187 (February 1991), actual knowledge of a violative condition is not a necessary element to establish aggravated conduct amounting to an unwarrantable failure.

In the instant case, the inspector based his order on two principal factors. He considered the extent and proximity of the accumulations to the active longwall, and a conversation that he had with an examiner (Underwood) a week before the inspection on May 11, 1992. According to the inspector, Underwood told him that he had examined the cited area on May 4, 5, and 6, and had "dragged" it on May 5 and 6, as well as after every shift, because "it got dirty and needed dragging every shift".

With regard to the extent of the accumulations, the inspector conceded that it was not unusual for float coal dust to accumulate rapidly when the shear is cutting coal at the longwall face, and he indicated that accumulations occur at the longwall tailgate entry which is a return air course. Given the fact that the return air course is designed to allow the removal of coal dust generated at the longwall during the mining cycle, I do not find it particularly significant that coal dust will be deposited and accumulate as it makes its way down the return. The critical issue is how fast is an operator reasonably expected to react to coal dust that has been allowed to accumulate for a protracted period of time.

The inspector confirmed that he reviewed the weekly examination books and found nothing to indicate the presence of coal accumulations in the areas that he cited. In his opinion, the cited accumulations had existed for time periods ranging from "several weeks", "a shift or two", "a couple of days", and "two or three weeks", and his beliefs in this regard was based on his "experience" and the thickness of coal dust, which ranged from "an eight of an inch", "medium thick", to "a thin layer". I find the inspector's opinions to be speculative and lacking in probative value.

I emphasize again that the burden of proof in this case is on the petitioner, and I take note of the fact that the two examiners responsible for examining the cited area prior to and during the inspection on May 11, 1992, (Underwood and Neeley), were not called to testify, nor were they deposed. With respect to Mr. Underwood, the fact that he believed the area needed dragging the week before Inspector Workley viewed the area, does not establish that it needed dragging on May 11, nor does it establish that dragging or rockdusting is required under the mine cleanup plan after every production shift as the inspector believed. If the inspector believed this was the case, it was incumbent on him to produce a copy of the cleanup plan to prove that this was the case. Further, I find it rather strange that MSHA'S policy prohibits an inspector from citing an operator for a violation of its required cleanup plan or program if it fails to rockdust or drag an area after each shift pursuant to its approved or required plan.

With respect to examiner Neeley, the inspector confirmed that he met Mr. Neeley in the tailgate entry after he had issued the violation and order, and that Mr. Neeley was in the process of conducting the weekly examination of the tailgate entry. The inspector confirmed that had he encountered Mr. Neeley conducting the weekly examination before he issued the order he may or may not have issued it depending on "what action Mr. Neeley had taken". Since Mr. Neeley did not testify, his intentions remain a mystery. However, one cannot speculate that Mr. Neeley would have recognized the accumulation as less than hazardous requiring no immediate corrective action. Indeed, the previous examiner (Underground), examined the area one day, found nothing that needed correcting that day, but subsequently found the need to take corrective action the next two days. This indicates to me that the respondent's examiners are taking care of business as required, and it is just as probable as not that given time to complete his examination, examiner Neeley may have taken corrective acetoin if he believed the conditions warranted it.

On the facts here presented, and after careful consideration of all of the evidence and testimony adduced in this case, I cannot conclude that the petitioner has made a case that the

violation was the result of the respondent's aggravated conduct amounting to an unwarrantable failure to comply with section 75.400. I short, I find no convincing credible or probative evidence to establish that the cited accumulations had existed for any protracted period of time and that the respondent failed to take any reasonable corrective action. Under the circumstances, the inspector's unwarrantable failure finding IS VACATED, and the section 104(d)(2) order IS MODIFIED to a section 104(a) "S&S" citation.

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

I conclude and find that the respondent is a large mine operator and the parties have stipulated that payment of the civil penalty assessments for the violations in question will not adversely affect the respondent's ability to continue in business.

History of Prior Violations

The petitioner's computer print-out for the Blacksville No. 2 Mine for the period March 20, 1990 through March 19, 1992, reflects that the respondent paid $229,523, for $1,055, assessed violations, and that 117 of these were for violations of section 75.400. I take note of the fact hat the violation in this case was issued on May 11, 1992, and the petitioner did not supplement its violation history from March 19, 1992 to May 10, 1992. The latest citation of record for violations of section 75.400, prior to May 11, 1992, was a February 26, 1992, section 104(a) "S&S" citation, the details which are not of record.

The petitioner's computer print-out of prior violations for the Arkwright No. 1 Mine for the period October 27, 1988 through October 26, 1990, reflects civil penalty assessment payments of $120,,371, for 651 assessed violations, and that 71 of these were for violations of section 75.400. Considering the size of the respondent's mining operations, I cannot conclude that its overall compliance record is particularly bad. However, given the number of past violations for coal accumulations, it would appear to me that the respondent needs to pay closer attention to its cleanup practices, and I have considered this in the penalty assessments that I have made for the violations.

Good Faith Compliance

The parties stipulated that the cited conditions were timely abated in good faith by the respondent.

Gravity

Based on my "S&S" findings and conclusions, I conclude and find that the modified Citation No. 3307787 (WEVA 92-1156), was a non-serious violation, and that Citation No. 371887 (WEVA 92-1050) was a serious violation.

Negligence

I conclude and find that both of the section 75.400, violations that I have adjudicated and affirmed resulted from the respondent's failure to exercise reasonable care amounting to a moderately high degree of negligence.

Civil Penalty Assessments

On the basis of the foregoing findings and conclusions, and taking into account the civil penalty assessment criteria found in section 110(i) of the Act, I conclude and find that a civil penalty assessment of $500, is reasonable and appropriate the section 75.400, violation in Docket No. WEVA 92-1156, and that a penalty assessment of $1,000, is reasonable and appropriate for the section 75.400, violation in Docket No. WEVA 92-1050.

ORDER

In view of the foregoing findings and conclusions, IT IS ORDERED AS FOLLOWS:

Docket No. WEVA 92-1156

1. The respondent IS ORDERED to pay the full amount of the proposed civil penalty assessments for the following violations that have been settled by the parties:

Citation/Order No.	Date	30 C.F.R. Section	Assessment
3314293	9/6/93	75.1722(a)	$213
3307182	9/10/90	75.512	$625
3314299	9/10/90	75.1722(a)	$213
3306265	10/17/90	75.400	$178
3308049	10/11/90	75.202(a)	$213

2. Section 104(a) "S&S" Citation No. 3314179, August 23, 1990, citing a violation of 30 C.F.R. § 75.403, IS MODIFIED to a non-"S&S" citation, and the respondent IS ORDERED to pay a civil penalty assessment of $115 in settlement of the violation.

3. Section 104(a) "S&S" Citation No. 3314297, September 7, 1990, citing a violation of 30 C.F.R. § 75.1003(a), IS MODIFIED to a non-"S&S" citation, and the respondent IS ORDERED to pay a civil penalty assessment of $128, in settlement of the violation.

4. Section 104(a) "S&S" Citation No. 3113921, September 6, 1990, citing a violation of 30 C.F.R. § 75.514, IS MODIFIED to a non-"S&S" citation, and the respondent IS ORDERED to pay a civil penalty assessment of $197, in settlement of the violation.

5. Section 104(d)(2) "S&S" Order No. 3307787, October 26, 1990, citing a violation of 30 C.F.R. § 75.400, IS MODIFIED to a section 104(a) non-"S&S" citation, and the respondent IS ORDERED to pay a civil penalty assessment of $500, for the violation.

Docket No. WEVA 92-1050

1. Section 104(d)(2) "S&S" Order No. 3312960, March 9, 1992, citing a violation of 30 C.F.R. § 75.1700, IS MODIFIED to a section 104(a) non-"S&S" citation , and the respondent IS ORDERED to pay a civil penalty assessment of $550 in settlement of the violation.

2. Section 104(d)(2) "S&S" Order No. 371887, May 11, 1992, citing a violation of 30 C.F.R. § 75.400, IS MODIFIED to a section 104(a) "S&S" citation, and the respondent IS ORDERED to pay a civil penalty assessment of $1,000, for the violation.

IT IS FURTHER ORDERED that payment of the aforementioned civil penalty assessments, including the settlement amounts, shall be made to the petitioner (MSHA) within thirty (30) days of the date of these decisions and Order. Upon receipt of payment, these matters are dismissed.

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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November 2, 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of LOY PETERS, DONALD GREGORY, & DARRYL ANDERSON, Complainants	:	TEMPORARY REINSTATEMENT PROCEEDING
	:	Docket No. WEST 93-652-D
	:	Thunder Basin Mine
v.	:	
THUNDER BASIN COAL COMPANY, Respondent	:	

ORDER OF TEMPORARY REINSTATEMENT

Appearances: Margaret Miller, Esq., Office of the Solicitor, U. S. Department of Labor, Denver, Colorado, for the Complainants;
Laura Beverage, Esq., Jackson & Kelly, Denver, Colorado, for the Respondent.

Before: Judge Amchan

On July 8, 1993, Complainants Loy Peters, Donald Gregory and Darryl Anderson were among 34 miners laid off by Respondent at its Black Thunder mine near Wright, Wyoming (Tr. 402, 466, Exh. R-30 pp. 5-6). These complainants allege that they were laid off, at least in part, in retaliation for the exercise of their rights under the Federal Mine Safety and Health Act. The three men were among nine employees, eight of whom worked in Respondent's pit maintenance shop, whose names appear on a form received by Respondent in October, 1990. This form designates United Mine Workers (UMW) officials Dallas Wolf and Robert Butero, who are not employees of Thunder Basin Coal, as their representatives to accompany MSHA personnel during any inspection of Respondent's mine (walkaround representatives) (Exh. G-1)[1].

[1]Mr. Gregory's name appears on the first page of the designation form as one of eight employees who are alternates for Mr. Wolf and Mr. Butero. Mr. Gregory did not sign page 2 of the document, designating Wolf and Butero as walkaround representatives. The name of Susan Lucero, who signed page 2 of

Complainants contend that Respondent's decision to lay off 14 employees from the pit maintenance shop, and the three of them in particular, was motivated at least partially by Respondent's animus towards them. This animus, they allege, is due in a substantial degree to their designating the UMW officials as their walkaround representatives pursuant to 30 C.F.R. Part 40.

The UMW has been trying to organize Respondent's employees since 1987. Thus far the UMW has been unsuccessful, losing an election conducted pursuant to the National Labor Relations Act by a vote of 307 to 56 in the fall of 1987 (Tr. 420). Complainants are all active supporters of the UMW organizational effort (Exh. R-29, Tr. 67-68, 85, 463). Mr. Peters and Mr. Anderson are leaders among the UMW adherents at the Black Thunder mine. Both sat on the Union side when ballots were counted in 1987 and they were among the seven employees who initiated a new UMW organizing effort at the mine in October 1991 (Exh. R-29, Tr. 463).

Respondent considers the designation of the UMW organizers as walkaround representatives to be an abuse of the Mine Safety and Health Act (Tr. 424, 443, 461). It views that designation as simply an effort to aid the UMW in organizing its mine and has never recognized the Complainants' designation of the UMW personnel as a valid exercise of the Complainants' walkaround rights. One of the individuals so designated, Dallas Wolf, is the primary organizer for the Union in Wyoming's Powder River Basin. The other designee, Robert Butero, is the safety representative of the UMW.

Respondent is very committed to remaining non-union and has exhibited considerable hostility to the UMW and to its supporters amongst the Black Thunder mine workforce (Tr. 421-24, 429-31, 460-61). One reason for this hostility is Respondent's belief that the UMW worked through an organization called the Powder River Basin Resource Council to prevent Thunder Basin Coal from obtaining the lease to an area immediately west of its then existing mine (Tr. 428-31).

At a series of meetings with the entire Black Thunder workforce on approximately December 18, 1991, company President James A. Herickhoff discussed the UMW role in opposing the lease. Mr. Herickhoff testified that:

> We showed the employees a graph which showed the importance of obtaining that lease, and then we also - - or I had told them about information that I

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the form does not appear on page 1. She apparently did not work in the pit maintenance division.

thought they should know about other groups who are - - were trying to prevent us from getting that lease (Tr. 429).

Mr. Herickhoff also testified that he showed the employees the October 10, 1991 letter to him from Dallas Wolf informing Thunder Basin of the renewed UMW organizational drive (Tr. 429 - 431, Exh. R-29). This letter prominently displays the names of seven Thunder Basin employees including Loy Peters and Darryl Anderson. While Mr. Herickhoff testified that "most of the time" the names of the employees was not visible to the employees attending these meetings, I infer from his testimony that for part of the time the names were visible (Tr. 57-59, 430).

According to Mr. Herickhoff, the reason the letter was shown to Respondent's employees was that:

> Well, it was so ironic to me that on the one hand you had this group of employees from the UMW trying to organize our employees and, on the other hand, they were taking actions through the Powder River Basin Resources Council to stop us from getting this lease. It made no sense to me, and I thought our employees should know it (Tr. 430).

Respondent submits that the termination of Peters, Gregory, and Anderson had nothing to do with their designation of the UMW officials as walkaround representatives, any other safety activity, or union activity. Thunder Basin contends that considerations such as the falling price of coal, increasing costs, and a shift from the shovel and truck method of removing overburden to a dragline operation, made the lay off necessary. Respondent further contends that the lay off was accomplished in an objective and nondiscriminatory manner (Tr. 358-9, 371, 373-92, 504-08, 546, 562-69, Exh. R-30).

Pursuant to the procedural rules of the Commission, 29 C.F.R.§ 2700.45(d), the issue in a temporary reinstatement hearing is limited to whether the miner's complaint was frivolously brought. The Secretary of Labor has the burden of proving that the complaints were not frivolous. Although section 105(c)(2) of the Statute and the Commission's rules indicate that it is frivolousness of the miner's complaint that is scrutinized in a temporary reinstatement proceeding, the legislative history of the Act and relevant case law indicates that it is the Secretary's decision to seek temporary reinstatement that is to be examined. Senate Report 95-181, 95th Cong., 1st Sess. (1977) at 36; Jim Walter Resources, Inc. v. Federal Mine Safety and Health Review Commission, 920 F.2d 738, 747 (11th Cir. 1990).

The legislative history of the Act provides that the Secretary shall seek temporary reinstatement "[u]pon determining that the complaint appears to have merit." The Eleventh Circuit

in Jim Walter Resources, Inc. v. FMSHRC, supra, concluded that "not frivolously brought" is indistinguishable from the "reasonable cause to believe" standard under the whistleblower provisions of the Surface Transportation Assistance Act. 920 F.2d 738, at 747. Further, that court equates "reasonable cause to believe" with a criteria of "not insubstantial or frivolous" and "not clearly without merit" 920 F.2d 738, at 747 and n. 9. I am ordering the temporary reinstatement of the complainants in this case because I conclude that the complaints are not frivolous and that it is possible, although by no means certain, that the Secretary could prevail in a discrimination proceeding.

For reasons stated below, I conclude that Respondent has established, at least for purposes of this proceeding, that it had a legitimate business reason for the July 1993 reduction-in-force. I also find that there is substantial evidence that Respondent had legitimate non-retaliatory motives in laying off 14 of the 38 employees in the pit maintenance department.

Nevertheless, there are some troubling aspects regarding the impact of the lay off on the pit maintenance department which give some credence to the Secretary's allegations. Moreover, there are even more troubling issues regarding the selection of employees within that department for lay off. Rather than relying on seniority, or on prior performance evaluations, Respondent selected the employees for lay off by instituting a "Forced Ranking" of the employees in the pit maintenance area. This ranking was done by six supervisory employees the day before the discharge of the complainants (Tr. 405-08, 473, 517-18, 522, 578-79, 583-94).[2]

The ranking of the 38 employees in the pit maintenance department in 30 different tasks was accomplished in 5-1/2 hours (Tr. 588). The scores of the individual employees were determined by a consensus opinion of the six supervisors, but it is apparent that in some cases the opinion of some individuals carried more weight than others (Tr. 439, 542, 586). It is an open question whether some of these supervisors bore an animus towards the complainants as a result of their protected activity (Tr. 46-7, 54, 55-6, 60-62, 65-67, 76-77, 79-80, 81-83, 263). It is however clear that the scores given to Peters, Anderson, and Gregory in the forced ranking are facially inconsistent with many and possibly all prior evaluations of their job performance (Exh. G-8, G-9, G-12, G-14, G-16, G-17, Tr. 62, 172, 263-4).

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[2] Pursuant to the request of Respondent's counsel, several exhibits pertaining to the forced ranking, G-13, G-15, the last four pages of R-30, and R-33, have been sealed and are to be treated as confidential.

The completely subjective criteria used in selecting the complainants for lay off, when objective criteria existed, raises a serious issue as to whether the selection of complainants for lay off was retaliatory. Although Respondent tried to establish that the selection process was fair and non-retaliatory, it has not satisfied me to the extent that I can conclude that, on the basis of this record, that the Secretary's case is frivolous. Without compelling evidence that the reduction-in-force was carried out in a fair and objective manner, I conclude that the Secretary's Application for Temporary Reinstatement was "not frivolously brought." See Rivera v. Installation Club System, 623 F. Supp. 269 (D.C. Puerto Rico 1985).

In a discrimination hearing, the Secretary establishes a prima facie case by showing that the complainant engaged in protected activity, and that an adverse action was motivated in part by the protected activity. The operator may rebut the prima facie case by showing that no protected activity occurred, or that the adverse action was in no part motivated by the protected activity. Sec. ex rel. Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (October 1980), rev'd on other grounds sub nom. Consolidated Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Sec. ex rel. Robinette v. United Castle Coal Co., 3 FMSHRC 803 (April 1981).

In this case, the Secretary has established that each of the complainants engaged in protected activity. Most significantly, Peters, Gregory, and Anderson were among eight employees who designated UMW personnel as their representatives on MSHA inspections (Exh G-1). Although Respondent regards such designation as an abuse of the walkaround provisions of the Mine Safety Act, the Commission has concluded that employees at another non-union mine were entitled to designate Mr. Wolf and Mr. Butero as their walkaround representatives. Kerr-McGee Coal Corporation 15 FMSHRC 352 (March 1993).

The Complainants allege other protected activity as well. Some of this activity relates to an effort by Respondent to enjoin MSHA from requiring Thunder Basin to honor the designation of UMW officials Wolf and Butero as walkaround representatives under the Mine Act.[3] In July 1991, Respondent moved to depose all nine employees whose names appeared on the October 1990

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[3]The injunction requested by Respondent was granted by the United States District Court for the District of Wyoming (No. 91-CV-0050-B). The Court of Appeals for the Tenth Circuit reversed the District Court on jurisdictional grounds Thunder Basin Coal Co. v. Martin, 969 F.2d 970 (10th Cir. 1992). The injunction remains in effect pending consideration by the United States Supreme Court, which granted certiorari in the case (No. 91-8029).

walkaround designation (Exh. G-2). Peters, Gregory, and Anderson were deposed (Tr. 33-4, 178, 255-56). In October, 1991, MSHA subpoenaed all three to testify in the United States District Court regarding Respondent's request for an injunction. Although only Peters actually testified, Gregory and Anderson notified their supervisors that they had received the Secretary's subpoenas (Tr. 37, 178-9, 259-60).

Loy Peters has also engaged in protected activity in filing a number of discrimination complainants alleging several previous instances of retaliation for his role in designating the UMW personnel as walkaround representatives. Peters, Gregory, and Anderson also allege that they have made a number of safety complaints to Respondent.

There is no question that the three complainants have experienced an adverse action. All three lost their jobs at Thunder Basin Coal Company on July 8, 1993. Mr. Peters had worked for Respondent for 14-1/2 years; Mr. Gregory had worked at Thunder Basin for 14 years; and Mr. Anderson had been employed there for 12-1/2 years. The real issue is whether there is any relationship between the complainants' protected activity and their discharge.

As an initial matter, I note that I am not charged with jurisdiction to decide matters arising under the National Labor Relations Act. Clearly, the organizational effort of the UMW is at the core of this case. Nevertheless, the complainants' choice of Mr. Wolf and Butero to be their walkaround representatives is protected by section 105(c) of the Mine Safety and Health Act.[4]

There is simply no way to completely separate the animus of the Respondent towards complainants due to their union organizational activities and their designation of Wolf and Butero as walkaround representatives. I conclude that Respondent bore considerable ill will towards the complainants for designating the UMW officials as walkaround representatives and the degree and ongoing nature of this animus may create the necessary inference for purposes of this hearing to establish a

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[4]Even if the Commission's decision in Kerr-McGee is reversed, complainants had a good faith belief that they were entitled to designate Wolf and Butero as walkaround representatives. This good faith belief renders their designation to be protected activity even if they ultimately turn out to be wrong on this issue.

relationship between their protected activity and their selection for discharge.[5]

Respondent contends that the Secretary has not established or even sufficiently alleged that the termination of the Complainants was motivated or caused by, or in any way related to, their alleged protected activity. Respondent's Memorandum Of Law In Support Of Motion To Dismiss. The Application for Temporary Reinstatement states that complainants alleged that they were discharged because they signed a miners' representative form and other protected activity. The Application also states that the Secretary has found these allegations to be "not frivolously brought." I find that the Application is a sufficient pleading to state a claim.

I also find that the affidavit attached to the Application, in the absence of any other evidence, would be sufficient to withstand a motion to dismiss. While the affidavit could have explained the Secretary's case more clearly, it does allege that complainants were engaged in protected activity (paragraph e), that Respondent displayed an ongoing animus towards complainants as the result of that activity (paragraph f), and that Peters', Gregory's, and Anderson's claims that they were discharged as the result of that activity is not frivolous (paragraph 4).

It is true that there is no direct evidence establishing a link between complainants' discharge and their designation of Wolf and Butero as walkaround representatives. However, circumstantial evidence may be sufficient to establish this link. Ellis Fischel State Cancer Hospital v. Marshall, 629 F.2d 563, 566 (8th Cir. 1980) cert. denied, 450 U.S. 1040 (1981). In this case, the circumstantial evidence of a relationship between the walkaround designation and the complainants' discharge is established by the strong and continuing animus of Respondent's management, including the company President, towards complainants, as the result of their union activities, of which the walkaround designation was a significant part. At a minimum, this circumstantial evidence is enough to establish a prima facie case that the Application for Temporary Reinstatement was not frivolously brought.[6]

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[5]The complainants' deposition testimony, Mr. Peters' trial testimony, and the prior discrimination complaints are merely outgrowths of the walkaround designation. I do not see any indication that complainants' safety complaints, absent their union activity and walkaround designation, were a material factor in their discharges.

[6]I decline to make any credibility resolutions between controverted testimony in this proceeding. For example, I will not make a finding as to whether Mr. Herickhoff did or did not

My conclusion that the allegations of retaliatory discharge are not frivolous rests primarily on the apparent incompatibility of the forced ranking used by Respondent in selecting the complainants for lay off with their previous performance appraisals. The employees in the pit maintenance department were rated from 1 to 5 in 30 categories. A score of 1 was the best and 5 was the worst. A rating of 4 was defined as "Inconsistent performance which is generally below the requirements for competency in the work." A score of 5 is defined as "Unacceptable performance which falls far short of the requirements for competency in the work." (Exh. G-14)

Mr. Peters received the second worst score of the 38 employees in the pit maintenance department (Exh. G-15, R-33). His overall score was 4.29. In 13 categories under the heading of "Heavy Mechanic", which accounted for 30 percent of his score he received 12 "5"s and 1 "4". In seven categories under "Equipment/Machinery" which accounted for another 20 percent of his ranking, Mr. Peters was received 7 "5"s out of 7 (Exh. G-8). These scores indicate that Mr. Peters was totally incompetent in performing much of his work. Yet in 14 years as an employee of Respondent, Mr. Peters received performance evaluations of "Meets Expectations" or "Exceeds Expectations" on all occasions save one (Tr. 62).[7]

Although Respondent contends that the six supervisors who participated in the forced ranking were tough scorers in general, the disparity between Peters' performance appraisals and his scores in the forced ranking raise a substantial issue as to whether that ranking was in some part a result of his protected

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fn. 6 (continued)
refer to the complainants as "cronies of Dallas Wolf" or whether Mr. McCreary, who oversaw the forced ranking procedure, had called the complainants "crony bastards", or told Mr. Peters that he would last a lot longer if he got out of "this political process." (Tr. 34-5, 60, 184, 261, 263, 430-31, 599-603) It may be that additional evidence introduced in a discrimination proceeding will provide a basis for making such determinations.

[7]The one "Does Not Meet Expectations" rating Peters received is an issue in this case in that Peters was evaluated by Foreman Doug Freeland, whom he contends demonstrated animus towards him as a result of his protected activity (Tr. 61-62, 65-67). Moreover, that rating was received in January 1992, a month after company President Herickhoff commented publicly about the potential effects of the UMW organizing effort on the company's future and identified Peters as a union supporter (Tr. 428-31). This rating was also received 3 months after the UMW renewed its organizing drive (Exh. R-29) and 2 months after Mr. Peters testified on behalf of MSHA concerning the walkaround representative dispute (Tr. 37, 421-24, 442-43).

activity. On this basis alone I would find the Secretary's decision to proceed with Peters' complaint to be "not frivolous."

With regard to Mr. Anderson, a serious question regarding the alleged discriminatory nature of his discharge arises even before one considers his forced ranking score. Mr. Anderson had been temporarily assigned to the Truck Maintenance shop 6 months prior to the lay off (Tr. 258, 535). Respondent knew before the forced ranking that it would not lay off anyone in the truck maintenance shop (Tr. 637, Exh. R-30 pp. 5-6).[8] Nevertheless, Anderson was rated with the pit maintenance employees and two employees temporarily assigned to the pit maintenance shop were rated with the Truck Maintenance workforce. This procedure may, to some extent, suggest that Anderson, a prominent union advocate and signer of the UMW walkaround form, was transferred back to pit maintenance so that Respondent would have a better chance of getting rid of him.

Anderson's overall score of 3.9 placed him tenth from the bottom in the forced ranking of the 38 pit maintenance employees (Exh. R-33). He received a "5" in 11 of 13 categories under "Heavy Mechanic" and 5 "5"s out of 7 under "Equipment/ Machinery."(Exh. G-12) As Anderson never got a performance evaluation below "Meets Expectations" in his 12-1/2 years with Respondent (Tr. 263-4), I find his forced ranking score facially inconsistent with Respondent's prior evaluation of his performance, and, thus, suspect.

In Anderson's performance evaluation for February 20, 1990 through February 9, 1991, he received a rating of "Meets Expectations" (Exh. G-16). The narrative of the evaluation is totally at odds with the numerous "5" ratings Anderson received in the forced ranking. Some of the relevant comments were as follows:

> "Quality of work is excellent. Completes work with little direction. Tools and equipment are used proficiently.
>
> Conveys accurate information pertaining to structural failures and makes repairs accordingly. Ingenuity is used in the design and construction of equipment that is used to make jobs easier and safer.
>
> Uses sound judgement in planning jobs. Has strong convictions seeing a job through to completion and that is (sic) been proven beneficial in use.

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[8]One employee in light vehicle maintenance was laid off but his duties were apparently not comparable to Anderson's (Exh. R-30, p. 5, Tr. 534-5).

> Excellent fabricator of materials. Weld repairs are made in a quality manner. Actively seeks more work as assigned job is complete.
>
> Darryl has shown me that he is a conscientious employee and I am sure this will continue. His skills, knowledge and willingness to share information about certain jobs has proven to be an asset to myself and others.

Anderson's evaluation for the period July 26, 1991 through February 9, 1992, was not as favorable, although he did receive a rating of "Meets Expectations." This evaluation followed not long after the October 1991 reinitiation of the UMW organizing campaign and the hearing on Respondent's suit to enjoin the UMW walkaround designation, but is still inconsistent with the forced ranking scores (Exh. G-17). Among the relevant comments are:

> Quality of work is excellent. Use of time has improved to an acceptable level and is expected to be maintained . . . .
>
> Excellent fabrication skill are utilized. More initiative can be applied in making some repairs. Troubleshooting on general mechanical repairs is improving with increased exposure.
>
> Has strong knowledge of weld repairs. Mechanical knowledge is improving and I will make more assignments on mechanical repairs so that experience can be gained.
>
> Darryl is a conscientious employee who applies a lot of creative thinking to his work. I appreciate his candidness in discussions we've had and recently noticed a stronger line of communication building with others in management...

In 14-1/2 years Gregory received evaluations of "Meets Expectations" on all but one occasion in 1988 or 1989 (Tr. 172). He received the fourth lowest score in the forced ranking (Exh. G-14). Under the category of "Heavy Machinery" Gregory received all "5"s except one 4 (Exh. G-9) The Secretary's case on behalf of Gregory is weaker than is his case on behalf of Peters and Anderson. First of all, Gregory was not nearly as prominent in union affairs as the other two complainants. He signed neither the walkaround designation form nor was he listed on the October 1991 notice to Respondent about the renewed organizational campaign (Exh. R-29, G-1, p. 2).

Nevertheless, Gregory is listed as an alternate walkaround representative to Mr. Wolf and Mr. Butero (Exh G-1, p. 1). He

was deposed by Respondent in July 1991, and was subpoenaed to testify for MSHA in October 1991. Upon receipt of a reprimand shortly thereafter he filed a discrimination complaint with MSHA. (Tr. 184). He has also given depositions on Mr. Peters' behalf regarding discrimination claims under section 105(c) of the Mine Safety and Health Act (Tr. 67-68, 85). Given the absence of any indication that Respondent previously considered Gregory as poor an employee as suggested by his forced ranking score, I conclude that the Secretary's case on his behalf in "not frivolous" as well.[9]

The entire forced ranking process is conceivably tainted by retaliatory motivation. Terry Walsh, Respondent's Operations Manager and Robert McCreary, Respondent's Maintenance Superintendent for the pit maintenance area, testified that the reason the company could not rely on performance evaluations in conducting the lay off was that they wouldn't allow Respondent to differentiate among the employees in the pit maintenance department (Tr. 517-18, 578-79). This suggests that there may not have been sufficient disparity in the performance of the workforce to make selections for lay off on this basis.

It also raises the possibility that the forced ranking process was an attempt to create distinctions where none existed and that the only objective way to differentiate between employees was on the basis of seniority, as Respondent had done once in the past. The forced ranking process may have been an effort to quantify the unquantifiable and may have been, in part, employed in order to avoid using seniority which would have spared all or most of the UMW sympathizers.[10]

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[9]Respondent at page 40 of its brief argues that Gregory should not be reinstated because he is physically unable to perform his job. Although Gregory has had knee surgery, which he considers unsuccessful, there is no indication that he did not perform his job satisfactorily from September 1992, when he returned from the second operation to the day of his discharge (Tr. 187-189). If Mr. Gregory is willing to work despite the pain and discomfort in his knees, he must be reinstated.

[10]I reject the contention that because five of the nine employees whose names appear on the UMW walkaround designation were not laid-off, retaliatory motive has been disproved. It is not necessary to discharge all the union adherents to accomplish a desired result--particularly when two of those laid-off, Peters and Anderson, were clearly leaders of the UMW faction at the Black Thunder Mine. Similarly, the fact that many of those laid off apparently had no connection with the UMW or the walkaround designation, does not necessarily mean the layoff was not discriminatory. On the other hand, both these facts must be considered in a discrimination case. Obviously, a situation in

In addition to the forced ranking process and the disparity between the complainants' rankings and their prior performance evaluations, there is a substantial issue regarding the impact of the lay off on the pit maintenance department. After the lay off, maintenance of the Respondent's rotary drills was transferred from pit maintenance, where most of the UMW faction worked, to the truck maintenance shop, which was spared in the lay off (Tr. 508-09, 533-34).

Respondent has convincingly established that the changeover from the truck and shovel method of removing overburden to a complete dragline operation produced a decreased need for maintenance employees on the trucks and shovels. However, its decision to lay off almost exclusively from the union-infested pit maintenance department is suspect[11].

The truck maintenance shop also was overstaffed as result of the changeover (Tr. 510). Instead of laying-off employees from the truck shop, as well as from pit maintenance, Respondent chose to lay off only from pit maintenance and transfer some of that department's work to the truck maintenance shop. It is not inconceivable that complainants' designation of Wolf and Butero as walkaround representatives had something to do with this decision.

In conclusion, I find that the Secretary has met his burden in establishing that the discrimination complaints of Loy Peters, Darryl Anderson, and Donald Gregory alleging retaliatory discharge on July 8, 1993 are "not frivolous." I also find that the Secretary's decision to seek temporary reinstatement in view of the record before me is "not frivolous."

ORDER

Respondent is hereby ordered to reinstate Loy Peters, Darryl Anderson, and Donald Gregory to the positions from which they

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which all those who engaged in protected activity and/or only those who engaged in protected activity lose their jobs is a stronger case from the complainants' perspective than this one.

[11]Five of the seven employees initiating the union organizing drive (Exh. R-29) and eight of the nine whose names appear on the form designating Wolf and Butero as walkaround representatives worked in pit maintenance (Exh. G-1, R-33).

were discharged on July 8, 1993, or to equivalent positions, at the same rate of pay and with equivalent duties.[12]

Arthur J. Amchan
Administrative Law Judge
703-756-4572

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/jf

[12]Respondent submits that Complainants' positions no longer exist at the mine. Such is the contention in every situation involving a lay off. The record clearly establishes that there is work at Respondent's mine that complainants can perform (Tr. 623-24). Moreover, Congress, in providing for temporary reinstatement, has determined that when a miner's complaint is "not frivolous" the employer must reinstate the miner regardless of whether it is economically beneficial for the employer to do so. Congress has determined that, when the discrimination complaint is "not frivolous", the employer must run the risk of paying a discharged miner whose claim may ultimately fail, rather than requiring the miner, who may prevail, to go through the discrimination proceeding without income.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

NOV 3 1993

SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	PROCEEDING
ADMINISTRATION (MSHA),	:	
ON BEHALF OF FREDDY THACKER	:	Docket No. KENT 93-977-D
Complainant	:	
v.	:	PIKE CD 93-12
	:	
BLACK DRAGON MINING COMPANY,	:	No. 2 Mine
Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Maurer

The parties to this proceeding have reached an amicable settlement and counsel have therefore jointly moved for approval of their settlement, dissolution of my earlier Order of Temporary Reinstatement, and dismissal of this proceeding with prejudice on the basis of their settlement agreement.

Accordingly, and for good cause shown, the proposed settlement **IS APPROVED**, the terms of the settlement agreement are hereby **INCORPORATED BY REFERENCE** into this Order, my previous Order of Temporary Reinstatement **IS DISSOLVED**, and upon full satisfaction of the agreement by both parties, the motion to dismiss **IS GRANTED** and the captioned proceeding **IS DISMISSED**, with prejudice.

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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FALLS CHURCH, VIRGINIA 22041

NOV 4 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. SE 92-419-M A.C. No. 54-00333-05504
v.	:	Arenas Matilde
ARENAS MATILDE INCORPORATED, Respondent	:	

DECISION

Appearances: Jane Snell Brunner, Esq., Office of Solicitor, U.S. Department of Labor, New York, New York, for Petitioner;
Adrian Mercado, Esq., Law Office Mercado & Soto, Santurce, Puerto Rico, for Respondent.

Before: Judge Barbour

STATEMENT OF THE CASE

In this civil penalty proceeding, brought by the Secretary of Labor ("Secretary") against Arenas Matilde Incorporated ("Arenas Matilde"), pursuant to section 105(d) and 110(a) of the Federal Mine Safety and Health Act of 1977 ("Mine Act" or "Act"), 30 U.S.C. §§ 815(d), 820(a), the Secretary charges the company with three violations of mandatory safety standards for metal and nonmetal mines found in Part 56, Title 30, Code of Federal Regulations ("C.F.R."). The Secretary further alleges that two of the violations constituted significant and substantial contributions to mine safety hazards ("S&S" violations). Arenas Matilde denies the Secretary's jurisdiction to cite the alleged violations. The company asserts that its product does not enter into interstate commerce nor do its operations affect interstate commerce.

MOTION TO DISMISS AND MOTION FOR RECONSIDERATION

Prior to the date of the scheduled hearing, Arenas Matilde moved to dismiss for lack of jurisdiction. I denied the motion, stating the issues could best be resolved through the hearing process, where sworn testimony, subject to cross-examination would be placed on the record. Arenas Matilde moved for reconsideration of the denial. Because the motion for reconsideration was filed shortly before the hearing, counsel for the Secretary did not have time to respond in writing. Accordingly, I afforded the parties the opportunity to argue the motion at the commencement of the hearing.

Arenas Matilde's counsel made clear that the essence of the company's request for reconsideration was that its product does not enter interstate commerce in that there is "an express law forbidding the exportation of sand in Puerto Rico." Tr. 9. Counsel for the Secretary responded that even if Puerto Rico prohibits the exportation of sand, the company's operations affect commerce . She stated, "MSHA jurisdiction is very broad" and that with respect to establishing jurisdiction "[i]t's not only products which enter commerce, it's also any operations or products which affect commerce[,] [a]nd that's about as broad as you can get." Tr. 10. Counsel for Arenas Matilde countered that the company can hardly affect interstate commerce if its sand can not be sold outside of Puerto Rico. Id.

I denied the motion for reconsideration. Tr. 10-11.

SECRETARY'S WITNESS

Roberto Torres Aponte

Roberto Torres Aponte, an inspector for the Secretary's Mining Enforcement and Safety Administration ("MSHA") was the Secretary's sole witness. He testified he had been an inspector for the past seventeen years and as such had inspected non-metal mines in Puerto Rico and the Virgin Islands. Prior to joining MSHA he had worked for eight years as a supervisor for a Puerto Rican cement plant. Tr. 13-14.

Torres stated that he went to Arenas Matilde's operation on June 24, 1992, in order to conduct a regular health and safety inspection of the facility. He described the activities at the facility: "[T]hey were extracting sand from a pond with a crane and they were processing sand with a portable [screening] plant." Tr. 17.

Torres testified the equipment used to conduct the extraction and screening activities included in addition to the crane and portable screening plant, two front-end loaders. Torres was asked whether the equipment was manufactured in the Commonwealth of Puerto Rico and he responded that he did not believe so, because there were no factories on the island to make such equipment. Id., Tr. 58. He was of the opinion the manufacturer of the front-end loaders was Caterpillar and the manufacturer of the crane or dragline was Bucyrus Erie. Tr. 57. (He did not know who manufactured the screening plant. Id.)

A dirt road led onto the operation. There were customers' trucks (trailers) parked on the operation and they were used to transport the sand Arenas Matilde extracted. The ground at the operation was generally flat but there were some banks and holes. Tr. 44-45, 56-57. In addition, there was a trailer (presumably a

house-type trailer) that was used as an office. It was on the property but was located some distance from the area where employees were working. Tr. 57.

Torres further related that the person in charge of the sand operation was Adrian Mercado, Jr., the same person who served as counsel for Arenas Matilde. Tr. 28. Torres maintained that after he issued the subject citations on June 24, Mercado arrived at the operation. Torres stated that he explained the alleged violations to Mercado and that Mercado had no comment. Tr. 28, 50.

In addition to describing Arenas Matilde's operation, Torres testified concerning conditions he observed that he believed violated mandatory safety standards. Torres stated he saw a front-end loader in operation and that the operator of the front-end loader was not wearing a seat belt. Torres believed the front-end loader operator worked for Arenas Matilde because that is what the operator told Torres. Tr. 21. The operator was feeding the portable screening plant. In addition, the front-end loader operator also was in charge of the screening plant and was selling tickets to customers who came onto the property to buy sand. Tr. 25, 28-29. In Torres' opinion, the failure to wear a seat belt constituted a violation of section 56.14130(g). Tr. 20.

Torres was asked if there was any hazard associated with the failure of the operator to wear a seat belt while operating the loader. He responded that the loader was used on irregular terrain adjacent to a pond and that the loader operator could be injured if the loader overturned. Tr. 21. Torres saw the loader's tracks close of the edge of the pond. Id. Torres agreed, however, that when he observed the alleged violation of section 56.14130(g) the front-end loader was being operated on flat terrain. Tr. 58. Nonetheless, Torres found the violation to be S&S because "there was a hazard and there was a possibility that an accident [could] occur there, and it could be of a serious nature." Tr. 22.

Torres believed the fact the loader operator was not using a seatbelt was visually obvious and could have been observed by Arenas Matilde's management personnel. Tr. 21.

Torres, issued to the company a citation alleging a S&S violation of section 56.14130(g). Tr. 20; Exh. P-3. Torres cited the alleged violation at 8:00 a.m., but he set the abatement time for the alleged violation at 7:00 a.m. the following morning. He agreed the front-end loader operator could have waited until that time to buckle his seatbelt. Tr. 34-35. In fact, however, the alleged violation was abated when the loader operator immediately fastened his seat belt. Tr. 31.

Torres further testified he observed that the front-end loader operator was working alone. This, according to Torres, was a violation of section 56.18020. Although there was another employee in the same general area, the other employee was about 300 to 400 feet from the loader operator -- or, as Torres described it "far away on the other side of the operation." Tr. 29. Torres believed the employees had no means of communication. Tr. 26. (The other employee was operating the dragline, extracting sand from the pond. Tr. 29.)

If the front-end loader operator (the same person who was not wearing a seat belt) was involved in an accident, Torres feared no one would help or treat him because no one would see him. Thus, the lack of observation by another person could have resulted in a fatality. Tr. 26. (However, on cross-examination, when Torres was asked how he knew that the front-end loader operator could not be seen by the dragline operator.) He responded, "I'm not sure, I don't know." Tr. 49. Torres admitted there was nothing to obstruct the employees' vision of one another and added that "[p]robably once in a while they could look at each other, but not as frequently as they should." Tr. 55. He explained, "they [were] . . . concentrating on the work they [were] doing . . . they [were] operating large pieces of equipment[.]" Tr. 55.) Torres stated he found the alleged violation to be S&S because "it is a probability that an accident occur [sic] and could be of a serious nature." Tr. 27.

In Torres' view, Arenas Matilde's management could have known the front-end loader operator was working alone simply by observing the situation. Tr. 26.

Torres also stated he observed that no potable water nor water cups were provided in the work area and that as a result he issued a citation for a violation of section 56.20002(a). Tr. 22; Exh P-4. Torres was asked whether or not he knew if running water was in the trailer on the job site and Torres responded that he had not inspected the trailer. Tr. 49. He further stated that even if there was water in the trailer, the water would not obviate the violation because the trailer was more than 500 feet away and the water "should be in an area where everybody can go . . . and drink." Tr. 54.

According to Torres, the front-end loader operator and the dragline operator were working in the area. Tr. 23. Torres did not believe the lack of potable water could cause an accident, but he noted that without water the weather in Pureto Rico could lead to heat stroke "or something like that." Tr. 24.

ARENAS MATILDE'S WITNESS

Adrian Mercado

Adrian Mercado was sworn as a witness and presented evidence on the company's behalf. Mercado testified that he was the sole owner of Arenas Matilde, which Mercado described as a sand extraction company. The company is located on the Mercado farm, near Ponce. Mercado described the operation:

> A dragline . . . takes the sand out and places it beside itself. A loader comes and has to wait until the sand dries a little bit and takes it to the telescreen which cleans the sand and there the loader picks it up and puts it in the trucks which continually are at the plant . . . .
>
> There is a continuous movement of trucks in and out of the plant.
>
> [T]here is not a plant in the sense that there is a building. There is no building there it is open. And there is a loader, a dragline and the telescreen -- which . . . I believe was manufactured in Ireland. [(Mercado stated that he did not know where the dragline was manufactured. Further, he "guessed" the front-end loader was manufactured in "the States." Tr. 66.)]
>
> There is a . . . trailer near the sand extraction operation . . . connected to the Puerto Rico Aqueduct and Sewer Authority line. The trailer is open when the first work[er] arrives and it has running water, it has a faucet.

Tr. 63.

The sand extracted at the operation, according to Mercado, can only be used for asphalt. Id. By law it cannot be exported from Puerto Rico. In addition, the equipment at the operation is insured by Puerto Rico American Insurance Company. Mercado stated that as far as he knew the insurance company did business solely in Puerto Rico. Further, Arenas Matilde carries no insurance on or for its employees other than Puerto Rican workman's compensation insurance. Tr. 65.

ISSUES

The issues are:

1. Whether the Secretary had jurisdiction under the Mine Act to cite Arenas Matilde.

2. If so, whether the Secretary proved the alleged violations existed.

3. If so, what are appropriate civil penalties for the violations in light of the statutory civil penalty criteria.

JURISDICTION

Parties' Arguments

Section 4 of the Mine Act states:

> Each coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this [Act].

30 U.S.C. § 803. As both parties agree, their jurisdictional arguments revolve around the question of whether the products or operations of Arenas Matilde "enter commerce" and/or "affect commerce."

"Commerce" is defined in part as: "trade, traffic, commerce, transportation or communication among the several States" and "State" is defined as including, inter alia, "a State of the United States . . . [and] the Commonwealth of Puerto Rico." 30 U.S.C. §§ 802(b), 802(c).

Such "commerce" among the several States is interstate commerce and it is the Secretary's position that Arenas Matilde's operations affect interstate commerce in that the record establishes the company is using equipment manufactured outside the Commonwealth of Puerto Rico. Moreover, juridiction vests even if the sand produced at the operation is used locally and cannot be exported -- that is, even if the company's product enters into commerce on an intrastate basis.

Arenas Matilde asserts the Secretary has not established his contention that if machinery was purchased outside Puerto Rico interstate commerce is affected. Moreover, the fact remains

that the exportation of sand from the Commonwealth of Puerto Rico is prohibited by law and thus Arenas Matilde cannot possibly engage in interstate commerce when it sells its product. A.M. Br. 3-6.

Whether the Secretary had jurisdiction under the Mine Act to cite Arenas Matilde?

I conclude that in citing Arenas Matilde the Secretary properly exercised his jurisdiction. It is clear that in enacting the Mine Act Congress determined that mining related accidents and occupationally related diseases unduly burdened interstate commerce. Section 2(f) of the Act states as much, 30 U.S.C. § 801(f), and as the Supreme Court has recognized:

> [I]t is undisputed that there is a substantial federal interest in improving the health and safety conditions in the Nation's underground and surface mines. In enacting the [Mine Act] Congress was plainly aware that the mining industry is among the most hazardous in the country and that the poor health and safety record of this industry has significant deleterious effects on interstate commerce.

Donovan v. Dewey, 452 U.S. 594, 602 (1981).

In its motion for reconsideration, Arenas Matilde appeared to argue that the Commerce Clause of the Constitution -- the very clause that Congress exercised in seeking to cure the deleterious effects of the mining industry upon commerce -- is not applicable necessarily to the Commonwealth of Puerto Rico. If so, it would come as a great surprise to the legislators who subjected to the Act "[e]ach coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce", who defined "commerce" as "trade, traffic, commerce, transportation or communication among the several States, or between a place in a State and any place outside thereof" and who specifically included Puerto Rico in the Act's definition of "State". 30 U.S.C. §§ 802(b), 802(c). Further, it would come as an even greater surprise, I expect, to the courts, which long have held or assumed that Congress has the power under the Commerce Clause to regulate commerce with the Commonwealth. Trailer Transport Corp. v. Rivera Vazquez, 977 F.2d 1, 7 n3. (1st Cir. 1992). Thus, the question is not whether Congress has the power to include Puerto Rico within the scope of the Act, but whether it has exercised that power. As the above quoted definitional sections of the Act make clear, the answer is, "yes."

As noted, Arenas Matilde goes on the argue that even if the Mine Act applies to Puerto Rico, a jurisdictional basis for the Secretary's case is lacking because Arenas Matilde does not, and indeed pursuant to Commonwealth law cannot, export the sand it extracts outside Puerto Rico. While I accept as fact that all of the sand mined by Arenas Matilde remains on the island and that the company is barred by law from exporting its product, I nonetheless conclude the company's operations affect interstate commerce. Torres testified that he believed the heavy equipment owned by the company -- the drag line, front-end loaders and portable screening plant -- were manufactured outside the Commonwealth in that there are no facilities on the island for producing such equipment. Tr. 58. Mercado did not know the origin of the dragline, but he "believed" the screening plant was manufactured in Ireland and he "guessed" the Caterpillar front-end loaders were manufactured in "the States". Tr. 66. It is black letter law that a company's ownership and use of equipment vital to its operations that has been manufactured and moved in interstate commerce, as at least the front-end loaders have been, "affects commerce." See United States v. Dye Construction Co., 510 F.2d 78, 82 (10th Cir. 1975); Secretary of the Interior, United States Department of the Interior v. Shingara, et al., 418 F. Supp 693 (D.C., M.D. Pa. 1976); Sanger Rock & Sand, 11 FMSHRC 403, 405 (March 1989) (ALJ Cetti).

Whether the Secretary has proved the alleged violations?

Citation	Date	30 C.F.R. §
3611121	6/24/92	56.14130(g)

Torres testified that he saw the cited front-end loader in operation and that the operator was not wearing a seat belt. Mercado did not dispute his testimony. The violation was cited at 8:00 a.m.. It is true, as Arenas Matilde points out, that Torres gave the front-end loader operator until 7:00 a.m. the following morning to abate and that the operator complied much faster by buckling the seat belt immediately. However, it does not follow that "if [Arenas Matilde] was given time to comply and there was compliance before the time provided had expired a violation could not have taken place." A.M. Br. 7. The structure of section 104(a), 30 U.S.C. § 814(a), makes clear that the citation of a violation during an inspection is separate and distinct from the fixing of a reasonable time for its abatement. The extent of the time fixed for abatement may reflect the inspector's assessment of the violation's gravity, but it has no bearing upon his or her finding of the violation's existence.

Section 56.14130(g) requires the wearing of seat belts on self-propelled mobile equipment, except when the equipment operator is operating a grader from a standing position, an exception not applicable here. Therefore, I conclude the violation existed as charged.

Torres testified that he found the violation to be of a significant and substantial nature because of the possibility that a serious accident could occur. He further testified that although, when he observed the violation, the front-end loader was operating on flat terrain, he noticed its tracks next to the pond and that the land was of an irregular grade adjacent to the pond. Torres believed that operating the front-end loader on the irregular ground with a full loaded bucket enhanced the possibility of an accident. Tr. 58-59.

Among those elements necessary for the Secretary to prove in order to establish the S&S nature of a violation is that the violation presented a reasonable likelihood of injury. Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984). If, as the Commission recently has emphasized, a reasonable likelihood of injury is not equivalent to a "substantial possibility" of injury the same must be true for the mere "possibility" of injury. Energy West Mining Co., 15 FMSHRC ___, Docket No. WEST 91-251 (September 27, 1993) slip op. 4. Torres' testimony was restricted to the possibility of the front-end loader overturning. Because there was no testimony regarding the frequency with which the front-end loader operated near the pond during the course of a shift, the frequency with which its bucket was loaded during the course of a shift, the number of instances in which front-end loaders overturned at that location, the number of instances when they overturned while operating under similar conditions at other locations, or the number of miners who have been injured under such circumstances, I cannot gauge from the record whether the failure of the front-end loader operator to buckle his seat belt presented a reasonable likelihood of injury and I must conclude the Secretary has not established that the violation was of a S&S nature.

Turning to the gravity of the violation, the inspector believed if the loader overturned it was likely the operator would have suffered a fatal injury as a result of failing to buckle the seat belt. The gravity of a violation constitutes both the potential injury to the miner and the possibility of its occurrence. I accept Torres testimony that there was a possibility the front-end loader could have overturned. It is common knowledge that when such equipment overturns and the equipment operator is not secured to his or her seat the operator can be pinned under the equipment or thrown from it and can be seriously injured or killed. Moreover, I accept Torres testimony that he observed the loader's tracks adjacent to the pond. The danger of the equipment operator being thrown into the water or pinned under it adds yet another dimension to the hazard, this was a serious violation.

The fact that the equipment operator was not wearing the seat belt was visually obvious. In failing to ensure that its employees complied with the standard, Arenas Matilde failed to exhibit the care required of it. I conclude the company was negligent.

Citation	Date	30 C.F.R. §
3611123	6/24/92	56.18020

Section 56.18020 states:

> No employee shall be assigned, or allowed, or be required to perform work alone in any area where hazardous conditions exist that would endanger his safety unless he can communicate with others, can be heard or can be seen.

To establish a violation of section 56.18020, the Secretary must prove first that the person working alone is working in an area where hazardous conditions exist that would endanger his or her safety. The employee referenced in the citation was the front-end loader operator. As I have found, he was working at a job where there was a danger of suffering death or injury should the front-end loader have overturned. Thus, he was working in an area where hazardous conditions existed that would endanger his safety.

However, the Secretary also must prove that the employee could not communicate with others, or heard by others or be seen by others, and this the Secretary has failed to do. Torres testified that the dragline operator was working 300 to 400 feet from the front-end loader operator. He also stated the employees could see one another. Tr. 55. What really concerned Torres was that because of the nature of their jobs they might not look at one another as frequently as he felt was necessary for safety. Id. Torres concern, while commendable, is outside the requirements of the standard.

The Secretary asserts that although the employees may have had visual contact they could not hear one another and their being outside each other's hearing violated the standard's intent. Sec. Br. I do not agree. While, there may be an instance in which employees are so far apart the fact they can only see one another does not constitute the type of "communication" contemplated by the standard, at the approximate length of a football field, I believe this is not such a case.

I conclude therefore, that the Secretary has not established the alleged violation.

Citation	Date	30 C.F.R. §
3611122	6/24/92	56.20002(a)

Torres testified that he issued the citation because there was no potable water nor were cups provided in the work area of the front-end loader operator and the dragline operator. Tr. 22. He admitted that he did not know if such water was available at the job site trailer. Tr. 49. Mercado, stated that the trailer had a faucet with running water and was open to the workers. Tr. 62.

Section 56.20002(a) requires that "[a]n adequate supply of potable drinking water shall be provided at all active working areas." Interestingly, the standard does not specifically require drinking cups. Rather it prohibits "common drinking cup[s] and containers from which drinking water must be dipped or poured" (section 56.20002(b)) and requires a sanitary container for single service cups where they are provided and a receptacle for such used cups (section 56.20002(c)).

I conclude the Secretary has not establish the violation. I accept Mercado's testimony that water, which I infer was potable since he also stated that it came from the Puerto Rico Aqueduct and Sewer Authority line, was available at the trailer. Tr. 62. This means that an adequate supply of potable water was provided.

Torres believed that if there was potable water in the trailer, the trailer was outside the work area and thus there was still noncompliance with the standard. Tr. 54. He described the trailer as being approximately 500 feet from the work area. Id. I have no way to judge whether this was outside the "active working area." The regulations do not define "work area," nor do the Secretary's enforcement guidelines for section 56.20002, which are set forth in the Secretary's Program Policy Manual ("Manual"). Department of Labor, Mine Safety and Health Administration, Program Policy Manual, Vol. IV (July 1, 1988) 67. Further, the Secretary offered no testimony regarding his interpretion of the term and the criteria by which his inspectors determine what constitutes such an area. I can only observe that if, as the Manual states, the purpose of the standard is "to ensure that potable drinking water is supplied and made available to all workers . . . to prevent water-deficiency related illness and to prevent workers from drinking ground water," 500 feet does not seem too far to travel to meet these goals. Id.

The Secretary further argues that Arenas Matilde did not prove that the employees were told ever that the water in the trailer was available for their use, or that they were permitted

to go into the trailer. Sec. Br. 9-10. However, these concerns were not alleged as violations of the standard and are not relevant to Arenas Matilde's defense of the Secreatry's allegation.

CIVIL PENALTY

I have found Arenas Matilde in violation of section 56.14130(g) as alleged in Citation No. 3611121. Further, I have found the violation was serious and that Arenas Matilde was negligent in allowing it to exist. The violation was abated immediately. Arenas Matilde is small in size and has a small history of previous violations. Exh. P-2. There is no indication that any penalty assessed will affect the company's ability to continue in business.

The Secretary has proposed assessment of a civil penalty of five-hundred six dollars ($506), which I find to be excessive. Given the statutory civil penalty criteria, I assess a penalty of one hundred dollars ($100).

ORDER

Arenas Matilde is ORDERED to pay a civil penalty in the amount of one-hundred dollars ($100) for the violation of section 56.14130(g) as cited in Citation No. 3611121. The Secretary is ORDERED to vacate Citation No. 3611122 and Citation No. 3611123. In addition, the Secretary is ORDERED to modify Citation No. 3611121 by deleting the S&S finding. Payment of the penalty is to be made to MSHA within thirty (30 days of this proceeding. The citations are to be vacated within thirty (30) days of this proceeding. Upon receipt of payment and vacation of the citations, this matter is DISMISSED.

David F. Barbour
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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NOV 8 1993

FMC WYOMING CORPORATION, Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. WEST 92-174-RM
	:	Order No. 3634714; 11/27/91
v.	:	
	:	Docket No. WEST 92-175-RM
	:	Order No. 3634718; 11/27/91
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. WEST 92-176-RM
	:	Order No. 3634720; 11/27/91
	:	FMC Trona Mine
	:	Mine I.D. 48-00152
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEST 92-464-M
	:	A.C. No. 48-00152-05608
v.	:	Docket No. WEST 92-542-M
	:	A.C. No. 48-00152-05612
FMC WYOMING CORPORATION, Respondent	:	FMC Trona Mine

DECISION

Appearances: Matthew F. McNulty, Esq., VAN COTT, BAGLEY, CORNWALL & McCARTHY, Salt Lake City, Utah, for Contestant/Respondent;

Kristi Floyd, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner/Respondent.

Before: Judge Morris

These contest and civil penalty proceedings arose under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the "Act"). In the civil penalty proceedings, the Secre-

tary seeks to impose civil penalties against FMC Wyoming Corporation ("FMC").

After notice to the parties, a hearing on the merits took place in Salt Lake City, Utah.

The parties filed post-trial briefs.

STIPULATION

At the commencement of the hearing, the parties stipulated as follows:

1. FMC Wyoming Corporation ("FMC") is engaged in mining and selling of sodium compounds in the United States, and its mining operations affect interstate commerce.

2. FMC is the owner and operator of FMC Trona Mine, MSHA I.D. No. 48-00152.

3. FMC is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq. (the "Act").

4. The Administrative Law Judge has jurisdiction in this matter.

5. The subject citations/orders were properly served by duly authorized representatives of the Secretary upon an agent of FMC on the dates and places stated therein, and may be admitted into evidence for the purpose of establishing their issuance, and not for the truthfulness or relevancy of any statements asserted therein.

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

7. The proposed penalty will not affect FMC's ability to continue in business.

8. FMC is a large mine operator with 3,132,680 hours worked in 1991.

9. The certified copy of the MSHA Assessed Violations History accurately reflects the history of this mine for the two years prior to December 9, 1991.

SETTLEMENTS

At the commencement of the hearing, the parties further agreed to settle certain citations:

1. As to Citation No. 3634735 FMC seek to withdraw its contest and pay the proposed penalty of $100. (Tr. 7).

2. As to Citation No. 3634706 the parties seek to reduce the penalty from $1000 to $780. They further noted FMC abated the violative condition, and it was agreed the accompanying non-penalty 104(b) Order should be affirmed. (Tr. 7).

3. As to Citation No. 3904302 FMC moved to withdraw its notice of contest and pay the proposed penalty of $1800. (Tr. 9).

4. As to Citation No. 3904303 the parties sought to amend the Citation and reduce the penalty for $206 to $50. (Tr. 9).

I have reviewed the proposed settlements as stated on the record and I find they are reasonable and in the public interest. They should be approved.

STATEMENT OF THE CASE AND ISSUES

No dispute exists as to the three citations issued under Section 104(a) of the Act. The citations, described hereafter, are supported by the testimony of MSHA Inspector Gerry Ferrin, an electrical specialist. FMC's witness Carl Watson offered no contrary evidence.

The dispute centers on whether the Inspector abused his discretion in failing to extend the time of abatement when he was requested to do so. Further, the proposed penalties are an issue in the case.

Citation No. 3634712 alleges FMC violated 30 C.F.R. § 57.20003. [1] It reads:

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[1] **§ 57.20003 Housekeeping.**

At all mining operations--

(a) Workplaces, passageways, storerooms, and service rooms shall be kept clean and orderly;

(b) The floor of every workplace shall be maintained in a clean and, so far as possible, dry condition.

> A quantity of trona had spilled on the stairway by E11 elevator, sesqui shipping; on the stairway access and on the access to the valves beside the stairway. The passageway and stairway was (sic) was not maintained in a clean and orderly condition. (Ex. G-2).

When FMC failed to abate the violative conditions, the Inspector issued Order No. 3634717 under Section 104(b) of the Act. (Ex. G-2).

Citation No. 3634713 alleges FMC violated 30 C.F.R. § 57.12032. [2] It reads:

> The thermostat in the restroom in Sesqui shipping was not provided with a cover over the 110 VAC terminals. The thermostat was about 4.5 feet above floor level. The terminals were somewhat recessed so that contact was unlikely. (Ex. G-3).

When FMC failed to abate the violative conditions, the Inspector issued Order No. 3634718 under Section 104(b) of the Act. (Ex. G-3).

> Where wet processes are used, drainage shall be maintained, and false floors, platforms, mats, or other dry standing places shall be provided where practicable; and
>
> (c) Every floor working place, and passageway shall be kept free from protruding nails, splinters, holes, or loose boards, as practicable.

[2] **§ 57.12032 Inspection and cover plates.**

Inspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs.

Citation No. 3634714 alleges FMC violated 30 C.F.R. § 57.20003.[3] It reads:

> In the old sesqui bagging/shop platform, housekeeping had not been performed throughout the entire area. Bags of soda ash had been dropped in walkways, cardboard, paper, rags, and metal materials were strewn about. (Ex. G-4).

When FMC failed to abate the violative conditions, the Inspector issued Order No. 3634720 under Section 104(b) of the Act. (Ex. G-4).

DISCUSSION AND FURTHER FINDINGS

On November 26, 1991, MSHA Inspector Gerry Ferrin issued Citation Nos. 3634712, 3634713, and 3634714. These three Citations were issued under Section 104(a) of the Act. (Gov. Exs. G-2, G-3, and G-4). On November 27, 1991, approximately 24 hours later Inspector Ferrin issued an accompanying 104(b) order for each Citation.

Evidence as to 104(a) Citations

CITATION NO. 3634712

The area involved in this Citation was identified as a passage or travelway. (Tr. 16, 58). Inspector Ferrin considered the area to be in use because he observed packed-down trona as well as footprints in the trona. (Tr. 17). Mr. Watson confirmed the passageway was in use and access had not been restricted. (Tr. 54, 60, 74).

Inspector Ferrin identified slip, trip, or fall as the hazard. He believed supervisory personnel traveling through the area should have recognized the hazard and taken care of it. (Tr. 16, 18, 59).

The uncontroverted facts establish a violation of 57.20003 and Citation No. 3634712 should be affirmed.

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[3] Cited, supra fn 1.

Citation No. 3634713

This Citation was issued on November 26, 1991, at approximately 10:23 p.m. Inspector Ferrin indicated the conditions cited presented an electrical shock hazard. (Tr. 24). He further testified as to the absence of any testing or repairs on the thermostat. (Tr. 24). Both management and employees use the restroom. Mr. Ferrin felt someone should have recognized the hazard and corrected it. (Tr. 26).

On the uncontroverted evidence Citation No. 3634713 should be affirmed.

Citation No. 3634714

This Citation was issued on November 26, 1991, at approximately 10:24 p.m. Inspector Ferrin described the area in question as a passageway and mechanic's storage/work areas. A slip, trip, or fall were identified as the hazards.

Mr. Watson indicated that access was not restricted to this area. In addition, it was possible that a mechanic might enter the area. (Tr. 64, 75-76).

Inspector Ferrin thought that someone should have recognized the hazards and taken corrective action. (Tr. 32).

On the uncontroverted evidence, Citation No. 3634714 should be affirmed.

Order Nos. 3634717, 3634718, and 3634720

The above 104(b) orders were issued on November 27, 1991, approximately 23 hours after the above 104(a) citations. Because of the circumstances surrounding the issuance of the orders, as well as the evidence of FMC, all three orders can be discussed together.

It is uncontroverted that FMC failed to abate the original citations.

Section 104(b) of the Act contains the authority for a failure to abate the order. It provides:

> (b) If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection (a) has not

> been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, except those persons referred to in subsection (c), to be withdrawn from, and to be prohibited from entering such area until an authorized representative of the Secretary determines that such violation has been abated.

Inspector Ferrin had originally set the time for abating the 104(a) violations as 4 p.m. on November 27, 1991. When he returned to the cited areas, approximately 23 hours after the initial citations had been issued, he observed that no apparent effort had been made to abate the violations (Tr. 19-20, 27, 32). FMC's Representative Watson verified the failure to abate. (Tr. 67-72).

Mr. Watson agreed the time allowed for abatement by the Inspector was reasonable (Tr. 78). Inspector Ferrin originally set the abatement time for each citation based on past experience and upon conversations with Carl Watson and the miner's representative, both of whom had accompanied him on the inspection. (Tr. 18).

DEFENSES

FMC offered several excuses regarding the failure to abate. These excuses included: the absence of a supervisor or a foreman on the inspection party (Tr. 52); [one foreman had called in sick (Tr. 55)].

FMC inspections had not occurred on the swing shift (Tr. 52); there was no graveyard shift in the cited areas (Tr. 53).

The violations were not of a severe nature (Tr. 70).

Watson stated that he discussed all of the above factors with Inspector Ferrin before the orders were issued (Tr. 70).

Mr. Ferrin testified that he had considered the nature of the violations and degree of danger posed by them (Tr. 41). Among the most important factors was whether the operator had made a reasonable effort to abate the violations. In fact, Mr. Ferrin stated that if a sincere effort has been made to abate a citation, he will extend an abatement period (Tr. 29, 32). In this case, however, the Inspector could find no mitigating circumstances or evidence of any effort made to abate the citations that would allow him to grant an extension (Tr. 23).

Mr. Ferrin believed that a lack of communication that allows a hazardous condition to continue to exist is not an excuse sufficient to allow an extension (Tr. 22). Opening and maintaining lines of communication is the responsibility of management and the breakdown of a communication line can not serve as an excuse for failing to abate a hazard. Mr. Ferrin also stated that the absence of a foreman on the inspection would not be a legitimate reason for an extension (Tr. 42, 44). Similarly, one foreman calling in sick hardly qualifies as an excuse; production does not stop when one man is absent (Tr. 78).

Carl Watson, a member of management, accompanied Mr. Ferrin on the inspection and was served with the three original Section 104(a) citations (Tr. 56). Mr. Watson then gave the citations to the foreman that was working at the time. The foreman is also a member of management (Tr. 72). Mr. Watson also informed Jack Thorner, his boss, of the citations. Mr. Thorner also is a member of management (Tr. 72).

APPLICABLE CASE LAW

The factors to be considered in determining whether an abatement period should be extended are (1) the degree of danger that any extension would have caused to miners; (2) the diligence of the operator in attempting to meet the time originally set for abatement; and (3) the descriptive effect an extension would have had on operating shifts. Youghiogheny and Ohio Coal Company, 8 FMSHRC 330 (March 1986, Maurer, Judge) citing Consolidation Coal Company, Barb 76-143 (1976).

In considering the initial facet, I conclude that the degree of danger caused by an extension of abatement was low. The Secretary does not claim otherwise and the 104(a) citations were not designated as S&S. All three citations indicated that an injury was "unlikely."

In considering the second facet, it appears the operator was not diligent. No effort was made to meet the time originally set for abatement.

In considering the third facet, the record fails to establish that an extension would disrupt the operating shifts.

FMC argues that for at least 15 years MSHA inspections had been performed on the day shift. The instant inspection was the first MSHA "off-shift" inspection.

An inspection during an "off-shift" could disclose safety deficiencies that might not be observed during the day shift. MSHA has considerable discretion in scheduling its inspections.

I am unwilling to conclude that a shift change in inspections constitutes an abuse of that discretion.

As a further reason in support of its position, FMC asserts its chain of command was broken because no superintendent or foreman was able to participate in the inspection.

I am not persuaded the chain of command had broken down. Carl Watson, a member of management, accompanied the Inspector and was served with the three original citations (Tr. 56). Mr. Watson gave the citations to the foreman who also is a member of management (Tr. 72.) Mr. Watson informed his boss Jack Thorner of the citations (Tr. 72). In sum, the communication lines were well established.

FMC claims an extension should have been granted because of extenuating circumstances citing Old Ben Coal Co., 1 MSHC 1452, 1456 (IBMOA 1976) and United States Steel Corporation, 1 MSHC 1490, 1492 (IBMOA 1976). These cases are not controlling.

In Old Ben the Interior Board held the Judge abused his discretion in vacating a notice of violation merely because it contained an unreasonably short abatement period. This issue is not present in the case at bar. FMC's witness Watson confirmed that the abatement time was the next day. Further, he stated "these people would have had time to abate the citations on the day shift the next day" (Tr. 74).

United States Steel Corporation is not factually similar to the instant case. 1 MSHC at 1491.

For the foregoing reasons, the 104(a) citations and 104(b) failure to abate orders should be affirmed.

CIVIL PENALTIES

The Secretary states that the 104(b) orders should be affirmed with no penalty and further states that the (b) order "enhances" the penalty for the 104(a) citations (Tr. 8). I reject the Secretary's views that the 104(b) orders "enhance" the 104(a) citations. Section 110(i) contains the critical criteria on assessing appropriate civil penalties and no "enhancement" exists in the Mine Act.

Section 110(i) of the Act mandates consideration of six criteria in assessing appropriate civil penalties.

Considering the evidence, it appears that FMC is a large operator with 3,132,680 hours worked in 1997 (Stipulation).

The proposed penalties will not affect FMC's ability to continue in business (Stipulation).

FMC's history of previous violations indicated it was assessed 240 violations for the two-year period ending December 9, 1991 (Ex. G-1).

The operator was negligent in that the violative conditions in the two housekeeping violations were open and obvious. In addition, the lack of a cover over 110 VAC terminals was open and obvious.

The evidence establishes to gravity was minimal. The Inspector considered any injury to be "unlikely."

FMC failed to demonstrate any good faith since it did not attempt to achieve prompt abatement of the violations.

Considering the statutory criteria, a penalty assessment of $100 for each contested violation is appropriate.

For the foregoing reasons, I enter the following:

ORDER

1. **WEST 92-542-M:**

Citation No. 3904302 and the proposed penalty of $1,800.00 are **AFFIRMED.**

Citation No. 3904303 and the amended penalty of $50.00 are **AFFIRMED.**

2. **WEST 92-464-M**

Citation No. 3634706 and the amended penalty of $780.00 are **AFFIRMED.**

Order No. 3634707 is **AFFIRMED.**

Citation No. 3634735 and the proposed penalty of $100 is **AFFIRMED.**

Citation No. 3634712 is **AFFIRMED** and a penalty of $100.00 is **ASSESSED.**

Order No. 3634717 is **AFFIRMED.**

Citation No. 3634713 is **AFFIRMED** and a penalty of $100 is **ASSESSED.**

Order No. 3634718 is **AFFIRMED.**

Citation No. 3634714 is **AFFIRMED** and a penalty of $100.00 is **ASSESSED.**

Order No. 3634720 is **AFFIRMED.**

3. **WEST 92-174-RM, WEST 92-175-RM,** and **WEST 92-176-RM,** the contest cases, are **DISMISSED.**

John J. Morris
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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NOV 12 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 93-171 A.C. No. 05-00294-03503ZW5
v.	:	Somerset
ART BEAVERS CONSTRUCTION COMPANY, Respondent	:	

DECISION

Appearances: Susan J. Eckert, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
James E. Masson, Esq., Crawford, Colorado, for Respondent.

Before: **Judge Cetti**

I

This case is before me upon a petition for assessment of civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act". The Secretary of Labor, on behalf of the Mine Safety and Health Administration, (MSHA), charges the Art Beaver Construction Company (Construction Company) with the violation of 30 C.F.R. § 48.28(a). That safety standard provides that each "miner" shall receive a minimum of 8 hours annual refresher training.

The mine inspector issued a 104(g) order alleging that four of the Construction Company's employees who had not received 8 hours annual refresher training were "observed performing laborer duties at this mines surface." MSHA made a special assessment and proposed a penalty of $800.

The operator filed a timely appeal contesting the existence of the alleged violation and the appropriateness of the proposed penalty.

II

ISSUES

At the hearing the issues raised by the Secretary were as follows:

1. Is Art Beavers Construction Company an independent contractor performing services or construction at mines?

2. Is Art Beavers Construction Company an operator performing services or construction at a mine site covered under the Federal Mine Safety and Health Act of 1977?

3. Did Art Beavers Construction Company employ individuals who are considered miners under the Act to perform services or construction at a mine site?

4. Did a violation of 30 C.F.R. § 48.28(a) occur as alleged in Order number 4060714?

5. Was such violation of a significant and substantial nature?

Issues raised by the Construction Company were as follows:

1. Whether the employees of Beavers Construction Co. were miners.

2. Whether the employees of Beavers Construction Co. were required to have safety certificates.

3. Whether the employees of Beavers Construction Co. were regularly or frequently exposed to mine hazards.

4. Whether the efficacy of the citation was terminated by the MSHA official on September 15, 1992; thus rendering the penalty assessment illegal or inappropriate.

5. Whether the penalty of excluding the employees from the premises of the mine was sufficient penalty.

6. When did the alleged violations occur. Does the citation adequately advise the Respondent of when the alleged violation occurred.

7. Were the employees of Beavers Construction Co. casual labor on the mine premises; infrequent laborers and thus not required to have safety certificates?

III

STIPULATIONS

At the hearing the following stipulations were read into the record.

1. The Commission has jurisdiction in this matter.

2. The subject order 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 purpose of establishing issuance and not for the truthfulness or relevancy of any statements asserted therein.

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

4. The proposed penalty will not affect Respondent's ability to continue in business.

5. The company demonstrated good faith in abating the violations.

6. The certified copy of the MSHA section violation history accurately reflects the history of this company for two years prior to the date of the order.

7. On September 10, 1992, the employees of Art Beavers Construction Company were cited and ordered from the premises of the mine at Somerset, Colordo, and on September 15, 1992, the order was terminated because the employees that had been cited received the annual eight-hour safety refresher course, on September 12, 1992, by Ed Hayduk.

8. The time cards of the Respondent's employees shall be admitted for the truth of the matters asserted therein without the need of the testimony of the company bookkeeper, Patricia Morse.

9. The company is a small company for purposes of size and penalty.

IV

The parties at the hearing presented documentary evidence and points and authorities in support of their contentions as well as written and oral argument. During a recess at the hearing the parties negotiated and reached a settlement of the case. On the record the parties moved for approval of their oral

settlement. The Solicitor stated that the original proposed penalty resulted from a special assessment and based on her conversations with the MSHA District Office during the recess it was agreed that in view of MSHA's reevaluation of the negligence, the history of no prior violations, the prompt abatement of the violation and the small size of the business, the penalty should be modified to one based on the regular assessment criteria including the S&S designation of the violation. Computation on this basis would result in a penalty of $195.

V

CONCLUSION

Based upon MSHA's reconsideration of the level of negligence, the timely abatement of the violation, the construction company's lack of penalty history (the company has never been cited before) and the small size of the construction company's business, it appears quite appropriate and reasonable to base the penalty on a "regular" rather than a "special" assessment, keeping intact and affirming the significant and substantial characterization of the violation of 30 C.F.R. § 48.28(a). It satisfactorily appears from the record that the citation should be affirmed as written and that the appropriate penalty for the violation in this case is $195.

ORDER

Accordingly it is **ORDERED** that Order No. 4060714 including the significant and substantial designation of the violation of 30 C.F.R. § 48.28(a) be and is **AFFIRMED** and that Respondent, Art Beaver Construction Company pay a civil penalty of $195 to the Secretary of Labor within 30 days of the date of this decision. Upon receipt of payment this proceeding is **DISMISSED.**

August F. Cetti

August F. Cetti
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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NOV 16 1993

NICHOLAS RAMIREZ, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. WEVA 92-1115-D
BEAR RUN COALS, INCORPORATED,	:	HOPE CD 92-9
MR. DAVID "TOBY" TONEY,	:	
W-P COAL INCORPORATED, Respondents	:	Mine No. 21

DECISION APPROVING SETTLEMENT

Before: Judge Koutras

Statement of the Case

This proceeding concerns a complaint of alleged discrimination filed by the complainant against the respondent pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). The complainant alleges that he was laid off by the respondent on May 5, 1992, because he served as the miners' representative at the mine.

The case was scheduled for hearing in Logan, West Virginia, on October 26, 1993. However, the hearing was continued after the parties advised me that they agreed to settle the matter. They have now filed their joint settlement proposal pursuant to Commission Rule 31, 29 C.F.R. § 2700.31, seeking approval of the proposed settlement.

Discussion

The parties have agreed to the resolution of all matters set forth in the complaint and have settled the matter. The terms of the settlement are set forth in an agreement executed by counsel for the respondents, and the complainant. All of the parties, including the complainant, have singed the agreement.

Conclusion

After careful review and consideration of the settlement terms and conditions I find that they reflect a reasonable resolution of the complaint and that the proposed settlement is in the public interest. Since it is apparent that all parties are in accord with the agreement for the settlement disposition of the complaint, I see no reason why it should not be approved.

ORDER

The proposed settlement IS APPROVED. The parties ARE ORDERED AND DIRECTED to forthwith comply with all the terms of the agreement. Upon compliance, this matter is dismissed with prejudice.

George A. Koutras
Administrative Law Judge

Distribution:

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NOV 17 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. LAKE 92-279-M A.C. No. 21-00282-05574
and	:	
	:	Minntac Mine
UNITED STEELWORKERS OF AMERICA, LOCAL 1938, Miners	:	
v.	:	
USX CORPORATION, MINNESOTA ORE OPERATIONS, Respondent	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. LAKE 92-306-M A.C. No. 21-00820-05676
v.	:	
	:	Docket No. LAKE 92-457-M
USX CORPORATION, MINNESOTA ORE OPERATIONS, Respondent	:	A.C. No. 21-00820-05706 Minntac Plant
	:	
	:	Docket No. LAKE 93-5-M
	:	A.C. No. 21-00282-05587
	:	
	:	Minntac Mine

DECISION

Appearances: Miquel J. Carmona, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for Petitioner;
James Ranta, Representative, United Steelworkers of America, Local 1938, for Miners;
William M. Tennant, General Attorney, U.S.S., Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Barbour

STATEMENT OF THE CASE

These consolidated civil penalty proceedings are brought by the Secretary on behalf of the Mining Enforcement and Safety Administration (MESA) against USX Corporation, Minnesota Ore Operations (USX), pursuant to Sections 105(a) and 110(a) of the Federal Mine Safety and Health Act of 1977 (Mine Act or Act).

30 U.S.C. §§ 815(a) and 820(a). The Secretary charges USX with five violations of certain mandatory safety standards for surface metal and nonmetal mines found in Part 56, Title 30 Code of Federal Regulations (C.F.R.). In addition, the Secretary asserts the alleged violations were significant and substantial contributions to mine safety hazards ("S&S" violations).

The alleged violations were cited by MSHA inspectors at USX's Minntac Mine and its Minntac Plant, both of which are parts of a large taconite operation located in St. Louis County, Minnesota. Following citation of the alleged violations the Secretary proposed the assessment of civil penalties. USX answered the Secretary's proposal by denying the violations, and by asserting in the alternative that if they had occurred they were not S&S.

Pursuant to notice the matters were heard in Duluth, Minnesota. Miguel J. Carmona represented the Secretary. William M. Tennant represented USX. In Docket No. LAKE 92-279-M, James Ranta represented the United Steelworkers of America (Steelworkers), who upon motion and without objection, were permitted party status.

During the hearing counsels stated they had agreed to settle the single violation alleged in Docket No. LAKE 92-457-M and one of the violations alleged in Docket No. LAKE 92-306-M.

THE SETTLEMENTS

DOCKET NO. LAKE 92-457-M

Citation No.	Date	30 C.F.R. §	Proposed Penalty	Settlement
4097355	6/10/92	56.11001	$309.00	$309.00

The citation alleges a S&S violation of section 56.11001 in that the floor area alongside a first floor belt conveyor was wet, muddy and slippery for a distance of 30 to 35 feet. The inspector who issued the citation found the condition was due to USX's negligence and that one person was exposed to a slipping or falling hazard as a result of the violation. The violation was abated within the time set by the inspector.

USX agreed to accept the citation and in doing so agreed that a violation of section 56.11001, which requires a safe means of access be provided and maintained in all workings places, occurred. Further, USX accepted the inspector's S&S and negligence findings, as well as the inspector's finding that it was reasonably likely one person would suffer an injury resulting in "lost workdays" or "restricted duty" due to the violation. USX further agreed to pay the proposed assessment.

DOCKET NO. LAKE 92-306-M

Citation No.	Date	30 C.F.R. §	Proposed Penalty	Settlement
4097197	3/17/92	56.12034	$288.00	$50.00

The citation alleges a S&S violation of section 56.12034, in that two lights located 71 inches above the walkway to the pan feeder furnace disconnects were not guarded. The inspector who issued the citation found the condition was due to USX's low negligence and that one person was exposed to a burn or shock hazard should he or she hit the lights. The violation was abated within the time set by the inspector.

USX agreed to accept the violation and the inspector's finding of negligence, and the Secretary agreed to vacate the inspector's S&S finding because, in counsel's opinion, the Secretary could not prove that allegation. Counsel stated that without the S&S finding and given USX's "low negligence," a $50 civil penalty was appropriate. USX agreed to pay that amount.

APPROVAL OF SETTLEMENTS

There is no indication payment of the agreed upon penalties will adversely affect USX's ability to continue in business. USX is large in size. The mine and plant have a large history of previous assessed violations. Pet. Exh's. 9 and 10. Based upon the representations of counsel and the civil penalty criteria, I conclude the penalties agreed to for the settled violations are appropriate and that the settlements are reasonable and in the public interest. Therefore, they are APPROVED. I will order payment of the civil penalties and vacation of the S&S finding at the close of this decision.

CONTESTED VIOLATIONS

STIPULATIONS

Prior to taking evidence on the contested violations the parties stipulated as follows:

1. That USX's Minntac operation is subject to the jurisdiction of the Mine Act and that the administrative law judge has jurisdiction to hear and decide the proceedings;

2. That civil penalties assess for any of the alleged violations will not affect the ability of USX to continue in business;

3. That USX exhibited good faith in abating all of the alleged violations in a timely fashion. Tr. 10.

DOCKET NO. LAKE 92-279

Citation No.	Date	30 C.F.R. §	Proposed Penalty
3893134	1/14/92	56.14214(b)	$350.00

Citation No. 3893134 alleges a violation of mandatory safety standard section 56.14214(b) and charges:

> At the East Pit, the [No.] 968 Locomotive train went thru the RR crossing at the [No.] 81 Dock, without sounding the horn. The RR Xing was a double track in which a train had just cleared the Xing heading West on the front track and the inspection van was waiting to cross the tracks. The No. 968 Locomotive train was heading East on the second track in which it was coming from the blind side because the view was blocked by the other train.

Pet. Exh. 1. The standard states that "[a] warning sound that is audible above the surrounding noise level shall be sounded -- [w]hen trains approach persons, crossings, other trains on adjacent tracks[.]" The parties agree that the train did not sound its horn at the crossing and thus that a violation of the cited standard occurred. They are at odds over whether the violation was S&S.

As is by now well recognized, the Commission has established four elements that must be proved by the Secretary in order to establish the S&S nature of a violation. Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981); Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984). Here, as is usually the case, the question is whether the third element has been satisfied; that is, whether the Secretary has proved that the failure of the locomotive to sound its horn at No. 81 Dock railroad crossing was reasonably likely to have resulted in an injury producing accident.

The inspector who cited the violation, Leon Mertesdorf, testified there are two tracks at the crossing and that a westbound train had just cleared the crossing when an eastbound train approached at a speed of 30 to 40 miles per hour and failed to sound its horn. According to Mertesdorf, the westbound train obscured the view of those in the van and they could not see the eastbound train coming. In addition, Mertesdorf believed the train operator's vision of the van equally was obscured. (Mertesdorf also stated he had seen the eastbound train earlier in the inspection party's travels and he warned the van driver, Randy Pond, that another train was on the tracks. Tr. 40.)

The tracks were used by trains that carried ore. The train that was headed east was empty, the train headed west was loaded. Tr. 21. The tracks formed the main haulage route for trains coming into and out of the west pit. Tr. 39. Mertesdorf believed approximately 15 trains went into and out of the pit during the course of a shift. Id. The road crossing the tracks was the main route from the east pit into the west pit. Tr. 38. Mertesdorf was of the opinion that "a lot of service vehicles" used the road each shift. Tr. 39.

Mertesdorf explained that because the eastbound train was not immediately visible, the normal reaction of a driver who had stopped at the crossing would be to proceed over the tracks and through the crossing once the westbound train had cleared the crossing. Tr. 24, 25. (There were stop signs on both sides of the crossing and railroad crossing signs at the crossing. The crossing did not have an audible signal. Tr. 37.)

Given the speed with which the westbound train approached the crossing, Mertesdorf believed an accident was reasonably likely. Tr. 29, 32. Mertesdorf stated that he had issued approximately three other citations at the mine for the failure of train operators to sound their horns. Tr. 35.

Randy Pond, a USX safety engineer at the mine, accompanied Mertesdorf during the inspection. He drove the van in which the inspection party was riding. He noted that Mertesdorf failed to mention the presence of a third track south of the two tracks on which the trains were located. The van had already crossed this track and had stopped between the third track and the double track when the eastbound train passed the crossing. Tr. 43-45; Exh. R-1. Pond maintained that even though he knew a train other than the westbound train was somewhere on the tracks and might be approaching, his vision was not totally obscured and he could see the eastbound train prior to it clearing the crossing.

Pond was of the opinion that it was not reasonably likely that the failure to sound the train's horn would have contributed to an accident because:

> I wasn't going to cross the tracks until I could see if anything was coming. I never do. I would never be flying across there in the blind.

Tr. 46.

Ranta, who not only represented the Steelworkers, but who also testified on their behalf, stated that pursuant to company rules, trains are supposed to make two long and two short horn blasts when they approach a crossing. Tr. 49; USX Exh. 1.

In arguing that the violation was not S&S, USX points out that Pond had stopped the van 20 to 25 feet away from the train track and waited for the train to clear the track before proceeding across and that Pond was aware of the presence of the train despite the fact the locomotive operator failed to sound the horn. Thus, at most, the evidence established "only that, on a single occasion, the operator failed to sound a horn as the train approached a crossing where a vehicle was waiting to cross when it was safe to do so [and that] [u]nder th[e]se circumstances, it was not reasonably likely that an event resulting in an injury would occur." USX Br. 11.

The problem with USX's argument is that it is focused upon the factual situation at the time of the violation. The concept of "reasonable likelihood" encompasses not only what happened at the time the violation occurred but also what reasonably could have been expected to happen if the violation continued to exist during the course of continuing normal mining operations. See Halfway, Inc., 8 FMSHRC 8, 12 (January 1986). Thus, I must consider not only what happened on January 14, but also what reasonably could have been expected to happen had the conditions been repeated during continued normal mining operations.

In this latter regard, it is important to note that the railroad crossing where the violation occurred was not an isolated, seldom used crossing. Rather, I accept Mertesdorf's testimony that the road crossing the tracks was the main road between the east and west pits and that it was used by many service trucks during the course of a shift. In addition, I accept his statement that during the same period of time the tracks were traveled by approximately 15 trains into and out of the pit.

I also credit Mertesdorf's testimony that the westbound train blocked his view of the eastbound train. Although Pond testified that he saw the oncoming train (Tr.43) and while this may well have been so, I believe, along with Mertesdorf, that he most likely had seen it earlier when Mertesdorf pointed it out and was aware therefore it might be approaching. Thus, Pond was alerted to be "on the lookout" at the crossing. I cannot assume other drivers always would have Pond's heightened awareness.

Given the train traffic at the crossing, it seems clear that during the course of continued normal mining operations eastbound and westbound trains would have met there again. It also seems clear that not every driver of a vehicle would have been as careful as Pond, who after all was driving a federal inspector and who, as I have found, was alerted to the possibility of an approaching train. Pond may always have stopped at the crossing when his vision was in any way obscured and not proceeded until he had good visibility but Pond was not everyman, and I cannot leave common knowledge of everyday behavior outside the S&S

evaluation. Drivers do not always stop at railroad crossings, which I assume is the reason USX implemented the standard by requiring the sounding of two long and two short whistles when a train approached the crossing.

As Mertesdof testified, other train operators had failed to sound their horns at crossings. It has happened previously, there is no reason to think it would not happen again. Given the reasonable likelihood that during continued normal mining operations the vision of drivers at the crossing would have been obscured by passing trains, given the fact that drivers do not always check for safe clearance before proceeding to cross the tracks, given the speed of westbound trains passing the crossing and given the amount of rail and road traffic at the crossing, I conclude that it was reasonably likely that during continued mining the conditions cited by Mertesdorf would have recurred and would have been reasonably likely to result in a potentially fatal accident. I therefore find the violation was S&S.

USX does not contest Mertesdorf's other finds regarding the violation. Tr. 54. On the basis of those findings, I conclude the violation was serious and was due to negligence on the part of USX. The mine has a large history of previous violations. Pet. Exh. 10. In the 24 months prior to June 10, 1992, there were five citations of section 56.14214(b) that were assessed and paid. Id. I will assess an appropriate civil penalty for the violation at the close of this decision.

DOCKET NO. LAKE 93-5-M

Citation No.	Date	30 C.F.R. §	Proposed Penalty
4097474	7/7/92	56.15005	$204.00

The citation charges as follows:

> At the West Pit, on the [No.] 32 stripping shovel, an employee was outside the operator's cab climbing a ladder to the top catwalk/platform above the operator's station while the shovel was operated by another shovel operator, swinging to load a truck. The employee was not in a secure position while the shovel was in swinging operation. There was a danger of him losing his grip and falling to the shovel roof, 5 to 6 feet below.

Pet. Exh. 3. In pertinent part the standard requires that "[s]afety belts and lines shall be worn when persons work where there is a danger of falling."

Mertesdorf testified that during the course of an inspection of the mine on July 7, 1992, the inspection party had parked the vehicle in which it was riding in order to observe the Bucyrus-Erie electric mining shovel in operation. While the shovel was digging, a person emerged from the operator's compartment and climbed the ladder at the rear of the compartment to the top of the compartment. Tr. 546-57; see Pet. Exh. 4. The person walked to the front of the compartment roof, turned and walked back and then climbed down the ladder. Tr. 57-58; Pet. Exh. 4. There was another person sitting on the roof taking pictures with a video camera. Mertesdorf believed both persons were involved in making a training video. Tr. 62, 66.

Originally, Mertesdorf cited USX for a violation of section 56.9200(d), which prohibits transportation of persons outside the cab of mobile equipment. However, one week prior to the hearing, counsel for Secretary moved, without objection, to amend the citation to a violation of section 56.15005. Mertesdorf understood the change was made "[b]ecause our attorneys said that the man wasn't being transported." Tr. 64, see also Tr. 65.

The ladder the person climbed was approximately 5 to 6 feet high. In Mertesdorf's opinion the hazard was that the person could have fallen off the ladder or off the roof of the operator's compartment due to the "jerking and swinging" of the shovel. Tr. 58. Mertesdorf believed the shovel should have been stopped while the person climbed the ladder. Short of that, the person should have tied off while climbing the ladder. In addition, the person should have had a safety belt and have secured it to the handrailing that ran around the compartment roof once he had reached the roof. Tr. 60. Mertesdorf, however, admitted he had never seen anyone tie off when climbing such a ladder and he did not know what purpose would have been served by using a safety belt on the roof. Tr. 65-66. (As Pet. Exh. 5 clearly shows, there was a two-rail railing around the roof.)

Because of the movement of the shovel, Mertsdorf believed it was reasonably likely the person would have lost his grip and fallen and have suffered a lost time injury. Tr. 61. In his opinion, such a fall could have resulted in a sprained ankle or wrist or a strained foot. Tr. 62.

To prove a violation of section 56.15005, the Secretary must establish the person climbing the ladder and walking on the roof was in danger of falling. Moreover, the danger must be that of an injury produced by the fall and prevented by the wearing of a safety belt or line. The record does not support finding that falling from the 5 to 6-foot ladder would have produced an injury. Moreover, as Mertsedorf ultimately seems to have recognized, it was utterly impractical to expect the person to tie off while climbing the ladder. Further, once the person was on the top of the operator's compartment, the railing made it

unreasonable to expect that he would fall from the roof, even though the shovel was jerking and swinging, and the record does not support finding that falling to the roof would have produced an injury preventable by wearing a safety belt or line.

Mertesdorf probably was right in stating that the person should not have been on the ladder or been walking on the roof while the shovel was in motion, but that concern is not addressed by the standard the Secretary ultimately chose to allege was violated. Thus, I agree with USX that the Secretary has failed to sustain his burden of proving that a violation of section 56.15005 existed and that the citation should be vacated. USX Br. 11-12.

Citation	Date	30 C.F.R. §	Proposed Penalty
4097478	7/13/92	56.17001	$288.00

The citation charges as follows:

> At the far-west pit, the [No.] 28 P&H 2100 BL shovel had inadequate lighting at the boarding ladder and walkway. The light at the shovel house entrance was broken and the light bulb at the top of the stairs, and operator cab entrance, was burned out, plus the top of the shovel roof A-frame had both lites [sic] burned out. The whole boarding area of the shovel was dark after daylight hours.

Pet. Exh. 5. The standard states that "[i]llumination sufficient to provide safe working conditions shall be provided in and on all surface structures, paths, walkways, stairways ... and work areas."

Mertesdorf issued the citation at 1:30 p.m., during daylight hours. He stated, however, that as a general rule, when he inspected a shovel he not only looked at the conditions in existence when he conducted the inspection, he anticipated the kind of conditions that would be present during later shifts that day. Tr. 70.

The shovel was used by USX to dig ore and load railroad cars. Tr. 72. Mertesdorf maintained that upon inspecting it he observed that all lights used to illuminate the boarding area were out. (By "out" he meant that a few were missing but most were burned out. Tr. 73.) In describing the lack of lighting in the boarding area, Mertesdorf stated that the lights under the shovel's carriage (approximately nine to twelve lights) used to illuminate the ground were out, as was the light above the ladder that a person had to climb to board the shovel and the light used to illuminate the stairway to the operator's compartment.

Additionally, lights were out on the A-frame, lights that illuminated the area in back of the shovel and the work cages and platform at the top of the shovel. Tr. 72-73, 75-76, 81. (The A-frame is part of the structure of the shovel and it rises above the operator's compartment and the compartment housing the shovel's engine. Tr. 73; See Pet. Exh. 4.) Except for the lights on the A-frame, most of the missing and burned out lights were "regular household lamps," that is, 75-watt to 100-watt bulbs. Tr. 76, 84.

Although there were large "beacon lights" on the front of the shovel, they directed most of their light forward. Mertesdorf also recalled seeing a large light at the back of the shovel. He agreed that it would "pretty well light up the back of the shovel." Tr. 85. Mertesdorf believed the illumination at the shovel was insufficient to assure safety because "if there [are] no lights burning at all, it's going to be dark" and "because of the rugged terrain and the access to the shovel, being it was so rough and so hard ... it was reasonably likely that a person could fall and the injury ... would be at least a sprain or a strain ... from the fall. Tr. 78. The fact that a person entering the shovel would have had to use a flashlight while climbing the ladder to board the shovel added to the likelihood of injury. Tr. 79. (Pond, who accompanied Mertesdorf, believed an employee would have put the flashlight in a tool bag and used both hands to climb the ladder. Tr. 106.) Mertesdorf found the alleged violation was S&S, and he stated it was reasonably likely a lost time injury would have occurred because of the insufficient illumination. Tr. 78. He also believed the condition of the lights was due to USX' negligence. Tr. 80.

Mertesdorf did not know when the cited shovel last had worked at night. Tr. 76, 83. Because he never saw the shovel at night he did not know how much illumination the lights that were operating actually provided. Tr. 83. While he stated that it was not unusual for a shovel to have some lights burned out, he "drew the line" and found illumination was insufficient when he saw "the lights were burned out to the extend where I [did not] see a safe entrance for the man to get on board." Tr. 87. In general, he would not issue a citation for a violation of section 56.17001 unless there was an area that was so dark he could not see or unless there was an area totally lacking in lights. Id.

Pond, identified shovel lights that were working when the violation was cited. (These lights are depicted on photographs of the cited shovel. Resp. Exh's. 1 and 2 (LAKE 93-5-M.) According to Pond, four lights faced forward: a 150-watt high pressure sodium light, a 400-watt mercury vapor light, a 300-watt flood light and a 300-watt quartz light. (Pond stated that the average street light is 150 to 200-watts.) The top two lights

were placed at a 45° angle and gave some light to the side, as well as to the front. Tr. 94. Pond also confirmed that a 300-watt floodlight is on the back of the shovel. Tr. 95. Pond was uncertain, however, whether lights other than these were operating on the shovel and although he disagreed "strongly" with Mertesdorf about the number of lights that were out, he did not know the number. Tr. 96, 102-103.

Pond identified a USX document purporting to specify the work history of the shovel. Resp. Exh. 3 (LAKE 93-5-M). The document indicated that from July 5, until the shift on which the citation was issued on July 13, the shovel was operated a total of 3 hours while it was dark. Tr. 97-98. Pond also identified shift reports for those shifts the shovel was running between July 5 and when the citation was issued. Resp. Exh. 4 (LAKE 93-5-M). The reports, which were completed by the shovel operators and on which the operators were asked to indicate any repairs needed, contained no reference to any problems with illumination. Id.; Tr. 99. Pond stated that during the hours when it was dark and the shovel was operating the only person who worked on the shovel was its operator. Tr. 100. Finally, Pond was of the opinion that there would have been sufficient illumination to board the shovel at night because "We didn't get anybody to say anything different." Tr. 101.

The question of whether a violation occurred is dependent upon the amount of lighting provided in the areas where work was being performed (or would be preformed during continued normal mining operations), taking into account any hazards presented by the lack of adequate lighting. Whether illumination was sufficient to provide safe working conditions presents a question of fact, and, given the general nature of the standard, which covers a multitude of locations and work activities, the question usually will involve a subjective judgement on the inspector's part. However, there is a point at which an inspector's determination may be so subjective it does not provide a basis for a factual finding regarding whether the illumination was sufficient to provide safe working conditions, and I conclude that point has been reached here.

First, Mertesdorf cited the violation during daylight hours and did not observe the shovel working at night. Tr. 83. Second, he cited several different areas as lacking in sufficient illumination, but what really concerned Mertesdorf was the lack of light at the ladder and undercarriage (although he did not include nonfunctioning undercarriage lights in the body of the citation), which, in his opinion, made it unsafe for a person to board the shovel at night. Tr. 87. He would not have found a violation had there been illumination sufficient to allow safe boarding. Id.

I accept Mertesdorf's testimony that no lights were working in the boarding area. However, Mertesdorf agreed that there were other working lights on the shovel, and Pond credibly described the five floodlight-type lights that were operating on July 13, 1992. Tr. 84, 94. Mertesdorf further agreed these other lights would have provided "a little diffused" lighting. Tr. 84. Obviously, he could not say how much because he had not seen the shovel after sundown. Thus, even if I fully credit the inspector's testimony, which I do, this is not a situation where the work area in question -- the shovel boarding area -- would have been without light entirely. See Kaiser Steel Corp., 2 FMSHRC 703, 721-722 (March 1980) (ALJ Koutras). That being the case, without more objective testimony regarding the actual illumination at night, I cannot find the Secretary has established the illumination was insufficient to allow a person to safely board the shovel, and I must therefore vacate the citation.

DOCKET NO. LAKE 92-306-M

Citation No.	Date	30 C.F.R. §	Proposed Penalty
4097196	3/17/92	56.14112(b)	$1,019.00

The citation charges as follows:

> The guard on the west side of the 001-03 main conveyor, protecting the undercarriage snubber pulley near the head pulley, was not kept in place. The conveyor was in operation, and a clean-up hose was observed extending approximately 3-feet under the belt. A person extending his arms or upper torso through the unguarded opening would be exposed to the pinch point approximately 18 inches above and to the right.

Pet. Exh. 6. The standard states that "[g]uards shall be securely in place while machinery is being operated, except when testing or making adjustments which cannot be performed without removal of the guard."

The citation was issued by Arthur J. Toscano at the plant. Toscano was accompanied during the inspection by USX supervisor of safety Robert Tomassoni and miners' representative Tim Kangas. The inspection party went first to the building housing the crusher and there waked the 00103 conveyor belt, which was operating. (Toscano estimated the conveyor runs at 400 to 500 feet per minute. Tr. 133.) The conveyor belt is approximately 4 feet wide. On the west side of the belt, just past the head area, Toscano noticed a conveyor belt guard in a raised position. The guard was hinged at the top and had been

raised and wired open to create a opening approximately 3 feet square in size. Inside the opening was the moving snub pulley and the moving bottom portion of the conveyor belt. Tr. 112, 117. (A "snub pulley" is defined as "[a]n idler pulley so mounted as to increase the arc of contact between a belt and a drive pulley." U.S. Department of the Interior, A Dictionary of Mining, Mineral and Related Terms (1968) at 1036.) A hose ran into the opening and the hose was spraying water under the snub pulley. The floor beside the opening was wet and slippery. Tr. 112-113.

Toscano believed the running hose was used to clean a troublesome spot under the belt -- a spot where "a buildup of mud and material would cause the belt ... to start slipping and clogging up" unless the spot frequently was cleaned. Tr. 114. He explained that wet, muddy spillage clings to the belt and drops off of the belt at the pulley. Tr. 117. The pulley and the conveyor belt created a pinch point, that according to Toscano was located approximately 1 1/2 foot above the mine floor and a few inches to the right of where the guard ended. Tr. 115. Thus, the frame of the guard offered 2 or 3 inches of protection from the pinch point. Tr. 131.

Although Toscano did not see anyone working in the vicinity of the open guard on July 17, and there were no footprints next to the cited opening, he believed the area was cleaned several times each shift, and he stated that a person cleaning under the belt and pulley with a hose while the guard was raised could slip into the pinch point. Tr. 116-117, 122, 124.

Further, although it was a practice at the plant to leave hoses running unattended under belts to wash away spillage, Toscano believed the amount of spillage disposed of in this way was limited and that to clear the entire area under the belt a miner would have had to direct the hose. Tr. 122-123. The miner would have to crouch to see under the belt and the pressure on the hose would cause the miner to lean toward the pinch point to control the hose. Tr. 116-117. If a pressure failure occured, Toscano believed the miner could loose his or her balance and slip or fall through the opening created by the raised guard into the pinch point. Tr. 116. (Normally, the hose was under high pressure, although on July 17 the pressure appeared to be reduced by the partial shut off of a valve. Tr. 123.)

The position of the hose indicated to Toscano that when a person cleaned with it, the person would have been very close to the opening -- just a matter of inches from it. Tr. 118. He agreed if the hose had sufficient pressure the person cleaning with it could have remained outside the unguarded area and cleaned, but he explained the temptation would be to get as close to the spillage as possible to ensure that all of it was cleaned. Tr. 126-127. Moreover, any person reaching into the opening to

pull the hose out would have his or her arm inches from the pinch point. Tr. 125.

Toscano feared that any person walking by the raised opening could loose his or her balance and fall into the opening, reach an arm out to catch himself or herself and be pulled into the pinch point. Tr. 119. Not only was the floor slippery, but the hose itself created a tripping hazard. However, he did not think it "highly likely" this would happen. Tr. 119.

Toscano found the alleged violation was due to USX's negligence. Pet. Exh. 6; Tr. 120-121. To abate the violation, the inspector required the guard to be welded to the frame of the conveyor "so that an employee unbeknownst to supervisor people couldn't be able to just lift up the flap and poke around or work around near that opening." Tr. 121.

Tomassoni was USX's sole witness. He described the raised guard as being approximately 2 by 3 feet in size. He agreed with Toscano the hose was under the belt. He described water as "trickling out" of the hose.

According to Tomassoni, hosing spillage from under the belt is a very common practice at the mine. Also, according to Tomassoni, USX employees are instructed not to work within 18 inches of a belt and not to reach under the belt to hose down spillage. Tr. 137. In addition, there is no need for an employee to go under the belt to recover a hose. Id. Normal water pressure at the mine is 90 PSI, and Tomasooni believed that pressure to be sufficient to wash down spillage and to do so from 10 to 25 feet away from the spillage. Tr. 138-139.

Tomassoni described the conveyor belt as running above the snub pulley. Because of this, the pinch point was positioned approximately 18 inches above the metal frame of the belt structure. Tr. 141; Resp. Exh. 1 (LAKE 72-306-M). In order to reach the pinch point an employee would have to "take his arm and actually extend it up behind the side frame of the conveyor." Tr. 142. Thus, Tomassoni maintained that because of the position of the pinch point there was no away a person could become entangled in the pinch point without intentionally reaching into it. Moreover, the conveyor belt frame prevented a person from falling into the pinch point. Tr. 143. Further, the snub pulley bearing housing, which Tomassoni described as a "massive piece of steel" also provided protection against a person coming into contact with the pinch point. Tr. 145.

Toscano was recalled as a witness following Tomassoni's testimony and stated he agreed that the position of the snub pulley provided partial protection from the pinch point. However, he believed that a person could contact the pulley "very

easily" by reaching in to grab the hose and having a sleeve caught on the moving belt. Tr. 149.

USX does not contest the violation. Rather, it argues Toscano incorrectly found the violation was S&S. Tr. 113. Here again, the critical question is whether the Secretary has proven that the failure to keep the guard securely in place was reasonably likely to have resulted in an injury producing accident. On balance, it seems to me the answer is "yes."

While I find Tomassoni accurately described the position of the pinch point as being above and behind the side frame of the conveyor belt and while I conclude that this position made it impossible for a miner to inadvertently come in contact with the pinch point per se, I also am persuaded that Toscano was right in noting that a miner's clothing could snag on the belt as it rounded the pulley and that if this happened the miner easily could be dragged up into the pinch point. Tr. 148. Obviously, if such an accident happened, the miner would be subjected to the possibility of serious injury -- or perhaps of death.

Obviously, as well, for such an accident to have been reasonably likely, miners must regularly have been adjacent to the unguarded snub pulley. I conclude they were. I note especially Tomassoini's testimony that the hosing of spillage was "very common" at the plant, and I conclude that miners frequently were in an area of the open guard. Tr. 137. I am persuaded also that it was likely for a miner to slip or fall in the area. With "very common" hosing under the belt, I conclude the floor area adjacent to the opening was frequently wet and slippery. Even a person crouching next to the raised guard could have slipped and reached in to steady himself or herself, and once within the confined and unguarded area adjacent to and under the belt, contact with the moving belt was reasonably likely.

I do not accept Tomassoni's opinion there was no need for miners to reach into the opening. Tr. 137. Rather, I accept Toscano's testimony that there would be times when the nozzle of the hose would snag under the belt (Tr. 125) and that in those instances a miner would be required to reach under the belt adjacent to the snub pulley to unsnag it. Further, and more important, the guard had been raised for some reason and, certainly, the most likely reason suggested by the record was to allow miners closer access to spillage under the belt in order to better hose it. (USX, who controlled the area involved, offered no alternative explanation for why the guard was raised.) In addition, I fully agree with Toscano that with the guard raised "the temptation would be [for miners] to get up as close as they could to clean [the spillage] and I infer that there would in fact be times when miners would reach within the open area to do so. Tr. 126-127. While Tomassoini may have been right that spillage could be washed away from a distance of 20 to 25 feet,

it is unrealistic to assume such always was the case. Spillage varies in size and content. Water pressure also can vary.

For all of these reasons, I conclude the failure of USX to keep the guard securely in place was reasonably likely to have resulted in a accident resulting in injuries of a reasonably serious nature and that Toscano correctly found the violation to be S&S.

USX does not contest Toscano's other findings regarding the violation and I find therefore that the violation was serious and was due to negligence on USX's part. The plant has a large history of previous violations, including 13 assessed violations of section 56.14112(b) in the 24 months prior to March 17, 1992. Pet. Exh. 9. I will take these factors into consideration when I assess a civil penalty for this violation.

ASSESSMENT OF CIVIL PENALTIES

DOCKET NO. LAKE 92-457-M

Citation No.	Date	30 C.F.R. §	Civil Penalty
4097355	6/10/92	56.11001	$309.00

The parties have settled this violation for $309, and I have approved the settlement. I therefore assess a civil penalty of $309.

DOCKET NO. LAKE 92-279-M

Citation No.	Date	30 C.F.R. §	Civil Penalty
3893134	1/14/92	56.14214(b)	$500.00

Given the fact that USX is large in size, that the violation was serious and that the failure to should the horn at the crossing was not an isolated incident, as well as considering the other statutory civil penalty criteria, I assess a civil penalty of $500.

DOCKET NO. LAKE 93-306-M

Citation No.	Date	30 C.F.R. §	Civil Penalty
4097196	3/17/92	56.14112(b)	$500.00

Given the fact that USX is large in size, that the violation was serious and that in the 24 months prior to March 17, 1992, thirteen previous assessed violations of section 56.14112(b) have been cited and assessed at the plant, as well as considering the other statutory civil penalty criteria, I assess a civil penalty of $500.

Citation No.	Date	30 C.F.R. §	Civil Penalty
4097197	3/17/92	56.12034	$50.00

The parties have settled this violation for $50 and I have approved the settlement. I therefore assess a civil penalty of $50.

ORDER

USX is ORDERED to pay civil penalties in the assessed amounts as set forth above. In addition, in Docket No. LAKE 93-306-M, the Secretary is ORDERED to modify Citation No. 4097197 by deleting the S&S finding. In Docket No. LAKE 93-5-M, Citations Nos. 4097174 and 4097478 are VACATED.

USX is DIRECTED to pay the civil penalties of MSHA within thirty (30) days of the date of this decision. The Secretary is DIRECTED to modify Citation No. 4097197 within thirty (30) days of the date of this decision. Upon receipt of payment and upon modification of the citation, these proceedings are DISMISSED.

David F. Barbour

David F. Barbour
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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NOV 17 1993

BUCK MOUNTAIN COAL COMPANY, Contestant	:	TEMPORARY RELIEF
v.	:	Docket No. PENN 93-442-R
	:	Citation No. 4069590; 7/16/93
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Buck Mt. Slope

DECISION

Appearances: Mr. Richard D. Kocher, Sr., Pine Grove, PA for Contestant;
H. P. Baker, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, PA, for Respondent.

Before: Judge Fauver

This is an application for temporary relief from the Secretary's Withdrawal Order No. 4069590, under § 105(b) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

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

FINDINGS OF FACT

1. On July 16, 1993, Federal Mine Inspector Wallace Taylor and Supervisory Inspector Thomas Garcia inspected Contestant's Buck Mountain Slope Mine.

2. Contestant's roof-control plan states that breast crosscuts "will be supported with one row of single props . . . placed on 5 foot centers lengthwise." Ex. G-1, p. 5. The term "breast crosscut" is synonymous with the term "miner heading."

3. Miner headings are crosscut connections between the breasts. Miners position themselves there for safety when blasting at the face. Also, materials are stored in the miner headings.

4. The roof-control plan also contains a diagram of the mine which depicts the miner headings and defines the "o" symbols that appear in the miner headings as "single props, 4" minimum diameter, installed on 5' centers."

5. The inspectors observed that no props were installed in the No. 2 miner heading. When they informed Richard Kocher, partner and mine superintendent, of this observation, Kocher told them that the No. 1 miner heading did not have props either. Inspector Taylor also observed three miners working at the face.

6. Inspector Taylor issued § 104(d)(2) Order No. 4069590 for a violation of 30 C.F.R. § 75.220(a)(1) on the ground that Contestant failed to follow its approved roof-control plan.

7. Under normal mining operations, blasting can loosen the immediate mine roof, and may cause a roof fall. Inspector Taylor observed areas where the immediate mine roof had fallen.

8. The need for supporting the roof in this mine is substantial because the 30 foot breasts place extra stress on the pillars, the natural roof support.

9. Props installed on 5 foot centers in the miner headings could prevent roof falls. They also help predict changes in roof conditions before the ribs show signs of changing roof conditions.

10. Prior to July 16, 1993, MSHA issued § 104(d)(1) Citation No. 3082768 for a violation of 30 C.F.R. § 75.220(a)(1) on the ground that Contestant failed to follow its approved roof-control plan, by failing to install props in the miner headings.

11. To terminate Citation No. 3082768, Contestant installed props in the miner headings, and held a safety meeting with the miners. At the meeting, Kocher discussed the roof-control plan including the specific requirement of placing props in the miner headings.

DISCUSSION, FURTHER FINDINGS AND CONCLUSIONS

In an application for temporary relief, the Contestant has the burden of proving that (1) there is a substantial likelihood

that the findings of the Commission on the merits of a contest of the Secretary's order or citation will be favorable, and (2) such relief will not adversely affect the health and safety of miners. 30 U.S.C. § 815(b)(2); and 29 C.F.R. § 2700.46(a).

Contestant contends that when miner headings are driven less than 6 feet wide they do not require props for roof support because the ribs give adequate roof support. It also contends that the installation of props in such miner headings creates a safety hazard in that the props would restrict the miners' rapid escape when the miner heading is used as an escapeway.

The evidence is sharply divided on the safety issues. Mr. Kocher testified in support of Contestant's contentions. Inspector Taylor and an MSHA roof control expert, George Klinger, disputed his opinions and testified that the props are necessary for safety and, if removed, present a reasonable likelihood of a fatal roof fall. I cannot infer, from this conflicted testimony, that there is a substantial likelihood that the finding of the Commission on the merits of the order will be favorable to Contestant, or that granting the requested temporary relief from the order will not adversely affect the safety of the miners.

Accordingly, I must deny the application for temporary relief. This will be without prejudice to Contestant's rights (1) to petition MSHA for a modification of its roof-control plan or of the application of roof control standards to its mine widths, and (2) to contest before the Commission citations or orders on the ground that MSHA's refusal to approve Contestant's proposed modification of Contestant's roof-control plan is arbitrary and without merit.

CONCLUSIONS OF LAW

1. The judge has jurisdiction.

2. Contestant has not carried its burden of proving a case for temporary relief under Section 105(b) of the Act.

ORDER

The application for temporary relief is DENIED, and this proceeding is DISMISSED.

William Fauver

William Fauver
Administrative Law Judge

Distribution:

Mr. Richard D. Kocher, Sr., Partner, Buck Mountain Coal Company, RD #4, Box 393A, Pine Grove, PA 17963 (Certified Mail)

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/efw

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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NOV 18 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 92-334-M A. C. No. 23-01924-05520
v.	:	
FORT SCOTT FERTILIZER-CULLOR INC., Respondent	:	Fort Scott Fertilizer-Cullor, Inc.
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 93-117-M A. C. No. 23-01924-05523 A
v.	:	
JAMES CULLOR, Employed by FORT SCOTT FERTILIZER-CULLOR, INC., Respondent	:	Fort Scott Fertilizer-Cullor, Inc.

DECISION

Appearances: Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Gary W. Cullor, President, Fort Scott Fertilizer-Cullor, Inc., and James Cullor, pro se, for Respondents

Before: Judge Feldman

These consolidated cases are before me as a result of petitions for civil penalties filed by the Secretary of Labor pursuant to sections 110(a) and (c) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. § 820(a) and (c). The petitions charge the corporate respondent, Fort Scott Fertilizer-Cullor, Inc. (Fort Scott), with violations of four mandatory safety standards and James Cullor, as an agent of the corporate respondent, with knowingly authorizing, ordering, or carrying out two of these alleged violations.[1]

[1] Section 110(c) of the Act provides, in pertinent part, that agents of corporate operators who knowingly authorize, order or carry out violations of mandatory safety standards are subject to the same civil penalties that may be imposed on the corporate operator.

These matters were heard on September 21, 1993, in Fort Scott, Kansas at which time the parties stipulated that the respondents were subject to the provisions of the Mine Act. The Secretary called former Fort Scott employees Raymond Jenkins, a truck mechanic, and truck drivers William Burris and Timothy Ragland. Michael Marler, the issuing inspector, also testified on behalf of the Secretary. Gary Cullor and his uncle, James Cullor, testified for the respondents. The parties filed posthearing briefs.

STATEMENT OF THE CASE

These matters concern the following citation and orders issued to Fort Scott by Inspector Marler as a result of his May 27, 1992, inspection: 104(d)(1) Citation No. 4110164 for inoperable brakes on a 30 ton Euclid truck (big Euclid); 104(d)(1) Order No. 4110166 for a disconnected left front brake on a red Kline haulage truck; 104(d)(1) Order No. 4110167 for inoperable brakes on a 15 ton Euclid truck (small Euclid); and 104(d)(1) Order No. 4110171 for a broken leaf spring on a little Kline haulage truck.

James Cullor was cited for knowingly authorizing or carrying out the violations in Citation No. 4110164 and Order No. 4110167 by purportedly ignoring repeated complaints about malfunctioning brakes on the big and small Euclids by truck drivers Burris and Ragland. Marler determined that brakes on the big Euclid driven by Burris and the small Euclid driven by Ragland could not hold the trucks on level ground.

The respondents have stipulated to the fact of the defective brake conditions on the three trucks in issue and to the fact that there was a reasonable likelihood that the hazards contributed to by these conditions could result in injuries of a reasonably serious nature. (Tr. 12-18, 195, 212). However, the respondents attribute the faulty brake systems to improper slack-adjuster settings on three of the four wheels on each of the three cited trucks. The respondents maintain that these adjustments were tampered with by Burris and Ragland who then reported the defective brake conditions to the Mine Safety and Health Administration (MSHA) on May 22, 1992, shortly before Marler's May 27, 1992, inspection. Burris and Ragland were terminated on June 1, 1992, because they did not have steel-toed boots. (Tr. 164). Both subsequently filed discrimination complaints pursuant to section 105(c) of the Mine Act. On July 14, 1992, MSHA advised Fort Scott that it had determined that Burris and Ragland had not been discriminated against.[2]

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[2] The record was left open for Gary Cullor to submit copies of MSHA's discrimination determinations. Pursuant to my request, Cullor submitted this information on September 27, 1993. These

As noted herein, the testimony in this proceeding supports the respondents' contention that the brakes were tampered with. Moreover, the Secretary's decision not to pursue related discrimination complaints on behalf of Burris and Ragland further support the respondents' position that the subject brake complaints were lacking in merit. The remaining issue is whether employee misconduct for the sole purpose of imposing withdrawal and civil penalty sanctions on an operator is an affirmative defense given the strict liability nature of the Mine Act.

PRELIMINARY FINDINGS OF FACT

Gary Cullor is President of Fort Scott Fertilizer-Cullor, Inc. (Fort Scott), a close corporation. Cullor's wife, Sally Cullor, is Secretary and Treasurer of the corporation and is a 100 per cent shareholder. The violations are alleged to have occurred on March 27, 1992, at Fort Scott's limestone quarry in El Dorado Springs, Missouri. Fort Scott sold this facility to Ash Grove Cement Company in May 1993.

William Burris and Timothy Ragland were employed by Fort Scott as quarry truck drivers at its El Dorado Springs limestone facility. Burris was hired on September 16, 1991. Ragland was hired on March 26, 1992. Both Burris and Ragland are qualified interstate truck drivers. Each holds a certified commercial driver's license (CDL) in the State of Missouri. As CDL licensees, they are required to be familiar with the operation and maintenance of trucks, including truck braking systems. (Tr. 90-92, 152-153).

Burris and Ragland became upset over the subsequent hiring of Jerry Carpenter who, in addition to other duties, was a welder. Carpenter's salary was higher than the wages of Burris and Ragland. (Tr. 166). Burris "thought it was wrong" and that he "deserved more [money]" (Tr. 118). Ragland also did not "think [Carpenter's higher salary] was right." (Tr. 166). Burris and Ragland knew that Fort Scott had to timely complete its performance on a state job that it had bid for. (Tr. 117, 166). Threats were made concerning some type of action if they did not receive a raise. (Tr. 168). Specifically, Ragland testified:

> Q. You know Jerry Carpenter? Do you remember Jerry Carpenter that was hired at the quarry?
>
> A. I think so.

---

fn. 2 (Continued)
documents have been identified and admitted into evidence as Respondents' Ex. 1. (Tr. 129, 141).

Q. Do you remember an incident where he was hired and apparently somebody found out about what the pay rates was (sic) he got and several of you were upset about what he was getting paid?

A. I don't see what that's got to do with this?

Q. Do you remember that?

A. Yes, I do.

Q. Do you remember you and Bill and a couple of others wanting more money because he was getting paid more?

A. Well, we really didn't go to that extreme on it, no, but, yeah, I didn't think it was right, because he came to work there after we did.

Q. But you did ask for more money?

A. Yeah, we did.

Q. Do you remember at the same time referring that things could get awful slow around there as far as getting anything done or on our state project and equipment could break down?

A. I never said nothing like that, no.

Q. You don't remember anybody else saying anything like that?

A. I can't speak for other people.

Q. Do you remember anybody saying that?

A. I can't tell you that. I don't know.

THE COURT: Mr. Ragland, that's not the question he asked you. He asked you did you ever hear anybody say that?

THE WITNESS: Oh, they was always shooting crap about something, you know. It was just kind of like doing carpenter work, you know, it's just one of them deals where everybody goes hem-hawing around, talking about what they'd do, but, no, I can't say that I just heard a bunch of people going on about it, no.

THE COURT: Would you please restate the question? I don't know if I got an answer.

Q. (By Mr. Gary Cullor) Did you hear any comments from anybody, without naming names, referring to the fact that if we didn't receive more wages, there could be a work slowdown or that equipment could break down?

A. Not --

Q. Equipment could break down a lot?

A. Not in them words, no.

Q. But something similar to that?

A. It was more like there just wasn't nobody going to come back out there is what it was more than anything. I don't remember them saying anything about that, no. They were talking more kind of like strike features than they were demolishing anything.

Q. There would be some implications that there would be some type of action taken if they didn't get a raise?

A. I guess you could probably put it that way. (Tr. 166-168).

Burris and Ragland requested a pay raise. (Tr. 118, 166). They received a small pay raise on May 18, 1992.

On Friday, May 22, 1992, Ragland telephoned the MSHA office and spoke to Inspector Marler's supervisor. At that time, Ragland requested an MSHA inspection because the quarry trucks reportedly had no brakes. (Tr. 96, 165, 259, 278-279). Burris knew an inspector would soon inspect the El Dorado Springs facility. (Tr. 96). However, Burris testified that he did not experience brake problems on the days immediately preceeding Marler's May 27, 1992, inspection. (Tr. 106).

Burris and Ragland started hauling mud and water out of the quarry pit at approximately 8:00 a.m. on Wednesday, May 27, 1992. Burris was driving the big Euclid, Ragland was operating the small Euclid and Derek Edmiston was driving the red Kline haulage truck. (Tr. 88). Burris, Ragland and Edmiston made several trips into the pit to haul mud between 8:00 a.m. and 9:00 a.m. During this period, the red Kline and the small Euclid became stuck in the mud. (Tr. 96, 287-288). Normal quarry operations were then suspended at approximately 9:00 a.m. because the high loader was experiencing steering problems. (Tr. 31, 184). Contemporaneous with the high loader breakdown, Burris and Ragland complained to James Cullor that their truck brakes were not working. James Cullor stated that he did not observe any brake problems prior to Marler's inspection. (Tr. 289-290). However, Cullor told Burris and Ragland to park their trucks by

the work shed so that the trucks could be checked out. (Tr. 287).

Marler testified that he arrived at the quarry at approximately 10:00 a.m., shortly after the trucks were taken out of service because of the high loader malfunction (Tr. 184, 258). Marler asked to talk to the drivers of the haulage trucks (Tr. 186). Marler spoke to Burris who told him that the big Euclid's brakes would not hold going down into the quarry. Burris stated that he had told Jim Cullor who reportedly told Burris to keep driving and not to complain so much about the equipment. (Tr.186). Marler tested the big Euclid and determined that the brakes would not hold the truck in gear on level ground. Therefore, Marler issued 104(d)(1) Citation No. 4110164 citing a violation of the mandatory standard in section 56.14101, 30 C.F.R. § 56.14101 for defective brakes on the big Euclid.

Marler also spoke to Ragland who complained about the brakes on the small Euclid. (Tr. 215). Consistent with Burris' complaint, Ragland informed Marler that he had reported the brake problems to James Cullor who did nothing about it. (Tr. 216). Marler determined that the brakes would not stop the small Euclid on a 6 per cent grade, even when unloaded. Consequently, Marler issued 104(d)(1) Order No. 4110167 citing a violation of section 56.14101 for ineffective brakes.

Marler also sought to inspect the red Kline haulage truck. Marler asked to speak to Burris about the condition of the truck as he was advised that Burris was the usual operator of this vehicle. Burris advised Marler that he had disconnected the front left brake after he told James Cullor that the brake was locking up and causing the truck to pull. (Tr. 235-236). Based on the information provided by Burris, Marler issued 104(d)(1) Order NO. 4110166 citing the mandatory safety standard in section 56.14101(a)(3) for failing to maintain the left front brake in a functional condition.

Finally, Marler observed a broken left front leaf spring on the little Kline haulage truck. The spring had eight to nine leaves, of which four or five were broken. The broken spring allowed the front to sag to the point where the tire was almost touching the fender on the left side. Consequently, Marler issued 104(d)(1) Order No. 4110171 citing a violation of the mandatory safety standard in section 56.14100(c) for the continued use of defective and hazardous equipment.

FURTHER FINDINGS AND CONCLUSIONS

The Secretary seeks to impose civil penalties on the corporate respondent as well as James Cullor, as an individual, based on the ineffective breaking systems on the big and small

Euclid trucks. Although there were several maintenance problems on these trucks that required attention, items requiring preventative maintenance, eg., brake shoe replacement, must be distinguished from the primary cause of the brake system failure.[3]

In the case at bar, Raymond Jenkins testified on behalf of the Secretary that there were loose slack adjusters on three of the four wheels on the big and small Euclid trucks and on the red Kline truck. Slack adjusters are located on the inside of each wheel. They consist of a bolt that can be tightened with an ordinary wrench. In view of the large diameter of the truck tires, slack adjusters can be easily tightened from a squatting position without removing the wheels. (Tr. 50) Properly adjusted, they are fully tightened and then turned back one-half turn. (Tr. 51).

If slack adjusters are not properly tightened, they prevent the brake shoe from contacting the brake drums. (Tr. 206). The slack adjustment procedure was described by Jenkins as being "real easy" (tr. 49); "a minute" to adjust (tr.50-51); and "there ain't nothing to it, really." (Tr. 36). Marler testified that anyone could walk up to [a slack adjuster] with a wrench and change [it] if they want." (Tr. 221). Jenkins found loose slack adjusters on the big and small Euclid trucks (tr. 32-36, 37-38, 48-49). Marler testified that the slack adjusters were loose, but not loose enough to prevent the shoes from contacting the drums (Tr. 206). Marler also stated that it was not determined whether the slack adjusters were out of adjustment. (Tr. 229).

Jenkins, however, opined that the major reason why the brakes could not hold the Euclid trucks on grade was the loosened slack adjusters. (Tr. 38-39, 48). Jenkins' opinion is consistent with Marler's testimony that slack adjusters can be loosened to the point where they would render the brakes ineffective. (Tr. 221-222). Significantly, Jenkins testified that neither Burris nor Ragland ever complained to him about brake problems. (Tr. 70). Therefore, I credit the testimony of truck mechanic Jenkins that the primary brake defects on the Euclid trucks driven by Burris and Ragland were the loosened slack adjusters.

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[3] For example, an inspection of the small Euclid with the wheels removed revealed a sticking left s-cam shaft and a broken ear on a right front cam support. Similar inspection of the big Euclid revealed a right rear leaking axle seal and a brake shoe lining pulled from the left rear brake shoe. (P Ex.2; Joint Ex. 2). However, I credit the testimony of Jenkins that these conditions were not the primary cause of the inoperable brakes on the Euclid trucks. (Tr. 38-39, 225-226).

Having concluded that the slack adjusters were the primary cause of the Euclid brake malfunctions, I now address the respondents' allegations of tampering. Although Burris initially denied familiarity with slack adjusters, both Burris and Ragland conceded that they knew how to make such adjustments. (Tr. 87, 92, 152-154, 168, 200). Jenkins and Marler testified that it is not uncommon for truck drivers to adjust slack adjusters. (Tr. 26-27, 36-37, 221). Although Marler did not observe any recent wrench marks on the slack adjuster bolts, he conceded that mud would cover any recent evidence of tampering. (Tr. 262-263). Significantly, Marler stated that slack adjusters are one of the first things checked by qualified, experienced truck drivers in the event of brake problems. (Tr. 199-200, 228-229). Yet, Burris and Ragland continued to operate trucks without brakes without checking these adjusters. Marler testified that a competent driver could conceal an inoperable brake condition by operating a truck with defective brakes in the quarry by downshifting. (Tr. 256, 264).

Thus, the evidence reflects that Burris and Ragland were disgruntled employees; threats had been made about disrupting quarry operations; Ragland complained to MSHA; Burris and Ragland were anticipating Marler's inspection; there was a pattern of loosened slack adjusters on three of four wheels on three quarry trucks that is indicative of tampering; Burris and Ragland had access to these slack adjusters; although slack adjusters loosen over time, there is no evidence of inoperable breaks on the days preceding Marler's May 27, 1992 inspection; and Burris and Ragland operated their trucks without brakes without checking the condition of the slack adjusters. Under these circumstances, I conclude that there is sufficient circumstantial evidence that supports the respondents' contention that brake tampering occurred.

Moreover, the Secretary's decision not to pursue the discrimination complaints of Burris and Ragland because the Secretary's investigation revealed that they "were not discriminated against" further supports the conclusion that the brake complaints in this matter were not legitimate. Under these circumstances, even counsel for the Secretary conceded that the Secretary's case is apparently inconsistent with his own investigation. (Tr. 130-131). The record was left open for submission of the pertinent discrimination investigation findings. (Tr. 129, 141). However, the Secretary has declined to submit this information. Consequently, the refusal of the Secretary to submit this relevant investigatory report creates the inference that this report would be adverse to the

Secretary's case.[4] See NLRB v. Dorn's Transportation Co., 405 F.2d 706, 713 (2d Cir. 1969). While the adverse inference to be drawn is not dispositive, it is consistent with other evidence of record and it is of significant evidentiary value.[5]

Having concluded that the brakes were tampered with, I turn to the novel question of whether such employee misconduct is an affirmative defense to the pertinent citations in issue. While employee misconduct is relevant as a mitigating factor in reducing a civil penalty, it is ordinarily not a defense to a citation given the strict liability imposed under the Mine Act. Southern Ohio Coal Company, 4 FMSHRC 1459 (August 1982). It is fundamental that strict liability is imposed on operators to encourage mine safety even if the hazard contributed to by the violation resulted from the employee's misconduct.

Thus, the Commission has consistently rejected arguments by operators that they are not liable for the unauthorized or careless actions of miners. See A.H. Smith Stone Company, 5 FMSHRC 13 (January 1983); Southern Ohio Coal Company, 4 FMSHRC at 1462-64; Sewell Coal Co. v. FMSHRC, 686 F.2D 1066, 1071 (4th Cir. 1982); Allied Products Co. v. FMSHRC, 666 F.2d 890, 893-94 (5th Cir. 1982). These cases recognize and are consistent with the ultimate goal of the Mine Act which is to encourage safety and avoid risk. In this case, however, employees attempted to use the Mine Act to create risk by disabling brakes. Such acts of sabotage can not be equated with the unauthorized or careless acts in the above cited cases. Acts of sabotage subvert the purpose of the Mine Act and must not be given effect.

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[4] Obviously, it is not appropriate to draw an adverse inference against a miner prosecuting a dicrimination complaint on his own behalf under section 105(c)(3) of the Mine Act when the Secretary, an entirely different party, elects not to bring a discrimination action under section 105(c)(2) of the Act. In this case, however, the Secretary is the party prosecuting this civil penalty proceeding. The Secretary's failure to bring discrimination actions on behalf of Burris and Ragland after they were terminated only days after filing the pertinent brake complaints with MSHA, in the absence of any explanation by the Secretary, permits the inference that the Secretary's investigation failed to support the validity of these brake complaints.

[5] I am sensitive to the Secretary's desire to protect confidentiality. However, it is no secret in this case that complaints were filed with MSHA. The Secretary has made no effort to explain its investigation results and subsequent decision not to pursue discrimination cases. Such an explanation could be provided without violating confidential sources, if any.

In reaching this conclusion, I am aware that the Secretary argues that, if tampering occurred, a de minimus civil penalty must be imposed for a technical violation of safety standards. I decline to elevate form over substance which, in this case, would contravene legislative intent. Rather, I conclude that tampering has occurred and that such tampering is a defense to Citation No. 4110164 (the big Euclid) and Order No. 4110167 (the small Euclid). Consequently, Citation No. 4110164 and Order No. 4110167, issued to Fort Scott and James Cullor, as agent, shall be vacated. Therefore, Docket No. CENT 93-117-M concerning James Cullor's personal liability under section 110(c) of the Mine Act must be dismissed.

With respect to Order No. 4110166 issued for the disconnected left front brake on the red Kline truck, I note that Burris has admitted disconnecting the brake. James Cullor denies any knowledge of Burris' action. Given my findings in this proceeding, I credit the testimony of James Cullor on this issue. Jenkins testified that a truck with a disconnected brake could not "stop as good." (Tr. 39-40) The evidence reflects that this brake was disconnected for a considerable period of time and that this action was not taken for the sole purpose of reporting it to Marler. Therefore, there is no defense to this citation. Fort Scott has stipulated to the significant and substantial nature of poor brakes on a quarry truck. However, I am unable to find any unwarrantable failure as I have found no knowledge of this condition on the part of the respondent. Therefore, I am modifying Order No. 4110166 to a significant and substantial 104(a) citation and I am removing the unwarrantable failure charge. Given the circumstances of this case and considering the criteria in section 110(i) of the Mine Act, I am assessing a civil penalty of $150.00.

Finally, Order No. 4110171 was issued for a broken left front leaf spring on the little Kline truck. Marler's testimony that the tire was almost touching the left front is consistent with the photograph of the little Kline truck placed in evidence. (P. Ex. 10). I reject Gary Cullor's assertion the spring's primary purpose is for driver comfort. Rather, I accept Marler's analysis that this condition posed a serious risk in that the driver could lose control of the truck and sustain serious injury. Therefore, I conclude that this violation was properly characterized as significant and substantial as there is a reasonable likelihood the hazard contributed to, i.e., loss of control, will result in an injury of a reasonably serious nature given continued use of the truck in frequently muddy conditions. Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984). With respect to the issue of unwarrantable failure, I note that the photograph illustrates that the defective spring was obvious in that the truck was listing to the left side. Fort Scott's continued use of this vehicle in its readily apparent defective state constitutes an unwarrantable failure. Given the serious gravity

of this violation, I am modifying this Order to a 104(d)(1) citation and assessing a civil penalty of $400.00.

ORDER

1. Accordingly, Citation No. 4110164 and Order No. 4110167 **ARE VACATED.**

2. Order No. 4110166 is modified to a significant and substantial 104(a) citation thus removing the unwarrantable failure charge and **IS AFFIRMED** as modified.

3. Order No. 4110171 is modified to a 104(d)(1) citation and **IS AFFIRMED** as modified.

4. The case against James Cullor, as an agent of Fort Scott Fertilizer-Cullor, Inc., in Docket No. CENT 93-117-M **IS DISMISSED.**

5. Fort Scott Fertilizer-Cullor, Inc., **IS ORDERED** to pay a total civil penalty of $550.00 within 30 days of the date of this decision, and, upon receipt of payment, Docket No. CENT 92-334-M **IS DISMISSED.**

Jerold Feldman
Administrative Law Judge

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/ll

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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November 18, 1993

SECRETARY OF LABOR, MSHA, on behalf of DANNY SHEPHERD, Petitioner	:	TEMPORARY REINSTATEMENT PROCEEDING
v.	:	Docket No. KENT 94-69-D
SOVEREIGN MINING COMPANY, Respondent	:	BARB CD 93-25
	:	BARB CD 93-27
	:	Mine No. 1

ORDER OF TEMPORARY REINSTATEMENT

Before: Judge Feldman

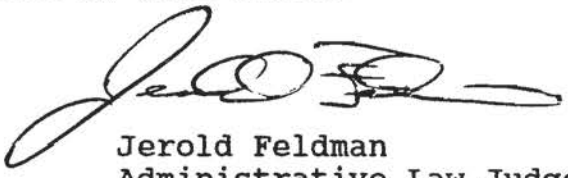
On October 28, 1993, the Secretary filed an Application for Temporary Reinstatement on behalf of Danny Shepherd. The application was supported by an affidavit of Lawrence M. Beeman, Chief, Office of Technical Compliance and Investigation for Coal Mine Safety and Health, Mine Safety and Health Administration. Beeman's affidavit identified several protected activities, including Shepherd's duties as a miners' representative for safety matters at the respondent's No. 1 Mine.

The Secretary's Application for Temporary Reinstatement was served upon Leroy B. Lackey, Jr., President, Sovereign Mining Company, on October 28, 1993. Commission Rule 45(c), 29 C.F.R. § 2700.45(c), in part provides: "Within ten days following receipt of the Secretary's Application for Temporary Reinstatement, the person against whom relief is sought shall advise the Commission's Chief Administrative Law Judge or his designee, and simultaneously notify the Secretary, whether a hearing on the application is requested. If no hearing is requested, the Judge assigned to the matter shall review immediately the Secretary's application and, if based on the contents thereof the Judge determines that the miner's complaint was not frivolously brought, he shall issue immediately a written order of temporary reinstatement."

The Secretary filed a Motion for Order of Temporary Reinstatement on November 10, 1993, noting that the respondent had failed to request a hearing in this matter. To date, the respondent has not requested a hearing or opposed the Secretary's Motion. Therefore, Commission Rule 45(c) requires me to review the Secretary's application to determine if Shepherd's complaint is not frivolously brought.

The "not frivolously brought" standard set forth in Section 105(c), 30 U.S.C. § 815(c), is satisfied when there is a reasonable cause to believe that the underlying discrimination complaint is meritorious. J. Walter Resources v. Federal Mine Safety and Health Review Commission, 920 F.2d 738, 747 (11th Cir. 1990). Thus, the Secretary must prevail on an application for temporary reinstatement if the facts supporting the application are not insubstantial or frivolous. Id. at 747. Beeman's affidavit submitted in support of the Secretary's application specifies alleged protected activities that are contemporaneous with Shepherd's employment suspension which occurred on or about August 5, 1993. Consequently, I conclude that Shepherd's complaint is not clearly without merit or pretextual in nature. Therefore, I find that Shepherd's complaint has not been frivolously brought.

Accordingly, the Sovereign Mining Company **IS ORDERED** to immediately reinstate Danny Shepherd to the position from which he was suspended on or about August 5, 1993, or to an equivalent position, at the same rate of pay and with the equivalent benefits. Shepherd's entitlement to backpay and benefits shall be calculated from the date of this order.



Jerold Feldman
Administrative Law Judge
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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NOV 18 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), On Behalf of JAMES JOHNSON, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. SE 93-127-D
	:	Mine ID 01-01401
and	:	No. 7 Mine
UNITED MINE WORKERS OF AMERICA (UMWA), Intervenor	:	
v.	:	
JIM WALTER RESOURCES, INCORPORATED, Respondent	:	

DECISION

Appearances: William Lawson, Esq., Office of the Solicitor, U.S. Department of Labor, Birmingham, Alabama, for Complainant;
David M. Smith, Esq., Mark Strength, Esq., and R. Stanley Morrow, Esq., Birmingham, Alabama, for the Respondent.

Before: Judge Fauver

The Secretary brought this case on behalf of James Johnson, alleging discrimination in violation of § 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

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

FINDINGS OF FACT

1. Jim Walter Resources operates an underground coal mine, known as Mine No. 7, which produces coal for sale or use in or substantially affecting interstate commerce.

2. During the night shift of March 13, 1992, the No. 1 longwall crew was assigned to remove an unproductive shearer from the longwall face through a crosscut (Ex. G-4, "Crosscut A") and

down the No. 3 entry. James Johnson, Complainant, a member of the crew, had been employed by Jim Walter Resources for 11 years as a general inside laborer, roof bolt construction worker, a shearer operator, and a longwall helper (6 years on the longwall).

3. Johnson heard UMWA Safety Committeeman Tommy Boyd, who was also the stageloader operator on the section, tell Danny Watts, the longwall face foreman on the previous shift, and Alvin McMeans, the owl shift longwall face foreman, that there was a problem with the shearer removal because there was no approved plan to correct the roof conditions before traveling through Crosscut A. Johnson looked up and saw that roof conditions in and near Crosscut A area were bad so he stepped under the No. 1 shield. Johnson observed that some roof had fallen on the stageloader in the adjacent No. 4 entry, some roof bolts were out, there was a brow and a crack in the No. 3 entry, and there were no cribs or timbers in Crosscut A. Foreman Watts told Boyd that if he had a problem, he needed to call Larry Vines, the longwall manager. Boyd replied that if he had to call someone, it would be MSHA.

4. Johnson had previously participated in the removal of the entire longwall unit, but never in the removal of a shearer by itself. Usually, when an entire longwall was removed, the longwall face advanced to "Crosscut B" in line with the track area (where the longwall equipment can be moved into the track area without a 90 degree turn). The longwall equipment was then removed in accordance with the MSHA-approved roof control plan, which required additional roof support in Crosscut B (timbers were usually set out to the track, cribs set in the No. 3 entry on both sides of the crosscut, timbers set in Crosscut B, additional roof bolts installed in Crosscut B, and the entire face meshed all the way to the tailgate). As the longwall advanced to Crosscut B, cribs were usually installed in Crosscut A to support the roof.

5. On the previous day, March 12, Johnson had observed two cribs supporting the roof in Crosscut A. However, on March 13, the cribs had been removed to enable removal of the shearer, and no additional roof support had been installed in Crosscut A. On March 12, Johnson had traveled up the No. 4 entry because the No. 3 entry was dangered off. On March 13, the No. 4 entry was dangered off.

6. Johnson knew that MSHA considered Crosscut A to be gob because the face had advanced outby the inby pillar. Consistent with this, he had seen roof falls in such crosscuts after they reached the gob stage. He also knew that MSHA had "written up" management personnel for traveling through a crosscut, like Crosscut A, after the longwall face had advanced outby the crosscut, because MSHA considered it to be gob exposing them to the hazards of a roof that might fall at any time. Johnson

routinely installed roof supports according to the roof-control plan, but he was not a roof-control expert and did not know how to make Crosscut A "safe" without a plan prepared by a roof expert. He considered the area to be gob and dangerous, and believed that MSHA should be called to review a plan to make the crosscut safe.

7. After Safety Committeeman Boyd raised the issue of a lack of a supplemental roof-control plan, Foreman Watts called Vines who then called Paul Phillips, a general mine foreman responsible for the entire operation of the mine on the owl shift. Meanwhile, the longwall crew was moved from Crosscut A to No. 4 entry to shovel on the belt line. Miners did not remain in Crosscut A to remove the shearer.

8. Phillips called Foreman McMeans, Johnson's immediate supervisor, who said that the crew questioned the safety of traveling through Crosscut A to remove the shearer. Phillips told McMeans to take each crew member aside and tell him to make the area safe, and if he refused, get input on what he thought should be done to make it safe. If crew members withdrew under their contract safety rights,[1] McMeans was to contact Phillips and he would enter the mine.

9. McMeans isolated the miners and questioned them individually. McMeans called Johnson to Crosscut B and asked him what he thought was wrong with Crosscut A. Johnson told McMeans that Crosscut A was in the gob, the cribs had been taken down and

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[1] The labor agreement provides in part (Ex. R.-1, Sec. i):

(1) If the employee reasonably believes a condition is abnormally or immediately dangerous, he shall notify his supervisor of the specific condition, and if management agrees that the condition is dangerous, immediate correction or prevention of exposure to the condition shall occur, using all necessary employees, including the involved employee.

(2) If management disagrees that the condition is dangerous, the employee shall have the right to be relieved from the assignment in dispute, and management shall assign and the employee shall accept other available work. A member of the health and safety committee shall review the disputed condition with management, and if they agree that the condition is not dangerous, the employee shall immediately return.

(3) If the health and safety committee member and management disagree that the condition is dangerous, and the dispute involves an issue of federal or state mine safety laws or mandatory health or safety regulations, the appropriate federal or state inspection agency shall settle the dispute the basis of the findings of the inspector.

roof bolts were missing, and he knew that MSHA had cited people for traveling through such crosscuts because they were in the gob. (Johnson knew from Carroll Johnson, Chairman of the Safety Committee, that Sanders had been written up). Johnson knew that MSHA considered Crosscut A to be gob. He had seen such crosscuts dangered off in the past and had seen the roof cave in in such crosscuts after they became gob. McMeans told Johnson, "If I asked you to work in the area, what would you say?" Johnson replied, "I would be afraid to work in that area." Tr. 67. Johnson said that he would have to withdraw under his individual safety rights. McMeans did not give Johnson a direct order to work in Crosscut A.

10. McMeans isolated the other members of the longwall crew and questioned them individually about the safety of Crosscut A and asked each miner what he would say if McMeans asked him to work in the area. Safety Committeeman Tommy Boyd told the foreman that MSHA would have to approve Crosscut A before he would work in it. Other miners told McMeans that Crosscut A was in the gob, two men had been written up by MSHA for traveling through this type crosscut (referring to a May 20, 1991, citation[2]), there was no roof support of any kind in Crosscut A, cribs were needed, and roof bolts were out. One crew member said that he would make Crosscut A safe and then go to work. Another said that he would have to withdraw under his individual safety rights. Another said that Crosscut A would have to be approved by MSHA before he would work in it.

11. Phillips entered the mine, looked at Crosscut A, and then talked to McMeans. Phillips saw the roof-fall on the stageloader, the crack in the roof, and the brow in the No. 3 entry. He observed there were no cribs to support Crosscut A. Phillips believed additional roof support was needed in Crosscut A. He discussed with McMeans what could be done to improve the roof support, e.g., building cribs, setting timbers, and hanging curtains.

12. Then Phillips met with Safety Committeeman Boyd in No. 3 entry at Crosscut B. Phillips said, "Let's go up there and look at the area that y'all feel is unsafe." Tr. 148. Boyd said he would go up No. 4 entry, but not No. 3 entry. Phillips told him that they could not go up No. 4 entry because the head gate drive had been shoved against the rib, there were some roof bolts missing, and there was no travelway. Phillips said they would go up No. 3 entry but Boyd refused to go with him. Phillips told Boyd it was his job to go with him and look at the affected area. Boyd told Phillips that if the area could not be looked at from where they stood, it would not be looked at. At the end of that conversation, the crew members arrived and they had a brief

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[2] The citation was issued because Larry Vines, the longwall manager, and Kevin Sanders, the deputy mine manager, traveled through a "Crosscut A" type crosscut.

discussion about Crosscut A regarding missing rib and roof bolts over the stageloader. Phillips told the crew that he wanted them to build cribs, set timbers, and hang a curtain from the inby pillar of Crosscut A and extend it over to Shield No. 1. Boyd said they did not have an MSHA-approved plan, supplemental to the roof control plan, to correct the area and one was needed. Phillips told Boyd that an MSHA-approved plan was not required to make an area safe. This became an impasse between Phillips and Boyd, who was serving as the miners' Safety Committeeman.

13. About 2:00 a.m., Phillips isolated the crew members and questioned them individually. Phillips told McMeans to bring the men in one at a time to No. 3 entry at Crosscut B.

14. When he reached Johnson, Phillips stated, "If I asked how to make that place safe, what are you going to do?" Tr. 92, see also Tr. 127, 131, and 173 ("I am telling you to go up there and make the area safe."). Johnson answered, "How do you make gob safe?" Tr. 92, 127. Phillips said "that's not what I asked you." Tr. 92 - 93, see also Tr. 127 Johnson said that he would have to withdraw under his individual safety rights. Phillips told Johnson to get on the bus. Johnson asked Phillips about other available work and Phillips said that he was going to give him other work. There were two or three other miners already on the bus, and they were all taken by another foreman to shovel a belt for the remainder of the shift.

15. Phillips isolated the other members of the longwall crew and told each of them to go to work and make Crosscut A "safe." One crew member asked if he went, whether there would be any repercussions and Phillips told him no. So he went to work. The others withdrew under their individual contract rights, and were sent to the bus to be taken to do other work.

16. Pursuant to the labor agreement, if a dangerous condition exists, Jim Walter Resources has the right to use available personnel to correct it. If a miner thinks there is a hazard that is abnormal, he is supposed to report the problem to management, and if Jim Walter Resources agrees that corrective safety work is needed, the miner may be assigned work to correct the hazard. When there is a dispute whether work is hazardous, the contract provides that the miner is to be given other available work. If the miners' Safety Committeeman disagrees with management's view that an area or work assignment is safe, the contract provides that MSHA is to be called in and the parties will abide by the findings of the MSHA inspector. Phillips declined to call MSHA to resolve this safety dispute.

17. Phillips testified that he gave the miners direct orders to work in Crosscut A because he wanted to follow the labor agreement "to the tee." Tr. 202. Johnson testified that

he knew when Phillips was talking to him that Phillips wanted him to go to work in Crosscut A to "make it safe." Phillips had told McMeans to give such orders, but McMeans used hypothetical language. Phillips felt he had to make the point clear.

18. The following day, March 14, Johnson and several other crew members were charged with insubordinate conduct for refusing to make Crosscut A safe. Each was given a 5-day suspension with intention to discharge. Under the labor contract, the miners were entitled to a meeting with the mine manager. Following this meeting, the discipline was reduced to a 2-day suspension. Johnson objected to this penalty, and filed a discrimination complaint under Section 105(c) of the Mine Act.

19. The trial record of Jim Walter Resources, Inc. v. Secretary of Labor, 15 FMSHRC 432 (March 1993), was incorporated by reference at the hearing. The prior case involved a citation issued at 8:45 a.m., on March 13, 1992, arising from the same safety dispute involved in this case. When Phillips ordered the miners to work in Crosscut A without an MSHA-approved plan, the miners' representative contacted MSHA and requested an inspection of Crosscut A pursuant to 103(g) of the Mine Act. MSHA found a violation, and issued a citation stating that miners in the No. 1 longwall section were required to travel through the gob to remove a shearer, and citing a number of unsafe roof conditions in and near Crosscut A. The citation was contested and, after a hearing, the citation was affirmed (by this judge) with a finding that Crosscut A was hazardous and required further roof support to comply with 30 C.F.R. § 75.202(a).

DISCUSSION, FURTHER FINDINGS AND CONCLUSIONS

To establish a prima facie case of discrimination under § 105(c) of the Act, a miner has the burden of proving that (1) he or she engaged in protected activity and (2) the adverse action complained of was motivated "in any part" by the protected activity. The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. If an operator cannot rebut the prima facie case, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action in any event for the unprotected activity alone. Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 817 (1981).

A miner's refusal to work is protected under § 105(c) if (1) it is based upon a reasonable, good faith belief that the work involves a hazard or a violation of the Act or a safety or health standard promulgated under the Act and (2) the miner gives reasonable notice to management. Secretary on behalf of Pratt v. Red River Hurricane Coal Co., 5 FMSHRC 1529, 1533-34 (1983).

I find that Johnson believed in good faith that Crosscut A was in the gob and dangerous to work in because, among other things, (1) MSHA considered this type crosscut to be in the gob and dangerous and had cited personnel traveling through such crosscuts, (2) his UMWA Safety Committeeman believed the area was dangerous and required an approved supplemental roof-control plan to make the area safe, and (3) Johnson personally observed dangerous roof conditions in and near Crosscut A.

Johnson's concern for his safety was confirmed when the miners' representative called MSHA for an inspection under § 103(g) of the Act. MSHA found that Crosscut A was part of the gob and cited a number of unsafe roof conditions. In this inspection, on March 13, 1992, before Johnson was disciplined, Federal Mine Inspector Bill Deason observed that the operator had dangered off approximately 75 feet of the travelway in the No. 4 entry because of bad roof (beginning at the forward crosscut), that roof had fallen near Crosscut A, that there was a roof crack across the entry and a brow, and that unsafe roof conditions in Crosscut A constituted a hazard to miners in violation of 30 C.F.R. § 75.202. This regulation provides that "the roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts."

When Inspector Deason issued the citation on March 13, the company promptly submitted a supplement to its roof control plan, providing for additional roof and rib support in Crosscut A. Specifically, it proposed to support the area by installing additional timbers on five foot centers in the No. 3 entry to a point outby the brow, and to install additional cribbing on five foot centers from the ribline to the shields in the No. 3 entry (as shown in Ex. G-3). The plan was promptly approved by MSHA and the citation was terminated. The supplemental plan, although acknowledging that it was "submitted as a result of the conditions being experienced," was submitted under protest by the company, which stated in the plan: "No. 7 Mine does not agree with the necessity of the plan and is only doing so to abate the citation issued .... " Ex. G-3.

Advancement of the longwall put stress on the roof across Crosscut A as evidenced by the conditions observed by Inspector Deason. Additional roof support was needed to protect the miners who worked in or traveled through the crosscut. The roof support provided in the approved supplemental roof-control plan was greater and far more detailed and specific than the roof support earlier indicated by Foreman Phillips.

In the early 1980's, the local MSHA Subdistrict Manager (Mr. Weekly) adopted an enforcement policy to cite a violation if the forward longwall crosscut was used as a travelway without additional roof support or safeguards. Mr. Weekly's concern was that roof pressures created by advancing the longwall exerted

substantial pressures on the forward crosscut and that, as a regular occurrence, the roof in that crosscut would deteriorate and present a hazard of falling without warning. Jim Walter Resources, Inc., 15 FMSHRC at 433, 434.

The enforcement position taken by Mr. Weekly was not a formal MSHA policy, nor was it reduced to writing. Rather, it was a local MSHA office directive that was communicated to the inspectors in an informal manner. Mr. Kenneth Ely, a supervisor in MSHA's plan group, testified that the enforcement policy was routinely discussed with operators and members of the UMWA at local safety training meetings.

UMWA Safety Committeeman Boyd was aware of the local MSHA enforcement policy. During the owl shift on March 13, 1992, when management ordered the miners to remove the longwall shearer through Crosscut A, Boyd was concerned that management had not submitted a plan for MSHA to approve the installation of roof support structures prior to working in or traveling through the area. Boyd's request for a plan was reasonable in light of the local MSHA policy, the roof conditions in Crosscut A, and in light of the citation that MSHA had previously issued because management personnel traveled through this type crosscut.

Johnson's concern for his safety was also underscored by the nature of the work to be performed. The removal of a longwall shearer is a rare event at this mine. Johnson had never participated in the removal of a shearer by itself, nor had the foreman. Johnson did have experience in removing the entire longwall unit from the section, and in those instances management continued to mine the coal face until the longwall was in line with Crosscut B (Ex. G-4) which goes out to the track area. Management then removed the entire longwall unit through Crosscut B under the provisions of the MSHA-approved roof-control plan.

In such moves, management installed additional roof supports and safeguards, such as additional roof bolts or double-bolting in Crosscut B, set additional timbers throughout the crosscut entry leading to the track and set cribs on both sides of the crosscut. With these additional roof support structures in place, management then transported the entire longwall unit off the section and out to the track.

No such safeguards or additional measures were taken in preparing to remove the shearer through Crosscut A. Indeed, rather than install additional roof support in the crosscut, management removed the only two cribs in Crosscut A that had supported the roof in an area which MSHA later found needed additional support.

Crosscut B was the normal and desired route to remove the longwall or any large equipment. On March 13, management chose to remove the shearer through Crosscut A because the entry to Crosscut B was dangered off. Because of the difficulty of maneuvering large equipment through Crosscut A, management

removed the cribs from Crosscut A. When General Mine Foreman Phillips arrived he observed that rib bolts and roof bolts were missing in Crosscut A and that the roof had fallen from around the bolts, and there were no cribs supporting the roof. Phillips believed additional roof support was needed in Crosscut A. In contrast, the section foreman (McMeans) considered the area "was safe enough to work in" (Tr. 69, 70), despite the deteriorating roof, despite the fact that the two cribs had been taken down, and despite the fact that MSHA considered this to be a gob and had cited management personnel for traveling through such crosscuts.

Johnson knew that his Safety Committeeman objected to working in Crosscut A without an approved supplemental roof-control plan. He was also aware that the cribs had been taken down and that the roof was deteriorating. Also, on other occasions he had seen the entire roof fall in areas such as Crosscut A, and was aware that MSHA considered the area to be gob and had cited personnel for traveling through the crosscut.

When Foreman McMeans isolated Johnson and questioned why he considered Crosscut A unsafe, Johnson pointed out that the cribs had been taken down, roof bolts were missing, the area was "in the gob" and Kevin Sanders, the deputy mine manager, had been written up by MSHA for traveling through such a crosscut because it was in the gob. The foreman then asked, "If I asked you to work in the area, what would you say?" Johnson replied, "I would be afraid to work in that area" and "I guess I'd have to withdraw under my individual safety rights." Tr. 67, 91.

As instructed by Phillips, McMeans also isolated and questioned the other crew members individually. (1) Safety Committeeman Boyd considered the area "gob" and believed the area should be approved by MSHA before they worked in it. (2) Terry Acker understood the area to be "gob," knew that two men had been written up for going through this type crosscut, and wanted MSHA to make a determination as to what it would take to make the area safe. (3) Charlie Boyd told the foreman that people had been written up for walking through the crosscut. (4) Charlie Reed told the foreman that the area was "in the gob" and must first be approved by the "federal." (5) Matt Smith told him that pins (roof bolts) were out over the stageloader, the area needed some cribs and other steps to make the area safe.

When Phillips arrived, he also isolated the miners and questioned then individually. Johnson told him that the crosscut was in the gob and the roof conditions were abnormal (Tr. 106), he did not know what it would take to make the area safe (Tr. 122), and explained his position by stating "How do you make gob safe?" Tr. 92, 121, 127, 131. Phillips did not give Johnson specific orders as to how the roof should be supported. He simply said, "I am telling you to go and make the place safe." Tr. 173. Johnson exercised his withdrawal rights under the

contract, and was given other available work for the remainder of the shift. The next shift, Johnson was instructed to go to the office where he was informed he was being given a 5-day suspension with intention to discharge for insubordinate conduct. The discipline was later reduced to a 2-day suspension.

I find that management was given ample notice by the complaints of Safety Committeeman Boyd, Johnson, and other miners that they believed Crosscut A was in the gob, the roof was abnormal, the area was dangerous to work in, an MSHA-approved supplemental roof-control plan was needed before performing work there and MSHA had cited personnel for traveling through such crosscuts because they were in the gob. Johnson, on reasonable, good faith grounds, believed Crosscut A was unsafe to work in, and that an MSHA-approved plan was needed to "make it safe." He was not a roof-control expert, and did not know exactly how to make the area safe. He had reasonable grounds to rely upon the opinion of his Safety Committeeman in refusing to work there without an approved plan. In addition, he personally observed dangerous roof conditions in Crosscut A. He gave reasonable and sufficient notice of his safety concerns to management.

Johnson's work refusal was a protected activity under § 105(c) of the Act. The operator's discipline of Johnson therefore violated his safety-complaint rights under § 105(c) of the Act.

I find that this violation involved serious and aggravated discrimination and interference with Johnson's rights under § 105(c).

Respondent's adverse action against Complainant involved more than a 2-day suspension. It included a disciplinary notice of a 5-day suspension with an intention to discharge. Threats of loss of pay and discharge directed at a miner exercising a protected safety-complaint right constitute discrimination and unlawful interference under § 105(c) of the Act. See, e.g., Denu v. Amax Coal Company, 11 FMSHRC 317, 322 (1989), (Judge Melick); Moses v. Whitley Development Corp., 4 FMSHRC 1475, 1479 (1982); and Secretary on behalf of Carson v. Jim Walter Resources, Inc., 15 FMSHRC 1993, 1996-1997 (1993) (Judge Maurer).

Respondent's method of isolating miners from their UMWA Safety Committeeman and interrogating them individually to explain why they believed Crosscut A was unsafe was an intimidating and harassing tactic, especially when coupled with an implied threat of loss of pay and even discharge. The collective bargaining agreement plainly provided that, "if the health and safety committee member and management disagree that the condition is dangerous, and the dispute involves an issue of federal or state mine safety laws or mandatory health or safety regulations, the appropriate federal or state inspection agency shall settle the dispute on the basis of the findings of the inspector." Ex. R-1, Sec. i(3). Respondent refused to address the safety concerns of the miners by complying with this contract

provision, i.e., by calling in MSHA to inspect Crosscut A and to resolve the question of whether an approved supplemental roof control plan was required to provide additional roof supports there to remove the shearer.

The Commission stated in Moses v. Whitley Development Corp., 4 FMSHRC 1475, 1479 (1982) that: "[C]oercive interrogation and harassment over the exercise of protected rights is prohibited by § 105(c)(1) of the Mine Act." § 105(c)(1) states that "no person shall discharge or in any manner discriminate against. . . or otherwise interfere with the exercise of the statutory right of any miner." (Emphasis added.)

In reaching this conclusion, the Commission was guided by the legislative history of the Mine Act which referred to "the more subtle forms of interference, such as promises of benefit or threats of reprisal." Moses, supra, at 1478, citing Legislative History at 624. The Commission observed that a "natural result" of such subtle forms of interference "may be to instill in the minds of employees fear of reprisal or discrimination." Moses, supra, 1478. In Phillips v. Interior Board of Mine Operators Appeals, 500 F.2d 772, 778 (D.C. Cir. 1974), the Court observed that "safety costs money" and "miners who insist on health and safety rules being followed, even at the cost of slowing down production, are not likely to be popular with mine foreman or top management."

In Denu v. Amax Coal Company, 11 FMSHRC 317, 322, (1989) (Judge Melick), a supervisor repeatedly asked a miner if he knew the consequences of his actions and told him that those consequences included discharge. Although the miner was told that he would receive no disciplinary action, the judge concluded that the questioning itself constituted unlawful interference:

> I find however that threats of disciplinary action and discharge directed to a miner exercising a protected right clearly constitute unlawful interference under § 105(c)(1), whether or not those threats are later carried out. Such threats place the miner under a cloud of fear of losing his job. In addition, while under such threats, a miner would be even less likely to exercise his protected rights when future situations might clearly warrant such an exercise.

Taken as a whole, I find that Respondent's conduct in isolating Johnson from his Safety Committeeman and twice interrogating him (by his section foreman and then by the general mine foreman) with an implied threat of losing pay and even his job, and acting on such threat with a 5-day suspension with intention to discharge, later reduced to a 2-day suspension, constituted aggravated, unlawful discrimination and interference with Johnson's safety-complaint rights under § 105(c) of the Act.

Respondent has a substantial history of violations of § 105(c) of the Act. Also, in the 24-month period before the violation in this case, Respondent accumulated $5,286.00 in delinquent civil penalties for violations of federal safety standards. These penalties were not contested by Respondent, and became final orders of the Commission. Failure to comply with such orders is an adverse factor in Respondent's compliance history under the Act.

Considering all the circumstances of this case and the criteria in § 110(i) of the Act, I find that a civil penalty of $5,000.00 is appropriate for the violation found above.

CONCLUSIONS OF LAW

1. The judge has jurisdiction in this proceeding.

2. Respondent violated § 105(c) of the Act by discriminating against James Johnson and interfering with his safety-complaint rights under the Act.

ORDER

WHEREFORE, IT IS ORDERED that, within 30 days of the date of this Decision, Respondent shall:

1. Compensate James Johnson for any loss of pay or other monetary benefits related to his work refusal on March 13, 1992, with retroactive interest computed in accordance with the Commission's decisions on interest.

2. Restore James Johnson to the same seniority, pay, status, benefits, and job conditions that would apply to his employment had he not been disciplined concerning the events of March 13, 1992.

3. Expunge from James Johnson's personnel record all references to its discipline or evaluation of him concerning the events of March 13, 1992; and Respondent shall not refer to such discipline or evaluation of him concerning any future employment inquiry or reference.

4. Pay to the Secretary of Labor a civil penalty of $5,000.00.

5. Post a copy of this Decision, unobstructed and protected from the weather, on a bulletin board at subject mine that is available to all employees; and it shall remain there for at least 60 consecutive days.

I retain jurisdiction of this case pending a final order on damages. If the parties are unable to stipulate damages and interest due under paragraph 1, the Secretary is directed to file a proposed Order on Damages not later than December 1, 1993. Respondent shall then have 10 days to respond and, if appropriate, a hearing will be held on damages.

William Fauver
Administrative Law Judge

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FALLS CHURCH, VIRGINIA 22041

NOV 18 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. YORK 93-81-M A. C. No. 18-00410-05522
v.	:	
	:	Laurel Operation
LAUREL SAND AND GRAVEL, INC., Respondent	:	

DECISION

Appearances: John M. Strawn, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, PA for the Petitioner;
Terry B. Eichelberger, Director of Safety for Laurel Sand & Gravel, Inc., Laurel, Md for the Respondent

Before: Judge Weisberger

This case is before me based on a Petition for Assessment of Civil Penalty alleging violations by Laurel Sand and Gravel, Inc. (Laurel) of various mandatory regulatory standards. The case was scheduled to be heard on September 23, 1993. On September 20, 1993, the hearing was canceled at the request of the parties, based on their assertions that a settlement had been reached regarding five of the six citations at issue. The parties also advised that the remaining citation would be submitted for resolution based upon a motion for summary decision. On October 12, 1993, the Secretary filed a motion for summary decision. On the same date, Laurel filed it's response to the motion for summary decision.

1. Citation No. 4082800.

A. Stipulations

The parties stipulated to the following facts:

1. The Laurel operation is owned and operated by Respondent Laurel Sand and Gravel, Inc.

2. The operation is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

3. The Administrative Law Judge has jurisdiction over these proceedings.

4. The subject Citation was properly issued and served by a duly authorized representative of the Secretary of Labor upon an agent of the Respondent at the date, time and place stated therein.

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

6. The appropriateness of the penalty, if any, to the size of the operator's business should be based on the following facts:

   a) Respondent company's annual hours for 1991 are 207,878;

   b) The Laurel operation's annual hours for 1991 are 74,850;

7. Respondent demonstrated ordinary good faith in attaining compliance after the issuance of the Citation.

8. Respondent was assessed a total of 18 Citations based upon 28 inspection days in the 24 months immediately preceding the issuance of the subject Citation. See Joint Exhibit "A", Respondent's history of previous violations.

9. Metal/nonmetal inspector (hereinafter "M/NMI") James E. Goodale is an experienced inspector with seven years as an inspector with MSHA and 16 years in the industry.

10. The Laurel operation is a small sand and gravel processing facility.

11. On December 9-10, 1991, M/NMI Goodale inspected the Laurel operation and issued a number of Citations including the subject Citation No. 4082800. See Joint Exhibit "B".

12. M/NMI Goodale took notes during his inspection corresponding to Citation No. 4082800. See Joint Exhibit "C".

13. M/NMI Goodale was accompanied on his inspection by several of Respondent's employees, Terry B. Eichelberger, Director of Safety and Quality Control, Richard C. Ramsay, Jr., Maintenance Supervisor, and James Roy, Maintenance Technician.

14. On December 10, 1992, M/NMI Goodale and the rest of the party observed approximately six upright unsecured compressed gas cylinders located along one of the exterior walls of the maintenance shop of the Laurel operation.

15. As a result, M/NMI Goodale issued Citation No. 4082800 as a "non-significant and substantial" § 104(a) Citation for violation of 30 C.F.R. § 56.16005.

16. The regulation requires: "Compressed and liquid gas cylinders shall be secured in a safe manner."

17. M/NMI Goodale indicated that the citation was "non-significant and substantial" based on findings of moderate negligence, of one miner exposed, of unlikely occurrence of injury, and of potential injuries of lost workdays or restricted duties.

18. Respondent's employees, specifically welders and maintenance workers, had access to the area outside of the maintenance shop but were not required to go to that area as a part of their regular duties.

19. The cylinders had open or missing valves and had been left abandoned by the previous owner of the facility.

20. There was no residual pressure in the cylinders.

21. A proposed penalty of $50.00 was assessed for Citation No. 4082800.

All exhibits are incorporated herein by reference and made a part hereof.[1]

[1] Joint Exhibits A, B, and C are admitted, and are considered to be part of the record of this proceeding.

B. Discussion

In essence, the citation at issue alleges that several compressed gas cylinders located at the maintenance shop were not secured in place, in violation of 30 C.F.R. § 56.16005 which provides that compressed gas cylinders "... shall be secured in a safe manner." In essence, Respondent does not deny that the cited cylinders were not secured. However, Respondent argues that, in essence, since the cylinders were not under any pressure, no hazard was presented to persons. I find that Laurel's argument is without merit for the reasons that follow.

According to the plain language of § 56.16005 supra, a violation is established if compressed cylinders are not secured in a safe manner. Laurel agrees that the cylinders at issue were not secured. In Tide Creek Rock Products, 4 FMSHRC 2241 (December 22, 1982), the operator, who was cited under Section 56.16-5[2], contended that the bottles were not empty, and therefore did not present a hazard. Judge Koutras, in affirming the citation found as follows: "The standard cited makes no distinction between full or empty cylinders, and Respondent's defense on this ground is rejected." (Tide Creek Rock Products supra, at 2250. Judge Koutras' reasoning finds support in the clear wording of Section 56.16005 supra, and I follow it herein.

For these reasons, I conclude that it has been established that Laurel violated Section 56.16005 supra, as alleged in Citation No. 4082800. Respondent has not interposed any further defenses. Based upon the criteria set forth in Section 110(i) of the Act as stipulated to by the parties, regarding the size of Laurel's operations, the effect of a penalty upon it's ability to continue in business, it's history of violations, and it's good faith in attaining compliance after the issuance of the citation, I conclude that a penalty of $50.00 is appropriate for this violation.

II. Citation Nos. 4082793, 4082794, 4082795, 4082796 and 4082799

The Secretary's Motion to Approve Settlement and its Amended Motion regarding Citation Numbers 4082793, 4082794, 4082795, 4082796 and 4082799, alleges that the parties propose to reduce the penalties sought from $380 to $200. In addition, the Secretary seeks to vacate Citation No. 4082793. Based on the representations in the Motion, and the documentation in the pleadings, I find that the settlement is appropriate and consistent with the purposes of the Federal Mine Safety and Health Act of 1977. The Motion accordingly is GRANTED.

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[2] Presently numbered Section 56.16005, supra.

ORDER

It is hereby ORDERED that citation No. 4082800 be affirmed, and that Laurel pay a total civil penalty of $250 within thirty days of this decision.

Avram Weisberger
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

NOV 18 1993

SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	PROCEEDING
ADMINISTRATION (MSHA),	:	
ON BEHALF OF JAMES W. MILLER,	:	Docket No. York 93-155-D
Complainant	:	MSHA Case No. MORG CD 93-06
	:	
v.	:	Mettiki Mine
	:	
METTIKI COAL CORPORATION,	:	
Respondent	:	

ORDER OF TEMPORARY ECONOMIC REINSTATEMENT

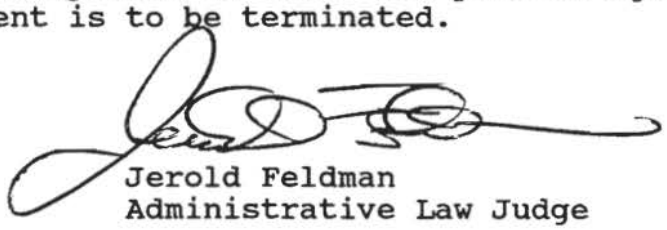
Before: Judge Feldman

This matter is before me based upon an application for temporary reinstatement filed pursuant to Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2), by the Secretary of Labor on behalf of James W. Miller. This case was scheduled for hearing on November 3, 1993 in Morgantown, West Virginia. However, prior to the hearing, the parties filed a stipulation for temporary economic reinstatement for my approval.

The terms of the stipulation are that the respondent, Mettiki Coal Corporation, will economically reinstate Mr. Miller by payment to him of the current standard hourly wage for the position he held at the time of his termination. Mr. Miller will also continue to receive such current benefits and bonuses to which he would have been entitled if he had remained in the respondent's employment. Payment of wages, benefits and bonuses will be made to Mr. Miller on the condition that he not actually return to work on company property.

The parties further stipulated that Mr. Miller's rights under this temporary economic reinstatement agreement are retroactive to October 18, 1993, and that Mr. Miller's rights under this agreement shall continue in accordance with the provisions of Section 105(c)(2) of the Mine Act. Consequently, the respondent withdraws its September 27, 1993, request for hearing in this temporary reinstatement matter.

Accordingly, the parties' request for approval of the terms of their stipulation for temporary economic reinstatement **IS GRANTED.** Mr. Miller is to be economically reinstated to the same salary and benefits that he was entitled to as of the date of his termination from the Mettiki Coal Corporation. Payment of such salary and benefits shall be retroactive to October 18, 1993, and shall continue until the Secretary acts on Mr. Miller's underlying discrimination complaint or until the parties agree that temporary reinstatement is to be terminated.



Jerold Feldman
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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NOV 19 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. SE 93-202
	:	A.C. No. 40-03011-03545
v.	:	
	:	Docket No. SE 92-396
S & H MINING, INCORPORATED, Respondent	:	A.C. No. 40-03011-03528
	:	
	:	S & H Mine No. 7

DECISION

Appearances: Thomas A. Grooms, Esquire, Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner; Imogene A. King, Esquire, Frantz, McConnell and Seymour, Knoxville, Tennessee, for Respondent

Before: Judge Melick

These cases are before me upon the petitions for civil penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq., the "Act," charging S & H Mining, Inc. (S & H) with three violations of mandatory standards and seeking civil penalties of $2,440 for those violations. The general issue is whether S & H violated the cited standards and, if so, what is the appropriate civil penalty to be assessed. Additional specific issues are addressed as noted.

The citations at bar were issued by Inspector Don McDaniel of the Mine Safety and Health Administration (MSHA) as a result of his inspection at the S & H Mine No. 7 on May 7, 1992. Citation No. 3383512 issued pursuant to Section 104(d)(1) of the Act[1] alleges a "significant and substantial" violation of

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[1] Section 104(d)(1) provides as follows:
"If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such a nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds

the mine operator's roof control plan under the standard at 30 C.F.R. § 75.220 and charges that "the approved roof control plan was not being complied with in the No. 7 entery [sic] on the 001 working section had been driven 22 feet and 9 inches wide for a distance of 15 feet long and additional roof support had not been installed." It is not disputed that the approved roof control plan required that the entries be driven no wider than 20 feet.

Inspector McDaniel was sent to the S & H No. 7 Mine to investigate a telephone report of an accident and injury. McDaniel was met by Mine Superintendent Charles White and they proceeded underground to check the accident area. According to McDaniel, in the area where the accident occurred and rock had fallen from the roof, the entry was excessively wide. McDaniel testified that he and White measured the entry widths at four locations along 15 feet 9 inches of entry and found the entry at three locations to be 22 feet 9 inches and at one location to be 22 feet 6 inches (Tr. 16). These areas had not been supported by added roof bolts at the time of the accident and in the area of the roof fall.

McDaniel opined that the violation was the result of "unwarrantable failure" because Steve Phillips, who was foreman on the shift preceding the accident on May 5, 1992, had also been operating the continuous miner on that shift and acknowledged that he had in fact made the cited cuts on the morning preceding the injury, i.e., the cuts that created the excess widths. Phillips also acknowledged to McDaniel that he had performed the preshift examination for his shift and that Foreman Willie Byrd performed a preshift examination for his second shift. Under the circumstances McDaniel concluded that

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fn. 1 (continued)
such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated."

both foremen should have discovered the excess widths and should have removed all miners and supported the roof before allowing anyone in the area.

In reaching his conclusions, McDaniel further relied upon statements by Second Shift Miner Operator Mark Moran who told McDaniel that before the roof fall he noticed that the roof bolts were located too far from the rib and that he (Moran) had asked Second Shift Foreman Willie Byrd to correct the condition.

McDaniel opined that a roof bolter could have bolted the roof in the cited area without removing the continuous miner by lifting the cable over the roof bolter or by protecting the miner's power cable with boards. McDaniel also concluded that, alternatively, they could have timbered the area without removing the continuous miner. McDaniel concluded that by allowing continuing efforts to clean up the face with the mining machine after Moran had notified Foreman Byrd of the excess widths, the violation was the result of "unwarrantable failure."

Foreman Willie Byrd was night shift foreman at the time of the accident on May 5, 1992. He proceeded underground around 2:30 p.m. on that date to perform a preshift examination. He estimated the preshift exam took about 45 minutes, including about 15 minutes at the face. Sometime during the shift, miner operator Mark Moran called him to the section. Moran was then waiting for a shuttle car to return and showed Byrd what he described as a spot that "looked a little wide." Byrd admitted that indeed you could tell it was "a little bit wide."

According to Byrd, he then told Moran to continue to clean up loose coal with the continuous miner to enable the bolting machine to position itself and then to "get out." Byrd conceded that loose coal was in front of the continuous miner at the time and that it was company procedure to clean that area before removing the continuous miner. He did not see any need to come "straight out." Byrd reiterated that after Moran showed him the wide spot he told the bolter to bolt the area. Byrd then proceeded elsewhere for about five minutes before learning of the rock fall. He admittedly had checked the same area on his preshift exam but concluded the area "wasn't that noticeable." While he believed the last row of bolts looked a little wide he did not believe it was in excess of 20 feet. Byrd further admitted that the continuous miner did not have to clean up before the bolter came in but he nevertheless told Moran to clean up the loose coal in front of the miner before backing out. Byrd also admitted that he could have placed timbers in the wide area even without removing the continuous miner.

As noted, the continuous miner operator for the second shift on May 5, 1992, was Mark Moran. Moran testified that he proceeded underground on May 5 at about 3:00 p.m. and began operating the miner at around 3:45 or 3:50 p.m. He completed a cut about 10 foot wide and 20 feet deep before the roof fall accident. He had been waiting for the shuttle car to leave and started backing up the continuous miner. In the process of backing up, the victim, Mr. Suttles, picked up the trailing cable and at that time the roof fall occurred.

Eddie Suttles testified that on May 5, 1992, he was the helper on the second shift assisting Moran with the continuous miner. He recalled that, after cleaning up, the continuous miner started backing up. Suttles first held the miner cable as the shuttle car backed up. It was at that point that the rock fell on Suttles dislocating his vertebrae and resulting in paralysis.

Steve Phillips, miner operator and foreman on the first shift on May 5, 1992, acknowledged that he made the cited cuts sometime after the dinner break at 11:00 or 11:30 on May 5. He had to make a left turn with the miner into the No. 7 entry and had to make several cuts to get around the turn. According to Phillips the area looked like the diagram in Exhibit R-3. He stated that if he thought he had been cutting wide he would have immediately stopped operating, but he did not see anything that lead him to believe it was more than 20 feet wide. He stated that he did not report any excess widths in the mine examination book because he did not see any excess width. He noted, however, that the usual cut varied from 16 feet to 18 feet wide and further acknowledged that the entry in fact was 4-1/2 feet wider than the usual 18 foot cut.

Roof Bolter Sam Ward bolted the area in the No. 7 entry after it had been cut by Phillips on that shift. Ward testified he could see "nothing wrong with the entry," only "just a little corner cut out when I saw it after the roof fall. "

Citation No. 3383512

The violation charged in this citation is not disputed, but only the "unwarrantable failure," negligence and gravity findings. "Unwarrantable failure" has been defined as conduct that is "not justifiable" or is "inexcusable." It is aggravated conduct by a mine operator constituting more than ordinary negligence. Youghegheny and Ohio Coal Company, 9 FMSHRC 2007 (1987); Emery Mining Corp., 9 FMSHRC 1997 (1987). In this case it is clear from the testimony alone of Second Shift Foreman Willie Byrd that the violation was the result of an inexcusable and aggravated omission constituting more than ordinary negligence.

It is not disputed that Byrd was apprised by Continuous Miner Operator Moran of the cited excess widths. Byrd himself admitted that "you could tell it was a little bit wide" (Tr. 88). After being apprised of this fact Byrd nevertheless directed Moran to continue to clean up loose coal in the face area in front of the miner before backing out. Byrd explained that he did not order the continuous miner operator to back out immediately because "it was just a procedure ... we always clean it up" (Tr. 89). In the process of removing this coal a shuttle car thereafter entered the No. 7 entry and, when backing up, caused Miner Helper Eddie Suttles to step into the wide, unsupported area where the roof material fell causing severe injuries and paralysis. Under the circumstances the violation was clearly the result of "unwarrantable failure" and high negligence.

The violation was also "significant and substantial" and of high gravity. 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 (1981). In Mathies Coal Co., 6 FMSHRC 1, 3-4 (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 reasonably 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 (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 (1984), and also that in the likelihood of injury be evaluated in terms of continued normal mining operations (U.S. Steel Mining Co., Inc., 6 FMSHRC 1473, 1574 (1984); see also Halfway, Inc., 8 FMSHRC 8, 12 (1986) and Southern Oil Coal Co., 13 FMSHRC 912, 916-17 (1991).

Since the rock that fell upon continuous miner helper Eddie Suttles in fact fell from the wide and unsupported area cited as a violation in this case causing serious injuries and paralysis, the violation was without question "significant and substantial" and of high gravity.

Citation Nos. 3383514 and 3383515

Citation No. 3383514 alleges a violation of the standard at 30 C.F.R. § 75.303 and charges as follows:

> The preshift examinations for the second shift on the 5-5-92 was not adequate. The No. 7 entery [sic] had been driven 22 feet and 9 inches wide on the 1st shift and this condition was not recorded in book.

The cited standard provides in relevant part as follows:

> (a) Within 3 hours immediately preceding the beginning of any shift, and before any miner in such shift enters the active workings of a coal mine, certified persons designated by the operator of the mine shall examine such workings and any other underground area of the mine designated by the Secretary or his authorized representative. Each such examiner shall ... examine and test the roof, face, and rib conditions in such working section; examine active roadways, travelways ... and examine for such other hazards and violations of the mandatory health or safety standards, as an authorized representative of the Secretary may from time to time require. ... If such mine examiner finds a condition which constitutes a violation of a mandatory health or safety standard or any condition which is hazardous to persons who may enter or be in such area, he shall indicate such hazardous place by posting a 'danger' sign conspicuously at all points which persons entering such hazardous place would be required to pass, and shall notify the operator of the mine. No person, other than an authorized representative of the Secretary or a State mine inspector or persons authorized by the operator to enter such place for the purpose of eliminating the hazardous condition therein, shall enter such place while such sign is so posted. Upon completing his examination, such mine examiner shall report the results of his examination to a person, designated by the operator to receive such reports at a designated station on the surface of the mine, before other persons enter the underground areas of such mine to work in such shift.

> Each such mine examiner shall also record the results of his examination with 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 operator to minimize the danger of destruction by fire or other hazard, and the record shall be open for inspection by interested persons.

Citation No. 3383515 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.304 and reads as follows:

> The on-shift examinations for 5-5-92 were not adequate. The No. 7 entry on the 001 working section was mined 22 feet and 9 inches wide and this condition was not recorded in the approved book.

The cited standard reads, in part, as follows:

> At least once during each coal-producing shift, or more often if necessary for safety; each working section shall be examined for hazardous conditions by certified persons designated by the operator to do so. ...

According to Inspector McDaniel these citations were based upon statements that Foreman Phillips had performed a preshift examination in the cited area but failed to report the excess widths in the preshift examination book. Based upon information that Foreman Willie Byrd had also performed a preshift examination for the second shift and failed to report this condition in the preshift examination books, McDaniel also found a violation of the reporting requirements. McDaniel testified that he also based Citation No. 3383515 upon Phillips' admission that he had performed a preshift and onshift examination but failed to observe the excess widths. McDaniel noted that Foreman Phillips was the same person who in fact cut the cited wide areas.

S & H does not deny these violations of the preshift and onshift examination requirements but maintains that its negligence was "non-existent or low due to the conditions then existing which served to obscure the violation." However, based on the evidence that First Shift Foreman Steve Phillips himself created the cited wide cuts around 11:00 or 11:30 on May 5, in an admittedly unusual maneuver with the mining machine, I find that he was thereby placed on notice that an excess width problem may thereby have been created and it was therefore his duty to ensure himself that there was not an excess width at that location. Under the circumstances I find

that S & H was indeed negligent in failing to have observed and noted the excess widths in the preshift and onshift examination books.

The violations were also "significant and substantial" since it may reasonably be inferred that the failure to have reported the condition led to the injury and paralysis of the miner helper. The citations are accordingly affirmed with the "significant and substantial" findings.

Under the circumstances, and considering all the criteria under section 110(i) of the Act, I find that a civil penalty of $220 each for the violations cited in Citation Nos. 3383514 and 3383515, and $2,000 for the violation charged in Citation No. 3383512, are appropriate.

ORDER

Citation No. 3383512 is affirmed as a citation under section 104(d)(1) of the Act and S & H Mining, Inc. is directed to pay a civil penalty of $2,000 for the violation charged in that citation within 30 days of the date of this decision. S & H Mining, Inc. is further directed to pay within 30 days of the date of this decision civil penalties of $220 each for the violations charged in Citation Nos. 3383514 and 3383515.

Gary Melick
Administrative Law Judge

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NOV 19 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of JOHN LACEK, Complainant	:	DISCRIMINATION PROCEEDING Docket No. WEST 93-106-D
v.	:	Cordere Mine
F & E ERECTION COMPANY, Respondent	:	

ORDER OF DISMISSAL

The Secretary of Labor has moved to withdraw his complaint in this discrimination proceeding on the grounds that the parties have resolved all issues relating to this matter and that Respondent has made proper payment to Mr. Lacek. The parties have also provided the undersigned with a copy of their stipulation of settlement and consent.

On November 8, 1993, the undersigned conducted a conference call with counsel for both parties to discuss the meaning and effect of paragraph 5 of the stipulation and settlement. That paragraph reads as follows:

> In consideration of the payment provided for herein, John Lacek expressly waives reinstatement and agrees that F & E Erection Company shall not be obligated to employ him on any future job.

I hereby grant the motion to withdraw and dismiss this case on the understanding that paragraph 5 of the stipulation and settlement does not mean that if Mr. Lacek should in the future apply for employment with Respondent that Respondent is entitled to discriminate against him for the exercise of his rights under the Federal Mine Safety and Health Act. I also do not read this paragraph as waiving any rights Mr. Lacek or the Secretary of Labor may have in filing a complaint pursuant to section 105(c) of the Act if Respondent were to discriminate against Mr. Lacek in the future for exercising his rights under the Act at any time; past, present, or future.

ORDER

The Secretary of Labor's motion to withdraw his complaint is granted and this case is dismissed.

Arthur J. Amchan
Administrative Law Judge
703-756-4572

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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NOV 23 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 91-251 A.C. No. 42-01944-03586
v.	:	Cottonwood Mine
ENERGY WEST MINING COMPANY, Respondent	:	

DECISION ON REMAND

Before: Judge Lasher

The Federal Mine Safety and Health Review Commission, in its Decision of September 27, 1993, rejected the "substantial possibility" formulation as the equivalent of "reasonable likelihood" in the third element of its "Significant and Substantial" (S&S) formula set forth in Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984). In so doing, (1) the conclusion reached in my decision in this matter that the violation committed by Respondent Energy West as charged in Citation 3413898 was S&S was vacated, (2) the Commission requested application of its traditional Mathies formula for determination of the issue, and (3) clarification of my finding that the mine was "gassy" and findings regarding past ignitable methane levels were requested.

After reviewing the record in this matter, I conclude that the evidence that the mine is gassy is too general (II-T. 133, 139-140) and is not sufficiently supported. Likewise, the evidence of past high levels of methane in the mine was sufficiently general and contradictory between Inspectors (see fn. 6 of Remand) to lack the persuasiveness necessary for such finding.

Accordingly:

1. The finding that the mine is gassy is **VACATED** and, as the Commission specifically requested in its Remand, it is here determined that there is not sufficient evidence on this record to determine whether the mine is or is not, or has been, subject to section 103(i) spot inspections.

2. The testimony of Inspector Donald Gibson at II-T. 139-140 is rejected as too general and my finding that there had existed prior ignitable levels of methane at the mine is **VACATED.** (See fn. 6 of Remand).

3. a. Applying the Mathies test, and determining whether there existed a reasonable likelihood that the hazard contributed would result in an injury, it is determined that there is no such likelihood since the mine was not determined to be gassy and since there was no evidence of record that the mine had ever had ignitable levels of methane.

b. Citation No. 3413898 is **MODIFIED** to delete the "Significant and Substantial" designation thereon.[1]

Michael A. Lasher Jr.

Michael A. Lasher, Jr.
Administrative Law Judge

Distribution:

Robert J. Murphy, Esq., Office of the Solicitor, U.S. Department of Labor, 1585 Federal Office Building, 1961 Stout Street, Denver, CO 80294 (Certified Mail)

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ek

[1] It is understood that the Commission has, in its remand order, reserved to itself responsibility for recalculation of penalty for this Citation, as modified.

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

NOV 24 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. KENT 93-487
	:	A. C. No. 15-16708-03569
v.	:	
	:	Docket No. KENT 93-488
NEW HOPE OF KENTUCKY, INC., Respondent	:	A. C. No. 15-16708-03570
	:	
	:	Docket No. KENT 93-489
	:	A. C. No. 15-16708-03571
	:	
	:	No. 1 Mine

DECISION APPROVING SETTLEMENT

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor, U. S. Department of Labor, Nashville, Tennessee, for the Secretary;
Mr. Reece Lemar, New Hope of Kentucky, Inc., for Respondent.

Before: Judge Maurer

These cases are before me upon a petition for assessment of civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). An evidentiary hearing in these matters was held on October 21, 1993, in London, Kentucky. At the conclusion of that hearing, the parties filed a motion to approve a settlement agreement and to dismiss these cases.

The citations, initial assessments, and the proposed settlement amounts are as follows:

CITATION/ ORDER NO.	PROPOSED ASSESSMENT	PROPOSED SETTLEMENT
KENT 93-487		
9885241	$ 500	$ 100
KENT 93-488		
3828487	136	136
3828488	147	147
3828490	220	170

3828494	50	50
3828995	252	202
3828996	50	50
3828997	50	50
3828999	147	147

KENT 93-489

3828489	600	400
3828491	1000	600
3828492	1000	600
3828998	1800	1040
TOTAL	$ 5952	$ 3692

I have considered the representations and documentation submitted in these cases, as well as the testimony contained in the record of proceedings 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 $3692 within 30 days of this order.

Roy J. Maurer
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

NOV 29 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of PERRY PODDEY, Complainant,	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEVA 93-339-D
	:	MORG CD 93-01
v.	:	
	:	Coal Bank No. 12
TANGLEWOOD ENERGY, INC., Respondent	:	

DECISION

Appearances: Heather Bupp-Habuda, Esq., Office of the Solicitor, U. S. Department of Labor, Arlington, Virginia; for Complainant;
Paul O. Clay, Esq., Conrad & Clay, Fayetteville, West Virginia, for Respondent.

Before: Judge Amchan

FINDINGS OF FACT

Procedural History

On January 12, 1993, Perry Poddey, an underground coal miner, filed a complaint with the Mine Safety and Health Administration (MSHA) alleging that he had been discharged by Respondent on January 6, 1993, in violation of section 105(c) of the Federal Mine Safety and Health Act. Pursuant to an application filed on Mr. Poddey's behalf, I ordered that he be temporarily reinstated by Respondent, effective May 18, 1993. On May 28, 1993, the Secretary of Labor filed his complaint in this

matter, which was later amended to propose a civil penalty. This matter came to hearing in Elkins, West Virginia on September 1 and 2, 1993.[1]

Factual Background

Perry Poddey began working for Respondent, Tanglewood Energy, at Coal Bank 12, an underground mine in Randolph County, West Virginia, in approximately December, 1990 (Tr. I: 130). His duties primarily involved the operation and servicing of a 480 S&S scoop, which is a vehicle used to clean coal off the floor of sections which have just been mined by a continuous mining machine (Tr. I: 79 - 83, 153 - 157, II: 83 - 84, Photographic Exhibits A - G). The scoop is operated lying down with the operator's head and knees raised so that the vehicle can maneuver in the 30 - 36 inch high coal seam of Coal Bank 12 (Tr. I: 26, 157, II: 84).

Mr. Poddey was also responsible for supplying the roof bolt operator with bolts, spreading rock dust, and moving the conveyor belts (Tr. I: 79 - 83, 153 - 157, II: 83 - 84). It is undisputed that Mr. Poddey performed his job well (Tr. I: 168, 235, 269, 288 - 290, 309, II: 15 - 16, 56, 115). On one occasion in 1991, he was almost fired due to a disagreement with his supervisors, but management concluded that discharge was not warranted (Tr. I: 145 - 147, 288 - 290, II: 147 - 157, 161 - 163).

There were no further difficulties between Mr. Poddey and Tanglewood management until the late summer of 1992 when Jeff Simmons became his section foreman (Tr. I: 122 - 123, II: 6 - 9).[2] Mr. Simmons had been employed by Tanglewood at another mine since April 1991 (Tr. II: 6 - 7). After he was transferred to Coal Bank 12, the mine shut down for a couple of months. When production resumed, a number of the miners working for Mr. Simmons immediately took exception to the way he ran the section (Tr. I: 308, 311 - 313, II: 8, 88 - 91, 109 - 110). In October 1992, the continuous miner operator, "Butch" Davis, asked General Mine Foreman Randy Key, one of the two principals of Tanglewood Energy, to convene a meeting in order to discuss the miners' differences with Mr. Simmons (Tr. I: 103 - 104, 281 - 282, II: 86 - 90, 160).

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[1]"Tr. I" citations are to the transcript of September 1, 1993; "Tr. II" citations are to the transcript of September 2, 1993.

[2]Through January, 1993, Coal Bank 12 was a one-section mine (Tr. I: 280, II: 83). When Mr. Simmons became section foreman he thus became responsible for all production operations at this mine.

This meeting lasted 3 hours and a number of employees voiced their displeasure with Mr. Simmons to Key (Tr. II: 86 - 90). Mr. Davis raised a specific work practice problem that Mr. Key changed (Tr. II: 87 - 88). Mr. Poddey and his friend, Lynn Moore, were particularly vocal regarding their unhappiness with Mr. Simmons. At the conclusion of the meeting, most of the issues were resolved and Mr. Key told the miners that they had to work for Mr. Simmons. He invited the men to inform him of any problems they had with Mr. Simmons in the future (Tr. II: 86 - 91).

According to Mr. Poddey, he and Mr. Simmons got along for about 2 months after the October meeting and then Mr. Simmons started to harass him in order to retaliate for his complaints to Mr. Key at the October meeting (Tr. II: 158 - 160). According to Mr. Simmons, Mr. Poddey and Mr. Moore continued to treat him "hatefully" after the October meeting (Tr. II: 8 - 9).

Perry Poddey's Protected Activity Regarding his Scoop's Parking Brake

On November 3, 1992, MSHA Inspector Kenneth Tenney conducted an inspection of Coal Bank 12, accompanied by Jeff Simmons as management's representative (Tr. I: 23 - 24). During this inspection, he encountered Mr. Poddey operating his 480 S&S scoop. He spoke to Mr. Poddey about the scoop and determined that it was not equipped with an automatic emergency-parking brake (Tr. I: 25, 98).[3] Tenney issued a citation to Respondent alleging a violation of 30 C.F.R. § 75.523(a) for the absence of the emergency brake (Secretary's Exh. 1).[4]

Mr. Tenney believed that the absence of the brake constituted a hazard to miners working in the "low" coal seam. Employees had to regularly load supplies in the bucket of the scoop, which Mr. Tenney believed exposed them to injury if the scoop rolled accidently (Tr. I: 25 - 26). The company had to order the parts to install the parking brake and was completing installation of the brake when Tenney returned to the mine on November 19, 1992 (Tr. I: 29, 171 - 176).

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[3]The brake or braking system is referred to throughout the transcript as the C.L.A. brake. C.L.A. is apparently the manufacturer of the braking system; S&S is the manufacturer of the scoop.

[4]The requirement for an automatic emergency parking brake became effective on May 23, 1991. The regulation was predicated on an MSHA study indicating that 126 out of 540 fatal haulage and machinery accidents between 1966 and 1977 may have been prevented by such a brake. 54 Fed. Reg. 12406, 12407 (March 24, 1989).

Between November 19, 1992 and January 4, 1993, the bolt, by which the emergency brake system was affixed to Mr. Poddey's scoop, worked itself loose on a number of occasions, rendering the emergency brake ineffective (Tr. I: 153). Mr. Poddey reported this problem to Doug McCoy, Respondent's principal mechanic on the day shift, who tightened the bolt with an Allen wrench on several occasions (Tr. I: 187). On January 4, 1993, the bolt was loose again and the C.L.A. brake did not work at all (Tr. I: 145). Mr. Poddey reported this to Jeff Simmons and to Mr. McCoy. Poddey told Simmons and McCoy that he thought that a second bolt needed to be installed in the brake assembly (Tr. I: 177 - 178, II: 12 - 13, 144 - 146). This was reported to the night shift, which did not fix the brake before the morning of January 5 (Tr. I: 189 - 190, II: 13, 144 - 146).[5]

On the morning of January 5, 1993, MSHA's Kenneth Tenney conducted another inspection of Coal Bank 12 (Tr. I: 31).[6] When Tenney encountered Mr. Poddey and his scoop, the inspector, in the presence of Mr. Simmons, asked Poddey to test the emergency brake (Tr. I: 32 - 33, 92 - 94, II: 13 - 14). When Poddey did so, the scoop drifted (Tr. I: 33). Poddey informed Tenney that the bolt holding the brake assembly was loose, that he'd reported it several days previously, and that it had not been fixed (Tr. I: 33, 92 - 97).[7] Mr. Poddey showed the inspector where a second bolt was needed to maintain the brake's effectiveness (Tr. I: 97). Inspector Tenney then issued another citation to Respondent for the automatic emergency-parking brake on Mr. Poddey's scoop (Secretary's Exhibit 2).

After the conclusion of the day shift on January 5, Mr. Simmons installed the second bolt in the maintenance shop at the mine's surface (Tr. II: 14 - 15). In order to install the bolt, Mr. Simmons burned a hole in the metal of the brake assembly with a cutting torch. Mr. Simmons testified that this job took him 15 minutes to complete (Tr. II: 14 - 15). Mr. McCoy, however, believes this task would have taken

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[5]The night or "Hoot Owl" shift only consisted of maintenance personnel. Coal was mined only by the day shift.

[6]This inspection apparently was not made pursuant to a miner's complaint and thus was not expected by either Mr. Poddey or Tanglewood management.

[7]Mr. Poddey may have discussed the need for a second bolt with Mr. McCoy a day or two prior to January 4 (Tr. I: 189, II: 144 - 146). I find it necessary only to find that he mentioned it both to Mr. McCoy and to Mr. Simmons before he left work on January 4.

45 minutes to an hour to accomplish (Tr. II: 140 - 141).[8]

On the evening of January 5, 1993, Mr. Simmons called Randy Key, his immediate supervisor (Tr. II: 16 - 17). They discussed the MSHA inspection, as well as other matters. When informed of the citation issued for the emergency brake, Mr. Key was upset and wanted to know why it hadn't been fixed (Tr. II: (17 - 18, 29 - 33).

Mr. Simmons said that Mr. Poddey told him about the brake problem the day before the citation for the first time, although he had apparently reported it to others. Simmons explained to Key that he had left written instructions for the night ("hoot owl") shift to install the bolt. He then told Mr. Key that the bolt had not been installed and that Poddey had not told Simmons on the morning of January 5, that the emergency brake had not been repaired (Tr. II: 17 - 18, 96).

Simmons also told Key that Mr. Poddey had a month in which he had the opportunity to fix the problem himself and had not (Tr. II: 30 - 32). Mr. Key asked Mr. Simmons to have Mr. Poddey call him at the beginning of the next workday.

The Telephone Calls and Confrontation of January 6

Almost immediately upon arriving at work on January 6, 1993, Perry Poddey talked to Mine Superintendent Randy Key on the telephone. According to Key, he told Poddey that he was upset about getting a citation for the emergency brake and asked him why he didn't install the second bolt himself (Tr. II: 97 - 99, 102). Key then told Poddey that it was his responsibility to install the bolt (Tr. II: 97 - 99, 102). According to Poddey, Mr. Key also told him he was tired of receiving MSHA fines and that if Poddey didn't stop complaining to MSHA, Key would find himself another scoop operator (Tr. I: 113 - 115).

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[8]I decline to make any specific finding as to how long it took to perform this work other than it took between 15 minutes to an hour. Obviously Mr. McCoy could not have known how long the repair actually took since he was not present when Mr. Simmons did the work, although he assessed the time it would take him to do the work when Mr. Poddey raised the need for the additional bolt.

It is important to note that Mr. McCoy did not take issue with Mr. Simmons, as he was unaware of Mr. Simmons' testimony. However, I don't know how Mr. Simmons can be so sure that the repair took 15 minutes as opposed to 30 minutes or 45 minutes. There was no reason for him to keep track of the time that it took to install the second bolt. I regard this testimony to be in the nature of an educated guess.

Mr. Key denies threatening or criticizing Poddey for talking to the MSHA inspector (Tr. II: 99). For reasons explained below, I find that Key did chastise Mr. Poddey for complaining to MSHA. Although it is not certain what was said, it is likely that Mr. Key said something to indicate his displeasure about Mr. Poddey complaining to MSHA about something Key believed Poddey should have fixed himself.

After Mr. Poddey hung up the phone, he was visibly upset and started yelling at Mr. Simmons, who at times was 6 inches to 2 feet from him (Tr. I: 116 - 117, 263 - 264, Tr. II: 18 - 21).[9] The testimony of Mr. Poddey, Mr. Simmons, and other miners who witnessed this exchange are fairly consistent. Poddey said he told Simmons that he didn't appreciate him telling lies about him (Tr. I: 116 - 117). Simmons recalled Poddey accusing him of telling Key that Poddey had "deliberately" told MSHA about the emergency brake (Tr. II: 19); Simmons responded to Poddey by saying he had not done so (Tr. II: 19 - 20).[10] "Butch" Davis recalled Poddey telling Simmons that he didn't appreciate him telling Key that he had talked to MSHA (Tr. I: 263 - 264).

Doug McCoy recalled Poddey blaming Simmons for accusing him of reporting the problems with the scoop emergency brake to an inspector (Tr. I: 184 - 185). Lynn Moore testified that Mr. Poddey denied volunteering information to MSHA, when talking to Randy Key and to Mr. Simmons (Tr. I: 202, 219). In light of these accounts of what clearly seems to have been a spontaneous and impulsive outburst, I think it very unlikely that Mr. Key did not take Mr. Poddey to task for bringing the automatic-emergency parking brake to MSHA's attention--although Key may have sincerely believed that there would have been no violation if Poddey had carried out his responsibilities.

Mr. Poddey stood very close to Mr. Simmons, yelling at him and apparently shook his finger close to Mr. Simmons' face (Tr. I: 273 - 274). Towards the end of the confrontation, Poddey told Simmons that if he (Simmons) had a problem with him (Poddey) they should settle it "outside the gate" (Tr. I: 116, Tr. II: 19). Simmons testified that he interpreted the last remark as an

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[9]The mine office in which this confrontation took place was rather small and filled with furniture and people. Thus, when Mr. Poddey began yelling at Mr. Simmons, he was, by necessity fairly close to him (Tr. I: 328 - 329, II: 35 - 37).

[10]By "deliberately" telling MSHA about the brake, I assume that Poddey was accusing Simmons of telling Key that Poddey had, in bad faith, gone out of his way to point out an MSHA violation which was Poddey's fault.

invitation to fight and thought a fight might start right there in the office (Tr. II: 20 - 21).[11]

Mr. Simmons immediately called Mr. Key and told Key that Mr. Poddey "wanted to take him to the gate", or that Poddey "wanted to whip him" (Tr. II: 21, 99 - 100).[12] "Butch" Davis got on the phone and asked Mr. Key to come to the mine to resolve the dispute (Tr. I: 118). The incident, including the phone calls, lasted 10 to 15 minutes, after which the day shift crew went to work (Tr. I: 181 - 182, 202, 322 - 323, II: 21 - 23).

Shortly thereafter Mr. Key called his partner, Randy Burke, and the two decided to discharge Mr. Poddey for threatening Mr. Simmons (Tr. II: 101).[13] Mr. Key drove to Coal Bank 12 and, at the conclusion of the day shift on January 6, called Poddey, Lynn Moore, and Jeff Simmons into the mine office and fired Poddey and Moore (Tr. II: 23, 103 - 104). After being discharged, Mr. Poddey expressed a desire to "whip" Simmons and even to kill him, which was heard by some of his co-workers, but not by Simmons (Tr. I: 274, 305).[14]

By the time of the hearing in this matter, Mr. Poddey had been working for over 3 months for Respondent pursuant to my

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[11]Mr. Poddey denies that his statement conveyed an invitation to fight off the premises. Doug McCoy testified that the statement does not necessarily constitute such a challenge. Witness Doy Carpenter interpreted the remark as an invitation to fight. I find that the remark was an invitation to fight at an unspecified time--unless Mr. Simmons stopped trying to get him in trouble. As Mr. Key observed, if all Mr. Poddey wanted was a discussion or argument, he and Mr. Simmons were having one in the mine office (Tr. II: 100 - 101)

Both Mr. Poddey and Mr. Simmons appeared to be in their early thirties. Mr. Simmons is 5'6" tall and weighs 175 lbs. Mr. Poddey is 6' tall and weighs 175 lbs.

[12]Mr. Key may have regarded "taking him to the gate" as essentially the same thing as a threat to beat up Mr. Simmons off the company premises.

[13]They also decided to fire Mr. Poddey's friend and co-worker, Lynn Moore, for threatening to strike. On the morning of January 6, at the conclusion of the confrontation between Poddey and Simmons, the latter told the day shift to go to work. Moore said something like, "maybe there isn't going to be any work today."

[14]Simmons made no mention of such threats in his testimony at hearing and I, therefore, conclude that they were not made in his presence (Tr. II: 23).

May 25, 1993 Order of Temporary Reinstatement. During this period, he has been working for foreman Roger Sharp without incident (Tr. I: 113, 123).

ISSUES OF LAW

Did Respondent Violate Section 105(c) of the Act?

Section 105(c)(1) of the Federal Mine Safety and Health Act provides that:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any . . . miner because such miner . . . has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent . . . of an alleged danger or safety or health violation . . . or because such miner . . . has instituted or caused to be instituted any proceeding under or related to this Act . . . or because of the exercise by such miner . . . of any statutory right afforded by this Act.

The Federal Mine Safety and Health Review Commission has enunciated the general principles for analyzing discrimination cases under the Mine Act in Sec. ex rel. Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981), and Sec. ex rel. Robinette v. United Castle Coal Co., 3 FMSHRC 803 (April 1981). In these cases, the Commission held that a complainant establishes a prima facie case of discrimination by showing 1) that he engaged in protected activity and 2) that an adverse action was motivated in part by the protected activity.

The operator may rebut the prima facie case by showing either that no protected activity occurred, or that the adverse action was in no part motivated by the protected activity. If the operator cannot thus rebut the prima facie case, it may still defend itself by proving that it was motivated in part by the miner's unprotected activities, and that it would have taken the adverse action for the unprotected activities alone.

In the instant case, there is no controversy regarding the fact that Perry Poddey engaged in protected activity. He engaged in such activity when he reported the malfunction of the automatic emergency-parking (C.L.A.) brake to Respondent's mechanic McCoy, when he reported it to Simmons prior to the

inspection, and when he discussed the problem with the brake and the need for a second bolt with MSHA inspector Tenney on January 5, 1993. Similarly, there is no question that the timing of Mr. Poddey's discharge, a day after his discussions with inspector Tenney, creates an inference that his discharge was motivated in part by his protected activity. Donovan v. Stafford Construction Co., 732 F.2d 954 (D.C. Cir. 1984). Thus, Complainant has clearly made out a prima facie case that Respondent violated section 105(c) in discharging Mr. Poddey on January 6, 1993.

The first of the difficult issues in this case is whether Respondent has rebutted the prima facie case by showing that it was in no part motivated by Poddey's protected activity. I find that Respondent fired Perry Poddey for what it perceived to be a threat to Foreman Simmons, or at least insubordinate behavior towards Mr. Simmons. A simplistic resolution of this case would be to hold that Respondent has, therefore, rebutted the Secretary's prima facie case and, thus, did not violate section 105(c) in discharging Mr. Poddey.

However, I think this case is more complicated and that a fair resolution, and one that comports with the purposes of section 105(c), requires an inquiry as to whether Poddey's insubordination and protected activity are so intertwined that his discharge violates the Act. See Pogue v. U. S. Department of Labor, 940 F.2d 1287 (9th Cir. 1991). It also requires an inquiry as to whether Mr. Poddey's conduct during the January 6, 1993 confrontation with Simmons, and/or afterwards, was such that he forfeited whatever rights he had under the Act Precision Window Manufacturing Co. v. N.L.R.B., 963 F.2d 1105 (8th Cir. 1992).

In analyzing the instant case, I find most helpful the following discussion by Judge Levin Campbell of the United States Court of Appeals for the First Circuit of a case under the National Labor Relations Act:

> A case of this nature requires balancing the employer's right to run its office as it pleases against the employees' right to act in concert without fear of retaliation. . . On the one hand, section 7 rights are "not a sword with which one may threaten or curse supervisors". . . On the other hand, if an employee's conduct is not egregious there is "some leeway for impulsive behavior". . . And the leeway is greater when the employee's behavior takes place in response to the employer's wrongful provocation. . . Trustees of Boston University v. N.L.R.B., 548 F.2d 391, 393 (1st Cir. 1977).

Perry Poddey was clearly acting in good faith when he reported the condition of his brakes to Mr. McCoy and to Mr. Simmons. While one can understand why Mr. Simmons and Mr. Key were upset at getting a second MSHA citation on account of the C.L.A. brake on Mr. Poddey's scoop, I find that they were not justified in blaming him for not repairing the brake himself and that, in so doing, they did "wrongfully provoke" the outburst on January 6, 1993. While Mr. Poddey's behavior would certainly justify discharge in the absence of his protected activity, I find that it was not of such a nature that it forfeited his rights under the Mine Act.

Possibly the most critical issue in this case is whether Mr. Poddey was at fault for not repairing the C.L.A. brake. If Respondent was correct that he was, Mr. Simmons and Mr. Key were perfectly justified in blaming him for the January 5, 1993 citation and Mr. Poddey was totally unjustified in exploding at Mr. Simmons on January 6. If, on the other hand, Mr. Poddey was not at fault for not repairing the brake, it is at least understandable why he turned on Mr. Simmons and greater leeway should be given to his impulsive behavior.

I find that, although Mr. Poddey may have been capable of installing a second bolt in the emergency brake assembly, it was not his responsibility to do so. Probably the most important evidence in this regard is the testimony of Mr. Simmons. When Mr. Poddey complained to him about the brake on January 4, 1993, Mr. Simmons did not tell Mr. Poddey to fix it himself, he reported it to the night shift (Tr. I: 189 - 190, II: 13, 96, Also see Tr. I: 111 - 112, 183). I regard this as establishing that Mr. Simmons did not consider installation of the bolt to be part of Mr. Poddey's responsibilities. It is also noteworthy that Mr. Simmons did not order Mr. Poddey to install the bolt after the MSHA citation was issued; he performed the installation himself (Tr. II: 14 - 15).

Mr. Poddey's contention that repairing the scoop was not his responsibility is also borne out by other witnesses.[15] Terry Bennett, who replaced him as scoop operator, testified that he did no repairs on the vehicle; instead he filled out a report for the maintenance crew on the night shift (Tr. I: 161 - 162). Doug McCoy's testimony also supports Mr. Poddey's position that repairs, as opposed to maintenance and servicing (greasing and oiling the scoop), were performed either by Mr. McCoy or the

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[15]Mr. Poddey testified that he performed whatever repairs to his scoop that his foreman allowed him (or allowed him time) to do. He contends that after Mr. Simmons became his foreman, he was given additional duties, particularly with regard to belt moves, and was not allowed, or had insufficient time to do any repairs on his vehicle (Tr. I: 101 - 102, 108 - 109, 132 - 135).

night crew, not by the scoop operator (Tr. I: 176, 189 - 190). The testimony of Sam Knotts, still an employee of Respondent, also supports the conclusion that repairs such as installation of the second bolt would be made on the night shift, not by the production personnel on the day shift (Tr. I: 251, 256).

Respondent contends that Mr. Poddey was obligated to do a pre-shift examination and that he failed to do so--as evidenced by the fact that he did not tell Mr. Simmons, on January 5, that the night shift had not installed the second bolt. However, the record does not establish that Mr. Poddey failed to do a pre-shift examination because one cannot draw such a conclusion simply from the fact that he didn't bring the absence of a second bolt to Mr. Simmons' attention (Tr. I: 139, II: 26). It may be that he believed reporting the condition to his supervisor once was sufficient or that he would wait for a few days before raising the subject again.

Moreover, as mechanic Doug McCoy testified, it is not clear that a preshift examination, as performed at Coal Bank 12 in January, 1993, would have alerted Poddey to the fact that the second bolt had not been installed (Tr. I: 190). McCoy testified that he believes he tightened the single bolt on the brake assembly when Poddey complained to him on January 4 (Tr. I: 189). It is possible that the C.L.A. brake was operational at the start of the shift on January 5, and worked itself loose by 12:35 p.m., when inspector Tenney cited it (Tr. I: 190, Secretary's exhibit 3). It is also important to note that Mr. Poddey's preshift examination would normally be performed at the underground charging station with only the light from his cap lamp (Tr. I: 140 - 141, 149).

If Mr. Poddey was not to blame for failing to fix the brake and the January 5 citation, his anger at having the blame placed upon him by Mr. Simmons and Mr. Key is understandable. I draw no conclusions as to who was responsible or most responsible for the pre-existing animosity between Mr. Poddey and Mr. Simmons. I do not impute venality to Mr. Simmons in blaming Mr. Poddey for the citation. Given the friction between Simmons and Poddey, Simmons' understandable frustration at receiving a citation for a condition he could reasonably have thought was corrected, and having to respond to his supervisor's inquiries, I can feel some empathy for Mr. Simmons' placing responsibility for the citation on Mr. Poddey.

Nevertheless, I conclude that, since installation of the bolt was not Mr. Poddey's responsibility, it was a violation of section 105(c) for Mr. Key, after talking to Mr. Simmons, to reprimand Mr. Poddey for causing the citation on January 6. Having found that Mr. Key did to some extent castigate Mr. Poddey for his discussions with Inspector Tenney, I conclude that Respondent violated the Act in so doing. Unjustifiably placing

the blame for a citation on an employee, whose discussions with MSHA contribute to the issuance of the citation, constitutes interference with a miner's rights under the Mine Safety and Health Act.

Indeed, it would be completely contrary to the purposes of the Act to allow an employer to place the blame for a citation on the miner who brings it to MSHA's attention, and reprimand him for it--unless the employer is clearly correct.[16] To hold otherwise, would greatly inhibit MSHA's ability to gather information from miners. No miner, even one acting in good faith, would bring health and safety conditions to MSHA's attention if they thought it likely that they would be deemed at fault and subjected to disciplinary action. When an employer lays responsibility for an unsafe condition on an employee who exercises statutory rights in bringing it to MSHA's attention, the employer should be absolved of a section 105(c) violation only if, from an objective standpoint, it is justified in doing so.[17]

Did Mr. Poddey's Conduct Forfeit his Protection by the Act?

Having found that Mr. Poddey was justifiably angry at being accused of causing the January 5, 1993 citation and being too forthcoming with MSHA under the circumstances, did he forfeit his protection by yelling in Mr. Simmons' face and suggesting that they take their mutual dislike for each other "outside the gate?" If the answer to this question is negative, there is still an issue of whether Mr. Poddey forfeited his rights under the Act by telling other miners that he was going to "whip" Mr. Simmons or that he would kill or like to kill him.

There is considerable case law for the proposition that an employee whose instantaneous insubordination is provoked by his employer's retaliatory conduct does not automatically forfeit his rights to "whistleblower" protection. NLRB v. Mueller Brass Co.,

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[16]Senate Report 95-181 indicates that assuring miner involvement in reporting safety and health violations was one of the primary reasons for including section 105(c) in the 1977 Act. The Senate Committee stated that it, "intends § [105(c)] to be construed expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation." Legislative History, p. 624.

[17]If the violation was clearly the fault of the employee who brought it to MSHA's attention, there might be an issue of whether the employee's protected activity was pursued in good faith. In such a situation, although a reprimand might be a provocation, it would not be a "wrongful provocation" in Judge Campbell's parlance.

501 F.2d. 680 (5th Cir. 1974); NLRB v. M & B Headware, 349 F. 2d 170 (4th Cir. 1965); Crown Central Petroleum v. NLRB, 430 F.2d 724, 729-31 (5th Cir. 1970); Trustees of Boston University v. N. L. R. B., 548 F.2d 391 (1st Cir. 1977); NLRB v. Steinerfilm, Inc., 669 F.2d (1st Cir. 1982); Pogue v. Department of Labor, 940 F.2d 1287 (9th Cir. 1991); NLRB v. Florida Medical Center, 576 F.2d 666 (5th Cir. 1978)Lewis Grocer Co., v. Holloway, 874 F.2d 1008 (5th Cir. 1989); NLRB v. Vought Corp.- MLRS Systems Division, 788 F.2d 1378, 1384 (8th Cir. 1986).

On the other hand, there is case law supporting the proposition that, at some point, the employee's insubordinate reaction will cost him his statutory protection. Dunham v. Brock, 794 F.2d 1037 (5th Cir. 1986); Precision Window Manufacturing v. NLRB, 963 F.2d 1105 (8th Cir. 1992); General Teamsters Local No. 162 v. NLRB, 782 F.2d 839 (9th Cir. 1989); NLRB v. Soft Water Laundry, Inc., 346 F.2d 930 (5th Cir. 1965).

It is important, in this case, to look very carefully at what Mr. Poddey said and did. Mr. Poddey's behavior was spontaneous and impulsive and I conclude from the case law cited above that his conduct in angrily yelling at Mr. Simmons after talking to Mr. Key would not forfeit his rights under section 105(c) of the Act.[18] The next issue is whether he forfeited these rights by telling Mr. Simmons that if he had a problem with him, they should take it outside the gate.

I find that this statement, in the context in which it occurred, did not forfeit Mr. Poddey's statutory rights to protection from retaliation under section 105(c). Mr. Poddey did not hit Mr. Simmons and did not even threaten to hit him. He did not threaten Simmons that he would beat him up later. I find that Mr. Poddey was clearly inviting Mr. Simmons to fight him off the premises at some unspecified time in the future, unless, as Poddey believed, Mr. Simmons stopped trying to get him in trouble with Mr. Key. What is critical is that Mr. Poddey never followed up on this invitation.[19]

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[18]Mr. Key testified that Mr. Simmons did not place responsibility for the missing bolt on Poddey, he (Key) did so. However, Simmons' testimony, which I credit, is that he (Simmons) did, in talking to Key, blame Poddey for not repairing the brake (Tr. II, 30 - 33).

[19]The fact that Mr. Poddey never acted upon his invitation to Simmons to settle their differences outside the gate distinguishes this case from the situation described in Precision Window Manufacturing v. NLRB, 963 F.2d 1105 (8th Cir. 1992). In that case, the discharged employee threatened to kill his supervisor and then returned to the plant. He left the employer's premises pursuant to police orders.

Similarly, I find that the remarks made by Mr. Poddey after he was fired, expressing a desire to kill Mr. Simmons, did not forfeit his rights under the Act. These were also made impulsively and not to Mr. Simmons. As with his invitation to take their problems outside the gate, Mr. Poddey never acted upon these statements and, indeed, there is no indication that he ever repeated them after the initial shock of his discharge.[20]

The instant case bears a striking similarity to that described in NLRB v. Steinerfilm, Inc., 669 F.2d 845 (1st Cir. 1982). In that case, an employee named Gazaille, who had engaged in activity protected by the National Labor Relations Act, received a written reprimand, which the Board found unjustified and motivated by his protected activity. Gazaille responded to the reprimand by getting into a heated argument with his plant manager during which he used some offensive and abusive language. During this argument Gazaille offered to "settle things with [the plant manager] out in the cornfield."

Gazaille was fired for his conduct during this argument and his "threat" to the plant manager. The NLRB found that Gazaille's insubordination was an excusable reaction to the unjustified warning he had just received and that no physical threat was made. The Court of Appeals for the First Circuit, in enforcing the Board's order of reinstatement and back pay, found that the Board's conclusions were reasonable.

While fully understanding how Mr. Simmons and Mr. Key, without any venal motive, could react as they did to the January 5 citation, I conclude, as did the NLRB in Steinerfilm, that Mr. Poddey's reaction to the reprimands he received and to his discharge were excusable, and that, therefore, Respondent has failed to rebut the Secretary's prima facie case. Similarly, given the inextricable relationship between the events leading to Mr. Poddey's discharge and his protected activity, I find that Respondent has failed to meet its burden of establishing that Mr. Poddey would have been fired even in the absence of his protected activity. Thus, I conclude that Respondent violated § 105(c) of the Act in discharging Perry Poddey on January 6, 1993.

The Civil Penalty

The Secretary has proposed a Civil Penalty of between $2,500 to $3,000 for Respondent's violation of section 105(c). I assess a civil penalty of $100. Applying the criteria set forth in

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[20]The record indicates that Mr. Poddey was surprised when Mr. Key fired him and may have expected Key to fire Simmons (Tr. I: 187, 282, II: 23, 104).

section 110(i) of the Act, I note that Respondent is a small employer with a relatively large number of previous violations of the Act. However, I find that a $100 penalty is appropriate using the criteria of gravity and negligence (which I view as a determination of fault in the discrimination context). Although I find that Mr. Simmons and Mr. Key unjustifiably placed blame on Mr. Poddey for the January 6, 1993 citation and that they provoked the outburst that led to Mr. Poddey's discharge, I find no evidence that they did so with the intention of generally discouraging safety complaints or cooperation with MSHA.

There is no evidence in the record that Respondent had, on any previous occasions, retaliated against employees for exercising their rights under the Act, or tried to inhibit them from so doing. Moreover, there is no indication that Respondent would have so retaliated but for the unusual circumstances of this case. Mr. Simmons' conduct appears to be motivated by the natural desire to avoid being saddled with responsibility for the citation, which he thought was not his fault, and the long-standing animosity between himself and Mr. Poddey.

Mr. Key's conduct was also an understandable reaction to being cited for a condition he thought had been corrected, his understanding of the reason for the violation gained from Mr. Simmons, and his reaction to the behavior of Mr. Poddey towards Mr. Simmons. While I do not find sufficient evidence to conclude that either Mr. Simmons or Mr. Key sought to inhibit employees in exercising their rights under the Act, I believe Mr. Poddey's discharge does tend to do just that (See Tr. 39 - 40, 51 - 52). For that reason, I believe a $100 penalty is warranted.

ORDER

1. My order of May 18, 1993, requiring Respondent to reinstate Perry Poddey to the position from which he was discharged on January 6, 1993, or to an equivalent position, at the same rate of pay, and with the same or equivalent duties, remains in effect.

I note that good faith compliance with this order may require some effort on the part of Respondent and its agents, as well as Mr. Poddey. Respondent and it agents must not try to subtly settle any scores with Mr. Poddey, or in any way discourage, inhibit or interfere with Mr. Poddey's right to raise good faith safety and health complaints with management, with MSHA, or with state or local safety and health officials. On the other hand, Mr. Poddey is reinstated with the admonition that he will be expected to conduct himself with due respect to Respondent's supervisory personnel, particularly Mr. Simmons. He must recognize that Respondent has a right to choose its supervisory personnel and that these supervisors have, with

narrow exceptions provided by law, wide latitude as to what they may demand of an employee.

2. Respondent IS ORDERED to pay Mr. Poddey full backpay and benefits with interest, less the payments he received in unemployment compensation. Clifford Meek v. Essroc Corporation, 15 FMSHRC 606 (April 1993). Interest should be computed in accordance with the short-term Federal rate applicable to the underpayment of taxes. Clinchfield Coal Co., 10 FMSHRC 1493 (November 1988).

3. Respondent IS ORDERED to expunge from Mr. Poddey's personnel file and/or company records all references to the circumstances surrounding his employment termination of January 6, 1993.

4. Respondent IS ORDERED to pay a civil penalty assessment of $100 for its violation of section 105(c) of the Act.

5. Respondent IS ORDERED to inform all its employees verbally and by posting a legible notice in a prominent place at all its properties that miners have a right under the Federal Mine Safety and Health Act to bring to the attention of management, the Mine Safety and Health Administration, and state and local safety officials, any concerns they have with regard to safety and health conditions in their employment. In so informing its employees, Respondent is also ORDERED to inform them that such activities are protected by section 105(c) of the Federal Mine Safety and Health Act.

6. Counsel are directed to confer and file a stipulation or agreement with me within 15 days regarding the amount due Mr. Poddey. In the event that counsel cannot agree on the specific dollar amounts due, they are to notify me within 15 days of this decision and shall submit their separate proposals, with supporting arguments, within 30 days of this decision. I retain jurisdiction in this matter until the remedial aspects of this case are resolved.

Arthur J. Amchan
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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NOV 30 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. PENN 93-109
	:	A. C. No. 36-07903-03517
v.	:	
	:	Heather Mine
BUCKET COAL COMPANY, Respondent	:	

DECISION

Appearances: Maureen A. Russo, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, PA for the Petitioner;
Andrew Drebitko, President, Bucket Coal Company, Minersville, PA for the Respondent.

Before: Judge Weisberger

This case is before me based upon a petition for Assessment of Civil Penalty filed the Secretary (Petitioner) alleging a violation by the Operator (Respondent) of 30 C.F.R. § 70.207(a). Also at issue is the validity of a subsequently issued order under Section 104(b) of the Federal Mine Safety and Health Act of 1977 ("the Act"). Subsequent to notice, the case was heard in Harrisburg, PA on October 13, 1993. Leonard W. Rogers, Jr., and Thomas J. Garcia, testified for Petitioner. Andrew Drebitko, testified for Respondent. The parties waived the right to file a written brief, and instead presented oral arguments at the conclusion of the hearing.

Findings of Fact and Discussion

Leonard W. Rogers, Jr., an MSHA inspector, testified, in essence, that a computer generates a non-compliance notice when dust samples required by 30 C.F.R. § 70.207(a) are not received by MSHA. On May 11, 1992, Rogers issued to Respondent a citation which alleges a violation of Section 70.207(a) supra in that "The mine operator did not collect and submit five valid respirable

dust samples for the bimonthly period of March/April, 1992 on mechanized mining unit 0001-1 for the designated occupation 039 (hand loader) as shown in the attached advisory, dated 5/8/92." Section 70.207(a) supra, as pertinent, requires the taking of five respirable dust samples in each mechanized mining unit during each bi-monthly period. It is further provided that the samples shall be collected on "consecutive normal production shifts or normal production shifts each of which is worked on consecutive days." 30 C.F.R. § 70.2(l) states that "production shifts" means "(1) with regard to a mechanized mining unit, a shift during which material is produced, or (2) with regard to a designated area of a mine, a shift during which material is produced and routine day-to-day activities are occurring in the designated area."

Tom J. Garcia, a supervisor at the MSHA Shamokin Field Office, testified that, for the period at issue, the subject mine was classified by MSHA as being in an A-A status. He said this means that it was in a production status. Garcia said that a mine remains classified in an A-A status until the operator notifies MSHA that it is no longer producing coal. There is no evidence that the operator had notified MSHA that it was no longer producing coal during the period when it was in an A-A status between July 9, 1991 and November 1, 1992.

Andrew Drebitko testified that the mine was flooded on February 24, 1992, and that the mine was not producing coal until it went back to a partially active status on July 28, 1992. He said that from February, 1992, until June or July, aside from somebody helping him to move pumps, he was the only one at the mine moving machinery and equipment. There is no evidence that he or anyone else representing the operator notified MSHA that the mine was not producing coal in April and May, 1992.

The clear language of the Section 70.207(a) mandates that dust samples in mechanized mining units are to be collected on "normal production shifts." As defined by Section 70.2(l) supra, a production shift is a shift "during which material is produced." I give more weight to the testimony of Drebitko based on his personal knowledge, as opposed to the testimony of Garcia based on an MSHA record, that was not offered in evidence, regarding Respondent's status during the period in question. Hence based upon Drebitko's uncontradicted testimony, I find that it has not been established that in April and May, 1992 Respondent was in production and had "production shifts."

Further, I note that pursuant to Section 70.207(a) the obligation to collect dust samples is limited to "normal" production shifts. A "normal production shift", according to 30 C.F.R. § 70.2(k) means "(1) a production shift during which

the amount of material produced in a mechanized mining unit is at least 50% of the average production reported for the last set of five valid samples; . . . ." There is no evidence that there was production in the period in question of "at least 50% of the average production reported for last set of five valid samples."

For these reasons, I conclude that it has not been established that Respondent violated Section 70.207(a) as alleged. I further find that the Section 104(b) Order issued by Garcia on August 27, 1992 for failure to abate the initial citation is to be vacated.

ORDER

IT IS ORDERED that Citation No. 98500040, and Order No. 3080318 are to be dismissed. It is further ordered that this case be Dismissed.

Avram Weisberger
Administrative Law Judge

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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NOV 19 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. VA 93-165
	:	A.C. No. 44-06594-03522
v.	:	
	:	Docket No. VA 93-166
SOUTHMOUNTAIN COAL COMPANY, INCORPORATED, Respondent	:	A.C. No. 44-06594-03523
	:	No. 3 Mine

DECISION DENYING MOTION TO DISMISS

Respondent Southmountain Coal Company, Incorporated (Southmountain) has moved for dismissal of the captioned cases on the grounds that the petitions for assessment of penalties were filed four days late. It is undisputed that Respondent hand delivered its notices of contest ("blue card") of the Secretary's notification of proposed assessments of penalty to the Secretary on September 10, 1993. It is further undisputed that the "blue card" was stamped "received" by an agent of the Secretary on September 10, 1993.

Commission Rule 28(a) provides, in relevant part, as follows:

> Time to File. Within 45 days of receipt of a timely contest of a proposed penalty assessment, the Secretary shall file with the Commission a petition for assessment of penalty.

Within the framework of this rule the petitions for penalties herein were due to be filed with this Commission by October 25, 1993. It is not disputed that the Secretary filed such petitions on October 29, 1993, four days beyond the 45-day deadline in Commission Rule 28(a). Southmountain argues that, accordingly, under applicable Commission decisions, these cases must be dismissed.

More particularly, Southmountain cites the Commission's two-tier test for determining whether a late filing requires dismissal -- the initial test requiring the Secretary to show adequate cause to support his late filing and the second test, applicable despite an adequate showing of cause by the Secretary, when an operator demonstrates prejudice caused by the filing delay. Salt Lake County Road Department, 3 FMSHRC 1714 (1981);

Medicine Bow Coal Company, 4 FMSHRC 882 (1982); Rhone-Poulenc of Wyoming Company, 15 FMSHRC _____, WEST 92-519-M (October 13, 1993).

In his Response in Opposition to the Motion to Dismiss the Secretary states, as reasons for the late filing, the following:

> 1. On September 10, 1993, Southmountain filed its 'blue card' with MSHA's Civil Penalty Assessment Office contesting penalties proposed by the Secretary in docket numbers VA 93-165 and VA 93-166.
>
> 2. All 20 violations being assessed by the Secretary in this case are the subject of earlier filed notices of contest filed by Southmountain and William Ridley Elkins. The contest proceeding is presently pending before Administrative Law Judge Gary Melick. Southmountain Coal, Inc. and William Ridley Elkins v. Secretary, VA 93-108-R through VA 93-140-R.
>
> 3. The civil penalties proposed by the Secretary in these two docket numbers total $436,372. (Attachment A.) Eight of the involved citations were assessed by the Secretary at $50,000 each. The Secretary intends to prove at trial that each of these eight violations contributed to a fatal explosion at Southmountain's No. 3 Mine on December 7, 1992, in which 8 miners were killed and 1 miner was injured seriously.
>
> 4. After Southmountain filed its blue card with MSHA, the undersigned counsel received separate civil penalty packets from MSHA's Civil Penalty Office for VA 93-165 and VA 93-166. These penalty packets are used by the Solicitor's Office to prepare the Petitions for Civil Penalty Assessment that are filed with the Commission. Each of the penalty packets received from MSHA in this case was bound together so that the Civil Penalty Office date stamp of 'September 17, 1993' appeared at the bottom of each of the two blue cards. (Attachments B & C. The undersigned counsel has circled this date with blue marker on each of the blue cards.) The undersigned counsel calculated the 45-day civil penalty filing period provided for in Commission Rule 28 from the September 17, 1993, date stamp. As a result, the undersigned counsel was under the good faith belief that the deadline for filing a civil penalty in docket numbers VA 93-165 and VA 93-166 was November 1, 1993.

5. Unknown to the undersigned counsel was the fact that there was a second MSHA Civil Penalty Office date stamp on each of the two blue cards and that this second stamp bore the date 'September 10, 1993.' The undersigned counsel certifies that given the position of this second date stamp, at the opposite end of each of the September 17 date stamp, and at the uppermost portion of the blue cards, it was not observed by him during his review of MSHA's penalty packets for both VA 93-165 and VA 93-166. (In addition, this second date stamp of September 17 was concealed from the undersigned counsel's view as the documents were reviewed in their bound condition.) The undersigned counsel also certifies that he expected to find only one date stamp from MSHA's Civil Penalty Office on the blue cards. As a result, the 45-day filing period was calculated from September 17, 1993, and not from September 10, 1993. The undersigned subsequently has learned that the September 17, 1993, date mistakenly relied upon by him was actually the date that MSHA's Civil Penalty Office received the blue card from the Commission.

6. The Secretary submits that the undersigned counsel's good faith reliance upon the wrong MSHA Civil Penalty Office stamp date, and counsel's explanation as to how this mistake occurred, constitute adequate cause under Rhone-Poulenc, supra., for his filing a civil penalty petition 4-days out of time.

The above representations are not disputed by Southmountain and I find that they do in fact set forth legally sufficient adequate cause for excusing the brief four-day delay in the filing of the Secretary's civil penalty petitions in these cases. However, while I have found the excuses acceptable in the instant cases there is indeed concern with the increasing number of late filings. For the Commission judges to maintain their dockets in manageable order, it is essential that the parties adhere strictly to filing deadlines.

While Southmountain also alleges in these cases that it has been prejudiced by the four-day filing delay, it has failed to cite a particularized factual basis to support the allegation. Under the circumstances, the motion to dismiss filed by Southmountain is **DENIED.**

Gary Melick
Administrative Law Judge

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