

NOVEMBER 2000

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NOVEMBER 2000

There were no cases in which review was granted during the month of November

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

Donald Ribble v. T & M Development Company, Docket No. LAKE 2000-25-M,
October 11, 2000 (Judge Melick)

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

November 2, 2000

DISCIPLINARY PROCEEDING

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Docket No. D 2000-2

BEFORE: Jordan, Chairman; Riley, Verheggen, and Beatty, Commissioners

ORDER

BY THE COMMISSION:

On May 17, 2000, Chief Administrative Law Judge David Barbour sent to the Commission a disciplinary referral pursuant to Rule 80 of the Commission's Procedural Rules, 29 C.F.R. § 2700.80.¹ This matter was raised by Lue A. Wilson.² We have reviewed the

¹ Commission Procedural Rule 80 provides in pertinent part:

(b) Grounds. Disciplinary proceedings may be instituted against anyone who is practicing or has practiced before the Commission on grounds that such person has engaged in unethical or unprofessional conduct; has failed to comply with these rules or an order of the Commission or its Judges; has been disbarred or suspended by a court or administrative agency; or has been disciplined by a Judge under paragraph (e) of this section.

(c) Disciplinary proceedings shall be subject to the following procedure:

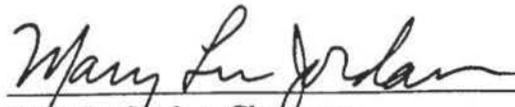
...

(2) Inquiry by the Commission. The Commission shall conduct an inquiry concerning a disciplinary referral and shall determine whether disciplinary proceedings are warranted. The Commission may require persons to submit affidavits setting forth their knowledge of relevant circumstances. If the Commission determines that disciplinary proceedings are not warranted, it shall issue an order terminating the referral.

29 C.F.R. § 2700.80.

² In December 1999, Lue Wilson filed a discrimination complaint under section 105(c)(3) of the Mine Act, 30 U.S.C. § 815(c)(3), against his former employer, Sidco Mining,

submissions and considered the allegations of misconduct presented by Mr. Wilson, and conclude that even if the facts he alleged were true, they would not warrant disciplinary proceedings under Commission Procedural Rule 80. Accordingly, this inquiry is terminated.



Mary Lu Jordan, Chairman



James C. Riley, Commissioner



Theodore F. Verheggen, Commissioner



Robert H. Beatty, Jr., Commissioner

Inc. ("Sidco"), which is currently pending before the Commission, awaiting hearing before an administrative law judge. *Wilson v. Sidco Mining, Inc.*, Docket No. CENT 2000-87-DM.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

November 3, 2000

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

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v.

Docket No. CENT 99-272

JUSTIS SUPPLY & MACHINE SHOP

BEFORE: Jordan, Chairman; Riley, Verheggen, and Beatty, Commissioners

DECISION

BY THE COMMISSION:

This is a civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act” or “Act”), in which Justis Supply & Machine Shop (“Justis”) challenges three citations issued by the Department of Labor’s Mine Safety and Health Administration (“MSHA”). At issue is whether Administrative Law Judge Richard Manning correctly determined that the site at which Justis was working on a dragline was a “mine” within the meaning of section 3(h)(1) of the Act, 30 U.S.C. § 802(h)(1).¹ 22 FMSHRC

¹ Section 3(h)(1) provides:

“[C]oal or other mine” means (A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities.

544 (Apr. 2000) (ALJ). For the reasons that follow, we affirm the judge's determination and therefore uphold the citations and penalties.

I.

Factual and Procedural Background

BHP Minerals, Inc. ("BHP") operates the Navajo Mine, a surface coal mine in San Juan County, New Mexico. 22 FMSHRC at 544. BHP uses draglines² at the mine to remove topsoil and other material to expose the coal seam. *Id.* According to MSHA Inspector Peter Saint, BHP had a total of three draglines at the Navajo Mine, including the dragline involved in this proceeding, at the time of the trial. Tr. at 16.

On January 5, 1999, MSHA Inspector Saint was conducting a regular inspection at the Navajo Mine. 22 FMSHRC at 544. As part of that inspection, he went to an area where a dragline was being assembled. *Id.* The site was about one mile from where coal was being mined. *Id.* An earthen berm surrounded the dragline site. *Id.* The site was accessible either by a public road or a private road that ran directly from the mine. *Id.*

The dragline was being assembled by a contractor, CDK. *Id.* CDK, in turn, contracted with Justis to perform cutting and welding services. *Id.* at 544-45. Employees of Justis, which operated out of Farmington, New Mexico, brought a welding truck to the site. *Id.* at 545. The first time Justis personnel arrived at the site, they came over the road from the mine. *Id.* BHP security personnel examined Justis' trucks and gave Justis employees a training handbook. *Id.* at 546. Thereafter, Justis employees entered and exited the dragline assembly site over the public road. *Id.* at 545. Neither CDK nor Justis performed any work at the site other than on the dragline. *Id.* at 546.

MSHA Inspector Saint came to the site over the mine road. *Id.* at 545. While at the site, he inspected several pieces of equipment that belonged to Justis, including a welding truck. *See id.* Justis' truck was not equipped with a backup alarm. *Id.* at 549. It had a gas powered welder mounted behind the cab. *Id.* Oxygen and acetylene tanks were mounted on the bed of the truck, and tool boxes were attached to the sides of the bed. *Id.* This equipment obstructed the rear view from the cab of the truck. *Id.* The rear of the truck was used as a workbench and was equipped with a vise and rack. *Id.* The truck was parked front end first about 40 feet from the dragline, and CDK and Justis employees were working in the area. *Id.* The inspector issued a

² A dragline is "[a] type of excavating equipment which casts a rope-hung bucket a considerable distance, collects the dug material by pulling the bucket toward itself on the ground with a second rope, elevates the bucket and dumps the material on a spoil bank, in a hopper, or on a pile." American Geological Inst., *Dictionary of Mining, Mineral, and Related Terms*, 167 (2d ed. 1997).

citation charging a violation of 30 C.F.R. § 77.410(a)(1)³ for failing to provide the truck with a back-up alarm when it had an obstructed rear view.⁴ *Id.* at 548. The inspector issued two additional citations.⁵ *Id.* at 550-51.

The Secretary issued a proposed assessment of civil penalties that Justis contested, and a hearing was held. Relying on section 3(h)(1) of the Mine Act, 30 U.S.C. § 802(h)(1), and its legislative history, the judge concluded that the dragline site where Justis employees worked fell within the Act's definition of a "coal or other mine." 22 FMSHRC at 546. He noted that the only activity at the site was the assembly of the dragline to be used for mining at the Navajo Mine. *Id.* The judge distinguished the factual setting in this case from one involving a commercial welding operation, which was open to the public, on a site adjacent to a mine. *Id.* at 547. He concluded that, except for the fact that an independent contractor was involved, the case was similar to *Jim Walter Resources, Inc.*, 22 FMSHRC 21 (Jan. 2000), where the Commission held that a supply shop, not located at a mine site, was a "mine" because the Mine Act's definition includes "facilities and equipment" used in or to be used in mining. *Id.* The judge reasoned that, if BHP employees were assembling the dragline at the site, they would clearly be subject to Mine Act jurisdiction. He held that the fact that those activities were being performed by independent contractors should not change the result. *Id.* Based on his determination that the dragline site was a mine, the judge concluded that Justis was an "operator" under section 3(d) of the Mine Act, 30 U.S.C. § 802(d), because it was an "independent contractor performing services or construction at [a] mine." *Id.* at 548.

The judge affirmed the violations charged in the three citations. *Id.* at 548-52. With regard to the citation charging Justis with a failure to provide a back-up alarm on its welding truck, the judge rejected Justis' contention that the truck was a "service vehicle" within the meaning of MSHA's Program Policy Manual ("PPM"), concluding that the PPM did not exclude from the requirements of section 77.410(a)(1) the truck of an independent contractor, when the truck was an integral part of the welding service that Justis provided. *Id.* at 549.

³ Section 77.410(a)(1) provides in pertinent part: "Mobile equipment, such as . . . trucks, except pickup trucks with an unobstructed rear view, shall be equipped with a warning device that gives an audible alarm when the equipment is put in reverse"

⁴ The inspector designated the violation as significant and substantial. *Id.* at 548. The judge upheld that designation (*id.* at 550), and Justis has not challenged that determination on review.

⁵ The inspector issued a second citation when he located a hand-held grinder that had a trigger lock that allowed it to run when there was no pressure on the trigger. *Id.* at 550. He issued a third citation as a result of the three-ton hoist on the back of the welding truck not having a safety latch on the hook to prevent cable from coming off the hook. *Id.* at 551. These two citations are challenged only on jurisdictional grounds.

II.

Disposition

Justis argues that the assembly site was not a mine and that its employees at the dragline site were not “miners” because they were not in frequent contact with the extraction site “and the accompanying dust exposure.” J. Br. at 4. Relying on cases arising under Title IV of the Mine Act, which governs black lung benefits, Justis contends that its employees would be ineligible for black lung benefits because they are not “miners,” and, therefore, estoppel prevents the Secretary from taking a contrary position in this proceeding. *Id.* at 4-6; J. Rep. Br. at 4-5. Further, Justis asserts that section 3(h)(1) of the Mine Act is unconstitutionally vague because it fails to give Justis fair warning of when and where its jurisdiction applies. J. Br. at 6-8; J. Rep. Br. at 5-8. Justis continues that Congress did not intend that vendors of welding services be covered by the Mine Act. J. Br. at 8-9. Justis further argues that the judge erroneously concluded that the site where the dragline was being constructed was a “mine” even though there was no evidence in the record establishing the identity of the owner or lessor of the site. *Id.* at 9-10; J. Rep. Br. at 1-2. Justis continues that the judge incorrectly assumed that CDK was not a trespasser and that CDK and Justis were invitees of the operator of the Navajo Mine. J. Br. at 10; J. Rep. Br. at 1-2. Similarly, Justis contends that there was no evidence establishing that the dragline was being assembled at the CDK site for use at the Navajo Mine. J. Br. at 10-12; J. Rep. Br. at 2-3. Justis also argues that there was no evidence to establish that the only work done at the assembly site was on the dragline. J. Br. at 12. Finally, Justis argues that its welding truck was exempted from section 77.410 by the Secretary’s PPM, because it was a “service” vehicle. J. Br. at 9, 12-14.

The Secretary argues that the plain language of section 3(h)(1) of the Mine Act establishes the dragline assembly site is a “mine.” S. Br. at 6-9. The Secretary asserts that cases addressing black lung benefits are not controlling, pointing out that the definition of a “mine” in section 3(h)(2), which applies to black lung cases, has a “geographical component” that section 3(h)(1) does not have — requiring that structures, facilities, machinery, and other property be “placed upon, under, or above the surface of such land . . .” *Id.* at 10-13. The Secretary also notes that the courts and the Commission have repeatedly held that the definition of a “mine” should be applied expansively. *Id.* at 12-14. Alternatively, the Secretary argues that her interpretation of the definition of “mine” should be given deference. *Id.* at 15-16. The Secretary contends that Justis’ argument that the Mine Act is unconstitutionally vague was not raised before the judge and, therefore, should not be considered by the Commission. *Id.* at 16. The Secretary continues that, in any event, Justis had adequate notice of Mine Act jurisdiction. *Id.* at 16-19. The Secretary further contends that the judge’s factual findings are supported by substantial evidence. *Id.* at 19-22. Finally, the Secretary argues that Justis’ welding truck is not within the exception in the PPM, which covers “service vehicles” making visits or deliveries to a mine. *Id.* at 22-25.

The first inquiry in statutory construction is “whether Congress has directly spoken to the precise question at issue.” *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467

U.S. 837, 842 (1984); *Thunder Basin Coal Co.*, 18 FMSHRC 582, 584 (Apr. 1996). If a statute is clear and unambiguous, effect must be given to its language. See *Chevron*, 467 U.S. at 842-43; accord *Local Union 1261, UMWA v. FMSHRC*, 917 F.2d 42, 44 (D.C. Cir. 1990). In ascertaining the plain meaning of the statute, courts utilize traditional tools of construction, including an examination of the “particular statutory language at issue, as well as the language and design of the statute as a whole,” to determine whether Congress had an intention on the specific question at issue. *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988); *Local Union 1261, UMWA*, 917 F.2d at 44; *Coal Employment Project v. Dole*, 889 F.2d 1127, 1131 (D.C. Cir. 1989).

The definition of a mine is “broad,” “sweeping,” and “expansive.” *Marshall v. Stoudt’s Ferry Preparation Co.*, 602 F.2d 589, 591-92 (3d Cir. 1979), cert. denied, 444 U.S. 1015 (1980) (“[T]he statute makes clear that the concept that was to be conveyed by the word [mine] is much more encompassing than the usual meaning attributed to it — the word means what the statute says it means.”).⁶ Under section 3(h)(1), “coal or other mine” includes “lands, . . . structures, facilities, equipment, machines, tools or other property . . . used in, or to be used in, . . . the work of preparing coal . . .” 30 U.S.C. § 802(h)(1) (emphasis added).

We conclude that the language of the statute is clear. In light of the Mine Act’s expansive language, we further hold that the judge properly determined that the dragline assembly site is a mine under the definition of section 3(h)(1). See 22 FMSHRC at 546. The record clearly demonstrates that the dragline was equipment “to be used in” mining coal. Saint testified without contradiction that at the time of the hearing, the dragline was in operation at the Navajo Mine. Tr. 19. Justis welding foreman Bob Sanders also testified that the dragline was to be used at the mine. Tr. 96; see also Tr. 60. Consequently, there is Mine Act jurisdiction because a “mine” includes “equipment . . . to be used in” mining operations at BHP’s Navajo Mine.

This conclusion is consistent with our reasoning in *Jim Walter Resources*, where we held that a common supply shop for several mines that was not located at any of the mines was subject to Mine Act jurisdiction. In that case we noted that “the hazards to which mines are exposed are not limited to the hazards of underground mines, but include improperly maintained equipment and supplies that are used in mining.” 22 FMSHRC at 27.

Justis argues that the judge erred in concluding that Justis and CDK were invitees at the assembly site. J. Br. at 10. Although there was testimony in the record regarding BHP

⁶ In addition, the legislative history of the Mine Act emphasizes that “what is considered to be a mine and to be regulated under this Act [shall] be given the broadest possibl[e] interpretation, and . . . doubts [shall] be resolved in favor of . . . coverage of the Act.” S. Rep. No. 95-181, 95th Cong., at 14 (1977), reprinted in Senate Subcomm. on Labor, Comm. on Human Resources, 95th Cong., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 602 (1978).

ownership of the dragline assembly site (Tr. 14-15), the judge did not make a finding on this issue. Instead, he found that “CDK was not a trespasser on the land. CDK was the principal employee at the site and exercised control over the site.” 22 FMSHRC at 546. Substantial evidence supports the judge’s findings.⁷ Saint and Sanders both testified that CDK was a general contractor responsible for assembling the dragline and that Justis was retained by CDK to perform cutting and welding. Tr. 16-18, 55, 96. Further supporting the integral relationship between Justis, CDK and BHP is Sanders’ testimony that Justis employees were required to report to the BHP security personnel upon coming to the site for the first time in order to have a vehicle inspection. Tr. 82, 90. BHP personnel told Sanders that he would be working at the CDK site and directed him to it. Tr. 90. In addition, BHP security personnel provided training to Justis personnel when they entered the mining area. Tr. 97.

Further, the judge’s rejection of Justis’ challenge based on lack of evidence of ownership is consistent with Commission precedent. In *W. J. Bokus Industries, Inc.*, 16 FMSHRC 704, 707-708 (Apr. 1994), the Commission rejected “insufficient evidence of ownership” of the equipment in question as a basis for denying jurisdiction where the evidence showed that the equipment was “used or to be used in mining and that, irrespective of ownership, the cited conditions would affect miners.” 16 FMSHRC at 708. In sum, there was more than adequate evidence to support the judge’s finding that CDK was not a trespasser and was properly at the assembly site.

Finally, Justis argues that there was no evidence to support the judge’s finding that all work done at the CDK site was done on the dragline. J. Br. at 9, 12. However, Justis’ own witness, Sanders, when asked to describe the work that Justis employees were performing at the site, identified only cutting and welding on the dragline. Tr. 82-83, 94-95. Similarly, Sanders testified that the site was used solely by CDK and Justis for the assembly of the dragline. *See* Tr. 91, 93, 96. Therefore, in the absence of any countervailing testimony, the judge was well warranted in concluding that the only activity at the site was construction of the dragline.

In regard to Justis’ reliance on cases dealing with black lung benefits, it is apparent that a different definition of “coal mine” applies to those cases. Section 3(h)(1), which defines “coal or other mine,” applies only to Title I of the Mine Act. Section 3(h)(2),⁸ which defines “coal mine,”

⁷ When reviewing an administrative law judge’s factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 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 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

⁸ 30 U.S.C. § 802(h)(2) states in pertinent part: “[C]oal mine’ means an area of land and all structures, facilities, machinery, tools, equipment, . . . and other property . . . placed upon, under or above the surface of such land . . . used in, or to be used in . . . extracting . . . coal”

applies to Title IV, the black lung benefits program. The Commission has previously considered and rejected reliance on cases arising under Title IV because these cases “lack precedential value in resolving . . . Mine Act jurisdictional dispute[s].” *Pennsylvania Electric Co.*, 11 FMSHRC 1875, 1881-82 n.7 (Oct. 1989), *aff’d on other grounds*, 969 F.2d 1501 (3rd Cir. 1992). In *Westwood Energy Properties*, 11 FMSHRC 2408 (Dec. 1989), the Commission explained that the financial scheme of the black lung benefits program is based on coal production; therefore, the specified activities in section 3(h)(2) must be tied to coal production. *Id.* at 2415 n.5. As the Commission concluded, the black lung benefits cases do not provide a basis from which to extrapolate an exemption from Mine Act coverage. *Id.*

Moreover, under section 3(g) of the Mine Act, 30 U.S.C. § 802(g), a “miner” is “any individual working in a coal or other mine.” Thus, contrary to Justis’ apparent assertion, an individual need not be “extracting coal” or “exposed to coal dust” in order to be a “miner” under the Act. *See* J. Br. at 4. Accordingly, Justis’ argument that its employees were not “‘miners’ in the broadest sense of the word” is unavailing. *Id.*

In its alternative argument, assuming *arguendo* Mine Act jurisdiction, Justis challenges only the citation involving its failure to equip its welding truck with a backup alarm. It contends that the truck is within an exception from the backup alarm requirement in the Secretary’s PPM, which exempts from the regulation’s requirements service vehicles making visits to surface mines. *V MSHA, U.S. Dep’t of Labor, Program Policy Manual, Part 77 Subpart E — Safeguards for Mechanical Equipment*, at 171 (1992). The judge concluded that the welding truck was not a service truck making visits to the mine because it was a truck belonging to an independent contractor providing welding services at a mine. 22 FMSHRC at 549.

The applicable regulation, section 77.410(a)(1), requires pickup trucks with obstructed views to have audible backup alarms. The PPM limits application of the regulation by exempting service vehicles making visits to the mine.⁹ Saint testified that the exception covered UPS and other delivery trucks that do not perform work at the mine. Tr. 56, 76-78. Clearly, the welding truck was not at the site on a short term basis to make deliveries of equipment or employees to the mine. Rather, as Saint further testified, the welding truck, which had an obstructed view, was present at the assembly site throughout the day and served as a portable work station for cutting and welding on the dragline with employees working behind it. Tr. 25-29. Therefore, the judge properly concluded that the welding truck did not fall within the PPM’s exception.

⁹ The PPM, although not binding on MSHA, is regarded as evidence of MSHA’s policies and practices. *Coal Employment Project*, 889 F.2d at 1130 n.5.

III.

Conclusion

For the foregoing reasons, we affirm the judge's determination that the dragline assembly site was a mine and uphold the citations and penalties.



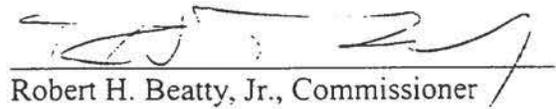
Mary Lu Jordan, Chairman



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Robert H. Beatty, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 17, 2000

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

v.

IDAHO MINERALS

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Docket No. WEST 2000-632-M
A.C. No. 10-01299-05529

BEFORE: Jordan, Chairman; Riley, Verheggen, and Beatty, Commissioners

ORDER

BY: Jordan, Chairman; Riley and Beatty, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On September 20, 2000, the Commission received from Idaho Minerals a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). The Secretary of Labor does not oppose the motion for relief filed by Idaho Minerals.

Under section 105(a) of the Mine Act, an operator has 30 days following receipt of the Secretary of Labor's proposed penalty assessment within which to notify the Secretary that it wishes to contest the proposed penalty. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

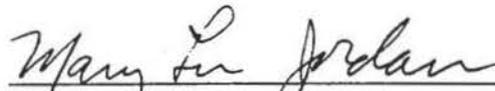
In its request, Idaho Minerals, which is represented by counsel, asserts that it never received a copy of the proposed penalty assessment. Mot. It explains that while it was in the process of selling its business and closing its operations,¹ it notified MSHA of its change of address. Idaho Minerals submits that the Department of Labor's Mine Safety and Health Administration ("MSHA") subsequently sent a second penalty assessment pertaining to a different violation to its former address. Although the second assessment was sent to Idaho

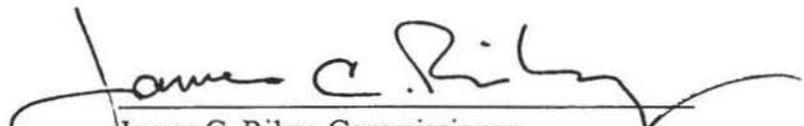
¹ Idaho Minerals states that it sold its assets, terminated its workers, settled its accounts, and shut down more than one year ago. Mot.

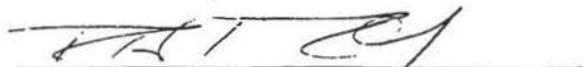
Minerals' old address, it somehow received the assessment, and then once again notified MSHA of its new address. *Id.* It notes that this second penalty assessment and the subject penalty assessment are consecutively numbered. *Id.* Idaho Minerals contends that during settlement of the second assessment, the Secretary's counsel and Idaho Minerals were unaware of the subject proposed assessment, and that it did not become aware of the assessment until it received a collection notice for the outstanding debt. *Id.* Idaho Minerals requests that the proceedings be "closed in a cost-efficient manner." *Id.*

We have held that, in appropriate circumstances and pursuant to Fed. R. Civ. P. 60(b), we possess jurisdiction to reopen uncontested assessments that have become final by operation of section 105(a). *See, eg., Kenamerican Resources, Inc.*, 20 FMSHRC 199, 201 (March 1998); *Jim Walter Resources, Inc.*, 15 FMSHRC 782, 786-89 (May 1993). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Preparation Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In accordance with Rule 60(b)(1), we have previously afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See National Lime & Stone, Inc.*, 20 FMSHRC 923, 925 (Sept. 1998); *Peabody Coal Co.*, 19 FMSHRC 1613, 1614-15 (Oct. 1997); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (Sept. 1996).

On the basis of the present record, we are unable to evaluate the merits of Idaho Minerals' position.² While Idaho Minerals claims that it did not receive the proposed penalty assessment, the reasons for, and circumstances surrounding that alleged non-receipt are not clear from the record. In the interest of justice, we remand the matter for assignment to a judge to determine whether Idaho Minerals has met the criteria for relief under Rule 60(b). See, e.g., *Bauman Landscape, Inc.*, 22 FMSHRC 289, 290 (Mar. 2000) (remanding where operator claimed it did not receive penalty assessment and that the return receipt was not signed by him); *Harvey Trucking*, 21 FMSHRC 567, 569 (June 1999) (remanding to judge where operator claimed it did not receive proposed assessment which was sent to operator's address twice but returned to MSHA undelivered); *Warrior Investment Co.*, 21 FMSHRC 971, 973 (Sept. 1999) (remanding to judge where operator claimed it did not receive proposed assessment and it was not clear from the record the reason why delivery was unsuccessful). If the judge determines that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.


Mary Lu Jordan, Chairman


James C. Riley, Commissioner


Robert H. Beatty, Jr., Commissioner

² In view of the fact that the Secretary does not oppose Idaho Minerals' motion to reopen this matter for a hearing on the merits, Commissioner Verheggen concludes that the motion should be granted.

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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November 2, 2000

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 99-364-M
Petitioner	:	A. C. No. 04-00599-05583
v.	:	
	:	Docket No. WEST 99-427-M
	:	A.C. No. 04-00599-05586
	:	
TXI PORT COSTA PLANT,	:	Docket No. WEST 2000-50-M
Respondent	:	A.C. No. 04-00599-05588
	:	
	:	TXI Port Costa Plant

DECISION

Appearances: Jason Vorderstrasse, Esq., Office of the Solicitor, U. S. Department of Labor, Los Angeles, California and Alan Raznick, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California for the Petitioner; Steven R. Blackburn, Esq., Epstein, Becker & Green, San Francisco, California for the Respondent

Before: Judge Weisberger

Statement of the Case

These cases are before me based upon Petitions for Assessment of Civil Penalty filed by the Secretary of Labor (“Secretary”) seeking the imposition of civil penalties against TXI Port Costa Plant (“TXI”) for allegedly violating various mandatory safety standards set forth in Title 30 of the Code of Federal Regulations. Pursuant to notice, these cases were heard in Alameda, California, on July 25 and 26, 2000. On September 29, 2000, TXI filed proposed findings of fact and a brief. On October 2, 2000, the Secretary filed a post hearing brief. On October 23, 2000 TXI filed a reply to the Secretary’s post hearing brief. On October 26, 2000, the Secretary filed a reply brief.

I. Docket No. WEST 99-364-M.

Introduction.

TXI's Port Costa Plant extracts shale from an adjoining quarry, and processes it into kiln-hardened aggregate material for use in concrete construction. The finished product, marble-like pellets, approximately ½ inch in diameter, is moved by a series of chutes and conveyors to one of six storage silos grouped together in a single structure covered by a flat roof. A variety of conveyors, screens, and related machinery are located on the roof. The height of the silo structure is approximately 80 feet. Access to the roof of the structure is via a grated metal stairway attached to the side of silo No. 2. The edges of the roof are guarded by three horizontal parallel rails. The upper rail is 40 inches above the ground. The other rails are referred to as the midrail, and toe, respectively.

A miner working in the scalehouse at the foot of the silos is required to go to the roof of the structure twice each 12 hour shift, to check the contents of the silos through observation hatches located on the top of the silos.

A. Citation No. 7972128.

1. Violation of 30 C.F.R. §56.11001.

On April 20, 1999, MSHA inspectors, John Pereza and Jerry Hulsey climbed to the top of the silo structure with several TXI representatives including Doug Evans, TXI's maintenance supervisor. The inspectors observed an accumulation of aggregate on the top of the No. 2 silo. There is some conflict in the record regarding the depth of the accumulated aggregate, but the weight of the evidence establishes that it was at least 6 inches deep. There was no specific designated path for an employee to travel on top of the silos to check their contents. Nor was testimony adduced from any witness having personal knowledge of the path normally taken by miners assigned to check the top of the silos. However, the weight of the evidence clearly establishes that the materials that had accumulated on top of silo No. 2 were generally in an area where a miner regularly travels to inspect the contents of the silos. Indeed, both inspectors testified that they observed footprints in the area of the accumulated material, and their testimony was not impeached or contradicted in this regard. Further, Evans indicated that he has observed a miner walking on top of the silo.

In essence, Pereza opined that the accumulated material constituted a stumbling or tripping hazard, and issued a citation alleging a violation of 30 C.F.R. Section 56.11001 which provides that "[s]afe means of access shall be provided and maintained to all working places".

I find that the weight of the evidence establishes that on the day cited there was an accumulation of marble-size pieces of aggregate to a depth of at least 6 inches on the top of silo No. 2, that a miner regularly traversed the top of silo No. 2 two times in a 12 hour shift as part of

his duties, and that the accumulated aggregate constituted some degree of a stumbling or tripping hazard. Accordingly, I find that it has been established that TXI was not in compliance with Section 56. 11001, supra.

2. Significant and Substantial.

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 U.S.C. § 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 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 (August 1985), 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).

As set forth above, the record establishes a violation of a mandatory safety standards and the fact that the violative condition contributed to a stumbling or tripping hazard. The critical issues for resolution are the third and fourth elements of *Mathies*, i.e., the likelihood of a injury producing event, and the likelihood of this event producing an injury of a reasonably serious nature.

It appears to be TXI's position that the evidence does not establish that there was any hazard of an employee falling off the silo as a result of the accumulated aggregate. In essence, TXI argues in this regard that a guardrail located along the edge of the silo, consisting of three parallel horizontal bars, the highest being 42 inches above the roof surface of the silo, protected an employee from falling off the silo, and landing on the ground 80 feet below. In this connection, the inspector testified that, at a point along the guardrail, the material had accumulated to a height of 20 inches which would have, in essence, diminished the protection of the upper guardrail by effectively reducing its height. In arguing that this testimony should not be accepted, TXI refers to geometry calculations predicated upon a 38 degree angle of repose of the accumulated material, as testified to by Evans, and the sine of this angle which results in a conclusion that at a point 12 inches from the edge of the silo¹, the height of the accumulated material could not have been more than 3.6 inches. However, I take administrative notice of the fact that the sine of an angle, which is part of a right triangle, is the ratio between the side opposite the angle and the hypotenuse, (Random House Websters Unabridged Dictionary ("Webster's") (2nd Ed., 1999) at 1784.) in this case an unknown distance. In contrast, the tangent of an angle in a right triangle, is the ratio between the side opposite the angle and the side adjacent to the angle. (See Webster's at 1941.) Hence, given an angle of 38 degrees, and a horizontal distance of 12 inches from between the edge of the silo, and applying the tangent of a 38 degree angle, the vertical height of the accumulation would be at a maximum of approximately a little more than nine inches. As a result, the relative height of the bars of the guardrail, especially the upper rail, would be reduced thus diminishing their ability to protect an employee from falling off the roof of the silo. In addition, I note the existence of the following conditions: the round shape of the accumulated material; the location of a hose in the area, which created a further stumbling and tripping hazard; the presence of metal structural cross-members in the area; and the fact that the area was traveled twice each 12 hour shift. I find that these conditions, in combination, establish that an injury producing event was reasonably likely to have occurred. Further, due to the presence of metal structural cross-members, the reduction in height of the protective guardrail, and the height of the subject silo, I find that it was reasonably likely that an injury resulting from the violation, would have been of a reasonably serious nature. I thus find that, within the context of this record, it has been established that the violation was significant and substantial.

3. Unwarrantable Failure.

The citation at issue alleges the violation herein was as a result of TXI's unwarrantable failure. Unwarrantable failure has been defined by the Commission to constitute more than

¹The slope of the material would be the hypotenuse of a right triangle, the horizontal distance of 12 inches from the edge of the silo would be the side of the triangle adjacent to the angle of repose, and the vertical distance, to be determined, between the ground and the height of the material would be the side opposite that angle.

ordinary negligence i.e., negligence that reaches the level of “aggregated conduct”. Emery Mining Corp., 9 FMSHRC 1997, 2003-2004 (Dec. 1987).

There is an absence of any direct evidence in the record as to how long the accumulated aggregate had been in existence up until the time it had been observed by the inspectors on April 20, 1999. The only evidence of record relating to the existence of material in the cited area consist of notations found in the OPERATOR’S CHECKLIST BEGINNING EACH SHIFT for April 16, 17 and 18, which, under the listing “Material Build-up”, indicates “onto Silo # 2”. (Co. Ex. 7)

I note Evans’ testimony that when he reviewed each of these reports early in the morning after the shift in which they were written, and noted that “walkways” were checked as “ok”, and that they “were being worked on”, he concluded that the reports indicated that whatever spillage had occurred was being addressed, and no hazard existed. It appears to be TXI’s position in this regard that accordingly it can not be found that its management was not effectively acting to address to problem of material build-up. However, to the contrary, I find that at best, Evans’ testimony relates merely to the condition of “walkways”, and does not relate at all to the condition of materials on the top of silo No. 2, which is the only area in issue.

I also note TXI’s assertion that, in essence, its negligence herein should be mitigated by the fact that it had taken steps to prevent hazards associated with material build-up such as directives in its safety rules to clear walkways, and statements in its collective bargaining agreement requiring employees to report safety hazards. Also, TXI refers to safety meetings conducted in the months preceding April 20, 1999, wherein employees were instructed that “walkways must be cleaned or reported”, and that these topics also had been discussed in prior meetings in the preceding September and October. However, I accord more weight to the fact that a build-up of materials in the specific area in issue on April 16, 17 and 18, was noted in pre-shift reports which were transmitted to management. Additionally, I note that the accumulated materials were in an area generally traversed by a miner two times each shift, from April 16 to April 20, as part of normal operations.

The only reliable evidence of record relating to TXI’s efforts to clean the accumulated material² consists of notations in the STORAGE AND HANDLING LOG for April 16, 4:00 p.m. to 2:00 am, and April 18, 4:00 p.m., as follows: “[h]osed off material from top of silo - 2 when I had the chance” (Emphasis added.) (Co. Ex. 9, page 2, 5). Thus, although some effort may have been made to clean the accumulated violative materials, it is difficult to conclude, based upon this quantum of evidence that the efforts constituted more than a token effort, rather than an

²I note Evans’ testimony that at the time of the inspection the leadman stated that “I had just finished cleaning that thing off Thursday night, or Thursday.” (Tr. 113). TXI did not call the leadman to testify, nor did it indicate that he was not available. Nor is there any other evidence of record specifically cooborating this hearsay statement of the leadman. Accordingly, I accorded no weight to Evan’s hearsay testimony in this regard.

intensive effort to make the area once again safe for access.

Also, I have considered TXI's arguments that, in essence, inter alia, it should be found that there was no unwarrantable failure because of its effective abatement efforts. Such an argument is not relevant relating to the issue of whether the order in question was properly issued under Section 104(d)(1) of the Act. In this connection I note that Section 104(d)(1) citations and orders are to be issued when the violation is "... caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, ...". Hence, what is relevant is TXI's conduct prior to the time of the alleged violation and not subsequent to the violation. As such, any evidence regarding abatement efforts are irrelevant regarding the level of its negligence prior to the cited violation.

Therefore, for all the above reasons, I find, within the context of the record as evaluated above, that the violation herein resulted from TXI's negligence which was more than ordinary, and reached the level of aggregated conduct. Hence, I find that the violation was caused by TXI's unwarrantable failure. (See Emery, supra.)

4. Penalty.

I find that the gravity of the violation to be relatively serious essentially for the reason set forth above (I.) (A.) (2.) supra. Also, I find the level of negligence relatively high essentially for the reasons set forth above (I.) (A.) (3.) supra. Considering the remaining factor set forth in section 110(i) of the Act as stipulated by the parties, I find that a penalty of \$2,500 is appropriate.

B. Order No. 7972129.

Pereza also issued Order No. 7972129 which alleges a violation of 30 C.F.R. Section 56.18002(a). Section 56.18002(a) supra provides that "[a] competent person ...shall examine each working place at least once each shift for conditions which may adverse affect safety or health. The operator shall promptly initiate appropriate action to correct such conditions." (Emphasis added.) Hence, in order to prevail, the Secretary must establish either that TXI did not examine each working place at least once per shift, or that it did not promptly "initiate" action to correct the conditions which may adversely affect safety or health.

It appears to be the Secretary's position, as set forth in the posthearing brief, that this order concerns itself not only with regard to the material as it existed at the time of the inspection "... but also with regard to spilled material and lack of effective cleanup over the previous four months." In support of this argument the Secretary refers to Pereza's testimony that spillage on top on the silos "... had been listed everyday for almost four months" (Tr. 40). The basis for this conclusion appears to be Pereza's testimony that "work place examinations" reports for four months beginning January 1, 1999, Pereza's testimony that stated indicated instances of material build-up on top of the silos, not just silo No. 2, and that these instances "far outnumbered" cleanup efforts. (Tr. 41). In response to a leading question on direct examination he agreed that

these reports indicated the existence of a hazard. He was asked whether the reports listed the word hazard, and he stated that it was his opinion, i.e., that he had drawn a conclusion that the reports indicated a hazard.

Clearly the Secretary has the burden of establishing all elements required for a violation. The Secretary did not proffer relevant pages of the reports which allegedly set forth notations of spillages and inadequate cleanup. The Secretary did not proffer any explanation for its failure to do so. The reports are the best evidence as their contents regarding the existence of spillages, their location, the number of instances of spillages on top of silos, and clean-up efforts. As such, I find that Perez's testimony alone, to be of insufficient probative weight to establish existence of spillages on silos "on many occasions", and that these instances far outnumbered cleanup efforts.

Further, regarding spillages on the top of silo No. 2 on April 16, 17 and 18, TXI's records indicate that a examinations had been performed in the areas in question and build up of materials were noted (Co. Ex. 7). Thus, in order to establish a violation herein, the Secretary must establish that TXI was not in compliance with the second sentence of Section 56.18002(a) supra, which requires that "[t]he operator shall promptly initiate appropriate action to correct such conditions." (Emphasis added.)

It appears to be the Secretary's position that, in essence, this sentence was violated as the unsafe conditions were not corrected, and that there is "no indication in Respondent's records of any time being taken to clean off the material on top of silos." I do not find much merit in the Secretary's position. The clear wording of the second sentence of Section 56.18002(a), supra, does not require the Secretary to establish either the adverse condition was not corrected, or that time had been taken to clean material from the top of the silos. Rather, it must be established that TXI did not initiate cleanup action to correct the spillage of material. In this connection, the only evidence of record relating to TXI's actions or lack of action, regarding spillages that had occurred on April 16, 17 and 18, consists of statements in entries in the Storage and Handling Log for April 16, and 18, as follows: "[h]osed off material from top of silo-2 when I had the chance" (Emphasis added). (Co. Ex. 7) These statements in TXI's reports indicate that it had initiated action to correct the adverse unsafe accumulation of material. Accordingly, for the above reasons, I conclude that the Secretary has failed to establish a violation of Section 56.18002(a) supra.

I. Docket No. WEST 99-427-M.

A. Order No. 7972161.

1. Violation of 30 C.F.R. § 56.12040

On June 19, 1999, Perez conducted another inspection of the site at issue. He examined a 480v. breaker box that was approximately 82 inches high, 70 inches, wide and 12 inches deep.

Two metal doors enclosed the interior of the box, and had to be opened to gain access to the interior. The lower right-hand corner of the box also contained a transformer, 18 to 20 inches wide and approximately 20 inches high. The surface area of the exposed wires on the right side of the box was approximately one to two square feet. The breaker box also contained energized wire connections, and an energized heat-sink on the left side of the box.

A circuit breaker for a 480v. Steadman crusher was also located in the upper right hand corner of the box. In normal operations, the breaker is thrown several times a week to shut off electric power to the crusher to allow the crusher to be repaired or maintained.

The breaker box was designed to be used with a handle, located on the outside of the box, which allowed the circuit breaker to be thrown without opening the box. This handle had not been in place for approximately 10 years. Hence, in normal operations, it was the practice of TXI employees to throw the circuit for the crusher by opening the right-hand door of the breaker box and using a "short section" of a 2 x 4 piece of lumber to throw the breaker.

Pereza issued an order alleging a violation of 30 C.F.R. Section 56.12040 which provides as follows: "[o]perating controls shall be installed so that they can be operated without danger of contact with energized conductors."

In essence, it is TXI's position that the breaker box is not an "operating control", and hence, it was improperly cited. TXI relies on the fact that the panel of buttons and switches used to operate the crusher, were located not in the box, but were elsewhere on the site. Thus, TXI argues that accordingly the breaker box is not the operating control for the crusher. TXI does not cite any authority, regulatory history, or commonly accepted definition, that supports its conclusion that a breaker used to de-energize a piece of equipment is not an "operating control". It appears to be TXI's position that the breaker box should not be considered an operating control as it is accessed only infrequently to de-energize the crusher to perform repairs or maintenance work. No authorities are cited which would mandate such a narrow construction to be accorded to the term "operating controls".

In normal operations the breaker at issue is thrown at least once a week to cut off power to the crusher in order to perform repair or maintenance work. It follows that, upon completion of the repair or maintenance work, the breaker would, of necessity, be reset allowing electricity to resume to flow to the crusher which would directly enable the crusher to operate. Indeed, the crusher could not operate if the breaker would not be reset to supply electricity. Since throwing the breaker stops the operation of the crusher, and resetting it allows the crusher to operate, it certainly controls its operation and, accordingly, is within the purview of the term "operating controls" (see, Webster's at 1357).

The only way the breaker could be thrown and reset required a miner to open the exterior doors of the box. According to Pereza, the miner would thereby be exposed to an approximately 1 ½ square foot area of energized 480v. conductors, thus subjecting the miner to an injury by

virtue of inadvertent contact with these energized conductors. This testimony by Pereza has not been impeached or contradicted, and I therefore accept it. I find that the manner in which the box was installed, with a missing lever on the outside of the box, required the interior breaker to be operated in a situation where there was danger of contact with energized conductors. I thus find that it has been established the TXI did violate Section 56.12040 supra.

2. Significant and Substantial.

According to Pereza, in normal operations, as a result of the violative condition, i.e. the lack of the lever outside the breaker box, once a week a miner is required to push or pull a tension lever on the breaker at issue. Pereza testified that, in performing these operations, the miner could lose his balance and slip, and be exposed to a significant area of energized 480v. 1200 amp components, which could result in possible fatal electric shock from contact with the energized components. Since these facts as testified to by Pereza were not impeached or contradicted, I accept them. Within this context I find that it has been established that the violation was significant and substantial, (see Mathies supra.)

3. Unwarrantable Failure.

In its brief TXI argues that, in essence, the violation was not unwarrantable since its managers were not aware that the conditions constituted a violation of Section 56.12040, supra, as it had not been cited for this condition in the past. However, no testimony was adduced from any of TXI's managers to the effect that, a reasonably prudent person familiar with the industry would have understood that the breaker box at issue was not to be considered an operating control, or that its managers did not consider the box to be an operating control, or that it relied on MSHA's not having previously cited the box in the past as indicating that the box was in compliance with Section 56.12040, supra, as it was not an operating control. In the absence of such proof, I do not accept TXI's arguments in this regard.

Also, it appears to be the position of TXI, that its negligence should be mitigated by the fact that, as testified to by Evans, there have been no injuries reported arising from the condition at issue subsequent to TXI's assuming ownership of the site in 1996. TXI further asserts that MSHA has repeatedly inspected this area, and until the issuance of the order at issue, had not previously cited the absence of an outside handle on the breaker box. On the other hand, the hazards involved in opening the box door and throwing the breaker switch with a piece of wood, had existed for 10 years. Management was aware that miners were throwing the breaker in this fashion and had, according to Pereza's uncontradicted testimony, so instructed its employees. Within this framework I find that it has been established that the violation herein was as a result of TXI's unwarrantable failure. (See, Emery supra)

4. Penalty

Inasmuch as the violation could have resulted in a fatality, the level of gravity was relatively high. Further, for the reasons set forth above, the level of negligence was more than ordinary and reached the level of aggravate conduct. Considering the further factors set forth in Section 110(i) of the Act I find that a penalty of \$2,500.00 is appropriate.

B. Order No. 7972162.

1. Violation of C.F.R. § 56.12040, supra

On June 10, 1999, Pereza also inspected the Westinghouse Motor Control Center (“MCC”), which houses circuit breakers for motors and other equipment at the plant. The circuit breakers are contained inside cabinet doors that were designed to be used with a rod that did not require the door to be opened in order to throw the circuit breaker. Three cabinet doors, each enclosing a separate breaker, did not have any rods. Accordingly, these doors would have to be opened in order to throw the circuit breaker inside. A written statement on the outside of each door stated that the door had to be opened to activate the breaker. Hence, once a week, a miner would have to reach inside the cabinet to throw the circuit breaker in order to repair or maintain certain electrical equipment. Various energized wires and a circuit breaker were located inside each cabinet. There were four square inches of surface area of exposed energized 480v. conductors inside each cabinet. Pereza considered the breaker boxes to be “operating controls”, and issued an order alleging a violation of Section 56.12040 supra.

Pereza opined that the boxes were operating controls. In contrast, no one testified on behalf of TXI regarding any definition of “operating controls” and whether breakers were within the scope of that definition as commonly understood in the industry. Nor did it present any evidence on this point. Since circuit breakers are thrown to cut off power to equipment to repair or maintain them, and then are reset, which supplies electricity to this equipment, I conclude, for the reasons discussed above ((II.) (B.) (A.), supra.) that they are within the scope of “operating controls”.

Further, due to the presence of energized 480v. wires inside the box, which has to be opened to throw or reset a breaker due to the violative condition herein, I find that miners performing this task would be exposed to the possibility of electric shock due to inadvertent contact with the energized conductors inside the box. Accordingly, I find that due to the lack of a rod on the outside of the cabinet doors at issue, the circuit breakers inside these boxes could only have been operated by exposing miners to danger of contact with energized conductors located inside the box. Accordingly I find that TXI did violate Section 56.12040 supra.

2. Unwarrantable Failure.

Because it was obvious that the boxes at issue no longer had handles on the outside, and that for many years instructions on the outside of the boxes informed employees to open the door in order to throw the breakers, I conclude that it has been established that the violation resulted from TXI's unwarrantable failure (see, Emery supra)³.

3. Penalty

I find that the gravity of this violation was relatively high as it could have resulted in a serious injury resulting from electric shock. Also, I find, as set forth above, that the negligence was relatively high. Taking into account the further factors set forth in Section 110(i) of the Act as stipulated to parties, I find that the proposed penalty of \$2,000.00 is appropriate.

III. Docket No. WEST 2000-50.

During the course of the hearing on July 26, 2000, regarding the citations at issue in Docket No. WEST 2000-50, the parties reached a settlement, and made a joint motion to approve the settlement, and the motion was granted at the hearing.

The parties proposed to have the total penalty initially sought by the Secretary for the violations alleged in these citations to be reduced from \$397.00 to \$228.00. I reviewed the record regarding these citations and the evidence presented at the hearing, and I found the proposed settlement to be appropriate under the terms of the Act, and I granted the motion.

³The order at issue was issued under Section 104(d)(2) of the Act, which requires the existence of a violation that resulted from the operator's unwarrantable failure, but not necessarily a significant and substantial violation. Thus, I reject as irrelevant TXI's argument that the order at issue should be vacated because Section 104(d)(1) sets forth that an order can properly be designated as an unwarrantable failure only if the inspector has also concluded that the violation was significant and substantial, whereas the order at bar does not allege the violation at issue to be significant and substantial. However, such an argument does not pertain to the order at issue which was issued under Section 104(d)(2) of the Act. Section 104(d)(2) pertains to a withdrawal order that was issued pursuant to Section 104(d)(1) which does not contain any requirement that the order be predicated upon a violation that is significant and substantial.

ORDER

It is **ORDERED** that, within 30 days of this decision, TXI shall pay a total civil penalty of \$7,228.00. It is further **ORDERED** that Order No. 7972129 be Dismissed.


Avram Weisberger
Administrative Law Judge

Distribution: (Certified Mail)

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November 3, 2000

WHITE CONSTRUCTION CO. INC.,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. SE 2000-228-RM
	:	A. C. No. 7759166;8/9/2000
	:	
	:	Docket No. SE 2000-229-RM
	:	A.C. No. 7759167; 8/9/2000
	:	
	:	Docket No. SE 2000-230-RM
	:	A. C. No. 7759168;8/9/2000
	:	
v.	:	Docket No. SE 2000-231-RM
	:	A. C. No. 7759169;8/9/2000
	:	
	:	Docket No. SE 2000-232-RM
	:	A. C. No. 7759170;8/9/2000
	:	
SECRETARY OF LABOR,	:	Docket No. SE 2000-233-RM
MINE SAFETY AND HEALTH	:	A. C. No. 7759171;8/9/2000
ADMINISTRATION, (MSHA),	:	
Respondent	:	Docket No. SE 2000-234-RM
	:	A. C. No. 7759172;8/9/2000
	:	
	:	Docket No. SE 2000-235-RM
	:	A. C. No. 7759173;8/9/2000
	:	
	:	Docket No. SE 2000-236-RM
	:	A. C. No. 7759174; 8/9/2000
	:	
	:	Docket No. SE 2000-237-RM
	:	A. C. No. 7759175;8/9/2000
	:	
	:	Docket No. SE 2000-238-RM
	:	A. C. No. 7759176;8/9/2000
	:	
	:	Docket No. SE 2000-239-RM
	:	A. C. No. 7759177; 8/9/2000
	:	
	:	Docket No. SE 2000-240-RM
	:	A. C. No. 7759178; 8/9/2000
	:	
	:	Docket No. SE 2000-241-RM
	:	A. C. No. 7759187;8/9/2000

ORDER OF DISMISSAL

Before: Judge Barbour

On September 8, 2000, counsel for the operator filed with the Commission notices of contest for fourteen citations that were issued against the operator on August 9, 2000 by an MSHA inspector. On September 11, 2000, I issued a letter acknowledging receipt of the notices of contest and advising the parties the docket numbers assigned to these matters. The September 11 acknowledgment letter was mailed to counsel for the operator and the Department of Labor's Solicitor's office in Arlington Virginia who represents MSHA.

On October 10, 2000, the Solicitor filed a motion to dismiss the notices of contest and memorandum in support of the motion. The Solicitor argues that the operator failed to notify the Secretary that it was contesting the citations as required by the Mine Act and Commission procedural rules. 30 U.S.C. § 815(d); 29 C.F.R. § 2700.20(b). According to the Solicitor, the Secretary first became aware of the contests when the Solicitor's Arlington office received the September 11 acknowledgment letter on September 12, 2000, which was forwarded to the Atlanta Regional office on September 18, 2000. On September 25, 2000, the Solicitor contacted the Commission and a copy of the notice of contest was faxed to him on that day. The Solicitor asserts that the Commission and the Secretary are two distinct entities under the Act and that service on one is not service on the other. The Solicitor also notes that in Diablo Coal Co., 15 FMSHRC 1605 (August 1993), I dismissed a notice of contest that was three days late because it deprived the Commission of jurisdiction.

On October 16, 2000, counsel for the operator filed a response to the Solicitor's motion to dismiss. Counsel asserts that he timely filed the notices with the Commission which was confirmed by the September 11 acknowledgment letter. In addition, counsel claims that White Construction filed its notice of contest with the Commission based on oral advice it had received from the Commission. Counsel alleges that White Construction was only instructed to file its notices with the Commission and to attach copies of all fourteen violations which it did. Counsel also distinguishes Diablo Coal noting that the operator in that case served neither the Secretary nor the Commission with its notice within the requisite thirty days. By contrast, the notices in these cases were timely filed with the Commission. Counsel asserts that this case is more like Rivco Dredging Corp., 10 FMSHRC 624 (1988), where the Commission held that "innocent procedural missteps alone should not operate to deny a party the opportunity to present its objections to citations or orders."

Section 105(d) of the Mine Act, 30 U.S.C. § 815(d), provides in relevant part:

If, within 30 days of receipt thereof, an operator . . . notifies the Secretary that he intends to contest the issuance . . . of an order issued under section 104(a), or citation . . . the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing.

Commission Rule 20(b) carries over the requirements of section 105(d) and states:

Contests filed by an operator. . . shall be filed with the Secretary at the appropriate Regional Solicitor's Office or at the Solicitor's Office, Mine Safety and Health Division, Arlington Virginia, within 30 days of receipt by the operator of the contested citation, order, or modification.

Commission Rule 20(c), 29 C.F.R. § 2700.20(c), requires the Secretary to notify the Commission immediately when a notice of contest has been filed.

A long line of cases dating back to the Interior Board of Mine Operation Appeals have held the late filing of notices of contest of citations is not permissible under the Mine Act and under its predecessor the Federal Coal Mine Health and Safety Act of 1969. Consolidation Coal Company, 1 MSHC 1029 (1972); Old Ben Coal Co., 1 MSHC 1330 (1975); Alexander Brothers, 1 MSHC 1760 (1979); Island Creek Coal Co. v. Mine Workers, 1 FMSHRC 989 (Aug 1979); Amex Chemical Corp., 4 FMSHRC 1161 (June 1982); Industrial Resources, Inc., 7 FMSHRC 416 (March 1985); Allentown Cement Company, Inc., 8 FMSHRC 1513 (October 1986); Rivco Dredging Corporation, 10 FMSHRC 889 (July 1988); Big Horn Calcium, 12 FMSHRC 463 (March 1990); Prestige Coal Co., 13 FMSHRC 93 (January 1991); Costain Coal Inc., 14 FMSHRC 1388 (August 1992); Diablo Coal Company, 15 FMSHRC 1605 (August 1993); C and S Coal Company, 16 FMSHRC 633 (March 1994); Asarco, Incorporated, 16 FMSHRC 1328 (June 1994); See also, ICI Explosives USA, Inc., 16 FMSHRC 1794 (August 1994). However, late filing of a contest of a citation or order has been allowed where the Secretary's own conduct is responsible for the operator's delay in filing a notice of contest. Blue Diamond Coal Company, 11 FMSHRC 2629 (Dec. 1989), See also, Consolidation Coal Co., 19 FMSHRC 816 (April 1997); Freeman Coal Mining Corporation, 1 MSHC 1001 (1970).

The Mine Act and Commission rules are explicit in requiring the Secretary to be notified of the operator's intent to contest within 30 days of the issuance of a citation. It is clear in the instant matters that counsel did not notify the Secretary as required by the Mine Act and Commission Rules. The notices were sent to the Commission and not to the Secretary. Notification of the Secretary was only achieved when the September 11 acknowledgment letter was mailed which was more than 30 days after the citations were issued. Therefore, the contests were untimely and it must be determined whether these cases should be dismissed in accordance with established precedent or whether the operator's failure to timely contest falls within the exception as set forth above where actions of the Secretary cause an operator to be late.

Counsel does not allege that the Secretary engaged in conduct that resulted in the delay, rather he alleges the actions of the Commission that were to blame. Counsel claims that the operator was only instructed to file the notices with the Commission and to attach copies of the violations. Counsel does not state who was contacted at the Commission with respect to the filing of the contests or the questions asked that individual, but simply identifies one alleged

statement made by a Commission employee regarding the requirements for filing a contest with the Commission. The Commission has no record of receiving a telephone call concerning these matters.

Moreover, a review of the notices of contest shows that counsel was unaware of the independent role of the Commission. Counsel erroneously addressed his contests to the "United States Department of Labor, Federal Mine Safety and Health Review Commission." I can only assume he did so because he did not familiarize himself with the Mine Act or the rules of the Commission prior to contacting the Commission or making his filing. Had he consulted the rules or the Act it should have been evident that the Secretary and the Commission are independent entities and that he was required to file his contests in a timely fashion with the Secretary. Because counsel has failed to demonstrate that misconduct by the Commission occurred in these matters and because counsel has failed to justify why he was unaware of the Commission's rules and the Mine Act's requirements, I find that sufficient reasons do not exist to permit these untimely notices of contest to proceed and therefore these matters must be dismissed.

In light of the foregoing, the Solicitor's motion to dismiss these case is **GRANTED** and it is **ORDERED** that these cases are **DISMISSED**. Counsel for the operator should note, however, that the failure properly to contest a citation does not preclude the operator from challenging in a subsequent civil penalty proceeding the violation alleged in the citation and/or any of the findings associated with the alleged violation.


David F. Barbour
Chief Administrative Law Judge

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/wd

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET, N.W., Room 6003

WASHINGTON, D. C. 20006-3867

Telephone No.: 202-653-5454

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November 7, 2000

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2000-64-M
Petitioner	:	A. C. No. 33-00168-05520
	:	
v.	:	
	:	
SHELLY MATERIALS INC -	:	
OSTRANDER PLANT,	:	
Respondent	:	Mine: Shelly Materials Inc Ostrander Plant

DECISION APPROVING SETTLEMENT

Before: Judge Barbour

This case is before me upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977. The Solicitor has filed a motion to approve settlement. A reduction in the penalty from \$7,000.00 to \$4,300.00 is proposed. I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is **GRANTED**, and it is **ORDERED** that the operator pay a penalty of \$4,300.00 within 30 days of this order.


 David Barbour
 Chief Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

November 17, 2000

BRIAN T. CHRISTIE, : DISCRIMINATION PROCEEDING
Complainant :
 :
 : Docket No. PENN 2000-23-D
 : PITT CD 99-05
v. :
 :
 :
MOUNTAIN SPRING COAL COMPANY, : No. 1 Mine
Respondent : Mine ID 36-08725

DECISION

Appearances: Brian T. Christie, Worthington, Pennsylvania, *pro se*;
Julia K. Shreve, Esq., Jackson & Kelly, P.L.L.C., Charleston,
West Virginia, on behalf of Respondent.

Before: Judge Melick

This case is before me upon the Complaint by Brian T. Christie, pursuant to Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, *et seq.*, the "Act," alleging that he was discharged by the Mountain Spring Coal Company (Mountain Spring) on August 2, 1999, presumably in violation of Section 105(c)(1) of the Act.¹ More particularly Mr.

¹ Section 105(c)(1) of the Act provides as follows:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by the Act.

Christie alleges in his initial complaint filed August 3, 1999, with the Department of Labor's Mine Safety and Health Administration (MSHA) as follows:²

- 1) Superintendent trying to force me to take vacation for injury instead of compensation.³
- 2) Superintendent asked me if I wanted to fireboss again on 7-30-99 and wanted an answer on 7-31-99. On 7-31-99 I told the face boss Walter Delt I did not wish to fireboss. On 8-2-99 at approximately 6:30 a.m. Mr. Saddler told me I was suspended with intent to Discharge, because you are no good to me if you wont fireboss. I don't need you.

In a statement to MSHA special investigator John Savine, on August 12, 1999, Mr. Christie stated that "I believe I would not have been fired if I would have agreed to fireboss" and at hearings testified that he was discharged because he refused to fireboss on July 30, 1999. These proceedings are limited to consideration of those allegations.

Mr. Christie seeks reinstatement and damages, including back pay and reimbursement of medical expenses. However, since he claims that because of his limited functional capacities from a pre-existing medical condition he must be exempted, in any reinstatement order, from working as a fire boss and from operating any equipment such as a roof bolter or power scoop which could aggravate the pain in his neck. Indeed, it appears that the only job for which Mr. Christie would accept reinstatement would be that of bridge operator.

This Commission has long held that a miner seeking to establish a *prima facie* case of discrimination under Section 105(c) of the Act bears the burden of production and proof that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *Secretary on behalf of Pasula v. Consolidated Coal Co.*, 2 FMSHRC 2786, 2797-2800 (1980), rev'd on grounds, *sub nom. Consolidated Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); and *Secretary on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (1981). The operator may rebut the *prima facie* case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. If an operator cannot rebut the *prima facie* case in this manner, it may nevertheless defend affirmatively by proving that it would have taken the adverse action in any event on the basis of the miner's unprotected activity alone. *Pasula, supra; Robinette, supra*. See also

² In a letter dated October 6, 1999, MSHA concluded that a violation of Section 105(c) of the Act had not occurred. Mr. Christie thereafter requested relief from this Commission.

³ In his subsequent statement to MSHA investigator John Savine on August 12, 1999, Christie acknowledged that he had by that time received all the Workers' Compensation to which he was entitled (Exh. C-3, p.3).

Eastern Assoc., Coal Corp. v. FMSHRC, 813 F.2d 639, 642 (4th Cir. 1987); *Donovan v. Stafford Construction Co.*, 732 F.2d 194, 195-196 (6th Cir. 1983) (specifically approving the Commission's *Pasula-Robinette* test). Cf. *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 397-413 (1983) (approving nearly identical test under National Labor Relations Act.)

A miner's refusal to perform work is protected under the Act, if it is based upon a reasonable, good faith belief that the work involves a hazard. *Pasula, supra*, 2 FMSHRC at 2789-96; *Robinette, supra*, 3 FMSHRC at 807-12; *Secretary v. Metric Constructors, Inc.*, 6 FMSHRC 226, 229-31 (February 1984), *aff'd sub nom. Brock v. Metric Constructors, Inc.*, 766 F.2d 469, 472-73 (11th Cir. 1985); see also *Simpson v. FMSHRC*, 842 F.2d 453, 458 (D.C. Cir. 1988); *Consolidation Coal Co. v. FMSHRC*, 795 F.2d 364, 366 (4th Cir. 1986). It is further required that "where reasonably possible, a miner refusing work should ordinarily communicate . . . to some representative of the operator his belief in the safety or health hazard at issue." *Secretary on behalf of Dunmire and Estle v. Northern Coal Co.*, 4 FMSHRC 126, 133 (February 1982); see also *Simpson v. FMSHRC, supra*, 842 F.2d at 459; *Secretary on behalf of Hogan and Ventura v. Emerald Mines Corp.*, 8 FMSHRC 1066, 1074 (July 1986), *aff'd mem.*, 829 F.2d 31 (3rd Cir. 1987) (table cite).

Christie had been off from work and receiving workers' compensation from April 21 through May 10, 1999, because of a knee injury and again from June 25 through July 29, 1999, because he reinjured that knee. According to Christie he reported back to work on July 30, 1999, to "full duty" upon the doctor's release without any restrictions (Exh. C-3, pp.2-3). Christie testified that mine superintendent Seibert Saddler had asked him on July 30th to perform fireboss duties and that he told him that he did not want to do it. He explained at hearing that performing the duties of a fire boss, traveling in a jeep in 36 to 41 inch-height coal and necessitating the twisting and wrenching of his neck, was painful. According to Christie, Saddler knew the history of his neck injury and pain based on his pre-employment physical exam and should have accepted him with his work limitations.⁴ Christie also admitted however that even if he was reinstated he would not be able to perform the duties of a fireboss nor could he operate a power scoop or roof bolter because of his neck pain. Indeed, he testified that the only work he could perform at the mine was that of bridge operator. He maintains that he is unable to ride into the mine in a sitting-up position and even riding in a jeep "would be a problem."

The narrow issue presented herein is whether Mr. Christie's refusal to perform duties as a fire boss was a protected work refusal.⁵ Even assuming, *arguendo*, that Christie entertained a

⁴ The pre-employment exam report shows however that Christie had "no physical or mental limitations related to work as an underground miner. (Exh. C-1).

⁵ At hearings Christie also appeared to allege for the first time that after he told Saddler that he did not want to fireboss, Saddler offered to have him perform only partial fireboss inspections but then sign the fireboss books as if he had completed the inspections - - an unlawful procedure. This allegation had never previously been made either in his complaint filed

good faith and reasonable belief that to perform the duties of fire bossing would have been unsafe because of his pre-existing neck condition, for a work refusal to be protected, the miner must first communicate his safety concerns to some representative of the operator. *Secretary on behalf of Dunmire*, 4 FMSHRC at 133. In this regard, the Commission has held that “proper communication of a perceived hazard is an integral component of a protected work refusal and responsibility for the communication of a belief in a hazard underlying the work refusal lies with the miner.” *Conatser*, 11 FMSHRC at 17, citing *Dillard Smith v. Reco Inc.*, 9 FMSHRC 992 at 995 - 96 (June 1987). The miner’s failure to communicate his safety concern denies the operator an opportunity to address the perceived danger and, if permitted, would have the effect of requiring the Commission to presume that the operator would have done nothing to address the miner’s concern. Thus, a failure to meet the communication requirement may strip a work refusal of its protection under the Act.

In this case, Mr. Christie, in his statement to investigator Savine and at hearings, acknowledged that he did not communicate that his refusal to perform the duties of a fire boss was because of his pre-existing neck injury. Christie testified only that he thought Saddler knew of the history of his neck injury and the pain associated with that injury based on his pre-employment physical exam and presumably should therefore have known the reason for his refusal to fire boss. However, as previously noted neither his preemployment physical nor the doctor’s release on July 29, 1999, placed any restrictions on Christie’s return to work as an underground miner. Indeed, it is uncontradicted that Christie was released by a physician to “unrestricted duty” upon his return to work only a few days earlier (Respondent’s Exh. No. 2) and that Christie himself admitted in his August 12, 1999, statement that he had been released by the doctor on July 29, 1999, to full duty without restrictions (Exh. C-3). In addition, Saddler testified credibly that when he asked Christie to do the firebossing Christie never mentioned any neck injury or pain or anything about putting his papers in jeopardy.

Under the circumstances and even assuming, *arguendo*, that Christie retained a good faith and reasonable belief that to work with his neck pain was a safety hazard, he cannot prevail under a “work refusal” theory because of his failure to communicate that as a reason for his refusing to perform the duties of a fire boss. In any event, I do not find that the work refusal in this case based on the impairment claimed in this case is protected by the Act. Here, Christie’s alleged neck pain, caused by a non-work related vehicular accident several years before he even began employment with Respondent, is an idiosyncratic physical impairment not involving inherently unsafe working conditions and practices of the mine operator. See, e.g., *Paula Price v. Monterey Coal Company*, 12 FMSHRC 1505 at 1519-1520 (August 1990), (concurring opinion); *Sam Collette v. Boart Longyear Co.*, 17 FMSHRC 1121, 1125-26 (July 1995) (ALJ) and *Perry v. Phelps Dodge Morenci, Inc.*, 18 FMSHRC 643 (April 1996) (ALJ). This case does not present

herein or in the lengthy and thorough interview by the MSHA investigator. Saddler also denied the allegation in his testimony at hearings. Under the circumstances, I do not find this new allegation to be credible.

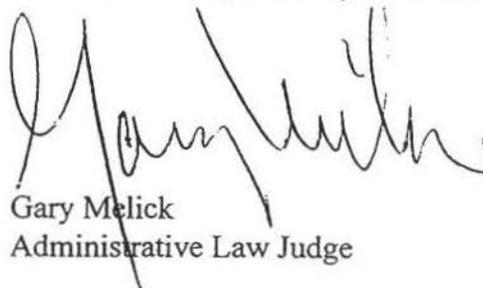
the “appropriate circumstances” mentioned in *Bjes v. Consolidation Coal Co.*, 6 FMSHRC 1411, 1417 (June 1984), in which a miner may refuse to work on the basis of a perceived hazard arising from his own physical condition.

Christie also claimed that he refused to perform fire boss duties because “Saddler would not run the mine the way it was supposed to be run” (Tr. 126). He admits however that he did not communicate this reason to Saddler. In light of this admission Christie likewise could not prevail under a “work refusal” theory. *Conatser*, 17 FMSHRC at 17, *Dillard Smith*, 9 FMSHRC at 995-96. Since Christie admits moreover that he could not in any event perform the duties of a fire boss because of his neck pain, this claim could not provide a good faith and reasonable belief basis for a work refusal.

Under the circumstances, Mr. Christie has failed to sustain his burden of proving that he was discharged in violation of Section 105(c) of the Act and accordingly his complaint must be dismissed.

ORDER

Discrimination Complaint Docket No. PENN 2000-23-D, is hereby dismissed.



Gary Melick
Administrative Law Judge

Distribution: (By Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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November 22, 2000

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA), on behalf	:	Docket No. SE 2000-39-D
of Terry McGill,	:	BIRM CD 99-04
Complainant	:	
	:	
v.	:	
	:	Oak Grove Mine
U.S. STEEL MINING COMPANY, LLC.,	:	Mine ID 01-00851
Respondent	:	

DECISION

Appearances: William Lawson, Esq., U.S. Department of Labor, Office of the Solicitor, Birmingham, AL, for the Complainant; Anthony Jeselnik, Esq., U.S. Steel Mining Company, Pittsburgh, PA, for the Respondent.

Before: Judge Weisberger

This case is before me based on a Complaint filed by the Secretary of Labor (“Secretary”) alleging that U.S. Steel Mining Company (“U.S. Steel”) discriminated against Terry McGill in violation of Section 105 of the Federal Mine Safety and Health Act of 1977 (“the Act”). A hearing on this matter was held in Hoover, Alabama, on August 23, 2000. On October 31, 2000, the Secretary filed findings of fact and a post trial brief. On November 1, 2000, U.S. Steel filed proposed findings of fact and post hearing legal argument.¹ On November 15, 2000, U.S. Steel filed a reply brief.

¹On October 16, 2000, the Secretary filed a Motion Seeking Reconsideration of numerous evidentiary rulings made at the hearing of this matter.

At the hearing U.S. Steel had objected to introduction, by the Secretary, of various exhibits and the objections were sustained. The basis for each of the rulings was set forth in the record of this matter, and need not be reiterated. I have evaluated the motion filed by the Secretary, but find there is no need to reconsider the initial rulings set forth in the record. Accordingly, the motion to reconsider is denied.

I. The Secretary's Case

Terry McGill, who is presently a retired miner, previously worked as a roofbolter for U.S. Steel. According to McGill, his first contact with Carl Harless, a foreman employed by U.S. Steel, occurred in April 1999 when Harless, who was not McGill's foreman at that time, noted that an underground miner had taken his hat off, and had turned his light off. According to McGill, Harless fired that miner. McGill confronted Harless and told him that if he would fire every miner at the mine who would be found with his hat or light off, he (Harless) would be busy, as this practice is widespread.

Subsequent to April 1999, McGill injured his knee at the mine and was off work for 13 weeks. When McGill returned on June 21, 1999, Harless had become his foreman. Sometime thereafter, Harless told McGill and Jerry Norris, McGill's co-bolter on the section, that since he now had two committeemen on the section, he was outnumbered, and should probably "start wearing a tape recorder". (Tr. 45.) According to McGill, Harless "... kept trying to goad me into something or get me to act". (Tr. 45.)

According to McGill, on July 13, 1999, the section's continuous miner was cutting a crosscut from the No. 3 entry to the No. 2 entry. McGill testified that on his way to lunch he passed the No. 2 entry, and saw that it had not been pinned all the way to the face. He indicated that this entry was 20 feet wide, and that at the face along the right side of the entry, the last row of bolts was approximately seven feet from the face. In contrast, on the left side of the entry the last row of bolts was approximately ten feet from the face.²

McGill went to see Luther C. Self, the miner operator, and asked him if he was going to cut all the way through to entry No. 2, and Self indicated in the affirmative. McGill told Self that if he were to cut into the No. 2 entry, he would then be cutting into an area that was not completely pinned. Self told him that Harless had told him (Self) to cut the crosscut through to the No. 2 entry. McGill then went to see Harless and asked him if he was going to cut through to the No. 2 entry, and the latter indicated in the affirmative. McGill then testified that he told Harless as follows: "... you know you will be cutting into a place that is not completely pinned". (Tr. 55.) According to McGill, Harless said that "it was his f...ing section and he would run it like he wanted to and for us to get our g-d damn butts out there and eat." (Tr. 55.)

At approximately 10:30 a.m., while at the dinner hole, McGill asked MSHA Inspector Bud Norris, who was present that day conducting an inspection, whether the law would be violated if a cut would be taken "... and it [was] not bolted up all the way". (Tr. 59.) According to McGill, the inspector asked if such a cut had already been taken, and McGill indicated that it

²On June 11 or June 12 when McGill bolted the face of the No. 2 entry, he asked Harless why he had not had the area "squar[ed] up" (Tr. 218) so it could be pinned properly, and Harless responded by saying that it was his "f--ing section ... and he'll run it like he wanted to". (Tr. 219.)

had not. The inspector did not say anything further to McGill on this subject.

Harless was located one to two crosscuts away from the dinner hole during the conversation between McGill and the inspector. According to McGill, Harless observed him talking to the inspector. McGill indicated that Harless then entered the dinner hole, and asked the inspector what he was inspecting, and the inspector said he was inspecting a belt. Harless then left, and McGill continued talking to the inspector.

According to McGill, at approximately 11:00 a.m., after he had left the dinner hole, he met the miner crew going into the dinner hole, and asked them if they had cut through to the No. 2 entry. Self told McGill that Harless told them to get the miner out of the entry, and to stop cutting in that area.

Thereafter, McGill went to the No. 3 entry with Norris to resume bolting, at which point Harless told him to get some curtains from the tail track area, and to bring them back to the section. The curtains were located approximately 180 feet from the section. McGill indicated that the curtains which weigh approximately three pounds each, but were "bulky" (Tr. 68), are usually transported by a miner via a scoop. He indicated that the floor of the walkway, from the tail track to the section, sloped downhill and contained mud that was more than ankle deep and generally consisted of "rough terrain". (Tr. 66.) McGill testified that he asked Harless if he could use a scoop, and Harless responded as follows: "Look, I told you to walk out there and get it. Are you violating a direct work order"? (Tr. 67.) McGill indicated that he told Harless that he would get the curtains,³ but that "... it may take me some time" (Tr. 67.) McGill took one curtain to the section, returned to the tail, and put another curtain on his shoulder, intending to take it to the section. Harless approached him and told him to put the curtain down and for him and Norris to bolt the No. 3 crosscut. Harless then offered to carry the rest of the curtains. McGill testified that he told Harless that if he would carry the curtains, then he (McGill) would file a grievance, as Harless would be performing "classified" work. According to McGill, Harless then said to him as follows: "... you little son of a b---h, I'm going to show you something about what's right and what's wrong." (Tr. 73.) According to McGill, Harless was "really cussing". (Tr. 73.) McGill told Harless that if he would continue cursing that he (McGill) would get Hank Keaton, the mine committee chairman, to be a witness. Harless then told him that he (McGill) did not need Keaton to be a witness because he (McGill) "was a f---ing committeeman." (Tr. 74.) McGill said that Harless then began to run at him with his fist drawn, and said that "you not going nowhere." (Tr. 74.) McGill told Harless that he was getting Keaton and started to walk away, at which point Harless said that he was insubordinate and "you're a fired son of a b---h". (Tr. 75.) Harless further told him that "the time is 11:46 ... [y]our time stops now." (Tr. 75.) In response, McGill told him that he was calling Mike Sumpter, a management official, and started to go to get him. Harless then called him (McGill) insubordinate, told him that he was fired, and that he (Harless) would get Sumpter. Harless then got Sumpter, who arrived at the scene and asked what was going on. McGill said that he did

³According to McGill there was about a dozen curtains to transport.

nothing, and he went outside accompanied by Harless and Sumpter.

Self testified that on July 13, he was told by Harless to cut the crosscut between the No. 2 and No. 3 entries. (Tr. 92.) After Self took only a 35 foot cut, Harless told him to back the miner out, and shut it down.⁴ According to Self, in normal operations the miner takes a 40 foot cut, and that it is not the normal practice to stop a miner after only a 35 foot cut in order to fix a suction hose. Self indicated that when he was told by Harless to remove the miner and shut it down, he had not experienced any difficulty operating the miner, that it had been operating properly, and that there was no indication that it was losing oil. Self conceded that a hose on the miner that is used to siphon oil to the miner was broken. However, he opined that as the hose was not pressurized, it did not have any effect on the operation of the miner.

After stopping the miner, Self left the area to go to the dinner hole.

Timothy Lynn Bynum, Self's helper, testified that Harless did not tell him the reason for having to back the miner out on July 13. He confirmed that he had not observed any problems with the hydraulic trammig of the miner, nor did he experience difficulty raising or lowering the cutting head. He also confirmed that the offset had not been bolted. He did not recall Harless saying that the suction hose had to be fixed. On cross examination, he indicated, in essence, that he was not sure who had informed Harless that they were cutting into an unpinned area, but that, in response, Harless was not angry nor did he issue any threats.

Jerry A. Norris, a roofbolter, was McGill's partner on the bolter during the dates in issue. He confirmed that Harless said that since he had two committeemen "... and an a--hole" (Tr. 139) he needed to carry a tape recorder.

According to Norris, on July 13, McGill asked Harless if he was going to cut a crosscut between the No. 2 and No. 3 entries, and Harless indicated, in the affirmative. Norris testified that he told Harless that cutting into an unpinned area is illegal. According to Norris, Harless said "it was his f---ing section; he'd run it any f---ing way he wanted to." (Tr. 141) and Harless then told Norris and McGill "to eat [their] goddamn lunch" (Tr. 141).

Later on in the day, Norris was assigned to build curtain drops. He asked Harless where the curtains were coming from, and the latter told him that McGill would bring them "if he wasn't too f---ing crippled." (Tr. 143) Norris testified that later on, when Harless told him to get the curtains, he used a scoop to get the curtains with Harless' knowledge.

On cross examination, Norris indicated that on July 12, the No. 2 entry had not been completely bolted. He explained that rocks on the floor of the entry had prevented the roofbolter from advancing further inby along the right side of the entry. As a result, the inby right side of the entry was more than 5 feet from the last row of bolts. Norris indicated that the unbolted area

⁴The following day, July 14, Self cut into the No. 2 entry.

was the area that would be cut from the No. 3 entry. According to Norris, at the end of the shift, on July 12, he informed Harless that they would not be able to pin all the way to the face due to uncut bottom.

Rex Tanner, the president of the local union, and a member of the mine committee, was with the inspector in the dinner hole on July 13. According to Tanner, after Harless arrived at the dinner hole he introduced himself to the inspector, and asked him what the problem was, and the inspector explained that if a cut would be taken through to an unpinned area there would be a violation. At that point, Harless turned and went to the face where the subject cutting was being done.

II. U.S. Steel's Case

Rick Nogosky, the superintendent at the site, testified that he made the decision to fire McGill, and that he was solely responsible for the firing. He indicated that he made that decision after the 24-48 union hearing related to the stopping of McGill's time by Harless. He explained that his decision was to "uphold" (Tr. 239) the discharge of McGill.⁵

Nogosky indicated that on two separate occasions he had heard McGill say f--k you to two supervisors.

Nogosky opined that an oil leak in a miner could occur suddenly, and would result in a malfunction in the miner's capacity to lower or raise the cutting head.

Harless testified that on July 13, at approximately 10:00 a.m., McGill wanted to know if he would cut from the No. 3 crosscut to the No. 2 entry, and he (Harless) indicated in the affirmative. McGill responded by stating that this could not be done, as the area was unsupported. Harless testified that, in response, he told McGill that it was supported and invited him to observe it. McGill did not go, but instead went to the crosscut between the No. 2 and No. 3 entries, where the miner was located. Harless said that the unbolted area was in the offset in by the end of the No 2 entry perpendicular to the crosscut between the No. 2 and No. 3 entries. He indicated that the appropriate plan required bolting to be performed within five feet of the face. In contrast, in the offset, the distance from the last row of bolts to the face was seven feet. He indicated that the height from the ceiling to the floor was four feet in that area, whereas the normal distance was six feet. He explained that in cutting through the crosscut from the No. 3 entry to the No. 2 entry, the miner would not have entered this offset area, as it was perpendicular to the cut. He indicated that on July 15, when the cut was taken from the crosscut into the No. 2 entry, Inspector Norris was present, but he did not criticize this action, nor was it cited.

⁵Nogosky testified that in deciding to fire McGill, he relied on the stories presented by Harless and McGill at the 24-48 hearing, and also his review of their personnel files. In contrast, in his deposition he testified that he relied on Harless' testimony, the nature of the events, and nothing else.

Harless testified that the area in the No. 2 entry, in a direct line inby of where the miner was cutting in the crosscut between the No. 2 and No. 3 entries, was bolted by 10:00 a.m. on July 13, as McGill and Norris had bolted that area on July 12. There was a conflict in Harless's testimony regarding the time during the morning of July 13, when Self backed the miner out from the crosscut in which he was cutting, trammed it to the No. 3 entry, and yelled at him (Harless) that the miner had busted a hose and needed oil. Initially, Harless said that this conversation occurred at approximately 12:00 p.m.. However, later on in his testimony, he indicated that the time of 12:00 p.m. was not correct, but that he was sure of the following sequence of events: that (1) after he had this conversation with Self, and after Self had backed the miner outby from the crosscut between the No. 2 and No. 3 entries, he saw the inspector in the dinner hole on a bench with Norris and McGill, and (2) that 30 minutes after he had the conversation with Self, he observed and lifted eight empty cans of oil that were in close proximity to the miner.

Harless testified that at approximately 11:30 a.m., on July 13, after he told McGill to get some curtains from the tail area, he approached the tail and saw McGill carrying only one curtain under his arm. Harless said to him "... let me get some of these for you and help you carry them up there". (Tr. 408.) McGill responded by telling Harless that if he touched one piece he (McGill) would file a grievance. Harless indicated that he was upset because McGill had been carrying only one curtain. Harless told McGill, who had continued walking inby, to stop as he wanted to tell him what to do for the rest of the shift. According to Harless, McGill said, f--k you, and that he was doing what I had told him. Harless again told McGill to stop, and told him that he needed for him to know what to do for the rest of the shift. According to Harless, he told McGill to stop two more times and both times McGill said, in response, f--k you. Harless told McGill that he was bordering on insubordination and McGill said get f---ed. Harless then told McGill to stop, and intending to fire him, told him "I'm stopping your time". (Tr. 413.) Harless next told McGill to sit down, and then he went to get Sumpter. Harless said that he reported this incident to Nogosky, and recommended that McGill be fired.

Harless indicated that he had not been concerned when he saw McGill and Norris with the inspector, as people speak to inspectors all the time. In essence, he said that the only time that he got angry was when he saw McGill carrying only one curtain.

III. Discussion

A. Case Law

The Commission, in *Braithwaite v. Tri-Star Mining*, 15 FMSHRC 2460 (December 1993), reiterated the legal standards to be applied in a case where a miner has alleged that he was subject to acts of discrimination. The Commission, *Tri-Star*, at 2463-2464, stated as follows:

The principles governing analysis of a discrimination case under the Mine Act are well settled. A miner establishes a prima facie case of prohibited

discrimination by proving that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *Secretary on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-800 (October 1980), rev'd on other grounds, sub nom. Consolidation Coal Co., v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); *Secretary on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. *Pasula*, 2 FMSHRC at 2799-800. If the operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action in any event for the unprotected activity alone. *Pasula*, 2 FMSHRC at 2800; *Robinette*, 3 FMSHRC at 817-18; see also Eastern Assoc. Coal Corporation, v. United Castle Coal Co., 813 F.2d 639, 642 (4th Cir. 1987).

B. The Secretary's Prima Facie Case.

1. Protected activities

It is not contested that on the morning of July 13, the most inby portion of the No. 2 entry had not been cut to an equal depth across the entire width of the entry, due to a low ceiling resulting from rock build-up on the floor. As a result, the right side of the entry was not bolted within five feet of the face. Similarly, U.S. Steel did not rebut or contradict McGill's testimony that on July 13 he had communicated both to Harless, his immediate supervisor, and MSHA Inspector Norris, his concern that if Self would complete the crosscut between the No. 3 and No. 2 entries and continue into the No. 2 entry, he would then be cutting into an unbolted area.

Section 105(c) sets forth the following language regarding activities that are protected under the Act: "[making] a complaint notifying ... the operator's agent ... of an alleged danger or safety violation in a coal ... mine" The Legislative History of the Act manifests Congress' intent that Section 105(c) be given a broad construction. S. Rep. No. 95-181, 95th Cong., 1st Sess., at 35 & 36 (1977) ["S. Rep."], reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 623 (1978) ["Leg. Hist."] cited with approval in Pasula, supra at 2791 - 2792) Thus, broadly construing Section 105(c), I find that McGill's communications of safety concerns to Inspector Norris and to Harless are protected under the Act. Accordingly, I find that it has been established that on July 13, McGill did engage in protected activities.

2. Adverse action.

The record unequivocally establishes that on July 13 Harless, after a confrontation with McGill, stopped his (McGill's) time, and intended to fire him permanently. Harless' action in stopping McGill's time led directly to a 24-48 hearing, which was a union mandated first step in the grievance disciplinary process. Further, according to McGill, and not subsequently

contradicted by Harless, the latter had told him, at the confrontation on July 13, that he was "fired".⁶ Thus I find that it has been established that U.S. Steel took action adverse to McGill.

3. The Adverse Action Was Motivated "in Any Part" by McGill's Protected Activities.

Harless, who took the action adverse to McGill on July 13, testified, in essence, that he had not gotten angry when McGill told him, on the morning of July 13, not to cut into the No. 2 entry because it was unsupported, and he was not concerned when he saw McGill sitting on a bench with the inspector in the dinner hole, because people speak to inspectors all the time. He explained, in essence, that, in intending to fire McGill and in stopping his time, he was motivated by McGill's "insubordination", i.e., refusing to stop when ordered by him (Harless), and cursing at him (Harless). Also, in essence, Harless indicated that on July 13, he got angry only when he saw McGill carrying one curtain.

However, I take cognizance of the following uncontested facts: that at approximately 10:30 a.m., on July 13, McGill told Harless that if he would cut from the entry No. 3 through to entry, No. 2 entry, he would be cutting into a place that was not completely bolted; that shortly thereafter McGill asked Inspector Norris, at the dinner hole, whether there would be a violation if a miner would cut into a place that had not been completely bolted; that Harless observed McGill sitting next to the inspector on a bench in the dinner hole; and that at 11:26 a.m. that same day, Harless, intending to fire McGill, permanently stopped his time. Also, I note that Harless did not specifically rebut McGill's testimony that on July 13, when he told him that he would be cutting into a place not completely bolted, Harless said it was his f---ing section and he would run it like he wanted to. Thus, primarily based upon the coincidence in time between (1) McGill's protected verbal communication to Harless, which was accompanied by some evidence of animus on the part of Harless, followed shortly thereafter by Harless observing McGill talking to the inspector; and (2) Harless' firing of McGill less than an hour later, I find that the Secretary has established that Harless' adverse action taken against McGill was motivated "in any part" by McGill's protected activities.

IV. U.S. Steel's Defense

I take cognizance, as discussed above, of the existence of some evidence of some degree of animus by Harless towards McGill regarding the latter's protected activities under the Act. However, it is significant to note that Bynum, Self's helper on the miner, testified that when it was brought to Harless' attention that they would be cutting into an unpinned area, Harless was not angry and did not issue any threats. Indeed, the record does not contain any evidence of any animus by Harless, or adverse action taken by him directed against either Bynum or Self, the miner operator. In the same fashion Norris, who was McGill's partner on the bolter, testified that

⁶Subsequently, Rick Nogosky, the superintendent at the mine made a decision after the 24-48 union hearing to uphold Harless discharge of McGill.

he told Harless that "... you're cutting into an unpinned place, such as Terry also said. And this is illegal," and Harless stated that "... it was his f---ing section; he'd run it any f---ing way he wanted to." (Tr. 141.) Later, Harless observed both McGill and Norris sitting with the inspector in the dinner hole. However, significantly, there is no evidence in the record that Harless directed any animus toward Norris or took any adverse action against him as a consequence of his having heard Norris express safety concerns, and having observed him talking to the inspector.

Further, most significantly, although Harless' action adverse to McGill shortly followed McGill's protected activities, i.e., voicing safety concerns to Harless and the inspector, it was McGill's actions that were not protected under the Act, i.e., threatening to file a union grievance, that were immediately followed by Harless' stopping his time. Additionally, according to McGill, Harless' cursing him and telling him that "you're a fired son of a b---h, ... your time stops now", immediately followed McGill's statement to Harless that he was going to get the mine committee chairman, Hank Keaton. It is not for this forum to decide whether, in the light of this sequence of events and actions, McGill has any redress under the National Labor Relations Act. However, considering (1) this scenario and sequence of events; (2) testimony of Norris and McGill regarding Harless' previous statements to them expressing displeasure with having union members on his section and; (3) the unrebutted testimony of Harless, whose demeanor I observed and found to be truthful in his testimony on this point, that McGill refused to stop walking away when ordered to do so by Harless, I find that although Harless' adverse action taken against McGill on July 13 was motivated in any part by McGill's protected activities, Harless would have taken the adverse action against McGill, based on McGill's actions that are not within the pervue of those protected by the Act. Accordingly, I find that U.S. Steel has prevailed in its affirmative defense. Within the above framework of evidence, I conclude that the Secretary has not established that U.S. Steel discriminated against McGill in violation of Section 105(c) of the Act.

ORDER

It is **ORDERED** that the Complaint filed in this case be **DISMISSED**, and that this case be **DISMISSED**.


Avram Weisberger
Administrative Law Judge

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issued two citations under section 104(a) of the Mine Act. He issued a third citation alleging that Northern Stone was not conducting dust surveys at the quarry.

A. Citation No. 7977666

Citation No. 7977666 alleges a violation of 30 C.F.R. § 56.5001(a)/.5005. The condition or practice section of the citation provides, in part:

The miner (Florentino Castillo) assigned to work in the quarry area was exposed to a shift-weighted average of .33 mg/cubic meter (TWA) of respirable silica-bearing dust on 7/1/99. This exceeded the permissible exposure limit of .15 mg/cubic meter (TLV) times the sampling factor (1.2 for respirable free silica dust sampling and analysis). .15 times 1.2 (EF) equals .18. .33 is 1.87 times .18 (TLV times EF). A fit tested respirator was not being used and a respiratory protection program meeting the requirements of ANSI Z88.2-1969 was not in place. All feasible engineering controls were not in use to control employee's dust exposure....

In the citation, Inspector Chitwood determined that it was reasonably likely that the violation would lead to a serious illness; that the violation was of a significant and substantial nature ("S&S"); and that Northern Stone's negligence was moderate. The Secretary proposes a penalty of \$655 for this violation. The safety standard provides, in part, that "exposure to airborne contaminants shall not exceed, on the basis of a time weighted average, the threshold limit values adopted by the American Conference of Governmental Industrial Hygienists...." Section 56.5005 provides, in part, that when "engineering control measures have not been developed or when necessary by the nature of the work involved ..., employees may work for reasonable periods of time in concentrations of airborne contaminants exceeding permissible levels if they are protected by appropriate respiratory protective equipment."

Northern Stone contested this citation for a number of reasons. First, Northern Stone states that MSHA conducted silica dust surveys in the past and no over-exposures were detected. As a consequence, it believed that it was in compliance with MSHA's health standards. Second, Northern Stone believed that MSHA was responsible for conducting these respirable dust surveys and it relied on MSHA's surveys to remain in compliance. Third, Northern Stone questions the accuracy of the allegations in the citation because, after the citation was issued, it arranged for its own respirable dust survey and no over-exposures were found.

I find that the Secretary established a violation. The Commission and the courts have uniformly held that mine operators are strictly liable for violations of safety and health standards. *See, e.g. Asarco v. FMSHRC*, 868 F.2d 1195 (10th Cir. 1989). "[W]hen a violation of a mandatory safety standard occurs in a mine, the operator is automatically assessed a civil

penalty.” *Id.* at 1197. In addition, the Secretary is not required to prove that a violation creates a hazard, unless the safety standard so provides.

The [Mine Act] imposes no general requirement that a violation of MSHA regulations be found to create a safety [or health] hazard in order for a valid citation to issue. If conditions existed which violated the regulations, citations [are] proper.

Allied Products, Inc., 666 F.2d 890, 892-93 (5th Cir. 1982)(footnote omitted). The negligence of the operator and the degree of the hazard created by the violation are taken into consideration in assessing a civil penalty under section 110(i). 30 U.S.C. § 820(i).

For purposes of this case, I find that MSHA may issue a valid citation for an overexposure to silica-bearing dust based on a single-shift silica dust survey. I reach this conclusion based on the Commission’s decision in *Asarco, Inc.*, 17 FMSHRC 1 (1995), and former Commission Judge Maurer’s subsequent analysis in *Asarco, Inc.*, 19 FMSHRC 1097, 1130-1136 (1997). Based on the evidence presented, Judge Maurer concluded that “MSHA’s use of single-shift sampling is a reasonable means of ascertaining, to the requisite degree of accuracy, whether the enforcement concentration level standard in Section 57.5001(a) has been exceeded.” *Id.* at 1136.

The Secretary presented evidence as to the procedures used by Inspector Chitwood to take the sample and the protocol used to analyze the sample at MSHA’s Pittsburgh laboratory. Jaime Alvarez, a safety and health specialist in MSHA’s Western District, testified very generally about MSHA’s sampling procedures. (Tr. 6-20). Inspector Chitwood testified about the procedures he used to sample at the quarry. (Tr. 20-59). Cathy Burns, the quality assurance coordinator at MSHA’s laboratory, testified about the procedures used to analyze respirable dust samples at the laboratory. (Tr. 75-101). James Polizzano, an x-ray analyst at the MSHA laboratory, testified as to the procedures he used when analyzing the particular respirable dust sample at issue. (Tr. 102-121). Northern Stone did not present any evidence to rebut this evidence. Consequently, I credit the testimony of these witnesses. I find that MSHA followed correct procedures when sampling for respirable dust at the quarry and when analyzing the sample at its laboratory. Accordingly, I find that the citation accurately reflects the amount of silica dust to which Mr. Castillo was exposed during the particular six-hour shift that was sampled. The shift-weighted average of .33 mg/cubic meter of respirable silica-bearing dust detected by MSHA is an “estimate” of that “individual’s exposure concentration level” on that date. *Id.*

The Commission has held that, in certain instances, there is a presumption that the violation of a respirable dust standard is S&S. *Consolidation Coal Co.*, 8 FMSHRC 890 (June 1986), *aff’d sub nom. Consolidation Coal Co. v. FMSHRC*, 824 F.2d 1071 (D.C. Cir. 1987); *U.S. Steel Mining Co., Inc.*, 8 FMSHRC 1274 (September 1986); *Twentymile Coal Co.*, 15 FMSHRC 941 (June 1993). In those cases, the mine operator violated sections 30 C.F.R. § 70.100 or §70.101, which apply to coal mines.

An S&S 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 ... mine safety or health hazard.” A violation is properly designated S&S “if based upon 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.” *National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out a four-part test for analyzing S&S issues. Evaluation of the criteria is made assuming “continued normal mining operations.” *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988).

Under the *Mathies* test, the Secretary must establish: (1) the underlying violation of the health standard; (2) a discrete health hazard, a measure of danger to health, contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an illness; and (4) a reasonable likelihood that the illness in question will be of a reasonably serious nature. The Secretary is not required to show that it is more probable than not that an illness will result from the violation. *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996).

In the cases involving coal mines, cited above, the Commission held that because an analysis of the four elements of the S&S test would be essentially the same in each instance in which the Secretary proves a violation of 30 C.F.R. § 70.100 or §70.101, proof of a violation gives rise to a presumption that the violation is S&S. See 8 FMSHRC at 1281. It based this presumption, in large measure, on the legislative history of the Mine Act. The Commission noted that “prevention of pneumoconiosis and other occupational illnesses is a fundamental purpose underlying the Mine Act.” 8 FMSHRC at 895.

For reasons set forth below, I find that this presumption should not be applied under the particular facts of this case. First, the Secretary made no attempt to introduce any evidence concerning the gravity of this violation, the reasonable likelihood of an illness, or whether any illness is likely to be serious. Indeed, counsel for the Secretary ignored the S&S and gravity issues both in the presentation of the evidence and in her closing arguments. The only evidence on these issues is the citation itself. The Secretary cannot rely on this presumption without at least attempting to invoke it in some way. The fact that the Commission created this presumption does not obviate the Secretary’s responsibility to establish her case.

In addition, this case involves facts that were not present in the Commission’s decisions. The Rocky Mountain Quartzite Quarry operates on a seasonal basis with short-term workers. The quarry only mines dimension stone about six months a year. Mr. Castillo was a stone cutter at an area of the quarry known as Silver Peak. When Inspector Chitwood conducted the health survey, Mr. Castillo agreed to cut stone for the entire shift. Normally, stone cutters do not cut stone straight through their shift. (Tr. 25-27). At Inspector Chitwood’s urging, Mr. Castillo agreed to work through lunch without taking any breaks or performing any tasks during his shift other than cutting stone. *Id.* Thus, his exposure to silica dust during this shift may not have been

representative of his exposure on a typical work day. In addition, it is not clear from the record whether Mr. Castillo returns every spring to work at the quarry or whether different people work at the quarry each season. Mr. Castillo returns to his home outside of Idaho when he is not working at the quarry. Given these circumstances, I believe that the application of the presumption would be inappropriate.

I find that the Secretary established the first two elements of the Commission's four part S&S test. A violation occurred that contributed to a discrete health hazard. The Secretary did not establish the third element of the *Mathies* formula: a reasonable likelihood that the hazard contributed to will result in an illness. First, other than the citation itself, the Secretary did not offer any evidence on this element. Second, as stated above, the sample taken by the inspector may not reflect Mr. Castillo's exposure over a period of time. The S&S criteria are to be evaluated assuming continued normal mining operations. It is not at all clear that Mr. Castillo would have been exposed to a shift-weighted average of .33 mg/cubic meter of silica dust during his normal work days. Accordingly, I find that the Secretary failed to establish that the violation was S&S.

I am required to assess a civil penalty for all violations of safety and health standards taking into consideration the six penalty criteria set forth in section 110(i) of the Mine Act. One criteria is the gravity of the violation. As stated above, the Secretary did not offer evidence on this criteria except the citation. Based on the evidence of record, I find that the violation was only slightly serious. I take official notice of the fact that, if a miner is overexposed to silica-bearing dust over a period of time, he can develop silicosis, which is a debilitating disease. But I also take into consideration the fact that it is not clear in this case that Mr. Castillo had been actually exposed to the level of silica dust measured by the inspector over a significant period of time or that he would be so exposed in the future. His work routine was altered when the sample was taken. The Secretary is not usually required to establish that the cited exposure level would continue, but the facts in this particular case warrant such consideration. The Secretary bears the burden of proof on the gravity criterion and I have taken into consideration the fact that this issue was not raised by counsel for the Secretary at the hearing.

I also find that Northern Stone's negligence was low. Mr. Greenwell testified that MSHA had taken silica dust samples at the mine and no citations were issued. He believed that the quarry was in compliance with the silica dust standard and that MSHA was responsible for taking samples to ensure compliance. He was very concerned that the sample showed an overexposure. He questioned the accuracy of the sample because he believed that miners were not being overexposed, but he also wanted to take steps to ensure that miners worked in a healthy environment. After the citations were issued, Northern Stone purchased a sampling device and has sought MSHA's assistance in developing a sampling program. It is important to note that the Secretary did not introduce any evidence on the negligence criterion.

B. Citation No. 7977667

Citation No. 7977667 alleged another violation of 30 C.F.R. § 56.5001(a)/.5005. The condition or practice section stated that a miner was exposed to a shift-weighted average of .17 mg/cubic meter of respirable silica-bearing dust on July 1, 1999, and that the exposure limit, taking into consideration the error factor, was .25 mg/cubic meter. When I pointed out that this citation does not set out a violation because the exposure level was less than the exposure limit, the Secretary agreed to vacate the citation. (Tr. 61-64, 133-34). It appears that the inspector made an error when entering the data received from MSHA's laboratory.

C. Citation No. 7977668

Citation No. 7977668 alleges a violation of 30 C.F.R. § 56.5002. The condition or practice section of the citation provides, in part:

Two (2) stone cutters were overexposed to respirable silica-bearing dust at the dimensional stone quarry site on 07-01-1999. The mine operator had not conducted dust surveys as frequently as necessary to determine the adequacy of the engineering control measures at the dimensional stone quarry site, to ensure a safe work environment for the miner.

Inspector Chitwood determined that it was reasonably likely that the violation would lead to a serious illness; that the violation was S&S; and that Northern Stone's negligence was moderate. The Secretary proposes a penalty of \$655 for this violation. The safety standard provides that "[d]ust, gas, mist, and fume surveys shall be conducted as frequently as necessary to determine the adequacy of control measures.

Northern Stone contends that it did not know how frequently such surveys were required under the standard. Northern Stone attempted to get clarification from MSHA on several occasions after the citations were issued. As stated above, Northern Stone incorrectly believed that MSHA would take all of the required respirable dust surveys.

I find that the Secretary established a violation because Northern Stone had not conducted any dust surveys prior to the issuance of this citation. Thus, the issue of how frequently such surveys must be taken is irrelevant for this citation. I note that Northern Stone contested the citations in this case primarily because it felt that MSHA was not providing sufficient assistance in helping it achieve compliance with its health standards. After the citations were issued, Northern Stone sought MSHA's assistance in developing a plan to solve respirable dust problems at its quarry and also sought help in learning how to use the sampling equipment it had purchased. Northern Stone's own silica-dust sampling results indicated that miners were not being overexposed. Messrs. Greenwell and Mullard expressed their frustration at the hearing and continued to seek MSHA's advice. They admitted that they did not sample for silica dust prior

to July 1999, but they were perplexed by MSHA's failure to follow through on its health inspection by answering their rather basic questions about the regulatory requirements.

Although the Secretary did not introduce any evidence on the gravity and negligence criteria at the hearing, I find that the violation was serious and that Northern Stone's negligence was moderate. The citation itself supports these findings. If a mine operator does not conduct respirable dust surveys, it cannot determine whether its employees are being overexposed to silica dust. Although MSHA conducts health surveys at mines from time to time, the standard requires mine operators to monitor the health conditions at the mine. It cannot rely on MSHA's testing alone. Since the language of the standard clearly places this responsibility on the mine operator, I find that Northern Stone was moderately negligent.

I could not help but notice that immediately after the close of the record in this case, while the parties were still in the courtroom, Mr. Alvarez of MSHA's Metal/Nonmetal Western District Office and Messrs. Greenwell and Mullard began generally discussing approaches that Northern Stone could take with respect to compliance with the silica dust standard. It appeared to me that Mr. Alvarez, on behalf of MSHA, pledged to provide assistance to Northern Stone in this regard. It is my hope that the parties follow through on this discussion so that Northern Stone can provide a healthy environment for its employees. Discussion and assistance will help improve health conditions at this quarry more than further litigation will ever achieve.

II. APPROPRIATE CIVIL PENALTIES

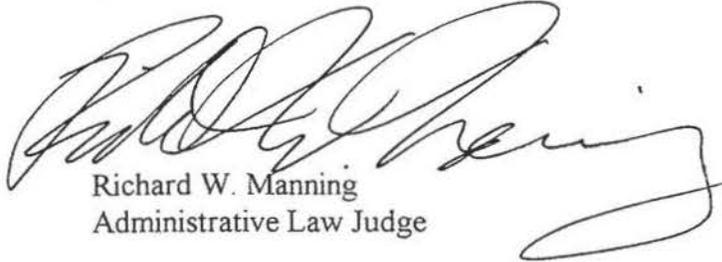
Section 110(i) of the Mine Act sets out six criteria to be considered in determining appropriate civil penalties. Northern Stone was issued 13 citations during the two years prior to this inspection. None of these citations involved silica dust. Northern Stone is a small operator and the quarry worked 9,980 man-hours. The violations were abated in good faith. Northern Stone appeared eager to take steps to prevent future violations of the cited standards. The penalties assessed in this decision will not have an adverse effect on Northern Stone's ability to continue in business. My gravity and negligence findings are set forth above. I significantly reduced the penalties, in part, because Northern Stone is small and it demonstrated good faith. Based on the penalty criteria, I find that the penalties set forth below are appropriate.

III. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess the following civil penalties:

<u>Citation No.</u>	<u>30 C.F.R. §</u>	<u>Penalty</u>
7977666	56.5001(a)/.5005	\$80.00
7977667	56.5001(a)/.5005	Vacated
7977668	56.5002	120.00

Accordingly, Citation Nos. 7977666 and 7977668 are **AFFIRMED** as modified above; Citation No. 7977667 is **VACATED**; and Northern Stone Supply, Inc., is **ORDERED TO PAY** the Secretary of Labor the sum of \$200.00 within 40 days of the date of this decision. Upon payment of the penalty, this proceeding is **DISMISSED**.



Richard W. Manning
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, Suite 1000
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FALLS CHURCH, VIRGINIA 22041

November 29, 2000

FREEMAN UNITED COAL COMPANY, : CONTEST PROCEEDINGS
Contestant : Docket No. LAKE 2000-102-R
Citation No. 7584882; 6/22/2000
v. : Docket No. LAKE 2000-103-R
Citation No. 7584883; 6/22/2000
: Docket No. LAKE 2000-104-R
Citation No. 7584884; 6/22/2000
SECRETARY OF LABOR : Docket No. LAKE 2000-105-R
MINE SAFETY AND HEALTH : Citation No. 7584885; 6/22/2000
ADMINISTRATION, (MSHA), :
Respondent : Crown II Mine
Mine ID 11-02236

SUMMARY DECISION

These cases are before me upon the Contests filed by Freeman United Coal Company (Freeman United) pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq., the "Act," to challenge four citations issued by the Secretary of Labor. On July 12, 2000, Freeman United filed a motion for summary decision. The Secretary responded on July 31, 2000, and filed her own cross motion for summary decision. Oral argument was held on September 15, 2000, and the parties thereafter filed supplemental written argument.

Under Commission Rule 67, 29 C.F.R. § 2700.67, a motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows: (1) that there is no genuine issue as to any material facts; and (2) that the moving party is entitled to summary decision as a matter of law.

The citations at bar all allege violations of the standard at 30 C.F.R. § 75.1909(a)(1). That standard provides as follows:

- (a) Non permissible diesel-powered equipment, except for the special category of equipment under § 75.1908(d), must be equipped with the following features:

(1) An engine approved under subpart E of part 7 of this title equipped with an air filter sized in accordance with the engine manufacturer's recommendations, and an air filter service indicator set in accordance with the engine manufacturer's recommendations.

More particularly Citation No. 7584882, charges as follows:

The Isuzu QD60 diesel engine used in the Number 04003 Diesel Gator was not being maintained in accordance with Subpart E of 30 C.F.R. Part 7. A legible and permanent approval marking as required by 30 C.F.R. Part 7.90 was installed but had not been supplied by the engine manufacturer.

Citations No. 7584883, 7584884 and 7584885, allege the same violation but with respect to Isuzu 4BD1PW diesel engine used in the 04031 Alpha personnel carrier, Isuzu 4BD1PW diesel engine used in the 04032 Alpha personnel carrier and Isuzu QD60 diesel engine used in the 03107 Taylor Atkinson personnel carrier, respectively.

There is no dispute in this case that the cited diesel powered equipment was non permissible within the meaning of the cited standard and that therefore the cited diesel engines must be approved in accordance with Subpart E of part 7. Under Subpart E at Section 7.90 "[e]ach approved diesel engine shall be identified by a legible and permanent approval marking inscribed with the assigned MSHA approval number and securely attached to the diesel engine."

At oral argument on September 15, 2000, the Secretary clarified that she is alleging a violation in the citations at bar only on the basis of her claim that the approval markings required by Section 7.90 must be "supplied by the engine manufacturer." (Tr. 5-6).¹ It is undisputed that the approval markings utilized by Freeman United on the cited equipment were supplied by Freeman United itself and not by the manufacturer. Accordingly there is no dispute regarding the material facts.

In effect however the Secretary seeks to have this Commission rewrite the cited standard to read as follows: "[e]ach approved diesel engine shall be identified by a legible and permanent approval marking *supplied by the engine manufacturer and* inscribed with the assigned MSHA approval number and securely attached to the diesel engine."

¹ Although the Secretary also claims, in her motion and at oral argument, that the cited engines were also not otherwise "approved" - - a claim that is disputed by the operator - - that is accordingly not an issue now before me in the instant cases.

The Secretary argues in support of this regulatory rewrite on the premise that the regulation's meaning is not plain and that therefore deference should be given to her interpretation citing *Martin v. OSHRC*, 499 U.S. 144, 148-149 (1991); *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965); *Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 460-461 (D.C. Cir. 1994); *Secretary of Labor v. Cannelton Industries, Inc.*, 867 F.2d 1432, 1435 (D.C. Cir. 1989); and *Emery Mining Corp. v. Secretary of Labor*, 744 F.2d 1411, 1414-1415 (10th Cir. 1984) I find however that the premise for Secretary's deference argument, i.e., that the meaning of the regulation is not plain, does not exist. When the meaning of a statutory or regulatory provision is plain, effect must be given to its language. *Chevron U.S.A. Inc. v N.R.D.C.*, 467 U.S. 837, 843-45 (1984).

The Secretary also argues that a statute or regulation that is intended to protect the health and safety of individuals, such as the regulation at issue herein, must be interpreted in a broad manner to actually achieve that goal citing *Cannelton Industries*, 867 F. 2d at 1435. *Donovan v. Stafford Const. Co.*, 732 F. 2d 954, 959-960 (D.C. Cir. 1984); and *Brennan v. OSHRC*, 491 F. 2d 1340, 1344 (2nd Cir. 1974). This rule of construction is not without limit however and is not a license to rewrite a clearly worded regulation whose plain meaning cannot reasonably be disputed.

Therefore, considering the plain language of Section 7.90, there is nothing to preclude the use on the cited diesel engines of approval markings supplied by Freeman United itself. Accordingly there are no violations as alleged in the citations at bar. Under the circumstances, Freeman United's Motion for Summary Decision must be granted and the Secretary's Cross Motion for Summary Decision must be denied.

ORDER

Citation Nos. 7584882, 7584883, 7584884 and 7584885 are hereby vacated.



Gary Melick
Administrative Law Judge

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041
November 9, 2000

PERFORMANCE COAL COMPANY,	:	CONTEST PROCEEDING
Contestant	:	
v.	:	Docket No. WEVA 99-40-R
	:	Citation No. 4204336; 12/17/98
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Upper Big Branch Mine - South
ADMINISTRATION (MSHA),	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 99-93
Petitioner	:	A.C. No. 46-08436-03564
v.	:	
	:	Upper Big Branch Mine-South
PERFORMANCE COAL COMPANY,	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2000-28
Petitioner	:	A.C. No. 46-08436-0350 A
v.	:	
	:	Upper Big Branch Mine-South
MARK ALLAMAN, Employed by,	:	
PERFORMANCE COAL COMPANY,	:	
Respondent	:	

ORDER GRANTING IN PART MOTION TO COMPEL

These consolidated contest and civil penalty proceedings are scheduled for hearing on December 19, 2000, in Charleston, West Virginia. Before me for consideration are the respondents' motion to compel the disclosure of documents and the Secretary's opposition to the respondents' motion. Specifically, the respondents seek any statements provided to the Mine Safety and Health Administration (MSHA) by Johnny Williams and Rick Lilly; all documents concerning how and why the subject citation was specially assessed and the calculations related thereto; and all documents in MSHA's investigative file, with the exception of MSHA's investigative recommendations and any information directly covered by the informant or miner witness privilege.

Consistent with my request during the course of an October 18, 2000, telephone conference with the parties, on November 7, 2000, the Secretary furnished the following documents for *in camera* review:

- (1) A signed statement of Johnny R. Williams obtained by MSHA on March 30, 1999.
- (2) A March 31, 1999, memorandum of interview with Randell L. Lilly prepared by MSHA Special Investigator James G. Jones.
- (3) A report of an MSHA Health and Safety Conference attended by Performance Coal Company representatives on January 20, 1999.
- (4) An MSHA Proposed Assessment Worksheet.
- (5) A Base Penalty Calculation for Special Assessment dated February 2, 1999.

A. The signed statement of Johnny R. Williams

The Secretary argues that the Williams statement is protected by the work product privilege. The respondents asserts the work product privilege is inapplicable because, despite the fact that the statement was obtained after the January 19, 1999, filing of Performance Coal Company's contest in Docket No. WEVA 99-40-R, it was obtained prior to the initiation of the captioned 110(c) proceeding in Docket No. WEVA 2000-28.

The work product privilege has been codified in Rule 26(b)(3) of the Federal Rules of Civil Procedure. In *ASARCO, Inc.*,¹² FMSHRC 2548 (December 1990), the Commission discussed the work product privilege, stating:

In order to be protected by this immunity under [Rule] 26(b)(3), the material sought in discovery must be:

1. documents and tangible things;
2. prepared in anticipation of litigation or for trial; and
3. by or for another party or by or for that party's representative.

It is not required that the document be prepared by or for an attorney. If materials meet the tests set forth above, they are subject to discovery 'only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship

to obtain the substantial equivalent of the materials by other means.’ If the court orders that the materials be produced because the required showing has been made, the court is then required to ‘protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.’

Id. at 2558 (citations omitted).

The burden of satisfying the three-part test is on the party seeking to invoke the work product privilege. Here, the Williams statement is a tangible document obtained by the Secretary in anticipation of litigation because it was obtained after the contest filed by Performance Coal Company. However, the signed statement was not “prepared” by the Secretary. The signed statement is entitled to the same protection from disclosure that a treatise obtained from the library by Secretary’s counsel would be entitled to - - none. The Secretary cannot prevent disclosure of Williams’ signed statement by asserting it is really the investigator’s work product because it is only Williams’ acknowledgment of the accuracy of what the MSHA investigator heard the Williams say. Since the signed statement constitutes a document “prepared” by Williams rather than the Secretary, the work product privilege does not apply. Consequently, the respondents’ motion to compel the signed Williams’ statement shall be granted.

I note parenthetically, even if Williams’ signed statement was protected under the work product privilege, the analysis would shift to whether the respondents have a substantial need for the statement, and whether depriving the respondent of these documents would constitute an undue hardship. *P. & B. Marina, Ltd. Partnership v. Logrande*, 136 F.R.D. 50, 57 (E.D.N.Y. 1991), *aff’d*, 983 F.2d 1047 (2d Cir. 1992). While assertions that protected material is needed for general purposes of impeachment may not be sufficient to overcome the work product privilege, here the statement provided by Williams, the victim of a November 24, 1998, roof fall accident, is unique in that the statement evidences Williams’ recollections less than six months after the accident. *Consolidation Coal Company*, 19 FMSHRC 1239, 1243-44 (July 1997). Depriving the respondents’ counsel of access to recollections recorded relatively soon after the accident would result in a significant hardship. Thus, even if the Williams statement was protected, the respondents have a compelling need to examine the contents of Williams’ statement in preparation for trial.

Finally, Williams will be called by the Secretary as a witness in these proceedings. Even if a witness’s signed statement is protected by privilege, such statements are routinely disclosed at trial in a criminal proceeding. See *Jencks v. United States*, 353 U.S. 657, 667-69 (1957); 18 U.S.C. § 3500 (Jencks Act). In this regard, the Commission has noted, in National Labor Relations Board (NLRB) administrative proceedings, the NLRB itself provides at trial, for cross examination purposes, a witness’s prior statements relative to the subject matter of his testimony. See *Secretary of Labor o/b/o Donald L. Gregory, et al v. Thunder Basin Coal Company*,

15 FMSHRC 2228, 2237 (November 1993), referring to 29 C.F.R. § 102.118(b)-(d) (NLRB “Jencks” procedure). Thus, the privilege issue notwithstanding, the Secretary would be compelled to produce Williams’ statement at trial.

B. MSHA investigator Jones’ March 31, 1999, memorandum of Lilly interview

With respect to the work product question, the Secretary’s memorandum containing Jones’ recollections of his March 31, 1999, interview with Randell L. Lilly is in stark contrast to the Williams statement. Unlike the Williams statement, the Jones memorandum was indeed prepared on behalf of the Secretary in contemplation of litigation. It contains the recollections of Jones concerning what Jones was told by Lilly. Accordingly, the Jones memorandum is protected by the work product privilege.

C. The January 20, 1999, MSHA Health and Safety Conference Report

The Secretary seeks protection of the January 20, 1999, MSHA Health and Safety Conference Report on the basis of the work product and deliberative process privileges. The conference was attended by officials of Performance Coal Company. The dispositive question concerning the applicability of the work product privilege is whether the document was “prepared in anticipation of litigation or for trial.” Whether these documents are privileged because they were prepared with litigation in mind must be based on the nature of the documents and the factual situation in each particular case. *ASARCO*, 12 FMSHRC at 2558. If the documents can fairly be said to have been prepared **because of the prospect of litigation**, then the documents are covered by the privilege. *Id.* [citing Wright & Miller, *Federal Practice and Procedure* § 2024 p.198-99 (1970)]. If, on the other hand, litigation is contemplated but the document was prepared in the ordinary course of business rather than for the purposes of litigation, it is not protected. *Id.* In addition, particular litigation must be contemplated at the time the document is prepared in order for the document to be protected. *Id.*

The question is whether MSHA reports of a safety and health conferences are routinely prepared in the ordinary course of business without regard to whether litigation is contemplated. In addressing this question, it is necessary to analyze MSHA’s procedures for health and safety conferences contained in 30 C.F.R. § 100.6. Operators that elect not to contest citations may decide not to request a safety and health conference. Safety and health conferences are only conducted, subject to MSHA’s approval, upon an operator’s request. 30 C.F.R. §§ 100.6(b) and (c). Such conferences are the means by which operators may submit mitigating information including facts that operators believe warrant a finding that no violation occurred. 30 C.F.R. § 100.6(e). Citations that are not vacated are referred by the safety and health conference official to the Office of Assessments with the inspector’s evaluation as a basis for determining the appropriate amount of civil penalty to be assessed. 30 C.F.R. §§ 100.6(f) and (g).

Thus, generally, only contested citations are the subjects of safety and health conferences. Moreover, the MSHA official conducting the conference uses the information submitted by the operator as a basis for the referral to the Office of Assessments. Upon receipt of a notice of proposed penalty issued by the Office of Assessments, the operator has 30 days to pay or contest the proposed penalty. 30 C.F.R. § 100.7(b). In essence, the safety and health conference is the initial step in the litigation process if the operator contests the proposed civil penalty. Consequently, such conferences are not routinely conducted, but rather, they are conducted when an operator challenges the initial citation. Accordingly, the reports of such conferences are protected by the work product privilege.

Having concluded that health and safety conference reports are protected, the analysis shifts to whether the respondents can overcome the privilege by demonstrating a substantial need for the information, and establishing that it will suffer an undue hardship if it must attempt to obtain the information by other means. It is difficult for the respondents to make such a showing since officials of Performance Coal Company attended the safety conference. Consequently, the respondents have failed to overcome the work product privilege. Thus, the motion to compel the safety and health conference report shall be denied. Having determined the health and safety conference report is protected by the work product privilege, I need not address the Secretary's assertion that it is also protected by the deliberative process privilege.

D. The MSHA Proposed Assessment Worksheet

The Secretary contends the Proposed Assessment Worksheet is protected by the deliberative process privilege. The Commission has defined the deliberative process privilege as one which "attaches to inter- and intra-agency communications that are part of the deliberative process preceding the adoption and promulgation of an agency policy." *In re: Contests of Respirable Dust Sample Alteration Citations*, 14 FMSHRC 987, 992 (June 1992) [quoting *Jordan v. United States Dep't of Justice*, 591 F.2d 753, 774 (D.C. Cir. 1978)]. The Proposed Assessment Worksheet contains mental impressions and opinions concerning the degree of gravity associated with the subject violation as well as the degree of culpability attributable to the respondents. It contains recommendations concerning the appropriate civil penalties that should be proposed. Consequently, the Proposed Assessment Worksheet is protected by the deliberative process privilege.

E. Base Penalty Calculation for Special Assessment

The Base Penalty Calculation for Special Assessment is a computer generated form that contains the special assessment penalty criteria relied upon by the Secretary as well as a history of previous similar violations. This form contains data without any opinion or impressions of MSHA personnel. It is apparently generated in the normal course of business to determine the appropriate penalty to be assessed regardless of whether the citation is contested. As such, this form is not protected by the deliberative process or work product privileges. Consequently, the

respondents' motion to compel the Base Penalty Calculation for Special Assessment form shall be granted.

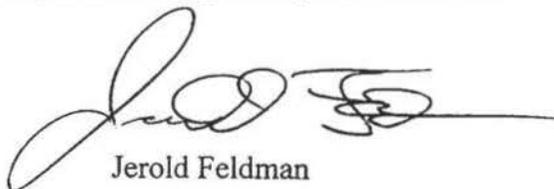
Finally, the respondents' motion to compel all documents in MSHA's investigative file not otherwise protected by privilege shall be denied because it is overly broad.

ORDER

Consistent with the above discussion, **IT IS ORDERED** that the respondents' motion to compel with respect to the March 30, 1999, statement of Johnny R. Williams and the Base Penalty Calculation for Special Assessment dated February 2, 1999, **IS GRANTED**.

IT IS FURTHER ORDERED that the Secretary provide the respondents with copies of the Williams statement and the Base Penalty Calculation for Special Assessment within ten days of the date of this Order.

IT IS FURTHER ORDERED that the respondents' motion to compel the March 31, 1999, Jones memorandum of Lilly interview, the January 20, 1999, Health and Safety Conference Report, the MSHA Proposed Assessment Worksheet, and all MSHA investigative documents not otherwise protected by privilege **IS DENIED**.



Jerold Feldman
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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November 14, 2000

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), :
Petitioner : Docket No. YORK 2000-46-M
v. : A. C. No. 30-03197-05505
: :
METRO RECYCLING AND CRUSHING, :
INC., :
Respondent : Phillipsport Pit

ORDER GRANTING MOTION TO AMEND PLEADINGS

This case is before me on a Petition for Assessment of Civil Penalty pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). It concerns one citation and two orders arising out of a fatal mine accident. The Secretary has moved to amend Citation No. 7716911 to allege alternative sections of the regulations. The Respondent opposes the motion. For the reasons set forth below, the motion is granted.

Citation No. 7716911 charges a violation of section 56.14202 of the regulations, 30 C.F.R. § 56.14202, because:

A fatal mine accident occurred at this operation on March 18, 1999, when the plant superintendent was caught in an unguarded return roller on the discharge conveyor from the portable screening plant. He was cleaning the roller while the conveyor was running. Cleaning the roller while the belt was running exhibited a serious lack of reasonable care constituting more than ordinary negligence and is an unwarrantable failure to comply with a mandatory safety standard.

Section 56.14202 requires that: "Pulleys of conveyors shall not be cleaned manually while the conveyor is in motion."

Stating that there "may be some legal and factual controversy" concerning the definition of "pulley" in section 56.14202, the Secretary proposes to amend the citation to allege that the conduct violates section 56.14202 or section 56.14105, 30 C.F.R. § 56.14105. Section 56.14105 provides, in pertinent part, that: "Repairs or maintenance of machinery or equipment shall be

performed only after the power is off, and the machinery or equipment blocked against hazardous motion.”

The company argues that allowing the Secretary to plead in the alternative would violate the provisions of section 104(a) of the Act, 30 U.S.C. § 814(a), and would be unfair and prejudicial. Neither of these arguments is persuasive.

Section 104(a) provides, in pertinent part, that: “Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated.” The Respondent asserts that this requires that the Secretary identify the standard alleged to have been violated *with particularity*. However, what has to be described with particularity is the nature of the violation, not the standard. Under the proposed amendment, the description of the violation would remain unchanged. Furthermore, even if the standard violated has to be described with particularity, the proposed amendment accomplishes that purpose by referring to the two standards alleged to have been violated.¹

Although there is no provision for amending citations in the Commission’s Rules, the Commission has held that the modification of a citation or order is analogous to an amendment of pleadings under Fed. R. Civ. P. 15(a).² *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1289 (August 1992); *Cyprus Empire Corp.*, 12 FMSHRC 911, 916 (May 1990). The Commission has further noted that:

In Federal civil proceedings, leave for amendment “shall be freely given when justice so requires.” Fed. R. Civ. P. 15(a). The weight of authority under Rule 15(a) is that amendments are to be liberally granted unless the moving party has been guilty of bad faith, has acted for the purpose of delay, or where the trial of the issue will be unduly delayed. *See* 3 J. Moore, R. Freer, *Moore’s Federal Practice*, Par. 15.08[2], 15-47 to 15-49 (2d ed. 1991) And, as explained in *Cyprus Empire*, legally recognizable

¹ On the other hand, this provision of the Act would prohibit what the operator claims is the logical result of permitting the Secretary to plead alternatively, that the Secretary “could just allege a violation of 30 C.F.R.,” because then there would be no reference to *the standard* alleged to have been violated.

² The Commission’s Procedural Rules provide that on questions of procedure not regulated by the Act, the Commission’s Rules, or the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, the Commission and its Judges shall be guided by the Federal Rules of Civil Procedure, “so far as practicable.” 29 C.F.R. § 2700.1(b)

prejudice to the operator would bar otherwise permissible modification.

Wyoming Fuel, 14 FMSHRC at 1290.

In this case, there is no evidence that the Secretary is acting in bad faith or is seeking amendment for the purpose of delay. Nor does it appear, and indeed there is no argument, that the trial will be unduly delayed. It is scheduled to begin on December 19, 2000, and there does not appear to be any reason why it will not begin on that date. The Respondent, however, argues that it will be prejudiced by the modification because its ability to defend itself by demonstrating that no violation of section 56.14202 occurred will be nullified.

In the first place, the fact that it may have a defense to a violation of section 56.14202, but, perhaps, not to a violation of section 56.14105, does not demonstrate that the company will be prejudiced by allowing the amendment. As the Commission has long recognized: "The 1977 Mine Act imposes a duty upon operators to comply with all mandatory safety and health standards. It does not permit an operator to shield itself from liability for a violation of a mandatory standard simply because the operator violated a different, but related, mandatory standard." *El Paso Rock Quarries, Inc.*, 3 FMSHRC 35, 40 (January 1981). Secondly, the prejudice that would warrant denial of the modification of the citation is prejudice resulting from delay, or if the amendment involves a new theory of violation or requires additional discovery. See generally 3 James W. Moore *et al.*, *Moore's Federal Practice*, § 15.15[2], (3d ed.1997).

In this case, there is no indication or allegation that any of this type of prejudice would occur. As noted above, there should be no delay. Nor does the amendment involve a new theory of violation. The factual allegations remain the same. Whether a violation of section 56.14202 or of section 56.14105, the matter will be decided on the language, "[h]e was cleaning the roller while the conveyor was running." In this regard, section 56.14202 is essentially an included offense in section 56.14105. For this reason, no extensive, additional discovery should be required. Thus, the Respondent has not demonstrated that it will be prejudiced by the modification.

In addition, it is clear that the Secretary could have moved to amend the citation to allege a violation of 56.14105 instead of section 56.14202 and, as discussed above, the company would have no apparent valid objection to such an amendment. Furthermore, if the Government proceeded to trial on the citation as alleged, it would appear that Fed. R. Civ. P. 15(b) would

permit it to move to amend the citation to conform to the evidence adduced at the trial.³ *Faith Coal Co.*, 19 FMSHRC 1357, 1362 (August 1997).

Finally, Fed. R. Civ. P. 8(e)(2) specifically provides that: "A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses." Since the Federal Rules affirmatively permit alternative pleadings, the Secretary has a good reason for pleading in the alternative and the Respondent has not presented any valid reason why the modification should not be permitted, it is clear that the citation may be amended as requested.

Accordingly, the Secretary's Motion to Amend Pleadings is **GRANTED** and it is **ORDERED** that Citation No. 7716911 is **MODIFIED** to allege that the operator violated either section 56.14202 or section 56.14105 of the regulations.



T. Todd Hodgdon
Administrative Law Judge
(703) 756-6213

³ Fed. R. Civ. P. 15(b) provides that:

When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that is not within the issues made by the pleadings, the court may allow the pleading to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

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